

WORKSHOP B: Distribution of Competences and Accommodation of Minorities

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INTRODUCTION: AIM AND CONTENTS OF THE WORKSHOP

The overall aim of the International Munich Federalism Days 2017 was to "identify, discuss and evaluate mechanisms of conflict management in different States and debate options for how these could be improved, specifically focusing on relations between different government levels."

The first part of the workshop "Distribution of Competences and Accommodation of Minorities" on 16 May focused on the clarification of key issues. The discussion centered on the relevance of the distribution of competences with a focus on legislative competences. As a wider input, Q&A as well as discussion session, it referred to both general issues and different case studies (among others, US, Canada, Germany, South Africa, Switzerland, Italy). The advantages and disadvantages of different models of allocating competences between the different tiers of government (federal, regional and local) were analysed. The second part of the workshop focused on the participants' presentations and on possibilities to better organize the distribution of competences in order to accommodate socio-linguistic diversity in the country of origin of the participants. A lively discussion amongst the participants contributed to both sharing knowledge and to identifying how challenges can be overcome in the participants' countries.

During the entire workshop, following questions were tackled: (1) How are powers divided in federal and regional States? What competences normally reside at the national, subnational and local level? What do the Constitution and other fundamental legal documents (special / basic laws) provide with respect to the division of competences? (2) What are the reasons for and underlying principles of the allocation of powers? Are there significant differences across constituent units in federal and regional States? When those differences cause problems, how are they overcome and who facilitates a resolution? (3) How can a revised distribution of legislative competences help to resolve conflicts? How can a revised distribution of legislative competences help to accommodate minority claims? What role does education play? How are competences in the policy field of education shared? What implications does this have for the accommodation of minority claims?

SETTING THE SCENE: DISTRIBUTION OF COMPETENCES IN THEORY AND PRAXIS

Dynamic nature

"Who does what? Who decides on what? And on what basis?" are pivotal questions for any State with an institutional design that transfers powers to lower levels of government. The answers vary across time and space and are heavily context-bound, particularly with respect to the reasons for the distribution of competences (for example, the accommodation of ethnic diversity) and the methods used. The distribution of powers between governmental levels is one of the most complicated challenges and therefore a task that is never finally solved, neither theoretically nor practically. It refers to the dynamics of the relationship between governmental levels (self-rule and shared rule, the formula famously coined by Daniel Elazar) and thus affects the system of checks and balances in a State. The process by which federal and regional States come into being

influences the distribution of competences. Where the process involved an aggregation (coming together federalism) of previously independent units (for example, US, Switzerland), the powers of the federal level are less or, in comparative terms, weaker than in countries where the process was triggered by decentralization (for example, Belgium and South Africa) (holding together federalism).

Dual vs. integrated federalism

In classic studies of federalism (for example, Kenneth Wheare), the ideal distribution of powers was considered to be one in which each order of government was able to act independently (watertight compartments of responsibility; dual federalism). However, in practice, federal States have found it impossible to avoid overlaps in the responsibilities of governments at different levels and a certain degree of interdependence is thus inherent to all federal States, in some less (US, Canada, Switzerland), in others more (for Germany the concept of interlocking / integrated federalism applies, with the *Länder* responsible for the execution of federal legislation).

Whatever the model looks like, as a rule, constituent units of a State may use powers but are – formally speaking – not obliged to do so. Interestingly, the Swiss Constitution calls upon the responsibility of the cantons to make use of their competences, most of the Constitutions do not. Moreover, any transfer of powers to lower levels of government can only be useful if the lower levels of government are endowed with financial resources to exercise their functions (financial autonomy, fiscal powers, and resources deriving from equalization systems).

Levels of governments and competences

Unlike in unitary and administratively deconcentrated States, in federal and regional States the key question to be addressed is to what extent constituent units have legislative powers. Notably, the local level does not have law-making powers. Thus, in classical

theory of federalism the local level is not taken into account when talking about the distribution of competences because a system where only executive power is divided is too little to define a system as federal. However, the local level, which in classical federal States derives its authority from the regional / subnational level, cannot be disregarded because of its pivotal role in providing services; as such, it needs adequate funding and must thus be considered in the arrangements with regard to fiscal federalism and intergovernmental financial relations. Furthermore, many of the new federations (Nepal, Brazil, South Africa) do include local government as a third order of government.

Means of distribution of competences (enumeration method)

Constitutions and / or basic laws (with special majorities and thus more difficult to amend than ordinary legislation) of federal and regional States normally contain competence lists. Enshrining such lists in the federal Constitution or in special legislation aims at making clarity and guaranteeing the constituent units of a State autonomy with regard to their functions (constitutional guarantee of autonomy). The so-called "competence-competence" (which level of government decides on who can decide on how competences are distributed) usually is vested with the federal level.

Competence lists look very differently across federal and regional States worldwide. They may be very detailed or not. As a general rule, old federal States have a rather short list (for example the US) while those that developed more recently (i. e. after Second World War II) contain more detailed lists. There are also States that, in theory, provide for a detailed list of competences, but, in practice, the transfer of powers to lower levels of governments is casuistic and subject to 'political winds' from the federal level (for example, India's Constitution includes a list of powers that consist of more than 200 items, but the federal level exerts a strong influence on the autonomy of its constituent units, the states). Similarly, South Africa's constituent units, the provinces, have strong com-

petencies on paper but this strength is undermined by fiscal arrangements which make provinces dependent on the national government.

Types of Competences

There may be powers that only the federal or lower levels of government may exercise (exclusive competences) and / or powers that are shared / concurrent between at least two levels of government. Moreover, any Constitution provides for criteria as to when federal law prevails over subnational law (principle of prevalence of federal law or supremacy clause).

The advantage of concurrency is that it can render a political system flexible by having the federal system being responsible for general provisions and allowing the constituent units to legislate on details by taking into account specific needs. Shared powers can also mean that both levels of government legislate within the same policy fields but without a neat distinction between principles and details. The Constitutional Court / Supreme Court / Constitutional Tribunal rules on controversies whenever the legislation of the two levels is in conflict. Constitutions also contain provisions to determine which level of government exercises residual competences (i. e. those not specifically allocated). Residual clauses ensure that every area of legislation comes under at least one tier of government. A number of Constitutions also contain so-called emergency powers (or national interest clause).

The allocation of exclusive federal powers is relatively limited in the US and Australia, with most federal powers being identified as shared or concurrent powers. In Germany, India, Ethiopia, South Africa the exclusive powers assigned to the federal level of government is higher. In Spain, the Constitution lists exclusive powers of the federal level and competences of its constituent units, the Autonomous Communities, are determined in their statutes (basic laws of the Autonomous Communities). Overlaps in responsibilities of governmental levels in most federal States have led to

extensive lists of concurrent powers, where both levels legislate. An exception is Canada with few concurrent powers (for example, agriculture, immigration and old age pensions with provincial law prevailing over federal law). The residual powers, thus the competences that are not enshrined and explicitly attributed to one level of government in the Constitution, in many federal States remain with the constituent units (especially in federal States whose origins date back to the 18th and 19th century such as the US, Switzerland and Germany; an exception is Canada). In some federal States, the residual powers remain with the federal level (for example in Canada, South Africa, India). A few Constitutions of federal States explicitly provide for emergency clauses (for example India, Pakistan and South Africa).

Even with the most comprehensive or intricate constitutional provisions on the distribution of competences, the division of responsibilities among layers of government remains a complicated matter in practice. This is because everyday governance is always more complicated than the neatly defined, artificial, competences in a Constitution. In practice, any assessment of the advantages and disadvantages of various patterns of the distribution of power depends on how the details are interpreted and how conflicts are avoided and / or resolved.

In most federal States international relations, defense, economic and monetary union, customs, international trade, tax powers, infrastructure are of federal responsibility, while health care, education, social policies, labor are usually assigned to the responsibility of the constituent units. Policy fields that often are shared or in which the responsibility has changed over time are agriculture, natural resources, environment, police, courts, cross-border cooperation. In European multi-level States the area of coordination of finances and public debt is more troublesome than ever in the aftermath of the financial crisis 2008-2009; this competence, as a general rule, is of federal responsibility, and often it is used to hollow out the autonomy of constituent units.

Underlying principles

In line with Abraham Lincoln's idea of "government for the people, of the people and by the people", the distribution of powers serves the purpose of (1) taking decisions as closest as possible to the citizens (democracy argument); taking decisions close to and with the peoples that are directly affected (subsidiarity principle); (2) transferring powers to the lower order of government allows to accommodate diversities (and minorities), responding to the different needs of the State's constituent units adequately (unity in diversity argument); (3) from an economic point of view, the transfer of functions to the constituent units favors economies of scales (units know best); the costs of certain services decrease if delivered at lower levels; this has positive effects for the whole State (efficiency argument).

In all federal and federal-alike States, the cooperation between the different levels of government is based on, as a general rule, constitutionally enshrined principles. For example, in South Africa the principle of co-operative government is in use; in Germany the principle of federal comity, in Italy the principle of loyal cooperation.

Policy Field Education

No univocal pattern can be found when it comes to dealing with the distribution of competencies in the field of education in federal and regional States. On the one side, there are States in which centripetal wind is blowing: competencies in education as well as the implementation of education policies are re-allocated to the central level in order to guarantee efficiency and unity within the State-wide education system. On the other side, there are States in which the need is exactly the opposite: governance schemes in education are legislatively, administratively and financially ever more decentralized due to structural reforms and in response of claims by constituent units within a State.

Generally, when dealing with education one has to differentiate between compulsory education, higher education and research. While compulsory education and higher education in many federal

States are exclusive competence of the constituent unit (or, especially in the case of higher education shared competence), research is usually of exclusive federal competence.

In the US, public education is not included in the list of enumerated powers of the Congress; its constituent units, the states, have the leading role in primary and secondary education, also with regard to funding; the federal level is a junior but active partner (who, by means of the grants-in-aid system, influences education policies in the states).

The Swiss constituent units, the cantons, are sovereign and responsible for school education; they decide on the design of the system, they set school curricula, they are responsible for funding and teacher education. The federal legislator is only responsible for a few main principles as the regulation of school entry age, compulsory school attendance, recognition of qualifications (only if cantons are not able to realize harmonization themselves by means of coordination); such coordination is elaborated by the cantonal conference of ministers of education, an organ that has no binding legislative powers (horizontal cooperative federalism).

Italy serves as an example for a regional State organized in 15 constituent units having an ordinary statute and five regions having a special statute. Regional autonomy was implemented in an asymmetric manner in order to meet territorial needs and the claims of linguistic minorities. When it comes to education, regions having a special statute have more powers aiming at accommodating linguistic minorities, teaching in mother tongue and pluri-lingual schooling. For example, in the Autonomous Province of Bolzano / Bozen, which together with the Autonomous Province of Trento forms the Autonomous Region Trentino-South Tyrol, education in German and Italian language is established, based on the parity of the German and Italian language in South Tyrol; moreover, in some valleys a pluri-lingual system is in use (German and Italian are used as teaching language next to Ladin, the language of the third officially recognized linguistic group in South Tyrol).

Identifying and discussing challenges

The different States represented by the participants are in different stages of discussion on federalism or decentralization. Some States practice federalism (for example Pakistan) or consider it as a sustainable means for conflict settlement (for example Myanmar). Some States practice decentralization (for example Moldavia), others point out the importance of the local level (for example Israel). Morocco practices deconcentration and is considering decentralization. Jordan is discussing democratic reforms. Whatever the ongoing debates are, they all have to be contextualized and interpreted against the legacy of either British (for example Israel) or French administration (for example Morocco). Such legacies next to general socio-economic conditions heavily influence mind-sets and political cultures (in favour of or against decentralization).

Overall trends in the discussed States are (the numbering does not imply any prioritization): (1) the central government is very reluctant to let go power; (2) minorities are marginalized; (3) there is an urgent need for political dialogue and reforms; (4) there is the need to link debates on federalism and decentralization to debates about what it means to live in a democracy and by which means a democratic system can guarantee the participation and non-marginalization of all groups inhabiting the respective State (democratization, civic education); (5) clarity with regard to the 'federal toolkit on an appropriate distribution of competences' has to be made (by taking into account the needs of special territories and granting them special status); (6) any division of powers between governmental levels has to be accompanied by capacity building measures and an appropriate allocation of funds (transferring competences to the lower levels of government without funds and in absence of capable politicians as well as administrators is useless); (7) clarity has to be made with regard to the concepts of internal and external self-determination; internal self-determination in the form of granting a special status to certain territories of a State helps to come to terms with conflicts (for

example, Gagauzia in Moldova; could also be an option for Western Sahara next to the empowerment of regions in Morocco); (8) foreign influence in all cases complicates the discussion on conflict settlement, decentralization and federalism (Russia and China were explicitly mentioned).

In general, the constitutional protection of lower levels and their competences is critical and in most cases very weak. For example, Israel refers to tensions between the central government and the local level; in Israel, the local level exercises powers related to the management of diversity (education, culture, language matters). Pakistan gives evidence on the tensions between the intermediate level, the provinces, and the local level; Myanmar points out the need to issue state and region constitutions as well as the need to implement capacity-building measures at local level.

With regard to the current reality of the distribution of competences, following challenges were discussed in detail (again, the numbering does not imply any prioritization): (1) the influence of the federal level controlling the finances; (2) the existence and impact of administrative structures referring to British or French legacy; (3) the presence of the army; (4) the absence of democratic structures at lower level; (5) the missing implementation of constitutional provisions; (6) the absence of proper coordination mechanisms between the central / provincial / regional and local government levels; (7) the need to uphold and increase political representation of underrepresented groups of persons (for example women and ethnic / religious minorities by means of reserved seats or quotas); (8) the need to better regulate policy fields as culture and education at the lower levels of government in order to accommodate diversities; (9) the need to create encounters within separated educational systems within a State / constituent unit of a State, aiming at creating civic bonds across groups; (10) the need to focus on liberal-democratic curricula and civic education.

The importance of democracy as a foundation for federalism or decentralization was pointed out by all participants.

CONCLUDING REMARKS: NO "ONE-SIZE-FITS-ALL" SOLUTION

There is no fixed formula to be applied when it comes to the distribution of competences. No current system is perfect. All models have to be constantly questioned and regularly revised against the backdrop of changing socio-economic conditions. Every system deals with de facto asymmetries. In order to accommodate diversities (and minorities), de jure asymmetries may be enshrined in the competence lists in the Constitution or other basic laws. Enshrining competence lists in a Constitution or basic law requiring special majorities usually comes with greater autonomy for the constituent units of a State (constitutional guarantee of sovereignty of constituent units). However, in order to analyse if a federal or federal-alike State performs well, it is of crucial importance not just to look at legal sources, but also to understand how the distribution of competences and the accommodation of minorities works in practice. If the transfer of competences is not accompanied by adequate financial resources, then no constituent unit can properly govern. Some States labelled federal States do grant their constituent units very few powers; some States that are not labelled federal States do work according to federal principles. Finding the right balance between the powers attributed to the federal level and those attributed to the subnational level is a never-ending task for all stakeholders involved. It is the cornerstone of every federal or federal-alike system.

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