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A GENERAL LEGAL REFERENCE FRAMEWORK TO FACILITATE THE SETTLEMENT OF ETHNO-POLITICAL CONFLICTS IN EUROPE

adopted by the Venice Commission
at its 44th Plenary meeting
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At the 713th meeting of the Ministers' Deputies (7 June 2000), the Chair indicated his intention of inviting the Commission, at its meeting on 16 June 2000, to consider the possibility of implementing one of the key proposals in the action programme of the Italian Chairmanship, i.e. the drafting of a general legal reference framework to facilitate the settlement of ethno-political conflicts in Europe.

At its 43rd meeting, held in Venice on 16 June 2000, the Commission approved a document concerning the drafting of a general legal reference framework to facilitate the settlement of ethno-political conflicts in Europe (CDL (2000) 50), which was submitted to the Ministers' Deputies at their 718th meeting (19 July 2000). The Deputies took note that the Venice Commission was ready to undertake an indicative study along the lines set out in document CM (2000) 99.

Introduction

There are a number of ethno-political conflicts in Europe in which a settlement has yet to be reached. A legal reference framework, such as that defined here, aims to identify the issues that may come to the fore in the search for solutions to such conflicts. As can be seen from its title, this document sets out to define a general legal reference framework, not to propose solutions to be adopted in particular cases. It will therefore deal with the general issues that arise not only in connection with specific ethno-political conflicts, such as those mentioned in document CM (2000) 99, but also in the far broader context of relations between different levels of public authority. Specific studies of particular cases may be carried out as part of other work.

In the context of a general approach it is indeed not possible to draw a distinction between "conflictual" and "non-conflictual" situations, since the term conflict has different acceptations, involving greater or lesser degrees of violence. It is moreover also difficult to distinguish ethno-political conflicts from other kinds of conflicts.

The first part of this document will present the general context of the study. Reference will first be made to the principles of the permanence of states and territorial integrity. The main forms of distribution of powers between various tiers of authority and the principles relating to the settlement of disputes under international law will be briefly recalled.

The second part of the document will broach the issues common to all systems involving a number of tiers of authority: distribution of powers, decision-making processes and settlement of disputes between the central state and its entities. The scope for international guarantees will also be discussed.

This study shall examine the solutions as provided by internal constitutional law. Reference shall, however, be briefly made to the principles of international law applicable to conflict resolution.

Part I: General context

A. States' permanent nature/the principle of territorial integrity

The principle of territorial integrity commands very widespread recognition - whether express or tacit - in constitutional law. On the other hand, constitutional law just as comprehensively rules out secession or the redrawing of borders. This should come as no surprise since that branch of

law is the very foundation of the state, which might be deprived of one of its constituent parts if such possibilities were provided for.

In most states this does not preclude changes in borders through constitutional amendments, but, in practice, such reforms are extremely rare. Furthermore, although a number of constitutions guarantee the right to self-determination, the concept excludes secession. What is often being referred to is a state's external self-determination. Where self-determination is envisaged within a state, it is construed in ways compatible with territorial integrity. Hence, although "self-determination of peoples within the *Russian Federation*" is one of the foundations of the federal structure, the same applies to the Federation's integrity as a state[1]. Similarly, the *South African* Constitution provides "the right of the South-African people as a whole to self-determination … does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation"[2], but, as the country's Constitutional Court has held, such self-determination does not comprise any notion of political independence or of separation[3].

In the case of *Northern Ireland*, on the other hand, the possibility of a future transfer of sovereignty has been envisaged and accepted. In the Belfast Accord of 1998, the British and Irish governments recognised the existence of two different national identities in Northern Ireland: British and Irish. The two governments were in agreement on the fact that should a majority in Northern Ireland wish to retain their position in the United Kingdom, this would remain the case, but if in the future a majority wished to be part of a united Ireland, the two governments would give effect to such a wish. Furthermore, institutions for the facilitation and promotion of co-operation between the United Kingdom and Ireland have been created. These are the North-South Ministerial Council, which comprises members of the Irish government and the Northern Ireland Executive, and the British-Irish Council, which represents the British and Irish Governments as well as the regional institutions of Northern Ireland, Scotland and Wales.

As already mentioned, it is conceivable that borders may be changed by a constitutional reform. This was acknowledged by the Supreme Court of *Canada* when, while ruling that Quebec had no right to self-determination or to secede, it held that the existing Canadian constitutional order could not be indifferent to a clear indication, in response to a clear question, by a clear majority of Quebeckers that they no longer wished to remain in Canada.[4] [5] But both such reforms and the question of unilateral secession fall outside the ambit of this study, which is concerned with relations between authorities within the same - internal - legal order, to be distinguished from relations between sovereign states within the international legal order.

For the same reason, this document will not broach the right to self-determination recognised in public international law, nor the links with any constitutional provisions apparently in conflict therewith[6].

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[1] Article 5.3 of the Russian Constitution.
[2] Section 235 of the Constitution.
[3] Bulletin on Constitutional Case-Law, RSA-96-3-020.
[4] Bulletin on Constitutional Case-Law, CAN-1998-3-002.
[5] On the subject of self-determination and secession in constitutional law, see document CDL-INF (2000) 2, adopted by the Commission at its 41st meeting (December 1999).
[6] With regard to self-determination and secession in public international law, see the memorandum to the Political Affairs Committee of the Parliamentary Assembly on this subject (AS/Pol (1996) 24, drawn up in consultation with Mr Severin, rapporteur, by Centrul Pentru Drepturile Omului, Bucharest).

The idea that a conflict can best be solved through division into a number of separate states is not consistent with the real shape of things at the dawn of the 21st century. Today power is increasingly distributed among various tiers of authority - at state level and the levels below and above states - to the point where it may be a question of shared sovereignty. In these circumstances the dichotomy between full sovereignty and total lack of power - if ever there may have been any basis for it - is in any case no longer relevant. The solutions to conflicts lie far more in co-operation between tiers of authority, which can be organised in as many ways as there are different situations. This report aims to determine the framework for such co-operation.

B. Existing types of solution

Constitutional law, in particular regarding instruments and relations between the central state and subordinate entities, has certain distinctive features in each state. Nevertheless, it is possible to identify the following major forms of organisation of public authorities, ranging from the most decentralised to the most centralised.

a. **Confederation**: This term traditionally refers to the system that prevailed in the *United States*, *Germany* and *Switzerland* before they became federal states. It can therefore be perceived as a historical concept, which subsequently led to the establishment of a more powerful central authority. However, the process of European unification has breathed new life into the idea of a confederation. The *European Union* must be regarded as a modern form of confederation, which is highly unified and includes certain genuinely federal elements[7]. It should nonetheless be noted that, so far, no confederation has come into being as a result of the partitioning of an existing state with a federal, or possibly even unitary, system of government. It is consequently difficult to recommend this as a solution - for lack of experience in applying it - although, in theory, an approach along such lines cannot be ruled out[8].

In comparison with the other forms of organisation mentioned below, the distinctive characteristic of a confederation is that its component entities are acknowledged to have international legal personality. However, it is a matter of controversy whether a confederation itself has international legal personality. In other words, a confederation differs from all the other structures referred to in this document in that it is not a state, but its component entities are themselves states enjoying international immediacy[9]. This is perhaps why no confederation has so far been established through a partitioning process[10], as both those in favour of preserving a state's territorial integrity and those seeking autonomy are inclined to discard the solution. Yet, it should not be overlooked that in a genuine compromise no party is ever given full satisfaction, and that the concept of shared sovereignty tends to narrow the difference between a confederation and a federal state. Here too, the European Union and, in particular, the Communities offer a good example; they are often considered to be a unique halfway house between a confederation and a federation[11].

b. **Federal state**: The traditional federal state more often than not came into being as the result of a unification movement or the transformation of a confederation into a federation

[7] Cf. Yves Lejeune, Contemporary concept of confederation in Europe - Lessons drawn from the experience of the European Union, in "The modern concept of confederation", Science and technique of democracy (STD) collection, No. 11, Council of Europe, Strasbourg, 1995, pp.122-142.
[8] Cf. Murray Forsyth, Towards a new concept of confederation, in "The modern concept of confederation", STD No. 11, pp. 59 to 67, 63.
[9] Cf. Lejeune, op. cit, pp. 122 ff.; and Giorgio Malinverni, The classic notions of a confederation and of a federal state, in "The modern concept of confederation", STD No. 11, pp. 39 to 51.
[10] Cf. Malinverni, op. cit., p. 41.
[11] Although Lejeune (op. cit.) regards them more as a confederation.

(examples are the *United States*, *Switzerland*, and *Germany*). Other federal states were founded when former colonies were grouped together (*Canada*, *Australia*). Associative federalism was the rule, as the federal state was not perceived as a means of solving conflicts, except perhaps as part of a gradual unification process leading to ever-closer interdependence, such as that taking place within the European Union. *Belgium*, which between 1970 and 1993 moved from a classic unitary system of government to a regional, and then federal, system, was the first example of dissociative federalism. *Russia* set the seal on this concept following the dissolution of the USSR. Although the USSR, and even the Russian Soviet Federative Socialist Republic, were officially federal in nature, the dominance of the Communist Party, described as "the nucleus of [the] political system"[12], prevented the emergence of any true federalism.

c. **Regional state**: This concept of state is not fundamentally different from the federal state. For that reason this document does not attempt to define the two concepts, but rather uses the terminology specific to national constitutional law. The concept of the regional state has developed above all in *Italy* and *Spain*[13]. In both of those countries, the system of regional government is not the same everywhere for historical reasons, since regions with special statutes were established before a regionalisation policy was applied countrywide. In this respect the process was slower in *Italy*. It is true that the 1947 Constitution made provision, from the outset, for the entire Republic to be divided into regions[14]. However, true regionalisation required the passing of a number of laws, a process which took almost 25 years to complete. The clause of the Constitution providing "Particular forms and conditions of autonomy, as laid down by special statutes adopted by constitutional law, shall be granted to Sicily, Sardinia, Trentino-Alto-Adige, Fruili-Venezia Guilia, and Valle d'Aosta"[15] was nonetheless implemented earlier, and the regions with special statutes enjoy greater autonomy than the others. Heterogeneous regionalisation is also enshrined in the Spanish Constitution. Moreover, upon the adoption of the 1978 Constitution, regionalisation was not the general rule, as the text stipulates that it is solely the territories concerned that may initiate the process towards self-government[16]. To begin with, self-government was primarily intended for the historical communities with specific linguistic characteristics. However, no region constituted an exception, with the result that Spain is now divided into a number of autonomous communities. The system is nonetheless highly asymmetrical. Although there are certain core powers, which, by nature, are the national government's preserve, the autonomous communities may assume jurisdiction in all other matters under their respective statutes[17]. The lack of symmetry consequently results from the diversity of the autonomous communities' statutes, complex legal instruments subject to special drafting procedures, which are ultimately adopted in the form of a national organic law.

As already mentioned, federal states and regional states do not fundamentally differ in nature. A feature common to both systems is the sharing of legislative authority, which is exercised both centrally and by the entities (federated states, regions, autonomous communities). There are therefore legislative, and into the bargain executive, bodies at both levels. This raises the question of the distribution of powers, to which we shall come back later.

The system of devolution applied in the United Kingdom has resulted in a highly advanced notion of decentralisation, which has lead to the creation of a new form of regional state. This

[12] Article 6 of the 1977 Constitution of the USSR.
[13] The concept is construed here in the restrictive sense of states where legislative authority is divided between central government and regional entities, that is to say first and foremost Italy and Spain.
[14] Article 115.
[15] Article 116.
[16] Article 143.2.
[17] Cf. Articles 148 and 149 of the Constitution and Article 150 on delegation of legislative authority.

system is asymmetrical and allows for different powers for Scotland, Wales and Northern Ireland[18].

d. **Specific statutes of autonomy**: The examples of Italy and, above all, Spain show that special autonomous status for certain territories with specific characteristics can go hand in hand with a country-wide system of regional self-government (a regional state). However, self-governing status may be confined to parts of a state's territory, in particular those with specific ethnic or geographical characteristics.

It is possible to cite the following examples of statutes of autonomy in Europe:

- In *Denmark* the Faroe Islands have their own legislature and executive. These islands are not only geographically distant from the rest of the country but also have their own distinct language and history. It should be noted that, although a 1946 referendum showed that a narrow majority of the population was in favour of secession from Denmark, the local parliament (Løgting) elected shortly after that referendum was not pro-secession, and a Home Rule Act was passed in 1948 following negotiations. Under that Act the Faroe Islands were granted greater powers of self-government than before but were kept within Denmark[19]. Greenland (geographically part of America) also has autonomous status.

- The status of the Åland Islands in *Finland* offers one of the best examples of peaceful settlement of a dispute at an international level. Although the question whether the inhabitants of the islands are themselves a separate minority has not been answered, it must be said that the majority of the population concerned is Swedish-speaking and that the Swedish-language population is in a minority in Finland. A majority of the inhabitants were in favour of union with Sweden. A dispute over the islands then arose between Finland and Sweden. This territorial dispute was referred to the League of Nations, which decided in favour of Finland. Even before that settlement an Act on Self-Government had been passed, giving the Åland Islands their own legislative assembly. The final solution agreed upon by Finland and Sweden, and adopted by the League of Nations, confirmed the islands' autonomy. This was subsequently broadened in scope, particularly in linguistic matters; Swedish is the language used in state schools, for instance. The autonomy arrangement is now sometimes regarded as part of customary international law[20].

- In *Portugal* the archipelagos of the Azores and Madeira are autonomous regions with their own political and administrative statutes, which are prepared by the regional legislative assemblies and approved by the Assembly of the Republic. The same procedure applies to amendments of those statutes[21].

More recently, special statutes of autonomy were introduced in two European unitary states, *Moldova* and *Ukraine*.

- In *Moldova* such a statute was conferred on Gagauzia, making it possible to resolve the crisis triggered by the unilateral proclamation of a "Gagauz Republic" in 1990. The Gagauz community is a national minority of Turkish origin and Christian faith. The region's special status is based on a clause of the Constitution which provides that autonomy may be granted,

[18] For Northern Ireland, see also *infra* point B.e.
[19] On this subject see Árni Olafsson, A note on the Faeroe Islands home rule case, in "Local self-government, territorial integrity and protection of minorities", Science and technique of democracy collection, No. 16, Council of Europe, Strasbourg, 1997, pp.103 ff.
[20] See Markku Suksi, The Åland Islands in Finland, in "Local self-government, territorial integrity and protection of minorities", STD No. 16, pp. 20 ff.
[21] Articles 6.2 and 225 ff. of the Constitution.

under an organic law, to places on the left bank of the Dniestr and certain other places in the south of the Republic of Moldova (where Gagauzia is located)[22]. Some geographical limits have therefore been placed on statutes of autonomy (unlike in Spain), but such statutes could be granted to a number of other territories mentioned in the Constitution. A case-by-case approach, resulting in asymmetry between territories, might be envisaged. The statute of Gagauzia was adopted following negotiations between Moldovan and Gagauz representatives. The relevant Act states that Gagauzia is an autonomous territorial unit with special status, constituting the form of self-determination of the Gagauz people and an integral part of the Republic of Moldova[23]. Self-determination is thus construed as leading to autonomy in accordance with the principle of territorial integrity. It should nonetheless be noted that, should Moldova lose the status of an independent state, the Gagauz people would be entitled to external self-determination[24] [25].

- In *Ukraine* it is the Republic of Crimea that enjoys special autonomous status[26]. This territory has a predominantly Russian population and belonged to Russia for part of the Soviet era. Its union with Ukraine was questioned, even officially, and signatures were collected on a petition for Crimea's independence[27]. The situation was in some ways similar to that which led to home rule for the Åland Islands, although it did not give rise to any international settlement. Crimea is now vested with legislative authority within the unitary state of Ukraine.

e. **Powersharing political arrangements.** In some cases, where a political unit contains a number of distinct communities, solutions to ethno-political conflict have been attempted which are not based on a division of the political unit into different entities but rather on the creation of special political arrangements within a single entity to provide for the representation of the distinct communities. A recent example is provided in the institutional arrangements for executive power sharing in *Northern Ireland*, where the population is divided between a majority British unionist and a substantial minority Irish nationalist community. A legislative Assembly is elected using proportional representation. Members of the Assembly are required to designate their identity as nationalist, unionist or other. Key decisions of the Assembly require either the support of a majority, including a majority of both the unionist and nationalist members voting, or a 60% majority overall which includes at least 40% of the unionist and the nationalist members. Such key decisions include election of key office-holders, including the First Minister and Deputy First Minister in the Executive, standing orders and budget allocations, and other issues where a significant minority of Assembly members express concern. Other Ministries in the Executive are allocated to political parties on the basis of the d'Hondt system by reference to the number of seats each party has in the Assembly[28].

f. **Protection of minorities** does not necessarily entail special autonomous status for part of a state's territory. Many states have passed legislation affording protection to minorities without adopting statutes of autonomy. At the same time, federalism, regionalism or statutes of autonomy do not necessarily go hand in hand with the presence of minorities. They may even exist independently of minorities, which may be protected by other separate legislation, as is the case with the Danish, Frisian and Sorb minorities in *Germany*. In particular, a **special status** -

[22] Article 111 of the Constitution.
[23] Section 1 of the Act.
[24] Section 2 of the Act.
[25] Concerning the situation in Gagauzia see Alexei Barbaneagra, The situation in Moldova, in "Local self-government, territorial integrity and protection of minorities", STD No. 16, pp. 174 ff, 175-180.
[26] Articles 134-139 of the Constitution.
[27] On the subject of Crimea see Serhiy Holovaty, Territorial autonomy in Ukraine - the case of Crimea, STD No. 16, pp. 135-150.
[28] For a fuller description of the Northern Ireland institutional arrangements see Brendan O'Leary, The Nature of the British-Irish Agreement, New Left Review 233, 1999.

notably through a system of personal autonomy - may be devised without there being any specific local or self-governing authority[29]. A halfway house solution has been adopted in *Hungary*, where, although there is no system of territorial autonomy, minority councils at local level have a say in all matters of importance to their communities. At national level autonomous bodies representing the minorities are made up of minority spokespersons and of electors designated in places where there is no representative or spokesperson for a given minority[30].

This document will not come back to the above-mentioned methods of protecting minorities - apart from federalism, regionalism or other forms of territorial self-government. That does not mean that attempts to find non-territorial solutions, including the granting of special status to minorities, should be ruled out, particularly in situations of conflict. Where a minority is scattered or its members are not in a majority anywhere, or only in a very small area, this may be the most desirable way of handling the situation. However, the question of protection of minorities in general[31] lies outside the ambit of this study, which focuses on situations in which several tiers of authority are superposed.

C. Principles of international law (overview)

In cases of ethno-political conflict, just as in any other situation, States must respect and enforce in good faith obligations flowing from international law, particularly with respect to disputes with other States. Put more precisely, they must respect the three core principles of the international system as established by the Charter of the United Nations: the principle that international disputes are to be settled by exclusively peaceful means (Article 2, paragraph 3); that of refraining from the threat or use of force in international relations (Article 2, paragraph 4); and finally the obligation to conform to resolutions of the Security Council taken within the context of collective security, by virtue of Chapter VII of the United Nations Charter. In their mutual relations, States must also respect the rules of neighbourly relations[32]. These principles are in particular to be applied when a dispute involves a national minority. It would be beyond the scope of this study, which concerns the settlement of ethno-political conflicts under internal constitutional law, to undertake a more thorough analysis of this question.

Part II: Systems involving a number of tiers of authority: issues to be addressed

The second part of this document will be devoted to a number of general issues relevant to all situations in which there are a number of tiers of authority. The three main themes to be broached are the distribution of powers, decision-making processes and settlement of disputes between the *centre* (confederation, federal state, central government) and the *entities* (states members of a confederation, federated states, regions or autonomous communities). Distribution of powers is a question that arises in all states, but is of particular importance in the cases with which we are concerned here, where legislative, or at least rule-making, powers are shared. On the other hand, participation in the decision-making process primarily concerns confederate or

[29] Cf. the relevant article of the draft Protocol to the European Convention on Human Rights appended to Parliamentary Assembly Recommendation 1201 and the Venice Commission's opinion on its interpretation, annual activities report for 1996, pp. 93 ff, 97-98.

[30] On this subject see János Báthory, Local and national minority self-government in Hungary, in STD No. 16, pp. 213 ff.

[31] For a study of this question see "The protection of minorities", Collected texts of the European Commission for Democracy through Law, Science and Technique of Democracy collection, No. 9, Council of Europe, Strasbourg, 1994.

[32] On this subject see Law and Foreign Policy, Science and Technique of Democracy, vol. 24, Strasbourg: Council of Europe 1998, pp. 10-11.

federal systems and is of less relevance to specific statutes of autonomy. Lastly, we shall consider the scope for international guarantees.

All of the systems studied are subject to the fundamental principles of *superposition* and *autonomy*. Firstly, the central state's law takes precedence over that of the entities (the principle of superposition). Secondly, the entities enjoy a certain degree of authority to organise themselves as they see fit (the principle of autonomy). In confederations - as is the case in the *European Union* - the emphasis is on autonomy, whereas as one moves on to federal states, then regional states or states granting certain areas specific statutes of autonomy the scales are tipped further and further towards superposition[33]. For example, states members of a federation adopt their own constitutions within the framework of federal law. Conversely, the statutes of regions or autonomous communities usually take the form of laws passed by the central state, even if they are first adopted by an organ of the entity concerned. For instance, in *Italy* the special statutes are adopted as constitutional laws[34], whereas the other regions without special statutes have no basic law. The statutes of the Spanish autonomous communities are ultimately enacted as an organic law[35]. The statute of the Åland Islands (*Finland*) is of the nature of a constitutional law (Act of Exception to the Constitution)[36]. The autonomous status of Gagauzia (*Moldova*) has its basis in an organic law[37]. The Autonomous Republic of Crimea adopts its own constitution, but subject to approval by the parliament (Verkhovna Rada) of *Ukraine*[38]. The powers of the autonomous regions of the Faeroe Islands and Greenland (*Denmark*) are guaranteed under Home Rule Acts, approved by the provincial assemblies and then by the national parliament, whereas the statutes of the Azores and Madeira (*Portugal*) are prepared by the regional legislative assemblies and approved by the Assembly of the Republic[39].

A. Distribution of powers[40]

The details of the distribution of powers are peculiar to each state, and we shall consequently not deal with them here. A solution adopted in one state is not transposable elsewhere as it stands. On the other hand, it is possible to identify a number of general practices in this area.

1. The basis and method of distribution of powers

a. Basis of distribution of powers

The first question that arises is the legal basis of the distribution of powers. More often than not it is the *Constitution.*

In *Russia* the Constitution nonetheless empowers the Russian Federation to give extremely broad scope to its activities in areas where the Federation and the subjects of the Federation have joint jurisdiction, since the subjects solely retain responsibility for matters not governed by federal legislation[41]. Certain subjects have therefore negotiated agreements with the Federation defining their respective powers and areas of responsibility. In addition, the federal treaty of 1992 - or the

[33] Cf. Malinverni, op. cit., p. 46.
[34] Article 116 of the Italian Constitution.
[35] Articles 81.1 and 145-146 of the Constitution.
[36] Suksi, op. cit., in particular p. 31.
[37] Cf. Article 111 of the Constitution.
[38] Article 135.1 of the Constitution.
[39] Article 226 of the Constitution.
[40] For a more detailed discussion of this question see "Federal and regional states", Science and Technique of Democracy collection, No. 19, Council of Europe, Strasbourg, 1997.
[41] Articles 71-73 of the Constitution, in particular Article 72 on joint jurisdiction.

part thereof not at variance with the Constitution - is also applicable in matters of distribution of powers[42].

In *Italy* the Constitution lists those matters coming within the jurisdiction of the ordinary-statute regions, whereas the specific powers of the regions with special statutes are set out in the relevant constitutional laws[43]. In *Spain*, however, it is primarily the statutes of autonomy, ultimately enacted in the form of a national organic law, which determine the powers of the autonomous communities. Again, where special statutes of autonomy exist, the Constitution frequently defines the powers of the autonomous regions, as in *Portugal*[44]and *Ukraine*[45]. The situation is more or less the same in *Finland*, since the Act conferring self-governing status on the province of Åland ranks as a constitutional law. On the other hand, in *Denmark* the powers of the Faeroe Islands and Greenland are determined in the specific Home Rule Acts. The same applies to the organic law on Gagauzia in *Moldova*.

b. Method of distribution of powers - residual power

In *federal states* the Constitution most often grants the entities *residual power*, in that those powers not expressly allocated to the federal state under the Constitution remain vested in the entities (examples are *Germany*[46], *Russia*,[47] *Switzerland*[48] and the *United States*[49]). In the old confederations the member states also enjoyed residual power, as is the case today in the *European Union*, in particular at Community level[50].

In *Belgium*, the principle of residual power for the communities and regions will come into force only after a further constitutional reform, with the result that it is the central state that currently enjoys residual power[51].

A system based on two lists of powers (of the central state and of the entities) is also conceivable. For instance, in *Canada* the Constitution contains both a list of federal powers and a list of the provinces' powers. However, such a system can function only where there is residual power, as it is not possible for the constitution-makers to foresee every scenario and, given the rigid nature of constitutions, to adapt the text to every new situation. Therefore, under the Canadian system residual power in principle belongs to the central state, but this rule is qualified by the fact that responsibility for local and private matters is conferred on the provinces[52].

Preservation of the central state's residual power in *Belgium* and *Canada* does not alter the fact that in those countries the entities enjoy more extensive powers than, for example, in *Austria*, a state where residual power is in fact vested in the entities. *The method of distribution of powers therefore does not affect their scope*. What is more, the balance of powers between the centre and the entities is affected not only by the number of powers, but also by the nature of those powers and how they are construed. In the *United States*, for instance, an inflexible constitution

[42] See Article 11.3 of the Constitution.
[43] Articles 117 and 118 of the Constitution.
[44] Articles 227 and 228 of the Constitution.
[45] Articles 137 and 138 of the Constitution.
[46] Article 70 of the Constitution.
[47] Article 73 of the Constitution.
[48] Article 3 of the Constitution.
[49] Tenth amendment to the Constitution.
[50] Article 5.1 of the Treaty establishing the European Community.
[51] Article 35 of the Constitution.
[52] Articles 91 ff. of the constitutional law of 1867.

goes hand in hand with the very broad interpretation given to the clauses conferring various powers on the Union.

Conversely, in *regional states* residual power lies with central government. The *Spanish* system is a particularly complex one. The Constitution may seem to contain two lists of powers - those that may be allocated to the autonomous communities and those reserved for central government[53] - but in actual fact it is the statutes of autonomy, ultimately adopted in the form of an organic law, which determine the scope of each entity's powers. At the very most, it might be said that certain powers are, by nature, the exclusive preserve of central government. The central government retains those powers not conferred on the autonomous community by its statute. In *Italy* the powers of the special-statute regions are laid down in their respective statutes, which take the form of constitutional laws[54]. The Constitution contains an exhaustive list of the powers of the ordinary regions[55].

The system of distribution of powers within the context of devolution in the *United Kingdom* is of an asymmetrical nature. In the case of Scotland, certain subjects are specifically devolved to the Scottish parliament, whilst others are reserved for Westminster, and issues that are not the subject of a specific rule fall to the Scottish parliament; Scotland thus retains residual competence. This is in contrast with Wales, where the Parliament may only adopt subordinate legislation in such areas as have been specifically devolved.

A fortiori, in unitary states, where all powers in principle belong to the central government but certain entities are granted special statutes, the entities only enjoy the powers laid down in those statutes.

2. Symmetry or asymmetry in the distribution of powers

Distribution of powers among several tiers of authority does not mean that each entity enjoys exactly the same powers. This goes without saying in states, which grant special self-governing status to certain of their entities, as the other entities do not enjoy the same autonomy. The regional states of Europe are also based on a degree of asymmetry in the distribution of powers. *Italy* has regions with a special status peculiar to each region concerned[56]. *Spain* has as many specific statutes as it has regions. On the other hand, federal states are usually based on a symmetric system of distribution of powers (examples are *Austria*, *Bosnia and Herzegovina*, *Canada*, *Germany*, *Switzerland* and the *United States*). The *Russian* system differs, however, since, on one hand, specific treaties between the subjects and the federation lead to a degree of asymmetry, and, on the other, there are different categories of subjects of the federation (republics, territories, regions, autonomous districts), some of which are included in others[57].

3. The various types of powers

Each state deals differently with the distribution of powers between central government and the entities. It is nonetheless possible to define a number of general types of powers[58]:

- *Exclusive* powers vested in the central state, with a corresponding lack of power at the level of the entities.

[53] Articles 148 and 149 of the Constitution.
[54] Article 116 of the Constitution.
[55] Article 117.
[56] Articles 116 and 117 previously cited.
[57] Article 65 of the Constitution.
[58] For more details see "Federal and regional states", STD No. 19 (previously cited).

- *Concurrent* powers (of the central state and the entities): the central state may exhaust all aspects of a matter; the entities retain the power to legislate only in so far as the central state has not done so.

- The central state's power to adopt *framework laws*, matched by the entities' power to deal with matters of detail. Framework laws contain general principles, whereas the entities have jurisdiction as regards points of detail and execution.

- *Parallel* powers (of the central state and the entities): a task may be performed simultaneously by the central state and the entities, each in its respective field. The most common example concerns taxation in states such as *Argentina*, *Belgium*, *Canada* and *Switzerland*.

- *Exclusive* powers vested in the entities in fields where the central state has no jurisdiction.

4. Common rules with regard to powers?

Powers are distributed between the central state and the entities as is deemed most fitting under each legal system. Consequently, although some similarities may be observed, diversity is the rule in such matters. However, although there is no binding rule under international law, where a genuine state - and not merely a confederation - exists, a number of spheres (almost) always come within the jurisdiction of the central state:

a. In domestic law

- Defence
- Monetary policy
- Intellectual property
- Bankruptcy
- Weights and measures
- Customs

This is of course without prejudice to the powers of the European Union.

Moreover, private law, criminal law and social security are usually - at least for the most part - matters for the central state. It should nonetheless be noted that some federal states, such as the *United States* and *Canada*, do not have a unified system of private law.

b. International relations

Foreign policy is always, wholly or partly, within the jurisdiction of the central state. The most advantageous situation from the entities' point of view is parallelism of domestic and international powers, where the entities and the central state have substantive jurisdiction to conclude international treaties in the same matters as come within their internal legislative authority, subject to the provisions of special clauses conferring treaty-making powers. This is the practice in *Belgium*, for instance[59]. However, more often than not the entities have fewer powers at an international level than at the domestic level. In addition, even where the entities have treaty-making authority in given matters, treaties are often concluded through the

[59] Article 167 of the Constitution.

intermediary of central government (*Switzerland*[60]) or subject to its approval (*Germany*, *Austria*[61])[62].

B. Participation by the entities in the decision-making process of the central state

Distribution of powers is not the only criterion whereby the entities' role within a state can be gauged. The entities may be recognised as having the status of *organs of the central state* and thus participate directly in the constitutional or - more rarely - legislative process. They may also participate indirectly in this process via a second chamber, which represents them. Generally speaking, participation by the entities in the decision-making process of the central state is mostly an established principle in federal states, and far less frequent in regional states or unitary states with autonomous entities.

1. Entities as organs of the central state: direct participation

In many federal states it is above all at the *constitutional level* that the entities participate in the decision-making process. For example, in *Russia*, constitutional amendments come into force only after they have been approved by the legislative authorities of at least two-thirds of the subjects of the Federation[63]. In the *United States* the agreement of the legislative authorities of three-quarters of the states is required, and a constitutional reform may be proposed by a convention convened at the request of the legislatures of two-thirds of the states[64]. In *Canada* such amendments require the approval of at least seven of the ten provinces representing at least 50% of the population; the most important rules can even be revised only with the provinces' unanimous consent[65]. In Switzerland federal constitution-making authority is conferred on the federal electorate and the cantons. Revisions of the constitution must therefore be approved by a majority of the federal electorate and a majority of the cantons[66]; however, the system is not absolutely symmetrical as the votes of six cantons only count as half a vote.

In states that do not follow the federal pattern direct participation is far more limited. For example, in *Italy* five regional councils may request a constitutional referendum on a constitutional law passed by parliament without a two-thirds majority[67].

Where specific statutes of autonomy exist, these may have to be approved by the relevant autonomous entity. An autonomous entity may also be empowered to take decisions concerning legislation of direct relevance to it: in *Finland* the province of Åland participates in any revision of the constitutional law on its self-governing status and of the Act governing the purchase of real property located on the Åland Islands[68].

At the *legislative* level, a referendum must be called at the request of five regions, in the case of *Italy*[69], or of eight cantons, in that of *Switzerland*[70](where referendums may also relate to certain

[60] Article 56.3 of the Constitution.
[61] Article 16.2 of the Constitution.
[62] For further details regarding the distribution of powers in the field of international relations see the report on "Federated and regional entities and international treaties" adopted by the Commission at its 41st meeting, CDL-INF (2000) 3.
[63] Article 136 of the Constitution.
[64] Article V of the Constitution.
[65] Articles 38 ff of the constitutional law of 1982.
[66] Article 195 of the Constitution.
[67] Article 138 of the Constitution.
[68] Suksi, op. cit., pp. 30 and 31.
[69] Article 75 of the Constitution.
[70] Article 141 of the Constitution.

international treaties). The right of initiative in legislative or constitutional matters exists, for instance, in those two states[71], in *Russia*[72] and in *Spain*[73], but is limited in scope, as the legislature is free to decide whether it wishes to act upon such an initiative.

2. Indirect participation

In a number of federal and regional states the second chamber of parliament may be considered to represent the entities.

However, the closeness of the link between the second chamber and the entities varies. It is particularly close in *Germany*, where the Bundesrat is made up of members of the Länder governments, which have authority for their appointment and dismissal[74]. It is less so where members of the second chamber are elected by the entities' parliaments, as in the *Austrian* Bundesrat[75]. *Russia* comes halfway between the two, since the Constitution provides "Two deputies from each subject of the Federation shall be members of the Federation Council: one from the representative body and one from the executive body of state authority"[76]. Lastly, the fact that members of the *Swiss* Council of States and the *United States* Senate[77] are elected directly by the people also tends to mean that they are not genuine representatives of the entities. In *Italy*, a regional state, the Senate is also elected on a regional basis[78].

The existence of a second chamber representing the entities does not necessarily entail their *equal* representation. Representation of the entities in the second chamber is equal - two members per federated state - in *Russia*[79], the *United States*[80] and *Switzerland*[81] (except for the six cantons which elect only one member of the Council of States instead of two). In *Austria*[82] a Land's number of representatives in the Bundesrat is in principle proportional to its population. In the *Italian* Senate allocation of seats among the regions is also basically proportional to the population. In *Germany*[83] the population is taken into account when allocating seats, but not on a proportional basis. Where the second chamber does not represent the entities, the number of members originating from each entity is of course not the same and there can be no question of equal representation.

The powers of the second chamber, where it represents the entities, also vary. *Switzerland*, for example, has a perfectly bicameral system in which the two chambers enjoy the same powers[84] (except at joint meetings of the two councils of the Federal Assembly, when the 46 members of the Council of States carry less weight than the 200 members of the National Council). In *Austria*[85], *Germany*[86] and *Russia*[87], however, the second chamber has fewer powers than the first.

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[71] Article 160.2 of the Swiss Constitution: Article 71.1 of the Italian Constitution.
[72] Article 104.1 of the Constitution.
[73] Article 87.2 of the Constitution.
[74] Article 51.1 of the Constitution.
[75] Article 35 of the Constitution.
[76] Article 95.2.
[77] Amendment XVII to the Constitution.
[78] Article 57.1 of the Constitution.
[79] Article 95.2 of the Constitution.
[80] Article I, section 3 of the Constitution.
[81] Article 150 of the Constitution.
[82] Article 34 of the Constitution.
[83] Article 51.2 of the Constitution.
[84] Article 148.2 of the Constitution.
[85] Articles 42 ff. of the Constitution.
[86] Articles 76 ff. of the Constitution.
[87] Articles 102 ff. of the Constitution.

In the *United States*[88] the Senate is vested with powers in certain fields, such as ratifying treaties and confirming the appointment of certain officials, which the House of Representatives does not possess[89].

In *Belgium* there is no real indirect participation of the entities in the decision-making process of the central state. The emphasis is more on linguistic parity, which therefore concerns the different *linguistic groups* but not the communities or regions. In very many instances where community or regional institutions or powers are affected, the Constitution requires the passing of so-called "special" laws, which must be adopted by a majority in each linguistic group[90]. This is therefore a somewhat different situation, where it is for groups - rather than federated or regional entities - to participate in the decision-making process.

It is conceivable that indirect participation of the entities in the decision-making process might take place not only in the legislature, but also in *the executive and the judiciary*.

As regards the *executive*, there are no real examples of such participation, apart from in the *European Union*. The EU Council, which combines features of both legislative and executive powers, is made up of ministers of the member states[91]. It should be noted that the *European Union* is more of the nature of a confederation than a federation. In *Belgium* linguistic parity is even more strictly applied in the government than in parliament, since "With the possible exception of the Prime Minister, the Council of Ministers includes as many French-speaking members as Dutch-speaking members"[92].

Lastly, with regard to the judiciary, the linguistic parity rule in *Belgium* also applies to membership of the Court of Cassation, the Conseil d'Etat (the highest ordinary courts) and the Court of Arbitration (constitutional court). In *Switzerland*, the various official languages, and therefore the linguistic groups, must be represented within the Federal Court[93], but this is not really linked to the federation's structure, which is not based on any linguistic criterion.

As can be seen from the above paragraphs, the *symmetry* or *asymmetry* question arises not only with regard to the distribution of powers, but also concerning the entities' participation in the decision-making process of the central state, whether directly or - above all - indirectly via their representation on central bodies.

C. Settlement of disputes

In federal or regional states a *judicial* mechanism is established to deal with disputes between the central state and the entities. In this way not only subjective but also objective impartiality is guaranteed. It is indeed necessary to ensure that a political body, moreover one belonging to the central state, does not have the final word in such disputes.

In states that have a constitutional court, that court has jurisdiction to decide such disputes. This is the case, for instance, in *Germany*, where the Federal Constitutional Court gives decisions, inter alia, "in case of disagreement or doubt as to the formal and substantive compatibility of federal or Land legislation with this Basic Law or as to the compatibility of Land legislation with

[88] Regarding legislative procedure in general, see Article I section 7 of the Constitution; regarding powers to ratify treaties and appoint senior officials, see Article II section 2.2 of the Constitution.
[89] For further details see Federal and regional states, STD No. 19, pp. 50 ff.
[90] See, for example, Articles 4.3, 115.1, 117.2, 121.1 and 123 of the Constitution.
[91] Article 203 of the Treaty establishing the European Community.
[92] Article 99.2 of the Constitution.
[93] Article 189.4 of the Constitution.

other federal legislation, at the request of the federal government, a Land government …" and "in case of disagreement over the rights and obligations of the Federation and the Länder, particularly concerning the implementation of federal legislation by the Länder and the exercise of federal supervision"[94]. In *Austria* the Constitutional Court gives decisions in "disputes as to jurisdiction between the Länder or between a Land and the federation"; "on an application from the federal government or a Land government, the Constitutional Court also determines whether a legislative or executive measure comes within the jurisdiction of the federation or the Länder."[95] The *Belgian* Constitution provides that the Court of Arbitration has authority, in particular on an application from the federal government or a community or regional government, to repeal legislation passed by the central state or its entities on the ground that it violates "rules laid down in the Constitution or pursuant thereto so as to determine the respective responsibilities of the state, the communities and the regions"[96]. In *Bosnia and Herzegovina* "The Constitutional Court has exclusive jurisdiction to decide any dispute that arises under the Constitution … between Bosnia and Herzegovina and an Entity or Entities…"[97]. The Constitutional Court of the *Russian Federation* resolves disputes as to jurisdiction between state bodies of the Russian Federation and state bodies of the subjects of the Federation[98].

Similar rules exist in regional states. In *Spain* the Constitutional Court resolves disputes as to jurisdiction between the state and the autonomous communities, and the central government may challenge before that court any decisions taken by autonomous community bodies[99]. In *Italy* the Constitutional Court deals with disputes as to jurisdiction between state authorities and regional authorities[100].

In some federal states where there is no concentrated form of constitutional review it is for the Supreme Court to rule, as sole instance, on legal disputes between the central state and the entities. This applies, for example, to the *United States*[101]. In *Switzerland* the Federal Court deals with disputes between the Confederation and the cantons, but has no jurisdiction to review the constitutionality of federal laws[102].

Conversely, in *Canada* all of the ordinary courts may give decisions concerning questions of constitutionality. The Supreme Court exercises appellate jurisdiction[103], except in cases where an advisory opinion is requested from it by the Governor in Council[104].

Judicial means of settling disputes, by means of a Constitutional Court or another equivalent court, also exist where specific statutes of autonomy have been granted. In *Ukraine* various national bodies may challenge the constitutionality of acts of the Verkhovna Rada of Crimea before the Constitutional Court, and the Verkhovna Rada of Crimea may do likewise in respect of national laws and regulations[105]. In *Portugal* the national authorities may refer legislation passed by the autonomous regions to the Constitutional Court for prior constitutional review[106];

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[94] Article 93.1 of the Constitution.
[95] Articles 138.1.c and 138.2 of the Constitution.
[96] Section 1 (1) of the special Act on the Court of Arbitration; also see section 2.
[97] Article VI.3.a of the Constitution.
[98] Article 125.3.b of the Constitution.
[99] Articles 161.1.c and 161.2 of the Constitution.
[100] Article 134.2 of the Constitution.
[101] Under Article III section 2 (1) and (2) of the Constitution the Supreme Court has jurisdiction in disputes to which the United States are a party and has original jurisdiction in all cases in which a state is a party.
[102] Articles 189.2 and 190 of the Constitution.
[103] See, in particular, section 35.1 of the Supreme Court Act.
[104] Section 53.1 of the Supreme Court Act.
[105] Article 150 of the Constitution.
[106] Article 278.2 of the Constitution.

although the same avenue is not open to the autonomous regions in respect of national legislation, substantive constitutional review of such legislation is always possible[107]. A novel solution has been found in the case of Greenland (*Denmark*): disputes over the respective responsibilities of the national and the regional authorities are brought before a body comprising two government-appointed members, two members appointed by the regional authorities and three judges of the Supreme Court appointed by its President. If the four persons appointed by the national and regional authorities reach an agreement, the dispute is settled. Failing this, the matter is decided by the three judges of the Supreme Court[108]. The first stage of this procedure resembles an arbitration arrangement.

The *European Union*, which is halfway between a confederation and a federal state, also has its own mechanisms for settling disputes between the Communities and the member states before the Court of Justice (*e.g.* actions brought by the Community against member states which it deems to have failed to fulfil a treaty obligation[109]; actions brought by member states to challenge acts adopted by the European institutions[110]).

D. International guarantees

Although federalism, regionalism and statutes of autonomy are basically matters for domestic law, they may be covered by international guarantees. Generally speaking, such guarantees may be based on treaties for the protection of minorities. It is true that multilateral treaties do not impose a statute of autonomy, let alone a regional or federal structure. However, federalism, regionalism or statutes of autonomy constitute one means of ensuring that the domestic legal order embodies the obligations resulting from those treaties. This may concern both multilateral treaties such as the Framework Convention for the Protection of National Minorities[111] and bilateral treaties aimed at solving the situation of a specific minority[112].

The most typical example of an international guarantee is that enjoyed by the *Åland Islands*. Soon after the Finnish declaration of independence in 1917, a majority of the electorate in the islands signed a petition calling for their union with Sweden. Shortly thereafter, a dispute over the islands arose between Finland and Sweden. A further petition-based campaign for union with Sweden followed. The territorial dispute was brought before the League of Nations, which settled it in Finland's favour on condition that guarantees were given, with the aim, inter alia, of ensuring the islanders' prosperity and well-being, and measures were taken to demilitarise and neutralise the islands. The final solution consisted in an agreement between Sweden and Finland, submitted to the Council of the League of Nations, which provided that the Council would supervise application of the guarantees and might refer to the Permanent Court of International Justice any complaint of a legal nature from the Landsting (parliament) of Åland concerning the guarantees. Under the agreement a number of provisions were to be added to the Act on self-government of the Åland Islands; these concerned use of Swedish as the language of instruction in schools, the purchase of real property and the introduction of a five-year residence requirement for entitlement to vote in municipal and provincial elections, etc.[113].

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[107] Article 280 of the Constitution.
[108] Section 18 of the Home Rule Act.
[109] Article 226 of the Treaty establishing the European Community.
[110] Article 230 of the Treaty establishing the European Community.
[111] ETS No. 157.
[112] Concerning the protection of minorities under international treaties see "The protection of minorities", STD No. 9, p. 52 ff.
[113] Suksi, op. cit.

In *Italy* the conclusion of the De Gasperi-Gruber agreement with Austria in 1946[114] led to the creation of the autonomous region of Trentino-Alto-Adige and the granting of special rights (including legislative powers) to the province of Bolzano, where the majority of the population is German-speaking.

The Dayton Agreements for peace in Bosnia and Herzegovina, which ended the armed conflict in that country, were concluded between Bosnia and Herzegovina, Croatia and Yugoslavia. They include, as an annex, the Constitution of Bosnia and Herzegovina, which provides for a complex balancing mechanism between the two entities, the Federation of Bosnia and Herzegovina and the Republika Srpska, and the various peoples present in the territory. International organisations are also involved, in particular NATO with regard to the military aspects of the peace settlement[115], and the Office of the High Representative, an ad hoc institution, concerning its civilian aspects[116].

Lastly, although it merely offers a transitional solution, Security Council Resolution 1244 takes an original approach, in that it gives the international community real powers in respect of the territory of Kosovo. Generally speaking, the international community has had a greater conflict-solving role in recent years, which would seem to point towards a long-term trend.

Conclusion

The detailed solutions to the various questions which arise when powers are distributed among different tiers of state authority are specific to each individual case. The questions, however, are virtually the same. This report has shown that statutes of autonomy, regionalism, federalism, and even confederation systems, not forgetting rules on the protection of minorities, can be reconciled with respect for territorial integrity. Where a number of tiers of authority co-exist it is necessary to determine the distribution of powers - to decide, firstly, the basis for that distribution and where residual power will lie and, secondly, the different types of powers (exclusive, concurrent, power to pass framework laws, etc.), or again whether distribution of powers will be symmetrical. Another question is whether the entities will participate - directly or indirectly (for instance through a second chamber of parliament) - in the decision-making process of the central state. Here too, should a symmetrical or asymmetrical approach be taken? Yet another important point is the means of settling disputes between the central state and the entities (in principle judicial or arbitral in nature). Lastly, among the solutions to situations of conflict there is room for international guarantees.

[114] See The Protection of minorities, STD No. 9, pp. 182 and 183, and the report by Sergio Bartole entitled "Federalism and protection of minorities - regional aspects in Italy" in the same volume, pp. 387 ff.
[115] Annex 1A to the Dayton Agreements.
[116] Annex 10 to the Dayton Agreements.