

# FEDERALISM: TRAGIC COMPROMISE AND CONFLICTS\*

*Federalismo: compromiso trágico y conflictos*

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## **Abstract**

The internal balance of power of federal orders is a major theme in Kelsen's constitutional thought. His theory of federal conflicts is indebted both to the achievements of his inquiries into legal theory and to his direct involvement in constitutional policy debates in the 1920s and 1930s. In so doing, he took a strong stance at the time of the Prussian coup, a major constitutional crisis in whose handling Carl Schmitt also played a significant role. In my essay I will build on Paolo Carrozza's analysis of Kelsen's contribution to the constitutional theory of federations. My goal is to make some points on its relevance for a proper understanding of the most recent developments in federal systems, including the aftermath of secession crises in Europe.

## **Keywords**

Federalism; Constitutional Law; Kelsen; secession.

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### ***Resumen***

El equilibrio interno de poder de las órdenes federales es un tema importante en el pensamiento constitucional de Kelsen. Su teoría de los conflictos federales está en deuda tanto con los logros de sus investigaciones sobre la teoría del derecho como con su participación directa en los debates de política constitucional en los años veinte y treinta. Al hacerlo, adoptó una postura firme en el momento del golpe prusiano, una importante crisis constitucional en cuya gestión Carl Schmitt también desempeñó un papel importante. En mi ensayo, me basaré en el análisis de Paolo Carrozza sobre la contribución de Kelsen a la teoría constitucional de las federaciones. Se trata de resaltar su relevancia para una comprensión adecuada de los desarrollos más recientes en los sistemas federales, incluidas las consecuencias de las crisis secesionistas en Europa.

### ***Palabras clave***

Federalismo; Derecho constitucional; Kelsen; secesión.

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**SUMARIO: I. INTRODUCCION. II. FEDERALISMO AND TRAGIC COMPROMISE. III. HOMOGENEITY CLAUSES AND CONSTITUTIONAL HOMOGENEITY IN FEDERAL ORDERS. IV. EXISTENTIAL CONFLICTS IN FEDERAL ORDERS. V. CONCLUDING REMARKS.**

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## I. INTRODUCTION

In assessing the significance of Hans Kelsen's contribution to constitutional law scholarship, Paolo Carrozza repeatedly mentions federalism<sup>1</sup>. Carrozza hints at three aspects of Kelsen's thought that are of interest in this respect: they have to do both with Kelsen's work as an academic and with his participation in the drafting of the Austrian Federal Constitutional Law (*Bundes-Verfassungsgesetz*) of 1920. First, the emphasis put by Kelsen on a value-free notion of constitution is probably indebted to the peculiar conditions which followed the collapse of the Austro-Hungarian dual monarchy and led to the establishment of an Austrian Republic as a result of compromise between the Socialist and Catholic parties (not to mention the *freiheitlich*, All-German camp). The federal structure of the Austrian Republic was part of this compromise. Second, the very origin of judicial review of legislation and the establishment of one of the first constitutional courts in Continental Europe did not stem from the conception of the Constitution as higher law but, rather, from the federal structure of the Austrian Republic: these innovations were seen as instrumental in providing a "solution of federal litigation", with the Court acting "as an arbiter of federal litigation in order to neutralize political conflicts"<sup>2</sup>. Carrozza builds on Alessandro Pizzorusso's comparative analyses<sup>3</sup> and highlights the persistent influence of the tradition of *Staatsgerichtsbarkeit* in Central Europe by the time the Austrian Federal Constitutional Law was being drafted. Finally, Carrozza looks into the relevance of Kelsen's thought, most notably of the *Stufenbau* theory, for a proper understanding of the multilevel hypothesis. On a different note, Carrozza's works on federalism pay great attention to the formal and informal links between the institutional layers of federal and regional orders, the coexistence of legal and

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<sup>1</sup> Paolo Carrozza, «Kelsen and Contemporary Constitutionalism: The Continued Presence of Kelsenian Themes», in this issue.

<sup>2</sup> See also Beniamino Caravita, *Corte "giudice a quo" e introduzione del giudizio sulle leggi*, I, *La Corte costituzionale austriaca*, (Padova: Cedam, 1985), 39.

<sup>3</sup> See Alessandro Pizzorusso, «Giustizia costituzionale (dir. comp.)», in *Enciclopedia del diritto*, Annali I (Milano: Giuffrè, 2007), 678-679.

political safeguards of federalism, and the difficulty of elaborating reliable classifications of composite constitutional orders<sup>4</sup>.

This paper focuses on the nature of the constitutional compromise underlying federalism and the possible conceptual framework for existential conflicts within federal jurisdictions.

## II. FEDERALISM AND TRAGIC COMPROMISE

Some of the most important analyses of federalism are marked by a distinctively optimistic tone. As improper generalisation is not desirable, Elazar's interpretation of federalism can be cited as a paradigmatic example: federalism moves from a realistic view of the human nature but is also marked by a genuine confidence in the possibility of its capacity to reconcile quite diverging elements and to foster further advances:

«Federalism tries to take people as they are “warts and all”, in Abraham Lincoln's felicitous phrase assuming humanity to have the capacity for self-government but the weaknesses that make all human exercise of power potentially dangerous. So the first task of federalism is to harmonize human capacity with human weakness, to create institutions and processes that enable people to exercise their capacity for self-government to the maximum and even grow in that capacity. At the same time federalism attempts to prevent the abuse of power derived from inherent deficiencies in human nature and, wherever possible, direct the results of those deficiencies to useful ends»<sup>5</sup>.

Similarly, an optimistic tone can be detected in Elazar's adaptation of covenant to federalism<sup>6</sup>.

However, very different views of the significance of federalism can also be found: they argue that more often than not the decision to adopt a federal system of government is the hardly desirable product of irreconcilable divergence:

«consociation, decentralization, and democracy can all be plausibly viewed as part of the effort to achieve political optimality under particular sets of circumstances. Their creation and elaboration serve as positive

<sup>4</sup> See Paolo Carrozza, «Principio di collaborazione e sistema delle garanzie procedurali (la via italiana al regionalismo cooperativo)», *le Regioni* 17, n° 2 (1989): 473-509; id., «I rapporti centro-periferia: federalismi, regionalismi e autonomie», in Paolo Carrozza, Alfonso Di Giovine and Giuseppe Franco Ferrari (eds), *Diritto costituzionale comparato* (Roma-Bari: Laterza, 2009), 761-818.

<sup>5</sup> Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987), 86.

<sup>6</sup> See Michael Burgess, *In Search of the Federal Spirit: New Theoretical and Empirical Perspectives in Comparative Federalism* (Oxford: Oxford University Press, 2012), 203.

steps towards the achievement of this much-desired goal. Federalism, in contrast, belongs to a world where there are no optimal solutions, where conflicts are irreconcilable, where political conditions are more likely to get worse than better. It is a grim expedient that is adopted in grim circumstances, an acknowledgment that choices must be made among undesirable alternatives. The instinct to conflate it with other features of government is understandable, for these optimistic strategies obscure the tragic character of federal solutions and provide them with a patina of optimality and optimism<sup>7</sup>.

Under this perspective, the notion of tragedy should be understood in its classic meaning, pointing at contradictions for which there are no viable solutions. Federalising processes both in the 19<sup>th</sup> and the 20<sup>th</sup> centuries can be interpreted in light of a tragic conceptual framework. A prime example is the establishment of Canada as a reluctant federation under the British North America Act in 1867. Also because of the events and disputes that had led to the American Civil War, the Canadian Fathers of Confederation did not hold in high regard the federal model of their southern neighbour. Moreover, their main goal was to create a system of government «similar in Principle to that of the United Kingdom», as the Preamble to the BNA reads. In this line, the adoption of federalism was the result of the need to accommodate the claims of the French-speaking community in what is today the Province of Quebec. In its landmark *Reference re Secession of Quebec*, the Canadian Supreme Court explicitly addressed this distinctive character of the constitutional settlement of 1867<sup>8</sup>. At the same time, the Court highlighted that federalism «enable[es] citizens to participate concurrently in differently collectivities and [to pursue] goals at both levels of government»<sup>9</sup>.

Similarly, the fact that five out of the twenty Italian regions are granted special status (*Regioni a statuto speciale*) should be explained having in mind the legal and political scenario in the founding years of the Italian Republic, amid military defeat, secession attempts and pressure from the neighbouring countries<sup>10</sup>. In theoretical terms, the peculiar circumstances

<sup>7</sup> Malcolm M. Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (Ann Arbor, MI: The University of Michigan Press, 2008), 39.

<sup>8</sup> Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, 244.

<sup>9</sup> Jean Leclair, «Legality, Legitimacy, Decisionism and Federalism: An Analysis of the Supreme Court of Canada's Reasoning in *Reference re Secession of Quebec, 1998*», in Alberto López-Basaguren and Leire Escajedo San-Epifanio (eds.), *Claims for Secession and Federalism: A Comparative Study with a Special Focus on Spain* (Cham: Springer, 2019), 71.

<sup>10</sup> See Giacomo Delledonne and Matteo Monti, «Secessionist Impulses and the Italian Legal System: The (Non) Influence of the Secession Reference», in Giacomo Delledonne

underlying the recognition of a special status for Sicily, Sardinia and the three border regions also explain why it is still recommendable to make a distinction between special regions and the possible development of the regimes of some of the ordinary regions along asymmetric lines<sup>11</sup>.

Finally, of course, the federal structure of the newly established Austrian Republic in 1920 was the result of perplexed compromise between the Catholic and Socialist parties. The long-lasting implications of the frail constitutional consensus underlying Austrian federalism are somehow mirrored by the very different interpretations of the rationale of the Austrian federalising process among local constitutional law scholars<sup>12</sup>.

These examples show that multiple understandings of federalism are possible. Federal arrangements are often a *grim expedient*, as Feeley and Rubin defined them, and the implications of the *grim circumstances* of the founding moment are often recognisable in the long run. Still, the joint operation of constitutional practice and the interpretation of constitutional provisions sometimes scales down some of the existential challenges inherent in the federal compromise.

### III. HOMOGENEITY CLAUSES AND CONSTITUTIONAL HOMOGENEITY IN FEDERAL ORDERS

Homogeneity clauses are among the most typical constitutional tools for addressing existential challenges that threaten the stability or the very existence of federal orders. By homogeneity clauses are meant constitutional provisions that lay down some basic principles of the overarching constitutional order that also apply to the constitutional orders of the constituent units of the federal polity. Among the most important examples, the Guarantee Clause of the United States Constitution (Article IV, Section 4) and the *Homogenitätsgebote* in the successive constitutions of the Paulskirche in Frankfurt (Article 186), the Weimar Republic (Article 17) and the Federal Republic of

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and Giuseppe Martinico (eds.), *The Canadian Contribution to a Comparative Law of Secession: Legacies of the Quebec Secession Reference* (London: Palgrave 2019), 185-207.

<sup>11</sup> See Giancarlo Rolla, «Alcune considerazioni in merito al fondamento costituzionale del regionalismo speciale. L'apporto del diritto comparato», *le Regioni* 43, n° 2 (2015). 333-356.

<sup>12</sup> See e.g. Peter Pernthaler, *Die Staatsgründungsakte der österreichischen Bundesländer. Eine staatsrechtliche Untersuchung über die Entstehung des Bundesstaates* (Wien: Wilhelm Braumüller, 1979); Karl Weber, *Kriterien des Bundesstaates. Eine systematische, historische und rechtsvergleichende Untersuchung der Bundesstaatlichkeit der Schweiz, der Bundesrepublik Deutschland und Österreichs* (Wien: Wilhelm Braumüller, 1980); Rudolf Thienel, «Der Bundesstaatsbegriff der Reinen Rechtslehre», in Robert Walter (ed.), *Schwerpunkte der Reinen Rechtslehre* (Wien: Manz, 1992), 123-136.

Germany (Article 28(1)) can be mentioned. Since the 18<sup>th</sup> century, the purpose of homogeneity clauses can be described as connecting federalism and constitutionalism and allowing the normative claims of constitutionalism to permeate federal orders<sup>13</sup>. This is particularly true of Germany both in the 19<sup>th</sup> century and after 1949, with the fight for constitutionalisation and later democratisation inevitably questioning the basic structures of the constitutional orders in the *Länder*. However, the history of homogeneity clauses seems to show that they can only be interpreted as constitutional provisions for the «bad weather»<sup>14</sup>: they express a minimalistic constitutional consensus and may offer a last resort for existential crises. In line with Carl Schmitt's thought, homogeneity clauses might be interpreted as a sort of secularised *katechon*. The history of the American Guarantee Clause as an apparently dormant constitutional provision seems to vindicate this claim. On the whole, homogeneity clauses might be described as a permanent sign of the hard-fought compromise underlying federal constitutions. In this respect, existential conflicts lend themselves to be described as a later re-emergence of an utterly unresolvable contradiction.

In my view, this is only one part of the story. Constitutional homogeneity cannot be reduced to its best-known manifestation, namely homogeneity clauses. Rather, constitutional homogeneity in a federal system should be seen as an «ordinating principle»<sup>15</sup>, characterising and shaping the constitutional life of the system from its establishment. According to Martinico, federal constitutional homogeneity can be defined as a «stream function»<sup>16</sup> that makes internal diversity sustainable over time: its ultimate goal is «to ensure a virtuous connection between diversity and unity with a series of mechanisms aimed at preserving loyalty and adhesion to the fundamental values of the national system»<sup>17</sup>. This has at least two implications: first, the contents of constitutional homogeneity are inherently dynamic, as the oscillating interpretation of the Guarantee Clause over the last two centuries show<sup>18</sup>.

<sup>13</sup> See Giacomo DelleDonne, *L'omogeneità costituzionale negli ordinamenti composti* (Napoli: Editoriale Scientifica, 2017).

<sup>14</sup> As defined by Francesco Palermo, *La forma di Stato dell'Unione europea. Per una teoria costituzionale dell'integrazione sovranazionale* (Padova: Cedam, 2005), 144.

<sup>15</sup> Frank Schorkopf, *Homogenität in der Europäischen Union – Ausgestaltung und Gewährleistung durch Art. 6 Abs. 1 und Art. 7 EUV* (Berlin: Duncker & Humblot, 2000), 34; Roberto Miccù, «Proteggere la democrazia, rinnovare il “contratto sociale” europeo», *federalismi.it*, n° 3 (2014), 11.

<sup>16</sup> Giuseppe Martinico, «Le costituzioni come strumento di gestione del rischio. Il caso della secessione», *Governare la paura* (2017), 31.

<sup>17</sup> Giuseppe Martinico, «“A Message of Hope”: A Legal Perspective on the Reference», in DelleDonne and Martinico (eds.), *The Canadian Contribution...*, 252.

<sup>18</sup> See DelleDonne, *L'omogeneità costituzionale...*, 106-112 and 134-143.

Second, homogeneity clauses are the most visible and important manifestation of the ordinating principle of constitutional homogeneity in the legal order: however, they are far from being the only ones to perform this function. The issue of constitutional homogeneity does not only affect the relationship between the constitutions of the two institutional layers, i.e. between the federal layer and the constituent units. Rather, it also applies to those states or territories that wish to join the federation. In *Minor v Happersett*, the Supreme Court held that «All the states had governments when the Constitution was adopted. ... These governments the Constitution did not change. They were accepted precisely as they were, and it is therefore to be presumed that they were such as it was the duty of the states to provide»<sup>19</sup>. But things went differently when territories applied for being admitted to the Union or when the Southern states were readmitted to it after the end of the American Civil War, with Congress being granted the exclusive power to «determine whether it is republican or not»<sup>20</sup>.

Among the comparable cases that deserve mention, the debate about the imminent admission of the five Eastern *Länder* in the run-up to the reunification of Germany: should have they adapted to the core principles of the (West) German Basic Law *before* joining the Federal Republic?<sup>21</sup> Similarly, attention should be paid to the role of the successive enlargement waves and the conditionality mechanisms in leading the European Communities and then the Union to enucleate its own founding principles (later labelled as values). However, this point should be assessed having in mind the peculiar features of the European federalising process<sup>22</sup>.

These cases show that constitutional homogeneity requirements do not only apply to the constituent units that are part of one federal order but also to those polities that apply for membership. In this respect, constitutional homogeneity may be invoked not only when existential crises surface: rather, it should provide guidance at all stages in the evolution of a constitutional order.

Over the last few decades, a further element has acquired greater prominence: it has to do with the attempts to address secessionist claims by

<sup>19</sup> U.S. Supreme Court, *Minor v. Happersett* (1874) 88 U.S. 162, 175-176.

<sup>20</sup> U.S. Supreme Court, *Luther v. Borden* (1849) 48 U.S. 1, 42. See also Matteo Nicolini, «Regional Demarcation, Territorial Alteration, and Accommodation of Divided Societies», *Revista de Derecho Político*, n° 94 (2015), 69-70; Andrea Buratti, *La frontiera americana. Una interpretazione costituzionale* (Verona: Ombre Corte, 2016), 88.

<sup>21</sup> See Josef Isensee, «Staatseinheit und Verfassungskontinuität», in *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer*, vol. 49, *Deutschlands aktuelle Verfassung* (Berlin: de Gruyter, 1990), 59; Thomas Giegerich, *Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozeß: Wechselseitige Rezeption, konstitutionelle Evolution und föderale Verflechtung* (Berlin: Springer, 2003), 427.

<sup>22</sup> See Delledonne, *L'omogeneità costituzionale...*, 223-234.



resorting to constitutional law, in the wake of the abovementioned *Quebec Secession Reference*. According to the Canadian Supreme Court, the conduct of the affected parties during the negotiations that may lead to secession and the establishment of a new state «would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities»<sup>23</sup>. Although the recognition of a right to secession is very rare in the comparative scenario, the attempts to regulate these processes

«can be read as forms of “exit related conditionality”, by ensuring an axiological continuity between the new order and the old one. This might appear paradoxical, but it is actually a process in which the old system accepts the detachment of the seceding entity by making it conditional upon the adhesion to its fundamental values. According to this scheme, the constituent phase of the seceding legal system is partly guided and influenced by the values of the old constitution. This way the revolutionary character of secession is partly “exorcised”»<sup>24</sup>.

#### IV. EXISTENTIAL CONFLICTS IN FEDERAL ORDERS

The preceding paragraphs have looked into views of federalism that are quite foreign to the Kelsenian framework. Quite to the contrary, the notion of constitutional homogeneity, which had been deeply rooted in the political thought since the 18<sup>th</sup> century, was popularised in the first half of 20<sup>th</sup> century by public law scholars of the likes of Carl Schmitt<sup>25</sup>. This paragraph gets closer to Kelsen’s thought and his contribution to a theory of conflicts within federal orders. Again, his writings can both be traced back to his theory of the constitution and to his reaction towards constitutional crises in Central Europe in the late 1920s and early 1930s.

According to comparative scholarship in Continental Europe, homogeneity clauses are not alone in «corroborating» federal sovereignty<sup>26</sup>: rather, they go hand in hand with other tools, including the power of the federal

<sup>23</sup> Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, 266.

<sup>24</sup> Martinico, «”A Message of Hope”...», 253; see also Delledonne, *L’omogeneità costituzionale...*, 209-214.

<sup>25</sup> However, German liberal scholars like Hugo Preuss also played a meaningful role in elaborating constitutional homogeneity as a constitutional law concept (see Dian Scheffold, «L’omogeneità nei sistemi *multilevel*. Cenni sull’attualità di Hugo Preuss tra sviluppo storico, vecchie analisi e nuova terminologia», *Giornale di storia costituzionale*, n° 19 (2010): 141-157).

<sup>26</sup> Giuseppe de Vergottini, *Diritto costituzionale comparato* (6<sup>th</sup> edition, Padova: Cedam, 2004), 306.

government to take action in order to ensure the respect of obligations stemming from the federal constitution. These instruments, e.g. federal execution (*Bundesexekution*) in Germany and state coercion (*coacción estatal*) in Spain, aim to ensure the cohesion of the legal system by enabling the federal government to resort to extraordinary powers. When the federal government decides to trigger the federal execution procedure, conflicts are not potential but actual.

Kelsen was personally involved in the controversy regarding the resort to extraordinary presidential powers under Article 48 of the Weimar Constitution<sup>27</sup>. This provision, which was used four times in order to face political unrest in specific German *Länder*, played a crucial role in the gradual transition towards authoritarian presidential governance.

In Kelsen's view, federal execution under the Weimar constitution was marked by a tight connection of theoretical and practical issues: this clause showed that legal theory heavily depended on political assumptions<sup>28</sup>. In line with Kelsen's interpretation of federalism, federal execution is triggered by a violation of the *Gesamtverfassung* of the federal order. Therefore, it is unconceivable that the power to resort to extraordinary powers lies with the federal government: the «objectivity of the organ called to make a decision on the facts that may trigger federal execution is the only safeguard of this principle, stemming from the very idea of the federal state»<sup>29</sup>. Because of its objectivity, a constitutional court, like the one regulated by the Federal Constitutional Law of Austria, was better placed to do this job: in Austria, «the

<sup>27</sup> «1. If a Land does not fulfil the obligations laid upon it by the *Reich* Constitution or the Reich laws, the President of the *Reich* may use armed force to compel it to do so.

2. In case public safety is seriously threatened or disturbed, the President of the *Reich* may take the measures necessary to re-establish law and order, intervening if need be with the assistance of the armed forces. In the pursuit of this aim he may suspend the civil rights described in articles 114, 115, 117, 118, 123, 124 and 153 partially or entirely.

3. The President of the *Reich* has to inform the *Reichstag* immediately about all measures undertaken that are based on paragraphs 1 and 2 of this article. The measures have to be suspended immediately if the *Reichstag* so demands.

4. If danger is imminent, the *Land* government may, for their specific territory, implement steps as described in paragraph 2. These steps have to be suspended on the demand of the President of the *Reich* or the *Reichstag*.

5. Further details are provided by *Reich* law».

<sup>28</sup> See Hans Kelsen, «L'esecuzione federale. Contributo alla teoria e alla prassi dello Stato federale, con particolare riguardo alla costituzione del Reich tedesco e alla costituzione federale austriaca», in *La giustizia costituzionale*. Translated by Carmelo Geraci (Milano: Giuffrè, 1981), 75. See also Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge: Cambridge University Press, 2015).

<sup>29</sup> Kelsen, «L'esecuzione federale...», 118.

primitive legal technique of federal execution has been completely overcome»<sup>30</sup>. The Constitution of the 2<sup>nd</sup> Spanish Republic also trusted the *Tribunal de Garantías Constitucionales* to act as an arbiter between the state government and regional governments.

Subsequent developments can be described as a mixed picture. Tools of the likes of the *Reich* execution regulated by the Weimar Constitution are still a typical component of federal constitutions. Their rationale points at the emergence of crises for which courts would not be able to provide viable solutions: therefore, it is for the federal executive to take action in order to face them. However, procedural safeguards usually ensure that actors other than the federal executive be also involved in the decision-making process. In substantive terms, the active protection of the core of the federal constitution should not lead to the demise of the constitution itself.

In the light of this, a procedure like federal coercion (*Bundeszwang*) under Article 37 of the Basic Law of the Federal Republic of Germany<sup>31</sup> cannot simply be described as the heir to the *Reich* execution; rather, its regulation tries to “tame” some of the most problematic aspects of the corresponding provision of the Weimar Constitution. Approval by a majority of the members of the *Bundesrat* is explicitly mentioned in Article 37, while scholars have come to the conclusion that respect of the principle of proportionality and a preliminary judgment of the *Bundesverfassungsgericht* should be recommended<sup>32</sup>. Furthermore, the dissolution of the *Landtag* and the removal of the executive in the concerned *Land* are not part of the admissible measures. In this respect, the current constitutional framework tries to address the complicated legacy of the Weimar Constitution: the events that led to the so-called Prussian coup (*Preußen-Schlag*) in 1932 were seen as playing a crucial role in the terminal crisis of the Republic.

The regulation of *coacción estatal* in Article 155 of the Spanish Constitution of 1978<sup>33</sup> is clearly indebted to the German Basic Law. Still, there are

<sup>30</sup> Kelsen, «L'escuzione federale...», 141.

<sup>31</sup> «1. If a Land fails to comply with its obligations under this Basic Law or other federal laws, the Federal Government, with the consent of the *Bundesrat*, may take the necessary steps to compel the *Land* to comply with its duties.

2. For the purpose of implementing such coercive measures, the Federal Government or its representative shall have the right to issue instruction to all *Länder* and their authorities».

<sup>32</sup> See Wilfried Erbguth, «Artikel 37», in Michael Sachs (ed.), *Grundgesetz. Kommentar* (5<sup>th</sup> edition, München: C.H. Beck, 2009), 1172-1173.

<sup>33</sup> «1. If an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following approval

some differences between them, showing that the Spanish autonomic state has some distinctive feature if compared with German federalism. These differences were made particularly evident by the need to react towards the initiatives of the Catalan *Generalitat* in September and October 2017, which can aptly be described as a secessionist coup. The moves of the *Generalitat* had been preceded by a number of unfruitful injunctions from the Spanish Constitutional Court and the wait-and-see attitude of Mariano Rajoy's government.

After the Spanish Government lodged a complaint with Carles Puigdemont, President of the *Generalitat* and leader of the self-styled Catalan Republic, the Senate of Spain had to move to the forefront of this institutional crisis in the framework of the Article 155 procedure. The Spanish Senate is routinely described as a very weak second chamber both in structural and functional terms<sup>34</sup>. As López-Basaguren put it,

«Firstly, the composition of the Senate is decisive in this incapacity to play an active role in the channelling of interests related with territorial autonomy. ... neither parties nor [Autonomous Communities have] ever felt the need to channel their territorial interests via the upper House. It is in the lower House that the interests of the ACs are channelled»<sup>35</sup>.

In the light of Article 155, the Senate had to decide alone on the measures envisaged by the Spanish Government, including the removal of the Catalan executive (*Generalitat*), the dissolution of the autonomous legislature (*Parlament*) and the calling of a snap regional election<sup>36</sup>. This was, however, to have important consequences. In comparison with the Congress of Deputies, the partisan composition of the Senate at that time overrepresented the right-of-centre *Partido Popular* (PP), which held a majority of seats; even more importantly, none of the 21 senators elected in the four Catalan provinces or

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granted by an absolute majority of the Senate, take the measures necessary in order to compel the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interests.

2. With a view to implementing the measures provided in the foregoing clause, the Government may issue instructions to all the authorities of the Autonomous Communities».

<sup>34</sup> See e.g. Josep Maria Castellà Andreu, «The Spanish Senate after 28 Years of Constitutional Experience. Proposals for Reform», in Jörg Luther, Paolo Passaglia and Rolando Tarchi (eds.), *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism* (Milano: Giuffrè, 2006), 859-909.

<sup>35</sup> Alberto López-Basaguren, «The Secession Issue and Territorial Autonomy in Spain: Bicameralism Revisited», *Perspectives on Federalism* 10, n° 2 (2018): 260-261.

<sup>36</sup> By the way, the compatibility of these controversial measures with Article 155 of the Spanish Constitution has been upheld by the Constitutional Court (see Press Release no. 86/2019 of 2 July 2019).

appointed by the Catalan legislature belonged to the Partido Popular. Because of the relative weakness of the Senate and its perceived anti-Catalan attitude, the Government felt somehow forced to seek active support from other parliamentary groups. Thus, the PP engaged in negotiations regarding the application of the procedure under Art. 155 with the main opposition party, the *Partido Socialista Obrero Español* (PSOE). To quote just an example, the Government was persuaded to give up its plan regarding Catalan public media and to accept that control over them would continue to rest with the *Parlament* of Catalonia<sup>37</sup>.

## V. CONCLUDING REMARKS

The above discussion does not aim to sketch a general theory of conflicts within federal and multi-level orders. Rather, it points at two crucial aspects. On the one hand, a tragic dimension is inherently related to federal arrangements. Devices like homogeneity clauses and provisions regulating federal intervention can be described as constitutional “stitches” trying to minimise, at least to some extent, the unsettling potential that lies at the heart of many federal compromises. On the other hand, paragraphs 3 and 4 have looked into the attempts of constitutional law to tame and channel existential challenges. Constitutional homogeneity has been described as an ordinating principle that should ensure the compatibility of the federal settlement with the very basic structure of the constitutional order, including the handling of secession crises. On the other hand, 20<sup>th</sup> century constitutionalism has strived to align last-resort mechanisms like federal interventions with some procedural safeguards. At the end of the day, the current discussion is not so much on the alternative between political and judicial solutions as on the need for the involvement of multiple centres of authority in order to reflect the inherent pluralism of the constitutional system.

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<sup>37</sup> See López-Basaguren, «The Secession Issue...», 258.

# FEDERALISM: TRAGIC COMPROMISE AND CONFLICTS

*Federalismo: compromiso trágico y conflictos*

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