

Perspectives On Comparative Federalism

Abstract

The number of countries embracing federalism is rocketing and research on federalism is booming. Federal studies are eventually abandoning the vain search for definitional clarity, and increasingly look at the potential of federalism to provide solutions to some of the most pressing challenges to contemporary constitutionalism. Federalism is indeed the oldest institutional mechanism to regulate pluralism, and has therefore a lot to offer in solving contemporary challenges originating from the quest for more pluralism, both institutional and societal.

Introduction: Living (well) without a Definition

The number of countries embracing federalism is rocketing (Huegelin and Fenna 2015:3) and federal studies are booming, despite the fact that no one can precisely define federalism. The good news, however, is that the hysteria about the search for a definition is relenting. Instead, a more pragmatic approach to federal issues is spreading. This will hopefully allow federal studies to address some of the most pressing challenges to contemporary constitutionalism, bringing in an essential perspective and offering solutions based on century-long refinement of federal instruments.

Defining federalism and classifying federal states have kept scholars busy for centuries, filling libraries in the process. Nevertheless, there is no universal agreement on what federalism means (Gamper 2005), nor is there agreement on how to classify federal countries (Watts 2008). Nor can there be one. Federalism is an essential component of theory and practice of states and power structures, but the federal principle is indeed much older than the modern and even the pre-modern state (Burgess 2006). In fact, federalism is at the heart of one of the most pressing challenges in the history of mankind: how to order public life and how to limit, organise and regulate power in a way that guarantees freedom and efficiency, unity and plurality, autonomy and coordination. This is why it can be seen in different ways, under different disciplinary angles, taking different features into account and coming to very different results as to the identification of traces of federalism.

In recent times, the study of federalism seems to have been gradually abandoning the obsession to define federalism, and reorienting focus towards its manifestations. A pragmatic approach that resembles the famous definition of obscenity by Justice Potter Stewart in *Jacobellis v. Ohio*, 378 U.S. 184 (1964): "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it". Precisely because of the absence of any possible definition of federalism going beyond the general formula by Elazar "self-rule plus shared rule" (Elazar 1987, Müller 2017), growing attention is being paid in more recent literature to the institutions and the procedures of federalism (Halberstam 2012, Huegelin and Fenna 2015, Palermo and Kössler 2017). Ultimately, it is their functioning that makes machines interesting, rather than what qualifies them as machines.

Evolution and Consolidation

Against this background, why are federal 'machines' interesting and popular like never before and what are the most pressing research questions for contemporary comparative federal studies?

When the idea of federalism was born, it was primarily a philosophical concept and a principle of political organization, essentially serving economic and military purposes. In legal terms, the early idea of federalism was closer to international rather than constitutional law, aimed at bringing together sovereign units that alone were no longer competitive in economic and military terms.

The more federal countries established themselves (in the nineteenth century) and significantly increased in number (in the twentieth century), the more federalism became noteworthy not only to political philosophers and political scientists, but also to constitutional lawyers and economists. All of these methodological perspectives facilitated the study of how federal systems (both classical federations and related manifestations such as regional or devolved states) work in practice, what elements they have in common, how their functioning can be improved, and, above all, what institutions and procedures are needed in order to make them work.

In the twenty-first century, the challenge is no longer the creation of new federations by pooling together sovereign states, as the example of the EU and the insurmountable obstacles to it becoming a fully-fledged federal state clearly shows. Even the establishment of federal systems through decentralization has lost the grip it had in the course of the second half of the twentieth century (Belgium, Spain, Italy, United Kingdom, South Africa and so on). The federal idea is by now sufficiently explored. Institutional strengths and weaknesses are well-known, and so is the importance of cooperative instruments and of the readiness to cooperate by the involved actors, as there can be no federalism without a certain degree of cooperation.

What does really matter? The Challenges Ahead?

While all this seems to be consolidated, the critical test that remains is the effective management of pluralism and its inherent complexity, given the challenges that pluralism is posing to contemporary societies. Federalism is the most developed constitutional instrument to deal with the pluralism of interests, actors, institutions and procedures marking contemporary societies, and can represent the matrix for dealing with their challenges. To do so, however, federalism can no longer be seen as a pure institutional interplay, a system accommodating the coexistence of institutions belonging to different tiers of government but has to include the understanding of how federalism works (or may work) in practice, what its added value could be and how it could be developed. Institutional facets are just one aspect of the contribution that federalism can provide to contemporary challenges: they are the historically most developed aspect and are thus fit to serve as a matrix for developing new instruments, but alone are by far no longer sufficient to make federalism relevant in the twenty first century.

The most pressing areas which could benefit most from hints and inputs from federal studies seem to be the following:

The first and most important one is the management of *pluralism*, in its various territorial, ethno-cultural and other manifestations. While this has always been the core task of federal systems, recent developments seem to indicate that all countries that are decentralizing do so in order to respond only to ethno-cultural challenges (Choudhry 2008, Broschek 2013:101). This seems confirmed by developments in countries such as Ethiopia, South Sudan, Kenya, Nepal, Myanmar, possibly the Philippines, and by adaptations in several other countries, also in Europe, where ethno-cultural issues are shaping federal dynamics much more than other elements and certainly more than in the past. If that is the case, one could argue that in present times federalism is seen, rightly or wrongly, at least at political level, primarily as an instrument to accommodate minority claims. If so, greater attention should be paid to rule of law instruments that balance the idea of exclusive control of a territory by a titular group (Kössler 2015).

The second main challenge is that of *participation*. This has also been an essential element of the federal toolkit from the inception. However, traditional institutional forms of (territorial) participation are no longer sufficient to establish a workable system, as shown by the ongoing crisis of second chambers in federal and regional systems (Gamper 2018). Not only are rules on participation essentially procedural, determining who can participate, how, under which conditions, exercising what rights, and - not least - what are the consequences of inclusion in or exclusion from the process (for example, whether those excluded have the right to challenge the decision in a court or not). In present times, the pressure towards more democratic and participatory decision-making makes it necessary to look beyond merely institutional participation and to include (and regulate) also forms of societal participation (Palermo and Alber 2015). The ways non-institutional stakeholders can be included in decision-making processes can more easily be designed by digging into the federal toolkit.

Finally, it is necessary for federal studies to look more carefully at *policies*, including how they are managed on the basis of legal norms and how they are interpreted by courts (Palermo and Kössler 2017). Only the analysis of relevant policy fields, both related to the constitutional division of powers and to the political processes, can illustrate the trends and challenges resulting from the governance of complex and transversal areas involving a plurality of actors, such as the environment, education, financial relations, immigration, and many others, forcing involved actors to develop effective forms and procedures for cooperation. In other words: making federal studies fit to provide responses to contemporary challenges of an ever more complex forms of governance of ever more complex phenomena in ever more complex societies.

Conclusion

It is expected that looking further into these aspects will be the main challenge for federal studies in the years to come. These are ultimately some of the main challenges of contemporary constitutionalism and are the reason why federalism is looked at with increased attention worldwide. Diversification of responses within a common constitutional framework allows for tailor-made solutions, for experimentation, for wider participation, for enhancing democracy by dividing and sharing

powers. It is up to the academic community to take up this challenge and to provide answers that can be developed from a contemporary reading of the solution and procedures that federalism can offer.

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