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Institutions and powers in decentralized countries

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Main study's coffered ceiling (detail)

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SUMMARY

INTRODUCTION

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I · Introduction

The 2003 report presented some more or less common characteristics of the countries following an "autonomous" or a federal system. Innova-

tions triggering completely different way of analyzing these countries have not occurred but comments on certain issues are necessary given the new events occurred and updated data gathered since then.

Despite the different origins and formal framework, the political structure of many countries does not follow a centralist and unified model. Instead, there are several centers of power that can generally enact laws or equivalent rules. These centres are interrelated in a way that cannot be described using hierarchy or supra-ordination criteria but principles of power distribution, separation or equi-ordination. The commonplace of all the different centers of powers is located in the (federal) Constitution which is protected by the Federal Supreme Court or the Constitutional Court that ensures its supremacy. In the majority of studied countries, the territorial structure is identified expressly as federal. This is the case of Germany, Argentine, Australia, Austria, Brazil, Canada, United States, Mexico, and Switzerland: group joined in 1970 by Belgium. Other countries are not formally identified as such even if several federal mechanisms are used and in many issues they work as federal systems; some of these countries achieve a plurality level similar — or even higher — than some federal ones. This is the case of Spain, Italy, or the United Kingdom. As it was explained in the questionnaire, the vocabulary used is, mainly, federal.

The evolution regarding the adoption of plural organizational structures has been very different in these countries. While in some, the political organization has always been federal (for e.g., Argentine, Australia, or the US) or have shift to it a long ago (Brazil or Mexico), others (Belgium, Spain, Italy, and the United Kingdom) have adopted these federal techniques quite recently. It must be mentioned that one of the latter — Spain — had precedents of short duration of this organizational model during the XX Century.

When it is inquired which are the causes that have motivated the adoption of the federal model (or similar ones), the answers vary. In some cases, it might be said that federalism is part not only of the historical process but of the definition of the nation itself. The most emblematic cases are the US and Switzerland. But the same consideration has some weight in countries like Australia, Argentina, Brazil, Canada, the Indian Union, and, even, Mexico. The large territory of these countries has to be factored in. More recently, the adoption of federal frameworks, formally or in fact, has been a result of the will of renovating the political system. Germany, Italy or Spain could be examples of this. In what Austria is con-

cerned, it can be asserted, without any doubt, that the historical inheritance has been the main driver. In addition to the motives already explained, in several countries there are specific reasons: the necessity of integrating in the political organization the ethnic, linguistic, or national minorities that have to cohabit within the same Federation. This is the case of Canada, Spain or Italy, and, to some extent, the UK. As for Belgium, the survival of the country as such required the recognition of its several groups generating, thus, a peculiar federal structure which, jointly with the territorial federalism organized in regions, there is a personal federalism channeled through cultural communities.

The process followed by federal states allows, under a very general framework, to differentiate between those where a continuous evolution can be observed — Australia, US, Mexico, Argentine, and the Indian Union — and those in which several stages and changes make them go back and forth from a unitary model to federal one and vice versa, as in Brazil, Spain or Italy. Apart from this, it is worth asking, even at the level of generality, whether there are some dominant trends. Regarding this, it can be said that in the XX century, and as a result of the public intervention in socio-economic issues and of the implementation of the welfare state, power has undergone a process of centralization. In our opinion, this assertion is not falsified by the fact that during the same time several federal or quasi-federal systems were born in Europe. This is so because the centralization was the answer to new challenging facts in a qualitative dimension, which is perfectly compatible with the development of the diverse federal countries. In other words, it is clear that in each country the adoption of a federal structure implies a very important change when it breaks up the unitary tradition — often authoritarian and uniform —, but new institutions have taken the model of classical federal countries in their current stage of evolution.

One of the issues that may arise with regard to the federal structure is the symmetry or not regarding the role of federal entities. The criterion of equal status of the members of the Federation has been common and the recognition of heterogeneous positions, exceptional, and, to some extent, odd. However, in fact, not all entities within the same country have the same weight since the population and the economic activity give more relevance to some of them. Consider also the presence today of macrocities — which are the federal capital, in many countries (Mexico, Austria, Argentina, Spain, Italy and Germany) —, with a special status as federated or autonomous entity, which is added to the magnitude of their activity, the

specific weight result of being the federal capital which naturally is not only political. Arguably, therefore, these countries present, in fact, important elements of asymmetry. In addition, the existence of cultural or national minorities has to be taken into account. The question is, then, whether these different questions are reflected in the regulation of the political organization. In this regard, various elements may be signaled as especially relevant. First, the recognition of a special status to some federal capital implies a rupture of the homogeneous framework. Second, different weight of the federated entities in the composition of one or several chambers of Parliament has been granted; the case of Germany is the most prominent. Third, in a country — Canada — the uniqueness of a federated entity is an essential element of their organization, even if asymmetry is not recognized in the Constitution — Fourth, there is recognition of linguistic minorities — Germany, Austria —, but it is limited in nature. Fifth, there are cases were the configuration of the country itself is built on the existence of diverse communities — Italy with its regions with a special status, some of which respond to the existence of linguistic and national minorities — or there is the possibility through a voluntary procedure of strengthening singular entities, implicitly recognized in the Constitution — Spain, particularly in relation with historic communities —; outlines the new organizational patterns with signs of singularity — UK —; or, the very definition and existence of the federal state opens the door to heterogeneity — Belgium and the various possibilities of articulation of communities, regions and the large Brussels —. To all this, the singularities arising from the presence of local political forces, or from the more open articulation of some federal political parties, should be added since they imply a different or more open operation of the institutional system.

In short, although the general pattern of uniformity was a formal criterion, in most states, but not all, elements of differentiation have appeared. Actually there are different situations and important exceptions implying, to a greater or lesser degree and extent, asymmetric elements or frameworks.

Normally, the fundamental elements of the political organization can be found in a written constitution (federal); the exception is the United Kingdom. But there are large differences in the scope or intensity of regulation, and the extent referred to complementary legislation to complete the institutional development. Some aspects of this central regulation should be taken into account. First, there are countries with constitutions that have

changed little since their enactment while in others there have been numerous amendments or even new constitutions have been approved. In the first group, the examples are the United States, Australia or Canada, while the second includes Belgium, Argentina and Brazil. Indeed, this feature must be qualified according to the year of approval of the fundamental law. Be as it may, we refer to this point mainly to emphasize that in the first case the doctrine of constitutional courts play a more prominent role. The progressive evolution of the role of various institutions is essentially in their hands, while the judicial role may be less relevant when they resort frequently to constitutional reform.

It is also important to note that some Constitutions refer to laws, with a special status or not, to complete various aspects of the constitutional organization. This situation occurs often in the areas of finance and taxation, but may extend to other areas. The Spanish and Italian systems are good examples, although undoubtedly the most striking one is the case of Belgium where the Constitution refers to the Law of the distribution of powers between the federal and regional institutions and communities. These rules are always subject to a qualified legislative procedure.

The participation of federated entities in the reform of the Federal Constitution is an important question to be taken into account. The picture in this respect is also very varied. In some countries — Argentina, Germany, Belgium, Brazil and Italy —, no direct involvement is established, although the intervention of the Senate in the process ensures the participation of the federal entities if these are central to the composition of the chamber as it is the case of Germany. In other countries, some direct intervention is provided but without much significance; as it is the case in Spain where federal entities have legislative initiative, as other bodies and institutions have. A third group gives federal entities an important role to play, even a decisive one. This is the case of Australia, Canada, US or the Indian Union.

In a sense, it can be asserted that in a federal scheme each federated entity has its own system with its own constitution, subject only to the Federal Constitution. This is the scheme in Australia, Austria, Germany, Argentina, United States, Mexico, Brazil, Spain, and Italy. In the latter two countries the state constitution is called the 'Statute' charter (special law) even though it does not perform the strictly same function in both. However, some federal entities do not have a Constitution themselves, as in Canada and Belgium. Typically, these Constitutions define the organi-

zational structures of the federated entities and, in some cases — such as Spain —, they are an essential tool for defining the distribution of powers picture. In this sense, it is noteworthy that the Spanish Federal Constitution does not regulate matters which are often treated in Federal Constitutions: the determination of which are the units, their powers or their legal nature. This regulation is contained in the Constitutions of the states (special laws charters). It should be noted that the adoption of these constitutions, (special laws charters) does not correspond exclusively to the individual states: they are the result of a procedure based on the agreement between the Federation and the State, but with predominant final position, if necessary, of the former. However, the general rule is that state constitutions are drafted and approved by the federated entities, without the intervention of the Federation, which can only make use of the courts in cases where their content is contrary to the Federal Constitution.

Two other issues need to be considered. First, the acceptance or not of a federation between federated entities outside the original federal system. In most countries, this option is expressly prohibited by the Federal Constitution, or it has been interpreted so. Instead, it is usual to provide for or support agreements between federal entities, requiring only that they report them to federal authorities. In some countries, the consent of the Federal Parliament is required for relevant agreements. There is a unique case — Belgium — where agreements between regions and communities are accepted. In fact, the Flemish cultural community has assumed the powers of the region of Flanders. Something similar could make the French cultural community and the Walloon region, but any decision in this regard has not been made so far. Albeit with different scope, we should mention the possibility of "supra-state" agreements, introduced by the 2008 reform in Switzerland. It is, in fact, a coordination formula which prevents the transfer of the issue at the federal level; however, the shift to the federal level is open if there is no agreement.

Second, it should be noted that almost all countries do not recognize the right to secede from the federation. Canada is an exception, since under certain conditions, as indicated by the Federal Supreme Court; the separation of a province and its independence from the Federation might be acceptable.

One issue that raises concerns in some of the countries covered is the qualitative difference between states and local communities. It has been discussed (Austria) differently depending on whether a decentralized ap-

proach — the difference is only quantitative — or a federalist one is adopted. In Belgium, they are identified with similar names as federated or decentralized collectivities.

New forecasts have also appeared regarding the development or federative process of pre-existing federal units, even if they did not enjoy independence. New results surveying the public adherence to the federal (or decentralized) system have been brought. In the case of Austria considerations are made about the connection between joining the European Union and strengthening or weakening the federal spirit. It is very interesting the reflection in the Swiss Confederation regarding the original connection between federalism and culturally diverse groups as the engine of the country's territorial structure, and how cultural diversity today is related to immigration, without that established relationship. Data collected on participation and acceptance of the new Constitution and federal system of financial compensation — 1999 and 2004 — reflect a strong support in the latter case — 23 of 26 States —. In Italy, the emphasis is on the dichotomy North / South and possibly in the last decade, the North has increased its support for federal approaches.

In Spain, the acceptance of the new territorial organization created under the Constitution of 1978 is broadly shared, although in those territories with the oldest roots of autonomist aspirations the demand for greater powers and resources is also striking. The wave of new state constitutions, launched in 2004, should be highlighted. It led to the approval of six new constitutions with the allocation of new powers to the federated authorities, the establishment of ways of participating in federal decisions, and a reformulation of the financing system of the states, which will be explained later on.

Finally, in relation to differential characteristics or privileges, there are few new data: historical details about the province of Buenos Aires, joint status as land and federal capital, ordinary and special regions now on equal foot, unique status for specific reasons (Jammu and Kashmir), and the persistence of the difference in Spain, particularly significant in the financial side, including "foral" authorities (Basque Country and Navarra) or not. It would be interesting to list the facts which were the basis for granting unique powers (culture and language, certain legal institutions, geographic locations ...) in certain settings.

It is important to pay attention to the bills of rights at the federal and state level. First, Federal Constitutions generally contain Bills of Rights,

and sometimes there is a progressive enrichment thanks to the maturation of new forms of rights. In some countries there is not a bill (the US and Australia), although some fundamental rights with a strong impact appear in the Constitution (United States), or only appear with episodic character (Australia).

In most countries, the inclusion of these bills has resulted in centralizing processes, particularly due to judicial decisions. "The powers of the Federation have been greatly strengthened because of the courts" (Germany), or have involved "a strong effect on the harmonization of basic principles" with a centralizing force (Switzerland). In Mexico, Argentina or Canada trends go on this same direction. The debate in the latter was very lively when the Charter was introduced, and remains so. This further emphasizes the centralization brought by decisions of the courts, including the standardization that comes from judicial decisions, particularly those mandatory, that affect the construction of a national loyalty at the expense of provincial loyalties and the ways the federation intervenes, usually under the umbrella of new economic and social rights. In other countries, the federal action regarding rights is a result of the federal power to establish "minimum essential provision levels of certain rights" (Italy, constitutional reform of 2001) or to ensure basic equal conditions in the exercise of rights (article 149.1.1 of the Spanish Constitution). Finally, with respect to other countries, the centralizing effects mentioned are doubtful (Austria, Belgium, Italy and India); but in relation with this latter country, it is necessary to be more specific since sometimes there have been occasional invasion of state powers by the federal government grounded on the recognition of certain rights.

In relation to the declarations or bills of rights in state constitutions, there are many countries where, indeed, they exist (U.S., Canada, Mexico, Argentina, Germany, with exceptions, Switzerland, Italy and Spain — new generation of constitutions —); while they do not exist in Australia, Austria and Brazil, although there may be some specific provisions. In the UK, with its institutional peculiarities, rights provisions appear in the scheme for Northern Ireland. State catalogs are very diverse: federal rights repeated, repeated plus additional ones, or drafted closely to mirror state powers. In general, it is clear that state regulations cannot contradict general federal principles that can be expressly stated or implicitly. However, between contradiction and complementarity, there are important nuances that can offer interesting interactions. Some countries have raised questions about

the legal nature of the rights enumerated in State Constitutions (Italy and Spain). In 2004 the Italian Constitutional Court, in several judgments, said that those rights are not legally relevant and have only a cultural value. The Spanish Constitutional Court follows a similar reasoning.

II · Institutional issues

A · Territorial Chamber (Senate or Federal Council)

One of the questions that appear in all decentralized states or federations is the existence of a second chamber. Nowadays it is an illusion to think that this common factor always responds directly to the characteristics of these complex political organizations. Its composition, as well as its functions, is very different, and in some countries there is no logical connection between its existence and the mentioned territorial plurality. However, in general, there is a recognized need to articulate somehow the relations between the Federation and the States, and the second chamber is commonly seen as an important tool for this since it can channel the participation of the federated entities in general decisions and in the procedures of integration of the constitutional bodies. We will return to these issues later on. We will now consider the current institutional landscape, both the composition and the functions assigned to these chambers.

The composition of the Senate in different decentralized countries responds to various organizational patterns. The first question to consider is whether the composition fits the federal entities. In this regard, it is important to distinguish between those countries that want to reflect the compositional character of the polity, and those in which the reference to federal entities does not really exist, but takes into account its territory as a mere electoral district. An example of this latter option is Italy, where elections for the Upper House are held by regional districts, with a number of seats proportional to population and elected by direct suffrage.

A different case it that of countries where the election is direct and results from districts that coincide with the territory of state entities, with an equal number of senatorial seats chosen independent of the population. This is a solution that exists in many countries influenced by American federalism. Thus, besides the United States, Australia, Argentina or Brazil have an equal number of senators per state. In the case of Mexico, to the

state senators, 32 more seats are added from the so-called national-list, which has blurred the condition of the Senate as a territorial chamber.

The strongest linkages between the Federation and the States are obtained in the German federalism matrix. In this group (Germany, Austria and the Indian Union), the Senate's composition reflects the proportion of various federal entities and their members are not elected directly. Instead the institutions — the governments of the Länder in Germany, Parliaments of the Länder in Austria, and the Legislative Assemblies of the Indian states — elect members to the Federal Council, the Federal Assembly, and the Senate.

A slight and distant reflection of this solution appears in the composition of the Spanish Senate ruled by the 1978 Constitution. 60 of its 260 members are elected by the Parliaments of the federal entities. The other members are elected directly in constituencies not matching the territory of the state (except in the case that this coincides with the local authority of the old second-order or intermediate: the province). Finally, we must mention the peculiar composition of the Belgian Senate, in which there are senators directly elected, representatives designated by federal entities, and those appointed jointly by the two colleges mentioned above. The complexity of the composition is completed with representatives of the royal family. In any case, as in other subjects, the composition of the Belgian Senate is the result of the concern for a balanced representation of the two main linguistic communities. Canada cannot be squared in the previous explanation. There, senators are neither elected nor representatives of the federated entities; instead, senators are drawn from four districts in which the territory of Canada has been divided. One of them coincides with the Quebec province. Currently, there is considerable debate, not only on the distribution of seats among provinces but also on the formula for appointment, being the majority in favor of direct election by citizens.

In this review of the composition of the Upper House in compound (decentralized) countries, two models quite formally defined could be identified: same number of senators per state, elected directly by citizens, or variable number proportional to the population of units, elected by the governmental bodies of these. It is clear that the criterion for membership of the Senate is not indifferent to elucidate the degree of federal coordination in the country and, therefore, in principle, the indirect designation by the federal entities could lead to additional efforts in this direction; but the operation of the party system should be taken into account since it can

convert the territorial logic into secondary and give full prominence to the dynamics of global political options.

However, considering the structure of the Senate, this first approach needs to be completed with the analysis of the roles assigned in each system to this chamber. It can be said that the Senate has been generally granted federal legislative functions parallel to those attributed to the Lower House. This observation can be qualified by tentatively discerning the cases where a low and high role of the Senate is devised. Thus, in some systems, the Senate has assigned specific duties and exclusive ratification of international treaties and appointment of senior officials and members of constitutional bodies, as proposed by the executive. The most striking example in this regard is the United States, but also some federal Latin American countries follow this model. In some countries — Australia —, co-legislative function is limited since the Senate has not initiative on tax and spending bills.

Especially large is the role of the Upper House in German federalism, which is consistent with its composition: in addition to the federal co-legislative role, it exercises control of the Federal Government, while assuming a significant role in relation with the German participation in the European Union. In the case of Austria, the aforementioned modulation is reflected in two directions: on the one hand, the co-legislative role is partially subject to the Lower House (as the persistence of its vote prevails), an, on the other, the Federal Assembly has power of veto over legislation involving the abolition of the powers of the federated entities.

There are other configurations of the Senate's role in non-formally federal countries. In Spain, the Senate holds co-legislative powers subordinated to the Chamber of Deputies, but it also has attributed three specific federal functions: a) Chamber of first reading for the territorial compensation fund; b) authorization of agreements between federated entities; and, c) authorization to use compulsory means regarding these entities.

This brief review of the provisions of various politically decentralized countries on the role of the Senate, Upper House or Federal Council has highlighted the existence in the most completed systems, jointly with federal co-legislative role, of: supervisory functions of the federal administration or the exercise of power by the Federal Executive, with special attention to appointments to federal agencies and high ranked officials.

Considering jointly the structure and functions of the Senate, in an analysis not only formal but taking into account the actual operation of

institutions, it can be answered whether there is, and to what extent, an effective participation of federated institutions in general decisions despite that separation criteria started to be in crisis a few decades ago.

B · Other types of particpation in the general policy

The regulations of various countries establish certain procedures for the participation of federated entities in the general policy developed by federal agencies. We will focus our attention in two issues: a) participation in the election of the Chief of the Federation; b) state initiative of federal laws.

In general, the participation of the organs of the federated entities in the federal election of Presidents is not established. This should not be confused with the role of the federated entities as electoral districts forming a college, as it is the case in the US where states as such do not participate. Germany, Italy and India, countries with different formal structure, provide for the involvement of representatives of federated entities in the election of the Head of State, who holds no executive powers but rather effective moderating functions. The number of state representatives in the elected assembly is clearly a minority. In American federalisms, the participation of representatives of the federal entities does not exist. In the British community model, the specific formula of governor, who is appointed after the federal government's proposal, does not properly articulate any involvement either.

The intervention of States in the promotion, or even the development of federal laws, is richer. Let us note, first, that in some countries there is no provision in this regard. Countries as different as US, Australia, Canada, Germany, Belgium, Brazil or the India Union do not envisage the participation of the federated entities in the federal legislative process. However, the significance of this omission is not the same in all cases; enough it is to recall the role and composition of the German Federal Council.

Other countries, again with heterogeneous institutional patterns, such as Mexico and Argentina and Italy and Spain, expressly stipulate that the federal entities hold power to initiate federal legislation. In general, this only implies the option to submit a bill, or to request the submission of draft rules, and, thus, the extent of the power of the federated entity ensures only the necessary consideration of initiative and global discussion on the

federal bodies. It is therefore of limited scope. This is different from the Statutes (Charters) of Autonomy in Spain, which is explained in another part.

There are some unique, more significant cases. Thus, the Argentinian Constitution provides agreement procedures, or quasi, between the Federation and the provinces in the so-called law — agreement that create new provinces. On fiscal matters, federal rules might require prior agreements between federal and state authorities in several countries; among them: Spain, where prior agreements provide for both the transfer of federal taxes and for the "foral" regimes, the most significant case.

A different case is the possibility of promoting the repeal of federal laws by the federated entities. This is provided in the Italian Constitution, under which five regional parliaments can prompt the call for a referendum to repeal a federal law.

C · Constitutional Court or Federal High Court

In all countries with territorial pluralism there is a body to resolve jurisdictional conflicts between the Federation and federal entities and, where appropriate, the judicial actions against laws passed by these parliaments; often it also decides about the validity of other acts issued by the executive powers according to the constitutional framework.

Despite the existence of this supreme authority is general, it exists a lot of different institutional solutions. In some countries, this instance is ranked at the top of the judiciary, in others it is a superior court outside the judiciary, with precedence over it. The first type is common in the countries following a classical pattern — United States, Mexico, Canada, Brazil, Argentina, Australia and the Indian Union —, while the new countries that have adopted a federal form or political autonomy frameworks — Germany, Austria Belgium, Italy and Spain — have a tribunal in charge of constitutional justice, which is not part of the judiciary.

Differences also appear on the exclusivity or not of the powers of the courts to resolve conflicts and suits that confront Federations with federated entities. In general, in countries of the second group just described, the Constitutional Court holds a monopoly on the function of resolving constitutional actions, while in other countries the constitutional control is vague and the issue can be raised at lower levels of the federal judiciary, reaching the Supreme Court through appeals, although there are exceptions. This

plurality of instances provides for standing to additional entities or individuals apart from the Federation and States (municipalities, individuals with legitimate interest).

Another point to consider is the existence in the federated entities — not in all, or in all of the entities of one country (Germany) — of constitutional bodies or state supreme courts with limited functions: rule on the constitutionality of laws and other acts of the federated authorities.

It also constitutes a heterogeneous characteristic whether standing is or not granted to local authorities to file constitutional challenges in defense of their powers. This is allowed in different countries such as Canada, Mexico, Argentina, Belgium, Germany or Spain. Local authorities do not have this pathway in other cases, like Brazil or Italy.

Focusing on various aspects of constitutional justice bodies addressed here, we examine the composition of these courts to see if there is and, if so, to what extent, an intervention of the federal entities in the appointment of its members. One thing appears to be common: there is no direct intervention of federated entities in the appointment.

However, in some countries there is an indirect intervention since the Senate participates in the appointment of the Court. It should be noted, however, that in such cases, the intervention can only be considered indirect because their impact on the composition and functioning of the Senate is unclear; since their presence might be diffused or the political parties system can blur it which make it hard to speak of intervention, even indirect, of the federated entities.

In this context, there is a fairly general scheme in federal countries following a classic pattern. The executive branch usually appoint (or recommend the appointment of) the members of the Federal High Court of Justice, and the ratification (or approval) of these appointments belongs to the Senate. This is the case in the US, Brazil, Argentina or Mexico.

The situation is different in more recent federal countries which have the Constitutional Court outside the judiciary. The appointment of the members corresponds to various federal bodies, including the Senate or Upper House. In Austria, the Senate appoints 3 of the 12 members. In Germany, the Federal Council or Senate appoints half the members of the Tribunal. In these cases, the intervention of the federal entities is clear, given the weight, especially in Germany, that these have on the composition of the Senate. It is, indeed, indirect intervention, but nevertheless significant and stands out in the institutional landscape. In Belgium, the two federal

legislative chambers designate half the members of the Constitutional Court, formerly called the Court of Arbitration, which has seen its powers gradually increased until 2003, with a highly qualified quorum of language groups, reflecting the need of a broad agreement in the Senate, the members of which come in part from the federated entities. Hence, it can be described as indirect intervention too. In Italy and Spain, not formally federal countries, the scenario is different. The Senate appoints the members of the Constitutional Court, but the presence of representatives of federated entities in the Senate is lacking (Italy) or very minor (Spain). In Spain, a 2008 reform of the regulation of the Constitutional Court provides that the parliaments of the federated units can nominate candidates to the Senate. However, there is no sufficient basis for asserting that there is an intervention, albeit indirect or remote, of federated entities in the appointment of the members of the Constitutional Court.

It should be stressed, finally, that in assessing the impact of states and regions in the appointment of constitutional justices, it must be taken into account that the possibilities can become even more evanescent due to the political and institutional reality.

Another issue of interest is the position of the Federation and the federated entities in front of the courts in charge of constitutional control. In general, all have the same possibilities of action; hence, it can be said that there is a symmetrical position, although there are some modulations. In non-formally federal countries, unlike in Italy, in Spain, the action against laws or acts of the federated entities by the Federation entails automatic suspension of their effectiveness or application if the Federal Government requests so; suspension that, after five months, the Constitutional Court can keep or not. In contrast, federated entities' actions against federal decisions do not entail suspension. It is not necessary to highlight the significance of this measure, which can lead to "inexistence" of federated legislation during the years it takes to resolve the dispute or appeal by the said Court. The position of the parties is not symmetrical in relation to the negative conflicts of jurisdiction either, since only the Federation can raise them; therefore, the federated entities have no instruments to trigger control of federal omissions or inaction.

The last important point in relation to constitutional justice is particularly significant: what has been the trend in the Constitutional Court decisions since this court has the ultimate interpretation of the constitution and defines the rules and criteria that guide the roles of Federation and the federated entities?

In rough terms, it can be said that the decisions of the Supreme Court and Constitutional Court have had, in all countries, a centralized taint, that is, they supported the decisions of federal powers and rebuilt the foundations on which their increasing role has been based. This is a common practice. The mechanisms have been diverse: the formulation of trade clauses or implied powers in some countries (United States), expansion of the constitutional operation of national interest (which has become a general criteria to delimit powers instead of a dimension to be decided on a case-by-case basis), interpretation of basic principles of legislation (which have been granted broad extent and impact)… In other countries (Italy and Spain), actually all paths have led to a strengthening of federal powers in detriment of those initially granted to federated entities. Although the techniques and procedures have been mixed, the process has always been oriented in the very same direction.

One must add, however, that this largely centralized doctrine has had some exceptions, sometimes highlighted with great resonance, which can hide the substantive trend just mentioned. However, these exceptions and the potential developments they opened up should not be underestimated.

A review of the situation in different countries, of a classic federal pattern or not, or even not formally federal, offers in this respect a considerable level of convergence. It might be wondered; however, whether Constitutional Court decisions are rather passive, that is, they just confirm decisions of federal bodies. If it is so, as this is the case in Spain, one might wonder if the outcome would have been different whether the federated entities had been more active and, thus, the constitutional decisions would have been rooted on federated acts and laws, and not in federal ones, which gives more prominence to the federal bodies.

A small but significant issue that it is important to point to is the initial protective attitude towards the powers of the federated entities by bodies of constitutional justice, as evidenced by the actions of the Supreme Court in Australia or the Privy Council (based in London, abolished in 1949) in the case of Canada.

Finally, it must be emphasized that these instances are never alienated from the mainstream trends. The growing presence of the government in the economy or the construction of the welfare state was suitable to prompt for centralization (Australia offers a clear example in this regard). However, the new tunes of the current moment, with a re-dimension of the required mechanisms of economic and financial policy, with the need to es-

tablish new standards of responsibility, and with the search for social proximity to face global challenges, could imply an turning point for the up to now mainstream doctrine.

D · Judiciary

The institutional structure of the countries concerned presents, probably, the more robust differences in the configuration of judicial power. Professor Delpérée refers to the concepts of associative and dissociative federalism to draw the line between the design of the judiciary according to the guidelines classic double-judicial order — federal and state —, closely linked to the distribution of tasks, and the conception of the judiciary as a single instance. In the dissociative model, the process of devolution or decentralization does not reach the court order, at least fully, and there is not a double, parallel level of courts.

This difference becomes particularly clear when comparing the most representative systems of both families. Thus, in federal countries like USA, Australia or Argentina, the formulation of the federal judiciary is clear; and in Belgium, India, Austria, Italy and Spain — the first formally federal and the latter described as such despite the lack of a formal definition —, there is a single judicial power and federated entities do not have responsibilities in the field of justice, at least substantial ones, and there is no separate judicial power.

However, also in this topic, there are certain nuances that should be considered. On the one hand, if you look at formally federal countries, we find the organization of the judiciary in Mexico where, although there is a double order of court with decision-making areas that follow the criteria of distribution of powers between the Federation and the States, there is also some subordination of State Courts, since their decisions can be often challenged in Federal Courts. In other federations, Canada and Germany, there are two orders of courts, although their jurisdictions do not follow the distribution of powers between federation and provinces or Länder. In Canada, the lines between the two judicial levels are somewhat blurred because the Federation is involved in the appointment of members of some state courts, which are also in a position, to some extent, subordinated. In Germany, there is a hierarchy between federal and state courts, but their members are appointed by the authorities of the Federated Entities. Beyond

this general characterization, it is important to note the specific case of Australia where the structural isolation between the two court orders have been relaxed since federal judicial powers can be delegated in the state judiciary.

In the group of countries with a single judiciary, modulations are fewer and less significant. The only salient issues are: the adaptation of judicial structure to the territorial division, or the internal distribution of powers between the courts taking into account the distribution of tasks between the Federation and federated entities. In any case, the judicial power has to absorb the requirements arising from the distribution of legislative and executive powers.

In terms of the organization of the judiciary in a country — Spain —, some powers are granted to the federated entities, either in setting the jurisdictional boundaries of some courts, or organizational ones related to the of staff and resources to support judges. In any case, these powers relate to issues that do not impair the existence of a single judicial power.

III · Distribution of powers

A · General characeristiques of the distribution of powers

At the beginning, it is always advisable to clarify some concepts. First, it is important to deal with the very notion of power in which the allocation of authority and its projection on a given field converge. Not always in the regulation of powers these elements are properly defined, and, sometimes, some adjectives are used to qualify the different type of powers do not have an unambiguous definition: exclusive, shared or concurrent. They might even be used in different jurisdictions with contradictory meanings. In these pages, we will try to reduce as far as possible misleading uses. In particular, the term "concurrent jurisdiction" is reserved for cases where two different public authorities hold the same power in the same area, which normally implies that federal rules pre-empt federated entities regulations if they cannot be accommodated. When the distribution of public powers implies that the Federation establishes the bases or principles on a certain area and that the federated entities are assigned the implementation or the complete regulation of the field, we will use the notion of "shared power".

As highlighted in the first edition of this study, regarding the distribution of powers, a common feature of federations studied can be stressed Federal Constitutions include provisions on power sharing between the various levels of government. Nevertheless, the detail of these constitutional provisions varies depending on the legal and historical tradition of the system studied. In most cases, the distribution of powers system is entirely determined by the Federal Constitution without any delegation to other rules of infraconstitutional order for its completion. Thus, in the US, Canada, Australia, Mexico, Brazil, Argentina, Indian Union, Germany and Switzerland, the distribution system is contained only in constitutional provisions.

In other models of decentralized countries, the collaboration of other norms (special laws, constitutional laws or State Constitutions) is required after the constitutional moment in order to operate the framework of powers established in the Federal Constitution. This applies to systems as diverse as the United Kingdom, Austria, Belgium, Italy and Spain. In the UK, the strong asymmetry of the system is due to the devolution of power to autonomous regions through special rules for each region, approved by the Federal Parliament. In Belgium, jointly with the distribution of powers established in the Constitution, special laws that assign both legislative and executive powers to Regions and Communities complete the system. In Italy, which has recently introduced changes that are still under development and not completely consolidated, the Constitution divides the legislative powers, but the executive can be distributed by infra-constitutional legislation since only the principles that should guide this allocation are established in the Constitution. Finally, in Spain, the distribution of powers is completed only when the Statutes of Autonomy (state constitution) of each region materialize the "dispositive principle", that is, when the autonomous communities in their respective "state constitutions" assume powers not exclusively reserved to the central government.

Beyond considering whether the Constitutional distribution of powers operates with or without contribution of other laws-, we must describe, the way the Federal Constitution makes the distribution of territorial power. In countries influenced by dual federalism, the Constitution establishes a single list of federal powers and the residual clause gives other powers to the autonomous units that form the Federation. The clearest example of this trend is the US, but following its model, similar examples are found in Australia, Mexico and Argentina. The Swiss Confederation also provides

that powers not reserved to the Confederation in the Constitution's list are allocated to the Cantons. Another system that contains a residual clause in favor of States is Italy, although it cannot be squared in a model of dual federalism. In the Spanish case, the Federal Constitution contains a list of exclusive federal powers, while the powers for the federated entities are only potestative. That is, the Federal Constitution does not confer fixed powers to the federated level; these will be established instead in each of the federated Constitutions. Italian regional system, following the reform undergone in recent years, also contains a double list of federal and regional powers.

By contrast, in the German federal system powers and areas not expressly reserved to the Länder are considered to be under federal power, even in cases of the so-called "new areas." It must be taken into account, in the German, case that the Federal Constitution provides extensive lists of federal powers, which can also be extended through the implied powers. The other system following a German model, the Austrian, has not followed here the German model, precisely because the latter has been amended in recent times. Thus, in Austria, there are still several lists of powers in the Federal Constitution and has maintained the institution of the federal legislative powers, the exercise of which requires the enactment of a "framework" law. The federal powers are expressly enumerated. It also includes a list of areas of shared power. In these, the legislation is set by the Federation and the Länder implement these regulatory provisions. In this system, all matters not expressly attributed to the Federation are allocated to the states, although the use of the residual clause has been limited (as has been in most analyzed systems) due to the trend to interpret federal powers extensively, despite the existence of the "in dubio pro Land" principle governing judicial interpretation.

In other systems, we found several cases in which the Federal Constitution establishes a double list of federal and state powers, and can even include provisions dealing with the areas of concurrent jurisdiction. This is, for example, the case of Canada. Moreover, the Indian Union also hosts in its Constitution a triple list, similar to Canada, but in this case the residual clause plays in favor of the Union. The Brazilian Constitution contains a complex system of distribution of powers with several lists of powers. That is, the Constitution contains explicitly the powers reserved to the Federation and to the States and also to municipalities, such powers are divided according to the interests affected in the area concerned. In Bel-

gium, the Federal Constitution states explicitly powers conferred to regions and communities, while the federal powers are residual, despite the misleading design of the residual clause in the Constitution.

With regard to the prevalence of federal law over state law, few changes are noticed when comparing the current situation with that of 2003 when the first edition of this work appeared. In general, countries following a dual federalism model, federal powers and laws prevail over the state ones, without addressing the specific power or whether the federated law is enacted in an area of exclusive state power. This is clearly so, both in the U.S. system, and in the Argentine, Indian, Brazilian and Swiss systems. In Canada and Australia, also tributaries of the concept of dual federalism, prevalence holds, but real incompatibility should be demonstrated (usually declared by the Courts of Justice and it has been always the subject of much litigation) between the federal and federated norms. The outcome might even be that both laws are constitutionally permissible. This is the case of Canada: the application of the federated norm is disabled, but not its validity, while the contradictory federal norm is in force.

German-style systems or systems where the constituent power has developed more sophisticated and complex rules to manage the distribution of powers (and thus, a complex scheme of rule production is entailed) do not resort to the principle of prevalence in the same way the systems so far analyzed do. Relations between Federation and States are often based, in this second group of countries, in the principle of power allocation, and therefore when there is conflict between two rules, it must be decided which level of government has the power in that area. The result, therefore, varies, and only one rule can be considered constitutionally or legally valid. This is the case of Mexico, Belgium (with the exception of financial law, where federal rules prevail), Austria and Italy (although there is a federal power of substitution). In the Spanish case, the prevalence of federal law is limited to the areas of competence that are not exclusively reserved to the states. However, this clause has not had much application, since the principle of power allocation has been far more used.

As for the existence of exclusive areas entirely reserved to the power of one level of government, we must emphasize that this feature occurs in greater or lesser degree and extent in all federal systems studied. On the contrary, the arrangements of executive federalism are not widespread. Typically, the level of government that has legislative power conferred on a given subject will carry out the implementation and enforcement of that

legislation. These executive functions tend to include the regulatory powers (U.S., Canada, Australia, India, etc). By contrast, in countries like Germany, Austria, Italy, and Spain, there is a distribution system that may imply that the legislative powers are attributed to a territorial entity, the Federation, and, in turn, the federated entities assume the executive power to implement the federal rules. In Italy, even after the 2001 reform, executive powers can be granted to the regions through regular federal law, according to certain constitutional principles, among which there is the principle of subsidiarity, introduced into the system during the last reform.

B · Flexibility in the territorial distribution of power and other complementary rules

At this point, the attention should be focus on one of the most interesting features of the current federal systems and the quasi-federal models of territorial distribution of powers: the existence and use of flexibilization mechanisms of the scheme established in the Federal Constitution and, where appropriate, in the rules that contribute to its complete definition.

In most systems, and following the scheme of dual or Anglo-Saxon federalism, federal bodies cannot delegate powers directly to federated ones. In general, in these systems the flexibility of the system occurs through the adoption of agreements, often with an inter-administrative character, which usually include the cost of funding the transferred power or service (U.S., Canada, Australia, Mexico and Argentina). However, in some systems, such as the Indian and German ones, there is no mechanism to make the distribution of powers flexible and any alteration of the system could occur only through a constitutional reform.

The Spanish, Italian, Swiss and Brazilian systems establish that the Federation is able to delegate or transfer powers directly to the states through the adoption of specific legislation. In general, the transfer or delegation involves the provision of economic and financial resources needed to assume the new task. However, curiously, in the case of Switzerland, the federal delegation of powers to the Cantons did not involve the transfer of resources until the 2008 reform. Finally, in Belgium the transfer or delegation of federal powers to the states is expressly prohibited by the Constitution, but such transfers are allowed between federated entities (regions and communities).

It is worth noting that the vast majority of territorial distribution of power systems that we analyze adopt the principle of territoriality of powers of the federated entities, and accept, to greater or lesser degree, the constitutionality of the extraterritorial effects arising from exercise of those powers. The most flexible in this regard is Australia since it allows States to exercise legislative powers over issues located outside its territory whenever there is a link with the phenomenon regulated. Other flexible systems regarding this issue are Switzerland and India which allow a certain degree of extraterritorial actions of States; in particular, the extraterritorial application of its legislation in cases where there is a connection or link with the state territory (India) or in specific cases established (Switzerland).

In the case of large American federal systems (U.S. and Canada), the extraterritorial effects are constitutionally valid if the State only intends to regulate intrastate matters. Something similar occurs in the Spanish autonomous system in which the Constitutional Court has accepted (even though its case-law is hesitant when approaching this subject) that the regional powers may have extraterritorial effect in certain cases. In the Mexican system, imitating the American system, the extra-territorial effects derive from the clause on the "full faith and credit". In the cases of Brazil and Argentina, the experts did not discuss whether it is possible or not to consider valid the extraterritorial effects of state powers, but they made clear that states cannot act beyond their boundaries. The same is true in German-model federal systems like Germany and Austria. Nevertheless, in the latter two cases, the extraterritoriality of the questions to be regulated is channeled through mechanisms of cooperation and horizontal collaborations. Such solutions have also been welcomed in the reform of state Constitutions started in 2005 in Spain with the aim to prevent the Federation from assuming powers in areas where it does not hold any power but where it used to base its power on the mere fact that the issue was in nature supra-autonomic (it affected more than one federated entity). This trend has also been followed by the Italian regional system, which prohibits, according to Professor Merloni, the inherent extraterritorial effects of regional powers. However, the regions may cooperate in those cases which present supra-regional interests, including the adoption of legislation previously coordinated and agreed between the affected regions.

Among other principles, we emphasize, for its originality, the solution given in Mexico. There are several prohibitions that act as a barrier to the exercise of powers by various governmental agencies and which at the same

time try to reduce as much as possible jurisdictional conflicts. These are two: firstly, the absolute prohibition on states to act in areas reserved to the federation; and, secondly, the prohibition to carry out certain activities unless federal consent is given. In Brazil, all levels of government are subject to the same principles and limitations set forth in the Federal Constitution. The same happens in Germany where the Federal Constitution establishes limitations on the powers of every territorial authority. In the Austrian system — also of an executive-type such as the German —, the Federal Constitution establishes a uniform set of standards to be met throughout the country. It should be noted, moreover, that as a result of the influence of these two systems, especially the German one, in most countries surveyed, the principle of federal loyalty acts as a limit (and as a guiding principle) of the exercise of the powers by the various levels of government. This principle is made explicit in the Federal Constitution or constitutional laws, or can remain in the unwritten constitutional conventions. The existence and respect for this principle has been asserted in systems as diverse as the Spanish, the Swiss, the Italian, the Australian and the Belgian.

Another type of constraints on the powers given to the various levels of government relate to fundamental and constitutional rights promulgated in the systems analyzed. This would be the case in Canada or Switzerland, where the exercise of federal and state powers is bound and limited to the respect for the rights and guarantees provided by the Federal Constitution and, where appropriate, in the State Charts. Respect for International Law and European Community law also work as general limits of the exercise of the powers of the different levels of government as acknowledged by experts from the United Kingdom, Italy and Canada, for example.

C · Broad interpretation of certain constitutional powers and tendency toward centralization

The response given by the vast majority of experts is positive when asked whether or not any or some powers have been interpreted in a particularly extensive way. This section examines when and to what extent this occurs in the studied systems. It must be said that the situation has not changed much since the previous edition of the study.

In almost all federal systems, the federal powers in certain areas — particularly those related to economic and financial activities — have

been broadly interpreted. In Canada, it is considered that the broad interpretation of certain federal powers is the result of the adaptation of the federal system to historical and social changes that have taken place. In the case of the U.S., Professor Agranoff thinks that all levels of government have seen an expansion of their regulatory powers but without a centralizing trend. The same happens in Germany, in the opinion of Prof. Degenhart, since both levels of government, federal and state; tend to interpret all their powers broadly. In this case, the Constitutional Court has solved the conflicts and, according to the expert, it has decided in a balanced way, sometimes in favor of States and others of the Federation. At the same time, Austrian Federal Constitution explicitly incorporates mechanisms to avoid the expansive reading of powers, especially the federal ones. These mechanisms are part of the petrification theory of the power distribution system and the principle of interpretation "in dubio pro Land" used by the Constitutional Court. However, as highlighted by Professor Gamper, the Constitutional Court has actually considered that some cases fall under federal jurisdiction based on "intrasystemic" criteria.

By contrast, Argentina has confirmed the expansion of federal powers in multiple areas, which has doomed the system to a process of strong centralization, according to Professor Hernández. In the case of Mexican federalism, it is considered that the federal tax power has been interpreted too broadly. This seems to be also the case in Belgium, where the economic powers or powers linked to economic policy have been widely interpreted in favor of federal power, as professor Delpérée notes.

In Brazil, as in the Spanish case, the expansiveness of federal powers to establish the principles, rules and guidelines to be followed by state lawmakers in the exercise of their legislative powers has been asserted. In some cases of shared powers, the federal bases are so large that prevent the normal development of the regional powers. Indeed, the reform of State Constitutions in Spain since 2005 has attempted to curb the expansive federal powers. In the Spanish case, as pointed out earlier in this section, general powers on matters of federal economic relevance have also been subject to a particularly broad interpretation. The Italian regional system, meanwhile, has also encouraged a broad interpretation of federal powers, and this persists despite the removal of the principle of general interest as a trigger of federal powers in areas of regional jurisdiction, as highlighted by Professor Merloni.

Finally, we must explain that in the peculiar system of "devolution" implemented in the United Kingdom, the existence of broad interpretations of powers cannot yet be confirmed. However, Professor Greer notes that some regions fear that the federal government will begin to use its powers in certain areas interfering with regional ones.

D · Administrative or Executive Powers

We refer now to the executive or administrative powers. Often, constitutional norms usually refer to areas or issues which are assigned to the Federation and/or Federated Entities, implicitly attributing all public powers over them, an approach that includes, indirectly, even the judicial power in countries with two levels of courts. Naturally, when the system does not have a dual judiciary, public powers conferred are rule-making — including legislation —, and executive or administrative ones. Therefore, in these cases, there is not a problem, at least initially, to determine the executive powers. They form a whole with the legislation.

However, sometimes constitutions only explicitly refer to legislative powers. This is the case of Australia, Italy or Germany, to name countries with different schemes. This raises the need to establish whether, by implication, the allocation of legislative powers entails also executive powers, or whether it can be understood, or if it is expressly provided that these powers belong to a different sphere of power, usually the Federated Entities. Regarding this issue, several groups can be identified: in some jurisdictions it has been established or interpreted that the executive powers are part of legislation. In Australia, the jurisprudence of the Supreme Court has set this criterion. This is also the solution of the American-inspired dual federalism, although there may be nuances in some countries. A second group comprises those countries where executive powers in areas of federal legislative power are assigned to the federated entities unless otherwise provided. This scheme might be: expressly provided, part of the residual clause or implied in the overall scheme. It is part of the executive federalism which has Germany as the best example.

In Italy, the Constitution sets out the principles and federal and federated laws have to establish the distribution of executive powers. In any event, the Federation may delegate administrative functions to the federated entities. The system established by the Spanish Constitution of 1978 is more

complex, since the full distribution of powers must be expressly provided: executive power does not always follow the legislative one and there is not a general power of the Federated Entities to implement legislation.

In the case of dissociation of the legislative and executive powers between public authorities, the contentious question that arises is to which level regulatory powers in these matters correspond. Either by express constitutional provision or by judicial interpretation, it seems that the current dominant position attributes the power to make regulations to the level that holds the legislative power. Nonetheless, sometimes the approach is clarified by distinguishing between general and sectorial regulations; or executive and organizational regulations, granting the latter to the authority that has assumed the executive functions.

E · Federal administration offices

Although not strictly an aspect of power distribution, while the relationship with it is obvious, it is important to examine the existence of federal government offices throughout the country, that is, in the territory of federated entities.

In this sense, we could say that there is a key difference between countries of executive federalism and others. In the first — Austria and Germany — indirect forms of administration dominate, and there are few peripheral federal agencies, and these have relation to specific services. However, regarding other countries (and this affects of course the extent or scope of federal powers) a distinction can be drawn between the great American federalisms, where peripheral federal offices cover specific areas, and countries such as Spain and Italy where the federal government has greater peripheral presence and significance.

F · Areas of federal and federated power

This section identifies the most significant areas assigned to federal and federated entities in order to provide general lines that emerge from the review of the various systems.

In regard to the powers of the Federation, there is a bundle of powers present in all systems. It can be said that these constitute the core expres-

sion of the central power: international relations, defense, customs and foreign trade, and monetary and economic policy. These areas are assigned to the Federation but this does not imply that connected areas might be attributed to the Federated Entities. The choice of the judicial power organization affects the attribution of exclusive jurisdiction or not regarding the judiciary to the Federation. Also, the peculiarities of the organization of the Treasury affect the distribution of powers in this field, but in any case there is exclusive federal jurisdiction in taxes.

Apart from what could be called hard core federal jurisdiction, there are significant differences between countries. There is a large group in which the police or internal security is not under the exclusive power of the Federation, which has limited powers in this area, while police is managed by Federated Entities. This is roughly the scheme in formal federal countries, with some exceptions, such as Belgium. By contrast, in Italy and Spain public order is attributed to the Federation; but in the latter country, in some specific Federated Entities, there is a distribution of powers in this field similar to that of most federal countries.

In many countries — Canada, Italy, Germany, Spain, among others —, the Federation has powers in criminal issues, but in some federal countries following a dual federal model, this is a matter of both federal and federated entities. It is almost unanimous the attribution of labor legislation to the Federation. In contrast, with regard to civil law, there are several schemes. In some federal countries — United States, Canada, Mexico —, there is not an exclusive power of the Federation; it is matter of federated power. The case of Spain is peculiar since only some states have jurisdiction over civil law, as it happens in Quebec.

The strategic importance of energy and hydrocarbons undoubtedly explains why these are under federal jurisdiction in Mexico. Perhaps it is also the reason for federal jurisdiction over cultural property in Italy. In several countries, there is a scheme of allocation of functions — it can be described as a system of shared powers — between the federation and federated entities over three areas: education, health and environment. As you can imagine, the ways in which it has been achieved are varied: in the old federal states only the broad interpretation of certain clauses and the instrumentalization of financial resources may explain the evolution; while in others, the scheme is explicitly reflected in their Constitutions. Anyway, it must be borne in mind that the actual distribution of functions is different in each country and, in some, the federal power over some areas may be

nonexistent — education in Germany or Belgium — or the power of federated entities may be deferred to the future — education in Italy —. The aim of this explanation is to highlight a general trend in which the activity or provision is essentially in the hands of the federal entities, although the Federations are responsible for establishing basic rules and standards.

If we now focus on the key areas of activity of the federated entities, in addition to the sectors that have just mentioned, there are three areas in which they generally hold full power: urban planning, culture, and economic activities. Some precisions regarding the general picture presented should be offered. As regards to planning, the modulations of federated power may have origins in property law and housing policy. In the field of economic activities, the limits of the federated powers, apart from the general economic and fiscal policy in the hands of the Federation, now responds to the prevalence of approaches in favor of reducing government intervention.

IV · Economic powers

A · General description and guiding principles of the distribution of powers in economic issues

This section is new; it was not included in the previous edition of the study. The series of questions that build this section of the research project aim at deepening in the analysis of a specific type of powers, the economic ones, since their distribution largely affects the general characteristics of all the studied systems. The degree of decentralization of economic powers can give an idea about the degree of decentralization of the system as a whole, and yet, it can be useful to assess if the system tends towards centralization or if, on the contrary, it maintains a balance between the state and federal levels. The study of this area provides, in turn, a fairly clear picture of the degree of sophistication and maturity of the systems under analysis.

The first two questions in this section refer to the existence in the Federal Constitution and/or State Constitutions of rules or principles that guide the activities of economic agents. In other words, it considers whether it can be argued that these rules provide the basic framework for regulating the structure and operation of economic activity.

Most experts consulted answer these questions affirmatively, but with some qualification in the sense of asserting that the Federal Constitution

does not prefix a particular economic system, but merely establishes principles guiding the economic agents and also the different levels of government. In other words, these guiding principles are included but it cannot be said that the Federal Constitution adopts or establishes a particular economic or social model. This is the case of Spain and India (in this case, although the Federal Constitution incorporates the name of the Socialist Republic of India, it has no practical significance). Also in Canada, the Federal Constitution does not state any principle other than the recognition of certain rights to individuals and businesses. The same happens in Belgium, where the Federal Constitution does not establish any principle about it, but certainly enacts certain economic rights and establishes mechanisms to ensure an economic union in the entire Belgian territory. This system is also followed in Germany where the Federal Constitution contains economic and social rights and incorporates mechanisms to ensure economic balance between the Länder. The Austrian federal system also takes this approach: recognition of rights and economic liberties by the Federal Constitution. To these principles, the free market principle should be added since it is considered implicit in the constitutional system. In turn, the system seeks the redistribution of income through the budgetary law.

In the United States, these principles and rights are not explicitly incorporated in the Federal Constitution, but the powers of both levels of government are limited in matters of economic content through various clauses (commerce clause, prohibition of levying taxes on goods from other states, prohibition to enact rules allowing exemption from contractual obligations previously incurred, and the full faith and credit clause) which aim to promote, maintain, and safeguard a single internal U.S. market and prevent it from fractionation.

However, there are other systems where the Federal Constitution seems to point more clearly to the introduction of a particular economic system. We refer to the cases of Australia and Switzerland where the Federal Constitution sets out the principles of free market and economic liberalism. Brazil and Argentina include among its economic constitutional provisions, apart from basic economic freedoms, that their economies are social market economies, where free enterprise and liberal rights are openly combined with principles like social justice.

Finally, it must be highlighted that in the case of the United Kingdom, in the absence of written constitutional law, economic freedoms and some social rights are guaranteed in ordinary legal norms.

As to whether the State Constitutions include similar provisions to those in the Federal Constitution in relation to economic activity, three lists of countries can be distinguished. First, there are countries embracing such provisions in their state constitutions (whether or not these principles and rules have an actual impact in practice). In this first group, the United States, Canada (but only in relation to the Quebec Charter of Human Rights), Mexico (some state constitutions parallel the federal), Argentina, Brazil, Germany (even if they are not applicable), Austria (although there are not many and they must comply in any case with those set out in the Federal Constitution), and Switzerland are included. A second group comprises those countries that do not include principles of economic order in their State Constitutions, either because there are no such constitutions (as in the case of India) or because they are only found in the Federal Constitutional or statutory level (the United Kingdom, Australia, and Spain; although in the latter case we may find some clauses but of little relevance). Finally, the third would include the particular case of Italy, whose regional statutes contain these principles, but whose effectiveness has been null because the Constitutional Court considers that they do not have binding legal force but merely a programmatic value.

B · Distribution of powers over economic regulation and principles inspiring this allocation

Regarding the existence in the Federal Constitution or State Constitutions of rules assigning to the Federation and/or individual states the power to carry out the regulation of economic activities, most systems show notable complexity in the distribution of such powers, and in most cases, the two main levels of government, federal and state, have been empowered to regulate parts of it. Therefore, much of the economic areas or powers can be considered, roughly, shared or concurrent. The main criteria for allocation of regulatory powers on economic activities follow, mainly, four considerations. First, the consideration of the activity as a strategic federal sector and, if this is the case, the entire area will be attributed to this level of government (this happens in Brazil, for example, with nuclear energy). Secondly, the dimension of economic activity (intra-or supra state). In general, all supra-state economic activities are considered under federal jurisdiction (this happens in countries like the United States, Canada,

Australia, Germany, or Spain), notwithstanding that in some cases elements of cooperative federalism can be introduced to address these issues on the state level through the use of horizontal agreements, trying to prevent parallel federal intervention (examples are Germany or Austria, and, more recently, Spain and Italy). Third, the so-called horizontal or transverse titles should be taken into account because they play their main role in economic regulation and if they are extensively used by the Federation, state powers in these areas can be voided of any content (it happens in Italy, Spain and Germany). Finally, some federal systems studied use, to a greater or lesser extent, the criterion of the interest (state or federal) affected by the economic activity in question as an element to confer jurisdiction on this matter to one level of government (this happens in India, but also, for example, in Spain on antitrust and other matters as the distribution of gas, oil or energy).

Other principles or rules that determine the allocation of powers to the Federation or the States can also be identified. These can be found in both Federal Constitutions as well as state ones, depending on the system. In the quintessential Anglo-Saxon federalism (U.S. and Canada) the broad interpretation of the commerce clause has resulted in some areas in a clear centralization of powers since it has been used as the title enabling the action of the federal level in areas traditionally reserved to state power. In the rest of the American federalisms surveyed (Brazil, Mexico and Argentina), the authors consider that there has been a centralization of the federal system because of the existence of principles such as the prevalence of Federal Constitutional provisions on economic matters in detriment of the state constitutional provisions (Brazil) and because, in practice, the regulatory scheme adopted has clearly set centralizing features.

Finally, in Switzerland the validity of the principle of subsidiarity has meant that virtually all relevant economic activities are assigned to the Federation. Despite this principle is not in force in the United Kingdom, the whole country's economy falls under the regulatory jurisdiction of the Federal Parliament and Government.

C · Limits to economic powers

As for the existence of limits to the exercise of economic powers conferred to one or another level of government, we must note, first, that often

there are no such provisions. In most systems analyzed, the limits to the exercise of the powers in economic matters tend to be exactly the same as those for other powers, regardless of the particular subject. This happens in Mexico, Brazil, Argentina, India, Germany, Austria and Spain. However, there are some systems that include specific limits on this issue. United States, for example, establishes that federal taxation should be uniform throughout the Union. Canada, meanwhile, provides as a general rule, discussed above, the prohibition of extraterritorial effects in exercise of the powers of the state. It also prevents the imposition of taxes on domestic products, which are the ones produced in Canada. In Australia, as highlighted by Professor Twomey, there is a significant feature in the economic sphere: the lack of exclusive federal jurisdiction to regulate all economic sectors. However, she also emphasizes that states' powers are limited in the tax area and that, in addition, there are limitations to their ability to borrow. In the UK, the imposition of these limits depends on what is established in each of the laws regulating the "devolution" for each of the autonomous regions.

Finally, to conclude this section, the Swiss limits on state powers should be mentioned. Those derive from the prohibition to change the basis of a liberal economic regime which has been adopted in the system and free market competition, unless expressly provided exceptions to these principles are established. It also provides that citizens should have equal economic treatment throughout the territory of the Confederacy.

D · Jurisdictional conflicts and centralization in economic powers

Most experts consulted have answered yes to the question of whether there have been jurisdictional conflicts regarding the division of economic powers. This has happened in the U.S., Canada and Australia. In the latter system, conflicts have occurred mainly in the field of taxation and control of federal spending power. In Brazil, this type of litigation has also been detected and professor Binenbojm asserts that there has been a tendency towards centralization, which is also experimented by Argentina. In Mexico, the result has been the same, but the conflict has been more political than legal.

On the other hand, in India and the United Kingdom there has been no such conflict on the basis of the responses given by professors Greer i Singh. However, the British expert stresses that the economic crisis has brought to

the debate the importance that all issues related to economics and finance depend on a single level of government; in this case, the federal. In Switzerland, according to professor Thalmann, there has been no conflict.

Countries following the model of executive federalism — Germany and Austria — have suffered processes of centralization in this area, although in the case of Austria, this process had been developed in the 50s and 60s of the last century. Nevertheless, in the latter system critics are still calling for a deepening in this process, demanding the implementation of the so-called "single window".

To conclude this discussion, we emphasize that in the Italian and Spanish cases, the conflict has been extreme and these systems have been highly centralized, despite the reform efforts (in Italy in 2001 and in Spain since 2005).

E · Economic cooperation or collaboration bodies and administrative agencies

Another issue of interest is on the existence of bodies of collaboration and economic cooperation in the federal systems. In the two North American Anglo-Saxon federalisms, there are not such bodies, while in the case of Australia, a federal system of the same family as those cited above, they exist. There are several depending on the subject and their sessions are held at least once a year.

In Italy there are no such collaboration or cooperation bodies devoted exclusively to economic powers; the same happens in the UK. Although in the latter, the coordination in this area is more of an informal type. Brazil has not provided for the establishment of such bodies or institutions, while Mexico and Argentina coordinate the economic policies of the various levels of government either through agreements for planning and coordination of spending and investment or by adopting binding agreements arranged in these bodies. Nevertheless, in the case of Argentina, they do not have enough strength or ability to influence a change in federal economic policy.

In all other systems analyzed (India, Germany, Austria, Belgium and Spain) there is one or several — depending on the country — specialized entities in the economic and fiscal areas with a cooperative character. If they are expressly provided for, they can be found in the Federal Constitution and its meetings are scheduled (once or twice a year, at least), except

in the case of Belgium where consultation committees meet according to changes in the economy. It should be mentioned that in Germany two bodies of this type were created when approving the constitutional reform of 2009. This would have set the Stability Council, with binding decisions (but for now, has not decided on any matter) and the Advisory Council on information technology and communication, with the goal of coordinating initiatives in the field.

With regard to administrative agencies (often independent authorities), it should be noted that in all the countries that we have studied there are such institutions and, in most cases, those agencies deal with highly sensitive sectors of great economic importance (telecommunications, energy, securities, etc.). They can be created by both the federal and the state level depending, obviously, on the scope of their respective powers.

In the case of federal agencies, the Federal Government decides on the appointments; and, in some cases, these are sanctioned or might be vetoed by the Federal Legislative Chambers. The degree of participation of the federated units in the appointment of members of federal regulatory agencies varies, but it is, generally, low. In the case of state regulatory agencies, certainly more scarce, the appointment of its members is decided by the State Government.

V · Powers on urban and regional planning

A · Land use and urban planning legislation

This is a new topic introduced into the study. In this section we discuss several issues related to the distribution of responsibilities on planning and land use. It will be examined which level or levels of government have assigned functions in this subject matter.

First, the distribution or allocation of legislative power over land use and its conditions, in most federal structures influenced by Anglo-Saxon federalism, is assigned exclusively to the States, which may even transfer part of its powers to municipalities, to the extent that these also fall under their exclusive jurisdiction (these would be the case in the United States, Canada, Australia and India). In the British system of "devolution", this power has also been attributed to the decentralized administrations. In Belgium, as professor Delpérée describes, this power also pertains to the Regions.

However, in other states, the matter under consideration has been organized on a shared basis, that is, involving the top two levels of government, state and federal. In the case of Mexico, this division of functions is not included in the Federal Constitution, because, according to Professor Serna, the powers on the subject are shared between federal and federated authorities as a result of the mandate contained in a provision of the Federal Parliament (General "Act" of Urban Settlements).

In the other systems where functions in this area are divided between two or three levels of jurisdiction, the influence of executive and cooperative federalism can be detected. This division is reflected in Germany where the parliament of the Federation provides general guidelines and States approve the general planning and the implementation of the rules is assigned to the Municipalities. In turn, in Austria, the general power of urban planning is shared between States and the Federation, corresponding to the first the general power over urban development. The Swiss Confederation establishes the guiding principles and criteria in the field, which should be developed and implemented by the Cantons. Similarly, in Italy, it is considered that this is, according to the statement of Professor Merloni, a matter in which the powers of Federation and States are "concurring" (shared, according to our terminology), since States develop their powers under the criteria set by the federal legislature. In the Spanish case, in principle, it is an exclusive State power, although the Federal Legislature has had an impact in this area through the use of cross-sectorial or horizontal powers. To prevent this federal interference, the New State constitutions (adopted from 2005 onwards) have sought to ensure the exclusivity of the State power.

Finally, peculiarities of two systems should be presented. First, in Argentina, legislative power on land use is mainly restricted to a single level of government: Local Government. Second, in Brazil, this subject is developed without the intervention of State authorities, since it is the Federal Legislator who establishes binding rules which are directly applied by the Municipalities.

B · Private property regulation

The second issue that has centered our attention in this section is the allocation of legislative power regarding the status of private property,

that is, the regulation of the rights and duties of owners of land or economic rights. Again we can identify three major trends among the surveyed countries.

The first attributes this power to the States. This group is formed by countries like USA, Canada or Australia (despite the clarification that such regulation comes from traditional Common Law). The second one covers those countries where property rights are regulated in a shared basis by various levels of government. In this case, we can include Mexico, Brazil (where all three levels of administration are involved) and Italy (where the development of federal civil law regulations is a "concurrent state power").

Finally, we can group those systems in which the regulation of private property is assigned exclusively to one level of government because it is considered part of the power in private law or civil law. This is the case in Argentina, Germany, Austria (considered a fundamental right), Switzerland, Belgium, and Spain. This does not preclude, however, that public law, both State and Federal, can modulate the rights in which private property is divided.

C · Land and urban planning

In this final section, the questions of which authority or authorities decide on planning and land use and, if so, what is the content of the decision of the highest authority will be addressed.

The answer to this question is closely related to that provided by experts in the two issues previously raised and included in this section. Thus, we can emphasize that in the United States and Canada power on land use is State, although the Federal Government can act if federal property is involved. In the case of the Australian Commonwealth, States also regulate urban development and they may delegate powers to Municipalities, although they retain the power to recover these delegated powers by a legislative amendment. In the UK, as we have mentioned, this power has been "devolved" to the regions and they have delegated responsabilities to local authorities, upon which, however, they exert tight control. In Spain, power is also attributed to the States, but previously Municipalities prepare planning proposals. Municipalities have also been attributed the power to adopt derivate urban planning tools.

Finally, in Switzerland and Belgium, these are exclusive State powers, without exception. The same is true in India since the Federal Constitution does not contemplate this issue and therefore it is within the competence of States "acquis" through the residual clause. In the case of Mexico, Italy and Austria, the three levels of government (federal, state and local) are involved in this matter with different degrees and, thus, their powers have different scope too.

VI · Local and municipal regime

A · Inclusion of the local level in federal constitutional provisions

As the 2004 study clearly described, one of the main issues in the organization of government is the management of the local government level. Thus, we must analyze the definition of which entities are included in this level, the typology and the role they play, that is, the quality of its powers and the delimitation of its responsibilities and the allocation of resources.

We believe that in politically decentralized countries it is important to know whether the power over local authorities' regime is assigned to the Federation and/or States and in which ways and to what extent these levels are involved in shaping local authorities.

The first question we address is the determination of whether the local government is defined (or included, or referred to) in the Federal Constitution, and also, whether local authorities are part of the federal configuration. On this point the conclusions reached in the first edition of the study have not changed since, in general, Federal Constitutions contemplate, with more or less detail, the existence of local government and their function in the governmental system. However, this rule has important exceptions in the Anglo-Saxon federalism model; though in this area the influence of this model is not reflected in other countries while in other matters many of its solutions are widespread. The Federal Constitutions of Australia, Canada and the United States do not contain references to local government.

By contrast, other formally federal States (Germany, Austria, Argentina, Belgium, Brazil or Mexico), as well as, Spain and Italy, include in the Federal Constitution a reference, of greater or lesser extent, to local gov-

ernment entities. In general, they enshrine the principle of local autonomy. The Austrian Constitution refers to the principle of "self-administration" and in Germany the concepts of self-responsibility and self-government are used. In Argentina, the municipalities are considered autonomous, but two subtypes of municipalities can be distinguished: those with full autonomy and those of 'prima facie' autonomy. In this country now more than 115 municipal charters have been approved, and that, in the opinion of Professor Hernandez, this is a clear and distinctive feature of the decentralization of power at the local level. Some Federal Constitutions contain provisions concerning the basic aspects of the organization of local authorities, in particular their most prominent exponent: the municipalities. Obviously, depending on the pattern of distribution of powers between the Federation and States, in the Constitution appear, if necessary, the relevant clauses. This is the case of the Indian Union. Its Federal Constitution, after the 1992 reform, recognizes the "Panchayats" as the village government and the municipal and city governments.

B · Local government position in the federal system

Regarding the position of local authorities within the Federation, the provisions that conceive them as fully members of the federal scheme stand out. In this regard, the Brazilian Constitution grants municipalities the status of "federal entities". And so does the Argentina's Constitution, according to the statements of Professor Hernandez. Although not formally federal, the Italian Constitution, amended in 2001, establishes local authorities are constituent authorities of the Republic.

It is worth remembering the theory of integral federalism reflected in the Spanish short-lived Constitution of the Federal Republic at the beginning of the last third of the nineteenth century. It established a "cascade" federalism in which one of its constituent blocks was the municipality. Currently, the 1978 Spanish Constitution recognizes and guarantees the autonomy of municipalities and provinces to manage their respective interests. This guarantee has been set doctrinally, however, as an institutional guarantee. At the state level, some of the new Constitutions (in Spain, 'Statutes of Autonomy') aim to strengthen the guarantee of local autonomy specifying (by using lists) that in certain matters of State power, States recognize and confer powers to municipalities.

C · Power to regulate the local regime

The answer to whether the regulation of local authorities is for the Federation or the States is mixed. In Brazil, the federal legislature regulates them. By contrast, in other countries — Germany, Argentina, Australia, Belgium, Canada, USA and Switzerland —, the federated entities are responsible for developing, where required, the principles set forth in the Federal Constitution. This is also the case of India, where regulation on the local system has been attributed exclusively to the State level and exclusive jurisdiction. In Belgium, there is an ongoing reform. Faced with the unilateralism of these responses in other countries, the answer is complex because, although with different modulations, the power of local government regulation is shared between the Federation and the States. In Mexico, the rules contained in the Federal Constitution are very accurate, with allocation of specific responsibilities. Hence, even if there is not a general provision at the federal level, state legislative powers are significantly constrained. In Austria, Spain, and Italy, regulatory power over local government is shared: the Federation retains the right to establish not only principles but also precise regulation of many aspects of the organization of local authorities. In Spain, the system of division of powers is described as a "two-faced system" to which the local government level is subordinated.

In line with these criteria, various regulations of local governments system that exist in these countries cannot differ considerably, despite the territorial organization, the population and the characteristics of the activities offered present significant differences. This explains, at least in part, the dissatisfaction in this regard and the frustration in governments of autonomous regions caused by the Italian reform of 2001, says Prof. Merloni. In any case, in regard to the allocation of powers to local authorities in this scheme, in addition to the minimum circle defined by federal law, the Federation and the States assign administrative functions to local authorities in subject-matters under their power.

Even if it is not a necessary consequence, this pattern of distribution of regulatory powers entails a particular configuration of the system of relations between the Federation, the States, and local authorities. In general, if the regulatory power is shared between the Federation and the States, the relationship with local government — that is, control, coordination, collaboration —, is two-faced. Local authorities directly relate to

both. On the other hand, where the power to regulate is exerced by the State, inter-administrative relations generally occur only between States and local authorities, leaving aside the Federation. However, important details should be added at this point. So on the one hand, in some countries, such as Germany, while the dominant relationship of local authorities is with the States, there is also a direct relationship between the Federation and those entities in cases where the two levels hold powers in the same area. However, the largest, and more general, conflict in inter-administrative relations occurs for reasons related to certain financial measures. For decades, with increasing significance in countries where local government is a State issue — including those like the U.S. or Canada, where the Federal Constitution contains no mention of this level of government — the Federation, through grants and financial subsidies, has been developing unique relationships, which may be broad and consolidated with local authorities. This can not only affect State's exclusive relationship with local authorities, but by setting conditions to obtain or maintain the grants, the scope of the principle of local government autonomy can be limited or blurred. Indeed, in Austria, for example, the Federation may intervene in local finances, modulating the extent or the strength of municipal powers, with the adoption of the Law on Financial Equalization (in its design, municipalities can participate informally).

This is, however, the only projection of the financial perspective in the design of local government. In many countries, regulation of local finances and the corresponding allocation of resources, at least in part, are held by federal agencies. Sometimes the assignment is done through the States; here, it is important to distinguish when they play a role of intermediary or there is a space to modulate these assignments. In general, the direct financial relationship Federation-local government is periodical and punctual, although significant, while in countries with a two-faced relationship, federal dominance in the management of the finances of local authorities is clear, as is the case in Spain (in fact, the new State Constitutions recently amended "internalize as much as possible" local governments, without neglecting, however, the federal regulation on the subject) and, at least so far, in Italy. Among other consequences of this approach, we can mention the difficulty, or near impossibility, of a territorial reform plan, although formally it is available to the States or they can create intermediate bodies between the state and municipal levels. This option is available in Germany, Canada, Spain, Italy or the United States. Therefore, in countries like

Spain and Italy the management of local finances strongly conditions the potential alternatives.

In general, nowadays, in all countries, the standard checks on the activity of local authorities are only of legality and the final decision depends on the Courts. It is a logical approach to the principle of local autonomy. Two points should be added. First, the existence of some special controls of a discretionary character — assessing the opportunity of a decision — which are generally exceptional. Second, the existence of two-stage decision processes which subject the exercise of local power to the superior entity resolution, generally justified by the confluence of interests of different dimension.

D · Election of representatives and/or local authorities

The power to enact ordinances and regulations commonly appears when regulating local authorities, which have their governing bodies elected, usually by direct suffrage. Typically, local authorities hold rule-making power. In some countries — Australia or Brazil —, it is expected that municipalities may enact laws, but subordinated to the federal and state laws. Finally, in the Indian case, the constitutional reform of 1992 has facilitated the promotion of democratic values among citizens and the participation of those in public affairs and political processes, making the local administration a bit more transparent.

E · Mechanisms to defend local autonomy

Judicial actions are the most common legal mechanism available for municipalities in order to defend their powers. However, in some countries, municipalities have standing for constitutional actions. In this regard, direct and indirect procedures should be distinguished. Procedures in defense of local autonomy are direct in Germany, Mexico, Argentina, and Spain. In the later, municipalities can file suit in front of the Constitutional Court claiming that their powers have been interfered by federal or state regulations, since 1999 through the procedure known as conflict of jurisdiction in defense local autonomy. There are also, as mentioned, indirect mechanisms such as those provided in the United States.

F · Creation of intermediate levels of local administration

There have been mixed answers to the questions whether States could create local intermediate entities between the municipality and the State itself, and what, if any, is the legal status of these. We can distinguish a first group of countries — like the United States, Canada, Australia, Brazil, Germany and Switzerland — in which states, without restriction by the Federal Constitution or limitation by the federal legislation, create, traditionally and systematically local intermediate entities. In the case of the United Kingdom, the devolved administrations could have created these entities but they have not so far. Second, there is a group of disparate systems that do not allow the creation of such entities. These are Argentina, Mexico, India, and Austria. Finally, we verify the existence of a third group of countries whose Federal Constitutions provide for the existence of local intermediate authorities. These are: Italy (provinces and metropolitan areas), Belgium (provinces, metropolitan associations, federations of municipalities, among others) and Spain (provinces and other intermediate bodies created by State legislation).

VII · Intergovernmental relations

A· Federal loyalty and collaboration between government levels

As highlighted in the first edition of this study, conducted in 2003, some constitutional clauses are principles that constitute an express guideline for the operation of the system, leading the network of relationships between public authorities. The case of Germany is well-known: the Federal Constitution establishes the principle of federal loyalty. In the Swiss Confederation, the 1999 Constitution explicitly includes a reference to the principle of federal loyalty, once thought to be implicit. Furthermore, also in Belgium, (article 143 of the Constitution) the principle of federal loyalty has been given constitutional recognition.

In other countries where there is no similar expression, Constitutional Courts' decisions have built principles inspiring intergovernmental relations. Austrian Constitutional Court has stated a principle of "mutual consideration" between the Federation and the Länder, which has often played in a manner favorable to the federation. In Spain, the principles of partner-

ship and loyalty have been described as inherent to the territorial authority distribution system. Currently, some of the new State Constitutions reflected the principle of institutional loyalty. As it is known, this principle was later enshrined in the Spanish constitutional case-law and has been included in legal rules, such as the Common Administrative Procedure Law. Also in Austria, the principle of "mutual consideration" has been distilled by the Constitutional Court.

To conclude this point, we emphasize that in all systems where this principle is valid, it is mandatory for all levels of government. Thus, for example, in the Republic of India the principle of collaboration between the Union and the united states applies both to the legislative functions of the Federation and the States, and to their respective administrative responsibilities.

Although in other countries, like the United States, similar principles have not been explicitly identified, it has been argued that, in fact, practice has set up federal cooperation between various public institutions. The same happens in Brazil, where there is an underlying principle of cooperation and loyalty between the different political and administrative authorities, but any substantial result arises from this principle.

B · Formal and informal tools of cooperation and collaboration

It is easy to conclude that in systems where the Senate responds to the model of a chamber for territorial representation — or is close to it — and / or the institutional game is more open in that chamber — mainly because of the decentralized operation of the political forces —, it becomes the center for relations between the Federation and Federated entities. Since the Senate is already covered, we only emphasize here its important role.

Typically Constitutions do not explicitly provide for or regulate intergovernmental relations. There are, however, some exceptions. The Austrian Federal Constitution expressly mentions agreements and arrangements between the Federation and the 'Länder'. The Constitution of the Commonwealth of Australia provides for the existence of a Council composed of representatives of Federal and State Governments, on loans and credit. More often, relations between the Federation and federal entities are built through federal laws, agreements and pacts — sometimes encouraged by funding formulas — among the various public entities. There is no defini-

tion or general and systematic regulation, but a set of relationships built over time through very different decisions.

In the area of intergovernmental relations, we could distinguish between the organizational forms and the procedural ones. Among the first, councils of mixed composition stand out. We can distinguish between general or sectorial, which are the most frequently stated. Among the few general ones, the State-Regions Conference in Italy should be mentioned. Its performance has highlighted the subordinate position of federated entities. Also in Spain, since 2004, there is a Conference of Presidents, where the President of the Federal Government and the Presidents of the States meet. To date, they have only met on four occasions and these meetings have not produced tangible results.

The case of Belgian Coordination Committee is different. It has an equal number of members representing the federal and the federated perspective. It also ensures equality of representations from the linguistic perspective. It is a forum of negotiation that helps to approximate positions and prevent conflicts; in case negotiation does not succeed, so either party can use the channels provided.

As we said, sectorial councils abound in many countries. In these, representatives, often high ranked officials of the Federal and Federated entities, meet. The composition and functions are varied, but usually they are advisory or informative, although in some cases their views may have significant impact. They are not often engaged in decision-making roles. Although it is not a definitive indicator, the characteristics of its composition may be an indication of its real role; and, above all, it can demonstrate whether they are on equal footing or not. Councils or similar bodies, in the fiscal area, sometimes exercising decision-making deserve attention. Regarding the functioning of these bodies, lack of transparency has been noted, and also the uncertainty over the responsibilities to be assumed in connection with their pronouncements and decisions has been highlighted. Finally, we note that in the case of India, Professor Singh suggests that the Constitution is a model of cooperative federalism and, consequently, the formal distribution of powers operates in practice, with flexibility.

It is also necessary to highlight that in numerous countries, along with organizational formulas, there are various agreements and arrangements between the Federation and federated entities in the most varied fields, in many cases fostered by a specific provision of financing instruments. It is true that these relationships can ensure a smooth operation of service deliv-

ery and realization of activities; but it, often, can accentuate the subordinate position of the states and also raise the question of lack of sufficient identification of responsibilities.

C · Horizontal cooperation and collaboration

In the framework of intergovernmental relations, the formulas of horizontal collaboration, both organizational and procedural, should be examined. Typically, this collaboration does not arise with a general approach, and when this is the case — conference of governors in the U.S. or regional presidents' conference in Italy —, this is more like an interest group lobbying.

In many countries there are bodies of cooperation between Federated Entities for specific purposes, where, sometimes, representatives of the Federal Administration participate. It is also discussed whether or not the local authorities should participate in the different organizational structures through which inter-administrative relations are channeled. The solutions are varied; clear trends cannot be identified. Perhaps one could say that this participation arises more easily in countries of classical federalism — like United States or Australia — than in systems that have opted recently for territorial pluralism schemes — like Austria, Germany or Spain —. In the latter country, there had been a completely abnormal situation, according to Prof. Viver, in terms of comparative law, since in more than thirty years of the autonomous state, there had not been any institution bringing together the states. Only very recently, particularly in late 2008, the situation has begun to change: a group known as "Encounters" has been constituted. Its initial membership included the six states which have recently reformed their respective Statutes of Autonomy (State Constitutions). In the October of 2010 meeting, it was agreed to transform it into the "Conference of the Governments of the Autonomous Communities", where 16 out of 17 States already participate.

As we have seen, the system of intergovernmental relations has been articulated in diverse ways, without responding to previously defined standards in all its aspects, and now — albeit with different degrees in the different countries — it is a necessary complement to the operation of these countries. It is also essential to consider the impact of cooperative federalism formulas — which sometimes arises in only one direction — in

the quality of the powers of the federated entities and in the public accountability system, which is essential for the relationship between citizens and public authorities.

VIII · Financial relations

A first impression of an overall review of the management of public finances in federal states can be summarized, in spite of some exceptions and recent changes, in two expressions: predominance of solutions rather centralized and common practical concern for the necessary means. We must assert that centralization arises with much greater intensity on the revenue side than on the expenditure. In fact, recently, there seems to be a trend to restore some areas of autonomy, in some countries, in the field of income, either by putting a greater emphasis on states own taxes, or, more commonly, by giving all or part of some federal taxes revenues jointly with a range of regulatory powers to alter some parts thereof.

This text has been referring to the general lines of the evolution of the solutions adopted, but in some countries, states own taxation has survived with considerable force (Brazil, Canada or the United States may be examples, with some mismatches among them); it should be analyzed whether there is a causal relation between this data and the increase in the conditioned transfers occurring in any of them. In any case, there is, although with different specific developments, a common trend: the existence of centralized financing approaches, based on the requirements of economic and financial policy, and they are often maintained because of economic emergency scenarios.

As noted above, proposals to correct have emerged, generated not only by the need to recognize areas of autonomy, but also, and, perhaps even more, to prevent some operational problems of a system distorted by the fact that Federated Administrations lack fiscal responsibility breaking, thus, a basic relationship for democratic life. Besides, often a lack of responsibility is accompanied by the lack of transparency. Another mismatch arises when who governs does not manage and can increase the expenses on service delivery or completion of the activity, without being responsible for covering them.

The problem of the sufficiency of resources generally and logically arises most acutely when the federated entities assume the management of

services with expenditure growth higher that the general one, as it happens in areas of health care and education. The request for increased resources and, especially and specifically, provision of resources available and consistent with the obligations generated by federal decisions are constant in all the reform proposals. In this regard, the principle introduced in the Italian Constitution in 2001 on comprehensive coverage of the functions — a term that seems to embrace all powers, regardless of a particular legal system — stands out.

Even though they are more exceptional, it should not be forgotten that any solution has to take into account the imperatives derived from the strong integration undergone in current economic systems. This entails taking into account, on one hand, issues related to the scope and management of debt, and, on the other, the instruments to correct territorial or other type of imbalance. Some events occurred (Argentina and Brazil) are sufficiently illustrative.

In many countries, regulation of financial relations is part of the Federal Constitution which sometimes includes a comprehensive and detailed regulation (Brazil) in the topic. But it is more common that the Constitution only establishes principles (Spain) and / or essential rules. In some countries, the need of a (federal) law to regulate the system has been specified (Argentina, Austria, Germany, or Spain) and its formulation may require a specific participation, with more or less decision-making power, of the federated entities themselves. As an example, we can cite the law-agreement in Argentina, still not used; the financial equalization law of Austria's to be enacted every four years; or the Organic Law on Financing of the Autonomous Communities in which federated entities only participate with an advisory role; and this despite they are crucially involved in the successive transfer tax laws. Still regarding the latter country, the special tax arrangements of two federal entities, of agreed nature (fiscal agreement of the Basque Country and Navarra), should be highlighted. The asymmetry is evident from their existence and it is not common among federal states, although there are different tax situations in Canada.

In many countries there are bodies with specific functions related to public finances of the federal system. For its uniqueness, the Federal Research Grants Council of Australia should be emphasized. It provides an unusual level of transparency and publicity to the distribution of funds and transfers.

We now examine the own taxation of the federated entities, participation in federal general funds (not conditioned) and the transferred federal taxes, subsidies, and tax management.

Although it is quite normal that federated entities have power to tax and their own tax figures, the revenues from those are generally insignificant and the federated power is subordinated to the federal taxing power.

The taxes themselves have a specific relevance in Brazil, Canada and the United States. In the first case, the States have assumed important high-yield and incidence taxes such as VAT and ICMS (Tax on Circulation of Goods and Services). In Canada, the provinces can tax the same taxable sources of income as the Federation. The same happens in the U.S. — where, however, there are exceptions concerning foreign trade and tariffs —, although indirect taxes are common.

In other countries, federated taxes have secondary weight. In Germany, the Länder may tax the same taxable events than the Federation; in Austria, taxes of the federated entities are determined by federal law every four years; in Australia, the taxable events are limited (property, gaming, fiscal stamps) and the federated entities have opted for the transfer of important federal taxes; in Belgium, new taxes cannot be established on the same taxable events used by the Federation, while in contrast, extra charges on federal taxes can be set; in Spain, federated entities own taxes are not significant and the possibility of imposing surcharges on federal taxes has been sometimes used choosing also transferred state taxes with some self-regulation leeway; in Argentina, there are federated taxes but with limited scope and federal regulation.

Participation in unconditioned federal funds and the transfer of federal are — especially in countries where federated entities' own taxation is not significant — the main sources of income. In this respect, one can differentiate between two schemes: a) participation in general federal funds that are distributed with some automation based on parameters established on a permanent or multi-year basis, reflecting or not principles of solidarity; b) transfer of federal tax to federated entities which can be total or partial and with, greater or smaller, or without regulatory powers over the tax. With this last source of income, relatively recent, the aim is to address, albeit partially, the problem of fiscal responsibility referred above. Australia, Belgium and Spain are examples of application of the latter mechanism, not found in other countries though. Except in the United States, participation in federal revenues is very significant in decentralized countries. It is,

in most cases, an unconditional transfer of resources from federal funds, fed often with the most important taxes (income, companies or VAT).

Virtually in all countries, conditional transfers or grants are established as a source of income for federated entities. Often, funds set up to rebalance the situation of the various parts of the country respond to this characterization. These grants can be linked to specific projects or programs in the formulation of which some intervention of the federated entities is provided. In any case, they constitute an important instrument of the Federation to influence the policies of the federated entities. Hence, their expansion can generate a risk for the autonomy of these (its extension to many different areas has led a Constitutional Court — Spain — to restrict its scope and limit the areas and regime).

The transfer of federal funds to local authorities is done in some countries through the federated entities — for example, in Mexico — or jointly through the federated units and directly — in many countries —, or only directly to local authorities. The relevance of adopting one of these options for configuring the system of relations between the federated and local entities is clear.

In regard to tax administration, the most common model — Argentina, Austria, Australia, Brazil, Spain, and the US — is that each level of government manages its taxes. In some countries — Canada, with differences between provinces —, the Federation carries out the tax management of the federated entities. The opposite situation occurs in Germany and Mexico — in this case empowered by a specific agreement — where the federated entities manage some federal taxes.

Reviewing the financial management developments of the decentralized countries surveyed, two initial observations arise. On the one hand, there are still concerns and discussions about, first, the level of centralization needed to manage today's economies and the requirements of autonomy, which follows logically from the mere existence of more or less consistent levels of decentralization or federalism, and, second, responsibility — the old relationship between citizen who is taxed and power that provides services —, as well as the requirements of solidarity due to imbalances and the principle of equality or the minimum level of provision in the services offered. But, on the other hand, incidents have arisen or have been enhanced linked to the rethinking of the welfare state (where has been implanted) or aspects of it, in any case; to the forms of service delivery; to the economic crisis which has implied, in some cases, drastic corrections on

public spending — which are projected, in general, into social services and public works, areas where decentralized entities play a role, rather than defense or security —; and also, in Europe, to the convergence and stability programs that involve, or imply, a control to ensure the correction of the deficit to reach a zero deficit.

In general, the regulation of decentralized entities is open to developments — although in some countries, like Brazil, there is considerable constitutional rigidity —, which means that in the few years significant developments have occurred, which could have been even more if discussions on possible reconsiderations were not very complex and quite long (United Kingdom).

Several singular milestones in this evolution — the reform of Australia, Switzerland, Italy or Spain — can be mentioned since they have made (or started) new models, even though their functionality or exact scope have not yet been verified. In general, one could say that we tend to objectify the funding system and reduce the elements of conditioning, which improves the autonomy of the spending autonomy, without, however, altering, or substantially modifying the main points of schemes formed during the last decades: namely, the centralization on the revenue side. Thus, the accountability requirements, listed above, achieve very limited significance. It should be noted, however, that despite the irrelevance of federated entities own taxation in federal countries — except in those which traditionally support federal and state taxation on the same tax events (US) — which leads to narrow down this possibility to "virgin" events (Belgium) or "invent taxes" (Austria), intermediate ways to articulate the relationship taxpayer — administration have been articulated — such as, full or partial, assignments of taxes with some regulatory power associated for the decentralized entities which will receive the revenue —. The most notable case is Spain since the 2001 reform, which has been extended with the new regulation of 2008. Although it must also be added that in this country subsist, still, to the detriment of equity, two financial management systems of decentralized entities: the common, which we have referred, and the "foral", which applies only to two entities with a very positive net effect for them. The new compensation system established in the Swiss Confederation is interesting, not only for the clarity of the solutions, but also for the vocation of generality. It will have to be analyzed the next year with the evaluation. Italian developments are linked, in any case, to the deployment of the new constitutional provisions.

An old question always present in the debate on the allocation of resources is its sufficiency. Logically, this aspect is closely linked to the powers assumed by the decentralized entities and the type of expenditure-elasticity, growth rate, etc. these involve. It also appears in the debate the lack of harmony that can occur when a body — central — has regulatory authority and management of an activity or service, while provision of these corresponds to others — the decentralized —, with the risk that new regulations or modifications of existing ones create new obligations that require additional spending. Their coverage becomes important and is a new question of sufficiency.

If you want to respond to a question about the general, more or less common, characteristics of the financing model, taking into account the peculiarities of some countries for their federal tradition, we should emphasize that the dominant system has a (increasingly) derivative character, which places the regional dimension exclusively on the expenditure side. With various schemes, ranging from the transfer of federal taxes and their collection (obviously with or without power to manage, and with or without recognition of regulatory powers) to the establishment of funds (general or more specific, from which the transfers to decentralized entities are guaranteed), two elements are not only the most debated, but have undergone some changes in recent years. First, there is the type, level of regulation, and specific characteristics of the parameters that govern the distribution of the fund. There has been a fairly general trend towards the objectification of those with an increasing primacy of the population factor. The need to combine, equality regarding the minimum levels of service, solidarity, and competitiveness contributes to configure systems with a plurality of funds, or with a main fund and other complementary, specific ones. Second, there are still concerns about the character, devoted to a specific goal or not, of transfers of resources, an aspect that influences the political autonomy of the decentralized entities. This is an old question that arises in all systems, including those with a dual federalism model. Arguably, in this regard, there is a certain restraint in the establishment of conditions. Developments in countries such as Australia, Mexico, Germany, the Swiss Confederation and Spain show it. However, a more definitive assessment requires that the data provided by the regulation to be accompanied with the quantitative results on the entire financial system. In addition, these situations are directly affected by cyclical elements of the economy, and current circumstances make the light, stated changes fragile.

Possibilities of debt and balance situations or not of public accounts are issues that affect the financial autonomy of the decentralized entities since they trigger procedures of monitoring and control. In this aspect, the current economic situation and location in a given supranational context — European Union — can have a significant impact.

Two additional issues regarding the development of decentralized systems' funding should be analyzed. First, the guarantees ensuring permanence in particular should. The difficulties of including the regulation of the decentralized funding in constitutional provisions are known. A statute may not be very appropriate to establish or develop some aspects, which are in the hands of the federal executive. Procedures for participation or organs "ad hoc" formed by an equal number of representatives from each side (or at least, with attributes of independence) have been established in some countries and, there, these schemes have been consolidated and improved (Australia, mainly).

On the other hand, there is sometimes the risk of arbitrary action, mainly caused by the breach of regulations, which implies that an apparently balanced system works, in fact, according to very different patterns.

Finally, regarding the distribution of public expenditure (data to be assessed, as is logical, taking into account the responsibilities assigned and whether or not all of it is integrated), you can see a slight trend towards better balance and a more prominent role of the decentralized entities, but unfortunately some data are old and not updated. Thus, relying on 2008 information, Australia approximately distributes spending in the following way: 61% federal, 34% states, and only 5% local. In Argentina, the distribution would be 50%, 40% and 10%. 2008 data in Germany offer this distribution: 42%, 36% and 22%. In Austria is set to 69%, 22% and 9% on the same year information. In the Swiss Confederation, spending was distributed: 37%, 36% and 27%. Finally, recent data (2008) from Spain provide this distribution: 50.4%, 36.3% and 13.3%.

IX · Language

Although schematicly, we can say that in countries surveyed, if several languages are spoken, there are three models: a plurality of federal languages, federal language/s and regional languages, and protection of minority languages. In many cases, this last line is linked to the survival of

indigenous languages. In this regard, there is a greater attention paid, which is translated into specific promotional measures and organizational initiatives in the field of education.

Aspects of transition between the first and second lines constitute the evolution on this area. Belgium and the Swiss Confederation follow the first model, although its actual operation is sometimes disputed. Examples of the second are Austria, Indian Union, and Spain, although with different actual implementations. In the case of Austria, regulation is set by the federal level and solutions relating to different linguistic minorities, projecting the territoriality of the minority language — to municipalities and areas — in the official dimension and in the first stages of education. The great Indian linguistic plurality is constituted of two federal languages — one theoretically eventual — and two dozen regional languages, which do not reach federal use, although they may be mandatory in the relevant areas, and they can be the one used in communications between States which share it. There is, therefore, a sort of equal treatment between federal and regional languages, although these circumscribed to their territory.

In the case of Spain, there have been over the last few years some steps in the direction of granting a territorial language a more equal status with the federal language and giving, in some respects, federal use to a regional language. In this sense, the new Catalan territorial Constitution provides for, on the one hand, a duty of territorial language knowledge by the citizens residing in its territory — the Federal Constitution only provides for federal-language duty —, and, on the other, the use, at the request of the citizen or as a form of communication, of the regional language in federal agencies — to date, only the Senate, and anecdotally, has planned the used of regional languages —. However, the Constitutional Court has clarified the duty of territorial language knowledge and institutional use, denying any attempt to give the regional language a similar status to the federal language one.

X · Appendix. European Union

At the time of the study prepared between 2003 and 2004, some experts expressed that the inclusion in a new work of the impact on European legal systems of the process of European integration could be extremely interesting. So we have taken that suggestion in this new project including several questions about it attached at the end of the questionnaire.

A · Participation of States in the initiatiaves of reform and review of the European Union Treaty and in the process of ratification and signing

The participation of States as such in the initiatives to amend and review the Treaties of the European Union and in the process of signing and subsequent ratification varies greatly depending on the system concerned. In cooperative federalism models (Germany and Austria), the participation of States in these processes is channeled indirectly through their inclusion in the Senate, since in Germany any alteration or amendment must be approved by the Bundesrat, and even the federal government may be bound by its opinion. Also in Austria, the modification of an EU treaty requires approval from the National Council and the Federal Assembly, which has absolute veto power.

In the case of Spain, there is no direct participation of States. It is simply provided in some state constitutions that the Federation must inform and that state may address to the Federation their considerations. There is also no formal mechanism for participation in the Great Britain.

However, the Belgian system allows, depending on the power affected (federal or federated), or on the area, the direct participation in these processes of communities and regions, or the Federation, if appropriate.

Finally, it must be highlighted that the Italian constitutional reform of 2001 has provided that "regions in issues within their power participate directly in decisions related to the formation of community legislation and that regions ensure the implementation and compliance with international agreements and acts of the European Union". This provision implies that the regions are involved in decision-making regarding the revision of the Treaties of the European Union.

B · Participation in the formation of the Federal Position before the European Union

Obviously, in this case there are no homogeneous solutions among the countries surveyed either. In the United Kingdom, for example, participation can be analyzed from three different levels: at the constitutional level is not provided; at a formal level, there is information sharing between all levels of government and they, in turn, are committed to support unani-

mously the decisions taken by the federal government; in practice, nonetheless, this politesse seems to have started breaking in recent times.

In Germany and Austria, the mechanisms of cooperative federalism found fertile ground in these types of issues and the Länder are involved to a greater or lesser extent in decision making at the federal level, depending on which are the issues and interests involved.

In Italy, legislation passed in 2003 envisaged that regions would participate in the upswing part "in the government delegations." In Spain, however, only some State Constitutions provide that States participate in the formation of the federal position on matters that affect their powers or interests. Moreover, participation can occur through the integration of state representatives in the federal delegation and in federal or European institutions.

C · State offices or bodies for direct relation with European institutions

In general, states in virtually all systems studied (with the exception of Belgium where their representations have a greater political significance) can only create such offices informally (even if they might be called "embassies") in Brussels, and often function as lobbies, as well as, in many cases, tools to facilitate the mutual information and documentation exchange.

D · Implementation of European Law

In all systems analyzed, both the Federation and the States must, in accordance with their respective powers, apply Community law, since the European legislation does not affect the internal distribution of powers. No example requiring the formal reception by the federal level of European laws in order to allow these to be implemented by state agencies has been found. The reasons behind this finding are the direct effect of directives, when it occurs, and automatic binding effect of the regulations for all national authorities.

Finally, we note that, nonetheless, there are some changes when it comes to delivering European funds and subsidies. In this case, the federal

level has a center role. For example, in Spain, for the simple fact of being European funds, they are distributed and managed by the Federation. In Italy, by contrast, formally the Regions have attributed the power to define the specifications, programs, and projects to be financed by the European Union.

I

GENERAL QUESTIONS

SUMMARY: 1. How the Federation is called (regional, federal State, etc.)? 2. Since when has the power been decentralized in your Federation? Was the decentralization established in its origins or at a later time? Has decentralization been formally abandoned or practically inoperative in any historical phase? 3. Which are the deep reasons for the adoption of a politically decentralized system? How much attached does federal/state population feel to this political decentralized system? Has this feeling substantially changed over the years? 4. Could you point out the main phases of the regime and the main characteristics? 5. How many States compose the Federation? Do they all have the same nature (for instance, States) or do they have different nature and position (for example, States, federal capital, colonial lands, communities with a specific regime of autonomy)? 6. Do they have singular features (i.e. historical, linguistic, geographical, political, legal or economical particularities)? Do these singular features have political or legal consequences? In other words, how have the differences among the main territorial communities been approached from the uniformity/diversity or symmetry/asymmetry perspectives? Are there any States which enjoy certain privileges (e.g. specific powers or special revenue sharing scheme) based on historical rights predating the Federal Constitution?

1 · How the Federation is called (regional, federal State, etc.)?

United States of America

United States of America (one of 23 federations).

Canada

At the time Canada was created as semi-autonomous member of the Commonwealth, the expression "Dominion of Canada" was used. Later, the word "Dominion" was used to designate the federal government, as opposed to the provinces. Today, the word has fallen into disuse. The preamble to the *Constitution Act, 1867* refers to the desire of the founding provinces to "be federally united into One Dominion under the Crown of the United Kingdom".

Australia

The formal title of Australia is 'the Commonwealth of Australia'. It is a federation comprising six States and several territories. The preamble to the *Commonwealth of Australia Constitution Act* describes the nation as 'one indissoluble Federal Commonwealth under the Crown'.

Mexico

The official name of the federation is "Estados Unidos Mexicanos". It appears in several articles of the Constitutions, such as the 1st and the 2nd. In addition, in article 40 of the Federal Constitution, the country is defined as a representative, democratic, and federal Republic.

Brazil

From 1891 to 1967 the official name of the federation was "United States of Brasil". From 1967 until now, the name has been "Federative Republic of Brasil".

Argentina

Article 35 of the National Constitution, originally enacted in 1853, states that: "The names adopted successively since 1810 until the present, say: "United Provinces of Rio de la Plata", "Republic of Argentina", "Argentinean Confederation", will from now on official names to designate the Government and territory of the provinces, using the words "Nation of Argentina" in the enactment of laws".

The most used denomination has been Republic of Argentina. Even though in the first years — from 1853 to 1880 — the denomination of Confederation of Argentina was used, it is now evident that ours, since 1853, is a Federation not a confederation.

India

"Union of States" in Article 1(1) of the Constitution but referred to as "Union" in the rest of the Constitution. In general parlance and communications, it is called "Union of India".

United Kingdom

The formal name is the United Kingdom of Great Britain and Northern Ireland.

Germany

The official name is: "Bundesrepublik Deutschland".

Austria

It is called Republic of Austria (Republik Österreich).

Swiss Confederation

The five official names are:
Latin: Confoederatio Helvetica
German: Schweizerische Eidgenossenschaft
Italian: Svizzera Confederazione
French: Confédération Suisse
Romantsche: Confederaziun Svizra

Despite its name, the Swiss system is a federation and not a confederation.

Belgium

"Belgium is a Federal State..." (art. 1 of the Constitution). The formula, more than a description, is a mandate to politically behave according to the principles of federalism. This is how the system institutionalized the phenomenon of "power sharing" that characterizes this complex form of state organization (see *La Belgique fédérale* — dir. F. Delpérée, Bruxelles, Bruylant, 1989; *La Belgique, un État fédéral en évolution,* Bruxelles-Paris, Bruylant-LGDJ, 2001).

Italy

The formal name is "Repubblica Italiana" (Italian Republic), without any reference to either federalism or regionalism.

Spain

From the perspective of the territorial organization, the federation does not have a formal name. "Informally", it is usually called "State of Autonomies". Internationally, the country is called Kingdom of Spain. The Spanish Constitution (CE) defines the state in all the traditional dimensions (Social and Democratic State under the rule of law) but it does not make any reference to the territorial organization. This omission is a clear manifestation of the lack of precision of the Constitution in what the territorial model is concerned.

2 · Since when has the power been decentralized in your Federation? Was the decentralization established in its origins or at a later time? Has decentralization been formally abandoned or practically inoperative in any historical phase?

United States of America

The Constitutional Convention met May-September 1787. State ratification occurred through 1790. However, Congress met in 1788 and the first elections for president were established in 1788, with the new federal government taking office in early 1789.

Decentralization has never been formally abolished, except for the rebelling Southern states during the Civil War (1861-65). Also, certain Northern state powers were suspended during the emergency. Also, in the rebelling states, powers were suspended during some twelve years of Reconstruction (occupation). Virtually all state powers were restored in 1877, with the fall of the last occupying Republican governments and the removal of federal troops from the South.

Centralization of powers has gradually occurred over the past 120 years, where the federal government has become involved in more domestic functions. However, this centralization has generally come in partnership with the state governments, which normally co-design programs and almost always administer them. With the exception of some regulatory regimes, the federal government rarely requires the states to vacate a policy area. As in the case of the German Länder, the states are the primary pro-

gram administrative vehicles. Finally, in the area of foreign affairs (as opposed to foreign policy), the states have moved in beside the federal government, particularly in matters of economic promotion and trade.

Canada

Power has been decentralized since 1867, when the British North America Act was enacted (today known as the *Constitution Act, 1867*). Federalism had existed *de facto* a few years before 1867 even though the main two colonies, Quebec and Ontario, were at the time forming a formally unitary government known as "United Canada". Since 1867, decentralization has never been abandoned. However, there have been periods during which a greater centralization of powers has been put in practice in order to allow the federal government to meet exceptional circumstances. This was mainly the case during the two great World Wars and for the time of economic reconstruction following each of the World Wars. Courts have developed an "Emergency Powers" doctrine, under which exceptional circumstances allow for a temporary centralization of powers in the hands of the federal authorities.

Australia

When Australia was first settled by the British in 1788, two-thirds of the continent was claimed as the colony of New South Wales. Convicts were initially settled on the east coast of Australia, in Sydney, and on the southern island of Tasmania. As the settlements were so far apart and it was impractical for the one Governor to govern both, power was decentralized by establishing a separate colony of Tasmania (known at the time as Van Diemen's Land) in 1825. South Australia was later carved out of New South Wales in 1836, as a colony of free settlers. The south of New South Wales became the colony of Victoria in 1851 and the north-east part of New South Wales became the colony of Queensland in 1859. The north-west part of New South Wales was transferred to South Australia in 1862 and was known as the Northern Territory. It was later transferred to the Commonwealth of Australia after federation. Western Australia is the only State that was never part of New South Wales. It was settled separately by the British in 1829. Thus the first stage of the settlement of Australia involved decentralization by breaking up the geographically large colony of

New South Wales into smaller colonies to serve growing populations with their own governments. By the late 1850s, all the Australian colonies, except Western Australia, had responsible governments with their own legislatures and elected governments.

An attempt was made by the British in 1848 to centralize some functions by establishing a 'General Assembly of Australia' to deal with matters of common interest such as import and export duties, post, roads, railways and internal communications. At the same time it was proposed to decentralize further through the establishment of an enhanced system of local government. Both proposals were rejected in Australia and did not proceed.

Federation was intermittently proposed throughout the second half of the nineteenth century, sometimes in response to perceived military threats and sometimes for economic reasons. An attempt at a loose form of confederation was made with the establishment of the Federal Council of Australasia in 1885, but not all the colonies joined and it proved ineffective. Full federation was not seriously pursued until the 1890s when the Commonwealth Constitution was drafted. It came into force on 1 January 1901.

The original intention of the framers of the Commonwealth Constitution was to create a central government of limited powers, leaving the vast bulk of powers to the States. This should have resulted in a highly decentralized federal system, but it did not last long. This was in part a consequence of two flaws in the drafting of the Constitution. The first was that the financial provisions of the Constitution resulted in most tax revenue being raised by the Commonwealth, rather than the States. This gave the Commonwealth immense financial power. The provisions that were intended to funnel most of this revenue to the States to fund their significantly greater responsibilities were either temporary in nature or ineffective, leaving a financially powerful Commonwealth and financially dependent States.

The other major flaw was that while the Commonwealth Constitution gave specific powers to the Commonwealth and left the rest to the States, it did not expressly reserve particular powers for the States. The consequence has been that the High Court has interpreted the Commonwealth's powers very broadly, in a manner that has trespassed into traditional areas of State responsibility. The States have no constitutional protection, because the Commonwealth Constitution does not expressly preserve any legislative subject areas for their exclusive exercise of power. The consequence of the Commonwealth's financial power and broadly interpreted

legislative power has been the gradual centralization of power since federation in 1901. While decentralization has not been formally abandoned or rendered practically inoperative, it has been steadily eroded over time and the trend towards centralization is likely to continue.

Mexico

The federal structure was adopted since the state gained his independence from Spain in 1821. The first Constitution (1824) already established the federal scheme.

During the unstable XIX Century, the federal structure was violently contested. In 1836, for example, a Constitution that abolished the decentralization was adopted. However, the federation was reinstituted by the 1857 Constitution. During the French invasion and the Maximilian Empire, the federal structure was abolished again until the Republic and the 1857 Constitution were reinstated in 1867.

Brazil

The Federal system was one of the major goals of the successful republican coup of November 15, 1889. Following the end of monarchy and the beginning of the republic, a new Constitution formally established the federal system in 1891. During dictatorships (1937-1946 and 1964-1985), decentralization was practically abandoned.

Argentina

Decentralization goes back to the origins of the Federation, since its establishment by 1853 National Constitution. Previously, since 1810 — when the first national government was instituted and the independence war started —, we went through cruel civil wars between Unitarian and federalists — especially from 1820 to 1853 —, until the Constitution was sanctioned in 1853. Its article 1 defines the form of government as "representative, republican and federal".

Decentralization has never been abandoned, but throughout the history of Argentina we have suffered a deep centralizing process, which has demonstrated the gap between the black letter law — the constitution — and the actual practice. For a wide range of reasons — historical, political,

economic, social, demographic, among others —, a structural unsolved problem exists between Buenos Aires and the rest of the country, as referred by historian Felix Luna, due to the concentration of political, economic, cultural and demographic power in the capital, which is one of the main causes of the incorrect functioning of federalism in Argentina.

India

Since 26th January 1950. It was established from the very beginning. It has never been abandoned or inoperative.

United Kingdom

The only formal decentralization to meso-level government since 1800, save for Northern Ireland's fifty years of devolution, was in 1997-1998 when devolution created autonomous governments in Northern Ireland, Scotland and Wales.

Arguably, decentralisation was abandoned in the sixteenth century (when Wales' separate status was extinguished), 1707 (when Scotland and England, which already shared a monarch, united their parliaments), and 1800 (when the Irish parliament was united with the UK parliament). In more recent times there has been no regional decentralisation to abolish in Great Britain. Northern Ireland had a decentralized government from the 1920s to 1972, when its government was suspended and Northern Ireland subjected to "direct rule" from London on account of its social problems and civil war.

Germany

In the Bundesrepublik Deutschland the power has been decentralized since 1949, that is, from its foundation. In the eastern part, however, which means the five Länder that joined the Bundesrepublik in 1990, power had been centralized until 1989.

Austria

The Republic of Austria succeeded the former Austro-Hungarian monarchy, which ended in 1918 and had been a decentralized unitary state.

Historically, the federal system was founded in 1918 both by the central power in Vienna, that proclaimed the new Republic of (then) German-Austria almost immediately after the end of World War I, and the former German-speaking Länder of the Crown, which, shortly afterwards, declared their intention to join the new Republic. The Länder also played a political role during the debates preceding the enactment of the Federal Constitution, which came into force in 1920.

Austrian doctrine, however, is divided between decentralists (who believe that the Länder simply derive their powers from the Federal Constitution and that the difference between Länder and municipalities depends just on the quantitative degree of decentralization) and federalists (who believe that the politico-historic origins of the federal system preceding the enactment of the Federal Constitution are important also for the interpretation of the Federal Constitution and that there is a qualitative distinction between a constituent Land and a municipality).

During the centuries of the Austrian (later: Austro-Hungarian) monarchy the self-determination of the Länder, that had been incorporated into the monarchy step by step (mostly through marriage and inheritance), gradually became weaker, particularly in the era of absolutism.

Between 1918 and 1920, when the enactment of the new Republic's Federal Constitution was being negotiated, federalism was not entrenched in the provisory constitution. In 1934, a new Constitution was illegitimately enacted by the Austro-fascist regime, which was in force until 1938, when Austria was occupied by Nazi Germany. The Federal Constitution of 1920, re-published in 1930, again came into force in 1945.

Swiss Confederation

With the exception of a relatively short period during the French occupation of Napoleon Bonaparte (1798 — 1803), Switzerland has never been a unitary country. With the founding of the federal state in 1748 centralization process began; with small steps and long term horizon which lasts until now. Prior to this, Switzerland was a confederation of sovereign states. The slow integration, which began with a federation in 1848 with very few powers centralized, can be seen as the only way to keep together states as diverse in their culture in general, as well as in the political position of their political leaders.

Belgium

The federalization of Belgium has taken place in successive stages since the constitutional amendment of December 24, 1970. This process has not cast doubt on the decentralization principle regarding municipalities and provinces, as it was provided in the original Belgian Constitution (1831).

Decentralization, in a narrow sense, is still a main feature of the Belgian institutional organization. From now on, decentralization will be used referring only to the regions, which are the entities which integrate themselves in a Federal State.

The term federated collectivities will be used to designate both the Regions and the Communities. The expression decentralized collectivities will be used to refer to communities and provinces. Belgium is both a federal and a decentralized state. (See Delpérée, "La décentralisation et le fédéralisme à l'heure de l'Union européenne — Précisions terminologiques", en *Revue du marché commun et de l'Union européenne*, n°531 (2009), pp. 515-519).

Italy

Constitutional provision for the Regions is contained in the Italian Constitution which came into force in 1948. Previously, there was no experience of regional-type autonomy. The Italian State was constituted in 1861 with the unification of a number of small pre-unitary States. The territory of the Regions provided for by the Constitution has no precise relations with these pre-unitary states.

Immediately after the Constitution, several Regions with special statutes were constituted (Sicily, Sardinia, Trentino-Alto Adige, Valle d'Aosta and then Friuli-Venezia Giulia). Only in 1970, after 23 years of non-enforcement, were the remaining 15 Regions constituted with an ordinary statute.

Spain

The current political decentralization was established by the 1978 Spanish Constitution. The most recent precedent was the so-called "integral State", during the Second Spanish Republic (1931-1939). The republican experience of decentralization was quite relevant, both from a theo-

retical and a practical standpoint, in spite of being brief, partial and precarious. (It was only applied to Catalonia in 1932. Its operation was interrupted for several months in 1934. From 1936 to 1939, it was disrupted by the Civil War. In 1936, during the course of the war, a Statute of Autonomy was enacted in the Basque Country. In 1939, a Statue of Autonomy was also enacted in Galicia but was never enforced in practice.

After the Second Republic, the political decentralization was legally abolished until the enactment of the 1978 Constitution.

In its origins, which might be traced to the XV century, the Spanish State was organized in two differentiated political entities (the Kingdoms of Castilla and Aragón), united only by the existence of the personal union of the two Crowns. This institutional diversity was replaced at the beginning of the XVIII century by a unitary and centralist state until the 1978 Constitution, with some short and precarious experiences of administrative and political decentralization during that long period. In any case, it should be emphasized that, despite the remote precedents, the current decentralization is not the result of the merger of pre-existent entities, but of a devolution process or, in other words, the decentralization of a unitary and centralist State.

3 · Which are the deep reasons for the adoption of a politically decentralized system? How much attached does federal/state population feel to this political decentralized system? Has this feeling substantially changed over the years?

United States of America

The colonial leaders believed in small state republicanism and objected to centralized control by the executive, i.e. British crown. In fact, each colony had a great deal of autonomy from the Crown. Colonies respected local governments.

The founding people no doubt identified more with the states than the union. Particularly, under the Articles of the Confederation, states were very strong. This state identity persisted for over a century. It took until after the civil war (1870-1900) to really develop a "national system," for example, with standing armed forces, regulation of commerce, and a federal officials' level. Then between 1900 and 1930 these elements were nationalized with a growing welfare state. Today the federal government has a clear identity

among the people, but it not always likes to everyone. Since the Great Depression of the 1930s and World War II, the federal government is generally ranked lowest in people's estimation, according to national polls.

Canada

In the two decades before Confederation, the Parliament of the largest British colony on the territory of present-day Canada was politically unstable and legislatively paralyzed by the frequent opposition of two majorities (French-speaking and Catholic in Lower Canada, English-speaking and Protestant in Upper Canada), a situation which followed the adoption of the *Union Act, 1840*, which had created the United Province of Canada by uniting former Upper and Lower Canada. When the Canadian Federation was created, Upper and Lower Canada were again separated to form Ontario and Quebec, which were joined by the maritime provinces of Nova Scotia and New Brunswick. Prince Edward Island and British Columbia, which already existed as British colonies in 1867, entered the federation a few years later. Manitoba, Saskatchewan and Alberta were created (respectively in 1870 and 1905) by the federal Parliament out of the Northwest Territories acquired by the Canadian government from the Hudson Bay Company. Newfoundland, which had been part of the negotiations in 1867 but had decided not to participate at that time, developed later as an autonomous British Dominion. It is only in 1949 that it finally joined Canada, after a popular referendum.

At the time of Confederation, Quebec and the Maritime provinces insisted on a federal union, while Ontario would have preferred a unitary state. The resulting compromise was a federal system with important centralizing (and even unitary) features. The provinces obtained the right to legislate over education, property and civil rights, municipal institutions, and generally all matters of a local or private nature, but the central (or federal) government obtained the residuary powers, contrary to the United States model (the drafters of the Canadian Constitution considered the American federation to be excessively decentralized).

Other reasons to establish a federal union relate to the need to create a unified internal economic market between the colonies, to allow for the construction of a transcontinental railway joining the Atlantic and Pacific coasts, and to facilitate the security of the union, considering the vast extent of the territory and the potential threats arising from the United States' territorial expansionism at the time.

In "English Canada" (all the provinces and territories except Quebec) people are generally satisfied with the federal regime. In Quebec, because the province's claims for more decentralization and the recognition of its distinct character have not been recognized in a manner considered as satisfactory by a substantial portion of the French-speaking majority population, autonomist sentiments have been growing over time, leading to the creation of a political party (the Parti Québécois — PQ —) that advocates a sovereign Quebec in economic association with Canada (the so-called "sovereignty-association" option). In the last thirty years, the PQ has won the elections and formed the government at several occasions. In 1980 and 1995, the PQ government held two referenda on "sovereignty-association". At both times this option was rejected by the electorate, but the second time only by the smallest of margins.

One defining feature of the Canadian situation, as opposed for example to the cases of Switzerland, Belgium or Spain, is that *only one federal subunit*, Quebec, serves as a vehicle for a self-governing national minority. The nine other provinces simply reflect regional divisions within English-speaking Canada. This reality explains that French — and English-speaking Canadians have two very different comprehensions of federalism. For Francophone Quebeckers, the Quebec provincial legislature is the only legislative body in which they form a majority and are thus in a position to control the decisions. On the other hand, only about 25% of the members of the federal Parliament in Ottawa are elected from Quebec. Members of Parliament representing Quebec can be outvoted, on questions deemed critical for Quebec's autonomy, by an English-Canadian majority. Hence, many Quebeckers consider the provincial government as their only true «national» government and they tend to oppose any diminution in its powers. Rather, they have been persistently asking for a significant expansion of provincial jurisdictions. Conversely, English-Canadians form the majority in every other provincial legislature, as well as in the federal Parliament. They are naturally inclined to see the federal government as their «national» government because it represents the interests of the whole of Canada. English-Canadians therefore have a tendency to oppose any diminution in the authority of the central government. At the same time, they will approve initiatives of the central government — for example in matters of health or education — even when these policies encroach upon areas of provincial jurisdiction, resulting in a diminished provincial autonomy.

Australia

Australian decentralization is primarily the consequence of the geographic size of Australia and its colonial history. It proved impractical to govern a jurisdiction so physically large in the nineteenth century, and even though methods of communication and travel are much faster in the twenty-first century, it remains true that a single central government today would find it very difficult to represent and satisfy the needs of citizens across such a large expanse. While there are no great ethnic, linguistic or cultural differences between the residents of the different States, there are significant differences in climate, resources, demography and economic wealth across the country. These differences need to be accommodated through a form of decentralized government.

There is also a strong desire for self-government. Queensland and Victoria were established in the 1850s after the local people campaigned strongly for their own government made up of their own representatives who understood their own problems and needs. Similar arguments would be likely to be made today in the absence of the States.

Arguments are sometimes made in Australia that it would be more efficient and cheaper to abolish the States in favour of a centralized unitary government. Unsurprisingly, such arguments are most commonly made by people who live in the more highly populated States of New South Wales and Victoria and who are geographically closer to the Commonwealth Government in Canberra. Power is often said to lie in Australia within the golden triangle of Canberra, Sydney and Melbourne. People who live further away, especially those in Western Australia, Tasmania and Queensland, tend to be more closely attached to their State and to the system of decentralization. They tend to be less confident that a government thousands of kilometres away is likely to understand their unique needs and be prepared to accommodate them. The attachment of people to their State therefore varies across the nation.

Mexico

During the last years of the colony, some administrative changes were introduced and these were the seeds for the federal states. The Borbonic reforms at the end of the XVIII Century created the “intendencias” (administrative divisions) intending to improve the government of the Spanish

colonies in America. Afterwards, while the Cadiz Constitution was in force, the "diputaciones provinciales" (another form of administrative division) were established and contributed to the formation of a political identity of their own and a sphere of autonomous self-decision taking from the center. Once independence was gained, these local forces strengthened and claimed the federal structure as a requisite for them to be part of the Nation-state.

We have not had enough elements to evaluate the public's attachment to the decentralized structure.

Brazil

Decentralization has its deep reasons in economic motivation. Local oligarchies (especially farmers from the states of Minas Gerais and São Paulo) were the greatest supporters for the adoption of the federal system in 1891. Inspired in the US model, they had seen in the federal system the opportunity to enhance their power. Population's involvement in federal ideals was close to inexistent. One can hardly argue that this feeling has substantially changed. With few exceptions, most of the Brazilian people do not really care about decentralization.

Argentina

The adoption of federalism and a decentralized system, which also included the municipal regime — included also in the 1853 National Constitution; article 5 — , was the result of the mentioned Argentinean civil wars, which lead to this form of State as the only solution for the political, economic and social conflicts of a country with a huge territory, which was influenced by several immigration waves (of the North, Cuyo and Rio de la Plata) of Spanish colonialism. The fourteen provinces (that correspond to the States' name) that existed previous to the Federal State (or Federation) formed it by delegating powers through the National Constitution. It was a process similar to the United States one; indeed the Constitution was inspired by the 1787 Constitution of Philadelphia. The historic Provinces were created from 1815 to 1834 (Buenos Aires, Cordoba, Santa Fe, Entre Rios, Corrientes, Mendoza, San Luis, San Juan, Santiago del Estero, La Rioja, Catamarca, Tucumán, Salta and Jujuy). These by interprovincial agreements settled the bases for the Argentinean federalism, which was consecrated in

the 1853 National Constitution, according to the Agreement of San Nicolas, subscribed in 1852, after the victory of General Urquiza over General Rosas in the battle of Caseros. This Agreement also implied the fulfillment of the federative organization already foreseen in the Federal Pact of 1831, which give birth to the "Argentinean Confederation", which existed from up to 1853. This explains the reference in the Preamble of the Constitution to the gathering of the General Constituent Convention "… by will and decision of the Provinces that compose it, honoring the pre-existing pacts…"

The adhesion level of the population to the system, even if we lack surveys, is estimated to be high throughout history and that it has not changed. This conclusion is sustained by the fact multiple constitutional amendments of the federal and provincial constitutions have aimed to strengthen federalism and local autonomies. Example of the latter has been, in particular, the 1994 amendment of the federal constitution — analyzed later on — and the amendments of provincial constitutions passed from 1986 on. In the same vein, more than 115 Municipal Charters established during this period. In Argentina, the constituent power is exercised through Constituent Conventions, which express the highest popular sovereignty level in the different layers within the federation.

India

India is a vast country with regional diversities. Therefore, a federal system was demanded from the colonial rules from the very beginning of the 20th century, which was partly conceded in 1919 and 1935 constitutional Acts of British Parliament but could not be fully realized until after the independence in 1947 and the commencement of the present Constitution of 26 January 1950. The people of the States do not feel as much attached to the State boundaries as they feel in some of the States in other countries. However, in 1956, on demand of the people of different states they were marked out on the basis of language. There is not much change in this feeling of the people. They are not too closely attached to the geographical boundaries of a State.

United Kingdom

The deep reasons for the adoption of a politically decentralised system vary by devolved country. In Scotland they are another chapter in the story

of Scottish civil society—its strong web of regional organisations—and their effort to maintain their autonomy and environmental stability through autonomist political activity. In Wales the story is the same but with a much weaker Welsh civil society; in many ways Welsh devolution happened because it would be unacceptable to the Welsh political elites to not have a similar status to Scotland. In Northern Ireland it is part of a quasi-confederal solution intended to resolve its conflict over whether it should be part of the UK or Republic of Ireland. England, lacking autonomous regional civil societies, has only a weak regionalist movement; English voters sometimes identify with local areas, but not with their local municipal authorities.

National Identities in England, Scotland and Wales

	1997	1999	2001	2003	2007
England					
English not British	7	17	17	17	19
More English than British	17	15	13	19	14
Equally English and British	45	34	42	31	31
More British than English	14	11	9	13	14
British not English	9	14	11	10	12
Scotland					
Scottish not British	23	32	36	31	26
More Scottish than British	38	35	30	34	30
Equally Scottish and British	27	22	24	22	28
More British than Scottish	4	3	3	4	5
British not Scottish	4	4	3	4	6
Wales					
Welsh not British	17	17	24	21	25
More Welsh than British	26	19	23	27	21
Equally Welsh and British	34	37	28	29	34
More British than Welsh	10	8	11	8	10
British not Welsh	12	14	11	9	10

National Identities and Constitutional Preference in Scotland and Wales 2003

Constitutional preference	National Identity				
Scotland	**Scottish not British**	**More Scottish than British**	**Equally Scottish and British**	**More British than Scottish**	**British not Scottish**
Independence	47	22	8	5	10
Devolution	41	63	62	66	68
No Devolution	5	10	26	23	21
Wales	**Welsh not British**	**More Welsh than British**	**Equally Welsh and British**	**More British than Welsh**	**British not Welsh**
Independence	27	11	11	7	6
Devolution	58	69	59	69	51
No Devolution	11	14	28	21	39

Source: Jeffery, Charlie. 2009. Devolution, public attitudes and social citizenship. In *In Devolution and Social Citizenship in the United Kingdom*. Ed. Scott L Greer. Bristol: Policy.

Germany

The main reasons for the adoption of a decentralized system are first of all historical. There had been no central power within the German States until the foundation of the German Reich in 1871, which was a federal state. So was the Republic of Weimar from 1918 until 1933, whereas under the dictatorship of the NS-regime (Nazi regime) power was centralized. After World War II, the allied powers established German political authorities first on the level of the Länder. The Parlamentarische Rat as legislator of Constitution of the Federal Republic, the Grundgesetz, was formed by representatives of the Länder and opted, according to the intentions of the allied powers, for a Constitution within the federal tradition. Today, the politically decentralized system is adopted not only as the historical form of German statehood, but also as an additional instrument of segregation of powers.

The attitude of the population towards the decentralized system is ambivalent. There is a strong attachment to the federal traditions, generally in

the south of the Republic more than in the north; on the other hand, different standards of legislation and public services are not accepted. The population wants "Gleichwertigkeit der Lebensverhältnisse" (equivalence of living conditions).

The historical facts are important to understand our federal system: Germany as a state was formed by a federation of independent states and has passed through a process of centralization, whereas countries like Spain, France, and Italy are historically centralized and are now running through a process of decentralization.

Austria

The main reason for the adoption of the federal system in 1920, which was a compromise between the Christian Social Party and the Social Democratic Party, is the historic independence and self-determination of the Länder, whereas there are no basic differences regarding race, culture, religion or language. A certain consciousness of historic Land identity still remains, although differing in degree from Land to Land. Austria's accession to the EU (in 1995) on the one hand enhanced the citizens' consciousness of being part of a larger multi-tier system, but on the other hand seemed to question the necessity of having smaller law-making entities. Only part of the people is aware of the idea of a "Europe of the Regions", and, if at all, in this context rather thinks of trans-border co-operation than of revitalizing Austrian federalism.

Swiss Confederation

In Switzerland there is no generally accepted theory about the historical causes and the reason for which remains until today a federal system, not a unitary one. Analyzing the history, the system is a compromise between the liberal progressive forces traditionally in favor of a unitary state according to the philosophies of the French Revolution and the conservative forces with ideals grounded on the feudal system and sought that Switzerland remained as decentralized as possible (that is, they favored a confederation). The answer becomes more complicated if you look for deep reasons why Switzerland reached such a degree of decentralization, which according to several comparative studies is highlighted as one of the most decentralized countries in the world. According to a convincing theory,

what has maintained this degree of decentralization in the long term is the cultural diversity between regions (linguistic, religious, economic, social and political). Another significant aspect is the political tradition of the Swiss regions characterized by an organization in small units. It is due to the fact that for centuries before the foundation of the federal state, many parts were not occupied by the great European dynasties.

In both federal and state population, the level of acceptance of the federal system is very high, maybe just because any other model has been known throughout history. Since this is a fact that has never been seriously questioned by any significant social or political force, the acceptance of federalism by the federal or state population has not been studied. However, there have been frequent criticisms of federalism based on financial grounds. It was observed that the increasing demands to government authorities cripple small States to meet them effectively. In the current discussion, the main reason for the existence of Swiss federalism is not mentioned as a reason to keep the federal system. Historically, the system was designed to mitigate conflicts and allow the coexistence of different cultural groups within a State. This motive became secondary since there is no serious potential for violent conflict between traditional cultural groups. However, at present, problems occur among cultural groups in the context of immigration. The new political groups are not represented in the federal system and, therefore, federalism in its current form does not serve to calm such conflicts. Neither in politics nor (with few exceptions) in the scholarship of federalism, federalism's potential to address these problems of modern multiculturalism is not mentioned.

A proxy for the acceptance of the federal system is the acceptance by the electorate. In recent years there have been several popular referendums on the basis of the federal system. The most important was the adoption of the new federal Constitution of 1999 which was accepted by the federal population in 2000. The new Constitution made no fundamental changes in the federal system, but relations between the Federations, States (cantons) and Municipalities (communes) were more specified. The constitution was adopted by 59.2% of the voters at the federal level. It was adopted by voters in 14 states and rejected in 12 states. Another important federal referendum was the one for a new bill regarding financial compensation (NFA, 'Neuer Finanzausgleich'), which had the ambitious goal of reviewing important elements of federalism, with the aim of improving the efficiency in the distribution of financial powers and the transparency of compensation.

The reform, which included changes to the Federal constitution and to federal law, was adopted on November 28, 2004 by 64.4% of voters at the federal level and by the electorate of 23 states. It was only rejected by voters in three states. These results can be interpreted as fundamental acceptance of at least the part of the population with right to vote (which excludes, in particular, those under age 18 and immigrants not nationalized).

Belgium

As several modern States, Belgium undergoes at the same time processes of decentralization and, above all, federalization. After 30 years, passing through different stages and adapting dynamically to practice what was actually happening in practice, Belgium has restructured itself from the inside. It has discovered in its core political communities more restricted communities and regions. It has introduced in the legal system the claims of these collectivities which request sovereignty and which represent, somehow, its competitors.

Belgium has established a complex institutional system in order to harmonize, as much as possible, the concerns of the federal authorities, in charge of the common matters, and those of the federated authorities, which have autonomous powers. Power has been smoothly shared. Applying this logic, the administrative apparatus and the financial resources applied to the different policy areas have been redistributed.

The redistribution of powers, which is still going on, has been very deep.

The successive amendments of the Belgian political society have made possible, for more than 30 years, the existence of a sole State. Paraphrasing Shakespeare, Belgium had a simple choice: *"To be federal or not to be at all"*. From the very beginning, as the Prime Minister Gaston Eyskens expressed it in 1968, "the unitary state has been surpassed by the facts" and the Belgians did not want to enter into suicide secessionist operations, hence a widely federal State seemed one of the few worthy paths to be taken.

What has been just explained does not prejudge the future attitude of the Belgians or of their political leaders. Compromises can be always questioned. In other words, the political collaboration within a single State depends on public opinion, which might change. The future, in a more or less long-term, cannot be predicted.

Noteworthy, in July 12, 2009, the special act of the Arbitrage Court has been modified again: a new paragraph 4 has been introduced. In cases where the constitutionality of a law, decree or regulation is challenged for an alleged violation of a right totally or partially recognized by a provision of Title II of the Constitution (the Belgians and their rights), by EU law or by international law, the court deciding the case has to file a suit (preliminary ruling) in front of the Constitutional Court and this will decide about the compatibility between the contested provision and Title II. This preliminary ruling becomes a key question of constitutionality (see F. Delpérée, *Le Conseil constitutionnel et l'Europe des droits de l'homme*, Colloque du cinquantenaire du Conseil constitutionnel, November 3, 2008).

Italy

Special Statute Regions were established because of the existence of ethnic and linguistic minorities or to stave off separatist movements (particularly in Sicily). The reasons for the Regions with ordinary statutes were diverse: the divisions among the different policies for public programs, differences in political systems.

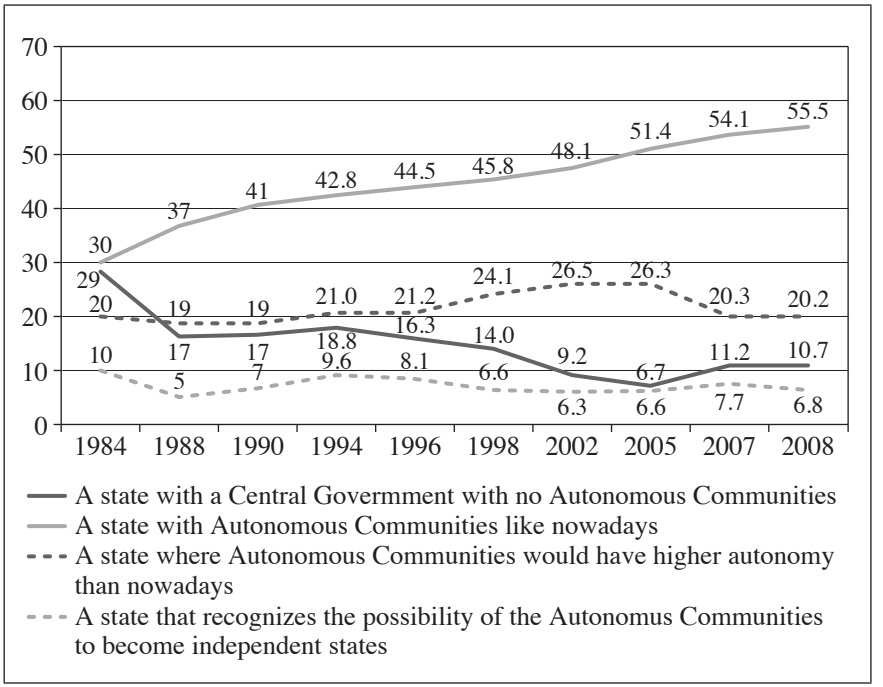
Italy was originally founded as a unitary country (1861) with a high degree of centralization to overcome the previous division into separate sovereign states. Only since 1948, with the Republican Constitution, has been gradually adopted and implemented a decentralized model. Adherence to this model is not homogenous: stronger in the northern regions (with even some separatists groups) and the centre and much less felt in the south which still expects central state policies aiming to a territorial balance and extraordinary intervention.

Spain

The main reason for the creation of a politically decentralized system was the need to respond to a long lasting claim for self-government by three national communities: the Catalan, the Basque, and, perhaps to a lesser extent, the Galician. Later on, however, the decentralization was extended to the whole federal territory. Other reasons that could explain this, yet of secondary importance, were the goal to improve the efficacy of the management of public matters and democracy by allowing more issues to be decided on the closest level to the citizens.

Regarding the level of support of the citizens, the following figure — elaborated with data from the Center of Sociological Research (Centro de Investigaciones Sociológicas) — shows a clear and increasing consolidation of the model of politic decentralization. In particular, in 2008, the 75.5% of the population was in favor of this system and from this a 20.2% would prefer the scenario where states have more autonomy. In two states — Catalonia and the Basque Country — the number of people favoring more autonomy was higher (38.7% and 75.5% respectively). In contrast, in the rest of the states, the percentages of those who claim more autonomy increased until 2006, the starting date of several amendments of state Constitutions. Since 2006, the percentage of citizens who prefer the status quo increases.

Spanish Model of Territorial Organization (1984-2007)



4 · Could you point out the main phases of the regime and the main characteristics?

United States of America

The main phases are:

a. Early establishment of the federal government, 1790-1824, "the Federalist Period".

b. States control and the introduction of democracy, growth of state powers.

c. Post Civil War economic growth and national and state power growth, 1865-1932.

d. Accelerated intergovernmentalism and the growth of national power, 1933-1977.

e. Concern for balance in the system, national regulation, states more closely linked to Washington, 1978-2000.

f. Governments at all levels working with governance partners (non-governmental organizations) through contracts, grants, loans, regulation and other tools of government. 2001-.

Canada

The main phases in the evolution of the federal regime are as follows:

—In 1867, upon the request of the representatives of the three British colonies that are going to form the four original provinces of Canada (The United Province of Canada, New Brunswick and Nova Scotia), the British Parliament adopts the *British North America Act* (later to become the *Constitution Act, 1867*), to serve as Constitution for Canada. By establishing two levels of government and a division of powers the Constitution was in essence federal, but it also contained many unitary features, such as the power for the central government to "disallow" (nullify) provincial legislation which that government found offensive to the national interest; the discretionary power of the central government to appoint all Senators, Supreme Court judge and the senior provincial judges, etc. As a consequence, there were some early doubts as to the true nature of the position of the provinces within the federation.

—For complex historical reasons, from 1867 until 1949, the Judicial Committee of the Privy Council in London acted as the court of last resort for Canada in constitutional matters, rendering many decisions that interpreted the division of legislative powers in a manner more favorable for the provinces than for the central government. The Privy Council also circumvented the unitary features of the constitutional system noted above, establishing that provinces were autonomous and sovereign within their own legislative sphere and not subordinate to the federal government in any way. Thus, the action of the Privy Council greatly reinforced the federal and decentralized nature of the Canadian Constitution.

—In 1949, all remaining Canadian appeals to the Privy Council were abolished and the Supreme Court of Canada became the highest Court in Canada, having thus the last say on the interpretation of the Constitution. Not surprisingly, the Canadian Supreme Court, whose members are appointed by the Canadian Prime Minister, has generally been more sympathetic to the central government than was the case for the Privy Council. However, until today there has been no wholesale rejection or modification of the main lines of the Committee's decisions but rather some progressive expansion of federal legislative jurisdiction.

—Because Canada was still not wholly independent from the United Kingdom in 1867, the Constitution adopted that year did not contain a complete amending formula allowing every amendment to its provisions by the Canadians themselves. Some modifications, when requested by the Federal government, hat still to be adopted by the British Parliament. From 1931 onward, after Canada became truly sovereign, the Central government and the provinces tried to agree on a constitutional package that would allow to "repatriate" the Constitution (meaning by that term one final modification of the Canadian constitution by the British Parliament in order to include a "domestic" amending formula). However, all attempts to achieve this end failed during almost half a century, for several reasons but in particular because the Province of Quebec made its consent conditional to a decentralization of the federal division of powers with which the Central government and the other provinces did not agree.

—In 1980, by taking advantage of the political weakness of the PQ government in Quebec, which had just seen his "sovereignty-association" proposition rejected by referendum, the federal government led by Pierre E. Trudeau obtained the consent of the nine other provinces in order to "repatriate" the Constitution. The Canada Act, 1982, adopted by the British

Parliament contains a domestic amending formula as well as a new Charter of rights and Freedoms and a provision recognizing the rights of the aboriginal peoples of Canada.

—The government of Quebec not having agreed to the new Constitution in 1982, nor since, several attempts have been made in the following decades in order to satisfy certain of its demands and "bring Quebec back into the Constitution". In 1987, a constitutional conference led to an agreement titled the "Meech Lake Accord", which however ultimately failed to be ratified in due time by two of the ten provinces (agreement of all provinces and the federal Parliament was necessary). In 1992, another constitutional package, contained in the Charlottetown Accord, was rejected by referendum in Quebec as well as in several other provinces and by a majority of the population of Canada as a whole.

—In 1995, a second referendum on sovereignty-association was held in Quebec. With more than 49% of the vote the proposal was almost adopted.

—In 1998, the Supreme Court of Canada ruled in the *Secession Reference* that the secession of a province from Canada is constitutionally possible, but only by applying the amending formula (for further detail, see below).

Australia

Australia had an indigenous population for many centuries before it was settled by the British in 1788. The British initially used Australia for the transportation of convicts until free settlers objected and transportation ceased in 1867. The first phase of government was the period during the late 18th century and early 19th century when institutions of government, including courts, legislatures and executive councils were established and the various colonies were separated from New South Wales. The first legislature was established in New South Wales in 1823, but it was comprised of appointed, rather than elected members. Representative government was established in 1842 with two-thirds of the NSW Legislative Council being elected and one-third appointed.

The second phase began in the 1850s when most of the Australian colonies drafted their own Constitutions, establishing bicameral Parliaments and the system of responsible government. Under this system, the government is drawn from those Members of Parliament who hold the confidence

and support of a majority in the lower House of the Parliament. It was this British system of parliamentary government that was first adopted in Australia. This was a period of growth and consolidation when the Australian colonies became confident in their self-government and British involvement rapidly diminished.

A loose form of confederation was attempted in Australia in 1885 by the establishment of the Federal Council of Australasia. It had limited powers to deal with matters of joint interest, but it was a matter for each colony as to whether to join. New South Wales refused to join and as it was the most populous and powerful colony, this undermined the effectiveness of the Council. Instead, the Premier of New South Wales proposed a true federation. This was achieved through the drafting of a federal Constitution at two constitutional conventions in the 1890s. The draft Constitution was approved by the people of each colony in a referendum and passed as s. 9 of a British Act of Parliament, the *Commonwealth of Australia Constitution Act* 1900. Queen Victoria proclaimed the establishment of the Commonwealth of Australia, which took place on 1 January 1901. It was comprised of six Original States, being the former Australian colonies. The opportunity was given to New Zealand to join, but it chose not to do so.

The system of government is a mixture of the Westminster system of responsible government, as exercised by the Australian colonies for the previous 50 years, and the United States federal system with an upper House that represents the States. It has sometimes been described as a 'Washminster' system. A consequence of its mixed origins is an inherent tension between the notion of responsibility to a lower House on the one hand and a powerful elected upper House that represents a different constituency, being the States, on the other hand. This led to a crisis in 1975 as to whether the Australian Senate had the power to block budget Bills and effectively force the lower House to an election.

The Commonwealth Parliament is bicameral. Its lower House is the House of Representatives. It is comprised of members, each of whom is elected to represent a separate electorate. Electorates are based on population, but they cannot cross state borders. The Prime Minister, who is the Head of Government, is the leader in the House of Representatives of the party or coalition that holds the confidence of the House. Other Ministers are drawn from either House from the governing party or parties. The Senate is comprised of 12 Senators from each of the six States and two each from the two self-governing territories, being the Northern Territory and

the Australian Capital Territory. It has the same powers as the House of Representatives, except in relation to money Bills.

The Commonwealth Parliament is given a list of specific powers by the Constitution. Most of these powers are concurrent and may therefore also be exercised by the States. Where State and Commonwealth laws are inconsistent, the Commonwealth law prevails to the extent of the inconsistency. Remaining powers are left to the States, but none are expressly reserved for the States. The Commonwealth and the States each also have executive powers that relate to the areas of their legislative power.

The Queen is the Head of State. Her powers are now largely formal. Her main role is to appoint the Governor-General, who is her representative in Australia. She also does the advice of the Australian Prime Minister. The Governor-General fulfils the Queen's functions in Australia, such as giving assent to Bills, making proclamations and subordinate legislation and appointing officials. Again, the Governor-General, by convention, acts upon the advice of his or her responsible Ministers in performing these functions. The Governor-General may seek further advice or warn Ministers, but must act upon their advice unless exercising the reserve powers. The reserve powers are those that in exceptional circumstances may be exercised by the Governor-General without advice, such as the removal of a Prime Minister. Their exercise is governed by convention.

At the time the Constitution came into force, there was already a system of State courts. The Constitution provides for the establishment of the High Court of Australia, which is Australia's highest court and which hears appeals from both federal courts and State courts. It also has original jurisdiction with regard to constitutional matters and matters in which the Commonwealth and the States are parties. The Constitution provides for the establishment of other federal courts, but unusually also provides for the vesting of federal jurisdiction in State courts so that federal matters could be heard and decided in existing State courts before federal courts were established. The Constitution does not provide, however, for the vesting of State jurisdiction in federal courts. The consequence is that State courts can hear federal and State matters but federal courts (apart from the High Court) can only hear federal matters.[1]

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1 Federal courts can, however, hear matters that involve aspects of State jurisdiction if they are so bound up with matters under federal jurisdiction that they form the one controversy. This is known as 'accrued jurisdiction'.

The doctrine of separation of powers is rigorously applied by the courts at the national level to protect the judiciary from interference by the legislature or the executive. However, there is no formal separation of powers between the executive and the legislature, as the system of responsible government requires the executive to be drawn from the legislature. Nor is there a constitutional separation of powers as the State level.

The States have retained their own Constitutions, legislatures, governments and courts. Each State has a Governor, who is appointed by the Queen on the advice of the State Premier. State Parliaments are bicameral, except in Queensland, which abolished its upper House. In practice, the States undertake most service provision, such as schools, hospitals and transport.

Mexico

A. Origins: This stage starts with the 1824 Constitution, which was in force until 1836, when the "Seven Constitutional Laws" with a centralization aim were enacted.

a. The 1824 Constitution established a federal system based in "States" and "territories" of the federation.

b. The distribution of powers was not specified (it was later on though).

c. Bicameralism was established; a House of Deputies and a Senate.

d. Congress would define a district where the federal powers will be located. Regarding this district, Congress itself would exercise the state legislative power.

e. The head of the federal state was the President who will exercise the executive power. A federal judicial power was also established. It was formed by the Supreme Court, Circuit Tribunals and Circuit Courts.

B. Consolidation: after the anarchy that prevailed during the 1840s, the federal structure was re-established by the 1857 Constitution. This Constitution was in force again from 1857 when the Republic was re-established to 1917. From 1867 a series of political events occurred that culminate with the dictatorship of the general Porfirio Díaz, who last more than 30 years in power. In contrast with the federal structure recognized in the Constitution, Diaz exercised the power in a centralized and authoritarian fashion. Furthermore, the federal constitution was amended several times to shift some powers from the decentralized entities to the federal govern-

ment (i.e. IP, emigration, immigration, interstate commerce, public health regulations…).

a. The 1857 Constitution established a federal system based in "States" and "Territories".

b. The subsidiary units were the residual lawmakers. (Article 117. "The powers not expressly assigned by this Constitution to the federal institutions are attributed to the States".)

c. Originally, the 1857 Constitution did not establish a Senate. However, the second chamber was re-instituted by the 1874 constitutional amendment.

d. A "Federal District" was expressly established. The federal institutions would be located in it. But Congress still had the power to change it.

e. The head of the federal state was the President who will exercise the executive power. A federal judicial power was also established. It was formed by the Supreme Court, Circuit Tribunals and Circuit Courts.

C. Post-revolution: After the Mexican Revolution (1910-1917), the 1917 Constitution was adopted, still in force today but with several amendments. This Constitution repeats, in general, the characteristics of 1857 Constitution's federal structure. Even if the dictatorship ended in 1910, a centralized political system had started in Mexico: the President of the Republic had great powers and much influence in the local politics through the binomial force of the Presidency-PRI.

a. The 1917 Constitution also established a federal system based in "States" and "Territories", and a "Federal District".

b. The subsidiary units were, as in the previous Constitution, the residual lawmakers. (Article 124. "The powers not expressly assigned by this Constitution to the federal institutions are attributed to the States".)

c. There was a bicameral Congress again, with a Chamber of Deputies and a Senate.

d. A "Federal District" was expressly established. The federal institutions would be located in it. But Congress still had the power to change it.

e. The head of the Federation was the President who will exercise the executive power. A federal judicial power was also established. It was formed by the Supreme Court, Circuit Tribunals and Circuit Courts.

f. A provision establishing the municipal organization was included in the Constitution for the first time in Mexican history (article 115).

Brazil

The history of Brazil as we know it today does not begin with the arrival of the Portuguese ships in April 22 1500. The Brazilian state actually begins in 1808, when the Royal Portuguese family got to Rio de Janeiro, running away from Napoleon and starting huge transformations in this country's reality. Before 1808, 98% of the population was illiterate, the ports were closed to international trade, and there were no universities or even high schools (there was only basic education with clerical teachers). There was no currency. One third of the Brazilian people were enslaved.[2]

From the independence in 1822 to the proclamation of the republic in 1889, non-elected emperors had ruled the country: Dom Pedro I from 1822 to 1831 and then his son Dom Pedro II from 1841 to 1889. In 1889, a military coup established the republic. There was no resistance. At the same time, the people did not take part in this coup.

From 1894 to 1930, period known as the "República Velha" (which means old republic), there was the first attempt to create a scheme of presidential elections. These elections were organized in order to maintain the desired "decentralization". Indeed, the old republic consolidated an oligarchic reality, based in a censitary and clearly corrupt suffrage. The system was developed to maintain the farmers from the states of São Paulo and Minas Gerais in office. There was an agreement between these states which was enforced with corruption and electoral manipulation.

In 1930, São Paulo broke the agreement. Minas Gerais reacted joining the states of Paraíba and Rio Grande do Sul to nominate Getúlio Vargas, a citizen from the state of Rio Grande do Sul, to run for the Presidency. Vargas lost the election and accused it of fraud and corruption. The political moment was delicate and a coup (sometimes called a revolution) terminated the old republic in 1930. Vargas was the leader of the coup and became the President (and dictator) from 1930 to 1945. Vargas was a super dictator through the authoritarian constitution of 1937, which granted him power to legislate and amend the Constitution.

During these years (called the "New State" — *Estado Novo*), civil rights were suspended, the Supreme Court was packed and Congress closed. The federation was dead letter in the Constitution. Vargas had the

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2 Luís Roberto Barroso, "Vinte anos da Constituição brasileira de 1988: o Estado a que chegamos", p. 27.

constitutional power to substitute state Governors who were in disagreement with him.

The end of World War II in 1945 combined with the Brazilian official support (and participation) against the Nazi made it impossible for him to maintain the dictatorship. The first period of constitutional democracy in the Brazilian history (between 1946 and 1964) began in the aftermath of this coup against Vargas. The 1946 Constitution was elaborated in a democratic environment, which permitted the practical return of decentralization, respecting the economic power reality of this time.

The cold war painted the big international picture, which influenced Brazilian politics. The world was divided in a clear dichotomy between friends and enemies. In this period of some regularity and stability, Getúlio Vargas became, again, the President. At this time not through a coup: he was democratically elected. Vargas took office with a strong populist agenda. He had popular support based in his public policies supporting the protection of the national industry and corporative labor law regulations. Political tensions were explicit and the seeds of a new coup were spread (and flourishing) within governmental institutions.

The last period of dictatorship Brazil had began in 1964 with a military coup. In March 31 of 1964, the military started the saddest period in Brazilian political history. Against the fear of communism, and with a messianic speech to save the country from chaos, the military sacrificed freedom, civil rights and democracy for more than two decades. Following the Latin American pattern, a military coup was the perfect solution against the communist fear. Centralization was the rule. Local power was strongly reduced and decentralization was practically inexistent.

This period of exception lasted until 1985, when a slow process of redemocratization was initiated by the military themselves. This process towards democracy had its climax in 1988, when the new (and current) Federal Constitution was enacted. The Constitution of 1988 promoted a shift in the Brazilian political and legal culture towards democracy and limitation of power, which included horizontal distribution of powers.

Argentina

1st Stage: Federalism in the Origin Constitution of 1853

As we have mentioned, between 1810 and 1853 the adoption of feder-

alism was made as a State form as expressed in the 1853 constitution. This was the result of cruel civil wars between Unitarians and federalists, in which besides the Hispanic traditions from the different colonial currents, the forces of the town hall (on top of which the provinces were formed), the geographic conformation and the interprovincial pacts that succeeded since 1820, ended the definition of this fundamental aspect of our political organization.

The Unitarians were a cultivated minority that sustained centralization, they were settles mainly in the cities and particularly, in Buenos Aires, from where they intended to rule the country. In the opposite, the federalists fount their support in the popular masses from the interior of the country called "montoneros", which were lead by the provincial caudillos.

The instrumental force of federalism were the interprovincial pacts, which reached almost one hundred and from which we must point the Pact del Pilas (23-2-1820) between the Provinces of Buenos Aires, Santa Fe and Entre Rios; the Treaty of the Quadrilateral (15 to 25-1 and 7-4 of 1822); between the Provinces of Buenos Aires, Santa Fe, Entre Rios and Corrientes; the Federal Pact (4-1 to15-2-1831) between the Provinces of Buenos Aires, Santa Fé and Entre Rios, to which others joined after; and as an immediate precedent the constitutional sanction of 1853, the San Nicolas Agreement (31-5-1852), which ratifies the federative organization bases already established by the Federal Pact of 1831.

The Constituent Convention of 1853 gathered in the city of Santa Fe, with the representation of thirteen provinces and the absence of the Province of Buenos Aires. As we've already said, the Convention had the Philadelphia Constitution of 1787 as an antecedent, even though some differential characters were established, postulated by Juan Bautista Alberdi who was the father of our public law, which had been written specially for the occasion, his transcendent book "Bases and departure points of the organization of the Confederation of Argentina".

The influence of Alberdi meant the consecration, in the origin text of 1853, of a more centralized federation than the north American, due to, for example, national bottom legislation (civil, commerce, penal, etc) was attributed as a legislative power to the Nation's Congress, as was the revision of the Provincial Constitutions and the political trial of the provincial governors (art. 67).

Otherwise, the same organization of the north American federation was adopted: A federal State that requires the coexistence of two different state

and government orders, with a power distribution that gives the federal government only the delegated powers in an express or implicit manner, while the Provinces have the residual powers, besides their own institutional, political, financial and administrative autonomy (constitutional power) (arts. 1, 5,104,105 y 106)). We believe it is important to transcribe these norms due to their fundamental importance to understand our federalism. Article 1 established: "The Argentinean Nation adopts a representative, republican and federal form of government, as established in this Constitution". Art. 5 disposed: "Each Province will dictate for itself a Constitution under the representative and republican system, according with the principles, declarations and guarantees of the National Constitution; and that assures its justice administration, their municipal regime and primary education. Under these considerations, the Federal Government guarantees each Province the enjoyment and exercise of its institutions". Art. 104 (actual art. 121) prescribed the basic norm in power allocation, as follows: "The provinces maintain all non delegated powers at the moment of their incorporation". Art. 105 (actual 122) expressed: Give themselves their own local institutions and are ruled by them. Elect their governors, their legislators and other provincial functionaries, without the intervention of the Federal Government" and art. 106 ordered that: "Each Province will dictate their own constitution, according to the disposition of article 5". (This norm, which is the actual art. 123, would be modified in the 1994 constitutional reform, to precise the sense of the municipal autonomy).

Likewise concurrent powers were prescribed for the Federation and the Provinces (art. 107).

The Senate was established as a federal organ par excellence, with an equal representation for each Province (State), of two Senators, who were appointed by the respective provincial Legislatures and the same representations by the Federal Capital. (Art. 46, actually modified under number 54.)

The 1853 text established that the Federal Capital should be the city of Buenos Aires and that the Federal Government had the power to intervene federally in the Province's territory (arts. 3 and 6).

2nd Stage: Federalism in the 1860 constitutional reform

After the secession of the province of Buenos Aires, in 1853, the problems in the Argentinean Federation continued, until the battle of Cepeda

in 1859, where General Urquiza as Head of the Argentinean Confederation triumphed and as a consequence of which the San Jose Pact or Union Pact was produced (11-11-1859) this meant the integration of that Province to the Federation, previous reform to the National Constitution of 1853.

This reform was made through a special procedure, different from the one established in the 1853 text, which leads certain Argentinean constitutionalists to sustain that this was too an original constituent, instead of a derived one and that is why they call our Supreme Law as of 1853 and 1860.

Beyond this matter, it is interesting to outline that this reform produced important reforms in the Federation, since in modified some 1853 articles, with the intention to establish bigger power decentralization. So, it is evident that this derogated the norms that prescribed the revision of the provincial constitutions by the Congress of the Nation, so as the political trial of the Provincial Governors before this organ.

Likewise, two important articles were modified: art. 3 on the Federal Capital and art. 6 on federal intervention. In the first case, the same principle of art. 13 was established, which is that the integrity of territory in the creation of new provinces, that meant that the territory of the Federal Capital should be determined by a Law of Congress, previous transfer of the respective territories by the legislatures of the affected Provinces (art. 3). Regarding art. 6 on federal intervention, the redaction was precise in order to reduce the discretion of the federal authorities to intervene, indication the need of a previous requisition by the provincial authorities to the Federal Government, to support them in case of rebellion or invasion by other provinces.

An important matter as the federal property of customs revenues, which had separated the Province of Buenos Aires from the rest of the Federation, since they benefited of them based to the important production of the port of the city of Buenos Aires, was solved in a definitive form by the constitutional reforms of 1866.

Definitively, despite de transcendence of this 1860 reform, the problems between the Provincial and Federal Government continued and after the battle of Pavon, where General Mitre won, produced the first *de facto* government in our history and in 1862 this triumphant chief was elected President of the Province of Buenos Aires, which gave the leadership of the national organization was conducted by this Province.

3rd Stage: Towards "concert" federalism (since 1950)

In this stage, called this way by Pedro José Frias ("Derecho Publico Provincial", Frias and others, Depalma, Bs.As., 1985. pg. 389), begun the transit from a dual or competitive federalism to a "cooperative" of "concert" federalism, since the beginning of the exercise of the attribution of art. 107 (actual 125) from the constitution of 1853-1860 that established: "The provinces may celebrate partial treaties on justice administration, economic interests and common utility works, with the knowledge of the Federal Congress…"

Indeed, provincial pacts which had stopped being celebrated in 1853, start to slowly appear in 1948, and then affirmed in the decade of 1950 and continued until today, with different objectives and names, which made possible building bridges and an interprovincial tunnel, the treatment of interprovincial rivers as a basin unit, the creation of water committees, the creation of a Federal Investment Council and other Federal Councils for different matters, so as for problem solution and project treatment.

4th Stage: The deepening of federalism in the 1994 constitutional reform

The 1994 constitutional reform, made by the Federal Constituent Convention gathered in the cities of Santa Fe and Parana, had the deepening of power decentralization in Argentina as a main idea.

As we've studied in our book "Federalism, municipal autonomy and the city of Buenos Aires in the 1994 constitutional reform", (1997) Depalma, Buenos Aires, the debate on this question — in which we were honored to participate as Vice president of the Redaction Committee — include an important part of the Convention, that as indicated, include three grand chapters: federalism, municipal autonomy — undoubtedly consecrated art. 123 of the Supreme Law — and the autonomous city of Buenos Aires, which had the character of city-state recognized — under our point of view —, with a similar institutional hierarchy to that of Provinces, as derived from art. 129 of the current Supreme Law.

Specifically, regarding federalism, such constitutional reform included different aspects: 1.Institutional and political, 2.Financial, 3. Economic and social.

About point 1, the Constitutional Reform established the following modifications:

a. The four orders of government of the Argentinean federation. Indeed, actually there are these orders: Federal Government (arts. 44 to 120), Provincial Governments (arts. 121 to 128), Government of the Autonomous City of Buenos Aires (art. 129) and Municipal Government (art. 123), with their respective powers and autonomy, that express the decentralization of political power in our country. The Argentinean federal society is composed by the Federal Government, 23 Provinces, the autonomous city of Buenos Aires, actual see of the Federal Capital. We also indicate that the Federal Government has no direct relations with municipal governments, since they are made through the provincial governments and States. The reform that included the regions in the constitution (art. 124), was foreseen as a reunion of provinces, exclusively for economic and social development and not as new political entities.

b. Power distribution. In the fundamental matter of power distribution in the federal State, the 1994 reform didn't modify the most important rule, which is ancient art. 104 (actual 121), which resumed the historic law of the Argentineans, in the words of Joaquin V. Gonzalez.

The circumstance that these questions were not discussed does not imply that the Convention had denied its importance and transcendence of these problems, probably the more difficult for a federation. For us, this means that the constituents gave the principles fixed by the supreme law of 1853/1860 as immovable. The concepts of Alberdi y Gorostiaga are fully valid, accepted by the doctrine and jurisprudence of the Supreme Court in the sense that the provinces have retained and unlimited powers, and the federal government exercises those delegated in an express or implicit form, so, those are limited powers.

It is true that this rule suffered changes, as the country's centralization process happened; and even the Supreme Court's jurisprudence begun admitting those advances of the central government, as pointed by authors as Vanossi, Frias, Bidart Campos, Romero, etc., but we are confident in the changes that must happen in the future, according to the constitutional mandate which emerged from the reform that deepens in federalism.

In consequence, the classifications made by the doctrine on the relations of our federal structure, also remain current. In this sense we remember the subordination relations (arts. 5 and 31, that establish the supremacy

of the national Constitution), participation (of the provinces and the city of Buenos Aires in the federal government, specifically in the Senate) and coordination (which in the delimitation of the powers of the federal and provincial governments and the city of Buenos Aires), opportunely pointed by Bidart Campos ("Manual de Derecho Constitucional argentino", Ediar, Bs. As. 1972, Cap. VII. Pgs. 120/121).

Actually there are several classifications of powers between the federal and province governments, which we may synthesize as follows: maintained by the provinces (art. 121); delegated to the federal government (principally those expresses of the different organs of the federal government, ex., arts. 75, 85, 86, 99, 100, 114, 115 and 116, and the implicit of Congress, art. 75, part 32); Concurrent between government organs (arts. 41, 75, part 2, 17, 18, 19, first paragraph, and art. 125); shared (that require the will of the levels of government as the law-agreement of co participation and the federal fiscal organ, and the transferences of powers, services and functions, art. 75, part 2) and exceptionally (for the federal government for direct taxes, art. 75, part 2, and for Province governments for dictating codes until dictated by Congress, and war vessel construction or calling armies in case of foreign invasion or of danger, so imminent, that does not allow any delay, art. 126).

There are also prohibited power for the provinces (because they were delegated to the federal government); prohibited for the federal government (because they are kept by the provinces) and prohibited to all government levels (as the concession of extraordinary powers, form the total public power or submission or supremacies to any government or person, art. 29, or the violation of the declarations, rights and guarantees from the dogmatic part of the supreme law).

We've said that after the reform the federal relation bonded the federal government, 23 provinces and the autonomous city of Buenos Aires, and, in consequence, are of general application, the classifications mentioned above. Nevertheless, as the city of Buenos Aires has a special nature, that of a city-State, which distinguishes it from the provinces and municipalities, we remit to chapter IV of our cited book for a particular analysis.

The constitutional reform added the following powers to the federal government, according to the prolix enumeration made by Castorina de Tarquini ("Derecho constitucional de la reforma de 1994", Pérez Guilhou and others, Depalma, Bs.As., 1995, Cap. XXVI, El régimen federal y la reforma constitucional, pgs. 351/2):

1. Establish and modify specific sharable resources allocation sharable, for a determined time and through a special law (art. 75, part 3);

2. Provide for the harmonic growth of the Nation and to the population of its territory; Promote differentiated policies aimed to balance the unequal relative development of the provinces and regions (art. 75, part 19);

3. Sanction organization and education base laws that consolidate national unity respecting provincial and local particularities, complying with certain requisites (art. 75, part 19);

4. Approve or drop the new international treaties incorporated by the reform, this is, treaties on human rights with future constitutional hierarchy, integration treaties, norms dictated by supranational organisms and have knowledge of the international treaties celebrated by the provinces (art. 75, part 22 y 24, y art. 124);

5. Legislate affirmative action measures that guarantee real equality in opportunities and treatment, and pain enjoyment and exercise of the rights recognized by the Constitution and by the current international treaties on human rights (art. 75, part 23);

6. Dictate a special and integral social security regime for children in defenceless situation and for mothers during pregnancy and nursing period (art. 75, part 23);

7. Order or decree federal intervention (art. 75, part 31, and art. 99, part 20);

8. Exert the govern function whose leadership is recognized to the person of the president of the Nation (art. 99, part 1);

9. Exert the general administration of the country, through the chief of cabinet, being the president of the nation the political responsible and its control organ, the General Auditory of the Nation (arts. 85, part 1, and 100, part 1);

10. Dictate decrees of need and urgency under determined conditions, excluding from this normative what refers to penal, tributary, electoral and political parties matters (art. 99, part 3);

11. Make collect the Nation's revenue and execute the national Budget Law, power of the chief of the Cabinet (Gabinete), who will exercise it under the supervision of the Nation's president (arts. 99, part 10, and 100, part 7);

12. The organization and administration of justice. A special organ, the Council of the Magistrature, which has no provincial representation, does the appointment of magistrates. The appointment is always made by the president with the agreement of the Senate (arts. 99, part 4, and 114).

The Constitutional reform also augmented the exclusive powers of the provinces, as indicates María Celia Castorina de Tarquini, pg. 353):

1. «Dictate provincial constitutions according to art. 5, assuring municipal autonomy and regulating its reach and content in the institutional, political, administrative, economic and financial order (art. 123). This disposition draws the third level of political decentralization, and gathers the, every day stronger, tendency, of provincial public law, in the sense of recognizing municipal autonomy;

2. Create regions for the economic and social development and establish organs for to comply with its goals (art. 124);

3. Celebrate international convention under certain conditions (art. 124);

4. Exercise all those powers which are implied in the concept of provincial origin domain of the existing natural resources in their territories (art. 124);

5. Exercise police and imposition powers on national utility establishments within the Republic's territory (art. 75, part 30).

Regarding concurrent powers, the reform incorporated: intern indirect taxes (art. 75, part 2); powers related to Argentinean indigenous peoples (art. 75, part 17) stated in the new progress and human development clause (arts. 75, part 19, primer paragraph, and 125). Even though there is no exact relation between the texts of these last norms, we interpret, in coincidence with Castorina de Tarquini (op. Cit., pg. 355), that all those matters mentioned in art. 75, part 19, first paragraph, require provincial concurrence execution, and we also think that the generic enunciation of art. 125 comprehend the more specific of that norm. Likewise, art. 41 recognizes the Nation's power to dictate "the norms that contain the minimum budgets" on environment, and art. 75, part 19, those "organization and base laws" for education, but for us the constitutional doctrine on concurrent powers, as sustained before the Constituent Convention.[3]

Art. 125 also prescribes that "the provinces and the city of Buenos Aires may maintain social security organisms for public and professional employees", which must be interpreted as a ratification of the concepts al-

3 See "Reforma constitucional de 1994. Labor del Constituyente Antonio María Hernandez (h.)", Imprenta del Congreso de la Nación, Buenos Aires, 1995, pg. 60.

ready determined by art. 14 bis, in a special defense of the powers of the provinces and those of the city of Buenos Aires, in front of the beatings from the central government, which through fiscal pacts and other pressures, intended the transfer of the pension funds.

Finally, regarding art. 42 which foresees "the necessary participation of consumer and users associations and the interested provinces, in the control organisms", in the "prevention and solution of conflicts" and the "regulatory frames for the public services of national competence", we also share the opinion of Castorina de Tarquini (op. cit., pg. 358), that a power, originally national, may turn in exercise concurrent by the will of the provinces who are interested in participating. We add that provincial participation in national organisms must be pointed as another important slaughterhouse of deepening in federalism.

Regarding the new shared powers introduced by the reform, Castorina de Tarquini (op. cit. pgs. 359/360) indicates: "1) the establishment of the contributions co participation regime, which will be made through a law-agreement, on the base of agreements between the Nation and the provinces [...] 2) The same constitutional disposition [art. 75, part 2] establishes another shared exercise power, by establishing that there will be no power, services or function transfers, if the respective resource re assigning is not made, approved by a law of Congress when necessary and by the interested province of the city of Buenos Aires, in such case. This means that such a transfer will operate if there is an agreement among the different political powers. [...] 3) Finally, the control of co participation and the possible service transference, will be in charge of the federal fiscal organism, with the representation of all the provinces and the city of Buenos Aires, by which this function is also exercised in a shared form (art. 75, part 2)".

c. The Senate and its federal role. The reform produced these changes: 1) The incorporation of a third senator for each province, who corresponds to the second party in the elections, or to the minority (art. 54). 2) The direct election of senators and the reduction of their mandates, since before it was indirect and with a nine year mandate, which was reduced to six. (Arts. 54 and 56 which modify anterior 46 and 48) and 3) The accentuation of the federal role: because it was instituted as an origin chamber in the treatment of two fundamental laws: The tax co participation law-agreement (art. 75 part 2) and the laws on the harmonic growth of the Nation and population of its territory and promotion of differentiated policies aimed to balance the unequal relative development of provinces and regions (art. 75 part 19).

d. Federal intervention. This is the classical claim of Argentinean federalism as expressed by Frías, sine our history counts more than 150 interventions of which nearly 2/3 were disposed only by a Decree of the President of the Republic and only the remaining third by a Law of Congress. Consequently, to avoid this abusive use of the institute which was one of the causes of the centralization of the country, the Reform established that only Congress could declare the intervention of the federation in the Provinces of in the autonomous city of Buenos Aires (art. 75 part 31), which also approves or revokes the intervention decreed by the President of the Nation during the recess of Congress. Art. 99 part 20 established that if the Executive Branch decreed an intervention during the recess of the legislative organ must be simultaneously called to extraordinary session to deal with the measure.

e. Political parties and federalism. We consider that by including parties in the Constitution (art. 38) with the obligation to respect the Constitution, they must accept the values and principles of federalism not only in state organization but within their organization and functioning. Another of the causes of disfederalization of the country has been the lack of a proper fulfillment of these principles by the bigger national parties.

Regarding point 2, on the financial aspects of federalism, the reform modified: a) Tax co participation and b) The federal principles of the nation's federal budget.

On tax co participation, first, the reform clearly defined power distribution between the federal and provincial governments, regarding: external indirect taxes, as federal — part 1 of art. 75-; the indirect internal taxes, as concurrent — in part 2, first paragraph of art. 75 —; and direct tributes, only exceptionally belong to the federal government — in part 2, second paragraph, of art. 75 — as stated by the doctrine.

Immediately after, part 2 of art. 75 defines as co participable those indirect intern taxes and those direct that in an exceptional form are collected by the federal government, except for the part or totality of them that are specifically assigned. This last matter was object of intense negotiations, since this was a commonly used system to take away funds from the sharable mass, which affected the provinces, that is why they establishes special conditions in part 3, as we will see. The taxes that correspond to provinces that have natural resources are not part of the sharable mass.

Afterwards part 2 says: "A law-agreement, on the base of agreements between the Nation and the provinces, will institute regimes of co participation for these contributions, guaranteeing the automatic remission of funds."

The above-mentioned law — agreement must fulfill the following conditions according to the Supreme Law: 1) The Senate is the Chamber of origin. 2) The sanction must be with the absolute majority of the totality of the members of every Chamber. 3) It cannot be modified unilaterally. 4) Neither can it be regulated. 5) It must be passed for the provinces. 6) The distribution between the Nation (or Federal Government), the provinces and the City of Buenos Aires, and between these, will be carried out in direct relation to the competences, services and functions of each one of them, contemplating objective criteria of allotment. 7) These criteria must be: equity, solidarity and priority to achieve an equivalent degree of development, quality of life and equality of opportunities in the whole national territory.

The incorporation of the institute of the law — agreement to the Constitution is, for us, a transcendental reform destined to guarantee a federalism of conciliation, in one of the most troubled chapters of Argentinean history: the financial relation between Nation and provinces.

The National Constitution, in a notable advance, forces to the conciliation: 1) first, of the president and of the governors, and also of the chief of Government of the City of Buenos Aires, since it is not possible to ignore his participation, so much in the debate on the primary distribution, as in the secondary distribution, as expressly mentions part 2 of art.75, to formulate the base of agreements on the co partnership. 2) Secondly, the project of law — agreement must get approval for qualified majority, specifically absolute majority of the totality of the members of every Chamber, which forces then to a high degree of consensus between the representatives of the people and of the provinces, since the legislative functioning indicates the difficulties to reach the above mentioned aggravated quorum. 3) Thirdly, to reach this laborious step of the law — agreement, sealed by the consensus and the conciliation, the approval must achieve on the part of each of the legislatures province

These special requirements are meant to revert, on the one hand, the simple adhesions that the provinces had to give to the legislation that the central government was imposing almost always due to the dependence of the provinces, and, on the other hand, fix a definitive regime with clear

rules, which allow a balanced development of the federation, instead of the arbitrariness that has sealed the relation Nation — province.

With regard to the nature of the law — agreement, Masnatta thinks that a contractual norm of right is "intra federal that and differs from the generality of the laws ", with "soul of contract and body of law" (according to opinion expressed in the bosom of the Constituent Convention).

The Constitution has prescribed the integration of the co participable mass with the indirect internal taxes and the direct ones that correspond to the Nation in exceptional form, according to part 2 of art. 75; but has admitted the possibility of derogation of a part or of the totality of they by means of specific assignments. Nevertheless, since for this route once affected federalism, as it has been indicated by Rodolfo Spisso ("Derecho Constitucional tributario", Depalma, Bs.As., pages. 156/7), in cases like the creation of the Transitory Fund to finance fiscal provincial imbalances (law 23.562), or the tax on interests and adjustments of fixed deposits in benefit of certain provinces (law 23.658), part 3 of art. 75 have established special requirements for them. In effect, it orders that the laws that establish or modify specific assignments of co participable resources should have determined time and sanctioned by a special quorum of the absolute majority of the totality of the members of each chamber. We insist that especially the latter requirement is very important as guarantee for the provinces, since it is not easy to reach the above-mentioned quorum in the legislative task, without a high degree of consensus. Likewise, in the arduous negotiations on this norm, they tried that the quorum was increased — of both two thirds of the totality of the members of the Chambers —, but finally the consensus achieved with the sanctioned draft, which will not be the ideal one, but that reflects the decision of the constituent to limit this modality that turned out to be so negative for the tax co partnership.

The reform imposed share criteria, for the primary distribution of resources as for secondary. Regarding primary distribution, between the Nation and the provinces and the city of Buenos Aires: a) related to specific grants, recently analyzed, y b) "the direct relation to the powers, services and functions of each one of them considering the objective share criteria", as says part 2 of art. 75, in a phrase that is correlated by a later paragraph of the same norm that expresses: "there will not be transference of competences, services or functions without the respective reassignment of resources, approved by law of the Congress when it corresponds and by the interested province or the City of Buenos Aires, in its case". We highlight

the transcendence of these criteria, since one of the tools to the federal government to injure the federalism was to impose transferences of competences, services or functions to the provinces or to the City of Buenos Aires, with what it centralized resources and nationalized the deficits.

Regrettably we know that transitory disposition number six was not observed, which indicated a final term to issue the co participation regime "before the end of 1996", but we pointed that this criteria would be determinant at the moment of discussion the primary distribution, because many services have passed to the provincial sphere and even municipal, in a decentralization process that we consider fundamental for the future of the country, and that, as a consequence, will require an increase of the corresponding percentage for the provinces, the city of Buenos Aires and after to the rest of municipalities.

The transitory disposition that we just mentioned, also insists in the concept we referred, because it prescribes that "current powers, services and functions distribution at the moment of sanctioning this reform, will not be modified without the authorization of the interested province"; and adds: "neither can the current resource distribution be modified in detriment of the provinces and in both cases until the issuance of the mentioned co participation regime. This clause does not affect the administrative and judicial claims in process originated by differences due to competence, services, functions or resources distribution between the nation and its provinces".

Regarding the terms used by the Constitution, Humberto Quiroga Lavié indicates that: "A competence is the ambit of juridical validity that enables to create an apply law. A function is a role foreseen within the administrative organization, to achieve determined objectives programmed by the administration. A public service is an activity of public utility, those knows an administrative law public services, which, then, are submitted to rules imposed by the need of giving the service, which implicates the exercise of police power " ("Constitución de la Nación Argentina comentada", Zavalia, Bs. As., 1996, pg. 350).

The sharing criteria for secondary distribution, in other words, between the provinces and the City of Buenos Aires, shall be, according to the constitutional norm we are studying: a) objective: which means, reasonable; b) equitable: with justice in the concrete case, ex.; c) solidarity: interprovincial mutual aid; and d) priority for the achievement of an equivalent degree of development, life quality and equality of opportunities. This clear con-

cepts, related to the high purposes of art. 75, part 19, which intends to be a new progress clause, with special emphasis in human development, oblige to make a big effort to correct the unbalances, inequities and injustices of the Argentinean society.

We share the opinion of Horacio Rosatti ("La reforma de la Constitution", Urinal Culzoni Editores, Bs.As., 1994, pags.243/4), which the "quality of life" and the "equality of opportunities" indicate that the tributary policy "must have the concrete inhabitant as a recipient" more than the regions, since they all have elevated poverty and marginality indexes. But we must add that the other parameter, "the equivalent degree of development ", reinforces the idea of overcoming the actual differences between the provinces and must be related to another important reform: the constitutionalization of the regions for economic and social development.

The tax co participation law-agreement wasn't sanctioned in the established term, which was another violation of the Constitution.

Finally, the reform disposed the creation of a Federal Fiscal Organism (art. 75 part 2) which orders: "Un federal fiscal organism will be charge of control according to the law, which shall assure the representation of all provinces and the city of Buenos Aires in its composition". So, the constituent elevated to the maximum hierarchy an existing organism, the Federal Tax Commission created by law 20.221, in 1971.

Respecting point b) on federal principles of the federal budget, this is an important modification established by art. 75 part 8, which posses the attribution of Congress to sanction the federal budget, and adds the following formula: "according to the established parameters in the third paragraph of this article". I remind that those parameters were indicated for the sanction of the tax co participation law-agreement. Consequently, both for the public spending and the calculation of re foreseen resources in the budget, must be based in the government and public investments program which must respect the constitutional parameters of objectivity, equity, solidarity and priority for the achievement of an equivalent development, life quality and equality of opportunities in all national territory. This constitutional policy links the budget with essential matters for the federal project: regionalization, integrations, decentralization and autonomy strengthening.

Unfortunately, as we've exposed, this dispositions haven't been respected after the reform.

In point 3, on economic and social aspects of federalism, se points the following reforms introduced in 1994:

a. The Federal Bank. In fact, part 6 of art. 75 established that Congress has powers to "establish and regulate a federal bank with power to issue coin, so as other national banks". The intention of the modification was adapting the Central Bank, whose conception and name is proper of a Unitary State, to that corresponding to a Federal State, following the examples of other federations as the North American, the Suisse or German.

b. Regions for economic and social development. As indicated by art. 124: "The provinces may create regions for economic and social development and establish organs with powers for the fulfillment of those objectives...". This modification has special importance and means, first, that the finality of regions must be the promotion of economic and social development.

Second, the Constitution allows provinces to celebrate partial treaties for justice administration, economic interests and common utility works and forbids them to celebrate partial political treaties, so regions may not constitute a new political government level.

Third, for us, regions have juridical public state personality; with adjective decision power, limited to the promotion of economic and social development; whose creations depends of the will of the provinces, according to the reformed Constitution.

Fourth, the region is an alternative to strengthen federalism as anticipated by Alberto Zarza Mensaque ("La región como alternativa federal", Boletín de la Facultad de Derecho y Ciencias sociales de la Universidad Nacional de Córdoba, nº 1 y 2, 1977, Córdoba). This means that the regions must only exist to strengthen our form of State, which is federal. This means that the region is another form of decentralization that must serve the constitutional federal project and cannot be used to centralize or attack the provincial or municipal autonomy.

On the meaning of economic and social development, indicated by the supreme law, we remind that development is the new name of peace, as said Paul VI in the "Populorum progressio". That is why the 1994 constitutional reform incorporated a new clause of progress or of development, in part 19 of art. 75 — as a power of Congress and the provinces art. 125 — with the name of "human development".

Consequently, there shall be a relation between economic and social development and human development, which is a common obligation for all the institutional actors of the federation.

In the Argentinean case, the federal structure of the State allows the addition of the possibility of regionalizing only for economic and social development to achieve the country's integration and a more balanced development of the different regions and provinces.

For a more detailed study on this matters see "Integración y globalizacion: rol de las regiones, provincias y municipios", where we point the necessary reforms to deal with national and supranational integration.

c. Provinces and international relations. Art. 124 of the national Constitution, after referring to provincial powers to create regions, establishes that: "... and may also celebrate international conventions while this are not incompatible with the Nation's foreign policy and do not affect the powers delegated to the Federal Government or the Nation's public credit, with the knowledge of the national Congress. The city of Buenos Aires will have the regime established to the effect ".

The imperious need of supranational integration — as a path imposed by globalization, interdependence and the increasing international economic competence —, originated the development of binational border sub regions, where some Argentinean provinces intervened.

In fact, within the frame of MERCOSUR and as a consequence of the Subregional Border Integration Protocols, were created the Crecenea y Codesul, a reunion of Argentinean Provinces and States of Southern Brazil aimed to promote foreign commerce and integration. Likewise there were other regional integration experiences, as the Noa (Argentinian Northwest) — Grand North if Chile and of infrastructure, as the Zapala — Lonquimay railroad — between the province of Neuquén and the respective region in Chile —, etc. Before the 1994 reform, some provinces had developed another important experience regarding international management: promotion of exterior commerce. In this sense, we must point the example of the province of Cordoba, which since 1983 made more than 50 foreign missions, had a Ministry in the matter and a "Córdoba Trade Center" with see in New York, Roma and Sao Paulo, with results in the notable expansion of the provincial exports.

Regarding the reach and limits of these conventions, we must conclude that the constituent distinguished the conventions from the treaties, according to their limited reach.

In this sense, Nestor Pedro Sagues ("Los tratados internacionales en la reforma constitucional de 1994", La ley, 11-3-1994) has sustained that "the provincial-international conventions must not exceed provincial powers in their competences (reason by which they may only operate in the matters

within provincial powers or with provincial concurrent powers with the Nation), and besides has to respect the existing federal law (constitutional and infraconstitutional), previous and posterior to the provincial-international convention".

Regarding their limits, the Constitution expressly mentions them in its text, not stopping in its analysis due to briefness reasons, but we remit the reader to our cited work on "Federalism."

d. The provinces and the original domain of natural resources. The reformed national Constitution, in the last paragraph of article 124, establishes: "The original domain of the existing natural resources in its territory corresponds to the Provinces".

The increasing centralization process suffered by the country, had as one of its most negative aspects, the advance of the national government over the domain of provincial natural resources. This invasion was affirmed by laws of Congress and through the jurisprudence of the Nation's Supreme Court of Justice, which under our point of view were unconstitutional, because even if the 1853/1860 text did not define the matter expressly, the federal principle of articles 1, 3, 13 y 104 should be applied. We even arrive to recognize the national domain, article 40, which constitutional zed the take away.

That is why this assignation to the provinces or the original domain of natural resources, made by the 1994 Santa Fe and Paraná Convention, must be seen as a decisive expression of the strengthening of Argentinean federalism, which was one of the stronger ideas-forces that lead the reform.

As understood, this domain reaches the sea, hydrocarbons, energy, fishing, etc. Consequently, this supposes the modification of the respective legislation by the Nation's Congress.

But we can't stop signaling the provincial responsibility, who has to defend the rights that undoubtedly corresponds to them, and that is why, should not doubt on the possibility of challenging before justice to make them prevail.

Likewise we consider that the exploration, exploitation and benefit of natural resources, with a sustainable development concept, opens a wide field for concert federalism, through the use of interjurisdictional relations and entities. This institutional modernization, fundamental for federal, provincial, of the city of Buenos Aires and municipal governments, and even with regional level, will be a requisite to face the great challenge of transforming in a developed, integrated and balanced country.

We do not ignore that this process demands an elevation of our political culture, to be able to overcome exacerbated individualism, corporative tendencies and the impossibility — that many times we suffer — to project and execute architectonic policies face to the structural problems of the Argentinean society and State.

e. Social security organisms and other concurrent powers. The 1994 constitutional reform, in its art.125, added the following paragraph to the anterior art. 107: "The provinces and the city of Buenos Aires may maintain the social security organisms for public and professional employees; and promote economic progress, human development, job creation, education, science, knowledge and culture".

This norm ratifies the dispositions of art. 14 bis (second) that defend provincial autonomy from pressures made for the transfer of the provincial pension funds to the federation. Likewise increases the reconnaissance of the free exercise of concurrent powers by the provinces.

The matter inscribes, under our point of view, in the strengthening of other aspects of federalism: specifically social.

f. Federal principles on education, science and culture. Besides art.125, which defines these matters as concurrent, art. 75, on the powers of Congress, expresses in part 19, third clause: "Sanction the law for the organization and for education base that consolidate national unity respecting the local and provincial particularities; [...]", and in its fourth clause: "Dictate laws that protect the identity and cultural plurality, free creation and circulation of works from the author, artistic patrimony and cultural and audiovisual spaces".

The reform has not only confirmed — as seen before —, the existing power distribution, but when referring to congress powers in education and culture, has given precise federal directives. It can't be interpreted differently respecting the "provincial and local particularities" or the protection of the "cultural identity and plurality", of the "free creation and circulation of works" and the "artistic patrimony and cultural and audiovisual spaces".

Consequently, Congress, when dictating regulating laws, must comply scrupulously with these federal principles in culture and education, which are essential for Argentinean identity (argentinidad) and for our single and diverse reality. Likewise, in the function and services decentralization process, which operates in the country, local responsibilities, will be each

time bigger, particularly in education. The same will happen in knowledge and in science and technology — beyond its links with education —, due that integration, competitiveness and the rules of the economic world order will require it that way.

We understand, then, that the 1994 reform, to strengthen federalism, dealt with these matters within its social aspects.

As a conclusion, the fulfillment of the federal project of the Constitution, results of a huge transcendence for the country. Of course that such question lays within another special problem, the lack of political and juridical culture which difficult the respect of the normative force of the Supreme Law.

India

The present regime as already mentioned started on 26th January 1950, under which the Federal government was called, as presently, the Union of India and the regional governments were divided into four kinds of States — Part A, Part B, Part C and Part D.

Since 1956, after the reorganization of the States, the entire territory of the Federation is currently divided into 28 States and 7 Union Territories.

United Kingdom

The United Kingdom has a reputation for stability. This reputation has some justification: it has never had a real refoundation of its regime and still does not have a written constitution. But its constitutional history is one of constant changes, including the progressive extension of voting rights (starting in 1832), changes in the territorial structure of the state including the independence of the Republic of Ireland in 1921, and the development of civil and social rights.

Until the 1980s the civil societies of Scotland and Wales were afforded a high degree of autonomy by the central state; social policy, industrial development and the welfare state were all administered by territorial parts of the central state called the Scottish Office and Welsh Office; this guaranteed regional civil societies autonomy and stability. The 1960s and 1970s were times of great social change in Scotland and Wales; as a consequence nationalist, separatist, parties were able to make gains (Plaid Cymru in Wales and the Scottish National Party, SNP, in Scotland). This led the in-

cumbent Labour government to hold referenda in 1979 on devolution in order to stave off the nationalist parties; with lukewarm support or opposition from regional organisations they both failed. From 1979, however, the Conservative governments were seen as violating the autonomy of Scottish and Welsh policy and civil society, and enacting policies disagreeable to many voters and elites in Scotland and Wales, and thus there was much broader-based support for devolution by 1997-1998 when the Labour government was compelled to introduce it.

Germany

Though there cannot be distinguished between different historical phases of the federal system in the Federal Republic of Germany, there has been a certain tendency towards centralization, especially in the sixties and the seventies of the 20th century; the revision of the Grundgesetz (GG) in 1994 strengthened the competences of the Länder, whereas the Föderalismusreform I in 2006 and the Föderalismusreform II in 2009 again are ambivalent: the legislative powers of the Bund (the federation) were strengthened, the Länder got more rights in the European field.

The main characteristics of the regime are laid down in Art. 20 GG: The Bundesrepublik Deutschland is a federal state; it is a parliamentary democracy; it is what we call a "Rechtsstaat": a state based on the rule of law, the separation of powers, the legality of executive power and jurisdiction, legal certainty and legal protection and the acknowledgement of human rights; it is also meant to be a social state and is obliged to the protection of environment.

Austria

The Federal Constitution is mainly based on the Federal Constitutional Act of 1920 (Bundes-Verfassungsgesetz, in the following: B-VG), but consists of a large number of additional federal constitutional acts and single federal constitutional provisions, which were reduced in 2008, but still amount to several hundreds. Moreover, the B-VG itself has been amended 101 times so far since its re-publication in 1930. In 1945, the Federal Constitution was re-enacted as it had been prior to the Austro-fascist Constitution of 1934 and the period of the Austrian occupation during World War II, i.e. in the version of its re-publication in 1930.

The Federal Constitution recognizes several leading principles, such as democracy, republicanism, federalism, the rule of law, the separation of powers and fundamental rights. As to the legal entrenchment of the federal system, the B-VG contains at least the basic provisions regarding the distribution of competences, the Federal Assembly (the federal second chamber) and Land constitutional autonomy as well as formal elements of co-operative federalism (informal co-operation is an important factor of Austrian federalism, although not entrenched in the law). The financial system is regulated by specific acts, namely the Financial Constitutional Act (Finanz-Verfassungsgesetz, in the following: F-VG) and the Financial Equalization Act (Finanzausgleichsgesetz, in the following: FAG).

Swiss Confederation

I only mention the important stages for political decentralization:

Before 1798: "Alte Eidgenossenschaft (Old Confederation): A Confederacy in the proper sense of the term based mostly in defense pacts between the various State authorities. It was characterized by all types of hereditary inequalities among individuals and between regions. Its core and only institution was the Federal Diet.

1798-1803: Helvetic Republic. Details:

—1798-1802: First Swiss Constitution introduced under the French occupation and supported first by liberal forces in Switzerland. Political instability arised due to the strong resistance from conservative forces (the confederalists, also historically called federalist).

—1802-1803: Second Helvetic Constitution, introduced under the French occupation. It was accepted in a general referendum where blank votes were counted as affirmative votes. It failed due to the conservative Federalist resistance.

1803-1813: "Mediation". First Federal Constitution, also imposed by Consul Bonaparte. In practice, this federal state operated much the same way as the former Confederacy. For the Swiss united states was not the Constitution but mostly the dependence from France**.**

1813-1847: After the failure of Bonaparte, the Swiss States became independent again and until 1815 their union was even weaker than before 1798. In 1815, a new Bundesvertrag (Confederal Treaty) was estab-

lished. It lasted until 1848. The first stage (until 1830) is known as the time of "restoration" because it set up again a very similar system to that of the former Confederacy. In 1830, several Cantons / States began to introduce liberal ideas in their Constitutions, which reflected the revolutionary spirit of the time. This period is identified as the time of "regeneration".

1847: Civil war between eight cantons / states dominated by conservative Catholics and the Confederation dominated by 12 progressive states in the Federal Diet (two states could not vote). Given the strategic weakness of the conservative Catholic states, the armed confrontation lasted only three weeks costing 113 lives, which is surprising if one takes into account that the two armies were composed of 30 thousand and 50 thousand soldiers. The war ended with the capitulation of the Conservatives.

1848: Introduction of the Federal Constitution by a majority decision in the Federal Diet (without the unanimity that would have been required to unite the previously sovereign states into a new Constitutional State). The new features are:

a. Union into a modern constitutional state (separation of powers but with a predominance of the legislature, representative democracy, guarantee of fundamental rights and equality between individuals).

b. Bicameral parliament with equal representation of States in one chamber and representation of the electorate in the other. Both chambers had equal powers (still maintained today).

c. Collegial executive body (still maintained today). Only slight centralization of authority. The major powers were an almost exclusive power over foreign policy and a concurrent one regarding military defense. Some of the other powers were the monopoly on postal and telegraph services and the right to establish universities. The small influence of centralization to the daily life of the population was most likely the most important reason behind the acceptance of the new Constitution.

Other developments of historical importance are the Union of Commerce (abolition of customs between states), freedom of movement and the introduction of the possibility of constitutional review through popular initiative and referendum.

1874: Total amendment of the Constitution. The main innovations are:

a. An important step towards centralization. Some examples of new federal powers — exclusive or concurrent — are civil and commercial law, with the exception of trust&estates and property law, railway construction, industrial worker protection, banknotes, weight and measurement system, direct taxes, fishing and hunting, etc.

b. Optional popular referendum for legislation.

c. New individual rights (freedom of religion, but banning the Jesuits Order-, freedom of trade).

1874-2007: The most important steps on political centralization:

—1881: Federal Code of obligations. 1898: new competition for total consolidation of civil and criminal law. 1907: Federal Civil Code. 1937: Federal Criminal Code. Intellectual property protection under federal law (powers and legislation between 1887 and 1922). Power on Labor Law (1908) and on Professional education regulation (1947), social insurance against accidents and illness (power in 1890) and for retirement benefits (1925), just to mention some of the powers of the first times. The other competitions were maintained. New federal powers were introduced over the years to get to the catalog that we have now are and that is represented in the comparative table of this study.

—1999: Total revision with very few material changes. The list of powers as well as the level of representation of states ("shared rule") remain the same. The most important changes from the point of view of the federal system are:

a. Introduction of the principle of subsidiarity. Explicit mention of the principle that States should be responsible for federal law enforcement when possible.

b. New principles of cooperation between States and the Confederacy, especially the obligation that the Confederation has to hear and take into account the views

2008: Introduction of a new system of financial compensation and compensation for expenses. The changes were accepted by the voters on November 28, 2004: 64.4% of voters at the federal level, and by voters in 23 states. The introduction is known in the literature as the "federalism reform". The system was not fundamentally changed, but the complex division of responsibilities between States and the Federation has been simplified in some areas. For financial compensation, there are new guidelines in order to avoid the lack of transparency, which has led to some inefficiency in the performance of state services. It is the first time since

the introduction of the 1874 Federal Constitution that the principle, the system and the operation system of federalism have undergone a major reform.

To 2011: Introduction of federal regulation of procedural law for cantonal instances (state) civil and criminal (already decided, but not yet implemented).

Belgium

Federalism varies across countries. However, every federal State is driven by the same foundational idea. The structural principle is the same: the existence of a state (country-wide) society does not exclude the presence of specific groups which aim to obtain particular recognition. The role of the federal Constitution is to consecrate these identities integrating them in the organization of the State. But beyond this foundational idea — quite rough and summarized in the maxim *E diversitate unitas* or *E pluribus unum* —, the institutional translations differ. (See F. Delpérée, "L'Etat fédéral belge aujourd'hui", in *Foedus semper reformandum? Dinámicas de las estructuras territoriales descentralizadas* (Fundación Coloquio Jurídico Europeo, Madrid, 16th and 17 th of November of 2006).

Putting aside the common institutional elements, there are two issues that are important to establish a federalist typology adapted, even if nuances are needed, to nowadays.

The first issue can be framed as follows: Is the State created by association, or, the other way around, is it going to be formed through disassociation?

The *federalism through association* arises from attraction towards the center. In more precise terms, its origin is the decision made by independent States renouncing to their initial sovereignty and merging in a new state order. These states do not accept to join a new entity if they do not mantaint some autonomy. This autonomy will not be exercised as states as it is the case in a Confederation, but as federated collectivities. Sometimes the denomination "State" is maintained as a historical feature or a sign of courtesy.

On the contrary, the *federalism through disassociation* arises from centrifuge forces. The autonomy claims appear in a unitary State. These urge the constitution or the recognition into the state of new political collectivities. The State will continue to be unique, but not unitary. The estate gives

to their constituent parts sovereign powers over certain issues. Some evolutions might bring deeper divisions, and even the split of the political community.

The political consequences of these options are predictable. In the first case, the residual powers — these powers not explicitly conferred to any layer — will be assigned to the federated units, while in the second, where a state dismembers attributing powers to federated entities, the residual powers will be hold by the central authorities (See V. 3).

The Belgian State is a clear case of federalism through disassociation.

The second issue answers the following question: are the collectivities based on territories or on personal characteristics?

In other words, are we organizing a territorial federalism dividing the national territory in geographical areas, regions, provinces, cantons… assuming that people or situations affected will be subjected, by the principle of homogeneity, to the federated law?

Or is it a personal federalism, that is, confer to the individuals a statues that applies to them in any part of the federated territory, with no role for the geographic location of people and situations?

The institutional choices made in these issues have very important consequences. For example, the protection of human rights is limited to the different geographical areas in a territorial federalism. In an extreme case, it can lead to an ethnic cleansing. Personal federalism can enhance the emergence of regimes more respectful with individual rights and more protective of minorities. However it can also perpetuate the presence in limited territories of different groups, which might be antagonist of one another.

The Belgian system has chosen a territorial federalism to deal with regional issues and a personal federalism to deal with matters related to the communities. The features of this federalism are pretty original. Our federalism can be the model for other states. It demonstrates that simple solutions are not always the answer, especially today that complex, tense political situations have to be faced.

Italy

1861-1922. A unitary state (the Kingdom of Italy), the result of the fusion of previously pre-unitary states, mainly based on the French Napo-

leonic model. Limited recognition of local autonomies: Municipalities and Provinces are, however, strictly supervised by the central government by means of a Prefect.

1922-1945. During Fascism the centralistic character of the system becomes more marked, with rigid control of local entities, also of the political type.

1945-1970. Italy becomes a Republic with a new Constitution which provides for the creation of Regions. Special Statute Regions are constituted.

1970-2001. Ordinary Statute Regions are constituted. With great difficulty the State makes several attempts (1972, 1977, and 1998) to transfer functions and resources to the Regions and local entities.

2001. Section V of the Constitution is rewritten, strengthening the position of the Regions and local entities as constitutive elements of the Republic.

Spain

In the formation of the "State of the Autonomies" we can define four periods. First, the foundational one (1978-1985) — which is a short period compared with other federal experiences —: the Federal Constitution and the Charters of Autonomy or state "constitutions" (1979-1983), several and the most important transfers were made, the politic and administrative organs were created, and three key decisions were taken: generalize the system to all the territory, divide it in 17 states — some of a very small size — while maintaining certain asymmetry, despite the fact that all share the same political nature of the self-government, among them in what powers, financing and self-government institutions are concerned. In the second stage (1985-1992) states are definitively in operation and the system is consolidated; hence, today it is hardly impossible to reverse its basic elements. During the third state (1992-2006), this process of systematization tending towards uniformity o all the states in both power and institutional dimensions was culminated. Between 1992 and 1994 the States which have fewer powers are assigned the powers they were lacking, in particular executive powers in health care and education. Finally, since 2004 an amendment process of the state constitutions (up to now, 7) has been going on aiming to assign more and better powers to the states, better financing system, more participation in the federal institutions and decisional procedures and, in those states with

national demands, a deeper recognition of their identitarian distinctive characteristics. Nonetheless, in 2010, the Spanish Constitutional Court, in the Decision 31/2010, of 28th June, denied the effects of many of these relevant reforms established by the new Catalan Charter of Autonomy.

5 · How many States compose the Federation? Do they all have the same nature (for instance, States) or do they have different nature and position (for example, States, federal capital, colonial lands, communities with a specific regime of autonomy)?

United States of America

The union is comprised of 50 states, one capital district, two associated commonwealths (Puerto Rico and Northern Marianas), three territories (Guam, American Samoa, American Virgin Islands), one freely associated state (Micronesia), and nine minor outlying islands (of less than 2000 population-total), in the Pacific. The District of Columbia serves as the federal capital. All states have the same de jure status, whereas each territorial status is different, with Puerto Rico being the closest to a state. All non-states experience self-rule.

Canada

There are ten provinces (from West to East: British Columbia; Alberta; Saskatchewan; Manitoba; Ontario; Quebec; New Brunswick; Prince Edward Island; Nova Scotia; Newfoundland and Labrador) and three territories (Yukon; Nunavut; Northwest Territories). As a matter of constitutional law, the Federal Parliament has complete and ultimate authority over all matters in the territories, which have no constitutional status. However, federal statutes have established legislatures in the territories and devolved them governmental responsibilities.

Australia

The federation is comprised of six States, which were all 'Original States' at the time of federation. They are: New South Wales,

Queensland, South Australia, Tasmania, Victoria and Western Australia. No new States have been admitted to the Commonwealth since federation, even though the Constitution permits the admission of new States.

There are also two internal self-governing territories. They are the Northern Territory (which was ceded to the Commonwealth by South Australia in 1911) and the Australian Capital Territory (which is an area within New South Wales that was surrendered to the Commonwealth in 1909 for the purpose of establishing the capital city, Canberra). These self-governing territories have their own legislatures and are represented in the Senate by two Senators each (although this representation is not guaranteed by the Commonwealth Constitution). While they are effectively self-governing, and are treated in the same manner as States in intergovernmental negotiations, their laws may still be overridden by the Commonwealth Parliament or disallowed. The Northern Territory has long sought statehood, but a referendum on the subject within the Territory was defeated in 1998.

Australia also has seven external territories. Three of them — Norfolk Island, Christmas Island and the Cocos (Keeling) Islands — are inhabited and have a form of government of their own. The other four — the Ashmore and Cartier Islands, the Australian Antarctic Territory, the Coral Sea Islands and the Heard and McDonald Islands — are uninhabited, except for scientific settlements.

For more information on the Australian territories, see: Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (2006), chapter 12.

Mexico

Currently, Mexico is formed by 31 States and a Federal District. All the 31 States have the same nature and position in the constitutional framework. The Federal District has its own constitutional charter, different from the state ones.

Brazil

In Brazil, there are 26 States and the Federal District. They all have powers expressly provided by the Constitution. The 26 states have the

same nature and position. The Federal District combines features and powers of a State and a Municipality. Virtually, it is a state, which can also exercise municipal powers (including the power to tax both as a State and as a Municipality).

Argentina

As we have anticipated, the Argentinean Federation has: 23 Provinces and the autonomous city of Buenos Aires, which is also the Federal Capital, see of the federal authorities.

The Provinces are States and the autonomous city of Buenos Aires is almost a Province. So, beyond the debates produced on its juridical and institutional nature, — remembering that for us it is a city-State —, which cannot be doubted is that it is one of the 25 "partners" of the Argentinean federation, considering also the federal government.

The 23 Provinces are: Buenos Aires, Catamarca, Córdoba, Corrientes, Chaco, Chubut, Entre Ríos, Formosa, Jujuy, La Pampa, La Rioja, Mendoza, Misiones, Neuquen, Río Negro, Salta, San Luis, San Juan, Santa Cruz, Santa Fe, Santiago del Estero, Tucumán and Tierra del Fuego.

India

Currently, as mentioned above, there are 28 States in the Federation. They are of the same nature with minor variations with respect to the composition of their legislatures and special arrangements taking account of their special needs and conditions. These special arrangements are provided in the Constitution. Prominent among these arrangements are the ones for the State of Jammu and Kashmir (Articles 370, 371 and 371-A to 371-I).

United Kingdom

The United Kingdom has four main components (Northern Ireland, Scotland, Wales, and England, the latter directly ruled by Parliament). It also has many smaller units attached; in Europe these include autonomous Gibraltar and the Channel Islands and the Isle of Man (which shares a monarch but not a parliament). There are also possessions in other continents that are self-governing, most of them very small, as well as some

directly ruled territories outside Europe, which mostly have no population worth mentioning. Legally, no territorial subunit constitutes part of the UK; the only sovereign, entrenched part of the UK state is the Westminster Parliament.

Germany

There are 16 Länder, whose constitutional status is the same; there is no federal territory. In the Bundesrat, which takes part in legislation and administration on the federal level, as well as in issues of the European Union, the number of votes of the Länder is different.

Austria

Austria consists of 9 constituent states, which are called Länder (singular: Land) and basically enjoy an equal position. As an important exception, special provisions apply to Vienna, which is a Land, a municipality and the federal capital. Another exception is the Federal Assembly where the Länder are represented by different numbers of representatives. The Länder also receive different financial revenues.

Swiss Confederation

Swiss territory is divided into 26 cantons (states) and over 2500 municipalities (the number declined to 400 in the last 20 years due to mergers). The Swiss cantons (states) are decentralized state authorities; municipalities have autonomy only within the boundaries of the delegation of powers by the states. Of the 26 cantons (states), 6 are the so-called half-cantons. Their autonomy *(self rule)* is not distinguished from other cantons. But regarding their participation in the formation of the will of the confederation *(shared rule),* the semi-cantons' votes have only half weight (i.e. they only have one representative in the Council of States, while other counties have two representatives). The reason for this disparity has no explanation under current circumstances; it can only be explained by historical reasons. The semi-cantons arise from division of cantons during the confederation, that is, before the federation was founded in 1848.

Belgium

"Belgium is a federal State formed by communities and regions" (Constitution, art. 1). "Belgium includes 3 communities: the French, the Flemish, and the German-speaking one" (Constitution, art. 2). "Belgium is formed by three regions: the Walloon, the Flemish, and the Brussels region" (Constitution art. 3). Communities and regions are presented as the ones who have to integrate themselves in the federal State. This is illustrated by the heading of Title I of the Constitution.

The group of communities and regions are on an equal footing. All have legislative powers, even if the actual legal act might be call decree or regulations. In their sphere of powers, every community and every region can be considered as equals to the federal government.

Italy

As previously mentioned (point 4), the Regions are not the only constitutive elements of the Republic because the Municipalities, Provinces and metropolitan Cities must be considered of equal rank.

In any case, the institutional position of the Regions is certainly of more importance due to the acknowledgement of their strong legislative powers and the explicit listing of the Regions in the Constitution (art. 131).

The Constitution formally provides for the creation of 20 Regions of which one, Trentino-Alto Adige, consists of two Provinces (Trento and Bolzano) which both have rank and powers equivalent to those of a Region. Several of the twenty Regions, those with a special Statute, enjoy a differentiated regime in terms of legislative powers and financial autonomy. Such differentiated regimes are established in the Statutes of these Regions and, unlike the others, are approved by constitutional law.

Spain

The Federation is composed of 17 States — Autonomous Communities —. We should add two "Autonomous Cities" (Ceuta and Melilla), whose legal and political nature is different from the States. They lack legislative powers, they are granted less powers and their institutions of government are closer to the local ones than to the state ones. The whole

federal territory is divided in territorial communities, taking into account both Autonomous Cities.

6 · Do they have singular features (i.e. historical, linguistic, geographical, political, legal or economical particularities)? Do these singular features have political or legal consequences? In other words, how have the differences among the main territorial communities been approached from the uniformity/diversity or symmetry/asymmetry perspectives? Are there any States which enjoy certain privileges (e.g. specific powers or special revenue sharing scheme) based on historical rights predating the Federal Constitution?

United States of America

Generally, the 50 states have many different features that are singular. Laws in one state follow another. However, Louisiana, for example, follows the French tradition in legal code, whereas the rest of the country does not. The New England states maintain the eighteenth century tradition of the town hall and town meeting. Linguistically the U.S. is officially monolingual, but in practice vast areas of the Southwest have many Spanish-speakers, and many big cities have immigrants speaking their native tongues. A given community could have up to 60 languages spoken in addition to English.

From a de jure standpoint U.S. states are symmetrical. However, de facto asymmetries are abundant. Large states are more politically powerful than small states, as are wealthier states and those that have higher proportions of educated people. Although mobility is changing this, states are culturally different, based on their ethnic makeup. The upper Midwest states (Minnesota, Wisconsin, Dakotas, Iowa) are predominantly Scandinavian-German in heritage and culture. South Dakota also has a notable proportion of Native Americans, on and off Indian Reservations. New Mexico's culture is Spanish/Native American Indian/Mexican whereas other western states are more Mexican in orientation. Many other patterns follow. The border states (Kentucky, Tennessee, West Virginia and parts of Southern Ohio, Indiana) are comprised of old English stock, Saxon hill people, and French Huguenot protestants. The people in these states speak a different dialect and have a different subculture.

No states enjoy specific privileges or fiscal powers in a legal sense. All are equal. For example, Article 1 states "but all duties imposts and excises shall be uniform throughout the United States." However, states are free to "volunteer" out of certain federal programs. For example, Arizona did not participate in Medicaid (assistance to the poor) from its enactment in 1965 until the mid-1980s, when it was encouraged in by a special "experimental program" status. The latter is a typical vehicle of exception. Most "exceptions" are by act of Congress (with administrative agency support), and can be of a financing nature. Singular state exceptions are rare but not unheard of, for example California has for some four decades been allowed to adapt its own (stricter) environmental codes. None of these are constitutional issues unless they happened to come before the federal courts.

Canada

The provinces and territories all have singular features. Some of these differences have legal and political consequences, others not.

—The provinces differ considerably in geographic area, population size, and economic importance. The two geographically central provinces — Quebec and Ontario — together contain over three-fifths of Canada's population and concentrate most of the manufacturing base. The four western provinces own the most valuable natural resources, with Alberta in particular sitting on enormous oil fields (the oil however being trapped in bituminous sands the exploitation of which is costly and environmentally hazardous). The four eastern provinces (Atlantic Canada) suffer from the decline of traditional industries and changed trade patterns and traditionally depend much on federal financial transfers. The situation has however changed recently for two of these four provinces with the exploitation of offshore oil and gas in Newfoundland and, to a lesser degree, in Nova Scotia.

—Regarding the legal system: in the field of property and civil rights that is under provincial jurisdiction, Quebec applies French-inherited civil law, while the rest of Canada applies the English-inherited common law; in the field of criminal law that is under federal jurisdiction, the English-inherited common law is applied throughout Canada (including Quebec).

—Regarding languages: Quebec is the only province with a French-speaking majority (more than 80% of the population); in relative terms, the

largest Francophone minority outside Quebec lives in New Brunswick where it amounts to approximately a third of the population; in absolute terms, the largest Francophone minority is to be found in Ontario, where French speakers number 400,000 people but represent less than 4% of the population. Finally, elsewhere in Canada, the Francophone population has become of marginal importance. The constitutional status of French and English is rather complex. For diverse historical and political reasons, three out of ten provinces only are constitutionally obliged to respect legislative, parliamentary and judicial French-and-English bilingualism: Quebec, New Brunswick and Manitoba. Ontario has introduced significant judicial, legislative and administrative bilingualism, which is however based on ordinary statutes. Finally, the constitutional Charter of Rights and Freedoms guarantees throughout Canada, but only where "numbers warrant", the right of Francophone minorities outside of Quebec and of the Anglophone minority inside Quebec to have their children receive primary and secondary public school instruction in their language.

—Regarding religion: at confederation, Quebec was the only province where Catholics formed a majority, the other provinces having a Protestant majority. To assuage religious fears, the existing rights to dissentient religious schools were entrenched in the Constitution. These guarantees, which prevented the secularization of Quebec's public schools, were removed by constitutional amendment in 1997 for Quebec, but have remained in place for other provinces, most notably Ontario.

The francophone majority in Quebec experiences itself as a distinct nation inside Canada and, therefore, seeks the recognition of Quebec's "distinct character" as well as asymmetrical arrangements under which Quebec will be recognized the right to exercise responsibilities that other provinces are willing to leave to the Central government. In some cases, this has been possible and there are instances where Quebec has been allowed to opt out (with financial compensation) from federal-provincial schemes applying to all other provinces (for example there exists a Canada Pension Plan and a separate Quebec Pension Plan). In other cases, immigration policy for example, Quebec has concluded arrangements with Ottawa under which the provincial government is able to exercise greater powers than is the case for other provinces.

However, because these instances of asymmetrical federalism are considered by many people in "English Canada" to be in contradiction with

the principle of equality of all provinces (and of all Canadian citizens), only asymmetrical arrangements that can also be offered to other provinces (even if no one takes advantage) are seen as acceptable. Thus, while Quebec is seeking not only increased powers in certain fields, but also a symbolic recognition of its distinct position, the "Rest of Canada" (as the expression is sometimes used), is ready to accept some asymmetrical arrangements, but only insofar as they are compatible with the equality of all provinces. These different visions of the principle of equality (differential versus identical treatment) explain in considerable part the failed attempts at constitutional reform in the last decades. And yet, equality does not require the same treatment for people or communities in different situations. The province of Quebec embodies the desire of it French-speaking majority to remain culturally distinct and politically self-governing, while the other provinces serve as regional divisions of a single national community. Thus, some form of differential treatment would be justified by the differences existing in the two situations. Actually, the refusal of English Canada to accept that point of view seems to be explained by the denial, by most English-speaking Canadians, of the fact that Quebeckers form a separate national community within Canada, and that Canada is a multinational federation.

Australia

Australia is a relatively homogenous nation. All States were first occupied by indigenous people and were later settled by the British. There is no constitutional or legislative designation of an official language, but the dominant language is English. While there has been significant immigration from both Europe and Asia, this has occurred across the country and is not confined to particular States. From an ethnic and linguistic point of view, the most notable singularity is the significantly larger indigenous population in the Northern Territory. Aboriginal people make up 31% of the Northern Territory's population (in comparison to 2.5% of Australia's overall population) and 59% of indigenous people in the Northern Territory speak an indigenous language at home.

The only distinct historical difference relates to Norfolk Island. It was used in 1856 to resettle from Pitcairn Island many of the descendants of those who had been the mutineers from *HMS Bounty*. They claimed that self-government was promised as a condition of their resettlement. Since

1856 there have been periods of self-government and dependency for Norfolk Island. It is currently largely self-governed. It also has its own special taxation regime. It funds itself with its own taxes in exchange for immunity from Commonwealth taxes, such as income tax.

Amongst the States, the main differences are geographical, with States such as Western Australia and South Australia having large areas of desert and sparsely populated areas, making service provision difficult to isolated communities. There are also significant differences in population, natural resources and economic wealth. These differences are reflected in the system of horizontal fiscal equalisation used by the Commonwealth in its grants of funding to the States.

Apart from these potential differences in terms of funding, the States are largely treated equally by the Commonwealth Constitution, each having equal legislative powers and equal representation in the Senate. In contrast, State representation in the House of Representatives is based upon population, but there is also a constitutionally guaranteed minimum of five Members for each Original State. The Commonwealth Constitution also requires that the Commonwealth, in imposing taxes, may not discriminate between States or parts of States and that the Commonwealth shall not, by any law or regulation of trade, commerce or revenue, give preference to one State or any part of it over another State or any part of it.

Mexico

Even if there are differences regarding population and the physical geography among states, the differences have not been considered by the constitutional texts. Up to now, these differences have not been considered relevant enough to justify a differential treatment at the constitutional level. All the states share the same constitutional position; state has privileges.

Brazil

In Brazil, there is a tremendous socio-economic disparity between the States from the north and the south. The south is wealthier due to historical reasons. This reality does not provoke genuine legal or political consequence, though the Constitution expressly establishes among its goals the reduction of regional differences (article 3, III). No State enjoys hierarchical superiority over another State of the union.

Argentina

There are no differential elements between the members of our Federation. We have only distinguished between "historic" and "new" provinces. The first, formed between 1815 and 1834, which were 14: Buenos Aires, Catamarca, Corrientes, Córdoba, Entre Ríos, La Rioja, Mendoza, Santa Fe, Santiago del Estero, Salta, Jujuy, San Luis, San Juan and Tucumán, were formed around the cities that were funded by the different colonial currents and gave origin to our federalism un the National Constitution of 1853 and 1860.

"New" provinces were created in the previously called national territories, which were directly governed by the Federal Government. The last province to be created was Tierra de Fuego in 1990.

Nonetheless, when the Province of Buenos Aires was incorporated into the Federation and as a consequence of the San José de Flores Pact (1859), certain historical rights were recognized to this Province in articles 31 and 121 of the National Constitution.

As has been explained, the Province of Buenos Aires separated from the federation and did not participate in the 1853 National Constitution approval. In the Cepeda Battle (1859), the province was defeated by the federation, and the San José de Flores Pact was signed, including an amendment to the 1853 Constitution and the reincorporation of Buenos Aires to the federation.

In this constitutional amendment, articles 31 and 121 were reformed, adding the following passages, respectively, that we put in italics: "This constitution, the laws enacted by Congress developing it, and the treaties with foreign countries are the supreme law of the Nation, and the provincial authorities have to observe it even if some provincial constitutions or legislation contradict it. *To the Buenos Aires province, this only applies to the treaties ratified since November 11, 1859*" and "Provinces have power over all matters not expressly assigned to the federal government, *and those expressly reserved for them in special agreements when they enter the federation*".

Even if we cannot go deeper in the interpretation and discussion of these provisions — which caused several controversies —,[4] it is important

4 See Rodolfo Spisso, "Derecho Constitucional Tributario, Depalma, Buenos Aires, 2000, pags. 152 and next.

to emphasize that since the San José de Flores Pact (1859), the Province of Buenos Aires has keep ownership of some real state properties, under the control of the Bank of the Province, located today in the territory of the Autonomous City of Buenos Aires.[5]

In 1994 constitutional amendment, the Autonomous City of Buenos Aires was created with a special institutional hierarchy since it was given the status of a quasi province and incorporated into the Federation. Hence, since then, there is an institutional asymmetry in the system because the Provinces and the Autonomous City of Buenos Aires do not have the same "status". Furthermore, there are remarkable political, geographical, and economic asymmetries among the states: the Province of Buenos Aires has more than 14,000,000 inhabitants and its extension is 307,000 Km^2; the economic indicators display enormous differences between the richer district which is the Autonomous City of Buenos Aires and the poorer which are the provinces of Santiago del Estero and Chaco.[6]

India

They do not have very clear singular features though, as already mentioned, in 1956 they were organized on linguistic lines. Again, as mentioned above, they are generally uniform in all respects except minor adjustments keeping in mind local conditions and needs and the special status assigned to the state of Jammu and Kashmir for historical reasons.

United Kingdom

The UK has extremely asymmetric devolution and no two autonomous regions have the same legal regime; each is constituted by its own legislation in the Westminster Parliament or special agreements in odd cases such as the Isle of Man. This reflects basic social differences (i.e. Scotland has a highly developed civil society and sought a high degree of autonomy; the English regions do not have meaningful civil societies and have not mounted strong campaigns for high levels of autonomy). Thus, devolution is

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5 Cfr. Spisso, obr. Cit., ibidem.

6 See Hernández Antonio María, "Federalismo y constitucionalismo provincial", Abeledo Perrot, Buenos Aires, 2009, Prólogos de Diego Valadés, Germán Bidart Campos y Eduardo García de Enterría.

about pragmatic responses to social differences, most of them on the periphery — England, with approximately 85% of the UK population, has no government or regions of its own although there might be referenda on creating as many as three English regions within the next 2 years.

The concept of "historic rights" does not work well in the UK, though Scottish nationalists and jurists sometimes try to assert them (by arguing that the 1707 agreement uniting Scotland and England was a treaty that binds the UK). This argument is politically and legally weak.

Germany

There are only a few states with a continuous historical tradition: this is Bayern (Bavaria), which has been existing as a state for more than 1.000 years now, and these are the two city states (Stadtstaaten) Hamburg and Bremen in the tradition of the former Hanse (a loose federation of commerce cities around the Baltic Sea in the Middle Ages); this is to a certain extent also Sachsen (Saxony). This has however no legal consequences. As for political consequences, especially the state of Bavaria has always been jealous of its autonomy.

There are no states with constitutional privileges.

There are no linguistic particularities, apart from a Danish speaking minority in the very north of Schleswig-Holstein, which enjoys certain privileges; they are not afflicted with the 5%-clause (five percent hurdle) for elections to the Landtag; there is also a bilingual minority in the east of Sachsen and Brandenburg ("Sorben").

There are particularities in the political organization of the states, though they follow more or less the same principles. It may be of interest, however, that the state of Bavaria ("Freistaat Bayern"), always sustaining its autonomy, is itself strictly centralized, with all important institutions concentrated in Munich, whereas Nordrhein-Westfalen is much more decentralized. For Bavaria this is due to the influence of France in the 19th century.

As far as the Länder have the right of legislation and/or administration, there is, of course, a certain variety, as for example in the field of education, where the northern states pursued from the sixties to the nineties of the last century an egalitarian policy, whereas the southern states pursued a policy of stronger selection and high standards.

Traditionally, there have always been strong confessional differences in Germany, with a Roman Catholic majority in the south and in the west

and a Protestant majority in the north and in the east; those differences are no longer that much important.

Austria

Basically, the Austrian federal system is of a unitary character, which somehow reflects the lack of major ethno-cultural or economic differences between the Länder. Apart from their different historic background, their main difference is that of population number and size of territory. However, federal constitutional law provides asymmetric treatment as well, e.g. concerning financial equalization, the number of Länder delegates to the Federal Assembly or different linguistic minorities in the Länder. Among the Länder, Vienna enjoys a special status due to its position as Austria's capital which, however, is not a "historical right" even though Vienna was the capital of the Austro-Hungarian monarchy, too.

Swiss Confederation

As I mentioned in the answer to question 4, there are important cultural and political differences and socio-economic inequalities between regions and states. However, these differences have no influence on the status of the state within the confederation. To illustrate this fact may be noted that Uri, a canton (state) with "normal" voting power, has 35,000 inhabitants. While Basel Stadt, with 187 thousand inhabitants, is a semi-state with half the votes. Both the division of territory into cantons (states) and the position of the cantons / states, have purely historical features dating from the time before the founding of the Federation. The only exception is the canton of "Jura", which was divided from the canton of Bern in 1979.

Belgium

On the one hand, the three communities have identical powers. The same happens at the regional level. However, the size of the German-speaking community (70,000 inhabitants) entails a specific regime: it does not have powers in language rights issues, except in educational matters. Similarly, in the region of Brussels, in the core of the country and of the institutional apparatus, some functions are controlled by the federal Government.

On the other hand, the institutional organization of the communities and regions is very varied. It changes in each case. Any federated collectivity has identical institutions. To this extent, the system can be described as an "asymmetrical federalism".

Any community holds privileges (for example, financial privileges).

Italy

The Constitution establishes a general criterion of decentralization in favour of the Regions (this system is valid for the ordinary statute Regions). The text of the Constitution provides, in uniform terms, the limits of the legislative and administrative jurisdictions of the Regions. The degree of autonomy and allocation of jurisdictions of the special statute Regions are established in their individual statutes. Therefore, there are specific differences among the legal regimes (in terms of powers and jurisdictions) of these regions.

The differential elements, which also decreased after the enlargement of the autonomy of the Regions with ordinary statute, cannot find a basis in law or in facts prior to the 1948 Constitution.

Spain

The States have several differing features: historical (in some States the claim for self-government has a long lasting tradition and, in the past, they enjoyed some sort of political decentralization); linguistic (three States have their own language); geographical (two States are archipelagos and both Autonomous Cities are located in the African continent); political (in all States there are federal and state parties. Usually, the latter are minority parties. In some States, however, these state "nationalist" parties are very relevant, and they have governed for several decades in their respective States. In these States, then, the party system is different from the federal and the other state systems); and finally legal (historically, certain states had their own civil legislation or specific economic agreements with the Federation). Obviously, there are differences regarding the economic level of the States, but they do not amount to serious and irreversible territorial imbalances that may challenge the established system or its operation. The "State of the Autonomies" has not made worse the economic and social inequalities between states; in fact, it has contributed to their reduction.

The Federal Constitution respects and protects the "historic rights" of the "foral" territories. Some of the state constitutions mention their historical rights prior to the Federal Constitution. Nevertheless, in practice, these mentions have not been translated in privileges. But there is a very important exception: the financing system for two states (Basque Country and Navarra) which allows them to have more resources and more autonomy in the management of them. The languages and "civil law" (private law: torts, contracts, property, family law, trusts and states…) are traditional of some states but not of others. These are differential traits which imply powers that can only be held by the states that have these "peculiarities".

II

CONSTITUTIONAL LAW

SUMMARY: 1. Is there a written Federal Constitution? To what extent can States participate in the process of elaboration, ratification, or amendment? Which have been the most important amendments or the main constitutional phases until now? 2. Are there any complementary federal constitutional rules? If so, which are the most important? Are "constitutional conventions" — namely, unwritten binding agreements or rules of conduct — recognized in your system? What are the most important ones? 3. Are there any written State Constitutions? To what extent can the Federation intervene in the process of elaboration, ratification or amendment? Could any federal body provisionally suspend some of state constitutional provisions? Could State Constitutions be reviewed by the Constitutional Court or the Supreme Court in case of conflict with the Federal Constitution? Are State Constitutions bound by federal rules other than the Federal Constitution? If so, by which ones? 4. Does the Federal Constitution have a rights section? Has this rights section strengthen the powers of the Federation? In other words, has the declaration of rights entailed centralization of powers? If so, how? 5. Do State Constitutions have declarations of rights different from the federal one? If so, how do federal and state rights interplay?

1 · Is there a written Federal Constitution? To what extent can States participate in the process of elaboration, ratification, or amendment? Which have been the most important amendments or the main constitutional phases until now?

United States of America

The Constitution is written. It is elaborated by the acts of federal officials and adjudicated by the Supreme Court. Amendments are proposed by Congress and ratified by State legislatures or the States are empowered to call a constitutional convention (they never have). The states' role therefore, has been to propose (through Congress) and ratify constitutional amendments, which pass with a three-fourths vote of the state legislatures. The first ten amendments, the "Bill of Rights," were enacted in this way.

Most important amendments:

1-10 Bills Of Rights
14 Equal Protection, ties the Bill of Rights to the States
16 Income Tax
17 Direct Election of Senate
19 Women's Voting
26 18 Year-old Voting

Canada

Like the British Constitution, and because it derives from it, the Canadian Constitution is "mixed", consisting in written and unwritten rules. The most important written rules are contained in the Constitution Act, 1867, in which are to be found the institutions of government, federal and provincial, as well as the division of powers between the two levels of government, and the Constitution Act, 1982, containing the amending formula, the Canadian Charter of Rights and Freedoms and the aboriginal rights. The unwritten rules are the conventions of the Constitution (see below).

The amendment procedure is set in Part V of the Canada Act, 1982. Provinces must participate to various degrees, depending on the projected amendment. In some cases, the unanimous consent of all provinces and of the Federal houses of Parliament is required (for example, the position of the Queen), while in other cases (this being the general rule) the consent of two-thirds of the provinces (seven out of ten), representing at least fifty per cent of the total population, is sufficient. In some other instances amendments can be achieved by the concurrence of the Federal authorities and only one, or only a few provinces, when the projected amendment only concern that or these few provinces. Finally, each province can amend, by ordinary provincial statute, certain parts of the Canadian Constitution that are part of the "internal" provincial Constitution, and the Federal Parliament can amend, by ordinary federal statute, parts of the Constitution that concern only some secondary aspects of the internal working of the federal institutions.

Before 1982, when most of the Constitution could only be amended by British statute on request by the Canadian government, the most important amendment relating to the federal system was the transfer, in 1949, of the jurisdiction over unemployment from the provinces to the federal authori-

ties (with the consent of the provinces). In 1982, it came the "patriation" of the Constitution, which was the last amendment adopted by the British Parliament (see above). The Constitution Act, 1982, contained a modification to the division of powers over natural resources enlarging somewhat the powers of the provinces. Since 1982, there have only been "bilateral" amendments pertaining to modifications concerning only one province and requiring only the consent of that province and of the federal Parliament. As noted above, there have also been two failed attempts at major reforms of the Constitution — the Meech Lake Accord in 1990 and the Charlottetown Accord in 1992.

Australia

Yes, there is a written federal Constitution. A referendum was passed by each participating colony (now State) approving the Commonwealth Constitution before it came into effect. However, the States have little role in the amendment of the Commonwealth Constitution. Section 128 of the Commonwealth Constitution provides that an amendment must first be passed by both Houses of the Commonwealth Parliament (or by one House of the Commonwealth Parliament on two occasions with a three month interval in between). The States have no power to initiate a constitutional amendment. The amendment must then be put to the Australian people in a referendum. It only passes if it is approved by a majority of electors overall and by a majority of electors in a majority of States (i.e. four out of six States). The electors of each State therefore have a role in approving or rejecting a referendum, but State Governments and State Parliaments have no formal role. Their role is purely influential, as they may encourage their residents to vote in a particular manner. If a referendum proposes to alter the representation of a State in either House or the boundaries of the States, then s 128 requires that it also be approved by a majority of electors voting in that State.

States can, however, alter the operation of the Constitution in other ways. Under s 51(xxxvii) of the Commonwealth Constitution, States may refer 'matters' to the Commonwealth, so that the Commonwealth Parliament can legislate with respect to a matter that is not otherwise within its constitutional power. States may also enter into financial agreements with the Commonwealth under s 105A of the Constitution, which override other constitutional provisions.

There have been few successful amendments to the Commonwealth Constitution. There have been forty-four referendum bills put to the people since federation, but only eight have been passed. The most significant have been the insertion of s 105A, dealing with the Commonwealth taking over State debts, the insertion of s 51(xxiiiA) which allowed the Commonwealth to provide social security pensions, and the amendment of s 51(xxvi) which allowed the Commonwealth Parliament to make laws with respect to Aboriginal people. Most referendum proposals that have sought to expand Commonwealth power have failed. The most recent referendum was defeated in 1999. It had proposed to make Australia a republic.

Most constitutional change in Australia has occurred through the increasingly broad and dynamic interpretation of the Commonwealth Constitution by the High Court. Its wide interpretation of the external affairs power, the corporations' power and the defence power has given the Commonwealth extensive legislative powers and diminished the role of the States. The Commonwealth's strong financial powers have had the same effect.

Other constitutional changes have occurred through changes in convention and the enactment of legislation by the United Kingdom in cooperation with Australia. The *Statute of Westminster* 1931 (UK) gave the Commonwealth Parliament power to repeal British laws that had previously applied by paramount force (except for the *Commonwealth of Australia Constitution Act 1900,* including the Commonwealth Constitution, and the *Statute of Westminster* itself). It also gave the Commonwealth Parliament full power to legislate extra-territorially. The *Australia Acts* 1986, which were enacted by both the Commonwealth Parliament and the Westminster Parliament, at the request of the States, gave the State Parliaments the same powers that the *Statute of Westminster* had given the Commonwealth Parliament, and terminated all power of the Westminster Parliament to legislate for Australia and all judicial appeals to the Privy Council. The *Australia Acts* terminated all constitutional links with the United Kingdom, except the link to the Queen. The only British laws that continue to have a binding constitutional status in Australia are: the *Statute of Westminster* 1931 (UK), the *Australia Act* 1986 (UK) and the *Commonwealth of Australia Constitution Act* 1900 (UK), section 9 of which contain the Commonwealth Constitution. Since 1986, the power to repeal or amend these entrenched laws now lies solely in Australian hands.[1]

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1 *Australia Acts* 1986 (Cth) and (UK), s 15.

Mexico

Mexico has a written federal Constitution. The constitutional text does not establish who can propose constitutional amendments. However, in practice, article 71 of the Constitution has been applied, which deals with the legislative procedure. According to article 71, the President of the Republic, deputies, senators or the state legislatures can initiate amendments in Congress. The 1917 Mexican Constitution has more than 400 amendments. Hence, it will be extremely difficult to summarize in few lines which have been the amendments or the main constitutional periods.

Brazil

There is a written Federal Constitution, which was elaborated by a constitutional assembly directly elected (with few exceptions) by the Brazilian people.

Only Congress can amend the Constitution, and States are formally part of this process through senators. Each State — no matter its population size and economic importance — has three senators directly elected by its electorate. The main constitutional phases were summarized above (question 4, chapter I). The current Constitution of 1988 represents one of the greatest achievements of Brazilian political and legal history.

Argentina

As we anticipated, there is a Federal written Constitution. For its elaboration and sanction a Constituent Convention met in 1853 that exercised the constituent original power. Though distinguished authors, among whom Germán Bidart Campos, recount the exercise of an original and opened constituent power, exercised between 1810 — date of our first government — and 1853 and 1860, in which the initial text is sanctioned. In the above-mentioned years, there were different attempts of constitutional organization in the country, besides a fratricidal struggle between unitary and federal that ended with the victory of the latter.

In turn, the procedure for the constitutional reform is regulated in art. 30 that say: “The Constitution can be reformed in everything or in any of its parts. The need of reform must be declared by the Congress with the

vote, at least, of two thirds of its members. It won't be carried out but by a Convention summoned for the effect".

In consequence, a pre constituent stage exists in charge of Congress, integrated by its two chambers, that of Representatives and that of Senators, who must declare the need of the reform and then if necessary to choose the Constituents that will have in their charge the specifically constituent stage.

The Convention at that time, express the popular sovereignty in its higher expression.

Some support that in 1853 they exercised as original constituent power, when the representatives of fourteen historical provinces, sanctioned the Supreme Law, under a representative, republican and federal form of government, as says the art. 1 °, though the federal one is a form of State.

Also, since we have advanced it, they support that in 1860 they exercised original constituent power, since the above mentioned reform was carried out after the incorporation of the Province of Buenos Aires to the Federation of Argentina, since it had been secessioned in 1852 and had not met in the Convention of Santa Fe in 1853 that was sanctioning the original text of the above mentioned year.

Beyond this question, of doctrinaire interest, we can indicate these stages of reform: a) initial Sanction in 1853. B) Reform of 1860. C) Reform of 1866. D) Reform of 1898. E) Reform of 1949, which was left without effect in 1956. F) Reform of 1957. G) Reform *de facto* of 1972, which also was left without effect. H) Reform of 1994.

This last reform, the most important in our whole history, ended definitively with the debate on our reforms. It indicated that the current Federal Constitution is the 1853's one, with the reforms of 1860, 1866, 1898, 1957 and 1994.

As for the participation of the Provinces in the constitutional reforms, we indicate that the Preamble of the Constitution expresses: "We, the representatives of the people of the Nation of Argentina, assembled in General Constituent Congress for will and election of the Provinces that compose it, in fulfilment of pre-existing agreements...". This indicates that the Provinces pre-existed to the Federal State and that it was them, who sent representatives, and also, created the Federal Government by means of the delegation of their competences by means of the Constitution, being still the North American model.

As for the stage of exercise of constituent derivative power that destined for the reform of the Constitution the Provinces take part hereby: in the pre constituent stage, the members of the Representatives Chamber of the Nation are elect in representation of the people of the Nation, on a demographic base, in each of the Provinces. And besides, and this is the more specific, in the Federal Senate, exists an equal representation of the Provinces, which had two Senators for each of them, and now, after the reform of 1994 they have three Senators. Here we observe with major intensity the participation of the Provinces in the pre constituent process. Our Senate, since it corresponds to a Federation, is the federal organ par excellence. We have already said that it was still the model of the North American Senate.

In turn, in the specifically constituent stage, the Convention joins with a number of constituents, elected by the people, which is the sum of the number of Representatives and Senators. Even though the constituents represent the people of the Nation, are elected in each of the Provinces that integrate the federation.

India

Yes, it is a written Constitution. The judiciary in the country is unitary and the High Courts and the Supreme Court can elaborate and interpret the Constitution. As regards amendment of the Constitution, provisions relating to federal arrangements can be amended only if at least half of the states ratify such an amendment. The Constitution has been amended 94 times since its inception. So far as Federal relations are concerned the 7th Amendment in 1956 relating to the reorganizing of States and 42nd Amendment in 1976 transferring some of the exclusive state powers into the concurrent jurisdiction are the most important ones.

United Kingdom

There is no written constitution for the UK. Statute laws and informal "conventions" can be agreed to have status as "constitutional" when they are seen by lawyers as constituting essential elements of the polity and by all actors as being reasonably difficult to change. Thus the Scotland Act, creating the Scottish Parliament, is "constitutional" and politically difficult to change although formally it is one more Westminster statute like the others. Sovereignty in the UK lies wholly with the "Queen in Parliament,"

which means the Westminster Parliament, and all constitutional law in written form is made up of Westminster statutes. That means that no other government in the UK can formally participate in, influence, or veto constitutional law since all other government in the UK are in legal theory creatures of the Westminster Parliament (and in Northern Ireland Westminster did indeed abolish a subunit, unilaterally, and has more recently suspended the devolved government).

In general, when reading about rights in the UK, it is important to note that rights are found in statutes, but defended by constitutional convention — and in the case of most important rights are actually now guaranteed by European Union and European Convention on Human Rights (ECHR) law.

Germany

There is a written Federal Constitution: the Grundgesetz.

Any amendment of the Grundgesetz must be approved by a majority of two thirds of the members of parliament (Bundestag) and two thirds of the members of the Bundesrat (the chamber of the states). The Bundesrat, whose members are the representatives of the governments of the Länder, may initiate amendments of the Grundgesetz, thus the Länder participate in the constitutional process.

There have been 54 amendments until now (2010), many of which gave new legislative powers to the Bund; the most important amendments of the Grundgesetz are:

— The "Wehrverfassung" in 1954/1956: the constitutional base of the establishment of the Federal Armed Forces — Bundeswehr;

— The "Notstandsverfassung": constitutional rules for the state of emergency in 1968;

— Several amendments of the "Finanzverfassung" concerning the financial relations between the Bund and the Länder in 1955, 1969 and 2006/2009;

— Amendments in connection with the Eastern German states joining the federation (1994);

— Amendments concerning the relations between the Federal Republic and the European Union as well as the relations between the Bund and the Länder and the rights of parliament in European issues (1992/2008);

—Amendments concerning the reform and privatization of postal services and national railroad (1993/94);

—Amendments shortening the right of asylum and the inviolability of the private sphere (1993/1998);

—Protection of the environment as a Staatsziel, Art. 20a GG (1994);

—Amendments concerning the relationship of Bund and Länder in legislation, administration and finance: Föderalismusreform I and II (2006/2009);

—There will be an amendment in the nearest future to legalize the collaboration of the Bund with the local entities regarding the so-called "job centers."

Generally, amendments of the Constitution are regarded as too frequent.

Austria

See above I.4. There is a written, though fragmented Federal Constitution. In order to amend federal constitutional law, at least half of the members of the National Assembly (first chamber of the Federal Parliament) have to be present, and at least two thirds of the present members have to consent to the amending bill. The bill then passes on to the Federal Assembly. After the bill has passed the Federal Assembly, it will be presented to the Federal President by the Federal Chancellor, then signed by the Federal President and counter-signed by the Federal Chancellor, and finally published in the Federal Gazette. It must be explicitly called "federal constitutional act" or "federal constitutional provision".

Within the process of federal legislation, the Federal Assembly usually is entitled to object to a bill, but may be overruled by the National Assembly's vote of persistence. Only in few cases the Federal Assembly enjoys the right of absolute veto (e.g. if a bill is intended to deprive the Länder of a competence).

In principle, the Länder themselves do not participate in the process of federal legislation. However, in rare cases the B-VG provides that the Länder are entitled to directly approve or disapprove of a federal bill (in addition to the Federal Assembly).

Apart from these formal rights granted by the Federal Constitution, the Länder are usually informally asked to deliver a statement on a drafted bill,

before the Federal Government proposes it to the National Assembly. Since 1999 they have formally had to be consulted if the federal legislator intends to enact a bill that is of financial impact on the Länder. This system is called "consultation mechanism" and applies vice versa as well. If an agreement cannot be reached despite consultation talks, the legislating authority will have to cover all expenses arising from this bill.

Since the B-VG alone has been amended 101 times, it is impossible to highlight all of its amendments. However, regarding the federal system one could particularly mention the following amendments and stages: 1925 (general system of the distribution of competences), 1945 (re-enactment of the B-VG as re-published in 1930), 1948 (enactment of today's Financial Constitutional Act), 1962 (competences), 1974 (competences, vertical and horizontal concordats), 1983 (competences), 1984 (competences, Federal Assembly's right of absolute veto), 1988 (competences, international treaty-making power of the Länder), 1990-1994 (competences), 1995 (EU accession), 1999 (loosening of strict homogeneity regarding civil servants, consultation mechanism between the territorial entities), 2001 (Stability Pact between the territorial entities), 2002 (administrative reform, competences), 2004 (competences), 2005 (Federal Assembly), 2007 (reform of the electoral system that had effects also at Land level), 2008 (several minor amendments in the framework of a large constitutional reform, Stability Pact 2008).

An overall reform of the Austrian federal system has been discussed for decades, but has not been realized so far. In the seventies, the Länder presented their demand programs to the federation, but were only partly successful. In connection with Austria's EU accession the reform of federalism became again a topic in the late eighties, since first the Länder did not want to join the EU unless an internal structural reform could be achieved: In 1994 a political compromise was found and a constitutional bill drafted, but — though being repeatedly proposed to the National Assembly in the following years — prevented from enactment by the Länder's refusal to modify the compromise and by new coalition governments without a constitutional majority in the National Council. Neither the Austrian Constitutional Convention (Österreich-Konvent) which took place in 2003-2005 nor more specific reform committees succeeded to achieve a reform of federalism. Even when the Federal Government commanded a constitutional majority in the National Council in 2008, a constitutional draft concerning the reform of the federal system (prepared by an expert

committee on constitutional reform) did not become law on account of the political opposition of the Länder.

Swiss Confederation

Yes. The translation of the official name is "Federal Constitution of the Swiss Confederation of April 18th 1999."

The final decision on a proposed partial amendment approved by Parliament or on a proposal arising from a popular initiative is always subject to a popular vote and States' approval. This means that the majority of the electorate on the whole Swiss territory and most voters in most states must approve the proposal. The semi-cantons have only half a vote. Qualified majority is not required; only a simple majority. However, due to great differences in terms of population, a member of the electorate in a small state has up to 35 times more weight than a member of the electorate in a large state (see above I.6).

The total amendment of the Constitution may be initiated by the people with the submission of 100,000 signatures. The decision whether to proceed to a comprehensive review should be completed by plebiscite election (but not states). It can also be determined by the two chambers. If only one chamber decides to initiate the review, people must decide whether to proceed with the review or not. If total review is approved, the two Houses shall be re-elected and then they should draft the Constitution.

The final decision on the new constitution must be approved by a simple majority of the people and the simple majority of States.

In 2008, new rules on vertical and horizontal financial compensation were introduced. The distribution of some powers has been reviewed to simplify the system without changing the pillars. The main innovations are:

a. A more explicit and detailed statement of the principle of subsidiarity in the federal Constitution. In the 1999 version, the principle was not mentioned by its name, but briefly paraphrased, leading to different, and even misleading, interpretations.

b. A more explicit and detailed statement of the principle of subsidiarity in the federal Constitution. In the 1999 version, the principle was not mentioned by its name, but briefly paraphrased, leading to different, and even misleading, interpretations.

c. Introduction of the principle that the community bears the cost of government service. Accordingly, it should be the community who decides on that service and profits from it (for the elimination of the "spill over" effects).

d. New rules for horizontal and vertical financial cooperation between the Federation and the States, in order to reduce the differences between the financial capabilities among states.

e. Introduction of the possibility of 'supra-state' agreements between the States, that is, interstate bodies are allowed to legislate.

f. The Federation might establish that interstate agreements in certain areas are binding on all cantons (states).

Belgium

The written Constitution of Belgium was enacted on February 7, 1981. It was consolidated and re-enumerated on February 17, 1994. It has been amended later on.

The amendments are quite frequent even if the procedure to reform the Constitution is pretty rigid. It has 3 stages. The legislative power establishes a list of articles that might be reviewed. Congress is dissolved and a new election takes place. The new legislative chambers, in accordance with the federal government, amend the constitution if a 2/3 majority is in favour.

The communities and regions do not participate in the amendment procedure, not formally at least. The requirement of a majority of 2/3 protects the regions from amendments that encroach upon their competences or that reduce their autonomy.

Italy

Yes, there is a written Constitution (which, however, cannot be defined as federal). The Constitution was written by a constituent Assembly, elected by universal suffrage, which worked from June of 1946 until the end of 1947. It was promulgated by the then provisional Head of State.

Article 138 of the Constitution regulates the procedures to amend constitutional rules: ratification of a constitutional law is by means of two resolutions with an absolute majority of the components of the two Chambers three months after the first resolution. A confirmatory referendum can

be requested. A referendum cannot be held if the law is ratified by a majority of two thirds of the components of both Chambers at the second reading. The Regions have no power to intervene in the procedures of constitutional amendment.

The most important constitutional amendments are both quite recent:

a. Constitutional law n. 1 of 1999, the statute autonomy of the Regions was extended to allow them to determine their form of government and the election system of their organisms.

b. Constitutional law n. 3 of 2001, Section V of the second part of the Constitution was almost entirely rewritten, greatly increasing the Regions' authority regarding legislative matters while the jurisdiction of the Central Government over such matters was reduced to a limited and explicit series.

Spain

The Federal Constitution was enacted in 1978. State Parliaments can request the Federal Government a project of constitutional amendment or send themselves a project to the Federal Congress; nonetheless, this mechanism has never been used. For 30 years, the Federal Constitution has not been amended (except for a slight modification in 1992 to allow the suffrage of the European citizens in local elections). The huge resistance of the Constitution to amendments might become one of the differential characteristics of the Spanish regime.

2 · Are there any complementary federal constitutional rules? If so, which are the most important? Are "constitutional conventions" — namely, unwritten binding agreements or rules of conduct — recognized in your system? What are the most important ones?

United States of America

Federal district, appellate or Supreme Court rulings on constitutional matters are the most important, as are the actions of the President and Congress, until challenged. There are no recognized, binding agreements of a constitutional nature.

Canada

As noted above, an important part of the constitutional system is formed of conventions of the Constitution, which are mostly unwritten (but sometimes written) rules, appearing by usage and custom, considered as binding by the political and institutional actors but not enforced by court. Conventions can clarify or complement written rules, but can also contradict and neutralize rules of the written Constitution that have lost their justification but have not formally been repealed (like for example the power of the Crown to refuse to assent to bills adopted by Parliament). They are too numerous to be all mentioned here. The most important have been inherited from Britain and are relevant to the working of the parliamentary system of government (responsible government; ministerial responsibility; appointment of the Prime minister by the Crown, etc.). Some conventions have also developed in the relations between the Central government and the provinces. For instance, it is by convention that the federal power to disallow provincial statutes (see above) has fallen into disuse.

Australia

The Commonwealth Constitution sets out the basic rules for the establishment and operation of the legislature and the courts and the relationship between the Commonwealth and the States. This has been supplemented by Commonwealth legislation concerning the operation of the courts (i.e. the *Judiciary Act* 1903 (Cth)) and electoral laws (i.e. the *Commonwealth Electoral Act* 1918 (Cth)).

The Commonwealth Constitution contains little concerning executive power. Instead, one must resort to constitutional convention and the common law to determine its scope and operation. Conventions have also governed Australia's relationship with the United Kingdom. At the time of federation, Australia remained a colony with no power to enter into treaties, appoint its own diplomatic representatives or declare war. Gradually, in the 1920s, these powers were transferred to Australia by way of changing conventions recorded at Imperial Conferences. From 1930, convention required that the King be advised by Commonwealth Ministers (not United Kingdom Ministers) with respect to any of his actions regarding the Commonwealth of Australia.

The key constitutional conventions derive from the principles of responsible government. They include the requirement that the Governor-General act on the advice of his or her responsible Ministers. The Governor-General has a right to be consulted, encourage and warn, which means that the Governor-General might seek further advice or raise concerns about a matter. However, in the end, he or she must act according to the advice received from his or her responsible Ministers. For example, the Constitution states that the Governor-General is commander in chief of the naval and military forces, but he or she could only exercise that role on the advice of Commonwealth Ministers. The Governor-General could not act unilaterally in fulfilling that role.

There is a very small area within which the Governor-General may exercise 'reserve powers' without (or contrary to) Ministerial advice. This area concerns matters such as the appointment of the Prime Minister, the dismissal of the Prime Minister and the dissolution of Parliament. It is also, however, governed by convention. For example, after an election, convention requires that the Governor-General appoint as Prime Minister the Member of the House of Representatives who can form a government which holds the confidence of the House. Usually that person is the leader of the party or coalition which holds a majority of seats in the House. The decision becomes more difficult if there is a hung Parliament in which no party has a majority. Difficulties might also arise if a Prime Minister dies in office or a coalition breaks down. In these cases the Governor-General may have to exercise discretion, although convention requires that the Governor-General always base his or her choice on an assessment of who is most likely to be able to form a government that holds the confidence of the House.

While most States and Territories have fixed four year term Parliaments, at the Commonwealth level the maximum parliamentary term is three years and an election can be called earlier by the Governor-General dissolving Parliament on the advice of the Prime Minister. The timing of the election is nearly always a matter for the Prime Minister. The Governor-General has, however, the reserve power to refuse to dissolve the Parliament. This might occur if an election had just been held and the defeated Prime Minister then advised the Governor-General to dissolve Parliament and hold another election so that he or she could be restored to office. If there were an alternative person who the Governor-General considered could form a government which had the confidence of the House of Repre-

sentatives, the Governor-General could exercise his or her reserve power to refuse a dissolution. Refusals of dissolutions occurred in the first decade of federation, but none has occurred since, at the Commonwealth level.

The most controversial reserve power is the power to dismiss a Prime Minister. This entails the dismissal of the whole government. The conventions governing such action are uncertain, as it has only occurred once at the Commonwealth level, in 1975. It would appear that a Governor-General could dismiss a Prime Minister who had lost the confidence of the House of Representatives but who had refused to resign. A Governor-General might also dismiss a Prime Minister who was engaging in gross illegality (as occurred at the State level in New South Wales in 1932), although some would argue that such matters should be left to the courts. In 1975 the Governor-General dismissed the Prime Minister on the ground that he had not been able to obtain supply by the passage of appropriation bills. Whether this action was supported by convention or not remains controversial in Australia.

On the 1975 dismissal see: G Sawer, *Federation Under Strain,* (MUP, 1977); and G Winterton, '1975: The Dismissal of the Whitlam Government' in H P Lee and G Winterton (eds), *Australian Constitutional Landmarks* (2003), Ch 10. On the 1932 dismissal see: A Twomey, 'The Dismissal of the Lang Government' in G Winterton (ed), *State Constitutional Landmarks,* (Federation Press, 2006), Ch 5.

Attempts have been made from time to time to list or codify the reserve powers and the conventions that govern them, but it has proved difficult to obtain universal agreement on their scope. The various attempts to do so are set out in: Republic Advisory Committee, *An Australian Republic: The Options — The Appendices* (1993) at Appendices 6 and 7.

Mexico

On the one hand, in the Mexican constitutional system, there are laws developing constitutional provisions ("leyes reglamentarias"). Scholars disagree on whether this type of laws has a hierarchical position higher than general legislation or not. The approval procedure is exactly the same as the one for general legislation. Examples of these "leyes reglamentarias" (regulatory laws) are: "Amparo" — protection of human rights procedure — Act (Ley Reglamentaria of constitutional articles 103 and 107); Ley Reglamentaria of the constitutional article 76.V; Ley Reglamentaria of

the section XIII.Bis of the 123th constitutional article; Ley Reglamentaria of the constitutional article 73.XVIII regarding congressional power to regulate exchange rates of foreign currencies; Ley Reglamentaria of section I and II of the constitutional article 105; Ley Reglamentaria of the 27th constitutional article regarding oil; Ley Reglamentaria of the 27th constitutional article regarding nuclear power; Ley Reglamentaria of the 5th constitutional article regarding the exercise of certain professions in the Federal District; Ley Reglamentaria of the railroad services. On the other hand, the Mexican system does not recognize what in other countries is known as "constitutional conventions".

Brazil

International treaties and conventions on Human Rights, which are approved in each House of National Congress as an amendment proposal, will be equivalent to Constitutional Amendments. In other words, Congress can decide whether to transform human rights treaties into constitutional amendments proposals.

There is no relevant constitutional convention in Brazil.

Argentina

In our constitutional system, as in the North American, there exists the principle of constitutional supremacy, enunciated in the art. 31 hereby: "This Constitution, the laws of the Nation that in her consequence are dictated by the Congress and the agreements with foreign powers, are the supreme law of the Nation and the authorities of every province are forced to conform her, nevertheless any disposition in opposite that the laws or provincial constitutions contain..."

In consequence, they can indicate some federal laws that complement the Constitution and that can integrate what some authors are call the "material constitution". In this respect we mention the laws on tax co partnership, of a very special way, besides others on political parties, on electoral legislation, or on the Federal Justice. Besides laws have been dictated on federal interventions or on industrial promotion or on natural resources or public services affected Argentinean federalism, in a particularly negative way, because they have not respected the constitutional bases of delimiting competence.

We must also indicate here, with critical sense, the jurisprudence of the Supreme Court of Justice of the Nation, which not always supported the federalist theses, but it admitted the advance of the powers of the Federal Government in decline of the provincial and local powers.

Since these questions cannot be answered with total accuracy, nobody can indicate the existence of constitutional conventions. Only some expressions of the doctrine (See Castorina de Tarquini Maria Celia, "Federalismo e integración", Ediar, Bs.As., 1997, pag. 73/77), following the terminology of German federalism, she refers to the principle of "federal loyalty" and to the "federal guarantee". But we have doubts in the matter, for being completely different situations and because we do not believe that especially the first principle has had force in our country, considering the incorrect functioning of the federal system of the Constitution.

India

There are no complimentary constitutional rules. There are also no established constitutional conventions yet with regard to federal relations.

United Kingdom

The recent nature of devolution to Scotland and Wales — and the recent and intermittent nature of devolution in Northern Ireland — means that it is still difficult to tell what forms of intergovernment agreement or convention will matter most. Since 1997 governments have been lazy about establishing conventions, preferring to negotiate bilaterally. Pressure is building for formal codes of conduct in intergovernmental relations.

Germany

There are no complementary federal constitutional rules. The rules of the Constitution of 1919 concerning the relationship between state and churches are incorporated in the Grundgesetz. There were certain complementary rules in the treaty between the Federal Republic and the former DDR about the unification (Einigungsvertrag), but they are obsolete now.

There are certain constitutional conventions in the sense of unwritten constitutional law, resulting from the interpretation of the written Constitution; so the principle of "Bundestreue" (loyalty in the relation of the

Bund and the Länder), the principle of "Rechtssicherheit" (certainty of law), derived from the principle of the rule of law (Rechtsstaatsprinzip — Art. 20 GG).

Austria

In principle, there are no unwritten constitutional conventions, at least not of a binding nature. Of course, there exist political rules of conduct, but they are strictly separated from law (e.g. requirement of ministerial unanimity for decisions taken by the Federal Government which is sometimes also considered to be an extremely rare example of a "constitutional convention").

Swiss Confederation

In Swiss constitutional history there have been isolated cases of constitutional laws. The reason why the rules were adopted outside the federal Constitution itself, instead of integrating them into it, has been always that these decisions were implemented only during a certain time period. Recent decisions of this nature have been introduced in the Constitution as transitional provisions. There are no "constitutional conventions". The rule is to codify the Constitution. In addition to the explicitly written text, there are only unwritten constitutional norms, but based on the interpretation of what is written.

Belgium

Several constitutional provisions authorize the legislator, qualified as a special legislator for this purpose, to develop the Constitution. To do so, a majority of 2/3 in each chamber is required. In addition, a majority within each of the linguistic groups (of deputies and senators) constituted in each of the chambers.[2]

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2 According to article 43 of the Constitution and the law of July 3, 1971, members of the Parliament are automatically divided in two linguistic groups. The French Community is formed by the members who have been elected in a district of the Walloon region or in the district of Verviers, as well as the members elected in Brussels — that is, the members elected in the district of Brussels-Hal-Vilvorde — who oath, exclusively, or primarily, in French. The Flemish Community is formed by the members who have been elected in a district of the Flemish region and

A Special Act of institutional reforms (August 8, 1980) includes, for example several provisions that sharpen the power spheres of communities and regions.

Again, the majorities required in the federal legislative chambers protect the interest of communities and provinces.

Italy

The Constitution refers to Constitutional laws or ordinary laws to enforce some of its provisions. Constitutional laws are ratified by means of the special procedures of art. 138 of the Constitution. Ordinary laws are ratified in accordance with normal legislative procedure.

There is no explicit reference to constitutional conventions in the Constitution. Nevertheless, on several occasions interpretation of the Constitution has been based on informal agreements that have the same function as constitutional conventions.

Spain

The Federal Constitution does not regulate several issues that affect the organization of the territorial system of the federation, even though this is a matter that federal constitutions tend to provide for. For example, it does not list the member states of the Federation, their powers, their financing regime or the political or only administrative nature of their autonomy. This is instead carried out by the state constitutions — called charters of autonomy — which are part of the "constitutionality block". Nevertheless, the charters, in contrast with the usual state constitutions in other systems, are not laws adopted by the states only; in Spain, they are agreed between the Federation and each of the states. States initiate the elaboration and amendment procedures, but the federal Parliament debates them and might modify them prior to its approval. In some cases, after the approval by the federal legislator, they are remanded to the states to be approved or disapproved by a popular referendum in the state.

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in the district of Brussels, who oath, exclusively, or primarily, in Dutch. The linguistic groups intervene in the cases established in the Constitution. These allow to verify if the majorities required for the adoption of a special law are reached (art. 4.3). They also authorize the same checks when the "alarm bell" procedure is put into practice (art. 54).

Even if they are not constitutional laws *stricto sensu*, it is important to mention that both the Federal Constitution and the state ones refer to federal laws for the delimitation of certain state powers. An important example is the Federal constitution's remission to an Organic Law for the regulation of the financial collaboration between the Federation and the States.

There are not binding constitutional conventions regarding the territorial distribution of power.

3 · Are there any written State Constitutions? To what extent can the Federation intervene in the process of elaboration, ratification or amendment? Could any federal body provisionally suspend some of state constitutional provisions? Could State Constitutions be reviewed by the Constitutional Court or the Supreme Court in case of conflict with the Federal Constitution? Are State Constitutions bound by federal rules other than the Federal Constitution? If so, by which ones?

United States of America

All 50 states have a written constitution. Most states amend and rewrite by convention and then have a referendum, but some put amendments directly to referendum. The general government does not intervene in state constitution-writing. There is no means of provisional suspension but the Supreme Court can render a provision of a state constitution invalid, and it has, e.g. on apportionment of legislative seats, residency requirements, welfare eligibility, and housing restrictions. Since the 14th amendment was adopted in 1868 rights under state constitutions are considered bound by the federal constitution. Other federal rules depend. Any rules relating to federal powers (e.g. commerce) apply; as would rules attached to federal funding or those rules affecting the right to 5th Amendment "due process" guaranteed all citizens (No person shall be deprived of life, liberty or property without due process of law).

State constitutions are often modelled after one another and some state constitutional provisions are modelled after the federal constitution, particularly those dealing with free speech. However, some state constitutional provisions antedated their federal counterpart, or may have been modi-

fied from the federal version. Regardless, state judges do not always treat the Supreme Court's interpretation as controlling. They often follow the approach that constitutional provisions have meaning independent of how the federal courts have interpreted, and thus a state judge's obligation to follow the Supreme Court's ruling ceases. State judges must determine whether the court has arrived at the true meaning of states' constitutional provision. The exception is when a state constitutional provision is changed and is modelled after the U.S. Constitution, when it must be within Supreme Court rulings. Finally, where the meaning of a state constitutional provision has not been elaborated, the state is free to develop its own independent meaning.

Canada

The situation is more complicated at the provincial level than that existing at the national level. Like the Canadian Constitution, the provincial Constitutions are mixed, partly written and partly unwritten. The unwritten part is mostly made up by constitutional conventions identical or similar to those applying at the national level and bearing on the relations between the executive, the legislature and the Crown.

Even if no province has a formal written document titled the "Constitution", every province has a number of provincial statutes that are constitutional in the "material", as opposed to the "formal", sense in that they are concerned with matters of a constitutional nature, like the electoral system, the privileges of the legislature, the position of the Crown, etc. In addition some provincial statutes of a constitutional nature have also been given supra-legislative authority and can be used by courts to invalidate other, inconsistent, provincial statutes (for example the Quebec *Charter of human rights and freedoms*, discussed below). Finally, there exists in Canadian constitutional law a very unusual feature that can be explained by the fact that the federal Constitution was adopted by the British Parliament at the request of a number of British colonies desiring to form a federal union: an important part of the written Constitution of each province is to be found inside the Canadian federal Constitution itself. Thus, Part V of the Constitution Act, 1867, is titled "Provincial Constitutions" and contains the provisions establishing the basis for the executive and legislative powers in the provinces (the position of the Lieutenant Governor, representing the Crown at the provincial level; the composition of the provincial legislature, etc.).

A Canadian province could decide to adopt a formal written instrument to serve as its "Constitution" by collecting and re-enacting the different constitutional statutes already in force (and perhaps by using the occasion to codify some of the constitutional conventions applying at the provincial level). At least two provinces, Quebec and Alberta, have entertained such a project, but without carrying it to completion. However, a province could not remove from the Constitution Act, 1867 the provisions in Part V bearing on the provincial executive and legislature.

Provinces do have the power to enact and modify their own constitution, but distinctions must be made between the various elements composing the provincial Constitution. As far as concerns the parts of the provincial Constitution that are found *outside* of Part V of the Constitution Act, 1982, the power of modification of the provincial legislature is complete and unhampered. As far as concerns the parts of the provincial Constitution to be found *inside* Part V, they can be modified by ordinary statute of the provincial legislature, except for the functions of the Lieutenant Governor, who represents the Queen at the provincial level in the same way as the Governor General does at the federal level (those functions, as well as the functions of the Governor General and of the Queen can only be modified by the unanimous consent of all provinces and the federal Parliament, which means that the Monarchy could only be abolished in Canada by using this very complex procedure). In a 1987 decision, the Supreme Court of Canada, by interpreting the constitutional amending power of the provincial legislatures, has added another limit: changes to the provincial Constitutions must not affect the working of "the federal principle" or any constitutional arrangement that can be considered a "fundamental term or condition of the union" (*Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2).

Since provincial Constitutions must respect the federal Constitution, their provisions can of course be reviewed by courts and, in the case of inconsistency, declared of no force or effect.

Australia

Each State had its own written Constitution prior to federation. Section 106 of the Commonwealth Constitution provides that the 'Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as it is at the establishment of the Commonwealth…until altered in

accordance with the Constitution of the State'. Section 107 also provides that '[e]very power of the Parliament of a Colony which has become… a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth…' The consequence is that State Constitutions were preserved at the time of federation, but that they remain subject to the Commonwealth Constitution. For example, s. 90 of the Constitution, which prohibits States from imposing an excise, would override the State's power to tax.

Section 5 of the *Commonwealth of Australia Constitution Act* also provides that the Commonwealth Constitution is binding on the courts, judges and people of every State, notwithstanding anything in the laws of any State. Accordingly, the High Court of Australia could find a provision of a State Constitution invalid on the ground that it is inconsistent with a provision of the Commonwealth Constitution.

The question of whether a Commonwealth law could override a provision of a State Constitution is more complicated. Section 109 of the Commonwealth Constitution provides that where there is an inconsistency between a Commonwealth law and a State law, the Commonwealth law prevails to the extent of the inconsistency. However, first there must be a valid Commonwealth law. The Commonwealth law would need to be supported by a head of legislative power in the Commonwealth Constitution. This could be difficult as there is no obvious head of power that would support a law concerning State institutions or powers. Secondly, the High Court has drawn an implication from the federal structure of the Commonwealth Constitution that the Commonwealth Parliament cannot legislate in such a manner as to destroy or curtail the continued existence of a State or its capacity to function as an independent government or restrict or burden a State in the exercise of its constitutional powers. It is known as the *Melbourne Corporation* principle.[3] The consequence of this principle is that the capacity of the Commonwealth Parliament to interfere with State Constitutions is limited.

State Constitutions tend to have both flexible and rigid provisions. Some may be amended by ordinary State legislation and some require special procedures, such as a special parliamentary majority or a referen-

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3 This principle was named after the case in which it was first recognized, Melbourne Corporation v The Commonwealth (1947) 74 CLR 31.

dum before they can be amended. This differs from State to State. The Commonwealth has no capacity to intervene in the process of State constitutional amendment or to suspend State constitutional law. If a State constitutional provision is invalid because it is inconsistent with the Commonwealth Constitution, this is a matter for the courts to determine. The Commonwealth Parliament could, if it had a relevant head of power, enact a law that was inconsistent with a State constitutional amendment to which it objected, but the validity of the Commonwealth law could be the subject of challenge in accordance with the *Melbourne Corporation* principle, discussed above. Again, it would be up to the courts to determine which law prevailed.

For more information on State Constitutions and their amendment, see: Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (2006); and Anne Twomey, *The Constitution of New South Wales* (2004).

Mexico

Each State of the Mexican Federation has a written Constitution. The Federation does not play any role in the adoption or amendment of the state Constitutions. However, regarding the substantive content of the Constitutions, the Federal Constitution ("Constitución General") has some provisions — articles 115 and 116 — which have to be followed by state constitutions. For example, states have to adopt republican, representative, popular government and the municipal organization (art. 115). Another example are among others (art. 116): the mandatory division of powers (Legislative, Executive and Judicial); the 6-year term for local governors, without re-election permitted; the prohibition of re-election in successive terms for local legislators; or, the relative-majority rule and the proportional representation to elect the deputies of the local assemblies.

If a State adopts a constitutional amendment contrary to the Constitutional mandates (articles 115 and 116), its constitutionality can be challenged through a procedure called "constitutional controversies" (art. 105.I). Therefore, an amendment might be declared unconstitutional by the Supreme Court.

Additionally, art. 76.V of the Constitution establishes the Senate power to appoint when the other state constitutional institutions have disappeared, an acting governor who should organize election according to the state

laws. In such case, the appointee will be chosen by the Senate from a list of three candidates nominated by the President. A majority of 2/3 of Senators present is required. If the Senate is not in session, the Congressional Permanent Commission will choose the governor. This is, nevertheless, a default rule (art. 76.V *in fine*); the state constitutions might provide otherwise.

It is important to mention that several state constitutions establish solutions different from the default rule (see for example, art. 83 of the Veracruz Constitution; art. 33-35 Chihuahua Constitution; or articles 109-113 of Campeche Constitution).

Finally, it must be noticed that state constitutions are not subjected to other federal laws apart from the Federal Constitution, which is the supreme law of the system. This supremacy is ensured by the "constitutional controversies" procedure through which state constitutional provisions can be challenged in front of the Supreme Court and declared unconstitutional.

Brazil

Every single State has its written Constitution, which must repeate a great deal of norms established by the Federal Constitution, according to the Supreme Court interpretation. Federal bureaucracy cannot provisionally suspend state constitutional norms, but these state norms cannot relate to federal bodies. If a state constitutional norm regulates federal issues, it is unconstitutional and the federal body may simply not consider its existence and require the Judiciary to suspend its effects.

The Supreme Court (which combines functions of a Constitutional Court) may review the State Constitution in case of conflict with the Federal Constitution.

State Constitutions are not bound by federal rules other than the Federal Constitution.

Argentina

As we previously anticipated, every Provincial State has recognized autonomy that includes institutional, political, financial and administrative aspects. The exercise of its constituent power is prescribed in art. 5 of the Supreme Law of the Nation, which says: "Every Province should dictate a Constitution under the representative republican system, in agreement to

the principles, declarations and guarantees of the National Constitution; and that assures the administration of justice, its municipal regime and primary education. Under these conditions, the Federal Government will guarantee to every province the possession and exercise of its institutions". In consequence, the Provinces sanctioned their Provincial Constitutions, first in an original way, immediately after the sanction of the Federal Constitution, and then exercising derivative constituent power. That is, the Federal Government does not participate when Provinces exercise their constituent power.

Provincial constitutions, until the 1860 federal Constitutional amendment, were reviewed by the National Congress. But since 1860, only courts can control the constitutionality of the provincial constitutional amendment: the National Supreme Court has the final decision on this.

The constitutional review of provincial constitutional amendments, which is a pretty complex issue, has been analyzed in several of our pieces of scholarship ("El caso Fayt y sus implicancias constitucionales", Academia Nacional de Derecho y Ciencias Sociales de Córdoba, 2001; "Derecho Público Provincial", Director Antonio María Hernández, Lexis Nexis, Buenos Aires, 2008, Ch. V; and "Federalismo y Constitucionalismo Provincial", Abeledo Perrot, Buenos Aires, 2009, Ch. XIV) which offer a more thorough analysis than the one that follows.

The Supreme Court has reviewed several constitutional amendments to determine whether they have encroached upon federal powers, violated constitutional rights, or affected the republican system established by our Constitution.

The Supreme Court plays a key role regarding federalism, especially in what distribution of powers is concerned. Hence, it is important to mention that its decisions have not always been fully respectful with provincial autonomy.

Two relevant cases will be analyzed to illustrate this point.

"Iribarren Casiano Rafael v. Santa Fe", which was the precedent for "Fyat", was decide on June 22, 1999 with the favorable vote of Justices Nazareno, Moliné O·Connor, Boggiano, Petracchi, Bossert and Vásquez (the three last ones with concurrent opinions) and the dissenting opinion of Justice Belluscio. This decision declared the unconstitutionality of article 88 of the Constitution of Province of Santa Fe, which declared that when judges are 65 and fulfil the general conditions for retirement their life tenure is finished.

The reasons were mainly set out in part 8: "the effects of article 88 of the Constitution of the Province of Santa Fe go beyond the provincial public law and encroach upon the National Constitution. The National Constitution recognizes the power of provinces to establish their own institutions, to operate them, and to elect their authorities, but it also establishes the duty of provinces to ensure the administration of justice, established its supremacy over local constitutions and laws, and gives the Supreme Court the role of guardian of the Constitution. And it is clear that the article at stake puts judges of a certain age in a precarious situation, without any temporal limit, letting their position at the will of the other provincial powers".

Part 9 added the following arguments: "When a situation such as the one encountered here, where constitutional provisions which are essential to our Republican form of government and which are basic to consolidate justice — one of the goals of the Constitution —, the Supreme Court decision does not encroach upon the provincial spheres, but contributes to improve their performance, ensuring that they are observing the principles all provinces have decided to abide by when establishing the National Constitution (Decisions: 310:804)".

Likewise, "obiter dictum" in Justice Vazquez opinion, a detailed analysis of article 99.4 of the National Constitution was offered. This reasoning was the basis for Fyat decision. It was a signal of the opposition of certain court members to the 75 years provision included in the 1994 constitutional reform. They sent out this message given the opportunity offer by this provincial constitution amended in the distant 1962.

Given the encroachment this decision entails upon provincial autonomy, we agree with the dissent by Justice Belluscio who rejected the unconstitutionality action filed by judge Iribarren offering the following arguments:

"6. Article 5 of the National Constitution obliges the provinces to enact their constitutions providing for a republican, representative system, according to the principles and guarantees established and ensuring the administration of justice. Obviously this does not imply that provincial states have to copy the national institutional design, they are not even the model they have to follow beyond what is essential. And regarding what is here at stake, what is essential is to ensure a republican form of government which entails the existence of a judicial power separated of the political powers

and a guarantee of its operation. Expand the constitutional supremacy will cancel federalism — which has the same constitutional Rank as the republican form of government (art. 1) and which allows provinces to establish their own institutions (arts. 122 and 123) and regulate them. Hence, and within the limits of article 5, each province has full power to organize its judicial power. The issue in the present case is whether the age limit — fixed by the challenged constitution at the same age as ordinary retirement — goes beyond these limits".

"7. This judgment cannot be base on the theoretical assessment about the theoretical advisability or not of the tenure, since this extreme is within the sphere of decision of the provincial constituent and thus it is not reviewable, but in the limits established by the National Constitution. In other words, it must be decided whether or not tenure is mandated or not by the National Constitution".

In the 8th part the majority suggest that it is necessary to compare with the federal system established in article 99.4. In part 9 it stated that: "not being assigned to this Court the possibility to make a policy judgment about the rules, the Court can just decide its compatibility or not with the National Constitution. Article 88 of the Santa Fe Constitution — so far as it limits judicial tenure at the general retirement age — does not clash with the National Constitution".

These arguments, in contrast to the majority opinion, express respect for our federal system and, consistently, for the autonomy of provinces to define their institutions. This principle is clear. It is enough to observe what happens in the US federation, which has the model for our organization. There, the rules regarding the appointment and terms of judges are different at the federal and at the state level. While at the federal level, judges are nominated by the President, appointed by the Senate and hold their offices during good behaviour; while in the majority of states, judges are elected and their term is thus limited. These provisions have never been declared unconstitutional. Apart from being a characteristic of the federal system, it does not affect to the republican division of powers.

Therefore, "Iribarren" case is, in our opinion, one of the gross errors of the Court; this decision damaged our already weak federalism system.

In the decision "Banco del Suquía S.A. v. Juan Carlos Tomassini", (March 19, 2002), the Supreme Court, formed by Justices Nazareno, Moliné O·Connnor, Fayt, Belluscio, Petracchi, Boggiano, López, Vásquez and

Bossert, decided the unconstitutionality of article 58 of the Constitution of the Province of Córdoba, which established that a real property that constitutes the only home cannot be foreclosed, because this purportedly encroach upon National Congress' powers in article 75.12 of the Constitution, referred to creditors rights and the common wealth of the creditors.

This question has been widely discussed in non federal courts, where even the Superior Court had decided the other way around because in the decision "Banco de Córdoba c. Grenni" of 1996, Justice Dr. Luis Moisset de Espanés, writing for the majority, with an argumentation similar to the referred by the Court, declared the rule unconstitutional while in the case "Banco del Suquía S.A. v. Juan Carlos Tomassini" of 1999, the highest court in the province of Cordoba, whose composition was changed since Dr. Rubio joined the court, declared that the rule did not violate the Constitution.

This arguments of the Superior Court, later rejected by the Court, were the following: a) Article 14 bis and International Human Rights Treaties such as the Interamerican Declaration of Civil and Political Rights, the International Covenant of Civil and Political Rights and the Children Rights convention establish the right to adequate housing and, therefore, the guarantee offered by the provincial constitution is just one that comes earlier to the guarantee established in the National Constitution; b) National Law 14.394 recognized the family property as an institution of private law, which is enough to fulfil what has been mentioned in a); and c) the protection of the only home is part of the social security not part of private law, hence the power over it is given by the second part of article 125 of the National Constitution (41).

In our opinion, provincial autonomy has not been respected by the highest Federal Court. As we have said, when exercising their constituent powers, the federal entities go beyond the federal constituent's recognition of rights and liberties. Several examples can be offered of such a case. In this specific case, to ensure the right to housing, a new right has been recognized, the right not to have your home foreclosed, which is granted to all the inhabitants, no matter whether they have or not family. Hence, article 58 is a valid exercise of the autonomy established by article 5 of the National Constitution. We are confident that our Supreme Court will reverse its interpretation.

Apart from this judicial control, theoretically if a Province does not respect the constitutional mandates of the Argentinean Federation, the Federal Government can decide to intervene in a political, extraordinary way.

This possibility arises from article 5 "in fine" of the National Constitution and it is developed in article 6, which states: The federal government intervenes in the provincial jurisdictions to guarantee the republican form of government, repel the external invasions, and after the request of its constituted authorities support or reinstaure them if they have been overthrown due to sedition or the invasion of another province". Provinces, as we have already described, have to respect the federal supremacy established in article 31 of the National Constitution and article 5, in particular.

India

There are no separate State constitutions. The Constitution of India 1950 is the Constitution for the Union of India as well as for the States. Federation and States can get the Constitution interpreted through the High Courts and the Supreme Court. All amendments to the Constitution are initiated by the Federation and subject to the requirement of ratification of half of the States in respect of amendments affecting federal relations. All other amendments conclude at the Federal level. The President of India can suspend the constitutional provisions during emergencies arising from war, external aggression or armed rebellion. The President can also suspend the Constitutional provisions in respect of any State which fails to run according to the Constitution. The President can also suspend some of the Constitutional provisions during financial emergencies. As there are no separate State constitutions, the question of conflict between the State and Federal constitutions does not arise. Similarly there is no question of State Constitutions being bound by any federal rules other than the Federal Constitution.

United Kingdom

There are written state constitutions only to the extent to that Westminster Acts constituting Northern Ireland, Scotland, and Wales, while giving them great policy autonomy, tightly regulate their structure and process (such as by setting the number of members of their assemblies/legislatures). Thus Westminster statutes fulfil the roles of state constitutions. Again, governments in Northern Ireland, Scotland, and Wales exist only as creations of Westminster and could theoretically be eliminated again by a majority vote in Westminster. The smaller areas — Man and the Channel Islands — are internally governed by a similar mixture of conventions and

law (which they set) and deal with the Westminster government on most external and policy matters.

Judicially, there have been small changes. The new UK Supreme Court has limited oversight of some Scottish court decisions and devolved governments, like the UK, are bound by European law and courts.

Germany

There are written Constitutions in all states.

The Federation is not involved in the process of the elaboration, ratification and amendment of the state constitutions. The Federation has to guarantee, however, that the constitutional order in the States corresponds to the principles of the republican and democratic state under the rule of law (Rechtsstaat).

Austria

Each Land has enacted its own (written) Land Constitution. The Federal Constitution empowers the Länder to do so as far as the Land Constitutions do not violate federal constitutional law. Although the basic organizational provisions applying to Länder are embodied in the B-VG, Land Constitutions are not simply "implementation laws", but are entitled to regulate all matters as far as this is in accordance with the Federal Constitution.

The Land constitutional amendment procedure is provided by the B-VG: In order to amend Land constitutional law, at least half of the members of the Land Parliament have to be present, and at least two thirds of the present members have to consent to the amending bill. The bill is published in the Land gazette by the Land Governor. Before being published, all Land bills must be presented to the Federal Government immediately after having passed the Land Parliament.

The Federal Government may object to ordinary or constitutional Land bills (suspensive veto) for various reasons. Which kind of argument may be used for the veto depends on whether the Federal Government had been consulted informally in the drafting phase of the Land bill (in this case, the veto may only state that the Land bill would violate the distribution of competences). In this case, the bill must not be published unless the Land Parliament repeats its resolution to pass the bill with a quorum of half of its members (which however, is the minimum quorum for any Land constitu-

tional law). The Federal Government will only have an absolute veto if the proposed Land constitutional bill stipulates implementation by federal administrative authorities.

The Constitutional Court may strike down Land constitutional law if it is in breach of federal constitutional law, but not if it is in breach of ordinary federal legislation. It is not possible for a federal body to provisionally suspend Land constitutional law — the only legal source that is superior to Land constitutional law is the Federal Constitution.

Swiss Confederation

Each state has its own Constitution. The federal requirements are: a) the state constitution must be approved by the inhabitants of the State by direct vote, and b) should be able to be reformed if the majority of the electorate request so. The Federal Assembly must "guarantee" the State Constitutions, that is, approve them before they take effect. Then the state can do partial revisions without any additional requirement; to decide on the procedure for review is part of the State's autonomy. The only limit to the content of the State Constitution is the condition that it should not conflict with federal law. But the fact that state constitutions are approved by the Federal Assembly makes them an exception to the supremacy of federal law. The Federal Court considers that it has no standing to challenge what has been approved by the Federal Parliament, and thus the original text of a State constitution, as approved by the Federal Assembly, has the same status as a formal federal ordinary law. If a federal law and an original provision of the state Constitution conflict, the principle *lex posterior derogat legi priori* applies. But the provisions which are then introduced into the state Constitution by partial revisions without being approved by the Federal Assembly are subjected to the principle of supremacy of federal law over state law. According to this principle, state regulations that contradict the Constitution or federal statutory law (i.e. a law decided by the Parliament) will be automatically not applied.

Belgium

The communities and regions do not have a "constitution".

These exercising of what has been imprecisely called "constitutive autonomy" can modify minor questions of organization and operation con-

cerning them established by the special act of institutional reforms. They do so through a special decree that has to be passed by a majority of 2/3. This decree might be constitutionally reviewed as any other rule enacted by a federal or federated authority.

Italy

The Regions have their Statutes. Therefore, the term "constitution" is avoided. Before the amendment of 1999, the Statute of the "ordinary" Regions was determined by an absolute majority of the Regional Council and ratified with the ordinary law of the State. After the amendment of 1999, the Statute is ratified directly by the Regional Council with resolutions adopted after two months. The State no longer has any power of ratification. However, when elements are seen as being in contrast with the Constitution, the State can contest the Statute before the Constitutional Court. This has happened more than once since 1999 and the Constitutional Court has declared the unconstitutionality of several provisions of Statutes.

For the "special" Regions, the Statute is ratified in a constitutional law.

In these issues which are referred to the Statute are only subject to the Constitution.

Spain

Rigorously, there are no genuine state Constitutions, enacted by an original state power. Nevertheless, as I mentioned before, the Statutes of Autonomy, apart from being the basic fundamental norm of the states, perform a constitutional function, by complementing the federal Constitution. Given the lack of provisions in the Federal Constitution, state constitutions, which constitute the states, assign the powers to the state — delimiting indirectly the powers of the Federation — and establish the bases for the state organization and its funding.

With regard to the amendment of the Statutes of Autonomy or state "constitutions", the federal Constitution provides that the same Statutes will regulate it. The only requirement is that the final amendment must be enacted as an "organic law" by the federal Parliament, and, in certain cases, by referendum. From the perspective of the degree of state par-

ticipation in the process of amendment of their Statutes we can distinguish two models, on the basis of the model of elaboration. When the States enacted their Statutes following the ordinary track, the state Government and Parliament may propose an amendment, and, according to some Statutes, also the federal Government and Parliament; the amendment always needs to be approved by the state Parliament (by qualified majorities) and then it shall be debated and enacted by the Federal Parliament (the absolute majority of Congress the lower House is required). When the States passed their Statues following the special track, state and federal Governments and Parliaments may propose an amendment. Concerning the process, there are two kinds of amendments: those that affect the relations with the Federation and those that only entail a mere internal state reorganization and do not affect the Federation. In the first case, the amendment shall be passed by the state Parliament by 2/3 of its members, enacted as organic law by the federal Parliament and approved by popular referendum. In the second case, the amendment needs to be passed by both Parliaments, but the referendum is not required. Some of the charters of autonomy, initially approved by the ordinary procedure, have adopted in the recent amendments beginning in 2006 the model of the states with a special procedure

In practice, even if in Spain the "dispositive" principle is emphasized, in practice the prominence of the states in the elaboration and amendment of their constitutions depends on a wide range of factors and particularly on the role of the two main federal political parties in a given moment and in that state. The role of the states was relevant in Catalonia, Basque Country and Galicia. The rest of the charters of autonomy were approved after the Autonomic Pact signed by the two main political parties in July 1981. The role of the states was not relevant for the key constitutional amendments at the beginning of the 90s since these were the result of the agreement between the two federal powers — which somehow responded to the pressures of some states. However, the states regained a key role in the recent amendments (2006-2009).

The state constitutions are hierarchically subordinated to the federal constitutions and, thus, their provisions can be challenged before the Constitutional Court and strike down by it. At the same time, though, these charters of autonomy cannot be modifies by any federal laws, not even by those federal laws — usually organic ones — to which the constitution assigns the regulation of certain matters.

4 · Does the Federal Constitution have a rights section? Has this rights section strengthen the powers of the Federation? In other words, has the declaration of rights entailed centralization of powers? If so, how?

United States of America

The main rights sections of the U.S. Constitution are contained in the prohibitions on Congress (bill of attainder, *expost facto* law, double jeopardy in a crime, two witnesses to the same overt act for treason), plus the Bill of Rights (Amendments 1-10) and the post Civil War 14th Amendment (equal protection), among others. These provisions have definitely strengthened federal powers. Most notable is that the 14th Amendment tied all other rights provisions to the states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Matters of equal protection, due process and individuals' entitlements have been among the most important means of strengthening federal power and the domain of the federal judiciary.

Canada

Before the adoption of the Constitution Act, 1982, containing the *Canadian Charter of Rights and Freedoms*, very few rights could be found in the Constitution Act, 1867. This was so because the drafters of the 1867 Constitution aspired to adopt as closely as possible the principles of British constitutionalism, in particular the sovereignty of Parliament, which of course was incompatible with the entrenchment of a Bill of Rights. However, to assuage the fears of the English-speaking and Protestant minority in Quebec and of the French-speaking and Catholic minorities in the other provinces, a very limited number of linguistic and religious minority rights were guaranteed in the Constitution in 1867.

In 1981, when the federal government initiated the process to "patriate" the Constitution and to adopt a Charter of Rights and Freedoms, many of the provincial governments opposed this action for different reasons, among which was the concern that a constitutional Charter would come to be an instrument of centralization and standardization, and thus detrimen-

tal to provincial autonomy. A majority of provinces withheld their consent to "patriation" until the federal government agreed to add to the Charter a provision (section 33) that allows the provincial legislatures (and the federal Parliament) to legislate « notwithstanding » the rights guaranteed in sections 2 and 7-15 of the Charter, which means to make them inapplicable to legislation in which an explicit notwithstanding clause has been inserted (and which will be adopted in accordance with the usual legislative procedure, requiring not more than a simple majority of members of Parliament present for the vote). A sure sign that the federal government conceived the Charter as an instrument of "Nation-building" lies in the fact that, even forced to accept the notwithstanding clause, Pierre E. Trudeau excepted from its reach three categories of rights that were seen as the most important in furthering the goal of Nation-building (strengthening in people a sentiment of belonging to Canada as a whole, as opposed to the sentiment of belonging to a particular province), namely democratic rights, mobility rights inside Canada (the right of every citizen of Canada to move, take up residence and pursue the gaining of a livelihood in any province), and, finally (and perhaps most importantly), linguistic rights of francophone minorities outside Quebec and of the Anglophone minority in Quebec.

The Charter's centralizing effect is a matter of debate, mostly between scholars in Quebec and in English Canada. The latter are much less troubled than their counterparts in Quebec about the Charter's potential to diminish provincial autonomy or diversity. In Quebec scholarship, however, the Charter is seen as inducing at least three centralizing effects on federalism. First, application of the Charter by courts, with the Supreme Court of Canada as the last resort, results in a transfer of decision-making power over social, economic and political issues from representative provincial bodies to a federal judicial body. This implies a deficit in terms of federalism, the Supreme Court being usually more sensitive to the priorities and concerns of the federal government than to those of the provinces. Second, applying the Charter helps to create and consolidate a shared national identity, a feeling of common citizenship. Such nation-building is almost necessarily at the expense of competing regional loyalties. And finally, economic and social rights (i.e., primarily health care, social services and education rights) are used to justify federal intervention in areas under provincial jurisdiction. Federal intervention is presented as necessary to redistribute resources among regions with different levels of wealth and to ensure a degree of uniformity in the way provinces deliver social services.

Although economic and social rights are not formally guaranteed in the Charter, the need to implement them effectively and consistently is an argument used in political discourse to justify the redistributive, harmonizing role of federal authorities. In other words, individual rights discourse has been transposed into the domain of collective social rights and redistribution to provide a basis for federal intervention.

Quebec scholars have also expressed the concern that, in addition to its centralizing consequences, the Charter will also homogenize legislation in areas of provincial jurisdiction that had previously allowed for diversity. One of the objectives of federalism is to promote legal, social and cultural diversity. In their areas of jurisdiction, provinces should be allowed to create different solutions to societal problems by taking into account the cultural values specific to each regional political community. However, protecting rights through a national constitutional instrument like the Charter has standardizing effects that are obstacles to such diversity. The courts, in particular the Supreme Court, impose uniform norms and standards on the provinces, which limit their choices when exercising their constitutional jurisdictions. Every time a legislation of a province is declared unconstitutional, the same automatically applies to the other provinces and territories. This amounts to *negative* standardization. Standardization can also be more invasive. It is well known that Supreme and Constitutional Courts often hand down «constructive» decisions in which they set out in great detail how the legislature should amend legislation to make it consistent with the Constitution. Sometimes courts go so far as to write new legislation themselves by judicially rephrasing the impugned legislative provision (adding to it or deleting part of it). In such cases, the courts impose *positive* uniform standards, sometimes down to minute details, on all the federated states.

Australia

The Commonwealth Constitution does not have a rights section. It contains a small number of disparate rights, such as s 116 on freedom of religion and s 80 on trial by jury. There is also a right in s 51(xxxi) to just terms compensation if one's property is compulsorily acquired by the Commonwealth and a right of residents of one State not to be discriminated against in another State. These rights have had little impact and have not been interpreted in a manner that centralizes power.

There is an ongoing debate in Australia about whether Australia should have a national Bill of Rights. Both major political parties, however, have ruled out the introduction of a constitutional Bill of Rights. If such a Bill of Rights is to be enacted, it will be legislative in nature, rather than constitutional.

Mexico

The Federal Constitution has a human rights declaration. This declaration has contributed to the strengthening the Federation; in particular, has strengthen the federal judicial power in front of the state judicial powers. This is due to a peculiar interpretation of article 14 of the 1857 Constitution which understood that the Federal Constitution recognized a right to the "exact application of the laws" in criminal cases judicial decisions. The procedure to protect this right was, as it is today, "amparo casación" or "amparo judicial" which is tried before the federal courts (in particular, "Tribunales Colegiados de Circuito" — Collegial Circuit Courts — and the Supreme Court). The right to petition for "amparo" was extended to all the cases (non-criminal) and the 1917 Constitution (still in force) recognized expressly the right to petition for amparo. This procedure allows the federal courts to review the final decisions of state courts (and of other federal courts such as the agrarian courts, the administrative courts, and the settlement and arbitration labor courts "juntas de conciliación y arbitraje en materia laboral").

Brazil

There is a specific section regarding fundamental rights in the Federal Constitution, including social, political and economic rights. According to the Supreme Court interpretation, all these rights must be repeated in the State Constitutions. This rule of repetition is a form of centralization.

Argentina

As we have explained above, in Argentinean Constitutional Law — both federal and provincial — there are three phases: 1) liberal or classic constitutionalism, which established the liberal state and recognized the first generation of human rights (politic and civil); 2) social constitutional-

ism, which established a welfare state and granted second generation rights (social); and 3) constitutionalism devoted to the internalization of human rights, which granted constitutional status to certain international human rights treaties and recognizes human rights of the third generation.[4]

In the federal level, the 1st stage started in 1853 and 1860, the 2nd was triggered by the 1949 and 1957 amendments, and the 3rd with the 1994 amendment. In general, it can be observed that Provincial Constitutions adapted to these changes.

However, it is important to highlight that in the changes towards social constitutionalism, some Provincial Constitutions adopted this perspective earlier than the National Constitution. For example, the Constitutions of the provinces of Mendoza (1915), of San Juan (1927), of Entre Ríos (1933) and of Buenos Aires (1934) recognized social rights to workers and the right to vote to women, which were incorporated at the federal level in 1949 and 1957.

The same happened in the 3rd stage since the Provincial Constitutions of Neuquén (1957), San Juan (1986) and Córdoba (1987) included among their complementary provisions some international human rights treaties, and granted some of the 3rd generation human rights — for example, Córdoba's Constitution recognized environmental rights in 1987 —, while at the Federal level this did not happen until the 1994 amendment.

Consequently, and having integrated Human Rights International Law[5] in our constitutional framework, human rights have two sources: the national and the international one. At the same time, the first is divided in several levels: federal, provincial, Autonomous City of Buenos Aires and municipal, since all exercise constituent power (with different degrees) and have enacted their constitutions recognizing rights.[6]

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4 See our work "Argentina Constitutional Law", International Encyclopedia of Laws, Suppl. 81, 2009, Kluwer Law International.

5 In particular, in article 75.22 of the National Constitution, included by the 1994 amendment — in which I was Vice-President of the Drafting Committee-, which recognizes constitutional Rank to 11 international human right treaties: American Declaration on Human Rights and Duties; Universal Declaration of Human Rights; American Convention of Human Rights; International Covenant on Economic, Social, and Cultural Rights; International Covenant on Civil and Political Rights and its Protocol; Convention to Prevent ; la Convention on the Prevention and Punishment of the Crime of Genocide; Convention on the Elimination of All Forms of discrimination against Women; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; and Convention on the Rights of the Child.

6 In the municipal level, the scope of human rights is more limited; it covers particularly political and vicinity since a broader approach will not make sense, since other rights are already recog-

When analyzing the rights listed in the Constitution, Germán J. Bidart Campos[7] points out the following arts.: 14, 20, 14 bis, 15, 16, 9 a 12, 26, 17, 7, 8, 19, 28, 33, 36, 37, 38, 39, 40, 41, 42, 75 incs. 17, 19, 22, 23 and 24, 43, 18 and 125. After emphasizing the density of rights, liberties, and principles of the National Constitution, he suggests that there is feedback between the dogmatic and the organic[8] parts of the Constitution, apart from the Preamble and the Transitory Provisions. Likewise, he argues that there are principles with constitutional rank such as the "pro homine" (in favor of the individual, the most favorable rule should be chosen when there are both national and international sourced); the "pro actione" (in favor of the action: judges should indicate the best procedural way to file action for redress), and the "favor debilis" (the conditions of the less favored part should be taken into account).

Provinces and the Autonomous City of Buenos Aires, in exercise of their constituent powers, when approving their own constitutions, include in its dogmatic parts declarations, rights and guarantees. In the majority of them, given that article 5 of the National Constitution mandates the applicability of rights and guarantees in the provinces, repeat the provisions of the Federal Constitution, which is not necessary.

In this vein, the complete list of rights included in the National Constitution and the fact that Congress and not the Provincial Assemblies enacts

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nized by the Constitutions. We consider the Organic Municipal Charters as local constitutions since constituent powers emerges from them. See Antonio M. Hernández, "Derecho Municipal-Parte General", Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de Méjico, 2003.

7 Cfr. Germán J. Bidart Campos, obr. Cit, pp. 65-66. For a deeper analysis of rights system in our Constitution, see the above-mentioned book, Ch. VI "El sistema de derechos", Ch. VII "La libertad y la igualdad jurídicas", Ch.VIII "La Libertad religiosa", Ch. IX "La Libertad de expresión", Ch. X "La educación y la cultura", Ch. XI "El derecho de asociarse", Ch. XI "El derecho de asociarse", Ch. XII "La libertad de contratar", Ch. XIII "Un plexo de derechos enumerados e implícitos" (right of petition, referidos a los de reunión, de petición, de circular y de casarse), Ch. XIV "Los nuevos derechos de los artículos 41 y 42" (al medio ambiente sano y de los usuarios y consumidores), Ch. XV "Los derechos implícitos", Ch. XVI "El derecho de propiedad", Ch. XVII "La expropiación", Ch. XVIII "La tributación", Ch. XIX "Los derechos sociales y el trabajo", Cap. XX "Los derechos gremiales", Ch. XXI "La seguridad social", Cap. XXII "Los derechos políticos", Ch. XXIII "Los partidos políticos", Ch. XXIV "Las garantías", Ch. XXV "Las garantías penales", Ch. XXVI "Las limitaciones en el sistema de derechos", Ch. XXVII "El amparo", Ch. XXVIII "El habeas data", Ch. XXIX "El habeas corpus" y Ch. XXX "Los tratados internacionales".

8 Given that the first 35 articles of the Constitution were unamendable, 1994 reform introduced new rights in a new chapter: in its First Part (dogmatic) — articles 36-43 — and in some provisions of the Second one (organizational), in particular, in article 75 which deals with congressional functions.

the codes have contributed to the strengthen of the federal government. In addition, the Supreme Court, as the superior interpreter of the Constitution, has helped the consolidation of this centralist effect.

India

The Federal Constitution has a section on fundamental rights — Part 3 of the Constitution. This section does not give any special powers to the Federation except of making laws for the enforcement of a few of them. But this has to be done with reference to the legislative powers of the Federation. It does not in any way lead to the centralization of powers, though it is also true that for the enforcement of some of these rights the Federation has made laws in certain areas which normally would have been the concern of the States.

United Kingdom

The UK does not have a formal written constitution; declarations of rights are either in legislation or are "conventions" whose strength can be difficult to identify precisely. The devolution Acts oblige Northern Ireland, Scotland and Wales to comply with European human rights law and reserve a number of areas relevant to rights to Westminster.

There has been discussion of a "UK Bill of Rights". The idea emerged from the Conservative Party, which is suspicious of European human rights law. The debate about the content and applicability of any UK Bill of Rights has shown us that the big UK political parties have a low level of understanding of devolution. They have not done good job thinking through the complex legal challenges of creating UK-wide rights that would not violate or rewrite devolution law.

Germany

The Federal Constitution — the Grundgesetz — has a rights section: the "Grundrechte" (civil rights), Art. 1-Art. 19.

Those have highly strengthened the powers of the Federation, due to the jurisdiction of the Bundesverfassungsgericht as the Constitutional Court of the Federation: the Bundesverfassungsgericht may review any state law, any decision of a state court and any state administrative act on

its conformity with the Grundgesetz and any citizen may appeal to the Bundesverfassungsgericht to defend his rights against the state authorities; the Bundesverfassungsgericht may declare void any state law or any state decision because of violation of federal civil rights.

Austria

The B-VG itself has no rights section, although some fundamental rights are spread over the federal constitutional text. Apart from the B-VG, however, rights have been entrenched in other federal constitutional documents: A catalogue of rights is listed in a law of 1867 (enacted in the monarchy, but received into the republican constitutional system), whilst the ECHR and additional protocols were transformed into domestic constitutional law. Since part of the rights entrenchments precede the Austrian federal system, it is not possible to say that they entailed centralization of powers. Besides, the Constitutional Court stressed that the principle of equality did not entail the requirement for Land legislation to enact equal rules.

Swiss Confederation

The Federal Constitution contains a bill of rights. Historically, once introduced by the 1848 and then 1874 Constitutions, these rights have had a strong effect on the harmonization of the basic principles of the state, which can be considered as a centralization of the system. Currently, these rights are accepted by the population in all areas of the Federation and are not questioned in any particular State. The centralization is achieved through the Federal Court constitutional control. Through various legal means, the Court may declare inapplicable state laws that contradict the federal Constitution, particularly when these conflict with the rights of the citizen.

The landmark case is the introduction of voting rights for women in the State of Appenzell Innerrhoden. Only in 1971, voters agreed to the introduction of women voting rights at the federal level. But this still did not require states to give women the right to vote in cantonal elections (statewide). After the Federal Court endorsed the general equality of women and men in other areas (for example, wages for public employees), an article which explicitly gives the federal equal rights of women and men

was introduced in of the Constitution in 1981 through popular initiative and vote at the federal level. But until 1990, the canton (state) Appenzell Innerrhoden had not introduced the right to vote for women. It was from a complaint filed by a woman in this State that the federal court[9] forced the state in 1990 to introduce voting rights for women.

Belgium

Title II of the federal Constitution is "Of Belgians and their Rights". Several provisions mandate a federal law, a decree or a regulation to guarantee the rights established there. These norms will play according to the general distribution of powers. This is not a centralization of the rights regime.

Italy

Yes, the Italian Constitution contains a bill of rights of citizens. The assertion of these rights, by itself, does not imply a centralization of authority since all levels of government, including regional, are obliged to respect the fundamental rights of citizens. In Italy, the constitutional revision of 2001 has recognized the central government the power to determine the "essential levels of benefits relating to civil and social rights which must be guaranteed throughout the national territory (article 117.2.m of Constitution)".

Spain

The Federal Constitution has a wide list of citizen rights and of principles guiding the economic and social policy. In theory, both are applied to all powers — federal, state, and local —: they limit them, they orient them, and they impose duties to them; but these are not assigning power provisions for any of the levels of government. However, the Federation has a key role in ensuring the uniformity in the protection and implementation of rights' across the country. This role is grounded in two provisions: art. 82 of the Constitution which mandates that an organic law (a kind of law that can only be dictated by the Federation) regulates the "development of fun-

9 BGE/ATF 116 Ia 359. Available at www.bger.ch

damental rights and public liberties" and art. 149.1.1 that assigns to the Federation the power to ensure the equality in the exercise of constitutional rights. The Federation has interpreted these provisions very broadly.

5 · Do State Constitutions have declarations of rights different from the federal one? If so, how do federal and state rights interplay?

United States of America

All fifty state constitutions guarantee a range of fundamental rights. They are generally contained in the initial article after the preamble. They date from the earliest state constitutions, which contained many provisions that have faded out of existence. Contemporary rights provisions more closely resemble the federal Bill of Rights. However, many distinctions remain in as much as state provisions tend to be more specific, for example, banning religious tests for jury duty, prohibiting expenditures for sectarian purposes, having certain types of punishments, and the rights of women and handicapped. Many provisions have no federal equivalent: legal access in the case of injuries, right to certain types of privacy, equal rights for women, private violations of rights, and free speech on private property that is open to the public. The 14th Amendment ties state rights to the federal constitution. As long as state's rights do not interfere with federal rights, they are enforceable.

Canada

Provinces do have their own statutes protecting rights and freedoms. While most provinces have only adopted antidiscrimination codes, others have full-fledged Charters, like Quebec's *Charter of Human Rights and Freedoms*, guaranteeing not only all or most of the same rights and liberties than those recognized in the Canadian Charter, but also additional rights not included in the Canadian Charter. Even when the rights guaranteed in the Canadian and in the provincial charters are the same, the advantage of the latter over the former is that they apply to private as well as to (provincial) state action, while the Canadian Charter only applies to (federal, provincial and municipal) state action. Sometimes a provincial ordi-

nary statute can be challenged at the same time as inconsistent with the Canadian as well as with the provincial Charter, with some of the members of the court deciding the case by applying one Charter, and others members of the same court having recourse to the other Charter.

Australia

State Constitutions do not contain declarations of rights. Again, there is the occasional inclusion of a right, such as the right to freedom of conscience and freedom of religion in the Tasmanian *Constitution Act* 1934 (Tas), but this is not common. Most State rights are set out in legislation, such as anti-discrimination laws. Victoria has enacted a *Charter of Human Rights and Responsibilities Act* 2006 (Vic), which contains a bill of rights, but it does not have constitutional status. The Australian Capital Territory also has a *Human Rights Act* 2004 (ACT) which was the first bill of rights to be enacted in Australia. It too has a legislative status, rather than constitutional status.

There has been some interplay between State anti-discrimination laws and Commonwealth anti-discrimination laws. In a case concerning racial discrimination, the High Court held that the Commonwealth's *Racial Discrimination Act* 1975 (Cth) was intended to 'cover the field' of racial discrimination, rendering State racial discrimination laws invalid. The Commonwealth Parliament later amended its law to make it clear that where there was no direct inconsistency with a State anti-discrimination law, the State law should continue to operate. This was because in many cases the State laws provided higher levels of protection or better remedies than the Commonwealth law and there was no intention or desire to exclude their operation.

Mexico

Since the amendment of the Veracruz Constitution (2000), a new trend has started in Mexican state constitutionalism: broad bills of rights are included in the state Constitutions accompanied with state mechanisms and procedures to protect these rights. The Veracruz's example has been followed by other state entities, such as Querétaro (2000); Coahuila (2001); Guanajuato (2001); Tlaxcala (2001); Chiapas (2002); Quintana Roo (2003); Nuevo León (2004) y Estado de México (2004).

There are several models. The first group of Constitutions refers to the Federal Constitution and also incorporates its own catalogue. The following thirteen states have followed this approach: Aguascalientes, Baja California, Baja California Sur, Campeche, Coahuila, Colima, Hidalgo, Michoacán, Morelos, Quintana Roo, Querétaro, San Luis Potosí, and Zacatecas.

The second group establishes their own catalogue. The following eight states have done so: Estado de México, Guanajuato, Nayarit, Nuevo León, Oaxaca, Puebla, Tabasco, and Tamaulipas. A third group, apart from its own catalogue, refers to both the Federal Constitution and international treaties. The latter approach is followed by 6 states: Jalisco, Sinaloa, Tlaxcala, Veracruz, and Yucatán.

Finally, four states — among these: Chiapas, Guerrero, Sonora constitutions refer to the federal constitution without establishing their own catalogue.

The coordination between the federal and state judicial powers is one of the most discussed nowadays. The criteria to guide their interaction are not clear. Some scholars have offered solutions to this new conflict. Prof. Carlos Arenas has proposed the following rules to frame these issues:

a. The protection of the fundamental rights has to resort originally to the national constitutional judicial power, so far as the rights are recognized in the federal Constitution.

b. However, the state judiciary, concurrently, should protect these rights if they are recognized both in the federal Constitution and in the state one, applying to solve these issues the precedents from the Federal Judicial Power.

c. States may recognize new fundamental rights or expand the ones in the federal constitution within their own jurisdiction. Its protection will be entrusted to the state judicial power.

d. According to the previous rules, state judicial decisions when acting as a concurring judicial power (see b) could be reviewed by the Supreme Court if challenged through the constitutional controversy procedure or by the Circuit Collegial Courts when these state judicial decisions do not decide cases strictly within their sole jurisdiction, that is, those cases regarding the new or expanded federal rights.

Finally, Superior State Courts, acting as constitutional review bodies, can be challenged before the Circuit Collegial Courts, whose decisions

would be final. This has been established by the Supreme Court. It has also recognized that the unconstitutionality of the general state norms have to be considered a legal not a constitutional question from the Federal Constitution perspective.

Brazil

State Constitutions should never reduce or restrict the declaration of rights. Arguably, State Constitutions may increase the list of fundamental rights (especially negative rights), but only if it does not conflict with the federal constitutional rights. This possibility has never been an issue in Brazil, but there is room for debate regarding the possibility of increasing the list of social and economic rights.

Argentina

Provinces have to respect the declarations, rights, and guarantees, according to article 5 of the Constitution, since this is one of the requirements to enact their own Constitutions. But taking these as the minimum, they can recognize other rights and liberties.

Provincial constitutions have richly developed this extreme.

This is another of the characteristics of our federalism, which in this area has followed the principles of the US model. This also entails a judicial federalism: there are a Provincial and Autonomous City of Buenos Aires' Judicial Powers and a Federal Judicial Power; all enforcing the supremacy of their Constitutions.[10]

The Federal Judiciary has jurisdiction over federal questions and Provincial Judicial Powers over common and ordinary law. The general codes (civil, criminal, labor, etc.) are applied by all of them according to subject matter or personal jurisdiction principles. Therefore, ordinary cases should be decided by provincial courts and only when a federal question arises appeal to the National Supreme Court would be available through the action called "Recurso Extraordinario Federal". It is necessary to have

10 See Hernández Antonio María, "Federalismo y constitucionalismo provincial", obr. Cit., Ch. XI about "El federalismo judicial y la protección de los derechos fundamentales en la República Argentina" and "Argentina, Subnational Constitutionalism", International Encyclopedia of Laws, Suppl. 66, Kluwer Law International, 2005.

reached a final decision from the Provincial (or Autonomous City of Buenos Aires) Supreme Court prior to the appeal, as the National Supreme Court "Strada" decision clarified.[11]

It is important to note that a lot of these rights and freedoms — both federal and provincial — are not actually fully observed and enforced.[12]

In Argentina, law is not adequately observed due to its legal, political, and democratic underdevelopment. In addition, emergencies (institutional, political, economic, or social) have eroded the Rule of Law, the Republican system, and the system of protection of rights and liberties.[13]

India

As there are no separate State Constitutions there is no special declaration of rights in the States.

United Kingdom

There are no State Constitutions, but the devolution legislation obliges Scotland and Wales to comply with a range of rights, including those in European law. Northern Ireland's devolution legislation provides both stronger protection for rights and a strong right to equal treatment for different ethnic and religious communities.

Germany

There are different types of State Constitutions:

Some State Constitutions were written between 1946 and 1949 and thus are older than the Federal Constitution (Bayern, Hessen, Rheinland-Pfalz, Bremen, Saar); they have their own declarations of rights in some parts diverging from the Grundgesetz, including also "Staatszielbestimmungen" (*State objectives*);

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11 Id, see note 6.

12 See Antonio María Hernández, Daniel Zovatto & Manuel Mora y Araujo, "Encuesta de cultura constitucional. Argentina: una sociedad anómica", Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de Méjico, Méjico, 2005.

13 See Antonio María Hernández, "Las emergencias y el orden constitucional", 1ª, ed. Rubinzal-Culzoni Editores, Buenos Aires, 2002 & 2ª. Ed. (extended), Instituto de Investigaciones Jurídicas y Rubinzal-Culzoni Editores, Méjico, 2003.

The State Constitutions enacted between 1949 and 1989 do not have their own rights declaration. Baden-Württemberg, Niedersachsen and Nordrhein-Westfalen incorporate the civil rights of the Grundgesetz; Schleswig-Holstein and Hamburg have no rights section.

The Constitutions of the States joining the Federation in 1990, have rights sections, but mostly repeat the rights declaration of the Federal Constitution, the Grundgesetz.

Due to the role of the Bundesverfassungsgericht, the constitutional courts of the states (Landesverfassungsgerichte) follow the former in the interpretation of civil rights; there may be differences in terms, but there are hardly any differences in the results.

Austria

The Land Constitutions do not include declarations of rights in the sense of comprehensive catalogues of fundamental rights, but they do recognize certain rights explicitly. Since the Land Constitutions must not violate the Federal Constitution, it is clear that they are only allowed to supplement federal constitutional rights by additional rights or to "enrich" existing federal constitutional rights. In practice, this works very smoothly. For example, the right of property, as entrenched in federal constitutional law, entails compensation for expropriation only under certain circumstances, whereas several Land Constitutions provide for compensation in all cases if the expropriation was due to a Land law. Federal constitutional rights are thus not at all superseded or violated, but expanded.

Swiss Confederation

All state constitutions mention the rights of citizens. Most have a detailed catalog of rights. Others refer to the Federal Constitution and do not mention all the rights, but complement aspects not mentioned in the federal Constitution. For example, the cantonal (state) Constitution of Zurich does not establish language freedom which is already established by Article 18 of the Federal Constitution; it only clarifies that freedom includes sign language. Other constitutions contain statements themselves.

State laws are subject to constitutional control by state courts and the Federal Court. They may be declared inapplicable for not respecting a citizen's right established only by a state constitution. From a federal stand-

point, state constitutions have the same rank as federal law because they are approved and guaranteed by the Federal Parliament. The administrative acts of the Federation should respect state constitutions. If a federal law conflicts with a state constitution, the most recent one prevails (lex posterior derogat legi priori).

Belgium

There is no federated constitution for the reasons stated in points 3 and 4. Declarations of human rights do not exist either at the federated level.

Italy

In the last generation of "Regional Statutes" (those approved after 1999), there are numerous statements on the rights of citizens. The government objected to these provisions on the basis of the existence of similar provisions in the Constitution. The Constitutional Court in various decision in 2004, dismissed the challenge brought by the central government and declared those statutes in conformity with the Constitution, but considering these provisions devoid of legal significance because they have a "cultural or even political function, but certainly not a normative one". The Court held that the statutes can contain these provisions but they have no legal effect.

Spain

The majority of amended constitutions since 2006 contain, for the first time, bill of rights for their citizens. Almost all are rights to certain service provisions related to the powers of the states. The relation between "constitutional" and "charter's" rights is of complement, even if they have the rank of the norm that establishes them. The Constitutional Court (Decisions 247/2007, of 12th December, and 31/2010, of 28th June) admitted, despite some considerations and interpretation clauses, that the charters of autonomy could contain declarations of citizen rights.

III

CONTENTS OF THE FEDERAL CONSTITUTION

SUMMARY: 1. Does the Federal Constitution expressly recognize federalism or political decentralization as a constitutional principle or value? 2. Does the Federal Constitution design a map of the territorial organization? In other words, does the Federal Constitution identify or list the territories and/or the communities that form the Federation? 3. Does the Federal Constitution establish the sovereignty/autonomy/self-government of the States? If so, how? 4. Does the Federal Constitution completely define the system of decentralization, or is this system supposed to be developed to a great extent by future federal provisions? If so, which are these? 5. Does the Federal Constitution recognize States the capacity to federate among them? Can they establish links or celebrate compacts or conventions among them without the participation or the authorization of the Federation? 6. Does the Federal Constitution allow the exercise of the right to self-determination or the separation of States or other territories? If so, what are the rules/procedures and which majorities are required?

1 · Does the Federal Constitution expressly recognize federalism or political decentralization as a constitutional principle or value?

United States of America

Federalism is not expressly recognized, in that, the country is not identified as a federation (in 1787 federation meant confederation). However, the Preamble states "We the people of the United States, in Order to form a more perfect Union …" The federal powers designated in the Constitution are expressed and limited, and by implication all others are those of the states. Amendment 10 makes this explicit.

Canada

No, although the Canadian Constitution is undoubtedly federal, it does not *expressly* recognize federalism as a constitutional *principle* or *value*. However, in several occasions, the Supreme Court found federalism to be a fundamental *unwritten* principle or value of the Constitution. For instance, in the Patriation Reference (1981), the Court held that a convention of the Constitution, founded upon the principle of federalism, pro-

hibited the federal government to seek from the British authorities the patriation of the Canadian Constitution without having first obtained a significant degree of provincial support. In the Secession Reference (1998), the Supreme Court again declared that federalism was one of the unwritten structural principles upon which the written Constitution was founded (the other principles being democracy, the rule of law, and the protection of minorities).

Australia

Federalism is expressly recognised by the Constitution to the extent that the preamble of the *Commonwealth of Australia Constitution Act* refers to the colonies uniting 'in one indissoluble Federal Commonwealth'. There are also references to a 'Federal Parliament' and a 'Federal Executive Council' in the Commonwealth Constitution, as well as the establishment of a federal structure. However, federalism is not expressly described as a constitutional principle or value by reference to which the Constitution is to be interpreted.

As discussed above, the High Court has drawn an implication from federalism, known as the *Melbourne Corporation* principle, which limits the legislative power of the Commonwealth to destroy the capacity of the States to operate as independent governments or restrict or burden the exercise of their constitutional powers. However, the High Court has otherwise proved reluctant to use federal principles or notions of decentralization in the interpretation of the extent of specific heads of Commonwealth legislative power. The High Court's approach has been to broaden the interpretation of Commonwealth legislative power and centralize it.

There has been disagreement within the Court as to whether 'cooperative federalism' should be regarded as a constitutional value. One High Court judge has described 'cooperative federalism' as a mere slogan, rather than a criterion of constitutional validity.[1] Another, however, has regarded cooperation between the Commonwealth and the States as a 'positive objective of the Constitution'.[2]

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1 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 556.

2 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 589.

Mexico

Yes. Article 40 of the Constitution expresses that the will of the Mexican people is to constitute in a federal, democratic and representative Republic.

Brazil

The Federal Constitution expressly recognizes federalism as a norm (article 1). It also makes this principle a clause that cannot be amended (article 60, §4, I).

Argentina

As we have previously explained, the Federal Constitution has clearly established power decentralization in Argentina; in particular, after the 1994 constitutional amendment. In 1994, besides the deepening of federalism, the principle of the municipal autonomy was recognized and the Autonomous City of Buenos Aires was established as another member of the Federal State.

Some authors, as Bidart Campos, have supported that federalism is part of the "immutable" content of our Constitution. Even if the use of the term could be contested, in our opinion, decentralization is one of the most important principles and values in our constitutional organization.

India

The Constitution does not expressly recognize federalism or political decentralization as a Constitutional principle but it is very much implied in it in so far as its very first Article states: "India, that is, Bharat, shall be a Union of States" and its subsequent provisions make detailed arrangements for two levels of governments and their working. After holding that the Indian Constitution is not true to any set theory of federalism, the Supreme Court has also held that federalism is part of the basic structure of the Constitution which cannot be taken away even by an amendment of the Constitution.

United Kingdom

There is no Federal Constitution but the Scotland and Wales Acts are seen as "constitutional" in the British legal tradition. The status of the Acts constituting Northern Ireland, as they can so clearly be suspended or revoked, are constitutional but easier to amend.

Germany

Yes, it does: it expressly says that the Bundesrepublik Deutschland is a Bundesstaat, Art.20 Abs. 1 GG; federalism as a constitutional principle cannot even be abolished by constitutional amendments, Art.79 Abs. 3 GG.

Austria

Yes. Art 2 paragraph 1 B-VG generally entrenches the federal system: "Austria is a federal state." Apart from Art 2 B-VG, the principle of federalism is enshrined in a wide range of more specific federal constitutional provisions.

Swiss Confederation

First, the vary title of the Constitution characterizes it as Constitution of a federal state. Then, in Article 1, both the people, as well as the cantons (states) are mentioned as constituent powers; and Article 3 explicitly refers to the sovereign status of those cantons. This is interpreted by a large part of the scholarship as an indication that the cantons, with its character of states, are not only constitutional, but the basis for the existence and legitimacy of the Swiss state. Therefore, the principle of federalism is pre-constitutional, thus it is not open to a constitutional revision.

Belgium

Federalism is recognized in article 1 of the Constitution as one of the foundational pillars of the Belgian State. The decentralization is recognized in article 162 as one of the organizational rules of the regions which

include provinces and municipalities organized under the local autonomy regime.

Italy

There is no reference to "federalism" in the Italian Constitution. However, it very explicitly recognizes the principles of "local autonomy" and "decentralization" in the part dedicated to its fundamental principles (art.5).

Spain

The Constitution does not proclaim federalism or political decentralization as a constitutional principle or value. It indirectly does, however, when after declaring in article 1 that national sovereignty lies in the Spanish people, article 2 recognizes and guarantees the right to self-governance of nationalities and regions and the solidarity among them, within the framework of the "indissoluble unity of the Spanish Nation". Article 137, not included in the Title concerning the constitutional values and principles, provides: "The State (that is, the Federation) is organized in municipalities, provinces and the Autonomous Communities (States) that might be created. All these institutions enjoy autonomy to manage their own interests".

2 · Does the Federal Constitution design a map of the territorial organization? In other words, does the Federal Constitution identify or list the territories and/or the communities that form the Federation?

United States of America

The federal government defines the territorial boundaries of each state by act of Congress. Normally, this has been accomplished when a state is admitted to the Union. In one case, after the Civil War, Congress removed the western, anti-slavery portion of Virginia and created the new state of West Virginia.

Canada

It did so for the initial four provinces (Quebec, Ontario, New Brunswick and Nova Scotia). Art. 146 of the *Constitution Act, 1867* envisaged a procedure for the admission of Newfoundland, Prince Edward Island and British Columbia, as well as of the Northwestern Territory and Rupert's Land. Later, a British amendment to the 1867 Constitution, the Constitution Act, 1871, conferred on the federal Parliament the power to create new provinces out of territories not already included in any province. The provinces of Manitoba, Alberta, and Saskatchewan were created by federal statutes, as were the territories of the Yukon, Northwest Territories and Nunavut. Since 1982, new provinces can be admitted or created out of the territories by using the general amending formula (concurrence between the federal Parliament and at least two-third of the provinces, representing at least half of the total population).

The provinces and territories presently comprising Canada are named in section 22 of the Constitution Act, 1867, which specifies the number of senators by which each province and territory is entitled to be represented.

Australia

The *Commonwealth of Australia Constitution Act* 1900 lists the 'Original States' that joined together to form the federation. The Commonwealth Constitution also provides for the creation of territories and the admission of new States, but so far no new States have been admitted.

Mexico

Yes. Article 43 of the Constitution lists the entities that integrate the Federation: 31 States and the Federal District.

Brazil

The Federal Constitution does not design a complete map of this country's territorial organization. There is no constitutional list of the states that form the Union, although there are generic references: *(i)* to two federal

territories (Roraima e Amapá) which were expressly transformed into States, *(ii)* to the creation of a new State (Tocantins), as a result of the division of a pre-existent State (Goiás), and *(iii)* to the State of Acre, whose borders with the States of Amazonas e Rondônia were confirmed by the Constitution. The Federal Constitution also refers to the Federal District, where is located Brazil's capital (Brasília).

Argentina

No.

India

The Constitution does not draw a map of the territorial organization but in Article 1 it mentions what the territory of India and States comprises and lays down the details of these territories with respect to every State and Union Territory in the First Schedule to the Constitution.

United Kingdom

The Scotland and Wales Acts define Scotland and Wales as does the Northern Ireland legislation.

Germany

The Federal Constitution — the Grundgesetz — lists the sixteen States within the preamble; changes are possible by federal law, which must be approved by a referendum in the States concerned. Changes can also be made by treaty between the States concerned, a referendum then is obligatory, too, with the exception of smaller changes.

Austria

Yes. Art 2 paragraph 2 B-VG enumerates the Länder: "The federal state consists of the autonomous Länder: Burgenland, Kärnten Niederösterreich, Oberösterreich, Salzburg, Steiermark, Tirol, Vorarlberg, Wien."

Swiss Confederation

No, it only lists each state with its name.

Belgium

The Constitution identifies the three communities and the three regions that are part of the federation. The delimitation of the three regions is established in the Constitution. It can only be modified by a special law.

Italy

The Constitution enumerates (art. 114, sub-section 1) the subjects that constitute the Republic: Municipalities, Provinces, metropolitan Cities, Regions and the State.

The Constitution explicitly enumerates the Regions (art. 131).

Spain

The federal Constitution does not establish this kind of territorial map. The Constitution only establishes the conditions or requirements that need to be met in order to create the States. The so-called dispositive principle governs this matter.

3 · Does the Federal Constitution establish the sovereignty/autonomy/self-government of the States? If so, how?

United States of America

Non-enumerated powers in the Constitution, plus the 10th Amendment. Also, states are free to move into areas not entered into by the federal government, even though it might be empowered to. For example, cable television, insurance regulation, and private pension regulation.

State sovereignty over its domain is assumed in as much as it was state delegations that wrote the federal constitution and state voting ratified it. Self-government is assumed, although the Constitution guarantees that each state has a "republican form of government," this article has only

once been before the court, which refused to deal with this matter, citing it was a political issue.

Canada

As mentioned above, the Constitution Act, 1867, contains several features that place provinces in a subordinate position to the federal government (like the federal power to "disallow" provincial statutes). However, the Judicial Committee of the Privy Council, who acted as the highest court for Canada until 1949, "corrected" these anomalies by adopting interpretations of the Constitution establishing that provinces were autonomous and sovereign within their own legislative sphere and were not to be seen as subordinate to the federal government in any way. The Supreme Court, in the Patriation Reference (1981), corrected another constitutional anomaly by establishing that a convention of the Constitution, founded upon the principle of federalism, prohibited the federal government to "repatriate" the Constitution without a substantial degree of provincial consent, although such a "unilateral" constitutional reform would have been constitutional in a purely legal sense (as it has been noted above, conventions of the Constitution sometimes contradict and neutralize written constitutional rules).

Australia

There is nothing in the Commonwealth Constitution which declares that the States are sovereign, autonomous or self-governing. The States claim that they are sovereign, but the Commonwealth would argue that they are not. The better view is that sovereignty is shared in Australia between the Commonwealth and the States, each being sovereign in its own sphere of responsibility.

As noted above, the High Court has implied from the federal system a limitation on the powers of the Commonwealth to destroy or curtail the continued existence of the States or their capacity to function as independent governments. To this extent, then, the autonomy of the States is protected by the High Court. The Constitutions of the States are also protected by s 106 of the Commonwealth Constitution and their legislative powers are protected by s 107 of the Commonwealth Constitution and s 2 of the *Australia Acts* 1986. The States could not be abolished

without a referendum being passed in all the States (as the abolition of the States would alter their representation and boundaries, requiring the consent of each affected State under s 128 of the Commonwealth Constitution).

Mexico

Yes. The above mentioned article 40 of the Constitution reads that the Mexican federal Republic is composed of free and sovereign States in what their interior regime in concerned, but united in a federation established according to the General Constitution principles.

In tune with States being "free and sovereign" regarding their interior regime, article 41 of the Constitution indicates that the people exert his sovereignty through the Powers of the Union, in the issues under their power, and through the powers of the States, in what their interior regime is concerned, according to what is respectively established by the Federal Constitution and those of the States, which must not contravene the stipulations of the Federal Pact.

Brazil

The Federal Constitution establishes self-government, self-administration and self-organization of the States. States have autonomy. Only Federation has sovereignty. States can collect their own taxes and free to administrate themselves according to the Constitution. Federation, in principle, shall not intervene. Intervention can only happen in extreme cases.

Argentina

As stated in our analysis of some of the key articles (5, 121, 122, 123, and 124), the National Constitution has established the institutional, politic, economic, and financial autonomy of the states of the federation. Other provisions are also related to this issue, such as article 3 and article 13 regulating the status of the Federal Capital and the formation of new provinces and establishing the principles of territorial integrity or intangibility as elements of provincial autonomy since the consent of provincial legislatures is required in order to assign part of the provincial territory.

Even if nowadays we use the concept of autonomy, before, both in scholarship and in court rulings, sovereignty was also used since the provinces formed the federal state transferring powers to it in the Federal Constitution. This is a much discussed topic in federal studies.[3]

India

The Constitution does not expressly establish the sovereignty of the States. But the autonomy and self-government of the States is assumed in the Constitution by expressly creating the two sets of government and by dividing all powers of governance between them.

United Kingdom

All bodies in the UK — including, arguably, the monarchy — are creatures of the Westminster Parliament. When the Westminster Parliament promises them autonomy and continued existence, it is only making a promise to bind itself in the future. There is consequently no recognition of sovereignty, autonomy, or any right to self-government.

Germany

The States are obliged by the Grundgesetz to follow the principles of the republican and democratic "Rechtsstaat" and to have a parliament issued from democratic elections; within those principles, the States are free to form their constitutional order.

Austria

Yes. Art 2 paragraph 2 B-VG calls the Länder "self-governing" (German: "selbständig"). This term — which is difficult to translate into English — was historically chosen following the Swiss model, which calls the cantons "sovereign". As well, Art 15 for 1 B-VG speaks of the "self-governing" sphere of Land competences.

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3 See Hernández Antonio María, "Federalismo y Constitucionalismo Provincial", Abeledo Perrot, Buenos Aires, 2009, Chap. I about "Los sistemas políticos federales".

Swiss Confederation

The only reference appears in Article 3, which is the basic article on federalism: "The Cantons are sovereign; its sovereignty is not limited by the federal Constitution; and they shall exercise all rights not delegated to federal power." This article has hardly changed since 1848. But the whole nature of the Constitution entails that the constitution itself is based on the existence of the states, not states based their existence on the Constitution. The Swiss legal tradition is particularly pragmatic, and so too has been reflected in the constitution. It does not devote many words to regulate status issues; instead, it focuses more on specific operational issues, especially specific constitutional procedures and rights. There is not much literature discussing whether the states' autonomy is guaranteed or not, since it is considered as a something natural which cannot be questioned.

Belgium

The autonomy of the different parts is recognized in a general way in the Constitution. "Each community has the powers recognized by the Constitution or by the laws passed developing it" (art. 38). A similar provision exists for the provinces (art. 39). It is specified in arts. 127 — 130 that the decrees of the communities have the "force of law" and in art. 134 that the regional decrees (or the regional regulations in Brussels) have "force of law" too. The legislative autonomy of the federated units is a key piece of the federal organization. As it happens regarding federal laws, the decrees and regulations are only subjected to the Constitution and the laws distributing competences. Hence, there is a true sharing of powers.

Italy

Both the Regions and local entities are recognized as being "autonomous entities with their own statutes, powers and functions according to the principles established by the Constitution" (art. 114, sub-section 2). Legislative authority is assigned to the Regions for many matters as an exclusive power, without the intervention of the State.

The recognition of autonomy entails the right of self-government, if self-government means the right to choose governing institutions themselves. Any reference to Italian Regions "sovereignty" is excluded.

Spain

The Federal Constitution establishes that "the national sovereignty is grounded in the Spanish people" (art. 1.2) and proclaims that "the Constitution is based in the indissoluble unity of the Spanish Nation" (art. 2.1) while it "recognizes and guarantees the right to autonomy of the nationalities and regions which integrate it" (art. 2.1) and the autonomy to manage their own interests (art. 137). In order to make this autonomy effective, the Constitution recognizes, implicitly, legislative power only subjected to the jurisdictional control of the Constitutional Court, a wide capacity of self organization and a financial autonomy to develop its powers. Indirectly, it allowed that future states could assume, if they want to, autonomy, not only administrative, but of political nature; thus some could have been able to assume only administrative autonomy.

4 · Does the Federal Constitution completely define the system of decentralization, or is this system supposed to be developed to a great extent by future federal provisions? If so, which are these?

United States of America

The system is defined by practice, enumerated federal and residual state powers. The accompanying paper explains the gradual growth of national power, but along with simultaneous growth of the states' powers.

Canada

The provisions of the Constitution bearing on the federal division of powers, and more generally on other aspects of the federal system, can only be formally modified (and thus "developed") by constitutional amendment requiring the consent of the federal Parliament and at least seven provinces, representing at least half the total population. However, the written text of the Constitution can be modified in its practical application, if not formally, by judicial interpretation and constitutional conventions. Constitutional conventions have for example nullified certain written federal powers that were not compatible with the autonomy

of the provinces in their own jurisdictions. Judicial rulings on the other hand provide interpretations of the text of the Constitution, allowing it to evolve as a "living tree" (a metaphor much used by the Supreme Court to justify judicial interpretations of the Constitution that give the text meanings that could not possibly have been anticipated by the drafters).

Australia

The Commonwealth Constitution defines the powers of the Commonwealth Parliament and leaves residual power to the States. It sets out the rules for conflicts of laws and for the exercise of federal jurisdiction by both federal and State courts. However, some of the financial aspects of federal arrangements were fixed only for a short transitional period and then left for the Parliament to determine. For example, s 87 of the Commonwealth Constitution provided that for a period of 10 years after federation 'and thereafter until the Parliament otherwise provides', three-quarters of the revenue from customs and excise duties shall be paid to the States. As soon as this transition period was over, the Commonwealth Parliament enacted a law to terminate the application of this provision (*Surplus Revenue Act* 1910 (Cth)).

Section 94 also provided for the Commonwealth Parliament to pay all the surplus revenue of the Commonwealth to the States 'on such basis as it deems fair'. This was intended to allow the Commonwealth Parliament to assess whether per capita distribution was appropriate or a distribution based upon where the revenue was collected. In addition, under s 96 the Commonwealth Parliament could grant 'financial assistance to any State on such terms and conditions as the Parliament thinks fit.' Section 94 was thwarted by the Commonwealth Parliament appropriating all surplus money to contingency funds so that since 1908 there has never been a surplus to pay to the States. The consequence has been serious vertical fiscal imbalance, with the Commonwealth raising the vast bulk of revenue and then making grants to the States 'on such terms and conditions as the Parliament thinks fit' under s 96. These grants have often been tied to policy conditions, so although powers are technically decentralized, they may be re-centralized by the Commonwealth controlling State policy by placing conditions on s 96 grants to the States.

Mexico

In many articles, the General Constitution defines the decentralization regime on a more or less complete form. Article 124 contains the clause of residual powers in favor of the States; article 40 defines Mexican State as a federal Republic, formed by "free and sovereign" states; article 41 widens this previous definition; article 73 defines the federal Congress powers; article 115 establishes the bases for the organization of local constitutions and the bases regarding municipal organization; article 116 establishes more organizational bases that must be followed by local constitutions; articles 117 and 118 establish prohibitions for States; article 122 establishes the organizational rules for the Federal District.

Besides these constitutional articles which are central to define the decentralization regime of the Mexican federal system, other constitutional provisions also contribute to the definition of the system, but it would be too prolix to expose them here. I will only mention, on a broad way, the existence of constitutional norms establishing the "concurrence" of the federation, states and municipalities regarding certain matters (such as education, health, human settlements, ecologic balance, sport, to mention some of them).

Brazil

The Federal Constitution completely defines the system of decentralization.

Argentina

The regime of decentralization is sufficiently defined in the National Constitution. However, in some cases, regulations by other authorities might be necessary. For example, the municipal regime, even if it is limited by the main principles recognized in art. 123 — which establishes local autonomy and its institutional, political, economic, financial and administrative dimensions-, will be completed by the Provincial Constitutions which have to further specify its content.

As for the Autonomous city of Buenos Aires, art. 129 of the Constitution established that is was the National Congress which had to dictate the

regulations defining the distribution of powers between the Federal Government and the Autonomous city.

Finally, a particularly sensitive topic should be highlighted: the financial relations between the Federal Government, the Provinces, the City of Buenos Aires, and, even, the municipalities, should be regulated by a Covenant-Law of Tax Co participation according to article 75.2 of the Constitution. This Act has still to be passed even if the established deadline was December 31st, 1996.

India

The Constitution completely defines the system of decentralization. It does not leave anything to be worked out separately except the constitutional practices that could develop with reference to these provisions.

United Kingdom

The Scotland Act specifies central state powers and leaves any other powers to Scotland (thus, it enumerates three small powers in health care; all other health powers are assumed to be Scottish). The Welsh legislation is much more tightly written; the Northern Ireland Act is in the middle. As individual statutes, none of these are connected; the eventual statute creating English regions will not technically be connected to them except insofar as it is seen as constitutional. In other words, there is no barrier to change since they are all just Westminster statutes.

Germany

The Grundgesetz defines completely the allocation of legislative and executive powers and of jurisdiction; it defines completely the allocation of tax revenues, so it almost completely defines the system of decentralization and centralization. The financial autonomy of the Länder has been restricted by an amendment in 2009, which restrains the *Kreditaufnahme (raising of credit)* of the Länder. Further amendments in the financial system are being discussed, some Länder are demanding certain autonomy in the field of taxes, but no greater changes are expected.

Austria

The federal system definitely was not fully developed, when the B-VG was enacted in 1920, but, due to various amendments and additions, it has now been constitutionally established as a full-fledged, though rather centralistic federal system for a long time. This does not mean, however, that there would be no political demand for reform or future development of Austrian federalism.

Swiss Confederation

All the general principles are listed in the federal Constitution. Before the 1999 constitutional reform, an important basis of federalism was the interpretation of the Constitution by the scholarship, by the federal court — through its limited constitutional control (see below) — and also by the federal Parliament. After the 1999 constitutional reform and the 2008 federalism reform, the federal Constitution defines all the important bases for political decentralization scheme. In the case of concurrent powers — that is, federal powers with subsequent overriding power — is up to the federal legislature to decide which part of the power is developed by the Confederation; and for all issues not addressed in federal law, states continue to be responsible for legislation and implementation of their provisions. It is also very common to delegate administrative enforcement of federal law to state governments.

Belgium

The decentralization regime, in its narrow definition, is established in art. 162 of the Constitution. It lists some general principles, such as direct election, which have to be observed in this area. Apart from these, every region can shape its institutional organization of the local collectivities within their territories. Hence, municipal organization can vary a lot among regions.

Italy

The Constitution directly establishes the principles of regional decentralization of the "ordinary" Regions. These principles are put into effect

by the regional Statute and by subsequent State and regional legislation, according to their respective jurisdictions.

For the "special" Regions, the Constitution refers its enforcement entirely to the Statute, ratified by means of a constitutional law.

Spain

The federal Constitution does not provide which States constitute the Federation, nor their powers. This task is left to the Statutes of Autonomy and, in a complementary and subsidiary way, to other federal laws. Despite the constitutional provisions containing rules and principles to guide the territorial organization of power, the system is much deconstitutionalized and, consequently, lacks a strong constitutional guarantee.

5 · Does the Federal Constitution recognize States the capacity to federate among them? Can they establish links or celebrate compacts or conventions among them without the participation or the authorization of the Federation?

United States of America

State federations (called in the Constitution as confederations) are not allowed, but compacts among them are, but must be ratified by Congress. Short of compacts states can convene in many ways without federal intervention. For example, the many Commissions in Uniform State Laws and state associations of officials. U. S. civic organizations are normally suborganized on the federal model.

Canada

The Canadian Constitution does not recognize to provinces the "capacity to federate among themselves" (the union or merging of two or more provinces would require a constitutional amendment and would need the agreement of the federal authorities), but they can establish links and conventions among themselves. For example, they did so to create the *Council of the Federation*, composed of the Premiers of each province and territory, with no formal participation of the central govern-

ment. The Council meets at regular occasions in order for the provinces and territories to discuss problems of common interest and to establish common positions in their relations and discussions with the central government.

Australia

There is no formal recognition in the Commonwealth Constitution of any capacity of States to federate amongst themselves. Each Original State retains an equal status and equal powers under the Commonwealth Constitution. However, States may enter into intergovernmental agreements with each other that involve the sharing of functions or the enactment of uniform laws in relation to a particular subject-matter. There is no necessity for Commonwealth involvement or authorization of inter-State cooperative schemes. However, if the Commonwealth also has concurrent power with respect to the subject or if it is prepared to fund part of the scheme, it may be invited to participate in the cooperative scheme.

Mexico

On the one hand, states cannot federate among themselves. In fact, article 117.I of the Constitution forbids States to form alliances and coalitions, or enter into treaties with other States ("neither with foreign countries").

On the other hand, the possibility for States to establish common structures and to celebrate covenants among themselves exists without federal participation or authorization. Nevertheless, this rarely happen in practice. During decades, the highly centralized federal system inhibited horizontal relations among States that could leave the federal government outside. Furthermore, since the federation accumulates the great majority of the legislating powers in a wide range of issues, there is no room for celebrating conventions among states without the participation of the federal government. Finally, since the financial power belongs overwhelmingly to the federation too, it is hard for States to take initiatives through conventions among themselves, which leave the federal government (and its financial resources) aside. The exclusion of the federation would mean the lack of resources to carry out the actions foreseen in the respective convention.

Brazil

According to the Federal Constitution, States cannot federate among them. However, States can celebrate agreements of cooperation regarding public services (*serviços públicos*) without authorization of the Federation (article 241). They can offer public services cooperatively.

The Federal Constitution also establishes that federal statutes will create norms of cooperation among the Federation, States, the Federal District and Municipalities (article 23, sole paragraph).

Argentina

The current National Constitution in art. 125 (previous 107) indicates: "The Provinces can celebrate partial agreements regarding: the administration of justice, economic interests and works of common utility, report to the Federal Congress..." So, Provincial States can celebrate these called "domestic" agreements, providing that they are not of "political" nature, since this is forbidden by current art. 126 (previously 108) that express: "The Provinces will not exercise the power delegated to the Nation. They cannot celebrate partial agreements of political character...".

These interprovincial agreements gave place, as we mentioned in the description of the federalism historical stages, to a cooperative or conciliation federalism, instead of the previous dual federalism.

In order to celebrate the above mentioned agreements, and beyond the doctrinal debates, we support that as the constitutional text indicates, it is only necessary to inform the Federal Congress, which only participates to control "ex-post facto" if the constitutional federal text has been violated, being able to challenge before the Supreme Court of Justice of the Nation or, very eventually, use the federal power of intervention of art. 6th.

After the 1994 agreement, art. 124 gives the provinces and the autonomous city of Buenos Aires the possibility of creating "regions for the economic and social development" and of celebrating "international agreements". These are key provisions for the future of Argentinean federalism in this global context. National and supranational integration will have a relevant impact in Argentinean Public Law, a process of modernization and change is expected given the 1994 amendment.[4]

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4 For more information, see our publications: "Federalism, municipal autonomy and City of Bue-

India

The Constitution does not recognize the capacity of the States to federate among them. They may, however, establish informal links amongst themselves not having the constitutional status.

United Kingdom

The "sovereignty of Parliament" (i.e. Westminster) cannot be shared but the devolved governments and UK government can and do establish working arrangements and shared agencies.

Germany

The capacity of the States to federate among them is recognized in Art. 20 Abs. 8 GG; a referendum is obligatory. The capacity of the Länder to have treaties between each other on matters within their legislative and administrative powers is supposed to be their natural right; so there is no explicit statement in the Federal Constitution; the Federation does not participate in these treaties.

Austria

Within their sphere of competences, the Länder are entitled to conclude treaties among each other (Art 15a paragraph 2 B-VG). The Federal Government has to be informed about such treaties without delay, but has no right to intervene or authorize such treaties. Further, the Länder strongly co-operate on an informal basis (several joint conferences [consisting of the Land Governors, members of the Land Governments, presidents of the Land Parliaments or Land civil servants], joint working groups, Land liaison office etc).

Swiss Confederation

The element of cooperative federalism both between states and between the Confederation and the states has always been one of the most

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nos Aires in the 1994 Amendment", "Integration and Globalization: role of the regions, provinces and municipalities", and, the latest one, "Federalism and provincial constitutionalism".

important elements of Swiss politics. The federal Constitution explicitly authorizes agreements between states and also between institutions of interstate organizations. There are some limits. Until the 1999 constitutional complete reform, mostly for historical reasons, "political" interstate treaties were banned. This was interpreted as prohibiting all types of organizations that had the effect of changing the distribution of weight and political influence within the Federation. For example, it would not have allowed the union of large parts of the administrations of two or more states resulting in an intermediate level between states and federation. This explicit prohibition of political pacts does not appear in the new Constitution of 1999. The principle of federal loyalty ("Bundestreue") and the principle that treaties cannot be contrary to federal law and the interests of the confederation or other states somehow replace the previous provision. An agreement or treaty that had the effect of a change in the balance of powers and political weights between the different members of the Confederation would of course be contrary to the interests of other states or of the Confederacy and, therefore, it will not be admissible. There are numerous treaties in Switzerland very important with a non-political nature, called interstate concordats. The federal power can be part in the concordat, but it is not mandatory. Apart from the above conditions concerning the content of the convention, there are other requirements or formalities required. The reform of federalism in force since 2008 introduced the possibility of concordats (agreement) between states. These may establish bodies enact laws that are directly applicable to the citizens.

Quite recent developments has entailed that states are forced to coordinate. For example, primary and secondary education is a traditional state power. A constitutional amendment (accepted by both the majority of voters at the federal level and in most statewide elections) introduced in 2006 a duty of coordination on some basic aspects of schools necessary in order to facilitate students moving from one state to another. At the same time, the Constitution provides for a conditional federal power: if the cantons (states) fail to coordinate among themselves by way of interstate treaties, the federation can assume the power through federal legislation. This school interstate concordat (interstate agreement) must be first approved by voters in each state to take effect.

The interstate federal or supra-state level is discussed with different approached in the literature. Scholars in the area have seen as an advantage that the coordination over certain things among several states is possible

without the necessity of a federal power. Thus, it makes possible to maintain the autonomy and sovereignty of states. The downside is twofold. The first criticism is dogmatic: Federation in Switzerland is not anything else that coordination between cantons (states). This is the peculiarity of Swiss federalism that evolved from a confederacy thus maintaining many confederal aspects. States have great weight in the federal law and, from this point of view, one can question the need to create another confederal level between the states. The other criticism relates to democracy. The contacts at the interstate level are exercised by governments. So, Parliaments are often limited to authorize or reject these agreements. This problem is called "democratic deficit". Taking into account that the executive bodies of the states are college councils of several ministers elected directly by the people, it seems less severe. However, the problem diminishes the role of state legislatures. Therefore, there are attempts to remedy it. Thus, the parliaments of the states of the "Romandie" (French speaking part of Switzerland) have joined an interstate treaty. It forces state governments to work closely with parliaments and inter-parliamentary groups to negotiate interstate or international treaties.

Belgium

Article 137 of the Constitution organizes the structural association of the Flemish Community and the Flemish Region. The underlying idea is that the institutions of the Flemish community have to exercise the powers assigned to it, but also the regional ones since both affect the same territory and the same people.

The Constitutional allows the French Community and the Walloon Region to adopt the same scheme. But they have not done so. This difference is explained by the different weight of the two communities in the bilingual region of Brussels, the capital.

The Constitution also authorizes the transfer of powers from the French Community to the Walloon Region and to the French Community Commissions constituted in the Brussels region (see V. 6).

According to art. 92bis of the institutional reforms special act, the federal State, the communities and the regions can enter into cooperation agreements. These agreements "focus on the creation and common management of services and institution, on the common exercise of their own power, or on the development of common initiatives" (# 1, subsection 1).

Italy

The Regions cannot establish entities at the constitutional level by agreement. The Constitution only regulates possible revision processes of the Regions' territories that can also be the fusion of two or more Regions to form a single Region.

The Regions have established structures of co-operation, such as associations regulated by private law, at the national level to sustain their relations with the State (Conference of the Regional Presidents).

The regions can establish agreements of co-operation among them "to exercise their functions better, also with the determination of shared organisms" (art. 117, sub-section 8). Such agreements are ratified by regional law. The State does not intervene in agreements but can challenge the regional law of ratification if an excess of the Region's legislative authority is recognized.

Spain

The Constitution expressly forbids the federation among States. They can establish conventions among themselves to render services, notifying the federal Parliament. In all other cases, cooperation agreements among States require the authorization of the federal Parliament.

6 · Does the Federal Constitution allow the exercise of the right to self-determination or the separation of States or other territories? If so, what are the rules/procedures and which majorities are required?

United States of America

The constitution does not provide for the right of self-determination (in the Spanish sense) or separation. The Civil War was fought over this issue. States can "voluntarily" join the union but cannot separate. President Lincoln refused to acknowledge the southern states right to secede, claiming that in 1774 the Union formed under a compact that could only be broken if all states agreed to rescind the federation. The Supreme Court endorsed that idea in *Texas v. White* (1868) when it claimed the Union is "an indestructible

union" and stressed that Texas never ceased to be a state in the Union. Secession is no longer considered to be available means of minority/state redress. As a result, no such rules or procedures exist. When the southern states seceded prior to the Civil War it was generally by act of the state legislatures/governors that formed secession conventions. Prior to secession some southern states' rights advocated for "nullification" of federal laws, that is, according to John Calhoun, state interposition and removal of offensive federal laws in order to impede the conversion of "the government into a consolidated, irresponsible government" without endangering the Union — one of "the great instruments of preserving our liberty, and promoting the happiness of ourselves and our prosperity." Nullification never received much support outside of a few headline seeking pro-slavery southerners, in as much as it was regarded as a direct attack on majoritarian government.

Canada

There is no express provision in the Constitution contemplating separation or secession. The question was referred to the Supreme Court of Canada after the 1995 referendum in Quebec, in which separation of Quebec from Canada almost received the support of a majority of voters inside Quebec. In the Secession Reference (1998), the Court ruled that secession by a province is of course not possible by unilateral action of that province, but that it could be accomplished through the constitutional amending formula. The Court did not specify if, in addition to the consent of the federal authorities, the concurrence of seven provinces representing fifty per cent of the population would suffice or if the unanimous consent of all provinces would be required, but most experts believe the latter to be the case. Perhaps the most interesting feature of the decision is that the Court declared that if a clear majority of the voters in a province gave its support to a question clearly asking for separation, the other "partners in the federation" would be under a constitutional obligation to negotiate in good faith with the province aspiring to secede.

Australia

There is no formal right to self-determination or to achieve a status of independence or autonomy beyond that already granted to the Original States under the Commonwealth Constitution. Nor is there a right to secede unilat-

erally from the Commonwealth. The attempt by Western Australia to secede in the 1930s failed and no State has since seriously pursued such a course.

There are provisions in the Commonwealth Constitution for the admission of new States, including States that were previously territories or part of an existing State. Section 121 of the Commonwealth Constitution empowers the Commonwealth Parliament to admit to the Commonwealth or establish new States, upon which it may impose such terms and conditions as it thinks fit. Section 124 provides that a new State may be formed by separation of territory from a State, but only with the consent of the State Parliament. A new State may also be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected. The alteration of the limits of a State also requires the approval of the majority of the electors of the State (s 123 and s 128). In addition, territory may be ceded by a State to the Commonwealth under s 122.

Mexico

The right to self-determination or to secede of the States is neither permitted nor acceptable under the Constitution.

Brazil

No, it does not. Article 1 of the Constitution provides that: "The Federative Republic of Brazil" is "formed by the indissoluble union of States and Municipalities and of the Federal District".[5]

Argentina

In our opinion, separation or self-determination is not allowed. The definition given by the US Supreme Court in "Texas vs. White" stating that the "federation is an indestructible union, of indestructible states" is accepted among us.

We are a federation, not a confederation (apart from historical denominations) and, in consequence, the states' rights of secession and of nullification are not recognized. It neither means that a province cannot split and form more than one, nor that several provinces cannot unite in one, nor that

5 This translation is not official.

new provinces could not be admitted. Article 13 establishes so in the following terms: "new provinces could be admitted into the Nation. But a province cannot be formed in the territory of others, or several cannot form a single one, unless all the assemblies of the affected provinces and Congress approve the change".

India

The Constitution does not allow the states the right of self-determination or separation from the federation**.**

United Kingdom

There is no written document in which such a right could be enshrined, although UK governments for three decades have repeatedly stated that they accept the right of Northern Ireland to self-determination if a majority of the population were to vote to leave the UK.

More recently, the strength of the SNP in Scotland has led to discussion of the possibility and procedures for Scottish independence. The UK government has not said that it considers self-determination unconstitutional. There is general agreement that a majority of Scots could vote to secede and it seems likely that the UK would accept that decision.

There is a current debate about the process that would be used to determine if the Scottish population wanted independence. The Scottish government cannot hold a binding referendum on independence (because the legislation incorporating Scotland into the UK is not Scottish law and all matters pertaining to the Union and crown are reserved to Westminster). Independence would therefore depend on persuading Westminster to accept the results of an unofficial Scottish referendum or calling its own referendum on Scottish independence. The more detailed debate is about process, specifically the structure of a referendum and whether multiple referendums would need to be held.

Germany

The Federal Constitution does not allow the States to separate from the Federation. They do not have the right of self-determination in the sense that they could decide on their own status.

Austria

As mentioned above (see III.3), the B-VG calls the Länder "self-governing". This term refers to their internal self-determination, which, however, is limited by the Federal Constitution. Neither does the B-VG assume the Länder to be sovereign under international law or entitle them to secede. However, it is possible under the Federal Constitution to change Land territory: All Länder that are concerned by a minor change of border between them have to respectively enact ordinary laws enabling this change. If the change of territory is more than just a slight readjustment of Land borders, but not so considerable that it would endanger the existence of a Land, the respective laws enacted by the Länder have to be accompanied by an ordinary federal law as well (that needs a quorum of half of the members of the National Council and a majority of two thirds — which are the quorum and majority normally needed for the enactment of federal constitutional laws). Territorial changes that would affect a Land in its very existence, however, need both a constitutional law enacted by the concerned Länder and a federal constitutional law.

Swiss Confederation

The 1874 Constitution had no provision regarding the secession of a territory to his Swiss independence. It was clear that the cantons / states are mentioned in the federal constitution and that the constitution guaranteed the territory of states. The secession of a state or part of its territory would require a revision of the constitution. Under the doctrine of international law, the right to self-determination does not automatically grants right to secession; it can be exercised within a State if a group concerned do not have guaranteed sufficient self-determination. In my opinion, the independence enjoyed by the Swiss states entails sufficient self-determination. The question becomes more difficult if there is a population within a state that requires self-determination. An example occurred in the state of Bern where the population upstate, in the Jura region, wanted to be independent. Although there was no provision in the federal Constitution providing for the possibility of the division of a state and for the procedure to be followed, the Jura region and is now separated from Bern; Jura is a state.

Since the total revision of the Constitution in 1999, the situation has changed. The new Constitution provides that "any change in the number of

states or their status will be subject to approval by the electorate and the cantons concerned, as well as the vote of the people and the cantons in its entirety." This is based on the procedure applied in the case of the secession of Jura from the State of Bern. This establishes a procedure that can be applied to issues of secession, but does not change the fact that the affected population cannot independently decide their destiny.

Belgium

Self-determination or secession of the federated units is not recognized in the Constitution.

Italy

No power of self-determination is provided for and, even less, secession of a Region.

Spain

Legally, this possibility is not recognized by the Constitution. A recent decision of the Constitutional Court (STC 103/2008), which is worthy a longer comment, explicitly rejects this possibility unless the Constitution is amended to provide for it.

IV

INSTITUTIONAL ISSUES

SUMMARY: 1. Do States participate in the election, appointment or dismissal of the Federation's Head of State or Head of Government? Is there any other relationship between this figure and States? Which one? Are Chiefs of State Governments considered federal representatives in their States? If so, to what extent are they federal representatives? 2. Is there any Senate or second legislative chamber where States are represented? If so, does it exercise its representative role effectively? Why? What functions does the Constitution attribute to this legislative assembly? How are States represented in this chamber? Does each State have the same number of seats or votes? Does any State have a special position in this chamber (for instance, exclusive initiative or veto prerogatives)? How state representatives are organized in this second chamber, according to their territorial origin or to their political groups? 3. Is there any neutral judicial court (Constitutional Court, Supreme Court, etc.) that protects the allocation of powers between the Federation and the States? Do States participate in the selection process of its members? How do you assess the influence of this court upon the current system of political decentralization? Broadly speaking, could you tell whether its case law has been most favorable to the interests of the Federation or of the States? Are there any subject matters or historical phases in which this phenomenon occurred? Can lower courts interfere — federal or state courts — in conflicts of powers between the Federation and the States? 4. Who is in charge of the official appointment of the main state authorities (the Chief of the State, President of State Government, President of State Parliament or Legislative Assembly, the President of State Judicial Council, etc.)? Does the Federation intervene in the process of appointment? 5. Do States have legislative initiative over matters under federal power? Is their consent required for the enactment of certain federal acts? In other words, do they have a veto? If so, what are the effects of this veto? How much relevant is this veto power? 6. Does the Judicial Power follow the allocation of powers? In other words, are there federal and state courts with jurisdiction to solve federal and state cases respectively? Regarding state courts, is the appointment of judges, magistrates and administrative staff a state power? Do States enjoy legislative power to regulate these issues? Is there any Judicial Council or Commission? If so, which is its composition? What functions does it have? Who is responsible for the provision of material resources to the Administration of Justice (Federation or States)? Which are the criteria for the allocation of resources? Can federal courts review state court's decisions? In what cir-

cumstances? 7. Which legal mechanisms do the Federation and the States have to protect their powers? Are they recognized only against legislative acts, or against administrative regulations/decisions/inaction, too? Could you tell whether the safeguards and procedural position of the Federation and the States are symmetrical? In other words, can the Federation challenge state acts before a court? And vice versa? Has the Federation a veto against state legislative acts, regulations or decisions? And the States against federal ones? Can a State bring a conflict of powers against another State before a court? In each State, which branch of government can initiate judicial proceedings to protect state powers? Can local entities or Municipalities bring judicial actions to protect their autonomy against federal or state rules or decisions? Are there any other institutions or individuals authorized to challenge federal or state legislative acts, regulations, rules or decisions on the basis of a conflict of powers? 8. Are there others mechanisms for state participation in federal institutions or functions? If so, are there mainly bilateral (i.e. between the Federation and one State) or multilateral (i.e. all States participate)? Are there any permanent organs to channel these relations? Which ones? How do they work? Do States participate or are represented in relatively autonomous federal organisms, regarding, for instance, citizen's rights or intervention in the economy (independent agencies with regulatory, financial and arbitration powers, etc.)? 9. Can States freely convoke referenda regarding political or legal issues? Are there any constraints? Does the Federation have any kind of control over these issues? 10. Is there any pro-state provision concerning symbolic issues (flags, anthems, protocol conventions, languages, etc.)?

1 · Do States participate in the election, appointment or dismissal of the Federation's Head of State or Head of Government? Is there any other relationship between this figure and States? Which one? Are Chiefs of State Governments considered federal representatives in their States? If so, to what extent are they federal representatives?

United States of America

Presidential election is by states, in the sense that the popular vote elects "electors" to an electoral college, who traditionally (but are not

bound) vote for the candidate they are pledged to. Except for two states in the 2008 election state votes are cast as winner take all. In the two states the votes are apportioned by congressional district, with the state winner also receiving the two senate equivalent votes. Under winner take all, state votes are cast as a block, which is the popular vote winner wins all of the state's electoral votes. This, of course makes large states more powerful.

The president does not have a direct relationship with the states, but acts through governors in an informal fashion. The only exception is in calling out the militia. Indirectly, there are many contacts between the president, president's cabinet and the states. For example, on homeland security or on health care.

The governors are only informally/politically the chief federal representative in the states, but they have no official federal standing other than as head of the state militia. Informally, the governors are the policy leaders of their states, including in matters of federal program concerns and is the chief (or final) advocate to the federal administration on the state's behalf.

Canada

The Head of State at the federal level is the Queen in right of Canada (presently, Elizabeth II of Great Britain). When acting as Monarch for Canada, the Queen is represented by the Governor General, who is appointed by the Queen, on the advice of the Prime minister of Canada. The provinces have no role whatsoever in the appointment of the Governor General. The Head of government at the federal level is the Prime minister of Canada. The Prime minister is appointed by the Governor General and, following the conventions of the Constitution, the Governor General must choose a person capable of mustering the support of a majority of members in the House of Commons. Again, the provinces have no role whatsoever in the appointment of the Canadian Prime minister.

The Head of State at the provincial level is the Lieutenant Governor, representing the Queen for provincial purposes. The provincial Lieutenant Governors are appointed and can be dismissed by the Governor General (which actually means by the federal Cabinet). The federal Cabinet is not required to consult the provincial government when choosing and appointing the Lieutenant Governor. This apparent subordinate position of the provincial Head of State in relation to the federal Head of State is one of the "unitary" features in the Constitution Act, 1867, at odds with the federal

principle. However, in a 1915 decision, the Judicial Committee of the Privy Council made it clear that the position of the Lieutenant Governor was to be considered an oddity and that no effective subordination of the provinces to the federal government could be deduced from it.

Australia

The Head of State of Australia is the Queen, whose representative in Australia at the Commonwealth level is the Governor-General. The Governor-General is appointed and removed by the Queen on the advice of the Australian Prime Minister. The States have no role in the appointment or removal of the Governor-General. The Governor-General only represents the Queen with respect to the Commonwealth level of Government. He or she has no role with respect to the States. Each of the States has its own Governor who is appointed and removed by the Queen on the advice of the State Premier. The Commonwealth has no role in the appointment or removal of State Governors. State Governors are in no way subordinate to the Governor-General. State Governors deal directly with the Queen, rather than through the Governor-General. For further information on State Governors see: A Twomey, *The Chameleon Crown — The Queen and Her Australian Governors* (Federation Press, 2006).

The only point when there is inter-play between State Governors and the Governor-General is when the Governor-General is absent, incapacitated or dies in office. By tradition the most senior State Governor is appointed to administer the Commonwealth until the Governor-General returns to work or a new Governor-General is appointed. While a State Governor is administering the Commonwealth, he or she is replaced in his or her State role by the State Lieutenant-Governor (who is usually the Chief Justice of the Supreme Court of the relevant State). The one person cannot administer the State and the Commonwealth at the same time.

The Head of Government at the Commonwealth level is the Prime Minister and at the State level is the Premier. Both the Prime Minister and the Premier are elected by the voters of their own constituency and are chosen by their relevant parliamentary party to lead it. The Prime Minister is appointed to that office by the Governor-General, without any State involvement, and a State Premier is appointed to that office by the State Governor, without any involvement of the Commonwealth. Neither State Governors nor State Premiers are considered to be federal representatives.

Mexico

States do not participate directly in the election or cease of the Head of the Federal State, who is also the Head of the Federal Government. The Head of the federal State, as chief of the federal executive, has among his powers the relations with the States. This leads, for example, to the subscription of tax coordination conventions, coordination conventions regarding health, human settlements, education, etc.

Neither the state governors nor the Head of government of the Federal District are considered representatives of the Federation in their territories. According to the letter of article 41 of the General Constitution, the people exert his sovereignty through the Powers of the Union, in the issues under their power, and through the powers of the States, in what their interior regime is concerned, according to what is respectively established by the Federal Constitution and those of the States, which must not contravene the stipulations of the Federal Pact.

Brazil

Brazil has a Presidential system. The people directly elect Federation's Head of State (President). States do not participate, and have no relationship with the Head of Federal Government.

Chiefs of State Governments (Governors) are not representatives of the Federal government. Each State's electorate directly elects its own Governors.

Argentina

Before the 1994 constitutional amendment, the Presidential and Vicepresidential election was indirect through the Electoral College, like in the US system. The Electoral College consisted of the popularly elected representatives; electors for each province are twice its number of representatives and senators. But after the reform, the election is direct and has two rounds. Therefore, States do not participate in that designation directly.

As to whether there is any other relation between the different levels of government apart from the typical in a federal state, article 128 (previously, art. 110) must be mentioned: "Provincial governors are natural agents of the Federal Government applying the Constitution and national laws".

Given the federal basis of our state, this article, despite the interpretative problems it has entailed, can only mean that cooperation between the different layers is necessary.

India

The States participate in the election and removal of the federal head of the State but not in the appointment or removal of the head of the federal government. The head of a State (Governor) is appointed by the Federation's head and holds office at its pleasure but the Chief of the Government of the State (Chief Minister) is elected by the representatives of the people in that State. The Chief Minister is not and also not considered as federal representative in the State. But Governor is considered such a representative.

United Kingdom

The Prime Minister is theoretically chosen by the Queen but really is chosen by Westminster Members of Parliament. Devolved governments have no formal, and almost no informal, role in any decision made by Westminster.

Germany

The Länder are represented in the Bundesversammlung (Federal Assembly) which gets together once every five years to elect the Bundespräsident — i.e. the Head of States —, whereas the Bundeskanzler is elected by the Bundestag — i.e. the lower house of the Federal Parliament —. Chiefs of State governments do not represent the Federation in their States.

Austria

No, the states do not participate in the head of state's or government's election/appointment. However, the Federal President, as head of state, nominally appoints the Land Governors and may dissolve a Land Parliament, if the Federal Government demands it and if a qualified majority of the Federal Assembly agrees. A Land Parliament must not be dissolved more than one time, if the reason for dissolution is the same.

The Federal Chancellor, as head of the Federal Government, has no direct relationship to the Länder.

Chiefs of Land Governments (Landeshauptmänner) are no federal representatives, but are elected, together with the other members of the Land Governments, by the Land Parliaments.

Swiss Confederation

First, in Switzerland there is not a head of state. In Switzerland, all executive functions, functions that in other states are implemented by the Head of State and his ministers, are entrusted to a collegial body, the Federal Council. This Council is composed of seven members who must decide collectively. There is a formal president who changes every year, but has no powers over his colleagues. Its special features are representing Switzerland abroad and conduct the meetings of the Federal Council. In other words, this is a primus inter pares. For the preparation of laws and executive functions, each of the seven members of the Council has the role of minister and chairs a Department of the federal Administration. The members are elected by the Federal Assembly in a joint session of both Houses. As the House representing the people the National Council at large, has 200 members and the Council of States has only 46 members, the first has much more weight in the election of members of the Federal Council than the representation of States.

As to the place of origin of the candidates, the Constitution establishes that the choice takes into account the adequate representation of regions and languages, but the observation of this requirement is not guaranteed by any independent body. The way the candidates are chosen is very particular, since by tradition the candidates are selected so that all major parties are represented according to a fixed formula, called the "Magic Formula", by which all political parties are constantly represented, and the states take turns. This tradition is surprising when one examines the Constitution since it would not prevent that a party or a coalition elects all members of the executive. Political science links this practice with direct democracy, which does not allow an "opposition" in the way it is common in purely representative parliamentary systems. A strong party in opposition would have the effect of making the system unmanageable, as the opposition will have strong tools to block the Government through the instruments of direct democracy (referendum and popular initiative).

State executive bodies are organized in the same way. The role of head of state is exercised by a collegial body called the Governing Council or Council of State. Its members are elected by the people and have a strong democratic legitimacy. These councils are accountable, in the first place, to the people and do not have any particular function of federal representation but, of course, they are an important contact body, representing the state interests before the federal government.

Belgium

The Head of State is the King, designated according to the succession rules. No intervention from public authorities — neither federal nor regional — is authorized. The succession rules established by the Constitution must be observed.

The Belgian King has several duties and functions. He is the Head of the State. He assumes the function of state representative both within the state and towards foreign countries. He is both a piece of the constituent power and part of the federal legislative power. He also contributes to the enforcement of judicial decisions. Finally, he plays a role in the main federal functions.

On the contrary, the King has almost no function regarding the federated level. The laws of institutional reform only had done precision, and it is at the procedural or courtesy level. Before taking office, the minister-president of a community or region takes the oath before the King. Any particular allegiance might be derived from this issue, apart from, perhaps, a compromise of federal loyalty, in the sense of article 167 of the Constitution.

The federated governments are not considered representatives of the State or the Federal Government in their regions or communities.

Italy

A limited representation of the Regions (three for each Region, 61 representatives) participates in the election of the President of the Republic, although it is mainly the responsibility of the two Chambers (945 components).

The Regions do not intervene in the cessation procedures of the Head of State.

The Presidents of the Regions are not considered representatives of the (central) State in the Region.

Spain

States lack participation in these procedures. The Head of the State is the king. The holder of the Crown is not elected, but is determined by lineage. The king cannot be held responsible. In the event of regency, disqualification from holding the Crown or extinction of all lines of succession, the federal Parliament has the sole power to intervene. The presidents of the states are the "ordinary representatives of the federation in the respective states". Given this position, they carry out certain functions — for example, they promulgate on behalf of the King the state laws and rules with rank of law —. Nevertheless, in what protocol is concerned, when the federation organizes any event, the high ranked officials of the federation precede the heads of the states.

2 · Is there any Senate or second legislative chamber where States are represented? If so, does it exercise its representative role effectively? Why? What functions does the Constitution attribute to this legislative assembly? How are States represented in this chamber? Does each State have the same number of seats or votes? Does any State have a special position in this chamber (for instance, exclusive initiative or veto prerogatives)? How state representatives are organized in this second chamber, according to their territorial origin or to their political groups?

United States of America

The Senate is a popularly elected body (since 1913), two per state, that has basically equal powers and is equally effective with the House. The Senate has the exclusive power to ratify treaties and to confirm (advise and consent) presidential appointments, including federal judges and Supreme Court members. No state has special powers or veto prerogatives — all 100 senators have the same legal standing —, although large state senators have many more voters to represent than do small state senators. The sen-

ate is organized by party caucus. There are currently two independents, which caucus with the Democrats.

Canada

At present the 105 seats in the Senate are distributed in the following way: Ontario and Quebec, 24 each; New Brunswick and Nova Scotia, 10 each; Prince Edward Island, 4; British Columbia, Alberta, Saskatchewan and Manitoba, 6 each; Newfoundland, 6; Yukon, Nunavut and the Northwest Territories, 1 each. In relation to their population, the four western provinces are poorly over-represented or even under-represented. With almost 30% of the population they have only 23.1% of the seats in the Senate. However, equality of Senate representation for all provinces would lead to undemocratic results. The six smallest provinces (the four Atlantic Provinces, Manitoba and Saskatchewan) would hold together 60% of the Senate seats, while representing only 17.4% of the Canadian population.

Senate reform has been the subject of a great deal of debate and a large number of proposals in the last thirty years have been discussed. Interest in the issue is explained by the fact that the less populous provinces, in particular in Western Canada (British Columbia, Alberta, Saskatchewan, and Manitoba). They elect too few members of Parliament to be able to wield an influence comparable to that of the two most populous provinces, Quebec and Ontario. See it as a way to obtain greater influence in the national political decision-making process. Therefore, they call for a reformed Senate modelled on the Australian and American model with each province represented by the same number of directly elected senators. This new Senate would have a democratic legitimacy equivalent to that of the House of Commons and thus would be able to exercise comparable powers.

At present senators are appointed by the Canadian Prime Minister, with appointments being almost always made on a political patronage basis. Thus senators represent neither the people nor the governments of the provinces. This lack of legitimacy, whether democratic or federative, means that the Senate cannot really exercise the powers it is endowed within legislative matters, which are almost identical to those of the House of Commons. In most circumstances the Senate should not block or even unduly delay the adoption of bills passed by the House of Commons. Senate reform must thus aim at re-establishing more coherence between senators' powers and their political capacity to exercise those. Direct popular

election of senators seems to have widespread support. Although very democratic, this solution does however have serious drawbacks within the context of a Westminster-style parliamentary system, with responsible government and party discipline. A popularly elected Senate could be either too *similar* to the House of Commons, which would make it redundant, or too *different*, which could result in a confrontation between the two Houses and mutual neutralization. In any case, the danger would be that party discipline leads the senators to align along party lines rather than in defense of the interests of the provinces or regions (senators regroup according the political parties, which are the same as in the House of Commons).

Australia

The Commonwealth Parliament is comprised of a lower House, being the House of Representatives, and an upper House, being the Senate. The Senate is comprised of 12 representatives from each of the six States and 2 Senators each from the Northern Territory and the Australian Capital Territory. Section 7 of the Commonwealth Constitution provided originally that each State shall have six Senators, but permitted Parliament to make laws increasing or diminishing the number of Senators for each State, as long as equal representation of each Original State was maintained and as long as no Original State had fewer than six Senators. Since then, the number of State Senators has increased to 12 each. No Senate representation is guaranteed to the Territories. The representation of the Australian Capital Territory and the Northern Territory in the Senate is a consequence of legislation, authorised by s 122 of the Commonwealth Constitution.

New States may be admitted upon such terms and conditions as the Parliament thinks fit, including as to representation in either House (s 121). Accordingly, if the Northern Territory became a State, it would not be guaranteed 12 Senators. This is particularly important, because there is a nexus between the size of the Senate and the House of Representatives. Section 24 of the Constitution requires that the House of Representatives shall have, as nearly as practicable, twice number of Members as number of Senators. Hence an additional 12 Senators would require an additional 24 Members of the House of Representatives.

The term of the Senate is six years (while the maximum term of the House of Representatives is three years). Half the Senate is normally elect-

ed every three years and takes office on 1 July after the election. If, however, a double dissolution is called under s 57 of the Commonwealth Constitution because of deadlocks over the passage of Bills, the whole Senate is dissolved and elected, with half serving three years and the other half serving six years, to get back into the system of rotation of Senators.

Senators are elected by way of proportional representation (although the electoral method is left by the Commonwealth Constitution to the Commonwealth Parliament to determine) and are elected by the entire State voting as one electorate, rather than by individual constituencies. Currently, voters may either give preferences to all candidates in their State, in whatever order they choose, or vote according to the preference list registered by a political party or group. Casual Senate vacancies are filled by a joint sitting of the Parliament of the State from which the Senate vacancy occurred. A 1977 amendment to the Commonwealth Constitution requires that the replacement Senator be of the same political party as the Senator who is being replaced.

The functions of the Senate are largely the same as the House of Representatives. All Senators are treated equally and no States have special powers or vetos. Senate approval is needed to pass all laws (unless a deadlock occurs, a double dissolution is held under s 57 and a joint sitting of both Houses passes the formerly deadlocked Bill). The Senate may not originate money bills or amend certain money bills, but it may request the House of Representatives to amend those money bills and it may reject them. Apart from these limitations with respect to money bills, s 53 of the Constitution provides that the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

In practice, because the Senate is elected by a system of proportional representation, it is usually not controlled by the Government. Small parties and independents may hold the balance of power. The consequence is that the Senate usually has a strong committee system that reviews Bills and undertakes other inquiries that hold the Government to account.

Senators tend to be grouped by reference to their political party. Although they are formally elected to represent a State or Territory, they nearly always vote according to their party's dictates. They are not subject to instructions by State Governments or State Parliaments and do not vote in State blocs.

Although the Senate can no longer be accurately described as a States' House, the greater representation of small States in parliamentary parties

as a consequence of equal Senate representation does have an influence on party policy. Occasionally, where an independent from a small State like Tasmania holds the balance of power in the Senate, political deals are done that give significant advantages to that State. On the whole, however, the Senate does not effectively represent the interests of particular States.

Mexico

In Mexico, there is a Senate which has been traditionally considered the chamber of State representation at the federal level. Nevertheless, in spite of the political rhetoric and the position of part of the doctrine, currently an important sector of the constitutional doctrine considers that the original "federalist" character of the Senate has been blurred. Several factors have contributed to this. First, the election system for the senate doesn't involve local legislatures (as it used to before); senators are now elected on a universal election and in a direct form. Second, 32 senators are elected through the system of proportional representation from lists voted in a single plurinominal national circumscription; these senators have no electoral tie to any State. Third, the requisites to become senator are exactly the same as the ones for deputy, except for the minimum age (25 years at the day of the election for Senators, 21 for representatives (deputies)).

128 members compose the Senate. 64 of them are elected in each of the 31 States and in the Federal District (two for each State and two for the F.D.) through a system of relative majority. 32 are elected (one in each State and one in the F.D.) as senators of the "first minority" (the seat corresponds to the party that in the corresponding State obtained the second highest number). Finally, 32 senators are elected by the proportional representation system from the lists voted in a single national plurinominal circumscription.

All States are equally represented, both regarding seats and in votes. No State has a special position in this Chamber.

Finally, the representatives of the States are grouped not according to their territorial origin but in "parliamentary groups", that is, according to their political party.

Among Senate powers, we may mention the following:

A. It participates in the ordinary legislative procedure, concurrently with the Chamber of Representatives. A bill does not become a

law until both chambers approve it. Neither prevails over the other one.

B. Senate does not participate in the approval of the Federal Spending Budget Bills, but it does in the approval of the Income Bills.

C. A majority of two thirds of the Senate members present (the same majority is required in the lower chamber) is necessary for a constitutional reform (besides, the approval of the majority of the local legislatures).

D. Exclusive powers reserved for the Senate (that is, not shared with the Chamber of Representatives) are:

a. Analyze the federal Executive's foreign policy and ratify international treaties and diplomatic conventions celebrated by the Union's Executive.

b. Ratify the appointments of the General Attorney of the Republic, general consuls, superior employees of Treasury, coronels and other superior chiefs of the National Army, Navy and Air Force nominated by the Executive.

c. Authorize the Executive to allow the departure of national troops outside the country, the passing of foreign troops, and the stay of other countries fleets, for more than a month, in Mexican waters.

d. Give its consent so the President of the Republic can dispose of the National Guard outside their respective States, fixing the necessary forces.

e. Declare, when all constitutional powers of a State have disappeared, that it is time to appoint a provisional state Governor, who will call to elections according to the state constitutional laws. The Senate will appoint the Governor from a three candidates list proposed by the President of the Republic. A majority of 2/3 of the senators present, or of the members of the Permanent Commission of the Union's Congress — standing committee — when the Senate is not in session, is required.

f. Resolve the political questions that may arise between the powers of a State when one of them asks the Senate to or when due to the conflict the constitutional order has been interrupted due to an armed conflict.

g. Act as a court to conduct the political trial of the faults or omissions committed by public servants.

h. Appoint the Ministers of the National Supreme Court of Justice, from a list of three candidates proposed by the President of the Republic. It also has approval power over the requests for leave or resignation of those.

i. Appoint and remove the Chief of the Federal District in the cases established by the General Constitution.

Brazil

There is a Senate where States are represented. Every State (and the Federal District) has three senators, one vote for each, no matter its population size. No senator has special position. They do not always effectively represent their States. Generally speaking, the effectiveness of a senator representation will depend on her relation with her state's leaders and Governor. Party system plays the crucial role on this tension between State's interests and senator political agenda. Party system also seems to guide a senator's organization within this chamber.

Article 52 of the Constitution establishes the Senate powers and functions:

"It is exclusively the competence of the Federal Senate:

I — to effect the legal proceeding and trial of the President and Vice-President of the Republic for crime of malversation, as well as the Ministers of State and the Commanders of Navy, Army and Air Force for crimes of the same nature relating to those; [impeachment]

II — to effect the legal proceeding and trial of the Justices of the Supreme Federal Court, the members of the National Council of Justice and of the National Council of Public Prosecution, the Attorney-General of the Republic and the Advocate-General of the Union for crimes of malversation;

III — to give prior consent, by secret voting, after public hearing, on the selection of:

a) Judges, in the cases established in this Constitution;

b) Justices of the Court of Accounts of the Union appointed by the President of the Republic;

c) Governor of a territory;

d) President and directors of the Central Bank;

e) Attorney-General of the Republic;

f) Holders of other offices, as the law may determine;

IV — to give prior approval, by secret voting, after closed hearing, on the selection of heads of permanent diplomatic missions;

V — to authorize foreign transactions of a financial nature, of the interest of the Union, the States, the Federal District, the territories and the municipalities;

VI — to establish, as proposed by the President of the Republic, total limits for the entire amount of the consolidated debt of the Union, the States, the Federal District and the municipalities;

VII — to provide for the total limits and conditions for foreign and domestic credit transactions of the Union, the States, the Federal District and the municipalities, of their autonomous Government entities and other entities controlled by the Federal Government;

VIII — to provide for limits and conditions for the concession of a guarantee by the Union in foreign and domestic credit transactions;

IX — to establish total limits and conditions for the entire amount of the debt of the States, the Federal District and the municipalities;

X — to stop the application, in full or in part, of a law declared unconstitutional by final decision of the Supreme Federal Court;

XI — to approve, by absolute majority and by secret voting, the removal from office of the Attorney-General of the Republic before the end of his term of office;

XII — to draw up its internal regulations;

XIII — to provide for its organization, functioning, police, creation, transformation or extinction of offices, positions or functions of its services and the initiative of law for establishment of their respective remuneration, taking into account the guidelines established in the law of budgetary directives;

XIV — to elect the members of the Council of the Republic, as established in article 89, VII;

XV — evaluate periodically the functionality of the National Tax System, its structure and components, and the performance of the tax administrations of the Union, States, Federal District and municipalities.

Sole paragraph — In the cases provided for in items I and II, the Chief Justice of the Supreme Federal Court shall act as President and the sentence, which may only be issued by two-thirds of the votes of the Federal Senate, shall be limited to the loss of office with disqualification to hold any public office for a period of eight years, without prejudice to other applicable judicial sanctions".[1]

Argentina

Our Congress is a complex body composed by 2 chambers: the House of Representatives which represent the Nation, and the Senate which represents the provinces.

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1 This is not an official translation. It was available on line at: http://www.v-brazil.com/government/laws/constitution.html.

As explained before, there is a Federal Senate which, in a US Senate fashion, is formed by 72 Senators; 3 senators per province and the City of Buenos Aires (art. 54º).

Moreover, according to its functions, the Senate is institutionally more important than the House of Representatives, since it approves the President's nominees for State high functionaries — such as Judges, Ambassadors or high officials of the Army. (Art. 99th parts 4th, 7th and 13th.)

The constitutional 1994 amendment, in order to reaffirm the Senate's key role in the federal state, assigned to this body, in the legislative procedure, the initiative regarding tax co participation covenant-law bills, proposals for the harmonic development of the Nation and population distribution, and the promotion of different public policies tending to balance the differential development of provinces and regions (art. 75th parts 2nd and 19th).

In few words, it can be said that historically the Argentinean Senate did not accomplish accurately its federal paper, as senators acted following the political national parties lines, instead of defending their respective provincial interests. This can be illustrated by the legislative debates discussing federal interventions, or bills regarding industrial promotion, co-participative taxes, or provincial natural resources.

India

The Council of States or the Upper House of the Federal Parliament represents the States. The representation of the States in the Council varies according to their size and population from 1 to 31. It does not exercise its representative role very effectively because of the lack of adequate territorial loyalties and unequal representation of various States in it. The representative of a State need not be even a resident or voter in that State. The Second chamber participates in all law making and constitutional amendments. The States in this house are represented through representatives elected by the Legislative Assemblies of the States. No State has any special position except that their representation vastly varies. The representatives in this chamber are organized accordingly to their political groups. Territorial origin is the predominant but not an essential condition.

United Kingdom

The upper house — the House of Lords — does not represent any territorial circumscription. There is debate about making it elected, but neither the function nor the electoral system of an elected Lords is clear.

Germany

There is a second chamber, the Bundesrat. It takes part in the legislation of the Federation, where it exercises its role very effectively. In many fields, any law must be approved by the Bundesrat, its consent is required for the enactment of the law: "Zustimmungsgesetze"; this concerns most legislative acts in a financial context, and, generally speaking, laws involving the interests of the Länder. For all other laws, the Bundesrat can raise an objection ("*Einspruch*"); the Bundestag may reject this with a qualified majority. The Bundesrat has also the right of legislative initiative.

Thus, the Bundesrat exercises its representative role effectively. It plays an important role especially when the political majorities in the Bundestag and the Bundesrat are different.

The number of votes of the Länder is different. The smaller ones with less than two million inhabitants (Hamburg, Bremen, Saarland) have three votes. The biggest ones with more than seven million inhabitants have six votes. That means, however, that for Nordrhein-Westfalen one vote counts for about three million inhabitants, whereas for Bremen the relation is one vote for about 150.000 inhabitants. Thus, the bigger States cannot overrule the smaller ones.

Austria

Yes, there is a Federal Assembly (Bundesrat), which is the second chamber of the Federal Parliament. Within the process of federal legislation the Federal Assembly usually is entitled to object to a bill, but may be overruled by the National Assembly's vote of persistence. Only in few cases the Federal Assembly enjoys the right of absolute veto (e.g. if a bill is intended to deprive the Länder of a competence). It may also set up its own standing rules, initiate bills, demand a referendum in certain cases, propose constitutional judges, challenge the validity of a law before the

Constitutional Court and, apart from legislative functions, has several particular rights of assent and control over the executive.

Basically, the Länder are represented according to their population figures. Art 34 B-VG provides certain rules of proportionality (between 3 and 12 members for each Land, depending on the number of citizens). The members are elected by each Land Parliament. They need not be members of the Land Parliament, but must be eligible to the Land Parliament.

The Federal Assembly is a permanent body, as its members are not generally elected, but sit as long as the respective Land Parliament is not dissolved. Since the Land Parliaments of the 9 Länder are dissolved and newly elected at different times, the Federal Assembly as such permanently remains.

Apart from the different numbers of delegates, no Land enjoys a privileged position in the Assembly. The position of the presiding officer circulates between the Länder semi-annually according to an alphabetic scheme.

De facto, the representatives stick to their respective parties, represented in the National Assembly, rather than to their own Land. This is also shown in the seating arrangements, where members belonging to the same party — and not those belonging to the same Land — sit together. On account of these "partisan politics" the Federal Assembly turns out to be a disappointingly weak organ, which has never yet made use of its right of absolute veto and has even rarely objected to bills passed by the National Assembly.

Swiss Confederation

In the Council of States (Senate), each state has two representatives, with the exception of half-cantons, which only have one. The second chamber has exactly the same powers as the National Council. For the approval of a bill or constitutional amendment, each of the chambers has to accept the proposal. The only exceptions are the joint meetings, for example, for the election of federal judges or federal advisers. It should be noted that States are completely free in defining the process of electing their representatives in the Council of States. National Council members as well as members of the Senate must vote without instructions. For this reason, there is a debate in Switzerland about whether the Council of States still exerts its function as a representative of the States, because many times the counsellors are guided more by their political party's agenda than by the

interests of their State of origin. In contrast, this voting system without instruction ensures that the councillors represent the voters of their state and not the Government, which is an advantage from the standpoint of separation of powers.

Belgium

The Senate has the status and the duties of a High Assembly (second chamber).

It has 4 different types of members: directly elected senators, community senators, co-opted senators, and senators by law. The latter are not democratically elected. Among those elects, only few are directly elected.[2]

The Senate does not always participate in the elaboration of federal laws. When it participates, plays a secondary role. The political control of the government and the budgetary issues are not under its control. The Senate is conceived as a reflection chamber. A definition of this function is lacking.

As it can be observed, the Senate does not follow the model of a federal Senate. It does not assign equal status to the two communities, the French and the Flemish. It does not have powers comparable to those of the House of Representatives. This scheme is often criticized and the pro-

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2 There are 40 senators directly elected. 25 are elected by the Dutch electorate; 15 by the French. This distribution wants to reflect the percentage of French-speakers and Dutch-speakers in the electorate.
21 community senators are elected by the three communities. This was the result of the willingness to ensure the communities representation in the Senate and transforming it into a federal assembly representative of the federated collectivities. This goal is only partially achieved since only 21 out of 73 are elected through this way.
There are 10 co-opted senators. The 25 senators elected by the Dutch electorate and the 10 Dutch-speaking community senators elect 6 senators. Hence, the Dutch group in the Senate has 43 members. One of them, at least, has to have its domicile, the day of the election, in the bilingual region of Brussels-Capital. He or she can be a senator elected in any of the ways. The 15 senators directly elected by the French electorate and the 10 senators elected by the Parliament of the French Community co-opt 4 more. Hence, the French group has 29 members. 6 of them are required to have their domicile in the bilingual region of Brussels-Capital. In both cases, the election follows the rules of proportional representation — prorate of the relevance of the political groups constituted in the Senate.
According to article 72 of the Constitution, the princes and the princesses — or in its defects, the descendants of the branch of the royal family that will reign —, are senators by law since they are 18, as long as they have taken the constitutional oath. Nowadays this is the case of the prince Philippe, the pronce Laurent, and the princess Astrid.

posal for a paritary Senate has been advocated for a long time. See e.g. *Quelles reformes pour le Sénat? Propositions de 16 constitutionnalistes*, avant-propos d'A. De Decker, Bruxelles, Bruylant, 2002.

Italy

A second chamber representing the Regions does not exist. The Senate is "elected on a regional basis" (art. 57 Const) with direct election of the senators by constituencies whose territorial division corresponds to a Region.

Spain

Formally, the Senate is the Assembly of territorial representation. However, the widespread agreement is that, in practice, it does not effectively represent the states for two main reasons. First, its members are almost exclusively elected through elections whose districts do not correspond with the territory of the States, but rather with the Provinces. Second, the Spanish Senate practically lacks any specific function as a territorial Assembly. The sole three specific powers regarding the system of territorial allocation of powers are: approving, prior to Congress (the lower house) the distribution of resources from the compensation fund; authorizing conventions and agreements among the States; and authorizing Government, by absolute majority, to adopt exceptional measures to force the States to comply with their obligations. This last power is the only one that might have certain practical relevance. Until now, however, these measures, which are extremely exceptional, have never been applied.

States are not represented as such in the Senate. There are four senators from each province, elected by universal suffrage. Each state Parliament may appoint one senator, plus another one for each million people in its territory. This means that, among the approximately 260 senators, only 60 are directly appointed by state Parliaments. No State enjoys a privileged position in the Senate. The senators organize themselves on the basis of political forces. They can also form territorial groups, which, however, have less parliamentary capacity to act.

To enhance the territorial representation role of this chamber, in 1994, the senatorial especial General Commission of the Autonomous Communities. This is a legislative committee with 23 varied functions assigned

(e.g. report and receive information from the presidents of the states). Nonetheless, the results of this experience have not been satisfactory, it hardly ever meets.

3 · Is there any neutral judicial court (Constitutional Court, Supreme Court, etc.) that protects the allocation of powers between the Federation and the States? Do States participate in the selection process of its members? How do you assess the influence of this court upon the current system of political decentralization? Broadly speaking, could you tell whether its case law has been most favorable to the interests of the Federation or of the States? Are there any subject matters or historical phases in which this phenomenon occurred? Can lower courts interfere — federal or state courts — in conflicts of powers between the Federation and the States?

United States of America

Judicial review of legislation began with *Marbury v. Madison* (1803), when the Supreme Court overturned a portion of the Judiciary Act of 1801. The court ruled that Congress could not enlarge on the original jurisdiction of the Supreme Court. Had this review power not been exercised early in the country's history, it might never have come to pass, for it was not until 1857 that a federal statue was next invalidated by the Court.

Power to review state actions began with *Fletcher v. Peck* (1810), when the Court ruled that a Georgia law violated the Contract Clause of the Constitution. The ruling was that the state could not be viewed as a single unconnected sovereign power, on whom no other restrictions are imposed than those found in its own constitution. As a member of the Union, "that Union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass." This was the "second stone" in American constitutional law.

The next move was to affirm the appellate power of the Supreme Court over state court decisions, in order to make them consistent with the Constitution, laws, and treaties of the United States. In *Martin v. Hunters*

Lessee (1816) reversed a Virginia court decision that a mandate of a federal court violated a treaty. Five years later, in *Cohens v. Virginia* (1821), the court affirmed its appellate power over decisions of state courts. The states, the Court maintained, are not independent sovereignties, but members of one nation, and the courts of that nation must be given the power of revising the decisions of local tribunals on questions that affect the nation. Since *Cohens v. Virginia* state attempts to make themselves the final arbiters in cases involving the Constitution, laws, and treaties were foredoomed.

Federal power was reinforced in *McCollch v. Maryland* (1819), where the Court established the doctrine of implied powers that is the broad construction of the "necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution" clause. The "necessary and proper" clause meant that the Court established the doctrine that federal government is "supreme within its sphere of action." This meant, as affirmed in *Gibbons v. Ogden* (1824), that federal action, if itself constitutional, must prevail over inconsistent state action. The Gibbons decision was also the first to expand the Commerce Clause, covering all forms of economic activity "between nations, and parts of nations, in all branches." It is the power to regulate, that is, to prescribe the role by which commerce is to be governed. This power, like all others vested in Congress is complete itself, may be exercised to its utmost extent. As interpreted, the Commerce Clause was to become the most important source of federal government power in times of peace. It is how Washington regulates many aspects of American life.

The Supreme Court, settles federal-state disputes, determines allocation of powers, and reviews unconstitutional state actions. Although nowhere written in the Constitution, it is now accepted practice. States have no role in any federal court nominations, including the Supreme Court. The Court has had great influence on centralization or of the accretion of federal power, particularly through broad interpretation of the commerce clause, the "necessary and proper" Congressional power, and the 5th and 14th Amendments (see paper). Only recently has the Court slightly reversed this trend, limiting Congressional or federal powers over the states. Case law has most definitely favored the federation from 1868 to the present.

Lower federal courts (district, appeals) are the original venues for federal-state conflicts. In non-state government cases there must be an "aggrieved party" who files a motion based on a "federal question" that is

heard in trial by a U.S. district court. Only rarely (e.g. 2000 Presidential Election dispute) does the Supreme Court take a case directly. If the Supreme Court refuses to hear a case on appeal that has gone through a lower court, the last decision of the lower court is considered to be law. In practice, this happens in many more federal cases than do Supreme Court hearings, as the Court lets earlier decisions stand. The Supreme Court is the original venue for all disputes between state governments. Finally, state courts do make certain federal constitutional decisions, but have no role in dealing with federal-state conflicts of power.

Canada

The Supreme Court of Canada is the general and last court of appeal for provincial as well as federal law (be it common law or statute law). In this function, it also exercises the role of ultimate constitutional arbiter with regard to the interpretation of the Canadian constitution and, therefore, of the division of powers between the federation and the provinces. However, note that the Supreme Court is not a "constitutional court" in the European sense. Judicial review of constitutionality is part of the jurisdiction of ordinary courts. Before any judicial court, federal or provincial, a litigant can question the constitutionality of any law (statute law or common law) used against him or her by another private party or by the Attorney General acting on behalf of the federal or the provincial government. The court must then examine the question and, if it finds the law unconstitutional, declare it not applicable or invalid (the inferior courts can only declare the law inapplicable to the actual case or controversy; the superior courts can invalidate it with general effect). Furthermore, there exist direct or declaratory actions that allow preventive challenges to the constitutionality of a statute, even before it is applied to any particular person.

Except in certain criminal cases, appeals to the Supreme Court exist not of right but by leave, which means that the Court must first authorize the appeal. The Court has accordingly the liberty to choose the cases it wants to hear and to select only cases that present a sufficiently important legal interest. The court hears less than 100 cases every year, of which approximately 25% have constitutional aspects.

The Supreme Court of Canada is composed of nine judges including the Chief Justice. Under the *Supreme Court Act*, three of the nine judges must be appointed from the courts or from the Bench of Quebec, in order

to ensure that enough judges learned in the civil law can sit on an appeal from Quebec on civil law questions (elsewhere in Canada, private law is governed by the common law). By usage, the six other members of the Court are appointed following a regional distribution within English Canada (three judges for Ontario, one for British Columbia, one rotating among the three Prairie provinces and one for the four Atlantic provinces).

Supreme Court judges are appointed by the federal Cabinet, with no requirement of consultation of the provincial governments or for confirmation by the federal Parliament.

As noted above, before 1949, the Judicial Committee of the Privy Council, in London, was the final court of appeal for Canada. In many occasions it gave a reading of the Constitution more favorable to the provinces than to the central government. Since 1949, the Supreme Court of Canada has become the court of final resort in Canada. An examination of the Supreme Court's positions on the division of powers clearly shows that the Court's vision of federalism is generally premised on considerations of economic efficiency and functional effectiveness. Of course, such a vision favours in the long-term centralism as opposed to decentralization and provincial autonomy. Appraisal of the positions of the Supreme Court on the division of powers is quite contrasted depending on whether it comes from English-Canada or from Quebec. In English Canada, the Supreme Court's work is generally considered as meeting adequately the needs of Canada's evolution as a nation and as maintaining an acceptable balance between the central government and the provinces. By contrast, in Quebec there is a widely held view that the expansion of federal powers, if continued in the future along the same lines, will endanger Quebec's provincial autonomy. As has been noted above, these diverging comprehensions are explained by the differences in the very conceptions of federalism held by Quebeckers and by English-Canadians respectively. Quebeckers see provincial autonomy as a means to preserve their distinct identity and political self-government; hence they want to protect it against any federal encroachment. English-Canadians, on the other hand, conceive of federalism more as a system of dividing powers in the most efficient way between two levels of government; if they can be convinced that administrative or economic efficiency, or national harmonization, require greater centralization, they will accept a weakening of their provincial governments' powers without to many qualms.

At any rate, judicial interpretation of the division of powers is no longer the most important factor in the evolution of Canadian federalism. The

equilibrium between centralization and decentralization is increasingly a consequence of the financial relations between both levels of government (see below).

It is the lower courts that will first rule on division of powers issues. Eventually, the case will ascend to an appeal Court and ultimately to the Supreme Court.

Australia

The High Court of Australia has original jurisdiction with respect to any matter arising under the Commonwealth Constitution or involving its interpretation (s 76(i) of the Commonwealth Constitution). It also has original jurisdiction with respect to matters in which the Commonwealth is a party and matters between States or between the residents of different States. State constitutional law matters about not involving the interpretation of the Commonwealth Constitution or about federal jurisdiction, are included into the State jurisdiction.

The Justices of the High Court are appointed by the Governor-General on the advice of the Federal Executive Council (which is comprised of Commonwealth Ministers). In practice, the Prime Minister or the Cabinet as a whole decides on who to appoint to the High Court, although State Attorneys-General and State judges are consulted prior to the appointment. The States have no constitutionally mandated role in the appointment of Justices of the High Court.

The High Court, in establishing a strict separation between judicial power on the one hand and legislative and executive power on the other hand, has argued that this is necessary to sustain the independence of the Court that is required to fulfil its role in adjudicating constitutional disputes between the Commonwealth and the States.

In the first two decades after federation, the High Court (which was then comprised of judges who had been heavily involved in the drafting of the Commonwealth Constitution) supported the decentralization of power and established doctrines of intergovernmental immunities and reserved state powers. However, this changed in 1920 with the *Engineers Case*[3] when those doctrines were overruled and a more literalist and centralist approach was taken by the High Court. Since 1920, the High Court

3 *Amalgamated Society of Engineers v Adelaide Steamship* Co Ltd (1920) 28 CLR 129.

has significantly centralized power in Commonwealth hands by broadly interpreting the Commonwealth's limited heads of legislative power. For example, the external affairs power was interpreted as permitting the Commonwealth to legislate to implement a treaty, regardless of whether the subject matter of the treaty was international or domestic in nature.[4] Given the increasing number and scope of treaties, this potentially gives the Commonwealth Parliament power to legislate about most subjects.

While the High Court has original jurisdiction to hear constitutional matters, lower courts, including both federal courts and State courts that are exercising federal jurisdiction, may also determine constitutional matters. Their judgments, however, are all subject to appeal to the High Court.

Mexico

The neutral judicial organ that guarantees the distribution of powers between the federation and the States (and the Municipalities) is the Nation's Supreme Court of Justice. The States do not participate in the appointment of the Justices of the Court (unless we consider that the Senate is a territorial representation which, which, as pointed above, is a contested subject).

During the stage of the political system that came after the Mexican Revolution, dominated by the binomial President-PRI which lasted at least until the year 2000, Supreme Court's decisions were mostly in favor of the federation. The best illustration of this interpretation of the Court's position is a 1954 decision which practically gave the federation unlimited tributary powers. In it, the federation was allowed to tax any possible base, independently and beyond the distribution of powers established in article 124 of the Constitution — according to which, all powers not expressly allocated by the Constitution to federal institutions are competence of the states —.

This trend varied towards a more balanced attitude at the beginning of the 1990s. In 1991, for example, the Court admitted, against its traditional interpretations, that municipalities were a "power" and, as such, could exercise the constitutional controversy action against states of the federation for invasion of their spheres. In 1994, a constitutional amendment took

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4 *Commonwealth v Tasmania* (1983) 158 CLR 1.

place to strengthen the constitutional defense mechanisms called "constitutional controversies". At the same time, important steps were taken towards the strengthening of the Supreme Court as a constitutional court (the number of Ministers was reduced to 11, and a Federal Judicial Council was created).

Today, the Supreme Court is seen as a federal organ with more independence from the influences exerted both by the federal Executive and Legislative Powers, and this perception as an impartial arbiter has made that, more regularly, States and (mostly) municipalities file constitutional controversies

Lower — neither federal nor state — judicial organs can not intervene in allocation of power conflicts between the Federation and the States. These conflicts are reserved for the constitutional defense instrument called "constitutional controversy", which is judged by the Plenary of the Nation's Supreme Court.

Brazil

There is a Supreme Court ("Supremo Tribunal Federal"), which combines functions of a Constitutional Court. The Supreme Court is the guardian of the Constitution and the only arbiter of federative conflicts. Lower courts cannot interfere in conflicts of power between the Federation and States.

States do not directly participate in the process of selecting Supreme Court members, though Senate has veto power over nominations. Supreme Court judges are appointed by the President and their nomination must be confirmed by the absolute majority in Senate.

Broadly speaking, the Supreme Court has a long tradition of protecting centralization and uniformization. For example, the Court created a "principle of symmetry", which means that states must repeat a great deal of norms of the Federal Constitution. Legislative process, for instance, must be the same in every state. This "principle of symmetry" is highly criticized in academic works as a rule that makes decentralization ineffective. It is true, however, that the Supreme Court has precedents, after the enactment of the Constitution of 1988, which protected states against the Federation intent of intervention. The Supreme Court also has important decisions that protected States against Federation's control on their tax and spending powers.

Argentina

Yes, the Nation Supreme Court of Justice. It is the top court in Federal Judiciary and the last and irrevocable interpreter of the National Constitution. The Argentinean Court, as its north-American homologue, exercises constitutional review.

In addition, it has exclusive and original jurisdiction according to constitutional article 117th in any case in which the province is a part.

Provinces participate in the appointment of the members of the Court through the National Senate, as the ministers are nominated by the Nation president with Senate's approval, manifested in a public session. A majority of two thirds of the members present, according to the art. 99th part 4th of the National Constitution.

I do not consider the Supreme Court decisions in the power conflicts area to be positive since almost always — except for few cases — it decided in favor of the federal government powers over the ones belonging to the provinces and municipalities. Only in its first years, the Court developed better case-law in these issues. However, later, the Court endorsed the centralization process. Finally, it must be emphasized that the inferior judicial organs decide these subjects, as these are part of the original and exclusive jurisdiction of the Nation Supreme Court of Justice.

India

The Supreme Court and the High Courts protect the allocation of powers between the Federation and the States. The States participate in the selection process of the judges of the High courts some of them are later elevated to the Supreme Court by judicial selection. The Courts have often interpreted the Constitution in favour of the Federation, but not always. They have tried to maintain balance between the Federation and the States to the extent as laid down in the Constitution. The lower Courts do not exercise the power of interpreting the Constitution.

United Kingdom

There is no neutral court; the UK Supreme Court resolves conflicts.

So far the main question is why there has been almost no litigation on devolution matters. See:

Hazell, Robert and R Rawlings. 2005. Devolution, Law Making and the Constitution. Exeter: Imprint Academic.

Trench, Alan. 2007. Devolution and Power in the United Kingdom. Manchester: Manchester University Press.

Germany

There is the Bundesverfassungsgericht (Federal Constitutional Court) that protects the allocation of powers. Half of its members are elected by the Bundestag, half of its members by the Bundesrat and, thus, with participation of the State Governments.

On certain occasions, the Court has been most favorable to the interests of the Federation, on other occasions, to the interests of the States. As far as the allocation of legislative powers is concerned, especially in the most important field of concurrent legislative powers, the Court favored the Federation as it did not control the condition "need for a federal law" — Art. 72 Abs. 2 GG — in an effective way. After an amendment of Art. 72 GG in 1994 the Court then strongly favored the States; this provoked a reaction of Federal legislation to weaken again the position of the Länder. As for the law of media and the education sector, however, the Court always defended the rights of the Länder.

Lower courts cannot interfere in conflicts of powers between the Federation and the States, but in certain cases they may appeal to the Bundesverfassungsgericht, if they consider a law to be violating the allocation of powers designed by the Grundgesetz.

Austria

The Constitutional Court (Verfassungsgerichtshof), consisting of its president, vice-president and 12 members, is, among other functions, responsible for deciding competence conflicts between the federation and the Länder. It can either strike down a federal law or a Land law if it is unconstitutional or declare whether a drafted law falls into the ambit of the federation or the Länder. The Länder do not formally participate in the process of designating constitutional judges, but the Federal Assembly is entitled to suggest 3 of its members and 1 deputy member, which, however, have to be nominally appointed by the Federal President.

Without doubt, the court's jurisdiction has been influential on the federal system, particularly with regard to the interpretation of competences where the Court has developed certain rules (see below V.3). However, it is hardly possible to assess generally whether the Court has been more favourable to the federation or to the Länder in certain phases. In general, the jurisdiction has probably been rather centralistic due to the rather centralistic concept of Austrian federalism. However, the Court has always held the principle of federalism to belong to the fundamental principles of the Austrian Federal Constitution, and there are several cases where the Court has taken a pro-Länder position.

If lower courts (all of them federal courts, since the Länder have no judiciary of their own) have to apply a law in a concrete case and believe this law to be unconstitutional, they have to bring the matter before the Constitutional Court in order to let this Court decide whether the law violates the distribution of competences or not. After the Constitutional Court's decision their own procedure may continue.

Swiss Confederation

The Federal Court cannot review the constitutionality of formal federal statutes. This includes the observance of the division of powers by the Federation. The Federal Court has the function of a Constitutional Court only to control the constitutionality of state statutes and decisions, and federal ordinances, which do not result from a decision legitimized by representative and direct democracy.

Belgium

The Constitution established a Constitutional Court, before called Arbitrage Court. As its original name indicates, the main function of this court is to watch over the distribution of powers between the federal State, the communities and the regions. It carries an essential role in this area. As art.142 of the Constitution states "decides the conflicts among federal, community, and regional laws".

In 1998, the Court has an additional function. It reviews statutes, decrees and regulations for their conformity with the equality, anti-discrimination and education constitutional rules.

Since March 9, 2003, the functions of the Court are even broader. It will review norms for their conformity with: any provision of title II of the Constitution (arts. 8-32 establishing the rights and liberties of the Belgians), articles 170 and 182 (legality and equality of taxes), and article 191 (foreigners' rights protection).

The composition of the Court is designed to fulfil this mission. The justices are appointed by the King and nominated by one of the chambers. The nomination requires a majority of 2/3 of the members of the chamber; both linguistic groups participate in this process.

The Court has 12 members and has 2 presidents. The paritarian composition of the Court tries to shield it from critiques that would arise, even in a dualist State, if it had not an equilibrated linguistic representation (F. Delpérée, "Présentation de la Cour d'arbitrage de Belgique", at *Les Cahiers du Conseil constitutionnel*, 2002, n. 12, p. 49).

Even though the denomination the court receives "arbitrator", it not only gives the foul or applies the rules of the game, which is the Constitution. It is its interpreter. It participates, *a posteriori*, in the exercise of the legislative function. The justice is a player in the political game — even if the affirmation sounds tough —. He is, at least, a counter-power of the other established powers.

The Constitutional Court has the monopoly of this function. The other jurisdiction cannot decide the constitutionality of federal and federated laws. On the contrary, these have to turn to the Arbitrage Court in cases involving a conflict of powers.

Italy

Yes, the Constitutional Court can be directly accessed by either the State or a Region to judge the legitimacy of a statute as regards excess of legislative authority. The Regions have no power to nominate the members of the Constitutional Court.

According to prevailing opinions, although the Constitutional Court strongly endorses the principles of autonomy and decentralization, it has often sided with choices and behaviour in favor of the State that have greatly affected the legislative autonomy of the Regions. The prevailing lines have been:

a. A broad interpretation of the concept of "national interests" which is a vague limit widely affecting regional law;

b. A very wide individuation of the provisions, in the central state laws, considered to be fundamental principles in matters of regional power. Thus, the State has legislated in detail in such a way as to reduce the regional legislative authority to mere executive development of the state regulations.

The judicial courts, which are always federal, have no power to resolve conflicts between the State and the Regions but can raise a question regarding the constitutional legitimacy of laws that are about to be applied. In this regard questions relative to possible excesses in legislative authority can also be raised.

Spain

There is a Constitutional Court which solves the distribution of powers conflicts. Until 2008, the states did not participate in the election of its members. The charters amended since 2006 establish this participation through the Senate. This provision was implemented with the 2009 amendment of the Organic Law regulating the Constitutional Court and of the Senate internal regulation. According to this, each state parliament nominates two candidates and the Senate elects from them the 4 justices he gets to appoint. Nevertheless, the Constitutional Court, in two polemic decisions, has declared that the Senate can elect members not included in the lists proposed by the state parliaments.

Given the constitutional vagueness and ambiguity regarding the system of allocation of powers, the role of the Constitutional Court in the definition of this system has been extremely relevant. It has decided a great number of conflicts of powers, probably without comparison in other countries. Generally, it benefited the Federation, with significant exceptions that allowed preserving the great lines of the system. In any event, when evaluating the role of the Court and the trends of its case law, we should bear in mind that its role has been more "passive" than active", in the sense that, rather than imposing a unique interpretation of the Constitution, it has generally accepted the constitutionality of the interpretations given by the federal institutions of government, without rejecting other possible interpretations of the model. When the conflict concerns a legislative act, only the Constitutional Court has the power of constitutional judicial review. In the case of other type of rules or acts, either ordinary

courts or the Constitutional Court review them. The ordinary courts can file a constitutional question before the Constitutional Court regarding the constitutionality of the laws that they have to apply to the specific case they are deciding. The constitutional question might deal with the distribution of powers.

4 · Who is in charge of the official appointment of the main state authorities (the Chief of the State, President of State Government, President of State Parliament or Legislative Assembly, the President of State Judicial Council, etc.)? Does the Federation intervene in the process of appointment?

United States of America

Most state officials are elected by popular vote, including judges. The U. S. has the long ballot, where separate administrative officials (Treasurer, Secretary of State, Attorney General, Auditor, and others) are independently elected. The governor appoints other department heads and fills judicial vacancies.

Unless there is a voting rights violation (Amendment 24, 1964) or some other violation tied to the 14th Amendment, the federal government would not intervene in a state appointment.

Canada

Provincial mechanisms regulate all aspects of the appointment of provincial officials and authorities and the federation does not intervene in any way in the process of appointment except for the choice and appointment of the Lieutenant Governor (see above).

Australia

The Queen appoints the State Governor, on the advice of the State Premier. The Governor appoints the State Premier, in accordance with the convention that the Premier is the person who holds the confidence of the lower House of the State Parliament to form a government. The Governor appoints other State Ministers on the advice of the Premier.

The Governor also appoints the Chief Justice of the Supreme Court, on the advice of State Ministers. The Houses of the State Parliaments elect their own Speaker (lower House) or President (upper House). The Commonwealth has no role in any of these appointments.

Mexico

State Governors and the Government Chief of the Federal District are elected through universal and direct vote of the electors of the territorial entities. The majority of each of the corresponding legislatures elects the President of local legislatures. Finally, the designation of the presidents of the States and Federal District superior courts of justice is made through procedures that generally involve a proposal from the governor and the approval of the state legislature. The Federation does not participate in any of these procedures.

Brazil

The people, through direct electoral process, choose State governors. State Courts have the power to elect and appoint their Chiefs. The Federation does not intervene in these processes of appointment within the States.

Argentina

As established by art. 122th of the National Constitution, the Provinces: "create their own local institutions and regulate them. They elect their own governors, their legislators and other provincial civil servants, without intervention of the Federal government."

All the provinces have a presidential system. Its executive power is assigned to the Governors; their legislative powers might be unicameral or bicameral; and judicial power is exercised by the judiciary.

India

The Governor of a State is appointed by the President of India for five years but holds his office at the pleasure of the President. The Chief Minister of the State is, however, an elected representative of the people of

the State and invariably the person who carries the confidence of the legislative assembly of the State is so appointed.

United Kingdom

There is no formal, and very little or no informal, say for Northern Ireland, Scotland, Wales and the smaller bodies like Man in the appointment of Westminster governments or the judiciary (in the legal system shared by England and Wales, and in the separate system in Scotland, the judiciary effectively appoints itself). Government boards charged with tasks such as running waterways or social security benefits are appointed by the minister of the government on which they depend (i.e. the UK-wide Secretary of State for Work and Pensions appoints the board of the Benefits Agency, while the Scottish Minister of Health appoints the boards of the local health boards).

Germany

The Federation does not intervene in the process of appointment, which is regulated by the State Constitutions. In all States, the Prime Minister is elected by the State Parliament — the Landtag —.

Austria

The Land Governor, as the head of the Land Government, is elected by the Land Parliament and sworn in by the Federal President. The other members of the Land Government are elected by the Land Parliament and sworn in by the Land Governor. The Land Parliament is usually summoned after elections by the presiding officer of the dissolved parliament (depending on the Land Constitution). It is also noteworthy that the supreme Land civil servant, who is head of the Land Government's office, is appointed by the Land Government with the consent of the Federal Government.

The Federal President may dissolve a Land Parliament, if the Federal Government demands it and if a qualified majority of the Federal Assembly agrees. A Land Parliament must not be dissolved more than one time, if the reason for dissolution is the same. In practice, however, this has never occurred yet.

The Austrian Länder does not have a judiciary of itself.

Swiss Confederation

States have a strong organizational autonomy. The only condition imposed by the Federal Constitution is that the state constitution must be democratic. A parliamentary representative democracy would be sufficient. Regarding the executive branch, there are states which have a system with a collegial executive body similar to the Confederation, while other States have a President elected by the people. The Federation is not involved in the procedure of appointment.

Belgium

The members of the community and regional assemblies are elected through universal direct suffrage. At the same time, these members elect, in the assembly or not, the government members of the community or the regions. Every government chooses the president among its members. Federal authorities cannot participate in these election procedures. The only federal intervention is reduced to the norms — Constitution, special act, ordinary laws… — that have to be observed in the electoral processes of the federated collectivities.

Italy

The regional institutions are all elected. The State does not intervene in the nomination procedures except for jurisdictional interventions (the ordinary judges control the eligibility requirements and the administrative judges, the election procedures).

Spain

The Federation does not intervene in any of these appointments, except for the ones concerning the judicial power, which in Spain is unified. Only regarding the President of the State, the King does adopt the formal act of appointment, ratified by the President of the Federal Government. However, these are ceremonial functions.

5 · Do States have legislative initiative over matters under federal power? Is their consent required for the enactment of certain federal acts? In other words, do they have a veto? If so, what are the effects of this veto? How much relevant is this veto power?

United States of America

States do not have direct legislative initiative over federal issues. But that is not a problem. It is easy for a state to ask a senator or house member to introduce a state bill. Hundreds of these bills are introduced each session.

States are considered to "agree" to federal legislatively authorized programs when they sign agreements (e.g. contracts) to participate in them. This normally entails money or the threat of withholding funding. While they have no veto, they can and do option out of some programs.

Canada

No. Provinces have no rights of initiating or vetoing federal legislation. The only influence provinces can try to exert is political.

Australia

Most of the Commonwealth's legislative powers are concurrent. This means that States can legislate on the same subjects, but where the State law is inconsistent with the Commonwealth law, the Commonwealth law prevails (s 109 of the Commonwealth Constitution).

State consent to the enactment of Commonwealth laws is very rarely required. Section 51(xxxiii) permits the Commonwealth to enact laws with respect to the acquisition of State railways 'with the consent of a State' and s 51(xxxiv) allows the Commonwealth to enact laws with respect to railway construction and extension in any State 'with the consent of that State'. This is no longer a significant issue.

Section 51(xxxvii) allows the Commonwealth to legislate with respect to a matter referred to it by the Parliaments of any States, but the law will only extend to the States that referred the matter or which afterwards adopt the law. In these circumstances, a Commonwealth law might be confined

in its application to particular States, leaving other States the capacity to refuse to adopt the law so that it will not apply within their jurisdiction. Further, if the Commonwealth seeks to amend a referred law, it may need an additional State reference, unless the amendment could be supported by another constitutional head of power or falls within the scope of the original reference.

Section 51(xxxviii) also gives the Commonwealth Parliament the power to enact a law with respect to the exercise of any power which at federation could only have been exercised by the United Kingdom, but only at the request or with the concurrence of the Parliaments of all the States directly concerned. For example, if, at the time of federation, only the United Kingdom Parliament could have changed the rules of succession to the throne with respect to Australia, then the Commonwealth Parliament could now legislate to do so if it had the request or concurrence of all the State Parliaments (as all States would be directly concerned). To this extent, a State has a veto by refusing to consent to the enactment of such a law. This power was exercised to enact the *Australia Act* 1986 (Cth) to terminate residual constitutional links with the United Kingdom. The request or concurrence of all the States is also needed to amend the *Australia Acts* 1986 (Cth) and (UK) (although it may also be possible to amend them by virtue of a power conferred on the Commonwealth Parliament by a constitutional amendment under s 128 of the Commonwealth Constitution).[5]

Mexico

State assemblies can introduce bills concerning issues under federal power, according to article 71 of the Constitution. Their approval is not necessary to pass any federal act, that is, they do not have right to veto any federal law.

Brazil

States have no legislative initiative over matters under federal power. They do not have a veto power.

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5 *Australia Acts* 1986 (Cth) and (UK), s 15.

Argentina

As mentioned, the Senate only has initiative in two matters: tax co participation covenant-laws, and those related to the territorial distribution of population and to the promotion measures designed to the differences in development among regions and provinces.

At the same time, provincial participation is required, through their governors, who hold the executive power, to agree with the Republic's President in the Co-participation tax covenant — law, according to art. 75 part 2. Furthermore, that agreement must be approved by absolute majority of each of the chambers of the federal congress and of each of the provincial legislative assemblies.

The conformity of the provincial legislatures is also necessary for the cession of territory in order to create the Federal Capital or the formation of new provinces, as established in arts. 3th and 13th of the Constitution.

In consequence, provincial vetoes are not established.

India

The States have no legislative initiative in matters under the Federal power nor are their consent required for any federal acts. States have no veto over the Federal matters.

United Kingdom

Northern Ireland, Scotland, and Wales all have legal remedies under public law if their competencies or powers as defined in their constitutive Acts (and subsequent ones) are violated by the central state without Westminster legislation. They have no formal influence over Westminster legislation. So far they have not exercised this power, and we have no judicial opinions about it, but it does not seem to be very important.

Germany

States have no direct legislative initiative over matters under federal power, but the Bundesrat has; so, if a State wants to forward a

legislative initiative, it has to introduce it in the Bundesrat which has to decide upon it; if it approves the initiative, the Bundestag has to deal with it.

See the above answer to IV.2.: for those federal legislative acts that must be consented by the Bundesrat ("Zustimmungsgesetze"), the States have in fact a veto with the majority of its votes; this veto power is very important, especially if the political majorities in the Bundesrat are different from those in the Bundestag, which is the case quite often.

Austria

The Länder themselves may not initiate federal laws, although they could informally ask their representatives in the Federal Assembly to do so. The direct consent of the Länder will be needed, if a federal law obliges federal authorities to carry out administrative matters which fall into the sphere of "indirect federal administration" (see below V.10) under the supervision of the Land Governor or if a system of "direct federal administration" replaces "indirect federal administration" in matters not included in an exhaustive list. Further, the Länder have the right of consent, if an Independent Administrative Tribunal is to decide on administrative appeals in administrative procedures that either belong to the sphere of genuine Land administration or indirect federal administration. Moreover, the Länder have the right to approve of federal laws on public procurement if these laws regulate procurement that is administrated by the Länder.

The direct veto power of the Länder is thus limited to a rather limited range of federal legislation. In practice, the Federal Government and the Länder negotiate such topics before so that the veto power is normally not exercised.

Swiss Confederation

States have initiative for constitutional amendment and to propose ordinary legislation, but it does not mandate necessarily the popular vote as it happens with the popular initiative; it is the federal Parliament that decides on the proposal. The approval of constitutional amendments requires the approval of the majority of the electorate in most states (see above II.1). Referendum is provided for state initiative regarding matters

of ordinary legislation; eight cantons (states) must request a popular vote. In practice, this state referendum has been used successfully in 2003 for the first and, so far, the only time against a reform of the tax laws, which states feared because it might have entailed a major financial loss. Against the same federal law, a referendum has been used successfully. In the popular vote caused by the two referendums, voters rejected the law by a very weak majority.

Belgium

The units forming the federation do not have a right to initiate, participate or veto in the issues concerning federal powers. This applies the other way around, too. The federal authorities cannot intervene in any way in the issues under the power of either the community or the regions.

Italy

A regional Council "can introduce a bill to the Chamber" (art. 121, sub-section 1, Const). Obviously it is a law dealing with the legislative, exclusive or concurrent authority of the State.

There is no provision for the intervention of the Regions after the Parliament has enacted a law. Five Regional Councils can request a referendum for the total or partial repeal of a State law.

Regions do not have any veto power over State laws.

Spain

The states enjoy "federal" legislative initiative, but they hardly ever use it and when they have used it, they have not been successful. They have no veto power assigned.

6 · Does the Judicial Power follow the allocation of powers? In other words, are there federal and state courts with jurisdiction to solve federal and state cases respectively? Regarding state courts, is the appointment of judges, magistrates and administrative staff a state power? Do States enjoy legislative power to regulate these issues? Is there any Judicial Council or Commission? If so, which is its composition? What functions does it have? Who is responsible for the provision of material resources to the Administration of Justice (Federation or States)? Which are the criteria for the allocation of resources? Can federal courts review state court's decisions? In what circumstances?

United States of America

State courts generally deal with state issues only, but some do consider federal issues like due process or civil rights. Under the Constitution, Federal Courts deal with federal questions only, although an increasing number of states issues have federal connections.

States have complete control over appointment, election, or removal of state judges, magistrates and court administrators. They are regulated by state legislation only. Some states do have judicial commissions of lawyers who set standards and recommend judicial discipline. Those commissions are appointed by governors. Legislatures appropriate funds to pay for state courts (Congress for federal). Normally, the chief judge submits a proposed budget.

Federal courts only review state court decisions when an appeal is made based on a federal question. Most issues of contract, civil law, or criminal law remain in the state court systems. Very few cases ever make it to federal courts.

Canada

The distribution of judicial powers between federal and provincial authorities does not follow the logic of the distribution of powers.

Canada's judicial system follows the British model in which ordinary judicial courts have jurisdiction over civil as well as criminal law, irrespective of whether the case is litigated between private parties or between a

private party and the state. The first two tiers of courts (courts of first instance and courts of appeal) are under provincial legislative jurisdiction and apply provincial as well as a large part of federal law. The Supreme Court of Canada, which sits at the apex of the system, is under federal legislative jurisdiction and acts as a general court of appeal, with jurisdiction over all Canadian law, federal and provincial. However, there exist also purely federal courts with a jurisdiction limited to certain parts of federal law, which are created and endowed with their responsibilities by the federal Parliament. Thus, when adopting a particular law, the federal Parliament can chose to confer the jurisdiction over it either to the provincial courts or to a federal court. The most important of the purely federal courts is the "Federal Court" that has two divisions, one of first instance and one of appeal. The Federal Court is exclusively (or in certain cases concurrently with the provincial courts) competent over cases involving the Crown in right of Canada (i.e. the federal state) and to apply certain federal laws, for instance admiralty, copyright, trade marks, patents, citizenship and other matters regulated by the federal Parliament.

Justices of the Supreme Court of Canada, judges of the purely federal courts (which in addition to the Federal Court include the Canadian Tax Court and military tribunals) as well as judges of superior provincial courts are appointed by the federal Cabinet. Judges of inferior provincial court are appointed by the provincial Cabinet.

There exist Judicial Councils both at the federal and provincial levels, respectively for federally-appointed and provincially-appointed judges. Their composition varies at the federal level and in the various provinces. Their functions include ethics, discipline and training.

Australia

There are two separate court systems — State courts and federal courts — but for both the final appellate court is the High Court. The High Court therefore imposes a level of conformity within the system. When there are conflicting decisions by different lower courts, the conflict can be resolved by the High Court. The High Court's decisions provide a binding precedent for both State and federal courts.

As State court structures were already in existence at the time of federation, the Constitution provides for federal jurisdiction to be vested in State courts. This avoided the need to act immediately to create a structure

of federal courts. Indeed, most federal courts were not established until the 1970s. While the Constitution provides for the conferral on State courts of federal jurisdiction, it does not expressly permit the conferral of State jurisdiction on federal courts. During the 1980s the Commonwealth and the States established a legislative scheme by which jurisdiction was 'cross-vested' among the different courts, so that a matter commenced in one State could be heard in another and federal courts could hear matters that involved State jurisdiction, just as State courts could hear matters involving federal jurisdiction. Proceedings could be transferred to the most appropriate venue. The intention was to avoid forum shopping and expensive time-wasting jurisdictional disputes. This system worked successfully for over a decade until the High Court held that it was not constitutionally valid for federal courts to exercise State jurisdiction.[6]

State Parliaments have power to legislate with respect to State courts and State Governments control the appointment of State judges and other court officers. However, a State's power is limited to some extent. This is because the Commonwealth Constitution refers expressly to State courts, including State Supreme Courts, and makes them receptacles for federal jurisdiction. Some Justices of the High Court have drawn from this an implication that a State Supreme Court could not be abolished or constructed in such a manner that it could no longer be regarded as a court. Further, the High Court has held invalid State laws that confer functions upon a State court that are incompatible with the level of independence necessary to exercise federal jurisdiction.[7]

The States do not have judicial commissions that determine the appointment of judges, although some States have judicial commissions (comprised of judges and lay representatives) to deal with complaints against judges and to make recommendations as to whether a judge ought to be removed from office. State judges may only be removed from office by the State Governor upon the recommendation of both Houses of the State Parliament. In some States the grounds for removal are confined to 'proved misbehaviour' or 'incapacity'. In other States no particular grounds are required.

The Commonwealth funds the administration of federal courts and the High Court. The High Court, the Federal Court of Australia and the Family

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6 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
7 *Kable v DPP (NSW)* (1996) 189 CLR 51.

Court have a degree of autonomy in how they manage the money granted to them. The States fund State courts, however, the Commonwealth also provides some capital grants with respect to the building and renovation of State court buildings. For a further discussion on court funding, see: Chief Justice French, 'Boundary Conditions — The Funding of Courts within a Constitutional Framework', 15 May 2009 at: http://www.hcourt.gov.au/speeches/frenchj/frenchcj15may09.pdf

Federal courts can review the decisions of State courts exercising federal jurisdiction that have been appealed to a federal court. The High Court determines appeals from both State and federal courts.

Mexico

Mexico has a "double jurisdiction" judicial system. On one side, we have federal courts, which solve matters of federal jurisdiction and who are in charge of constitutional jurisdiction; on the other side, we have state courts, which solve matters of state jurisdiction.

The conflicts of jurisdiction between courts of the same state are solved by the state's superior court of justice. But the conflicts between Federal Courts, between Federal and State or Federal District courts, between courts of different States, or between State and the Federal District courts are solved by the Sections of the National Supreme Court of Justice (there are two Sections), as established by sections VI and VII of article 21 of the Organic Law of the Judicial Branch of the Federation.

Selection and nomination of judges, magistrates and auxiliary personnel of state courts is an exclusive state power, according to the rules established in the constitution of each of the States. Generally, the governor nominates the magistrates of the State's Superior Court of Justice but the state legislative's approval is required. Regarding the nomination of first instance judges, the general trend is the designation by state judicial council. As for auxiliary personnel, generally judges designate them. State's legislatures have powers to issue organic laws to regulate state judicial powers, which contain the specific rules regarding appointments.

There is self-government organ of the federal judicial branch, named, "Judicature Council". Seven members form this organ. One of them is the President of the Nation's Supreme Court of Justice (who also chairs the Council). Three members are designated by the Plenary of the Supreme Court of Justice, by majority of at least eight votes, between circuit and

district courts (which are federal courts) magistrates. The Senate and the last one by the President of the Republic designate two members. The functions of the Judicature Council are administrative and disciplinary. It has powers to decide the designation, adscription, ratification and removal of circuit magistrates and district judges. Likewise, this organ establishes the training and continuous education for federal judicial functionaries, and for the development of the judicial career.

At the local level, the trend of local judicature councils is being imposed, with similar functions to the federal council.

The provision of Federal Justice Administration material resources corresponds to the other federal branches: the President of the Republic and Union's Congress which design and approve the Federal Spending Budget. Regarding local judicial branches, such provision corresponds to the governor and local legislatures through the state spending budget.

The criteria for resource allocation for the judicial branches are not fixed. Hence, there is no obligation to allocate a determined percentage of the federal or state budget. The allocation depends fully on political negotiation.

State judicial organs decisions may be reviewed by federal judicial organs (specifically by Circuit Collegiate Courts) if appealed through "direct amparo" or "amparo cassation". All the resolutions of the states superior court of justice relating state competence matters, in application of state law (for example, a civil code or a penal code) may be challenged through these mechanisms. As a matter of fact, this kind of amparo has become a third instance by which federal courts may review state courts' decisions.

Brazil

The Judicial Power is divided between federal and state courts with jurisdiction to solve federal and state cases respectively. The rules of appointment of state judges and administrative staff are established in the Federal Constitution, and states have no legislative power to regulate these issues. The majority of the judges and staff are not appointed. They must be approved in a public servants entrance exam. Still, one fifth of the higher State Tribunal seats shall be occupied by members of the Public Minister (*Ministério Público*), with over ten years of office, and by lawyers of notable legal knowledge and spotless reputation, with over ten years of effec-

tive professional activity, nominated in a list of six names by the entities representing the respective classes. Upon receiving the nominations, the state court shall organize a list of three names and shall send it to the Executive Power. Then, Governor will select one of the listed names for appointment.

There is a National Council of Justice ("Conselho Nacional de Justiça" — CNJ —), created by constitutional amendment in 2004. CNJ has the power to regulate federal and state courts administration and finances.

Federal and State Courts have broad financial autonomy. They have the power to decide about their budget.[8] The Executive and the Legislative branches cannot change the Judiciary (state and federal) budget.

Federal Higher Courts (Supreme Court and Superior Court of Justice) can review state courts decisions in two main cases: *(i)* when state court wrongly interpreted and applied federal law (one can appeal to the Superior Court of Justice);[9] and *(ii)* where there is a federal constitutional issue involved (one can appeal to the Supreme Court).[10]

Argentina

In the Argentinean Federation there are a Federal Judicial Power and a Judicial Power for each of the Provinces. The Federal Constitution in art.75th part 12 prescribes that the main Codes (Civil, Criminal, Commercial, Mining and Social Security) are applied by the federal or provincial courts, "depending on the issues or people under their jurisdictions".

At the same time, it establishes as one of the requirements for the provincial Constitutions the "judicial administration".

In consequence, each Provincial Constitution organizes its Judicial Power. This is generally integrated by the Superior Court of Provincial Justice and the lower courts, specialized in different subject-matters.

Since every Province is autonomous, it establishes the nomination system of the members of its Judiciary, and also provides funds for it, without any intervention of the Federal Government. One of the main powers re-

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8 In Brazil, public budget is formally approved as a statute, by the Legislative Branch.

9 The Superior Court of Justice (Superior Tribunal de Justiça — STJ) uniformizes federal law interpretation in this country. Since most of the Brazilian law is federal, STJ has a very important duty to control lower courts (state and federal) interpretation.

10 The Supreme Court (Supremo Tribunal Federal — STF) has the last word about the Constitution.

served to the provinces is the issuance of their respective Codes of Procedures in the different matters.

In the same way as the Federal Congress is authorized to enact the laws regulating the administration of federal justice, the Provincial Constitutions authorizes the Provincial Legislatures to issue the respective procedure of organization of the provincial justice.

As for the designation of the provincial judges, in approximately half of the provincial Constitutions a Judicial Council has been created, integrated normally by representatives of the BAR, the judges, the Legislative Power and the Executive, with powers for the selection by public competition of the judges and judicial civil servants, in the same way as it happens in the federal order, after the constitutional amendment of 1994, for the designation of the judges to the lower court. In other provinces, the traditional system of designation of judges is in place: the Governor nominates the candidates and the legislative assemblies approve them. These are roughly the two models. A more fine-grained analysis would require details from 23 Provincial Constitutions and the one of the Autonomous City of Buenos Aires.

As anticipated, to guarantee the constitutional supremacy recognized in art. 31st of the National Constitution, the Supreme Court of Justice can review all the acts or procedures that violate the constitution, no matter whether they are from federal, provincial or municipal authorities.

The law 48 organizes the Federal Judiciary. Its article 14 establishes the extraordinary action which is the route normally used to exercise the constitutional review power. There are 3 situations that might be challenged using this procedure. The questions presented might be simple or complex according to whether the rules clash directly or indirectly with the federal constitution. Besides, the Supreme Court has broadly interpreted its constitutional review power including the control of arbitrariness of provincial judicial decisions and the cases called “institutional seriousness / relevance”.

India

The judicial power in India is unitary and not divided between the Federation and the States. The same courts decide all matters relating to Federation as well as the States. The States have some legislative power to regulate subordinate judiciary subject to the supervision of the High Court

in that State. But they do not have power to regulate the higher judiciary, i.e. the High Courts and the Supreme Court. There is no judicial council or commission. The Supreme Court through its interpretation of the Constitution has, however, created informal bodies for the selection of the judges to the High Courts and the Supreme Court. They are called collegiums of judges. Material resources for the administration of justice come from both the Federation as well as the States.

United Kingdom

Scotland has always had its own legal system; only since devolution it has been possible to appeal any matter to a UK court (certain criminal cases can go to the UK Supreme Court). Scotland's judges are quite autonomous from politics. While the Welsh judiciary is not formally separate from England, their professionals identify and the amounts of distinctive Welsh legislation are both growing. Northern Ireland has long had its own court system. The new Supreme Court has appellate jurisdiction for the whole UK, though only a few Scottish cases can be appealed to it.

Germany

The Judicial Power does not follow the allocation of powers. State courts solve federal and state cases, whereas federal courts — with very few exceptions — only decide as *Revisionsgerichte (appellate courts)*. There are five of them: Bundesgerichtshof (Federal High Court of Justice), Bundesverwaltungsgericht (Federal Administrative Court), Bundesarbeitsgericht (Federal Labor Court), Bundessozialgericht (Federal Court of Social Insurance) und Bundesfinanzhof (Federal Fiscal Court). As the lower courts are all state courts, the federal courts have to review the decisions of the state courts. There is also a Bundespatentgericht (Federal Court in Patent Matters) as the only instance above the Federal Patent Office.

Appeal to the federal courts is allowed when violation of federal law is claimed, in legal matters of general importance and in cases of divergence from the jurisdiction of the federal courts.

Whereas the state courts apply federal and state law, the federal courts only apply federal law.

Regarding state courts, the appointment of judges, magistrates and administrative staff is a state power, but it is regulated by federal law. The

responsibility for the provision of material resources lies with the Federation for the federal courts and with the states for the state courts.

Austria

There are no Land courts, although Land administrative courts have been demanded by the Länder for a long time. Since 1988 Independent Administrative Tribunals have been installed in the Länder, but they are no genuine courts.

Swiss Confederation

The principle of separate jurisdictions for federal law and state law issues does not apply. All state judicial courts apply both state law and federal legislation, and in the case of a contradiction, the principle of prevalence of federal law rules. Contrary to this, the Federal Court is limited to the application, with few exceptions, of federal law in civil, administrative and criminal law matters. However, there are cases where the federal courts may reach a decision based on state law. This can happen, for example, with respect to municipal autonomy which defined by state law but protected by the Federal Court.

As for the election of judges and appointment of other staff, states have full autonomy. The courts are funded directly and solely by the State to which they relate.

The Federal Court's jurisdiction includes constitutional law, administrative law and private law, and is the only and final authority over state judicial institutions. The jurisdiction in the area of constitutional law includes protecting the constitutional rights of citizens and the decision of jurisdictional conflicts, as has been described in the previous answer. In the field of private law, certain relevant cases can be appealed; in any case, those exceeding 30'000 Swiss francs (in some cases SFr 15'000) can. In administrative law matters, appeal to the Federal Court exists only in those cases were the administrative federal law provides so explicitly. Hence, there are federal administrative law cases in which the last instances are state courts.

For social security matters, there is a specialized federal court.

In addition, there are a Federal Criminal Court and a Federal Court of Cassation. They are responsible for federal jurisdiction in the area of crim-

inal law. The latter can override decisions of the highest state institutions when appealed. The Federal Criminal Court as the sole body has sole jurisdiction on federal administrative criminal law; cases regarding this rarely arise.

Belgium

In the Federal States constituted by association, it is quite predictable that the federated collectivity, which had their own judicial powers before the birth of the new State, keep them, all or part of them.

On the contrary, in a State, like the Belgian one, with only a judicial power originally, the distribution of legislative and executive powers has been given priority, and consequently, the break-up of the political and administrative bodies. Judicial Power — consisting in the constitutional jurisdiction, the administrative one, and the general judiciary — is organized at the federal (central) level.

This is the current situation but a debate about the Judicial Power in a federal State is expected to arise soon in Belgium.

Italy

Judicial power is exclusively part of the central government. The regions have no authority, neither legislative nor administrative, regarding civil, penal, administrative or accounting courts.

Spain

The judicial power is unified, that is, the judicial power is not decentralized. The Federation is in charge of the selection and appointment of judges, magistrates and auxiliary staff. The States only have the faculty to ask that selection tests be commenced. There is an institution for the self-governance of the judiciary, called the General Council of the Judicial Power ("Consejo General del Poder Judicial"). It is composed of the President of the Supreme Court and twenty other members, elected by judges and magistrates and by both legislative assemblies of the federal Parliament. Its main competence concerns judges' selection, training, posts, promotions, administrative situations and disciplinary regime. It is also in charge of the courts' inspection. It enjoys a limited regulatory power and it

is informed of certain legislative drafts regarding the judiciary as well as criminal laws or penitentiary regulations. The state constitutions amended since 2006 have introduced, with a remission to the Judicial Power Organic Law, some provisions to bring the Judicial Power closer to the states, such as the existence of decentralized bodies of the General Council of the Judicial Power in several states. Nevertheless, the Decision of the Spanish Constitutional Court 31/2010, of 28th June, in relation to the new Catalan Charter of Autonomy, declared unconstitutional the sections that established a decentralized body of the General Council of the Judicial Power to the extend that it was intented to exercise self-government functions of the judiciary in Catalonia.

7 · Which legal mechanisms do the Federation and the States have to protect their powers? Are they recognized only against legislative acts, or against administrative regulations/ decisions/ inaction, too? Could you tell whether the safeguards and procedural position of the Federation and the States are symmetrical? In other words, can the Federation challenge state acts before a court? And vice versa? Has the Federation a veto against state legislative acts, regulations or decisions? And the States against federal ones? Can a State bring a conflict of powers against another State before a court? In each State, which branch of government can initiate judicial proceedings to protect state powers? Can local entities or Municipalities bring judicial actions to protect their autonomy against federal or state rules or decisions? Are there any other institutions or individuals authorized to challenge federal or state legislative acts, regulations, rules or decisions on the basis of a conflict of powers?

United States of America

The first legal protection is federal court adjudication. But that is often not the last word. At the federal level Congress can act by re-enacting legislation of slight variation, or hope the court might change over time. The president can control by enforcement — strong or weak — or even refuse to implement court orders. The states' main protections are: 1) that they

administer most programs, 2) their representatives in Congress do represent and protect states' interests, 3) can individually or collectively influence federal officials, 4) use public opinion for leverage, or 5) get Congress to propose constitutional amendments. This is true of legislative acts, regulations and administrative decisions. These actions are de jure symmetrical but de facto are subject to political power, size of the state, same/different party as president, and so on.

Under the American system, normal constitutional suits are brought by aggrieved private parties, even when federal or state power questions are at issue, and a government may join in as amicus curiae. However, any government — local, state, federal can challenge in federal courts.

The federal government thus can and does challenge state acts. In 2003 the Justice Department joined in another party's challenging Michigan's racial based admissions policies at its main university. States can and do challenge the federal government. For example, in the early 1980s Florida challenged the Vocational Rehabilitation Act, which mandated a particular form of state organization structure. (Note: Florida lost in the district and appeals courts, dropped the suit, then established a nominal "foundation" to meet the letter of the law, in practice maintaining its preferred organization to this day.)

The federal government has no direct veto of state legislative acts, regulations or decisions. It must pursue the federal court route. The states lack similar powers. The political route or informal settlement is often used both ways, because court processes are expensive, lengthy, and cumbersome.

A state can contest the powers or actions against another state, but only in federal courts. It happens often. One example is a boundary dispute between Kentucky and Indiana due to the changing course of the Ohio River. After nearly 100 years of competing state legislative actions, Indiana took the issue to the federal courts. It lost in 1991, so now part of the north bank of the river is Kentucky. It was a more symbolic than real victory. The famous Louisville (Kentucky) Slugger baseball bat factory is once again in Kentucky, as it sits some 10 meters from the Indiana line on the "Indiana" side of the river.

Any state entity is the legal vehicle for federal judicial action. Generally, it is the state's attorney general that brings action, which in all but a few states is an independently elected executive officer.

Local entities may also bring action in the courts as legal corporations. They do not have the same federal standing as the states.

Citizens or organizations can challenge both state and federal actions — legislative, or administrative — on the basis of misuse of powers. Normally, this comes in the arena of individual or civil rights (e.g. due process) that are infringed, but other powers can also be challenged. For example, during the New Deal economic recovery programs of the 1930s, many were challenged by businesses, associations, and individuals as violations of federal powers. The Court ruled by 5-4 in 2010 that corporations (and unions and voluntary associations) could not be limited from or prevented from making electoral campaign contributions (that is persons representing the organizations) under the 2003 McCain-Feingold prohibitions, as a violation of free speech, thus broadly interpreting free speech rights. (Direct corporate contributions remain prohibited.)

Canada

Judicial review of legislation based on division of power grounds is available to both the federal government and the provincial governments. Both levels of government can challenge the constitutional validity of a statute adopted by the other level on the claim that it does not conform to the constitutional division of powers. As well, local entities or municipalities, private corporations and any individual, can challenge the constitutionality of legislation before the courts, provided the claimant has "standing" to do so (which means that the claimant must show that he is directly affected by the statute he wants to challenge, or if he has no personal standing, that he wants to act in the public interest).

Absent any actual legal dispute the federal government can ask an advisory opinion (or "reference") from the Supreme Court on any constitutional question and a provincial government can do the same from the provincial court of appeal.

Australia

The only legal means by which a State or the Commonwealth can protect its powers is by litigation in the courts. The Commonwealth or a State could challenge the constitutional validity of a law of another Australian jurisdiction. There are also mechanisms for the judicial review of administrative action at the Commonwealth and the State level. The pow-

ers of the Commonwealth and the States to challenge the legislative or executive acts of each other are relatively symmetrical, although the nature of judicial review of administrative action tends to differ from jurisdiction to jurisdiction depending on whether or not a more extensive legislative scheme has been enacted (such as one giving merits review) or whether one must rely on common law or constitutional remedies.

No jurisdiction has a 'veto' power against the enactment of legislation of another (unless, as discussed above, State consent is required for the enactment of a particular Commonwealth law). Where it has an appropriate head of legislative power, the Commonwealth could, however, enact a law that conflicts with a State law, leaving the State law inoperative to the extent of the inconsistency. A jurisdiction could also seek a court injunction to prevent another jurisdiction from exercising an administrative power in a particular manner if it is unlawful to do so.

A State can bring legal proceedings against another State, arguing that the other State's law is invalid or its administrative action is unlawful. This might occur, for example, where one State pollutes water that flows into another State. Judicial proceedings are normally commenced by the executive branch of government.

Local governments may in some cases challenge the validity of State or Commonwealth laws, where they have standing to do so. However, local governments are subject to State legislative control and most State constitutional provisions are not entrenched, so the result might simply be that the State enacts new legislation to authorise its actions. Local government has no constitutional autonomy in Australia. Some State Constitutions purport to protect local government, but it is doubtful that any State has the capacity to entrench such provisions, so they can probably be amended by ordinary State legislation.

Individuals may challenge the constitutional validity of Commonwealth or State laws, where they have standing (i.e. a sufficient interest) to do so. For example, an individual challenged the validity of a Commonwealth law that provided for the making of financial grants to individuals in order to stimulate the economy during the global financial crisis in 2009. He was held to have standing, because he was personally entitled to receive such a grant.[11]

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11 *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

Mexico

The mechanism for States to defend their competences are the "constitutional controversies" actions, established in section I of article 105 of the constitution. The action belongs to the constitutional judicial system; they are heard and decided by the Plenary of the Nation's Supreme Court of Justice whose decision cannot be appealed.

In a general way, it can be said, that the constitutional controversy action proceeds against general dispositions (laws and regulations) and against acts of the Federation, States, the Federal District and the municipalities that violate the distribution of powers system established by the General Constitution, but not for administrative omissions (the controversy is also possible in case of controversies between the federal Executive and Legislature; or between one of the chambers of the Union's Congress and the federal Executive).

In constitutional controversies, the guarantees and procedural position of the Federation, States, the Federal District, and municipalities are symmetrical since they can challenge general dispositions and acts of the others.

Nevertheless, the Federation does not dispose of a suspension power or veto of state laws, regulations or acts; nor the states have these privileges regarding federal laws.

Section I of article 105 of the constitution allows a State to file an action against another State before the Supreme Court of Justice due to a conflict of powers (there are other possibilities, for example, a municipality against the federation or against a State; the Federal District against the Federation, a State or a Municipality; two municipalities against each other).

Article 11 of the Regulatory Law of sections I and II of article 105 of the constitution adopts an open formula regarding the process standing within constitutional controversies. It states that "The plaintiff, the defendant and, if it exists, an interested third party, must be represented in court by the functionaries that, in their terms of the regulatory norms, are legitimated to represent them." This means that it's local constitutions and laws who will determine the organs and specifically which functionaries are legitimated to exercise constitutional controversies in defense of the competence sphere of States and Municipalities.

As indicated above, municipalities also have active standing to initiate constitutional controversies in order to defend their sphere of power defined in article 115 against federal and state norms and actions.

Finally, according to sections II and III of article 103 of the constitutions, citizens may challenge through the "amparo" action either laws, regulations or acts, both state and federal, which contravene the constitutional power allocation scheme if they cause a personal grief.

Brazil

Federation and states can challenge states and federal acts respectively before the court. The Supreme Court will decide this case. This possibility and the procedural positions are symmetric. Federation has no veto power over state acts, and vice versa.

A state can bring a conflict of powers against another state before the Supreme Court. The initiative to protect state power will mainly come from the Executive, but the state Legislative branch also can provoke the court in this issue.

Municipalities can bring to a court a conflict of powers against the state or the Federation.

Argentina

Not only the Federation but also the Provincial States can appeal to the Nation Supreme Court of Justice to defend their power. Their representation is usually assigned to the Attorney General (Procuración del Tesoro de la Nación) and by the Provincial States Attorneys, respectively. There are several actions that can be filed by either the Federation or the States: "amparo", "certainty declarations", or ordinary actions, established by the procedure regulations.

On the other hand, the constitutional control is exercised not only over statutes, but also over any other norms or acts that violate the Supreme Law.

The municipal governments file suit before the Judicial Court of the respective provinces and to the Federal Judicial Power in defense of their rights and powers. Usually, once a Provincial Court of Justice's decision is reached, they can file an extraordinary appeal before the National Supreme Court of Justice, if a federal question has been raised.

But it must be noted that in cases in which a Municipality is part, there is no original jurisdiction of the National Supreme Court of Justice. In other words, if the local governments have to sue the Federal Government, it must appear in front of a Lower Court Federal Judge and afterwards take

the process up to the Federal Court of Appeals, and, finally, if the requirements have been met, reach the National Supreme Court of Justice through the extraordinary appeal.

However, after the constitutional reform of 1994, which recognized the municipal autonomy principle explicitly in art. 123, it is now easier to make the case a federal question one and, thus, reach the Supreme Court, instead of finishing the procedure in the provincial jurisdiction. In this vein, Provincial Constitutions give their respective Supreme Court original and exclusive jurisdiction in cases in which a municipality is part, and also in those cases of power conflicts between the Province and the municipality.

It must also be said that once the "amparo" (constitutional complaint) was established by art. 43 of the Constitution, as a guarantee to assure the applicability of the rights recognized in the Supreme Law and in the International treaties which are part of the federal constitutional bloc, who can file it has been extended. Class action is admitted in those cases affecting collective and diffuse interests. Hence, the "amparo" action might be a way to defend their respective powers.

India

The Federation and the States have the mechanism of courts to protect their powers, legislative as well as administrative. The Federation and the States can challenge the acts of each other in the same courts. The Federation can exercise veto against State legislative Acts through the office of the Governor of the State but the States cannot exercise any such veto against the Federal legislation. A State can bring a dispute of conflict of powers against another State before the courts. Judicial proceedings may be initiated by the executive branch in the government. The local entities can also invoke judicial power to protect their powers and autonomy. The individuals, who are affected by the legislative or other acts of the Federation or the States, may challenge them on the ground of conflict of powers.

United Kingdom

Assuming that the basic devolution legislation is fully intact, Scotland and Wales are well-protected. In Scotland the central state must be acting

within its defined competencies in the Scotland Act if it is to enact a policy in Scotland. In Wales the legislation is more complicated since some classes of all Welsh legislation are reserved to Westminster ("secondary," implementing, legislation is Welsh while "primary" statute law is Westminster); Westminster law since the start-up of devolution in Wales has usually expanded Welsh powers. Once Westminster legislation protects a devolved competency, only more Westminster legislation can take it away and any court can enforce the protection of the devolved government. Standing to bring cases is extensive and there is no meaningful legal inbuilt advantage to Westminster. Again, the interesting question is why there is so little intergovernmental litigation; the answer appears to be that the governments prefer to resolve disputes bilaterally.

Germany

The Federation and the States both may appeal to the Bundesverfassungsgericht (the Federal Constitutional Court) to protect their powers against legislative and administrative acts; against the latter, in certain cases they have to appeal to the Bundesverwaltungsgericht. A State can also bring a conflict against another State before the Bundesverfassungsgericht or the Bundesverwaltungsgericht. Judicial proceedings normally have to be initiated by the state government. Since 2004, the state parliaments may as well bring a federal legislative act to the Bundesverfassungsgericht.

The Federation has no veto against state legislative acts and decisions; under certain conditions, if a state constantly violates the federal constitution, the Grundgesetz, the Federation may interfere; this, however, has never been the case.

The States have no direct veto against federal acts, but the Bundesrat has in the cases mentioned above (see above 5.).

Local entities may appeal to the constitutional courts of the States to protect their autonomy against state rules or decisions and they may appeal to the Bundesverfassungsgericht against federal acts.

Any individual has the right of Verfassungsbeschwerde; i.e the right to appeal to the Bundesverfassungsgericht to protect his/her civic rights against federal and state acts. Within one's Verfassungsbeschwerde, one may also *rügen (rebuke),* that a federal or state act violates the allocation of powers.

Austria

Both the federation (Federal Government) and the Länder (Land Governments) may challenge each other's laws before the Constitutional Court on account of their unconstitutionality (e.g. violation of competences).

The same applies regarding regulations.

Administrative rulings can be brought before the Constitutional Court by individuals, if these decisions violate their fundamental rights and are based on an unconstitutional federal or Land law/regulation. If the law/regulation directly and currently violates their rights, individuals may directly challenge a federal or Land law/regulation on account of its unconstitutionality, unless an administrative ruling or a judgment has been passed in this matter or unless one could reasonably expect from the person to claim such a decision. Further, higher courts and Independent Administrative Tribunals have to appeal to the Constitutional Court, if, on the occasion of a case which they have to decide, they believe a law to be unconstitutional. Finally, a third of the members of the National Assembly and the Federal Assembly respectively and a third of the members of a Land Parliament, if the Land Constitution does so provide, may challenge the validity of a law before the Constitutional Court, if they believe it to be unconstitutional. However, parliaments may only challenge laws enacted by their own entity.

The Länder (i.e. the Land Governments) may ask the Court to deliver a judgment on the question whether an agreement between them is an agreement under Art 15a B-VG (see above III.5) and if the obligations, imposed on them in this treaty, have been met.

Municipalities may challenge federal or Land regulations, if they struck down municipal regulations that were enacted within their autonomous sphere, before the Constitutional Court on account of their alleged illegality. As well, they are entitled to challenge administrative rulings before the Constitutional Court, if they were passed by a supervisory (federal or Land) authority.

The Constitutional Court also resolves competence conflicts between federal and Land authorities. Moreover, both the Federal Government and the Land Governments may submit a draft law to the Constitutional Court for an opinion whether the bill, if it became law, would violate the distribution of powers. If the Court holds that this would be the case this will not formally prevent the federal or Land lawmaker from enacting such a law.

If, however, the law, after its enactment, is challenged before the Constitutional Court, the Court will resume its former pre-legislative opinion and strike down the law.

Swiss Confederation

At first sight, the situation is informal and in favor of the Federation. As it has been already mentioned, there is no legal authority to decide on the constitutionality of a federal law. In other words, if the Federation violates the division of powers through a law, neither the court nor any other body can intervene. In other cases, the Federal Court can decide on jurisdictional disputes between States and the Confederacy or between different states. This includes the case that a federal ordinance violates a state power, or a law, ordinance or state decision violates a federal power or the power of another State. The governments of both levels are entitled to exercise a "Staatsrechtliche Klage" (public law claim). There is another case in which the Federal Court decides on the constitutionality of state law. The principle of prevalence of federal law, and therefore also of the division of powers by the Federal Constitution, is interpreted as a fundamental individual right. Hence, it is the basis to evaluate claims by an individual or an association regarding the violation of federal powers by a State. The court may invalidate parts of the state law at stake or deny its application in a particular case. All cases are decided by the principle of prevalence of federal law over state law, which is mandatory for all law enforcement bodies; that is, also for the administration and for state courts.

The municipalities have municipal autonomy. This is defined by state law and protected by the Federal Constitution. The State, through its Constitution and laws, regulates the degree of autonomy enjoyed by municipalities. But once established this degree of autonomy in the law the State is obliged to respect it. The Federal Court protects the autonomy in more or less the same way it protects the fundamental rights of individuals.

Belgium

As any other court, the Constitutional Court, called originally Arbitrage Court, does not act *ex officio*. To exercise the function assigned by the Constitution, it has to be prompted to act. According to art.142.3 of the Constitution, "any authority according to law or any person with an inter-

est at stahe can file a suit before the Court, and any court can request a preliminary ruling". The special law of January, 6th 1989 — modified by the law of March 9th, 2003 — specifies (article 2 onwards) the requirements for these judicial actions.

The action can be filed by an ordinary actor or by a privileged one.

The ordinary one is a private party — either a person or an entity —.[12] It has to justify an interest to exercise the action. Preliminary proceedings can be carried out by the Court to verify this interest in order to rule out those parties without standing for the unbounded interest they argue. The control is effective but standing has been broadly interpreted. A law regulating political rights could be challenged by any citizen since each has an interest in the democratic principles and in equality in the exercise of democratic rights (active and passive suffrage). As the Courts put it: "the right to vote is a fundamental political right in a representative democracy" (CA, n. 9/89 April, 27 1989 and n. 26 of July 14, 1990).

The privileged plaintiff is a public authority. It does not need to justify a particular interest, it is assumed. However, the authority has to be listed in the special act. This list includes executive authorities — federal, community, or regional — or their legislative assemblies.[13] Even if privileged plaintiffs are cautious in order to show respect for the other authorities, they do not remain inactive in front of their political competitors. Not only they file suits, but they may participate in the procedures to favor the challenged norm or support the action of other agents against a rule.

From this point of view, the Federal State and the federated entities are on an equal footing. They have the same legal tools to enforce the Constitution and the distribution of powers regime.

Furthermore, the Conséil d'État reviews the constitutionality, of administrative adjudicative and regulatory decisions.

The local collectivities can also intervene before the Constitutional or Administrative court. They participate to defend their specific interests.

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12 Giving standing to private parties arouse concerns: would the court be invaded by an avalanche of individual actions that will impair the efficacy of the courts? These concerns did not materialize. The number of new norms challenged in the first 6 months was limited. The harm, if any, was scant. As has been mentioned, a screening procedure (sort of certiorari) has been established in order to eliminate those actions clearly inadmissible or the cases over which the Court does not have jurisdiction. This procedure allows deciding quickly those annulment actions evidently groundless (special act, arts. 69-73).

13 The presidents of the legislative assemblies file the suit at the request of 2/3 of the members.

Italy

The Constitutional Court is competent not only for questions regarding constitutional legitimacy of the laws and "acts that have legal force" (which do not include regulations) but also for "conflicts of powers between the State and the Regions and among the Regions" (art. 134 Const). The action of conflict of power can be used to challenge any act or secondary or administrative regulation which encroaches upon the sphere of the respective authority of the State and of the Regions.

The procedure for safeguarding authorities can be considered symmetrical. Regarding the possibility of revocation, the situation is different for laws and for acts, either regulatory or administrative. Concerning laws, before the reform of 2001, the State had the power of preventive control over regional laws, which it has lost; while a Region could only challenge a state law without being able to have it suspended. Today, both have the power to challenge laws before the Constitutional Court which has no power to suspend the legal effect of the law challenged. However, in the case of conflict of power between the State and the regions, the Court, pending decisions, has the power to suspend the legal effect of acts.

Judicial actions challenging laws or acts are filed by the executive organism of the Region (the regional council). Neither local entities (Municipalities and Provinces) nor other public entities have the power of direct appeal to the Constitutional Court, the only organism with the power of judicial review over state or regional laws.

Spain

The control is essentially judicial. Only in the case of delegation of powers, can the federal Government review regulations and administrative acts. The scope of judicial review extends to legislative acts, regulations, acts and omissions. In general, the situation is symmetrical, except for the possibility, very relevant in practice, of temporarily suspend the enforcement of legislative acts, which is only applied automatically against state laws. The suspension, however, can be revoked by the Constitutional Court in five months if the legal requirements are met.

States are granted standing to bring a conflict of powers against other States. Within each State, the state government and the Parliament, but not parliamentary minorities, can bring a conflict before the Constitutional

Court against the Federation. Local institutions may bring a conflict before the Constitutional Court against federal and state laws. Apart from the federal and state Executives and Parliaments and the local entities, there are no other institutions with standing to challenge legislation or other acts based on distribution of powers arguments. For instance, in 2006 the Ombudsman challenged some provisions of the Catalan Charter of Autonomy which had nothing to do with the citizens' rights (which are what the Ombudsman is in charge of protecting and the basis of his standing).

8 · Are there others mechanisms for state participation in federal institutions or functions? If so, are there mainly bilateral (i.e. between the Federation and one State) or multilateral (i.e. all States participate)? Are there any permanent organs to channel these relations? Which ones? How do they work? Do States participate or are represented in relatively autonomous federal organisms, regarding, for instance, citizen's rights or intervention in the economy (independent agencies with regulatory, financial and arbitration powers, etc.)?

United States of America

With the exception of numerous interstate compacts and agreements and a few federal-interstate agreements most of the mechanisms are informal and political. Another vehicle is bilateral or civic association contact and/or lobbying. Also contact with members of Congress is important. States have no direct participation in federal bodies other than special commissions, although state interests are normally considered when these bodies are formed.

Most bilateral/multilateral activity is not at the legislative but at the administrative level. Virtually every program has regular federal-state contacts and an "annual conference" to bilaterally renegotiate programs is the norm. Multilateral conferences of a more general nature are also the norm, although these vary more by program. For example, in the case of emergency management, working conferences have been more frequent since the Katrina emergency of 2005. Permanent state-federal organs are less frequent or outside of government. The National Governor's Association has divisions that include state planning officers, state budget officers, and state

tax commissioners. The Council of State Governments also has divisions for state constitutional officers-secretaries of state, treasurers, attorneys general, auditors, comptrollers, etc. Finally, other state program heads, e.g. in public health, mental health, highways, environment have their own independent associations. These officials have important state-federal interactions. Although widely recognized they are not official organs.

Canada

There have been over the years several proposals for a Canadian Securities Commission composed of a certain number of Commissioners representing provinces or regions. Such Commission has not yet been established.

Australia

The primary body that deals with intergovernmental relations is the Council of Australian Governments ('COAG'). It is comprised of the heads of government of the Commonwealth, the States and the two self-governing territories, as well as a representative of local government. It meets regularly and not only addresses intergovernmental matters at the highest level, but also directs and oversees the work of other ministerial councils. Although the States participate fully in COAG by generating policy ideas and negotiating proposals, the agenda and the frequency of meetings is still controlled by the Commonwealth. Proposals to legislate to institutionalise COAG and to give it an independent secretariat or take it out of Commonwealth control have not been successful.

There are also numerous ministerial councils, such as the Standing Committee of Attorneys-General, that meet regularly to develop joint cooperative schemes and uniform legislation. They are comprised of the relevant Ministers from each jurisdiction.

Sometimes the Commonwealth and the States establish joint bodies comprised of representatives of each jurisdiction or whose members are appointed with the approval of a ministerial council. Examples include the Joint Coal Board, the Snowy Mountains Commission, the Murray-Darling Basin Commission, the National Road Transport Commission and the Australian Financial Institutions Commission. Sometimes the body will be established as a public company with the shares held by participating gov-

ernments (eg the National Rail Corporation) or sometimes it may be a Commonwealth body but an intergovernmental agreement requires consultation with the States before appointments are made to it (eg the Australian Securities and Investment Commission). In most cases the arrangements are multilateral in nature.

Sometimes cooperative schemes provide for uniform Commonwealth and State legislation and confer on one jurisdiction (usually the Commonwealth) the function of exercising enforcement powers across the scheme. There is, however, a constitutional difficulty with such arrangements. The High Court has held that the Commonwealth cannot legislate to impose on its officers a duty to perform functions or exercise powers conferred by State law unless the Commonwealth has a head of legislative power to do so.[14]

Mexico

States, through their legislatures, may participate in the constitutional reform process. To amend the constitution, the approval of two thirds of the present members of each congressional chamber is required, plus the approval of the majority of state assemblies. There is no other significant state participation in federal institutions or functions. There is no recognized participation or presence in federal independent bodies either. Nonetheless, there is certain participation in consultative bodies (with a multilateral composition) that have been created to coordinate certain matters, such as public safety or civic protection. So, there is a National Public Safety Council and National Civic Protection Council in which state governors participate.

On the other hand, the Federation and the States enter into a wide range of compacts or covenants (in a bilateral scheme) in order to coordinate actions or to transfer certain powers (e.g. the collection of certain federal taxes).

Brazil

State participation in federal institutions and functions is concentrated in Senate.

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14 *R v Hughes* (2000) 202 CLR 535.

Argentina

Besides the Federal Councils in operation — such as those dealing with Investments, Education, Energy, etc. — the reform of 1994 has foreseen a fiscal federal body, where provinces and the autonomous city of Buenos Aires participate, for the control of the system of tax co-participation, which has not been regulated yet.

India

There are no other mechanisms for States participations in federal institution or functions other than their representation in the Federal Parliament or the provision for Inter-State Council which may be created by the President of the Federation or coordination among the States (Art. 263).

United Kingdom

Informally there is a great deal of co-ordination — such as Scotland playing a major role in relevant EU policy formulation. Formally, the Memoranda of Understanding emphasise co-ordination, co-operation, and confidentiality between the administrations; it would be strange to expect anything else of the UK civil service.

Germany

Besides the participation of the Bundesrat in federal legislation and, in certain cases, administration, there are no other formal mechanisms.

Austria

Basically, this is not the case. However, it is up to ordinary law to provide that certain agencies or committees include a Land representative among other members (e.g. within the Austrian Public Broadcasting Organisation according to the Broadcasting Act). Joint bodies could moreover be established by formal treaties between the Länder and the Federal Government.

Moreover, cooperative federalism in Austria is characterized by informal consultation talks within joint conferences and working groups, where

Land delegates are represented. This is particular the case with respect to negotiations preceding the enactment of the Financial Equalisation Act and relating to EU matters.

Finally, the Land representatives participate in several joint organs on a private law basis, where they are not restricted by the distribution of competences (e.g. national parks, road companies, universities, regional development agencies).

Swiss Confederation

States should be consulted before the adoption of any proposed federal legislation, either by parliamentary committees or by the federal government, but always before the debates in Parliament. The same is true in the case of international treaties that may affect their interests or powers.

Since 1993, there is a Conference of Cantonal / State Governments ("Konferenz der Kantonsregierungen" KDK). Its purpose is to coordinate, to the extent possible, the positions of cantons (states) before the Federation, particularly in cases of consultation with the Confederation, and to coordinate state interests. The KDK has energized a lot Swiss federalism; for example in 2003, for the first time since its introduction in 1874, the state referendum has been used successfully. But despite its weight, the KDK is not an institution, but a platform for coordination and lobbying (see below Chapter IX).

Belgium

The defense of human rights is not exclusive of the federal authorities. Both federal and federated public authorities have to ensure the observance and defense of human rights within their spheres of power.

The principle of participation of community — and, to a lesser extent, regional — authorities in the Federal State shapes the structure of the federal institutions. Even though the communities are not represented as such, the council of ministers has the same number of French and Dutch ministers. Hence, the interests of both groups are expressed in the core of the federal government. This is one of the main features of the Belgian federalism.

The parity principle guides the composition of the high judicial courts — Arbitrage Court, Conséil d'État, Cassation Court — and the organiza-

tion of the federal administrations — an equivalent number of high-ranked officials in the management positions of the departments.

Only the two major communities are informally represented in the structure of the federal State. This is not the case neither for regions nor for the German-speaking community.

Italy

The Regions' instrument of participation in the decision-making of the central government is the State-Region Conference where opinions are expressed on important legislative (still in the bill phase) or administrative acts and on planning. A second Conference should be mentioned, the Local Autonomies City-State Conference that allows an analogous participation to local entities. The two conferences often meet jointly in a unified Conference.

Both bilateral and multilateral relations are possible. Multilateral relations are conducted in the State-Regions Conference. There is no general regulation of bilateral relations; they operate in practice on a case by case basis in relation to policies and actions of common interest.

The Regions do not participate in organisms provided with special autonomy or independence, especially if such organisms deal with matters of federal power.

Spain

The participation of the States in institutions, bodies and decisional procedures has been carried out with lack of planification and important shortcomings. The charters of autonomy regulate it only partially. But the new charters devote up to a complete chapter to the regulation of intergovernmental relations. Some provide for more than 100 mechanisms of participation in institutions or decision-making procedures. The debate about bilateral versus multilateral relations has been alive for decades. In practice, both types of relations exist. There are Bilateral Commissions with all the States, not all of which have the same relevance. The participation of states in the federal regulatory agencies was established in some federal laws. The new charters have provided for state participation in much more bodies and they have upgraded the provisions because now these are in the state constitutions which are part of the constitutionality block. The federa-

tion still has not modified the regulatory laws of these agencies to implement these provisions. In any case, one must consider that the Decision 31/2010 of the Constitutional Court, in relation to the new Catalan Charter of Autonomy, declared these provisions not legally binding; therefore, the federation has absolute freedom to comply, or not, with these provisions. It also stated that, if the federation desires to comply with these provisions, the participation of States would be constitutional as long as it is limited to consultative bodies.

9 · Can States freely convoke referenda regarding political or legal issues? Are there any constraints? Does the Federation have any kind of control over these issues?

United States of America

Unlike the federal level, most states have referendum powers. Many states give their citizens the power of initiative, as the right to petition issues directly into law by popular vote, and recall or removal of office by popular vote. The federal government has no powers regarding these issues.

Canada

Yes, provided the referendum is consultative, not deliberative. Provinces can indeed initiate a referendum on any matter they consider proper, including any political, legal or even constitutional measure. The only caveat is that such referenda can only have consultative value, the Judicial Committee of the Privy Council having ruled in a 1912 decision that the elective institutions in our system of governance cannot abdicate their powers, even in favor of the people (however, this decision may have become outdated and would have to be confirmed by the Supreme Court if someone were to invoke it as authority today). The same applies to both provincial and federal authorities. Various statutes define the rules under which referenda can be held at both levels.

After the 1995 referendum on sovereignty in Quebec, the federal Parliament adopted a statute declaring that if the question asked in any *future* referendum on secession of a province is not *clearly phrased*, and does not

attract a *clear majority*, the results will not be taken into consideration by the federal authorities, which will not start negotiations with the secessionist government.

Australia

States can freely hold their own referenda. If the State Constitution requires a referendum for the amendment of the State Constitution or another law, then this may be held without Commonwealth interference. A State may also hold a form of referendum to ascertain popular support for a proposal. This is more commonly known as a plebiscite and may be used to ascertain support for matters such as daylight saving or for extending shop trading hours, even though it has no constitutional effect. Again, the Commonwealth has no involvement. However, Commonwealth electoral legislation provides that a State referendum cannot be held on the same day as a Commonwealth election, without the authority of the Governor-General.

A State cannot initiate a referendum on the amendment of the Commonwealth Constitution. Only the Commonwealth Parliament can do this.

Mexico

Some territorial components have established semi direct democratic mechanisms. This is the case of, among others, the Federal District, Aguascalientes, Baja California, Baja California Sur, Colima, Chiapas, Chihuahua, Guerrero, Jalisco, Morelos, or Puebla. Generally, the mechanisms that have been established in their constitutions are the plebiscite, the referendum and the popular initiative. There are no Federal restrictions on this subject matter insofar these mechanisms remain within the state power sphere.

Brazil

This has never been an issue. Arguably, a State can convoke referenda to discuss something regarding its own competences.

Argentina

In general the Provincial States have been recognizing direct or semi direct democracy institutions such as the popular initiative, the popular

consultation, the referendum and, in minor cases, the popular authorities' reproval.

The above-mentioned institutions deal with political and legislative questions in the majority of the cases. But some matters might not be decided using these mechanisms, such as constitutional amendments, establishment or abolition of taxes, etc.

The recognition of these direct or semidirect democracy mechanisms were first recognized at the local level, then at the provincial level, and finally, after the constitutional reform of 1994, at the federal level.

Nevertheless, despite the constitutional recognition of these mechanisms at all governments' levels, they have been rarely used in practice.

India

There is no provision for referenda in the Indian Constitution.

United Kingdom

There is no explicit power for Northern Ireland, Scotland, or Wales to hold a referendum on matters within their own jurisdiction, but no obstacle either. They can hold a referendum on an issue where they have no jurisdiction, but it cannot have any legal effect and would only matter in political terms. Westminster can hold any referendum it wants to legislate.

Germany

The States may convoke referenda within their competences according to the state Constitution.

Austria

Direct democracy at Land level is not explicitly determined by the Federal Constitution left to the Land Constitutions to decide. In principle, therefore, the Länder may regulate and convoke referenda themselves.

However, there are implicit restrictions of homogeneity, as the case law of the Constitutional Court shows. Accordingly, the Länder must not establish direct democracy in a way which would be in breach of the democratic principle inherent in the Federal Constitution, as this principle is

considered to establish mainly representative democracy, whereas direct democracy is established by way of exception. This means that the Länder must not establish radical forms of direct democracy, whilst more moderate forms are admitted.

Swiss Confederation

States are completely free in the decision of the question, no matter whether their system is based on direct or representative democracy. All States have implemented direct democracy to some extent. Most States consult the views of their constituents often about all kinds of bills or, for example, also on questions like whether or not to build some infrastructure, such as the renewal of a public hospital. All States provide for the initiative and referendum for legislative bills.

Belgium

Referenda — either at the federal or federated level — do not exist in the Belgian legal system. Nevertheless, at the local level, plebiscites can be celebrated.

The declaration for a constitutional amendment of May 1st, 2007 aims to modify Title III of the Constitution in order to include a new provision allowing the regions to organize referenda about issues under their powers. This authorization is not operative yet.

Italy

According to art.123 of the Constitution, the regional statute allows the Region "to exercise the right of initiative and to convoke referendums on laws and administrative provisions of the Region". Since statutes no longer undergo State approval, we must wait for the promulgation of the new statutes before assessing the breadth that will be given to these instruments of public participation.

Spain

As established in some state constitutions, State can organize popular consultations, but not referendums. The latter require authorization from

the federal Government. According to the Constitutional Court decision 103/2008 the consultations that use the electoral census and involve the electoral and judicial administrations to ensure that the procedure is legal are referendums. Hence, in Spain states have their use of popular consultations very limited. Furthermore, the mentioned decision establishes strict limits regarding the issues consulted since it forbids any question an affirmative answer to which implies that the Constitution should be amended.

10 · Is there any pro-state provision concerning symbolic issues (flags, anthems, protocol conventions, languages, etc.)?

United States of America

Symbolic issues of a state/regional nature are generally left up to the states, particularly in non-language areas. All states have their own state flags, birds, animals, trees, flowers and even "nicknames," e.g. Indiana is the "Hoosier State" for which there is no clear origin, Oklahoma the "Sooner State," named for the early free land homesteaders.

Language is different. Some states have, in the past 4-5 decades, legally adopted English although that was more of a convention before. Some states have bilingual laws with English as primary, and usually Spanish as acceptable educational languages. The federal government once encouraged bilingual education, but it does so less and less. There have been U. S. Constitutional Amendments introduced to codify English, but none have passed.

Canada

Generally speaking, symbolic issues are the respective responsibility of each order of government, federal and provincial. Concerning official languages see the section below addressing that issue.

Australia

There are no constitutional provisions (either regarding the Commonwealth or the States) concerning flags, anthems, languages or other symbolic issues. Some States have their own legislation concerning their own

symbols, such as their flag and their coat of arms. See, for example, the *State Arms, Symbols and Emblems Act* 2004 (NSW).

Mexico

The General Constitution of the Republic does not have any explicit or specific provision regarding state flag, anthem, languages, etc.

Brazil

Article 13, § 2, of the Federal Constitution confers the right of States and Municipalities to have their own symbols, which includes, e.g., the right to have a flag.

Argentina

The Federal Constitution is silent on this matter.

India

There is no provision for symbolic issues in the Constitution except provisions with respect to language.

United Kingdom

Other than declaratory statements in the Scotland and Wales Acts about the preservation of the unity of the UK, there is no effort to legislate symbolic issues. The Northern Ireland legislation is quite clear that there must be symbolic and other parity between different communities.

Germany

No, there is not; the states are free in these issues.

Austria

The Federal Constitution, which only regulates federal symbolic issues, leaves symbolic issues to the Land Constitutions, without even ex-

plicitly mentioning them. Notwithstanding certain minority rights, however, the official language in Austria is the German language (see below XI.1).

Swiss Confederation

Each state has its own flags and many other symbols and traditions based on its history, which is much older than the history of the federal state. These symbols are not listed in the federal Constitution.

Belgium

The Constitution fixes the colours of the Belgian flag — red, yellow, and black-, its coat of arms — the lion Belgium —, its motto "union is strength", and its capital — Brussels. Belgium has also a national anthem — the Brabançonne —. Communities and regions have adopted a flag and a capital. The law specifies how the symbols can be. The same regime applies to the regional and community anthems. Regarding languages see XI.

Italy

The Regions have a coat of arms and a standard (sort of banner), but there is no such thing as a regional hymn or flag.

Spain

The Constitution establishes the Spanish language as the official language of the Federation and provides that all citizens have the duty of knowing it and the right to use it. At the same time, the Constitution recognizes that other languages (Catalan, Basque and Galician) are official in their respective States, according to their own Statutes of Autonomy. Similarly, the Constitution also establishes that state flags and symbols will be used, in conjunction with the federal flag, in state public buildings and official acts. The state constitutions and laws have regulated the state languages and symbols. The federation's use of state languages and symbols is scarce and not relevant at all.

V

THE ALLOCATION OF POWERS

SUMMARY: 1. Is the system of allocation of powers mainly enshrined in the Federal Constitution? Is it secured by the Federal Constitution? 2. Which is the basic design of the system (a list of federal powers, a list of state powers, a double list, and other solutions)? Is there any constitutional provision concerning residual powers, namely, "new" subject matters, not allocated either to the Federation or to the States by constitutional law? If so, where are the residual powers (federal or state level) allocated? Has this residual powers provision been actually effective? Are there any rules or principles that presume that the power is vested in a certain level of government? 3. Is there any rule that gives preference to federal law in case of conflict with state law? If so, has it been actually applied? Are there other general rules regarding the allocation of powers? If so, which are they? 4. Besides constitutional amendment, are there any federal constitutional provision establishing mechanisms to modify the allocation of powers? In other words, can the Federation, by itself, transfer or delegate powers to States? If so, through which mechanisms? And vice versa? What role have all these mechanisms played on the evolution of the Federation? How have the transfer of the material, economic and human resources resulting from a delegation of powers been implemented? 5. Has any subject matter been fully attributed to just one of the territorial levels of governance — federal or state —? 6. Are there any subject matters in which the Federation can establish principles that state legislation has to follow or respect? If so, has the Federation made an extensive use of this power? Is there any mechanism to address that situation? 7. Are there any subject matters in which legislative power is exclusively attributed to the Federation, while executive power is attributed to the States? If so, is decree power — that is power to issue norms subordinated to the laws — regarded as legislative or executive power? Can federal legislation determine state administrative organization and practice? 8. Is the technique of "concurrent" powers recognized (both Federation and States have legislative powers, although federal law takes precedence over state law in case of conflict)? 9. Are there "simultaneous" powers? Are there any other power sharing mechanisms such as remissions to the regulation of the other jurisdiction (i.e. provision stating that federal/state power is subordinated to the provisions enacted by state/federal legislator in certain issues) or the mutual recognition of their acts? 10. Does the Federation have its own administrative organization on the state territory? How strong is that

Administration? In which fields does it act? Can the state Administration exercise any federal power delegated by the Federation? If so, are state administrative bodies hierarchically subordinated to the Federal Administration? What mechanisms of review are reserved to the Federation to ensure that States correctly enforce federal law? 11. What are the general limits of state powers? Can states exercise some powers beyond its territorial borders? 12. In your opinion, what are the most important federal powers? 13. In your opinion, what are the most important state powers? 14. Have any of these federal or state powers been broadly or expansively interpreted? 15. Is the e-administration completely implemented in your country? Has its implementation had any impact on the allocation of power between the different layers of government? 16. Does the Federal Constitution provide the transfer of sovereign powers to regional or international organizations? In the domestic legal system, is this issue addressed taking into account the decentralized structure of the Federation? Can States negotiate international instruments on behalf of the Federation or can they participate in the federal delegation? If so, can States only participate when treaties deal with certain issues? Are there any other limits on state participation in foreign affairs? Does the Federal Constitution give the States the right to ratify international treaties or agreements? If so, in which conditions? How is the international responsibility of the Federation addressed for state acts or omissions? Have States established offices in foreign countries? If so, how are they regulated?

1 · Is the system of allocation of powers mainly enshrined in the Federal Constitution? Is it secured by the Federal Constitution?

United States of America

Federal powers — interstate commerce, defense, patents and trademarks, foreign affairs, postal service and roads, duties, naturalization, monetary system, promote science and industrial arts — are enumerated in the Constitution and secured as "supreme" over state actions in those areas. There are areas where states have sometimes entered (e.g. science promotion, commerce, foreign affairs) but must yield to federal supremacy.

Canada

The provisions governing the division of powers are to be found in sections 91 to 95, 101 and 132 of the *Constitution Act, 1867*. These provisions can only be amended by recourse to the amending procedure (Constitution Act, 1982, Part V, section 38 and following). Modifications to the division of powers require the consent of the federal Parliament and of the legislatures of at least seven provinces, representing at least half of the Canadian population. An unusual feature, provided for in section 38, is that a province can "opt-out" of any amendment that derogates from its legislative powers, proprietary rights or other rights or privileges, and such an amendment, even if passed by a seven-provinces majority, will not have effect in relation to the province (or provinces) having dissented. This possibility has never been used since its introduction in 1982. If it were to be used, it would introduce a measure of "asymmetry" in the formal division of powers that, for the moment, is strictly symmetrical.

Australia

Yes, the Commonwealth Constitution gives express legislative powers to the Commonwealth Parliament, most of which are concurrent powers, and leaves residual powers to the States. Most of the Commonwealth's legislative powers are listed in sections 51 and 52 of the Commonwealth Constitution. They are secured by the need for a referendum to amend the Constitution (although most constitutional change occurs in practice through expansive High Court interpretation). Sections 51(xxxvii) and 51(xxxviii), discussed above, also allow for the Commonwealth to exercise additional legislative powers with the consent or concurrence of the States.

The allocation of executive powers is not as clear, but is regarded as following the allocation of legislative power. For example, as the Commonwealth Constitution confers legislative power on the Commonwealth Parliament with respect to external affairs and defence, then the executive powers regarding entering into treaties and declaring war and peace are exercisable by the Commonwealth Government, rather than the States.

Judicial power is divided between State and federal jurisdiction. Chapter III of the Commonwealth Constitution allocates to federal jurisdiction all matters arising under Commonwealth law or under the Commonwealth Constitution, matters in which the Commonwealth is a party

and matters arising between States or between residents of different States. Matters arising under State laws (that do not involve the interpretation of the Commonwealth Constitution or in which the Commonwealth or another State is not a party) fall within State jurisdiction.

Mexico

The distribution of powers is mostly established in the Federal Constitution, and it is guaranteed through the constitutional procedure called "constitutional controversy" (described above). This instrument is established by article 105 of the Constitution.

Brazil

Yes it is. The system of allocation of powers is enshrined and secured by the Federal Constitution (Articles 1, 18, 21, 22, 23, 24, 25, 29 and 30). It is important to stress that the federal system cannot be changed by amendment (Article 60, § 4º, I), which includes the allocation of powers and competences.

Argentina

Yes, as presented before in the description of the historical stages of Federalism, the power distribution system between the federation and the different provinces is organized by the Constitution. If the distribution of powers allocation is violated, an action might be filed before the National Supreme Court of Justice.

India

It is entirely and exclusively enshrined in the Federal Constitution and is secured in it because it can be changed only by an amendment of the Constitution in which at least half of the States must concur.

United Kingdom

Allocation of powers to Northern Ireland, Scotland, and Wales is in their respective constitutive Acts; subsequently, Wales has seen consider-

able expansion of powers in Wales legislation (for example, legislation allowing a reorganisation of the health service in Wales, passed by Westminster, carries out the reorganisation desired by the Welsh government and also transfers the powers to Wales to conduct future reorganisation on its own).

Germany

The system of allocation of powers is exclusively regulated in the Federal Constitution. It is secured by the necessity of a qualified majority for any amendment: 2/3 of the members of the Bundestag and 2/3 of the votes of the Bundesrat. The main principles, as the participation of the States in federal legislation, cannot be altered.

Austria

Yes. The general system is entrenched in Art 10 — 15 B-VG, but one should keep in mind that there is a number of specific federal constitutional laws and constitutional provisions (inside and outside the B-VG) which entrench specific competences. If a competence is to shift from the federation to the Länder, a federal constitutional law is needed. If it is to shift from the Länder to the federation, a federal constitutional law is needed as well, but it additionally depends on the approval of the Federal Assembly (right of absolute veto). If the distribution of competences in general is to be largely modified, this will be recognized to be a "total revision" of the Federal Constitution and therefore need a referendum as well.

There is only one instance where the decision to allocate powers is left to ordinary federal legislation: In a very limited range of federal matters that are enlisted exhaustively the ordinary federal lawmaker may decide to leave certain matters to be implemented by Land laws. This may only be done, however, in a very specified and selective way.

Swiss Confederation

As mentioned above, the Swiss Constitution, as all the laws of Switzerland, is quite pragmatic in the sense that it does not spend many words

in basic principles and status. This situation changed somewhat with the new Constitution which now explicitly states certain constitutional principles which were previously unwritten constitutional rules, implied from the interpretation of the Constitution by the Federal Court. Examples are the principles of legality of the Administration or the principle of proportionality.

All the principles listed now — still not many — have in common that are based on practices established by the Federal Court. Hence, it is clear that there still may be other unwritten constitutional principles which might not have been ever the subject of a Federal Court decision, as it is the case of the principle of federalism. This principle, as such, is not mentioned in the Constitution, but there are many indications that it is one of the main pillars of the legitimacy of the Swiss State. As already mentioned (see III.1 above), the principle of federalism can be seen as a core value of the Constitution through its interpretation, especially since it explicitly mentions the sovereignty of States. You could also regard it as a pre-constitutional value, based on the philosophy of the State, describing the Swiss State as a social contract not only between individuals, as it postulates the dominant philosophy of the Enlightenment, but also as a contract between collective groups therefore, the groups are as untouchable as individuals.

If the principle of federalism is sacred, so should be its components the principle of autonomy ("self rule") and the principle of participation ("shared rule"). Part of the Swiss doctrine defends that centralization has a limit, and that it would be unconstitutional to centralize the country to a degree that the autonomy remain only a mask. In other words, the Constitution defines quantitatively how much autonomy they have to have the States. But the implicit principle of federalism shows that a certain degree of autonomy is untouchable. The German Constitutional Court defined this principle in BverfG 34, 20: "Die Staaten Länder sind nur dann, wenn Ihnen als ein Aufgaben Eigener Kern, Hausgut 'unentziehbar verbleibt'".

Belgium

The general principles that organize the distribution of powers between the federal State, the communities and the regions are established in the constitution and in the special acts that distribute the normative and execu-

tive powers. The decisions from the legislation section of the Council of State and of the Constitutional Court have contributed to define better the delimitation of powers. For the last 10 years the constitutional doctrine has played a very important role.

Italy

A distinction must be made between legislative authority and administrative authority.

As regards legislative authority, the Constitution provides for the distribution of authority between the State and the Regions and the relative formal guarantee is in the mutual right to challenge, before the Constitutional Court, state or regional laws that invade the sphere of authority established for each in the Constitution. Regarding administrative authority, the Constitution (art. 118) establishes principles that must be respected concerning allocation (subsidization, due proportion, differentiation), but refers its effective allocation to state or regional law according to the respective legislative authority.

Judicial review of these federal laws for the distribution of administrative powers may be requested before the Constitutional Court which may declare them unconstitutional for violation of constitutional principles in this matter.

Spain

The federal Constitution only established the powers that correspond in any case to the federation; it leaves the definition of the state powers to the state constitutions. The powers not listed in neither the federal Constitution nor the state ones are assigned to the Federation. The main problem regarding the constitutional guarantee of the system of allocation of powers is not this "dis-constutionalization" but the use of very broad clauses which allow the constituted powers, particularly the federal ones, specify the content of the powers while the Constitutional Court lacks clear criteria to control the constitutionality of acts or laws grounded on these open provisions. This problem is not exclusive from the Spanish system but here is pretty harsh.

2 · Which is the basic design of the system (a list of federal powers, a list of state powers, a double list, and other solutions)? Is there any constitutional provision concerning residual powers, namely, "new" subject matters, not allocated either to the Federation or to the States by constitutional law? If so, where are the residual powers (federal or state level) allocated? Has this residual powers provision been actually effective? Are there any rules or principles that presume that the power is vested in a certain level of government?

United States of America

See above, number V.1. States possess all other powers. There is no "double list," since state powers are a) residual and b) general.

Amendment 10 reaffirms that all powers not delegated to the United States, or prohibited by the Constitution, are "reserved to the states respectively, or to the people." This power has not meant a great deal, since the federal government has gradually expanded its powers (see paper). Thus, Amendment 10 has not been effective since the post-Civil War periods of Reconstruction and industrial expansion.

During the twentieth century the presumption is that the federal government can move into virtually any area through the commerce clause, necessary and proper clause, supremacy clause (below) or through such various other powers as due process. As a result, the residual power has not proved to be effective, except in limited circumstances. For example, the federal government was limited in the past decade from requiring schools to enforce "gun-free zones" under the Commerce Clause, which the Court said was not only an unreasonable application of regulating commerce, but encroachment on the states' power to regulate in this arena. It was the first meaningful protection of state powers/limitation of the federal Commerce Clause in about 100 years.

Canada

The basic design, contained in sections 91 and 92 of the Constitution Act, 1867, is a double list of exclusive federal (section 91) and provincial (section 92) powers. In addition, section 93 confers the exclusive power over education to the provinces and a small number of concurrent powers

are listed in sections 92A (export from provinces of natural resources), 94A (old age pensions) and 95 (agriculture and immigration).

The preamble of section 91, preceding the list of enumerated federal powers, confers on the federal Parliament power over all matters "not assigned exclusively to the legislatures of the provinces", while paragraph 92(16) confers on the provincial legislatures "generally all matters of a merely local or private nature. Thus, there are two residuary powers, one federal and one provincial. To distinguish them, Courts have interpreted the federal residuary power as applying to un-enumerated matters of national importance (air-traffic, airports, radio-communications, the television, urban planning of the national capital, etc.) and the provincial residuary power as applying to un-enumerated matters of local and provincial importance (motor-vehicles traffic on provincial roads; censorship or cinema; social welfare, etc.).

The residuary powers, federal as well as provincial, have played a certain role, but not as important as could have been expected. The explanation is that Courts, when confronted with matters seemingly not addressed in the lists of enumerated powers, have tended to reason by analogy and to assimilate by interpretation un-enumerated matters to one of the enumerated matters.

Australia

The basic design is a list of federal powers with residual power being left to the States. The allocation of residual power to the States has not been very effective because there is no provision that clearly reserves particular subject-matters to State jurisdiction. The consequence has been that the High Court has interpreted the Commonwealth's legislative powers more and more broadly, in a manner that trespasses upon traditional areas of State responsibility, but the States are not able to prevent such incursions because there is nothing in the Constitution that preserves those subject-areas for the States alone.

The most commonly invoked rule of constitutional interpretation used by the High Court is that it should always lean towards a broader interpretation of legislative powers, unless there is something in the Constitution that indicates that a narrower interpretation is required. Hence the specific powers allocated to the Commonwealth have been interpreted as broadly as possible.

There is no express rule or principle such as subsidiarity in the Commonwealth Constitution.

Mexico

Article 124 of the constitution is the basis of the system. It establishes that: "The powers that are not expressly granted by this Constitution to federal servants are reserved to the States". This is a formula of residual powers in favor of the States. Nevertheless, besides this general principle of power distribution, there are other constitutional norms that establish a different distribution regime for certain subject matters.

In isolation, the formula of article 124 establishes a rigid power distribution system. According to that formula, typical in "dual federalism", it seems possible to clearly determine whether a power corresponds to the federation or to a federated entity. Such rigidity comes from, as explained by several authors, the use the constitution makes of the adverb "expressly" in virtue of which it must be understood that a power either belongs to the federation or to the federative entities.

Nevertheless, in fact the Mexican system is much more complex due to some constitutional principles that classify powers as follows: powers given to the federation;[1] powers given in an explicit or tacit way, to federative entities;[2] powers prohibited to the federation;[3] powers prohibited both absolutely (art. 117) or relatively (art. 118) to federative entities; coincident powers;[4] coexisting powers;[5] assistance powers;[6] and finally,

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1 Listed in article 73 of the Constitution.

2 As the express power to regulate family wealth, established in section XVII of article 27; or the power of enacting its Constitution tacitly included in article 41.

3 Article 24 which forbids the enactment of laws establishing or prohibiting any religion.

4 Both the federation and the federative entities may exercise these powers. They can be either be defined broadly (when both the federation and the states may regulate the subject matter in equal conditions, as the treatment of insections of minors, according to paragraph 4 of article 18 of the constitution) or in a restricted way (when either the federation or the states are given powers to establish the bases or criteria for power division, as would be the case of the power given to the Union's Congress to issue laws to unify and coordinate education among the federation, the states and the municipalities, according to section VIII of article 3 and section XXV of article 73 of the constitution).

5 Part of the subject matter corresponds to the federation, and the other part to the states. For example, general roads and highways correspond to the federation (art. 73 section XVI) hence, states have local roads.

6 An example could be found in the power of state authorities to aid the federation in religion regulation matters according to article 130 of the constitution before the 1992 reform.

powers given by the decisions of the Nation's Supreme Court of Justice.[7]

According to the above, we must recognize that Mexico has a complex power distribution system between federation and states, which allows the coordination, the overlapping, the coexistence, and coincidence between the two terms of the equation of the federal system. Even though, the basis of the scheme is still article 124 of the constitution and its residual powers clause in favor of the federative entities.

Despite this favorable prevision for States, we must mention the fact that the sphere expressly given to the federation is considerably wide. In fact, many "new" powers have been consistently incorporated to the list of powers expressly given to the federation. This list if found, principally, in article 73 of the General Constitution. Interestingly enough, this article happens to be the one with more reforms since 1917. Up to now, article 73 has 60 amendments or additions. Hence, the residual powers allocated to the states are few.

Recently the Supreme Court has recognized one exception to the general rule of article 124, under the formula of the "general laws", which are considered by the Supreme Court an expression that the permanent constituent power has given up its power to define the distribution of powers regime, favoring the Congress of the Union (these general laws distribute powers among the different levels of government over some issues; these issues are thus examples of "concurrent powers").

Brazil

The Constitution adopts a complex system combining a cooperative model of allocation of powers with a model of enumeration of powers. Federation powers are established in a long and detailed list (Articles 21 and 22). States have residual powers, but the Federal Constitution also enumerates some state powers in Article 25. Some Municipalities powers are enumerated in Article 30, but they also have residual power. The Federal Constitution enumerates common powers of the Federation, States, Federal District and Municipalities too (articles 23 and 24).

Broadly speaking, the Federation has most of the powers and there is residual powers allocated to the States (Article 25, § 1) and Municipalities

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7 Which has, for example, recognized the existence of "concurrent" powers to tax.

(art. 30, II). Yet, the constitutional catalog of Federation's powers is so long and relevant that the residual power is not practically broad.

Systematically, it is generally understood that a principle of predominance of interest guides distribution of powers in the Federal Constitution. This idea means that Federation's powers are related to national interests, or general concerns; States have power regarding regional interest, and Municipalities have powers associated with local issues.

Argentina

As presented before, following the north American model, some powers are delegated expressly or implicitly to the Federal Government; the reserved and not explicitly enumerated belong to the Provincial States; and there another category, concurrent powers of the federal and provincial governments. Article 121 (previously, 104) is the basic provision regarding distribution of powers. The prominent scholar, Joaquin V. Gonzalez considers this provision the synthesis of the historical law of the Argentinean people.

The residual power clause has not been very effective given the centralization process that the country has suffered.

India

The basic design of the system is that all the powers of the Federal and the State Governments have been listed in the Seventh Schedule to the Constitution which includes legislative items in three lists called as Union List, State List, and Concurrent List. The Federal Government has exclusive power to make laws on items included in the Union List and the States have exclusive power to make laws in the State List. On the Concurrent List both of them can make laws. In case of repugnancy between the two laws on the Concurrent List made by the Union as well as the State the Union Law prevails over the State Law subject to the exception that with the assent of the Federal President a State law on Concurrent List may prevail over the Federal law. The Concurrent List overrides the State List but is subject to Union List. Article 248 of the Constitution assigns the residuary subjects, not included in any of the Lists, to the Union. The residuary power has been exercised quite a few times by the Federal Government.

The general principle underlying the distribution of Legislative powers between the Union and the States is that the matters of national and international importance have been included in the Union List, the matters of local and regional interest have been included in the State List and the matters which are occasionally of common interest for the whole nation as well as particular region have been included in the Concurrent List.

United Kingdom

Scotland has a negative list that specifies central state powers and grants all others to Scotland; Wales has a detailed list of statutory instruments (excluding primary legislation) that it can change and a process for creating new powers; Northern Ireland has a negative list akin to Scotland but subject to oversight due to the fear it will be used for discriminatory purposes.

"New" powers automatically go to Scotland unless Westminster legislates otherwise or Scotland chooses to ask Westminster to legislate; in Wales they go automatically to Westminster unless Westminster has chosen to devolve a relevant issue area; in Northern Ireland they go to Northern Ireland unless there are a human rights or political reason for them not to do so.

On the complex situation in Wales: Trench, Alan. 2006. The government of Wales act 2006: The next steps in devolution for Wales. Public Law 687-696.

Germany

There is a comprehensive clause according to which all matters not within the explicit power of the Federation are in the competence of the States (Art. 30, Art. 70, and Art.83 GG). This concerns also "new" matters. There are, however, extended lists of federal powers, and in certain cases also unwritten competences of the Federation are acknowledged.

Austria

Art 10 B-VG enumerates a long list of exclusively federal matters, whilst Art 11 B-VG enumerates a shorter list of subject-matters where the federation is responsible to legislate, and the Länder to administrate. Art 12

B-VG enumerates a list of subject-matters where the federation is responsible to enact federal framework laws, and the Länder to enact implementation laws and administrate them. According to Art 15 paragraph 1 B-VG all competences that are not enumerated as federal competences automatically fall into the residuary Land competence. The problem, however, is that such a wide range of important matters is allocated at federal level through Art 10 B-VG that not very much is left to the residuary competence of the Länder.

The residuary competence also entails that "new" subject matters will fall into the Land's competence, unless a federal constitutional amendment covers them by a newly-enacted federal power.

The Constitutional Court has developed the rule of in-dubio-pro-Land, which means that a subject-matter falls into the Land residuary competence if, after having exhausted all kinds of interpretation, it remains a doubt whether the matter falls into a federal competence. Notwithstanding the theoretical importance of this rule, however, there have not been many cases where this rule has been applied so far.

Swiss Confederation

The federal powers must be listed in the federal Constitution. The areas of competence not assigned in the Constitution are for the States. The majority of the scholarship defends that not only are assigned to the Federation the powers explicitly mentioned in the text, but also implied powers can be inferred by the interpretation of the Constitution. However, especially since the 1999 amendment, state powers are included in some provisions. These are not constitutive, but only declarative, and serve to establish more accurately the limits of federal powers.

Like all powers not mentioned or implied, "new" subject-matters are under state jurisdiction.

Belgium

In Belgium, communities and regions have their autonomy recognized in radical terms. To avoid conflicts between the federal State, the communities, and the regions, the Constitution establish a system based on the exclusivity of powers — both at the issue level and at the geographic level —.

The powers of the communities and regions are assigned. The powers of the State are residual. According to the decisions of the Constitutional Court, the powers expressly assigned have to be broadly interpreted. The Court states that communities and regions have "plenary power" over the issues assigned and, thus, "they can completely regulate the matter".[8] Hence, the trend to interpret restrictively the exceptions established by the Constitution or by law to the plenary power over certain issues.

Is this technique establishing separate spheres enough to avoid conflicts? The answer is not clear. All experts on federalism think it is. But, actually, both consciously and unconsciously, with the intention of damaging or just to exercise correctly their preferences, the encroachments are pretty common. These conflicts cause interminable debates about the distribution of powers. For example, education is under the power of the communities, urban development is a regional power, and professional regulations are national. Who has the power to establish an educational program for those architects willing to work as planners? Federalism brings the seeds of, if not conflicts, at least discussions.

At the extreme, the contractual perspective adopted in a federal State, in particular in states created by association, implies that the federal state does not have any other power or resources than those assigned by the federated units. The residual powers are assigned to the federated entitites in this model.

To some extent, art.35 of the Constitution follows this regime. "Residual powers" are assigned to the communities and regions. This article is a clear example of an ambiguous provision (in *trompe l'oeil*, preliminary consideration, 3). A transitional provision leaves it without content. It cannot be currently applied. Hence, residual powers are exercised by the federal State.

It is not in the agenda of public authorities to put into force this art. 35 since it seems a difficult, even dangerous, project to engage in.[9]

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8 Each community has, according to article 127§ 1, #2 of the Constitution, of "all powers to regulate education" (CA, n. 76/2000). "The plenary nature of this power" allows the community to regulate education broadly understood (CA, nº2/2000). "This power entails the establishment of rules regarding the administrative status and salary of the education staff, except for the retirement benefits" (id). Article 127,§1.1-2 d of the Constitution and 175,.2 should be read jointly (CA, n. 30/2000). The establishment of the financial resources for education arises from the "regulation" of education (id).

9 This article establishes that those powers not expressly conferred neither to the federal authorities nor o the federated ones, are assigned to the latter ones. In political terms, the federated entities should agree on the powers that the Federal State will continue exercising subsidiarely.

Italy

Its basic design is in a double list of subject matters (authority exclusive to the State (art. 117, sub-section 2) and concurrent authority (art. 117, sub-section 2)) and a residual general clause for the Regions (art. 117, subsection 6 Const).

The residual clause allows the Regions to legislate on any subject matter that is not listed among those that are exclusive to or concurrent with the State, therefore on any "new" subject matter.

The effectiveness of the residual clause has been reduced by the practice of the State to legislate on matters not listed but based on matters within its exclusive legislative powers — particularly in some of them which are transverse, that is, which touch on many matters, assuming functions or setting limits on issues under regional residual powers (see below 6).

Spain

The Constitution lays down a list of federal powers. It also includes a list of powers that the States created following the ordinary track might include in their Statutes. Five years after the enactment of their Statutes, those States could assume any power not expressly granted to the Federation. States created following the special track did not need to wait five years to be able to assume such powers not expressly reserved for the Federation. All powers not expressly assumed by the States correspond to the Federation. The residual clause in favor of the Federation includes also "new" issues. Until now, the residual clause has rarely been enforced; neither concerning subject-matters that were "forgotten" when the Constitution and the Statutes were enacted and so not included in any text, nor concerning "new" subject-matters. The scope of the subject-matters expressly mentioned in the text of the Constitution and the Statutes has tended to be interpreted broadly, to cover all public acts in controversy.

But a veiled application of this clause can be found in the varied federal acts regarding issues under state powers justifying them on the grounds that the social phenomena regulated have effects beyond state borders (supra-state).

Not further developments can be taken under this path without crossing the line between a federation and a confederation.

3 · Is there any rule that gives preference to federal law in case of conflict with state law? If so, has it been actually applied? Are there other general rules regarding the allocation of powers? If so, which are they?

United States of America

Article VI includes a provision that U. S. Constitution and laws "shall be the Supreme Law of the Land." It has regularly been applied and is a major contributor to the growth of federal power. Article VI along with Amendment 10 on the states residual powers has, as expected, created great constitutional confusion.

Article IV limits all states: states must give full faith and credit to other states' actions; citizens of each state are entitled to privileges and immunities of citizens of all the states; states have extradition requirements; there are restrictions on entry of new states; there is federal control over disposal and regulation of federal land in the states; the rights contained in the Bill of Rights limit the states since the 14th Amendment adoption.

Canada

Courts have developed the federal "paramountcy" doctrine. It is applied to render "inoperative" valid provincial legislative provisions that are conflicting with valid federal legislative provisions. Note that the provincial provisions remain constitutionally valid, but their operation is suspended for the time the conflict with the federal provisions exists. If the conflict ceases, for example because the federal provisions are repealed, the provincial provisions automatically become operative again.

Courts have developed several other doctrines, in order to apply the division of power to actual problems (pith and substance doctrine; double aspect doctrine; national dimension doctrine; necessarily incidental powers, etc.).

Australia

Yes, section 109 of the Commonwealth Constitution provides: 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be

invalid.' The High Court has interpreted 'invalid' in this provision as meaning ineffective or inoperative. The State still has the *power* to enact the inconsistent law. However the inconsistent State law lies in abeyance, inoperative until such time as the inconsistency is removed. If the Commonwealth law with which the State law is inconsistent is repealed, then the State law immediately comes into force again.

This provision is one of the most frequently litigated in the Commonwealth Constitution. Disputes usually concern whether or not there is inconsistency. The High Court has held that s 109 applies not only to 'direct inconsistency' (eg where it is impossible to obey both laws or where one law gives a right or privilege which the other law takes away), but also to 'indirect inconsistency' (eg where the Commonwealth intends to 'cover the field' of a particular subject and a State law intrudes upon that field).

In addition, there is s 5 of the *Commonwealth of Australia Constitution Act* (the British Act, s 9 of which contains the Commonwealth Constitution). This provision makes the Commonwealth Constitution and all laws made by the Commonwealth Parliament under the Commonwealth Constitution, binding on the courts, judges and people of every State, notwithstanding anything in the laws of any State. Thus, if there is a conflict between a State Constitution and the Commonwealth Constitution, the Commonwealth Constitution prevails.

Mexico

There is no rule establishing the primacy of federal law in case of conflict, as in the Fundamental Law of Bonn. Nevertheless, doctrine and judicial decisions have discussed the point, in relation with article 133 of the constitution, which establishes the hierarchy of norms in the Mexican legal system. This article indicates that the Constitution, laws of the Union's Congress that emanate from the Constitution, and all Treaties that are in accordance with the constitution will be the Supreme Laws of the Union. If we understand that "the laws of the Union's Congress" are federal laws, then we must understand that they also have a supreme character, and, therefore that they prevail over state's laws. But if we consider that "the laws of the Union's Congress" are certain laws with constitutional rank, different from ordinary federal laws, the consequence is that the latter and state laws have exactly the same rank and

hierarchy, by which a conflict between them can only be understood in terms of a distribution of powers conflict between the federation and the states.

Doctrine and judicial decisions have not well defined and have hesitated between these two interpretations.

Besides the mentioned rules in question 2 of this section, there are no other rules regarding the allocation of powers between Federation and States.

Brazil

In common powers, the Federation establishes general rules and states have supplementary power, if this power is related to a peculiar state interest (Article 24).

Argentina

Article 31st may establish the supremacy of the federal legislation. Even though we defend a "federal" interpretation of this norm, as the US scholarship does. According to this approach, it should be analyzed whether Congress has issue laws connected enough with the constitutional provisions (and its power distribution scheme). However, a different interpretation has prevailed, a "centralist" one, which instead of giving the same hierarchy to federal and provincial governments, has almost always privileged the federal government in power distribution conflicts.

The supremacy of the Federal Constitution over all the rest of the legal system cannot be doubted. But this cannot be translated as the supremacy of the federal government over the provincial ones.

India

The rule is that the exclusive Federal powers override exclusive State powers and in concurrent matters Federal powers override State powers. There are no other general rules regarding the allocation of powers except that in respect of Union territories as well as specified tribal areas Federation (and under its supervision the State Governors) can make some laws and regulations. For territories that are not included in the States, Federation has exclusive power to make laws.

United Kingdom

The legal and administrative precedents in the UK delineate competencies relatively clearly; the likely clashes are in Wales, where Westminster primary legislation is much stronger than Welsh secondary legislation.

The UK's use of individual statutes in highly asymmetric decentralisation means there are almost no general rules.

Germany

Art. 31 GG says: "Bundesrecht bricht Landesrecht" (federal law shall override state law). It has been applied in many cases.

There are general rules concerning the allocation of legislative powers: in certain matters of concurrent legislation, there must be evidence of the necessity of a federal law; in certain matters the States may deviate from a federal law.

Austria

In principle, there are no concurrent powers (but there are some exceptions). This means that even if both the federation and the Länder believe a subject-matter to be covered by their respective competences, there can only be one competent entity. As a consequence, there is no rule such as "federal law takes precedence over Land law" (only federal constitutional law takes precedence over Land law).

According to the Constitutional Court's jurisdiction, both the federation and the Länder are obliged to take each other's interests into consideration when enacting their own laws ("principle of mutual consideration"). According to the "principle of aspects" both the federation and the Länder may enact laws on the same subject-matter, if their respective laws concern different aspects of this subject-matter which are covered by their respective competences. According to the "theory of petrification" a federal competence comprises only those subject-matters which it was thought to comprise when the competence was enacted (regarding most competences, on 1 October 1925), i.e. within the limits of the (ordinary) law regulating a certain subject-matter or the jurisprudence and case-law at that time. "New" subject matters are only covered by the federal competence if there is a close intra-systematic relationship between them and

the "petrified" subject matters. Regarding the rule of in-dubio-pro-Land see above V.2.

Swiss Confederation

As I have mentioned, the principle of prevalence of federal law is one of the most important rules in the field of federal distribution of powers in Switzerland. The principle is crucial in two cases:

—In the case of concurrent federal powers with "post derogatory" effect (see III.5 above), it is part of the very nature of these power that federal and state laws coexist. In general, states are struggling to bring its legislation in the area of one of these powers in a way not inconsistent with federal law. However, it is inevitable that sometimes rules conflict. In these cases, the issue from a legal point of view is whether the case can be regulated by federal law, or if the latter has a gap that may be supplemented by state law.

—In the case of an exclusive federal power, there is no room for any state legislation, apart from cases of delegation of authority provided by federal law. The distribution of responsibilities is part of federal law and, therefore, a state rule involved in a field of exclusive federal power contradicts federal law. State courts and the Federal Court should interpret the rule to infer whether a power is an exclusively federal one.

An example occurred in the field of air navigation, which is under federal jurisdiction when a state passed a law to regulate, inter alia, the right of takeoff and landing aircraft for certain sports. The Federal Court first decided that it was not an exclusive power, but a power with "post derogatory" effect. Second, it decided that federal law did not completely address the management of the landing, leaving room for state regulations for this type of sports equipment (BGE 122 I 70).

Belgium

Belgian Law establishes the fundamental principle of equality between the federal State, on the one hand, and the federated collectivities, on the other (F. Delpérée y M. Verdussen, "L'egalité, mesure du féderalisme", *Revue belge de droit constitutionnel*, 2004, n. 3-4, 289-303).

The rule "federal law pre-empts or trumps federated entities' law" does not exist in the Belgian regime. In traditional federal states, this rule only works in the concurrent powers area. Since Belgian Law, operating only with exclusive powers, does not present this category, there is no need for such a rule.

See, nevertheless, the substitution power at the international level in order to implement EU Law (V.16).

In practice, the principles of equality and exclusivity might conflict. The exercise of powers by the federal State, the communities or the regions might create frictions or clash with the powers of another political collectivity. The Arbitrage Court considers that there is no miraculous rule to solve these problems. It states that "in the exercise f powers, the communities cannot encroach upon federal State powers assigned explicitly by the Constitution or by special laws, or which are part of its residual power as long as art.35 of the Constitution has not been implemented" (n. 110/99). We may add that the same applies the other way around (reciprocity). In fact, "the federal legislator cannot, exercising its powers, go too far so that it encroaches upon the powers assigned to the communities and regions…, blocking or impairing them" (n. 102/99).

However, the primacy of federal law over federated law applies in financial matters (section X).

Italy

There is no general statement that gives preference to state law over regional law. The Government has a preventive power "when it requires the safeguard of legal unity or economic unity" (art.120, sub-section 2). In this case the State can enforce superiority of state regulations over regional ones.

Art.117, sub-section 1, plainly states that the legislation of the State and that of the Regions "is executed with respect to the Constitution as well as the obligations derived from EU regulations and international obligations".

Spain

The Constitution includes a clause whose interpretation is very controversial. It provides that federal legislation prevails over state legislation in

all those fields which are not granted to the exclusive power of the States. The question, then, is what "exclusively granted to the States" means. This is also very controversial. Probably for this reason, this clause has hardly been enforced. Conflicts are solved not by applying the criterion of prevalence but of power validity.

The Constitution establishes that federal legislation is supplementary vis-à-vis state legislation. After long doctrinal debates, the Constitutional Court held that this clause did not allow the Federation to legislate within fields where it lacked powers. Rather, the supplementary principle delineates the extent to which federal rules, enacted by the Federation in the exercise of its own powers, might be applied to analogous state areas.

4 · Besides constitutional amendment, are there any federal constitutional provision establishing mechanisms to modify the allocation of powers? In other words, can the Federation, by itself, transfer or delegate powers to States? If so, through which mechanisms? And vice versa? What role have all these mechanisms played on the evolution of the Federation? How have the transfer of the material, economic and human resources resulting from a delegation of powers been implemented?

United States of America

Definitely (see paper on expansion of federal powers) through: 1) Broad interpretation of its enumerated powers, particularly commerce; 2) The implied power or necessary and proper clause; 3) War and emergency powers; 4) To some extent due process under Amendments 5 and 14.

The federation does not "transfer" power to the states, as the states have general powers. The constitution, as amended, has added federal powers, e.g. over voting rights and the levying of income taxes. The federal government also uses its powers often to pre-empt (force states to wholly or partially vacate) certain powers. This became prevalent after 1970.

These actions have without a doubt increased federal government power at the expense of the states.

Transfer of resources often does occur, but usually at a ratio far below their costs. For example, Congress appropriated $1.5 billion in 2002 for

federalization of state voting machines and training of officials, whereas the estimated cost is over $4 billion. Also, many such takeovers or preemptions are unfounded. When Congress ordered all states to perform driving license examinations in the 1960s, no funds were appropriated.

Has any subject matter been fully attributed to just one of the territorial levels of governance — federal or state —?

Canada

After the Supreme Court of Canada ruled that direct delegation of legislative power from the federal Parliament to the provincial legislatures, or vice versa, was prohibited, other means to attain the same result have been developed and declared constitutionally valid by the Court. Thus, it is allowed for the federal Parliament to delegate part of its legislative powers to an administrative body created by a provincial legislature, or vice versa (administrative delegation). Another technique is referential "legislation" whereby a legislative body incorporates in one of its statutes, for its own purposes, the legislation, future as well as already existing, of another legislative body. Finally, "conditional legislation" allows one legislative body to make the application of its own legislation conditional on the wish of another legislative body (for example, in the Canadian Criminal Code, the federal Parliament prohibits all lotteries except those allowed by provincial authorities; such a system has the effect of delegating the jurisdiction over lotteries from the federal Parliament to the provinces). All these devices can be used to delegate legislative powers in either direction.

These mechanisms play a relatively minor role except in a few technical fields such as interprovincial transport (trucking), agricultural products marketing and fisheries.

Generally, these techniques of indirect delegation do not involve the transfer of resources, but in some cases the order of government taking up the responsibilities of the other receives financial compensation.

Australia

The Commonwealth Parliament has no capacity to transfer its powers to the States. A constitutional amendment to effect such an exchange of powers was put to a referendum and defeated in 1984. However, as most Commonwealth legislative power is concurrent, the Commonwealth Par-

liament could theoretically leave most matters to State legislation simply by not legislating itself on the subject. In practice, the Commonwealth exercises no such restraint.

In contrast, the States can refer 'matters' to the Commonwealth under s 51(xxxvii) of the Constitution, allowing the Commonwealth to legislate with respect to such matters. This can be done in two ways. First, a State might refer a subject-matter to the Commonwealth, allowing the Commonwealth to enact any law with respect to that subject-matter. Secondly, and more commonly, the State will refer to the Commonwealth the 'matter' of the enactment of a law substantially in the form of an attached schedule. This gives the State greater control over what law the Commonwealth can enact. States may also refer the 'matter' of the amendment of the referred law, but make any amendments subject to prior agreement through a Ministerial Council or another mechanism set out in an intergovernmental agreement. Again, this ensures that States retain some control over referred matters.

It has never been certain whether a State can revoke its referral. Accordingly, most references are for a limited period which may be extended. This ensures that if the reference is being misused or a later State Government wishes to terminate it, it has an opportunity to do so by simply not extending the reference. As references fall within the concurrent powers of s 51, they do not prevent the State from continuing to legislate on the subject. However, once the Commonwealth has the power to legislate on the subject, its legislation will override any inconsistent State law.

Some States, such as Western Australia, prefer not to refer matters themselves, but may be prepared later to 'adopt' a Commonwealth law that was enacted pursuant to a reference of a matter by one or more other States. Section 51(xxxvii) permits this.

States have referred to the Commonwealth matters concerning family law, corporations and terrorism, amongst others. Referrals take place as a result of intergovernmental negotiations where it is perceived to be necessary for one jurisdiction to deal with a matter of importance.

Mexico

The Mexican General Constitution allows the "flexibilization" of the power distribution system by other ways than constitutional amendment. For example, the Federation can transfer through covenants functions to

States (and States to Municipalities) according to section VII of article 116 of the constitution. Likewise, section III of article 115 establishes the possibility for municipalities to celebrate agreements with the States so they will take temporary care of some of the public services that correspond to the municipalities, or to give or exercise them in coordination by the State and the municipality. The same scheme is established by section IV regarding taxes that originally belong to municipalities.

This kind of agreements are common, for example, for tax matters, in States where the municipalities don't have neither the resources, the technical capability, nor the infrastructure to take care of the collection and administration of their taxes (mainly the tax on property). That is why, through the respective agreement, the municipalities transfer certain powers to the State, such as: a) contributors' registry; b) collecting and solving administrative appeals; c) functions of verification of the fulfilment of tax obligations; d) determination and liquidating taxes; e) notifying and collecting; f) assistance to the contributor; g) valuing real property.

Given that during the last ten years several controversies regarding transfer of powers between municipalities and states (section III of article 115) have arisen, the Supreme Court has determined that these transfers are revocable since the agreements cannot permanently prevail in front of the constitutional provisions. According to this, municipalities can claim back their constitutionally recognized powers asking the state government to return them.

Likewise, the constitutional amendment regarding these covenants — published in the Federal Official Gazette on December 23rd, 1999 — established rules to organize these transfers (3rd transitory provision of the amendment):

"Third. Those functions and services that prior to the date where this reform will be in force are under the power of the municipalities but are exercised by the ste governments or by those coordinated with municipalities could be assumed again by a municipality if its city council approves it, States have to provide the necessary means to ensure that the services are transferred back in a proper manner, according to the state transfer program, in 90 days or less from the receipt of the local request.

In article 115.III.a), within the deadline established in the previous paragraph, state governments can request to their respective state legislator, to keep the power over the services mentioned in the section, when

the transfer to the municipality might impair the delivery injuring the inhabitants.

While the transfer is being carried out as established in the first paragraph, the services have to still be delivered according to the current terms."

Finally, the Court has determined that the transfer program that return the services or powers to the municipalities has to take into account and transfer the funds, resources, or buildings needed in order to deliver the service according to what is established in the local laws. It is not enough to solely transfer the faculty.

"A transfer that only returns the faculty or the power would be unnecessary given that this faculty to deliver the service was given to the municipality in an exclusive and mandatory manner by the Constitution. But, it would be not only unnecessary but it will be detrimental for the municipality because it will have to carry out more functions with the same resources and funds. The permanent constituent power would not strengthen the local governments with such a provision; on the contrary, it will damage it, which is clearly the opposite goal pursued by the reform".[10]

Consequently, the Court ordered the executive power of the State of Mexico to present within 90 days the transfer program and actually transfer the transit service jointly "with the necessary resources to deliver the service by the municipality (plaintiff) according to this order".

Brazil

Yes, a supplementary law can authorize the States to legislate upon specific questions related to the matters listed as Federation competences (article 22, sole paragraph).

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10 Constitutional Controversy 326/2001, Municipio de Toluca, Estado de México vs. Poder Ejecutivo del Estado de México (Toluca Municipality, State of Mexico v. Executive Power of State of Mexico). See also Constitutional Constroversy 42/2005, Municipio de Amecameca, Estado de México vs. Poder Ejecutivo del Estado de México (Amecameca Municipality, State of Mexico v. Executive Power of State of Mexico).

Argentina

In our opinion, the routes foreseen by the Constitution to make the system more flexible are the interjurisdictional agreements, allowed by current art. 125th (previously 107th), which must take us to cooperative or collaborative federalism. This is what the 1994 constitutional amendment dictates since in smoothing the path for not only national but supra-national integration, gave new roles for the regions, the provinces and municipalities.

The fulfilment of the federal project has to fully respect the provincial and municipal autonomy.

As we have already stated, this is the way to go in order to overcome the challenges posed by globalization, which lead us to, on the one hand, go deeper into national and supra-national integration, and, on the other to decentralize power even more.

As for the delegation of powers, historically it was the federal government who illegitimately exercised powers assigned to the provinces. This process has generally stopped due to the serious financial and economic problems of the Federal Government. In consequence, the provinces and municipalities have reassumed the above mentioned powers or the delivery of services. But this process has been carried out without the due recognition of the local tax powers and without the transfer of the economic means needed. In the last decades, the deficits continued to spread among the decentralized entities while the federal government continued to centralize the revenues.

Given this situation, article 75.2, amended in 1994, established that: "there will not be transference of powers, services or functions without the respective reassignment of resources, approved by law of Congress when it corresponds and by the interested province or the city of Buenos Aires in its case".

Power delegations by the Federal Government to Provinces or Municipalities are possible in several matters, such as police.

It is important to note that, in general, the Argentinean system does not follow a model of federalism of execution, such as the German one. Instead, Argentina has adopted primarily the US system.

India

During emergencies arising from war, external aggression or armed rebellion that threaten the security of the country or any part of it, Federal

government can make law on any subject in the State List (Article 250). During such an emergency financial arrangements between the Federation and the States can also be altered (Article 354). Federation can also make a law on an exclusive State subject if the Council of States declares that Federation should make a law on that subject in national interest (Article 249). Federation can also make a law on a State subject if two or more states request it to make a law common to them on that subject (Article 352). Federation can also make a law on any subject included in any of the Lists for implementing international treaties, agreements, etc (Article 253). Finally, the Federation can also make a law on State subjects for that state which in the opinion of the Federal President fails to run itself in accordance with the provisions of the Constitution (Articles 356 & 357).

The mechanism of making laws during national emergencies has hardly been used but the mechanism of making laws for the States which failed to run their government according to the Constitution has frequently been used until a few years back. It has now become infrequent because there are rare cases of a State failing to run its government according to the Constitution. The power to make laws through a resolution of the Council of States or on the request of two or more States has been used only on a few occasions. Quite a few laws have, however, been made by the Federation to enforce international treaties etc. The general trend has been towards exercise of greater powers by the Federation vis-a-vis the States. There is no provision for delegation of powers from one government to another except the provision mentioned above that two or more States may request the Federation to make law for them.

United Kingdom

The Constitution is just the sum of statutes, legal decisions, and conventions; the real question is how easy it is to change particular legislation on account of its political and legal importance (i.e. its constitutionality). There is no obstacle to Westminster giving the devolved governments more powers, and devolved governments sometimes opt to just use Westminster legislation.

Germany

Any modification of the allocation of powers requires an amendment of the Grundgesetz. The Federation can delegate powers to States only in

the cased mentioned in the Grundgesetz, for example decree power (Rechtsverordnung).

Austria

Basically, no. As an exception, ordinary federal legislation may empower Land legislation to enact certain specific implementing provisions in a very limited range of federal matters (Art.10 paragraph 2 B-VG).

One could also mention the system of indirect federal administration, which indeed is an important element of Austrian federalism. Art 102 B-VG provides this system as the general concept, excepting however a wide range of federal matters which need not, but could be directly executed by federal administrative authorities. It is up to federal law to decide whether these matters should be executed by the Länder as well (which usually is the case). However, this does not change the allocation of powers, only the way in which federal administration is actually carried out (directly or indirectly).

The Länder have to cover mainly all expenses on materials and staff, whereas the federation has to cover all expenses directly required for realizing the purpose of a certain matter of indirect federal administration.

Swiss Confederation

There is the possibility of transfer of powers from the Confederation to the state by federal law approving the scope of a federal power. The reverse situation does not occur; the Confederacy cannot exercise jurisdiction unless provided by the federal Constitution. There are the following: a) the delegation of federal powers over the federal law may occur in the case of concurrent jurisdiction; b) theoretically, as a part of the doctrine has asserted, it is also conceivable for some of the exclusive powers; c) it would not be possible for federal power based on general principles; it must be contained in the Constitution.

In case a) it is clear that it would be unconstitutional if the Federation delegate all or a very important part of the power to the States, because the decision of the federal constituent will be distorted. For independent provisions it is often used. According to the scholarship, a federal power includes the administrative implementation and its main regulation. In a large number of federal laws, the Federation delegates the administrative

application and an important part of the regulation on the implementation to the states. This practice is so common in Switzerland that is regarded as an important part of the federal nature of the system, subsumed under the term "Vollzugsföderalismus (implementation federalism). No funding is provided by the Confederation according to the delegated power. But apart from that the States have ample powers to collect taxes themselves. The Confederation supports them through vertical financial compensation which must take into account the range of powers and administrative responsibilities delegated.

Belgium

As a general rule, the transfer of powers is done from the federal State to the federated collectivities. The Constitution could be modified regarding this issue or it might be included in special acts of institutional reform.

The global transfer of powers between the Region and the Communities, that is, interfederated transfers, are authorized by art.137 of the Constitution. This has been used to transfer powers from the Flemish Region to the Flemish Community. It contributes to a simplification at the institutional level allowing a more rational management of community and regional issues. The financial transfers between the Flemish Region and the Flemish Community are allowed too.

Partial transfers of powers are also possible. It has been the case of transfer from the French Community to the Walloon Region and the Walloon Region to the German-speaking Community.

Italy

Allocation is rigid regarding legislative authority since it can only be modified with constitutional amendment. Negotiated instruments of interpretation of the Constitution do not exist (agreements, organisms for the prevention of conflicts). The only organism qualified to interpret the Constitution in cases of conflict is the Constitutional Court.

Regarding secondary legislation, art.117, sub-section 6, provides that the State, in matters of its own exclusive legislation, can delegate to the Regions the power to control by regulation.

The Constitution says nothing about the possibility of delegating administrative functions but holds pacifically the possibility, with a law, of delegat-

ing functions, by official subjects, both downward (from the State to the Region, from the Region to local entities) and upwards (the latter possibility, the regional delegation of functions to the State, has never taken place).

In general, the instrument of the delegation of administrative functions between the State and the Regions has been used very little while it is more widely used between Regions and local entities.

Regarding single financial resources, the Constitution affirms the principle that they must be distributed among the different levels of government in such a way as to "finance integrally the public function to which they are attributed" (art. 119.4).

Spain

The Federation may delegate or transfer powers to the States. In these cases, the Federation may establish principles, bases or guidelines that States must respect and methods of control regarding the exercise of these powers. The legislative act of transference or delegation should provide the financial means needed to exercise that power. The Federation may reverse the process and recuperate the power at any moment. This possibility has not been used often and, in some cases, it has been useful to anticipate and to uniformate the state constitution reforms, transforming what is supposed to be a bottom-up process into a top-down one distorting the effects of the dispositive principle. Accordingly, the relevant constitutional amendments of the beginning of the 90s arisen from a previous agreement between the two main federal parties which were carried out through the delegation of powers to the states that still did not have them and, afterwards, these states amended their constitutions referring to the law delegating the powers.

5 · Has any subject matter been fully attributed to just one of the territorial levels of governance — federal or state —?

United States of America

Clearly matters of the monetary system, national defense, foreign policy (not foreign affairs), immigration and naturalization, are fully federal. But most areas, e.g. policing, education, science, transport and highways, commerce are shared powers.

One observer of US state building put it this way. "The United States was born in a war that rejected the organizational qualities of the state as they had been evolving in Europe over the eighteenth century…They established the integrated legal order necessary for control of the territory, but at the same time, they denied the institutions of American government in the organizational orientations of a European state…The national government throughout the nineteenth century was promotional and supportive state services for the state governments and left the substantive tasks of governing to these regional units. This broad diffusion of power among the localities was the organizational feature of early American government most clearly responsible for statelessness in our political culture." In other words, the core operational characteristic of early (and to some extent present) American state organization was a radical devolution of power accompanied by a serviceable but unassuming national government.

Canada

Theoretically, all powers listed under sections 91, 92 and 93 are "exclusively" attributed to the federal or provincial level of governance. However, the courts have developed doctrines, like the "double aspect" doctrine, which have the effect of allowing both levels to legislate at the same time on the same subject, but under two different aspects (for example, motor-vehicle operation can be regulated by the federal Parliament under the criminal law power, in order to define offences and sanctions, and by the provincial legislatures, in order to maintain public order on public roads). Thus, the judicial interpretation of the provisions addressing the division of powers has blurred the lines. This tends to favor overlapping or concurrent jurisdiction in many areas requires a high degree of cooperation and coordination between the central government and the Canadian provinces, in order to coordinate policies.

A few subjects can be said to be truly exclusively federal (military defense, monetary policy, the postal service, for example) or provincial (municipal institutions, primary and secondary education, for example).

Australia

Yes, some subject matters fall within exclusive Commonwealth powers. Section 52 of the Commonwealth Constitution gives the Common-

wealth Parliament exclusive power with respect to the seat of government of the Commonwealth, all places acquired by the Commonwealth for public purposes and matters relating to departments of the public service that have been transferred to the Commonwealth. Section 90 gives the Commonwealth exclusive power to impose excises. Section 115 prohibits the State from coining money and s 114 prohibits the States (without Commonwealth consent) from raising or maintaining any naval or military force or taxing Commonwealth property, leaving these matters within the exclusive control of the Commonwealth. The Commonwealth also has exclusive power under s 122 to legislate with respect to territories.

Mexico

There are subject matters wholly given to the federation, such as electric and nuclear power production; oil extraction; or mail and telegraph services. Other public services are given exclusively to municipalities, such as water works, drainage, treatment and disposal of waste water; clean-up, collection, transport, and disposal of trash; grave yards; slaughterhouse; streets, parks and gardens; public safety and municipal transit.

Anything that is not exclusively assigned to the federal or municipal governments is understood to belong to the States. Nevertheless, there are areas in which concurrence has been established between the three levels of government, as we will see.

Brazil

Yes. The Federation has the exclusive power to legislate on civil, commercial, criminal, procedural, electoral, agrarian, maritime, aeronautical, space and labor; expropriation; civil and military requisitioning, in case of imminent danger or in times of war; waters, energy, informatics, telecommunications and radio broadcasting; postal services; monetary and measures systems, metal certificates and guarantees; policies for credit, foreign exchange, insurance and transfer of values; foreign and interstate trade; guidelines for the national transportation policy; the regime of the ports and lake, river, ocean, air and aerospace navigation; traffic and transportation; beds of ore, mines, other mineral resources and metallurgy; nationality, citizenship and naturalization; Indigenous populations; emigration, immigration, entry, extradition and expulsion of foreigners; the organization of the national employ-

ment system and conditions for the practice of professions; the judicial organization of the Public Prosecution and of the Public Legal Defense of the Federal District and of the territories, as well as their administrative organization; the national statistical, cartographic and geological systems; systems of savings, as well as of obtaining and guaranteeing popular savings; consortium and lottery systems; general organization rules, troops, material, guarantees, drafting and mobilization of the military police and military fire brigades; the jurisdiction of the federal police and of the federal highway and railway polices; welfare; directives and bases of the national education; public registers; nuclear activities of any nature; general rules for all types of bidding and contracting; territorial defense, aerospace defense, maritime defense, civil defense, and national mobilization; commercial advertising (Article 22).

Argentina

Yes, foreign relations and national defense generally correspond exclusively to the Federal Government. It is also possible to argue that the general interests of the country are under the power of the Federal Government, given the powers delegated by the Provinces in Federal Constitution to each of the branches: Legislative, Executive and Judiciary (arts. 75th, 99th and 116th). As for the provincial governments, it is possible to establish that they are assigned the reserved powers in the ones related to the satisfaction of the typical governmental functions in a region, as defended by Arturo M. Bas ("El derecho federal argentino". Nación y Provincias", Volume 1, p. 70, Abeledo-Perrot, 1927). So, each layer of government has its respective powers, according to the constitutional mandates.

After the constitutional reform of 1994, the federation is composed of 4 different governmental levels, to the federal and provincial layers, the amendment added the one of the autonomous city of Buenos Aires and the municipal autonomous governments, which also have their respective powers. The powers of the latter are not only given by the Federal Constitution, but also by the Provincial Constitutions and the Constitution of the Autonomous City of Buenos Aires

India

There are as many as 97 matters which have been exclusively assigned to the Federation and 66 matters that have been exclusively assigned to the States.

United Kingdom

Shared powers are understood but not seen as a distinct category of law or public administration; presently the UK-wide civil service has performed the necessary co-ordination very well. The Scottish Parliament often lets Westminster legislate, offering its consent by a vote. That said, key areas (health services, schools, universities, social security) are wholly the preserve of one government or another —Scotland could theoretically abolish the public health system and the UK could do nothing.

Germany

There are subject matters where legislation and administration are attributed only to the Bund but they are just a few: Army, air traffic and telecommunication. On the other hand, there are important matters fully attributed to the Länder as, for example, education and media.

Austria

In principle, there are no concurrent competences of the federation and the Länder. However, as there are several aspects of nearly all subject matters, the Constitutional Court has held that both the federation and the Länder may enact laws on the same subject-matter, if these laws concern different aspects covered by different competences.

Most competences are fully attributed to either the federation or the Länder exclusively, with regard to legislation as well as administration. However, there are a couple of split competences where the federation is only competent for legislation, and the Länder for administration or where the federation is only competent for framework legislation, and the Länder for implementing legislation and administration. The judiciary is a federal power only.

Swiss Confederation

There are exclusive powers of the Federation. In this case, all the state rules will automatically become void. Where federal law is silent, should be interpreted according to the rules generally applicable to fill gaps, not by the application of state law. There are also areas in which there is no federal juris-

diction or powers are only fragmentary. But more often the case in Switzerland is the concurrent powers scenario where a matter is subject to both federal and state powers, with different distributions of functions in each case.

Belgium

At the issue level, the different collectivities may have exclusive powers. They do not have to share the powers. They do not compete with other jurisdictions to occupy a field to gain power over it before another does. The autonomy, in an etymological sense, is fulfilled here. In their sphere of powers, the collectivities cannot accept any encroachment, neither by the federal collectivity nor by a federated one.

In order to take into account these postulates, the Constitution does not establish any hierarchical relation between the federal and federated laws. The community and regional decrees have the force of a law. The regulations of the Brussels' region have also the rank of a law — except for the ones that deal with specific issues such as urban development or land use-. Laws, decrees and regulations are on an equal footing.

From a geographical perspective, the territory is linked to the jurisdiction of the regions. These are fixed in art. 2 of the special act of institutional reform. The Flemish and Walloon regions have jurisdiction over 5 provinces each. The region of Brussels is a special case that does not map the provincial division. Its limits, fixed too, are established by a special act.

Regarding the communities, the answer is much more complex. The German-speaking community represents the interests of 70,000 people that live in 9 listed German-speaking municipalities. The other two communities face much more intricate situation. The Flemish governs in the north; the French, in the south. They both have a common territory: the region of Brussels-capital, which has one million of inhabitants, that is, it concentrates 10% of the Belgian population. This requires complex criteria to connect people and institutions.

Italy

Regarding legislative powers, a large part of the subject matters, with the only exception being those of concurrent legislation, are attributed exclusively either to the State (list of art. 117, sub-section 2) or to the Regions (general clause of residuality of art. 117, sub-section 4).

However, if we consider several subject matters exclusively of state legislation, we realize that they do not deal with subject matters in the proper sense that is relative to specific subjects or complexes of homogeneous activities, but rather with transversal subject matters. Therefore in this case, the State can legislate posing limits, also important ones, on regional legislative authority. Examples of this type of transversal authority: "safeguard of competition"; "jurisdiction and court regulations"; civil and penal order; administrative justice; "determination of the basic levels of the services concerning the civil and social rights that must be guaranteed throughout the entire national territory".

Spain

Yes. Regarding several subject matters, all functions have been granted to the Federation or the States. In practice, however, the exclusive state powers have not been that exclusive since the Federation has encroached upon them exercising its basic and "horizontal" powers which may affect any area.

6 · Are there any subject matters in which the Federation can establish principles that state legislation has to follow or respect? If so, has the Federation made an extensive use of this power? Is there any mechanism to address that situation?

United States of America

Setting of state standards is an every day occurrence for Congress and the administration. It sets state standards in road safety, environmental protection, employee hiring and most recently in educational performance. States use their informal political power to affect these situations. There is no formal mechanism.

Canada

No arrangement of this sort is expressly provided for in the Constitution. However, by exercising its "spending power", i.e. by offering to provide all or part of the funding of programs under provincial jurisdiction,

and by attaching conditions to the receipt of such money, the federal government is able to intervene in areas that are formally under exclusive provincial jurisdiction, like higher education or healthcare. When federal funding is conditional on the respect of certain standards, provincial legislation has to respect principles established by the federal government. Thus, the *Canada Healthcare Act* establishes principles that the provinces have to follow in the management of their healthcare systems if they want to continue to receive federal financial transfers.

Australia

The States are bound by valid Commonwealth laws, so theoretically, the Commonwealth could legislate to impose principles that it required the States to comply with, as long as the Commonwealth had a head of legislative power to support the law and it did not breach the *Melbourne Corporation* principle (i.e. it did not interfere with the exercise by the State constitutional powers). In practice, the Commonwealth does not normally lay down principles which the States are required to follow. If the Commonwealth wanted the States to act in a particular way, its more likely course would be to place conditions upon the making of financial grants to the States under s 96.

In rare cases, however, the Commonwealth has adopted the approach of legislating with respect to a subject matter, but permitting its law to be wound back in favour of a State law if the State law meets particular Commonwealth requirements. This approach is used where the subject matter of the law needs to be integrated with other State laws and programs that already exist, in order to avoid complex duplication and inconsistencies. Commonwealth environmental and native title laws therefore permit the application of State laws with respect to certain matters if they are certified as being consistent with the principles and minimum requirements set out in the Commonwealth law.

Mexico

There are subject matters in which the Federation may set principles, bases and directives for state legislation. This happens in subject matters that are object of "concurrent powers" (how this term is understood in Mexico is explained in question 8 of this section).

For example, regarding education the Union's Congress has powers to issue laws aimed to distribute the powers over education between the Federation, the States and Municipalities, in order "to unify and coordinate education in the Republic" (art. 3, section VIII of the Constitution).

Regarding health, a Federal law defines the bases and modalities of access to health care and establishes the concurrence of the Federation and the federative entities in general health (art. 4, third paragraph of the Constitution).

The Union's Congress has powers to "issue laws to establish the concurrence of the Federal Government, the States and the Municipalities, within their respective powers, in human settlements matters." (Article 73, section XXIX-C of the Constitution). The same scheme applies for environmental protection, and restoration and preservation of ecological balance. Similarly, regarding civic protection, Union's Congress has powers "To issue laws that establish the bases by which the Federation, States, the Federal District and the municipalities, will coordinate their actions concerning civil protection". (Article 73, section XXIX-I of the Constitution).

As for sport regulation, Congress has powers to establish general coordination bases of the concurrent power between the Federation, the States, the Federal District, and municipalities (article 73, section XXIX-J of the Constitution).

Finally, the concurrence scheme has been extended to tourism, fishing, aquiculture, and promotion and development of cooperatives.

Brazil

Within the scope of concurrent legislation, competences of the Federation shall be limited to the establishment of general rules (article 24). If there is no federal law providing for the general rules, the State establishes the general rules (Article 24, § 3).

Argentina

As mentioned, the 1994 constitutional amendment established that in education matters Congress has to enact laws providing the general organization and bases — "leyes de organización y de base" — (art. 75 part 19); and, similarly, in environmental protection, Congress has to set the

minimum requirements, which will be implemented and developed by provincial legislation (art. 41).

In theory, this federal legislation cannot disregard provincial powers; in case of conflict, it could be challenged before the Supreme Court of Justice. There are no decisions about this.

India

There are no legislative matters in which the States have to follow any instruction from the Federation. However, in the exercise of their executive powers which are coextensive with legislative powers Federation may give directions to the States to exercise their executive power in a manner so that they do not conflict with the exercise of the executive powers of the Federation. The Federation has, however, not utilized this power frequently.

United Kingdom

In Wales this is part of Westminster's primary legislative powers. In Northern Ireland such powers are confined to policing, human rights and similar issues, and are to be phased out. In Scotland there are effectively none.

Germany

No; the former "Rahmengesetzgebung" (framework legislation) has been abolished.

Austria

Yes, according to Art 12 B-VG: The federation may enact framework laws in a couple of enumerated matters, such as in the field of social policy, health, agricultural estates reform, protection of plants, electricity, non-litigious settlement of disputes and agricultural or forest employees. If a framework law has not been enacted, the Länder are fully competent to enact their own laws, being however bound to modify them, when a future framework law is enacted. The Constitutional Court holds that a framework law must not be as detailed as to permit its direct execution by an administrative organ. In order to observe the strict principle of legality,

an implementing Land law is therefore needed as an intermediate component between the framework law and the execution of the concerned matter. The Constitutional Court may be addressed if the Länder believe a federal framework law to be too extensive. This is sometimes the case, but not very frequently.

In a very limited range of matters, moreover, ordinary federal legislation may also specifically and selectively authorize the Länder to pass implementing legislation.

Swiss Confederation

There are federal powers over principles (bases). There are examples, among others, in the field of environmental protection. There had not been so far use of this type of power which would have been interpreted as too extensive by the doctrine. If you produce this abuse, there is no correction mechanism, since there is not a judiciary that can review the respect of the federal division of powers.

Belgium

In general, there are no power-sharing mechanisms in which the federal State legislations fix the guidelines or principles later specified and implemented by the communities and regions.

Exceptionally, the community legislator or regional cannot issue legislation disregarding rules adopted at the federal level regarding certain issues. For example, in the administrative area, (V.11), each collectivity can define the regime of its personnel. However, in doing so, it has not observed the principles established by the King in a Royal Decision regulating the general principles of the civil servants regime.

Italy

Yes, they are in the spheres of "concurrent" legislation. We do not have a survey yet regarding the enforcement of the new constitutional text.

However, we can refer to previous experience when there was a list of subject matters of regional legislative authority and their authority was limited by the State's power to establish the "fundamental principles" of each subject matter. We can affirm that the State made extensive use of this

power, defining even detailed regulations as fundamental principles, thus greatly compromising the autonomy of the Regions, often with the approval of the Constitutional Court.

The instrument to prevent an extensive use of this power is the filing of an action before the Constitutional Court challenging the law encroaching upon regional powers.

Spain

Regarding a relevant number of subject-matters, the Constitution grants the Federation the power to establish the principles, bases or guidelines for the state legislation. The Federation has made an extensive use of this power, concerning both the scope of the subject-matters over which this kind of power is recognized and, especially, the level of detail of the basics or the principles, even including mere executive acts regarded as necessary to secure the basics. The Constitutional Court tends to uphold the enactment of very detailed basic rules. The criterion bases-development has proved to be barely useful and secure as a judicial canon to solve the conflicts of powers between the Federation and the States.

Some of the state constitutions amended recently want to limit the expansive effects of the "bases" delimitating the subject-matter to ensure that the bases do not intrude on these and clarifying that the bases have to be principle-like and not very detailed, except in some cases which are exceptions not the general rule. The real effect of these provisions should be analyzed.

7 · Are there any subject matters in which legislative power is exclusively attributed to the Federation, while executive power is attributed to the States? If so, is decree power — that is power to issue norms subordinated to the laws — regarded as legislative or executive power? Can federal legislation determine state administrative organization and practice?

United States of America

Not in the Constitution, but in practice this is a very common pattern. In many social welfare, highways and transport, higher education, environ-

mental, and now homeland security the states largely carry out federal programs through their administrative organs. As such, they have broad flexibility in setting priorities and allocating funds. The regulative power is both, as most states require that federal programs/funds be legislated through state legislatures. In fact, most federal-state programs experience dual laws/budget processes.

Federal legislation can and does determine state administrative practice for federal programs. In addition to the Florida example cited above, the federal government usually requires that a "single state agency" administer each program, that state civil service employees only be involved (no appointed patronage employees), and that as many as fifty "cross over requirements" in purchasing, procurement, civil rights and minority protection be followed, in addition to program requirements.

Issuance of federal norms — regulations, rules, guidelines, orders — are always subordinated to the laws. All such norms — federal, state, or federal-state — must be rooted in some legislative enactment. For example, rules regarding the abuse of handicapped persons who are being supported by federal programs begin with a provision of the Americans with Disabilities Act of 1991. Several relevant offices of the U.S. Department of Health and Human Services then proposed rules, based on standards derived by panels of outside specialists that are subject to public hearing and final publication in the Code of Federal Regulations. Then the relevant offices will write guidelines and orders that will hold the state (usually health) departments responsible. The state agencies are then responsible for enforcing these rules and procedures (e.g. reporting, investigation, mitigation, punishment) through the network of for-profit and non-profit agencies that deliver services.

Canada

No such arrangement exists in Canada.

Australia

No. Executive power follows legislative power. The States do not have executive powers with respect to matters that are exclusively within Commonwealth legislative power. The Commonwealth cannot legislate to determine State administrative organization and practices.

Mexico

In the Mexican federal system there are no matters in which the Federation has only legislative powers and the execution and implementation correspond to the States. Besides, federal legislation cannot influence or configure the administrative organization of the States.

Brazil

No, there are not.

Argentina

Since the US model was adopted, Argentina does not follow a federalism of execution where the legislative power is assigned to the federation and the executive power to the provinces. Decree power is tied to the legislative one. Only after the 1994 amendment, the matters mentioned in the previous question constitute a new way to share the powers.

In general, given our federal organization, federal legislation should neither determine the provincial administrative organization or practice, nor influence beyond the scope of its powers.

India

Though in general executive power of the Federation as well as of the States is coextensive with their legislative power, on subjects in the Concurrent list it lies primarily with the States unless the Federation decides to exercise any such power. The power to make subordinate laws can be conferred on the executive but it has to be exercised only on the authorization of a law made by the legislature and not otherwise. Moreover essential legislative functions, which consist in laying down the policy of law, cannot be transferred to the executive. The Federal legislature cannot determine State administrative organization. The State administrative organization has however, to confirm to the requirements of the Constitution.

United Kingdom

This is the basis of the Welsh settlement — the most important legisla-

tion is Westminster, the implementation and relevant implementing legislation is Welsh. Welsh powers are determined from a long list of Westminster secondary (implementing/administrative) legislation that the Welsh can change. This is widely viewed as unsatisfactory and is likely to change soon (a Commission is at work on proposals). Northern Ireland and Scotland can issue subordinate and secondary legislation in any area where they hold primary legislative power.

Germany

This is quite often the case, as executive power is in most cases attributed to the States. Decree power is regarded as an executive power.

Administrative organization and practice lies normally within the executive power of the Länder; the Bund may, however determine administrative organization and practice to a certain extent, Art. 84 GG; consent of the Bundesrat then is required.

Austria

According to Art 11 B-VG, the federation is responsible for legislation and the Länder for administration in a limited range of matters: Such matters comprise, for instance, citizenship, certain aspects of the representation of professional groups, housing, traffic police, and shipping.

The power to enact regulations generally is seen to belong to the executive and not to the legislative power, even though both decrees and laws have a general character. Thus, administration (or the executive power) normally includes the power to issue decrees. However, Art 11 paragraph 3 B-VG specifically entitles the federation — and not the Länder, which are responsible for administration under Art 11 B-VG — to enact decrees in those matters which are enumerated in Art 11 paragraph 1 and 2 B-VG.

Land administrative organization is basically determined by federal constitutional law and, in conformity with these provisions, by the Land Constitutions. Land organization is thus not regulated by ordinary federal laws. Provided that "administrative practice" means "administrative procedure": The federation has enacted uniform acts on the general administrative procedure and on administrative offences, making use of an overruling competence "due to needs of uniformity", which leaves the Länder

nothing but the (rarely exercised) right to set up their own administrative procedural rules if such a measure would be highly imperative.

Swiss Confederation

As a general rule, the Federal Constitution declares that states are responsible for the implementation of federal law. In addition, it stipulates that federal law must leave as much leeway as possible to States. There are some powers in which the Constitution explicitly states that administrative implementation should be carried out by States, but always with the note "... unless the law reserves the power [of execution] of the Confederacy". In these cases, the administrative enforcement and their regulation are, in principle, state power and federal law generally respects this principle, provided that the federal legislature does not consider necessary unification of administrative regulations and its organization to ensure uniform application of federal law. The majority of the federal powers are concurrent powers in legislation. In this case, federal law may leave the administration and even port of the legislation for States. "Executive" (implementation) federalism is regarded as an important pillar of the autonomy of states. It should be noted that, in the case of concurrent federal legislative powers, the depth of federal law is defined by federal law, upon which, at the same time, states have a significant influence ("shared rule").

New instruments of "executive federalism" are the conventions (see below IX.2), introduced with the latest reform of federalism, in force since 2008.

Belgium

The implementation (execution) of federal laws is carried out by the federal government. The implementation of federated norms is carried out by the federated government. The Belgian system does not have the model of administrative federalism.

Italy

As mentioned in point 1, the allocation of legislative authorities and administrative functions follow different criteria. The Constitution strictly allocates the first ones while state or regional laws, applying the prin-

ciple of subsidization, distribute the second ones. This can cause, for example, administrative functions regarding legislative authority that is exclusively attributed to the State, to be attributed to the Provinces or Regions.

In general, the State cannot influence the organization and the development of the administrative functions attributed to the other levels of government.

Indeed, the State can only legislate, in an exclusive way, on subject matters regarding "administrative order and organization of the State and national public institutions" (art. 117.2 g). This is not true for delegated administrative functions for which the State retains a legislative power of detail and decree/regulatory power.

Spain

The division legislation-implementation is frequent. Until the recent amendments of the State constitutions, the rule-making power *ad extra* — not the internal organization one — was only included in the legislative power. In the state constitutions recently amended (2006-09) the decree/regulatory power has been included in the implementation power of the states; but the Decision of the Constitutional Court 31/2010, of 28th June, in relation to the new Catalan Charter of Autonomy, denied the possibility that executive powers of Catalonia enable the enactment of decrees (regulations/secondary legislation) with general effects (*ad extra* effects), limiting the power just in relation to internal regulation decrees (*ad intra* effects).

8 · Is the technique of "concurrent" powers recognized (both Federation and States have legislative powers, although federal law takes precedence over state law in case of conflict)?

United States of America

Indeed, shared powers, although not formally recognized, is the normal operation. State shared powers are "understood" by the states powers in the U. S. Constitution and Amendment 10.

Canada

See the answers to questions 2 and 5 above.

Australia

Yes. Most legislative powers conferred upon the Commonwealth Parliament are concurrent powers. The States may continue to legislate with respect to these subjects, but if the State law is inconsistent with the Commonwealth law, the Commonwealth law prevails. As discussed above, if a Commonwealth law 'covers the field' of a subject matter, any State law that intrudes into that field will be regarded as inconsistent, regardless of whether there is any direct inconsistency or it is possible to comply with both laws.

Mexico

The concurrent powers technique has not been recognized in our federal scheme in the same way as it has in the rest of the world's constitutional doctrine and jurisprudence (with the characteristic "displacement" phenomenon). Nevertheless, the term "concurrent powers" is used in Mexico to refer to a situation in which the same subject matter is shared by the different levels of government, based in the rules established by a federal law. That is the case, for example, of education, health, sport, environment, and human settlements. Article 73 section XXIX-G illustrates it stating that the Union's Congress has powers: "To issue laws that establish the concurrence of the Federal Government, of the state governments, and the municipalities, in the sphere of their respective powers, regarding environmental protection, and restoration and preservation of ecological balance." Similar redactions can be found for other matters mentioned above.

Brazil

Yes, it is. This technique is recognized in article 24.

Argentina

Yes, it is as we have already explained. These concurrent powers of the different levels of government (federal, provincial, and local) arise from

articles 75.18, 75.19, and 125 of the Federal Constitution. These powers are related to health, education and general welfare. Given its relevance, article 125 must be quoted: "Provinces can celebrate partial treaties regarding judicial powers, economic interests, or common interest works, giving notice to the Federal Congress; and promote its industry, immigration, railroad and navigation waterways construction, territorial colonization of its land properties, introduction and establishment of new industries, importation of foreign capital, and exploration of its rivers according to the protection given by law and with its own resources. The provinces and the city of Buenos Aires can maintain their own social security systems for public servants and professionals; promote economic growth, human development, employment creation, education, science, knowledge, and culture".

India

As already mentioned the technique of the concurrent powers is recognized in the Constitution.

United Kingdom

There are informal mechanisms and legal-administrative arrangements that work like this (especially in Wales) but there is no formal category of law or public administration.

Germany

Yes, see above 3.; in certain matters, the Bund may legislate only in case of necessity of a federal law, where as in the most important matters — civil legislation, penal law, law of procedure — the Bund may act without any restriction: the Länder may legislate as long and as far as there is no federal law; so, there should be few conflicts — for the case of conflict see above 3.

Austria

Both the federation and the Länder enjoy (exclusive) legislative competences, and ordinary federal law does not take precedence over Land law in Austria.

Swiss Confederation

The concurrent powers are very common. There are three types:

a) *Federal jurisdiction "with post derogatory" effect* (in general, the Swiss doctrine applies only to this type of power when it analyzes concurrent jurisdiction). This is the most frequent case of federal power. This scheme implies that the state law remains in effect until the Confederation use its power (this case might be regarded as a provisional state power). Secondly, the Confederation may, but need not, fully exercise the power. If the Confederation makes use of its power only partially, those aspects not covered are part of state powers. Moreover, according to the principles of subsidiarity (Article 43.a) and moderate use of powers, the Confederation should exercise its power only when it is necessary to unify the public functions in an area (Article 46 II: "The Confederation shall Cantons allow room for manoeuvre as broad as possible ...").

b) *Federal powers principles* (bases). In these cases, the Confederation must limit its laws to regulate the most fundamental principles and leave the rest in the original jurisdiction of States.

c) *Parallel powers*. These are matters on which both the Confederation and also the states can have the same public functions. For example, both levels can support the production of movies.

Belgium

As it has been explained, the concurrent powers scheme is not authorized. Nonetheless, the financial powers of the federal State, the communities, and the regions follow somehow a system close to concurrent powers: the supremacy of the federal State in this area is not usually disputed.

Italy

Yes, a list of subject matters of concurrent legislation exists, but it is a special competition, different from the one established in Germany. In Italy, the Regions are responsible for the legislation of these subject matters "except for the determination of the fundamental principles that is reserved for the legislation of the State". In this way, therefore, the competition of the two legislations is strictly divided according to the distinc-

tion regulation of principle (for the State) and regulation of detail (for the Regions).

Spain

In the Spanish system the concurrent power technique jointly with the precedence of federal legislation when it regulates the same area as state regulation already had does not exist.

9 · Are there "simultaneous" powers? Are there any other power sharing mechanisms such as remissions to the regulation of the other jurisdiction (i.e. provision stating that federal/state power is subordinated to the provisions enacted by state/federal legislator in certain issues) or the mutual recognition of their acts?

United States of America

Virtually all non-exclusive federal powers are in effect "simultaneous powers" in the sense that at least two (and sometimes three, for example education) levels are involved.

While not enumerated, some powers have been assumed by the states in the absence of federal enumeration. The clearest example is that of local government, ignored in the federal Constitution. States initially ignored them as well but captured control over their power during the 19th century. Local governments came to be understood as entities whose powers are derived from and subject to the sovereign state legislative rather than as component units of a quasi-federal state government. It led to the doctrine of "Dillions Rule," mentioned below.

Canada

See answer to question 4 above.

Australia

Valid Commonwealth laws always take priority over inconsistent

State laws. However, the Commonwealth may expressly state that it does not intend to 'cover the field' in relation to a particular subject, leaving room for the operation of State laws.

When the Commonwealth and the States agree upon a uniform legislative scheme, sometimes one jurisdiction (either the Commonwealth or a State) will lead by enacting a law in agreed terms and then the other jurisdictions will all legislate to 'adopt' the law of the lead jurisdiction, including any amendments made to that law from time to time. Amendments will then only be made if agreed by the participating jurisdictions pursuant to an intergovernmental agreement. In this manner, a uniform law can be maintained across all jurisdictions.

The States and the Commonwealth also participate in a 'mutual recognition' scheme relating to the sale of goods and the recognition of entitlement to carry on particular occupations. For example, if goods manufactured or imported by State A are legally permitted to be sold in State A, then they are also allowed to be sold in State B, even if State B has different laws about safety or standards. Similarly, if a person is entitled in State A to carry on a particular occupation, he or she is also entitled to do so in State B, even if State B requires different levels of qualification or experience to carry out that occupation. There is also a trans-Tasman mutual recognition scheme that involves New Zealand.

Mexico

In Mexico, these schemes of power sharing between the different layers of government do not exist.

Brazil

States and Federation have some simultaneous powers (e.g. regarding environmental protection, article 23). Nevertheless, Federal general rules will prevail in case of conflict.

Argentina

It is possible that Provinces and Municipalities, exercising their powers, decide to adopt federal regulations or refer to these.

As to the recognition of their actions, several provisions of the Constitution can be mentioned. Art. 7: "Public actions and judicial proceedings from one province have full effect in the others…". And art. 8 establishes that the citizens of a province "have the same rights, privileges, or immunities recognized to the citizens of other provinces while in those" and that the extradition of criminals "is a reciprocal obligation between the provinces".

India

The answer to this question is covered under Question 4 above. It is also mentioned in that answer that in one situation State law on a Concurrent subject may override Federal law.

United Kingdom

The answer depends on the jurisdiction. The powers of the Scottish Parliament are extensive and typically exclusive but the Scottish Parliament can pass motions to use Westminster legislation in its areas of competencies if it chooses. The Scotland Act contains provisions that allow the Scottish Parliament to participate in reserved (UK) matters if it is helpful to the UK government. The National Assembly for Wales, in a sense, has little but "simultaneous" powers because of its limited primary legislative capacity. The Northern Ireland Assembly has powers more akin to those of Scotland, but its political disorder, administrative separation and lack of policy initiative means that there has been less experimentation than in Scotland.

Germany

There are no simultaneous powers.

Austria

If a Land delays to implement EU law (which must be confirmed also by one of the EU courts) or international treaties punctually, the federation will become competent to enact subsidiary measures, even though the delaying Land does not lose its competence.

Another example is the ancillary power of the Länder to enact civil or criminal law (which are normally covered by a federal power), if this is indispensable in order to exercise a genuine Land power. For example, if the Länder want to exercise their right to regulate the transfer of agricultural estates, they need an ancillary power to declare contracts void that were concluded under private law and led to the acquisition of agricultural estates without heeding the criteria set up by public law.

The principle of mutual consideration obliges both tiers to respect each other's legislation and not to disavow it.

Swiss Confederation

There is what the Swiss doctrine called "parallel powers". These can be found in different areas, for example powers over: establishment of universities, promotion of cultural or linguistic diversity, parts of civil security and the protection of the state, etc. In these areas, the Federation may enact laws and implement them without diminishing the state competition. There may be parallel powers with a duty to cooperate. This exists in the area of universities, where the Constitution requires the Federation and the States to cooperate and establish agreements and joint bodies to coordinate their responsibilities.

Belgium

In practice, there are parallel powers exercised simultaneously by different politic collectivities.

The Constitutional Court accepts the exercise of these powers. It admits that the federal collectivity, or the federated ones, carries out their responsibilities if they do not interfere seriously in the other/s power spheres.

In a decision of February 25, 1986, the court stated that the regions have power "over industrial public entrepreneurship financed with regional funds developed and regional institutions devoted to the promotion of the regional economic development; while the federal authorities can start and manage public industries financed with federal resources in order to promote federal economic development" (C.A. n.11/86, February, 25 1986).

In the scientific research area, communities and regions have power if the research is related to issues over which they have power (l.sp., art. 6bis, §§1st and 2).

Italy

There are no other general mechanisms. It may be noted recent decision of the Constitutional Court have clarified that the "subsidiary" powers, whereby the central government may reserve to itself administrative functions, even in matters of clear regional power, if the functions at stake meet the interests of national unit . The only condition for their operation is a "preliminary agreement" with the Regions: the State, prior to the adoption of laws in which claims as his authority (and subject to federal regulation) administrative functions in matters of regional power must obtain the consent of the Regions, normally in the State-Regions Conference.

Spain

In principle, this technique, except for the case of culture, is recognized neither by the Constitution nor by the Statutes. In fact, the specification of power techniques may reject this idea. However, in practice, the number of matters with here is this sort of concurrence is increasing, and thus the number of conflicts before the Constitutional Court over these issues is rising.

10 · Does the Federation have its own administrative organization on the state territory? How strong is that Administration? In which fields does it act? Can the state Administration exercise any federal power delegated by the Federation? If so, are state administrative bodies hierarchically subordinated to the Federal Administration? What mechanisms of review are reserved to the Federation to ensure that States correctly enforce federal law?

United States of America

Federal programs of direct administration include: Social Security (pensions), Postal Service, most agriculture programs, Veterans Affairs and Hospitals, and a few others. In these areas the federal presence is everywhere, but it is programmatically small compared to the states' program presence.

States can and regularly exercise delegated federal power. The most common areas include environmental protection, occupational health and safety, housing, transportation planning, mass transportation, civil rights and protections, human rights and protection. All state and local governments are, in effect but not actual or legal, administrative arms of federal laws and regulations.

State administrative bodies are not hierarchically dependent; they are legally and financially dependent, and failure to act is either subject to political negotiation or federal litigation. The states try to negotiate the best deal they can. On occasion, a president has enforced federal law by use of force through militia action. Normally, states directly appeal or seek administrative review in the agencies themselves, or try to get Congress to change legislation, and through federal court action.

The major vehicle of federal enforcement, however, is the threat (it rarely happens) of withholding federal money or monetary penalties. Also, fear of costly litigation, can move a state to act.

Canada

The general rule is that each order of government is responsible for the execution and administration of its own laws. Thus, for every legislative jurisdiction of the federal Parliament there is a corresponding federal executive administration. The one exception, in which the Constitution divides legislative and administrative authority on the same subject between the two levels of governance, is criminal law, which is within the exclusive legislative competence of the federal Parliament but is administered by provincial attorneys generals and provincial courts. In addition, there are a few cases, were one legislative body has delegated the enforcement of its laws to an administrative agency of the other level of governance. Thus, in all provinces except Quebec, the provincial income tax is perceived by the federal Revenue Department. Conversely, in Quebec, the federal sales tax is administered and perceived by the provincial Revenue. In such cases, the Constitution provides for no mechanisms of review of the enforcement of the laws of one level of governance by the administrative machinery of the other level.

It must also be noted that, while Quebec and Ontario have created their own provincial police forces, in all other provinces criminal and provincial law enforcement is "contracted out" to the Royal Canadian Mounted Po-

lice (R.C.M.P.) (which also performs contractual services to many municipalities throughout the country).

Australia

The Commonwealth Government has its own offices in States and Territories that fulfil Commonwealth functions. Commonwealth functions are almost always fulfilled by Commonwealth officers. There is no custom or substantial practice of the Commonwealth delegating administrative functions to the States.

However, in some cases there are intergovernmental cooperative schemes that allow State officers to exercise Commonwealth functions. For example, when State police officers arrest a person for a State crime, they may also do so in relation to crimes against Commonwealth laws. Such a delegation of powers is often formalised by an agreement made by the Governor-General and the relevant State Governor (always on the advice of their relevant responsible Ministers) pursuant to legislative authority. Where the Commonwealth has delegated functions to State officers, Commonwealth laws regarding the review of administrative action will still often apply.[11]

Mexico

The Federation has its own Administration in state territories. In each of them, there is a "Federal Delegation" of each of the existing "Secretarías de Estado" (federal; this is the name the departments receive in Mexico). Since these "Delegations" have broad attributions, exercise key powers, and manage economic funds, they play an important role in the States.

Roughly speaking, "Federal Delegations" in the States have the following attributions: coordinate the actions and programs of the corresponding "Secretaría de Estado"; report the advances and results of such actions and programs; elaborate diagnostics relating local problems; participate in the State development actions the Federal Executive agrees with State's governments; propose, participate and subscribe coordination agreements and conventions between the Federations and State governments; grant permissions, licenses, authorizations, and their respective

11 See, for example, Schedule 3 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

modifications, suspensions, cancellations, revocations or extinctions; and organize and maintain registries and catalogues.

Besides, State Administrations may exercise federal functions, but not under the form of delegation or commission of the Federation, but through conventions according to section VII of article 116 of the constitution.

Maybe the most common example of these conventions is the ones regarding tax matters. "Administrative aid conventions" are usually signed between the federation, through the Secretariat of Treasury, and State's Governors. In this conventions both parties agree that administrative functions of certain federal taxes will be carried out by the State (the taxes that are usually included in this conventions are the Income Tax and the VAT, even the Special Tax on Production and Services and the Tax on Vehicles). In fact, the collaboration may reach the municipalities, due to a clause that established that the States, with the consent of the Secretariat of Treasury, might exercise the transferred faculties, totally or partially, through the municipalities.

States must exercise these faculties in the terms of federal legislation. Even though these conventions do not imply the hierarchic dependence of State organs from the Federal Administration, states have the following obligations: inform the federation on the probable commission of tax offence; deposit the amount of federal taxes collected during the past month, each month, in the Treasury of the federation; render each month the "Verified Monthly Account of Coordinated Revenues"; and follow federal rules relative to fund concentration and federal property values.

The Secretariat of Treasury has the following attributions: intervene in any moment to verify the fulfilment of state obligations; file suits for tax offences; process and solve the revocation appeals presented by the contributors against definitive tax resolutions; appeal resolutions that are adverse to federal fiscal interests (relative to coordinated revenues); and in an important way, exercise Planning powers,[12] Programming,[13] Normative[14] and Evaluation[15] regarding these coordinating revenues.

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12 Set the priorities and the goals in matter of incomes and activities coordinated and establish the policy guidelines and the mechanisms for its implementation.

13 Define the procedures and goals of the monitoring actions that the State will take.

14 Issue dispositions regarding the administration of the coordinated revenues, such as guidelines, procedural guides, general resolutions, etc.

15 The Secretariat of Treasure evaluates how advances each of the programs regarding the functions carried out by States and Municipalities regarding tax coordination are.

Federal control is guaranteed. First, States are willing to collaborate because if they do not celebrate the convention or, once celebrated, do not comply with it, they might be deprived of economic incentives. Those incentives consist basically in percentages of the coordinated revenues of the fines contributors paid for violations committed. Second, conventions always establish that the Federation may recuperate the functions by the corresponding convention when the State does not comply with any of the duties in it (after previous written notice). Likewise, the State may cease to exercise one or several of the transferred attributions providing written notice to the Secretariat of Treasury.

Brazil

Federation has its own administrative organization on state territories in order to exercise its own duties and competences. States can exercise federal competences delegated by Federation, when these competences are not exclusive.

Argentina

The Federation has its own administration in the territory of the States. It has judicial institutions, tax services, and other national institutions such as Universities, military bases, national parks, etc.

The relevance of the above-mentioned administrative structure varies in every place of the country. It has been very important in the southern provinces of the South since there were huge oil reserves owned by "Yacimientos Petrolíferos Fiscales, de Yacimientos Carboriferos Fiscales y de Parques Nacionales".

Provinces can exercise certain powers delegated by the Federal Government, such as the police, but, in my opinion, a hierarchic dependence does not exist given our constitutional federal organization.

India

The Federation has its own administrative organization in the National Capital Territory of Delhi as well as its other organization in the territory in different States and Union Territories. It has a strong administration with all necessary infrastructure and paraphernalia to discharge its responsibilities under the Constitution. The administration acts in all those fields on which

Federation has the power to make laws or exercise executive powers. The State administration can also exercise federal executive powers on delegation by the Federation. In such cases the State administration has to exercise these powers as required by the Federation. There is no special constitutional mechanism for review of exercise of these powers by the States but the Federation may give such directions as it considers appropriate. The directions are binding upon the States.

United Kingdom

There is almost no general UK government organisation in Scotland, Wales, or Northern Ireland; the central state operates the agencies and departments it retains on a UK-wide basis (so the UK-wide Department of Work and Pensions operates social security offices around the UK). The "territorial offices", Westminster departments responsible for relations with Northern Ireland, Scotland and Wales are mostly located in London but have small outposts in Belfast, Cardiff and Edinburgh.

Germany

The Federation has an administrative organization on the state territory only in a few fields: finance, army, inland waters, job centers; there exists a Bundespolizei (federal police) with limited powers as for cross border traffic. There also exist central authorities, which are competent for the whole territory, as for example the Bundeskriminalamt (Federal Office of Criminal Investigation).

The Federation can delegate by law certain administrative tasks to state administration, but state administrative bodies are not hierarchically subordinated to the Federal Administration.

As far as States enforce federal law, the Federation has the right of supervision; in cases of severe violations it may send a commissioner, but this has never been the case.

Austria

There are few federal authorities that directly carry out federal matters in the Länder: Of major importance are the Federal Police Departments or the School Councils set up in each Land.

Most federal administrative matters are carried out indirectly, i.e. not by federal administrative authorities themselves, but, according to the traditional concept of the B-VG, by the Land Governor and, supervised by him, the district administration authorities. Being Land authorities from an organizational viewpoint, these latter authorities functionally serve both the federation and the Länder as administrative authorities of first instance.

Indirect federal administration means that the Länder carry out federal administration on behalf of the federation, but the allocation of powers remains unaffected.

The Land Governor is bound by the instructions of the competent Federal Ministers or the Federal Government as a whole, when he carries out an indirect federal administrative matter. Otherwise, this would not be possible since Land Governors, being supreme Land authorities, are not subordinate to the Federal Government.

Since 2002, however, a wide range of indirect federal administrative matters has been removed from the Land Governor, although this does not affect the system of indirect federal administration as such: In these matters, the district administration authorities decide as a first instance, and the Independent Administrative Tribunals of each Land as a second instance.

Apart from the Federal Ministers' instructions by which the Land Governor is bound when carrying out indirect federal administrative matters, all state organs are bound by the general principle of legality. If a Land regulation is in breach of a federal law, the Federal Government may appeal to the Constitutional Court to strike it down as unconstitutional on account of illegality. In particular cases the federation enjoys special rights (e.g. to be informed about the execution of a certain matter). Further, the Federal Ministers are entitled to lodge a complaint against an administrative Land ruling at the Administrative Court, if the parties involved have exhausted all administrative remedies and if it concerns matters such as those of Art 11 and 12 B-VG.

Swiss Confederation

There is a federal administration; for example, in the military sector, in the education sector (federal polytechnic schools), customs, postal services, railways or public insurance against accidents. Compared with the weight of the state administration, applying both federal and state laws, federal self-administration in the territory of States is a relatively

small. Regarding the application of law by state governmental agencies, I refer first to what has been said above V.6: is very common and is an important part of state autonomy. In general, State agencies acting on their own behalf. State agencies are institutionally separate from the federal government.

Often, but not always, people affected by a state decision can appeal to an instance of the federal government, alleging that the State administration has violated federal law. For each sector powers might be delegated to different agencies since federal administrative law may establish the type and number of federal and state agencies, as well as administrative and judicial actions and appeals. States should provide and implement the necessary bodies to comply with the requirements of this law. Sometimes, after appeal before the state agencies, there is no possibility of appeal before a federal authority, that is, the state ultimately decides definitively on federal administrative law cases. In any case, the way of the Federal Court is always open if the person concerned can claim a violation of a fundamental constitutional right. The latter might be interpreted as including the blatant arbitrariness argument, but not the discretion that federal law grants the state administration ("angemessenem Ermessen").

Belgium

Each politic collectivity, federal or federated, has its own administrative apparatus, which it organizes appointing its members, defining their regime, determining their duties, and ensuring its control.

Italy

Yes, the State maintains its own peripheral administration to exercise the administrative functions that have remained at the national level. The most important sectors are those regarding peace (public order), education (which, however, should be mostly regionalized), financial administration, social security (national insurance) and the safeguard of cultural assets.

There are cases of administrative functions delegated to the Regions. In this case, organisms of the Regions carry out the functions delegated according to the disposition of state law (and possible regulations), but without any hierarchical-type subordination. The State reserves the right of instruction and to transfer financial resources to predetermined destinations.

Spain

The Federation has its own Administration within the territory of the States. The federal Administration is still very relevant regarding fields such as defense, police or the judiciary. The States can develop federal powers by means of prior delegation or transference from the Federation, according to the mechanisms and requirements laid down by the federal Constitution (see V.4)

Besides such typical mechanisms to make the formal allocation of powers more flexible, the delegation of powers from the federal Administration to state Administrations is not admitted. This kind of delegation, however, is expressly recognized between the Federation and local entities and between States and local entities. Apart from that, administrative legislation provides a mechanism called "encargo de gestión". This mechanism allows Administrations to entrust "other entities of the same or a different Administration, for efficacy reasons or lack of appropriate means" with the "the development of material or technical activities or services" of which they are in charge. Generally, it is agreed that this mechanism, in spite of being theoretically limited, has allowed "covert delegations of powers". Although strictly there is no hierarchy between the Administration that receives the mandate and the one that gives it, certain dependence between them develops. The latter can revoke such mandate according to the terms laid down in the convention.

Finally, in certain occasions, state Administrations have exercised federal powers through atypical mechanisms that make the allocation of powers more flexible, such as the grant of powers through ordinary law, in the case of harbours of general interest, or mechanisms of collaboration, such as consortiums or conventions.

11 · What are the general limits of state powers? Can states exercise some powers beyond its territorial borders?

United States of America

See V.3. Also, states must yield to federal legislative supremacy. Amendment 11 (effective 1798) states that federal judicial power does not extend to suits involving citizens of one state against citizens of other states

or foreign countries. States are bound to the federal constitution, particularly the Bill of Rights, through articles XIII, XIV, and XV. Finally, Article I, section 10 precludes state treaty making or joining a confederation, money issuance, issuing bills of credit, bills of attainder or expost facto laws, laws that impair contracts, grant nobility titles, or grant letters of marquee and reprisal.

Also, when a state is home to a corporation that is chartered in that state, court decisions regarding that corporation has national influence. As a result, many corporations charter where the laws are flexible, for example, in Delaware.

Extra territorial power is recognized in Article IV of the Constitution. "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." This extradition goes on to protect the right to return a "person held to service or labor" to the original state. Until the 1860s this provision allowed for the pursuit of fugitive slaves by owners/agent of one state in another state. Now moot, the provision is used to allow, with the approval of the governor of the state where a person is located, pursuit of criminals across state lines, including the recognition of law enforcement officers of one state to enter into other states for pursuit and arrest.

Canada

Theoretically, the provincial legislative powers can only be exercised within the bounds of the provincial territory. However, since some extra-territorial effects of provincial legislation are inevitable, Courts have developed a doctrine under which such effects are valid if they are indirect and if the "dominant purpose" of the statute is intra-provincial or falls otherwise within provincial authority.

Australia

States have extra-territorial legislative powers. This was confirmed by s 2 of the *Australia Acts* 1986. However, the law must have a connection or nexus with the State. Such a nexus could be found in the fact that the law applies to actions of State residents while outside the State, or in

relation to acts that occur within the State (e.g. gambling outside the State on races taking place within the State) or property that is situated within the State (e.g. a tax applying to persons residing outside the State with respect to the ownership of property within the State). Difficulties may arise, however, where there is a clash of laws of different States. The Constitution does not set out a priority rule for inconsistency of laws between States.

Mexico

The general limits for State powers are established in articles 117 and 118 of the General Constitution. Article 117 establishes absolute prohibitions. Among these, we can highlight the prohibition to celebrate alliances, treaties, or coalitions with other States of the Union, so as with foreign States. Likewise, States cannot mint coin, issue paper money, stamps, or stamped paper. Neither can they tax interior commerce, or establish interior customs, nor establish fiscal contributions that carry tax or requisite differences by reason of the origin of national of foreign merchandises; and they can't contract direct or indirect obligations or loans with the governments of other nations, with foreign companies or individuals, or which must be paid in foreign coin or beyond national territory.

Article 118 establishes relative prohibitions, this is, state cannot engage in these activities unless they have the consent of the Union's Congress. This kind of prohibitions are: establish taxes on tonnage, or other related to harbours, or impose levies on imports and exports; have permanent troops of war ships; make war by themselves to a foreign State.

The extension of state jurisdiction to issues, people or activities beyond the territorial borders of the states is established by the "entera fe y crédito" clause (article 121 of the Constitution). According to this article, every state the laws, registers, and judicial decisions of other states must be accepted and recognized. The federal Congress should regulate the certification of these laws, registers or decisions, according to the following criteria:

i) State laws only have effect in their own state; hence, they are not binding beyond the territorial limits of the respective state.

ii) Personal and real property will be regulated by the laws of the state where they are located.

iii) Judicial decisions of state courts about real property located in another state will only have effect in the latter if the laws of the state where the property is located establish so.

iv) Rights about personal rights will be only executed in another state when the person will accept it voluntarily or because she lives in the jurisdiction of the court that decided. This person should be provided proper notice to be heard in the trial.

v) Marital status resolutions decided according to the laws of one state will be valid in others. The same applies for professional degrees.

Brazil

States are bound by the same principles of government that limit Federation (e.g. article 37). Moreover, states are bound by the residual rule, and cannot exercise powers beyond their borders. This is not an issue in Brazil.

Argentina

As described in the historical analysis of the powers in the Federal State, the provincial States cannot exercise the powers delegated to the Federal Government (art. 126); likewise, the Federal Government cannot exercise the powers reserved to the Provincial States.

The grant of extraordinary powers, the accumulation of public powers or the grants of supremacy to the Executive are banned to both governments since "life, honour or fortunes of the Argentineans should not be at the mercy of the government or any person". (Art. 29th of the National Constitution.)

Provincial powers cannot extend beyond its respective territorial borders.

India

The States can make laws and exercise other powers only within their territory. Only in case of close territorial nexus between the object of a law and the State that makes the law, the State laws can have extra territorial application.

United Kingdom

State powers are limited by (1) the competencies listed in the relevant legislation establishing devolved governments (2) the UK's system of unconstrained block financing (3) the lack of administrative capacity or interest in the affairs of Northern Ireland, Scotland, and Wales. Other than the "nuclear bomb" of rewriting the devolution legislation, the state has few powers in areas of devolved competency in Scotland. The UK state has extensive ability to interfere with most areas of Welsh law and its devolution, and has shown recently that it can also interfere in Northern Ireland at a tolerable cost.

In foreign affairs, the devolved administrations are strictly subordinate; foreign policy (including EU policy) is a UK competency. The UK government has so far been quite tolerant and even supportive of devolved initiatives in international projection and EU lobbying as long as they support the general UK position. The problems have mostly emerged when the UK government forgot to consult with devolved administrations or ignored them.

Germany

State powers must be exercised within the rules of the Federal Constitution.

States cannot exercise powers beyond their territorial borders.

Austria

The limits of Land powers are set by the Federal Constitution (standards of homogeneity). In particular, the fundamental principles of the Federal Constitution (representative democracy, federalism, republicanism, the rule of law, human rights), but also other constitutional provisions of a more general character (e.g. the liability of state organs) form the pattern of homogeneity. It is noteworthy that these general standards do not only bind the Länder, but also the federation.

Normally, the Länder cannot exercise their own powers beyond their territorial borders. It is, however, possible for them to set up joint bodies with certain powers through a treaty according to Art 15a B-VG.

Swiss Confederation

The fundamental constitutional rights (freedoms, social rights and political rights), the basic principles of the federal state, the rule of law and the liberal state, and federal loyalty principle are the general principles that limit the exercise of state powers. Within the state powers, states have great freedom to cooperate among themselves. Thus, the administration of a State may act in the territory of another State, but you cannot describe this as a power of a State in the territory of another. There are very few areas in which there are powers and responsibilities of States or municipalities over its citizens (based on place of origin of the family), and those affected live in another state. This is the case with few responsibilities in the area of "rights of the poor".

Belgium

There are no limits to the exercise of by federated entities of federated powers, except that they have to respect the federal State and the other federated entities power spheres. Another sort of exception is the duty to observe the principle of federal loyalty as established by art. 143§1 of the Constitution: "In the exercise of their powers, the federal State, the communities, the regions and the EU Commission have to respect federal loyalty in order to avoid conflicts". As the text suggest, federal loyalty is not a principle of distribution of powers; it is a rule of conduct which respects the interests of other political collectivities if these arise from the exercise of the powers assigned to those.

Italy

Regional legislative powers are only subject to the limits imposed by the Constitution, EU regulations and international obligations. A limit based on "national interest" is not provided for; there is no general clause that gives preference to federal regulations over regional ones. There are no limits regarding respect for the general principles that can be drawn from federal legislation either.

Regional legislation has the limit of its own territory: their effects can not extend beyond the territorial limits of the Region. However, the pursuit of interests in the territory of more than one region does not meant that the

central state must necessarily intervene. If it is a matter of regional power, the regions concerned by this action may legislate in a coordinated manner, including through an agreement between them.

Spain

The Constitution sets forth a group of principles that all public authorities must respect. These principles are, for instance, the principle of solidarity among all the parts of the territory; the inexistence of economic or social privileges; and the prohibition of adopting measures that direct or indirectly undermine the free movement and establishment of persons and the free movement of goods within the Spanish territory or undermine the principle which says that all citizens have the same rights and obligations in any part of the federal territory. These principles, however, should be interpreted systematically, so that the capacity of self-government of the States is not completely obliterated.

In general, state acts over people or activities in their territories can have effects on territories of other states. In contrast, with few exceptions, the state acts cannot have as sole object people or activities beyond its borders. Nonetheless, when the exercise of a state power embraces per se people or activities located in other states, state constitutions and the case-law of the Constitutional Court establish that the power is not automatically assumed by the federation, instead it should be tried a split of the power among the states affected. When the latter is not viable, the states should collaborate and, if they do not, the Federation should implement cooperation between the states. In practice, however, in many occasions, the scope or effect beyond the limits of a single state of a public act entails the automatic assumption by the Federation.

12 · In your opinion, what are the most important federal powers?

United States of America

Commerce, due process, necessary and proper, foreign policy, and the binding effect of Amendment 14.

Canada

Criminal law; taxation (direct and indirect); international and interprovincial trade and commerce; monetary policy; defense and foreign affairs; the federal spending power.

Australia

The most important Commonwealth powers include: (a) the external affairs power, which includes the power to implement treaties on any subject; (b) the corporations power, which includes the power to legislate about the activities and the relationships of trading, financial and foreign corporations with their workers, their customers and others; (c) the defence power, which can be interpreted extremely widely in times of war and has recently been given a wider interpretation with respect to terrorism; (d) the postal, telegraphic, telephonic and like services power, which has been extended by interpretation to cover television and the internet; (e) the taxation power; (f) the power with respect to immigration and aliens; (g) the social security power; and (h) the power to compulsorily acquire property on just terms.

Mexico

First, I would mention tax powers which give unlimited power to tax any possible base. This is the keystone of the federal financial power (and consequently political power).

Second, powers over oil, which give the Federation control over a strategic resource and revenue from oil exports. We must also include the power in electricity matters.

Third, Federal powers regarding, among many others: commerce, financial intermediations and services, labor, nuclear power, general health, federal offences, foreign investment, consumer protection, anti-trust regulation, telecommunications.

Brazil

The most important federal powers are the power to legislate on civil, commercial, criminal, procedural, electoral and labor law (Article 22), the

power to tax and to create new taxes (States cannot create taxes not permitted by the Federal Constitution), and the power to establish general rules (article 24, § 1º).

Argentina

The most important are the powers assigned to the three branches of the State — Legislative, Executive and Judicial —, which are summarized in those over national defense, foreign relations and the general interests of the country.

India

The most important Federal powers are external affairs, defense, security of the state, means of communications and inter-state and international trade and commerce.

United Kingdom

The most important Westminster powers are above all in finance. Westminster sets taxes on major tax bases (above all personal income); Scotland can vary tax rates by +/– 3% and it can allocate it as it chooses but by block grant. Combined with Westminster's dominant role in industrial policy and complete competency in social security and pensions, it effectively controls all major forms of income redistribution and macroeconomic policy, and when Westminster's dominance of transport is taken into account it also is much stronger in questions of inter-regional redistribution. Westminster has also proven quite open to involving devolved countries in EU policy but still decides the policies.

Germany

In my opinion, the most important powers are:

a. The competence of the legislation on taxes;
b. The competence of civil law, penal law, procedural law;
c. The competence of social security;
d. The competence of foreign and European affairs.

Austria

There are so many important federal powers that it is only possible to mention some of them: foreign affairs, defense, most matters pertaining to traffic, energy and economy, civil law, criminal law, water, forestry, commerce, universities, much school, environmental, social and health matters, employment, police, etc.

Swiss Confederation

Fundamental rights (definition and judicial protection), foreign policy, defense, professional education, civil and criminal law, social insurance, limits on immigration, currency and currency control.

Belgium

The most important federal powers are those regarding two areas:

1. Internal and external security. The Army and the organized Police are clear examples.

2. Labor Law and Social Security. Granting benefits, no matter where the person lives, is a key element of interpersonal and interregional solidarity.

Italy

Foreign policy, defense and the armed forces; currency, savings and financial markets; peace (public order); social security (national insurance); safeguard of the environment, the ecosystem and cultural assets.

Spain

Foreign affairs, defense, justice, corporate, criminal, penitentiary and labor legislation, customs, foreign commerce, monetary system, bases of credit and banking, bases of health, bases of social security, bases of public Administration's regime, bases of environment, bases of press, radio and television regime, bases of education.

13 · In your opinion, what are the most important state powers?

United States of America

Education, higher education, non-federal highways, corporation registry and regulation, intrastate commerce and economic development, criminal and civil law, small business and association licensing and regulation, land law and land use, and control over local governments.

For example in 2010 state governments, through their legislatures, are expected to deal with the following issues: taxes, e.g. cigarette and other excise taxes; healthcare, particularly attempts to negate anticipated federal legislation to require purchase of health insurance; jobs, through bonds to promote capital for construction/public works; education, to compete for discretionary federal grants; mortgage foreclosures, mandatory loan mediation laws; driver safety, outlawing texting/emailing while driving; elections, to match overseas voting procedures with federal law; and, courts, rules of testimony that comply with Supreme Court ruling in 2009 that technical evidence submitted at trials must include the right to cross-examine.

Canada

Property and civil rights (i.e. all private law); taxation (direct); health care and social welfare; education; natural resources; environmental protection.

Australia

The States do not have any particular powers reserved to them. They have plenary legislative power, except to the extent that it is removed by the Commonwealth Constitution. State powers are also subject to being rendered inoperative by the enactment of inconsistent Commonwealth laws.

The most important areas of traditional State responsibility include: (a) criminal law; (b) property, land use and planning; (c) education; (d) health; (e) environment; (f) local government; (g) resources and fisheries; and (h) transport.

Mexico

I believe that the more important state powers are those regarding private law, civil procedure law, criminal law, and criminal procedure law.

Brazil

The most important state power is the residual power (article 25, §1º). Moreover, it is important to mention that states play a fundamental role in public security. States responsibility in security policies is a core political issue in Brazil, where drug dealers sometimes are able to control very poor neighbourhoods (*favelas*). Police forces are mainly state, although there is a federal police office, focused in strategic national issues.

Argentina

The most important are powers concerning interests of each of the Provinces, which are the reserved powers and, more generally, the powers necessary to carry out the local autonomy through the exercise of the constitutional, political, financial, and administrative functions.

India

The most important State powers are the powers relating to police, maintenance of law and order, agriculture and welfare of the people in the State territory.

United Kingdom

The most important devolved powers are in the administration of social policy: health, education, universities, and local government**.**

Germany

Education, broadcasting, police.

Austria

Building law, general spatial planning, nature protection, fishery, agriculture, real estate transfer, sport, folklore, event planning etc.

Swiss Confederation

Primary, secondary and university education (including the definition of curricula), health (sanitation and public health benefits), protection and promotion of culture, economic promotion and civil security (police, fire protection, etc.).

Belgium

In this context, the most important community powers are the ones regarding education. Each community can regulate — according to art. 127, §1st, 2nd — education and the only limit are the principles established in art. 24 of the Constitution (CA, nº76/2000). "The plenary power it has allows regulation of education, defining education as widely as possible" (CA, nº 2/2000).[16] This power entails "the regulation of the rules regarding the administrative status and salaries of the teachers, except their retirement benefits regime" (*id*).

It has been suggested, at the same time, a "jointly reading of article 127§ 1 parts 1&2 and article 175.2" (CA, nº 30/2000). According to it, the "possibility of fixing the financial resources for education arises from the regulation of education itself" (id).

Two areas of regional power can be highlighted.

The first is environment. In decisions 52/2000 and 74/2000, the Arbitrage Court stated again that the regions have power to regulate the environment. This includes police powers over hazardous establishments, the protection of rivers and riparian lands, and the protection against environmental damages and nuisances.

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16 The charter of the Military Royal School has, nevertheless, a "reserve of power for the federal legislator, according to art. 182 of the Constitution" (CA, nº 64/2000). It has to be highlighted that the reason behind the assignation to the federal legislator of the power to decide recruitment procedures, promotion criteria, rights and duties of the members of the Army in article 182 — is the avoidance of a full executive control of the matter. Nothing prevents the transfer from the legislator to the King of limiter power in this issue. (id)

The second one is employment policy. The regions have power over occupational policy and can develop programs to reinsert in the labor market the unemployed who receive benefits. Can the federal State, under its power over companies and trade associations, start a program to ensure reoccupation of a certain group of workers? According to the Arbitrage Court, which interprets mildly the provision, "the challenges provision does not aim to prevent or make difficult the regional exercise of regulatory powers over occupational policies. On the contrary, the federal government favours regional development by making the possibility to compete to become a public contractor contingent to the adoption of certain occupational policies". The Court did not consider these provisions problematic. Even more, it considered it praiseworthy: "the federal legislator contributes, within its powers, to the employment policies promoted by the regions" (CA, n. 122/2000).

Italy

Health and social assistance; town-planning and building; industry, agriculture and the production sectors in general. In perspective, education, including that of universities, has been very relevant.

Spain

Organization of the institutions of self-government; legislative development of education, health, environment and local regime; culture, tourism, internal commerce, industry, agriculture, ranching; civil legislation in the states that historically had had their own; and police in certain states.

14 · Have any of these federal or state powers been broadly or expansively interpreted?

United States of America

Extensive legal interpretation is the normal procedure. See paper in expansion of federal power and state control in the 19th century. Extensive interpretation versus (literal interpretation) has been a pattern during the early Federalist Period (John Marshall Court 1801-1936) and since the

Civil War. State courts have always provided extensive interpretation of their constitutions.

Canada

Most of the powers have been interpreted broadly so as to meet changing conditions and new needs.

Australia

Yes, as noted above, most Commonwealth powers have been broadly interpreted, particularly the external affairs power, the corporations power and the defence power. See further: Leslie Zines, *The High Court and the Constitution,* (5th Ed, 2008).

Mexico

In particular, federal tax powers have been interpreted broadly. The "unlimited tax power" in favor of the federation (which allows the establishment of taxes on any possible tributary base) arises from the Supreme Court's interpretation of section VII of article 73 of the Constitution, which states that Union's Congress has powers: "To impose the necessary taxes to cover the Budget". This has been interpreted in a sense that gives Union's Congress powers to impose all contributions that are necessary to cover the Federal Spending Budget, even those that would be understood as state power, if we follow the residual power formula of article 124.

Brazil

Yes, the federal power to the establishment of general rules has been expansively interpreted.

Argentina

As expressed previously in several answers, we are of the opinion that there was an extensive interpretation of the federal powers, which allowed an intense process of centralization of the country.

India

The general rule of interpretation of legislative powers is that they must be interpreted liberally and harmoniously so that conflict of powers is avoided. In practice the Federal powers have been interpreted more broadly than the State powers and therefore whenever a power can be read both within the jurisdiction of the Federation as well as the States the decision has gone in favour of the Federation because of the superiority of the Federal power laid down in the Constitution. But no State power has ever been completely annihilated or denied by the exercise of Federal power. The rule of harmonious construction establishes the balance between the two.

United Kingdom

Broadly, no, although there have only been a few years during which Labour governments in the UK, Wales, and Scotland and a unified civil service were able to tamp down dispute and prevent invasions of competencies. There has been some tension in areas of elderly care (by far the highest-profile area) and in transport.

Germany

Federal and state authorities tend to broadly interpret their mutual powers; for the jurisdiction of the Bundesverfassungsgericht, there is no clear tendency — sometimes it broadly interprets federal powers, sometimes it doesn't —.

Austria

See above V.3. As a general rule, both the petrification theory and the principle of "in-dubio-pro-Land" should prevent an extensive interpretation of federal competences. However, the Court has often held a competence to be federal on account of "intra-systematic" reasons.

Swiss Confederation

The broad interpretation has been most important in the field of fundamental rights. From the right of equality between individuals a number of

procedural principles were implied and had a major influence on the state administration and powers.

There were historical disagreements between the doctrine and the federal Administration on the extent of federal power in foreign policy. Proponents of a broad interpretation according to which the Confederation was considered competent to conclude international treaties in all areas, and therefore also capable of unifying the areas of cantonal (state) power. Proponents of a conservative interpretation denied this competition. The extensive interpretation prevailed and was incorporated into the new Constitution of 1999 but added the requirement to consult the Confederation of States during the negotiations and the rule that the enforcement of international law corresponds to the States as far as possible.

Belgium

The broader interpretations in favor of the federations are found in the area of economic policy, which are, in principle, under regional power. The Arbitrage Court, and after the special act of institutional reforms, have stressed that the exercises of these powers cannot threaten the principles of the "economic and monetary union". These interpretations show the aim to have a uniform basis for the economic organization within the integrated market. The existence of an economic union in Belgium implies that there is free movement of goods and production factors among the different parts of the federal State. This requires also a customs union.

Italy

Up to recent times, based on the previous text of the Constitution, a broad interpretation came about, as mentioned above, with the extension of the concept of national interests and the extended use of power in determining the fundamental principles regarding subject matters of regional authority

With the new constitutional text such phenomena should be avoided: a) by the lack of a provision of national interest as a general limit; b) by the absence of limits to the subject matters (numerous and important) which exclusively regard regional legislation.

The decisions of the Constitutional Court after the reform of Title V have repeatedly endorsed federal actions entailing expanded terms of their powers. In particular the Court:

a. has allowed a broad interpretation of the subject-matter of unique state legislative competence, including "transversal" powers;

b. has allowed a broad interpretation of the principles which the State may establish in order to limit regional legislation because amongst them also includes a category — "the principles directly derived from the constitutional norm" — that the Constitution does not expressly provide;

c. has almost always accepted in cases of uncertainty concerning the application of the principle of the prevalent matter an interpretation in favor of central state power;

d. has endorsed the technique, already mentioned (see above 9), of the "subsidiary call" by the central State of administrative functions in regional matters.

Spain

All the economic powers (bases and coordination of the general planning of the economy, bases of credit regulation, banking and insurances, foreign commerce and State Treasury); the basic powers and the guarantee of equality in the exercise of constitutional rights established in art. 149.1.1 CE.

15 · Is the e-administration completely implemented in your country? Has its implementation had any impact on the allocation of power between the different layers of government?

United States of America

Virtually all federal and state agencies are now engaged in e-administration, far beyond intra — and inter-communication. For example, states now have a series of web sites to provide basic information and many routine transactions — appointments, licenses, license plates, business licenses, permits, tax payments — are available online, and have been for at least 5-10 years. States are also able to accept credit card payments online. Virtually every state has a CIO or chief information officer who heads a small information-support office and promotes standardized uses and consolidated systems across departments. Some states are heavily into geographic informa-

tion systems (GIS) to support decision-making and planning. The states are now beginning to enter Web 2.0 experiments where citizens and groups can connect with government agencies and to promote civic engagement. Most large and many smaller local governments follow similar patterns.

Canada

Centure, a management consulting and technology services company, examined 22 countries and ranked them according to the quality and maturity of services and the level at which business can be conducted electronically with government. Canada has been ranked first among 22 countries in e-government for the third year in a row. Canadians are among the world's most enthusiastic users of the Internet for government services. According to an Erin Research report in January 2003, 70 percent of Canadian Internet users have visited a Government of Canada Web site at least once in the past year and more than 80% of those who have used an on-line service would do so again. More information on the Government On-Line Initiative and a hyperlink to the Accenture report "eGovernment Leadership: Engaging the Customer" are available at: www.gol-ged.gc.ca.

The implementation of e-government has had no impact on the allocation of powers between the two levels of government.

Australia

Commonwealth and State Governments have been gradually increasing the use of the internet and electronic methods in the administration of government and in access to government records and policies. This has had no discernable impact upon the allocation of powers between layers of government.

Mexico

It is difficult to assess the level of implementation of the e-administration in Mexico nowadays. Some examples might be illustrative of it. In both federal and state levels, there are several on-line procedures, such as the payment of certain taxes. In the same vein, according to new regulations about the transparency in public information, both levels of government have to offer on-line information about its structure, functions, responsibilities, and

salaries of public servants. Nevertheless, the e-administration has not had a significant impact in the relation between the different governmental levels.

Brazil

No, the e-administration is not completely implemented in Brazil.

Argentina

The e-administration has not had a significant impact. Nevertheless, there are some progresses in the different government and state spheres.

India

The e-administration is still in its initial phases and no claim can be made yet that it has been completely implemented in India. For that reason it is too early to say that it has any impact on the allocation of powers between the Federation and the States.

United Kingdom

The various governments and administrations have made considerable, but variable progress in IT. It is hard to find patterns; in primary health care, for example, Northern Ireland has the best IT implementation, but England is trying to build the best hospital IT system (without much luck). So far the development of e-government has been at a governmental or departmental level and has not had noticeable effects on the allocation of powers between governments.

Germany

It is just beginning to be implemented, and it has no impact on the allocation of power.

Austria

E-administration has had no striking impacts on the allocation of powers. It mostly affects procedural matters which are regulated by fed-

eral laws so that no competence dispute arose. However, the general question remains whether e-administration could be improved and expanded.

Swiss Confederation

There are several projects to implement e-government. Projects have been assessed to allow voting via the Internet for popular votes and elections, but not yet implemented. For security reasons, few of these projects have not been carried out today. Regarding business, there are certain administrative procedures operating electronically, such as the establishment of small businesses and commercial registry registration. It has not had a significant influence on the power and relations between the political authorities.

Belgium

The introduction of the electronic administration at the federal and at the federated levels has not modified the relations between the different political authorities.

Italy

Italy has a policy of computerization of the administrative activity and documents. Regarding information exchange, it is in process of expanding the use of certified electronic mail in the relations between administrations. However, it cannot be argued that the new exchange systems have significantly changed the mode of operation of the various administrations or improved their relations.

Spain

It is in initial state of development, but it cannot be reversed. The most relevant from our perspective is that since this is an instrumental dimension, it should be regulated by each territorial administration. But its "bases" have been established by the Federation and some states have completed it; hence, the situation looks like a "concurrent" power one.

16 · Does the Federal Constitution provide the transfer of sovereign powers to regional or international organizations? In the domestic legal system, is this issue addressed taking into account the decentralized structure of the Federation? Can States negotiate international instruments on behalf of the Federation or can they participate in the federal delegation? If so, can States only participate when treaties deal with certain issues? Are there any other limits on state participation in foreign affairs? Does the Federal Constitution give the States the right to ratify international treaties or agreements? If so, in which conditions? How is the international responsibility of the Federation addressed for state acts or omissions? Have States established offices in foreign countries? If so, how are they regulated?

United States of America

There is no transfer of sovereign powers but treaty agreements can change the nature of federal powers. Domestic legal affairs (including state actions) would have to yield to federal treaty powers, unless there was some other constitutional conflict. States must seek Congressional approval for international agreements. Treaties are exclusively federal, according to Article I, Section 10. See attached paper for general discussion of the states in foreign affairs.

States regularly have offices in foreign countries, particularly to promote trade, attract business, and encourage tourism. They are free to engage in any affairs that do not constitute foreign policy or illegal acts. They are not regulated or supervised by the federal government, but subject to the laws of the state that established them. Under state laws, some larger cities, e.g. New York, Chicago and Los Angeles also have offices in some foreign countries.

Canada

The Canadian Constitution does not provide for the transfer of sovereign powers to regional or international organizations.

International treaties will only be applied by the Canadian courts after having been transformed into domestic law and thus never have pre-emi-

nence over domestic Canadian law. International customary law can be applied without transformation, but only insofar as it does not contradict domestic law. However, Canadian courts will, as far as possible, apply and interpret Canadian law in a way that is compatible with Canada's international legal obligations.

In 1867 Canada was still a British dominion, and until the end of the 1920's treaties were concluded on behalf of Canada by the Imperial government. Section 132 of the *Constitution Act, 1867* endowed the Federal Parliament with the authority to enact any legislation necessary to implement these «Imperial treaties» by incorporating their provisions into the domestic law of Canada, even when the matter was under exclusive provincial jurisdiction. When Canada became a sovereign state, it was clear that the power to *enter into* (*conclude*) treaties would now be exercised by the federal executive, irrespective of the subject matter. At the same time, the federal government expected section 132 to receive a dynamic construction, keeping the power to *implement* all treaties to the Federal Parliament. However, the Judicial Committee of the Privy Council decided in the 1937 *Labour Conventions case* that the legislative authority to implement treaties was divided between Parliament and the provincial legislatures according to their respective jurisdictions. The main reason given by the Judicial Committee for adopting this view was the necessity to protect provincial autonomy, in particular Quebec's jurisdiction over private law. Indeed, the opposite solution would have provided the Federal authorities with an easy excuse to invade any provincial jurisdiction on the pretext of implementing an international agreement. This solution has of course created certain difficulties for the federal government when it wants to conclude a treaty. The Canadian Constitution does not contain any mechanism allowing the central government to compel a recalcitrant Province to implement a binding treaty affecting provincial matters. The solution to the problem has generally been for Ottawa to obtain from the provinces, before concluding such an agreement, the assurance that they will do their part at the implementation stage. In return, provincial governments are associated in various ways in the negotiations. For example, such a procedure was followed in 1976, for the ratification and implementation of the two United Nations Human Rights Covenants. At that time, a more general federal-provincial agreement was also concluded, under which there is to be ongoing consultation and cooperation between the two levels of govern-

ment, before as well as after the ratification of human rights conventions. Under this agreement, the provinces are able to prepare their specific part of the Canadian report to the monitoring agencies and are allowed, if they so wish, to have a representative on the Canadian delegation when the report is examined. Moreover, they can also defend their policies when these are attacked before an international body like the United Nations Human Rights Committee. However, some difficulties remain. If a province is found by the Committee to have adopted a policy contrary to the Pact and refuses to amend it, the federal government has no recourse to compel it to act or to substitute its own policy over that of the provincial authorities.

In the area of international trade agreements, the federal jurisdiction over trade and commerce (see below) is considered by most commentators as supporting the constitutional validity of the legislation adopted by Parliament to implement the Canada-U.S. Agreement and North American Free Trade Agreement. Actually, this legislation has never been challenged in court. In so far as the implementing federal legislation has an effect on matters falling within provincial jurisdiction, such an effect would be considered as merely incidental to the main purpose of the acts that is international trade. Thus, the experience with the FTA and NAFTA (as well as with the World Trade Organization) has demonstrated that the rule adopted by the Judicial Committee of the Privy Council in the *Labour Conventions Case* does not prevent Canada from entering into comprehensive trade agreements.

Provinces have no capacity to enter into international treaties, even if the subject-matter of the treaty falls within their jurisdiction, but they can participate in federal delegations. Provinces can also enter into administrative agreements with member-states of other federations, like American states, or even foreign sovereign states. For example, Quebec has entered into such agreements with France on issues mostly related to education or family law.

Provinces can open delegations in other countries. Quebec, for example, has seven general delegations abroad, which are under the direction of and report to the provincial Ministry of International Relations.

Quebec and New Brunswick have been recognized a status of "participating government" in the Organisation Internationale de la Francophonie (OIF) and Quebec has since 2006 a "permanent representative" inside the Canadian mission to UNESCO.

Australia

When the Commonwealth of Australia was brought into being, it remained a colony without sovereign powers in relation to international affairs, although the Commonwealth was granted a legislative power with respect to 'external affairs'. In the 1920s, a series of Imperial Conferences changed the status of Australia and other self-governing 'Dominions' by giving them power to enter into treaties, appoint their own diplomatic representatives and exercise full sovereign powers on the international stage. These powers were acquired by the Commonwealth, rather than the States. Only the Commonwealth may exercise the executive power to sign or ratify a treaty or declare war. The States do not have international personality and cannot enter into treaties on their own behalf.

The States, however, still enter into international agreements of less than treaty status. These include memoranda of understanding and sister-State relationships. Sometimes these agreements involve the sharing of expertise with neighbouring countries on subjects such as training on bushfire prevention or agriculture in dry climates and desertification. These agreements tend not to be legally binding and rely on 'best endeavours' or are used as a means of opening up future trade opportunities. In 1992 the Northern Territory entered into a Memorandum of Understanding with Indonesia on Economic Development Co-Operation and in 1995 it entered a similar agreement with the Philippines. This was largely because of its geographical proximity to these nations and the potential for trade development. Sometimes States enter into relations with the sub-national polities in other countries. For example, in 2005, the Australian States of Victoria, New South Wales and South Australia entered into a Declaration of the Federated States and Regional Governments on Climate Change' with other sub-national states including California, Quebec, Bavaria, Scotland and Sao Paulo.

All States have either trade or tourism offices abroad. For example, Western Australia has trade missions in London, Shanghai, Hangzhou, Mumbai, Chennai, Jakarta, Tokyo, Kobe, Kuala Lumpur, Dubai, Seoul, Taipei, Bangkok and Los Angeles. It also has tourism offices in Shanghai, Munich, Tokyo, Seoul, Auckland, Singapore and London. While these offices are run by the States, there is close cooperation with the Commonwealth Department of Foreign Affairs and Trade.

States are also often involved in Commonwealth delegations that negotiate treaties. This is usually the case where the subject-matter of the

treaty concerns matters of traditional State jurisdiction in which States have more relevant expertise or where the treaty will have a significant impact on State laws. For example, State representatives were included in the delegations negotiating the Kyoto climate change treaty and the Declaration on the Rights of Indigenous Peoples. The States are regularly consulted about treaties that are being negotiated by the Commonwealth. There is a Standing Committee on Treaties which oversees this consultation at the officials, and a Treaties Council which oversees it at the head of government.

For more details on State involvement in foreign affairs, see: A Twomey, 'Commonwealth of Australia', in H Michelmann (ed), *Foreign Relations in Federal Countries* (McGill-Queens University Press, 2009) pp 36-64. For more details on how States are consulted and involved in the treaty-making process, see: 'Principles and Procedures for Commonwealth-State Consultation on Treaties' at http://www.coag.gov.au/coag_meeting_outcomes/1996-06-14/docs/attachment_c.cfm.

Mexico

The Constitution does not provide the cession of sovereign powers to international or regional organizations. Neither does it give the States the possibility to sign international treaties nor agreements. On the contrary, the latter is expressly forbidden by section I of article 117 of the Constitution. Accordingly, state representatives cannot negotiate treaties on behalf of the federation, not even as part of the international delegation of the Federation.

States do not have juridical personality before the international community. Only the federation has through federal organs like the federal executive and the Senate and it is who is internationally responsible.

However, the Federation might be internationally liable for state, and even municipal, actions. This is illustrated by the North America Free Trade Agreement (in particular, by its Chapter 11 which regulates investment). According to this agreement, US or Canadian investors might file suit against Mexico, as a country, due to NAFTA's rights violations committed by municipalities, states or the federation.

Some states have offices in foreign counties (mostly in the US) in order to attract investment and promote tourism. There is no specific regulation of these offices.

Brazil

The Federal Constitution, after Amendment 45 in 2004, expressly recognizes the International Criminal Court's jurisdiction. This is not an issue commonly addressed in connection with the federal system.

It is important to mention that there is a general constitutional goal of economic, political, cultural and social integration between Brazil and Latin American countries, but it does not mean a transfer of sovereign powers to MERCOSUR (article 4, sole paragraph).

Only the Federation can have international relations (article 21, I). States cannot ratify or negotiate treaties and international agreements. They have no international representativeness.

Argentina

The 1994 constitutional amendment in art. 75.24 prescribed, as a power of Congress of the Nation: "the approval treaties of integration which delegate powers and jurisdiction to international organizations in conditions of reciprocity and equality, and which respect the democratic order and human rights. The norms dictated developing these are superior to ordinary laws. The approval of these agreements with Latin America countries will require absolute majority of the totality of the members of each Chamber. In case of agreements with other States, the Congress of the Nation, with the absolute majority of the members present of every Chamber, will declare the advisability of the approval of the agreement, and one hundred and twenty days after the declaration, it will be approved if it is supported by the absolute majority of the totality of the members of every Chamber. The denouncement of the agreements referred to in this clause will require previous approval of the absolute majority of the totality of the members of every Chamber".

Hence, the possibility of supranational integration is recognized in the Constitution as dictated by the times we are living. Argentina is a part of a regional system: the Organization of American States, which as a human rights protection system, based essentially in the American Declaration of Human rights and in the American Convention of Human rights (Agreement of San Jose de Costa Rica, 1969). This system has established an Inter-American Commission of Human rights and an Inter-American Court of Human rights. This Convention was approved by the Law 23.054 of

1984 of the Congress of the Nation; after the 1994 constitutional amendment, in particular by article 75.22, these occupy the same level in the hierarchy as the Constitution.

Article 28 of the mentioned American Convention is devoted to the Federal Clause which reads as follows:

"1. Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.

2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfilment of this Convention.

3. Whenever two or more States Parties agree to form a federation or other type of association, they shall take care that the resulting federal or other compact contains the provisions necessary for continuing and rendering effective the standards of this Convention in the new state that is organized".

Consequently, the provincial States must adapt their legislation and judicial decision to the American Convention, in the same way as the federal government must respect scrupulously the federal principles of the Constitution in this process of supranational integration, being careful not to affect the powers of provinces and municipalities.

Similarly, and as we have defended, it has to give participation to the provinces and municipalities, both in the ascending and descending aspects of integration.[17] This is an ongoing process of integration, still far away of the European Union achievements.

Finally, as we have previously explained, according to the constitutional reform of 1994 (art. 124), the Provinces are also authorized to celebrate "international agreements" with the established limitations.

This entails a main change which signals the path to be taken in a globalized world.

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17 See our book "Integración y Globalización: rol de las regiones, provincias y municipios" and Castorina de Tarquini Maria Celia, "Federalismo e integración", pgs. 201/243.

Nevertheless, we must emphasize that the direction of the foreign affairs is under federal power, and thus provinces do not have diplomatic representation in foreign countries.

India

The Constitution does not provide the transfer of sovereign power either to regional or international organizations. As the powers relating to external affairs and treaty making are within the exclusive jurisdiction of the Federation, the States cannot negotiate international treaties or agreements with foreign countries. There are no instances of the Federation having delegated any such powers to the States. Therefore, the States do not participate in international treaties. Accordingly, the question of acts or omissions on the part of the States in respect of foreign affairs or international treaties has never arisen, nor will perhaps arise in future. The States have no offices in the foreign countries and for that reason the question of regulating them does not arise.

United Kingdom

The legislation on devolution entrusts EU and other international affairs exclusively to the UK government, although in practice there is extensive consultation and co-operation. This means, for example, that Scotland has been the leading part of the UK for EU fisheries policy — but it is only voicing a position decided by the UK government.

The devolved administrations open offices abroad, both directly and through enterprises set up to promote their culture and economic development. The UK government sees them as helpful and friendly lobbies, but both the devolved administrations and the UK government take care to ensure that their lobbying is coherent with the UK position. The devolved administrations have no legal basis to interact with international organizations or engage in international policy debates except in support of the UK position.

Germany

The Federal Constitution provides the transfer of sovereign powers to the European Union and international organizations without regard to the

allocation of powers within the Federation, thus, the Federation can transfer also state powers to the European Union, but in this case the Bundesrat must be involved.

States may ratify international treaties for matters within their legislative competence and with consent of the federal government.

Some States establish offices in foreign countries, especially in the European Union, but they have no formal competences.

Austria

Art 9 paragraph 2 B-VG provides the transfer of powers of the federation to international organizations (not to regional organizations).

Under Art 16 B-VG the Länder are competent to negotiate and conclude international treaties with neighbouring states or their component parts, if the respective matter concerns their competences. However, the federation has strong rights of supervision and approval over such Land treaties.

The Länder are not entitled to negotiate international treaties that affect the federation and its powers.

If the federation itself concludes an international treaty which involves Land competences the Federal Assembly has the right of consent (absolute veto) during the parliamentary approval procedure. If the consent was given and the treaty approved of by the Federal Parliament, the Länder have to take all (legislative or administrative) measures required for the implementation of the treaty. Administrative acts of implementation may be determined by the instructions of Federal Ministers. If a Land does not act accordingly, its competence will devolve to the federation which will then be able to take all measures in order to meet the international obligations imposed by the treaty, until the Land is willing to make use of its competence.

Before the federation concludes treaties that affect their competences or require them to implement these treaties, the Länder have to be asked for their statement. If a uniform statement is given by the Länder (which means the support of at least 5 Länder and no explicit denial), the federation is bound to observe it when concluding the treaty. Deviations are only admitted if compelling reasons of foreign policy require it and the reasons for this have to be forwarded to the Länder without delay.

Swiss Confederation

It is not (yet) provided the transfer of sovereign powers to supranational organizations. States have a limited right to sign international agreements within their powers given they are not contrary to laws or the interests of the Confederation or the other States. So far no case has arisen where the Confederacy has had to assume responsibility due to a treaty entered by a State. There is also no established doctrine on the matter.

Belgium

Belgium is singular because foreign affairs are not only assigned to the federal government but to the federated units. Given its location in the core of Europe, Belgium has been immersed in the discussion about the role of communities and regions in the European Union. The political program regarding this issue is pretty clear: "A federal State within a federal Europe has to be organized".

Three main difficulties have been encountered when trying to give the communities and regions a role in the international order. (see my book about this topic *Le fédéralisme en Europe* (Paris, PUF, 2000, collection *Que sais-je?*, nº 1953).

First, the elaboration of EU Law. In 1992, at request of Belgium and Spain, the Treaty of the European Community weakens the monopoly of the federal representation in the European Council. The treaty establishes that the Council is composed by a representative of each member state who must have ministerial rank (new art. 203). This opens the door to the participation of federated ministers since each country can decide who is a valid representative. This provision allows the countries to determine who and under which conditions can bind the state.

In Belgium a simple solution has been adopted. Federated ministers participate in the operation of supranational organizations when these deal with issues under their areas. A rotational regime has been established in order to ensure that every federated collectivity can exercise this power.

This formula is very interesting because it offers the federated units a guarantee against the encroachment they could suffer if the action of the federal state at the European level would be aimed to violate the internal distribution of powers.

Second, implementation of EU Law. How can be a correct implementation at the federated collectivities level be ensured? The federal state does not have any power to limit the collectivities. It cannot mandate them to act even if their omission might entail state liability for Belgium (for example, before the European Court of Justice). The problem arises because some powers, such as environmental regulation, are under the power of the regions.[18]

Third, autonomous international policy of the sub national entities. Belgian Law is by far the regime that gives the regions and the communities a larger *treaty making power*. The federated collectivities are on an equal footing with the federal State in what international affairs, including treaty negotiation, are concerned if they have power over the issues discussed at the international level.

As article 167.3 of the Constitution establishes, "the governments of the communities and regions can enter into treaties regarding the issues under their powers" and "these treaties do not have effect until the consent of the community or regional council has not been given".

Italy

Yes, the Constitution (art. 11) provides that Italy agrees to "the limitations of sovereignty that are necessary for a regulation that assures peace and justice among nations".

The main transfer of sovereign powers was to the European Union. This has some effects on the system of relations with the EU. The State has exclusive authority over its relations with the EU, which concern all the subject matters under its jurisdiction, including foreign policy and international relations. Regarding the Regions' international relations and relations with the European Union, the subject matter is of concurrent legislation: the State can establish the fundamental principles.

It is also expressively provided that the Regions, in matters under their own jurisdiction, can ratify agreements with other States and pacts with territorial entities within another state in the cases and in the ways regulated by the laws of the State (art. 117, sub-section 9).

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18 J. Rideau, "Quinze États membres en quête d'Union", en *Les États membres de l'Union Européenne. Adaptations — Mutations — Resistances*, Paris, LGDJ, 1996, p. 90, note 48.

These constitutional provisions have been developed by Law n. 131 of 2003, which has imposed clear limits to the international activity of the Regions:

a. An agreement with other local authorities of other states requires a communication to the State prior to signing;

b. Agreements with other States can only be executed and performed regularly as an international agreement in force; these agreements must be submitted to the State and may be signed by the region only on the basis of granting full powers of signature as the regulation of international treaties provides for.

Spain

The Constitution grants the Federation exclusive powers to transfer sovereign powers, regardless of the decentralized structure of the country. The Federal Constitution does not contemplate the impact of such a transfer in the internal allocation of powers. It is established in some state constitutions recently amended and by the decisions of the Constitutional Court which consider that the internal distribution should not be affected. In practice, regarding the incorporation to the EU, in some EU regulations and in the attitude of the federation and even the behaviour of some states have causes a recentralization.

States lack powers to sign international agreements or treaties. Only the Federation is responsible at the international level, but some federal regulation establish that the federation might charge the state if its actions or omissions entail liability of the Federation. Some Statutes of Autonomy provide that the States will be informed of the elaboration of treaties that concern their powers.

States can act in foreign countries, which is completely different form the federal exclusive power over international relations. This possibility is not related to state powers but to the defense and promotion of their interests. States have "diplomatic" and commercial offices in foreign countries, but these lack the recognition as and status of diplomatic delegations.

VI

ECONOMIC POWERS

SUMMARY: 1. Are there in the Federal Constitution any principles or rules guiding the activity of the economic agents? In other words, does the Constitution establish the basic regulatory framework for economic activities? For instance, the Spanish 1978 Constitution establishes: right to conduct a business, right to choose ones occupation, free market, and the subordination of private property to general public purpose. 2. Are there parallel provisions in the State Constitutions? 3. Are there provisions empowering the Federation or the States to regulate economic activities? 4. What are the guiding principles for the allocation of economic powers between the States and the Federation? Where are these principles established? 5. Are there any limitations on the power of the States to regulate the economy? Are there any limitations on the power of the Federation to regulate the economy? 6. In your opinion, what are the most important powers of the Federation regarding the economy? What are the most important powers of the States regarding the economy? Are the powers over economic regulation exclusive or shared? If the latter, what is the specific distribution of legislative and executive powers? 7. Who regulates antitrust law? Who implements and enforces it? 8. Has the allocation of powers over economic issues been a contentious issue? Has there been a trend towards centralization? 9. Are there any bodies for the cooperation or collaboration between the Federation and the States in the economic domain? If so, are the issues under their power general or sectorial? Are their decisions binding? How often do they meet? 10. Are there central independent regulatory agencies which regulate or control certain economic sectors (energy, stock markets, telecommunications…)? If so, are these federal or state? How are their members selected? If there is a federal agency, do States participate in the selection process of its members? If so, how do they participate?

1 · Are there in the Federal Constitution any principles or rules guiding the activity of the economic agents? In other words, does the Constitution establish the basic regulatory framework for economic activities? For instance, the Spanish 1978 Constitution establishes: right to conduct a business, right to choose ones occupation, free market, and the subordination of private property to general public purpose

United States of America

Several provisions protect certain economic rights: a) taxation based on the decennial census; b) no tax or duties on state exports; c) no preference given to any port or vessels; d) states cannot coin money or emit bills of credit; e) states cannot pass laws impairing the obligation of contracts; f) states cannot lay duties on imports or exports, except to support inspection; and g) states cannot lay any duty of tonnage. Most important, Article IV begins with, "Full faith and credit shall be give in each state to the public acts, records and judicial proceedings of every other state" and "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Canada

No specific economic system is specified in the Canadian Constitution. Property rights have been deliberately omitted in the *Canadian Charter of Rights and Freedoms* as a concession to provincial governments worried about the possible misuse of such rights by private economic interests eager to have undesirable public regulation of their activities dismantled. Generally, the Supreme Court of Canada has constructed the rights and freedoms of the Charter as not protecting purely economic rights. For instance, the right to liberty in section 7 has been held not to include the right to freely choose one's profession. The prohibition of discrimination in section 15 has been interpreted as protecting only natural persons or groups of natural persons, but not corporations or other legal persons. On the other hand, the Supreme Court has also held that, when charged with a penal or criminal offence, corporations can defend themselves by invoking any right or freedom of the Charter, even rights that by nature are applicable only to human persons like liberty of religion. Thus, the rights and freedoms

guaranteed in the Charter contribute indirectly to the functioning of a market economy.

Section 2(d) of the Canadian Charter, guaranteeing freedom of association, has been interpreted as protecting the right to form and to belong to a worker's union but not the right to collective bargaining or to strike. Legislation requiring workers to join a union in order to obtain work in a particular workplace or imposing on non-unionized employees the obligation to pay union dues later put to use for political ends has been held to be constitutional.

Australia

Section 92 of the Commonwealth Constitution provides that 'trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free'. The High Court has had great difficulty in interpreting this provision. Its current interpretation is that this provision, which binds both the Commonwealth and the States, prohibits the enactment of laws that impose a discriminatory burden of a protectionist nature upon interstate trade and commerce.

Section 99 of the Commonwealth Constitution also provides that the 'Commonwealth shall not, by any law or regulation of trade, commerce or revenue, give preference to one State or any part thereof over another State or any part thereof.

There are, however, no general constitutional provisions concerning free markets or the rights of individuals to chose their occupation or conduct a business.

Mexico

The Federal Constitution contains certain provisions regulating economic activities. For example, article 25 establishes the power of the state (country) to guarantee the national development, to plan the economic development and the mixed market economy, and over the strategic areas (that are exclusively granted to the federation; see, for example, oil extraction) and the duty of the state to promote and support the economic agents. Other articles, such as 27, regulate private property, public property, and social property. Another example is article 28 which forbids monopolies and establishes the framework for economic activity regulation.

Brazil

Yes, there are broad general principles that guide the Economic Activity. This group of norms is called the "Economic Constitution". Property, the right to conduct a business, social justice, and environmental protection are some examples of principles of Brazilian basic regulatory framework.

Argentina

In the federal Constitution there are principles that guide economic activity.[1] First, when the 1853 Constitution was approved, the criteria established had a political and economic liberalism, part of the classic constitutionalism and the liberal State. Individual rights were recognized and the State was in charge of its enforcement and protection. Liberties of commerce, industry and navigation were included. European immigration was promoted (arts. 14, 20, 25 y 26). The federal system was established, based on the US model but more centralized that the latter. The economic powers was almost completely assigned to the Federal Government, since it was in charge of enacting the main Codes (Civil, Commercial, Mining and Labor) and the custom, monetary, and banking policies. In addition, interstate commerce and general welfare promotion were under the power of the Federal Congress, and interior customs were banned.

Afterwards, with the constitutional amendments of 1949,[2] 1957 and 1994, we moved to a social constitutionalism and the Welfare *Rechtsstaat*, which imported new principles of economic regulation and a key state intervention in the economy in order to achieve the Welfare State.

Current art. 14 bis, which was introduced by the 1957 amendment, granted workers the rights to a minimum equitable working conditions; limited working day; fair retribution; minimum salary; equal remuneration for equal job, participation in companies' profits; collaboration in companies' management; protection against arbitrary dismissal; and stability in public employment.

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1 For a detailed analysis of this relevant topic, see Alberto Dalla Via, "Derecho Constitucional Económico", Abeledo Perrot, Buenos Aires, 1999.

2 Approved by the Constituent Convention of 1949, under the presidency of Juan Domingo Perón, but not enforced due to the 1955 Revolution, and abolished in 1956.

The same article provided for a free and democratic union system, establishing that a union will be recognized by the simple enrolment in a special registry and gave to the unions the right to participate in collective agreements of labor, mediation, arbitrage and the right to strike.

Finally, it granted: social security benefits, retirement and retirement benefits to movable people; integral protection to the family; protection to the family wealth; and access to a decent housing.

1994 constitutional amendment went deeper regarding the principles of social constitutionalism and, in our opinion, implicitly, established a social market economy and a social *Rechstaat*.

To this extent, it is important to highlight some of the new rights and liberties (arts. 36 a 43): equal opportunity for men and women; semi-direct democracy (initiative and referenda); right to a clean environment; right to users and consumers. In the latter case, there are several related provisions: education for consumers, antitrust regulation to ensure competition and avoid distorted markets; control of natural and legal monopolies; regulatory framework of public utilities; and control of public utilities through the participation of consumers and users associations and of the affected provinces.

Regarding guarantees, *amparo*, habeas corpus, and habeas data were included in the constitutional provisions.

In addition, other economic, social and cultural rights were recognized through other ways:

a) 11 international human rights agreements were given constitutional rank, listed in article 75.22.[3] In addition, Congress has the authority to recognize other treaties, which implies that there will be a double source of rights: internal and external (international law of human rights).

b) the incorporation of these through Congress' powers, listed in article 75. In fact, in subsection 17, the ethnic and cultural pre-existence of the Argentinean indigenous people. Subsection 19, which is relevant to the issues discussed here, is known as the "development or progress clause", and included the recognition of several human rights, social justice principles, and harmonic growth of the country principles. It states that: "Provide what is necessary for human development, economic progress jointly with social justice, the national economy productivity, employment generation,

3 Among those, there is the UN International Covenant for Economic, Social and Cultural Rights.

professional education of workers, defense of currency value, technological and scientific research and innovation, and its diffusion. Provide for the growth of the Nation and its territory; promote policies that equilibrate the unequal development of provinces and regions. To these purposes, the Senate will be the chamber of origin…" From a simple reading of the rule, we can see that the constituent is in favor of, on the one hand, a social market economy, social democracy, and Social *Rechstaat;* and, on the other hand, of overcome the economic and social asymmetries our federalism suffers from.

Finally, subsection 23 introduces the promotion of positive discrimination actions to ensure the actual equality of opportunities and of treatment in order to guarantee that human rights have effect; in particular, regarding children, women, elders, and handicapped people.

Hence, the Constitution has clearly recognized an extensive catalogue of human rights; in particular, those with an economic, social, and cultural character, and the later generation ones, such as the right to human development. But, as we have defended before, there is a gap between what constitutional law is in the books and how it is actually implemented. Full observance of its provisions has not been achieved. This is illustrated by the worrying social reality of the country, which shows the problems we have regarding legal observance and underdevelopment.[4]

India

Initially the Constitution did not commit itself to any particular economic policy except that it provided the fundamental rights including the right to any trade profession or business as well as the right to property and certain directive principles required the state to provide a social order in which justice social economic and political shall inform all the institutions of the national life as well as to take special care of women children and weaker sections of the society and to secure " that the ownership and control of the material resources of the community are so distributed as best to sub serve the common group" and " that the operation of the economic

4 See Hernández Antonio María, Zovatto Daniel y Mora y Araujo Manuel, "Encuesta de cultura constitucional. Argentina: una sociedad anómica", Méjico, 2005. There we use the Word "anomia" — used in sociology — to describe the violation of social and legal rules, in particular.

system does not result in the concentration of wealth and means of production to the common detriment". The Preamble of the Constitution also provided for justice, liberty, equality and fraternity assuring the dignity of the individual. However, through an amendment in 1976 the word "SOCIALIST" was inserted in the Preamble to the Constitution indicating that India was a socialist republic. The inclusion of the word "SOCIALIST" in the Preamble has, however, not made much difference in the determination of the economic policies of the country. While until mid 1980's the government claimed to be following some kind of socialist policies change started taking place since then and since 1991 the country has been following the model of free market economy. The fundamental right to property was repealed in 1979 and replaced by a constitutional right specified in a section outside the fundamental rights.

United Kingdom

There is no Constitution, though the basic rights of private property and social citizenship are entrenched as constitutional conventions and in European law.

Germany

The Grundgesetz establishes the right of private property, Art. 14; free enterprise, Art. 12; the right to choose ones occupation, Art. 9; the freedom of trade unions, Art. 9; the freedom of contract, the freedom of competition, Art. 2 I / Art. 12. On the other side, it establishes the guarantee of public welfare, so the Grundgesetz establishes what we call "Soziale Marktwirtschaft". Apart from this, the Bundesverfassungsgericht has always emphasized the Grundgesetz to be "neutral in the economic sense".

Austria

The Federal Constitution establishes various rights that relate to economic activities, such as the equality principle, right to conduct a business, right to choose one's profession, property etc. It is possible under certain conditions (such as rationability, proportionality etc) to infringe these rights. The free market is not explicitly mentioned in the Federal Constitution, but one may indirectly deduce this principle.

Art 13 B-VG, moreover, stipulates that the state is bound to observe an overall economic balance and that all territorial tiers have to coordinate their budgets and attempt to achieve sustainable budgets.

Swiss Confederation

The fundamental principles of economic order are established in the federal Constitution. The fundamental principle is economic freedom, that is, freedom of a federal citizen of any State to exercise any economic activity throughout the federal territory. Economic freedom was federally guaranteed first by the 1874 Constitution in Article 31. It had, at that time, a dual role. On the one hand, it was a citizen's constitutional right. But, on the other, the main reason for its introduction was instrumental: the creation of a common economic space in the entire federal territory. This forced the States to introduce a liberal economic system and avoided protectionism among them, preventing discrimination between their own nationals and citizens of another state.

In the 1999 Constitution, the two functions (the right of citizens and the economic one) are established in two separate articles in different chapters. The citizens' right to choose and freely exercise their economic activity is set in the chapter on constitutional rights (article 27). The second function, the definition of the economic order, is now in the chapter that defines and delimits federal powers from state powers in Articles 94 et seq.

Belgium

The federal Constitution does not have provisions regarding economic activities. The only related issues are the socioeconomic and cultural rights established in article 23 to all the citizens, which include the right to labor and the freedom to choose one's occupation.

Article 16 specifies that "anyone can have his property taken except for public utility in the cases and following the procedure established by law. A previous and fair payment is required". These rights are protected by federal, community, and regional laws.

On the contrary, the special act of institutional reforms assigns the regions relevant economic powers. These have, nevertheless, considered the responsibilities the federal State holds in this area. The region has to act within the framework established by the Economic and Monetary Union.

Hence, they have to take into account the principles of the economic union and monetary unit.

In economic matters, some federal powers are understood to be exceptions to the regional ones, since the latter are supposed to be the general rule. The region can act but constrained by the principles set in the federal laws, that is, the principles of freedom of trade and commerce. This liberty cannot be considered as unconstrained. The legislator with jurisdiction in the matter can regulate, and hence constrain the activity, of certain sectors. Obviously, both the federation and the region will violate such a freedom if they limit it when it is unnecessary to do so, constrain it in a disproportionate to the goal to be achieved, or the restriction affects a principle of the Economic Union.

Some powers are directly assigned to the federal State. The special act of institutional reforms lists them in its article 6.1.VI subsections 4 and 5. This is the case of commercial Law, company Law, labor Law, or social security law. Among them, the regulation of professions is also included. The exclusive power to regulate the requirements to be a member of certain professions has to be interpreted in a way that distinguishes the general requirements from the complementary ones and the adjudicatory decisions (CA, n.18/96 du 5 mars 1996).

Other economic powers are only partially assigned to the federal authorities. For example, the federal legislator can only establish the "general rules" regarding public contracts, consumer protection, economic organization and financial aid for the companies. Public contract regulation is established by: the principles specified in the act of July 14, 1976 regulating the public contract for works, services and supplies; the royal decision of April 22, 1977; the ministerial decision of August 10, 1977 establishing the general framework of these contracts and the regulation regarding the companies' incorporation. The region can complete the federal regulatory framework in order to implement policies adapted to its necessities.

Furthermore, the federal legislator can only act in this area to "guarantee the principles listed in the last paragraph of the article (6.1.VI)" which has to be interpreted as a reference to the rules and principles that govern the economic and monetary union.[5]

In general, the Constitutional Court has emphasized — according to the amended constitutional texts of 1970, 1980, 1988 and 1993 and particularly

5 C.A., n. 6/96, Jan. 18, 1996.

art. 6.1.VI.2 of the special act of August 8, 1980 as rewritten by article 4.8 of the special act of August 8, 1988 and by art. 9.1.3 of the special act of January 16, 1989 — that the Belgian state structure is based in an economic and monetary union characterized by an integrated market and by a monetary unit.[6] These provisions translate the "will in maintaining a uniform regulation of the economic organization in an integrated market".[7]

Once this has been stated, "the existence of an economic union implies the freedom of movement of goods and production factors among the federated units".[8] This implies a custom union too.[9] Given this context, a tax — within a region — has the same effect as a custom levy since it mandates a higher tax burden for those wastes which will be eliminated in a region different from the Flemish than the waste eliminated in the later. This measure impairs the "interregional trade". And, thus, "it does not abide the regulatory framework of the economic union".[10]

Accordingly, the region can regulate: 1. Economic policy; 2. Regional aspects of credit policy; 3. Exports; 3.5. Natural resources (l. sp., art. 6, §1, VI, al. 1).

The region has to exercise its powers regarding exports policy respecting the "parallel powers assigned to the Federal State".[11]

Italy

The Italian Constitution contains provisions on Economic Relations (Part I, Title III, Articles 35-47). It recognizes the principle of freedom of economic initiative (art. 41) but also the possibility to direct and coordinate the private sector for social purposes. It also provides rules which allow the nationalization of productive sectors in the field of essential public services (art. 43).

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6 C.A., n.55/96, Oct. 15, 1996.
7 *Id*.
8 *Id*.
9 *Id*.
10 *Id*.
11 R. Andersen, « Les attributions de la région », in *La Belgique fédérale* (dir. F. Delpérée), Bruxelles, Bruylant, 1994, p. 225. Ch. Darville-Finet, « Le commerce extérieur, les principales étapes du nouveau paysage institutionnel », R.B.D.I., 1994, p. 164. « Les régions sont compétentes pour mener leurs propres politiques de promotion dans le domaine du commerce extérieur sans préjudice toutefois des initiatives fédérales en la matière qui résulteraient soit d'une concertation avec la région, soit d'accords de coopération » (C.E., L. 26.943/4, Nov. 5, 1997).

However, these provisions should now be compatible with Community law, and particularly with the provisions on competition, state aid and services of general economic interest.

Spain

A socio-economic model is not established in the federal constitution. Within the constitutional framework, several alternative models can be squared. These must observe the principles and guidelines, as states in the question that direct the acts of the public powers and the citizens in this area.

2 · Are there parallel provisions in the State Constitutions?

United States of America

State guarantees tend to parallel the federal constitution. In general, state constitutions enter more deeply into matters of public policy, with separate articles on taxation, corporations and small business. Many are specific to the economy of a given state, covering, for example, mining, livestock, or manufacturing. Finance and taxation articles can prohibit certain taxes — ad valorem or prohibit assumption official government debt.

Canada

Quebec's Charter of Human Rights and Freedoms guarantees the right to "peaceful enjoyment of property" (section 6).

Australia

No. The States are bound by the application of s 92. State Constitutions do not tend to deal with economic matters. They are directed instead at establishing the institutions of government.

Mexico

Some state Constitutions contain provisions similar to those stated in the previous question. For example, property, takings, state and municipal

planning of economic development, prohibition of monopolies (see Estado de Nuevo León Constitution, articles 23 and 24). Other examples are provisions regarding state duty to promote economic prosperity (Michoacán Constitution, article 129); or development state planning (Veracruz Constitution, article 75.).

Brazil

Yes, there are similar provisions in the State Constitutions, which repeat the Federal economic Constitution.

Argentina

As we anticipated, in our historical analysis of the stages of our sub national constitutionalism, Provinces did the transition from liberal democracy and social constitutionalism to the social democracy and constitutionalism earlier than the federal level. Some examples are the provincial Constitutions of: San Juan (1927), Entre Rios (1933), and Buenos Aires (1934).

On the one hand, in general, Provincial Constitutions include similar provisions to the examples mentioned regarding economic, social, and cultural rights. On the other, one of the requirements the Constitution imposes on Provincial Constitutions in order to be approved is that they have to abide by its principles, declarations, and rights.

Even if the 1994 constitutional amendment has entailed a broad recognition of new rights and guarantees, it still can be observed that some Provincial Constitutions go beyond the baseline level set by the Federal Constitution, which is possible because of provincial autonomy.

Another issue to be mentioned in the analysis of the economic activity framework is that Provinces have concurrent powers with the federal government over the economic development and general welfare, according to article 125 of our National Constitution.

Finally, it is worth pointing out that article 124 of the Constitution authorizes Provinces to: a) create regions for economic and social development; and b) celebrate international covenant, which can be linked to foreign trade and tourism issues. This does not imply that the main powers over economic planning, foreign relations, banking, customs, and monetary policy hold by the central government could be disregarded.

India

As there are no State Constitutions, question of having parallel provisions does not arise.

United Kingdom

No. The statutes constituting the devolved administrations leave rights and most economic management in the hands of the UK government.

Germany

There are, but they are not practical.

Austria

Hardly any, but the Land Constitutions respect the relevant federal constitutional provisions.

Swiss Confederation

Several state constitutions repeat the provisions of the federal Constitution, in particular citizens' rights, including economic freedom. These repetitions are acceptable, while they do not contradict the Constitution or federal law. In addition, state constitutions contain rules regarding the respect by state law of economic freedom and rules on the promotion of the economy in the state. Sometimes they contain interesting additions, for example, that the State should encourage, when it cooperated with private companies, these actors to take measured promoting a balance between work and child care among their employees (the Constitution of the Canton of Zurich).

Belgium

See answer to question 1, last paragraph.

Italy

Statements of principles in the regulation of the economy often appear in

the regional Statutes. However, they follow the fate of purely programmatic standards: the Constitutional Court considers them not legally binding.

Spain

The state constitutions, except for very particular issues, do not include this type of provisions. The ones established in the Federal Constitution are binding on the states too.

3 · Are there provisions empowering the Federation or the States to regulate economic activities?

United States of America

It clearly is a dual function. Article I, Section 8 clearly gives Congress the power "To regulate commerce with foreign nations, and among the several states". States not only regulate intrastate commerce but license businesses, regulate state-chartered lending institutions, promote business, enforce related health codes, and so on. Most of the principles of division have been crafted by state and federal courts over time.

Canada

Section 92(13) of the Constitution Act, 1867, confers jurisdiction upon provinces on "property and civil rights", which has been interpreted as including the regulation of all economic activity taking place inside the province's boundaries (other than activities, like banking for example, expressly allocated to the federal jurisdiction). Other heads of power in section 92 that relate to economic activity are: 92(2): direct taxation; 92(5): management and sale of public lands; 92(9): business licenses; 92(11): incorporation of companies with provincial object.

Section 91(2) confers jurisdiction upon the federal Parliament on "regulation of trade and commerce". Other heads of power in section 91 that relate to economic activity are: 91(2A): unemployment insurance; 91(3): raising of revenue by any mode of taxation; 91(14): currency and coinage; 91(15): banking and paper money; 91(19): interest; 91(20): legal tender; 91(21): bankruptcy and insolvency; 91(22): patents; 91(230: copyrights.

Finally, section 95 confers on both levels of government concurrent powers (with federal paramountcy) over immigration and agriculture.

Australia

The Commonwealth has argued, unsuccessfully, in the High Court that the Commonwealth Constitution gives it a power to control the national economy. It based its argument on the disparate provisions in the Commonwealth Constitution that affect economic activities, such as the power to impose taxation (including excises), the power to grant bounties, the power to make laws with respect to inter-state and overseas trade and commerce and the power to make laws with respect to banking, the borrowing of money on the public credit of the Commonwealth, currency and coinage, insurance, bankruptcy and insolvency. The High Court held that while such powers existed and would be interpreted to their full extent, this did not give the Commonwealth a broader power to legislate to control the national economy.

State Constitutions do not deal generally with economic matters. In practice, there are significant differences between the economies of the different States which vary according to State economic policies, population, education and training, infrastructure and resources, national policies and international circumstances (e.g. Chinese demand for Western Australian natural resources).

Mexico

The distribution of powers over economic regulation follows the general formula (residual powers to the states, article 124) and the "concurrent powers" scheme (the meaning of this formula in Mexico has been explained above). Therefore, the economic regulation powers not expressly given to the Federation are reserved to the States implicitly. Nonetheless, it is important to highlight that article 73 of the Constitution gives the Federal Congress legislative powers to regulate key economic issues such as: internal commerce and foreign trade, oil, mines, financial services, electric power, nuclear power, labor, and taxes.

The Constitution labels as "concurrent powers" (actually, we may refer to them as shared powers) other important issues with impact in the economic activities such as human settlements, urban development, environment, tourism, fishing and aquiculture.

Brazil

Both States and Federation, according to their powers, can regulate economic activity, which comprises the functions of supervision, encouragement and planning (article 174 of the Federal Constitution). However, the Federation exercises most of the regulatory function, concentrating the most important administrative and legislative powers.

Argentina

This question has already been answered affirmatively in our analysis of the distribution of powers. 1994 constitutional amendment included in article 75.6 the power of Congress to establish and regulate a Federal Bank which can issue money. This implies that the Federal Bank created in the 30s should be adapted to the federal system, allowing the participation of the Provinces. Unfortunately, this very important reform has not been introduced, given the lack of regulation of the Constitution.

India

Among the powers allocated to the Federation and the States regulation of economic activities fall within the jurisdiction of both.

United Kingdom

The specific answers vary with each devolved administration and kind of regulation. Broadly, economic policy in the UK is highly centralized. The reserved powers of the UK give it responsibility for overall economic management and ensure a consistent business climate, while more local regulation (such as control of urbanization) is devolved.

Germany

The Federation has the power to regulate economic law (Art. 74 I Nr. 11 GG) including the law of economic competition, antitrust law and labor law (Art. 74 I Nr. 12 GG). These are concurrent competences, but as the Federation has regulated it completely, there is no more competence left for the States.

The Federation has the exclusive power to regulate telecommunication and traffic, monetary issues, banking law.

As taxation lies mainly in the competence of the Federation, see Art. 105 ff GG, thus it is empowered to regulate economy by taxes.

Austria

Yes. The allocation of powers mentions them respectively.

Swiss Confederation

The federal Constitution requires both the Federation and the States to exercise all their powers so as to create favorable conditions for the development of private economic sector.

The federal Constitution includes federal power to create a single economic area in Switzerland, that is, to ensure the free movement of goods, services, and professionals. This requires that higher qualifications (often state) are recognized among States.

Some of the federal powers are in the chapter of the Federal Constitution on economic powers. These are: antitrust policy, consumer protection, legislation on the activities of banks and insurance companies, monetary policy, cyclical economic policy, structural policy (support for economically disadvantaged regions, such as Alpine regions), foreign economic policy, the country's supplies, agriculture, weapons and war material, and others.

Another part of the rules governing economic activities are split in various federal and state powers. The most important example is the power over private law, including, in particular the contract and obligations law. Federal law enacted on the basis of these powers are the basic rules for most private economic activity.

Most of the rules of commercial police order are state/canton powers. These are rarely mentioned in state Constitutions. Constitutions have general statements in relation to the maintenance of public order by state bodies, which also include limitations to economic activity.

As a very important political tool for states, it must be mentioned fiscal autonomy, that is, freedom to define canton and local tax rates, both for individuals and companies, as well as to conclude tax agreements with companies and individuals, having the cantons the ability to attract businesses.

Belgium

As we have demonstrated, the powers of the federal state and the regions are particularly intermingled in the economic activity regulation.

Italy

In principle, many of the matters relating to the economy (agriculture, industry, tourism, trade, etc.) are considered Regional residual powers (art. 117.4).

There are also other economic matters under concurrent regional powers (labor protection and safety; scientific and technological research and innovation support in the productive sectors; improvement of cultural goods; savings banks; rural banks; regional credit companies — art. 117.3).

However, many clauses allow the state to legislate comprehensively in this area. The main ones are (art. 117.2):

a. The power over "currency; protection of savings and markets; antitrust; secondary markets";

b. The power over "civil law" which reserves for the State all private law (commercial law, corporate law, family law, etc.).

Spain

These provisions exist in both federal and state constitutions assigning powers to both levels of government.

4 · What are the guiding principles for the allocation of economic powers between the States and the Federation? Where are these principles established?

United States of America

The guiding principles, as stated in the commerce clause, are that the federal government has come to have very broad powers over almost everything that is even narrowly construed as interstate. This extends, for example, to items manufactured entirely in one state but transported, distrib-

uted and sold in another state. These principles have been established by the federal courts, and there are few limits on them.

States' powers are generally enumerated in their constitutions and are enforced by state courts. Generally, state legislators establish economic development/commerce departments to promote state activity, in partnership and/or collaboration with a number of non-governmental entities.

Foreign commerce is promoted by both state and federal governments, but ultimately regulated by federal code as an exclusive power.

Canada

Regarding the division of economic powers, the framers of the 1867 Constitution clearly wanted to establish a high degree of centralism. The Canadian Parliament was endowed with all the legislative powers needed to regulate the economy. In particular, the federal commerce power was expressed in a wide fashion. However, although the Constitution did not limit the commerce power of Parliament to international trade and trade among federal units, the Judicial Committee of the Privy Council precisely read such a limitation into the relevant provision. The prevailing reason for this construction was the very large scope the Committee had already given previously to the most important provincial legislative power, over «property and civil rights», which was interpreted as bestowing on the Provinces the authority to legislate on all forms of legal rights possessed by persons within the province. The Committee then gave a narrow interpretation to the federal power over «trade and commerce» so it did not overlap with the provincial power. The result was that the Judicial Committee limited the reach of the federal commerce power to two dimension or «branches»: (1) international and inter-provincial trade and commerce (intra-provincial trade coming under the jurisdiction of the provinces); (2) general regulation of trade affecting the whole country. Furthermore, the Judicial Committee effectively sterilized the second branch of the federal commerce power by refusing to give it any real effect, and in relation to the first branch refused to apply the kind of functional and economic test that has been used by the United States Supreme Court. This meant that the Committee still refused to recognize jurisdiction to the Federal Parliament even when matters of local trade and commerce were inextricably bound up with international or inter-provincial trade. The Committee preferred to apply a formal test of a legal nature in deciding that exclusive provincial

jurisdiction was established as soon as «contractual relations entirely within a Province» were involved. As a consequence, in Canada such matters as the regulation of insurance and other businesses, of labor standards and relations and of the marketing of natural products have been found to be mainly under provincial jurisdiction. In contrast, in the United States the commerce clause has justified a strong federal presence in all those fields.

After 1949, one of the areas in which the Supreme Court has moved away from the decisions of the Judicial Committee and increased federal jurisdiction is that of the trade and commerce power. First, the Supreme Court is more willing than the Judicial Committee to recognize federal jurisdiction on *intra*-provincial transactions when it can be shown that they are «necessarily incidental» to *inter*-provincial or *international* trade and commerce. Second, the Supreme Court has revivified the second «branch» of the commerce power that had been left dormant by the Judicial Committee, the «general regulation of trade affecting the whole country». A federal legislation can be supported as a «general regulation of trade» if it is concerned with trade as a whole rather than with a particular industry or commodity, if it is of such a nature that provinces alone or jointly would be constitutionally incapable of passing such an enactment and, finally, if failure to include one or more provinces or localities in the scheme would jeopardize its successful operation in other parts of the country. It is not necessary that all criteria be met, the main consideration being whether the federal statute addresses a genuinely national economic concern and not just a collection of local ones. To give an example of the application of this test, federal legislation regulating anti-competitive practices has been upheld in its application not only to international and inter-provincial trade, but also to intra-provincial transactions. The Court considered that the negative effects of anti-competitive practices transcended provincial boundaries and that ensuring a competitive economy was an issue of national importance rather than a purely local concern. Restricting the application of the federal legislation only to international and inter-provincial trade would have rendered it ineffective.

The re-interpretation of the federal commerce clause is not the only area in which the federal authority to regulate the economy has been expanded by the Supreme Court. Important cases have recognized that Parliament has the necessary authority to enact legislation designed to sustain and to promote the proper functioning of the Canadian economic union. Such a federal authority finds its source in the various features of the Con-

stitution that are designed to foster economic integration (one such feature is section 6 of the *Canadian Charter of Rights and Freedoms* contained in the *Constitution Act, 1982*, which guarantees the inter-provincial mobility of citizens and permanent residents). Leading commentators are of the opinion that under this authority Parliament can legislate to eliminate trade barriers and restrictions on the free movement of persons, goods, services and investments across provincial boundaries, as well as to provide rules for the mutual recognition of standards and regulations by provinces. However, the positive harmonization of provincial measures affecting internal trade would still require voluntary measures and cooperation between the provinces.

An examination of the Supreme Court's positions on the division of powers clearly shows that the Court's vision of federalism is generally premised on considerations of economic efficiency and functional effectiveness. Of course, such a vision favours in the long-term centralism as opposed to decentralization and provincial autonomy.

Australia

There are no constitutional principles as such regarding the allocation of economic powers. There is, however, a constitutional requirement that inter-state trade and commerce be free (s 92), that customs and excise duties only be imposed by the Commonwealth (s 90) and that the Commonwealth not discriminate between the States in imposing taxation (s 51(ii)) or in enacting laws regulating trade or commerce (s 99). One might draw from these provisions broader principles such as free trade and equality of treatment of the States, although this would be subject to any other provisions to the contrary.

There are also some limitations on the Commonwealth's powers to legislate with respect to economic matters. For example, the Commonwealth is only given legislative power with respect to 'trade and commerce with other countries and among the States'. The Commonwealth Constitution does not give the Commonwealth the power to legislate with respect to trade and commerce within a State (although the Commonwealth's power to regulate the activities of trading and financial corporations now largely covers this area). Similarly, the Commonwealth is given legislative power with respect to 'banking, other than State banking'. This might suggest that economic activities within a State were intended to be left largely

within the control of the State. However, the High Court's approach has been to read broadly any Commonwealth powers.

Mexico

There are no special principles guiding the distribution of powers over economic issues. However, a centralized regulatory framework has arisen from the principle of "guidance of economic activity" attributed to the Federation by article 25, jointly with the federal exclusive powers.

Brazil

It is generally agreed that there is a general principle of predominance of interest in the Federal Constitution regarding economic regulation. Federation can regulate economic activities when there is a national interest. States and Municipalities can regulate regional and local economic activities, respectively.

Practically speaking, Federation can fully regulate the most important and strategic public utilities and economic activities, though. These activities are listed in the Constitution (e.g. telecommunications, oil and gas, energy, mail). The Constitution also establishes a number of specific States (e.g. local distribution of natural gas) and Municipalities (e.g. local public transportation) regulatory competences, but they are few if compared with Federation's regulatory powers. Moreover, when Federation has no complete regulatory power, States competence is bound by Federation's general rules and principles.

Argentina

As already explained, these principles are established not only in the National Constitution, but in Provincial and Autonomous City of Buenos Aires' Constitutions.

India

There are no general principles separately laid down for the allocation of economic powers between the Federation and the States. However, as a general principle of allocation of powers already mentioned, matters of

national and international importance have been assigned to the Federation while the matters of local and regional importance have been assigned to the States.

United Kingdom

Broadly, the reserved powers of the UK give it responsibility for overall economic management and ensure a consistent business climate, while more local regulation (such as control of urbanization) is devolved. This was, explicitly, the logic used by the UK government when drafting the devolution legislation.

Germany

See above. Generally speaking, all economic activities, which are not limited to the territory of a state, are within the competence of the Federation, as far as legislation is concerned.

Austria

Most economic powers are enumerated by Art 10 B-VG in favour of the federation. However, the Länder are free to engage in or promote economic activities themselves on a private law basis, which is not determined by the allocation of powers.

Swiss Confederation

The fundamental principle which should be observed in the distribution of powers is the principle of subsidiarity, as defined in the Federal Constitution (arts. 3, 5a, and 43a). Generally, it is clear that the subsidiarity principle justifies that the assignment to the federal level of the core powers of regarding the economic order and the exercise of the private economy given medium-small size of the cantons (states) in Switzerland.

Belgium

The Constitution is particularly brief regarding this matter. On the contrary, the special act of institutional reforms, following the Constitu-

tional Court decisions, has been pretty explicit, as has been described in question 1.

Italy

It is not easy to find a general criterion to distinguish between the powers of the State and the Regions. As has been mentioned, it is necessary to check the lists of legislative powers: exclusive state, concurrent, residual regional. Regarding the first, the State governs the matter entirely (both principles and details). In the second case, the State has the authority to establish the principles and, in general, tends to regard as principles rules that are too detailed. For the third, the State would have no power to intervene, not even establishing principles.

Spain

The federal constitution assigns to the federation specific powers over certain economic sectors (foreign trade; regulatory bases of credit, bank and insurance; fishing; mining and energy; etc.) and, particularly, the generic power over "bases and coordination of the general economic planning" which is usually called — even by the Constitutional Court — "general regulation of the economy". This clause has been broadly interpreted, covering all the powers that the federation is willing to exercise in the economic arena. The new state constitutions have tries to limit this federal power.

5 · Are there any limitations on the power of the States to regulate the economy? Are there any limitations on the power of the Federation to regulate the economy?

United States of America

See VI.1 above for U.S. constitutional limitations. The federal government: must levy taxes uniformly throughout the states, and is prohibited from levying taxes or duties on exported items from any state. States are generally free beyond any constitutional limitations to offer land grants, loans, tax exemptions, deregulate, promote infrastructure, charter banks

and business, and subsidize business ventures. In regard to taxes, most states restrict special laws that grant differential tax rates, although this is often circumvented by means of establishing "classifications" that include one or a few cases.

Canada

Obvious limitations, for both levels of government, stem from the division of powers. Two additional limitations apply only to provinces. The first derives from the rule against extraterritorial effects of provincial legislation, as explained above. The second concerns certain persons or undertakings specifically assigned to federal jurisdiction, which the Courts have held to be immune from the application of provincial laws that affect an "essential or vital part" of their management and operation (for example banks, the post office, aeronautics undertakings, etc.). Although a provincial law is valid, it will considered inapplicable to federally regulated undertakings insofar it affects a vital aspect of such an undertaking. Under this test, Courts have for example established that provincial legislation regulating labour relations or occupational health and safety will not apply to federally regulated undertakings like banks, telephone companies or air carriers.

Finally, section 121 of the Constitution Act, 1867, prohibits any custom duties on articles grown, produced or manufactured in a province and exported to another part of Canada. It is a limitation on the federal Parliament, solely competent to impose custom duties.

Australia

The main limitations upon the States in regulating the economy lie in their limited powers to tax. They cannot impose an excise and their powers to impose many other taxes such as income tax have been effectively limited by the Commonwealth. The States have also referred to the Commonwealth their powers with respect to corporations, to allow the enactment of a uniform *Corporations Law,* in order to give the necessary security and uniformity demanded by corporate investors.

The States may also be subject to limitations on their power to borrow. Section 105A of the Constitution authorises the making of financial agreements between the Commonwealth and the States. Those agreements es-

tablish the Australian Loan Council and previously provided for the imposition of limits on State borrowings. These days the approach of the Loan Council is to oversee borrowing on a voluntary basis and 'emphasise transparency of public sector financing rather than adherence to strict borrowing limits'.[12]

Although the States have power to enact laws with respect to State banking, the Commonwealth generally controls fiscal policy through its exercise of its power to legislate with respect to banking, under which it has established the Reserve Bank, which sets official interest rates.

As a result of the vertical fiscal imbalance built into the constitutional system, the States are reliant, to a significant extent, upon Commonwealth grants under s 96 of the Constitution. As the Commonwealth often imposes conditions upon those grants, it may use these conditions to limit the way in which these grants can be spent, effectively limiting the power of a State to regulate its economy.

The main limitation on the power of the Commonwealth to regulate the economy is its lack of full legislative power in relation to all aspects of the economy. It may legislate with respect to banking, but not State banking, it may impose taxes, but not on State property and it may legislate with respect to interstate and overseas trade and commerce, but not intra-State trade and commerce (unless another head of power, such as the corporations' power, supports such a law). Accordingly, its powers are patchy, rather than comprehensive. For example, the Commonwealth had some difficulty in finding sufficient power to support its legislation to stimulate the economy in 2009. In the end, the High Court upheld the validity of the Commonwealth's legislation on the ground that it was supported by an executive power to deal with emergencies and an associated incidental legislative power. However, the Court rejected the argument that the Commonwealth had an implied power to regulate the national economy.[13]

Mexico

The limits, for both federal and state powers, are established by the general distribution of power clauses.

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12 Commonwealth, *Budget Paper No 3 — Australia's Federal Relations*, 2009-10, p 156.
13 *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

Brazil

States and Federation are limited by the Economic Constitution principles and rules. Moreover, states are restricted by Federation's power to enact general rules.

Argentina

The limits that can be identified are those that arise from the distribution of powers. In fact interjurisdictional conflict occurs, the Judicial Power through the National Supreme Court — which has exclusive and original jurisdiction when a Province is one of the parties, according to article 117 of the Federal Constitution — should intervene.

India

There are no limitations on the powers of the Federation or the States to regulate the economy except those relating to the allocation of the powers between the two.

United Kingdom

Scottish and Northern Ireland power to regulate the economy extends to all on-reserved matters. Wales can regulate the economy within Westminster primary legislation or subject to Westminster transferring its legislative competency.

Germany

There are general limitations in the constitutional rules quoted above 1; the power of the States is limited by the broad competences of the Federation; the power of the latter is limited by the powers of the European Union.

Austria

The powers of the federation are, as always, enumerated and therefore restricted within the limits of the "petrification and intra-systemat-

ic interpretation". However, economic powers are mostly enumerated in favour of the federation, so that the Länder are left only marginal powers.

Swiss Confederation

The citizen's economic freedom, established by the federal Constitution, may be limited both by federal and state law, under the same conditions that restrictions to any right of citizens should comply with (Article 36 cf). This means, in particular, that the only possible restrictions are those aimed at the protection of another right or constitutional value, must be justified by public interest or for the protection of fundamental rights of a third party, and be proportional to its end. Furthermore, all constraints intended to influence the market need to be mentioned in the federal Constitution.

The limits set in state law are subject to review by the Federal Court, which exercises constitutional control over the state law (Article 189). In addition, the Federal Court can control acts of federal agencies, such as ordinances issued by the executive, which is the Federal Council. The Court cannot, however, question a federal law which conflict with the federal Constitution (including the distribution of powers).

Furthermore, the federal Constitution requires all authorities to exercise its powers so as to create favorable conditions for the development of private economic sector

Besides, the federal Constitution provides in Article 94, paragraph 4, a further condition to avoid political-economic measures: "The repeal of the principle of economic freedom and, particularly, measures contrary to free competition, are not admissible, unless provided by the Federal Constitution or based on historic privileges of the cantons". On the basis of this provision, a court has established a distinction between restrictions of economic freedom, at times, according to its principle, and not (e.g. "departure from the principle of economic freedom").[14] The latter should be established by the Federal Constitution and include those that have a political-economic nature, aimed to limit economic freedom and the equal treatment of competitors, by encouraging, for example, commercial or other types of

14 French: "Les dérogations au principe de la liberté économique". German: "Abweichungen vom Grundsatz der Wirtschaftsfreiheit".

business. The restrictions in accordance with the principle need only a law as legal basis, either state and federal, and not one based on the Constitution. These are those restrictions that are intended to protect other rights or values, such as police order.

Belgium

The power is addigned to the region but it has to exercise it according to the principles set by the special act of institutional reforms and observing the exception it lists.

Italy

See supra 4.

Spain

Apart from the limits established by the federal constitution that have already been mentioned, there are the limits that arise from the powers of the other territorial entities.

6 · In your opinion, what are the most important powers of the Federation regarding the economy? What are the most important powers of the States regarding the economy? Are the powers over economic regulation exclusive or shared? If the latter, what is the specific distribution of legislative and executive powers?

United States of America

Clearly the commerce clause and the power of Congress to "provide for the general welfare" in regard to the federal government. The states generally act in the same regard, although their constitutions and laws are more explicit regarding promoting their competing economies. Recent state economic activity has focused on three broad areas: 1) attracting businesses to the state and retaining existing enterprises, 2) enhancing the productivity of ongoing businesses, and 3) general capacity building, which

means everything from improving basic education/training to creating and applying new technology.

As indicated, economic regulation power is shared, although from the 1970s on the federal government has moved into many new areas and has taken the lead. Nevertheless, states continue to play a shared role. With some variation by policy area, legislative powers at both levels are necessary for enablement but administrators are usually granted broad discretion over related rules and other norms/standards.

Canada

Federal jurisdiction over the regulation of trade and commerce, banking, interest, bankruptcy and insolvency, and interprovincial transportation.

Provincial jurisdiction over "property and civil rights", which has been interpreted as extending to almost everything related to production and commercial activities inside the province.

As mentioned above, these powers are formally exclusive but there are large areas of overlap because of the doctrine of "double-aspect" and other interpretive doctrines developed by the courts.

Australia

The most important powers of the Commonwealth regarding the economy would include its powers with respect to taxation (s 51(ii) and s 90), banking (s 51(xiii)) and currency (s 51(xii)), interstate and overseas trade and commerce (s 51(i)), trading and financial corporations (s 51(xx)), the making of grants to the States (s 96), the making of financial agreements with the States regarding borrowing (s 105A) and its executive power to spend money (s 61) that has been validly appropriated for Commonwealth purposes (s 81).

As noted above, the States have residual powers, rather than express powers. They can borrow (subject to any financial agreements under s 105A) and spend money, they can regulate trade and commerce and they can tax (except for imposing an excise). They can grant State tax concessions (but not bounties) to attract businesses. Most importantly, they can establish the conditions necessary for businesses to flourish, such as skilled workers, good transportation infrastructure (e.g. ports and trains for the carrying of goods) and good planning laws.

Mexico

Federation exclusive powers: regulation on internal commerce and foreign trade, oil, mines, financial services, electric power, nuclear power, labor, as well as a broad power of taxation, economic competition, consumer protection and industrial property.

Federation-States shared powers: human settlements and urban development, environment, tourism, fisheries and aquiculture.

States exclusive powers: agriculture and forestry development.

Brazil

The Federation can fully regulate the majority of the strategic infrastructure sectors, such as telecommunications, oil and gas and energy. Moreover, the Constitution confers monopolistic rights only to the Federation regarding some aspects of oil and gas prospecting, exploitation, refining and transportation (article 177). Federation also has full monopoly in nuclear related activities (prospecting, mining, enrichment, reprocessing, industrialization and trading of nuclear mineral and their by-products, according to article 177).

States can regulate some public utilities regarding regional interest. For example, States have regulatory power over public transportation among its Municipalities.

Regulatory powers are shared between Legislative and Executive branches. After the 1990s, the regulatory institutional model was concentrated in independent economic regulatory agencies. Most of these agencies are federal.

Argentina

The most important economic powers — that is, the external relations; economic, customs, banking, monetary policies; and interprovincial commerce — are assigned to the Federal Government. In contrast, there are concurrent power of the federal and State Governments regarding other economic activities and public projects construction to promote the general welfare.

Regarding fiscal federalism, the 1994 amendment, in particular, embraced the model of federalism of "concert" which mandates the enact-

ment of a law-covenant of tax co-participation. Again, this is one of the main violations of the Constitution since the law should have been passed before the end of 1996. This law has not been enacted, and the current fiscal centralization process has increased the political and financial dependence of the Provinces on the Federal Government.

India

The most important powers of the Federation relating to economy are the powers such as atomic energy and mineral resources, defense industry, railways, highways, shipping and navigation, airways, currency and coinage, foreign loans, Reserve Bank of India, trade and commerce with foreign countries, inter state trade and commerce, trading corporations including banking insurance and financial corporations. Stock exchanges and future markets, industries which Parliament declares to be under the control of the Federation, oil fields and mineral resources etc. Similarly, the States have the power in respect of agriculture, fisheries, mines other than those falling under the Federal control, trade and commerce within the State, production supply and distribution of goods, markets and fairs, money lending and money lenders, etc.

The foregoing powers are exclusive while transfer of property, contracts, bankruptcy, trusts, forests, drugs, economic and social planning, industrial monopolies, social security and social insurance employment and labour welfare, shipping and navigation on inland waterways, trade and commerce in a few specified matters, price control, factories, electricity and acquisition and requisition of properties are within the concurrent jurisdiction.

United Kingdom

The UK government did a good job of keeping economic management in its hands. Its powers cover key areas of business regulation (such as financial regulation), tax administration and collection, benefits, macroeconomic management, overall budgeting, EU and international organizations, and government debt. The devolved administrations' economic policy efforts are confined to economic development and local regulation (such as land use).

Germany

For the powers of the Federation see above 4: the power of legislation for economy and taxation. There are few important legislative powers of the States: they may regulate activities limited to their territory, as for example closing times of shops. The administrative powers however are mainly allocated to the States.

Austria

Exclusive federal powers concerning the economy are in particular: federal finances, monopolies, the monetary, credit, stock exchange and banking system; the weights and measures, standards and hallmark system; civil law; matters pertaining to trade and industry; public advertising and commercial brokerage; restraint of unfair competition; patent matters and the protection of designs, trade marks, and other commodity descriptions; matters pertaining to patent agents; matters pertaining to civil engineering; chambers of commerce, trade, and industry; establishment of professional associations (with exceptions).

Energy is split between Art 10 and 12 B-VG, so that the Länder partly have the power to administrate this subject-matter and even enact implementation laws.

Public procurement is largely, if not exclusively, a federal matter with regard to legislation, whereas the administration of public procurement is split between the Federation and the Länder (according to whether it is a public contract of the Federation or the Länder).

Swiss Confederation

Important federal powers are the following:

a. Codification of private law (contractual, commerce, corporations).

b. Development of regulations on the exercise of private economic activities for profit. This power is limited by the prohibition mentioned in the previous question (they cannot derogate the principle of economic freedom, without having a particular base in the Federal Constitution). The most important example is the federal law against unfair competition.

c. Creation of a single Swiss economic area (which was used to enact

legislation on the free movement of persons and services and the harmonization and recognition of professional qualifications from other states). About professional degrees, the law gives priority to interstate conventions ensuring mutual recognition of diplomas.

d. Competition policy (antitrust).

e. Consumer protection.

f. Legislation on the activity of banks and stock exchange.

g. Monetary policy.

h. Cyclical policy.

i. Foreign economic policy.

j. Agriculture.

The most important state powers are:

a. Economic Policy (promulgation of laws which the Federation has not enacted and enforcement of federal and state laws).

b. Short-term policy at state level; in particular, economic development.

c. Autonomy on state taxes for private companies.

Belgium

The general clause regarding the economic and monetary union results on the federal state maintaining important powers in economic matters. It must not be forgotten that EU Law and economic liberties it establishes are implicit in this discussion. This does not ban the exercise by the region of economic powers originally assigned to it making decisions of economic policy that will only affect a part of the territory.

The social consequences of the regional economic decisions are, essentially, of federal nature.

Italy

See supra 3.

Spain

The most important federal power is the one called "general regulation of the economy". Regarding states, the most important ones are the regula-

tions of several economic sectors (agriculture, savings banks, commerce, industry, tourism…).

7 · Who regulates antitrust law? Who implements and enforces it?

United States of America

The Constitution controls governmental power and the antitrust law controls concentrations of economic power. Federal antitrust law comprises a set of acts of Congress, administrative regulations, and court decisions that attempt to regulate market structure and competitive behaviour in the national economy. Over time has been modified to deal with corporate mergers/acquisitions and with price discrimination, based in English and American common law. Most cases were originally decided on very narrow interpretations of Congress' power to regulate but over time the general "rule of reason" was applied, which exempts reasonable restraints of trade.

Most states have comparable laws that complement federal law, with varying degrees of effectiveness. The most basic federal-state issue is, does federal anti-trust legislation decree a national free market, or may the states depart from competitive structures for economic activity otherwise in their regulatory power? This issue has arisen in connection with state utility regulation, control of the legal and medical professions, and agricultural marketing programs, all of which operate on a franchise or monopoly model. Generally, the Supreme Court has held that state actions regulating a market do not violate federal law and state law is not in conflict with federal law. Finally, it is anticipated that in the future there could be a conflict between state authority to control alcoholic beverages under the 21st Amendment and claims that state regulating authorities have participated in price-fixing.

Canada

The federal Parliament has jurisdiction over competition law. Federal law in this field is enforced by a federal agency, the Competition Bureau.

Australia

The Commonwealth, through the use of its corporations' power, legislates and regulates in the field of antitrust law. The law is implemented and enforced by Commonwealth officers and by proceedings in federal courts (or sometimes in State courts exercising federal jurisdiction).

Mexico

The Federation has exclusive power over antitrust regulation (there is a Federal Antitrust Act) and there is a federal body (Antitrust Commission) empowered to implement it.

Brazil

There is a general and comprehensive federal antitrust statute (Law n. 8.884 enacted in 1994). Antitrust regulation is implemented and enforced by federal administrative agencies, which not only create antitrust norms but also adjudicate anti-competitive practices.

Formally, States can regulate economic law. Nevertheless, this is a concurrent competence, almost exhausted by federal law. In practice, there is little room for States regulation in this area.

Argentina

Even if it can be argued that both the Federal Government and the Provinces have power over this issue according to article 42 of the National Constitution and to the Provincial Constitutions, which regulate the rights of users and customers, actually the Federal Government exercises these powers as illustrated by the Antitrust Act num. 25.156 enacted in 1999 by the Federal Congress. An Antitrust Court has been created as an independent body within the National Ministry of Finance and it has jurisdiction over acts occurred in all the country even if it is located in the Autonomous City of Buenos Aires. However, it can operate in any place if the President of this Court appoints delegates, who can be federal, provincial or municipal civil servants.

India

Commercial and Industrial monopolies are within the concurrent jurisdiction. Therefore, both the Federation as well as the States can implement and enforce them unless the Federation assigns their exclusive enforcement to the States.

United Kingdom

Competition law, which includes antitrust law, is a UK competency, organized in keeping with EU law and administered by an Office of Fair Trading and a tribunal called the Competition Commission.

Germany

For antitrust law, there is a concurrent competence, but as the Federation has regulated it completely, there is no more competence left for states. It is implemented mainly by the Federation — Bundeskartellamt (Federal Cartel Office) —; there are antitrust authorities in the States whose powers are limited.

Austria

This is an exclusive federal competence, both regarding legislation and execution.

Swiss Confederation

Antitrust law: both legislative and executive powers are federal.

Belgium

Antitrust legislation, which derives from the competition policy, is under federal power (F. Naert, "Une évaluation politico-économique de la politique belge de la concurrence", *Reflets et perspectives de la vie économique*, vol. XLVII, 2008-1, pp. 73-88).

Italy

In terms of "antitrust law" there is an explicit reservation to the State of the subject-matter "protection of competition", which includes both the legislative and the administrative-regulatory powers.

Spain

Legislative power in this area is federal. The implementation is state power if the activity which distorts or may distort competition in the market does not extend beyond the limits of a state.

8 · Has the allocation of powers over economic issues been a contentious issue? Has there been a trend towards centralization?

United States of America

Contention describes the past 120 year history since the economy has been more regulated. To some degree it has been over state versus federal power, particularly regarding the Commerce Clause and anti-trust legislation. Also, the federal courts have; over varying times, limited the power of Congress to move in these two areas. In the decades of the 2000s, despite a Court that was supposedly pro-state powers, issued few rulings that would limit Congressional power over the Commerce Clause. For example, in 2005 it sustained Congressional power (under the federal Controlled Substances Act) in *Gonzales v. Rich* (125 S. Ct. 2195) to prohibit local cultivation and use under California's medical use of marijuana law, as "necessary and proper" for commerce regulation. Other cases, e.g. *Central Virginia Community College v. Katz* (126 S .Ct. 990[2006]), *Cutter v. Wilkinson* (125 S. Ct. 2113[2005]) and *U.S. v. Georgia* (126 S. Ct. 877[2006]) limited states' sovereign immunity (from lawsuits) under the 11th Amendment.

As the essay that follows indicates, the trend is definitely toward increasing federal involvement in matters that were once state prerogatives. It does not, however, mean "centralization," in as much as the power of all governments is simultaneously expanding. State and local power have also exponentially expanded over the years.

Canada

See answer to question 4 above.

Australia

Yes, the allocation of powers over economic issues has proved contentious, largely in the areas of taxation, spending and grants to the States. Although the States are only excluded by the Constitution from imposing customs and excise duties, in practice the States have also been prevented from imposing other taxes, such as income tax. Prior to World War II, the States imposed income taxes, but the Commonwealth sought to seize the income taxing power for the duration of the war. It did so by enacting laws that (a) required taxpayers to pay Commonwealth taxes before State taxes; (b) imposed a high Commonwealth income tax (leaving little if any capacity for taxpayers to pay the State income tax too); and (c) offered the States a grant to replace most of their income tax revenue, but only if they ceased to impose income tax. The Commonwealth law was challenged but upheld by the High Court both during the war and again after the war, when the Commonwealth reneged on its promise to return income tax powers to the States.

The Commonwealth has also imposed conditions on its grants to the States from time to time that require the States to cease imposing particular kinds of taxes. This has made the States even more dependent upon Commonwealth grants and has had the effect of centralizing power.

There has also been controversy about the Commonwealth's spending power. Section 81 provides that the Commonwealth may only appropriate money for 'the purposes of the Commonwealth'. Section 94 requires that the Commonwealth's surplus be paid monthly to the States. The amount of the surplus is directly related to the requirement that money only be appropriated for 'the purposes of the Commonwealth'. The Commonwealth has avoided paying its surplus to the States by spending money on purposes beyond those indicated by its legislative powers and by appropriating all the rest of its surplus to contingency funds so that no surplus has existed since 1908. This has left the States financially beholden to the Commonwealth through s 96 grants which may be the subject of conditions imposed by the Commonwealth. The High Court has upheld the Commonwealth's ability to bury its surplus in contingency funds to avoid

paying it to the States and has also held that any conditions may be placed on s 96 grants, regardless of whether or not they relate to the purpose of the grant. The trend has been towards the centralization of financial power in the Commonwealth.

Mexico

In some cases, the allocation of powers over economic issues has been a source of conflicts. For example, there is an issue regarding water distribution regulatory powers. States and Municipalities contend about who has the power to regulate this public service. Broadly speaking, there is a trend towards centralization.

Brazil

In some cases, the distribution of powers in economic matters has been a source of contentions. For example, who has the regulatory powers in the distribution of water may cause problems. States and municipalities argue about it. In general, there is a tendency to centralization.

Argentina

The system has tended towards the centralization of powers in this area, as the Constitution provided.[15] It is important to analyze the "commerce clause" of article 75.13 of the Constitution which gives Congress the power to regulate interprovincial commerce and the "progress clause" of article 75.18 that gives Congress the power to promote the development and welfare of all the provinces. Both provisions have always been interpreted broadly by the Supreme Court allowing, consequently, an expansion of the federal government which encroaches upon the provincial powers.[16]

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15 Not only our federalism was more centralized tan the US model, but a historical process of defederalization has taken place. The 1994 constitutional amendment could not reverse the trend. A wide range of political and economic causes explain the centralization of the country, which implies a huge territorial disequilibrium due to the concentration in the metropolitan area of Buenos Aires. In the institutional arena, the "hiperpresidentialism" has affected both the republican and the federal systems. See Hernández Antonio María, "Federalismo y Constitucionalismo provincial", Abeledo Perrot, Buenos Aires, 2009.

16 Interprovincial commerce has included, among others, the following issues: energy, transportation and communications.

Congress enacted laws that distorted the constitutional distribution of powers covering economic, financial, tax, natural resources, and tax exemptions issues in detriment of the provincial and regional interests.[17]

In addition, the emergencies, in particular the economic ones, have contributed to centralization.[18]

India

Allocation of powers over economic issues has not been a contentious issues but the allocation of revenues earned from taxes has been a contentious issues. The Constitution has from the very beginning assigned greater powers to the Federation. Accordingly the trend has been towards centralization.

United Kingdom

The political debates vary but tend to focus on finance rather than economic regulation. The Scottish National Party generally argues that Scotland's economy would be better if it had a very high degree of fiscal autonomy and focuses on calling for greater "fiscal autonomy" (i.e. responsibility for taxes and spending, sometimes calling for a level of autonomy similar that of the Basque Country and Navarre). It also has been the most adventurous in using its powers to interfere with UK government plans (for example, refusing to accept new nuclear power plants) or suggesting new powers for itself (as with the Scottish Labour government's failed effort to develop a program for encouraging immigration). Politicians in Northern Ireland and Wales are aware that they receive large subsidies from England and concentrate on defending or increasing those subsidies. There has been no notable trend towards centralization in the decade of devolution, though the financial crises of the last three years (which included the nationalization and forced sale of Scotland's two biggest banks at the hands of London) have made it very

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17 See "Aspectos fiscales y económicos del federalismo argentino", Director Antonio María Hernández, Instituto de Federalismo de la Academia Nacional de Derecho y Ciencias Sociales de Córdoba, Córdoba, 2008.

18 See Hernández Antonio María, "Las emergencias y el orden constitucional", 2ª. Ed., Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de Méjico y Rubinzal-Culzoni, Méjico, 2003.

clear that the UK government's powers over finance and the economy are crucial.

Germany

There has been a trend towards centralization.

Austria

The trend towards centralization in economic matters was particularly visible in the fifties and sixties. Still, centralists demand further reforms, such as the "one stop shop principle" (that one single administrative authority is responsible to give a general permit to build a new facility site instead of a couple of different authorities that apply different laws).

Swiss Confederation

There has been no significant conflict regarding the distribution of powers in these matters. Under the 1974 constitution, before the 1999 amendment, there was a discussion about the power of the Federation to enact the law on the Swiss economic area, since the power was mentioned in the same article as the citizen's right to economic freedom. The discussion was conducted only in the academic and political arenas, since there is no constitutional control over federal law.

Belgium

The power conflicts regarding economic matters have arisen from the definition of the economic and monetary union and its implication for the policies carried out in Belgium and in its regions. The decisions of the constitutional court provide a coherent distribution of powers.

Italy

Italy comes from a strongly centralized system in economic matters. The 2001 constitutional amendment intended to 'regionalize' powers in this area, but the reality is still far from the constitutional provision: the

state continues to legislate and the Regions get involved in these matters with great timidity.

Spain

The conflicts in this area have been numerous and the Constitutional Court, except in very few cases, has embraced the expansive interpretation adopted by the federation of its own powers — in particular the "general economic planning" —; the Court has considered that these broad interpretations do not violate the Constitution. In my opinion, the centralization in this area is clear.

9 · Are there any bodies for the cooperation or collaboration between the Federation and the States in the economic domain? If so, are the issues under their power general or sectorial? Are their decisions binding? How often do they meet?

United States of America

There are no formal or official bodies. However, the U.S. Commerce Department has a number of advisory groups that normally have nominal state economic department representation. This would include special panels on small business, import-export, knowledge industry, manufacturing, and so on. The Department of Agriculture has several related agribusiness and marketing advisory bodies. They are non-paid groups that meet quarterly or semi-annually. Their recommendations are not binding.

Canada

No such body comes on mind. On the more general topic of cooperation between the federal authorities and the provinces, see below.

Australia

The Commonwealth Constitution provides in s 101 for an Inter-State Commission which was supposed to exercise powers of adjudication

and administration regarding trade and commerce. This body has only existed for a short time and no longer currently exists.

The main bodies through which there is cooperation in the economic domain are (a) the Council of Australian Governments ('COAG') which is comprised of the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association and to which Treasurers have recently been invited; (b) the Australian Loan Council, which is formally comprised of the Prime Minister, Premiers and Chief Ministers, but in practice is usually comprised of their Treasurers as delegates; (c) Heads of Treasuries meetings, comprising the public servants who are heads of Commonwealth and State Treasuries; and (d) the Ministerial Council for Federal Financial Relations, comprising the Commonwealth Treasurer and all State and Territory Treasurers. These bodies tend to meet at least once a year, but more commonly, two or three times a year. While the Loan Council and the Federal Financial Relations Council are more confined in their remit, COAG and the Heads of Treasuries cover much broader issues. Their decisions are not usually legally binding but are authoritative policy decisions which then are usually implemented by the governments concerned.

For a more detailed description of the nature, function and operation of these bodies, see: 'Commonwealth-State Ministerial Councils Compendium' at http://www.coag.gov.au/ministerial_councils/docs/compendium.pdf.

Mexico

Instead of cooperation or collaboration bodies (as the ones for education, health, security…), the Mexican federal system has channeled collaboration in economic and social policies through covenants in which the parties (federation and states) agree to coordinate their investment and public infrastructure programs in order to promote economic growth and social prosperity in certain regions.

Brazil

There are no bodies of cooperation or collaboration between the Federation and the States.

Argentina

There are interjurisdictional relations bodies in the economic arena where the Nation and the Provinces participate such as the Federal Council of Investments, Federal Tax Commission, and other Federal Councils (Public projects, Education, etc.) which bring a coordination or "concert" federalism.[19] In general, these institutions have a sectorial character and even if their agreements are binding, those are not able to modify de economic policy, clearly dominated by the Federal Government.

India

The Constitution provides for an Inter-State Council (Article 263) whose primary objective is cooperation among the States in general and not regulation of economic activity. The Constitution also provides for the constitution of a Finance Commission every five years which primarily lays down the principles for the allocation of revenues between the Federation and the States (Article 280). A Planning Commission, though not provided in the Constitution, has also been working since the early days of the Constitution under the Chairmanship of the Federal Prime Minister. The Commission has been playing an important role in the determination of economic policies of the country.

United Kingdom

As with most issues in the UK, the interesting question is why formal mechanisms are underdeveloped or disused. Officials, ministerial political advisors, and ministers discuss issues, usually bilaterally and without reference to the few agreements and forums that there are. The SNP government's call for more formalization and use of existing mechanisms has not produced much effect. The existing mechanisms do not produce binding decisions or override the allocation of powers in the devolution legislation but do encourage governments to consult, inform, and be helpful to each other.

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19 See "Argentina Sub national Constitutional Law, Hernández Antonio María, "International Encyclopedia of Laws", Kluwer Law International, Suppl. 66, 2005; and our already cited book "Federalismo y Constitucionalismo Provincial".

Germany

A "Stabilitätsrat" (stability counsel) has been established by an amendment to the Grundgesetz in 2009, see Art. 109a GG, that has to observe and control the budget policy of the Federation and the States; its decisions are meant to be binding, but there are no experiences with this body so far. There has also been established a counsel to coordinate the IT activities, especially the networks for the Federation and the States.

Austria

Cooperation is a regular characteristic of Austrian federalism. There is a large number of more or less informal instruments of cooperation, such as the prelegislative exchange of draft bills, joint meetings both at political and civil servant level, etc. Such joint bodies and meetings discuss also economic issues.

Swiss Confederation

It must be noted that there are few areas within the power of the States. There is cooperation in the field of promotion of the economic location ('Location promotion'). For this promotion, the Conference of Heads of State Departments of Public Economy (www.vdk.ch) cooperates with the federal Department of Economy (http://www.evd.admin.ch).

Belgium

The cooperation between the federated collectivities and the federal state in economic matters is organized through interministerial committees of coordination. These deal with several matters. The issues they tackle can be either general, such as the transposition of the "services" directive, or a particular one, such as commercial hours.

The interministerial committees meet with variable frequency according to the current affairs.

The decisions of these committees can lead to the signature of cooperation agreements.

Furthermore, there are several advisory bodies at the different layers of power. Among them, the central Economic Council and the economic and social regional councils must be highlighted. Their members are politicians,

representatives of the workers, and representatives of the companies. They cooperate to bring suggestion to the different levels of government.

Italy

There are no specific intergovernmental cooperation institutions in the economic field; for (State-Regions-Local Authorities); the general scheme of the Conferences is used.

Spain

There is an organ of collaboration between the Federation and the States for economic matters: the Council for Fiscal and Financing Policy. It was created in 1980 by an organic federal law (Organic Law of Autonomous Communities Financing). According to it, the Council is aimed to coordinate the financial activity of the States and the Treasury of the Federation. It is formed by the federal ministers of Economy and Public Administration and by the state Treasury ministers. It meets at least two times per year. It covers general economic issues.

There are also bilateral cooperation institutions in both financing and economy in general. In some cases these bodies are part of the Bilateral Commission State-Federation, and in others are aside.

Finally, apart from these institutions dealing with general economic matters, there are sectorial ones (such as the Sectorial Conferences). Their agreements are not binding.

10 · Are there central independent regulatory agencies which regulate or control certain economic sectors (energy, stock markets, telecommunications…)? If so, are these federal or state? How are their members selected? If there is a federal agency, do States participate in the selection process of its members? If so, how do they participate?

United States of America

In the economic arena there is the Federal Trade Commission, Federal Power Commission, the Interstate Commerce Commission and the Fed-

eral Communications Commission. These are all federal bodies but many states have counterparts that serve the same functions. The most common are utilities and alcoholic beverage control commissions. Federal Commissioners are appointed by the president, confirmed by the Senate, with mixed political party representation. States do not participate in selection. Some state utility commissioners are elected, but most are appointed by their governors.

Canada

Yes, there are such regulatory agencies and they are under either federal or provincial control, depending on their mandate. For example, telecommunications are a federal jurisdiction, and consequently the Canadian Radio-television and Telecommunications Commission (C.R.T.C.) is a federal regulatory agency the commissioners of which are appointed by the federal Cabinet (one commissioner being appointed to 'represent' each province or region or territory). Labour relations being a divided field (with the Federal Parliament having jurisdiction over the labour relations of federal public employees and private employees of companies and businesses under specific federal control, like banks, television channels or air carriers, and the provinces having jurisdiction over all other labour relations), there exists a provincial Labour Relations Board in each province and territory, as well as a Canadian (national) Labour Relations Board.

Since provincial jurisdiction over "property and civil rights" has been interpreted as extending to securities regulation, there exist presently 13 provincial and territorial securities commissions or equivalent authorities. The provincial security commissions operate under a passport system, with the approval of one commission essentially allowing for registration in other provinces. However, there have been strong demands from industry groups for the creation of a national securities commission and the present federal government has announced its determination to go ahead with such a project. Several provinces have voiced their opposition and the federal Cabinet has forwarded a reference to the Supreme Court of Canada to have it give an advisory opinion on the question. The creation of a national securities commission by federal statute could probably be supported as a «general regulation of trade» under the "second branch" of the commerce power (see answer to question 4 above).

Australia

Yes, there are many such bodies. For example, the Australian Securities and Investments Commission ('ASIC') is Australia's corporate, markets and financial services regulator. It is a body established by Commonwealth legislation. Pursuant to an intergovernmental agreement, the Commonwealth is required to consult with the States before making appointments to ASIC. The Reserve Bank Board also plays a crucial role in Australia's financial regulation. The Reserve Bank of Australia is Australia's central bank and conducts monetary and banking policy. Its members are chosen by the Commonwealth Government.

Other regulators include: the Australian Competition and Consumer Commission, the Australian Prudential Regulation Authority, the Australian Energy Regulator and the Australian Communications and Media Authority. All are Commonwealth statutory authorities and their members are appointed by the Commonwealth, pursuant to the legislation establishing them. In some cases, however, consultation with the States is required by intergovernmental agreements or takes place on an informal basis.

Mexico

Yes, this type of agencies exists and they are federal only.

Federal Antitrust Commission: its members are appointed by the President of the Republic, with the approval of the majority of the Senate or the Standing Committee if the Senate is not in session.

Federal Telecommunications Commission: members are appointed by the President of the Republic.

Water National Commission: the general director is appointed by the federal Executive.

Bank and Securities Commission: the president is appointed by the Secretary of Treasury (federal).

Energy Regulatory Commission: it has 5 members, counting its president, appointed by the federal Executive upon nomination by the Secretary of Energy.

Brazil

During the 1990s, Brazilian regulatory institutional model changed

dramatically towards a system based on central independent regulatory agencies. These agencies regulate sectors such as telecommunications, audiovisual market, electricity, pharmaceuticals and health surveillance, oil and gas, aviation, etc. Federal independent agencies' directors are nominated by President, after Senate confirmation. Senate confirmation is the only state participation in this selection process.

States can also create independent agencies, with directors indicated by Governor. However, these state bodies are limited to a few economic sectors (e.g. state public transportation, local state public utilities specific listed in the Constitution, such as local natural gas distribution).

Argentina

In our country, there are institutions that regulate and control certain economic sectors. Some of them will be analyzed.

Stock market: Law 17.811 of 1968 created the National Commission of Stocks, as an independent agency with jurisdiction in all the country. Its board is formed by 5 members appointed by the President of the Republic. The Commission depends on the Ministry of Economy.

The function of the Commission is to regulate, control, authorize and investigate the public offers of stocks and the capital market. Even if different Stock Exchanges exist in the country, federal authorities have power over these issues.

Energy: even if provinces have powers over this issue and some own public utility companies, given the interconnection of the entire electrical network, the Federal Government regulates the sector as the constitutional commerce clause establishes.

Law 24.065 of 1992 establishes the general principles of the national electrical system, which is considered a public service, and the following institutions: "Secretaría de Energía de la Nación" (National Economy Secretary)-within the Ministry of Finance — which monitors other institutions, such as: a) "Ente Nacional Regulador de la Electricidad" (Power Regulatory Agency) which is an independent body that applies the regulations and has a Board formed by 5 members — 2 are proposed by the Energy Federal Council — appointed by the Executive Power; and b) the "Despacho Nacional de Cargas", which is a public company that managed the national electric interconnected system.

The Energy Federal Council is formed by the Provinces, being, thus, an expression of federalism of "cooperation" or "concert".

Regarding telecommunications, the current legislation (Act num. 26.522 de 2009) assigns the regulation and management of the radio electric spectrum to the federal government, in particular, to the Executive Power. Within the Executive Power, a Federal Authority of Audiovisual Communication Services will implement the regulations. This Authority is subordinated to the Media Secretary of the Head Office of the Cabinet of Ministers.

This Federal Authority will have 5 members, 2 of which will be proposed by the Audiovisual Communication Promotion and Monitoring Bicameral Commission.

This Act also created a Federal Council to advice the Federal Authority, composed by several members and a representative of each Province.

Some aspects cast doubt about the constitutionality of this Act. We agree with these challenges, but we will only mention one critique: article 32 of the Constitution bans the issue of laws that restricts freedom of press or that establish federal jurisdiction over this liberty. However, previous national laws that granted the federal government power over this issue were declared constitutional by the National Supreme Court in conflicts filed by the Provinces which have issues laws regulating this matter. This confirms the centralized trend of the Supreme Court decisions.

Telecommunications: Decree num. 1185 of 1990 the National Telecommunications Commission was established, depending on the National Ministry of Public Works and Services. This commission is in charge of applying the National Telecommunications Law. It has jurisdiction over the whole country and is composed of 5 members appointed by the President of the Federation.

Gas: Act 24.076 of 1992 the company "Gas del Estado" was privatized and the Gas National Regulatory Agency was created in the Economy and Public Works and Services Ministries in order to regulate and control the transportation and distribution of gas in the whole country. This institution is independent and to ensure decentralization, the participation of provincial representatives from the different areas of gas distribution. Its board is formed by 5 members appointed by the National President.

From the analysis of these economic sectors, the centralized direction of the National Government is confirmed. The main argument to support this role has been the commerce clause (art. 75.13) which gives the federal

government power over interprovincial trade. This rule has been expansively interpreted, encroaching upon provincial powers and, thus, our federalism.

Provinces have a scarce, if any, participation in the boards of the different institutions. And this even if the 1994 constitutional amendment supposed a great step towards decentralization.

To this extent, article 42 of the National Constitution establishing consumers and users rights provides an example: "the legislation will establish the procedures to prevent and solve conflicts and the regulatory framework of public services under federal power, providing for the participation of consumers and users associations and of the affected provinces in the institutions".

We cannot forget that article 124 of the Constitution, among other issues, assigned the property of natural resources to the Provinces. This implies that the regulation of hydrocarbons and fishing has to be adapted to this constitutional mandate, and, in particular, regarding the scope of provincial property in the Argentinean continental platform which has to extend up to 200 miles.

Unfortunately, the National Congress has not amended the legislation to observe the spirit and the text of the Federal Constitution.

India

The Constitution does not provide for any Federal or State agencies for the regulation of the economic sectors. However, the Federation as well as the States have established several such agencies including statutory bodies, public corporations, societies, etc. for the purpose of regulating those economic activities which fall within their respective jurisdictions.

United Kingdom

The UK state depends heavily on agencies for crucial functions including the regulation of utilities, competition, finance, food safety, electoral administration, occupational safety and health, and transportation safety. These are all agencies of the UK government. Specifically, it has the powers to regulate in these areas under the devolution legislation, and it has chosen to use these agencies.

Germany

There are various central regulatory agencies, the most important are: the Bundesnetzagentur (network agency) for electricity, gas, telecommunication, postal services, and railway. They are federal agencies. Their members are selected by the federal government, though there is an informal coordination.

Austria

These agencies are of a federal nature. Normally, the Länder do not participate, but there are exceptions: For instance, they are represented in the consultative committees that advise the Federal Minister for Economy in matters of electricity and natural gas.

Swiss Confederation

Yes, there are. One of the most important is the "BAKOM"/"OFCOM", the federal bureau of communication, which implements all federal regulation on telecommunications. It is a purely federal power. In the field of energy, there are collisions between state and federal powers. In general, the power over energy facilities is a federal one, while the States decide on land use. This has created significant challenges of coordination, which have been remedied by a closer cooperation and coordination between States and the Federation, without having founded a common management agency.

Cooperation between States is through interstate treaty (interstate compacts) and has an important tradition. The possibility that the Confederation participates in a cooperative approach is relatively new, and is rarely applied (see infra IX.3).

Belgium

Some economic sectors are regulated or controlled by an independent agency, created by the legislator. The members of these independent administrative bodies are appointed by the Cabinet of Ministers in a royal decision. These institutions have a federal or a federated nature depending on which layer exercise the specific economic power. At the federal level,

for example, IBPT (Belgian Institute of Postal Services and Telecommunications) was created to control and organize the telecommunications sector. In the energy sector, the CREG deals with the regulated sectors which are the transportation and distribution of power and gas. Nevertheless, regional regulators deal with the regional powers.

Italy

In many sectors there are authorities, constituted as "independent administrative authorities".

The most significant examples are:

—Antitrust Authority on competition and market.
—Authority on electricity and gas.
—Authority on communications.
—National Commission on business and the stock market.
—Private Insurance Monitoring Institute.

These, all created by central government laws with different legal nature (in some cases they are truly public companies; in other, organs of the State deprived of legal personality), perform guardian/monitoring, regulatory and quasi-jurisdictional functions.

The law (state) ensures the independence of the chief-officials of these bodies of authority through special appointment procedures, through the establishment of a long term of mandate and through their no-re-election, or by setting appointment requirements to ensure their independence from the state and the government. This is supposed to (should) be legally based, outside the political influence and management of the State. These are also, for the same reasons, far from any form of regional political control.

Only regarding the Authority on Communications, the establishment of an authority at the regional level is provided: the Regional Committees for communications.

Spain

There are federal regulatory agencies for several economic sectors (Securities Exchange, Energy, Telecommunications, Antitrust, Bank of Spain…). The majority of the new state constitutions establish the partici-

pation of the States in the nomination of some of the members of those agencies. However, currently the Federation has not yet enacted the laws that should regulate these participation mechanisms. States participate in some of the agencies, and when they do, it is always in the advisory, not in the decision-making, boards.

Some states, not all, have this type of institutions; they are less numerous (usually when they have agencies, these deal with antitrust, data privacy protection).

As it is pointed out before, the Decision 31/2010 of the Constitutional Court, in relation to the new Catalan Charter of Autonomy, declared these participation provisions not legally binding; therefore, the federation has absolute freedom to comply, or not, with these provisions. It also stated that, if the federation desires to comply with these provisions, the participation of States would be constitutional as long as it is limited to consultative bodies.

VII

URBAN DEVELOPMENT AND LAND USE POWER

SUMMARY: 1. Which level of government establishes the framework for urban development and land use? 2. Which level of government places limits/conditions on private property? How is the institution of private property regulated in your country? 3. Which layer of government has the power to regulate urban development? If the different levels of government have to agree upon these decisions, which are the issues decided by the highest administration participating in the process? 4. Is public property owned by the Federation, a State or any other public entity under the same regime as private property? If not, what are the main features of the public property regime? Which level of government — federal and/or state — has power to regulate public property regime (acquisition, management, alienation, etc.)? Which level of government — federal and/or state — has power to regulate expropriation for public purposes? Do state powers regarding land use (environmental, urban development, etc.) cover federal infrastructures and federal land? Or does the federal nature of those limit state power? Does public property owned by any of the levels of government have any effect on the distribution of powers? Does expropriation of private property have any effect on the allocation of powers?

1 · Which level of government establishes the framework for urban development and land use?

United States of America

With the exception of federal questions of due process, commerce, and other constitutional matters this is entirely a state government matter. Local matters in the U.S. come under the *ultra vires* rule, which holds that political subdivisions possess only those powers expressly conferred by charter or law and no other powers. States normally delegate land use to localities under "home rule," a broad delegation of power. For the 20th Century states have generally allowed localities to "zone at will," but concern over loss of farmland, local officials in collusion with developers, and lack of enforcement of classifications have led to gradual state centralization of land use. Other aspects of urban development have also come under greater state control, for example the use of economic development incentives like tax relief are subject to many more controls.

Canada

The provinces have that role, since they are invested with jurisdiction over "property and civil rights" and over municipal institutions. In practice, provinces create municipalities and grant those municipalities the power to establish the framework for land use and zoning and the power to regulate accordingly.

Australia

The State Governments exercise powers with respect to urban development and land use. Local government bodies are also given powers under State laws and State plans to approve or reject some forms of urban development or land use.

Mexico

Urban development and land use — which in Mexico is called "human settlements" — is a "concurrent power" (that is, a shared power). The Federal Legislature distributes this power among the different layers by the "Ley General de Asentamientos Humanos" (General Act of Human Settlements).

Brazil

Municipalities establish the framework for urban development and land use (Articles 30, VIII and 182), but they are bound by federal general rules. According to the Constitution, the Federation is responsible for establishing guidelines for urban development (Article 22, XX). Municipalities have powers regarding local urban planning, according to a principle of predominance of interest (Articles 30, VIII and 182). States have less importance in this subject matter.

Argentina

The power over urban development and land use is assigned essentially to local governments in their jurisdictions. Provinces have the constitutional duty (article 123) of providing the bases for the municipal regime,

guaranteeing their institutional, political, administrative, economic, and financial aspects. Hence, Provinces have to define the scope and content of the local autonomy; they can define different tiers of municipal governments with different sets of powers. In our country, there are 23 different local regimes, that is, one for each province. It must not be forgotten that after the 1994 constitutional amendment, Argentinean federalism has four different governmental levels. Regarding its nature, we have argued that municipalities are truly local States.[1]

As for environmental protection, article 41 of the Federal Constitutions establishes that the Federal Government has to issue a Law establishing the minimum standards, which might be completed by Provinces exercising their powers.

Besides, also related to the territory, the Constitution authorizes Provinces to create regions for the economic and social development, which might have an impact in the territory. Municipalities have power over intermunicipal and interjurisdictional relations. This allows them to take part on the integration process, both national and international.

India

Urban development is not specifically mentioned in the legislative lists, but "Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; … land improvement and … colonization" are within the exclusive jurisdiction of the States. Acquisition and requisition of property is within the concurrent jurisdiction of the Federation and the States. As the express powers are interpreted liberally and broadly, the States carry out the urban development. Since 1992 by an amendment of the Constitution urban planning including town planning and regulation of land use and construction of buildings have very specifically been brought within the jurisdiction of municipalities, which have a distinct constitutional status but subject to the provisions of the Constitution are within the regulatory power of the States (Part IX-A and Schedule XII).

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1 Hernández Antonio María, "Derecho Municipal", Depalma, Buenos Aires, 1997 and "Derecho Municipal"-Parte General, Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de Méjico, Méjico, 2003.

United Kingdom

Devolved administrations are responsible for land use and urban development. The devolved administrations, like the UK government in England, typically let local governments deal with smaller issues and reserve the larger issues to themselves.

Germany

The legislative power is attributed to the Federation (Baugesetzbuch), whereas the local development plans (Bebauungspläne) are laid down by the local authorities; regional planning lies within the competence of the States.

Austria

Urban planning and land use is a so-called "complex matter" which means that it has numerous different aspects so that numerous powers — and, thus, both the federation and the Länder — are affected. A general competence regarding urban development and land use is held by the Länder, but the more specific aspects of spatial planning are split between the federation and the Länder. For example, if the federation is responsible for water law this will also imply the power to enact specific spatial planning with regard to rivers or lakes. If the Länder are responsible for nature protection law, this will also imply the power to enact specific spatial planning such as nature parks etc.

Swiss Confederation

The Federation has legislative power over principles and can fix the most fundamental bases. States have the legislative power over what has not been regulated by the Federation. It is interpreted that the Federation has no power to define land use particularities. But the federation defines the principles, criteria, goals, instruments and types of measures that can be used by States to specify zoning and land use. The most fundamental principles are already established by the Constitution itself and must be observed by both federal law (principles) and by state law. The goal of all legislation must be proportionate and allow a reasonable use of land and a

rational land occupation. States define their laws, through plans and areas, the specific application of these principles in their territory.

Belgium

Regions are entrusted in broad terms of the most important responsibilities in the organization of regional life. This includes the urban development powers, which includes: the regulation of the system of roads; the acquisition and regulation of craftwork and industrial lands, services lands, or other lands to attract investment. This power also includes the investment to equip the industrial areas close to harbours, urban remodelling, and changes in the location of economic activities.

Urban development and land use is a regional competence. As the constitutional Court emphasizes, this powers knows of no exception. The region also adjudicates the individual cases that might arise with the implementation of urban operations.

Italy

The subject-matter "land use and planning" is included among the subjects of concurrent regional power, that is, it has to be exercised within the limits of the principles laid down by a law of the central state. This state law does not yet exist and the Regions have legislated on the subject observing the rules and principles which can be identified in the existing state law. This creates considerable uncertainty about the effective scope of regional powers. Recently, the state has enacted legislation (the so-called "piano-house") with which seeks to foster the construction activity allowing the enlargement of the houses within a limit of 20%. The regions have adapted legislating according to the terms of application of state law.

The scope of the subject-matter is also discussed which should coincide with the notions of "planning" and "construction." Matters, such as the "protection of the environment, ecosystem and cultural property" (art. 117.2.s), fall outside this regional power despite their impact on land regulation.

Regarding infrastructure in the regime of division of powers, State conduces its own public works (which are instrumental to the exercise of state functions), but this power must be combined with those of the Regions on the management of its own territory; an agreement should be

reach, for example, about the location of the works. This is the source of many disputes, which are delaying the works.

Spain

The legislative power over urban development and land use is state power according to the constitutional texts. However, the Federation has legislative powers over connected issues such as regulation of the economy, regulation of the environment, etc. In practice, the federal legislation deals with specific questions of urban development and land use. The new State constitutions try to guarantee the exclusivity of this state power. Nevertheless, the already mentioned Decision 31/2010 of the Constitutional Court, in relation to the new Catalan Charter of Autonomy, limited the different attempts to ensure the exclusivity of state powers.

2 · Which level of government places limits/conditions on private property? How is the institution of private property regulated in your country?

United States of America

Mostly the states, but the federal government has become involved from time to time. In a landmark case, *Kelo v. City of New London* (125 S.Ct. 2655[2005]) the Supreme Court included condemnation by eminent domain for public use requirement of the 5th Amendment. It held that "there is no basis for exempting economic development from our traditionally broad understanding of public purpose." It sustained the city's taking of a private home for the development of a shopping center, considered by many to be a federal encroachment on state land use regulation power.

Canada

As noted above, the provinces have constitutional jurisdiction over "property and civil rights" and over municipalities. Any limit on private property must be provided for in a statute or in a regulatory instrument adopted under statutory authority.

Australia

Laws with respect to property are usually derived from the common law or from statutes enacted by the States. The Commonwealth and State governments can compulsorily acquire property, however the Commonwealth is subject to a constitutional requirement that any such acquisition be on 'just terms'. The States are not subject to such a constitutional requirement (and a referendum to impose such a condition on the States failed in 1988). However, in practice each State has enacted legislation providing compensation for the compulsory acquisition of property by the State.

Mexico

Legislative power is shared between the federal and state legislators. According to this, the Federal Congress has enacted the "Ley General de Asentamientos Humanos" which defines which policy issues correspond to the Federation, which to the States, and which to the municipalities. According to these bases and definitions given by this Act, the state assemblies issue their urban development acts. Subsequently, according to the latter, municipalities issue their regulations and exercise their powers, which include, among others, the following: design, issue and implement their different urban plans; evaluate the level of compliance, according to local regulations; regulate and monitor the reserves, areas, and agricultural land in the urban areas; manage the zoning according to the plans; grant the licenses and permits for land uses, construction, divisions, condominiums, etc. according to local regulations, urban plans and the reserved areas.

Nevertheless, it is important to mention that agriculture (which includes agricultural land property and the regulation of its limits in order to prevent the formation of large States) is under federal power. There is an Agricultural Law enacted by the Federal Congress and a federal department, called "Secretary of Agrarian Reform" which holds the executive power over this matter.

Property in Mexico is subject to a "strong" regulatory regime, as can be inferred from article 27 of the General Constitution, which establishes that water and land within the country borders is owned "originally" by the Nation, "which had and has the right to transfer its ownership to private individuals, constituting private property".

Apart from private property, there are two more categories: public property and social property (cooperatives and common property called "propiedad ejidal").

Brazil

Federation, States and Municipalities can regulate private property, according to a principle of predominance of interest. Most of the regulation is created and implemented by Municipalities, but they have to follow Federation and States' guidelines.

Private property is protected against takings (Constitution, article 5, XXV). Federation, States, the Federal District and Municipalities can expropriate for public reasons, but (with few exceptions) government must previously indemnify owners in cash.

The Constitution also establishes that private property should have a social function ("função social"). Urban policy, e.g., is oriented by that principle. For example: when urban property is no longer used or abandoned, Municipalities can progressively increase property taxes and eventually expropriate, indemnifying with public debt bonds.

Countryside property regulation is an issue in Brazil, where agrarian reform is a compelling debate. This country's history is marked by unequal distribution of land, with roots in a plantation system. Given this framework, land reform has become a requirement of social classes excluded. Several social movements have organized around this purpose with great emphasis on the MST (Movimento dos Trabalhadores Sem Terra — Movement of Landless Workers). The Constitution of 1988 establishes rules and principles concerned with Brazil's unfair land distribution in the countryside.

Among these norms, the current Federal Constitution enshrines the social function of rural property in article 186:[2]

"Article 186. The social function is met when the rural property complies simultaneously with, according to the criteria and standards prescribed by law, the following requirements:

I — rational and adequate use

II — adequate use of available natural resources and preservation of the environment

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2 Non-official translation.

III — compliance with the provisions that regulate labor relations
IV — exploitation that favours the well-being of the owners and laborers".

The social function of rural property is a highly disputed concept, since it is fulfilled when the open and unclear requirements of Article 186 are observed. In any case, to combat poor distribution and unproductive land, the Constitution establishes that Federation (not States) may expropriate rural property that is not performing its social function (Article 184). This special type of federal expropriation does not require cash compensation. Owners will be compensated with public debt bonds. Difficulties generated by article 186 *open textures* made this powerful tool of agrarian reform dead letter, though.

Argentina

Private property regulation is assigned to the National Congress; according to article 75.12, it has power to issue "Civil, Commercial, Criminal, Mining, Labor and Social Security Codes, in a single or separate laws; these codes cannot modify the local jurisdictions: they will be applied by both federal and provincial courts, depending on whether these have jurisdiction over people or goods…"

India

Though, as stated in the previous question, States primarily regulate land and land use, economic and social planning and acquisition and requisition of property are in the concurrent jurisdiction of the Federation and the States. Accordingly while primarily the regulation of private property lies with the States, the Federation can also regulate in some matters. The Federation has done so in the past by nationalization and regulation of private properties, industries and business.

United Kingdom

In the case of land use and urban policy, the answer is almost always the devolved administration or a local government acting as a delegate. There is extensive judicial oversight over planning rules, mostly in the rules about legal challenges to specific planning decisions, but courts defer to devolved legislation.

Germany

As far as private law is concerned: the Federation. Limits on private property under public law may be determined by federal as well as by state law.

Austria

Private property is a fundamental right entrenched in the Federal Constitution and additionally in some Land Constitutions. It is possible both for the federal and Land legislatures to restrict this right if this is in the public interest and if this is proportional.

Swiss Confederation

The legislative power over private law is federal, including property law (which contains land ownership). Private property is a federal constitutional right of the citizen. Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms protects in Article 1 private property. Switzerland signed this protocol, but so far it has not ratified it. The Constitution requires all state and federal agencies to protect property rights, arising from private law, and some from public law. This includes rights to movable and immovable property, the limited rights on personal and land property, obligations, property over intangible rights, etc.

Belgium

Property is regulated by a federal law: the Civil Code. Takings regulation is divided since both the federal State and the federated collectivities can take property for public and general interest uses.

Italy

If by "status of private property" means all the limits that the law may impose, in general, on private property and its transmission, in Italy this status is part of private law ("civil law") reserved exclusively to the central state.

But if by "status" we refer to the possibility of establishing, through the exercise of administrative powers (e.g. in urban planning and construc-

tion), limits on land ownership, status is included in the notion of "land use" and "urban planning" and it is, thus, a regional concurrent power.

To clarify the system: on land expropriation for public interest purposes, the fundamental rules must be established by State Law, the Regions cannot adopt different regulations on takings. However, the organization of public functions or procedures can be differentiated from the main regulation of property.

Spain

The Federation is assigned the legislative power over the general regulation of property. Right to property is a constitutional one, but it is not a fundamental one. The exercise of the urban development prerogatives associated with the right to property is subject to the constitutionally mandated principle of social function of property. The Federation sets the scheme of rights and duties of property owners, and these are concreted by the urban development and land use regulations enacted by the states. The rights and duties vary depending on the type of land, its objective characteristics and the assigned use the land has in a specific moment. The general framework set by the Federation included the right to build installations to use and enjoy the land; to construct if it is authorized in this land and it fulfils all the requirements; and to participate in the urbanization works. On the duties side, the following can be listed: use the land in a way compatible with the urban development and land use regulations; build within the required terms; in rural land, preserve it; and pay for the works and infrastructures needed given the type of land.

3 · Which layer of government has the power to regulate urban development? If the different levels of government have to agree upon these decisions, which are the issues decided by the highest administration participating in the process?

United States of America

It is mostly a state matter, with the state administration as the highest level that agrees on decisions. Federal involvement is only (and very infrequently) if a federal question is involved.

Canada

The provinces have this power and they can delegate its exercise to municipalities. The federal government has no say in this matter, except when federal property is involved (see next question).

As an exception to the above stated principle, the federal Parliament has been recognized the authority to regulate urban development in the National Capital Region, comprising the city of Ottawa, the national capital, and the surrounding area (located in Ontario and Quebec). This particular jurisdiction, carved out from the provincial power over property and civil rights, is supported by the "national dimensions" doctrine, under which subjects originally under provincial jurisdiction but having attained a national dimension come under federal jurisdiction.

Australia

The States regulate urban development. Some of their powers with respect to urban development are delegated to local government, but the State can always legislate to resume control if it objects to a local government decision. A State may also establish statutory authorities to deal with aspects of urban development. For example, in New South Wales the Sydney Harbour Foreshore Authority deals with some urban development matters around the foreshore of Sydney Harbour.

Mexico

Urban development is a "concurrent power" (that is, a shared power) among the three levels of government. The Federal Congress has passed the "Human Settlements General Act", which establishes the mandatory guidelines for state legislation regarding urban development. State laws establish the rules and guidelines to be followed by municipalities exercising their powers regarding urban development.

Brazil

Federation establishes general rules of urban development (Articles 21, XX and 24, § 1), which may be developed by States (Articles 24, I) and Municipalities (Article 30, I, II and VIII). Practically, urban development

policy is carried out by Municipalities. The guidelines for urban development are established in a federal statute called "Statute of the City" ("Estatuto da Cidade" Law 10.257/2001). The creation of these guidelines does not require a formal agreement. It is approved as an ordinary federal statute (i.e. voted by Congress and sanctioned by President — who has a veto power).

Urban policy has different peculiarities in each Municipality. Every city enacts a *director plan*, with rules regarding urban land use (e.g. zoning norms).

Argentina

The answer to this question can be found in question one of this section.

India

As mentioned in response to Q. 1 above, urban development as such is not assigned either to the Federation or the States but land and its use is assigned exclusively to the States and urban development is now specifically assigned to the municipalities within the States.

United Kingdom

Urban development policy is devolved to all three devolved administrations, and all three devolved administrations, like the UK government in England, exercise tight control over the activities and powers of local governments.

Germany

See above 1.

Austria

Urban development is administrated by the municipalities, which are, however, bound to the respective federal and, in particular, Land laws in this field.

Swiss Confederation

Land use planning is a state power. The cantons (states) define land use in a basic plan distinguishing rural, agricultural areas, buffer zones, danger zones, etc. These plans should be based on a development strategy planning. They should indicate the goal of rural zones and their use, how it envisions traffic development, environmental protection, etc. The Federal Council (the federal executive) must approve these master plans and consider whether they respect the principles established by the federal Constitution and federal law on planning and, in particular, if the plan is compatible with the plans of the neighbouring states. Once approved by the Federal Council, the plan is binding on all authorities, both federal and state, and also to neighbouring states. Based on this basic plan, the municipalities define their zoning plans. These plans bind private landowners.

Belgium

The power to regulate urban development and land use is regional, without any exception.

Italy

In Italy has a complex system of urban planning. The State may retain (using the conditional form is necessary since many doubt the constitutionality of this provision) the ability to define "basic features of national planning." Regional laws, in general, would provide two levels of territorial planning above that of the municipality: a regional synthesizing the planning of Local Authorities and the need for transformation of the territory expressed by the State; and another provincial, defined as "coordination", i.e. aimed at resolving any discrepancies between the plans of the municipalities to make it operative. Ultimately there is the municipal urban planning level, which was established in 1942 by a state law.

The relationship between the content and legal effects of the different levels of planning is governed by regional legislation.

Spain

States decide over urban development but cities formulate the proposal regarding the planning of land use in their boundaries. The superior authority approves the urban plans formulated by municipalities or other local governments with a scope broader than a single town. The municipal government approves the plans with a scope smaller than the municipality and issue proposals for the plans with a municipal scope.

4 · Is public property owned by the Federation, a State or any other public entity under the same regime as private property? If not, what are the main features of the public property regime? Which level of government — federal and/or state — has power to regulate public property regime (acquisition, management, alienation, etc.)? Which level of government — federal and/or state — has power to regulate expropriation for public purposes? Do state powers regarding land use (environmental, urban development, etc.) cover federal infrastructures and federal land? Or does the federal nature of those limit state power? Does public property owned by any of the levels of government have any effect on the distribution of powers? Does expropriation of private property have any effect on the allocation of powers?

United States of America

No, federal and state property is under separate regime, regulated by that body. Neither entity can tax the other. Each level regulates and manages its own property. Either level (and by state legislation local governments) can exercise expropriation (with payment) with *public use* restrictions always. State powers do not include regulation of federal land or properties. Each regulates its own. Public property does not affect distribution of powers, although the trend is for federal and state lands that are adjacent to one another to be collaboratively managed by mutual agreement, usually by memorandum of understanding. Eminent domain, with the exceptions of 5th Amendment cases, does not affect the distribution of powers.

Canada

In general, the federal Parliament has the authority to legislate over federal public property and the provincial legislatures have the same authority in relation with provincial public property. However, there are two exceptions to this rule. While legislative authority over "Indians and the lands reserved for the Indians" and "sea coast and inland fisheries" is federal. Lands reserved for Indians and fisheries are generally part of the public property owned by the province in which they are situated.

The rule is that provincial laws or general application will apply on federal public lands, unless they affect the "core" of the federal property or of a federal jurisdiction.

Regarding provincial "public property", zoning and land use regulations are applicable to all entities which are not "agents" of the provincial Crown, even if the functions they perform are public (e.g. school boards). Agents of the Crown, on the other hand, will be exempted from these rules, unless these rules specifically provide that the Crown is bound by them (because of the principle according to which no law binds the Crown unless specifically provided).

If a property qualifies as public property, whether provincial or federal, it will be governed by public law, either provincial or federal.

Finally, the power to expropriate private property is considered to be "incidental" to all heads of legislative jurisdiction, federal or provincial. In other words, the power to expropriate will be considered to be implicitly included in every legislative head of power insofar the effective use of that power makes expropriation necessary.

While the federal Parliament can expropriate land or property owned by the provincial Crown, the opposite dubious, the dominant opinion being that it is not possible (for reasons to complex to be explained here).

Australia

The underlying title to all land in Australia (known as the 'radical title') is held by the States (or the Commonwealth, with respect to the Territories). Land that has never been granted or sold is known as 'Crown land'. It may be subject to native title claims unless it has been used in a manner that is inconsistent with the continuing exercise of native title. Crown land is subject to statutory regimes in the States concerning its use

and its grant or sale to others (see, e.g. *Crown Lands Act* 1989 (NSW) and *Crown Lands Act* 1929 (SA)). The position in the self-governing territories is more complex. For example, s 69 of the *Northern Territory (Self-Government) Act* 1978 (Cth) provides that all Commonwealth interests in land in the Territory are vested in the Territory. Native title is also now subject to a statutory regime at both the Commonwealth and State levels (see eg *Native Title Act* 1993 (Cth) and *Native Title (South Australia) Act* 1994 (SA)) although common law native title rights are preserved by that statutory regime. On native title, see further: Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Law Book Co, 2003).

In addition to 'Crown Land' the Commonwealth and the States may acquire land that is owned by persons under the general laws concerning private property. This land, even if it is acquired by a State, does not fall within the Crown land regime, unless the title to the land is cancelled and it reverts to its original status as Crown land.

The States may compulsorily acquire land. Unlike the Commonwealth, they are not constitutionally required to pay just terms compensation for any land that they compulsorily acquire, although as a matter of practice State laws require the paying of such compensation. See, eg *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW).

The Commonwealth Government, under s 51(xxxi) of the Commonwealth Constitution may acquire property 'on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'. Section 52 of the Constitution gives the Commonwealth exclusive legislative power with respect to 'the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes'. Hence State planning laws would not, of themselves, apply to Commonwealth places. However, because many areas of law are primarily covered by State laws, the Commonwealth Parliament has enacted the *Commonwealth Places (Application of Laws) Act* 1970 (Cth) which applies existing State laws as Commonwealth laws to every Commonwealth place within a State, except to the extent that those laws would breach other constitutional prohibitions if enacted by the Commonwealth. This means that State planning laws would then apply to Commonwealth places, but as Commonwealth laws.

In some cases the Commonwealth may legislate to ensure that State planning laws do not apply to a Commonwealth place or to a particular development within Commonwealth power, by establishing an inconsist-

ency under s 109 of the Constitution. For example, State planning laws were excluded from applying to the development of a third runway at Sydney airport[3] and are excluded from applying to the construction of telecommunications facilities.[4]

The ownership of public property by the Commonwealth or the States does not tend to affect the allocation of powers, however, the Commonwealth does obtain exclusive power to legislate with respect to Commonwealth places once they are acquired for public purposes.

Mexico

The starting point to understand the scope and limits of property in Mexico is article 27 of the Constitution which establishes the concept of "original property".

This concept is an innovation introduced by the 1917 constituent assembly and, according to some scholars, it is an idea derived from the colonial era in the following sense: Spanish King was the "lord" of the lands called "Indias" during the colonial time, the 1917 Constitution established that the Nation will have the "original property" over land and waters.[5]

In the same vein, the Supreme Court has recognized that:

"The Mexican Republic, after gaining independence from the Colony, assumed all the rights to property that the Kings of Spain had. All this wealth was assumed by the Nation, not by the divisions that existed at that time (provinces, territories, captaincies, etc.), and, thus, not to the States of the Republic which were not even defined at that time".[6]

This concept — "original property" — implies that all the ways to acquire property in the Mexican legal system are derived, not original. Public, social, and private properties are subjected to this idea of "original property" hold by the Nation.

Regarding private property, this secondary character is clear from the last sentence of the article 27 first paragraph stating that the Nation has the

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3 *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453.

4 *Telecommunications Act* 1997 (Cth), Schedule 3, cl 37; *National Transmission Network Sale Act* 1998, s 24.

5 González, Ma. del Refugio, "Del Señoría del Rey a la Propiedad Originaria de la Nación", *Anuario Mexicano de Historia del Derecho*, vol. V, 1993, pp. 129 y ss.

6 Weekly Judicial publication of the Federation. Volume XXXVI, p. 1067, October 15, 1993, (majority 14 votes).

right to transfer its dominion over land and waters, constituting, thus, private property.

But not all goods can be appropriated as private property. In fact, the Constitution expressly establishes that there are certain types of goods that are part of the "direct dominion" of the Nation or that are owned by it (national property), not being able to be appropriated by private individuals. The Nation's dominion over these goods is *inalienable and not subjects to a statute of limitations*. All these concepts are, at the same time, the constitutional basis for public property in Mexico.

The goods under "direct dominion" of the Nation are the minerals, including oil and the other hydrocarbons; while the goods classified as "national property" are, in general, the hydro resources within the national territory (including territorial waters).[7] Regarding these goods, the Nation has the rights to use, transfer, and exploitation. That is, the Nation is the direct owner of all these goods and has the powers bundled in property over them. However, article 27 allows the transfer of the exploitation or use of these goods (except for oil and radioactive minerals) to private individuals or companies incorporated according to Mexican laws, through concessions granted according to their respective regulations by the Federal Executive.

The states' and municipalities' right to acquire and posses is established by section VI of article 27: "The States, the Federal District, and the municipalities can acquire and possess all the real property necessary to deliver public services". This article is criticized because it only refers to "real property" necessary to deliver "public services". There is a proposal to amend this provision to widen it in order to embrace all types of property necessary to carry out public functions and deliver public services.

The same section (article 27.IV) states that federal and state laws — in their jurisdictions — will establish which public use reasons may justify a taking. The administrative authority will declare when this is the case according to such laws. In other words, both the federation and the states can take property in their power spheres. In some states, even municipalities can expropriate property (for example, Baja California Sur, Coahuila, Puebla, Sinaloa).

The public property regime is clearly centralized since the federation controls the minerals. The Constitution, according to the interpretation by

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7 There are some water resources which fall outside the concept of "waters of the Nation".

the Supreme Court, also establishes that the "natural resources that can be appropriated" (which can be appropriated by private individuals, but subject to a "strong regulatory regime" in order to ensure its preservation and its reasonable use; for example, wild animals, both marine and terrestrial, and flora, including forests and rainforests) can be regulated only by federal laws. The Supreme Court has interpreted the term "nation" as "Federation".[8]

Finally, and regarding the island territory, article 48 of the General Constitution establishes that islands and reefs which are part of the national territory, the continental platform, the submarine bases of the islands or reefs, the territorial waters, the interior waters, and the area located in the national territory will depend directly from the federal executive, except those which have been up to this day under state jurisdiction.

Brazil

Federation, States, the Federal District and Municipalities are also property owners in an almost private regime. The Federal Constitution mainly distributes public property and Federation regulates it. States and Municipalities powers regarding land use partly covers federal infrastructures and federal land. For example, a federal property shall observe Municipal zoning rules. The distribution of public property is not crucial, but it has effects in the distribution of powers, since the Federation owns strategic natural resources, such as oil and gas.

As answered above, Federation, States, the Federal District and Municipalities can expropriate for public reasons, but (with few exceptions) government must previously indemnify owners in cash. Federation can also expropriate State property and States can expropriate Municipalities properties.

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8 "PRIVATE PROPERTY. TYPES. The 3rd paragraph of article 27 of the Constitution, assigns exclusive power to the Nation to establish the types of private property, taking into account public interest; but this power has to be understood as assigning only to the Union Congress the exclusive power to issue laws implementing the constitutional provision. Hence, any law issued by a state legislature imposing any restriction in the types of private property will be in violation of article 27 of the Constitution". Apéndice al Semanario Judicial de la Federación 1917-1954, Tesis 832, Quinta Época, p. 1517.

Argentina

Public property regime is different from private property one according to the Argentinean Civil Code. This regime applies to all the governmental levels, which have, at the same time, their own regulation of public property. Therefore, each level (federal, provincial, Autonomous City of Buenos Aires', and municipal) exercises its powers related to it. These powers include the authorization to take private property.

Article 75.30 of the Constitution has given to provinces and municipalities police powers over national utility buildings and establishments (federal public offices, Universities, arsenals, airports, national parks, etc.) not located in the Federal Capital. The exercise of these police powers cannot impair their operation. This provision was added by the 1994 constitutional amendment which aimed to enhance federalism and the autonomy of provinces and regions; before legislation and judicial decisions excluded local participation.[9]

India

In respect of public property owned by Federation and the States certain immunities from taxation of the property of the one by the other exist which are not available to private property (Articles 285 and 288). Apart from that the Constitution does not draw any difference between public and private property. Federal as well as State governments can regulate public property in the same way as they do private property. Both governments, as already noted, also have the power to regulate expropriation of property for public purposes. Ownership of public property does not have any effect on the distribution of powers. Nor does expropriation of private property have any effect on the allocation of powers.

United Kingdom

The relevant provisions of land law have been very stable across the UK for decades and were relatively easily transferred to the devolved administration. The main source of excitement in land law was the Scottish

9 See Hernández Antonio María, "Federalismo y Constitucionalismo Provincial" and "Derecho Municipal".

Parliament's decision to reform Scotland's laws on private land tenure shortly after devolution. Scotland had, amazingly, still had a form of feudal land tenure law that gave landowners enormous powers over tenants. Reforming it was a major cause of devolution campaigners, and it was a priority. It passed smoothly.

For further information about the Scottish land law reform: Laible, Janet. 2008. The Scottish parliament and its capacity for redistributive policy: The case of land reform. *Parliamentary Affairs* 61 (1): 160-184.

Germany

There is no special public property regime.

Austria

Both the federation and the Länder may own private property. Within the limits drawn by the fundamental right of property, they can expropriate persons. Expropriation itself is a so-called "annex matter", which means that if the federation or the Länder are responsible for a certain competence, they will also be responsible for expropriation in this matter.

When the Länder exercise their power of "general spatial planning", they have to heed the interests of the federation, too, since general spatial planning comprises the whole of the federal territory.

Swiss Confederation

There is no division of powers between the Federation and the States in relation to publicly owned property different from the general distribution of powers. Basic principles, in particular the guarantee of private property and the principle of legality, are under federal power.

Public goods that have a financial purpose — investments — are subject to the same regime as private goods. Private and public law is applied as it is to any other property. Publicly owned property in the strict sense, which are administrative assets, public property for public use, and public property arising from historical sovereign privileges have to be distinguished. For these, the system of private ownership changes, that is, there is a duality. Either private or public law might apply depending on the issue that arises. Private law is federal law because it was codified by the Fed-

eration according to its power constitutionally established by the federal Constitution. In the case of public law, applicable laws apply to the issue. In some cases it may be that state law is in force. The acquisition, management, sale, etc., of public goods corresponds to the level which owns or deals with the good (for example, the municipality for a school community; and the Federation for a federal polytechnic college).

Public takings may be state or federal, depending on the purpose.

In accordance with Article 75 of the Federal Constitution, the Federation has to "take into consideration" the imperatives of planning. Because of the principle of legality (cf. Article 5); the Federation must act within the borders of the law, including state and local laws. For construction projects, the Federation has to respect state and local laws and procedures, unless the Constitution or federal law grants immunity from state and local procedures to certain projects. According to the federal Constitution, "federal law prevails over state law which conflicts with it" (Article 49). Some examples are the federal laws governing the construction of federal roads (motorways) or federal railways, which include criteria and regulate the procedures. In these cases, the Federation acts in accordance with federal law, not state, but still has to "take into consideration" the imperatives of state planning, as much as possible in federal law enforcement.

Belgium

Each collectivity (federal or federated) owns certain property.

This property is regulated under the public domain regime, which is analogous to the private property one. A region cannot use its power of urban development, zoning, or land use (e.g. construction license) to encroach upon federal powers. Such an attitude will violate the proportionality principle and will attempt on the federal loyalty principle.

Italy

The regime for "public goods" is established in the Civil Code, which provides different regulations for different categories of property, whether specifically identified or determined by its objective characteristics (see the case of public domain assets), or in relation to the public interest purposes.

In addition to public domain goods, there are also patrimonial goods (not alienable while used for public purposes) and the alienable goods. The first two categories (public domain goods and patrimonial) are subject to a special regulation, subsidiary with respect to the ordinary regime which applies to alienable public goods too.

All levels of government (state, regional and local authorities) can own property (either public domain or patrimonial). All levels of government have the same rights in relation to alienable patrimonial goods as private owners have.

Since the scheme of public goods is regulated in the Civil Code, we are dealing with a matter under exclusive jurisdiction of the State.

The land use planning power does not affect the ownership of public goods: infrastructure (e.g. roads) becomes part of the assets of the entity which has built it. Conflict of powers (or necessary collaboration between different powers) arises in the field of the location of public works, if it is inconsistent with land planning (here there are problems of uncertain distribution of powers between the State — which lays down the basic lines — and regions — which are in charge of planning — and local authorities — which have operational powers in this area —).

Takings power in order to build public works is implicit in the authority to perform such works. If applicable to the central state, the expropriation procedure is also carried out by the State.

Spain

Public property can be subjected to two different regimes: public domain or private domain. The public domain regime is pretty different from private property since these are goods subjected to a public service or a general use and are characterized by the fact that they cannot be seized (not fell into foreclosure), by its inalienability, and by the fact that they are subject to the statute of limitation (constitutional mandate). In contrast, private goods owned by the public administration are under a regime similar to private property, despite the relevant privileges the Administration has regarding acquisition, defense and alienation of these.

The Federation regulates the general regime of public domain and private domain and determines which goods can be part of the public domain. Each level regulates specifically the acquisition, management, transfer, etc. of their property. The regulation of takings is federal. It includes procedure,

valuation and guarantees. There has been distribution of powers conflicts regarding takings. States can regulate the administrative institutions that will be in charge of the takings and the causes that justify a taking.

The powers of the States affecting the territory affect the federal infrastructure. The same is true the other way round. Federal laws establish mechanisms of cooperation and participation that, if there is a conflict, give prevalence to the federal powers over the state ones.

VIII

LOCAL AND MUNICIPAL GOVERNMENT

SUMMARY: 1. Does the Federal Constitution recognize local or municipal autonomy? And the State Constitutions? If so, how is this autonomy defined? What are the substantial effects arising from this constitutional recognition? 2. Is the design of the local government regime (the kind of local entities, organization, powers, human resources, etc.) under federal or state power? What local subject matters or functions are allocated to the Federation and the States? Can the Federation establish direct bilateral relationships with Municipalities or other local entities? Can the Federation intervene upon local powers by exercising federal sectorial powers or through its spending power? 3. Can States create "intermediate" local entities between Municipalities and States? Are there any intermediate local entities in your system? Do they exist only in some States or in all of them? Can States establish the territorial limits of local jurisdictions? What powers do they have? To what extent are they dependent on the States? How are the members of local/municipal government appointed or elected? Can the Federation intervene in the organization, powers or financing of these intermediate local entities? If so, how? For which purposes? 4. Are there "City-States" in your system? Which provision recognizes them? Is their regime equivalent to the States' one? Apart from these City-States, are there any Municipalities with a particular autonomous regime? Which ones? Which is the basis for the recognition of this regime? 5. How are local powers determined? Can local governments provide services or carry out federal or state powers? If so, which legal mechanisms coordinate their collaboration (delegation, assignment, etc.) with other levels of government? Is the collaboration mandatory? Are local governments obliged to cooperate? Do they have a right to receive financial funds from the Federation or the State which requests the collaboration?

1 · Does the Federal Constitution recognize local or municipal autonomy? And the State Constitutions? If so, how is this autonomy defined? What are the substantial effects arising from this constitutional recognition?

United States of America

No, municipal status is a state function. The Constitution only mentions states. When the federal courts deal with local government matters they are legally referred to as "states and local governments."

Canada

There is no constitutional basis for municipal or local government autonomy. Municipal entities are regulated by provincial legislation and can be created, abolished or reorganized at will by the provincial legislatures. Municipalities can exercise only powers delegated by provincial authorities and are, in all respects, submitted to provincial authority.

Australia

No, the Commonwealth Constitution does not recognise local or municipal autonomy. There have been two referenda concerning the recognition of local government, one in 1974 and another in 1988, but both failed. In 2010 the Commonwealth Government was supportive of the idea of a further referendum on the subject, but at the time of writing no such formal proposal has been announced.

State Constitutions all contain provisions recognizing local government as part of the State's system of government, but also recognizing the power of the State Parliament to enact laws concerning the structure and operation of local government.[1] Local Councils may be suspended or dismissed or amalgamated against their wishes, either by an Act of the State Parliament or in some cases by ministerial action. Hence, they do not have constitutionally protected autonomy.

Mexico

Article 115 of the federal Constitution does recognize municipal autonomy (the terms used in the article are "Free Municipality"). State Constitutions also recognize municipal autonomy; they refer to this institution as "Free Municipality" and they organize their regime according to the basis established by article 115.

The contents that define the autonomy of the "Free Municipality" derive from article 115:

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1 *Constitution Act* 1902 (NSW): s 51; *Constitution of Queensland* 2001 (Qld): ss 70-1; *Constitution Act* 1934 (SA): s 64A; *Constitution Act* 1934 (Tas): ss 45A and 45B; *Constitution Act* 1975 (Vic): ss 74A and 74B; *Constitution Act* 1889 (WA): ss 52-3.

a. Each Municipality will be governed by a city Council, elected by popular direct election, which will be composed by a Municipal President and the number of councillors and syndics that the municipal organic law of each state will determine.

b. The powers that the Constitution grants to the municipal government are exercised by the City council in an exclusive way and there will be no intermediate authority between them and the state government.

c. Municipalities are invested with juridical personality and can manage their budget according to the law.

d. City council may approve, according to the laws issued by the state legislatures regarding municipal matters, the police and government edicts, circulars and general administrative resolutions within their jurisdiction, that organize the municipal public administration, regulate the matters, procedures, functions and public services within their powers, and ensure city and neighbour participation.

e. Municipalities are responsible for the following public functions and services: potable water, drainage, sewer system, treatment and disposition of their residual waters; public illumination; cleaning, collection, transfer, treatment and final disposal of residues; markets and wholesale food markets; graveyards; slaughterhouse; streets, parks and gardens and their equipment; public safety (under the terms of article 21 of the constitution), municipal police and traffic; and others that State Legislatures determine according to the territorial and socio-economic conditions of the municipalities, so as their administrative and financial capacity.

Likewise, fraction IV of article 115 establishes that municipalities will freely administrate their property, which will be formed from the profits arising from the goods that belong to them and the contributions and other incomes established by state's legislatures for them, which will include in any case: real property tax, including additional rates, that States establish, as well as from taxes imposed on the division, consolidation, translation and improvement of real property or its change of value; federal contribution to the municipalities which will be determined according to the bases, amounts and terms determined annually by the State legislatures; incomes from delivering municipal public services.

Furthermore, Municipalities have powers to formulate, approve and administrate the zoning and planning of municipal urban development; participate in the creation and administration of territorial reserves; participate in the formulation of regional development plans; authorize and control land use, within the ambit of their powers and within their territorial jurisdictions, intervene in the regularization of urban land property; grant licenses and permits for constructions; participate in the creation and administration of ecological reserve zones and in the elaboration and application of ecological ordering plans; intervene in the design and implementation of public transport plans when they affect their territorial jurisdiction; celebrate conventions for the management and control of federal areas.

Brazil

The Federal Constitution recognizes municipal autonomy (Articles 1, 18, 29 and 30). According to the Federal Constitution, Municipalities are part of the federal union (article 1). Municipalities have the capacity to self-organization (preparation of the organic law), self-governance (election of the Mayor and Aldermen) legislative powers (according to the Federal Constitution) and management capacity (with its own governing imposing taxes to mantain and provide their services). Municipalities are subjected to the Federal Constitution and State Constitutions.

Despite the formal status conferred by the Constitution, there is no real substantial effect arising from this. Municipalities do not participate in the formulation of *federal volition*. They have no representatives in Senate. Furthermore, the absence of a Judicial Council mitigates municipalities' autonomy. Yet, local government has the capacity to relate directly with the Federation.

Argentina

1994 constitutional amendment incorporated in article 123 the principle of municipal autonomy: "Every Province dictates its own constitution, in conformity with article 5, assuring the municipal autonomy and regulating its scope and content in the institutional, political, administrative, economic and financial orders".

It is a question of the recognition of the legal nature of the municipalities as autonomous, that is, as organs with ability to organize themselves, and to be self-governed. This is an autonomy of political nature; hence, the base of our political decentralization begins with the municipalities.

The Provinces must establish its scope and content in their respective Provincial Constitutions, but this regulation must always respect the following dimensions of autonomy: a) Institutional, that is, the possibility of issuing their own organic municipal charter, which is a real local constitution enacted exercising a third degree of constituent power; b) Political, which entails the popular election of the local authorities; c) Administrative, so that municipalities can deliver public services without depending on another governmental order; d) Economic — financial, which entails that municipalities can collect and invest their local revenues.

All the Argentinean municipalities are autonomous, but there are differences among them. Some have "full" autonomy, with the possibility of dictating their own organic charters; others have "semi full" autonomy, which may have all the dimensions of autonomy except for the institutional one.

Today in our country, more than 115 organic Municipal charters have been approved,[2] which is the clearest signal of power decentralization.

India

Yes, it does recognize the Panchayats for the villages and municipalities for the towns as autonomous bodies. It was very specifically done by two amendments of the Constitution in 1992 introducing two separate parts and two Schedules in the Constitution (Parts IX & IX-A and Schedules XI & XII). Subject to the Constitution the Panchayats and the municipalities fall within the regulatory power of the States. These amendments have led to the uniformity of local governments throughout the country with some adjustments for tribal areas. They have also ensured that these bodies remain in existence and perform their functions effectively. These provisions have also strengthened de-

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2 For a more detailed analysis on these questions, see our book "Municipal Law", Volume 1, 2nd Ed., Ed., Depalma, Bs.As., 1997, Ch. III and VI.

mocracy at grass roots and public participation in political process and administration.

United Kingdom

Local government is a servant and creation of more important governments. In Northern Ireland and Scotland, the new devolved governments control local government and in Wales power over local government is divided between the devolved country and the UK. In England local government is an agent of central government.

There is, in general, very little respect for, interest in, or trust in local government anywhere in the UK, and so there is little opposition to interference by devolved administrations or (in England) Westminster. The only possible exception is London, whose inhabitants appreciate having a government with a Mayor even though it is weak.

Germany

Federal and State Constitutions recognize municipal autonomy.

Austria

Yes, Art 116 B-VG stipulates that each municipality is a territorial entity and is entitled to self-government (Selbstverwaltung). The Land Constitutions recognize this right as well.

The main consequence is that municipalities enjoy a sphere of "autonomy" where they can act freely on a private economic basis and where they can carry out administrative tasks without being bound by the instructions of federal or Land authorities, who have only limited rights of supervision.

Swiss Confederation

The Constitution provides for local autonomy, but leaves the definition of its content to the States, according to Constitutions as well as federal laws. Local autonomy is not defined by a general principle, but through the responsibilities and powers given by state laws. The municipality is autonomous in all matters in which state law leaves a relatively

wide margin of discretion, or where it does not fully regulate. In these areas, the municipality has the legislative power or, at least, discretion guaranteed within the limits of state and federal law. Different states have very different regulations. The constitutional guarantee of autonomy gives standing to the municipalities to defend it in the judicial bodies which vary in different states. But in any case, the Federal Court is the last instance and applies the same process provided for the protection of constitutional rights of individuals.

Belgium

The Constitution has always recognized the local autonomy principle, even though it is exercised within the regional framework. 5% of the constitutional provisions are devoted to the regulation of this issue. These illustrate the interest that the constitutional designers had and still have in the status of local collectivities.

The explanation is a historical one. No one ignores the political, economic, and cultural role of the cities — Flemish or Walloons — during the Medieval Era. Similarly, no one ignores the role of provinces or principalities within their kingdoms or empires.

The explanation has a political dimension too. The Belgian State of 1831 could not ignore the competitive relations that might arise between these old collectivities. It was important to gain control. They should be identified and their functions and resources should be assigned. Politic, administrative, and financial controls should be set; in particular, the ones related to tutelage.

The organization of a federal State cannot lose the advantages of this regime of broad decentralization. From this standpoint, the reform of the State occurred since 2001 is aimed to reduce the distance between the central power and the local collectivities power. The particular collectivities — mainly, municipalities and provinces — do not depend — in what their organization, operation, and control is concerned — on the federal State but on the regions that integrate the former. Regions become responsible for the optimal operation of local collectivities.

The decentralization does not counteract the federalization movement. On the contrary, it complements the latter. Jointly and under the control of the federated collectivities, completely autonomous, the local collectivities can collaborate in the operation of the State.

Italy

Yes, the Constitution recognizes in general local autonomy in art. 5 and names Municipalities, Provinces and metropolitan Cities as constitutive parts of the Republic (art. 114, sub-section 1) and autonomies, with their own statutes, powers and functions (art. 114, sub-section 2). Local entities do not undergo external controls on their acts, neither by the State nor by the Regions.

The Statutes of the Regions in turn contain explicit statements of recognition of the local autonomies.

It can be deduced from the constitutional provisions that state or regional law cannot suppress the constitutionally guaranteed autonomy and that the basic requirements for such autonomy are: 1) self-government, that is, the right to set up their own organisms of government; 2) regulative autonomy regarding the organization and development of the functions attributed to them; 3) political and administrative autonomy; 4) financial autonomy.

Spain

The federal Constitution proclaims the principle of autonomy of municipalities and provinces. It only establishes, however, that their governments and administrations will be autonomous and democratically elected by the people, direct or indirectly. Usually, state constitutions do not go beyond the mere reiteration of the principle of local autonomy. Some of the new state constitutions, such as the Catalan one, emphasize the principle of local autonomy and, even if it does not assign specific powers, it lists subject-matters under state powers over which the laws have to assign powers to the municipalities. It states that the exercise of local powers is only subject to a constitutionality and legality control and regarding financing recognizes that local governmental have autonomy to set their budget and spend their resources. Federal basic laws and state laws implementing them establish the local powers. The Organic Law of the Constitutional Court recognizes since 1999 standing to a group of municipalities or provinces to challenge federal or state law in a distribution of powers conflict in order to protect local autonomy.

2 · Is the design of the local government regime (the kind of local entities, organization, powers, human resources, etc.) under federal or state power? What local subject matters or functions are allocated to the Federation and the States? Can the Federation establish direct bilateral relationships with Municipalities or other local entities? Can the Federation intervene upon local powers by exercising federal sectorial powers or through its spending power?

United States of America

All local government forms and functions are under law and state supervision. For example, the state determines the allowable forms of local government election/organization (strong mayor, weak-mayor, council-manager [hired administrator], commission [deputies from government]).

The federal government, particularly since the 1960s, has established bilateral relations with local governments, through grant and regulatory programs. For example cities over 50,000 in population and counties over 200,000 receive Community Development Block-Grant funds directly for economic development, urban revitalization and housing in primarily low income areas. It is normally the spending power through which the federal government intervenes at the local level.

Canada

Municipalities and their organization are strictly under provincial control.

Local subject matters are under provincial jurisdiction and are subsequently delegated to local (municipal) authorities. Section 92(16) Constitution Act, 1867 attributes to provinces jurisdiction over "all matters of a merely local or private nature in a Province".

The Constitution is silent on the matter of bilateral relationships between the federal authorities and municipalities. In practice, municipalities being under complete control of the provinces, such direct bilateral relations have to be authorized by the provincial authorities. However, relations at the personal level between municipal and federal politicians are of course frequent.

It has happened that the federal authorities offer municipalities to participate in programs based on the federal spending power (particularly for renovating or improving local infrastructures). In most provinces, under provincial statutes, provincial authorities must authorize municipalities to enter into such understandings with the federal government.

Australia

The existence and operation of local government fall under State legislative power. Local government is primarily funded by the States directly and by Commonwealth grants to local government that pass through the States. However, sometimes the Commonwealth by-passes the States and funds local government directly. Whether direct funding is constitutionally valid remains a matter of contention. In 1974 the Commonwealth Government sought to deal with local government directly, including providing direct funding to it, but a referendum to legitimise this approach failed. Later Commonwealth governments instead channelled payments to local government through the States. However, in more recent times some funding of local government by the Commonwealth has been direct (particularly in relation to the funding of local roads). A recent High Court case concerning the Commonwealth's spending powers has again given rise to concerns that the direct Commonwealth funding of local government may be constitutionally invalid.

The Commonwealth may also enter into agreements with local government bodies concerning particular projects. The President of the Australian Local Government Association is regularly consulted by the Commonwealth and is a member of the Council of Australian Governments.

Mexico

The definition of the municipal regime is established by:

a. The Constitution (article 115), which sets out the bases for the general organization, as mentioned in point 3 of this section.

b. Organic municipal laws issued by the State legislatures, which must follow the bases established by article 115 of the Constitution respecting the powers granted by it to the municipalities.

c. Police and government edicts, regulations, circulars and general observance administrative regulations that organize the municipal public administration, and regulate the matters, procedures, functions and public services within their competence.

Hence, we may say that the power to define the municipal regime is shared between the Constitution, the state legislatures and the municipal City councils themselves.

Unless the Federal Executive is generally or transitorily located in a Municipality (hypothesis in which it will have the command of the corresponding public forces in this place), no function or matter regarding the municipal regime is reserved to the Federation.

Besides, States have legislative powers regarding the municipal regime reserved according to different section of article 115, as mentioned in question 3 of this part. Additionally, articles 115 and 116 allow States to celebrate conventions with one or several of its municipalities in order to transfer temporarily to the State the delivery of one or several public services constitutionally assigned to the municipalities.

The only case in which the general Constitution provides for the possibility that the Federation may establish bilateral relations with the municipalities is found in article 115, section V, subsection I, which allows the municipalities to celebrate conventions with the federation for the management and control of federal areas.

Finally, it is clear that the federation may condition municipal activity through the exercise of federal specific powers or through its spending power due to the relevance of federal investment in the development of the different regions of the country.

Brazil

The Federal Constitution establishes a great deal of the institutional design of local entities. Human resources rules, types of local entities and powers are generally granted and limited by the Federal Constitution.

Federation can establish direct bilateral relationships with Municipalities and vice versa. Federation has been controlling local spending power in a more aggressive way since the enactment of Supplementary Law n. 101 in 2001, whose constitutionality has been disputed. This 2001

statute imposes severe limits and conditions to States and Municipalities in their tax and spending powers. For example, the power of creating tax exemptions is almost banned. The spending power with public servants is also restricted. There is a general understanding that these limits and conditions are incompatible with decentralization.

Argentina

The definition of the bases of local regime is a duty of the provincial States established in articles 5 and 123 of the National Constitution. But the Provinces can only establish a municipal "autonomous" regime, respecting the dimensions indicated before. Otherwise, the Provinces might be controlled by the Federal Government if they violate what is established in the Supreme Law of the Nation.

Consequently, the relations between the Federal Government and municipalities are not direct, but indirect through the provincial government, where every municipality is located.

However, given the great power of the Federal Government (plus our important centralization), it is evident that it can determine local life through his political, economic, and financial power.

India

The design of the local governments is provided in the Constitution. The Constitution also indicates the powers that may be conferred on them. But they are subject to State control. The Federation does not have any powers in respect of local governments. The Federation can and does, however, directly fund the local governments for purposes of executing any welfare schemes at the local level. The Finance Commission is also required to make recommendations for transfer of funds to Panchayats and municipalities. The Federation may exercise some control over the local governments through its spending powers.

United Kingdom

Scotland and Northern Ireland have local government as exclusive competencies and can redesign them at will, just like the UK government with England. Wales requires concurrent Westminster legislation. Any part

of the UK — local, devolved, or central — can be challenged by any other part, or by the public, for having violated legislation.

Germany

The legislation on municipal law is allocated to the States; the Federation cannot establish direct bilateral relationships with Municipalities or other local entities. The Federation cannot assign duties and responsibilities to the local entities. It cannot intervene upon local powers.

Austria

Organisational structures of municipal government are laid down in Art 115 — 120 B-VG. The Länder are competent to enact the more detailed provisions or to determine what has been left undecided by the B-VG, and have thus enacted Municipality Acts and City Statutes. Apart from the organisation, it depends on the distribution of competences whether and how a federal or Land law allocates a function at the municipal level (within their sphere of autonomy, certain tasks must be allocated at the municipal level by a federal or Land law).

Municipalities constitute the third tier of the three-layered territorial structure (federation, Länder, municipalities). They are represented by the Austrian Association of Municipalities and the Austrian Association of Towns. In particular regarding financial questions (Financial Equalisation Act, consultation mechanism, Stability Pact) the federation and the Länder consult and co-operate with municipalities via these two associations. However, so far there neither is a general bilateral relationship between these associations and the federation and the Länder nor a direct bilateral relationship between an individual municipality and one of the latter entities.

The federation can certainly intervene financially, since it can decide on local finances through the Financial Equalisation Act (in the preparation whereof municipalities may, however, informally participate).

Swiss Confederation

The federal Constitution only mentions that there will be municipalities. The regulation of their size, organization, function and autonomy is the re-

sponsibility of States. The Federation, through the Federal Court, guarantees local autonomy in the range defined by state law. The municipality can have direct relations with the Federation within the margin of autonomy granted by state law. Whenever a State carries out the implementation of federal law, this administration can be delegated to municipalities. In these cases, a change in federal law based on this power directly affects the municipality. There are isolated cases where federal law imposes obligations directly to municipalities. Influence through the spending power is less important as the financing of municipalities is not a federal power, but state; and municipal governments can collect their own taxes.

Belgium

The organization (conferral of functions) of local collectivities is completely a regional power.

Italy

Before the constitutional reform of 2001, all regulating of local entities was reserved for legislation of the State which had collected the relative regulations in a single text (d. Lgs. N. 267 of 2000).

With the constitutional reform, three sub-matters of the previous general regulatory system are reserved exclusively for state legislation:

a. determination of the organs of government;
b. the relative electoral legislation;
c. determination of fundamental functions.

In this way, the Regions are now responsible for important matters:

a. distribution of administrative functions, besides the fundamental ones;
b. regulation of the types of association and collaboration among the local entities;
c. regulation of local revenue.

Therefore, one can affirm that the design for regulating local entities is a matter which is divided between the State and the Regions.

There is a long tradition of relations between the State (Minister of the Interior) and the national associations of local entities that will remain in place regarding all aspects of regulating that are still determined by state law. However, greater weight can be expected to be given to direct relations between the Regions and the local entities within them.

The State has certainly greatly influenced the activity of the local entities, also by enforcing its own policies and by means of subsidies and grants.

Spain

The definition of local government is made both by the Federation and by the states. The Federation establishes the basis; the states the legislative development. In practice, however, basis, also in this area, are very broad and detailed. The Spanish system has been qualified by the Constitutional Court as "bifronte" because of this double dependence of the local governments. Some of the new state constitutions seek to strengthen the role of states by "internalizing" local governments as much as possible, although they cannot violate the basic federal powers entrenched in the federal Constitution. The Federation maintains direct bilateral relations with these local governments and conditions their activities through federal powers as well as its spending power.

3 · Can States create "intermediate" local entities between Municipalities and States? Are there any intermediate local entities in your system? Do they exist only in some States or in all of them? Can States establish the territorial limits of local jurisdictions? What powers do they have? To what extent are they dependent on the States? How are the members of local/municipal government appointed or elected? Can the Federation intervene in the organization, powers or financing of these intermediate local entities? If so, how? For which purposes?

United States of America

States regularly create intermediate structures. In addition to school and special districts, states operate through counties (comarcas in Spain) as

basic state subdivisions, and townships within counties in rural areas. Basically, these structures exist in all states; although in the New England's states counties have limited powers and towns general power. It is the reverse situation in the rest of the country (see paper).

County powers are state powers decentralized except for about 300 (of 3,000) urban counties that also have municipal powers. States can set their territorial limits (however, Article IV of the U. S. constitution sets the rules for changing state boundaries, which basically requires the consent of all affected legislatures and the Congress). Counties in most states are governed by elected boards of 3-24 persons, who serve both legislative and executive functions. In addition, the voters directly elect other independent elected officials: sheriff, treasurer, auditor, clerk, surveyor, and others.

The federal government, except to protect Constitutional provisions, has no local intervention powers, and rarely becomes locally involved unless a matter of federally guaranteed civil rights is involved.

Canada

The provinces can create whatever local or "intermediate" local entities they wish. In the province of Quebec, for example, municipalities are regrouped in "Municipalités régionales de Comté" (County Regional Municipalities). The constitutional status of such entities is the same as for municipalities. The provinces can establish any territorial limit they see fit. Such entities are "creatures" of the provincial legislature and have only the powers expressly entrusted to them by the legislature. Once established, they are usually financed by municipal or local taxes.

Regarding federal intervention, see the answer to the question above.

Local (municipal) elections are held every four years and every person resident within the municipality's boundaries is entitled to vote.

Australia

States could create intermediate local entities between local government and State government for the purposes of creating an additional level of government, but have not done so. Some States 'regions' (comprised of a number of local government areas) are used for the delivery of particular services, such as health or education or regional business development programs. The regions used, however, are usually not consistent. For example,

New South Wales uses eight regions for the delivery of area health services and thirteen regions for business development purposes. Local government bodies themselves voluntarily form 'Regional Organisations of Councils' for the purposes of sharing expertise and resources, research and advocacy. See further on the issue of regionalism in Australia: A Twomey, 'Regionalism — A Cure for Federal Ills?' (2008) 31(2) *University of NSW Law Journal* 467; and A J Brown and J Bellamy (eds) *Federalism and Regionalism in Australia: New Approaches, New Institutions?* (ANU E-Press, 2006).

A State can establish the territorial limits of local government bodies within the State. Controversy arose in 2007-8 regarding the forced amalgamation of many local government bodies in Queensland, but despite much local campaigning and Commonwealth support for the protesters, the changes still went ahead.

Members of local government bodies are all democratically elected (except when the local government body has been dismissed and temporarily replaced by an administrator). The electorate is generally comprised of residents within the local government area as well as non-residents who own or occupy property within the local government area (as local government bodies primarily raise revenue by taxes on property). The councillor who heads the local government is usually described as the 'mayor'. The mayor may be directly elected by the voters of the local government area (resident and non-resident) to hold that position or the mayor may be elected by local councillors from among their number.

Local government bodies have the power to enact local laws with respect to the functions and powers vested in them by State legislation. These laws are often called 'by-laws'. They must not conflict with State laws. Local government bodies raise revenue through imposing rates on land and charging for services such as water and sewerage supply, garbage removal and other amenities. In some States local government rates are capped and cannot be raised above a certain level without the approval of the State government or Parliament. Local government bodies may also raise revenue by imposing fines or charging for permits and licences. Much of their funding, however, comes from the State and Commonwealth governments through grants. Local governments provide local facilities such as parks and playgrounds, community halls, sporting facilities and local libraries. They regulate matters such as car parking, build and repair local roads and footpaths and undertake planning approvals and heritage and environmental protection.

The Federal Government has no real capacity to intervene in the organization or powers of local government, but it can place conditions on its funding to local government which may affect the way that local government bodies operate.

Mexico

States cannot create intermediate entities between them and the municipalities; this is explicitly forbidden by article 115, section I of the general Constitution.

States may not freely establish their territorial limits. Article 45 of the general Constitution established that the States of the Federation maintain the extension and limits they had until the expedition of the 1917 Constitution and clarifies: "… if there is no difficulty in doing so."

Article 47 of the Constitution refers particularly to the territory of the State of Nayarit establishing that this State will have de territorial extension and limits of the ancient "Territory of Tepic".

If there were territorial conflicts, a first way to solve them would be a convention between the States, which in must always be approved by the Union's Congress. If states cannot agree on a convention, they could go before the Supreme Court of Justice to solve the conflict.

Brazil

According to the Federal Constitution, states may establish metropolitan regions, urban agglomerations and micro-regions, by a "Supplementary Law" (a statute whose enactment requires more than the simple majority in State's Assemblies). However, metropolitan areas, urban and micro regions are not federal entities. Their existence is only motivated by organizational reasons.

Metropolitan areas are the most prominent. They are generally composed of economically strong Municipalities and large areas (e.g. São Paulo, Rio de Janeiro and Belo Horizonte). Metropolitan areas' main goal is to integrate organization and execution of public services of common interest. Currently, there are 25 metropolitan regions in Brazil.[3]

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3 Source: IBGE (Instituto Brasileiro de Georgrafia e Estatística — Brazilian Institute of Geography and Statistics), at http://www.ibge.gov.br/concla/cod_area/cod_area.php.

Argentina

In our country, there are no local intermediate entities between the municipalities and the provincial States, as it is the case in Spain with the Provinces. The idea of the "intermunicipal relations" is increasingly developed, leading to the creation of different associative figures, with different purposes (for example, associations of municipalities, intermunicipal entities, productive corridors, or metropolitan entities). But they do not exist in the whole nation, only in some Provincial States. The above mentioned entities are created by the municipalities, without intervention of the provincial State, and the designation of the authorities is decided by the respective municipalities, which are represented by their civil servants (specially the "Intendentes"). So, there is no popular election for the above-mentioned intermunicipal entities.

The provincial State participates in these entities only through the approval of the constitutional or infraconstitutional norms that authorize them; but nothing else, since decisions belong to the municipal governments. For a more detailed analysis of these questions, see our work "Municipal Law", already mentioned.

India

As the Constitution provides for all levels of local governments, the States cannot create any further intermediate localities even though local government falls within the exclusive jurisdiction of the States. There are no intermediate local entities in our system. The States can, however, establish the territorial limits of local jurisdiction. The power of the States in respect of local government includes "The Constitution and powers of municipal corporations, improvement trusts, district courts, mining settlement authorities and other local authorities for the purpose of local self government or village administration"(State List, entry 5). They are dependent on the States for their powers as well as their revenues. The constitution, election, powers and functions of Panchayats and municipalities are provided in the Constitution. The Federation cannot intervene in the organization, powers or financing of the local entities. As the organization, powers and functions as well as financing are now primarily laid down in the Constitution. Therefore, little is left for any intervention either by the Federation or the States. Only through funding of schemes conditions may be imposed for the utilization of those funds.

United Kingdom

The UK (in England), Scotland and Northern Ireland can create any entities they wish in local government, but have not done so in recent years (local government reorganisation in the next decade is almost certain in Wales). The UK tradition is to create special appointed boards for particular tasks rather than modify local governments; local government reorganisation has been about rationalising the provision of existing local government services. In London, a major exception, the UK government has created the Greater London Authority, which is akin to a regional government and which can cajole and persuade London's individual local governments.

Germany

There exist intermediate local entities in all States with the exception of the City States Hamburg, Bremen and Berlin. They are created by the States, in some States they are ensured by the State Constitution. In the bigger States, there are even two intermediate levels between Municipalities and States: the Landkreis (county, rural district) and the district; the Municipalities belong to a Landkreis with exception of the big cities, which fulfill the duties of the counties as well: "kreisfreie Städte" (municipalities not associated to a county).

There is no local jurisdiction.

The members of local government are elected and not appointed. The Federation cannot intervene in the organization neither of the intermediate entities nor of the Municipalities.

Austria

There are no intermediate local entities between the municipalities and the Länder (district administration authorities are no territorial entities, merely administrative agencies). Neither are municipal associations "intermediate" territorial entities, as they may only be established for the purpose of jointly performing single tasks belonging to the municipal sphere of autonomy. The Federal Constitution would in abstracto provide for an intermediate "district municipality", but it would require a specific federal constitutional law to realize this kind of tier which has never been enacted.

Swiss Confederation

Some states divide their territory into administrative bodies (districts). To determine whether there are intermediate entities and what their functions are is part of the autonomy of state organization. In general, these are only state administrative districts, with no legislative powers or autonomy, being an integral part of the State administration. In some other states, districts have a limited discretion in implementing state and federal law, but have no legislative powers. In others, district Heads are elected by the people, while in other States are appointed by the central authority.

Belgium

The Constitution defines the type of local collectivities that can be established: mainly, municipalities and provinces, both present in the whole territory (only the municipalities of Brussels escape from their articulation as provinces). The Constitution provides the possibility to create districts, within some metropolitan communes (i.e. Ambers). The possibility of federation of municipalities is not banned (e.g. it exists in Brussels). Accordingly, the creation of other types of intermediate collectivities is not allowed unless the Constitution is modified. This has been discussed but never implemented since the administrative regime is already pretty complex.

Italy

The Constitution provides for two types of intermediate entities between the Municipalities and the Regions that should be considered as alternatives. The Provinces, which are meant to cover the entire national territory (except for the metropolitan areas) and the metropolitan Cities, meant to substitute the Provinces in these metropolitan areas.

The territory of the Provinces (and of the metropolitan Cities) is defined by State laws (art. 133, Const). The Region can only express an opinion.

The Provinces are local entities like the Municipalities and their autonomy is guaranteed, in the same way, by the Constitution.

No privileged relationships exist between the State and the Provinces.

Spain

In Spain, the Constitution sets an intermediate local entity, but States can create, and they have actually done so, intermediate local entities. They are fairly widespread, although not in all the States. The States can determine and modify the territory of these entities (the modification territory of the intermediate entities constitutionally established requires a federal organic law). They are vested with supra-municipal powers, regarding subject-matters such as the regulation of the territory and urbanism, health, social services, culture, sports and education; powers of coordination and cooperation with the municipalities located in their territorial area; and delegated powers from the state administration. These entities enjoy legal personality and full capacity. They are autonomous vis-à-vis the States to seek their own interests. Their members are elected by and among the members of the municipal institutions. The Federation may intervene to establish the bases that all public administrations must respect to secure a minimal uniformity, and above all, a basic uniform treatment for all citizens before the several public administrations, but the intervention is lower in these entities created by the states.

4 · Are there "City-States" in your system? Which provision recognizes them? Is their regime equivalent to the States' one? Apart from these City-States, are there any Municipalities with a particular autonomous regime? Which ones? Which is the basis for the recognition of this regime?

United States of America

The District of Columbia is the only city that has status similar to a state. It elects presidential electors (since 1961) and has non-voting members of Congress. The District was created by act of Congress. No other units are autonomous, although Puerto Rico has some free standing and is treated like a state for certain federal funding purposes. Congress decides on such status.

Canada

No, there are none.

Australia

There are no 'City-States' in our system. The closest equivalent would be the Australian Capital Territory, which largely comprises Canberra. However, it is a self-governing territory with the same status as the Northern Territory.

Mexico

In Mexico, "City-States" (as Hamburg, for example) do not exist. Also, there are no municipalities that enjoy a special autonomy regime.

Brazil

No, there are no "City-States" in Brazil. Municipalities have the same status and regime. The Federal District has the advantage of having state and municipal powers, though.

Argentina

As we have mentioned above, all the municipalities enjoy autonomy in our country; however there are still five provincial constitutions to be amended in order to conform to the limits established in article 123 of the Constitution.

In my opinion, a true "City-State" exists: the autonomous city of Buenos Aires, according to article 129 of the Supreme Law of the Nation as amended in 1994. The autonomous city of Buenos Aires has a superior hierarchical position compared to the rest of autonomous municipalities, since it can even popularly elect Deputies and Senators of the Nation and exercise judicial powers. Also it participates in the Law-covenant of tax co-participation and can celebrate international agreements. Definitively, the autonomous city of Buenos Aires is a quasi Province and integrates the "federal" Argentinean society, jointly with the 23 provinces and the Federal Government.[4]

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4 For a more detailed analysis of this topic, see our book "Federalismo, autonomía municipal y ciudad de Buenos Aires en la reforma constitucional de 1994".

India

We do not have any City-States nor do we have autonomous regimes except in some tribal areas.

United Kingdom

There is one "City-State", Greater London, which has a Mayor of London (not to be confused with the Lord Mayor of London, who is the leader of the City of London, which is the 2.2 square km financial center, which is not actually a democracy because companies can vote and outnumber voters!). It also has a Greater London Assembly, which is little more than a debating chamber and opportunity to monitor the Mayor. The Mayor has appointment powers to the big agencies that carry out major services in London; in practice the Mayor has influence over police and controls London's economic development agency and the day to day running of the transport system.

Other parts of the UK have similar agencies that cross local government boundaries. They are created under UK law (in England) or devolved administrations, and typically led by a board of by local government officials chosen by the relevant devolved or UK minister. They were mostly created to replace the transport, fire and police functions of the large elected "city-states" abolished by Margaret Thatcher in places such as Greater Manchester, Glasgow, or Birmingham.

Germany

See above 3, for City States, whose regime is equivalent to the States' one.

Austria

The capital Vienna is the only city-state. As it is a Land, a municipality and the federation's capital, Art 108 — 112 B-VG provide specific organizational rules for Vienna.

There are 15 towns with their own city statute. These towns comprise all larger towns and several smaller towns for historic reasons. Art 116 paragraph 3 B-VG further provides that every municipality populated by at

least 20,000 inhabitants may apply for its own city statute (which is a Land law). Such a city statute has to be enacted unless Land interests would be endangered or the Federal Government refuses to give its approval within a certain period of time. On their territories, statutory cities have to administer all tasks which are usually performed by district administration authorities. The names of their main authorities differ from ordinary municipalities as the local assembly is called city council, and the local board city senate, whilst the auxiliary local office is called city magistrate.

Swiss Confederation

This institution does not exist in Switzerland. In fact, "Basel Stadt" canton is composed by a single city, which is divided into different municipalities. This canton has no different formal status than other ones.

Belgium

City-States do not exist in the Belgian Constitutional regime.

Italy

No. In Italy, there are no cities that enjoy an equivalent legal status to that of the Regions.

The new Constitution provides for metropolitan Cities but refers their determination, the definition of their organism, their power and functions to state law. This part is still not implemented.

Spain

There are two City-States, Ceuta and Melilla, in North Africa. Although their potential existence was recognized by the federal Constitution, they were actually created through the enactment of their respective state Constitutions by the federal Parliament. In spite of having a "Constitution" or "Statute of Autonomy", like the other States, the legal and political nature of these Cities is different from the Sates. As I mentioned before, they lack legislative powers, they enjoy less powers and their institutions of government are closer to the ones of local entities than to the state ones. Besides Ceuta and Melilla, the two biggest cities in Spain,

which are Madrid and Barcelona, enjoy a particular regime enacted by means of special Municipal Charters. Rigorously, however, from the standpoint of their autonomy, this regime is not substantially so different from the regime of other municipalities.

5 · How are local powers determined? Can local governments provide services or carry out federal or state powers? If so, which legal mechanisms coordinate their collaboration (delegation, assignment, etc.) with other levels of government? Is the collaboration mandatory? Are local governments obliged to cooperate? Do they have a right to receive financial funds from the Federation or the State which requests the collaboration?

United States of America

Local powers are set by state legislatures, although often broad "home rule" powers are devolved. Local governments can and do provide a range of federal and state services within their borders: election administration, registration and licensing, consumer protection, libraries, recreation and culture, public health and public safety, and many others. They are coordinated by federal and state law, and supervised by the city or county attorney who is the legal compliance officer along with the chief executive officer, mayor or commissioner. Local governments are obliged to cooperate, subject to court enforcement. They can and do receive federal and state funds for such enforcement, another collaborative tie, but not normally on a fully funded basis. Also, many mandated cooperative services are unfunded.

Canada

Local powers are determined by the provincial legislature in the various general statutes relating to municipal powers and, in some cases, in particular statutes creating a given municipality (Montreal, Quebec City and Laval).

In theory, municipalities can provide federal services; in practice, it rarely happens. If it were to be done, it would have to be accomplished

through what is called administrative delegation (see above) and be previously approved by provincial authorities.

Australia

The powers of local government bodies are determined by State legislation — usually in a *Local Government Act*. They are required by State legislation to fulfil certain functions and if they fail to do so, they may be dismissed. Collaboration with the Commonwealth may arise through conditions placed upon grants made to the States. This form of collaboration is not mandatory. A local government body could always refuse to accept the grant.

Mexico

The specific municipal powers are defined in article 115.III of the Constitution. These include among others:

a. Potable water, drainage, sewer system, treatment and disposal of their waste waters.
b. Public lighting.
c. Cleaning, collection, treatment and final disposition of waste.
d. Markets and supply centrals.
e. Graveyards.
f. Slaughterhouses.
g. Streets, parks, gardens, and their equipment.
h. Public safety, within the terms of article 21 of the Constitution; municipal police and traffic.
i. And other powers determined by local legislatures according to the territorial and socio-economic conditions of the Municipalities and their administrative and financial capacity.

Likewise, Municipalities may give and exercise federal or state services and functions:

a. Municipalities may exercise state functions through a legislative decision, based on subsection I) of section III of article 115 of the constitution (considering the territorial and socio-economic conditions of the Mu-

nicipalities and their administrative and financial capacity, as mentioned in the last point).

b. Fraction VII of article 116 of the constitution allows both the Federation and the States to celebrate conventions so States may assume federal functions, building and operation of public infrastructure and deliver public services "when the economic and social development makes it necessary." Also, States have powers to celebrate conventions with its municipalities, so they may assume the delivery of services or carry out the functions the Federation has transferred to the States through the mentioned conventions.

The convention mentioned in part B is used for tax issues. "Administrative Collaboration Conventions" are common in this subject matter.

In the cases mentioned in part A, the exercise of State functions is obligatory for the municipalities once the specific legislative decision is taken.

The rules regulating funding for the transferred functions can be found in the state law, which ordered the transfers, or the convention celebrated with the State.

Brazil

Local powers are determined by the Federal Constitution. Broadly speaking, Municipalities have the power to supplement federal and state legislations when there is a local interest (Article 30, II). In principle, local governments cannot carry out federal or state powers. Cooperation and collaboration are possible, but not mandatory.

Argentina

The municipal competences are defined in every Provincial Constitution and in the Organic Municipal Acts of every Province and in the respective Organic Municipal Charters, in those municipalities that have passed one.

The municipal power is wide, since it reaches all matters related to the satisfaction of the local society needs of common good. This gives power to the municipality in institutional, political, administrative and economic-financial matters.

The municipalities have shared powers with the provincial and federal governments and they exercise some delegated by the other governmental levels.

There are different systems to assign powers to the municipalities, but the most common one is a list, included in the Provincial Constitutions, enumerating these local powers with a final clause stating that municipalities have all the necessary powers to satisfy the needs of the local society.

The provincial constitutional systems authorize not only the exercise of intermunicipal relations but also inter jurisdictional, which points to the construction of a cooperative or collaboration federalism, where the local governments shall interrelate increasingly with other governmental levels.

Be as it may, there is still a long way to go in this matter. In this respect, we indicate that there is no general legislation that specifies, for example, the delegations to the local governments or the contributions or funding that must be assigned to them. Normally the delegations are related to police powers, e.g. in public health issues.

Even though there is a duty to collaborate among the different levels of the Federal State, this is not duly established in the laws, which is necessary to advance in those inter jurisdictional relations.[5]

India

As noted above, now the Constitution enumerates powers and functions of the Panchayats and the municipalities. The State governments may confer any further powers on the local governments. There is no specific legal mechanism for coordination or collaboration among the local governments. The Federal and the State governments may, however, seek their collaboration for executing their welfare schemes for the people in the local areas.

United Kingdom

Local government is sufficiently tightly controlled by its superiors. Its powers are usually delegated by law and overseen by the superior govern-

5 For a more detailed analysis of these questions, see our mentioned work, " Municipal Law".

ment's civil service. Discretionary grant funding from the superior government provides added incentives for them to carry out the tasks asked of them.

Germany

Local powers are determined by constitution and by law, which distinguishes between duties to be accomplished in self-administration (mainly local matters) and duties assigned to the local entities by the State; the Federation however may not assign duties to the local entities. Duties assigned to the municipalities by the states are accomplished under survey of the state authorities, this cannot be qualified as "cooperation"; the instruments of survey are provided by law. If the state assigns new duties to a municipality, they have the right to receive financial funds from the State.

Austria

Local governments provide public services and perform federal or Land tasks either within their autonomous sphere of self-government or their delegated sphere where they are bound to instructions by federal or Land authorities. Art. 118 B-VG provides that all matters which are in the specific interest of a local community and may be suitably performed by them must belong to their autonomous sphere (principle of subsidiary). Art. 118 B-VG also provides some examples, such as local buildings or local spatial planning. Other, non-autonomous tasks can be delegated to them by federal or Land laws. The municipalities have to respect federal and Land laws and act accordingly.

Local governments can be obliged to join municipal associations by a federal or Land law, but have to be heard on this matter. Moreover, their functions as self-administrating entity must be maintained and their influence on the association as well as their representation within its bodies must be granted.

Municipalities must be considered by the Financial Equalisation Act with regard to their performance and capacity. Thus, they receive financial funds from the federation and the Länder as well as levy taxes of their own. This means that the performance of tasks — either in their autonomous or delegated sphere — must be considered when it comes to financial equalization.

Swiss Confederation

The specific powers of the municipalities are defined by state law, and the sole limitation is federal and international law. Municipalities have legal personality acting on their own. They might apply state law if some power has been delegated. There are several powers under their responsibility. The most important are primary education, zoning, land use, development, security and public order. In general, state dictates the legal framework, leaving a margin of discretion to the Municipalities. Municipalities collect their own taxes and define the municipal tax rate for their territory, which gives them major financial independence. They may receive certain state subsidies for services they provide.

Belgium

The Constitution does not list the interests that the local collectivities will take care of. The Constitution establishes the following tautologic general provision: "The exclusively communal or provincial interests will be regulated by the community or provincial councils, according to the principles set by the Constitution" (art. 41.1 of the Constitution).

This is a highly imprecise text. It does not limit the evolving local interest to the XIX Century reality but, at the same time, does not define the sphere of power of the municipality or the province. The federal State might erode the powers of the regions and communities.

A triple evolution — not particular to the Belgian system — has occurred in this area:

In a first stage, "communal and provincial interests" were narrowly interpreted. Local authorities have the initiative to define these interests (New municipal act, art. 117), but their silence or inactivity — explained by their lack of human and financial resources — gives leeway to the intervention of central authorities.

In a second stage, the legislator assumes that it has power to define and disqualify the local interests, reading them through the lens of the general administration ones. A bunch of laws — national, community, regional — regulate issues — education, traffic, urban development, land use… — which were traditionally local powers.

In a third stage, the legislator follow the example offered by the Constitution in its regulation of marital status (art.164) and assigns to the local

government some functions related to the general interest: marital status registers. Electoral registers, driving licenses, benefits applications, unemployment control… (see New communal Act, art. 116 &117).[6]

This triple evolution has been going on for more than a century. During it, municipalities and provinces have seen their sphere of powers devoided from local interests and full of functions more related to general interests.

There is no clear limit between "communal and provincial interests" and "general interest", that is, federal, community, and regional interests. The frontier is dynamically fixed by the different legislators depending on the context and the opportunities.

The texts organizing municipal institutions have highlighted some of the specific missions of the municipalities. These are not exclusive though. Several regulations cohabit in this area. The New Communal Act or other federal, community, and regional regulations try to define how the local power has to be exercised in these particular areas.

For example, the concordated laws of August 20th, 1957 state that "every municipality has to create and sustain at least a primary school" (art. 22.1) if the parents of 15 children request it. They can create a nursery/ daily care too (art. 28) if parents of 35 children of ages between 3 and 6 years request it.

The municipal school is managed by the municipality. The council decides the personal and appoints the teachers. The municipality organize the education of this school.[7]

Similarly, "the municipal police are part of the local interest".[8]

Italy

Administrative functions are attributed to the Municipalities by state or regional law, according to the principle of subsidiarity.

Therefore, the State can attribute or delegate functions to the Municipalities according to their own exclusive authority. Examples: immigration, civil status and from the General Register Office.

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6 Y. Lejeune, «La gestion des intérêts généraux pour les communes», *A.P.T.,* 1986, p. 126.

7 F. Delpérée et D. Déom, "L'administration de l'enseignement en Belgique", *Ann. eur. adm. publ*., 1990, p. 199.

8 C.A., no 18/94, 3 mars 1994.

If the function is attributed, it is carried out by the Municipality according to the provisions of state law, and also according to its own autonomous regulations and abiding the principle of integral financial coverage of the activity in cases of transfers.

If the function is delegated, the State has not only the legislative power, but also the regulatory and guiding power, again with the principle of integral financial coverage of the activity in cases of transfers.

Spain

Local powers are defined by federal basic laws and, actually in a residual way, by state laws of development. The system of allocation of powers is grounded upon a general clause. Apart from an eventual list of concrete powers, municipalities are vested all those functions aimed at satisfying the needs of the municipal community. Both the Federation and the States may delegate the exercise of powers to the municipalities by means of delegation of powers or assignation of competences for the management of services. Except for some specific cases legally established, the consent of the local institutions and the provision of the corresponding financial resources, particularly when the delegation is mandatory, are required.

IX

INTERGOVERNMENTAL RELATIONS

SUMMARY: 1. Does a principle of collaboration or constitutional loyalty among the different political and administrative authorities exist in your Federation? If so, where is recognized (Constitution, convention, etc.)? Which is its content and what consequences follow from this principle? To what extent is there a hierarchy among the different jurisdictions? 2. Does the Federal Constitution establish a system of intergovernmental relations between the Federation and the States? If so, through which mechanisms? Are these mechanisms established in other constitutional or legislative provisions? To what extent are institutional practices or conventions important on this matter? Generally, which is the importance of intergovernmental relations for the dynamics of the system? To what extent do they allow to make more flexible the formal allocation of powers? 3. Are there any institutionalized encounters between the federal executive, either the president or department high-officials, and their State equivalents? Are there organisms to coordinate the horizontal collaboration among States? Does the Federation participate in these organisms? Is an authorization required for their creation? How the States are represented? Are these meetings or institutions important for the system? 4. Do different governments or administrations usually participate in organisms or entities with legal entity (public or private: consortiums, associations, foundations, private societies, etc.)? Is this joint collaboration usual for developing public works, managing services, or financing of activities? Which legal regime is applicable?

1 · Does a principle of collaboration or constitutional loyalty among the different political and administrative authorities exist in your Federation? If so, where is recognized (Constitution, convention, etc.)? Which is its content and what consequences follow from this principle? To what extent is there a hierarchy among the different jurisdictions?

United States of America

The principle of cooperative federalism is long standing. Cooperation occurs regularly in public safety, highways, transportation, economic development, social welfare, higher education, public health, vital statistics, and many other areas. It is nowhere recognized in any constitution but is a

long-standing constitutional law and practical matter. There is no hierarchy among jurisdictions; the U. S. has a long history of jurisdictional independence.

Canada

No principle of "federal loyalty" exists in Canada, neither in written nor in unwritten constitutional law or conventions.

As has been explained before at length, the Constitution Act, 1867, contains several features that point to a subordination of the provinces to the federal authorities, but over time conventions of the Constitution and pronouncements of the Courts, mainly the Judicial Committee of the Privy Council before 1949, have had the effect of neutralizing these centralizing or "unitary" features and today the applicable principle is that provinces and the federal government alike are "sovereign" in their respective jurisdictions and, thus, on an equal constitutional footing.

Australia

There is no formal principle of collaboration or constitutional loyalty within the Australian federation. There is, however, a pragmatic acceptance of the need to cooperate with respect to particular matters and the benefits of collaboration. Significant amounts of cooperation and collaboration occur through the formal mechanisms of the Council of Australian Governments and Ministerial Councils. The States have also established the Council for the Australian Federation, which is comprised of State Premiers and Territory Chief Ministers, to enhance cooperation at the State/Territory level without the need for Commonwealth involvement.

The Commonwealth and the States, on one view, have their own independently operating systems of government and share sovereignty. Within their respective spheres of power, each is sovereign. However, others would point out that where there are concurrent powers, the Commonwealth's legislative power prevails over the States. In practice, the Commonwealth is more powerful than the States as a consequence of the broad interpretation of its legislative powers and its financial supremacy over the States. Hence, to the extent that there is a hierarchy, the Commonwealth prevails over the States.

Mexico

The Mexican legal system does not have a principle of collaboration or constitutional loyalty as the German *Bundestrue*, or the United States *comity*. Likewise, Mexican federalism, from a formal point of view, does not consider that there is a hierarchical relation between Administrations. Each one has its own power sphere and in case of conflict, this is not solved through a principle of prevalence of the federal law over state law, but according to the distribution of powers principle.

Brazil

There is an implicit constitutional principle of collaboration and loyalty among the different political and administrative authorities. There is no substantial consequence derived from this principle.

There is no formal hierarchy among the different jurisdictions. Still, intervention is possible (article 34, Federal Constitution). As a general rule, Federation shall not intervene in the States or in the Federal District. The intervention will occur exceptionally, only in the cases expressly established by the Federal Constitution in order: *(i)* to maintain national integrity; *(ii)* to repel foreign invasion or that of one unit of the Federation into another; *(iii)* to put an end to serious jeopardy to public order; *(iv)* to guarantee the free exercise of any of the powers of the units of the Federation; *(v)* to reorganize the finances of a unit of the Federation that stops the payment of its long term debts for more than two consecutive years except for reasons of *force majeure*, fails to deliver to the municipalities the tax revenues established in this Constitution, within the periods of time set forth by law; *(vi)* to provide for the enforcement of federal law, judicial order or decision; *(vii)* to ensure compliance with the following constitutional principles: a) republican government, representative system and democratic regime; b) fundamental rights; c) municipal autonomy; d) rendering of accounts of the direct and indirect public administration; e) the application of the mandatory minimum of the income resulting from State taxes, including those originating from transfers, in the maintenance and development of education and in public health services.

Argentina

We have already mentioned that part of the doctrine defends this principle, which should be recognized in our constitutional organization. But the problems we have been through in this matter, casts doubt on whether it is in force. Furthermore, there is no reference to it in the constitutional or conventional texts.

We also insist, beyond the notorious larger power of the Federal Government, that there are no hierarchical differences between administrations in our system.

India

The principle of collaboration between the Union and the States exists both in respect of legislative as well as administrative functions. In respect of legislative matters, as already noted, two or more states may ask Parliament to make laws common to them on State subjects as well as Parliament can make law on a State subject if in the opinion of the upper house of Parliament a subject has become of national importance. Similarly, executive powers of the States have to be exercised in harmony with the powers of the Federation. The Federation and the States may also delegate their executive powers to each other (Articles 256, 258 and 258-A). As a consequence of these arrangements, a cooperative functioning of the governments takes place but often in these arrangements the Federation has the upper hand.

United Kingdom

There is no formal, constitutional principle but the Memoranda of Understanding enshrine what would happen anyway, namely co-ordination, co-operation and confidentiality in most circumstances. In day-to-day policymaking and administration, the superiority of the UK government is much modified by the strong protection of competencies of Northern Ireland, Scotland, and Wales.

UK law still adheres to the principle of the sovereignty of the Westminster Parliament, so in principle all bodies and laws are subordinate to it. In practice, devolution in Northern Ireland, Scotland and Wales (no London) is "constitutional" and hard to change. This is simply because the political

support for devolution in those areas is so strong that to revoke it would probably break up the UK.

Germany

The principle of "Bundestreue" (federal loyalty/ allegiance to the Federation) is regarded as an unwritten principle of the constitution; it has been developed by the jurisdiction of the Bundesverfassungsgericht (Federal Constitutional Court). It applies to the relations between Federation and states and among the states.

It commits states and Federation to consideration of the interests of each other and to mutual information.

In case of violation, states and Federation may appeal to the Bundesverfassungsgericht.

Austria

The principle of "mutual consideration", as a general rule, is not a written principle, but it has been developed by the jurisdiction of the Constitutional Court. It means that both the federation and the Länder do have to consider each other's interests when enacting their own law. They must not contravene each other's interests excessively, even if this does not permit them to make full use of their own competence.

It is important to note that, in principle, federal administration and Länder administration are on an equal footing. Due to this lack of hierarchy, cooperation between the units is more important.

Swiss Confederation

The principle of federal loyalty is now explicit in the 1999 Constitution. Most applications of this principle are now explicitly mentioned in it. The following are examples from the literature or the Constitution:

a. The Confederation shall ensure that States have sufficient capacity to carry out a power before delegating it.

b. States should not join each other through relationships that result in a change in the political balance of powers within the Federation.

c. The Confederation and the States must act according to a common goal; not as rivals, as it has happened many times. This leads to cooperative federalism.

d. States among them, and in connection with the Confederation, should cooperate, providing each other, for example, judicial or administrative assistance.

e. States should be informed and consulted at the first stages of federal legislation drafting when their interests or powers can be affected.

The hierarchy between administrations exists when a State Administration applies the law of the confederation and a federal authority can control state decisions (see supra V.10).

Belgium

The principle of federal loyalty is established by article 143 of the Constitution (see V.11).

Italy

The principle of loyal collaboration was not provided for in the original text of the Constitution of 1948. It was coherent in a very unitary system in which the State was the only subject endowed with sovereignty, on which the other subjects depended. On a number of occasions, the Constitutional Court has referred to the principle, considering it implicitly affirmed in the Constitution, almost always to justify state interventions and procedures which made the interests of the Central Government predominate over those of subjects endowed with autonomy.

The new text affirms the principle of equality among all levels of the government in the Republic, with a strong separation of powers directly guaranteed by the Constitution. However, a clear affirmation of the principle of loyalty is lacking. An indirect reference is contained in art.120 of the Constitution which provides for the exercise of substitutional power by the State according to regulations to be established by law. The law should establish "procedures capable of guaranteeing that sovereign powers are exercised with respect to the principle of subsidization and the principle of loyal collaboration". This law has not been enacted yet.

It is doubtful that there is or has been a hierarchical relationship between different levels of government in this Republic. In any case, this relationship has disappeared after the 2001 constitutional amendment. This does not prevent the State from retaining broad powers which are more relevant than those of other levels of government.

Spain

The Federal Constitution does not expressly establish any principle of collaboration or constitutional loyalty, but the Constitutional Court, however, in several decisions, has held that in spite of the silence of the Constitution, the principles of collaboration and loyalty were inherent to the autonomic system. Some of the new state constitutions states the institutional loyalty principle. In contrast with other federal systems, the practical relevance of this principle has been scarce. It has been used, at the most, to justify the establishment of cooperation mechanisms by the federation and to limit some powers. In some new state constitutions, such as the Catalan one, under the title "institutional loyalty", there is a provision establishing that the financial impact, positive or negative, of the general rules passed by the federation may have on the state and vice versa in order to set the adjustments or compensations necessary.

It cannot be said that there is a hierarchical relationship between public administrations.

2 · Does the Federal Constitution establish a system of intergovernmental relations between the Federation and the States? If so, through which mechanisms? Are these mechanisms established in other constitutional or legislative provisions? To what extent are institutional practices or conventions important on this matter? Generally, which is the importance of intergovernmental relations for the dynamics of the system? To what extent do they allow to make more flexible the formal allocation of powers?

United States of America

The federal Constitution is silent on IGR. They are established through

court and executive action, and by legislation. The most important mechanisms have been grants, regulations, contracts and intergovernmental agreements, all of which have greatly stretched formal powers at all levels.

Canada

No system of intergovernmental relations is formally provided for in the Constitution. However, such a system has been established by usage over time.

With Canada having a parliamentary system of government based on the Westminster model, political life in general is characterized, both at the federal and at the provincial levels, by a predominance of the executive over the legislature. This feature marks also intergovernmental relations, which are worked out by the executives and bureaucracies of the various governments. There is a remarkable lack of involvement of either the Canadian Parliament or the provincial legislatures in the process. As a result, major policy decisions are adopted behind closed doors, in intergovernmental forums where participants are all members of the executive — cabinet ministers of the federal and provincial governments —. These decisions are later laid before the corresponding legislative bodies and ratified without any possibility of change by the majority members under strict party discipline. Therefore, cooperative federalism is subject to a major democratic deficit. The dominant role of the executive branches in intergovernmental relations explains why the system has been termed «executive federalism».

The small number of provinces (10) and territories (3) keeps the number of participants to the intergovernmental process to an acceptable level and ensures that each government has an influence on the result. However, in all other respects there are great disparities in the respective influence and bargaining power of the respective provinces and territories. The two geographically central provinces — Quebec and Ontario — have together over three-fifths of Canada's population and GDP. Ontario is the most populous and wealthy province, with almost 30% of the population and the largest industrial base. The four Atlantic Provinces (New-Brunswick, Nova-Scotia, Newfoundland and Prince-Edward-Island) have together only 7.7% of the national population and produce less than 6% of the total GDP. Alberta has only 10% of the population but its rich oil and gas reserves give it an enhanced influence. The three northern territories (the Yukon, the

Northwest Territories and Nunavut) make up two-fifths of Canadian territory but have only 0.3% of the Canadian population and contribute 0.45% of the national GDP. The territories enjoy no constitutional status and have legislative powers only delegated to them from the federal government. The territories participate in intergovernmental conferences, but without voting rights.

The system of intergovernmental relations functions operates through a myriad of intergovernmental conferences and meetings at all levels (civil servants, deputy ministers, ministers and prime ministers). Literally thousands of agreements of all sorts are concluded between all orders of governments. Although intergovernmental relations are generally based on informal usage, transfer payments (made under the spending power) and equalization payments must be made under statutory authority. Transfer payments have no formal constitutional basis, while the principle of equalization (but not its concrete modalities) has been enshrined in section 36 of the Constitution Act, 1982.

Although the usages relating to intergovernmental relations play a very important role, they have not given rise to conventions of the Constitution in the true sense.

Intergovernmental relations are crucial for the functioning of the Canadian federal system because, as shown above, it exists the need for a high degree of cooperation and coordination between the central government and the Canadian provinces. Financial and fiscal relations must be adjusted and renegotiated over time. Governmental policies of both levels of government must be coordinated to avoid negative reciprocal impacts and maximize synergy. Most of the major social and economic problems can no longer be dealt with in an effective way by one single order of government. Courts have adopted interpretive doctrines that tend to favor overlapping or concurrent jurisdiction in many areas. Also, the need for cooperation increases as domestic policies become increasingly subject to international standards, because international agreements entered into by the federal government must be implemented by provincial legislatures when their subject matters are within provincial jurisdiction.

Australia

The Commonwealth Constitution allocates power and sets out the rules for resolving conflicting State and Commonwealth laws and the circum-

stances in which State consent is required for Commonwealth action or vice versa. Some degree of cooperation is anticipated by the Constitution. For example, s 77 of the Commonwealth Constitution permits federal jurisdiction to be conferred upon State courts and s 120 requires that States make their prisons available for Commonwealth prisoners. However, no system for achieving that cooperation is established by the Commonwealth Constitution. An Inter-State Commission was intended to deal with intergovernmental disagreements with respect to trade and commerce, but its existence was short-lived, as was an attempt to revive it in the 1980s.

The system of intergovernmental relations in Australia is instead based upon intergovernmental agreements and practice. For example, the Intergovernmental Agreement on Federal Financial Relations, which came into effect on 1 January 2009, sets out the framework for intergovernmental relations on financial matters. The Council of Australian Governments ('COAG') which is the peak body for undertaking intergovernmental relations has no constitutional or legislative basis. It exists as a matter of agreement between the parties. Its role and use was greatly expanded after the election of the Rudd Commonwealth Government in 2007. Some Ministerial Councils are referred to in legislation and given formal functions, but most operate as a matter of practice pursuant to intergovernmental agreements or decisions of COAG.

Through the negotiation of uniform cooperative legislative and executive schemes, COAG has been able to adjust, to some extent, the allocation of powers between the Commonwealth and the States, making this allocation more flexible.

Mexico

The Federal Constitution does establish an intergovernmental relations system between the Federation and the States. There are two mechanisms that compose this system. First, the regime of "concurrent powers" established for several subject matters, through which the federation, the states and the municipalities are assigned different functions over the same subject matter, based on a "ley-marco" issued by the Federal Congress which frames the distribution of powers among these three layers of government. Examples of "concurrence" are among others: human settlements (urban development), health, education, civil defense, environment, and sports. This "concurrence" regime is establish directly by several constitutional

articles, like article 3·VIII, 3rd paragraph of article 4, and article 73 (sections XXIX-C, XXIX-G, XXIX-I, XXIX-J).

The second mechanism is the conventions made in different matters between the federation and the states, between the federation and municipalities, between states and municipalities, or between municipalities. The possibility to celebrate conventions is, in some cases, directly established in the Constitution. For example, article 26 of the constitution establishes a national development planning scheme, which the Federal Executive may coordinate through conventions celebrated with state governments. Another example is article 115.III which establishes that municipalities may celebrate conventions with the State to transfer temporarily some of municipal functions or the delivery of municipal services which its state might carry out directly or through a body specifically created for these purposes. Similarly, section IV of article 115 allows municipalities to celebrate conventions regarding the administration of municipal taxes by the State.

Municipalities may celebrate conventions with the federation about the management and control of federal zones (art. 115, section V, subsection I).

Finally, the Federation and the States may celebrate conventions through which the latter may exercise federal functions, will be responsible for the building and operation of public works, or deliver public services "when economic and social development make it necessary". And States may celebrate conventions with their municipalities regulating the assumption by them of the delivery of services or the implementation of functions that the Federation has transferred to the States (art. 116, fraction VII).

Besides these constitutional bases establishing an intergovernmental relation regime, there are several laws that determine an intergovernmental legal regime. Among them, we can mention, first, the "leyes-marco" in the subject matters mentioned above (General Education Law, General Health Law, General Human Settlements Law, General Ecologic Balance and Environment Protection Law, Civil Defense Law, General Sport Law). Second, we can mention the law which, according to article 26 of the Constitution, establishes the bases for the celebration of conventions between the federation and the states in matters of economic development planning (Planning Law). Third, article 21 of the constitution establishes that a law may regulate regarding the establishment of a national public safety sys-

tem (General Law that establishes the Coordination Bases for the National Public Safety System). Fourth, we must mention other laws that establish the possibility of coordination conventions in several matters among the three levels of the Mexican federal system: Fiscal Coordination Law, Law for the rural sustainable development, Federal Tourism Law, Federal Housing Law, Federal Law for the encouragement of micro industry and handcrafts activities, Forest Law, General National Property Law, General Population Law, General Wildlife Law, Law for the coordination of Higher Education, Law for the protection of the rights of children and teenagers, Law establishing the minimum norms for social re-adaptation of condemned persons.

In Mexican federalism, intergovernmental relations have taken major relevance in practice, and have allowed the relaxation somehow of the formal power distribution, which according to article 124 (residual powers in favor of states) is very rigid. The coordination conventions that may be established between the federation and the states in an important number of subject matters described above clearly illustrates this point.

The Federation participates in most intergovernmental relations while few or none horizontal relations take place.

Brazil

The Constitution does not have a real system of intergovernmental relations between States and the Federation. It only establishes their powers including some concurrent capacities, without explaining in details how it is going to work. The basic idea in this system is that the Federation establishes general rules in these concurrent powers, which must be followed by States and Municipalities. A federal Supplementary Statute shall establish rules for the cooperation among the Union and the States, the Federal District and the municipalities aiming at the attainment of balanced development and well-being on a nationwide scope (article 23, solo paragraph).

Argentina

We have already referred to this issue, indicating that the text of art.107, contained in the original Constitution of 1853-1860 and maintained in the 1994 amendment, actual art. 125º, envisages "domestic" treaties between the provinces. Such provision, since the 1950s, enabled the smooth shift

from a dual or competitive federalism towards a cooperative or concerted one.

Likewise, we have advanced towards deeper inter jurisdictional relations through the Federal Councils, which entail the joint participation of federal and provincial representatives.

What has been explained shows a trend towards a flexible use of power and institutional practices, but this is an ongoing process, which should be consolidated.

Currently, our country goes through a deep crisis, — in my opinion of structural characteristics in all aspects of national life —, which affects the Rule of Law, the operation of the republican system, and the individual rights and guarantees.

Given the emergency situation — institutional, political, economical, financial… — only temporary measures can be taken which implies that a thoughtful consideration of such a relevant matter as the federal system and the required changes to fulfill the 1994 constitutional amendment, in the integration process, both national and supranational, we are facing, cannot be taken.

For all of the above, we encourage future important changes that must be made to our public law in order to deepen the power decentralization and integration, which are the adequate responses according to our Supreme Law (Constitution) to face the pressing global challenges.

India

The answer to this question is covered in the answers to the foregoing questions. The Constitution of India represents a model of cooperative federalism and accordingly it lets the formal allocation powers to remain flexible in practice.

United Kingdom

There is very little legislation pertaining to intergovernmental relations; both the unified civil service of the UK and the Labour politicians in office preferred informality. Since opposition nationalist parties entered government in 2007 they have called for more formalization and legal certainty, and made some joint statements on various issues, but in practice continue to deal with the UK government on an informal, bilateral, basis.

Germany

There is no regulation of intergovernmental relations within the Grundgesetz, apart from the Bundesrat (federal counsel/Parliamentary Council), where the governments of the Länder are being represented. There are, however, institutional practices like the conference of the ministers of certain departments, as for example the conference of the ministers for education or the ministers for environment of the Federation and the states; these instruments are of no influence on the formal allocation of powers.

Austria

With regard to the Federal Constitution, one could mention the agreements under Art 15a B-VG (both between the Länder themselves and between the federation and the Länder). Art 23a — 23f B-VG provide instruments and mechanisms of Land participation regarding issues relating to the EU.

Further to that, a couple of ordinary laws establish certain commissions, working groups or arbitrary bodies in which both entities are represented, e.g. the National Security Council.

Intergovernmental relations are often based on informal processes and institutions (e.g. joint conferences and working groups, e.g. on spatial planning and regional policy [Österreichische Raumordnungskonferenz ÖROK]). Clearly, co-operation between the federation and the Länder is a main characteristic of Austrian federalism. Whilst a formal evaluation, especially of the allocation of powers, would prove Austrian federalism to be highly centralistic, its (mostly informal) co-operative nature somehow acts as a counterbalance.

Swiss Confederation

Intergovernmental relations between the Federation and States are essential to the system operation. The Constitution devotes a separate chapter to them. In it, it establishes the fundamental principles of: federal loyalty, cooperation to fulfill their responsibilities, and negotiation and mediation as means of conflict resolution. In the area of federal administrative law, there are a variety of forms of cooperation among the different levels of government. Many are based on intergovernmental agreements.

In other cases, of concurrent or parallel powers, the existence of federal and state laws in the same field creates the need for cooperation between administrations of different levels. A new way was established with the reform in force since 2008: agreements on programs. In these, the Federation and the States agree on the purposes and goals to be fulfilled through shared responsibilities. The Federation supports financially the implementation by States. Federal funds are measured in terms of its purpose and scope, not according to state public expenditure, which is a regime of subsidies completely opposite of what took place prior to the year 2008. There are already in place several such agreements, especially in the area of parallel and concurrent powers, for example, in the field of environmental protection. The conventions that have been made so far have shown that this new form of vertical cooperation between the Federation and States leads to more transparency in the allocation of powers between both levels. The implementation is made more efficient by reducing parallel efforts, control over the scope of the objectives has been systematized, and the administration has taken a less hierarchical and more collaborative approach, based on a more active and pragmatic dialogue. But this point is also debatable. The new formula was introduced to replace conditional grants, since they greatly restricted state autonomy. The solution should have led states to have more power of decision in "how" to achieve the programme aims, as well as to encourage their self-interest in improving the Administration efficiency. But it is still a form of conditioned grands and, consequently, we still have to observe and assess if the aim of strengthening the state autonomy can be achieved.

In short, the forms of cooperation are different in each subject and they cannot be generalized since the system adapts to the demands of the matter. Relationships are very important in cases of concurrent or parallel power, but cooperation do not compensate or relaxes the formal distribution of powers because it is an integral part of it.

Belgium

The constitution does not provide formal mechanisms of collaboration between the Federal State, the communities and the regions. The special law of institutional reforms corrects this point. The intercommunity or interregional dimension of collaboration is magnified. The

idea of "cooperative federalism" has been amplified by the act's provisions (see Special Act, Title IV, "Cooperation among communities", and title IV bis "Cooperation between the State, the communities, and the regions"; special act, January 12 1989, Title IV, "Cooperation between State, communities and regions"; special act, July 16 1993, Title II, chapter II, "Collaboration and cooperation between State, Communities and regions (infra, from 454 on)). The institutional scholarship, not very critique on this issue, supports this "cooperative federalism" idea. The current practice is far from the aspirational content of law has in the books.

The intercommunity and interregional relations can be developed in the areas of federal power. This meddled with their international affairs powers.

See Special Act of May 5th, 1993 about the international relations of the communities and regions and the cooperation agreement entered on March 8th of 1994, between the Federal State, the communities and the regions, regarding the ways these may enter into mix treaties (Mon. B. March 6th, 1996).

"Since the federal government enters into negotiations, either bilateral or multilateral, or envisages these negotiations to enter later on in a treaty regarding areas power over which is not exclusively assigned to it. The communities, the regions or the Federal State have to inform the Foreign Affairs Inter-ministry Conference… If a region or community requests a mixed treaty, it informs the Conference in order to compel the federal government to pursue this initiative" (cooperation agreement, art.1.1&1.3).

"The diverse authorities concerned by a mixed treaty have to be committed to obtain as soon as possible the consent of their Parliament or Council. If any difficulty is encountered, they have to report it to the Conference to reach the agreement necessary" (cooperation agreement, art. 11).

Italy

As previously mentioned, the Constitution does not provide for a system of intergovernmental relations, neither before nor in the text in force today.

In the previous system different organisms of co-operation developed between the State and the Regions. These organisms, initially of

the sectoral type (the individual national Ministries of a sector created organisms of co-operation with the regional councillors of the same sector) were then unified in the already mentioned State-Regional Conference, regulated by Legislative Decree n. 281 of 1997, which defines in detail the functions and operation of this Conference, and which also regulates the called city-state-local autonomies and the one which unifies them (it is called, in fact 'Unificata'). All Conferences are located under the Presidency of the Council of Ministers (the head of government). The Regions are represented by their Presidents.

These instruments create regional participation but subordinate to the decision-making of the State. Certain "agreements" are foreseen that are to be concluded at the Conference. But if the agreement is not accomplished, the final decision depends on the Central Government. Therefore, intergovernmental relations have contributed to assuring the presence of the Regions in legislative procedures of national planning and administration, just as they have made the distribution of power less rigid, substantially favouring processes of sharing public policies, but they still have not changed the centralistic stamp of the overall institutional system.

Spain

The Federal Constitution does not include any provision regarding this issue. This kind of relations did not start until the Constitution was in force, but they were not formalized until the federal law 30/1992. Nowadays, several state constitutions regulate these relations and, thus, their regulation is part of the constitutionality block. As it happens in other countries, these relations have been extremely important. Today, despite the shortcomings of the intergovernmental relations regime, it has been generalized and consolidated and it has relevant effects for the operation of the State of the Autonomies. In several occasions, this system not only introduces flexibility into the distribution of powers systems but distorts the system of allocation of powers. This happens, for example, in those cases — normally when Commission of Ministers of one sector is held — were it is agreed the granting of federal subsidies subjected to conditions — managed by the federation — in areas of exclusive or shared state powers.

3 · Are there any institutionalized encounters between the federal executive, either the president or department high-officials, and their State equivalents? Are there organisms to coordinate the horizontal collaboration among States? Does the Federation participate in these organisms? Is an authorization required for their creation? How the States are represented? Are these meetings or institutions important for the system?

United States of America

Generally the president meets with and speaks to the governors at least once a year at the National Governor's Association meetings in Washington. It is usually a speech with questions and answers. There is not a formal mechanism, however. The U.S. president would be reluctant to meet formally with 50 governors. Federal department heads have been known to meet with groups of governors or state cabinet members. Formal mechanisms do not exist.

Horizontal coordination is through: 1) bilateral or regional informal contacts, 2) interstate compacts, and 3) associations of state officials. The federal government is only informally involved, except where federal law requires official state consultation on a matter. In this case states are represented by designation of a state association, for example the National Governor's Association.

Canada

The main institution of executive federalism is the First Ministers Conference that meets annually and is composed of the federal Prime Minister, the ten provincial Premiers and the leaders of the three territories. There are also regular meetings of the ministers in charge of departments where there are overlaps in federal and provincial jurisdiction. Moreover, there are regular meetings of officials in the federal and provincial bureaucracies, to whom executive power in both federal and provincial governments is often delegated (which would justify the label of «bureaucratic federalism»).

In 2003, Canada's provincial Premiers and territorial Leaders agreed on the creation of a new inter-provincial/territorial body, the «Council of

the Federation» (with a permanent secretariat and a steering committee), to better manage their relations and ultimately to allow for a more constructive and collaborative relationship with the federal government. The central government is not represented in the Council. This initiative holds some promise of establishing a basis for more extensive collaboration among provincial and territorial governments. It will merit attention as it develops in the future.

Australia

Yes, there are regular formal intergovernmental meetings involving the Commonwealth and the States both at the highest political levels (COAG and Ministerial Councils) as well as at civil service where those involved in developing and implementing policy meet to share ideas and information and negotiate cooperative agreements. For example, there is a Standing Committee on Treaties, comprised of senior officials from the Commonwealth, State and Territory Governments that meets regularly to identify treaties being negotiated that are of particular interest to the States. It ensures that there is appropriate consultation as well as monitoring treaty implementation. In practice, there is a high level of informal discussion, sharing and collaboration across all levels of government.

The States also act collaboratively through the Council for the Australian Federation without Commonwealth involvement. This forum is sometimes used to negotiate a uniform State position before dealing with the Commonwealth on an issue, or to achieve cooperation on a subject that falls solely within State jurisdiction. No 'authorization' is required for the creation of such a body. It was established by way of an intergovernmental agreement between the participating States and Territories.

Meetings of intergovernmental councils or committees, whether or not they include the Commonwealth, are very important for the operation of the federal system.

Mexico

Mexican legislation foresees the constitution of organisms or other sort of horizontal collaboration between States, but actually in the majority of cases the federation participates.

Among the following bodies, only in the case of the National Council for Civil Defense, the periodical meeting between the Chief of the Federal Government and the Chiefs of the State Governments is established.

A ·Public Safety

In this matter, the law establishes the constitution of the National Public Safety Council, composed by the Public Safety Secretary (who chairs it); the governors of the States; the Secretaries of Defence, the Navy, and Communications and Transports; the Republic's General Attorney; Federal District head of government; and the Executive Secretary of the National Public Safety System. This Council is the higher coordination institution of the National Public Safety System. Among its functions, we can enumerate the following: establish the public safety general policy guidelines; determine the measures for the national system, jointly with other national systems, regional or local; issue bases and rules for the joint operation of federal, local and municipal polices. Furthermore, States must establish local Public Safety Councils and municipalities must establish municipal Public Safety Councils. Likewise, the law foresees the possibility to form regional and intermunicipal organs in order to coordinate policies in public safety.

B · Civil Protection or Civil Defense

The General Law on Civil Protection establishes the constitution of a National Civil Protection Council, an advisory board in civil protection planning, which is composed by the President of the Republic (who chairs it), 15 Secretaries of the federal government, state governors, and the head of government of the Federal District. This is an advisory body which channelizes the federal coordination action whose goal is to concert, induce, and integrate activities of the different participants and interested parties in order reach the objectives of the national civil protection system. Accordingly, the law foresees the creation of state and municipal councils.

C · Sports

The law establishes the creation of a National Sport Commission, which is a non-centralized body of the Public Education Secretariat, which

coordinates the National Sport System. The Commission is a federal organism, but state entities promoting sport participate in the System. Among the functions of the National Sport System, the most relevant ones are: propose, elaborate and execute the policies aimed to develop sport in the national level; support the proceedings procedures for a better coordination in sport matters; issue proposals to elaborate a national sport program.

D · Education

The General Education Law foresees periodic meetings set and presided by the Public Education Secretary to analyze, discuss, issue recommendations, and agree on actions for the development of the national education system.

E · Health

The General Health Law establishes a National Health System, coordinated by the Health Secretariat, which includes all dependencies and health care entities from the federal and local public administration. The coordination of the National Health System corresponds to the federal government through the Health Secretariat, but the General Health Law empowers state governments to "contribute" — within their sphere of powers and according to the coordination agreements celebrated with the Health Secretariat — to the consolidation and function of the system. Likewise, the Law determines that State governments must plan, organize and develop within their respective territorial jurisdictions, state health systems, coordinated with the National System.

F · Fiscal Coordination

The Fiscal Coordination Law establishes several organisms in coordination matters. Among them, the National Meeting of fiscal civil servants stands out.

The National Meeting is composed by the Treasury and Public Credit Secretariat, and by the state Treasury counterparts. The Federal Secretary calls the meeting which he presides jointly with the highest ranked state treasury authority from the state where the meeting takes place. This meeting, as the law determines, has to take place at least once per year. Its most

important function is the establishment of measures to actualize or improve the national fiscal coordination system between the federation and the states.

G · Conurbations

Finally, regarding conurbations — two or more urban centers located in municipal territories that belong to two or more states form or tend to form a demographic continuity —, the Federation, the States and the respective Municipalities, according to their respective powers, will plan and regulate in a coordinated manner the development of these centers following the dispositions of the General Human Settlements Law (which is a federal law). Coordination in this subject matter is done through conurbation commissions in which the affected governments participate and which is presided, as the law establishes, by a representative of the Social Development Secretariat (which is a federal institution).

In fact, the actual relevance of these horizontal collaboration mechanisms is minimal due to its predominantly advisory character and the preponderance of federal authorities in the decision-making procedures in the respective areas, enhanced by the strength of the federal budget.

Brazil

There are no institutionalized encounters between federal and state officials, and there is no coordinator of horizontal collaboration among States.

Argentina

There are any institutions neither coordinating the President with the Governors and the Chief of Government of the Autonomous City of Buenos Aires, nor the Governors among themselves. We have proposed the formation of a National Association or Conference/Summit of Governors, following the example of the US or México, in order to discuss the problems our country is facing and, in particular, make easier the communication with the Federal Government.

Only a meeting of the Governors can balance the power disequilibrium between the President and each one of them. This is a clear consequence of

the hiperpresidencialism that we suffer, which affects both the republican form of government and the federal system.

As stated, there are Federal Councils in which the Federal Government participates. The provinces are represented by Ministers in charge of the area the Council deals with. Even if according to article 125 of the Constitution, the authorization by the Federal Government is not necessary, sometimes they have been created by a Congress law.

The most important ones are: the Federal Council of Investments and the Federal Council of Taxes. The former deals with the study of: provincial development, regionalism, and federalism. The latter, discusses and interprets the tax co-participation system, which is a complex and relevant issue.

India

In view of the fact that the Governor of a State is appointed by the President of India and holds its office during the pleasure of the latter, occasionally questionable actions take place. The Governors may sometime interfere in the functioning of the State Governments at the behest of the Federation. Apart from the Inter-State Council, already mentioned, six Zonal Councils have been created by Federal legislation for the purpose of horizontal cooperation among the States. A National Council chaired by the Prime Minister and consisting of several Federal ministers and the Chief Ministers of the States also exists. So also the Governors of the States also meet annually in the Federal capital, in which the Federal Prime Minister and other ministers also participate. Except the Inter-State Council for which the Constitution provides other organizations are created through resolutions among the governments or through executive orders.

United Kingdom

There are a number of organisations; the most important are JMCs (Joint Ministerial Councils) in which the four politicians responsible for a subject area, or the four prime/first ministers meet to discuss a policy area. These promote co-ordination, co-operation, and confidentiality, which are to be expected in the context of Labour (and the Liberal Democrats) governments being in office in England, Scotland, and Wales, and the three sharing a single civil service. They do not have decision-making powers.

They received little use (except for preparing EU positions, especially in agriculture and fisheries), though the SNP's calls for them to be convened more often has led to some more activity since 2007.

Germany

For institutionalized encounters and horizontal collaboration among states see above 2. The Federation does not participate in the coordination between the states; the conferences mentioned above are important for the system, as they ensure a certain equivalence of legal and administrative standards.

Austria

There are a number of joint Land working groups and conferences, in which either political functionaries, such as the Land Governors or the presidents of the Land Parliaments, or Land civil servants participate. There also exists a Land liaison office. All these institutions, which have an informal character and are not based on any law, perform important functions of coordination, cooperation and information which make the federal system work more smoothly and effectively.

Federal representatives do not normally participate in them, although they may be admitted as observers, but they meet their Land counterparts in joint federation-Land-workings groups and conferences.

On a more institutionalized basis, one could mention the committees established under the treaties on a consultation mechanism and on an Austrian Stability Pact: In the first case, a committee consisting of equal numbers of representatives of the federation, the Länder and the municipalities decides on cases where one tier wants to introduce legal measures that entail additional financial burdens on the others. In the latter case, a similar committee decides on sanctions if one tier surpasses the budgetary limits set by the Stability Pact.

Swiss Confederation

There are several types of "conferences" which are organs of collaboration and coordination. The most common are the conference of directors of certain matters, such as directors of agriculture or education. There are

also regional conferences of governments. All these conferences are platforms for coordination in subject-matters or regions. Their decisions are not binding; they are just recommendations. There is also a conference of cantonal governments ("Konferenz der Kantonsregierungen"). This is relatively new and aims to coordinate, if possible, state positions in order to give more weight to state positions in cases of consultation by the Confederation (see above IV.8).

The federal government participation as a member of a cooperation platform is relatively rare. There are frequent exchanges between governments, but few mandatory or formalized. Each government has to maintain the necessary contacts with other governments to fulfill their legal obligations. The possibility that the Confederation participates in an inter-state convention is relatively new, and it is rarely applied, as it depends on a complicated procedure. It requires, first, an interstate agreement; second, a federal law that enables the Federation to participate in that agreement; and, finally, an agreement between States and the Federation. An example based on an agreement of this nature is the Swiss Conference of Universities. It is a joint federal-state body for cooperation in higher education. Its members are some of the heads of education departments of the university States, two other States, the federal Secretary of science and research and a representative of the federal polytechnic universities. This conference can make certain regulations binding on States.

After the new Constitution enter into force, the authorization of the Federation for interstate treaty is no longer necessary.

Belgium

The smooth operation of the federal system might well require political settlement of some issues. It might be important to achieve an agreement, consensus, between the affected collectivities or make political decisions at some point.

The conciliation reduces the gap to be filled with interpretation in the application of the rule since negotiation and agreement are more explicit. The question is not to give every collectivity what it demands but to approximate positions, avoid misunderstandings, and, when necessary, reach agreements.

Two explicit consequences arise from the political decisional method. If an agreement is not reached, a latent conflict rests unsolved. Every pub-

lic authority retains its autonomy. It might reconsider the contested provision and might implement it. Or it might worsen the conflict with its initiatives. On the contrary, if an agreement is reached, the adopted decision has only political repercussion. It does not modify the legal system. It does not legally bind the governments or the assemblies. The other public authorities are informed about the agreement reached and they autonomously extract the consequences they think are useful.

This politic negotiation is undertaken in the Conciliation Committee. This is a body composed of 12 members. Its composition follows the rule of double parity (l. ord. August 9, of institutional reforms, art. 31).

6 members are French speakers and 6 more Dutch-speakers. 6 represent the federal State — the prime minister and 5 other ministers — and 6 more represent the federated collectivities — the minister-president of the Walloon-government, the minister-president of the French community, the minister-president of the Brussels capital region, a minister of the Brussels government from a different language group than the minister-president of the region, and 2 ministers of the Flemish government.

When the German-speaking community is part in a conflict, the minister-president of this community also takes part on the deliberations (l. December 31, 1983, art. 67, #3). On the contrary, there is no guaranteed representation for the collegial body of neither the French Community Commission, nor the collegial body of the Common Community Commission.

Applying art.3 §§ 3 & 4 of the coordinated laws of the Conséil d'État, if a bill (proposal for a law or a decree) or an amendment or project of amendment, which according to the legislation section of the Conséil d'État, goes beyond the powers of the Federal State, the community or the region, it will be remanded to the Conciliation Committee, which has to issue an opinion in 40 days.

The provisions of a project or bill may encroach upon the interests of the State, the communities or the regions. A legislative assembly can, with a majority of ¾, request the suspension for 60 days of the legislative procedure for a specific norm. A conciliation procedure — an informal one — starts between the interested assemblies. If this procedure fails, the conflict is settled by the House of Representatives which will issue an opinion in three days. Once this opinion is issued, the Agreement Committee has to decide within 3 days.

An interest conflict might also arise between the federal government,

the government of a community or a region and the collegial body of the Common Community Commission when it is in session. If one of these authorities thinks that it can be extremely affected by a proposal or a decision, or the lack of them, issued by an executive authority, the Prime Minister or the minister-president of a government or cabinet might appeal to the Conciliation Committee. The latter has to take a decision within 60 days. If what is challenged is an omission without a duty to act, conciliation might be sought in front of the Conciliation Committee (L. August 9th, 1980, art. 32, ## 2 & 3).

The Conciliation Committee barely seems to be a cooperation authority. The parties hardly ever get involved and committed, and almost never common initiatives are proposed. Normally this is the forum where they accuse the other actors of not having paid attention to their interests or rights (S. Depré, "La cooperation" at *La Belgique fedérale* — dir. F. Delpérée — Bruxelles, Bruylant, 1994, p. 99).

It is important to notice that the "Conciliation Committee can, in order to promote cooperation and agreement between the Federal State, the communities and the regions, establish specialized committees called "interministerial committees" composed by members of the federal government and of the communities and the regions". (L. Ord. Of institutional reforms, art. 31 bis.[1]

The interministerial conferences are forums for dialogue and information Exchange. They do not have decisional power. Its members do not need to observe any procedural rule. The conferences are forums where "institutionalized contractual" cooperation can be achieved because the parties consent to working together. These conferences can be the places where cooperation agreements are reached.

Italy

Regarding the first, the State-Regions Conference can also function as the meeting forum between the Head of Government and the Presidents of the Regions, but only when the Prime Minister decides to intervene and chair the meetings (in other cases the Conference is presided by the Minister on regional issues).

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1 See Primer minister report of Sept. 12th 1995 regarding the interministerial conferences, Mon. b., Oct. 4th 1995.

In relation to the second kind, the Conference of the Presidents of the Regions should be underscored; it works as an instrument of pressure, similarly to the national associations of local entities.

Regarding the third, it has to be mentioned that the Regions have the right to stipulate agreements "in order to exercise their functions better, also with the establishment of common organisms" (art. 117, sub-section 8). It concerns a regulation that "constitutionalizes" previous provisions of ordinary law (d.P.R n. 616 of 1977, art. 8; d.lgs. n. 112, art. 3, sub-section 5). The Central Government does not take part in these organisms. Before now, the Regions had always been denied the right to establish permanent organisms of a general nature, which could be an intermediate organism between the Central Government and the Regions.

Spain

In 2004, the Presidents Conference met for the first time. It is composed by the President of the Federal government and the presidents of the states. It has met only in 4 occasions and the results have not been relevant. In the last meeting, held at the end of 2009, they dealt with the economic crisis but none of the proposals introduced by the President of the Spanish Government was approved. Party interest prevailed over other considerations. There are 32 Sectorial Conferences composed by the federal minister of a certain area and his/her homologues at the state level. Nevertheless, some of them hardly ever met. Actually, only 5 to 6 work on a regular basis.

Until very recently, an institution that coordinates relations between the states did not exist and in more than 30 years of the State of the Autonomies, any agreement among all the states had been signed, but there were bilateral agreements between, normally neighbouring, states. This anomalous situation started to change at the end of 2008 when a group called "Encuentros" ("meetings"), formed initially by 6 states that had just amended their Charters of Autonomy. In October 2010, the group, which is already composed by 16 of the 17 existing States, became a Conference of State Governments ("Conferencia de los gobiernos de las Comunidades Autónomas"). The representatives in this entity are the vice-presidents or presidential ministers of the states. This group meets two times per year, has established a permanent secretary's office and internal procedural rulings, and has signed several

covenants and political resolutions. The federation does not participate in this horizontal body. It is too soon to evaluate its practical relevance. Spain still lacks a summit of the state presidents without the President of the Federation.

4 · Do different governments or administrations usually participate in organisms or entities with legal entity (public or private: consortiums, associations, foundations, private societies, etc.)? Is this joint collaboration usual for developing public works, managing services, or financing of activities? Which legal regime is applicable?

United States of America

The involvement with nongovernmental organizations in this era of collaboration and networks is extensive at all levels of government. Normally this collaboration is for many areas: economic development, social services, arts and culture, leisure and recreation, historic preservation, and many others.

Canada

They can and they often do. It is usually done through "crown corporations" (semi-autonomous government agencies created to perform particular mandates).

Regarding the applicable legal regime, the government can choose between acting though a public-law entity that will have governmental status and enjoy privileges and immunities not recognized to private corporations, or through private-law corporations or associations.

Australia

Governments often participate in public-private partnerships for the purposes of building major infrastructure such as tunnels and toll-roads. Sometimes government services are 'out-sourced' to private organisations, such as the running of some prisons. These relationships are managed by both contract and the legislation of the relevant jurisdiction.

Mexico

Joint participation through entities with juridical personality is not common. When this is the case, it is articulated through conventions; in particular it happens regarding the management and solutions of problems involving conurbations in the larger urban concentrations in the country.

Brazil

According to the Federal Constitution, Federation, States, the Federal District and Municipalities shall regulate (by statute) public consortia and cooperation convenes among them, authorizing the associated management of public services (e.g. health services), as well as the total or partial transference of charges, services, personnel and assets essential to the continuity of the transferred services (article 241). This is not a frequent practice, though.

A federal statute created general rules regarding the creation of public consortia (Law 11.107/2005). This statute establishes that public consortia may have the nature of public associations or even of a private legal entity.

Argentina

This participation is not frequent. In the current cases, different legislation is applied: administrative or commercial, which allows such participation. Municipal legislation, both provincial and specifically local, has allowed different formulas to deliver public services or construct public works, which allows associative schemes, with a flexible regulation, characteristic to commercial societies.

India

There is no specific constitutional bar in the participation of the governments or their administration in such legal entities as societies or foundations. Several such societies or foundations have been established by different governments. Such joint collaboration is on increase on matters of public works and management of services. These arrangements are done under the law of the land applicable to private persons or entities and the government. But some of these bodies are statutory and governed by the terms and conditions of those statutes.

United Kingdom

The favoured form of co-operation on the local level (beyond the most common, simple agreements to work together) is a privately incorporated organisation with an appointed board that receives grants from interested parties. In major issues, such as infrastructure building, there typically is a PPP (public-private partnership) in which the government or board works closely with a private contractor.

Germany

For certain public works, the Federation, the states and the local entities often join in private societies.

The legal regime is "mixed": to a private society, private law is applicable, however, with modifications resulting from the fact

Austria

For years, there has been a strong trend toward privatization which can be perceived on all levels of government. The performance of many former state tasks has been transferred to private companies, associations and foundations. The state, however, keeps its influence on these bodies, as it usually holds the major part of shares and is represented in all their organs.

In principle, all three territorial entities are free to act under private law, being only bound by constitutional obligations (e.g. fundamental rights, the principle of economy, expediency and thrift etc) and the relevant laws (e.g. Civil Code, Commercial Code).

There are also several cases, where different tiers are represented in the same legal entitity, e.g. because all of them are shareholders. Still, there are many cases where just one tier is represented so that no joint collaboration takes place.

Swiss Confederation

Very often we find this kind of cooperation between municipalities for the provision of services, for example, schools and kindergartens, public sports facilities, waste disposal, sewage, etc. If the aim of cooperation is

the provision of basic public services, these establishments often have legal personality under public law. There is also the participation of different governments in entities with legal personality under private law, for example, associations or foundations such as cultural establishments.

Belgium

A cooperation agreement can lead to the creation of an autonomous legal entity. This will be organized according to what is established in the agreement.

Italy

Setting up mixed organisms at different levels of government is not directly regulated in general by the law. The principle is valid that any entity with a distinct legal personality has the right to establish organisms of collaboration with other entities according to the regulations of civil law.

The right to stipulate agreements of collaboration of various kinds is affirmed and regulated: organizing agreements in general (in the law on administrative procedure); program agreements (TV on local entities); different types of so-called "negotiated programming". In the framework of such agreements, whose use is growing especially in the field of the integrated establishment of joint public interventions in determined territorial areas, it is certainly possible, though rare (because the state prefers to reserve for itself the realization of national interests, excluding the Regions), to set up joint organisms of collaboration.

Mixed organisms exist that have been created directly by legislation of the sector; entities for the management of national parks or authorized to manage watersheds of national interest are significant examples.

Spain

The participation of different Administrations in consortiums, corporations or other entities with legal personality is quite common, especially over the last years. In this sense, it could be affirmed that, as a result of this tendency, our system follows the cooperative federalism model. The objects of these legal entities extend to all the fields mentioned before, such as public services and works or the financing of joint activities. Their legal

regime differs in each case. A common feature would be its lack of precision, and consequently, a high level of legal uncertainty. Consortiums between the Federation and the States enjoy a minimal common regulation, which defers almost the whole regime of each consortium (goals, organic, functional and financing regime, percentages of participation or representation) to its statutes.

When the management of conventions of collaboration between the Federation and the States requires the creation of a common organization, this may be perfectly a corporation. Then, corporate law applies. The participation of different public Administrations, however, poses legal problems from the perspective of free competition and contracts legislation.

X

TAXING AND SPENDING POWER

SUMMARY: 1. What is the level of state autonomy regarding income? Can they establish taxes? If so, are there any constraints? In other words, can they make use of the same kind of taxes (official prices, rates, extra charges, etc.) that the Federation establishes? Can they use both direct and indirect taxation? Can they establish taxes over subject matters already taxed by the Federation? 2. Do States participate in federal taxes? If so, in which taxes and to what extent do they participate? When States participate in federal taxes, do they have any kind of normative power (for instance, power to fix deductions, exemptions, etc.)? 3. Who is in charge of the management, liquidation and collection of taxes? Can States collect taxes on behalf of the Federation? To what extent and in which fields is this method used? Is it relevant? 4. Can States ask for credit or issue public debt within the State or Federation without the authorization of the Federation? Can they do this abroad? If the Federation has the power to authorize these operations, which are the legal rules that regulate them? 5. Do States receive direct transfers or funds from the Federation? How are these transfers regulated? What criteria are used to determine the amount of these transfers? Do States participate in the determination of the amount of transfers? If so, through which mechanisms? To what extent are States own income important relative to the transfers that they receive from the Federation? 6. Can the Federation condition the transfer on state actions or can it intervene on what the transferred funds will be allocated to? If so, in which subject matters? To what extent? Generically or specifically? Can the Federation determine their management or procedure? In general, how has the federal spending power constrained state powers? 7. How does the principle of "tax solidarity" among States work? In other words, what kind of economic contributions do the States make to the Federation which would be redistributed afterwards? What are the main criteria to determine the contributions and its redistribution? How are they implemented? Which are their limits? 8. What is the percentage of public spending in which each level of government — federal, state and local — incurs? How would these percentages change if the spending on defense, education, health, pensions and administration of justice is excluded from the calculation? How many civil servants or administrative officials does each level of territorial government have? Which are the figures excluding the above-mentioned fields? 9. To what extent are the relationships between levels of governance regarding the tax system satisfactory? Which elements are more satisfactory? Which elements are

less satisfactory? Nowadays, is there any new trend? 10. Can the Federation establish the maximum or can the Federation set the levels of state indebtedness or budgetary deficit? Can the Federation establish the maximum wage of public officials (federal, state, local, etc.)? 11. Can the Federation unilaterally compensate the debts that States owe to the Federation (for example, reducing federal transfers)? If so, in which fields does this power exist? Do States have any safeguards (right of audience, judicial actions, etc.)? 12. Are there coordination mechanisms among the different levels of governance? If so, are there located within the political institutional framework (in an assembly of territorial representation — Senate —, in intergovernmental institutions — e.g. Councils of Prime Ministers —, etc.)? Are there mechanisms of technical coordination (e.g. deductions in quotes of sub central taxes in central taxes)?

1 · What is the level of state autonomy regarding income? Can they establish taxes? If so, are there any constraints? In other words, can they make use of the same kind of taxes (official prices, rates, extra charges, etc.) that the Federation establishes? Can they use both direct and indirect taxation? Can they establish taxes over subject matters already taxed by the Federation?

United States of America

States have the same types of broad taxation powers that the federal government has. They often overlap, e.g. income taxes. However, states are constitutionally prohibited from taxing imported or exported goods, impose duties on other states, or on vessels. In practice states use the same taxes as the federal government, but have also taxed property. Indirect taxes (e.g. excises) are common, although no U.S. government uses the value-added tax.

Canada

In Canada, provincial autonomy is fairly important with regard to the provinces' capacity to raise taxes. However, they can only use direct taxation, and have established it on a vast array of subject matters, some of

them already taxed by the federation: income tax, property tax, retail sales tax, value added tax (VAT), amusement tax, etc. Therefore, both levels do in fact exploit mostly the same tax bases (however, the federal Parliament is solely competent to legislate over excise and custom duties).

Australia

Section 90 of the Commonwealth Constitution prohibits a State from imposing customs or excise duties (being taxes on goods). This effectively prevents the States from imposing a goods and services tax (although technically, a State could tax services). Section 114 prohibits a State from imposing any tax on property of any kind belonging to the Commonwealth. Otherwise, the only other constitutional limitation on the power of the States to tax is the requirement that State laws have a nexus with the State — so the State cannot tax people or property outside the State unless they have a connection with the State.

In practice, the State has little power to tax. As noted above, during World War II the Commonwealth took over income tax, which had previously been a major source of State revenue, 'for the duration of the war'. It did so by imposing its own high income tax and requiring taxpayers to pay it before paying State taxes. This left no economic room for the States to tax income. The Commonwealth then promised to give grants to the States in exchange for them ceasing to impose income tax. The States had no real economic choice but to accept. After the war ended, the Commonwealth refused to return income tax to the States or to make economic room for State income taxes. Proposals to give States room to impose their own income taxes in the 1970s were not successfully implemented for various political reasons.

The States then earned significant amounts of revenue by imposing 'business franchise fees' on the right to sell tobacco, alcohol and petroleum in the State. The validity of these fees was struck down by the High Court in 1997. It held that in reality the fees amounted to an unconstitutional excise.[1] This cost the States approximately AUD $5 billion annually.

To address this major loss of State revenue, in 1999 the Commonwealth offered the States the revenue from the goods and services tax ('GST') that the Commonwealth imposed. However, a condition was that

1 *Ha v New South Wales* (1997) 189 CLR 465.

the States abolish a number of other State taxes. Again, the States had no real choice but to accept. The consequence is that the States are highly reliant upon Commonwealth grants and have few effective taxes of their own. State taxes mainly include stamp duties (being taxes on certain types of transactions, such as the registration of a motor vehicle), gambling taxes, payroll taxes and land taxes.

See further on fiscal federalism: Commonwealth, *Budget Paper No 3 — Australia's Federal Relations,* 2009-10; A Fenna, 'Commonwealth Fiscal Power and Australian Federalism' (2008) 31(2) *University of NSW Law Journal* 509; A Morris, 'Commonwealth of Australia' in A Shah and J Kincaid (eds), *The Practice of Fiscal Federalism: Comparative Perspectives* (McGill-Queens University Press, 2007) 44; A Twomey and G Withers, *Australia's Federal Future,* (Federalist Paper No 1, April 2007); N Warren, *Benchmarking Australia's Intergovernmental Fiscal Arrangements,* (NSW Government, 2006).

Mexico

The residual powers clause competence in favor of the States does not apply to financial relations according to the Supreme Court of Justice interpretation of article 73.VII: the federation can tax any base that is necessary to cover the federal spending budget (the text of this article establishes that Congress has powers: "To impose the necessary contributions to cover the Budget").

Due to this interpretation, the federation may establish not only the taxes expressly attributed by article 73.XXIX of the constitution, but any other necessary tax to cover the Budget.

States, on the other hand, may establish the taxes that are not expressly assigned to the federation by article 73.XXIX. But, given the mentioned constitutional interpretations, overlapping and confusion existed when defining which taxes are expressly assigned to the federation and those understood as reserved to the States by the residual clause of article 124. The result was a "fiscal chaos", which ended with the creation of a National Fiscal Coordination System.

The essence of the Fiscal Coordination System consists in the following: the Federation and the States may subscribe conventions on fiscal coordination, through which the States yield part of their tax powers to the federation, in exchange of receiving a share of federal fiscal incomes. Ac-

tually, all States have signed this kind of conventions, which has made that the two more important taxes (Income Tax and the VAT), are established and administrated by the Federation (even if it is not expressly established in article 73.XXIX, which enumerates the taxes that correspond to the federation). This situation has given the federation the control of over 80% of the total tax revenues generated in the country, which indicates the degree of financial dependence of the States and Municipalities towards the federation.

Brazil

States cannot create new taxes. The Federal Constitution lists all States taxes. Their most important tax is something similar to a sale's tax ("*Imposto sobre Circulação de Mercadorias e Serviços"*). States have no direct taxation power. Income tax favours the Federation, not the States.

Argentina

The National Constitution, after the 1994 constitutional amendment, has specified the constitutional distribution in tax matters between the Federation and the Provincial States, without modifying the criteria of the Constitution of 1853 and 1860.

According to article 75 subsections 1 and 2, which were added by the amendment, plus the articles not modified, the following classification can be made:

For the federal government:

—Indirect external taxes (customs): in a permanent and exclusive way (arts. 4, 9, 75 part 1, and 126);

—Indirect internal taxes: in a permanent and exclusive way with the provinces (art. 4);

—Direct taxes: exceptionally (art. 75, part 2).

For the provinces:

—Internal indirect taxes: on a permanent and concurrent form with the federal government (art. 4);

—Direct taxes: in a concluding and permanent form, except if the federal government exercises the power of art. 75 part 2 (arts. 121 y 126).

Consequently, it is clear that the Argentinean constituent also follows the North American model of tax sources separation and that the Provincial States have a wide tax power recognized, which empowers them to receive all of the three types of taxes: taxes, rates (levies) and contributions.

Even if tax law does not establish the double or triple taxation between different government orders, the Nation's Supreme Court of Justice has admitted this circumstance.

On the other hand, since the 1930s, the application of a tax co participation system began, despite not being initially foreseen by the Constitution, which helped the advance of the federal government powers, in keeping with the country's centralization process. Such system was finally constitutionalised in the 1994 constitutional reform, basing it on a co participation law-covenant, mentioned above, and which has not been yet sanctioned; hence, another violation of the Nation's Supreme Law.

India

States have independent exclusive source of their income. They can impose certain exclusive taxes which the Federation cannot impose. The tax powers of the Federation and the States are exclusive. Therefore the States cannot impose those taxes which Federation can. The States can impose both direct and indirect taxes. As the tax powers of the Federation and the States are exclusive both of them cannot impose the same tax.

United Kingdom

Scotland can vary the income tax rate by 3%. This has not been done and would change revenue very little. Otherwise, there is no tax power for the devolved governments. That said, there is room for creativity: their control of local government and its taxation, and their user fees (such as for water supply in Northern Ireland) give them more fiscal flexibility than appears in the law or than they have used.

Germany

States can only establish certain local taxes as for example "Getränkesteuer" (a tax on drinks consumed in a bar or restaurant), under the condition that these taxes are not of the same kind as federal taxes. The munici-

palities can impose certain local taxes within the law: property tax and trade tax which are provided by federal law and certain local taxes like a tax on alcoholic beverages when consumed in a restaurant/bar (not when bought in a shop); taxes on dogs and others.

Austria

The Financial Constitutional Act (Finanz-Verfassungsgesetz, F-VG) basically determines the different kinds of taxes:

a. Exclusive federal taxes
b. Exclusive Land taxes
c. Exclusive local taxes
d. Shared taxes

Shared taxes are shared between the federation, the Länder and the municipalities or between at least two of them. "Sharing" either means that all sharing entities may levy taxes on the same subjects of taxation or that the federation/Länder levy a basic tax, whereas the other entities are only entitled to levy additional taxes on the same subjects of taxation, or that only the federation/Länder levy a tax, whereas the other entities receive part of its revenues ("joint taxes").

It is up to the Financial Equalisation Act (Finanzausgleichsgesetz, FAG) to provide, which of these taxes may be levied by which entity on which subjects of taxation. The FAG is an ordinary federal law, which is usually enacted every 4 years for reasons of fiscal flexibility. Traditionally, however, the Federal Government negotiates the Act with the Länder and the Associations of Municipalities and Towns. If all tiers have basically agreed on the drafted act, the FAG will be presumed not to be discriminatory by the Constitutional Court.

The question whether the Länder may levy the same taxes as the federation or whether they may use both indirect and direct taxation, thus depends on the respective FAG, which is constitutionally empowered to distribute the taxes according to the principle of equality and the consideration of all tiers' economic encumbrances and capacities.

The Constitutional Court holds that the Länder are entitled to "invent" all taxes which have not been already determined by the FAG, but this amounts to nearly nothing in practice.

Swiss Confederation

Financial independence is not understood as a separate subject from the basic principle of the division of powers. That is, when the federal Constitution does not provide power for the Confederation, the power remains on the States. The Confederation has the power (almost) exclusive of collecting indirect taxes on consumption. This includes taxes such as VAT, taxes on gasoline, alcohol and tobacco, truck traffic, casinos, etc. The power to levy direct taxes is a concurrent power. Both the Confederation and the States and municipalities have the power to levy direct income taxes.

The Confederation also makes use of its harmonization power over direct tax defining a unified set of tax figures which have to be imposed by all States in order to make tax systems more comparable and competition between the cantons (States) more transparent, without defining the tax rate. The tax rate continues under the power of States.

Belgium

The organization of a federal State entails the division of public resources. As Jean Anastopoulos explains the division of financial power is a consequence of the constitutional recognition of two separate autonomous governments. At the same time, this is a guarantee since without financial resources, linked to the assigned powers, neither the Federal State nor the federated collectivities, will be able to assume their functions.

This federal goal can be achieved through several ways: autonomy in revenue collection, autonomy in expenditure, financial responsibility, or mixed formulas… These techniques ensure certain mechanistic revenue obtaining and preserve the autonomy since parties can decide how to spend them.

These financial problems might be shaded in political societies economically growing. But they stand out when public resources are scarce and the State has to resort to public debt. When resources are not abundant, a new question arises: a federal system entails solidarity, but does this solidarity include financial solidarity between the different governments? Is balancing out desirable or feasible? Which should be the measure? What should be done if one or more of the federated collectivities do not participate in the common growth?

In Belgium, the distribution of financial funds between the different levels of government is in the core of both the legal and the political debate. The debate has not finished yet. Some principles seem to be rooted though.

First principle. According to art. 170, §2.1 of the Constitution, the communities and the region have the right to collect taxes. They have their "own taxation power" (CA n.86/2000). This power is paralyzed in what communities are concern due to the difficulties encountered to determine how taxpayers should be classified for tax purposes between those who should pay to the French Community and those who should pay to the Flemish one.

It must be highlighted that the tax base of the federated collectivities is not related to their regional powers (E. WILLEMAERT, *Les limites constitutionnelles du pouvoir fiscal*, Bruxelles, Bruylant, 1999, p. 29).

Second principle. Communities and regions cannot tax what has already been taxed by the federal government. They can only establish taxes on "virgin" issues. The Walloon Region has established, in a decree of November 19, 1989, a tax over abandoned/vacated buildings. It considers this a way to ·fight housing in inadequate conditions, to improve housing, and to promote the construction sector" (CA, nº 67/2000).

The legislator can also prohibit the establishment of additional taxes by the federated entities or the establishment of rebates in the taxes instituted by the financial law.

In two activity sectors, article 2 of the ordinary law of January 23rd 1989 establishes a rule of regional priority: "The (Federal) State and the communities cannot tax water or waste".

Third principle. The federal legislator can, according to constitutional article 170 §2.2, specify "exceptions when their necessity is justified". Hence, it can decide in abstract which taxes cannot be collected by the communities or regions.

Tax revenues are not enough to ensure the financial autonomy of the federated entities. While their own fiscal and parafiscal revenues of regions and communities amount to 18.5% of their total revenues. Transfer from the federal power amount to 30.5% of the VAT and 39.1% of Personal income taxes. Hence, almost ¾ of the federated entities incomes comes from the federal power.

Italy

Presently, the taxation capacity is put in action through own taxes and through additions to federal taxes and is very limited: in both cases the tax is entirely regulated by federal law and Regions can only establish the tax rate within rigid limits established by federal law. These own taxes or additions to federal taxes have either tax or duty/fee nature, and must be considered as a form of direct taxation. In the new constitutional system the situation should largely change: the new version of art. 119 Constitution gives directly to Regions the capacity of establish regional taxes and art.117 the exclusive legislative power to regulate them.

Spain

The Spanish Constitution provides that States "will enjoy tax autonomy for the development and enforcement of their powers, according to the principles of coordination with the Federal Treasury and solidarity among all Spaniards". Moreover, the Constitution lays down the possible state sources of income and defers to a federal organic law the regulation of the exercise of state tax powers, the rules to address conflicts and the mechanisms of collaboration between the States and the Federation to a federal organic law (articles 156-157).

The financial autonomy of states has been increasing over the years through various financing arrangements (1986, 1992, 1993, 1996, 2001 and 2009) agreed in a multilateral body called the Council of Fiscal and Financial Policy in which States and the Federation are represented.

Concerning revenue autonomy, the Constitution allows States to establish their own taxes. This power is limited by two principles: first, States cannot tax goods located outside their territory or impose taxes that hinder the free movement of goods and services; and second, States cannot impose taxes over any taxable income or property already taxed by the Federation. The latter is fundamental because the Federation has imposed taxes over most of the taxable things. Hence, States can hardly create new taxes, as the conflicts before the Constitutional Court in cases regarding the imposition of new state taxes have demonstrated. Furthermore, we should bear in mind that political parties in government tend to avoid increasing the tax burden since it is perceived to be already high. States have created their own tax figures that primarily fall within the tax on gambling (e.g.

gambling tax on bingo) or environmental taxes (e.g. on water charges, taxes on the CO_2 emissions, etc.). Quantitatively, these taxes contribute about 1% of total State revenue.

The regulation of state surcharges over federal taxes is as follows. States may impose surtaxes on federal taxes susceptible of being transferred, except for the tax on hydrocarbons' retail sales ("Ventas Minoristas the Determinados Hidrocarburos"). Regarding the value added tax ("Impuesto sobre el Valor Añadido") and special taxes; States may only impose surtaxes when they have powers to regulate the kind of charge. In any event, such surtaxes can not diminish the federal income from the mentioned taxes or distort their nature or structure. This way of obtaining revenue through surcharges has not been used by any of the States.

It should be noted that the Federal Constitution (First Additional Provision) protects and respects the historical rights of the provincial territories (the Basque Country and Navarra). This implies the existence of a specific funding model for those areas that is characterized precisely by a high degree of financial autonomy in both the expenditure and the revenue side. In fact, all taxes of the Federation have been transferred to these territories, that is, they receive all revenues, and they have regulatory power over some and collect and enforce them. In exchange for this scheme, they pay an annual fee for the public services that the Federation provides them, and whose value is established through a bilateral agreement between the Federation and the State itself (called "convenio" in the case of Navarra and "concierto" in the case of the Basque Country). Hence, in Spain there are two distinct funding models: the so-called common regime model of financing, which applies to 15 states, and the "foral" regime financing model that applies to two states.

2 · Do States participate in federal taxes? If so, in which taxes and to what extent do they participate? When States participate in federal taxes, do they have any kind of normative power (for instance, power to fix deductions, exemptions, etc.)?

United States of America

States have participated in federal taxes during periods of general revenue sharing. During the last such period, 1967-1982, amounted to direct

transfer of funds for states. States had no formal role in fixing the structure of these taxes. Federal-state tax cooperation basically exists with regard to parallel structures of payment. For example, many states set their rates and exemptions/deductions to a ratio of federal taxes. This allows tax preparers to easily figure state taxes after federal taxes are fixed.

Canada

The province of Quebec "participates" in the collection and administration of some federal taxes. For example, the provincial Revenue Agency administers the federal Goods and Services Tax. In that case, the province applies the federal laws and regulations, and has no normative power as such.

Australia

The primary participation of the States in Commonwealth taxes is the payment to the States by the Commonwealth of the net revenue from the Commonwealth's goods and services tax ('GST'). The Commonwealth's GST legislation provides that the consent of each State must be obtained before the rate or base of the GST can be changed (*A New Tax System (Managing the GST Rate and Base) Act* 1999 (Cth), s 11). However, this legislative guarantee has no substance because it can be amended by ordinary Commonwealth legislation without State consent. The Commonwealth has no power to entrench these provisions in such a manner. A legislative change to the rate of the GST without State consent would be effective because it would impliedly repeal the requirement for State consent. These provisions were included for political appearances and have no real legal effect (although they might have a political effect).

There is, however, an intergovernmental agreement that deals with aspects of the management of the GST which are overseen by the Ministerial Council for Federal Financial Relations. See further: *Intergovernmental Agreement on Federal Financial Relations* at: http://www.coag.gov.au/intergov_agreements/federal_financial_relations/index.cfm.

In addition, in very rare cases the States collect Commonwealth taxes. This arises because of a constitutional anomaly. Under s 52 of the Commonwealth Constitution, the Commonwealth has exclusive power with respect to 'places acquired by the Commonwealth for public pur-

poses', which are usually places such as airports or post offices or office buildings. The Commonwealth has enacted a law that picks up and applies to each Commonwealth place the law of the State in which the place is situated. However, the High Court held that this was not effective with respect to State taxes in Commonwealth places. As a result, the Commonwealth and the States cooperatively enacted 'mirror legislation', so that the Commonwealth directly imposes taxes that are the equivalent of the otherwise applicable State taxes in the Commonwealth place. The States then collect those taxes on behalf of the Commonwealth and bear the administrative costs of collection. The revenue is formally credited to the Commonwealth and simultaneously granted to the States by way of a Commonwealth standing appropriation. So while legally, the taxes are Commonwealth taxes, in practice they operate as if they are State taxes.

Mexico

The States and the Municipalities participate in federal taxes. The core of this participation (within the framework of the Fiscal Coordination System) consists in the following: the federation and the states can sign fiscal coordination covenants, according to which states agree to limit their tax powers in favor of the federation, receiving in exchange a share in the federal tax revenues. Currently, all states have signed this type of agreements, and, consequently, the two most important taxes (Income Tax and VAT) are established and administered by the Federation (even if any of them was expressly assigned as a federal Congress power by article 73.XXIX of the Constitution, which enumerates the taxes assigned to the federation).

This has implied that the Federation controls around the 80% of the tax revenues of the country. From this, the financial dependence of states and municipalities can be easily inferred.

These participations are articulated through the regulations and formulas that integrate the "National Fiscal Coordination System", whose main characteristics will be described below.

As has been mentioned before, the basis for the National Fiscal Coordination System is the agreement of the states to partially assign their fiscal powers to the federation — through a "Convenio de Adhesión al Sistema" (covenant agreeing to join the system) celebrated between the federal government and the state — in order to receive, in exchange, a share in the

federal revenues. Likewise, the Fiscal Coordination Law which establishes several sharable federal funds. The most important ones are:

(General Fund) "Fondo General de Participaciones": composed by the 20% of the federal revenues in which states can participate. These are defined as the amount that the federation obtains from all its taxes, oil production and mining extraction, deducting the refunds for the same taxes (the Fiscal Coordination Law is much more specific and enumerated the sources of federal revenues that will not be participated by the states).[2]

This General Fund is distributed in the following way:

I. 45.17% according to the state population in that fiscal year.

II. 45.17% according to a coefficient that measures how efficient the state has been collecting the income, rewarding the most successful one.

III. 9.66% will be distributed in a reverse order as the amount per habitant that a state will receive — calculated adding the amounts referred in sections I and II — would dictate (compensatory criteria).

Municipal Promotion Fund: formed with 1% of the federal revenue in which other entities can participate, it corresponds to the municipalities and is distributed according to the formula established in article 2-a, section III of the Fiscal Coordination Law. These funds are not directly given to the municipalities, but to the state governments which transfer them to the local governments.

States and the Federal District can include in the coordination agreements celebrated with the Federation, that 100% of the revenues collected from certain taxes, such as the tax on possession or use of vehicles or the tax on new vehicles (from which municipalities will receive at least 20%, distributed according to the formula established by the state legislature).

Likewise, states and the federation can agree that part of the revenues obtained from the special tax on production and services of the following goods be transferred to the states: 20% of the collection of taxes on beer, soft drinks, alcohol, and alcoholic drinks; 8% for tobacco tax. This will be distributed according to the share sold in the state. Finally, this Law establishes that municipalities will receive at least 20% of the state share.

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2 See article 2 of Fiscal Coordination Law.

It is important to note that even if states and municipalities participate in the revenues, they do not have any rulemaking power.

Brazil

States indirectly participate in Federal taxes when they receive direct funds from the Federation. States have no normative power regarding federal taxes (see question 5 below).

Argentina

As mentioned, there are two systems: one that classifies taxes and assigns them to the different governmental levels and another of tax co-participation. For a deep analysis of this issue, see the explanations given in the historical description of the federalism stages; in particular, the fiscal matters after the 1994 amendment.

Few additional comments should be made. Since the law-covenant envisaged in the Constitution has not been enacted, the 23.548 Act (1988) is still in force. This Act has been infringed too: the initial rates of primary distribution between the Government and the Provinces have been modified, in detriment of the latter.

In this long process of fiscal centralization, the tool used has been the assignation of certain taxes to specific ends in order to exclude them from the amount co-participated. By decrees, laws, and Fiscal Pacts, the federal government has been changing what was achieved in 1988 (date of the primary distribution) which gave the provinces a bigger share (over 56%).

This 1988 law established, in its article 7, that in this distribution the provinces could not end up having less tan 34% of the co-participated amount. Today, it is estimated that they hardly achieve the 25% of it while the federal government keeps the 75%. This clearly shows the centralist advance in this matter, in detriment of sub national governments and the Constitution itself.[3]

However, things may change given the victory of the opposition party in 2009 election. Congress will discuss a bill of the winner party which

3 For a deeper analysis, see Hernández Antonio María, "Federalismo y Constitucionalismo Provincial", obr. Cit.

proposes to increase the co-participation rate assigned to the Provinces in the tax over checks, which today is around 15%.

We can point out that there is an exclusively federal tribute co-participated by provinces: the tax over the withholdings on farming exports. This was established by the Presidential Decree n. 206 of 2009, while the conflict between the President Fernandez de Kirchner and the farmer representatives was going on. The same decree created a Federal Solidarity Fund, according to which the 30% of the withholding over soy are distributed to the Provinces following the criteria established in the Co-participation Law in force, which assigns the rate for each of them.

India

States participate in the collection of a few Federal taxes such as some stamp and excise duties that are levied by the Federation may be collected and utilized by the States (Article 268). Similarly service tax is levied by the Federation but can be collected and utilized both by the Federation and the States (Article 268-A). The States do not have any normative power with respect to these taxes.

United Kingdom

No, except for Scotland's 3% power.

Germany

The most important taxes — taxes on income, corporate income tax, value-added tax — are divided between Federation and States. Certain taxes as for example inheritance tax are due to the States and the local entities (trade tax, property tax); all those taxes are regulated by federal tax law for which the consent of the Bundesrat is required; for property tax and trade tax the municipalities may fix the collection rate within a certain range fixed by federal law.

Austria

The Länder may participate in shared federal taxes. It is up to the FAG to decide which kinds of taxes these are in concreto (the F-VG al-

lows shared taxes where the federation levies the tax and distributes the revenues among the different tiers; shared taxes where all tiers may levy taxes from the same object of taxation; shared taxes where the federation levies a basic tax and where the other tiers are allowed to levy additional taxes). Currently, nearly all shared federal taxes are taxes where the federation levies the tax and where the revenues are distributed among the three tiers according to different percentages (joint taxes). The Länder have only normative power with regard to those shared taxes where they do not only receive revenues from the federation, but where they may levy shared taxes themselves. Presently, the FAG allows the Länder to levy additional taxes with regard to certain types of betting.

Swiss Confederation

The federal Constitution guarantees state participation in at least 15 percent of federal taxes. This participation is seen as a compensation for the collection of direct taxes by State Administration. This participation does not entail any regulatory capacity. Regulatory capacity of States to tax is limited to state taxes. The State participation is closely linked to the financial compensation system, through which states receive more financial resources directly from the federal treasury (see below X.7).

Belgium

The federal collectivities do not participate, with that character, in the establishment of federal taxes. Taxpayers, people and companies, located in the communities and regions paid these taxes. A great deal of the resources of the federated entities come from this source.

Communities and regions are authorized to receive taxes in three additional areas-registers, income tax, and tax on radio and television. In the first to cases, they can establish deductions or tax credits.

Italy

The current structure of regional finances (157,210.00 million Euros, according to 2009 data) consists of:

a. Direct transfers from state: EUR 92.814 million (59%).

b. Tax controlled by the regions ("IRAP" — regional tax on productive activities) and participation in state taxes: EUR 62.703 million (40%).

c. Other (capital income and other capital): EUR 1,693 million (1%).

The sources of funding referred to in paragraph b) (tax revenues) comes 40% from the IRAP and the remaining 60% from the participation in direct and indirect taxes of the state.

With regard to IRAP, the Regions have some leeway in: implementation of the tax, rate determination, and granting of benefits and deductions.

With regard to participation in state taxes:

DIRECT TAXES:

—Participation in the IRPEF (income tax of individuals): Regions are autonomous in determining the regional surcharge, between a minimum +0.9 and a maximum of +1.4 of the rate. It is paid to the region where the taxpayer's domicile is located. Participation in the IVA (VAT) is set for each year in the range of 38.55% of total revenue in the penultimate year before the one taken into consideration, with the exception of the transfer to the regions with special status and the European Union. The amount is attributed to the Regions by reference to the average household final consumption provided by ISTAT ('Istituto nazionale di statistica') at the regional level for the last three available years.

—Participation in excise duty on petrol and other fuels, in a lump sum of 0.13 EUR / liter (for gasoline).

Spain

The Federation has been transferring to the States a portion of their tax revenue. In some cases, the transfer is complete and in others it is partial. Specifically, after the entry into force of the Organic Law 22/2009 of December 18, which regulates the financing system of common regime States, the situation is as follows:

a. The taxes whose revenue has been fully transferred to States are: the capital tax, inheritance and donation tax, tax on capital transfers and documented legal acts, taxes on gambling, the tax on retail sales of certain hy-

drocarbons; the excise duty on certain means of transport and the electricity tax.

States have "certain" regulatory power over all of these completely transferred taxes, except for the excise duty on electricity, as shown in Table 1.

b. Taxes only partially assigned to States are: 50% personal income tax on, 50% of value added tax (VAT), and 58% special taxes on the production of alcohol, tobacco and hydrocarbons.

In this case, Member States have regulatory power only on the income tax (see table 1).

Table 1. Regulatory power of states over taxes totally or partially transferred

Tax	Powers assigned to States
Capital gains tax	Modification of the minimum exempt income (non-taxable); modification of rates, without limit; the introduction of any bonus or deduction in the tax liability.
Inheritances and donations tax	Reductions in the tax base (taxable income), without limit; modification of the rates and ratios applying to pre-existing wealth; the introduction of any bonus or deduction in the tax liability.
Capital transfer tax	Change in tax rates on: administrative concessions (public contracts), transfer of personal and estate property, formation and transfer of rights in the collection of personal and real estate property, except for warranty and lease of real estate and personal property; introduction of deductions and bonuses in the amount in the previous cases.
Gambling taxes	Regulation of exemptions, tax base, tax rate and fixed payments, bonuses and accrual.
Special tax on certain means of transport	Increase up to 15% of the federal tax rate.
Retail sales tax on certain hydrocarbons	Applying a tax rate in addition to the federal one, up to a maximum that varies for each product.

(Continues)

Table 1. Regulatory power of states over taxes totally or partially transferred

Tax	Powers assigned to States
Personal Income Tax	Changing the scale of the tariff applicable to the general tax base maintaining a progressive structure; Deductions to the amount owed based on: personal and family circumstances; non-business investments; non-exempt grants and subsidies received by the States (except those affecting the development of economic activities or the income to be integrated into the tax base of savings); personal and family minimum within a range of + -10%; increases and decreases in the rates of deduction from home ownership.
Value Added Tax (VAT)	None. The 2009 agreement introduced the commitment of the federal government to initiate proceedings with the EU to enable States to decide on the retail level.
Certain special consumption taxes (tobacco, alcohol, hydrocarbons)	None

Data obtained from Bassols, Bosch, Vilalta (2010).

According to the previous explanation, the Spanish system can be described as one where the Federation and the States share tax power.

3 · Who is in charge of the management, liquidation and collection of taxes? Can States collect taxes on behalf of the Federation? To what extent and in which fields is this method used? Is it relevant?

United States of America

Each level of government is responsible for collecting its own taxes. At the local level, the county usually administers all taxes for special districts and municipalities, as well as for itself. The most important option is that

excise taxes, that are collected at the point of purchase (e.g. merchants) and paid to the local, state, or federal treasury.

Canada

The provinces and the federal government are in charge of their respective taxes. As mentioned above, the province of Quebec collects certain federal taxes, but usually it is the Federation that collects taxes on behalf of provinces, not the other way around. In all provinces except Quebec, provincial personal income taxes are levied by federal authorities at the same time than federal income taxes. Corporate taxes are also levied by the Federation on behalf of all provinces except Quebec and Alberta (in 2009 Ontario's corporate tax became administered by the Federal administration). The moneys levied by the federal authorities are then transferred to the province where they originated. In the provinces where the collection of provincial income or corporate taxes is retained (Quebec, Ontario and Alberta), a taxpayer has to file two income tax reports, each according to different rules.

Australia

Apart from the above anomaly, the States are in charge of the management, liquidation and collection of their taxes and the Commonwealth is in charge of such matters with respect to its own taxes. As the GST is a Commonwealth tax, it is collected by the Commonwealth before the revenue (less the collection costs) is transferred to the States.

Mexico

Management, liquidation and collection of federal taxes are carried out by federal organs. The Secretariat of Treasury has a specialized organ named "Tax Administration Service", which has national presence, and is in charge of federal tax collection. States have within the structure of their Finance Secretaries, specialized organs for the collection of state taxes. This is the general model.

The Fiscal Coordination Law allows states and the federation to subscribe "administrative collaboration conventions" which may establish that states will manage, liquidate, and collect certain federal taxes. Among

them we can find the federal tax on the possession or use of vehicles; and the tax on new automobiles. In both cases, those states that celebrate such conventions are entitled to 100% of the collection of these federal taxes and they have to distribute at least 20% of the amount collected to municipalities.

Under other rules, they may also have this kind of collaboration conventions for the administration of other taxes, including the Income Tax or the VAT.

As mentioned above, "administrative collaboration conventions" are usually signed between the federation, through the Secretary of Treasury and Public Credit, and the State governments since some functions of administration of certain federal taxes are transferred to the State. In fact, collaboration may even reach the municipalities of the State, because these conventions usually include a clause by which the State, with the consent of the Secretariat of Treasury, may fully or partially exercise the transferred administrative faculties through their municipalities.

The State must exercise these faculties according to federal legislation. Likewise, even if the State bodies do not depend hierarchically on the Federal Administration, certain duties must be fulfilled: report to the Federation of the probable commission of tax offences; make monthly deposits in favor of the Federal Treasury of the amount of federal incomes collected during the last month; render, each month, to the Federation, the "Monthly Verified Account of Coordinated Incomes"; and follow federal rules regarding funds and securities concentration.

The Secretariat of Treasury has the following powers: intervene at any moment to verify the fulfilment of State obligations; file law suits for tax offences; process and resolve the revocation appeals presented by the contributors against definitive tax resolutions; file different kinds of appeals against resolutions which are contrary to its fiscal interest (regarding coordinated revenues); and, which is very important, exercise the faculties of Planning, Programming, Regulating, and Evaluating the coordinated incomes.

The way the Federation ensures control is, on the one hand, if states do not celebrate the convention or once celebrated they do not comply with it, they do not receive economic revenues, which consist basically in percentages of the coordinated incomes, and the fines paid by contributors. On the other hand, the conventions always establish the faculty of the federation to take exclusive power over any of the transferred functions to

the State by the respective convention when the State does not comply any of the obligations established in it (written notices have to be send to the state in advance). Likewise, the State may stop exercising one or several of the transferred powers; written notice shall be send to the Secretariat of Treasury.

Finally, the Fiscal Coordination Law admits the possibility that municipalities of the States participate up to 80% of the amount collected from the taxpayers subject to the "Small Taxpayer" regime (according to the federal Tax Revenue Law), if they take verification actions aimed to detect violations and control those who should be taxed under the mentioned regime. However, in case the municipalities ask for the aid of state government to make these verification actions, the collection from these contributors will be divided as follows: Municipalities, 75%; States, 10%; and Federation 15%.

We must highlight that the tax revenues incomes in which State and municipalities participate are still federal taxes. State and municipal authorities have to deposit these resources in the Treasury Secretariat and periodically report on their collection; nevertheless, it is possible that the Secretary of Treasury and the respective State agree on a permanent compensation procedure, so the State retain the part that corresponds to the transfers he is entitled to receive.

Brazil

Federation, States, the Federal District and Municipalities are responsible for the management, administration and collection of their own taxes (Articles 145, 153, 155 and 156).

According to the Constitution, States and Municipalities collect income tax of its own public servants on behalf of the Federation. The money collected belongs to States and Municipalities respectively though.

Argentina

As a general rule, each government level manages and collects its taxes, according to the principle of treasury separation.

But the federal tax co participation system has allowed some taxes to be raised by the federal Government and, then, co participated to Provincial States. Similartly, there are systems for provincial tax co participation,

which operates the same way: it is the provincial state that collects the tax revenues — for example, on automobiles — which are later co participated by the municipalities.

There is no experience the other way around.

India

Both the Federation and the States may manage, liquidate and collect taxes. As mentioned above, the States may collect some of the taxes on behalf of the Federation. This method is used in respect of stamp duties, excise duties on medicinal and toilet preparations and service tax. Yes, it is relevant to the extent mentioned here.

United Kingdom

The administration of taxes is wholly carried out by the UK (via its agency, called the Inland Revenue).

Germany

The finance authorities of the Länder carry out the administration of taxes, but according to federal law; for local taxes: the municipalities.

Austria

The Federation, Länder and municipalities respectively are each in charge of their exclusive taxes. Regarding shared taxes, the federation is in charge of federal joint taxes, distributing Länder and municipal shares among them after having levied these taxes and the Länder are in charge of Land joint taxes, shares of which are given to the municipalities. The Länder do not collect taxes on behalf of the federation. The municipalities may levy certain exclusive taxes of their own, if a respective Land law entitles them to do so. Another range of local taxes, which are enumerated by the FAG as well, does not even need a Land law, but may be directly levied if the municipal councils do so resolve (e.g. entertainment tax, charges for local services etc). The amount of these taxes is significant, although still less than what the municipalities get from the shares they hold in joint taxes.

Swiss Confederation

The cantonal (state) Administration collects state and federal taxes. In some states they also collect municipal taxes. In others, municipalities collect their taxes with their own Administration. This technique is used for all direct taxes. For federal taxes on consumption (VAT and others), the federal government is responsible for the collection and administration.

Belgium

Regions receive all the revenues collected of certain taxes. These are called "regional" even if they are federal because the federal authority which establishes them does not participate in them. The special legislator has defined the taxable income and lists them on article 3 of the Special law of January 16th, 1990. Its intervention binds both the federal legislator (simple majority) and the regional legislator. These taxes are called regional because their collection is distributed according to the region where they arise. Some examples of the issues subjected are: succession taxes, real estate discounts, or registration of real state transfers.

Italy

Regions do not participate in any way in the management of federation taxes. On the contrary, it is the federation who manages regional taxes (tax on productive activities, additions), afterwards it distributes the revenues from their taxpayers among the Regions.

Spain

In principle, each territorial entity has the power to manage its own taxes. There is, however, a long tradition of collaboration with entities that are not the particular tax holders. According to this tradition, the federal Constitution, federal legislation, as well as state Constitutions provide for the collaboration between the Federation and the States in this matter. The Federal Constitution recognizes that States may act as delegates or agents of the Federation to collect, to

manage and to settle these tax resources, in accordance with the laws and state constitutions.

In particular, taxes, whose performance has been fully transferred to the States, are managed by them, except the tax on certain means of transport, the retail sales tax on certain hydro-carbons and excise duty on electricity. In each case the management is undertaken by the Federal Agency, which is also the one that manages all taxes whose revenue has been partially assigned to the States. Note that the Catalan State Constitution provides for a tax agency which is supposed to, on the one hand, manage taxes fully transferred, and, on the other hand, manage partially transferred taxes under the form of a consortium with the federal agency. The Catalan tax agency has operated since January 2008 and the creation of the consortium is being negotiated.

According to the applicable legislation, States and local entities within their territory may adopt such techniques of collaboration regarding the taxes established by them. Usually, this form of collaboration applies to taxes previously transferred, totally or partially, and it is advantageous because it ensures the resources from the moment they are liquidated and collected, and a posterior transfer from the formal holder.

Collaboration between local authorities does not always translate into a vertical one, from higher layers of territorial administration to the lower ones. The agreements might work bottom-up. Two specific examples are the collection of certain taxes that the majority of states and some local authorities have assigned to the Federal Tax Agency.

4 · Can States ask for credit or issue public debt within the State or Federation without the authorization of the Federation? Can they do this abroad? If the Federation has the power to authorize these operations, which are the legal rules that regulate them?

United States of America

States cannot issue credit, but can incur public debt on the private lending market. They do this for capital projects. Foreign lending is allowed, but often limited by state law. They do not require federal authorization or review.

Canada

Yes, they can and do so regularly, abroad or within the province. I am not sure that Canadian federal authorities could have the power to prevent a province from raising moneys abroad. In any case, to my knowledge, they have never asserted such a right.

Australia

Section 105A of the Constitution provides that the Commonwealth and the States may enter into agreements respecting the public debts of the States, including the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States. It further provides that every such agreement shall be binding upon the Commonwealth and the States notwithstanding anything contained in the Commonwealth or State Constitutions or any of their laws. This became the subject of great contention in 1931 when the New South Wales Government sought to renege on its obligation to pay interest on overseas loans during the Great Depression. The Commonwealth Government took over the State's debt and paid the interest, but took increasingly severe legal steps to obtain the money back from the State, including ordering all banks to pay to the Commonwealth any money they held that stood to the credit of the State. The New South Wales Government challenged the validity of the Commonwealth's action in the High Court, but the Commonwealth won.

The Australian Loan Council, established by the financial agreements between the Commonwealth and the States, has over the years regulated State and Commonwealth borrowing. It now focuses on transparency and scrutiny as a means of restricting borrowing to prudent levels. See further: R Web, *The Australian Loan Council* (Parliamentary Research Note No 43, 2001-2) at: http://www.aph.gov.au/library/Pubs/rn/2001-02/02rn43.htm.

At its meeting in March 2009 the Loan Council approved each jurisdiction's nominated allocation of borrowings, 'having regard to each jurisdiction's fiscal position and the macroeconomic implications of the aggregate figure'.[4] It approved a Commonwealth deficit of AUD$34.1 billion and State deficits amounting in total to AUD$24.8 billion.

During the global financial crisis of 2009, the Commonwealth Government, through the Australian Loan Council, also gave a temporary guaran-

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4 Commonwealth, *Budget Paper No 3 — Australia's Federal Relations*, 2009-10, p 156.

tee of the borrowings of the States, for a fee (see *Guarantee of State and Territory Borrowing Appropriation Bill* 2009 (Cth)).

Mexico

There in an express constitutional prohibition for states to contract direct or indirect obligations and loans with the governments of other nations, with foreign societies or particulars, or when they must be paid in foreign currency or outside the national territory.

But both States and Municipalities may contract obligations and credits but only when they are destined to productive public investments, according to the bases established by their own legislatures in their respective law, and for the concepts and up to the amount they fix annually in their respective budgets.

In fact, state and municipal governments usually enter into loans from commercial and development (for example, BANOBRAS) banks. Besides, there is evidence that supports that in many occasions, the contracted debt is not used to finance "public productive investments", but to cover the lack of funding.

Brazil

States can ask for credit without the authorization of the Federation. However, Senate can establish limits (article 52, VI, of the Federal Constitution). States can ask for credit abroad, but they need Senate authorization, which is also mandatory for Federation (article 52, V, of the Constitution).

Argentina

Yes, both at a national and at an international level. However, in the latter, according to article 124, there is a limit: the public credit of the Nation cannot be affected. Usually, the guarantee that needs to be provided by the Provinces to be granted the credit is the federal tax co-participation; this opens the door to federal control of the matter.

The fiscal and economic situation of the country has been so harsh that provinces achieve high levels of debt. To mitigate the situation, Provinces have issued bonds — which we consider unconstitutional since article 126 forbids them from minting coin — which end up operating as local currency.

Nowadays, any province is in such a hard situation, which does not mean that they are not highly indebted. Such level of debt makes them more dependent, both economically and politically, on the federal government, which uses its spending power to put governors on its side.

All this can be traced to the current maze of tax co-participation, based in arbitrariness since the constitutional mandate is not followed: a new tax co-participation law-covenant should be passed.

India

The States can borrow money within the territory of India upon the security of the consolidated fund of the State within such limits as may be fixed by the State legislature. States cannot borrow from abroad. The rules relating to borrowing are provided in the Constitution (Articles 292 & 293).

United Kingdom

Public debt is tightly controlled by the Treasury in Westminster; even if the law on whether they can issue debt is murky, the political reality is that they will not do it without Treasury approval and have done it very little (Northern Ireland has borrowed to fix its water system, with Treasury approval and conditions).

Germany

Yes.

Austria

§ 14 F-VG provides that it is up to Land legislation to determine whether and how the Länder may ask for credit or take up loans. However, the Federal Government may object to a Land bill providing these possibilities. If the Land Parliament sticks to its bill despite the Federal Government's objection, a joint committee, consisting of representatives of both the National Assembly and the Federal Assembly, has to decide within a certain period whether the Federal Government's objection is to be maintained or not.

Credits may be granted to the Länder by the federation only on account of the Federal Financial Act (Bundesfinanzgesetz) or another specific federal law.

However, due to the regime of the Stability Pact 2008, which was concluded in order to meet the Maastricht criteria of convergence, the Länder have obliged themselves not to run into debt, but to achieve a considerable budgetary surplus. It is remarkable that the Stability Pact is a treaty which presupposes "voluntary" accession by the Länder. Nevertheless, § 24 paragraph 9 FAG stipulates that, unless the Länder accede to this treaty, their revenues from federal shared taxes will be reduced considerably. Although the FAG itself is politically negotiated between representatives of all three tiers, the federation is predominant due to its legal superiority (competence to enact the FAG) so that the Länder cannot but accept the FAG if they want to receive sufficient revenues which obliges them indirectly to accede also to the "voluntary" Stability Pact.

Swiss Confederation

There is no formal limit on domestic credit. Regarding foreign credit, a limit could be found in the fact that foreign affairs are an almost exclusive power of the Confederacy. In other words, if the external debt of the States reach such a level that has influence on Swiss foreign policy, this could justify an intervention by the Confederation limiting this state practice through federal legislation based on its power over foreign affairs.

Belgium

The federal collectivities can request loans according to the conditions fixed in the special act of financing. This is a way to acquire additional resources to finance capital investments or to cover temporary deficits. Normally the State does not 'stand' guarantor for the communities and the regions.

Italy

Yes, Regions can ask for credit or issue public debt, but respecting rigid limits (established by federal law): the income must be bound to investment expenditure; the total of interest expenditure cannot overcome the 25% of tax income established by the annual budget. Further limits can be fixed by federal legislation (especially the legislation bound to the respect of Maastricht

limits). The ask for credit does not need a federal authorization, except for regular authorizations relating to the financial market in the event that the regions intend to issue negotiable financial instruments. In retrospect, the introduction of the new Title V of the Constitution should not change this situation, since the State has power to determine, through legislation, the fundamental principles of public finances coordination.

Spain

States can engage in credit transactions with certain limits. Such transactions can be made for a period of less than one year to respond to transitory needs, or for more than one year when the following requirements are met: a) the total amount of the credit is devoted to investment expenditures; b) the total amount of the yearly debt redemption cannot exceed the 25% of the state income; c) prior authorization of the Federation when the information provided by the State shows the failure to comply with the goal of budgetary stability (this goal is established every year by the Federation according to the budgetary stability laws).

To make credit transactions abroad and to issue public debt or to engage in any other public credit transaction, States need the authorization of the Federation. In order to grant this authorization, the Federation should take into account the compliance with the principle of budgetary stability. Operations in Euros within the European Monetary Union territory are not considered external, and thus they do not require federal approval.

5 · Do States receive direct transfers or funds from the Federation? How are these transfers regulated? What criteria are used to determine the amount of these transfers? Do States participate in the determination of the amount of transfers? If so, through which mechanisms? To what extent are States own income important relative to the transfers that they receive from the Federation?

United States of America

Transfers in the form of grants/contracts are the major means of federal state funding. Depending on the state, the federal total can be 40-60%

of a state's entire budget. Funds come for medical assistance, highways, public welfare, public health, mental disabilities, special education, senior services, social services, and many other functions. Distribution is based on a formula that is different for each program. States informally advocate but do not directly participate in the determination of transfers. Congress sets the basic formula, which must be based on census-derived population counts.

Canada

The framers of the *Constitution Act, 1867* were convinced of the necessity of entrusting federal authorities with the most important jurisdictions, and logically bestowed upon them the major financial resources. Conversely, they had given to the provinces much less financial range believing that it would suffice to meet what was considered their far lesser responsibilities. However, two factors have created an imbalance between the province's expenditure responsibilities and their financial resources. First, as we have already seen, the decisions of the Judicial Committee did broaden the jurisdictions of the provinces and narrow those of the federal government with respect to matters of economics, trade and social policy. Second, the changed social and economic conditions that appeared in the 1930's rendered some of the provincial policy areas, such as education, health and welfare, immensely more expensive than before. The fact that the financial means of the provinces do not match their enhanced responsibilities has created a *vertical financial imbalance* that favours the federal government, who has a greater capacity to raise and spend funds. By offering to provide all or part of the funding of programs under provincial jurisdiction, and by attaching conditions to the receipt of such money, the federal government has been able to intervene in areas that are under constitutionally exclusive provincial jurisdiction (it has been estimated that as much as 35% of all federal spending occurs in such areas). Some funding is unconditional (although it still has to be spent by the province in a particular domain), but in many cases federal funding is conditional on the respect of certain standards imposed by the federal government. The federal «spending power» has thus been used to encourage provinces to create or expand major shared-cost programs in the fields of education, health care and social assistance, all areas under provincial jurisdiction but in which the federal government has been able to impose its own rules or

standards (that may be contained in federal Acts such as the *Canada Health Act* and the *Canada Assistance Plan*.). The four main shared-cost programs established through the federal spending power relate to post-secondary education (since 1951), hospital and doctor services (respectively since 1958 and 1968) and social services and income support (since 1966). In 1996, these programs were joined in one single financial transfer: the «Canada Health and Social Transfer». The federal contribution to the CHST is made through a combination of transferred tax points and cash grants, the withholding of all or part of the cash-grant being the sanction against non-compliance by a province with the federal conditions. Conversely, in so far as the federal contribution takes the form of tax points, the federal government looses some leverage because tax points cannot easily be taken back. As well, the direct cost sharing has been eliminated in so far as the transfer in no longer based on the actual spending, but on other factors like the GNP and the provincial population.

The federal spending power is regulated according to formulae that are contained in federal statutory provisions, including the federal budget. The decisions thus taken are legally unilateral, since federal authorities do not need provincial agreement in order to decide the levels of payment to be made to the provinces. Of course, on the political rather than on the legal plane, the provinces apply all the political pressure they can muster to obtain a better treatment.

According to Finance Canada, in 2009-10, federal transfers to provinces and territories will amount to $52 billion, an increase of $10.3 billion over the 2005-06 figures. These transfers are estimated to account for about 19% of provincial and territorial revenues in 2009-10. Note that federal transfers include equalization payments (see below), which amount to about 14 billions in 2009-2010.

In relative terms, in 2009-2010, transfer payments represented 27% of Quebec's revenue, 35% of New Brunswick's revenue and 11% of Alberta's revenue (data from Finance Canada, http://www.fin.gc.ca/fedprov/mtp-eng.asp).

Australia

Yes, States do receive direct transfers from the Commonwealth. They are regulated according to Commonwealth financial legislation, such as the *Federal Financial Relations Act* 2009 (Cth) and the *Financial Manage-*

ment and Accountability Act 1997 (Cth), as well as the terms of the *Intergovernmental Agreement on Federal Financial Relations* and the individual agreements attached to it as schedules.

There are three main types of grants made to the States. The first type is the general revenue assistance grant which is not tied to any conditions and may be used by each State in whatever way it wishes. Most of these grants come from GST revenue. In 2009-10, approximately 45% of Commonwealth transfers to the States were for general revenue assistance. This amounted to AUD$41,824,000,000.

General revenue assistance grants are distributed according to the principle of horizontal fiscal equalisation. Sections 5 and 8 of the *Federal Financial Relations Act* 2009 provide that the Treasurer shall determine "GST revenue sharing relativity" for each State, after consultation with the States. It is multiplied by the State's population to create an adjusted State population, which is then multiplied by the GST Revenue and divided by the sum of adjusted State populations for all the States. This determines the amount payable to each State. Clause 26 of the Intergovernmental Agreement on Federal Financial Relations clarifies that 'the Commonwealth will distribute GST payments among the States and Territories in accordance with the principle of horizontal fiscal equalisation'. In practice, this is done on the recommendation of the Commonwealth Grants Commission. The primary principle is that 'each State should be given the capacity to provide the average standard of State-type public services, assuming it does so at an average level of operational efficiency and makes an average effort to raise revenue from its own sources'.[5] The consequence tends to be that the more populous States of New South Wales and Victoria end up supporting the States with smaller populations, such as Tasmania and South Australia.

The second type of grant is the specific purpose payment ('SPP'). This requires the money granted to be used for a specific purpose. Previously, the conditions imposed upon these grants and the administrative obligations in accounting for the grants were often highly burdensome, leading to much criticism. It resulted in some areas being over-resourced and others under-resourced, with citizens receiving inappropriate services for cost reasons. In 2008 the grants were rationalised and the conditions stripped from them except for the basic condition that the money be used for the general purpose of the grant. This gave the States much more flexibility in

5 Commonwealth Grants Commission web-site: http://www.cgc.gov.au/about_cgc.

how they could allocate their resources. There are now five broad SPPs covering (1) healthcare; (2) schools; (3) skills and workforce development; (4) disability services; and (5) housing service.

For example, s 14 of the *Federal Financial Relations Act* 2009 (Cth) sets the total amount payable to the States under the housing SPP at AUD$1,202,590,000 for 2009. It is to be indexed for future years. The Treasurer is to determine the indexing factor and how the amount is to be distributed between the States. The only legal condition placed on this SPP in the Act is that 'the financial assistance is spent on housing services'. However, there is also a 'National Affordable Housing Agreement' which is attached as Schedule F to the Intergovernmental Agreement on Federal Financial Relations. It sets out in detail the outcomes and outputs that the Commonwealth and the States seek to achieve with respect to housing. It also sets out the roles and responsibilities of the Commonwealth, States and Territories and local government and the areas in which roles and responsibilities are shared. It lists performance indicators and reform and policy priorities for the future.

Although the payment of the SPP is not dependent upon meeting the performance indicators or achieving the outcomes listed in the relevant agreement, the States and Territories will be independently assessed by the COAG Reform Council on how well they meet these agreed outcomes and indicators. The pressure on the States and Territories to perform will be political pressure resulting from public assessments of their performance.

The third type of grant (which is sometimes regarded as a subset of the SPP) is the 'national partnership payment' ('NPP'). These payments may be made to: '(a) support the delivery by the State of specified outputs or projects; (b) facilitate reforms by the State; or (c) reward the State for nationally significant reforms' (s 16, *Federal Financial Relations Act* 2009 (Cth)). These payments are the subject of detailed conditions and are the means by which the Commonwealth continues to intervene in State policy areas to achieve its own priorities and goals. They are similar in nature to the old SPPs before the 2008 reforms. If the States do not meet the conditions for NPPs, they may be required to return the money.

In 2009-10, the SPPs and the NPPs together amount to approximately 55% of Commonwealth transfers to the States, in the sum of AUD$50,076,000,000.[6] About half of that amount was comprised of

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6 *Commonwealth, Budget Paper No 3 — Australia's Federal Relations*, 2009-10, p 21.

SPPs and the other half by NPPs. SPPs and NPPs are not the subject of horizontal fiscal equalisation. SPPs are to be distributed among the States in accordance with population. As this is a change in approach to the healthcare SPP, it is being phased in over five years.[7] The amount of NPPs depends upon the nature of the project and what is sought to be achieved.

These three types of grants are now the subject of a standing appropriation in the *Federal Financial Relations Act* 2009 (Cth). This means that instead of being included in the appropriation bills passed annually by the Commonwealth Parliament, these amounts are automatically appropriated and the States have a legal right to receive them, until such time as the *Federal Financial Relations Act* 2009 is amended.

See further on grants to the States: Commonwealth, *Budget Paper No 3 — Australia's Federal Relations,* 2009-10; J Wanna, J Phillimore, A Fenna, J Harwood, *Common Cause: Strengthening Australia's Cooperative Federalism,* (Federalist Paper No 3, May 2009); N Warren, 'Reform of the Commonwealth Grants Commission: It's All in the Detail' (2008) 31(2) UNSWLJ 530; A Morris, 'Commonwealth of Australia' in A Shah and J Kincaid (eds), *The Practice of Fiscal Federalism: Comparative Perspectives* (McGill-Queens University Press, 2007) 44; Allen Consulting Group, *Governments Working Together? Assessing Specific Purpose Payment Arrangements,* (Vic Government, 2006); and N Warren, *Benchmarking Australia's Intergovernmental Fiscal Arrangements,* (NSW Government, 2006).

Mexico

The Fiscal Coordination Law establishes another type of transfers from the federation to the states, which are "contributions" of a diverse sort. These are defined by article 25 of the Law as: "funds that the federation transfers to the state, Federal Districts, and municipal treasuries, conditional upon the achievement of the goals established by the law for every contribution". These contributions from the following funds:

a. Contributory Fund for basic and normal education.
b. Contributory Fund for health care services.

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7 *Commonwealth, Budget Paper No 3 — Australia's Federal Relations*, 2009-10, p 25.

c. Contributory Fund for social infrastructure.

d. Contributory Fund for the strengthening of municipalities and territorial subdivision of the Federal District.

e. Multiple Contributory Funds.

f. Contributory Fund for technological and adult education.

g. Contributory Fund for the public safety of states and the federal district.

h. Contributory Fund for the federated entities strengthening.

The criteria to fix the amount of these transfers depend on which fund is involved. For example, in the Contributory Fund for basic and normal education, to determine the contribution, school registries, personnel, funds received in the previous fiscal year, etc. will be taken into account but there is not a special formula to distribute this fund among the entities. Instead, a meeting between federal and state education authorities will analyze the options and proposals to allocate this funds according to equity.

The Contributory Fund for health care services fixes the amount taking into account variables such as the medical infrastructure inventory, personnel, or federal funds transferred to cover personnel or operative and fixed costs in the previous fiscal year. Once the total amount has been computed, a formula (article 31 of the Fiscal Coordination Law) is applied to define the allocation among the different states. The formula takes into account, among others, the mortality indexes and the social exclusion index.

The Contributory Fund for social infrastructure is determined annually in the Federal Spending Budget; it amounts to the 2.5% of the federal tax revenue sharable. This Fund is distributed by the Federal Executive, through the Social Development Secretary, according to a formula which takes into account variables related to extreme poverty. The idea behind this scheme is that the funds are distributed according to the share that each state represents in the national extreme poverty.

Similarly, article 46 of the Fiscal Coordination Law establishes that the Contributory Fund for the federated entities would amount to a 1.40% of the federal tax revenue sharable, defined in the 2nd article of the same Law. Besides, it establishes that the contributions will be sent to the states and the Federal District on a monthly basis by the Secretary of Treasury according to the percentage assigned to every entity in the distribution of the

previous year. Article 47 of this law establishes the specific uses of the funds allocated by this Fund.[8]

As a general comment, it must be noted that the formulas and calculations applied to define the amounts and its allocation are established by the Fiscal Coordination Law. These calculations are made by the federal authorities; states participate in the procedure providing information and statistical data.

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8 Article 47. The resources from the Contributory Fund for the federated entities strengthening will be devoted to:

I. The investment in physical infrastructure — including construction, reconstruction, enlargement, and maintenance-, and the acquisition of good for the infrastructures; hydro-agricultural infrastructure; and up to a 3% of the cost of the program or the project established in the fiscal year to cover indirect costs such as the elaboration of studies, the elaboration and evaluation of projects, or the monitoring of the infrastructure;

II. The reorganization of debt, preferably through the amortization of public debt, expressed as a reduction of the balance registered on December 31st of the previous fiscal year. Other actions to improve the financial situation might be accepted if their positive impact on the state public financial situation is demonstrated.

III. To support the retirement benefits programs or their reform in the States and the Federal District. They should be primarily devoted to the actuarial reserves.

IV. To the modernization of the public registries of property and commerce, within the framework of a program to coordinate the public registries; or to the modernization of the cadastre or land registry, aimed to actualize the valuations and contribute to the efficient collection of taxes;

V. To modernize the state tax collection systems and to establish mechanisms that extend the taxable income, providing a net increase in the tax collection;

VI. To the strengthening of the scientific and technological development projects, only if the federal contributions to this are additional to the state resources devoted by the state legislatures;

VII. To the Civil Protection systems in the States and the Federal District if the federal contribution to this is additional to the state resources devoted by the state legislatures;

VIII. To support public education if the federal contribution to this is additional to the state resources devoted by the state legislatures and the latter amount has been increased compared to the previous fiscal year; and

IX. To deposit in funds created by states or the Federal District in order to support infrastructure projects, granted through concession or which entail the participation of public and private resources; to the payment of public infrastructure works if these funds may be complemented by private investment, immediately or at some future date; and to the funding of studies and projects, their monitoring, acquisition of the right-of-way; or other goods and services related to these infrastructures..

The resources of the Contributory Fund for the federated entities strengthening aim to strengthen the budgets of these entities and the regions that form them. To this end and with the same limits, the Federated Entities may agree among them or with the Federal Government, the destination of these funds, which may not be devoted to cover operational costs, except otherwise provided in the preceding subsections. The Federated Entities shall present to the Secretary of Treasury a monthly report detailing the use of these resources within 20 days after the end of the term. (DR)IJ

The Superior Auditor of the Federation of the Chamber of Representatives of the Union Congress is the highest authority in charge of the monitoring and control of the use of these funds according to the established goals.[9]

Brazil

Yes they do. States receive *direct transfers* from the Federation. According to the Federal Constitution, 48% of income taxes product shall be delivered by the Union as follows: 21.5% is delivered to the Fund of the States and the Federal District; 22.5% is delivered to the Fund of the Municipalities; 3% for use in programs to finance the productive sector of the North, Northeast and Midwest; and 1% Fund of the Municipalities (Article 159, I). Moreover, States receive 10% of the industrial goods tax (Article 159, II), and 29% of federal "contributions" (new taxes created by the Federation).

States can also receive *voluntary transfers* from the Federation. These transfers of funds derive from agreements between Federation and States, Federal District or Municipalities. States and Municipalities, in different levels, depend on this money. Federation imposes strict condition to these transfers, dramatically limiting States and Municipalities spending power and autonomy.

Argentina

Provinces receive transfers and subsidies from the federal government, as the Constitution authorizes. It also provides the bases for the Congress' approval of the federal budget, following the criteria of the tax co-participation law-covenant, as presented in the historical analysis of the evolution of our federal system. But, again, this regulation is not observed; arbitrariness is what drives the transfers and subsidies distribution decided by the Federal Government without the proper participation of the Provinces. However, in this decadence, in particular this degeneration of federalism, the provincial representatives in Congress are to be blamed for it too since they have consented to the hiperpresidentialism we suffer from and which wounds our republican federal system.

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9 Article 49 Fiscal Coordination Law.

In the last years, the problem has been blatant: utility companies from the Big Buenos Aires have accumulated the 85% of the federal subsidies, while the rest of the country only received 15%.

A similar situation has arisen regarding the Contributions from the National treasury to the provinces, established in the current Co-participation Law, since these have been distributed according to the political interest of the time.

India

The States receive revenues from the federation in several ways. For example, service tax is levied by the Federation but it is collected and appropriated both by the Federation and the States (Article 268-A); taxes on the sale and purchase of goods and taxes on the consignment of goods are levied and collected by the Federation but are assigned to the States (Article 269); and all other Federal taxes except surcharge on any taxes and duties are distributed among the States in accordance with the principles laid down by the Finance Commission (Article 270). The Constitution gives the criterion for determining the amount of transfers as is evident from the foregoing provisions. The Constitution also provides for the Finance Commission which lays down the principles of distribution in those cases where it is not provided otherwise (Article 280 and 281). The receipts from taxes imposed by the States vary according to the stage of development in different States. In any case their receipts from taxes are much lower than the receipts from taxes of the Federation. Therefore, they heavily depend on Federal grants which of course the Federation is constitutionally bound to make.

United Kingdom

The UK has a remarkable system with no international equivalent. The devolved administrations have no real revenue capacity of their own and depend on transfers from the UK government. Until the 1970s Northern Ireland and Scotland had very high per-capita funding (as a result of effective lobbying and the threat of nationalism). Wales had high per-capita funding, but its funding was below average when we consider any indicator of need (poverty etc). During the 1970s the UK government adopted the "Barnett formula", which allocates changes in spending on a strict per-capita basis relative to spending for England. If a new pound is spent on

"English" services, the formula automatically adds about 12p to devolved budgets, which the devolved administrations can spend as they like. Because devolved per-capita spending is higher than English per-capita spending, this means convergence on the same per-capita spending over time. The Barnett formula has been more and more formalized, and more strictly applied, over time, though it can still be manipulated (for example, the London 2012 Olympics are deemed "UK" spending, and therefore do not cause budget increases for devolved administrations, even though the money is obviously being spent in England). This system is increasingly unpopular; a variety of commissions and committees have called for it to be changed. There is, however, no consensus on a different formula and much of the political debate on the subject in London is primitive.

Germany

For direct transfers see 7 below. For the additional payments ("Ergänzungszuweisungen"), Art.107 Abs. 2 Satz 3 GG; these payments are meant to level the differences in financial power between the States.

According to Art.104b GG, the Federation may within its legislative competence accord financial support to the States for important investments in case of disturbances of the economic equilibrium or equivalence. Those subsidies must be regulated by law with the consent of the Bundesrat. In an extreme situation the Federation may accord supports without regard to its legislative competence.

The amendment of the Grundgesetz in 2009 also provides additional supports for the Länder Berlin, Bremen, Saarland, Sachsen-Anhalt and Schleswig-Holstein for the time between 2011 and 2019.

Austria

The FAG provides that the Länder receive funding in order to maintain or balance their budgets. The number of citizens of each Land is relevant for the amount each Land receives, whilst their own income is not relevant. Further, the federation grants also subsidies to the Länder with regard to theatres, hospitals and nursery schools.

Specific provisions apply to the system of indirect federal administration and with regard to certain categories of teachers, where the federation bears all or at least part of the costs.

The Länder do not legally participate in the determination of these transfers, apart from their general political involvement in the phase of negotiations that precedes the enactment of the FAG.

However, Länder that do not achieve a budgetary surplus, as required from them in the Stability Pact, will have to pay sanctions, which does not curtail transfers, but indirectly may lead to the same result: Reduction of money in case of a budgetary deficit.

Swiss Confederation

The system of subsidies of various kinds, largely conditioned, has been replaced by a new system of financial compensation, described below X.7.

Belgium

According to the mechanisms provided in the special act of financing, and particularly, in its title IV, a part of the federal tax revenues — income tax, VAT… — can be assigned to the communities and regions. These are called "assigned parts of the tax". These are one of the main sources of financial resources for the communities and regions. The federal legislator — with a supermajority — decides the taxable income, the tax rates, the exemptions… It decides also the amount transferred in a particular year to the federated collectivities.

In what the individual income tax is concerned, regions might impose surcharges or discounts.

In order to respect the principles of the economic and monetary union, it is banned that the establishment of surcharges by a royal decision. Such a measure should be deliberated in the Council of Ministers, with the consent of the regional governments, and it must be confirmed by a federal law.

Italy

Currently, transfers to the regions (which amount to 60% of regional funding) are used primarily to finance the regionalized health system (which alone is between 70% and 90% of the regional expenditure). The apportionment of national health fund (as defined from 2000 on in a State-Regions negotiation culminated in the so-called "Pact for health") was initially based on "historical cost", but over time has been progressively com-

plemented (but not replaced) with parameters relating to population, average age and socio-demographic and territorial characteristics.

With the Compact for Health 2009-2011, the Government proposes that, instead of calculating the quota for each region using the criterion of the "standard cost" of health care applied to the socio-demographic characteristics of the Regions, the financing structure outlined in the delegation act n. 42/2009 should be used in advance. This structure stipulates that the regional finance are determined so as to assure each region (through its own taxes, participations and transfers) resources deemed necessary (and sufficient) to assure the Regions (as well as municipalities and provinces) full funding of public functions entrusted to them. However, it should be noted that under Article 119 of the Constitution (as amended by the reform of Title V) identified funding sources for the "financial self-sufficiency of the Regions" including those from the equalization fund (paragraph III of Article 119), which aims to rebalance the finances of "the territories with lower fiscal capacity per capita".

Spain

Financing system of common regime States, these receive about 80% of its revenue through tax figures (totally or partially transferred taxes) and the remaining 20% through transfers from the Federation (vertical funds) and the States themselves (horizontal fund). These transfers are channeled through the following funds:

i) The guarantee fund for essential public services.

The purpose of this fund is to provide compliance with the principle of horizontal equity. It aims to ensure that all States have the same resources per unit of need (total levelling) to finance basic services of the welfare state (mainly education, health care and social services), making the same tax effort.[10] The money of this fund comes from two sources: each state

10 One must know that the definition of *equity* is established by section 206.3 of the Catalan Charter of Autonomy, in which it is also established the contribution of Catalonia with regard to solidarity. To be precise, the Charter establishes that the solidarity contribution will be the necessary sum of money to ensure that the education, health, and other essential social services of the Welfare State provided by the different States can achieve similar levels throughout the federation, provided that they also make a similar fiscal effort ("*siempre que lleven a cabo un esfuerzo fiscal también similar"*). The Decision 31/2010 of the Constitutional Court, in relation

contributes 75% of its tax revenues (horizontal fund) and the Federation transfer a certain amount to the fund (vertical fund). The distribution of the fund among the several States is done by estimating its expenditure needs and fiscal capacity. The amount for each state is obtained by subtracting from their spending needs 75% of their fiscal capacity. To calculate the expenditure requirements of each state the adjusted population is taken into account. This variable is defined from the following variables and weighting coefficients: the legal population (30%), the protected population distributed in seven groups age (38%), the population over 65 years (8.5%), and the population between 0 and 16 years (20.5%). As one can see, the sum of the weights of these variables is 97%. The remaining 3% corresponds to the territory (1.8%), dispersion (0.6%) and insularity (0.6%). Therefore, one can say that the main indicator of state expenditure needs is the population. The indicator used to measure fiscal capacity is calculated using potential tax revenues.

ii) The sufficiency fund.

It is an unconditional grant from the Federation. Its goal is to ensure that the implementation of the new funding model implemented since 2009, all states obtain a given increase in resources. Specifically, an additional contribution of resources from the federation to the system was agreed. This amount is distributed among the States using a set of socioeconomic variables, the most important of which is the existing population increase during the period 1999-2009 (it has a weighting coefficient of more than 70%).

iii) The convergence funds: the competitiveness fund and the cooperation fund.

—The competitiveness fund is a fund endowed by the Federation. The agreed amount in the base year (2009) evolves according to the rate of growth of tax revenues of the Federation. Its aim is to strengthen inter-state equity and reduce disparities in per capita funding in order to encourage

to the new Catalan Charter of Autonomy, declared against the Constitution the condition of *provided that they also make a similar fiscal*, arguing that this condition would force the other States to establish the same levels of taxation as Catalonia, and the Charter of Autonomy is not able to do so by itself. This declaration of unconstitutionality does not have any effect on the current federal Organic Law 22/2009, which establishes a solidarity mechanism that takes into account the mentioned section declared unconstitutional.

state autonomy and fiscal capacity. Only states that are in one of the following two situations receive resources from this fund: a) those whose resources per capita are below average, b) those whose index of resources per capita is less than its fiscal capacity per capita. The distribution of this fund among States that meet either of the above conditions shall be made using the same variables that are used to distribute the resources of the "guarantee fund for essential public services" which, as we have explained, is based almost entirely on population variables.

—The cooperation fund is also a fund endowed by the Federation and aims to contribute to regional development and stimulate growth and convergence in terms of income. States beneficiaries of this fund are those that meet any of the following three conditions: a) those that on average in the past three years have had a GDP per capita of less than 90% of the state average; b) those that have a population density lower than 50% of the growth; c) those in the last three years have had a population growth of less than 90% of the average growth and a population density below the average multiplied by 1.25. This fund is distributed as follows: a) 2 / 3 of the fund are distributed among the beneficiary States according to population weighted by the distance between GDP per capita and the state average; b) the remaining third of the fund is distributed between the beneficiary states with a population growth of less than 50% of the average, and is distributed according to population. There is an additional condition: no state can receive more than 40% of these two parts of the fund.

The operation of these funds has been agreed within the Council of Fiscal and Financial Policy where states are represented (through their Secretaries of Economy and Finance) and the Federation (through the Minister of Economy and Finance). The content of the agreement has been approved by organic law in the Spanish Parliament (the legislative branch of the Federation).

In addition to these funds provided within the financing model of the States, there is inter-territorial compensation fund, whose operation is determined by a specific law passed by the Spanish Parliament (Federation). Its aim is to correct economic imbalances and implement the inter-territorial solidarity principle. The resources of this fund come from the Federation and it is divided between those States whose per capita income is less than 75% of the EU average. Its current regulation provides for the distribution of the fund into two: the compensation fund (75% of total volume)

and the supplementary fund (25% of total volume). The first should be allocated by States to investment expenditure, while the second can finance the operating costs associated with investment up to two years. The distribution of the compensation fund among the beneficiaries is calculated according to the following variables and weighting coefficients: population (87.5%), dispersion (6.9%), size (3%), net migration (1.6%), and unemployment (1%). The result is corrected according to two criteria: the inverse of income per capita and insularity. Regarding the supplementary fund, each State receives an amount equal to 33.33% of their respective compensation fund amount.

6 · Can the Federation condition the transfer on state actions or can it intervene on what the transferred funds will be allocated to? If so, in which subject matters? To what extent? Generically or specifically? Can the Federation determine their management or procedure? In general, how has the federal spending power constrained state powers?

United States of America

Most funds are earmarked and the federal government can (and has) asked for a return of funds in all subject matters. This is done on a case-by-case or specific fashion. Many management rules are set up, as mentioned above in V.6.

Federal spending "influences" by inducing the states to enter into areas like elderly health care or low income housing through the promise of funding, but it does not determine state spending. Federal regulatory mandates lead to required spending. The same pattern would hold with regard to federal inducement of the local governments. The states can require local spending but are often encouraged to as an alternative. In other words, sometimes state and local governments are "bribed" or induced into entering certain fields, whereas in others they are required to enter.

Canada

On the positive side, the spending power has allowed the federal government to persuade the provinces to provide important services to the

population and to secure nation-wide standards of health, education, income-security and other public services. On the negative side, the use of the spending power can be viewed as disturbing the priorities of the provinces and undermining their autonomy. Furthermore, the federal transfers can be withdrawn unilaterally once a program has existed for a certain time and has created expectations in the provincial population. This is precisely what happened in Canada during the later years of the 1980's and the first half of the 1990's. In order to reduce its huge deficits, the federal government unilaterally diminished its contribution to many of the shared-cost programs ("off-loading" so to say its deficit on the provinces), while at the same time continuing to impose federal standards that were to be respected by the provinces.

Some transfers, such as equalization (see below), are by definition unconditional. The level of such transfers is usually determined by defining a given amount to be paid on a per capita basis. Once established, the amount is multiplied by the population of the province as defined in the latest census.

In the case of conditional transfer payments, the techniques vary enormously from one sector to the other. Some of the main sectors have to do with health, social services and post secondary education; other less important sectors have to do with basically all aspects of federal and provincial jurisdiction thus creating a vast and complex web of financial relations between the two orders of governments. The question here becomes that of the extent to which Federal authorities can impose conditions in the exercise of their spending power in provincial fields of jurisdiction, which is one of Canada's constitutional law's unanswered questions. The educated guess in constitutional circles is that the courts will eventually accept the existence of a conditional federal spending power, providing that the conditions do not amount to an indirect control over a field of jurisdiction belonging to the provinces. The test will probably be close to that of United States constitutional law in similar matters. For now, Federal authorities usually impose conditions which are, in fact followed by all provinces, even those, such as Quebec, which do not accept the legitimacy and the legality of such spending.

Traditionally, provinces have asked that three kinds of limitations be imposed upon the federal spending power. First, the possibility for a province to withdraw (or "opt-out") of a program initiated by the federal government without being financially penalized. Second these new

programs should only be created with a broad provincial consensus. And third, the participation of the provinces in developing the principles and standards they must apply in administering the programs (instead of the unilateral imposing of such standards by the federal government). In 1999, the federal government and nine of the ten provinces, Quebec being the missing one, have signed the "Social Union Framework Agreement" (or SUFA) under which any new federal initiative respecting health, education or welfare must receive the prior consent of a majority of provinces. As well, a province opting-out of a new program will nevertheless receive its share of federal funding, under the condition that it accepts to abide by the objectives of the program and to submit to an «accountability framework». Quebec has refused to sign the agreement because it did not contain an *unconditional* opting-out arrangement. Only such a provision would give a province the possibility to use the federal financing for a venture of its own choosing and, in that way, recover the freedom to set its own priorities. The other reason for Quebec's opposition is that the 1999 Agreement did not put any limitation on the possibility for the federal government to use its spending power by making direct financial transfers to individuals and to subordinate provincial bodies like municipalities. In fact, since 1999, the federal government has created a major program of scholarships for university students (the Millennium Scholarship Fund) and has announced its intention to offer financing to municipalities, while education and municipal institutions are two fields under exclusive provincial jurisdiction.

Australia

As noted above, section 96 of the Commonwealth Constitution provides that 'the Parliament may grant financial assistance to any State on such terms an conditions as the Parliament thinks fit'. This has been interpreted broadly by the High Court, so that the Commonwealth Parliament can impose virtually any condition on State grants, regardless of whether it is relevant to the purpose of the grant and regardless of whether it would otherwise fall within Commonwealth legislative or executive power. For example, the Commonwealth could grant money for expenditure on primary schools on the condition that hospital workers are employed in accordance with a particular industrial relations scheme. The High Court

has recently held, however, that s 96 is subject to the requirements of s 51(xxxi) that just terms compensation be paid for the compulsory acquisition of property.[11] The Commonwealth could not, therefore, avoid the need for just terms compensation by instead requiring a State, as a condition of a grant, to compulsorily acquire property without providing just terms compensation.

The use of SPPs in the past has had a significant impact upon the capacity of the States to distribute resources in a fair and rational manner. One of the consequences has been that some areas of State responsibility have been over-funded and some under-funded, leading to cost-shifting and inadequate services for those affected. Another problem has been that Commonwealth funding conditions have often required that the States 'match' Commonwealth funding for a particular area. This has resulted in large portions of State budgets being tied up, reducing the State's capacity to distribute its resources in a fair and rational manner.

In response to the many criticisms of this kind, the Commonwealth reformed SPPs in 2008 and took away its input controls, policy conditions and administrative burdens. However, there is a considerable risk that the same problems will now arise in relation to NPPs, which are far more prescriptive in nature. There is also a risk that future governments might restore the conditions previously placed on SPPs.

Mexico

The spending of State funds coming from their share in the General Transfers Fund, the Municipal Promotion Fund, and from the participation in certain taxes, is not conditioned. But the incomes that come from the federal contribution funds are.

The conditions are in some cases generic and in others, more specific. The spending conditions imposed upon contribution funds for education and health, are generic: the law indicates that the resources of those funds must be applied to the education (basic or normal) and health care, respectively. But in case of, for example, the multiple contributions fund, the resources must be exclusively destined to school breakfasts, food aids and social assistance to those under extreme poverty conditions.

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11 *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51.

The law indicates that all these conditioned federal contributions will be administered by state government and, in determined cases, by the municipalities, which receive them, according to their own laws. The law also mentions that municipalities must register them as incomes of their own specifically devoted to the goals set in the law.

Once the states and the municipalities receive the resources and until their complete spending, the control and supervision of the management of those resources corresponds, first, to local organs of control; but on a second and last instance, to the Superior Auditor of the Federation of the Chamber of Representatives of the Union Congress.

Interestingly enough, the amount of federal Contributions Funds to the states (which are conditioned) has been higher than those coming from the Transfers regime. In the 2001 Spending Budget of the Federation, for example, the Contributions were $199,578,247,902.00 (Mexican pesos), while Transfers were $194,084,700,000.00 (Mexican pesos).

In order to assess the degree of dependence of the states from federal incomes, we can analyze two states:

In Queretaro, a relatively developed State, the previsions for year 2003 are the following:

a. Own incomes	$ 377,841,000.00
b. Federal transfers	$ 3,555,373,000.00
c. Federal contributions	$ 4,498,409,000.00[12]

In Guerrero, a relatively poor State, the corresponding data for the 2002 fiscal year are the following:

a. Own incomes	$ 616,000,000.00
b. Federal transfers	$ 3,744,000,000.00
c. Federal contributions	$ 10,071,000,000.00[13]

Brazil

As a general express rule, the Federation is prohibited from retain or to restrict the delivery and use of the funds expressly allocated by the Consti-

12 Project for Spending Budget of the State of Queretaro for year 2003.
13 Income Law of Guerrero, for fiscal Exercise of year 2002.

tution to States, the Federal District and Municipalities (Article 160, *caput*). There are two constitutional exceptions to article 160 though. First: Central Government can condition the direct funds transfer to the payment of States debits with the Federation. Second: Federation can retain funds when States do not comply with a minimum of actions in public health services (Article 160, paragraph solo).

Voluntary transfers can be limited and conditioned. Federal law (Supplementary Law 101 of 2000) establishes strict conditions to these transfers, dramatically limiting poor States and Municipalities autonomy which depend on these funds.

Argentina

Regarding co participation, the Federation cannot set condition on spending, which means that these are resources which undoubtedly correspond to the Provinces.

For other transfers, especially Contribution of the National Treasure, the Federal Government may establish the destination. This is not regulated because these contributions are part of the federal budget managed by the federal government.

However, other federal government transfers must have a specific target such as those corresponding to the National Housing Fund, the Federal Council of potable water and sanitation, the Interior electric Development Fund and the Federal Roads Fund.

It must also be noted that article 75.8 — which establishes that the coparticipation criteria should apply to the federal budget — is not being observed. According to this provision, interregional criteria should guide the allocation of public federal spending, with an adequate "federal" vision of the country. But this does not happen; federal government assigns most of its transfers to most developed and populated areas of the country, specially the metropolitan area of Buenos Aires.

Argentina suffers a deep unbalance in its development. In 2000 the income per capita of the autonomous city was 22.800 pesos or dollars, while those of the province of Santiago del Estero, reaches only 1900 pesos or dollars. This reveals the magnitude of the regional and provincial differences, besides the territorial distribution problems arising from the fact that the metropolitan area concentrates 35% of the country's population.

India

As we have noted above in certain cases the Federation has to transfer the money to the States without any conditions while in other cases it may impose such conditions as it may consider appropriate or necessary. This may be done specifically in respect of certain grants and not in general. The Federation may lay down the conditions and the requirement of accounting for transfer of funds but not necessarily the detailed management of funds. The availability of larger funds with the Federation and accordingly its larger spending power impacts the powers of the States to the extent that they have to act in accordance with the wishes of the Federation in the utilization of those funds.

United Kingdom

The Barnett formula simply allocates funds to governments (technically, it allocates them to Whitehall departments — the Scottish Office, the Welsh Office — which then pass it on). There is no formal or meaningful informal constraint on what is done with it. The largest argument in public about devolution finance happened when Scotland spent its budget on expanding home care for the elderly, to the irritation of the UK government. This meant Scotland was actually taking over a UK competency (allowances for home care); the UK government simply stopped paying the allowances for home care in Scotland, thereby effectively giving up on that competency, demonstrating Scotland's autonomy to spend in any of its competencies, and taking advantage of Scotland's expansion of its powers to save money.

For the Barnett formula in more detail, see:

—Trench, Alan. 2007. *Devolution and Power in the United Kingdom*. Manchester: Manchester University Press.

—Aldridge, John. 2008. Financing devolution: 2008 and beyond. In The State of the Nations 2008. Ed. Alan Trench. Exeter: Imprint Academic.

—McLean, Iain, Guy Lodge, and Katie Schmuecker. 2009. *Social citizenship and intergovernmental finance. In Devolution and Social Citizenship in the United Kingdom*. Ed. Scott L Greer. Bristol: Policy.

Germany

Generally, the Federation cannot intervene in the allocation of the transferred funds. If financial support is accorded for certain investments (see above 5), it may be allocated to no other subject matter, but also then the Federation does not determine their management. The limitations for payments and transfers to the States provided by the Grundgesetz are often evaded; thus, the federal spending power constrains state powers; so do the fiscal powers of the Federation.

Austria

The F-VG provides that only transfers on demand and subsidies for fixed purposes may depend on conditions, the performance of which may be supervised by the federation. These conditions — where permitted by the F-VG — and indeed all transfers are provided and enumerated in detail by the FAG. The exact percentage depends on the FAG as well — its assessment is difficult, since Vienna is both a municipality and a Land and because there are so many different transfers and subsidies. The Land revenues, which they receive in the "first stage" of financial equalization — i.e. shares in joint federal taxes and, much less, their own exclusive taxes —, are certainly higher than what they get in the "second stage" of financial equalization.

Swiss Confederation

Before the 2008 reform, on average, 75% of federal transfers were intended for a special purpose (the percentage rose about to 90% in the case of countries with few own resources, and it dropped to only 40% for states with many resources). States sometimes had to meet very restrictive conditions which leave them very little autonomy. Besides leaving little autonomy for the use of federal funds, these were tied to state resources by a very common mechanism which consisted in asking the States for a financial contribution as a condition to receive federal funds. This practice, for states with few own resources, led to a weak spending power projects within their own powers. This has been criticized in the literature (see below X.9.). These mechanisms were the main reason for the fundamental revision of the financial compensation system. Currently, subsidies are not

conditioned, with the exception of agreements on programs in cases of federal law enforcement by states (executive federalism; see above IX.2).

Belgium

The federated collectivities can decide freely about the revenues arising from the exercise of their own powers. The federal State has no way to intervene in this area.

Italy

Regions are bounded by the federations transfers to specific destinations, regulated in a more or less detailed ways: in some cases they are bound to sectors, in other cases to specific initiatives. This situation will change after the implementation of the new version of art.119 Const since it provides for transfers aiming to equalize the fiscal capacity to the Regions and establishes that the destiny of these resources cannot be conditioned or established.

Spain

The federal spending power is very relevant in the Spanish system as well as in any other federal system. In our system, this is a very controversial issue. The Constitutional Court has addressed this problem in several occasions. In its decision 13/1992, on February 6, the Constitutional Court summarized its doctrine.

The constitutional doctrine states the following: a) the federal spending power is not an autonomous power that can distort or limit powers granted to the States. Consequently, there is no independent spending power coming from the federal tax power; b) the Federation may only exercise powers in connection to the spending activity when the Federation has powers on the subject matter being funded; c) the Federation should seek the general interest through, rather than in spite of, the allocation of powers; d) the Federation cannot establish conditions or the goals of the funds beyond the scope of its tax coordination powers; e) the federal direct and centralized management of funding activities charged to federal funds is only admissible when this is essential: first, to secure the full efficacy of these activities, second, to guarantee equal access and enjoyment of the funds to the

potential recipients in the whole federal territory, and third, to avoid going above the global amount of funding provided. Otherwise, the general rule is the decentralized management of the funding by the States.

Under this general doctrine, the Court distinguishes between four cases, each with a specific legal regime: a) the State holds exclusive jurisdiction over a particular matter and the Federation does not invoke any power, generic or specific about it, Federation can allocate federal funds to such matter, but the goal to be achieved can with these funds can only be set in generic or global terms, for entire sector of activity or subsectors. These funds are to be integrated as a resource of the state treasury and, whenever possible, and have a territorial assignment in the General Budget of the Federation; b) The Federation has a generic concurrent power with the state or it has power to coordinate the bases of a sector, the Federation can specify the destination of the subsidies and regulate the basic conditions for granting them to the extent permitted by their power, but it must recognize that the States have power to manage the grants and it must territorialize the funds; c) If the legislation on a matter is allocated to the Federation, while the states implement it, the only difference with the previous assumption is that the Federation can regulate in great detail the destination, conditions, and processing of grants, without diminishing or affecting the power of States on the organization of services; and d) Subsidies can be uniquely managed by the Federation when it has a concurrent power with States. In this case, the Federation can even centrally manage the process of allocation of subsidies, provided that they meet the above requirements (ensuring the effectiveness of incentive measures, equal access and enjoyment of them, and ensure that they do not exceed available funding).

The Court repeated this theoretical scheme on numerous occasions, although in its practical application it may not have been able to avoid a certain proliferation of federal promotion measures, either the ones that just set the measures or those that provide. In any case, this situation, coupled with a little unfair interpretation of the power distribution by the federal agencies, continues to provoke a lively debate and explains the frequent challenges to the federal budget by the States.

These grants accounted for 6.2% (year 2007) of total state revenue. However, despite this relatively low rate, the federal spending power has determined to a great extent the exercise of state powers. Generally, these same rules are applied to the funding of local entities by the Federation or the States. In this case, since local powers and resources are in a weaker

position, local entities are more dominated by the federal or state spending power.

7 · How does the principle of "tax solidarity" among States work? In other words, what kind of economic contributions do the States make to the Federation which would be redistributed afterwards? What are the main criteria to determine the contributions and its redistribution? How are they implemented? Which are their limits?

United States of America

Other than cost-sharing of programs states do not make federal tax contributions. At one time, general revenue sharing for states existed (1967-1982), but solidarity (in the Spanish sense of redistribution) was not operative and the funds were small (like Interterritorial Transfer Funds). Poorer states are helped by larger federal shares of transfer payments for welfare programs like Medicaid, TANF (income maintenance), housing and social services.

Tax solidarity is informal. Rich states such as Connecticut, Massachusetts, Utah, Oregon, Minnesota, Wisconsin pay more in federal taxes that go to poorer states like Alabama, Mississippi, Wyoming, District of Columbia, West Virginia in the form of higher federal grant contribution payments and lower cost sharing formulas. For example, Mississippi pays only 40% of Medicaid costs whereas Connecticut pays 60% of costs. And so on. The only limit is that states are not allowed to reduce their program spending by use of federal funds. They must at equal or higher levels than prior years and/or before a program begins. This is called a "hold harmless" provision, which accompanies most federal fund distribution programs.

Canada

As in most federations, there exists in Canada (since 1957) a comprehensive system of revenue sharing and fiscal equalization to reduce the *horizontal wealth imbalance* between the richer and the poorer regions and to ensure that all citizens wherever they reside are entitled to comparable services without being subject to excessively different tax rates. The Cana-

dian system is based on the differential fiscal capacities of the provinces and is achieved through federal transfers to the poorer provinces.

Equalization payments are totally unconditional; the recipient provinces are free to spend the funds on public services according to their own priorities. In 2009-10, provinces will receive approximately $14 billion in equalization payments from the federal government.

For the last twenty years, it was almost always the same provinces that were receiving ("poor" provinces) or not receiving ("rich" provinces) equalization, Ontario, Alberta and British Columbia being in the latter situation and the seven other provinces (as well as the three territories) in the former. However, this situation has recently changed, Ontario now qualifying for equalization transfers (because of the impact of the economic crisis on its industrial sector, the automobile industry in particular) and Saskatchewan and Newfoundland joining the group of "rich" provinces because of the rise in value of their gas and oil resources.

When the equalization system was put into place, there existed no basis for it in the Constitution. Now, the *Constitution Act, 1982* contains a provision (section 36) affirming the commitment of the federal Parliament and provincial legislatures to promote equal opportunities and provide essential public services of reasonable quality to all Canadians. In the same provision the federal authorities commit themselves to make equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation. To the date however, it remains unclear if these commitments are purely political or can be enforced by courts.

Australia

Tax raised by the Commonwealth within a State does not necessarily return to that State through Commonwealth grants. Because of the principle of horizontal fiscal equalisation, the more populous States such as New South Wales and Victoria have long supported the less populous States. (For further detail on horizontal fiscal equalisation, see: http://www.cgc.gov.au/).

For example, a significant portion of the GST raised in New South Wales is sent to other States. This has been the source of some antagonism between the States, especially as the New South Wales economy has struggled during the global financial crisis while that of mineral resource-rich

States such as Queensland and Western Australia has boomed. In 2010, for example, a New South Wales business organisation attempted to advertise on billboards in Queensland, welcoming visitors to a Queensland lifestyle that was 'subsidised by New South Wales'. Queensland billboard operators refused to accept the advertisements.

Mexico

The fiscal solidarity principle between States is applied within the National Fiscal Coordination System, with the intermediation of the federal fiscal authorities. This principle manifests through the compensation criteria found in the different formulas that must be applied to define the share of transferable federal funds to be distributed among states, which consider different factors such as levels of poverty, or marginality and mortality indexes in the different states.

Victoria Rodriguez reports that under the current distribution formula, a 64% increase of federal transferences to the four poorest states (Chiapas, Guerrero, Hidalgo y Oaxaca) has occurred between 1989 and 1992, while the rest of states have received an average increase of 20%. The global effect of the 1990 reform was that the ratio between the proportion of transferences to the three wealthiest states (Nuevo Leon, Baja California, and Federal District) and the transferences with those made to the six poorest states was reduced from 3:1 in 1989 to 2:1 in 1992, which caused certain friction between the richest states in the north and the Secretary of Treasury because the former felt punished for being more prosperous, more efficient in raising taxes, and for contributing more to the federal treasury.[14]

Brazil

See answer to question number 5 above.

Argentina

Current co-participation law 23.548 established the corresponding percentage to each province in the secondary distribution. The previous sys-

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14 Rodríguez, Victoria, *La descentralización en México*, Fondo de Cultura Económica, México, 1999, p. 185.

tem, established by law 20.221, described more clearly the solidarity criteria, since the secondary distribution was made, according to art. 3, in the following way: a) 65% directly in proportion to population, b) 25% in an inversely proportional order given the development gap between each province and the most developed area of the country and c) 10% in an inversely proportional order to the population density between the provinces that do not reach the provincial average.

Article 75.2, after 1994 amendment, fixed the following criteria for the future co participation law-covenant: equity, solidarity and priority to achieve a homogenous degree of development, life quality and equality of opportunities in all the territory of the nation.

It is not foreseen that the provincial states contribute to the Federation. Article 75.9 of the National Constitution prescribes, on the contrary, the following: [Nation's Congress can] "Give contributions from the national Treasury to the provinces whose revenues are not enough, given their budgets, to cover their ordinary expenses".

Be as it may, we have already expressed that throughout history, centralization bloomed in the country by the advance of the federal government over provincial tax powers and the degree of economic, financial and political dependence from the federation grew simultaneously.

India

The tax powers of the Federation, as we have noted above, are so wide that the States have no opportunity or possibility of contributing anything to the Federation except that they collect some taxes on its behalf that are assigned to them.

United Kingdom

The UK makes economic contributions to the devolved countries. The devolved countries lack the fiscal capacity or a mechanism to contribute directly to the UK government (except as described in the case of Scotland and home care).

Germany

It works as follows:

i. The tax revenue which is due to the Federation and the States (see above 2: Verbundsteuern) is first of all globally distributed between Federation and States: 50:50 for income and corporate income tax according to Art. 106 Abs. 3 GG; for the VAT the quotes are fixed by law with consent of the Bundesrat.

ii. The States' share of the tax revenue according to (1) is distributed between the states: for income tax and corporate income tax, this share is due to the State where the tax has been paid; the VAT is divided in relation to the number of inhabitants of the States. Those taxes which are due to the States remain to the States where they are paid.

iii. As a result of (2), there are "rich" and "poor" States; by federal law with consent of the Bundesrat there is redistribution from the former to the latter; it may however not alter the ranking of the States and the differences between the States do not have to be levelled completely.

iv. Additional payments ("Ergänzungszuweisungen") are made by the Federation to the lean States.

Austria

The FAG itself provides several keys according to which the Länder receive different shares from the joint federal taxes as well as different amounts regarding transfers and subsidies. This means that the FAG does not simply provide a quota distributing shared taxes between the three tiers, but provides sub-quotas concerning the exact shares of each Land. The criteria used are the number of Land inhabitants on the one hand and specific sub-quotas which have to consider the respective economic encumbrances and capacities of the Länder.

As shown above, the Länder obliged themselves in the Stability Pact to achieve significant budgetary surpluses over the next years, whereas the federation may still show a deficit and the municipalities at least a balanced budget (Stability Pact of 2008).

Swiss Confederation

The most important part of the reform of federalism, in force since 2008, is a new financial compensation regime. This scheme establishes rules for transfers from the Federation to States (vertical financial compensation) and between states (horizontal financial compensation). One of

the main reasons for the reform was that the cantons (states) with few own resources received major federal transfers, but these were, in many cases, conditioned, limiting significantly the cantonal / state autonomy and sovereignty (see below X.9.). In the regime introduced in 2008, the subsidies are, in principle, transferred without being reserved for a special purpose. The means and the distribution of compensation are defined by the federal Parliament and the more specific questions by the Federal Council (executive), within the limits defined by the federal Constitution. It distinguishes between "compensation of liabilities" and "compensation of resources".

The "compensation of liabilities (burdens)" is vertical, that is, it gives ensures transfers federal grants to the states. These are calculated according to the particular burdens of States. These may be costs caused by sociodemographic reasons (age of the population, concentration of social problems in cities, etc.) or costs caused by geographical reasons, especially in States with large alpine regions.

The "compensation of resources" is the financial compensation in the strict sense: states with weak financial resources are subsidized in order to reduce economic disparities between states. Both States with strong financial resources (horizontal) and the Federation (vertical) transfer subsidies to States with weak resources. The basic criterion for distinguishing between states with strong and weak financial position is their potential tax collection per capita. From the resources used for this compensation system, between 40% and 44% come from the states (horizontal) and between 56% and 60% come from the Federation (vertical).

In figures, the total financial compensation paid in 2010 is 4,063 millions of Swiss francs (CHF)[15] (3,368 million under "compensation of resources" and 695 million under "compensation of burdens"). To assess its relevance it might be useful to compare it with total tax revenues (direct and indirect) of 116,381 millions of Swiss francs (per capita at the federal level: 15,509 CHF; Federation: 53,396 CHF; States: 37,885 CHF; municipalities 25,100 CHF). For every inhabitant of the Federation (7,504 million Swiss francs), the total amount used for financial transfers is 449 CHF.

The Federation pays 2,657 million Swiss francs (354 CHF per person) in the vertical compensation scheme, including both "compensation of resources" and "compensation of burdens". The canton (state) of Zug, being

15 1,51 CHF amount to 1 € given the average exchange rate in 2009.

the state with the highest federal tax revenue per capita, contributes more than 1,000 CHF (estimated)[16] per capita[17] to the vertical compensation.

In addition to that, there is the horizontal compensation. 'Rich' States (with lots of resources) pay 1,406 million CHF or 449 CHF in average per capita (horizontal compensation). The horizontal contribution of the "richest" state (Zug) amounts to 2,032 CHF per inhabitant.

States (Cantons) receiving funds have few resources or very high expenditures; they receive on average 916 CHF per capita on transfers. The canton (state) of Jura, with particularly scarce resources, receives 1,821 CHF per inhabitant. These figures do not include direct transfers between states.

Furthermore, an obligation to cooperate for States ensuring that the costs for services are paid by the community that takes advantage of them has been introduced. States have concluded a basic agreement. In it, they provide common organizations, paid by different cantons (states), or the purchase of services by one State to another. In the case of agreements that distribute the charges on states according to where the population taking advantage of the services comes from, the Federation may declare that such a convention is binding on all states, including those which have not signed it.

Belgium

Every year, a solidarity amount is assigned to the region with the lowest average revenue from the individual income tax. Since 1989, this measure has benefited the Walloon region.

The budgetary amounts assigned to the poorest regions tend to increase when the contribution of these regions to the national economy decreases; it decreases in periods of economic growth.

It is considered, generally, that the national solidarity intervention will favor inefficacy and will penalize the efforts of a region aiming to promote its growth.

The fact that social security remains under the control of the federal government has an indirect effect in the income distribution. It entails solidarity among citizens — no matters their community or region — despite the lack of solidarity among federated collectivities.

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16 Calculated using data from diverse sources and years. Approximation.

17 Including all the inhabitants, not only taxpayers.

Italy

Nowadays, according to the new version of art. 119 Const., mechanisms of tax solidarity among Regions are not established. Equalization measures are implemented only through federation transfers.

Spain

The principle of fiscal solidarity is satisfied primarily through various funds and the various assignments that states perceive with balancing purposes by the application of criteria that have already been mentioned. These are the following funds: i) The guarantee fund for essential public services, ii) The sufficiency fund; iii) The convergence, competitiveness and cooperation funds; iv) The inter-territorial compensation fund (see above X.5).

Although the legislation and final decisions are taken at the federal level, ("Consejo de Política Fiscal y Económica de las Comunidades Autónomas", federal government and Parliament), there is an effort to enhance cooperation between the Federation and the States, either multilaterally through the "Consejo de Política Fiscal y Económica de las Comunidades Autónomas", or bilaterally through the several Commissions between the Federation and each of the States.

8 · What is the percentage of public spending in which each level of government — federal, state and local — incurs? How would these percentages change if the spending on defense, education, health, pensions and administration of justice is excluded from the calculation? How many civil servants or administrative officials does each level of territorial government have? Which are the figures excluding the above-mentioned fields?

United States of America

The Federal spending is about 40%, state is about 35% and local one is about 25%. These figures are deceiving because of federal and state transfers to local governments. It is impossible to unbundle education (10-45-

45), health (20-20-10-50 private), pensions (15 federal, 5 state, 80 private), and justice (5-10-85). Defence is over 95 percent federal. Federal officials, 1.9 million civilian, state and local officials total 4.6 million. In addition there are 1.2 million uniformed military, 850,000 postal service workers and over 12.7 million nongovernment contract, grants, and mandate employees.

Canada

The federal share of total direct public spending is 37%, the provincial and municipal share combined, 63%.

While the number of public servants in each provincial administration varies, the federal government employs approximately 500 000 people, including the Royal Canadian Mounted Police (R.C.M.P.) and the military. Some 200 000 of this number constitute the public service in the strict sense.

Australia

In 2007-8 the Commonwealth's share of public spending was 61%, the States' share was 34% and local government's share was 5%. Table 1 sets out relevant spending on defense, education, health, social security and 'public order and safety' (which includes administration of justice) across the levels of government.

Table 1. Government expenditure by purpose 2007-8[18]

	Commonwealth $m	**State $m**	**Local $m**
Defense	18,228 (100%)	0	0
Education	18,694 (32%)	39,540 (67'8%)	98 (0'2%)
Health	44,405 (51'6%)	41,288 (48%)	305 (0'4%)
Social Security	97,840 (88'9%)	10,816 (9'8%)	1,412 (1'3%)
Public order and safety	3,503 (17'5%)	15,947 (79'8%)	547 (2'7%)

18 Information drawn from: Australian Bureau of Statistics, Cat 5512.0, Government Finance Statistics, Australia 2007-8.

Table 2 sets out the public sector employees of each level of government. Unfortunately, there are no figures that break down public sector employment by purpose for each of the levels of government.

Table 2. Australian Public Sector Employment 2009[19]

Level of Government	Employees 2009 '000	Cash wages and salaries 2008-9 $m
Commonwealth Government	242.9	16,557.4
State Government	1,386.6	83,111.6
Local Government	178.0	8,465.8
Total Public Sector	**1,807.4**	**108,134.8**

Mexico

The percentage of total public spending that corresponds to the federation, states and municipalities in 1991 was 86%, 11% and 2% respectively.[20]

Brazil

There is no updated and comprehensive study on this topic. Public spending varies according to the subject matter. We make reference to two studies regarding public spending in public health, and public education.

Federation, States, the Federal District and Municipalities have powers and duties to provide public health services (article 23, II). Federation expenses have always been higher. Increasingly, local entities have increased spending on health.

19 Australian Bureau of Statistics, Cat 6248.0.55.002, 2009.
20 Data from the work of Luis F. Aguilar, *op. cit.*, p. 131.

Public expenditure on health as a proportion of GDP, by level of government Brazil and Major Regions, 2000 and 2004

Regions	2000				2004			
	Federal	State	Municipal	Total	Federal	State	Municipal	Total
Brazil	1.9	0.6	0.7	3.1	1.9	0.9	0.9	3.7
North	2.5	1.6	0.6	4.7	1.9	2.0	0.9	4.7
Northeast	3.2	0.9	0.7	4.8	2.6	1.4	1.2	5.1
Southeast	1.3	0.5	0.7	2.5	1.2	0.8	0.9	2.9
South	1.4	0.4	0.6	2.3	1.2	0.6	0.8	2.5
Midwest	1.6	0.7	0.5	2.8	1.3	1.1	0.7	3.1

Source: http://www.ripsa.org.br/fichasIDB/record.php?node=E.6.1&lang=pt&print=true (last access, 20th February).

Public spending on education is relatively higher in local levels (States and Municipalities). Educational policy implementation has been a local issue in Brazil.

Estimated Percentage of Total Investment in Education by Level of Government in Relation to Gross National Product (GNP) — Brazil 2000-2007

Year	Percentage of Total Public Investment in Relation to GNP (Gross National Product)			
	Total	Government level		
		Federation	States and the Federal District	Municipalities
2000	4.7	0.9	2.0	1.8
2001	4.8	0.9	2.0	1.8
2002	4.8	0.9	2.1	1.8
2003	4.6	0.9	1.9	1.8
2004	4.5	0.8	1.9	1.9
2005	4.5	0.8	1.8	1.9
2006	5.0	0.9	2.2	2.0
2007	5.1	0.9	2.1	2.0

Source: http://www.inep.gov.br/estatisticas/gastoseducacao/indicadores_financieros/P.Y.I._dependencia_administrativa.htm

Argentina

Approximately 50% of public spending is done by the Federal Government, 40% by the Provinces, and 10% by the Autonomous City of Buenos Aires. The Federal Government is the level which spends more, even if the other levels of government are in charge of the delivery of more public services. The Federal Government is responsible for national defense, federal judiciary, and part of the social security while Provinces are responsible for health care, education, environmental protection, housing, culture, etc.-in some cases, with the participation of municipalities. The principle of fiscal correspondence or symmetry is not observed either. Part of Provinces' expenditure it comes from the federal government through the tax-co participation system. In this system, the Federal Government receives a 75% share, while Provinces, 25%. This violates blatantly current regulation.

It must be highlighted that the co participation is indispensable for the provinces; some of them receive over 90% of its resources from this system.[21]

Regarding the number of civil servants, in 2004, Provinces and Buenos Aires had 1,427,215, while the Federal Government had a lower number. But for the provinces, the salaries amounted to 50% of their public expenditure, while for the federal government was around 13%.[22] This also impacts in our federalism since an increase in federal public employees' salaries might have political and economic effects in the provinces, as the education sector illustrates.[23]

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21 See Hernández Antonio María, "Federalismo y Constitucionalismo provincial", obr. Cit. and "Aspectos fiscales y económicos del federalismo argentino", Academia Nacional de Derecho y Ciencias Sociales de Córdoba, Director Antonio María Hernández, Córdoba, 2008.

22 See Norberto Bertaina, "Federalismo fiscal, su deterioro", in "Aspectos fiscales y económicos del federalismo argentino", *supra*.

23 Teacher unions agree with the Federal Education Department increases in salaries, but those have to be paid by Provinces because they are responsible for primary, secondary, and technical education.

India

No percentage of public spending at different levels of the government is specified in the Constitution or any other constitutional document. As regards different items such as defense, education and health, on defense the entire expenditure is done by the Federation while on education and health a large share is contributed by the Federation as may be fixed by the Federation in consultation with the States. The federation and the States have their independent civil servants, though at the level of highest civil service, the Indian Administrative Service, the civil servants selected by and on the rolls of the Federation are assigned to the States who draw their salaries from those States during such assignment.

United Kingdom

Identifiable public spending per head, minus social protection and agriculture, across the nations and regions of the UK 2007-08

London	5,985	England	4,523
Northern Ireland	5,684	Yorkshire and the Humber	4,477
Scotland	5,676	West Midlands	4,430
Wales	5,050	East Midlands	4,086
North East	4,960	South West	3,947
North West	4,927	Eastern	3,820
UK	4,679	South East	3,874

Source: *McLean, Iain, Guy Lodge, and Katie Schmuecker. 2009. Social citizenship and intergovernmental finance. In Devolution and Social Citizenship in the United Kingdom. Ed. Scott L Greer. Bristol: Policy.*

Note: The above table includes English regions. It is worth noting that the variation between English regions is comparable to the variation between England and devolved administrations.

Civil Service numbers 2008/9

Welsh Assembly Government: 5,850
Scottish Government (directly employed) 4,850
Scottish Government (including civil service non-agencies) 16,390
Total Home civil service in Scotland including Scottish Government and UK departments: 50,660
Total Home civil service in Wales including Welsh Assembly Government and UK departments: 36,220
Total Home civil service in England: 394,683
Total Home civil service in UK including Scottish Government (all) and Welsh Assembly Government: 489,680
Northern Ireland Civil Service (NICS): 23,511
Home civil service in Northern Ireland (excluding NICS): 4,570

Sources: *Office for National Statistics; Northern Ireland Statistics and Research Agency*.
Notes: The UK has two relevant civil service bodies: the Home Civil Service, which serves the UK, Scottish and Welsh governments, and the Northern Ireland Civil Service (NICS). The numbers given for civil servants in Scotland and Wales refer to the members of the Home Civil Service who work for the Scottish Government and Welsh Assembly Government. The Northern Ireland numbers refer to the Northern Ireland Civil Service for 2008/9. The numbers exclude home civil servants working for UK departments in devolved territories; in Scotland most of those are tax, social security/pensions staff, and military; in Wales they include criminal justice and some other staff; in Northern Ireland they are defence and tax staff. All numbers are calculated as "full time equivalent", which means roughly that two half-time officials will be counted as one full time official. Headcounts are slightly higher. The much higher per-capita numbers for civil servants in Northern Ireland (almost 50% more officials for less than half the population) are because (1) local government in Northern Ireland is much weaker, and functions carried out by local government elsewhere are carried out by the Northern Ireland Executive and (2) the Northern Ireland Executive performs some functions, such as administration of pensions and disability benefits, that are carried out in Scotland and Wales by UK government departments.

Germany

Public Spending Federation — States — Local entities (in 2008): 42:36:22 %.

Excluding the above-mentioned fields: 45:30:25 %; number of employees in public service: Federation 460,000; States 1,929,000; Local entities: 1,220,000; on the level of the States, about 1,217,000 are employed in education (for details see Statistisches Jahrbuch).

Austria

Federation: expenditure in 2008: **122,488,704,000** Euro (69%)
Länder: expenditure in 2008 (without Vienna): **27,164,201,000** Euro (15'3%)
Municipalities: expenditure in 2008 (without Vienna): **16,772,568,000** Euro (9'5%)
Vienna: expenditure in 2008: **11,079,731,000** Euro (6'2%)

National spending on defence 2008: 2,822 mio. Euro.
National spending on education 2008: 15,042 mio. Euro.
National spending on health 2008: 21,826 mio. Euro.
National spending on pensions 2008: 33,729 mio. Euro.
National spending on administration of justice 2008: 802 mio. € (courts) + 379 mio. Euro. (administration of penalities)

Public employees at federal level: 141,907
Public employees at Land level 2008 (including Vienna): 253,356
Public employees at local level 2008 (excluding Vienna): 74,325

Source: Statistik Austria. More recent figures are not available.

Swiss Confederation

The figures are those that were valid before the introduction of the new system of financial compensation in 2008. Revenue in 2007: Confederation 46%; States 33%; municipalities 21%. Public expenditure: Confederation 37%; States 36%; municipalities 27%. Excluding defense spending, education, health, old age pensions or unemployment, and Justice Administration, the figures are: Confederation 51%; States 21%; municipalities 28%. There is not general statistical data on the number of administrative staff of each state level.

Belgium

Fiscal revenues for the States are increased, in 2010, up to 96.4 billion € (which implies a 6.25% increase). The non-fiscal revenues are increased up to 2.79 billions € (which implies an increase of 1.23%).

An increasing part of these resources is transferred to other public authorities or social security agencies. 53.2 billion € are transferred (its

increase is 6.45%): to the UE (2% of the total revenues), communities and regions (35%) and social security institutions (15%).

Italy

Not considering public expenditure for covering interests of public debt, in the 1999 fiscal year 59% of total public expenditure was made by the federation, 23% by Regions, and 18% from local authorities. The situation has not substantially changed.

Spain

The most recent data for the expenditure incurred by the different levels of government (2008) shows that the Federation makes 50.4% of the total; States, 36.3%; and Local Entities, 13.3%.

Public expenditure distribution	**Millions € (2008)**	**%**
Federation	223,375	50.4
States	160,884	36.3
Local Entities	58,946	13.3
Total	443,206	100.0

Source: Advance in economic and financial performance of Public Administration 2008. Intervención General de la Administración del Estado.

The federal expenditures can be classified down in: i) expenditure by the central administration itself of the Federation, which amounts to 95,732 million €, representing 21.6% of total public expenditure in Spain, and ii) expenditure by the social security administration whose main function is related to the payment of pensions and amounts to 127, 643 million € representing 28.8% of total public expenditure.

It should be noted that States have taken core powers related to the welfare state, such as education, health care and social services. While at the beginning of the decentralization process these powers were assumed by some States; from 2001 on, all have assumed the same roof jurisdiction, with some exceptions: the police (only assumed by Catalonia and the Basque Country), prison administration (only assumed by Catalonia), or

the normalization of the languages of some States (Balearic Islands, Catalonia, Galicia, Basque Country and Valencia).

Regarding the personnel composition of the administrations, see the following tables. (Data from the Ministry of the Presidency, in the Statistical Bulletin Staff at the Service of Public Administration, Central Personnel Registry, July 2009. http://servicios.mpr.es/publicaciones/pdf/BoletinEstadPersonal_JUL09.pdf)

All Public Administration Personnel

	Number of civil-servants	**%**
Federation	583,447	21.9
States	1,345,577	50.6
Local Entities	627,092	23.6
Universities[24]	102,894	3.9
Total	2,659,010	100.0

Federal public service

	Number of civil-servants	**%**
General Administration of the Federation	239,865	41.1
Police forces	135,950	23.3
Army	127,373	21.8
Judicial administration	23,658	4.1
"Entidades públicas empresariales" (public entities with corporation-like structure) and public entities with a particular regime	56,601	9.7
Total	583,447	100.0

24 Although universities are transferred to the States, they are taken as an independent group, considering the autonomy that the law recognizes to them, the common type of staff that serves them and the common source of data for all them. The only teaching and non-teaching staff data collected is from the Universities that provide the information to the Central Personnel Registry.

Federal General Administration

	Number of civil-servants	%
Ministries and autonomous entities	133,813	55.8
Non-universitary teaching staff	7,208	3.0
Penitentiary personnel	21,839	9.1
Social Security (offices and common services)	30,237	12.6
National Treasury	1,435	0.6
Federal Tax Agency	29,463	12.3
Federal Agencies devoted to the improvement of Public Services	14,256	5.9
Public Health Care (Social Security)	1,614	0.7
Total	239,865	100.0

This information must be completed offering data about the personnel working in State and local entities:

State personnel

	Number of civil-servants	%
GENERAL ADMINISTRATION	1,283,041	95.3
— Ministeries and autonomous entities	252,265	(18.7)
— Non-universitary teaching staff	539,669	(40.1)
— Health Care	491,107	(36.5)
JUSTICE	38,710	2.9
SECURITY CORPS	23,826	1.8
Total	1,345,577	100.0

Local entities[25] personnel

	Number of civil-servants	%
Public officials with national qualification	5,589	0.9
Other personnel	621,503	99.1
Total	627,092	100.0

Although officials with national qualification may be considered to some extent as local staff, the fact is that the Federation preserves important regulatory and administrative powers over them and, in particular, on their selection, duties, provision of jobs, mobility scheme and disciplinary regime. Even if the number of those is not high, the qualitative importance of these positions need to be underscored since they have important functions — such as legal advice and representation, notary services, intervention… — reserved.

9 · To what extent are the relationships between levels of governance regarding the tax system satisfactory? Which elements are more satisfactory? Which elements are less satisfactory? Nowadays, is there any new trend?

United States of America

Satisfaction depends on the evaluator. They are so linked that a change in one affects the other. The simplification aspects are most satisfactory. The current trend is that federal tax cutting efforts will reduce connected state revenues beyond their projections; which is alarming many state officials, particularly during the recession of 2009-2010.

Canada

Provinces tend to see the situation as one of vertical imbalance (see above) in which revenue sources and expenditure responsibilities are not

25 City Councils, Provincial governments, "Cabildos" (institution from the Canary Islands) and Insular Councils are included.

correctly matched. Therefore, they ask for a correction of the revenue/expenditure mismatch through a reallocation of taxation powers, asking that the federal government evacuate some tax room to be occupied the provinces. This provincial position has had some force between 1997 and 2008, when federal revenues were in excess of federal expenditures and Ottawa accumulated surpluses in the federal budget. However, the economic crisis of 2009 and the end of the surpluses era at the federal level now render the provincial position less plausible.

There are also different tax philosophies at work depending on the political party in power in Ottawa and in each of the provinces. When the government, provincial or federal, is more favorable to free market forces, it will insist on having fewer taxes and fewer services, to enhance competitive advantages with the United States, while more social-democrat governments will insist on maintaining more interventionist policies calling for higher levels of taxation.

As mentioned above, Ontario recently stopped administering its own corporate tax, and now relies on federal administration of that tax, as harmonized with the federal system; Quebec refuses to have the federal administration levy either the income tax or the corporate tax.

Australia

The tax relationship between the Commonwealth and the States is far from satisfactory. The States have access to few efficient taxes to raise their own revenue. The taxes that are likely to raise the highest revenue are under the effective control of the Commonwealth. Although the revenue from the GST is returned to the States, the States have no real control over the rate or base of the tax other than a political influence upon the maintenance of the *status quo*. Ideally, States should have the capacity to raise all the revenue needed to fulfil their functions under the federation. This would make the States fully responsible for both their taxing and spending and avoid the blame-shifting that currently occurs within the federation. However, even if the Commonwealth were willing to cede areas of taxation to the States, there would still be the problem of finding taxes that could efficiently operate at the State level without adding an economic burden through the imposition of taxes at multiple levels and with different rates, bases, rebates and deductions across the country.

Mexico

States are actually discontent with the existing financial relations system. In the media, state governors appear often expressing their opinion in favor of a reform of the fiscal coordination system of Mexican federalism.

Generally, it is accepted that the current system has merits in its recent evolution. For example, the raise of federal transferences to states and municipalities through the funds included in "Part 33" of the federal spending budget has been welcomed. Likewise, the increase of the percentage of the general transfers' fund (which is now equivalent to 20% of the federal sharable resources) has been approved. The end of "fiscal chaos" is recognized as a merit of the actual system, even if the price to pay was an increasing centralization.

Nevertheless, there is discontent regarding the general design of the system, which leads to a great centralization of the fiscal resources in the federal government, generating state financial dependence. It is argued, for example, that states have a very limited legal power to establish their own incomes. It is considered necessary for states to have tax powers with a relevant collection potential (and that those powers should be established in the General Constitution, to give them more certainty). In the same vein, some have considered that it is necessary to give higher responsibilities and attributions to states not only relating incomes, but also regarding the spending power, diminishing the conditions established on the management of an important part of the federal transferences (federal contributions funds).

Public debate and the generated proposals in this matter, both in the federal and state level, seem to aim to a constitutional and legal reform to substitute the fiscal coordination law by a treasury coordination law. This reform purports to organize Mexican public finances from an integral perspective, which includes coordination at the credit and public debt level too. The intention is that the federal government intervenes to facilitate state access; that states obtain lower credit rates; that more options to guarantee credits are recognized; and that municipalities participate from the benefits of those credits acquired by the federal government.

Finally, a National Treasury Coordination System would design the mechanisms to ensure balance between the parties; and fix the bases to maintain constant institutional communication with the federal congress.

The latter will make sure that when legislation in one of the coordinated matters is considered, Congress will take into account intergovernmental coordination, its precedents, the existing programs and collaboration conventions, and the positive and negative consequences for state treasuries.

Brazil

The system is highly constitutionalized. Constitutionalization has two basic outcomes. On the one hand, States and Municipalities are more effectively protected. On the other hand, constitutionalization makes change harder. There is a trend towards centralization, since States and Municipalities depends on Federal funds and cannot create new taxes.

Argentina

There are no satisfactory aspects of this conflictive financial relation between the federal government, provinces and municipalities. We believe that the only solution consists in strictly complying with the constitutional norms, which mandate — the term has already expired — the immediate enactment of a tax co participation convention-law.

India

Concerns have always been expressed on the low level of revenue availability for the States and apart from making other inter governmental arrangements the Constitution has also been amended more than once to reduce this mismatch. But apart from the distribution of revenues through the Finance Commission no other mechanism has yet been found. In general the system is working without much strain.

United Kingdom

Devolved governments appreciate the unconstrained block funding of the Barnett formula, which gives them extensive autonomy and the UK state very little ability to intervene. Pressure is building against the allocative formula in Barnett, however, and it is likely to be reviewed — at the moment many English, Northern Irish, and Welsh politicians are seeking reviews of the formula as they feel that it is unfair. The Scottish Govern-

ment is also seeking changes to the financial formula, but their alternative of "full fiscal autonomy" is unlikely to be adopted and they have rejected the Brown Government's suggestions for partial devolution of tax-setting powers (from the Calman Commission Report). The debates among experts focus on the need to balance redistribution to the poor with the need to avoid creating dependent governments — the UK Treasury suspects that extensive solidaristic transfers could reduce governments' interest in improving their economies.

Germany

It depends on the point of view:

Those who understand the federal principle of the Grundgesetz in a sense of federal solidarity, regard the system of tax solidarity as satisfactory, those who see the sense of federalism also in competition, do not. Poor States see tax solidarity as necessary and satisfactory, the rich ones do not deny this totally but want to reduce it. "Rich" States — the States with a strong and modern economy, and high employment, mainly in the south and in the west, plead for more autonomy of the Länder in the tax system, for example the right to fix their own collection rate, the poorer States, with a lack of modern industries their high unemployment, mainly in the east and in the north, do not. Though there seems to be a certain tendency towards more autonomy of states and local authorities, people will not accept different income taxes.

Austria

Fiscal federalism was a much-discussed topic during the Austrian Constitutional Convention. The Länder, for instance, lamented that they could only participate in the enactment of the FAG via informal pre-legislative political talks without the Federal Assembly having a right of absolute veto in the legislative phase. The Länder also want to have more revenues, whilst the federation points out that the Länder could "invent" new taxes (as far as the FAG does not mention them) — which the Länder refrain from doing for political reasons and because the most profitable objects of taxation are already covered by the FAG. Clearly, the European criteria of convergence as well as the economic crisis lead to tensions between the three tiers, since all of them need money and have great prob-

lems to keep their budgets in the limits of the Stability Pact. It is the federation on which Länder and municipalities mainly depend financially, which, under the current conditions, rather strengthens the position of the federation despite the existing formal and informal mechanisms of cooperation in fiscal federalism.

Swiss Confederation

The new financial compensation system goals are: a more equal distribution of resources among states and a more efficient use of resources. The first evaluation of the new system will take place after 2011. Regarding the previous system, in force until 2007, one could see that financial compensation had not achieved its purposes, and that the disparities between some states did not diminish. Furthermore, subsidies were mainly conditioned (see above X.6.). In many areas, the effect was an administrative decentralization, rather than a legislative and executive real autonomy. It should also be underscored that this system gave the wrong incentives to States. To receive federal funds, States paid more attention to compliance with the requirements of the Federation than to the quality of their services. The effect was an ineffective use of resources. Although there is no systematic assessment of whether the new system works, preliminarily it can be remarked that, on the one hand, the system will boost the state's autonomy in the field of executive federalism, and, on the other hand, it will leave more freedom to States to use the resources to exercise their own legislative and executive powers. However, conditional subsidies have not disappeared, because agreements on programs were introduced (see above IX.2). The revitalization of federalism, a goal of this scheme, will depend on the moderate or excessive use that the Federation will do of this new possibility of conditional grants.

Belgium

The provisions of the special law of financing are criticized, especially in the north of the country, since the scheme organized does not guarantee the assumption of enough responsibility by the federated collectivities. The later ones practice "consumption" federalism, leaving the Federal State in charge of the expenditures, especially in social fields that benefit their citizens. If the salaries of the public servants in the community and

regional levels are fixed at the federal level, the retirement benefits responsibility is considered a federal power to.

On the Flemish side, is suggested increasing the responsibility of the regions in the establishment and the management of its financial resources. From this perspective, it is suggested that a part of the income tax for individuals should be transferred to the regions. They claim that tax differences among the regions should be allowed. Regions should be allowed to grant tax discounts to enhance its economic and social activity or to fight against black markets (informal employment or employment not observing the labor and social security regulation).

Italy

Financial intergovernmental relations are not satisfactory, mainly because they are unbalanced in favor of the federation, because they are characterized by a double track system: a binary federation-Region system of relations doubled by a federation-local authorities system. In both cases Region and local authorities are scarcely guaranteed. New Title V should change completely the present system.

Spain

The state financial system, once amended, is relatively satisfactory. Among the most valued aspects, we should mention the constitutional proclamation of the principle of state tax autonomy as well as the development of this principle by the constitutional case-law. However, these elements have not guaranteed a tax system considered to be sufficient. Another relevant element is that the federal Constitution regulates the system at a minimum level. On the one hand, this reduces state safeguards. But, on the other hand, it has allowed a relevant development of the tax system from its origins to the present. This development, favored by intense intergovernmental relationships and relationships between the different political forces, has allowed certain solutions that years ago would have been regarded as unacceptable, such as the transference to the states of a significant part of the income tax, or the recognition of rule-making capacity concerning some transferred federal taxes.

Among the most unsatisfactory aspects, the following could be mentioned: a) Despite the transfer of taxes from the Federation to the States

taking place especially after recent financing agreements for the years 2001 and 2009, the State financial autonomy is more based on the autonomy of expenditure than in revenue autonomy; b) Perhaps the biggest problem of the state financing model has been the operation of the resource levelling mechanism that must be equitable. This aspect has been improved in the last financing agreement of the States (2009) mainly thanks to the operation of so-called guarantee fund for essential public services. But still does not resolve the breach of the principle of equity due to the duality of systems (common versus foral model of funding). Foral states receive per capita more than common regime states. For example, 2006 data showed that the Basque government (statutory regime) obtained 76% more revenue per capita than the average of the governments of the common system. This is because the foral model does not include any contribution of levelling or solidarity with other States, which is perceived as a privilege; c) Lack of coordination mechanisms both technical and institutional results in too many cases where some institutional disloyalty; d) lack of transparency in providing the information makes difficult the operation of the system. A clear example of this was the negotiation of the latest model of State funding in 2009. Official results of the implementation of the agreement have not been offered. Furthermore, the existence of a large number of funds (guarantee fund for essential public services, sufficiency fund, competitiveness fund, cooperation fund, compensation fund, supplementary fund) also diminishes the transparency of the model.

10 · Can the Federation establish the maximum or can the Federation set the levels of state indebtedness or budgetary deficit? Can the Federation establish the maximum wage of public officials (federal, state, local, etc.)?

United States of America

States control their own deficit levels. Every state but one (Vermont) constitutionally requires a balanced budget. Capital spending is financed through borrowing on the open market. States bond ratings control deficits. The same is true for local governments.

Each level of government sets its own public official wages and rates. State legislatures, however, set local government employee pension and

benefit programs and funding levels, impacting local budgets. However, federal controls have been imposed on overtime and compensatory time, for all public officials, under the commerce clause.

Canada

The Federation could not interfere in provincial indebtedness, since the provinces have exclusive jurisdiction over "The borrowing of money on the sole credit of the province" (section 92(3) of the Constitution Act 1867).

The federation can fix the wages of federal public servants but not provincial ones, the provinces having exclusive jurisdiction over the provincial bureaucracy. However, in the 1970's, at a time when inflation was running high, the Supreme court ruled that the federal Parliament, under the emergency powers doctrine, was empowered to fix maximum wages not only in the areas under its own jurisdiction, but also in those normally under exclusive provincial jurisdiction (such emergency measures being only allowed for the duration of the exceptional circumstances).

Australia

The Commonwealth has in the past given long-term loans to the States with respect to subjects including housing, the provision of sewerage facilities, railway projects and the provision of natural disaster relief. The States are required to make payments of principal and interest to the Commonwealth on these loans. The Intergovernmental Agreement on Federal Financial Relations 'provides for payments which the States are required to make to the Commonwealth to be netted from the monthly payments of general revenue assistance' to the States (i.e. the grants to the States paid out of GST revenue).[26]

Specific purpose payments and national partnership payments are made subject to conditions. If those conditions are not met, the Commonwealth Treasurer may determine that the amount (or part of it) must be repaid to the Commonwealth. Section 20 of the Act provides that if the State does not pay the money back, the Commonwealth is entitled to deduct that amount from any financial assistance the State is entitled to receive under the Act in a subsequent financial year. If this were to occur, a State could

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26 Commonwealth, *Budget Paper No 3 — Australia's Federal Relations,* 2009-10, p 122.

seek judicial review of the Minister's decision if it was made in a manner that breached the rules of procedural fairness or natural justice.

Mexico

The Federation cannot fix the maximum levels of debt and budgetary deficit of the states and municipalities. The General Constitution leaves this matter to laws issued by the state legislatures, by establishing that "The States and Municipalities cannot contract obligations or debts unless they are destined to productive public investments, including those contracted by decentralized organisms and public enterprises; they can enter in such contracts according to the bases established by state legislatures in a law and for the concepts and up to the amounts fixed annually by their respective budgets." (Article 117, section VIII of the General Constitution).

On the other hand, neither does the federation fix maximum retribution limits to the personnel who work for the different public entities (Federation, States, and Municipalities).

Brazil

As a general rule, Federation cannot control State's indebtedness and budgetary deficit. Nevertheless, Central Government is constitutionally authorized to establish the maximum that States, the Federal District and Municipalities can spend with public servants (article 169 of the Constitution). Based on this, Federation enacted in 2001 a Supplementary Law (number 101), which created severe limitations on States and Municipalities powers to tax and spend. Supplementary Law number 101 is highly criticized for its centralized character. A number of scholars argue it is unconstitutional in many aspects, because it is not compatible with federalism.

Maximum wage of States and municipal public officials is established by federal law. According to the Constitution, no Brazilian public official can earn more than a Supreme Court Judge, whose wage is established by a federal statute.

Argentina

Due to provincial and municipal autonomy, neither a deficit or debt limit nor a wage limit can be established. Nevertheless, the idea of deficit

cero has been promoted through agreements, due to the extraordinary level of debt of federal, provincial, and municipal governments.

India

Apparently there is no power of the Centre to fix the limit on the borrowings of the States except in those cases where the States borrow against the guarantee of the Consolidated Fund of India. Against the security of their own consolidated fund the States can borrow to such extent as the State Legislature may fix. The Federation can fix the maximum wage of Federal public officials but not of State public officials. Similarly, it cannot fix the maximum wage of local public officials. Federal public services and all-India services are within the exclusive jurisdiction of the Federation and State public services are within the exclusive jurisdiction of the States. During the financial emergency the Federation may direct the States to reduce the salaries and allowances of all persons serving in connection with the affairs of the States (Article 360).

United Kingdom

The UK effectively controls debt. The centralization of finance, in general, might be the single most important fact about how the territorial politics of the UK works at the moment.

Public sector salaries are often negotiated on a UK level — small, overstretched devolved governments prefer not to negotiate with groups like the British Medical Association or the public sector unions — but there are increasingly numerous separate wage and conditions deals in different parts of the UK.

Germany

Since the amendment of 2009, the new Art.115 b of the Federal Constitution limits the raising of credit by the Länder, but there are no experiences with it.

Since the amendment of 2006, the Federation has no more competence to fix the wages of public officials; up to then, wages were fixed by federal law, so even now they do not differ in a significant way.

Austria

Under the Stability Pact of 2008 the Länder have to reach a fixed budgetary surplus, whereas the federation is allowed a fixed deficit and the municipalities at least a balanced budget. The Stability Pact follows the type of treaty under Art 15a B-VG (includes the municipalities, however, which are normally excluded from treaties under Art 15a B-VG), which means that it could not be formally forced upon the Länder by the federation, since their consent was needed. Still, they were politically forced to do so, as the federation would otherwise have reduced their revenues from federal shared taxes according to § 24 paragraph 9 FAG.

In general, the maximum wages of Land and municipal civil servants may not be determined by the federation. However, maximum wages of top political functionaries of the Länder and municipalities are determined by a specific Federal Constitutional Act on the Limitation of Public Functionaries' Wages.

Swiss Confederation

There is no provision in the constitution establishing that the Confederation should interfere in the indebtedness of the states, and problems calling for federal intervention have not arisen yet. The Constitution does not regulate either the distribution of state spending, apart from the conditions imposed by the transfers that occur within the scope of the agreement on programs (see IX.2 and previous paragraph).

Belgium

In agreement with the regions and communities, the Federal State can fix the limits of the budgetary deficit given the shared goals in the Eurozone and the "stability pact". The agreement of December 15th establishes, for example, the budgetary goals for 2009 and 2010 in what the federal and the federated collectivities are concerned.

Italy

For the implementation of specific initiatives some federal acts provide the Federation guaranty on debts of the Regions and charging to the Fed-

eration the payment of part of interest. The new version of art.119 of the Constitution changes this situation, since it provides the prohibition for the federation to give guaranties to regional debt.

Spain

According to its economic powers, the Federation may fix, and it actually does, the budgetary goal to be achieved by the States and the local entities. Going beyond the goal of budgetary stability established by the European Union, the Federation enacted a very controversial regulation that has intensely undermined the spending autonomy of the States. Some States challenged such regulation before the Constitutional Court, but the Court has not issued a decision yet.

In general terms, the federal legislation lays down the following rules: a) the elaboration, enactment and enforcement of public entities' budget should respect budgetary stability; b) budgetary stability is understood as the situation of equilibrium or surplus, according to the definition established in the European System of National and Regional Accounting; c) the federal government, with a previous report from the "Consejo de Política Fiscal y Financiera de las Comunidades Autónomas", determines every year the stability goal for the following three years, for the whole public sector as well as for each group of public Administrations; d) Congress and Senate should approve or reject such goal; e) the "Consejo de Política Fiscal y Financiera" determines the particular goal of budgetary stability for each State; f) if there is no agreement on such goal, each State should manage its budget in a situation, at least, of equilibrium; g) the government and its subordinated organisms supervise the compliance of state obligations. In order to do that they enjoy coercive powers and powers to impose sanctions.

The Federation also established upper limits to the increase of the administrative staff's global remuneration. This decision was challenged before the Constitutional Court. The Court held that those measures were legitimate because the Federation enjoyed widespread economic powers as well as basic powers regarding civil servants. However, it held that such upper limits could not be applied to concrete bodies of civil servants, rather they should operate as general limits to the global increase of remunerations. The Federation developed a strict control of the measures

passed by other public Administrations to indirectly increase their staff's remuneration. The Constitutional Court declared the unconstitutionality and annulled such measures.

11 · Can the Federation unilaterally compensate the debts that States owe to the Federation (for example, reducing federal transfers)? If so, in which fields does this power exist? Do States have any safeguards (right of audience, judicial actions, etc.)?

United States of America

This has been done, but infrequently, by exactly this method, of reducing transfers. It can occur in any field, but has been most prevalent in public assistance, social services and Medicaid. States can appeal and litigate in federal courts.

Canada

This matter does not seem to be explicitly regulated by constitutional law or convention. However, insofar the federal government is able to unilaterally fix the amount of transfer payments made to provinces under the spending power (see above), it could probably decide to compensate for debts owed by a province by reducing the transfers.

Australia

The Australian Loans Council, through the financial agreements negotiated under s 105A of the Constitution, is capable of making resolutions concerning State borrowing, although these days it primarily operates to ensure transparency and financial probity, rather than to cap borrowing. The commercial rating agencies have a stronger influence on State borrowing, as their assessment will affect the interest rates upon which States can borrow.

The Commonwealth cannot control the State's budget or set a maximum wage for all State and local government public officials. This is because the *Melbourne Corporation* principle, discussed above, prevents the

Commonwealth from interfering with the constitutional powers of the States, including their power to employ senior officials (such as judges) at such remuneration and upon such terms and conditions as the States may choose.[27]

The Commonwealth Government could establish a maximum wage for Commonwealth public officials.

Mexico

The share from the federal funds that correspond to states and municipalities can be retained and affected by the federation to cover the financial obligations contracted in favor of the federation, of the credit institutions operating in the country, and of physical or moral persons with Mexican nationality (see article 9 of the Fiscal Coordination Law). It must be noted that this law does not establish any kind of guarantee for the States for those cases where the federal Executive, through the Secretariat of Treasury en Public Credit, decides to retain and affect state shares to the payment of the acquired debts.

The Fiscal Coordination Law does establish the possibility for States to challenge this decision before the Supreme Court of Justice, in those cases in which, previous hearing, the Secretariat of Treasury and Public Credit determines that they will not continue to participate in the fiscal coordination system, either for due to non compliance with the law or with the administrative collaboration conventions. In these cases, the Federal Secretariat may also diminish the share of the referred state on an amount equivalent to the revenues it collected contravening the fiscal coordination system. Finally, States may also file an action before the Supreme Court of Justice when the Federal Secretariat does not comply with the Fiscal Coordination Law or the corresponding conventions (article 12 of the Fiscal Coordination Law).

Brazil

As a general rule, Federation cannot directly compensate debts that States owe to the Federation. However, Federation can condition funds

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27 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; and *Austin v Commonwealth* (2003) 215 CLR 185.

transfer to the payment of States' debits with Central Government (art. 160, I, of the Constitution).

Still, a clause that allows Federation to unilaterally compensate state debts can be part of the formal agreements States make with the Federation in order to receive voluntary transfers.

Argentina

These matters are almost always solved through agreements between governments, which are negotiated by their executive branches, and afterwards approved by the local legislative branch. It is always possible to take the conflicts that may arise in this subject between the federation and the provinces before the Federal Courts, in particular, the National Supreme Court of Justice.

India

The Constitution makes no provision for unilateral collection of its debts from the funds assigned to the States.

United Kingdom

The financing formula is wholly set by the UK Treasury. It is not even entrenched in law. Most of the reforms being suggested would require legislation in order to be credible.

Germany

The States do not owe debts to the Federation.

Austria

The federation can grant the Länder credit only under the Federal Financial Act or specific credit federal laws. Transfers are provided by the FAG. If the federal law-maker wants to reduce federal transfers — on account of which reason whatsoever — it simply has to enact a new FAG. However, a new FAG is usually enacted only after the Länder have agreed to its draft. If this is not the case, there will at least be no a priori-presumption of the FAG's equality.

The Länder will be able to bring the matter before the Constitutional Court who will strike down the Act if it does not take account of the economic capacities and encumbrances of the Länder.

Swiss Confederation

There are no federal regulations on the States' indebtedness, and so far there has been no need for federal action on state financial debt. If the debt of a State would jeopardize the economy of the entire Federation, or the federal balance, the Federation should take measures. In these cases, one could consider that the State does not fulfill federal loyalty. The Federal Government may, therefore, intervene on their responsibility and authority to protect and defend the federal and state constitutional order, choosing the most appropriate actions within the general preconditions, which are particularly given by the federal loyalty and principle of proportionality.

Belgium

No.

Italy

The Federation has the power to compensate owns debts and credits with the Regions as it can do with every person or company. There is no specific regulation concerning relations between the federation and Regions.

Spain

In general, the unilateral compensation of debts is only admissible regarding local debts. It is not possible regarding state debts to the Federation. Nevertheless, if any public Administration fails to comply with the goals concerning budgetary stability and, as a result, Spain fails to fulfill its obligations before the European Union, this Administration will be held responsible. The process through which this responsibility is imposed must ensure the hearing of the Administration. Given the lack of other provisions and in the case of resistance from the Administration obliged to pay, the Federation might apply the mentioned mechanisms of compensation.

Until now, however, there has not been any case where this question formally arose.

12 · Are there coordination mechanisms among the different levels of governance? If so, are there located within the political institutional framework (in an assembly of territorial representation — Senate —, in intergovernmental institutions — e.g. Councils of Prime Ministers —, etc.)? Are there mechanisms of technical coordination (e.g. deductions in quotes of sub central taxes in central taxes)?

United States of America

Technical coordination, primarily through commissions of state tax administrators, and frequent U. S. Treasury — state tax conferences tend not to be political.

Canada

No formal coordination mechanisms exist among the provincial and federal governments in the particular area of taxing powers. However, as seen above, there exists a vast and complex web of intergovernmental relations, including meetings and conferences bringing together finance ministers, federal and provincial, and their staff, which can obviously serve to discuss coordination in tax matters.

Australia

Coordination mechanisms tend to be found not in formal political institutions, such as the Senate, but rather in intergovernmental structures which are established by practice but find no basis in legislation, such as the Council of Australian Government, Ministerial Councils and the Council for the Australian Federation. With respect to the financial system, the main coordinating bodies are the Commonwealth Grants Commission, the Australian Loan Council, the Ministerial Council for Federal Financial Relations and the COAG Reform Council. There is also ongoing contact and coordination at the official's level.

Mexico

The existing coordination mechanisms between government levels consist in councils or periodic meetings formed or called to this effect to deal with issues such as public safety, health, sport, education, civic protection or fiscal coordination. Some of them have a politic-institutional character (for example, the Councils); in other cases they do not have that character, as it is the case with the reunions called by the Health Secretary (see answer to question 3 of section VII on Intergovernmental Relations).

Brazil

Exemptions regarding state taxes are coordinated by states representatives' deliberation. This coordination has its framework created by a federal statute (art. 155, XII, *g*, of the Federal Constitution). This coordination is seen as a safeguard against the "tax war" among States, which want to attract investments using their power to exempt.

Argentina

The coordination and participation body in our democracy is the Federal Senate. However, historically it has not fulfilled its role since senators have not defended their provinces interests, but those of their parties.

In addition, there are several Federal Councils for certain matters, as have been mentioned. In particular, the Federal Tax Commission plays a key role in tax co-participation.

It is obvious that Argentina need more and better interjurisdictional relations between its different governmental levels. A National Association or a Governors' Conference should be formed to move forward in the search for solutions for the common problems of the Federation.

India

The Constitution provides for the institution of the Finance Commission which the President of India had to initially constitute within two years of the commencement of the Constitution and afterwards every five years for recommending to the President distribution of taxes between the Federation and the States, principles governing the grants-in-aid of the rev-

enues of the States from the Consolidated Fund of India, measures for augmenting the Consolidated Funds of the States for supplementing the resources of the Panchayats and the municipalities and such other matters as the President may refer to the Commission. The institution of the Finance Commission has worked well for cooperation between the Federation and the States in financial relations.

United Kingdom

The centralisation of finance in the Treasury means that there is very little co-ordinating activity other than the normal machinery of civil service and finance ministers' consultation. Effectively, the UK government sets the tax income and England budget, and notifies the devolved governments of what they will get, which they can then spend with no real constraint.

Germany

There is the Bundesrat as an assembly of territorial representation; for intergovernmental institutions see above IX.2.

Austria

As already mentioned above, the FAG is enacted after political negotiations between the federation, the Länder and the representatives of the municipalities (Austrian Federation of Municipalities and Austrian Federation of Towns). Due to the federation's competence to enact the FAG, these negotiations, which are not legally required, are predominated by the federation. Beyond the FAG, two treaties between all three tiers have been concluded: The consultation mechanism clearly constitutes an instrument of co-operation, since all tiers are represented equally in a consultation committee that has to decide if one entity wants to enact a law or decree that would impose additional federal burdens on the others (certain laws, such as the FAG, are, however, excluded from being submitted to such consultation). The Stability Pact obliges the tiers to follow different kinds of budgetary behaviour, which are particularly burdensome for the Länder. Still, although fiscal federalism is characterized by intense cooperation between all levels, the federation is predominant. It is also interesting that the

cooperation does not take place in traditional or constitutionally established institutions.

Swiss Confederation

Coordination mechanisms in the economic sphere are the same as for other federal and state powers, therefore, answers given in Chapter IV are also valid.

Belgium

The special act of January 16th 1989 regarding the financing of communities and regions establishes the "exchange of information within the framework of the fiscal powers of the regions included in this act and of the federal authority is regulated by a cooperation agreement" (art. 1st bis).

The program of public loans is determined by the Council of Ministers but a prior agreement with the executives of the communities and regions is necessary (art. 49).

It is necessary to take into account that the Superior Council of Finance issues recommendations to all the levels of government.

Italy

The coordination mechanisms among the different levels of governance for financial aspects are largely mechanisms of superimposition of the federation over Regions and local authorities. Three examples: 1) the unified treasury system (the obligations for all public authorities to deposit their own liquidity to the federation treasury); 2) the insufficient fiscal autonomy allowed to Regions and local authorities; 3) the power of the federation to establish limits and burdens not strictly imposed by the Maastricht limits. At the political institutional level, art. 11 of the Constitutional Law n. 3 of 2001 establishes that state laws concerning, inter alia, the financing of the Regions and Local Authorities should be taken with a more demanding procedure in these cases in the parliamentarian Commissions for regional affairs — which is composed, among others, by representatives of the Regions and Local Authorities. The rule has not yet been implemented due to lack of regulation on the new membership composition of the Commission. At the regional level, the new version of art.123 of the

Constitution states that regional Statutes should govern the Council of local authorities, which is an advisory and communication body between the Regions and Local Authorities. In this case, consultation on financial matters might seem probable, but in this point the final decision will be taken by the new regional statutes.

Spain

Such mechanisms of coordination exist. However, they could be improved from the state perspective. First, although the Senate enjoys a more active participation than in other fields, we already mentioned its incapability to represent state interests. As a result, the tax intergovernmental coordination essentially takes place within the "Consejo de Política Fiscal y Financiera de las Comunidades Autónomas", as well as the Mixed Commissions between representatives of the Federation and each State.

The States have claimed for the total or partial decentralization of the agency that administrates the tax powers of the Federation, the so-called "Agencia Estatal de Administración Tributaria", or at least for their participation in the organs of direction. Through a legislative amendment in 2009, the federal legislature has provided for the participation of six representatives of States in the Management and Coordination Tax Board ("Consejo Superior de Dirección y Coordinación de la Gestión Tributaria"). It is a collegial body composed of representatives of the Federation and the States and it is responsible for coordinating the management of assigned taxes. The functions of this organ are advisory, consultative and proposal-making. The Plenary of the Supreme Council shall meet at least once per semester, and as convened by its President or upon request of at least three representatives of States. For the adoption of agreements, the representation of the Federation has the same number of votes as the number of votes that all the states together have. The adoption of guidelines and criteria for action in matters of regulation or management of assigned taxes would require an absolute majority (of members) for approval. The adoption of guidelines and criteria for action in matters of regulation or management of assigned taxes over which states have power, requires additionally the approval of representatives of the states affected.

XI

LANGUAGES

SUMMARY: 1. Does the Federal Constitution recognize more than one official language in the whole federal territory? If so, which are they? At the federal level, are they officially used on equal basis in the whole territory of the Federation by the different authorities? Are they equally used in private? Why? Does the Federal Constitution or federal law establish linguistic citizens' rights or duties? 2. Even if the Federal Constitution does not specify more than one language as official, does it mention other languages or does it refer to the protection of different languages? Could you assess, approximately, the quantitative importance of these diverse linguistic communities? 3. Do State Constitutions recognize official languages different from those listed by the Federal Constitution? If not, could they do so? Are federal and state official languages on an equal footing? Can States establish linguistic duties to citizens and companies different from those established by the Federation? Can States exclusively or mainly use an official language different from the one established by the Federation as official? 4. Broadly speaking, which is the linguistic system regarding education? 5. To what extent are legislation and administrative practice adapted to the multilingual reality of the Federation? To what extent are they the origin of conflicts between the different layers of government or among the society? Are the different languages important identity symbols of the States?

1 · Does the Federal Constitution recognize more than one official language in the whole federal territory? If so, which are they? At the federal level, are they officially used on equal basis in the whole territory of the Federation by the different authorities? Are they equally used in private? Why? Does the Federal Constitution or federal law establish linguistic citizens' rights or duties?

United States of America

Language is not a U. S. issue, with the exception of bilingual education. See above.

Canada

The constitutional and legislative provisions currently establishing French and English official bilingualism are rather complex, this complexity deriving in particular from the fact that they have been adopted and consolidated over a period of more than a century (often among great political controversy).

First, Section 133 of the *Constitution Act 1867* recognizes parliamentary, legislative and judicial (but not executive and administrative or educational) bilingualism at the federal level and at the Quebec provincial level. Under this provision of the Constitution, either French or English *may be* used in the federal Parliament and Quebec legislature and in federal and Quebec court proceedings; and both French and English *must be* used in legislative and regulatory enactments in Quebec and at the federal level. It is to be noted that while section 133 guarantees certain linguistic rights to the English-speaking minority in Quebec and to French-speaking minorities outside of Quebec in their relations with federal institutions, no such guarantees were extended to the French-speaking minorities in their relations with the provincial authorities of the English-speaking provinces (with the only exception of Manitoba, created in 1870 and to which provisions similar to section 133 were made applicable).

In 1969 the Federal Parliament adopted the *Official Languages Act* (this statute was later updated in 1989), the main object of which was to ensure some measure of French and English executive and administrative bilingualism by providing that federal government services be available in French and English in the National Capital region (the Ottawa region) and elsewhere in the country where the demand for services in those languages is large enough (which, in practice, means Quebec, New-Brunswick, and some regions in the North and in the East of Ontario).

Finally, the Constitution Act, 1982, enacted the Canadian Charter of Rights and Freedoms, sections 16 to 20 of which (a) restate the substance of section 133 of the Constitution Act, 1867 in its application to the federal institutions; (b) enshrine the basic principles of the Official Languages Act of 1969; and finally (c) extend official English and French bilingualism to the province of New Brunswick (which becomes thus the third province to which the constitutional provisions on official languages ap-

ply). Section 16 proclaims English and French as official languages of Canada (at the federal level) and of New Brunswick (at the provincial level), the two languages having "equality of status and equal rights and privileges". The status of the two official languages and the corresponding linguistic rights recognized to "everyone" are further specified in the following sections of the Charter addressing the language or parliamentary debates and proceedings (section 17), statutes, records and journals of the New Brunswick legislature and of the federal Parliament (section 18), proceedings in federal and New Brunswick courts (section 19) and communications by the public with public institutions at the federal level and in New Brunswick (section 20). It has to be noted that sections 16 to 20 do not apply to Quebec or Manitoba, which continue however to be bound by the obligations deriving, in the case of Quebec of section 133 of the Constitution Act, 1867, and in the case of Manitoba, by the similar provisions contained in the Manitoba Act, 1870. Thus, French and English are formally proclaimed as official languages only for the Federation and for New Brunswick. However, the two languages enjoy the same status in practice in Quebec and Manitoba.

From what has been explained above, it is obvious that the Constitution contains language rights related to the use of French and English (see also below, the discussion of minority language educational rights). However, there exist no constitutional linguistic "obligations".

Another aspect of the federal language policy deriving from the *Official Languages Act* is internal bilingualism in the Canadian civil service. The objectives are twofold. First, while respecting the merit principle, to increase the presence of Francophones at all levels of the civil service until they represent the same proportion as Francophones in the general population, that is, about 25%. Secondly, to allow Francophone civil servants to work in their own language by translating the necessary documents and by making sure that their English speaking colleagues learn enough French to speak, or at least to understand, that language. These last measures do not apply everywhere outside Quebec, but mainly in the Ottawa region and in some parts of New Brunswick and Ontario. The federal civil service in Quebec operates in both official languages, but predominantly in French.

The third and last aspect of the federal linguistic policy consists in legislative and financial measures to support official linguistic minorities (i.e. Anglophones in Quebec and Francophones elsewhere in Canada). In

particular, the federal government has taken the initiative in a series of federal-provincial programs whose aims are to improve education in the French or English minority language and to promote learning of the second official language. Federal grants-in-aid are made to the provinces to support part of these programs.

Beginning in 1971, the federal government has also implemented a multicultural policy aimed at recognizing the contribution of immigrants neither Anglophone nor Francophone to Canada. This policy was also adopted to appease some of the negative reactions to the *Official Languages Act* of 1969. With the consecration and promotion of multiculturalism, it could be claimed that even if there are two official languages in Canada, no culture possesses an official status and no ethnic group can claim priority over others. During the two following decades, the multiculturalism policy has grown in importance as more and more immigrants from diverse cultures and origins were admitted in Canada. In 1982, the principle underlying multiculturalism was enshrined in section 27 of the *Canadian Charter of Rights and Freedoms*. Also, in 1988, the Canadian Parliament adopted the *Multiculturalism Act*.

In the private area, Canadians are free to use the language(s) of their choice and, if necessary, in order to have such "linguistic freedom" legally recognized, they can invoke freedom of expression and the prohibition of discrimination based on language. The relative importance of the use, in social and economic life, of French, English or any of the many languages present in Canada depends of course on the linguistic composition of the population in any given location (see the data given above and below).

Australia

The Commonwealth Constitution does not recognise any official language, nor is there an official language recognised by legislation. In practice, the national language is English, which is used for official government communications and for all laws.

Mexico

The 1917 Mexican Constitution recognizes only one official language. Nevertheless, article two establishes that Mexico is a nation of multicul-

tural composition originally based in its indigenous groups. Likewise, this article establishes in section IV that the indigenous people have right to "Preserve and enrich their languages…".

Despite this disposition, in the federal level there is no equal official use of these languages throughout the whole federal territory; parity does not exist either in the private use. These are not, at the end, other official languages. Besides, neither the Constitution nor federal legislation establishes linguistic rights or duties for the citizens.

Brazil

No, it does not. Portuguese is the official language in Brazil (Article 13, Federal Constitution).

Argentina

Argentina has only one official language, which is Spanish. The 1994 constitutional amendment, in article 75 — subsection 17, established "the right for bilingual and intercultural education" for Argentinean indigenous people. This article establishes that: "The provinces may exercise these powers concurrently".

India

The Constitution recognizes Hindi in Devanagari script as the official languages of India for the whole of its territory, but it also allows the use of English as the official language of India initially for fifteen years from the commencement of the Constitution or until such extended period as the Parliament may by law provide. Parliament has by law authorized continuation of English as the official language of India. In addition to English as the official language of India applicable throughout the territory of India the Constitution also recognize the following twenty two regional languages which are used in different parts of the territory of India: Assamese, Bengali, Bodo, Dogri, Gujarati, Hindi, Kannada, Kashmiri, Konkani, Maithili, Malayalam, Manipuri, Marathi, Nepali, Oriya, Punjabi, Sanskrit, Santhali, Sindhi, Tamil, Telugu, Urdu.

Except English and, to the extent the President of India may allow its use, Hindi, the other languages are not used at the Federal level for

official purposes. They are also not used equally in private. Hindi is widely spoken in private because it is the mother tongue of nearly fifty per cent of the population. But it is also not spoken everywhere throughout the territory of India. Any section of Indian citizens having distinct language or script has the fundamental right to conserve the same (Article 29) and all linguistic minorities in India have the fundamental right to establish and administer educational institutions of their choice (Article 30). This right also includes the right to get financial grants from the state without any discrimination. The Constitution also imposes the duty on every citizen to promote harmony amongst all the people of India transcending, among others, linguistic diversities (Article 51-A). It also makes special provisions for making representations in any recognized language, for instructions in mother tongue at primary level, and for appointment of special officer for linguistic minorities (Articles 350, 350-A & 350-B).

United Kingdom

There is no statement that the UK overall is multilingual. The Welsh devolution legislation recognises Welsh and seeks promotion of it such that all public services can be accessed in Welsh, anywhere in Wales as well as allowing the Welsh administration to promote it elsewhere such as in schools. The Northern Ireland legislation recognises both Gaelic and Scots-Irish, although there are few speakers of the former and the latter was largely invented since 1998 by Protestants in order that there might be Catholic-Protestant parity in linguistic treatment.

Germany

The answer to all of these questions is negative.

Austria

The official language of the Republic is German. However, there are 6 formally recognized minorities (Slovenes, Croats, Hungarians, Czechs, Slovaks, Romanian) which traditionally live in the Länder Burgenland (Croats, Hungarians, Romanian), Carinthia (Slovenes), Lower Austria (Slovaks), Styria (Hungarians, Slovaks, Slovenes), Upper Austria (Slo-

vaks) and Vienna (Czechs, Hungarians, Romanian and Slovaks). They have the right to use their own languages before the courts or administrative authorities in certain districts and municipalities (where the minorities traditionally live). If a municipality in a certain area is populated by a certain percentage of persons belonging to a minority the name of this municipality will have to appear on place names both in German and the respective minority language. In certain areas of the Länder Burgenland and Kärnten law requires the establishment of elementary and grammar schools where children belonging to a minority are taught their own language as a specific subject or on any subject in their own language respectively.

All these guarantees are based on different sources of federal constitutional law (cf. Art 8 B-VG, State Treaty of St. Germain, State Treaty of Vienna, Minority School Acts for Burgenland and Carinthia that contain single constitutional provisions), although not all of them entrench subjective rights. If subjective rights are entrenched, moreover, they cannot be exercised by the minority as a collective body, but only by individuals belonging to the minority.

Swiss Confederation

The official languages in federal level are: French, Italian, German and Romansh. Any of these four languages can be used for communication with federal authorities. All official publications are published in these languages, with some exceptions for Romansh. In states and municipalities the principle of territoriality is implemented, that is, they have recognized as official languages only the languages spoken in the territory of the State or municipality. There is a trilingual state (Grishuns), several states and several municipalities are bilingual. Each language is formally equal, but not in practical use, which is easily explained by the percentage of the population using these languages: Romansh 0.5%, Italian 6.5%, French 20.4%, and German 63.6%; other languages not traditional Swiss and unofficial 9%. Only in bilingual states or municipalities a person has the right to freely choose a language to contact the administration (for example, schools). The linguistic duties are not inferred from federal law, but from state law. In all states, the teaching of at least one other official language other than their own is required.

Belgium

Belgium recognizes three "national" languages. These are the three languages "used in Belgium" (art. 30 of the Constitution): French, Dutch, and German. The constitutional text is written in the three languages. No matters his or her origin or location, each citizen can use any of the three in his or her relations with the public authorities. These have to be organized, especially at the federal level, to use the language selected by the citizen.

According to article 30 of the Constitution, "the use of the languages spoken in Belgium is optional". As it has been said elsewhere,[1] this text has to be read jointly with article 5 of the Provisional Government Decision of November 16, 1830 (Pasinomie, 1830-31, p. 82): "Citizens, in their relations with the administration, are authorized to use French, Flemish, or German languages". Hence, German is, without doubt, a language used in Belgium. The "concorded" laws regarding the use of the languages in administrative matters still have the imprint of this legal regime. The central services of the State (federal) use the German if an individual uses it (art. 41. # 1st). These services write the acts, certificates, declarations and authorizations in German if the particular requests so (art. 42).

At the federal level, the Constitution only speaks two official languages: French and Dutch.

Italy

No, the Constitution only recognizes Italian as being official for the entire territory. In two Regions, Valle d'Aosta and Trentino-Alto Adige (but in reality only in Alto Adige), bilingualism is acknowledged, that is, Italian and local languages (French and German) are both officially used.

Spain

The federal Constitution recognizes one official language for the whole territory and the possibility for the state Constitutions to establish other official languages in their respective territories. Thus the federal Constitution does not determine the number of these other languages, the

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1 F. Delpérée, *Le droit constitutionnel de la Belgique*, Bruxelles-Paris, Bruylant-LGDJ, 2000.

official character of which, in any event, cannot be extended to the whole federal territory. In Spain there is a principle of territoriality regarding languages other than Spanish. There is no equality in the use of languages by the federal institutions and entities. Among the institutions that exercise their powers in the whole territory, only to some extent the Senate allows in certain occasions the use of languages other than Spanish. However, a recent reform of the Standing orders of the Senate, adopted on the 21st June 2010, empowered the use of the official languages different from Spanish.

The new Catalan constitution establishes, for the first time, the possibility of using Catalan before the constitutional institutions and the federal judicial bodies. Nonetheless, the Decision 31/2010 of the Constitutional Court, in relation to the new Catalan Charter of Autonomy, declared these sections not legally binding; therefore, the federation has complete freedom to allow, or not, the use of Catalan before the constitutional and federal bodies with authority throughout the country. The federal institutions that exercise their powers in the state territory tend to use more often both official languages and the citizens have the rights to address to them in any of the official languages. In the private sphere, citizens are free to speak them.

The Constitution lays down the duty of all citizens to know the Spanish language. The new Catalan constitution establishes the duty to speak Catalan, but the Decision 31/2010 of the Constitutional Court, already mentioned, understood that the duty to know Catalan is not equivalent to the duty to know Spanish; limiting the scope of these sections (duty to know Catalan) to the education and the relations between the Catalan Public Bodies and their employees.

2 · Even if the Federal Constitution does not specify more than one language as official, does it mention other languages or does it refer to the protection of different languages? Could you assess, approximately, the quantitative importance of these diverse linguistic communities?

United States of America

Not applicable.

Canada

French and English are the only languages given official status in the Constitution. No other language is even mentioned. However, section 27 of the *Canadian Charter of Rights and Freedoms* states that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". In theory, this provision could be interpreted by the Courts as recognizing certain rights to languages other than French and English, but to date no such interpretation has been adopted.

If we look at the Statistic Canada 2006 census, the mother tongue of the population of Canada (31 M) is as follows:

English: 17.6 M
French: 6.8 M
Non-official languages: about 6.1 M: (Chinese: 1 M; Italian: 455,000; German: 450,000; Spanish 345,000; Arabic 260,000).

Australia

The Commonwealth Constitution does not mention languages at all. Nor does it refer to the protection of languages or their speakers.

Mexico

As mentioned above, the federal constitution does recognize the existence of other languages besides Spanish, but not as official languages. It simply establishes the right of indigenous people to preserve and enrich their languages; and the duty of federal, state and municipal authorities to favor bilingual and intercultural education within indigenous communities.

In Mexico, there are approximately 60 indigenous languages.

Brazil

The Federal Constitution recognizes and protects indigenous languages. Native Brazilians speak these languages. They represent less than 1% of this country's population.

Argentina

At the most, in our country, there might be approximately 500,000 indigenous people (total population of over 37,000,000) who belong to different communities in the northern and southern regions of the country. They all speak Spanish.

India

See above question 1.

United Kingdom

A great deal of legislation in the UK stresses the importance of public administrations serving diverse populations; outside Wales, where promoting Welsh is very important, and Scotland, where there is an effort to provide Gaelic-language services, the focus is on immigrant populations and services to them in languages such as Spanish, Urdu, Russian, Portuguese, Bengali, Chinese, and Hindi.

Germany

The answer is again negative.

Austria

According to the (most recent) official nation-wide census of 2001 the Slovene minority consisted of 17,953 Austrian nationals, the Croat minority of 19,374 nationals, the Hungarian minority of 25,884 nationals, the Romanian minority of 4,348 nationals, the Czech minority of 11,035 nationals and the Slovakian minority of 3,343 nationals. In quantitative terms, their numbers are low in relation to the total number of citizens (in 2001: 8,032,926).

Swiss Confederation

Romansh 0.5%; Italian 6.5%; French 20.4%; German 63.6%; unofficial 9.0%. The Constitution guarantees freedom of use of any language, but does not give rights to languages not traditionally Swiss.

Belgium

As has been properly stated by B. Berghmans,[2] "*la langue officielle est…la langue que les diverses autorités publiques vont utiliser pour leur propre fonctionnement et dans les relations avec les particuliers; une langue nationale est plutôt une langue de la nation, celle du peuple, qui a té reconnue officiellement telle"*.

The linguistic legislation mandates the learning of official languages, which are national languages. "*Là où une langue nationale n'est pas promue au rang de langue officielle, la reconnaissance explicite ou implicite du caractère national de la langue vise à lui donner un statut moins favorable sans doute que celui des langues officielles, mais mieux protégé que celui dont jouissent toutes les autres formes de langage, et en particulier les langues étrangères"*.[3]

Italy

The Constitution (art. 6) provides that the "Republic safeguards with appropriate regulations the linguistic minorities". Through the effect of the above mentioned acknowledgement of bilingualism in several Regions, and more recently law n. 482 of 1999, this constitutional provision has become the safeguard of other minor linguistic communities (French, French-Provencal, Friulian, Ladin and Sardinian). Safeguards may promote cultural interest in these languages, but they do not make them the formal equivalent of Italian as the official language.

Spain

The Constitution recognizes the existence of other "linguistic modalities", besides the official languages. It establishes that they will be respected and protected. The Catalan linguistic community is composed of approximately eleven million people, the Basque of four million and the Galician of three million. The other "linguistic modalities" or dialects (Aranés, Bable, Fabla...) are spoken by small minorities.

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2 B. Berghmans, *Le statut juridique de la langue allemande en Belgique*, préface M. Somerhausen, Louvain-la-Neuve, 1986, p. 69.

3 B. Berghmans, *op. cit.*, p. 71.

3 · Do State Constitutions recognize official languages different from those listed by the Federal Constitution? If not, could they do so? Are federal and state official languages on an equal footing? Can States establish linguistic duties to citizens and companies different from those established by the Federation? Can States exclusively or mainly use an official language different from the one established by the Federation as official?

United States of America

Some states have recognized English in law as the official language/ language of instruction. Only New Mexico recognizes Spanish as co-official, but primary instruction is in English.

Canada

The provinces can enact statutory provisions regarding the official language(s) in the province and in relation to matters under their jurisdiction (language is not an independent matter of jurisdiction and jurisdiction over language is considered to be ancillary to other heads of power), as long of course as such provision do not contradict the constitutional provisions explained before. Currently, no provincial constitutions or statutes recognize any language other than French or English, but a certain number of aboriginal languages are given official status in the Northwest Territories and in the territory of Nunavut, in both cases along with French and English.

As seen above, the only province with French and English formally declared as official languages in the Canadian Constitution is New Brunswick, Quebec and Manitoba being however subject to constitutional provisions that give French and English some of the major practical benefits of official status (both languages having to be used for the adoption and publication of provincial statutes and regulations; litigants being allowed to use both languages before provincial courts, etc. — see above). As will be explained below, the fact that the Canadian Constitution does not formally declare French and English to be the official languages of Quebec has allowed Quebec to declare French as the only official language in an ordinary statute, the *Charter of the French Language*. However, the Supreme Court of Canada has ruled that such a declaration could not in any way

diminish or detract from the privileges recognized to the English language by section 133 of the Constitution Act, 1867.

New Brunswick and Ontario have both adopted measures more or less inspired by the official bilingualism policy promoted at the federal level. The demography in both these provinces explains this choice of linguistic policy. In these two provinces neighbouring Quebec, Francophones are an important minority either in absolute numbers or in relative terms. In New Brunswick, there are 270,000 French speakers who constitute more than 30% of the total population. In Ontario, Francophones are mostly concentrated in the north and the east of the province and form the largest linguistic minority; they number 400,000 people and make up 4% of the total population. Of the two provinces, New Brunswick has gone the longest way in implementing official bilingualism. In 1969, it adopted its own *Official Languages Act*, inspired by the new federal legislation of the same year. At the same time, the province established a French school system which seems to satisfy the needs of the French minority. As it has been the case at the federal level, the basic principles of the linguistic policy of New Brunswick have also been enshrined in the *Canadian Charter of Rights and Freedoms* in 1982. As for Ontario, the implementation of its official bilingualism policy was not as far-reaching nor as quick as New Brunswick's. Measures were progressively adopted to improve the French school system. The same was true for bilingualism in provincial statutes and regulations as well as in courts and in the provincial government services (in the latter two fields, bilingualism applies only in areas where demand for services in French is large enough). A number of these measures were consolidated in a provincial Act which came into force in 1988. However, in 1982, the Ontario government refused to subject the province to the sections of the Canadian Charter of Rights and Freedoms dealing with official bilingualism and language rights. The Francophone population of both New Brunswick and Ontario represents 83% of all Francophones outside Quebec. As just described, they benefit from a growing number of services in their own language.

In the other seven English-speaking provinces, located at the eastern and western ends of the country, official bilingualism has met with a varying degree of scepticism or even suspicion. Once again, these attitudes toward bilingualism can be explained by demographics. In these regions of Canada, there remain very few Francophones and they are rapidly assimilated into the majority language (on average, they represent only 3.7% of the population). In the four western provinces, Francophones do not even make up the largest

minority; they are fewer in numbers compared to other linguistic minorities such as the Germans and the Ukrainians in Alberta or the Chinese in British Columbia. As a consequence, French is mostly treated, in provincial matters, on the same level as any other minority language. Historical considerations, like the idea of the Francophones being one of the two founding peoples, are given very little weight. In these provinces, only federal subsidies for French schools have somewhat enhanced the status of the French language. The situation has slowly improved as a result of the application of section 23 of the *Canadian Charter of Rights and Freedoms*, which guarantees education in the language of the French or English minority in areas where the number of Francophone (or Anglophone) children warrants (see below). Among these seven provinces, Manitoba is in a particular situation. Even if Francophones now only represent 3% (31 000) of the total population, for historical reasons, the province is subject to constitutional provisions that institute bilingualism in the legislature, statutes and in the courts (see above).

The most remarkable language policy on the provincial level, and certainly the most contentious, is the policy adopted by Quebec and contained in the *Charter of the French Language*.

Quebec's present linguistic policy originated in the 1960's. It emerged as a result of some disturbing findings concerning the position of the French language in Quebec at that time. In the sixties, "allophone" immigrants — whose language was neither French nor English — were sending their children to English schools, instead of French schools, in disproportionately high numbers. Since the birth rate of Quebec's Francophones was rapidly declining at that time, this trend, if unchecked, would have threatened the majority status of Francophones in the long run. Another disturbing fact was that, from an economic point of view, the French language possessed far less attractive force than English, with the consequence that the income of Francophones in Quebec was at the lower end, below Anglophones and even immigrants. From these observations, it became obvious which aims ought to be given to Quebec's language policy. The first objective consisted in bringing the children of immigrants back to French schools, as opposed to English schools. The second objective consisted in trying to raise the prestige and economic utility of the French language so as to motivate Non-Francophones to learn and use French in order for it to become the common language in relations between members of the French-speaking majority and the Non-Francophones. These two objectives have led to the adoption in 1977 of the *Charter of the French Language* (or Bill 101).

The CFL regulates the use of languages in three main areas: provincial governmental institutions; the economic sector; and public education. In these three areas, the CLF aims at raising the status of French, and in order to achieve that aim, it restricts certain traditional rights of Anglophones in Quebec. This was considered necessary because unchecked competition between the two conflicting languages — French and English — too greatly favours English at the expense of French. So it was decided that legislative measures were needed to strengthen French in certain areas.

In each of the three main areas of Quebec's linguistic policy, the legislation has been weakened over time, a number of sections of the CFL being struck down after having been found to be in conflict with the Canadian Constitution. The most vigorous opposition was brought against the provisions dealing with education and commercial signs.

Originally, Bill 101 prescribed, with some exceptions, that public and commercial signs should be in French only. The Supreme Court of Canada struck down these measures in 1988, holding that they violated the freedom of expression guaranteed in the *Canadian Charter of Rights and Freedoms*. The Supreme Court found the mandatory use of French on public signs to be justifiable, but that the exclusion of other languages violated free speech. In 1993, the United Nations Human Rights Committee came to a similar conclusion, based on the provisions protecting freedom of expression in the *U.N. Convention on civil and political rights*. Faced with these decisions, the Quebec government amended the CFL accordingly. They allow using other languages than French on commercial signs, provided that French remains the "predominant" language.

As for the provisions of the CFL relating to education, in order to explain how they conflicted with the Canadian Constitution, I will move to the next question.

Australia

State Constitutions do not recognise any official language either.

Mexico

State Constitutions do not recognize languages other than Spanish as official, but some do recognize the existence of other languages (as

does article 16 of the Constitutions of the State of Oaxaca which recognizes the languages of the indigenous people settled within its territory).

Neither in the Federal Constitution nor state ones establishes an "official language"; State Constitutions do not establish a "local official language" either.

The Federal Constitution contains provisions regarding education, which is a concurrent public service in which the federation, the states, and the municipalities participate according to the power distribution established by the federal legislator through a federal law (General Education Law).

This law establishes, in article 7th.IV, the duty of the Mexican State (all its levels) to: "Promote, trough the teaching of the national language — Spanish —, a common language for all Mexicans, while protecting and promoting the development of indigenous languages." This means that the state and municipal educational authorities, as the federal ones, have the duty to promote the national language, which is Spanish.

Brazil

State Constitutions cannot recognize different official languages.

Argentina

Our country does not have this kind of problems, as happens in other countries. Regarding indigenous communities, we have seen that Provinces have concurrent powers with the federal government.

India

As there are no State constitutions in India, question of recognition of any official languages does not arise. The Federal and State official languages are not on equal footing as the State official languages are used only within the State while the Federal official languages are used throughout the country. Within their territory the States may require citizens and companies to use the official language of that State. As a matter of rule the official language of the Federation would be the language of communica-

tion between different States, but two or more States may agree to make Hindi as the official language for communication between such States (Article 346).

United Kingdom

In Wales, in law and in practice, Welsh should be normalised and on an equal footing with English in public administration and affairs; this includes a bilingual public service, services and signs in Welsh, and promotion of Welsh through Welsh-language media and schools. Northern Ireland's real commitment to linguistic diversity is nil since linguistic issues are bargaining chips in the ongoing peace process negotiations and the languages scarcely exist.

Germany

There are two States with small bilingual minorities; they may use their language in an official context, but it is not recognized as an official language by the Constitution.

Austria

8 B-VG provides that German is the official language of the Republic (as a whole). This means that the Land Constitutions must not stipulate any other official languages. National minorities fall under the federation's competence which means that the Länder are not competent to regulate their matters (including their languages), but are only allowed to consider their protection alongside the exercise of their own powers, due to the "principle of mutual consideration".

Swiss Confederation

Any state gives special recognition to languages other than the official. But they could do so because the federal constitution does not prevent it. All states have as official languages one, two or three of the official languages of the Confederation. The only language requirement is the duty to learn one of the other official languages during mandatory education. A special obligation exists in the state of Grishuns where Ro-

mansh is spoken by only about 30 to 40,000 people (according to different statistical criteria). It is further divided into several dialects very different from each other. In municipalities where a majority of people have Romansh as their mother tongue, the language rights of other communities are limited due to the public interest to protect Romansh against extinction. In particular, at the municipal level Romansh is defined as the single official languages in those places in which this language is the historical and traditional one, even if it only remains a minority (at least 40%) of Romansh population. In a typical example of this type of municipality, children of a majority of German-speaking population (up to 60%, usually from migration within the same canton/state) do not have the right to receive the primary education in their native language. Moreover, its inhabitants do not have the right to communicate with public authorities in the language of the majority (German) and it is even possible that the German-speaking majority does not understand the elections documentation, as it is only written in Romansh. This implies a strong limitation of the freedom of language, which is recognized in the federal Constitution, it contradicts the democratic principle and it could also mean a prohibited discrimination by the European Convention of Human Rights. Nevertheless, this fact could be justified by the interest of protecting the Romansh language minority, which is in real danger of disappearing (a disappearance not forced by any power, but as a result of a natural demographic development). The cantonal law[4] which defines these rules is relatively new (in force since 2008) and, until the moment, there has not been any case before the federal court or the European Court of Human Rights.

Belgium

There are no constitutions of the federated entities.

This is not an obstacle to presume given the recognition in the Constitution of linguistic regions that the language used for administrative matters is French, Dutch or German in the French, Dutch, and German communities. This observation is given even if the Constitution and the laws organize some mechanisms for the linguistic minorities.

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4 Lescha da linguas dal chantun Grischun / Sprachengesetz des Kantons Graubünden / Legge sulle lingue del Cantone dei Grigioni.

The three languages mentioned at the community level are also the three languages recognized as national by the Constitution.

There is not a linguistic census. It is considered generally that the French Community is formed by more or less 4.250.000 people, the Flemish by 5.700.000 people and the German by 70.000 people.

The French and Flemish communities have exclusive powers over language use in their linguistic regions. This power allows them to determine the rules regarding the use of languages in the public administration — apart from the federal one —, in education, and in the social relations within companies.

Italy

The Statutes of Valle d'Aosta and Trentino-Alto Adige recognize respectively French and German as official languages.

Spain

Certain state Constitutions establish other official languages and regulate their use. The different official languages are not totally on an equal footing. The new Catalan Constitution, as I have already said, has established the duty of the Catalan citizens to know Catalan, but the Decision 31/2010 of the Constitutional Court, already mentioned, understood that the duty to know Catalan is not equivalent to the duty to know Spanish; limiting the scope of these sections to the education and the relations between the Catalan Public Bodies and their civil servants.

The states can establish linguistic obligations. For example, the new Catalan Constitution recognizes the right of consumers and users of goods and services to be attended in the official language they choose and establishes the correlative duty of "linguistic availability" of entities, companies and establishments open to the public. Yet, the Decision 31/2010 of the Constitutional Court, of 28th June, declared that the duty of "linguistic availability" cannot mean the imposition of individual obligations to enterprises, their employers or their employees, forcing them to use any of the different official languages.

Public powers, both state and local, often employ exclusively their own official language. However, notifications to the citizens have to be in Spanish if they ask the State to do so.

4 · Broadly speaking, which is the linguistic system regarding education?

United States of America

Only English is the language of instruction in all states. However, mixed language communities use up to 20 different tongues as a means of integrating immigrant populations into English instruction.

Canada

In Canada, education is a matter falling under exclusive provincial jurisdiction (Constitution Act, 1867, section 93).

Before 1982, the Canadian Constitution contained absolutely no provision whatsoever in relation to the language of public (or private) education. This allowed Quebec, in the *Charter of the French Language*, and for the reasons explained above, to adopt provisions forcing immigrants and Francophones alike to send their children to French primary and secondary public or private but publicly funded schools (the law not applying to private schools not publicly funded). Section 73 of the CFL, called the "Quebec clause", provided that the only children admissible to English public schools were those whose parents had themselves received their primary school education in English in Quebec and those whose older brothers or sisters had already received their education in English in Quebec. In practical terms, the clause prevented three categories of persons from sending their children to the English public schools: (1) immigrants wherever they come from and whatever their language is; (2) Francophones (before 1977, a sizable number of Francophones was sending their children to English schools); (3) Canadians coming from other provinces and wishing to establish themselves in Quebec, unless a reciprocity accord existed between the province of Quebec and their province of origin, or if their province of origin was offering comparable treatment to its Francophone minority.

The exclusion of Canadians from other provinces was immediately denounced by the federal government as restricting the freedom of movement and establishment that forms the basis of a federal system. However, when the CFL was enacted, absolutely nothing in the Canadian Constitution prevented Quebec from adopting such a restriction. Since no argument to strike down the "Quebec clause" could be found in the existing Consti-

tution, the Federal Government, with the consent of all the provinces except Quebec, adopted the Constitution Act, 1982, and with it the Canadian Charter, with a provision (section 23) knowingly drafted so as to collide with the "Quebec clause" (and which for that reason was called "Canada clause" in popular parlance). Thus, two years later, it was no surprise that the Supreme Court declared the Quebec clause invalid on the ground that it contradicted the "Canada Clause".

Section 23 of the Constitution Act, 1982, guarantees the right of Canadian citizens (a) whose first language is that of the French or English linguistic minority of the province in which they reside (par. 23(1) a), or (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the French of English minority (par. 23(1) b), to have their children receive primary and secondary school instruction in that language in that province. Subsection 23(2) adds that citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in French or English in Canada, have the right to have all their children receive primary and secondary school instruction in the same language. Finally, subsection 23(3) states that the rights under subsections (1) and (2) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction and includes where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Paragraph 23(1) a) presently applies to all provinces, Quebec excepted, and will apply to Quebec in the future only when authorized by the legislative assembly or the government of the province (Constitution Act, section 59). Paragraph 23(2) contains the "Canada clause" that has been relied upon by the Supreme Court to strike down the "Quebec clause" in the *Charter of the French Language*. The remaining provisions of the CFL relating to the educational language are largely intact. All Anglophone immigrants — as well as Francophones themselves — must continue to send their children to French schools. However, it becomes increasingly clear that French education is not sufficient to integrate immigrants into the French language and culture. Most immigrants settle in the Montreal area and the proportion of allophone children has reached such a high level in many French schools that they have lost the ability to integrate allophone

children into the French language and culture. This situation is the result of the high level of immigration in recent years, but also from the massive exodus of the Francophone middle class, which prefers to live in suburban areas, while immigrants settle in the center of the city. Yet, the linguistic situation of Montreal is of key importance for the future of the French language and culture in all of Quebec. It must also be noted that the francophonization of allophones largely depends on their economic integration and that in Montreal a large part of the economic activity is conducted in English.

Australia

Schools use the English language, although some international schools also teach in another language. In some places, such as the Northern Territory, some schools are bilingual, teaching in indigenous languages as well as English.

Mexico

The linguistic regime in education establishes a national language, but accepts and promotes the existence of other languages (those of indigenous people).

Besides article 7.IV of the General Education Law, there are other norms in this law with a trend to combine the learning of the national language with indigenous ones. For example, article 38 of this law establishes that basic education, in its three levels, will have to be adapted in order to respond to the linguistic and cultural characteristics of each one of the different indigenous groups of the country. To manage these "adaptations", within the Education Federal Department, there is a General Indigenous Education Director, who is in charge of proposing pedagogical norms, didactic and auxiliary materials, and evaluation instruments for indigenous education, ensuring that it has a bilingual-multicultural orientation that guarantees the integral formation of the students that belong to different ethnic groups and the protection, promotion, and development of their languages, customs, resources, and specific forms of organization (article 27 of the Internal Regulation of the Public Education Secretariat).

The States also have education authorities in charge of these "adaptations".

Brazil

According to the Constitution (article 210, § 2), Portuguese is mandatory in fundamental school. Indigenous communities have the right to use their native languages, though.

Argentina

We have already referred to it.

India

Broadly speaking, at the primary and secondary level education is imparted in the regional languages along with English as an additional language. At the University level regional languages are permissible within the State boundaries along with English as the link language for higher education.

United Kingdom

All parts of the UK, but especially England with its many diverse immigrant populations must offer some education not in English. In Wales there is an extensive effort to incorporate Welsh into bilingual education in the state sector (including compulsory Welsh classes in most schools as part of the national curriculum), and state support for Welsh-only schools. This, like bilingual government publications, predates devolution (Welsh was first strongly promoted in 1981 by the Conservatives); its implementation is more thorough since devolution.

Germany

Education is in German.

Austria

In principle, pupils are educated in the German language. However, in certain areas of the Länder Burgenland and Kärnten (in the traditional areas of settlement of the Slovene and Croatian minority and where there is

strong need), federal law (including some constitutional provisions) entitles pupils to receive elementary instruction in Slovene or Croatian and a proportional number of grammar schools of their own.

Swiss Confederation

Monolingual education uses the sole official language of the municipality. At a certain age (depending on state), students learn one of the other official languages at the federal level as a foreign language. In bilingual municipalities normally exist schools of each language, and parents are free to choose the school for their children. The other official language of the municipality is taught as a second language.

Belgium

The language for education is the language of the linguistic region where the school is located. Belgian Law applies, except in Brussels' region, a strict territorial principle. The European Court of Human Rights, in a decision of July 21st of 1968 has not decided against this.

Italy

Except for the two above-mentioned Regions, all education is in Italian.

Spain

Spanish is a compulsory subject of pre-college education in the whole territory. The other official languages are also compulsory in their respective States. Regarding the language in which the other subjects are taught (channel-language), there are two main models, each with several variations. The first model allows the parents or the students to freely choose the channel-language. There are schools where all the education is in Spanish while in others all the education is taught in the state official language. There are also mixed schools, in which both languages are used as channel-languages. According to the second model, there is no right to choose the channel-language. All students follow the same system, which might consist either of using both official languages in variable proportions over

the several phases of the educational system or of using only the state official language. There is a mixed model that recognizes the right to choose the channel-language during the first years of primary education and then establishes a unified system.

5 · To what extent are legislation and administrative practice adapted to the multilingual reality of the Federation? To what extent are they the origin of conflicts between the different layers of government or among the society? Are the different languages important identity symbols of the States?

United States of America

The reality of Spanish speaking (nearly 20% Hispanic) has never been faced in the U.S. The problem is that a whole generation of Hispanics (approximately 20-40 years old) never learned Spanish, do not speak it in their homes, and cannot use it. Language does not involve intergovernmental conflicts. To Hispanics less than 20 and over 40 Spanish is an important identity symbol, but because most are either bilingual or quickly become bilingual it is not in any real political discourse with "Anglos".

Canada

If one wants to assess the results of the *federal* linguistic policy, it appears that it has had a positive, but partial, impact. The ability of the federal administration to operate in French is much better today than it was thirty years ago. However, it is still difficult, even today, to be served in French by federal civil servants outside the province Quebec, the Ottawa region, New-Brunswick and some areas of Ontario. Many complaints are filed each year with the Official Languages Commissioner (the federal language Ombudsman) on this subject. The hiring of a greater number of Francophones in the federal civil service has benefited to a large extent Francophones outside of Quebec, who are usually more bilingual than Francophones in Quebec. It must also be noted that the requirement of bilingualism in the federal civil service has provoked discontent with a large number of unilingual Anglo-

phones who consider that such a measure decreases their chances of being hired or promoted. This is especially true amongst Anglophones living in the west of Ontario. Generally, the federal linguistic policy has not been successful in seriously curbing the trend of French minorities to assimilate into the English language. However, it is doubtful that this phenomenon could be reversed by a state policy, considering the unequal socio-economic strength of the two official languages in most regions outside Quebec.

More generally, language policies have been for the last thirty years, and still are today, a constant source of tension between Quebec, on the one hand, and "English Canada" (the federal government and the English-speaking provinces), on the other, because the language policy implemented by each is defined by a different philosophy. Quebec's language policy result from a deliberate choice between the two main models existing in the field: the principles of territoriality and of personality. According to the principle of territoriality, all persons living in a given jurisdiction must adopt the language of the majority, which is the only official language, in their relations with public authorities and for the education of their children in public schools (with linguistic freedom normally applying in the private area and for private schools). According to some specialists of sociolinguistic issues, the principle of territoriality better serves the interests of linguistic stability and security. Such an arrangement separates competing languages along jurisdictional borders, thus offering to each one a territory on which it has a monopoly or a net predominance over competing languages. The principle of territoriality forms the basis of the linguistic laws we now find in Switzerland and Belgium and that Quebec has tried to implement with the *Charter of the French Language*. On the other hand, the principle of personality, by giving two or more languages equal official status, allows individuals to make free choices between those languages in their communications with State authorities and for their children's public education. This solution requires that the State and the public education system be bilingual. Applying the principle of personality maintains the contact between competing languages, with the result that the language with the most prestige and economic utility will develop at the expense of the more vulnerable language. The principle of personality and the institutional bilingualism that necessarily accompanies it have been adopted by the Canadian federal government and, to some

extent, by the provinces of Ontario and New-Brunswick. Obviously, this poses no threat to the English language, which is predominant throughout North America.

Language policy issues were one of the major themes during the campaign preceding both referenda on sovereignty in Quebec and the Party Québécois has insisted that a better protection of the French language in Quebec is one of the reasons justifying Quebec's separation from Canada.

Australia

No State is associated with a different language. All Australian governments use English as the primary means of communication, but also provide translations of some governmental material into the most dominant community languages within the relevant jurisdiction.

Mexico

Indigenous languages problems in Mexico are related to the cultural separation, that is the different visions of the cosmos held by on the one hand, the predominant "mixed-race" population, and, on the other, by the indigenous groups. All institutional contact points between the "mixed-race" and "indigenous" societies entail communication problems at the very best, or prejudices and discrimination in the worst and more frequent cases.

Nevertheless, the languages of the ethnic groups do not create conflicts between one or several States, with other States or with the federation. More often, each State has indigenous languages that resist, confront or yield before the "national language", which is Spanish.

Brazil

There is no controversy regarding the adoption of Portuguese as the official language.

Argentina

This question does not apply to Argentina.

India

The answers to the foregoing questions in this section substantially answer this question. By enacting the Official Languages Act, 1963 the Parliament has foreclosed the discontent among various language groups. Also appropriate steps are taken at the Federal level to ensure that no linguistic group feels discriminated in matters of recruitment to Federal services. The Constitution also provides for a Federal Language Commission and a Committee of Parliament to smoothen the operation of different languages (Article 344) and also for the special officer for the linguistic minorities mentioned above. Different languages are not strong identity symbol in India.

United Kingdom

Language issues matter in Wales where there is an important cleavage between self-identified Welsh who do speak Welsh, and see that as the marker of Welsh identity, and self-identified Welsh who do not habitually speak Welsh and do not see it as a major part of Welsh identity. The former are mostly in the rural north (where it can be hard to function in English) and the latter, much more numerous, are mostly in the urban, industrial south (where it is almost impossible to function in Welsh). Atop this are efforts in the rural north, led by Plaid Cymru councillors, to preserve Welsh-language communities against English-speaking immigrants; this is considered very offensive by the southern self-identified Welsh who do not use Welsh or consider it a major part of their identity and damages Plaid Cymru in the south. Promoting Welsh is a large economic sector and Plaid Cymru activists concentrate in it and in the bilingual public service; this might save Welsh numerically but causes tensions in politics. Plaid Cymru and Labour are both trying to be formally bilingual in order to avoid the heated polemics that come with being seen as siding with English or Welsh. Other than through any hypothetical challenges under European human rights law, the language issue, its policies, and its problems, are wholly Welsh competencies with no real UK role, and have been for decades.

Germany

There is no multilingual reality within the Federation.

Austria

It is not really possible to speak of a "multilingual reality of the federation", as German is the only general official language and, practically, by far predominant. Thus, the different minority languages are definitely no identity symbol of Austria.

In 2001, however, a conflict arose between the Constitutional Court and the right-wing Governor of Kärnten, as the Court had struck down a law which had provided that a municipality's name had to be written down in a minority language if at least 25% of local citizens belonged to this minority. The Court held that the percentage number was too high in order to come up to the obligations imposed on Austria by the State Treaty of Vienna. Although the Constitutional Court has meanwhile confirmed its judgment in a number of similar cases, the old and new Carinthian right-wing governors have found several ways of dodging the Court's judgment and have, as yet, not provided for thoroughly bilingual place names in a couple of municipalities. Although it is acknowledged that they ought to respect the Court, the Federal Government avoids an open political conflict with the Land Government, which is, however, detrimental to the minorities' interests.

Swiss Confederation

Legislation and administrative practice of multilingualism have not been source of major problems or discussions at the current time, neither at the federal level nor at the cantonal one, with two exceptions. The first one is the case mentioned in answer XI.3 (State of Grishuns' Language Act). The other one has its footprints in the law, began with the decision of the State of Zurich to start in primary school teaching English, without changing the start age of teaching French, with the aim that children had knowledge of English before they have knowledge of French. This decision caused very emotional discussion. The decision was seen by some exponents of French-speaking states as a waiver of federal solidarity. Zurich's argument was that students who complete school in Zurich generally speak better French than the French-speaking students of German, and this in spite of English. I have no knowledge of conflicts between government agencies because of language. In public discourse from time to time tensions between language groups can be spotted, especially among the Fran-

cophone and German-speakers. It is unclear whether these are based in reality or in the use of the polemic for other purposes by politicians and journalists.

Nevertheless, it must be noted that the two aforementioned groups have differing views on many policy areas. This is clearly seen in the electoral results. Many times, Francophones feel like losers because they are a minority in front of the German-speaker. This is certainly a motive of this moderate degree of tension.

In conclusion, we can confirm that language is an important sign for the main Swiss States. Especially for those where there is a dominance of a language which is minority at the federal level (French), solidarity between the people of the States where this language is spoken is often mentioned in the press or in political speeches.

Belgium

There are still linguistic conflicts. These appear in mainly two areas. On the one hand, citizens can perceive that the federal administrations are not attentive to their concerns of having the whole procedure in their language. A false *de facto* bilinguism is sometimes used.

On the other hand, linguistic minorities persist in monolingual regions, particularly in the Dutch region, in the outskirts of the capital. These tried to enlarge their numbers while the Flemish where extinguishing. In relation to this problem, the signature of the Belgian Framework-convention of the European Council regards the protection of national minority.

Italy

Not answered.

Spain

Probably, it would be advisable to have a better knowledge of all the official languages in the whole territory as well as to promote the value of pluralism, particularly linguistic pluralism. Moreover, the knowledge of the state official languages by the federal civil servants who work in those states, especially judges, should be furthered. There are no remarkable problems between administrations concerning linguistic issues. With re-

gard to individuals, some citizens living in states where there is a different official language claim that their rights concerning the federal official language are violated. States that have their own official language consider this to be one of the most relevant symbols of their identity. Actually, the States that have their own language are the ones where the claim for self-government has been, and still is, stronger.

XII

GLOBAL ASSESSMENT AND ADDITIONAL COMMENTS

SUMMARY: 1. Nowadays, how is the level of political decentralization generally assessed? What is your assessment? What are the main historical claims by States? To what extent have they been satisfied? 2. What are the main threats and opportunities for the development and consolidation of the system of political decentralization? What are the main current trends in the evolution of the federal system? Is it shifting towards centralization or decentralization? 3. Generally, would you say that the system is becoming more centralized, decentralized or that it is in a relative equilibrium? 4. Would you like to add any additional comment about the political decentralization of the Federation that was not mentioned in the questionnaire? Would you like to make any suggestion about the structure or the contents of it? 5. Which is the landmark literature offering further in-depth analysis about your federal system?

1 · Nowadays, how is the level of political decentralization generally assessed? What is your assessment? What are the main historical claims by States? To what extent have they been satisfied?

United States of America

Today the role of the federal government in guiding state programs and the role of states in deeply effecting local governments is decried as control but accepted. There is no other choice because of constitutional powers and fiscal flows "downward." The contemporary call from below has two parts, "send more money" "with fewer controls on our actions." However, the U.S. remains highly decentralized in that the important tools of implementation, that is day to day control over program operation and funds expenditure remains at decentralized venues in the system. The U.S. does not have, indeed never has had, a prefectural system of prior permission. Supervision from the top is minimal, often informal after a contractual agreement is reached and/or a law is executed at lower levels. The accountability system includes minimal reporting, some in-program assessment and fiscal post-auditing.

As a result, most states are in fiscal positions where their claims for less control are sometimes followed but their need for federal revenue (as a result of a general unwillingness to raise state income taxes and inability to borrow

money) means that restrictions inevitably flow downward. At this writing the economic crisis has made state dependence on the federal government even greater. The other issue is that even though the current Supreme Court has a conservative majority, states rights has barely moved in the direction of strengthening states and its concern appears to be more interested in supporting federal power at the expense of the states to advance their ideological agenda. There has been no clear Court move toward the states in the past seven years, only a few isolated cases while it has reinforced national power. One example of upholding state authority occurred in 2009, upholding state laws regarding union dues, and in two other cases in 2008-09 the Court decided to invoke the pre-emption doctrine with regard to state tort claims and on several issues of criminal procedure. On the other hand the Court limited state discretion regarding the death penalty in three separate decisions in 2008 and in that year limited state authority to enact gun control measures in a District of Columbia case. In the latter case the Court raised the possibility that it would incorporate the 2nd Amendment (right to bear arms) into the due process clause of the 14th Amendment and thus apply its guarantees to state and local governments. There is thus some modest trend in the 2000s to uphold state powers in the face of general federal encroachment.

Canada

The literature on the subject is characterized by a particular phenomenon, namely that the interpretation of the evolution of Canadian federalism differs greatly depending on the origin of the author. Quebec Francophone scholars have, in large measure, attempted to show that the spirit which marked the adoption of a federal state in Canada has been betrayed. They have accused the Supreme Court of misinterpreting the Constitution in order to allow the federal government to interfere in provincial jurisdiction and to centralize power. Federal initiatives and Supreme Court decisions are more often judged by these authors to be contrary to the initial division of powers. Conversely, scholars from English Canada generally approve the work of the Supreme Court in interpreting the division of power provisions of the Constitution and are of the opinion that the Court has maintained an adequate balance between the need of an efficient national government, on the one hand, and the maintaining of a meaningful provincial autonomy, on the other.

My own assessment is somewhat more nuanced. It is true that changes made by the Court, in the last three decades, to certain fundamental con-

cepts of constitutional law now provide the federal Parliament with greater latitude than before in the exercise of its legislative powers. The Court has reinforced the Central government's power to regulate the economy, including *intraprovincial* matters affecting trade, by resorting to functional tests that emphasize economic efficiency over other criteria and thus make it more difficult to invoke legitimate regional interests. Explicitly or not, the Supreme Court's vision of federalism is generally premised on a functional effectiveness perspective; one that favours centralism as opposed to decentralization. However, the Supreme Court shows also some concern for the community dimension of federalism, an approach that brings it to recognize some form of decentralization and to maintain a meaningful provincial autonomy. In particular, through the combined use of the double aspect doctrine and a restrictive definition of inconsistency, the Court has allowed a great number of subjects to be regulated concurrently by the provinces as well as by the federal authorities. According to the "aspect" (or "double aspect") doctrine, a law whose true nature allows to assign it to the jurisdiction of the enacting legislature, federal or provincial, will be upheld even if it affects matters which appear to be a proper subject for the other level of government. To give an example, the double aspect doctrine enables the federal Parliament to establish minimal standards of environmental protection that can be exceeded by the provinces in the exercise of their own powers. Such an approach has undeniable advantages in terms of flexibility. The net effect is that the two fields of formally exclusive powers [ss. 91 and 92 of the *Constitution Act, 1867*] are combined into a single more or less concurrent field of powers governed by the rule of paramountcy of federal legislation. This would be quite dangerous for provincial autonomy if the Courts in Canada did consider that a conflict or inconsistency, triggering the application of the federal paramountcy, is present as soon as there are parallel federal and provincial legislation in the same field (or by mere duplication of valid provincial and federal legislation). However, Canadian court has generally adopted a very restrictive "express contradiction" test to determine federal paramountcy. A valid provincial statute will be pre-empted by federal legislation only where *dual compliance* is impossible. It is very rare that Canadian courts apply the United States style field pre-emption approach, where it is enough that the Central government has occupied the legislative field to trigger the federal paramountcy.

As explained at length above, Quebec's historical claims have been for more decentralization and/or asymmetrical arrangements under which Que-

bec would be recognized more autonomy than are the other provinces, as well as for the formal recognition of Quebec's distinct character as the sole province with a French-speaking majority. Among Quebec Francophones, it is generally considered that these claims have not been satisfied, as is attested by the fact that no Quebec government since 1982 has formally accepted the "patriation" of the Canadian Constitution and to the *Constitution Act, 1982*.

For the last four decades, Western Canada (British Columbia, Alberta, Saskatchewan, and Manitoba) has been asking for a Senate reform that would give those less populous provinces a stronger representation in the Senate, thus allowing them to counterbalance the majority possessed by the two most populous provinces of Central Canada (Ontario and Quebec) in the House of Commons. The reasons why such a reform has not yet been achieved have been explained above.

Australia

The States regard themselves as sovereign within their own spheres of responsibility and would claim the right to be able to fulfil those responsibilities without the interference of the Commonwealth. In practice, however, States are dependent upon Commonwealth grants in order to be able to fulfil their responsibilities to provide services, such as health, education and housing. The Commonwealth, in making those grants, has in the past sought to direct State policy by placing both policy and administrative conditions on the grants. The States have long complained that this wastes money by tying the States up in red tape and results in inadequate services, inefficiency and perverse incentives to shift costs.

The Rudd Commonwealth Government, when elected in 2007, promised to end this conflict between the Commonwealth and the States and improve intergovernmental cooperation. As discussed above, it reviewed the fiscal federalism system with a view to simplifying and reducing the number of different specific purpose payments, reducing the administrative burden and giving the States more freedom in how they use Commonwealth grants. While these changes have been beneficial to the States and the operation of the federation generally, there is a significant risk that the same problems will arise through the use of national partnership payments.

Overall, there is an ongoing trend towards centralization. The Rudd Commonwealth Government has proposed taking over the financing of the health system unless health services (provided by the States) improve. It

has also attempted to interfere in planning for large cities, such as Sydney (another State function).

The level of decentralization in Australia would generally, and accurately, be assessed as relatively low.

Mexico

The Mexican federal system is still very centralized. The main claim of states and municipalities, nowadays, is a reform of the financial relations regime. They ask for a more balance between federal budget and the state and municipal ones (and state and municipalities among themselves, too). These requests are far from being satisfied.

Brazil

The political practice reveals a centralized connotation of Brazilian federalism. The Constitution of 1988 intended to increment decentralization. Political practice evolved in a different way though. Increasingly, States and Municipalities depend on federal money, which creates a powerful mechanism of control. Federation can manage local public policies conditioning voluntary transfers to the accomplishment of goals and to financial stability.

States have claimed greater autonomy to address local issues. They have also asked for more financial autonomy and less federal control of their spending power. These are reasonable demands. However, Federation control over States and Municipalities' spending powers in the last years contributed to this country's development and financial stability. This control also increased local government accountability. Education and health services are better after central government control through voluntary transfers conditioning. Indeed, it is fair to sustain that the Brazilian people expect central control over local government in a certain level, which includes States' and Municipalities' tax and spending powers.

Argentina

Decentralization is well established by the laws. But putting aside what law in the books says, it is actually necessary to battle to make these principles a reality.

Since democracy was established in 1983, the autonomy of provinces and municipalities has risen, but nevertheless there is still a long way to go in order to modify the centralization around the metropolitan area of Buenos Aires.

Provinces are still dependent from economic, financial, politic, and social perspectives on the federal government, which should lead us to give full effect to the constitutional norms, in particular those established by the 1994 amendment.

This amendment has framed the reform of our Public Law, which should encourage us the development of new roles for the regions, provinces, and municipalities in the integration process, both national and supranational, in the context of the globalized world we live in.

The gap between legal regime and practice, characteristic of Argentina and Latin America, which is evident in the operation of our federalism, is a signal of our cultural, politic, and legal underdevelopment.

The claims do not differ from the ones presented in the 1994 Constituent Convention, which were satisfied in the amendment. But as we have been saying, the constitutional scheme has not been fully respected. Hence, it is necessary to ensure the normative force of the Constitution.

India

In the context of globalization the Federal government has made extensive use of Article 253 of the Constitution which authorizes the Federal Parliament to make any law for the implementation of any treaty or agreement made with foreign countries. This has particularly been noticed in the implementation of TRIPs Agreement. Suggestions have been made for putting up fetters on the power of Parliament in respect of those matters which are exclusively in the domain of the States such as agriculture. But no concrete steps have been taken, nor is there any serious pressure for changing the Constitution or the constitutional practice in this regard. Therefore, apparently the globalization process seems to be leading towards centralizing tendencies in economic matters.

United Kingdom

The United Kingdom has taken to devolution remarkably well. There is almost no support for its reversal, little change in levels of support for secession, and considerable public support for further devolution.

First, public opinion has moved toward support for greater devolution in Scotland and Wales. English opinion, which has never opposed to devolution, is unchanged in its broad satisfaction with existing constitutional arrangements. There is, however, an increasingly strong sense in English public opinion that Scotland (and perhaps the other devolved administrations) receives illegitimate subsidies from England.

The following three tables illustrate this point:

Which institution does/ought to have 'most influence over 'the way Scotland/ Wales is run'?

	Scotland				Wales			
	Does have most influence		Ought to have most influence		Does have most influence		Ought to have most influence	
	2003	2006	2003	2006	2003	2007	2003	2007
Devolved	17	24	66	64	22	36	56	74
UK	64	38	20	11	58	53	29	18
Local	7	18	9	19	15	5	14	8
UE	5	11	1	1	5	6	1	0

Constitutional Preferences for England 1999-2007

With all the changes going on in the way different parts of Great Britain are run, which of the following do you think would be best for England?	1999	2000	2001	2002	2003	2005	2006	2007
	%	%	%	%	%	%	%	%
1. England should be governed as it is now, with laws made by the UK Parliament	62	54	59	56	55	54	54	58
2. Each region of England to have its own assembly that runs services like health	15	18	21	20	24	20	17	14
3. England as whole to have its own new parliament with law — making powers	18	19	13	17	16	18	22	17

Scotland's Share of Government Spending

	England				Scotland			
Is Scotland's Share…	**2000**	**2001**	**2003**	**2007**	**2000**	**2001**	**2003**	**2007**
More than fair	20	24	22	32	10	10	11	16
Pretty much fair	42	44	45	38	27	36	35	37
Less than fair	12	9	9	7	58	47	48	37

Source for tables: *Jeffery, Charlie. 2009. Devolution, public attitudes and social citizenship. In Devolution and Social Citizenship in the United Kingdom. Ed. Scott L Greer. Bristol: Policy.*

Second, there is near-universal consensus among Scottish political elites on the need for greater powers, and most Welsh elites support greater powers (there is still some elite-level opposition to devolution in Wales, despite the very impressive increases in public support for devolution since 1998). Most political elites in Scotland support a measure of greater fiscal autonomy, including tax-setting powers and even debt issuance. The spectrum of debate in Scotland extends from the Calman Commission (a UK government panel that recommended c. 20% of Scottish revenue be determined by the Scottish Parliament) through to advocates of "full fiscal autonomy" in which Scotland would raise its own funds and pay the UK for the equivalent of services rendered. Elites in Northern Ireland and Wales are aware of their relative economic weakness and mostly support greater legislative autonomy coupled with a restructured financial formula that would give Wales higher per-capita spending and sustain Northern Ireland's high per-capita spending.

There are two main problems in elite political debate. First, there is no consistent devolved position. The differences are clearest in questions of finance. Second, the issue of devolved powers is of much more interest in devolved politics than in UK politics. The discussion of devolution politics and potential changes is much more intense and sophisticated in Belfast, Cardiff and Edinburgh than in London, where most elites regard the "problem" as having been "solved" in 1998 and are happy to ignore devolved politics and demands (it is an interesting question whether benign neglect from the central state capital is better or worse for the devolved administrations than having it express an interest in devolved politics). In England, there is increasing resentment of the Barnett formula, focused almost entirely on the sense of unfair subsidies to Scotland. Scope for

English populism, combined with a primitive debate in London, creates a structural risk of a party seeking English votes by proposing to change the financial formula in a way that is not well thought out.

Have the major revindications of the stateless nations been settled? In relation to the specific demands being made in 1998, yes they have. In each case devolution was about quarantine: it was intended to quarantine Scotland and Wales from English policy developments, and to quarantine all of Great Britain from the consequences of Northern Ireland's toxic politics. To date, it has done that. Scotland and Wales were free to avoid English market-oriented health, education and local government policy, and devolution has enabled the "peace process" in Northern Ireland with beneficial consequences in terms of reduced terrorism.

Nevertheless, revindications are political and can change size and shape. The public opinion cited above shows that many Scots and Welsh trust their governments more and want more powers for them. English resentment of the devolved funding system continues to grow. Furthermore, there is not much evidence that politicians have thought through the consequences of centralized finance during an economic crisis such as that facing the UK.

Germany

The level of political decentralization is esteemed as quite different for the different subject matters.

As for education, the level is assessed to be too high — in other words: the system is too complicated, and unitary standards are being postulated.

As for economy, the wealthy states claim a higher level of financial autonomy, but the poor states do not.

In my judgment, the level of political decentralization is sufficient, and the historical claims of the states have been satisfied from the very beginning.

Austria

Austria is a centralistic federal system from the constitutional viewpoint, but there are many features of a more informal and cooperative nature which make the system work more harmoniously as one would assume it to be. Nevertheless, a reform of the federal system remains on the

political agenda, and the ideas are highly divergent: Whilst the Länder are keen to preserve or strengthen their rights, there are strong centralistic powers which demand even the abolition of the federal system.

Swiss Confederation

In the current situation, political decentralization is not a cause of major conflicts, neither political, nor judicial, nor academic. Federalism was introduced in 1848 and, in broad terms, the system continues to operate under the principles of that time. Federalism was a compromise between liberal claims (dominant in the cantons / Protestant states) with a tendency to unify the system and the opinions of conservative political forces (dominant in the cantons / Catholic states) that favored the confederal union between the states (see above I.3.). The historical claims of the two streams have been satisfied enough so that the system was never significantly challenged by any significant political force since that time (see below XII.2.). In addition, the system has served to hold together culturally diverse groups with differences of all kinds — linguistic, religious and economic, to name few-. The system has just been refurbished with new mechanisms of financial compensation to meet the needs of modern times, including, above all, greater transparency and efficiency in the performance of administrative services, maintaining or strengthening the sovereignty of States. These reforms are still too recent to know if they would meet expectations.

Belgium

The claims expressed by the different communities and regions are not identical. These demands have to be squared with the concerns about preserving a valid government at the federal level.

Regarding the Flemish community, in general, it demands more powers coupled with major financial responsibility. This reasoning, on the edge, will imply that the federal State will have only those powers expressly assigned to it by the regions and that the regions will be attributed all the residual powers. Shifting from a federal state to a confederation is not ruled out from the political program of some Flemish parties.

The French community and the Walloon region are essentially concern about how to organize the cooperation between their authorities to exercise their powers. They are ready to assume new powers and more resources,

but they do not raise many demands to this extent. The region of Brussels acknowledges the duties and responsibilities that it has to fulfill as Belgian and EU capital. It requests more financial resources to assume its wide range of functions.

Italy

The general situation of decentralization in Italy is not considered particularly good. There is still a significant gap between the constitutional provisions (after the 2001 reform), which seems to put Italy with the countries with marked regional decentralization, and the actual reality in which the state is taking the reins, especially financial, of the system and using centralized solutions keeping powers and functions which, according to the Constitution, should be attributed to the Regions and local authorities.

The situation is strongly influenced by several key factors:

a. The financial and economic crisis faced by Italy, not only after the recent global financial crisis, but for at least fifteen years characterized by high public debt (not less than 110% of GDP). The crisis prevents the expansion of public powers and discourages excessive spending decentralization. The experience of health spending in some regions (with the repeated state intervention to end serious financial deficits) appears to lead to the maintenance of the overall State responsibility with regard to the limits of public funding;

b. The political system remains highly centralized and the recent trend toward a majoritarian electoral system has heavily personalized political life around the figure of the Prime Minister (national parliament suffers from a general stagnation);

c. The concept of political decentralization is not homogeneous. First, in the North there is strong pressure; there are even separatists (fed by the Northern League party, key in determining the balance of the center-right coalition currently in power). Second, in the South there is a strong fear of a "federalism" that could lead to a much smaller flow of resources from the State to the poorest regions;

d. Regions are not in great health; they do not seem to be able to express an independent developed policy; they have a political class considered of little value with weak roots in regional civil society; they appear reluctant to assume the role that the Constitution grants them, reluctant to

claim new powers, reluctant to deal with local governments as the key point of reference for local public policies;

e. Local governments, at the same time, act primarly to maintain the *status quo*: they prefer direct dialogue with the central government before building a privileged relationship with Regions (with which local governments are afraid of being in a subordinate position).

With this situation all pay attention to the actions of state law regarding the "fiscal federalism", whose implementation will take several years. This is a reform that requires a strong will to act and should be based on bipartisan agreement. Most of the observers (me included) cast doubt on whether bipartisanship will be possible.

Spain

It is practically impossible to summarize in few lines the assessment of "health status" of political decentralization in Spain. The so-called State of Autonomies, the name that political decentralization receives in Spain, was established in the federal Constitution of 1978 primarily to respond to the will to self-govern long claimed by two states (the Basque Country and Catalonia), although the system was generalized to the entire federal territory. More than 30 years after the adoption of the Constitution, the "fit" of these two states in the Federation has not been resolved satisfactorily. In Spain, it is generally recognized that there was an extensive process of decentralization, that the system has worked reasonably well, that decentralization has contributed to economic and social development of all states and that this development has occurred without creating inequities, on the contrary, has helped to balance the various territories of the Federation. Today, no state wants to give up the political decentralization achieved. However, since late last century in Catalonia and the Basque Country a broad social and political majority considers that their political autonomy has significant deficits. In short, they claim that the process begun in 1978 has defrauded their aspirations. Specifically, they demanded and still demand more political power, more resources in the case of Catalonia, a greater recognition of their distinct national identity, greater participation in federal decision-making institutions and agencies. To achieve these objectives, given the practical impossibility of reforming the federal Constitution, proposed to reform their state constitutions. The Basque proposal

was not accepted by the federal parliament; the Catalan, after suffering a significant modifications and cuttings was approved, but it was challenged before the Constitutional Court. In the year 2010, the Constitutional Court published its very relevant Decision 31/2010, of 28th June, that declared ineffective most of the reforms of the Catalan Charter of Autonomy which tried to ensure bigger powers to Catalonia.

Therefore, the implementation of the new Catalan constitution has not entailed so far a significant change to the level of political power, identity recognition and participation, although it somewhat improved the funding system. The Basque and Catalan demands are still alive and the underlying problem is that while these two states considered that decentralization should be expanded and improved, the Federation and other states are believe that it has already gone too far and that the Federation must regain powers or, at least, establish more coordination and cooperation mechanisms to give greater unity to public policies. Spain is experiencing a discussion and review processes of its system of territorial organization, but the actors do not share the diagnosis of the problem and, therefore, they do not agree on the solutions either.

2 · What are the main threats and opportunities for the development and consolidation of the system of political decentralization? What are the main current trends in the evolution of the federal system? Is it shifting towards centralization or decentralization?

United States of America

The risks are great when the federation encroaches on traditional state functions, which has happened many times. Normally, the states can contain this accretion of federal power through the political arena, but not always. In recent years, an education law that requires testing of all school children in the same way with the same achievement standards is putting the federal system at risk because education (primary and secondary) has always been state-local. Since the law was passed states are now resisting. Homeland security and gun control are two other areas where federal power puts federalism at risk, but in the case of gun control the Supreme Court upheld the power of the states to regulate and enforce in this area (Prinz v.

United States [1992]. The Court has also begun to limit the growth of national power through the commerce clause since they struck down a requirement that schools do mandatory gun checks on students (United States v. Lopez [1995]).

The opportunities remain in: 1) continuing cooperative federalism in joint programs, 2) reduction or elimination of unfunded mandates, 3) elimination of pre-emption of state-local programs, 4) full funding of federal program requirements (e.g. for testing of students, voting machinery), 5) the political will of state and local officials to control the march of federal power, and 6) continuing day-to-day state and local control over the operation of most programs.

Federal growth is more visible than state growth. The interdependence is largely invisible. The developmental trends in the U. S. are cycles of centralization (e.g. 1930-45, and 1976-1999) within a steady growth of the federal government, but the states are not far behind. Simultaneous growth will continue, but after the economy grows, war ends, and homeland security is under control, federal growth will fall back as it has in the past. The states and their governors will fight centralization when the times are right. In the United States, it is always dangerous to overlook the potential power of 50 governors/governments and 200-300 big city mayors, and thousands of other elected officials. At some point they get "the ear" of Congress. In the U.S. there are around 510,000 elected officials. Only 551 represent the federal government.

Canada

External factors, such as international trade negotiations, continental economic integration, and relations with the United States will probably encourage the federal government to assert its authority in these areas.

Internal factors may exacerbate regional divisions. For example, given that some provinces are energy producers and others energy consumers, a national energy policy will be very difficult to achieve, the producing provinces desiring to maximize oil prices, the consuming provinces, conversely, aiming at keeping domestic energy prices below the world-market level. As well, the oil producing provinces do not share the same concerns as the non-producing ones regarding environmental policies.

Increasing integration into the North American economy (more than 80% of all Canadian exports go to the United States) contributes to the fact

that each of the major regions in Canada (the Atlantic Provinces, Quebec, Ontario, the Prairie Provinces and British Columbia) has more economic links with its more immediately adjacent neighbours in the United States than to one another.

Australia

There are three main threats to the system of political decentralization in Australia. The first is the tendency of the High Court to interpret Commonwealth legislative power broadly and any limitations on that power narrowly. In recent years, however, there have been some indications that High Court judges are giving greater consideration to federalism principles in their judgments and that they are reluctant to go as far as the Court has in previous years in expanding Commonwealth legislative power.

The second main threat is the financial one. The Commonwealth maintains financial supremacy over the States and if the States are perceived as not providing adequate services, the Commonwealth may seek to take over areas such as health, further centralizing the political system.

The third main threat, which may also be an opportunity, arises from the significant increase in intergovernmental cooperation through COAG and Ministerial Councils. The number of uniform legislative and administrative schemes has increased dramatically in recent years. While this has the advantage of making government work more smoothly and consistently for citizens, it has the potential disadvantage of further centralizing power and losing the benefits that come from diversity and competition.

A fourth consideration is the effects on the federation of globalisation. On the one hand, this may result in all power shifting a level up, as an additional supra-national layer of governance is established, creating even greater centralization. On the other hand, it is possible that as some powers are pushed up from the national level to the supra-national level, others will be pushed down to a level closer to the people. This may lead to the decentralization of some power.

Mexico

The main risks have to do with the possibility that a political decentralization process could lead to a loose macroeconomic control by the federal government (as happened recently in Brazil). Others are related to

the design of formulas that consider the asymmetry that exists between the estates. Not all states have the same capabilities, resources or infrastructure. In some cases, the differences are huge. Hence, decentralization cannot be equally for all, or can take place at the same pace. Formulas that consider these disparities have to be found.

Decentralization may be considered an opportunity to increase the efficiency and the legitimacy of public actions. This is so because decentralization brings decision making closer to the location where problems arise. The deciding authority may be better informed, and have a better and more complete vision of the problems and of possible solutions. Likewise, decentralization may generate more proximity between citizens and decision centers, bringing major citizen control and feedback of and for the exercise of power.

Brazil

States and Municipalities financial crisis is the main threat for the development of Brazilian decentralization.

The Constitution of 1988 created an environment pro-decentralization, especially when one look to Municipalities constitutional status (they became part of the federal union). Yet, political evolvement changed this tendency. States and Municipalities economic crisis made decentralization less effective. Federation has the most important taxes, whereas States and Municipalities do not satisfactorily plan their budget. Indeed States and Municipalities have been not capable to live with the financial sources they have. Their dependence upon Federation's financial support increases every year, reducing their autonomy.

Argentina

The opportunities arise in the globalized world; we must deepen the decentralization and the integration, both national and supranational, processes if we do not want to suffer the negative consequences of this phenomenon. The Word "glocal" is increasingly used to describe the fact that we have to think globally but act locally.

Regarding the risks, we cannot hide that we are going through a crisis. This, given our underdevelopment, urges us to solve the short-term problems, without providing solutions to the long-term, structural ones.

We are convinced that the completion of the federal Project envisaged by the Constitution will provide the effective solution for the majority of our problems and imbalances.

India

The Federal arrangements as have been laid down in the constitution are under no serious threat. On the other hand due to the politics of coalition governments, in which regional parties are contributing to the formation of the Federal government, keep the Federation alert about the interest of the regions in which those parties are dominant or are ruling. In view of that the Federal system is slowly getting stronger and stronger politically, while in economic matters there are centralizing tendencies.

The democratic process is also reaching to the grassroots and therefore the third tier of the Government i.e. the municipalities and village Panchanyats are also contributing towards the federating tendencies.

United Kingdom

There are a number of risks. The most important is that the financing system will be opened for review and create damaging polemics or shift major power to the UK Treasury. In Scotland, nationalists and Conservatives seek "full fiscal freedom" (transfer of tax powers), while almost every part of the UK feels underfunded. Scholars expected such polemics to start earlier. But the interaction of party politics (Labour wanted to defend its position in Scotland) and failure to agree on an alternative kept it off the UK political agenda. The structure of UK devolution centralizes economic policy and government finance, creating hard budget constraints for the devolved administrations and ensuring that they do not issue excessive debt. This centralization has advantages, but by centralizing so much power in the central government it also centralizes blame. It would be reasonable for devolved politicians to blame almost any spending issue on the UK government. So far they have not, but it is a standing incentive.

Germany

The main threats are: the centralization on the European level; the loss of competences of the Länder parliaments as competences are yielded to the

European Union; the "cooperative federalism" which means that the Länder agree upon uniform legislation within their competences by treaty; as these treaties are being negotiated by their governments, the parliaments lose their importance; this is, however, an opportunity for the system too, as it prevents a yield of competences to the Federation. The tendency towards a competitive federalism has been stopped as a result also of the economic crisis.

Generally, the system of political decentralization is consolidated.

There is, however, a serious problem that has existed from the beginning of the federation in 1949: the different shape of the states and the differences in size, population, economic and financial power. The Grundgesetz demands in Art. 29 a re-organisation, but this request has never been achieved, mainly because of political and historical antagonisms.

Austria

The Austrian federal system does not really need to consolidate — it rather has to be reformed. Nevertheless, a reform might be risky, since, as mentioned above, it is currently understood rather as a reform towards centralism, weakening the legislative and strengthening the administrative powers of the Länder. Joining the reform of federalism with a basic reform of the Austrian administration, which is being demanded as well, could be advantageous to the Länder, if federal bureaucracy would thereby be replaced by Land authorities. Instead, the more realistic option is that the need for administrative reform is seen as a vehicle to legitimate centralistic demands.

EU membership challenges the Länder insofar as several of their competences are determined by EU law which weakens their legislative authority. In some cases the implementation of EU law requires implementation both by the federation and the Länder ("9 + 1") which raises the question whether the federation should not have a uniform competence instead of competences split between the federation and the Länder. However, the new possibility to set up a European Grouping of Territorial Cooperation could turn out to be advantageous to the Länder as well as all other forms of cooperation between them and other European regions.

Swiss Confederation

The great challenge for the Swiss system is not to lose the balance between decentralization and centralization. The many small reforms that

lead to the centralization existed since the founding of the Federation (see above XII.I), and have not led to a centralization. But in recent years, the centralizing tendencies have been reinforced for reasons that are recent and, in particular, economic dependence of certain states (see above X.6. and X.9.). This problem is being addressed by a reform of the financial compensation, in force since 2008.

Another reason of the recent centralization is international law binding on Switzerland which imposes the duty to uniform regulations which also affect State powers. The larger force is European integration. Switzerland is (still) not a member of the European Union, but this does not mean that integration does not have an influence on the system. To compete in the markets, Switzerland is forced to synchronize many of its rules with the European regulations, although there is any formal obligation because it is not a member. Also other international instruments, such as the WTO, require Switzerland to standardize its laws.

Apart from this, there is also an internal force driving centralization, since in several social media and politicians the reasons why there is a political decentralization and the value it has are not known. By these, federalism is seen as a historical phenomenon that hampers modernization, decreases transparency and complicates the system. This tendency is reinforced by some macroeconomic doctrine views which see the small size of many cantons / states as leading to an inefficient administration. Many times, this doctrine is based on macroeconomic statistics and international comparisons and neglects certain features of the country not directly economic. For example, often does not take into account the influence of federalism to avoid intercultural conflicts and the efficiency is gained by avoiding such conflicts.

At the same time, you can see a new trend to recognize the importance of federalism and decentralization, especially at the level of teaching political science and constitutional law, and at the Administration level. Nowadays, the Confederation would have neither the capacity nor the knowledge necessary to absorb the powers of the states. And above all, the Confederation has increasingly recognized the importance of cooperation with States.

The recent reform of the financial compensation system in force since 2008 seeks to meet the need for increased efficiency and, simultaneously, to maintain political sovereignty and administrative autonomy of the States. However, the policy areas that require interstate and international

coordination will increase. This will lead to the need to compensate the decline of state autonomy by other instruments that give States the option to retain their political sovereignty.

The recent evolution of cultural diversity is another challenge. Europe has become one of the continents more attractive to immigrants, in my personal opinion, all legal, police and military efforts to curb immigration will not be able stop the migration of people, so we can ignore the phenomenon. In Switzerland, one in three residents is an immigrant or daughter or son of immigrants, with or without Swiss nationality. And the trend is increasing. These people brought new cultures and new ideas.

Swiss federalism exists because of cultural diversity. If it does not adapt to the evolution of this diversity, it risks losing its reason to exist because the basic concept of federalism in Switzerland is to integrate people into the system, recognizing the identity of different cultural groups and giving them a certain level of political autonomy. For cultural communities that result from immigration, this principle does not apply, or not yet. If Switzerland wants to continue using its federalism as the magic formula to maintain social and economic stability, preventing violent conflict, federalism will have to adapt so that they can participate in "new" cultural groups that are not identified with one of the traditional groups.

Belgium

Federalism is nowadays part of the core of the Belgian constitutional system. There is no reverse way. There could be further regional and community developments. From time to time some express their concerns about this later possibility. Is there any residual that should not be transferred?

The decentralization is part of the core of the Belgian constitutional system too. It is one of the essential elements of the regional organization. These will tend to mandate supplemental tasks to the city councils and provinces, as well as to control the use of resources by these local institutions and to organize collaborative relations to manage certain local interests. The autonomy of these local collectivities might be affected.

The questions from the past are still present. Beyond the rules of organization and operation, a Federal State implies a range of techniques and procedures carried out in a particular way. Too much autonomy produces impair collaboration. Too much collaboration damages the effective exercise of autonomous powers. Squaring the circle.

How collaboration of the federated entitities at the federal level can be achieved if these are cuasi-sovereigns at the federated level? How can a federal state accept to observe the will of the federated entities if the former is liable at the international level?

The answer to these classic questions is not legal. It is political. It depends on the will to live together in a Federal State. This cannot be captured in texts or preambles. It is manifested on a daily basis, in the behaviour of political actors and, even more, in the attitude of the men and women that are part of the same political society.

Italy

The risks of centralization are evident and arise from a weak system of territorial authorities, whether Regions or Local Authorities. These risks raise with the increasingly common use of state emergency response tools, particularly with the progressive expansion of Civil Protection power (which goes far beyond the catastrophes and natural disasters), often justified by the inefficiency of the regional and local governments (which end up being replaced by a special administration subjected to the central government).

In terms of opportunities, there is currently a wave in favor (especially in the north) of the application of "fiscal federalism." This reform, as has been said, entails defining the extent to which levelling will be carried out and, above all, the essential levels of benefits. If these two steps are done correctly and jointly, the way towards a more mature and conscious decentralization will be paved.

Spain

Although the system of political decentralization is widely accepted and consolidated, feelings that their operation is far from ideal is spreading in several political and social sectors. As I have already stated, the problem is that the alternatives being considered are many and some are totally contradictory. There is an important sector which claims greater centralization; one that calls for reform within the federal structure — although in this case not all who embrace this formula gives the same content to it (there are those who advocate a multinational asymmetrical federalism, while another group prefers a strengthening of federalism

symmetry and the "clarification" of the powers of the Federation); and, in Catalonia and the Basque country, there are sectors that remain advocates of the independence of these two states. In the short and medium term, it is likely that the status quo prevails. The rules of the system are not expected to change, but they might be modulated depending on the equilibrium of forces at a specific time.

3 · Generally, would you say that the system is becoming more centralized, decentralized or that it is in a relative equilibrium?

United States of America

It is fair to conclude that it is seeking equilibrium now that the federal courts are willing to look deeply at the extent of federal power and states are now policy and administrative partners with the federal government. In regard to the courts, in *Boerne v. Flores* (521 U.D. 507[1997] the Supreme Court limited congressional power in controlling the states to a "congruent and proportional" test to invalidate acts whose sanctions are not narrowly tailored to remedying state and local violations of constitutional rights. Several pending cases with regard to voting rights will further test this doctrine and could limit federal action. With regard to state administration, in some areas states are becoming more under the federal yoke due to congressional and court actions, for example, in requirements for the treatment of persons with disabilities, whereas these decisions have given states new powers in creating programs to address these needs. As a result, state power in this arena of program development has expanded, in as much as the American model may require states to do something, but the states are relatively free to decide how it will do it. The sum, it is a matter of simultaneous expansion.

Canada

See answer to question XII.1.

Australia

The system is generally becoming more centralized.

Mexico

In my opinion, the system has achieved a relative balance.

Brazil

The system is becoming more centralized.

Argentina

Currently there is a balance between both trends, but in the future, we should abide by the laws and the Constitution, that is, mode towards decentralization. Given the result of the last election (the opposition party won) and the political and institutional definitions given, it seems that the republican and federal system will be reaffirmed, in contrast to the previous period characterized by hiperpresidentialism (illegitimate enhancement of the role of the President) which was not supported by the Constitution and was clearly causing institutional decadence.

India

In view of the comments in the foregoing questions I would say that there is a relative equilibrium between the Federation and the States.

United Kingdom

Scholars and observers of devolution have been predicting major changes and major conflicts since 1998. Most of us are becoming wary of more such predictions because devolution has had so few serious intergovernmental conflicts over its decade in operation. For example, there was a consensus that problems would arise if the SNP or Plaid Cymru entered government. They did, and the problems for the devolution settlement were not significant because neither nationalist party, nor Labour, chose to create routine intergovernmental conflict as a strategy.

The formal settlement has, therefore, remained relatively stable. Finance has been discussed but there has been no change in the financial

formula. The Welsh legislation was changed in 2006 in a curious way that gave Westminster the power to increase Welsh autonomy, but do it through a legislative technique that invited interference by Westminster in the structure of the Welsh legislative powers.

The weaknesses of the system are therefore the same:

—Luck of formal connection between devolved administrations and Whitehall/Westminster, which produces administrative misunderstanding and means the devolved administrations have no necessary influence on UK policy.

—Tightly centralized finances, which might or might not be a problem, but which are then allocated by a widely unpopular formula whose replacement is difficult to formulate.

—Extensive autonomy for devolved administrations in key areas such as health and education, which worries proponents of UK-wide standards.

General dependence on the civil service to prevent disputes and on party politicians to avoid creating disputes.

—A serious imbalance between the importance and sophistication of constitutional discussions: they are important and sophisticated in Belfast, Cardiff and Edinburgh, while they are unimportant and crude in London. This means that the UK rarely understands, let alone sets, the agenda. Time has shown that this is not always a good thing because it means that the UK government might make decisions that, had it engaged in previous debate, it would have recognized as bad.

Germany

There has been a tendency towards centralization from the beginning, but it seems to slow down — the economic crisis, however, favours centralization —. Generally, the system is in a relative equilibrium with still a slight tendency towards centralization.

Anyway, there is a strong trend towards uniformity on the level of the Länder within their legal powers. In the Federal Republic of Germany the legislation of the Länder in many fields follows more or less the same pattern, following concepts that have been written by the conference of the ministers of certain departments (see above IX.2) especially for police law, construction law, press law or agreed by treaties among the Länder (Staatsverträge), as for example broadcasting law.

Austria

Rather more centralized.

Swiss Confederation

The Swiss system shows a steady but slow process of centralization, since the founding of the Federation in 1848. However, the system still has a very high level of decentralization, both political and administrative (see supra Chapter I).

Belgium

The distribution of powers and resources in Belgian is considered to benefit the communities and regions. This evolution has not been halted by the Constitutional Court which has interpreted broadly the decentralized powers. It seems that the limit of decentralization has been reached, even if some might argue that justice, among other sectors, could be decentralized. The constitutional amendments developed after 1970 and the changes introduced by the special act of institutional reform have tended towards an increased distribution of powers and resources. The trend in opposite way is not perceptible.

Italy

A relative balance between the two axes of transformation has been maintained, but this means that it still remains a highly centralized structure.

Spain

The answer should be much more detailed, distinguishing sectors and subjects, from a general point of view, in my opinion, Spain, as most of the Federations, is experiencing a certain process of re-centralization that occurs through the expansive use of the federal powers to dictate the bases, the federal horizontal or cross-sectional powers such as "general regulation of the economy", "the guarantee of equality in the exercise of citizens' rights" — which have become general clauses —, the enormous construction activity carried out through conditional grants or the criterion of supraterritorial

effects according to which the federation can assume power in any subject-matter. The current economic crisis and becoming a member of the EU have strengthened the position of the Federation in front of the States.

4 · Would you like to add any additional comment about the political decentralization of the Federation that was not mentioned in the questionnaire? Would you like to make any suggestion about the structure or the contents of it?

United States of America

See the accompanying essay. The system in the U.S. has moved from: 1) building the integral state with levels until the 1920s; 2) that was followed by the growth of the welfare state (broadly construed) interdependency of lives; 3) then the move went to externalization involving non-governmental organizations; and 4) to the current era of networking among actors at the various levels and among NGOs. All of these phenomena are alive today, making the system complex and difficult to comprehend.

Canada

It would be interesting to add a section about the division of powers over aboriginal questions, as several of the federations under study have aboriginal peoples living on their territory.

Australia

No.

Mexico

I do not have any additional comment. This is a detailed questionnaire that covers all the relevant aspects in a federal State.

Brazil

No.

Argentina

In my opinion, with the added questions to this questionnaire, this useful book will be perfectly updated.

India

Although almost everything relating to Indian Federation has been covered in the foregoing questions, I may reiterate that India may not be having strong traditions of political decentralization, the country is so diverse in terms of geography, people, languages, religion etc that a uniform political and legal system for the whole country operating in practice is incongruous. Therefore, though the Constitution creates a loose Federation based on the lines of cooperative federalism there is apparently no chance of India emerging into a unitary or centralized system.

United Kingdom

The UK's particular structure made parts of the questionnaire (especially the tables below) difficult to answer. Where the legislation devolved powers, especially in Scotland and Northern Ireland, it frequently devolved all powers. This creates its characteristic combination of extreme decentralization in some policy areas (health care services, education policy) and extreme centralization in others.

Germany

The attitudes towards decentralization are quite ambivalent. We emphasize the federal traditions, we want political autonomy for the Länder and the local entities, but we do not accept different standards in law and administration and in public services.

Generally, the peoples' attitudes towards political decentralization should not be neglected.

It also would be interesting to learn, to what extent legislation of the States within their legislative powers actually differs — for the Federal Republic of Germany see above 3.

Austria

No

Swiss Confederation

One observation that must be taken into account in analyzing the Swiss federal system is the general political functioning. In all political levels (federal, state and municipal), a semi-direct democracy operates. That is, the population is directly involved in a number of policy decisions by popular vote. Between 2005 and 2009, the Swiss electorate took action in 30 policy issues, considering only the federal votes. The number of popular votes in the state and municipal level is even higher, since the questions can even regard budgetary decisions. Out of the 30 federal elections, there were 11 popular initiatives, 6 required referendums that led to reforms of the federal Constitution and 13 optional referendums concerned ordinary federal laws. The topics were very different nature, from the article in the Employment Act which regulates the opening hours of private businesses, shops and malls, foreign policy (e.g. Schengen / Dublin or treaties on the free movement with the European Union), immigration policy, social issues and taxes, to such exotic questions which received international attention, such as popular initiatives on banning the construction of new minarets or non-prescription of sex crimes (both violate international law or basic principles of the rule of law and are likely to cause further public discussion when they are applied to particular cases).

As described above IV.1, semi-direct democracy does not allow the exclusion of any considerable social force from political decision-making and, therefore, there is any large political party which does not participate in the responsibility of government. In other words, there is no opposition as it is known in other republics in parliamentary democracies. A strong opposition might make use of "popular rights" (initiative and referendum) and the country would become ungovernable. Therefore, each decision is carefully taken considering the positions of all political actors (parties, cantons / states, federations, businesses, etc.). The aim is always to find a compromise agreed among all the stakeholders.

Swiss policy is a constant search to achieve consensus among all political actors. This political culture is known as "matching policy".

Cantons / states are an important basis of this political culture. First, they are strong and significant actors because they can make use of both "popular rights" as well as their own means to block federal policies, such as the popular referendum. In recent years, states have begun to coordinate more strongly against the Federation through the Conference of State Governments (see above IX.3.). So, they have gained considerable strength which cannot be ignored by the federal government.

In addition, states are one of the main historical reasons for this political culture. Swiss federalism grew out of a Confederation based, like all the confederations, on consensus. Even if at the institutional level, Switzerland is a federation, consensual political culture remained, supported by the institutions of direct democracy, giving thereby a plausible basis for the parts of the federal Constitution that may seem exotic (the name of the Federation, *Confoederatio Helvetica*, which identifies it as a Confederation; the reference to cantonal (state) 'sovereignty' on Article 3 of the Federal Constitution; and the doctrine that federalism as a political system has preconstitutional value (see above V.1.).

Belgium

The questionnaire could ask more about the transformations undergone in the federal apparatus as a result of the regionalization. For example, the organization and operation of the parliamentarian regime is affected but the organization of the communities and the regions. Similarly, the federated collectivities reproduce in their organization the federal institutions, such as government and parliament. In other words, there is a group of institutions that respond to the same principles of institutional organization. It could be useful to flesh out them.

Italy

The Italian experience shows that there are two central issues in the evaluation of the institutional system in general and of its degree of decentralization:

a. The relationship between the Regions and local authorities; if these levels of government, rather than work together to deliver more power and

resources, they operate separately, looking for different relations with the central government, centralization is most likely to prevail;

b. The increasingly role of emergency policies, operated always with extraordinary interventions. Therefore, attention to the ordinary structure of powers and resources diminish decreases, and with it, so does decentralization.

These are issues that perhaps in other countries are not central to the general debate, but would be useful to research about them in a comparative perspective.

Spain

No.

5 · Which is the landmark literature offering further in-depth analysis about your federal system?

United States of America

There is really a plethora of literature — for general bibliographical data see the citations for my accompanying paper. In regard to the debate on centralization/decentralization, the Zimmerman book, *Contemporary American Federalism* is organized around the centralization argument, the Walker book, *Rebirth of Federalism* is a more balanced view but explains the growth of national power, and the Beer book *To Make a Nation* argues that state and federal power have always existed together. The best book on the role of state governments is Daniel Elzar's *American Federalism: A View from the States* (1986) although it is now outdated.

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APPENDIX
EUROPEAN UNION AND FEDERALISM

(Questions for reporters of EU-member countries)

SUMMARY: 1. Do States, as such, participate in the amendment proposals and/or later ratification procedures of the European Union Treaties? How do they participate? If they do not take part, does the Federation report to the States about them? 2. Do States take part in the formulation of the country's position before the EU? Do States only participate when issues concerning their exclusive powers are at stake? Do they also participate when issues concern other kind of powers? Is their participation internal or do they directly participate in the EU-institutions? 3. Which are the mechanisms for internal participation? Are they bilateral or multilateral? Are the decisions reached through these mechanisms binding for the Federation? Do the effects depend on the kind of powers affected? 4. Do States have representatives in the federal delegation before EU-institutions? In particular, do States have representatives in the Council and in the Council's or Commission's advisory bodies? How is participation organized when state exclusive powers are affected? Do all the States participate or is there a rotation/selection procedure to decide which ones? 5. Do States participate in the permanent representation of the Federation before the EU? If so, how do they participate? Do they select members of these representations? 6. May States create offices or bodies to directly interact with the EU-institutions? 7. Do States participate in the pre-promulgation control assessing whether subsidiarity and proportionality principles have been observed? Which are the mechanisms established according to the Protocol on the role of national parliaments in the application of these principles? How do state parliaments participate? What are the effects of their participation? 8. Do States implement and enforce EU-law? Does EU-Law formally or in practice distort the internal allocation of powers? Does it make the difference whether the EU-norms are regulations or directives? How are European subsidies distributed and managed? 9. Are there any cooperation mechanisms between the States and the Federation regarding the implementation and enforcement of EU-Law? How do they deal with those cases where the EU-norm envisages a single authority in each member-state? 10. Are there internal mechanisms to oversee the implementation of the EU-Law? Does the Federation have subsidiary powers in case of state inaction? Which level of government is liable for EU-law infringements?

1 · Do States, as such, participate in the amendment proposals and/or later ratification procedures of the European Union Treaties? How do they participate? If they do not take part, does the Federation report to the States about them?

United Kingdom

There is no formal participation and the UK government is under no obligation to give them any special level of information. In practice there has been a reasonable, though deteriorating, level of comity and information sharing.

Germany

Any amendment has to be approved by the Bundesrat; for certain amendments the federal government is bound to the opinion of Bundestag and Bundesrat.

Austria

An EU Treaty needs the approval of both the National Council and the Federal Assembly (absolute veto), but the Länder have no direct veto right.

As regards the ascending phase see below 2.

Belgium

In Belgium the general rule is that the distribution of powers at the international level follows the internal distribution. It shares, thus, one of the issues that are traditionally regarded as power of the Federal State. Article 167.1.1 clearly establishes this scheme: "*Le Roi dirige les relations internationales, sans préjudice de la compétence des communautés et des régions de régler la coopération internationale, y compris la conclusion des traités, pour les matières qui relèvent de leurs compétences de par la Constitution ou en vertu de celle-ci*".

There are specific procedures of information, negotiation and approval for European treaties. The parliaments, both of the Federal State and the

federated collectivities, have to be informed as soon as the negotiation start "*en vue de toute révision des traités instituant les Communautés européennes et des traités et actes qui les ont modifiés et complétés*" (Const, art. 168). The assemblies have to receive the treaty proposal before it is signed.

The different governments, of the Federal State and the federated collectivities, have to commit themselves for the review of the European treaties too.

If the treaty only deals with issues that are exclusively federal — such as judicial power or police —, it can be entered only by the federal government as representative of the Belgian Kingdom. If a treaty only deals with community or regional powers — such as audiovisual or environmental protection — it is not the King but the different community or regional governments who lead the negotiations. Their representation in the negotiations is organized in rotations. The treaty is signed by the federal government, but it is understood and specified that the signature of the minister binds the community and regional governments. If the treaty is mixed, that is if it has provisions that affect both federal and federated powers, this has to be negotiated, in both levels, by the different Belgian representatives.

The Lisbon treaty was entered on behalf by the King of Belgium. It was signed by the foreign affairs minister. It was specified that the signature bound the three communities and the three regions. This was even included in the official document.

The different assemblies have to give their consent to such a relevant treaty. This means that the approval of a treaty requires eight consents — Federal State, 3 communities, 2 regions, and 2 community commissions of Brussels —. This means that if one of these holds-out, the incorporation of the treaty into Belgian legal regime is paralyzed.

Italy

The Constitution, after the 2001 reform (Article 117, paragraph 5) provides that the Regions "in matters within its competence, participate directly in decisions for the elaboration of Community legislation and ensure implementation and enforcement of international agreements and the acts of the European Union". Regions are expected to participate in both the upstream and the downstream phases.

They participate in the 'decisions' which must be understood to also include decisions on the review or amendment of European Union treaties.

Participation is not direct; the Regions do not have the authority to engage directly with European institutions. They do so through national representation.

The constitutional provisions have been clarified by ordinary legislation of the central state: first, law n. 131 of 2003 (art. 5), and after, the law n. 11, 2005.

Spain

There is no direct participation of the States. Some new State constitutions establish that the Federation has to inform them and that they can make observations.

2 · Do States take part in the formulation of the country's position before the EU? Do States only participate when issues concerning their exclusive powers are at stake? Do they also participate when issues concern other kind of powers? Is their participation internal or do they directly participate in the EU-institutions?

United Kingdom

This question can be answered on three levels.

Constitutionally, there is no role for the devolved administration in any aspect of EU policy formation. The devolution legislation is clear about this.

In formal practice, as written in government documents, there are serious commitments to information sharing in which the UK government commits to inform devolved administrations of issues and consider their opinion. In return, devolved administrations adhere to UK positions.

In ordinary practice, the norm of cooperation, coordination and information sharing is breaking down, not so much because of divergent interests as because many of the big UK departments simply forget to coordinate with devolved administrations.

Germany

They take part with graded intensity according to the issues involved; their participation is internal: the Bundesrat issues an opinion.

In subjects concerning their exclusive power, the opinion of the Bundesrat is binding under condition of a majority of 2/3 in the Bundesrat; for other subjects it must be regarded, but is not obligatory.

For certain subjects, mainly concerning education and media, a representative of the Länder, who is appointed by the Bundesrat, directly acts on the European level, see Art. 23 Abs. 6 GG.

Austria

The Federation has to inform the Länder without delay about all "EU projects" that concern their competences or are of interest to them (which could also include the proposed amendment of an EU treaty, of course). The Länder are entitled to give a statement on this matter.

If the EU project concerns a matter where the Länder have a legislative competence and if the Länder submit a "uniform statement" (which means that the statement is supported by at least 5 Länder, with no Land explicitly against it), the federation is bound to this statement. This means that the member of the Federal Government that represents Austria in the Council must act in accordance with the wishes of the Länder expressed in this statement. Deviations are only admitted in case of "compelling reasons of foreign and integration policy".

Moreover, the Länder themselves could represent Austria in the Council (in cooperation and with the approval of the Federal Government), if their legislative competences are concerned and if the Federal Government allows them to do so. This is very rarely the case, though.

Belgium

See answer 3.

Italy

Law n. 131 of 2003 envisages the participation of the Regions when the upward phase takes place "in the field of government delegations." These

delegations are led by a Head of Delegation, usually appointed by the central government. In the event that Community decisions being discussed regarding issues related to the residual powers of the Regions, the Head of the delegation could even be a President of the Region, always chosen by the Government (but according to the criteria agreed with the Regions).

Spain

States do participate in the formation of the federal position in issues which affect their "powers" or "interests" — as states in some State Constitutions —. The participation can be channeled by integrating state representatives in federal and European institutions; in the latter case, the state representatives would be part of the federal delegation.

3 · Which are the mechanisms for internal participation? Are they bilateral or multilateral? Are the decisions reached through these mechanisms binding for the Federation? Do the effects depend on the kind of powers affected?

United Kingdom

Constitutionally the UK has no obligation to involve devolved administration. In formal practice, as presented in the formal Memoranda of Understanding and other government statements, it informs them as EU dossiers and a decision arise and seeks their input. Their influence depends on their persuasiveness, political influence, and the importance of the issue to the UK government.

Germany

See above 2.

Austria

See above 2. The Federal Constitution stipulates the main procedure (following a treaty between the federation and the Länder), but several details were left to an internal treaty among the Länder.

Belgium

Belgian law is grounded on simple premises. The federal state, the communities and the regions are to some extent part in the negotiation of primary EU Law. A fortiori, they are part of the derivative one. The different collectivities participate in the elaboration of the EU norms that affect their power spheres.

Three questions have arisen:

a. Should communities and region act under the federal umbrella? This is a superfluous issue. The Belgian representative before the European communities — who is a federal civil servant — plays an essential role in the communitarian norms elaboration. He develops a key function of coordinating and synthesizing.

b. Should regions and communities decide alone what affects to their powers? ¿Do excesses of power tend to arise? Should federal-federated arbitration procedures be organized? It is at the Belgian level that conflicts should be solved. These will be solved according to the cooperation procedures. If these conciliation forms are not successful, a party can challenge before the constitutional court the transposition. There is no decision in this area.

c. Can the federal state or the federated entities challenge the other's authorization to participate in the elaboration of derivative EU Law? ¿And what happens if any party considers that an issue is under its power? ¿Who resolves this negative conflict? The European Court of Justice might declare the lack of execution of EU Law and the responsibility of the Member State. Afterwards, the latter might sue or go after the integrated parties.

Italy

Beyond the formation of the national delegation, in order to determine the position represented within the European Union, a complex system of information to the Regions (Board and Council) on Community measures being adopted is established. The regions have a deadline for the submission of their own observations, but may also require the call of the State-Regions Conference.

The State-Regions Conference held, for this purpose, a special meeting every six months, called "community meeting" in which the general guide-

lines concerning the preparation of Community acts affecting the powers of the Regions are adopted.

Spain

Even though some State Constitutions provides for bilateral participation in those cases when an activity of the Union only affects its powers, the participation is generally multilateral. In some Bilateral Commission State-Federation, a Sub commission dealing with European Affairs has been created.

The internal multilateral participation operated in the different Sectorial Conferences and, particularly, in the Conference dealing with European Community Affairs.

Some state constitutions regulate briefly the effects of the state position upon the federal position. The effects vary according to the affected powers. In contrast, these effects are not contemplated in any federal regulation; this is an important gap.

4 · Do States have representatives in the federal delegation before EU-institutions? In particular, do States have representatives in the Council and in the Council's or Commission's advisory bodies? How is participation organized when state exclusive powers are affected? Do all the States participate or is there a rotation/selection procedure to decide which ones?

United Kingdom

The informal nature of cooperation did actually lead to Scotland dominating UK positions on a few issues (e.g. fisheries). But this is informal and depended on the Scots' intense interest and level of expertise relative to the lack of interest and expertise of the UK government. There is nothing like the formal systems of Spain or Germany.

Germany

See again above 2; apart from the case mentioned in Art. 23 Abs. 6 GG, the Länder have no representatives within the federal delegation (but they are involved in informal ways).

Austria

It is possible for the Länder to represent Austria in the Council (see above 2), if the Federal Government approves of this. In this case, the Länder must delegate one representative at ministerial level (normally, this would be one of the Land Governors).

Moreover, the Federal Constitution stipulates that the Länder are entitled to propose representatives to the Committee of the Regions which are formally suggested to the EU by the Federal Government. The Länder are represented in this Committee by all 9 Land Governors.

The Länder are usually also represented in federal delegations if their interests are concerned. A treaty between the Länder regulates their internal procedures regarding EU matters and even established a formal body called "integration conference of the Länder" — however, this body is not actually operative, since the Land Governors informally take the required decisions.

Belgium

In Belgium, the substitution is the rule. The federated ministers participate in the supranational institutions. In particular, they have seats in the European Union Council and their decisions are binding for Belgium. This representation is formed by a representative with ministerial rank of a member-state "authorized to represent that member-state". This legal formulation is pretty flexible. It allows each state to decide who will be its representative. It could be a federal minister or a minister of the community or regional governments. Both bind the Belgian State.

Article 81 §6 of the special act of institutional amendments allows this authorization. It allows the ministers of the regional or community government to represent Belgium in the EU Council and bind the State.

The substitution set off with the cooperation agreement signed on March 8th 1994 by the Federal State, the regions and the communities. Four council types are defined according to the agendas:

—If the agenda of the meeting deals with issues that are under exclusive federal powers (foreign affairs, economy, financing, budget, justice, telecommunications, commerce, development, civil protection, fishing), the representation is exclusively federal.

—If the agenda only deals with issues of community and regional powers (culture, education, tourism, youth, housing and urban development), the representation is exclusively federated. There is a semester rotation among the federated collectivities.

—If the agenda deals with issues under the scheme of mixed powers, but where the federal component predominates (agriculture, public health, environment, transportation, social services), the representation is federal but a federator advisor assist the federal representative.

—If the agenda deals with issues under a scheme of mixed powers but where the community or regional dimensions are controlling (research and industry), the representation is federated. The federated representative is assisted by a federal representative.

Italy

As has been mentioned, the regions participate in the national delegations. When regional exclusive powers (residual) are at stake, the delegation may be led by a President of a Region. The composition of the delegation does not involve the presence of all regions, but a balanced representation, taking into account the regions with special status (at least one of which must always be present). The criterion of formation of the delegations is set in the State-Regions Conference.

Spain

The states participate in the Permanent Representation of Spain before the European Union by agreeing on some candidates for the Autonomic Affairs Council which exists in that Representation. They also participate in five working teams of the Council of the Union through: the mentioned advisors or through the incorporation to the Spanish delegation of a representative of all of the states nominated by a Sectorial Conference. Thirdly, they participate in the Permanent Representatives Committee (COREPER) and directly in five ministerial groups of the Council, designated in the latter case by a Sectorial Conference. The participation can also take place on other advisory or preparatory organs of both the Council and the Commission.

If the decisions to be taken affect state exclusive powers, their representatives can preside the federal delegation and, if it is the case, the corresponding institution of the Union.

The Sectorial Conferences establish the procedure to nominate its state representative. In some cases, there is a rotation among the states, but generally the criteria are more flexible and take into account the interest or the relevance that the issues to be discussed have for each State.

Despite the progress achieved in state participation, there are plenty of shortcomings because there is a strong prominence of the Federation, unanimity is required among the states, states lack information, some states have not shown much interest in this question and even there have been some protocol problems.

5 · Do States participate in the permanent representation of the Federation before the EU? If so, how do they participate? Do they select members of these representations?

United Kingdom

They do not. The Permanent Representation is run by Whitehall departments, which legally speak for the UK (so the UK Department of Health has the formal responsibility and power to speak for all parts o the UK on health issues).

Germany

No.

Austria

The team of the Permanent Representation of Austria in Brussels, which is headed by an Austrian ambassador, includes one representative of the Länder.

Belgium

The permanent representation of Belgium before the European Union plays an essential role in the defence of the interests of the nation, the communities, and the regions. It has to assemble all the perspectives and con-

cerns. It is chaired by a diplomatic official. Regional and community officials collaborate with the representation.

According to article 31 of the ordinary act of institutional amendment of August 9th of 1980 — modified by the act of May 5th of 1993, the interministerial conferences are constituted to facilitate an agreement between the members of the federal, community, and regional governments. In the foreign affairs conference, the government informs regularly about the international policy to the executive powers, either voluntarily or upon request of one of the executives. A specialized interministerial conference (e.g. in agriculture) can be also constituted.

Italy

Italy, unlike other European states, has a permanent representation made by the State, in which the Regions do not participate.

Spain

As it has been said, States participate in the Permanent Representation of Spain before the EU (REPER) through the Autonomic Affairs Council by nominating all together two advisors.

6 · May States create offices or bodies to directly interact with the EU-institutions?

United Kingdom

They can and they do, though the offices do not formally represent the UK before the EU; they are simple lobbying offices. They are expected to support overall UK positions in their lobbying. While UK local government offices sometimes diverge, the devolved offices are more politically exposed and reluctant to diverge in public.

Germany

They may create only informal offices (so-called “embassies” in Brussels).

Austria

Yes, all Länder (except Vorarlberg) have established their own (informal) liaison offices in Brussels.

Belgium

Within the framework of their organizational powers, communities and regions can create specialized bodies to deal with European matters.

Italy

Despite the State has reserved the Permanent Representation before the EU, the regions can (and many have) open their own offices in Brussels to have direct relations with the EU institutions. It entails, however, simple relationships of information and documentation.

Spain

They may do it, and almost all of them have done it in practice.

7 · Do States participate in the pre-promulgation control assessing whether subsidiarity and proportionality principles have been observed? Which are the mechanisms established according to the Protocol on the role of national parliaments in the application of these principles? How do state parliaments participate? What are the effects of their participation?

United Kingdom

No. They are free to discuss these issues, lobby, and issue any statements they like. If they use private UK information, they are obliged to adhere to the UK position and respect its secrecy.

Germany

According to Art. 23a GG — since the amendment of the Grundgesetz in 2009 — the Bundesrat may appeal to the European Court of Justice in case of violation of the principle of subsidiarity.

Austria

Some Länder and the Conference of Land Governors take part in the subsidiarity monitoring network of the Committee of the Regions. As regards the new protocols annexed to the Lisbon treaty, there have been no changes so far.

As regards the ascending phase of EU matters, several Land Constitutions bind Land Governors to resolutions of the Land Parliament when they decide on statements to the Federal Government.

Belgium

Belgium, on the occasion of the Lisbon Treaty, made a declaration (n. 51) about the start of the subsidiarity principle operation. "Given the Belgian constitutional regime, the Federal House of Representatives, the Federal Senate, and the representative assemblies of the communities and regions, act, according to the powers assigned by the Union, as components of a national parliamentary system or different chambers of a national parliament". In this declaration, it also affirms the will of the community and regional parliaments of establishing control mechanisms for bills to analyze whether the subsidiarity principle has been correctly applied.

Italy

The national regulation that deals with the participation of national institutions in determining the policies of the European Union, including draft legislative acts, does not address explicitly the role and powers of Parliament in relation to the mode of application of principles of subsidiarity and proportionality.

The control by the Regional Legislative Assemblies is done on an experimental and practical way in some Regions.

In one case, the experiment has resulted in legislative regulation: the regional law n. 16/2008 of Emilia-Romagna Region which explicitly assigns to the Legislative Assembly the power to monitor the observance of the principle of subsidiarity in the European proposals and actions in regional powers. The control results in the adoption of guidelines requiring the Regional Executive to adopt a particular position in its relations in the upward phase (State-Regions Conference). Also in Emilia-Romagna, the internal rules of the Legislative Assembly (art. 38) provide for the control of subsidiarity even in contexts of inter institutional and inter-parliamentary cooperation, approving the results through a special resolution. In this case, the communication of the results to the Board is also directed to the formation of the regional position which must be assumed in successive phases developing decision-making process at national level identified by the procedural law.

Spain

They participate indirectly if their own powers are affected. The participation takes the form on non-binding reports sent to a Mixed Commission created in the Federal Parliament to this purpose.

8 · Do States implement and enforce EU-law? Does EU-Law formally or in practice distort the internal allocation of powers? Does it make the difference whether the EU-norms are regulations or directives? How are European subsidies distributed and managed?

United Kingdom

Devolved administrations implement and enforce all EU law. If they fail to enforce EU law and face penalties from domestic courts, they pay the penalties. If they fail to enforce EU law and the UK government has penalties imposed on it in the EU courts, the devolved government is obliged to pay the fine that it caused the UK to incur. They apply for and distribute EU subsidies on their own, though there have been contentious and complex problems with the effects of some subsidies on the financial settlement.

The devolution legislation passed decades after the UK entered the EU, so its framers understood the EU allocation of powers. In areas where the EU has created additional autonomy, such as agriculture, the devolved governments benefit from it. The key problems arise in social policy such as health and education, where the EU is still expanding its powers.

Germany

The states implement and enforce EU law within their competencies; EU law does not touch the internal allocation of powers. European subsidies are being distributed and managed according to the internal allocation of powers.

Austria

The Federal Constitution obliges the Länder to implement EU law if it concerns their competences. This means that the internal allocation of powers applies also to the implementation of EU law (which is not always very suitable since EU law often regulates matters that, in Austria, are split between the federation and the Länder and thus require "9+1" implementation). Directives normally require to be implemented by a law which leaves the Länder more power than just to administrate the matter. EU regional subsidies, which need to be distributed between the 9 Länder, are normally managed by the Länder themselves.

Belgium

European Law, as the Lisbon Treaty establishes, has distanced itself from the principle of indifference regarding the internal constitutional arrangements traditional in general international law, even if the ECJ has transposed it to the EU regime.

The Court is worried to ensure the quick and full transposition of the EU directives. It keeps reminding that "*il incombe à toutes les autorités des Etats membres, qu'il s'agisse d'autorités du pouvoir central de l'Etat, d'autorités d'un Etat fédéré, ou d'autres autorités territoriales, d'assurer les respect du droit communautaire dans le cadre de leurs compétences*" (ECJ, 12 June 1990, Allemagne c. Commission rec., 1-2321). In other words, the communities and regions cannot excuse the transposition or the

delay in transposing alleging organizational particularities. In that case, the Federal State, the communities, and regions, in their spheres, are responsible for the application of EU Law.

Italy

Given the division of legislative powers between State and Regions prescribed by Article 117 paragraphs I, II, III and IV, national regulations currently in force (Law of February 4, 2005, n. 11) states — in general — that the State and the Regions are responsible for implementing the EU directives within their own area legislative powers.

In matters of concurrent jurisdiction, mentioned in paragraph III of Article 117 of the Constitution, the regulation provides, however, that a federal law (legislative instrument — established by law n. 6, 1989, and now the law No. 11 of 2005 — passed annually to prepare or grant direct effects to european law) indicates the fundamental principles which are irrevocable by subsequent regional or provincial laws adopted; these principles prevail over contrary provisions that Regions and Autonomous Provinces could enact.

The regions and autonomous provinces in matters within its residual powers (paragraph IV of Article 117) may give immediate effect to EU directives.

From a formal point of view, therefore, the intervention of a Community regulation by directive does not alter the distribution of legislative powers between State and Regions, except for the State authority to identify the principles in matters of concurrent legislation (which actually represents significant limitations on the regional legislative power: to provisions of the directive, the principles identified by national law must be added).

The effectiveness of the system, however, depends largely on the functioning of mechanisms (constitutionally admitted) to safeguard the State's responsibility for the proper (and timely) application of Community law (see below, 10), which helps to change the distribution of powers established in the system.

The Constitutional Court has also recognized the possibility that the Community rules themselves introduce or justify changes in the distribution of powers State / Region, stating that "community standards can legitimately establish, given European Union organizational requirements, the application scheme themselves, which may require that state regulation

goes beyond the normal framework of constitutional distribution of internal powers, always respecting the mandatory constitutional principles (Constitutional Court, 20/11/2006, n . 398).

Regarding EU funds, Regions can formulate specifications for submission of projects, interventions and programs to be funded. The state has only one responsibility: coordination and general programming. The regions are presented as the key partners in Brussels.

Spain

As it is established by state constitutions, states are in charge of the implementation of EU Law in the areas of state power since EU Law does not distort the internal allocation of powers. In practice, nevertheless, the federation has played the main role, in part due to the inaction of some States. More than 90% of the European directives are transposed by the Federation, and the European subsidies, just for the mere fact of being such, are managed and distributed by the Federation. During the last years, the principle of neutrality — EU law does not distort internal allocation of powers — has been relaxed and an internal unique authority has been required to coordinate or manage the application and granting procedures for EU subsidies in areas of exclusive state powers.

9 · Are there any cooperation mechanisms between the States and the Federation regarding the implementation and enforcement of EU-Law? How do they deal with those cases where the EU-norm envisages a single authority in each member-state?

United Kingdom

The civil servants will routinely coordinate on implementation. If EU law demands a single authority, it will be created under UK law but might have concessions to devolved interests in its makeup and approach.

Germany

For cooperation see above 2.

Austria

As regards the ascending phase of EU law, see above 2 (there is also an Austrian Council for Integration and Foreign Policy where the Länder are represented). As regards the descending phase informal cooperation takes place.

If the EU envisages a single authority (but the EU is normally "blind" as to whether a member state has a centralized or decentralized nature) and if this would be detrimental to the Land competences, the Federal Assembly may bind the Austrian representative in the Council by a binding statement (deviations only admitted in case of "compelling reasons of foreign and integration policy").

Belgium

See answers to questions 5 and 10.

Italy

Law n. 11 of 2005 provides for a call, at least every six months, a special session of the State-Regions Conference, dedicated to the treatment of aspects of EU policy of regional and provincial interests. At these meetings, the Conference expresses its opinion in particular about:

—General guidelines regarding the development and implementation of Community measures affecting regional powers;

—Criteria and procedures to adjust the performance of regional functions to observe and to fulfill the obligations under Article 1, paragraph 1;

—Draft of the EU law (state law approved annually).

On the basis of practical application, but principally of the constitutional court's decisions (see Constitutional Court n. 398/2005), the national legislature may depart from the division of legislative powers established by Article 117 (even without an agreement within the State-Regions Conference) to establish a single national authority. This is explicitly provided for in the law n. 11, 2005, which establishes a preference for state intervention by EU law when "the application of the guidelines involves the establishment of new bodies or administrative structures" (art. 11, paragraph 7).

Spain

Nowadays these mechanisms are not in place and even less mechanisms of horizontal relations between the States. Hence, the federation assumes the power, arguing that the activity has a supraterritorial power or simply justifies it citing the European normative to be applied.

10 · Are there internal mechanisms to oversee the implementation of the EU-Law? Does the Federation have subsidiary powers in case of state inaction? Which level of government is liable for EU-law infringements?

United Kingdom

The UK relies on the obligation of devolved administrations to pay costs incurred by noncompliance. If a devolved administration were to be judged noncompliant, it would have to pay the fine and make the required changes. So far this mechanism has not been tested as a deterrent or as an actual punishment.

Germany

The Federation has no subsidiary powers to enforce the implementation of the EU law.

Austria

If the Länder delay to implement EU law punctually and if this delay is recognized by a European court, the competence will devolve to the federation which in this case receives a subsidiary competence. Still, however, the Länder remain competent and may be willing to catch up. As soon as they have enacted their own implementing law the federation's subsidiary competence enters out of force. The Republic of Austria is liable for EU law infringements, but if the Länder is responsible for the infringement they will have to pay damages.

Belgium

Some substitutions have been organized grounded in article 169 of the Constitution: "In order to guarantee the respect for the international or supranational duties, of the powers listed in art. 36 and 37 (the legislative and executive federal powers) can, observing the conditions established by a special act, substitute temporarily the institutions enumerated in articles 115 and 121 (the councils and the community and regional governments)".

The special act of institutional reforms of August 8th 1988 specifies, in article 16 §3 the types of control. The requirements to carry it out are very demanding and it seems that the situations where it can take place are rare (please find below the original text of the article to avoid any loss of precision):

"*Après avoir été condamné par une juridiction internationale ou supranationale du fait du non-respect d'une obligation internationale ou supranationale par une Communauté ou une Région, l'État peut se substituer à la communauté ou à la région concernée, pour l'exécution du dispositif de la décision aux conditions suivantes:*

1° la communauté ou la région concernée doit avoir été mise en demeure trois mois auparavant par un arrêté royal motivé et délibéré en conseil des ministres. En cas d'urgence, le délai de trois mois prévu au premier alinéa, 1°, peut être abrogé par l'arrêté royal visé au même alinéa;

2° la communauté ou la région concernée doit avoir été associée par l'État à l'ensemble de la procédure du règlement du différend, y compris la procédure devant la juridiction internationale ou supranationale;

3° le cas échéant, l'accord de coopération prévu à l'article 92bis, § 4ter, doit avoir été respecté par l'État.

Les mesures prises par l'État en exécution du premier alinéa cessent de produire leurs effets à partir du moment où la communauté ou la région concernée s'est conformée au dispositif de la décision.

L'État peut récupérer auprès de la communauté ou de la région concernée les frais du non-respect par celle-ci d'une obligation internationale ou supranationale. Cette récupération peut prendre la forme d'une retenue sur les moyens financiers à transférer en vertu de la loi à la communauté ou à la région concernée".

The federal control, and a *fortiori* the substitution, has its limits. If the federation controls beyond the observance of the Constitution and international treaties and enters the political opportunity scrutiny, the control is incompatible with a equilibrated federal system.

Italy

It provides a monitoring activity by the Government of the level of adequacy of domestic legislation with the EU obligations, whose results are reported quarterly to both the national parliament and the Presidents of Regional Legislative Assemblies (Article 8, paragraph 3 of the Act n. 11, 2008).

Regions, in relation to matters within its jurisdiction, monitor the adequacy of their respective legislation to European law; many regions have legislated with respect to time limits, procedures and relevant subjects in the monitoring activity at the regional level. The results are transmitted to the Department of EU policy.

Each year, based on the overall results of the monitoring procedures, the Government presented to the Parliament before January 31, a bill on "Provisions for the fulfilment of obligations arising from Italy's membership of the European Communities". This title is complemented by the words "Community Law" followed by the reference year of the bill (section 9, Act No. 11 of 2005).

Article 117, paragraph V of the Constitution recognizes the State power (exclusive) to establish how it will replace regional power in case of failure of the Regions in the implementation and enforcement of international agreements and acts of the European Union. On the basis of this power, the state has regulated a replacement mechanism, usually designed to operate preventively in cases of non-implementation / non-compliance with European law by the Regions.

Under the law n. 11, 2005, in relation to EU law, the State may, in fact, contain "provisions adopted in the exercise of replacement of power established by Article 117, paragraph V of the Constitution" (Article 9, paragraph 1, point h), which may have a legislative nature or be secondary legislative acts adopted by the Government (exercising replacement enacting regulations — art. 11, paragraph 8) in issues under regional power (Article 16, paragraph 3). These provisions shall apply from the deadline set by EU rules on and until the Regions do not dictate their own rules

(substitutive provisions are subsidiary). These provisions adopted by the State must stipulate that the nature of the power exercised is replacement and that has subsidiary character. Furthermore, these are subject to a preventive examination by the State-Regions Conference.

The above mentioned mechanism is adopted dealing with Community not automatically applicable. It changes the way of implementation and the technical characteristics of the directives already transposed to national law, but in this case the framework is provisional (technical adequacy) and applies to the regions whose power is taken by Government, through a decree of the Minister responsible for the matter. In this case, no provision establishes preventive examination by the State-Regions Conference.

Regions (as well as all other local authorities and public bodies) are liable to the State for damages arising from the violation and the delay in the implementation of EU law. If Regions are held responsible for the violation of the obligations arising from EU law or have not properly complied with the judgments of the European Court of Justice, the State replaces them in the exercise of their power, according to the principles and procedures set out in Article 8 of Law n. 131 of 2003 and Article 11, paragraph 8, of law n. 11, 2005.

The State is entitled to claim the persons responsible for financial charges arising from the judgments rendered by the European Court of Justice under Article 260, paragraph 2 of the Treaty on the European Union.

The State also has a claim against the persons named by the EU financial regulation which prevent Italy rely receive resources from the European Agricultural Guidance and Guarantee Fund (EAGGF), European Agricultural Fund for Rural Development (EAFRD) and other Structural Funds.

Detailed regulation of the state right to compensation can be found in article 16.bis of the law n. 11, 2005.

Spain

In the Spanish legal system there are any mechanisms to internally control the application of EU law. The ordinary administrative and judicial mechanisms and the coordination ones must be used for these purposes. The Federation does not have expressively assigned a power to implement is a subsidiary way EU law in cases of state omission. Nevertheless, as it

has been mentioned, in practice, the Federation has fulfilled this subsidiary role in cases of state inactivity and in other cases by giving a broad interpretation to its power of "general regulation of the economy". The Federation is liable for infringements. Several federal laws have established mechanisms enabling the Federation to charge the States with the sanctions that have been imposed to it for state violations; this is also included in several of the new state constitutions.

COMPARATIVE TABLE ABOUT THE ALLOCATION OF POWERS AND FUNCTIONS

EF: Federal exclusive power.

LF/EE: Federal exclusive legislative power and state executive power (federal regulation and state administration).

BF: Federal power to issue the guiding principles. All the other functions are assigned to the States.

CN: "Concurrent" (powers both Federation and States have legislative powers, although federal law takes precedence over state law in case of conflict).

EE: State exclusive power.

ML: Local/municipal power.

OS: Other (e.g. simultaneous powers, other forms of shared powers with asymmetric distribution of powers). Additional comments (in the cell or in the "final note" section).

Note: Use italics to refer to the actual distribution of powers (e.g. *LF/EE*).

USA	United States of America	**Arg.**	Argentina	**Sui.**	Switzerland
Can.	Canada	**Ind.**	India	**Bel.**	Belgium
COA	Australia	**UK**	United Kingdom	**Ita.**	Italia
Mex.	Mexico	**Ale.**	Germany	**Esp.**	Spain
Bra.	Brazil	**Aus.**	Austria		

ISSUE	USA	Can.	COA	Mex	Bra.	Arg.	Ind.	UK	Ale.	Aus[1]	Sui.	Bel.	Ita.	Esp.
NATIONALITY														
Nationality recognition	EF	CN	*EF*[2]	EF	EF	EF	EF	EF	LF/EF	LF/EE	OS[3]	EF	EF	EF
Passport issuance	EF	EF	*EF*[2]	EF	EF	EF	EF	EF	LF/EF	EF	LF/EF	EF	EF	EF
Identity Document issuance	EE[4]	EE	*CN*[5]	EF		CN	EF	EF	LF/EF	EF	LF/EF ML	EF	EF	EF
Emigration (internal and external)	EF	CN	*CN*[5]	EF	EF	EF	EF	EF	LF/EF	EF	EF	EF	EF	EF
Borders control	EF	EF	*EF*[2]	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF
Immigrants: contingent or origin	EF	CN	*EF*[2]	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF[6]
Immigrants: territorial distribution	CN	CN	*CN*[5]	EF	EF	EF	EF	EF	EF	EF[7]	EF	EF	EF	EF
Immigrants: stay and labour regime	LF/EE	CN	*CN*[5]	EF	EF	EF	EF	EF	EF	EF	LF/EF	EF	EF	EF[6]
Right to asylum: regulation and granting	EF	EF	*EF*[2]	EF	EF	EF	EF	EF	EF	EF	LF/EF	EF	EF	EF
INTERNATIONAL RELATIONS														
Conventions and treaties signature	EF	EF	*EF*[2]	EF	EF	EF CN[8]	EF	EF	CN	OS[9]	CN[10]	OS	EF BF[11]	EF
Treaties implementation and observance	EF	CN	*CN*[5]	OS[12]	[13]	CN	EF	EF	CN	OS[14]	CN	OS	EF BF[11]	OS[15]
International organizations representation	EF[16]	EF CN	*EF*[2]	EF	EF	EF	EF	EF	EF	EF[17]	EF[18]	OS	EF	EF
Embassies and representation offices	EF	EF CN	*CN*[5]	EF	EF	EF	EF	EF	EF	EF[19]	EF	OS	EF	EF
International responsibility	OS	EF	*EF*[2]	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF

(Continues)

ISSUE	USA	Can.	COA	Mex	Bra.	Arg.	Ind.	UK	Ale.	Aus[1]	Sui.	Bel.	Ita.	Esp.
DEFENSE														
Armed forces command	CN[20]	EF	*EF*[2]	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF
Recruitment	EF	EF	*EF*[2]	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF
Call to arms and sending troops	CN[21]	EF	*EF*[2]	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF
JUDICIAL POWER														
General regulation	CN	CN	*CN*[5]	OS[22]	BF	CN	CN OS	EF EE[23]	CN	EF	CN[24]	EF	EF	EF
Organizational chart and powers of the different judicial institutions	CN	CN	*CN*[5]	OS[12]	EF	CN	CN OS	EF EE[25]	CN	EF	CN	EF	EF	EF
Judiciary personnel (selection, appointment…)	CN	EE	*CN*[5]	OS[12]	BF	CN	OS	EF EE[26]	OS[27]	EF	CN	EF	EF	EF
Material investment	CN	EE	*CN*[5]	OS[12]	BF	CN	OS	EF EE[28]	OS	EF	CN	EF	EF	OS[29]
LAW														
Private Law	EE	EE	*CN*[5]	OS[30]	EF	EF	EF,CN OS	EF OS[31]	EF[32]	OS[33]	LF/ EF[34]	EF	EF	OS[35]
Commercial Law	CN	CN	*CN*[5]	EF	EF	EF	EF,CN OS	EF OS[36]	EF[32]	EF	CN	EF	EF	EF
Intellectual Property Law	CN[37]	EF	*EF*[2]	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF	LF/EF
Criminal Law	OS[38]	EF CN	*CN*[5]	OS[39]	EF	EF	CN	EF EE[40]	EF[32]	OS[33]	LF/ EF[41]	OS	EF	EF

(Continues)

ISSUE	USA	Can.	COA	Mex	Bra.	Arg.	Ind.	UK	Ale.	Aus[1]	Sui.	Bel.	Ita.	Esp.
Penitentiary Law	EE[42]	CN	*EE*[43]	OS[12]	EF	CN	EE	EF EE[44]	EE	EF	BF	EF	EF	LF/EF
Labor and Employment Law	CN	CN	*CN*[5]	EF	EF	EF	EF CN	EF	EF[32]	EF	CN	EF	BF	LF/EF
Procedure Law	CN	EE	*CN*[5]	OS[12]	EF	CN	CN	CN	EF[32]	EF[45]	CN[46]	EF	EF	OS[47]
COMMERCE AND ECONOMY														
Foreign trade	CN	EF	*CN*[5]	EF	EF	EF	EF	EF	EF	EF	EF	EE	BF	EF
Customs	EF	EF	*EF*[2]	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF
Interstate commerce	CN[48]	CN	*CN*[5]	EF	EF	EF	EF	EF	[49]	EF	BF	EE	EF EE[50]	EF
Intrastate commerce	EE[48]	CN	*EE*[43]	EF	EF	CN	CN EE	OS[51]		EF	EE	EE	EF EE[50]	EE
Currency (e.g. exchange)	EF	EF	*EF*[2]	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF	OS[52]
Banking regulation	CN	EF	*CN*[5]	EF	EF	EF	EF	EF		EF	CN[53]	EF	EF BF[54]	BF
Credit regulation	CN	CN	*CN*[5]	EF	EF	EF	EF	EF	EF	EF	LF/EF	EF	EF	BF
Securities, capital markets, etc.	CN	CN	*CN*[5]	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF	BF
Insurance	EE[55]	EE	*CN*[5]	EF	EF	EF	EF	EF	CN	EF	CN[56]	EF	EF	BF
Official metric system	EE	EF	*CN*[5]	EF	EF	EF	EF CN	EF	EF	EF	LF/EF	EF	EF	LF/EF
Economic planning	EE	CN	*CN*[5]	OS[57]	CN	EF	CN	EE	CN	OS[58]	CN[59]	EE	EF EE	BF

(Continues)

ISSUE	USA	Can.	COA	Mex	Bra.	Arg.	Ind.	UK	Ale.	Aus[1]	Sui.	Bel.	Ita.	Esp.
Tax revenue	CN[61]	CN	*CN*[5]	OS[62]	[63]	CN	EF EE	EF	EF[32]	EF[64]	CN	OS	EF	CN
Public debt	EF	CN	*CN*[5]	OS[65]		CN	EF EE	EF	CN	OS[66]	CN	EF	EF	EF
Antitrust regulation	CN	EF	*CN*[5]	EF	CN	EF	CN	EF	EF[32]	EF	EF	EF	EF	LF/EF
TERRITORY														
Environmental regulation	LF/ EE[67]	CN	*CN*[5]	CN[68]	CN	BF,CN ML[69]	CN ML	EE	CN	OS[70]	LF/EF	EE	EF	BF
Environmental protection: management and control	LF/ EE[67]	CN	*CN*[5]	CN	CN	CN ML	CN ML	EE	CN	OS[70]	EE	EE	LF/EF ML	EE
Territorial organization or regional development	OS[71]	CN	*CN*[5]	CN	CN	CN	OS	EE	EE	OS[50]	EE	EE	BF	EE
Urban planning: land property regime	ML[72]	EE	*EE*[43]	CN	CN ML	ML	EE ML	EE	LF/EE	OS[70]	LF/EF	EE	EF BF	EE
Land uses and zoning	ML[72]	EE	*EE*[43]	CN	CN ML	ML	EE ML	EE	ML	OS[70]	BF	EE	BFML	EE
Urban development management	ML[72]	EE	*EE*[43]	CN	CN ML	ML	EE ML	EE	LF/EE	OS[70]	EE	EE	BFML	EE
Urban development control and enforcement	ML[72]	EE	*EE*[43]	CN	ML	ML	EE ML	EE	LF/EE	OS[70]	EE	EE	BFML	EE
Coastal areas	LF/EE	EF	*CN*[5]	EF	EF	EF EE[73]	EF	EE	CN	[74]		EE	EF BF[75]	OS[76]
Water resources	OS[77]	EE	*CN*[5]	OS[78]	EF	EE	EE	EE	CN	EF[79]	BF	EE	EF ML[80]	OS[81]

(Continues)

ISSUE	USA	Can.	COA	Mex	Bra.	Arg.	Ind.	UK	Ale.	Aus[1]	Sui.	Bel.	Ita.	Esp.
Forest resources	OS[77]	EE	*CN*[5]	CN	CN	EE	CN	EE	CN	EF[79]	BF	EE	EF ML[82]	BF
Energy resources	OS[77]	CN	*CN*[5]	EF	EF[83]	EE	CN EE	EF	LF/EE	OS[84]	BF[85]	EE	EF,BF EE[86]	BF
Radio-electric spectrum control	EF	EF	*CN*[5]	EF	EF	EF	EF	EF	EF	[87]	EF	EE	EF BF	BF
TRANSPORTATION AND COMMUNICATIONS														
Main infrastructure construction	EE[88]	EE	*CN*[5]	EF	CN	CN	EF EE	EE[89]		EF	CN	EF	BF[90]	EF
Granting concessions for infrastructure private management	EE[88]	EF	*CN*[5]	EF	BF	CN	EF EE	EE	LF/EE	EF	CN	EE	BF[91]	EF
Roads	EE[92]	EE	*CN*[5]	OS[93]	[94]	CN	EE	EE	CN	OS[95]	CN	EE	OS[96]	OS[97]
Motor vehicles traffic	OS	EE	*EE*[43]	ML	EF	CN ML	CN	EE	LF/EE	EF	LF/EF	EE	EF ML[98]	EF
Railroads (infrastructure)	CN	EF	*CN*[5]	EF	[99]	CN	EF	EE[100]	EF	EF	EF	EF	EF	
Land transportation: regulation	BF	EE	*EE*[43]	OS[101]	BF	CN ML	EF,CN EE	EF	LF/EE	[102]	LF/EF	EE	EF EE	OS[97]
Land transportation: authorization, control.	EE	EE	*EE*[43]	OS[103]	LF/EE	CN ML	EF,CN EE	EF	LF/EE	[104]	EE	EE	EE ML	OS[97]
Airports	CN	EF	*EF*[2]	EF	EF	CN	EF	EF	LF/EE	EF	LF/EF	EF	EF BF	OS[105]
Air navigation	EF	EF	*EF*[2]	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF
Ports	EF[106]	EF	*CN*[5]	EF	EF	CN	EF	EF	LF/EE	OS[107]		EE	EF BF[108]	OS[105]

(Continues)

ISSUE	USA	Can.	COA	Mex	Bra.	Arg.	Ind.	UK	Ale.	Aus[1]	Sui.	Bel.	Ita.	Esp.
Maritime transports	EF	EF	*CN*[5]	EF	EF	EF	EF CN	EF	EF	[109]		EE	EF BF	EF
Postal service	EF	EF	*EF*[2]	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF	EF
Radio-electric spectrum	CN	EF	*CN*[5]	EF	EF	CN	EF	EF	EF	[110]	EF	EF	EF BF	EF
Telecommunications	CN	EF	*CN*[5]	EF	EF	CN	EF	EF	EF	EF	EF	EF	EF BF	EF[111]
Private mass-media (press, radio, television)	EF	CN	*CN*[5]	EF	EF	CN	EF	EF	EE	EF	LF/EF	EE	EF BF	BF
Public mass-media	EF	EE	*CN*[5]	EF	EF	CN	EF	EF	EE	EF	EF	EE	EF BF	BF
PUBLIC HEALTH AND HEALTH CARE														
Public health regulation	OS[112]	CN	*CN*[5]	EF	CN	EF,CN ML[113]	EE	EE	LF/EE	EF	EE	OS	EF BF	EF BF[114]
Pharmaceutical products regulation	CN	EF	*CN*[5]	EF	EF	EF	CN	EF	EF	EF	LF/EF	EF	EF	EF
Public health care regulation	OS[112]	EE	*CN*[5]	OS[115]	EF	CN ML	EE	EE	LF/EE	EF	EE	OS	EF BF[116]	EE
Hospital construction and management	OS[117]	EE	*EE*[43]	OS[118]	CN	CN ML	EE	EE	LF/EE	BF	EE	EE	BF	EE
EDUCATION														
Education: general regulation	EE	EE	*CN*[5]	CN[119]	EF	BF	CN	EE	EE	OS[120]	EE	EE	EF	BF
Educational levels	EE	EE	*CN*[5]	CN	EF	BF	CN	EE	EE	OS[120]	OS[121]	EF	EF	EF

(Continues)

ISSUE	USA	Can.	COA	Mex	Bra.	Arg.	Ind.	UK	Ale.	Aus[1]	Sui.	Bel.	Ita.	Esp.
Requirements for each educational level (contents)	EE	EE	*CN*[5]	CN	EF	BF	CN	EE	EE	OS[120]	BF[122]	EE	EF	BF
Issuance and recognition of official academic certificates	ML	EE	*CN*[5]	CN	EF	BF	CN	EE	CN	EF	CN	EE	EF	LF/EF
Construction or authorization of educational centres	ML	EE	*CN*[5]	CN	EF	CN ML	EF CN	EE	EE	EF	EE ML	EE	ML	EE
Professional training	OS[117]	CN	*CN*[5]	CN		CN	EF CN	EE	CN	EF	LF/EF	EE	EE	BF
Universities regulation	EE	EE	*CN*[5]	OS[12]	[123]	BF	EF CN	EE	EE	EF	CN	EE	EF BF	BF
Creation or authorization of universities	EE	EE	*EE*[43]	OS[12]	[124]	EF	EF CN	EE	EE	EF	CN	EE	EF BF	EE
Investment and relations with universities	EE[125]	EE	*CN*[5]	OS[12]		EF	EF CN	EE	CN	EF	CN	EE	EF BF	EE
Scientific and technical research (promotion)	CN	CN	*CN*[5]	OS[12]	CN	CN	EF CN	CN	CN	OS[126]	CN	OS	EF BF	CN
CULTURE											[127]			
Protection of historical and cultural heritage	OS[128]	CN	*CN*[5]	OS[12]	CN	CN ML	EF EE	EE	OS	EF	EE ML	EE	EF	CN
Cultural goods exports	CN	EF	*CN*[5]	OS[12]		CN	EF	EE	EF	EF	EE	EE	EF	EF
Archives: regulation and management	EE[129]	CN	*CN*[5]	OS[12]		CN ML	EF,CN EE	EE	OS	OS[130]	CN ML	OS	EF	OS[131]
Libraries: regulation and management	EE	EE	*CN*[5]	CN	CN	CN ML	EF EE	EE	EE	OS[132]	CN ML	EE	EF ML[133]	OS[131]

(Continues)

ISSUE	USA	Can.	COA	Mex	Bra.	Arg.	Ind.	UK	Ale.	Aus[1]	Sui.	Bel.	Ita.	Esp.
Museums: regulation and management	EE	CN	*CN*[5]	OS[12]	CN	CN ML	EF EE	EE	OS	OS[134]	CN ML	EE	EF ML[135]	OS[131]
Culture promotion	OS[136]	CN	*CN*[5]	OS[12]	CN	CN ML	CN	LF/ EE[137]	OS	OS[138]	EE	EE	EF BF	CN[139]
Literature and reading promotion	OS[136]	EE	*CN*[5]	OS[12]	CN	CN ML	CN	EE	OS	OS[140]	CN	EE	EF	CN[139]
Cinema, theatre, and music	OS[136]	EE	*CN*[5]	EF[141]	CN	CN	EE	EE	EE	OS[142]	CN	EE	EF BF	CN[139]
Information and communication technology	CN	CN	*CN*[5]	OS[12]		CN	EF	EE	EF	OS[143]	CN	EE	EF	CN[139]
Languages and dialects protection	CN	CN EE	*CN*[5]	OS[12]	EF	CN	OS	EE	EE	EF[144]	CN	OS	BF	CN
Linguistic duties	CN	EE	*CN*[5]	OS[12]	EF	CN	CN	LF/ EE[145]	OS	EF[146]		OS	BF	CN
SOCIAL BENEFITS														
Retirement or widowhood pensions	EF	CN	*CN*[5]	OS[12]	CN	CN	EE	EF	OS	EF	LF/EF	EF	EF BF[147]	EF
Geriatric centres: management and control	BF	EE	*CN*[5]	OS[12]		CN ML	OS	EF	EE	EE	EE	EF	EE	EE
Unemployment benefits	BF	EF	*CN*[5]	[148]	EF	CN	CN	EF	LF/EE	EF	LF/EF	EF	EF BF	EF
Employment measures	BF	CN	*CN*[5]	OS[12]		CN	CN	CN	CN	OS[149]	EE	EF	EF BF	CN

(Continues)

ISSUE	USA	Can.	COA	Mex	Bra.	Arg.	Ind.	UK	Ale.	Aus[1]	Sui.	Bel.	Ita.	Esp.
Measures against poverty	BF	CN	*CN*[5]	OS[12]	EF	CN ML	CN	CN	LF/EE	BF	EE ML	OS	EE ML	CN
Minors: protection	EE	EE	*CN*[5]	OS[12]	CN	CN ML	EE	CN	LF/EE	EE	CN	ML	EE ML	EE
Marginalized groups: protection	BF	CN	*CN*[5]	OS[12]	CN	CN ML	CN	CN	LF/EE	OS[150]	EE	EE	EE ML	CN
PRODUCTIVE SECTORS								[151]						
Agriculture: regulation	EE	CN	*EE*[43]	OS[12]		CN	EE	EE	CN	EE	LF/EF	EE	EF EE	BF
Agriculture: promotion and control	CN	CN	*EE*[43]	OS[12]		CN	EE	EE	CN	EE	CN	EF OS	BF EE[152]	EE
Cattle farming/ stockbreeding	EE	EE	*EE*[43]	OS[12]	CN	CN	EE	EE	CN	EE	CN	EE	BF EE[152]	EE
Fishing; aquiculture	CN	EE	*CN*[5]	CN	CN	CN	EE	EE	EE	EE	BF	EEOS	BF EE[152]	ML[153]
Artisans, craftworks	EE	EE	*EE*[43]	OS[12]		CN ML	EE	EE	LF/EE	EF	CN	EE	BF EE[152]	EE
Industry	EE	CN	*CN*[5]	EF		CN	EF EE	EE	LF/EE	EF		EE	EF EE	EE
Retail commerce	EE	EE	*EE*[43]	ML		CN ML	CN EE	EE	LF/EE	EF		EE	BF EE[152]	EE
Tourism	EE	EE	*CN*[5]	CN	CN	CN ML	OS	EE	EE	EE	EE	EE	BF EE[152]	EE

(Continues)

ISSUE	USA	Can.	COA	Mex	Bra.	Arg.	Ind.	UK	Ale.	Aus[1]	Sui.	Bel.	Ita.	Esp.
Energy (oil, gas, power…)	CN	CN	*CN*[5]	EF	EF[154]		CN EE	EF	LF/EE	OS[155]	BF	EF	EF	BF
PUBLIC ADMINISTRATION														
Citizens' general rights	CN	CN	*CN*[5]	OS[12]	EF	CN ML	CN EE	LF/EE	CN	OS[156]	EF OS	OS	EF	EF
Organizational regime	EE	CN	*CN*[5]	OS[12]	EF	CN ML	EF EE	CN		OS[157]	CN	OS	EF,EE ML[158]	BF
Public officials regime and salary	CN	CN	*CN*[5]	OS[12]	EF	CN ML	EF EE	EF	EF BF[32]	OS[159]	CN	OS	EF,EE ML[158]	BF
Administrative procedure	CN	CN	*CN*[5]	OS[12]	EF[160]	CN ML	CN	EE	EF BF[32]	OS[161]	CN	OS	EF	BF
Expropriation of private property	CN	CN	*CN*[5]	OS[12]	EF	CN ML	CN	EE	OS	OS[162]	CN	OS	EF	LF/EF
Public contracts	CN	CN	*CN*[5]	OS[12]	BF[163]	CN ML	CN	EF	OS	OS[164]	CN	OS	EF	BF
Government's or administration's liability	CN	CN	*CN*[5]	OS[12]	EF	CN ML	CN	EF	CN	OS[165]		OS	EF	LF/EF
Mechanisms to control the Administration	CN	CN	*CN*[5]	OS[12]		CN ML	EF EE	CN	BF	OS[166]	CN	OS	EF,EE ML[158]	BF
Intervention in municipalities or local issues	CN[167]	EE	*EE*[43]	EE		EE	EE	EF	EE	OS[168]	EE	EE	EF	BF

Notes

1 The allocation of powers is an original allocation between the federation and the Länder only. Municipalities do not constitute a third tier that participates in the allocation of powers. They derive powers only through an assignment by an ordinary federal or Land law. I have therefore not classified subject-matters as ML, although some of them are performed by the municipalities. One should keep in mind that the allocation of powers only applies to authoritative behaviour of the state, whilst federation, Länder and municipalities are free to act as private law persons. This means that some of the enlisted subject-matters could be performed by all tiers in a non-authoritative way, in particular if this concerns the promotion of certain matters.

I have not treated indirect federal administration, since this does not change the allocation of powers formally.

As you can see, I have frequently chosen OS which suggests that there may be too few categories. For example, the federation and the Länder may share a competence without the rule of preference in favour of the federation. Moreover, a couple of subject-matters enlisted here are not homogeneous from the Austrian standpoint, but concern different competences which are not "concurrent", but rather form a conglomerate.

The Austrian Constitutional Court has very subtly defined what competences stand for, however general their name may appear to be: In most subject-matters, one would have to add details, exceptions and reservations.

2 In practice an exclusive power, although not formally identified as exclusive by the Constitution.

3 Section 37.I of the 1999 Federal Constitution of the Swiss Confederation (CF): "Every citizen of a canton and a municipality in Switzerland is a Swiss citizen." There are two types of naturalization processes: The regular naturalization which is the common one and facilitated naturalization, which is more exceptional, provided for, mainly, spouses of Swiss citizens. In the first case, the municipality, the canton, and the Confederation, must decide on each case. Acceptance into these three levels is a prerequisite for naturalization. Cantons have power to legislate on the right to state and municipal citizenship; the municipality has executive power on this matter. In many municipalities, the inhabitants with voting rights who, through the municipal assembly, decide on the applications for naturalization. In this case there is no right to naturalization and the decision is purely political, given formal conditions are met. Conversely, under certain conditions, facilitated naturalization is provided; for this type of naturalization the legislation is federal and states implement it. In this case, there is a right to naturalization under certain conditions, such as being married to a Swiss citizen and being in Switzerland for a certain period. This applies in cases where a right to naturalization can be derived from higher principles like human rights and thus cannot be entrusted to a political decision at the municipal level.

4 No identity card; only driving license or state-issued identification, secure (federal sanctioned) introduced 01/01/10, issued by states.

5 In practice concurrent powers, to the extent that the Federation uses a broad interpretation of its other powers to intervene in these subject areas. In some cases aspects of these subject areas are regulated exclusively by the States and other aspects are regulated exclusively by the Federation.

6 In some of the new state Constitutions, some of these competences are attributed to the states.

7 However, there has recently been a conflict between the competent Federal Minister and the Land Burgenland that prevented a planned asylum centre though a spatial planning regulation.

8 In relation to conventions and treaties signature, we reiterate that the signature of treaties is a federal power, but Provinces can enter into «international conventions», after the 1994 constitutional amendment. This is why, although assuming a difference of degree between conventions and treaties, we mark that even if the foreign policy is a federal power, Provinces have the powers indicated.

9 The Federation has a full competence, but the Länder may also conclude treaties in a limited way; however, there is no preference rule in favour of the federation.

10 The Confederation has unlimited power to conclude international treaties, even if the latter concern state powers. The cantons have the competence to conclude treaties regarding matters under their powers if these agreements do not contradict federal law or treaties signed by the Confederation.
11 Depending on the interest, which can be federal or regional.
12 Joint power.
13 Treaties are incorporated as federal Law. Depending on treaty nature, State will be competent to enact supplementary law.
14 The competence for implementation and observance follows the internal allocation of powers so that either the federation or the Länder will be competent.
15 The holder of the specific power or treaty object.
16 In most cases federal power, but states and cities are represented in international organizations, and states are signatories to international agreements, subject to federal approval.
17 However, the Federal Constitution empowers the Länder to be represented in the Committee of the Regions. Moreover the Länder may be included in federal delegations or be represented on an informal basis.
18 Nothing impedes the cantons to establish representative offices but these offices have no official status to represent Switzerland. These are mere observatories. The only current example is the interstate observation office for the European Union in Brussels.
19 All Länder (except Vorarlberg) established their own informal liaison offices in Brussels.
20 States have their own militias, or National Guard units, which are under their governor's direction, but subject to call by the US President.
21 Only President of US for international conflicts; governors for within state matters.
22 Joint power. In Mexico exists a dual structure of courts. There are federal and state courts. The former decide cases regarding issues of federal power and the latter issues under state power.
23 Federal exclusive power in relation to England, Wales and Northern Ireland; state power in relation to Scotland.
24 Since April 1st, 2003, the Constitution provides that the civil and criminal procedural code is a federal matter. It is a classic case of concurrent jurisdiction according to the definition given by the Swiss doctrine, that is, it has posterior derogatory effects (see introduction to this questionnaire). The state codes are and will remain in effect until the federal codification into force. The federal code on civil procedure, criminal procedure and juvenile criminal procedure were developed in recent years by the parliament and the federal government, and they have been approved by the federal parliament. The optional referendum has not been used. They will come into force in 2011.
25 Federal exclusive power in relation to England, Wales and Northern Ireland; state power in relation to Scotland (with some general provisions in UK law).
26 Federal exclusive power in relation to England, Wales and Northern Ireland; state power in relation to Scotland.
27 States for state courts; Federation for federal courts..
28 Federal exclusive power in relation to England, Wales and Northern Ireland; state power in relation to Scotland (and Northern Ireland, eventually).
29 Implementative concurrency.
30 Joint power. There is a Federal Civil Code and each state has their own Civil Code.
31 In Scotland, some areas of UK law enforced in Scotland must be in Scots law.
32 Federation and States have legislative powers, but as there is a complete federal regulation, there is no more room for state legislation.
33 There is a full federal power; however, the Länder may enact ancillary civil law provisions if this is indispensable for the exercise of a genuine Land competence. No rule of preference in favour of the federation.
34 It is a concurrent power, but the federation has codifying comprehensively, not leaving room for state law.

35 States with their own private law have competences in conservation, development and codification. The rest belongs to the Federation.
36 Federal exclusive power in relation to England, Wales, Northern Ireland and Scotland for most purposes. In Scotland, some areas of UK law enforced in Scotland must be in Scots law.
37 Currently under dispute; states claim exclusivity but US Congress increasingly acting under commerce clause.
38 Mostly state except for certain designated federal crimes, and matters of civil liberties.
39 Joint power. There is a Federal Criminal Code and each state has their own Criminal Code.
40 Federal exclusive power in relation to England, Wales and Northern Ireland; state power in relation to Scotland, with limited appeal to the UK.
41 It is a concurrent power, but the federation has codifying comprehensively, not leaving, except for few issues, room for state law.
42 Except for federal prisons.
43 In practice an exclusive State power, although States formally only have residual powers into which federal powers may intervene when interpreted broadly.
44 Federal exclusive power in relation to England, Wales and Northern Ireland; state power in relation to Scotland.
45 If "procedure law" means criminal or civil law procedure and not administrative procedure.
46 The Judiciary — General Regulation comments apply here
47 It belongs to the Federation, except special features derived from the substantive state law.
48 Under the "Commerce Clause" of the federal Constitution, less and less regarding commerce across state borders is left to the states. States do register and regulate businesses that operate within a state and regulate state chartered banks.
49 See "commercial law" comments.
50 It can be a state (regional) competence under de limits of the national private law.
51 Simultaneous jurisdiction by function as specified in legislation.
52 Transferred to the European Union.
53 Private Banks and the National Bank regulated by federal law; in addition, each canton has a bank established by the state's public law.
54 It can be BF in regional interest banks.
55 Congress has asserted its right to regulate insurance, but has not chosen to do so, leaving it as an exclusive state function until it acts. It is currently acting to regulate health insurance for the first time.
56 The regulation of private insurance is an exclusive power of the Confederacy, except for insurance of certain buildings where state regulations apply.
57 Joint power. There is a Planning Act (Federal) that regulates the "National Plan for Development"; and there are state planning acts that regulate planning for the social and economic development.
58 "Economic planning" may involve very different aspects and concern Land competences, too (e.g. general spatial planning).
59 Exclusive state power except for the economic development of rural and mountainous regions.
60 "Industry" falls under EF, but a reconversion might also concern Lander powers, such as building law, nature protection or general spatial planning.
61 Some localities also have income taxes.
62 Joint power. There are federal, state, and local taxes.
63 The system is highly constitucionalized. See our answers in chapter X.
64 The Länder could, however, "invent" new taxes (as far as they are not regulated by the FAG) and thus determine their tax revenues.
65 Joint power. There is a General Act of Public Debt (federal); and the states have state acts of public debt.
66 All tiers are basically responsible for their own budgets. However, the Federal Constitution and the Stability Pact oblige them to keep them within certain limits.

67 States maintain some residual authority in some environmental arenas, and states can exceed federal standards, but federal pre-emption in most areas, with state enforcement.
68 These issues are under a "concurrent powers" scheme, but as explained, the idea is closer to shared powers.
69 In relation to environmental protection and regulation, legislative bases which fix the «minimum content» come from the Congress regulation, but the legislative and control power remains as concurrent among all levels of government: Federation, Provinces, Autonomous City of Buenos Aires and local entities.
70 Both environmental protection and spatial planning are so-called "complex matters" which involve a wide range of federal and Land powers so that it is only possible to say that these are shared powers.
71 States have predominant power, but federal funding has been influential.
72 Under code of laws and regulations by the states.
73 In relation to territorial sea, the Federal Government exercises its powers of national defense and police control over navigation, but ownership of resources is provincial, as well as the coasts.
74 No coasts in Austria.
75 EF for environmental protection; BF for land use.
76 The new state Constitutions confer exclusive power to the states over coastal planning, occupation and use of the sea-line domain, and their economic and financial system, although the Federation retains powers of general legislation over some of these subject-matters.
77 Joint powers, depending on ownership, particularly for state and federal owned lands.
78 Joint power. Some waters are under federal law and others are regulated by states.
79 However, the Länder could regulate certain aspects, such as, e.g. nature protection (with regard to rivers and lakes).
80 EF for national basins.
81 The holding depends on a territorial basis (whether the water pass more than one state).
82 EF for environmental protection.
83 States can regulate local distribution of natural gas (article 25, § 2º)
84 The competence is split between EF and BF.
85 Except for atomic energy regulation which is a federal matter.
86 BF for national energy distribution.
87 I do not understand what this power should comprise.
88 With federal financing.
89 For most policy areas.
90 Networks and major highways.
91 As part of territorial regulation.
92 Despite the US highway system, the federal government only funds roads, the state's plan, build, "own" and control.
93 Joint power. The Federation is in charge of "general ways/roads".
94 There are federal and state roads. State can have roads within its borders.
95 Federal roads EF, traffic police LF/EE, Land roads EE.
96 It is an exclusive federal power in case of motorways and national roads; federal power to issue the guiding principles in case of networks and major highways; exclusive regional power in case of regional roads; and municipal power in case of regional and local roads.
97 It depends on a territorial basis.
98 EF for regulation and control of the national network; ML for control of regional and local roads.
99 Can be both federal and state. State can have railroads within its borders.
100 Except for some major lines.
101 Joint power. The Federation is in charge of "general ways/roads".
102 I do not know what this power means.
103 Joint power. The Federation is in charge of "general ways/roads".

104 I do not know what this power means.
105 It depends on a federal or state interest.
106 Some local government management and infrastructure maintenance.
107 No sea in Austria. As regards rivers and lakes, the competence is split between EF and LF/EE.
108 EF in case of national ports.
109 No sea in Austria.
110 I do not know what this competence means.
111 Although some new state Constitutions have attributed to the state implementation powers related to electronic communications.
112 Shared federal, state, local normative and administrative power.
113 The external health is a federal power, but the other health legislation is concurrent, so it corresponds to the different governmental, according to their jurisdictions.
114 EF for external health; BF for health legislation.
115 Joint power. There is a Federal Health Care Bill, and state health care ones.
116 EF in case of standard regulation; BF in case of organization of health care.
117 State-local power.
118 Joint power. There are federal and state hospitals and health care centres.
119 There is a General Law of Education that distributes the education public service among the three levels of government. There are also state laws regulating the operation of the educational service that corresponds to the state and municipalities, according to the leeway left by the General Law. It is a regime of shared powers in which the distribution of powers is decided by the Union Congress.
120 Competences are split as to whether it concerns schools (mainly responsibility of federation) or agricultural/silvicultural schools (mainly Länder).
121 The federation has the power to coordinate, to the extent necessary, the harmonization of ages, levels and recognition of years, education levels and qualifications between states, if states do not agree to do so on an interstate compact. An agreement is in force, but not yet ratified by all states / cantons. In some states / cantons, the referendum has to be voted; in others, the agreement have been rejected and, consequently, these states failed to sign and ratify the agreement. The federation has the power of declaring the agreement binding for all cantons, even on those that did not sign it "voluntarily".
122 See note 96.
123 Universities have autonomy, according to the Federal Constitution. Still, general regulation.
124 It is required federal authorization, but states can create public universities.
125 With the exception of federal grants, scholarships, loans.
126 Promotion is non-authoritative, which means that both the federation and the Länder may promote as private law persons, without being restricted by the allocation of powers.
127 The promotion of any cultural activity as well as the protection of cultural property is one of the most important powers of the cantons. However, the Confederation has the power to deal with such domains as long as it concerns the protection or promotion of cultural values relevant for the whole Switzerland.
128 Federal-state local.
129 With the exception of national historic sites records.
130 Split between the federation and the Länder (without rule of preference in favour of the federation), depending on which federal or Land archive it is.
131 In cases of federal holding, states only have implementation powers. In cases of state holding, states have all powers.
132 See note 130.
133 EF for national libraries regulation; ML for local public libraries.
134 See note 130.

135 EF for national museums regulation; ML for local public museums.
136 Federal (minor role) — state-local.
137 Certain aspects of Northern Ireland language and culture policy are in law.
138 "Promotion" is non-authoritative (see note 126).
139 Some of the new state Constitutions have attributed to the states the exclusive power in this subject-matter when the cultural activity takes place in the state territory.
140 See note 126.
141 Cinema is under federal power.
142 Cinemas, Land theatres and (professional aspects of) music are Land competences, federal theatres a federal competence.
143 Shared competence according to different aspects.
144 With regard to national minorities or universities.
145 Certain aspects of Northern Ireland language and culture policy are in law.
146 With regard to national minorities.
147 BF for supplementary pensions.
148 They do not exist in Mexico.
149 Split between EF and BF.
150 Split between EF, BF and EE.
151 These are devolved tasks subject to health and safety, business and other regulation held by state.
152 BF with national limits.
153 It depends on a territorial basis. States have exclusive powers in inland waters and aquaculture. The Federation have powers in the other subject-matters.
154 States can regulate local distribution of natural gas.
155 Split between EF and BF.
156 Fundamental rights entrenched in the Federal Constitution and, additionally, Land Constitutions. Ordinary rights are entrenched both by federal and Land laws, depending on the matter.
157 Mainly determined by the Federal Constitution, additionally by Land Constitutions.
158 EF for federal administration; EE for regional administration; ML for local administration.
159 Shared competence, without rule of preference in favour of the federation. Federal constitutional law regulates salary of supreme political functionaries.
160 Federation regulate federal administration procedure and States can regulate state administrative procedure (art. 24, XI).
161 Uniform federal legislation, deviations by the Länder only possible, if indispensable.
162 Ancillary competence that follows either a main federal or Land competence.
163 Federation establishes general rules.
164 Legislation mostly federal, administration split between federation and Länder according to whose public contract it is.
165 Shared between the federation and the Länder according to who is liable.
166 Regulated in the Federal Constitution.
167 Mostly state; US "Commerce Clause" has led to some federal intervention.
168 Both federation and (particularly) Länder, regulated in the Federal Constitution.

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A basic definition of federalism emphasizes: first, two separate areas of power attributed to two different levels of government; and, second, the lack of power of the federal government to modify the territorial distribution of powers. Broadly speaking, these two characteristics are met in all cases analyzed in this book, except for the United Kingdom given the peculiarities of its "devolution" system. This book analyzes the scheme adopted in the most well-known systems of territorial distribution of power (U.S., Canada, Australia, India, Mexico, Brazil, Argentina, UK, Germany, Austria, Switzerland, Belgium, Italy and Spain), be them called federal or not, in order to identify the main characteristics of their evolution and to find out which institutions have been transferred from one system to another. The comparative perspective allows us to underline the peculiarities of each system and to identify and highlight common patterns established to address specific phenomena or events.

This book is an excellent and updated source of information for both students of comparative federalism and for those readers who are curious about possible future developments in federal systems.