Financial constitutions and responsibility at the margin: from legal framework to practice

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1. Aim of the study

This study investigates the principle of financial responsibility from a comparative and legal perspective[2]. From a political point of view, the principle is part of the foundation of any decentralizing process, while from an economic perspective it becomes a precondition for efficiency[3]. As a consequence, financial responsibility is considered the cornerstone of all compound States[4].

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[1] The paper presents and discusses the most important findings of a research project on comparative fiscal federalism, conducted under the supervision of Prof. Dr. Francesco Palermo and elaborated in the PhD thesis (in Italian language) at the University of Verona.

[2] On the dilemma of method *vs* science, see – *ex plurimis*: L. PEGORARO, A. RINELLA, *Diritto costituzionale comparato. Aspetti metodologici*, Cedam, Padova, 2013, 13-23; G. DE VERGOTTINI, *Diritto costituzionale comparato*, Cedam, Milano, 2013, 19-21; R. SCARCIGLIA, *Metodo comparatistico*, in L. PEGORARO (ed.), *Glossario di diritto pubblico comparato*, Carocci, Roma, 2009, 179-81; P. BISCARETTI DI RUFFIA, *Introduzione al diritto costituzionale comparato,* VI edition, Giuffré, Milano, 1988, 3 ss.; A. PIZZORUSSO, *Corso di diritto comparato*, Giuffrè, Milano, 1983, 100-07; and also, *IDEM*, *Sistemi giuridici comparati*, Giuffrè, Mlano, 1995, 135-43.

[3] Efficiency in economic terms is linked to the social welfare maximization and works by bringing decision-making closer to the people, as little entities tend to offer public goods and services that are closer to the preferences of the community of reference. On the principle of efficiency from an economic perspective, see further: R. BOADWAY, A. SHAH (eds.), *Fiscal federalism. Principles and practice of multiorder governance*, Cambridge University Press, New York, 2009, 29-60.

[4] The term 'compound States' is favoured in order to not take too much into consideration attempts of differentiation between federal and regional states. To this regard, among others: G. DE VERGOTTINI, *Stato federale*, in *Enciclopedia del Diritto,* XLIII, Giuffrè, Milano, 1990, 831 ss.; S. ORTINO, *Introduzione al diritto costituzionale federativo*, Giappichelli, Torino, 1993; R. BIFULCO, *La cooperazione nello stato unitario composto*, Cedam, Padova, 1995, 20 ss.; T. GROPPI, *Il federalismo*, Laterza, Roma-Bari, 2004, 5-12; G. F. FERRARI, *Federalismo, regionalismo e decentramento del potere in una prospettiva comparata*, in *Le Regioni*, *no*. 4, 2006, 589-648; A. REPOSO, *Profili dello stato autonomico. Federalismo e regionalismo*, Giappichelli, Torino, 2005, 3-4. A prominent scholar, A. GAMPER, *A 'global theory of federalism': The nature and challenges of a federal state*, in *German Law Journal*, vol. 6, no. 10, 2005, 1297-318 (1297), refers to the lack of a global theory as '*one of the great dilemmas (omissis) that despite so much discussion, there is no settled common denominator of federalism*'. While, R. L. WATTS, *Contemporary views on federalism*, in B. DE VILLIERS (ed.), *Evaluating federal systems*, Juta & Company, South Africa, 1994, 7, refers to federalism as '*a changing and flexible principle*'. On an imaginary line, at one end there would be the unitary state and on the other the union of states, while other types of state can be accommodated in between, depending on the extent of decentralization at the considered moment in time. The image is taken from: G. F. FERRARI, *Federalismo, regionalismo e decentramento del potere in una prospettiva comparata,* in *Le Regioni, no.* 4, 2006, 589-648 (589-98). Another prominent scholar: G. BOGNETTI, *Federalismo*, in *Digesto,* IV edition, Utet, Torino, 1992, 275, observes that 'we face abstract classifications that fade into one another and that *de facto* refer to concrete legal systems, *among which there are differences but not rigidly separating lines'* (own translation). This approach is welcomed, among others, by: F. PALERMO, *Stato regionale*, in L. PEGORARO (ed.), *Glossario di diritto pubblico comparato*, Carocci editore, Roma, 2009, 253, who considers it a unitary phenomenon: '*the territorial deconcentration of power*'; and also by R. BLANCO VALDÉS, *Il Tribunale costituzionale spagnolo: disegno giuridico e pratica politica*, in S. GAMBINO (ed.), *Diritti fondamentali e giustizia costituzionale. Esperienze europee e nord-americana*, Giuffré, Milano, 2012, 300, who uses the formula '*territorially complex State*'. Anglo-American literature comprises significant attempts at classification. Among others, K. WHEARE, *Federal government*, Oxford University Press, New York-London, 1947, 11. The author defines the federal principle as '*quel metodo di divisione del potere in base al quale il livello di governo generale e quello regionale sono ciascuno – entro la propria sfera – coordinate ed indipendenti*'. Along the same line: A. V. DICEY, *Introduction to the study of the law of the constitution*, Liberty Fund, Indianapolis, 1982, 73; as well as V. BOGDANOR, *Devolution*, Oxford University Press, New York-London, 1979, 2. A reading that takes into account the functional aspects of the systems is offered by: D. J. ELAZAR, *The American*

This assumption is reflected in the selected case-studies, being the trajectory for the Spanish reform in 2009, as well as for the reform under discussion in Germany[5].

After some preliminary remarks on the background theories governing this scenario (part 2) and on the essential features of the selected case-studies (part 3), the paper focuses briefly on the principle as embedded in legal frameworks and developed through constitutional jurisprudence (part 4). Later, it scrutinizes, classifies and compares the legal tools which put the principle into practice (parts 5-8). The ultimate aim is to provide a comparative measurement (part 9) and assessment (part 10) of these instruments, in order to estimate the existing margin of responsibility vested in the intermediate level of government[6], that is, the autonomous Communities and the Länder. In doing so, the system of intergovernmental financial relations will be taken into consideration paying attention to both the '*law in books*' and the '*law in action*'[7]. The latter is pivotal when it comes to understanding the functioning of a system.

2. Background theories

The first generation theories of fiscal federalism support the idea of a perfect match between '*those who receive the benefits of a collective public good and those who pay for it*'. They make reference to this pattern in terms of '*fiscal equivalence*'[8], which calls for a '*perfect correspondence between revenue and spending powers*'[9].

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partnership. Intergovernmental cooperation in the nineteenth century United States, Chicago University Press, Chicago-London, 1962. The author overcomes the idea of separation between the tiers of government and proposes the concept of 'interdependence'. According to this wider approach, the author develops a conception of federalism as a combination of '*self-rule*' and '*shared rule*'. To this extent: D. J. ELAZAR, *Exploring federalism*, University of Alabama Press, Tuscaloosa, 1987, 5, in which he considers federalism as an organizational principle which allows for the integration of at least two constituent units in a wider union, while preserving their autonomy. There are also many attempts at classification that aim to draw a border line between federal and regional states. Among others: J. J. GONZÁLEZ ENCINAR, *El Estado unitario-federal*, Madrid, Tecnos, 1985; M. VOLPI, *Stato federale e Stato regionale: due modelli a confronto,* in *Quaderni Costituzionali,* no. 3, 1995, 367-409*;* P. HÄBERLE, *Föderalismus, Regionalismus, Kleinstaaten in Europa,* Baden-Baden, 1994, 209 e 257 ss. Devolution is another interesting example. For a definition of this phenomenon see: V. BOGDANOR, *Devolution in the United Kingdom*, Oxford University Press, Oxford, 2001; and also N. BURROWS, *Devolution*, Sweet & Maxwell, London, 2000.

[5] In the Federal Republic of Germany it played an important role in both the *Föderalismusreformen* I and II, passed respectively in 2006 and 2009. Both reforms were based on the need to overcome the unbearable entanglement of powers and functions the different tiers of government were vested with. To this regard: W. F. SCHARPF, *Die Politikverflechtungs-Falle: Europäische Integration und deutscher Föderalismus im Vergleich*, in *Politische Vierteljahresschrift*, no. 26, 1985, 323-56. The author referred to such situations as a '*Politikverflechtungs-Falle*' that is, a system where competences are interlocked to the extent that they challenge its very functioning. On the contents of the *Föderalismusreformen* see: *ex plurimis*, J. WOELK, *Eppur si muove: la riforma del sistema federale tedesco*, in *Le Istituzioni del Federalismo*, no. 2, 2007, 193-216; R. T. BAUS, T. FISCHER, R. HRBEK (eds.), *Föderalismusreform II: Weichenstellungen für eine Neuordnung der Finanzbeziehungen im deutschen Bundesstaat,* Nomos, Baden-Baden, 2007; C. KASTROP, G. MEISTER-SCHEUFELEN, M. SUDHOF (eds.), *Die neuen Schuldenregeln im Grundgesetz. Zur Fortentwicklung der bundesstaatlichen Finanzbeziehungen*, BW-Verlag, Berlin, 2010; M. KOEMM, *Eine Bremse für die Staatsverschuldung? Verfassungsmäßigkeit und Justitiabilität des neuen Staatsschuldenrechts,* Mohr Siebeck, Tübingen, 2011.

[6] Along the line with the option to adopt the expression of 'compound States' (see above footnote 3), the term 'intermediate level' refers to both the Länder and the Autonomous Communities, and the locution 'central level' applies to both the federal tier (in case of Germany) and the State tier (in case of Spain).

[7] According to the conceptual representation developed by: R. POUND, *Law in books and law in action*, in *American Law Review, no.* 44, 1910, 12-36 (12), re-published in W.W. FISHER, M. J. HORWITZ, T. A. REED (eds.), American Legal Realism, Oxford University Press, USA, 1995, 39-40.

[8] The quotation is from: M. OLSON, *Strategic theory and its applications. The principle of 'fiscal equivalence': The division of responsibilities among different levels of government*, in *The American Economic Review*, vol. 59, no. 2, 1969, 479-89 (483).

[9] Along these lines: W. E. OATES, *Fiscal federalism*, Harcourt, Brace & Co., New York, 1972, 33-5.

Put another way, finance has to follow function[10], as the degree of spending decentralization reflects the allocation of competences, in particular of the administrative ones. This connection supposedly activates democratic control and triggers political accountability, based on the belief that citizens through elections evaluate the choices made by their representatives[11]. The argument relies on the famous Tiebout model '*vote with feet*'. Consumer-voters pick the community which best satisfies their own preferences in the selection of public goods and in case they dislike it, they move to another community[12].

This theoretical approach has raised contentious issues: on the one hand, there is no existing system, in which such theories are converted into practice, on the other hand, it becomes very problematic when referring to cooperative models of federalism[13]. The cooperative archetype portrays the image of entanglement as opposed to the idea of '*watertight compartments*' [14], a legacy of dual federalism. Despite the fact that first generation theories would prompt a model based on perfect equivalence[15], the existing patterns rather provide for asymmetric allocation of expenditure

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[10] The expression can be traced back to the Anglo-American doctrine and finds application, for example, in the Canadian model, according to a statement of one of its most prominent scholars: P. W. HOGG, *Constitutional Law of Canada*, Carswell, Scarborough, 2000, 147, where he states that '*the initial financial arrangements reflected the allocation of functions*'. To this regard see also: E. AHMAD, G. BROSIO (eds.), *Handbook of Multilevel Finance*, Edward Elgar, Cheltenham, 2015, 358-59.

[11] To this regard: L. ANTONINI, *Federalismo all'italiana*, Marsilio, Padova, 2013, 41, refers to this pattern as the '*regular circuit of democratic control*'. See also, *ID.*, *L'autonomia finanziaria delle regioni tra riforme tentate, crisi economica e prospettive*, in *Rivista AIC*, no. 4, 2014, 1-4. A critical reading is offered by B. R. WEINGAST, *Second generation fiscal federalism: Implications for decentralized democratic governance and economic development*, Working paper, Hoover Institution on War, Revolution, and Peace, Stanford University, 2006, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153440 (last access 15.03.2016). The author refers to the mechanism known as '*tragic brilliance*' and observes that voters are substantially manipulated: political support is gained through the leverage of economic benefits. According to the author, this creates a form of political dependence and impact the federal structure fostering a strong centralization.

[12] The theory basis on the assumption that citizens express their preferences in terms of services, moving from one entity to another. This is the thesis of the model elaborated by: C. M. TIEBOUT, *A pure theory of local expenditure*, in *Journal of Political Economy*, vol. 64, no. 5, 1956, 416-24. A criticism to this model can be found in: J. M. BUCHANAN, J. G. CHARLES, *Efficiency limits of free mobility: an assessment of the Tiebout model*, in *Journal of Public Economics*, no. 1, 1972, 25-43. An interesting interpretation of the Tiebout's model has been developed by: W. E. OATES, *The many faces of the Tiebout model*, in W. A. FISCHEL (ed.), *The Tiebout model at fifty*, Lincoln Institute of Land Policy, Cambridge (MA), 2006, 21-45. More recently, L. GADENNE, *Tax Me, But Spend Wisely? Sources of Public Finance and Government Accountability*, in *American Economic Journal: Applied Economics* (online appendix), 2015, http://www.ifs.org.uk/uploads/publications/mimeos/Gadenne_pubfinance.pdf (last access 2.02.2016). Her opinion is that the same outcome can be obtained even in the absence of voters' mobility. She bases on the assumption that voters can have a stronger control over local taxes than over intergovernmental grants. This factor could have in her opinion a deterrent effect against overspending (or inefficient spending).

[13] On the concept of cooperative federalism from an American viewpoint see: *ex plurimis*, M. GRODZINS, *The American system: A new view of government in the United States*, Rand McNally & Company, Chicago, 1966; M. D. REAGAN, *The new federalism*, Oxford University Press, 1972; J. KINCAID, *From cooperative federalism to coercive federalism*, in *Annals of the American Academy of Political and Social Science*, 509, 1990, 139 ss. For a commentary in the light of the European paradigm (with a focus on the German model) see: W. F. SCHARPF, *Die Politikverflechtungs-Falle: Europäische Integration und deutscher Föderalismus im Vergleich*, in *Politische Vierteljahresschrift*, no. 26, 1985, 323-56; and also, *IDEM*, *The Joint-Decision Trap Revisited*, in *JCMS: Journal of Common Market Studies*, vol. 44, no. 4, 2006, 845–64.

[14] The metaphor goes back to a statement of Lord Atkin in the *Labour Conventions* case: '*[w]hile the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure*'. See: *A.-G. Canada v. A.-G. Ontario (LabourConventions),* [1937] A.C. 326 at 354, 1 D.L.R. 673 (P.C.).

[15] A comparison of the different theoretical approaches to the topic is offered by: W. E. OATES, *Toward a second-generation theory of fiscal federalism*, in *International Tax and Public Finance*, vol. 12, 2005, 349-73; as well as by: B. R. WEINGAST, *Second generation on fiscal federalism: Political aspects of decentralization and economic development*, in *World Development*, vol. 53, 2014, 14-25. The latter draws a line between first vs second generation theories. In his opinion the difference lies in the perception of decision-makers: these are considered perfect in the first case (so-called *benevolent social planners*) and imperfect in the second one. In the latter decisions are thus dependent on the system of incentives of financial-economic and political nature.

and revenue responsibilities. The margin of autonomy is much higher on the spending side and there is no single entity that fully finances itself with own tax-revenue[16].

The mismatch can have negative impacts on the political responsibility of subnational entities, since financial autonomy is both an instrumental and essential component of political autonomy[17]. A subnational financing system based only, or predominantly, on transfers – that is vertical or horizontal flows of money whose amount is not linked to the fiscal capacity of the territorial entity (i.e., its economic wealth), but rather the opposite[18] -, would make subnational entities dependent on decisions adopted by another layer of government and nullify their autonomy.

Over the past decades the literature has elaborated a mitigated concept of financial responsibility that accommodates a more flexible approach to fiscal equivalence. These second generation theories on fiscal federalism have expanded the scope of analysis, taking into account the system of incentives[19]. The approach is based on the assumption that different tax systems result in diverse fiscal incentives that can have a strong impact on public choices and actions. Put differently, the way each system addresses the vertical fiscal gap influences the extent to which the pursued objectives are satisfied[20]. According to this revised standpoint, the instruments and the procedures of revenue distribution are of pivotal importance. While ensuring that subnational entities cover their spending needs, they determine the extent to which subnational entities have been made responsible for their financing.

To this regard scholars underline the importance that subnational entities retain a quota of the tax-revenue generated within their territory. On the one hand, they would be more inclined to adopt policies that foster economic development, on the other hand, the risk of interferences of the central level in their businesses would be reduced and they would be more independent. If the central tier retained all sources disregarding their origin, incentives for economic growth would be lost. Subnational entities should bear the political costs, without economic gains[21].

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[16] On the other hand, the first generation scholars, in advocating for a perfect equivalence, at the same time theorize a threefold function of the State intervening in financial matters (allocation, redistribution and stabilization). The latter arguments cause a certain centralization of all financial systems. Further, as stated by V. TANZI, *The future of fiscal federalism*, in *WBZ Discussion Paper*, no. SP II 2008-03, 2008, 6, federal agreements are much more the result of political and historical dynamics than of economic evaluations.

[17] Along this line: *ex plurimis,* T. MARTINES, *Studio sull'autonomia politica delle regioni,* in *Rivista Trimestrale di Diritto Pubblico*, 1956, 100-90 (109-12); V. RUIZ ALMENDRAL, *Impuesto cedidos y corresponsabilidad fiscal*, Tirant lo Blanch, Valencia, 2004; 99-101; S. KORIOTH, *Der Finanzausgleich zwischen Bund und Länder*, Mohr Siebeck, Tübingen, 1997, 268; F. PUZZO, *Il federalismo fiscale. L'esperienza italiana e spagnola nella prospettiva comunitaria*, Giuffrè, Milano, 2002, 45; M. BERTOLISSI, *'Rivolta fiscale', federalismo, riforme istituzionali*, Cedam, Padova, 1997, 24-5. A further confirmation comes also from the jurisprudence of the EU Court of Justice.

[18] H. BLÖCHLIGER, D. KING, *Less than you thought: the fiscal autonomy of sub-central governments*, in *OECD Economic Studies*, vol. 43, no. 2, 2006, 166-67.

[19] Along this line, B. R. WEINGAST, *Second generation fiscal federalism: The implications of fiscal incentives*, in *Journal of Urban Economics*, no. 65, 2009, 279-93 (280 e 287).

[20] G. ANDERSON, *Fiscal Federalism: A comparative Introduction*, Oxford University Press, Canada, 2010, 50.

[21] To this extent: B. R. WEINGAST, *Second generation fiscal federalism: The implications of fiscal incentives*, in *Journal of Urban Economics*, no. 65, 2009, 279-93 (280 e 287). The author states that this is possible only under well-defined conditions. These can be traced back to the concept of political autonomy and in the existence of adequate guarantees thereof. See *ivi, 281-82*. Further, if subnational revenue depend on decisions adopted by the central layer of government, this would result in the presumption that the central level would bail out subnational entities in the case of bankruptcy. See J. A. RODDEN, G. S. ESKELAND, J. LITVACK, *Fiscal decentralization and the challenge of hard budget constraints*, MIT Press, Cambridge (MA), 2003. The scholars refer to this phenomena in terms of *soft budget constraints*. The concept has been defined for the first time by: J. KORNAI, *Resource-constrained versus demand-constrained systems*, in *Econometrica,* vol. 47, no. 4, 801-19.

Against this background, second generation theories underpin the concept of '*fiscal responsibility at the margin'* and advocate for at least a partial responsibility of subnational entities on the revenue side[22]. The idea builds on the opinion that entities entrusted with powers for their financing tend to be politically more responsible to their citizens, on the assumption that financial responsibility through democratic control serves as a tool to strengthen political autonomy itself. This calls for a multi-faceted scheme of revenue distribution, which pays attention to the design of the instruments and the correlated procedures. As a matter of fact, both elements play a great deal in defining the balance between the overall objectives pursued.

3. Common features of the case-studies

This pattern applies in the two selected case studies and in general terms in all European compound States, with the sole (and limited) exception of Switzerland[23].

Both the German and the Spanish system are based on the 'welfare State' model, in which autonomy and solidarity have to coexist. Substantial equality is a recurrent *trait d'union*, with the aim of ensuring a national minimum standard of civil and social rights that is independent from the place of residence[24]. To this regard the German Basic Law mentions as one of its main goals the existence of '*comparable living conditions throughout Germany*'[25], while in Spain the Constitution call for the guarantee of an '*equivalent level of essential services in all the territory*' with regard to essential services (health, education and social assistance)[26]. It goes without saying that solidarity requirements challenge the room for differentiation the system may allow. The two notions derive from different conceptions and ensure a differentiated level of substantial and procedural safeguards. However, they both follow the spirit of the social welfare State and serve the ultimate aim of ensuring substantial equality by means of the constitutionalization of social rights and of a more equitable distribution of income[27].

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[22] To this regard: R. BIRD, *Tax assignment revisited*, in J. G. HEAD, R. E. KREVER (eds.), *The 21st century: A volume in memory of Richard Musgrave*, Kluwer Law International, The Netherlands, 2009, 441-70 (453). See also: ID., *Rethinking subnational taxes: A new look at tax assignment*, IMF Working Paper, 165, 1999, http://www.imf.org/external/pubs/ft/wp/1999/wp99165.pdf (last access 12/01/2016). At the same time there can be cases (mainly dual systems) where the central power to tax coexists with the allocation of significant powers to tax even at the subnational entities. This is the case for the USA and Switzerland. For an in-depth analysis on the allocation of the legislative power to tax see respectively: W. HELLERSTEIN, *The United States*, in G. BIZIOLI, C. SACCHETTO (eds.), *Tax Aspects of Fiscal Federalism. A comparative analysis*, IBFD, Amsterdam, 2011, 25-78; and D. P. RENTZSCH, *The Swiss Confederation*, in G. BIZIOLI, C. SACCHETTO (eds.), *Tax Aspects of Fiscal Federalism. A comparative analysis*, IBFD, Amsterdam, 2011, 223-272. Among others, M. F. AMBROSIANO, M. BORDIGNON, *Normative vs positive theories of revenue assignments in federations*, in E. AHMAD, G. BROSIO (eds.), *Handbook of fiscal federalism*, Edward Elgar, Cheltenham (UK), 2006, 306-38, underline the lack of an optimal model of *tax assignment* and point out the importance of vesting subnational entities with a significant degree of tax autonomy.

[23] This means that the analysis – including the measurements - could also be applied to the Austrian case.

[24] On the balance between solidarity and autonomy/accountability see: M. BERTOLISSI, *Il bilanciamento tra solidarietà e responsabilità nell'ambito del federalismo fiscale*, in F. PALERMO, E. ALBER, S. PAROLARI (eds.), *Federalismo Fiscale: Una Sfida Comparat*a, CEDAM, Milano, 2011, 13-64.

[25] Art. 72.3 GG. Actually, before Federalism Reform I, the German Basic Law referred to '*equal living conditions'* throughout Germany. For a commentary: C. DEGENHART, *Art. 72*, in M. SACHS (ed.), *Grundgesetz Kommentar,* III edition, C.H. Beck, München, 2003, 1523-539.

[26] The reference goes to art. 158.1 of the Spanish Constitution and to art. 2.1, let. c), of the LOFCA no. 3/2009.

[27] Cfr. T. MARTINES, *Diritto costituzionale,* XII edition, Giuffrè, Milano, 2010, 126.

As a result the center holds a predominant role in the tax field, as the taxing power is a major tool for pursuing the redistribution of resources among both individuals and territories[28]. This relies on the assumption that the vertical allocation of powers and competences strongly influences the balance between autonomy and solidarity. This is even truer when it comes to financial matters.

Even the contrary is true. The social welfare model impacts the distribution of power among the different tiers and favours the consolidation of the cooperative paradigm of federalism[29]. The welfare State has led to an expansion of the central level's sphere of influence[30]. From a constitutional perspective this has resulted in a change of the parameter of reference. It is not anymore the principle of formal equality, but rather the principle of substantial equality that calls for a widespread guarantee of civil, social and to some extent also economic rights. This new conception of the State has determined the centralization of important competences that are considered instrumental for the redistribution of wealth[31].

This theoretical construct and its constitutional framework find application in a system of intergovernmental financial relations that presents typical common traits.

First of all, it is characterized by asymmetrical revenue and spending responsibilities[32]. This is due also to the fact that the two above-mentioned components do not act in the same way. As a rule, spending autonomy is implicitly inferred and goes hand in hand with the decentralization of legislative and – mostly – administrative competences[3334]. In Germany and in Spain, subnational entities are vested with significant administrative competences, which include the most costly functions related to the social welfare state. This implies strong decentralization of spending. The same, however, does not apply to revenue autonomy. The responsibility to raise revenue is the outcome of a political decision laid down in a legal act enjoying constitutional or quasi-constitutional nature. Furthermore, the decision is the result of a balance between opposites: autonomy claims and solidarity concerns. Due to its redistributive capability, the power to levy

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[28] G. BOGNETTI, *Federalismo*, in *Digesto,* IV edition, Utet, Torino, 1992, 283.

[29] The New Deal policies enacted by the U.S. President Franklin Delano Roosevelt have given rise to the first embryo of cooperative federalism. To this regard: M. GRODZINS, *The American system: a new view of government in the United States*, Rand McNally & Company, Chicago, 1966. The German model is the European prototype of cooperative federalism. To this specific regard it is of interest to recall the opinion of the Tröger Commission (1966): KOMMISSION FÜR DIE FINANZREFORM, *Gutachten über die Finanzreform in der Bundesrepublik Deutschland (Tröger-Guthachten)*, Kohlhammer, Stuttgart, 1966. A criticism to the functioning of paradigm within the german legal system can be found in: F. W. SCHARPF, *Die Politikverflechtungs-Falle: Europäische Integration und deutscher Föderalismus im Vergleich*, in *Politische Vierteljahresschrift*, no. 26, 1985, 323-56; and also, IDEM, *The joint-decision trap revisited*, in *JCMS - Journal of Common Market Studies*, vol. 44, no. 4, 2006, 845–64.

[30] See: A. IANNELLO, C. IANNELLO, *Il falso federalismo,* La Scuola di Pitagora*,* Napoli, 2004.

[31] In this respect: R. BIFULCO, *La cooperazione nello stato unitario composto*, Cedam, Padova, 1995, 7, 13, observes that the compound States within the EU legal system tend to develop intergovernmental relations of cooperative nature. Further, this results in a tendency towards homogenization with the EU legal framework.

[32] Indeed, this pattern characterizes all compound States with no exception. However, the extent of the gap can vary deeply from one case to the other, due to the different conceptions of the role of the State, together with the respective models for the division of competences.

[33] *De facto,* the decentralized spending authority is influenced by several factors. The major impact derives from the way the federal level exercises its spending power beyond limits. The transfer of earmarked grants or the adoption of stimulus and austerity measures appear to be detrimental in this respect. On the trend of the federal level to spend beyond limits: *ex plurimis*: R. L. WATTS, *The spending power in federal systems: a comparative study*, Queen's University, Kingston, 1999.

[34] Cfr. R. L WATTS, *Comparing federal systems*, III edition, McGill-Queen's University Press, Montreal & Kingston, 2008, 100-03.

taxes is strongly centralized and the role of subnational entities on the revenue side can only be marginal[35].

Such an allocation scheme gives rise to a vertical fiscal gap: the central level gets more resources than the ones it needs to cope with its own competences, while own sources of subnational entities are insufficient to cover their expenditures[36]. This requires instruments and procedures for the distribution of the revenue overall available.

The second common trait is a direct consequence of the previous one. As subnational entities do not rely on own tax sources, their system of financing is a mixed one[37]. It results from the combination of own and devolved sources of revenue. The first group includes own-source taxes, i.e., taxes imposed and regulated by the subnational level of government on its own. In this sense the adjective '*own*' ascribes exclusively to the subnational legislator the power to impose a tax. Beyond own taxes (*stricto sensu*), the group comprises surtaxes, that is, taxes levied by a subnational entity on top of another tax, typically belonging to the central level. Even though they lean on the same tax-base as previously defined by the central level, the intermediate layer is vested with the power to set it up and to determine the related tax-burden.

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[35] The scheme is the result of several factors. Besides the ones illustrated above, it is worth mentioning the silent but strong influence exerted by the European legal order. The expression is quoted from: R. BIFULCO, *Le relazioni intergovernative finanziarie negli Stati composti tra costituzione, politiche costituzionali e politiche di maggioranza*, in V. ATRIPALDI, R. BIFULCO (eds.), *Federalismi fiscali e costituzioni*, Giappichelli, Torino, 2001, 5. On the impact of EU legislation on the fiscal sovereignty of Member States: F. ESCRIBANO LÓPEZ, A. MARTÍN JIMÉNEZ, F. M. CARRASCO GONZÁLEZ, A. SANZ CLAVIJO (eds.), *El impacto del derecho de la Unión Europea en el poder tributario de las comunidades autónomas*, Aranzadi, Cizur Menor, 2011; A. MAGLIARO, *Autonomia tributaria nelle relazioni substatali: il quadro europeo*, in F. PALERMO, E. ALBER, S. PAROLARI (eds.), *Federalismo fiscale: una sfida comparata?*, Cedam, Milano, 2011, 157 ss.; L. GIANI, *La finanza locale tra armonizzazione fiscale e scelta federale*, in V. ATRIPALDI, R. BIFULCO (eds.), *Federalismi fiscali e costituzioni*, Giappichelli, Torino, 2001, 35-73. An important role to this respect is also played by the stringent obligations member States have to respect in the framework of the European economic governance. Such centralization is a common trend in all European compound States, with the exception of Switzerland. On the ongoing trends of reform see: E. ALBER, A. VALDESALICI, *Reforming Fiscal Federalism in Europe: Where Does the Pendulum Swing?,* in F. PALERMO, E. ALBER (eds.), *A New Era of Federalism - Une nouvelle ère de fédéralisme*, L'Europe en Formation, no. 1, 2012, 325-66 (334-38).

[36] To this extent see: A. SHAH, *Introduction: Principles of fiscal federalism,* in A. SHAH, J. KINCAID (eds.), *The practice of fiscal federalism: Comparative perspectives*, A global dialogue on federalism, vol. IV, McGill-Queen's University Press, Montreal, 2007, 28-9. The author distinguishes the '*vertical fiscal gap*' (as defined above) from the '*vertical fiscal imbalances*' that is, the vertical fiscal imbalances resulting in the case that the vertical fiscal gap is not properly addressed by means of reallocation of competences, or fiscal transfers or other adequate tools. See also: R. BOADWAY, A. SHAH (eds.), *Intergovernmental fiscal transfers: principles and practices*, World Bank, Washington D.C., 2007, https://openknowledge.worldbank.org/handle/10986/7171 (last access 2.02.2016). Scholars are not unanimous as to the definition of '*vertical fiscal imbalances*'. On this issue: R. BOADWAY, *Mind the gap: reflections on fiscal balance in decentralized federations*, in T. J. COURCHENE, J. R. ALLAN, C. LEUPRECHT, N. VERRELLI (eds.), *The federal idea. Essays in honour of Ronald L. Watts*, McGill-Queen's, Montreal, 2011, 363-77.

[37] From a legal perspective the differentiation between separated and mixed financing systems is illustrated, among others, by: F. GUELLA, *Modelli di federalismo fiscale a confronto: Italia e Austria*, in F. PALERMO, S. PAROLARI, A. VALDESALICI (eds.), *Federalismo fiscale e autonomie territoriali: lo stato dell'arte nell'Euregio Tirolo-Alto Adige/Südtirol-Trentino*, Cedam, Padova, 2013, 64-72; V. RUIZ ALMENDRAL, *Impuesto cedidos y corresponsabilidad fiscal*, Tirant lo Blanch, Valencia, 2004, 93. This applies mainly to a theoretical approach. A perfect correspondence of revenue and spending cannot be found in any compound State, not even in dual systems. The Swiss case is emblematic to this regard, where the assignment of a significant tax autonomy to the cantons coexists with an equalization mechanism. See further: D. P. RENTZSCH, *The Swiss Confederation*, in G. BIZIOLI, C. SACCHETTO (eds.), *Tax Aspects of Fiscal Federalism. A comparative analysis*, IBFD, Amsterdam, 2011, 223-272; G. BIAGGINI, *Il federalismo fiscale in Svizzera*, in J. WOELK (ed.), *Federalismo fiscale tra differenziazione e solidarietà: profili giuridici italiani e comparati*, vol. 55, Eurac research, Bolzano, 2010, 117-30; P. MISCHLER, *Il federalismo fiscale in Svizzera*, in A. DE PETRIS (ed.), *Federalismo fiscale 'learning by doing': modelli comparati di raccolta e distribuzione del gettito tra centro e periferia*, Cedam, Milano, 2010, 59-76; S. GEROTTO, *Il 'federalismo fiscale' svizzero*, in F. PALERMO, M. NICOLINI (eds.), *Federalismo fiscale in Europa. Esperienze straniere e spunti per il caso italiano*, Edizioni Scientifiche Italiane, Napoli, 2012, 95-108.

The second group encompasses a wider range of revenue sources that can derive from three different tools: 'tax-power sharing', 'tax-revenue sharing on a territorial base', 'equalization transfers' (or, generally speaking, 'grants')[38]. The first category includes those tax-revenue which are the outcome of a shared legislative power. Put another way, the revenue raised is the result of a combined exercise of the legislative power to tax. However, it is always the central legislator that decides to impose (or to eliminate) the tax. The second category refers to revenue coming from a tax levied by the central layer, then distributed pro-quota and by formula among and within the different tiers of government. The border line between this second subset and the third one (grants) lies in the formula of apportionment applied: it is included in the second category if it takes into consideration the amount of revenue generated within the territory of reference. Otherwise, all other sources of revenue can be considered equalization transfers or - broadly speaking - grants[39]. In sum, these pursue the compensation of territorial discrepancies through the redistribution of wealth and serve the implementation of the solidarity principle. For this reason, they will not be directly investigated in this paper.

4. Embedding financial responsibility in the constitutional framework

The above-illustrated theories of second generation disclose in the legal discourse the importance of a constitutional allocation of financial powers, able to vest subnational entities with autonomy not only on spending, but also on the revenue side, at least at the margin[40]. The power to tax represents one of the most significant expressions of financial autonomy[41]. At the same time, the financial structure plays an instrumental role and turns out to be the cornerstone of the principle of autonomy[42]. As a consequence, political autonomy cannot be conceived without an appropriate balance between these two dimensions within the limits set forth by other constitutional claims

[38] This classification has been made by the author, in order to facilitate the analysis – that will follow – of the different legal tools which try to place more responsibilities with the intermediate tier of government. In this attempt, inspiration has been drawn from two prominent scholars: R. L WATTS, *Comparing federal systems*, III edition, McGill-Queen's University Press, Montreal & Kingston, 2008, 95-116; G. ANDERSON, *Fiscal federalism. A comparative introduction*, Oxford University Press, Canada, 2010.

[39] The criteria applied to distinguish between the two sources are thoroughly illustrated by: H. BLÖCHLIGER, D. KING, *Less than you thought: the fiscal autonomy of sub-central governments*, in *OECD Economic Studies*, vol. 43, no. 2, 2006, 166-67.

[40] To this extent, P. RUSSO, *Finanza regionale e questione fiscale*, in *Rivista di Diritto Tributario*, 1994, 885-911 (888), underlines that in order to make subnational entities politically responsible for the discharge of their competences, financial autonomy cannot be limited to the power to decide on the destination of the available resources (spending autonomy), but must incorporate the responsibility to determine the allocation of the revenue at disposal. Otherwise the aim would remain unsatisfied.

[41] Along this line: F. GALLO, *Brevi riflessioni sull'autonomia tributaria delle regioni*, in *Rivista di diritto finanziario e scienze delle finanze*, 1975, 253. The author states that financial autonomy cannot be reduced to budgetary autonomy - that is to the power to make use of the resources at disposal without any limit. In his prominent opinion financial autonomy in its broadest sense should include tax autonomy. In this sense also: F. PUZZO, *Il federalismo fiscale. L'esperienza italiana e spagnola nella prospettiva comunitaria*, Giuffrè, Milano, 2002, 45. The author highlights the functional nexus with co-responsibilization.

[42] In the word of C. MORTATI, *Istituzioni di diritto pubblico*, vol. II, IX edition, Cedam, Padova, 1976, 906. See further: V. RUIZ ALMENDRAL, *Impuesto cedidos y corresponsabilidad fiscal*, Tirant lo Blanch, Valencia, 2004, 99-101; S. KORIOTH, *Der Finanzausgleich zwischen Bund und Länder*, Mohr Siebeck, Tübingen, 1997, 268; F. PUZZO, *Il federalismo fiscale. L'esperienza italiana e spagnola nella prospettiva comunitaria*, Giuffrè, Milano, 2002, 45; M. BERTOLISSI, *'Rivolta fiscale', federalismo, riforme istituzionali*, Cedam, Padova, 1997, 24-5; F. GALLO, *Brevi riflessioni sull'autonomia tributaria delle regioni*, in *Rivista di diritto finanziario e scienze delle finanze*, 1975, 252. According to the author political autonomy is inherently linked to financial autonomy. The latter is thus considered – together with the legislative autonomy – essential to the very existence of a territorial entity.

(e.g. equality and solidarity). Only this pattern would make subnational entities responsible for the decisions they adopt[43].

The significance of linking the two sides of autonomy comes to the fore if one considers the fundamental role played by the democratic principle in financial matters. In general terms democracy is essential to autonomy[44] and it becomes even more important if related to financial autonomy: democratic representation lies at the very foundation of the power to tax[45]. Under these premises, a transfer-based system makes subnational entities dependent on decisions adopted by another tier of government and undermines the incentives towards a responsible management of resources. On the contrary, if the intermediate level of government is co-responsible for determining the amount of money at disposal, it becomes at the same time more cautious in spending-related decisions. This highlights the need to ensure a certain degree of self-financing.

The principle of financial autonomy finds application in both case studies. The frame of reference is the financial constitution[46] - that is, the array of principles and rules which govern not only the tax regime, but generally speaking the intergovernmental relations in financial matters as well as the allocation of responsibilities on revenue and spending in a compound state[47].

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[43] To this extent: *ex plurimis*, F. PUZZO, *Il federalismo fiscale. L'esperienza italiana e spagnola nella prospettiva comunitaria*, Giuffrè, Milano, 2002, 45; L. ANTONINI, *La rivincita della responsabilità. A proposito della nuova Legge sul federalismo fiscale*, I quaderni della sussidiarietà, num.7, Milano, Fondazione per la sussidiarietà, 2009, 5-6; M. BERTOLISSI, *Il bilanciamento tra solidarietà e responsabilità nell'ambito del federalismo fiscale*, in F. PALERMO, E. ALBER, S. PAROLARI (eds.), *Federalismo fiscale: una sfida comparata*, Cedam, Milano, 2011, 19-26.

[44] In this respect: R. MÁIZ, *Beyond institutional design. The political culture of federalism*, in A. LÓPEZ BASAGUREN, (ed.), *The Ways of federalism in Western Countries*, Springer, Heidelberg, 2013, 83-103 (93).

[45] The nexus dates back to the *Magna Charta Libertatum* (1215), but the slogan '*no taxation without representation'* has been coined during the American Revolution. On that occasion, the thirteen British colonies in North America opposed certain tax laws passed by the British Parliament (the Revenue Act of 1763, named after Sugar Act, the Stamp Act of 1765, the Townshend Acts of 1767, and later (in 1774) – an array of measures referred to as Intolerable Acts), on the assumption that there were no representatives of the colonies in the British Parliament. See: T. O. LLOYD, *The Short History of the Modern World: The British Empire 1558 – 1983*, Eng. Oxford University Press, Oxford, 1984, 3 ss; G. MARONGIU, *I fondamenti costituzionali dell'imposizione tributaria. Profili storici e giuridici*, Giappichelli, Torino, 1991, 28 ss. To this extent, G. FALSITTA, *Manuale di diritto tributario. Parte generale*, IV edition, Cedam, Padova, 2003, 125, observes that dating back to 1091 in the Kingdom of Castiglia the *Cortes* claimed against the monarch the right to control the tax regime. A critical reading can be found in: R. T. MACHAN, *No taxation with or without representation: completing the revolutionary break with feudalist practices*, in R. W. MCGEE (ed.), *Taxation and public finance in transition and developing economies*, Spinger, New York, 2008, 25-38.

[46] This the English translation of *Finanzverfassung*. The expression goes back to the Austrian and German federal States and was used to refer to the constitutional provisions on fiscal federalism. To this regard see: P. PERNTHALER, *Österreichische Finanzverfassung. Theorie – Praxis – Reform*, in *Schriftenreihe des Instituts für Föderalismusforschung*, vol. 33, Wilhelm Braumüller, Wien, 1984, 21 ss. According to the prominent scholar, the word *Finanzverfassung* refers to the federal financial order as a whole. It does not merely refer to the tax system and the distribution of resources (*Finanzausgleich*). The concept has to be understood *lato sensu*, as including the constitutional principles and rules which govern the financial system as whole (financial responsibilities, budgetary autonomy, management of resources and public debts). In the German literature see: among others, J. HELLERMANN, *Artikel 104a*, in H. V. MANGOLDT, F. KLEIN, C. STARCK (eds.), *Kommentar zum Grundgesetz,* vol. 3, VI edition, Franz Vahlen, München, 2010, 1099-1186. The definition finds confirmation in the constitutional jurisprudence: BVerfG decision of 11 March 1980, BVerfGE 55, 274 (300) – *Berufsausbildungsabgabe*. In this sense: G. DI PLINIO, *Il federalismo fiscale degli Stati Uniti d'America*, in G. F. FERRARI (ed.), *Federalismo, sistema fiscale, autonomie. Modelli giuridici comparati*, Donzelli, Roma, 2010, 274, referring to: J. M. BUCHANAN, R. E. WAGNER, *Democracy in deficit: political legacy of Lord Keynes,* Academic Press, New York, 1977, 21. It represents an evolution of the expression '*fiscal constitution*' with which James Buchanan and Richard Wagner refer to the rules – written or unwritten – that govern fiscal decisions in the US Federation.

[47] In Germany the point of reference is title X of the Basic Law, having particular regard to articles 104a-108. According to J. HELLERMANN, *Artikel 104a*, in H. V. MANGOLDT, F. KLEIN, C. STARCK (eds.), *Kommentar zum Grundgesetz,* vol. 3, VI edition, Franz Vahlen, München, 2010, 1103, this is the financial constitution *stricto sensu*, that is, the provisions that regulate the allocation of the *Finanzhoheit*. The following articles (art. 109 ff.) refer to budgetary autonomy (*Haushaltverfassung*). This is confirmed by: BVerfG decision of 11th March 1980, BVerfGE 55, 274 (300) –

In this respect article 156 of the Spanish Constitution states that '*autonomous Communities shall enjoy financial autonomy for the development and exercise of their powers, in conformity with the principles of coordination with the State finance system and of solidarity among all Spaniards*'[48]. The principle appears to be subject to conditions and limits. First of all, the instrumental nature of the discharge of competences can work even the other way round, that is, political autonomy will determine the degree of financial autonomy. Secondly, it has to be balanced with the principles of coordination and solidarity[49].

However, the Constitution does not specify the nature of such autonomy. This is left open for the central legislator to decide, who could opt for vesting autonomous Communities with autonomy merely on spending or on both sides. Indeed minimum requirements have progressively been developed through constitutional jurisprudence, but always following the spirit embedded in the LOFCA. After initial self-restraint[50], the Court has progressively recognized that a new conception of subnational financing has come to the fore. The main contribution has derived from the positivisation of the principle of co-responsibility[51], which has led the Court to tell a new story. The jurisprudence embraces a broader approach to financial autonomy thoroughly portrayed in a constitutional decision of the year 2000. According to this renewed conceptual approach, subnational financing shall be based '*not only on a share of central State revenue* (literally, *participation to State resources*), *but also – and in a meaningful way – on the capacity of the tax system to generate a system of own revenue as main source of public resources*'[52]. This calls for a system which is less dependent on State transfers and relies much more on the '*capacity of the autonomous Communities to determine and raise own taxes*'[53]. The new conception has been gradually translated into the LOFCA and provides for the increase of tax-revenue over state transfers, on the one hand, and for the strengthening of the legislative powers of ACs over State taxes, on the other.

Nevertheless the new pattern has to come to terms with two principles: '*of coordination with the State finance system'* and *'of solidarity among all Spaniards'* (art. 156.1 CE)[54]. The first one can be outlined as the need to *'integrate (omissis) the subsystems in the system as a whole, avoiding contradictions and reducing shortcomings that could prevent or worsen the functioning of the system'*[55]. Conversely, the second one has to

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Berufsausbildungsabgabe. In Spain it is a combination of several sources: the Constitution, having regard to arts. 156-158 and all other provisions devoted to the allocation of competences with financial relevance, the Organic Law on the Financing of Autonomous Communities (so called LOFCA) and the Statutes of autonomy. A comparative analysis of financial constitutions from the perspective of the sources of law is available in: S. PAROLARI, *From a formal to a substantial approach: sources of law and fiscal federalism*, in F. PALERMO, A. VALDESALICI (eds.), *Comparing Fiscal Federalism,* Brill, Leiden-Boston, 2016 (forthcoming).

[48] The English translation of the Spanish Constitution is the one edited by the Congress of Deputies, published in: https://www.congreso.es. While the English version of the German Basic Law is the one edited by the Bundestag, published in https://www.bundestag.de. The translation of the decisions of the Federal Constitutional Court and of the Spanish Constitutional Court are own.

[49] STC 179/1987, of 12th November, LF 2.

[50] Among others: STC 63/1986, of 21st May, LF 4.STC 201/1988, of 27th October, LF 4; STC 13/1992, of 6th February, LF 7; STC 14/1986, of 31st January, LF 2 e 3, STC 127/1999, of 1st July, LF 8.

[51] The principle firstly appeared in the LOFCA 3/1996, of 27th December.

[52] STC 289/2000, of 30th November, LF 3.

[53] STC 96/2002, of 25th April, LF 2.

[54] Here also comes to the fore the principle of equality. According to art. 139.1 CE *'every Spaniard is entitled with the same rights and obligations in any part of the State territory'*. Furthermore, a proper vision requires the consideration of even those exclusive legislative State competences which are of economic significance. The latter include among others the competence to regulate the '*bases and coordination of general planning of economic activity*' as well as the *'general finances and State debt*' (art. 149.1 CE, let. XIII and XIV). To this regard: M. CARRASCO DURÁN, *La interpretación de la competencia del Estado sobre las bases y la coordinación de la planificación general de la actividad económica (art. 149.1.13ª de la Constitución)*, in *Revista de Derecho Político*, no. 62, 2005, 55-94.

[55] STC 32/1983 of 28th April, LF 2; and also, STC 194/2004 of 4th November, LF 8.

be interpreted in the light of art. 138.1 CE. The provision entrusts the State with the task of ensuring '*the establishment of a just and adequate economic balance between the different areas of Spanish territory*'[56]. This is portrayed as instrumental to give effective implementation to the principle of solidarity and has to be realized through '*a more equitable distribution of regional and personal weath*'[57]. The mentioned provisions do not vest in the central level a specific legislative competence. However, the vagueness of the expression *'just and adequate economic balance'* together with the *'national dimension'* of the problem *'justify a unitary intervention of the State on the whole territory'*. This is based on the fact that *'only a uniform treatment allows to correct the inter-territorial economic imbalances and to favor a more balanced distribution of the economic activities on the whole national territory'*[58]. *De facto,* this framework prompted an extensive interpretation of art. 138.1 and leaves to the central level a wide margin of political discretion in balancing autonomy with solidarity[59]: according to the jurisprudence this '*is a political task of the central Parliament*'[60].

In Germany, unlike Spain, the Basic Law does not include a provision which explicitly refers to either the principle of financial autonomy or its limits. Even if the constitution is silent on this point, the principle can be derived from the federal principle *ex* art. 20 GG. To this regard the constitutional jurisprudence states that both autonomy and solidarity necessarily have to coexist in it. Otherwise the very substance of the federal constitutional order would be impeded: a federal system is a combination of diversity and unity[61], where the Federation respects the statehood of the Länder and the Länder respect the federal unity[62].

The reasoning of the Federal Constitutional Court relies on art. 20 Basic Law, which provides for the coexistence of both the welfare state and the federal order. This necessarily results in a financial structure with a solidarity blueprint (*Solidargemeinschaft*), capable of ensuring '*equivalent living conditions'* throughout the federal territory (art. 72.2. GG) through a system of intergovernmental relations based on the principle of federal loyalty (*Bundestreue*). However, the function of the financial constitution is not exhausted by the establishment of a system of public finance that

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[56] To this regard it is worth mentioning the decision STC 31/2010 of 28th June, LF 134. The Court states that the State is vested with a pivotal role when it comes to the guarantee of inter-territorial solidarity and this cannot be conditioned by provision of the Statutes of autonomy. For an in-depth analysis of the impact of the decision in respect to the principle of solidarity, see: J. PAGÈS I GALTÉS*, El finançament autonòmic a la sentència 31/2010 del tribunal constitucional sobre l'estatut català de 2006*, in *Revista Catalana de Dret Públic*, 2010, 437-43; and also, N. BOSCH, M. VILALTA FERRER, *Efectos de la sentencia del Tribunal cosntitucional sobre el modelo de financiación de la Generalitat de Cataluña*, in *Revista Catalana de Dret Públic*, 2010, 435-37.

[57] *Ex* art. 40.1 CE.

[58] In this sense, STC 146/1992, of 16th October, LF 1.

[59] The legal reasoning is based on a functional interpretation of the exclusive State competences that have economic relevance. To this extent, see: E. ALBERTÍ I ROVIRA, *Artículo 138*, in M. E. CASAS BAAMONDE, M. RODRÍGUEZ-PIÑERO BRAVO-FERRER (eds.), *Comentarios a la constitución española. XXX aniversario*, Fundación Wolters Kluwer, Madrid, 2009, 2087-092 (2089). An example to this regard is the exclusive legislative State competence on the '*bases and coordination of general planning of economic activity*' (*ex* art. 149.1, let. 13 CE). On the far-reaching dimension of this competence title see, among others: STC 1/1982, 28th January; STC 146/1992, of 16th October, LF 2.

[60] STC 13/2007, of 18th January, LF 5.

[61] Cfr. J. ISENSEE, *Der Föderalismus und der Verfassungsstaat der Gegenwart*, in *Archiv des öffentlichen Rechts (Aö*R*)*, vol. 155, 1990, 248, 252; A. DITTMANN, *Historische Aspekte des deutschen Föderalismus im Vorfeld einer Europäischen Föderation,* in H.-W. ARNDT, F.L. KNEMEYER, D. KUGELMANN, W. MENG, M. SCHWEITZER (eds.), *Völkerrecht und deutsches Recht. Festschrift für Walter Rudolf zum 70. Geburtstag,* München, 2001, 157. The different academic positions are reconstructed by: H. SCHELLER, *Solidarietà e senso di responsabilità in Germania*, in F. PALERMO, E. ALBER, S. PAROLARI (eds.), *Federalismo fiscale: una sfida comparata,* Cedam, Milano, 2011, 85-91.

[62] In this sense, K-P. SOMMERMANN, *Artikel 20*, in H. V. MANGOLDT, F. KLEIN, C. STARCK (eds.), *Kommentar zum Grundgesetz,* vol. 3, VI edition, Franz Vahlen, München, 2010, par. 37; W. HERZOG, *Art. 20*, in T. MAUNZ, G. DÜRIG, *Grundgesetz, Kommentar,* Beck, München, 1980, 117.

confers an adequate (i.e., sufficient) amount of resources to both federation and Länder, in order to allow them to satisfy their assigned functions[63]. It is not enough to guarantee sufficient revenue. According to the federal constitutional Court, autonomy is inherent in the statehood of the Länder and has to be able '*to unfold in the independence (Eigenständigkeit) and in the responsibility (Eigenverantwortlichkeit) linked to the discharge of competences and the budgetary autonomy*, *in order to allow that statehood becomes real*'[64]. Instead, solidarity is an expression of the '*community based on solidarity (Solidargemeinschaft) and of the principle one for the other (Prinzip des Einstehens füreinander) that belongs to the federal order*'[65].

Notwithstanding such divergent dogmatic approach, the principle of financial autonomy has a significant common feature in the analysed case-studies. Both recognize that it consists of a twofold dimension: the power to decide how to spend money and how to raise it. As the two countries are characterized by a strong decentralization of spending, there is the need to focus on the allocation of autonomy on the revenue side in order to determine the extent of responsibility at the margin, respectively, vested in the autonomous Communities and the Länder.

5. Selection and categorization of the legal tools

Moving from the theoretical paradigm of '*fiscal responsibility at the margin*' to legal practice, the need to observe how and to what extent revenue is distributed among and within the different layers of governments emerges. The way in which the vertical fiscal gap is addressed influences the degree of financial autonomy each entities is vested with. The major issue at stake is the revenue structure of the intermediate tier of government, paying particular attention to the legal tools and procedures devoted to revenue-sharing.

Proceeding from the classification offered at the end of section 3, four major legal categories emerge. These are: tax-revenue sharing on a territorial base, tax-power sharing, surtaxes and own taxes.

First of all, the selection focuses on the resources generated from taxes. This is due to the fact that this kind of revenue represents the lion's share of the budget, but also that tax autonomy plays an essential role if related to political autonomy[66]. Secondly, another crucial element is the assignment to the intermediate level of margin of discretion to affect the amount of resources at disposal. In other words, the choice is limited to those tax-revenue sources, in which the intermediate level is vested with a certain power to co-determine the amount of money at disposal. This element is considered a means to pursue the financial and political responsibilization of territorial entities.

Bearing this in mind, two components come to the fore in the examination of the four above-mentioned categories: the legislative competence to tax and the power over the tax revenue.

Among these, the legislative power to tax is a typical vehicle for making territorial entities bear the economic and political costs of the decisions they adopt. Due to the significance of the legislative

[63] See also: BVerfG decision of 11 March 1980, BVerfGE 55, 274, (300) – *Berufsausbildungsabgabe*; BVerfGE 72, 330, (388).
[64] BVerfG decision of 24th June 1986, BVerfGE 72, 330, (383) - *Finanzausgleich I*.
[65] BVerfG decision of 27th May 1992, BVerfGE 86, 148 (264) - *Finanzausgleich II*. Here the Tribunal recalls the above mentioned '*Prinzip des Einstehens füreinander*', alongside previous decisions (see BVerfGE 72, 330 [386]).
[66] M. VILLARÍN LAGOS, *La cesión de impuestos estatales a las Comunidades autónomas*, Lex Nova, Valladolid, 2000, 120.

power in tax issues, it turns out to be the best tool to make the intermediate tier co-responsible for the determination of its financial sources. However, it cannot be reduced to this. One of the major subnational sources of revenue consists of taxes levied and regulated by the central layer, then distributed by formula among and within the different tiers of government. These will be considered in the investigation, acknowledging that the *ratio* for apportionment links the allotted amount to the resources generated within the territory of reference. In this case the amount of money at disposal depends heavily on a (legislative) decision adopted by another layer of government – the central one. However, when the territorial entities have influence on the *quantum,* this can exert a certain – although weak – responsibilizing function. In this case responsibility relies on two main factors: the extension of political autonomy each entity enjoys and the degree of financial autonomy therein. On the one hand, wider autonomy over competences makes entities more responsible. This connexion reflects the possibility to make decisions that impact the development of regional economy and, although indirectly, influence the revenue at disposal. The more the regional GDP grows, the more the fiscal capacity increases, the more money the entity has. On the other hand, the desired effect relies on the absence of mechanisms of economic compensation. In other words, the positive results in terms of responsibilization are lost, if an autonomous decision adopted by an entity results in a reduction of resources that is compensated by means of grants or subsidies coming from another layer or entity.

All these parameters will be taken into consideration in the selection and comparative analysis provided in the following sections (6-8). The focus will therefore be limited to those sources of subnational financing that can be traced back to one of the four above-listed categories. Indeed, the legislative competence to tax and the power over the tax-revenue can be found in different combinations. In particular, the 'degree of autonomy' increases moving from the first to the fourth category. It passes from the single power on revenue that comes with 'tax-revenue distributed on a territorially-based-formula' to the full-power over 'own taxes'. The latter includes the power to impose the tax (*an*), the competence to define the *quomodo* of the tax liability (e.g. the tax-base, the taxable event or the taxpayers), as well as the tax-burden that is the *quantum* (e.g. the tax-rate, the brackets or the multipliers). The legal tools in between the two extremes have nuanced characteristics, resulting from a variety of combinations of these powers.

6. Tax-revenue apportionment on a territorial base

This category includes those sources of subnational financing that typically come from taxes imposed and regulated by the central layer and are then distributed among and within the different tiers of government on the basis of a formula that links the amount of money to the resources generated within the territory of reference.

Due to the strong centralization of the respective tax systems, both in Germany and Spain this is one of the most important sources of the subnational budgets. It amounts in average to 70% of the overall revenue of the Länder and of the autonomous Communities[67].

[67] The amount is thus unevenly distributed among the different entities. Being related to fiscal capacity, it is higher for richer units.

The link with the principle of territoriality draws a line between this tool and the general category of grants[68]. The amount of the latter is not proportional to the fiscal capacity of the territory. Frequently, it rather has an inversely proportional relation to it. By and large, the revenue coming from grants tends to be higher for poorer units than for richer ones.

If the aim had been to guarantee sufficient resources, grants would have served the purpose. Therefore, the choice of 'tax-revenue sharing' is meant for further purposes. As the formula of apportionment mirrors the fiscal capacity of the territory this results in a territorial differentiation based on the economic *ratio*.

If considered from an operational perspective, the solutions hosted by the two cases do not differ too much. In Germany this category comprises the following sources: the exclusive Länder taxes (art. 106.2 GG) and the shared taxes (art. 106.3 GG)[69], while in Spain the reference goes to the ceded taxes (art. 157.1, lett. a. CE)[70]. In sum, both systems provide for a vertical apportionment of a set of sources, which includes the most relevant measures of the respective tax regimes. Among others, it encompasses the tax on individual income as well as the value added tax, which together represent one of the major sources of public finance. Furthermore, both systems transfer a consistent percentage of the revenue thereof to the intermediate tier (if not the entire amount collected). Finally, the criteria that are applied to the horizontal distribution aim to link the amount to the place of origin, while taking into consideration the tax structure[71].

The tables below (tabs. 1 and 2) describe these instruments on a case-study base.

Table 1. Länder's share of tax-revenue from exclusive and shared taxes [72].

Tax source	**Revenue entitlement**	**Participation share (%)**	**Apportionment criteria**	**Legal base**

[68] A useful set of indicators for drawing a line between the two categories can be found in: H. BLÖCHLIGER, D. KING, *Less than you thought: the fiscal autonomy of sub-central governments*, in *OECD economic studies*, 43, 2006/2, 166-68.

[69] For details see: K.-A. SCHWARZ, *Art. 106,* in H. v. MANGOLDT, F. KLEIN, C. STARCK (eds.), *Kommentar zum Grundgesetz,* vol. 3, VI edition, Franz Vahlen, München, 2010, 1277-335; H. SIEKMANN, *Art. 106,* in M. SACHS (ed.), *Grundgesetz Kommentar,* VI edition, C.H. Beck, München, 2011, 2215-232; H.-B. BROCKMEYER, *Art. 107*, in B. SCHMIDT-BLEIBTREU, F. KLEIN (eds.), *Kommentar zum Grundgesetz,* XII edition, Carl Heymanns, Waldbüttelbrunn/Trento, 2011, 2239-254; M. HEINTZEN, *Art. 107,* in I. VON MÜNCH, P. KUNIG (eds.), *Grundgesetz Kommentar*, vol. 2, VI edition, C.H. Beck, München, 2012, 1130-155.

[70] For an in-depth analysis on the ceded taxes see: M. D. MORA LORENTE, *Impuestos cedidos: implicaciones internas y comunitarias*, Tirant lo Blanch, Valencia, 2004; V. RUIZ ALMENDRAL, *Impuestos cedidos y corresponsabilidad fiscal*, Tirant lo Blanch, Valencia, 2004; M. M. DE LA PEÑA AMORÓS, *Los puntos de conexión de los tributos cedidos a las comunidades autonómas*, in *Revista Jurídica de Castilla y León*, no. 17, 2009, 241-311; A. RIBES RIBES, *Poder normativo autonómico y tributos cedidos*, Tirant lo Blanch, Valencia, 2012; J. M. LAGO MONTERO, I. GIL RODRÍGUEZ, M. A. GUERVÓS MAÍLLO (eds.), *El sistema de financiación de las comunidades autónomas. Comentario a la ley 22/2009, de 28 de diciembre, tras la Sentencia del estatuto catalán,* Dykinson, Madrid, 2010.

[71] With an important exception in the German case. As a matter of fact, the horizontal apportionment of the VAT quota the Länder as a whole are entitled to, it is based partly on population (75%), but partly on the below-average fiscal capacity (25%). If the amount of money coming from a pool of specified taxes is below Länder average, that Land in entitled to an added share of revenue from VAT. See further, P. M. HUBER, *Art. 107*, H. MANGOLDT, F. KLEIN, C. STARCK (eds.), *Kommentar zum Grundgesetz*, VI edition, Franz Vahlen, München, 2010, 1345-395.

[72] Source: own elaboration on the basis of arts. 106-107 GG and the implementing regulation (*Zerlegungsgesetz* of 6th August 1998, in *BGBl.*, part I, 1998, as last amended by art. 15, law 22nd December 2014, in *BGBl.*, part I, 2417).

Capital (net worth) tax	exclusive	100	Local revenue principle (place of collection)	art. 106, par. 2, part 1, GG
Inheritance tax (incl. gifts)	exclusive	100	Local revenue principle place of collection)	art. 106, par. 2, part 2 GG
Taxes on transactions (excl. the federal ones)	exclusive	100	Local revenue principle (place of collection)	art. 106, par. 2, part 3 GG
Beer tax	exclusive	100	Local revenue principle (place of collection)	art. 106, par. 2, part 4 GG
Tax on gambling establishment	exclusive	100	Local revenue principle (place of collection)	art. 106, par. 2, part 5 GG.
IRPF (incl. wages)	shared	42,5	Local revenue principle (residence of the employee)	art. 106, par. 3, art. 107, par. 1 GG; § 5, Zerlegungsgesetz
Corporate tax	shared	50	Location of the operational headquarters	art. 106, par. 3, art. 107, par. 1 GG; §§ 2-4, Zerlegungsgesetz
Turnover tax	shared	44,6	3/4 on a per capita basis; 1/4 below-average per capita income	art. 106, par. 3, art. 107, par. 1 GG.

Table 2. ACs' share of tax-revenue from ceded taxes[73].

Tax source	**Revenue entitlement**	**Participation share (%)**	**Apportionment criteria**	**Legal base (law 22/2009)**
Tax on individual income	shared	50%	regular residence	Art. 25, par. 1, lett. a) Art. 30

[73] Source: REAF-REGAF, CONSEJO GENERAL DE ECONOMISTAS, *Panorama de la fiscalidad autonómica y foral*, 2015, 39, http://www.economistas.org (last access 25.02.2016).

Capital tax	Exclusive	100%	Regular residence	Art. 25, par. 1, lett. b) Art. 31
Inheritance and gift tax	Exclusive	100%	Regular residence	Art. 25, par. 1, lett. c) Art. 32
Tax on capital transfers and documented legal acts	Exclusive	100%	Regular residence or residence for tax purposes or location of the real estate or place of authorization	Art. 25, par. 1, lett. d) Art. 33
Tax on gambling	Exclusive	100%	Place of authorization or of realization of taxable event	Art. 25, par. 1, lett. e) Art. 34
Value-added tax	shared	50%	Territorial consumption (statistical index)	Art. 25, par. 1, lett. f) Art. 35
Tax on electricity	Exclusive	100%	Index of territorial net consumption of electricity	Art. 25, par. 1, lett. m) Art. 42
Other special taxes	shared	58%	Territorial consumption (statistical index); index of territorial delivery of fuel, diesel, fuel oils; index of territorial tobacco sales to tobacconists	Art. 25, par. 1, lett. g)-l) Artt. 34-41
Special tax on determined means of transport		100%	Residence for tax purposes	Art. 25, par. 1, lett. n) Art. 43

Tax on hydrocarbons		100%	Location of the sales factory	Art. 25, par. 1, lett. ñ) Art. 44

However, major traits of the overall system of 'tax-revenue apportionment on a territorial base' are highly distinct.

A first element is related to the architecture of the respective financial constitutions. In Germany this legal tool is part of a multi-stage and coordinated system of revenue sharing - the so-called *Finanzausgleich* (arts. 106-107 GG) - that provides for the distribution of all resources at disposal among and within the various tiers. It is described in detail in the financial constitution itself, in order to avoid as far as possible conflicts between financial resources and political interests[74]. Further, it combines tax-revenue sharing with the system of equalization (equalization transfers) in order to ensure the overall coherence and effectiveness of the system of distribution. Finally, the constitutional revisions and the regulations regarding their implementation are subject to the approval of the (thus mitigated[75]) majority of the Länder via the Bundesrat.

Conversely, the Spanish financial constitution contains only general provisions. These are limited to the fundamental principles (articles 156 and 158) and the list of sources that make up the financing system of the autonomous Communities (art. 157). The detailed regulations can be found in the organic Law LOFCA and in ordinary legislation. This scheme has a twofold consequence. On the one hand, the 'tax-revenue sharing system' is in the hand of the central tier of government. The LOFCA and the implementing ordinary legislation are adopted after an agreement has been reached between the State and the autonomous Communities in the Financial and Fiscal Policy Council (hereinafter, also FFPC)[76]. However, the central level has *de facto* the final say. This is due to both the composition and the functioning of the Council itself. To reach an agreement an absolute majority is required in the second vote (2/3 in the first) and the State has a number of votes equal to the one of the ACs altogether considered[77]. This scheme definitely confers a determining role upon the central level. Furthermore, the LOFCA provides only for very general trajectories in this specific regard. As a consequence, from a legal standpoint, the system of tax-revenue sharing is basically found in an ordinary law adopted by the central State[78]. On the other

[74] With the exception of the allotment of the VAT. This is left to the implementing regulations, which have to be submitted to the Bundesrat for approval. This was the purpose of the *Maßstäbegesetz* itself. See: BVerfG decision of 11th November 1999, BVerfGE 101, 158 – *Finanzausgleich III*

[75] In the Bundesrat, the Länder are not represented on an equal base (1 unit = 1 vote). The number of representative is calculated by taking into account the demographic factor (population), even though it is weighted (min 2; max 6) in order to favour less-populated ones.

[76] The Council comprises representatives of both tiers of Government on equal numbers. On its composition and role see: J. CALVO VÉRGEZ, *El Consejo de Política Fiscal y Financiera en el nuevo modelo de Financiación Autonómica*, in *Crónica tributaria*, no. 139, 2011, 7-44.

[77] In this sense, J. LUIS GARCÍA RUIZ, E. GIRÓN REGUERA, *La financiación autonómica: ¿competencia constitucional o estatutaria?*, in *Revista española de derecho constitucional*, no. 75, 2005, 33-58 (44).

[78] Indeed, from a political perspective it is difficult to imagine that the State can ignore what has been agreed upon in the Financial and Fiscal Policy Council or in the bilateral Commission State-autonomous Community with this specific regard. See further on this topic: J. RAMOS PRIETO, *La cesión de impuestos del estado a las comunidades autónomas. Concepto, régimen jurídico y articulación constitucional,* Comares, Granada, 2001, 391 ss; *ID.*, *El sistema tributario en el estado autonómico. Análisis a la luz del estatuto de autonomía para Andalucía de 2007 y de la reforma de la financiación autonómica de 2009*, Fundación Pública Andaluza, Centro de Estudios Andaluces, Sevilla, 2012, 161 ss.; J. CALVO VÉRGEZ, *Financiación autonómica: problemas constitucionales y legales*, Arazandi, Cizur Menor, 2005, 115 ss.

hand, the equalization mechanism consists of a plethora of funds regulated in the LOFCA. This results in a highly fragmented system that can hardly be brought to synopsis.

Through the comparison, two factors that influence the extent of financial autonomy assigned to each entity become visible, having specific regard to the sources included in the category 'tax-revenue sharing'. One aspect involves the procedural dimension of the decision-making process. In Germany, the Länder participate in the decision-making process at federal level and their consent is needed not only for constitutional revisions but also for enacting ordinary laws in financial matters if these affects their interests. The same does not apply to the Spanish system. The involvement of territorial entities in the decision-making at central level reflects on the substantial dimension of autonomy. As a matter of fact, the procedural gap ends up weakening the same guarantee of the financial allocation. The amount of money at the disposal of the autonomous Communities is entirely dependent on the political will of the central layer of government and this further undermines their financial autonomy.

7. Tax-power sharing: the legislative power to tax of Länder and autonomous Communities

The category of 'tax-power sharing' includes those legal tools pursuing a vertical distribution of the legislative power to tax. As mentioned, the power to regulate taxes is a typical vehicle for making territorial entities bear the economic and political costs of the decisions they adopt. This results in conferring upon subnational entities a margin of discretion to co-determine the revenue at disposal.

This is confirmed by the fact that the legislative power is the most accurate indicator of political autonomy. As financial autonomy is a major component of the latter, law-making becomes a critical factor also in terms of financial responsibility[79]. Otherwise, the existence and the sufficiency of financial means would depend on the discretion of another tier: the central one[80]. This pattern would in turn result in a path-dependent system of subnational financing. Furthermore, this kind of power is always associated with the taxes whose revenue flows wholly or at least partially to the intermediate level itself. This strengthens the connection between decision-making and financial endowment and thus contributes to making a leap forward in terms of financial and political responsibility.

Against this background, the comparison of the two case-studies brings to light the co-existence of dissimilar patterns. The least common denominator can be found in two elements that always have to co-exist. The first one concerns the decision to levy the tax which always happens through a legal act of the central level, that is, a federal law for Germany and a state law for Spain. It is pivotal that constituent units are not assigned full authority over the tax. If they were solely in charge of imposing the tax, independently one from the other, the revenue thereof could only be considered as 'own taxes'[81]. The second one refers to the way in which these sources are regulated.

[79] L. VANDELLI, *Autonomia e decentramento*, in L. PEGORARO (ed.), *Glossario di diritto pubblico comparato*, Carocci editore, Roma, 2011, 24-7 (25).

[80] This link is thoroughly illustrated in: U. DE SIERVO, A.ORSI BATTAGLINI, D. SORACE, R. ZACCARIA, *Note in tema di finanza regionale*, in *Rivista Trimestrale di Diritto Pubblico*, 1971, 712-734 (717).

[81] With specific regard to the Spanish case, scholars underline the existence of core powers that shall remain with the central level: A. MARTINEZ LAFUENTE, *La cesión de tributos del estado a las comunidades autónomas*, Civitas, Madrid, 1983,

It is always the outcome of a meeting of wills, as the legal framework is a combination of decisions at the central level and at the intermediate level.

Besides these common traits, the category can include a great variety of instruments. Such multifaceted nature finds evidence in the selected case-studies, where the legislative competence of well-determined taxes is the result of either a shared or a joint decision-making process.

In the German case, the legal solution consists in the assignment of a co-legislative role in tax matters to the Länder[82], via their mitigated representation in the Bundesrat[83]. Even if the Bundesrat is a federal organ, its composition and functioning guarantee the representation of the Länder, or rather their executives. The decision-making power lies at the federal level, but the legal act is the outcome of a legislative process that calls for the double approval of the same text.

Pursuant to art. 105.3 GG '*Federal laws relating to taxes the revenue from which accrues wholly or in part to the Länder (omissis) shall require the consent of the Bundesrat*'. The scope of the provision is rather broad, as it includes all major taxes of the system. It is estimated that 85% of overall tax-revenue comes

45-6. See also: E. QUINTANA FERRER, *Los recursos participativos en el marco de la articulación entre las haciendas autonómica y estatal*, Escola d'Administració Pública de Catalunya, Valencia, 2001.

82 Almost all legal acts adopted in financial matters require the approval of the Bundesrat, if so required by a provision of the Basic Law. In sum, if the act affects the financial powers and sources of the Länder, the consent of the Bundesrat is necessary. All in all, financial relations are an emblematic example of the phenomenon German scholars refer to as *Beteiligungsföderalismus* (participatory federalism). In this respect: J. WOELK, *La forma segue la funzione: il Consiglio federale tedesco (Bundesrat)*, in E. ROSSI (ed.), *Studi pisani sul Parlamento,* Pisa University Press, Pisa, 2014, 161. With reference to participatory dynamics see further: R. LHOTTA, H.-W. HÖFFKEN, J. KETELHUT, *Von Fröschen, Sümpfen und Tauschgeschäften: Zur Logik des Scheiterns bundesstaatlicher Reformen im Beteiligungsföderalismus am Beispiel von Gesetzgebung und Gemeinschaftsaufgaben*, in R. HRBEK, A. EPPLER (eds.), *Die unvollendete Föderalismus-Reform. Eine Zwischenbilanz nach dem Scheitern der Kommission zur Modernisierung der bundesstaatlichen Ordnung im Dezember 2004*, in *EZFF-Occasional Papers*, no. 31, Tübingen 2005, 15-42. In general terms, on the participatory function of federal bicameralism see: F. PALERMO, M. NICOLINI, *Il bicameralismo. Pluralismo e crisi della rappresentanza in prospettiva comparata*, Edizioni Scientifiche Italiane, Napoli, 2013, 135-37. It remains the same, even after the *Föderalismusreform I.* On this aspect: *ex plurimis*, P. SELMER, *Die Föderalismusreform – Eine Modernisierung der bundesstaatlichen Ordnung?*, in *JuS - Juristische Schulung,* no. 12, 2006, 1052-060 (1057-058).

83 This happens only indirectly through the representatives of their executives, who sit in the Bundesrat. See further: BVerfG decision of 18th December 2002, BVerfGE 106, 310, (310) – *Zuwanderungsgesetz.* According to the constitution (arts. 50 and 59.2 GG), this body is expressly vested – among others - in financial matters with a legislative function (M. KLOEPFER, *Verfassungsrecht*, vol. I, C.H. Beck, München, 2011, par. 13; and also, G. MULERT, *Die Funktion zweiter Kammern in Bundesstaaten. Eine verfassungsvergleichende Untersuchung des deutschen Bundesrates und des südafrikanischen National Council of Provinces*, Nomos, Baden-Baden, 2006, 85-6), equal to the one assigned to the Bundestag. Nonetheless, according to the constitutional jurisprudence, it cannot be considered as *'a second chamber of single legislative body'* - BVerfG decision of 25th June 1974, BVerfGE 37, 363, (380) – *Bundesrat.* In support to the decision the Tribunal quotes: E. FRIESENHAHN, *Die Rechtsentwicklung hinsichtlich der Zustimmungsbedürftigkeit von Gesetzen und Verordnungen des Bundes*, in BUNDESRAT (ed.), *Der Bundesrat als Verfassungsorgan und politische Kraft: Beiträge zum fünfundzwanzigjährigen Bestehen des Bundesrates der Bundesrepublik Deutschland*, Neue Darmstädter Verlagsanstalt, Bad Honnef/Darmstadt, 1974, 251 ss. On this issue see also: M. KLOEPFER, *Verfassungsrecht*, vol. I, C.H. Beck, München, 2011, par. 19. It is classified as a *sui generis* body by: F. PALERMO, M. NICOLINI, *Il bicameralismo. Pluralismo e crisi della rappresentanza in prospettiva comparata*, Edizioni Scientifiche Italiane, Napoli, 2013, 147. Along these lines, M. KOTZUR, *Federalism and bicameralism – the German 'Bundesrat' (Federal Council) as an atypical model,* in J. LUTHER, P. PASSAGLIA, R. TARCHI (eds.), *A world of second chambers. Handbook for constitutional studies on bicameralism*, Giuffrè, Milano, 2006, 258, observes that from a functional standpoint (not from a formal one) the *Bundesrat* can be considered '*a second chamber*' when it takes part in the legislative process. On the basis of this function, R. STURM, *Der Bundesrat im Grundgesetz: falsch kontruiert oder falsch verstanden*, in EZFF (ed.), *Jahrbuch des Föderalismus 2009*, Nomos, Baden-Baden, 2009, 137-48 (138), considers it as a quasi-parliamentary body. Also F. PALERMO, J. WOELK, *Il Bundesrat tra continuità e ipotesi di riforma*, in *Le Regioni*, no. 6, 1999, 1097-122 (1106) underline the legitimation of the Bundesrat as an '*actual second chamber, substantially equal to the first chamber in the political management of the State*'.

from *Zustimmungsgesetze,* that is, laws that require the consent of both the Bundestag and the Bundesrat[84].

German legal scholars agree that the reference to '*federal laws relating to taxes*' necessarily has to be interpreted to approve all material tax laws[85], but not formal tax laws[86], or acts exerting only an indirect impact on the revenues that accrue to the Länder[87]. Further, it includes all acts which amend[88], or repeal a previous law[89]. The second requirement touches upon the link between the approval and the vertical apportionment of revenue (*Ertragshoheit)*. When art. 105.3 prescribes the consent of those federal laws '*the revenue from which accrues wholly or in part to the Länder'*, the reference goes to art. 106 GG. Only if the Federation regulates one of the taxes listed in par. 2 and par. 6 of art. 106[90], the consent of the Bundesrat is mandatory[91]. While art. 106.2 GG refers to the exclusive taxes, which accrue wholly to the Länder, art 106.6 GG relates to joint taxes that only partially accrue to the Länder. In any case, the majority of taxes falls under these provisions, as the ones that are exclusive to the Federation (art. 106.1 GG) are indeed very few. Furthermore, in case the Federation wants to impose a tax that falls beyond the list of art. 106 GG[92], a constitutional revision is necessary and this would still entail the Bundesrat's approval (2/3 majority).

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[84] In this respect, J. ENGLISH, H. TAPPE, *The federal republic of Germany*, in G. BIZIOLI, G. SACCHETTO (eds.), *Tax aspects of fiscal federalism*, IBDF, Amsterdam, 2011, 293.

[85] According to art. 80.2 GG, it includes also statutory instruments (*Rechtsverordnungen*), in case they find their legal basis in a law requiring the Bundesrat's approval (*Zustimmungsgesetz*).

[86] *Ex plurimis*, M. JACHMANN, *Art. 105,* in H. MANGOLDT, F. KLEIN, C. STARCK (eds.), *Kommentar zum Grundgesetz*, VI edition, Franz Vahlen, München, 2010, par. 53; S. MÜLLER-FRANKEN*, Art. 105*, in K. H. FRIAUF, W. HÖFLING (eds.), *Berliner Kommentar zum Grundgesetz*, vol. 4, Erich Schmidt, Berlin, 2103, par. 254; R. LEHMANN-BRAUMS, *Die Mitwirkung des Bundesrates an der Gesetzgebung*, in I. HÄRTEL (ed.), *Handbuch des Föderalismus - Föderalismus als demokratische Rechtsordnung und Rechtskultur in Deutschland, Europa und der Welt*, vol. 1, Springer-Verlag, Berlin-Heidelberg, 2012, 718; M. HEINTZEN, *Art. 105* in I. VON MÜNCH, P. KUNIG (eds.), *Grundgesetz Kommentar*, VI edition, C.H. Beck, München, 2012, par. 57. The 28,5% of the *Zustimmungsgesetze* (laws that require the Bundesrat' approval) falls within the scope of art. 105.3 GG. To this extent, R. LEHMANN-BRAUMS, *Die Mitwirkung des Bundesrates an der Gesetzgebung*, in I. HÄRTEL (ed.), *Handbuch des Föderalismus - Föderalismus als demokratische Rechtsordnung und Rechtskultur in Deutschland, Europa und der Welt*, vol. 1, Springer-Verlag, Berlin-Heidelberg, 2012, par. 97

[87] *Ex pluribus*, H. FISCHER-MENSHAUSEN, *Art. 105*, in I. VON MÜNCH, P. KUNIG (eds.), *Grundgesetz-Kommentar*, III edition, 1996, par. 27; W. HEUN, *Art. 105,* in H. DREIER (ed.), *Grundgesetz Kommentar*, II edition, Mohr Siebeck, Tübingen, 2008, par. 44; M. JACHMANN, *Art. 105,* in H. MANGOLDT, F. KLEIN, C. STARCK (eds.), *Kommentar zum Grundgesetz*, VI edition, Franz Vahlen, München, 2010, par. 53.

[88] W. HEUN, *Art. 105,* in H. DREIER (ed.), *Grundgesetz Kommentar*, II edition, Mohr Siebeck, Tübingen, 2008, par. 44. Parzialmente *contra,* S. MÜLLER-FRANKEN*, Art. 105*, in K. H. FRIAUF, W. HÖFLING (eds.), *Berliner Kommentar zum Grundgesetz*, vol. 4, Erich Schmidt, Berlin, 2103, par. 255. See also: H. MEYER, *Diskussionsbeitrag*, in *VVStRL - Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, no. 58, 1999, 114-16 (116).

[89] In this respect: R. LEHMANN-BRAUMS, *Die Mitwirkung des Bundesrates an der Gesetzgebung,* in I. HÄRTEL (ed.), *Handbuch des Föderalismus - Föderalismus als demokratische Rechtsordnung und Rechtskultur in Deutschland, Europa und der Welt*, vol. 1, Springer-Verlag, Berlin-Heidelberg, 2012, 719-20. Academics disagree on this point. See *ivi*, 720, par. 102, having particular regard to footnotes 214-215).

[90] Having a look at the revenue composition of the Länder budget, this category encompasses the same revenue sources included in the previous category 'tax-revenue apportionment on a territorial base'. As underlined above in the text, this is instrumental to the enhancement of financial responsibility.

[91] S. MÜLLER-FRANKEN*, Art. 105*, in K. H. FRIAUF, W. HÖFLING (eds.), *Berliner Kommentar zum Grundgesetz*, vol. 4, Erich Schmidt, Berlin, 2103, par. 254; and also, M. HEINTZEN, *Art. 105* in I. VON MÜNCH, P. KUNIG (eds.), *Grundgesetz Kommentar*, VI edition, C.H. Beck, München, 2012, par. 57.

[92] The enumeration in art. 106 GG is considered peremptory. Along these lines, K. STERN, *Das Staatsrecht der Bundesrepublik Deutschland*, vol. II, C.H. Beck, München, 1980, 1159-160; K.-A. SCHWARZ, *Art. 106,* in H. V. MANGOLDT, F. KLEIN, C. STARCK (eds.), *Kommentar zum Grundgesetz*, vol. 3, VI edition, Franz Vahlen, München, 2010, par. 18.

As a consequence, any alteration of the financial endowment of the Länder cannot be decided solely by the federal level via the *Bundestag*[93], but calls for an express vote of (the community of) the Länder via the Bundesrat.

The Spanish system is very different from this scheme. In this case, the trick has been to allocate significant legislative competences on well-determined elements of the so-called ceded taxes to the autonomous Communities. As mentioned in the previous section (6), the decision to levy a tax remains at the central level and it is always a State legal act that provides for the whole or partial transfer of the revenue thereof to the Länder.

The revenue of fifteen taxes accrue wholly or partially to the autonomous Communities (see above, table 2)[94]. Each entity is vested with legislative powers over seven of these. As a consequence, the legal framework of these ceded taxes is the result of 'shared' or 'concurrent' legislative exercise, which combines acts of both the central and the intermediate tiers[95] on the basis of the allocation of competences set forth in the State laws[96].

Among them, significant differences are likely to be found. A first element bears on the extension of the related autonomy. In some cases (e.g. gambling taxes) the subnational legislative power encompasses the design of essential elements, such as the tax base, and it is almost comparable to an exclusive competence, always with the exception of the power to impose the tax[97]. The allocation of powers is important even in the case of the tax on capital transfers and documented legal acts or the one on inheritance and gifts. With regard to the latter, autonomous Communities hold important competences related to the quantification of the tax burden. Among others, these include tax-base reductions, the tax-rate or even the multipliers. In contrast, there are examples in which the transferred competences are rather restricted, including only limited power to vary the rate. This is the case for the tax on means of transport where only an increase of maximum 15% is allowed. Basically the same applies to the tax on hydrocarbons. In between these extremes the subnational allocation of competences can vary substantially from one case to the other.

In this framework, even the mere transfer of the power to vary the tax rate means an enhancement of financial autonomy. The reasoning here is twofold: not only is the rate one of the most visible tax elements, but the assignment of legislative competences always goes hand in hand with the

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[93] To this regard, H.-G. HENNEKE, *Art. 105*, in B. SCHMIDT-BLEIBTREU, F. KLEIN, H. HOFMANN (eds.), *Kommentar zum Grundgesetz*, XII edition, Carl Heymanns, Köln, 2011, par. 28.

[94] According to art. 25, Law no. 22/2009.

[95] See: J. RAMOS PRIETO, *El sistema tributario en el estado autonómico. Análisis a la luz del estatuto de autonomía para Andalucía de 2007 y de la reforma de la financiación autonómica de 2009*, Fundación Pública Andaluza, Centro de Estudios Andaluces, Sevilla, 2012, 305; and also, M. VILLARÍN LAGOS, *La cesión de impuestos estatales a las comunidades autónomas*, Lex Nova, Valladolid, 2000, 160. For an in-depth analysis of the legal nature of this institute see: M. D. MORA LORENTE, *Impuestos cedidos: implicaciones internas y comunitarias*, Tirant lo Blanch, Valencia, 2004, 127-40.

[96] The scope of the subnational legislative competences is defined in general terms in the LOFCA (art. 19.2), while the detailed provisions are included in Law 22/2009 (arts. 46-52) with reference to each single ceded tax. An analysis of the historical evolution of this tool can be found in: V. RUIZ ALMENDRAL, *Impuestos cedidos y corresponsabilidad fiscal*, Tirant lo Blanch, Valencia, 2004, 367 ss.; C. CHECA GONZÁLEZ, *Propuestas para un nuevo modelo de financiación de las comunidades autónomas de régimen común en materia de impuestos propios y cedidos*, Aranzadi, Cizur Menor, 2008, 67-82; A. RIBES RIBES, *Poder normativo autonómico y tributos cedidos*, Tirant lo Blanch, Valencia, 2012, 141-242.

[97] However, some scholars question the State ownership of some ceded taxes, due to the extension of powers assigned to the intermediate level. In this respect: J. M. LAGO MONTERO, *El poder tributario de las comunidades autónomas*, Aranzadi, Elcano, 2000, 190; and also, A. RIBES RIBES, *Poder normativo autonómico y tributos cedidos*, Tirant lo Blanch, Valencia, 2012, 128.

entitlement to a quota of the related revenue. This means that through law-making each entity co-determines its own financial endowment[98].

A second aspect pertains to the impact of the single tax on the entire tax-system. Put another way, the revenue amount associated with every single source should be taken into consideration. These data are relevant in order to understand the related impact on the financial autonomy of the subnational entities[99]. Emblematic in this regard is the individual income tax. First of all, it is one of the pillars of the entire system of public finance[100]. Secondly, the legislative powers of the autonomous Communities on this tax are very extensive[101] and 50% of its revenue accrues to them[102].

This scheme can be found only as an exception in the German federal state. Pursuant to art. 105, par. 2a GG, the Länder are '*empowered to determine the rate of the tax on acquisition of real estate*'. Each Land can vary the rate thereof without upper or lower limits and thus affect the amount of money at disposal[103]. It represents an important step in terms of financial autonomy, although limited by the little value of the tax in terms of revenue[104]

The comparison of the two institutional solutions reveals significant discrepancies that impact the degree of financial autonomy each single tool contributes to the legal system 'in action'. For a better understanding, these divergences are taken into account distinguishing between a substantial and a procedural dimension.

The first approach considers the object of the law-making process, that is, 'what is decided'. It examines the kind of powers vested in the intermediate level. The aim is to discern who can decide whether to impose a tax (*an*), how to structure it (*quomodo*) and, finally, who determines the elements that quantify the tax burden (*quantum*).

In Spain the tax competences ceded to autonomous Communities comprise mostly the determination of the *quantum* of the tax burden and, partially, the design of the aspects related to the tax structure (*quomodo*), such as the tax base or the taxable event. However, the decision to levy the tax (*an*) remains exclusively at the central level. On the contrary, in Germany, the Länder through the Bundesrat approve each single federal legal act in the field of material tax law. Even though the act is always a federal law, the intermediate level has - although indirectly - the competence to co-design all tax elements (*quomodo* + *quantum*), including the power to levy it (*an*).

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[98] Conversely, these could not be considered ceded taxes. The entitlement to a quota of the related tax-revenue is indeed a minimum requirement.

[99] M. D. MORA LORENTE, *Impuestos cedidos: implicaciones internas y comunitarias*, Tirant lo Blanch, Valencia, 2004, 146-7.

[100] In the words of the constitutional Tribunal: *ex plurimis,* STC 134/1996, of 22nd July, LF 6; STC 47/2001, of 15th February, LF 9. It also refers to it as a '*fundamental component*' (STC 182/1997, of 28th October, LF 9), and also as a '*primary form of taxation*' (STC 134/1996, of 22nd July, LF 6; STC 182/1997, of 28th October, LF 9; STC 46/2000, of 14th February, LF 6). It amounts to 42.1% (November 2014). Data source: AEAT - Agencia Estatal de Administración Tributaria.

[101] Pursuant to art. 46, Law no. 22/2009, they can determine: personal minimum and minimum per family (±10%), deductions to the autonomic quota, the progressive tax rate and the related tax brackets.

[102] Subnational revenue coming from IRPF amounts to more than 40% of overall subnational revenue. Precisely, to 41.44% in 2011 and to 41.17% in 2012. Source: Ministerio de Economía y Hacienda.

[103] See: H. SIEKMANN, *Art. 105*, in M. SACHS (ed.) *Grundgesetz Kommentar*, C.H. Beck, München, 2011, par. 47; and also, S. MÜLLER-FRANKEN*, Art. 105*, in K. H. FRIAUF, W. HÖFLING (eds.), *Berliner Kommentar zum Grundgesetz*, vol. 4, Erich Schmidt, Berlin, 2103, par. 239.

[104] Due to the little value in terms of tax-revenue collect, the scholars assume the *status quo* has remained substantially unchanged. Among others, W. HEUN, *Art. 105*, in V. EPPING, C. HILLGRUBER (eds.), *Grundgesetz Kommentar*, II edition, C.H.BECK, München, 2013, par. 42; K.-A. SCHWARZ, *Die Änderung des Art. 105 GG*, in C. STARCK (ed.), *Föderalismusreform. Einführung*, Vahlen, München, 2007, par. 39.

Therefore, the Länder can influence the entire tax regime and, in so doing, co-determine *ab origine* their own financial endowment. Conversely, the autonomous Communities only have a say *ex post,* i.e., only after the central level makes use of its exclusive legislative power to levy a tax and only if it opts to activate the transfer of power over the potentially transferable taxes[105].

Even greater discrepancies appear when the institutional solutions are scrutinized, taking into consideration the procedural dimension; namely 'how decisions are made'. This is due to the fact that only the Spanish option (and in the German system only the tax on acquisition of real estate) guarantees the intermediate level effective autonomy. Solely the Spanish Communities are free and autonomous in determining their own financial endowment by means of laws enacted by their own legislatures, valid and enforceable exclusively within the territory of reference. On the contrary, in Germany the consent of the Bundesrat does not uphold the autonomy each single Land is vested with. It rather provides for a form of representation of territorial interests on a merely collective dimension. The intermediate level participates as a whole[106] and this results in the integration of the single units in the federal legal order[107]. Even though in tax matters the Bundesrat is vested with a co-legislative power, equal to the one of the Bundestag, the autonomy of each single entity is narrowed down, due to its composition and functioning. First of all, the Bundesrat works on the basis of the majority principle which, indeed, is based on a mitigated formula of territorial representation. On the one hand, the representation of the units is unequal, as it is based on the population. On the other hand, the number of representatives is not exactly proportional to demographic numbers, but is tempered in order to favour less-populated Länder[108]. Secondly, it does not exclusively channel territorial interests, but integrates multi-faceted interests of political nature, combining federal with regional claims. This is fostered both by the way the Bundesrat functions and the role of political opposition to the Bundestag, it has taken up in practice[109].

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[105] The LOFCA (art. 11) lists the taxes that can be ceded to autonomous Communities, but these require an ordinary State law to turn into effectively ceded taxes.

[106] Along these lines: F. PALERMO, J. WOELK, *Il Bundesrat tra continuità e ipotesi di riforma*, in *Le Regioni*, no. 6, 1999, 1097-122 (1103). The authors refer to a second-level federal pact, which involve the units considered as a whole.

[107] It is a federal body and as such it does not safeguard autonomy per se, but the integration of single units in the federal legal order. To this extent: J. WOELK, *La forma segue la funzione: il Consiglio federale tedesco (Bundesrat)*, in E. ROSSI (ed.), *Studi pisani sul Parlamento VI, Pisa University Press, Pisa, 2014,* 165.

[108] The provisions of Title IV (art. 50-53 GG) are devoted to the *Bundesrat.* However, for a comprehensive understanding of its structure and powers the reference has to go beyond title IV and requires a systematic reading of the Basic Law. On the historical evolution, structure and powers of this body see: *ex plurimis*, M. KOTZUR, *Federalism and bicameralism – the German 'Bundesrat' (Federal Council) as an atypical model,* in J. LUTHER, P. PASSAGLIA, R. TARCHI (eds.), *A world of second chambers. Handbook for constitutional studies on bicameralism*, Giuffrè, Milano, 2006, 264-68; M. KLOEPFER, *Verfassungsrecht*, vol. I, C.H. Beck, München, 2011, parr. 3-9; and also, T. INGO SCHMIDT*, Der Bundesrat. Geschichte, Struktur, Funktion*, in I. HÄRTEL (ed.), *Handbuch des Föderalismus - Föderalismus als demokratische Rechtsordnung und Rechtskultur in Deutschland, Europa und der Welt*, vol. 1, Springer-Verlag, Berlin-Heidelberg, 2012, 652-57. For a classifcation of the existing federal second chambers see: F. PALERMO, M. NICOLINI, *Il bicameralismo. Pluralismo e crisi della rappresentanza in prospettiva comparata*, Edizioni Scientifiche Italiane, Napoli, 2013, 163-65.

[109] Among others, G. ZILLER, G.-B. OSCHATZ, *Der Bundesrat*, Droste Verlag, Düsseldorf, 1998, 64; M. ANDERHEIDEN, *Mitwirkung der Länder bei der Gesetzgebung*, in J. ISENSEE, P. KIRCHHOF (eds.), *Handbuch des Staatsrechts*, vol. VI, III edition, C. F. Müller, Heidelberg, 2008, parr. 56-60. See also, F. PALERMO, J. WOELK*, Il Bundesrat tra continuità e ipotesi di riforma*, in *Le Regioni*, no. 6, 1999, 1097-122 (1105); as well as, R. DOLZER, *Das parlamentarische Regierungssystem und der Bundesrat – Entwicklungsstand und Reformbedarf*, in *VVStRL - Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, no. 58, 1999, *passim* 7, 15. According to the latter, this is due to the fact that the Bundesrat has to tackle multi-faceted interests: the ones of the Federation, of each single Land, of the majority of Länder, and/or finally of the political parties at federal level. For this reason, F. PALERMO, J. WOELK*, Il Bundesrat tra continuità e ipotesi di riforma*, in *Le Regioni*, no. 6, 1999, 1097-122 (1112), refer to its function as a *'zip-role'*. On the role of political opposition vested with the Bundesrat: P. BADURA*, Staatsrecht. Systematische Erläuterung des Grundgesetzes für die Bindesrepublik Deutschland*, II edition, C.H. Beck, München, 1996, 422. Some scholars refer to this phenomenon as *cohabitation à la allemande*. See: F. PALERMO, J. WOELK*,*

Furthermore, these kind of divergent law-making solutions – individual *vs* collegial - impact the degree of differentiation each system allows for. In Spain, the decentralization of substantial legislative tax-powers implicitly permits variable tax-pressure on a territorial basis. In Germany the consent of the Bundesrat ensures the integration of the territorial interests in the federal decision-making process, while preserving the uniformity of the tax pressure in the entire federal State.

8. Own taxes and surtaxes

Moving to the categories of 'own taxes' and 'surtaxes', the two cases show diverging patterns. This is due to the different systems of competence distribution in tax matters. A first aspect concerns the details of the constitutional framework. Although in practice both systems portray the tax authority of subnational entities as a limited power, the theoretical approach is quite the opposite.

The German Basic Law stipulates in art. 105, par. 2a that '*the Länder shall have power to legislate with regard to local taxes on consumption and expenditures so long and insofar as such taxes are not substantially similar to taxes regulated by federal law*'[110]. On the contrary, the Spanish Constitution does not provide an explicit enumeration of the taxes of the autonomous Communities. It only makes reference to the various actors vested with tax powers (State, autonomous Communities, local entities), leaving the concrete allocation to the implementing regulations. Indeed, the LOFCA itself does not undertake any sort of distribution. Major emphasis is put on the constraints on subnational entities. The delimitation of this category rests widely on the interpretation of such constraints by constitutional jurisprudence and can thus be determined only by way of exclusion[111]. Conversely, in the German system the explicit enumeration of 'own taxes' already comprises such a balance of opposites.

The Spanish model reduces the safeguards of subnational tax autonomy, however it allows for wider flexibility and room for adjustments based on the economic circumstances. It also impacts the justiciability of the system and the scope of constitutional review. On the other hand, the Spanish constitutional Court has stipulated that the system of subnational financing has to include also this kind of source. This is due to the fact that own taxes are listed in art. 157 CE. The same does not apply to the Länder. Although the provision of art. 105 par. 2a GG stipulates that they

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Il Bundesrat tra continuità e ipotesi di riforma, in *Le Regioni*, no. 6, 1999, 1097-122 (1098). In this respect: M. ANDERHEIDEN, *Mitwirkung der Länder bei der Gesetzgebung*, in J. ISENSEE, P. KIRCHHOF (eds.), *Handbuch des Staatsrechts*, vol. VI, III edition, C. F. Müller, Heidelberg, 2008, par. 7, observes that this happened around half of time elapsed since the entry into force of the Basic Law (see further, H. LAUFER, *Der Bundesrat als Instrument der Opposition*, in *ZParl – Zeitschrift für Parlamentsfragen*, 1970, 318-41) and that, indeed, it is the rule as of 1969. This tendency is linked to the current praxis of coalition governments even at the Länder level. On this trend: J. WOELK, *La forma segue la funzione: il Consiglio federale tedesco (Bundesrat)*, in E. ROSSI (ed.), *Studi pisani sul Parlamento VI, Pisa University Press, Pisa, 2014,* 166.

[110] When it comes to determine the weight of the category 'own taxes', the concurrent legislative power to tax stipulated in art. 105.2 GG is not to be taken into consideration. In practice it has been interpreted and used so extensively, that the margin of autonomy of the Länder in this field is *de facto* nullified. To this regard: BVerfG decision of 4th February 1958, BVerfGE 7, 244 - *Badische Weinabgabe*. In the literature, among others: R. WENDT, *Finanzhoheit und Finanzausgleich,* in J. ISENSEE, P. KIRCHHOF, *Handbuch des Staatsrechts*, vol. VI, III edition, C. F. Müller, Heidelberg, 2008, par. 38 ff.; as well as he in-depth analysis offered by: M. KÜSSNER, *Die Abgrenzung der Kompetenzen des Bundes und der länder im Bereich der Steuergesetzgebung sowie der Begriff der Gleichartigkeit von Steuern*, Duncker & Humblot, Berlin, 1992, 82-108.

[111] In this respect: STC 150/1990, of 4th October, LF 3; and also, STC 168/2004, of 6th October, LF 4. The jurisprudence underlines that whatever interpretation is given to such limits, these cannot nullify the power of the autonomous Communities to set 'own taxes'. For an in-depth examination of the topic: C. CHECA GONZÁLEZ, *Los impuestos propios de las comunidades autónomas: Ensayo de superación de las fuertes limitaciones existentes para su implantación*, Aranzadi, Elcano, 2002; J. M. LAGO MONTERO, *El poder tributario de las comunidades autónomas*, Aranzadi, Elcano, 2000.

shall '*have power to legislate with regard to local taxes on consumption and expenditures*'[112], according to art. 106.6 GG the revenue thereof accrue exclusively to municipalities[113]. As a consequence, own taxes simply do not exist as a source of financing for the Länder. On the contrary, autonomous Communities show meaningful activism in this field[114]. At present there are more than 70 own taxes[115], although they remain marginal in economic terms (1.6% of all revenue)[116].

Even if the differing approaches leave room for significant variations in the respective financing schemes, both systems confirm extremely centralized tax regimes, which allow *de facto* for little tax autonomy.

Similar results are obtained, when it comes to surtaxes. Despite the discrepancies in the respective financial constitutions, the economic data show the lack of relevance of this type of source in both systems. This is self-evident in Germany, as the Basic Law does not vest the power to set taxes on top of another federal tax in the Länder[117]. Even in the Spanish system there are almost no surtaxes, notwithstanding a far-reaching constitutional provision, confirmed by the LOFCA itself[118], and further stressed by constitutional jurisprudence[119]. As a matter of fact, autonomous Communities can set surtaxes on top of all state taxes which are enumerated as transferable to them pursuant to art. 11 of the LOFCA[120]. Furthermore, the outer limits of this power are very few and less stringent

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[112] An illustration of these tax-types is offered by: S. MÜLLER-FRANKEN, *Art. 105*, in K. H. FRIAUF, W. HÖFLING (eds.), *Berliner Kommentar zum Grundgesetz*, vol. 4, Erich Schmidt, Berlin, 2103, parr. 224-29; R. WENDT, *Finanzhoheit und Finanzausgleich,* in J. ISENSEE, P. KIRCHHOF, *Handbuch des Staatsrechts*, vol. VI, III edition, C. F. Müller, Heidelberg, 2008, par. 44; M. JACHMANN, *Art. 105,* in H. MANGOLDT, F. KLEIN, C. STARCK (eds.), *Kommentar zum Grundgesetz*, VI edition, Franz Vahlen, München, 2010, parr. 55-64.

[113] Besides being of little relevance in economic terms. Along these lines: M. HEINTZEN, *Art. 105,* in I. VON MÜNCH, P. KUNIG (eds.), *Grundgesetz Kommentar*, VI edition, C.H. Beck, München, 2012, par. 61; and further, R. WENDT, *Finanzhoheit und Finanzausgleich,* in J. ISENSEE, P. KIRCHHOF, *Handbuch des Staatsrechts*, vol. VI, III edition, C. F. Müller, Heidelberg, 2008, par. 50.

[114] SECRETARÍA GENERAL DE COORDINACIÓN AUTONÓMICA Y LOCAL, *Tributación Autonómica. Medidas 2014,* Attachment IX, 2014, 49, http://www.minhap.gob.es/ (last access 8.02.2016).

[115] With the sole exception of Castilla y León, all ACs have set at least one tax. Precisely, these were 74 in 2015. For details see the following reports: SECRETARÍA GENERAL DE COORDINACIÓN AUTONÓMICA Y LOCAL, *Tributación Autonómica. Medidas 2014,* Attachment IX, 2014, 49, http://www.minhap.gob.es (last access 8.02.2016); and also, REAF-REGAF, CONSEJO GENERAL DE ECONOMISTAS, *Panorama de la fiscalidad autonómica y foral*, 2015, 286-8, http://www.economistas.org/ (last access 8.02.2016); CONSEJO GENERAL DE ECONOMISTAS, *Los impuestos propios de las comunidades autonómas*, 2013, http://www.economistas.org/Contenido/REAF/LosImpuestosPropiosCCAA2013.pdf (last access 21.02.2016).

[116] Year 2013. Source: MINISTERIO DE HACIENDA Y ADMINISTRACIONES PÚBLICAS, *Las haciendas autonómicas en cifras 2013*, 49, http://www.minhap.gob.es (last access 26.02.2016).

[117] In this respect: H. ZIMMERMANN, *Ein Hebesatzrecht für Länder und Gemeinden?* di F. SÖLLNER, A. WILFERT (eds.), *Die Zukunft des Sozial- und Steuerstaates: Festschrift zum 65. Geburtstag von Dieter Fricke*, Springer, Berlin-Heidelberg, 2013, 162-80 (162-63). See further: ENQUETE-KOMMISSION VERFASSUNGSREFORM, *Schlußbericht*, Deutscher Bundestag – 7. Wahlperiode, Drucksache 7/5924, Bonn, 1976. The only form allowed is the surtax on top of own taxes. However, this does not make sense. Furthermore, the revenue thereof would be transferred to the municipalities.

[118] The only existing surtax is the one set by Asturias, Cantabria, Madrid, Murcia and La Rioja on the top of the State tax on economic activities. For details see the following reports: SECRETARÍA GENERAL DE COORDINACIÓN AUTONÓMICA Y LOCAL, *Tributación Autonómica. Medidas 2014,* Attachment IX, 2014, 49, http://www.minhap.gob.es/ (last access 8.02.2016).

[119] Emblematic in this regard is the following decision: STC 150/1990, of 4th October, LF 5). In the literature see: *ex plurimis*, J. CALVO VÉRGEZ, *Financiación autonómica: problemas constitucionales y legales*, Arazandi, Cizur Menor, 2005, 338-41; G. DE LA PEÑA VELASCO, *Los recargos como recursos de las comunidades autónomas*, in *REDF - Revista Española de Derecho Financiero*, no. 43, 1984, 373-94. An in-depth analysis of this tools is provided by: J. A. FERNÁNDEZ AMOR, *Análisis jurídico del recargo autonómico. Relaciones con los tributos cedidos*, Cedecs, Barcelona, 1999.

[120] The list of taxes that can be ceded to autonomous Communities includes almost all State taxes, with the important exception of the corporate tax.

than the ones applied to own taxes[121]. This is due to the unpopularity associated with this tax measure, on the one hand,[122] and to the lack of real space to manoeuvre for the ACs, on the other hand. In fact, there is little fiscal room left to the intermediate tier.

9. Measuring financial autonomy from 'in books' to 'in action'[123]

9.1. Main goal and foundations

With the aim of quantifying the degree of 'responsibility at the margin' respectively vested in the Länder and the autonomous Communities, this measuring exercise focuses on the tools examined in the previous sections and involves a twofold evaluation: of the legal framework in force ('*law in books*') and of its effective functioning ('*law in action*')[124].

In systems with strong centralization of taxing powers, the data related to the vertical fiscal gap tends to give an over-summarized picture, which fails to portray the real extension of the subnational autonomy on the revenue side[125]. Bearing this in mind, a new method has been developed by the OECD in order to measure fiscal decentralization[126]. It is based on a taxonomy of tax autonomy, which includes not only the power to levy taxes, but broadly speaking all those instruments which confer the power to co-determine the amount of money at disposal upon the intermediate level[127].

The method of assessment applied in this paper is partly based on the OECD taxonomy on fiscal decentralization, and partly goes beyond that, in order to take into consideration the peculiarities of the two case-studies, the needs of a legal comparison, and the aim of the study. With regard to the latter, the idea is to combine an assessment of the degree of autonomy as embedded in the respective financial constitutions (degree of autonomy in books)[128] with an appraisal of the legal practice and of the use made of each single tool by the intermediate layer of government (level of

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121 According to the constitutional doctrine, the extension to the surtaxes of the limitations only referred by the LOFCA (art. 9) to the own taxes, '*would be not only technically complex, but it would nullify the power itself*' (STC 150/1990, of 4th October, LF 5).

122 J. A. ROZAS VALDÉS, *Las potestades tributarias autonómicas: presente y futuro de su configuración y ejercicio*, in *RCDP - Revista Catalana de Dret Públic*, no. 47, 2013, 103-27 (118).

123 The method of measurement has been developed with the support of an expert statistician, Dr. Agnieszka Elzbieta Stawinoga of the Europaean Academy of Bolzano/Bozen, to whom I am very grateful.

124 See above footnote 7.

125 Some economists criticise the structure of this synthetic indicator: its evaluation grounds on a far too complex procedure and can lead to contrasting results. Among others: J. RODDEN, *Comparative federalism and decentralization: on meaning and measurement,* in Comparative Politics, no. 4, vol. 36, 2004, 481-500.

126 The first indicators and related evaluations were published by the OECD in 1995. The most recent measurements date back to 2011.The OECD has developed a database on fiscal decentralization, which is available at the following link: http://www.oecd.org/tax/federalism/oecdfiscaldecentralisationdatabase.htm#A_Title (last access 28.02.2016). The results of the study have been published also in: H. BLÖCHLIGER, *Measuring decentralisation: The OECD fiscal decentralisation database,* J. KIM, J. LOTZ, H. BLÖCHLIGER (eds.), *Measuring fiscal decentralization. Concepts and policies*, OECD Publishing, Paris, 2013, 15-36.

127 The taxonomy is available in the OECD database on fiscal decentralization. See footnote above.

128 The expression is not used *stricto sensu*, as it refers only to the constitutional provisions which stipulate the distribution of powers in financial matters. It is understood in its extensive meaning and thus includes all sources of law integrating the constitutional legal framework. In Spain it includes the LOFCA and the Statute of autonomy. In Germany the reference covers the federal law on standards (*Maßstäbegesetz*) as well as the federal law on the overall distribution of revenue (*Finanzausgleichgesetz).*

'responsibility in action') [129]. The importance of this twofold approach lies in the very nature of constitutional law, in which the gap between the written law and the law as interpreted and applied can be rather broad. Financial systems of compound States are emblematic in this regard, due to the contamination within legal provisions, political events and the so-called rules of economics[130].

9.2. Object of the measurement

The measurement is the result of a biphasic procedure. The first preliminary stage defines what to evaluate (the object) and how to make such an evaluation (the criteria and the method). The second one consists of the concrete appraisal.

As to the object, this exercise takes into examination all sources of financing of the intermediate tier, which come from one of the four legal categories portrayed in the previous paragraphs (6-8). The table below (tab. 3) offers a synthesis of this classification.

Table 3. Classification of the legal tools per categories.

Category	OWN TAXES		SURTAXES		TAX-POWER SHARING			TAX-REVENUE SHARING ON A TERRITORIAL BASE	
Country	GERMANY	SPAIN	GERMANY	SPAIN	GERMANY		SPAIN	GERMANY	SPAIN
Legal tool	own taxes of the Länder	own taxes of the ACs	n.a.	surtaxes of the ACs	tax on acquisition of real estate	exclusive taxes of the Länder and shared taxes (without the tax on acquisition of real estate)	ceded taxes, with legislative competences	exclusive taxes of the Länder and shared taxes	ceded taxes, without legislative competences

Each single tool is evaluated on the basis of 'what is decided' (first column on the left, tab. 4 below). As the revenue taken into account is of tax nature, all tools are the combination of the same three substantial powers[131]: 1. to impose the tax (*an*); 2. to outline the tax (*quomodo*), that is to delineate the tax liability (e.g. the tax-base, the taxpayers or the taxable event); 3. to determine the tax-burden that is the *quantum* (e.g. the tax-rate, the brackets or the multipliers).

According to this approach, the scrutiny of each individual instrument occurs making reference to the same components. This favour an accurate judgement and facilitate the comparison.

[129] Another example of a comparative measurement is offered by: P. ATIENZA MONTERO, L. Á. HIERRO RECIO, *¿Hasta dónde la corresponsabilidad fiscal en el sistema español* de *financiación autonómica de régimen común? Un ejercicio de comparación con el caso canadiense*, in *Revista de Estudios Regionales*, no. 74, 2005, 43-87. However, it is limited to the degree of autonomy 'in books'.

[130] To this extent, see G. G. CARBONI, *Federalismo fiscale comparato*, Jovene, Napoli, 2013, 2.

[131] According to the classification of tax law in material law *vs* formal law.

9.3. Criteria for measuring

As to the criteria for measuring, the choice was made to anchor the assessment to parameters of procedural nature. This choice is instrumental in fostering the most objective evaluation possible. As a matter of fact, decision-making procedures have the advantage of limiting the margin of discretion that lies *ex rerum natura* in every law-measuring attempt[132].

The value given to each single component *p* is thus based on the way decisions are made, varying from min 0 to max 4 (integer values). As a consequence, each single tool obtains three distinct ratings related to the margin of autonomy (discretion) the intermediate level enjoys with respect to its establishment, its design and its quantification. This is done according to the criteria of the table below (tab. 4).

Table 4. Evaluation criteria of the degree of autonomy 'in books'.

DEGREE OF AUTONOMY 'in books'	**0**	**1**	**2**	**3**	**4**
elements under assessment					
An - that is the power to impose the tax	The intermediate level cannot decide to impose the tax; the legal tool is not foreseen	The central level decides to impose the tax, after consulting the intermediate level	The intermediate level as a whole decides to impose the tax, together with the central level	Each single unit decides to impose the tax, within limits	Each single unit decides to impose the tax, without limits
Quomodo - that is the competence to define the tax liability (e.g. the tax-base, the taxpayers or the taxable event)	The central level decides unilaterally how to structure the tax; the legal tool is not foreseen	The central level decides how to structure the tax, after consulting the intermediate level	The intermediate level as a whole decides how to structure the tax together with the central level	Each single unit decides - partly - how to structure the tax	Each single unit decides how to structure the tax, without limits
Quantum - that is the power to determine the tax-burden (e.g. the tax-rate, the brackets or the multipliers)	The central level determines unilaterally the tax burden; the legal tool is not foreseen	The central level determines the tax burden, after consulting the intermediate level	The intermediate level as a whole determines the tax burden together with the central level	Each single unit determines the tax-rate, within limits	Each single unit determines the tax-rate, without limits

9.4. The method and the measurement

The result obtained in application of the above-mentioned criteria (tab. 4) is illustrated in the following table (tab. 5).

[132] On this topic: A. GAMBARO, *Misurare il diritto?,* in *Annuario di diritto comparato e di studi legislativi*, ESI, Napoli, 2012, 18-47.

Table 5. Degree of autonomy 'in books', per legal tool and per country (including normalized values).

	OWN TAXES		SURTAXES		TAX-POWER SHARING			TAX-REVENUE SHARING ON A TERRITORIAL BASE		ALL CATEGORIES	
	GERMANY	SPAIN	GERMANY	SPAIN	GERMANY		SPAIN	GERMANY	SPAIN	GERMANY	SPAIN
	own taxes of the Länder	own taxes of the ACs	n.a.	surtaxes of the ACs	tax on acquisition of real estate	exclusive taxes of the Länder and shared taxes (without the tax on acquisition of real estate)	ceded taxes, with legislative competences	exclusive taxes of the Länder and shared taxes	ceded taxes, without legislative competences	overall evalutation	overall evaluation
An - that is the power to impose the tax	4	4	0	4	2	2	0	2	1	2	2.25
Quomodo - that is the competence to define the tax liability	3	3	0	0	2	2	2	2	1	1.8	1.5
Quantum - that is the power to determine the tax-burden	4	4	0	4	4	2	4	2	1	2.4	3.25
Degree of autonomy 'in books' Absolute values (min=0; max=12)	11	11	0	8	8	6	6	6	3	6.2	7
Degree of autonomy 'in books' Normalized values (min=0; max=1)	**0.92**	**0.92**	**0**	**0.67**	**0.67**	**0.5**	**0.5**	**0.5**	**0.25**	**0.52**	**0.58**

In the table above (tab. 5) each tool has received three values *p* varying from 0 to 4 (integer value), one for each of the three components depicted above (see tab. 4).

The index of autonomy X_i of the single tool results from the sum of all three ratings. The outcomes are integer values and vary from a theoretical minimum equal to 0 to a theoretical maximum equal to 12.

$$X_i = \sum_{j=1}^{3} p_j \ , i = 1, \dots, k$$

where *k* is the number of components taken into consideration for each tool.

The data have been normalized[133], in application of the following formula:

$$X_i^* = \frac{X_i - X_{min}}{X_{max} - X_{min}} \ , i = 1, .., k$$

where X_i^* varies from min 0 to max 1 and is a pure number, i.e., it is dimensionless, without the unit attached to X_i. The normalization is made using minimum and maximum theoretical values. The normalized ratings obtained have an intuitive intermediate point equal to 0.5 and if multiplied by 100 can be translated into percentages.

Example: (11-0)/(12-0)=0.92

X_i=11, X_{min}=0, X_{max}=12

Finally, the overall degree of autonomy 'in books' referable to each single Country is calculated considering *Z* as the average of the ratings obtained for each single tool.

[133] This is instrumental in allowing a comparison between the data of table 5 and table 6. In statistics normalization of ratings means adjusting the values measured on different scales to a notionally common scale.

$$Z = \frac{\sum_{i=1}^{k} x_i^*}{k}$$

For Germany (k=5)[134], the total degree of autonomy 'in books' is equal to 0.52 and is the result of the following calculation:

(0.92+0+0.67+0.5+0.5)/5=0.52

While for Spain (k=4) it is equal to 0.58 – as a result of:

(0.92+0.67+0.50+0.25)/4=0.58

Subsequently, the overall degree of responsibility 'in action' has to be calculated on a Country base. The developed procedure relies on the assumption that the use of the conferred margin of autonomy has an impact on the revenue composition of budget. As a consequence, it affects the relative economic weight of one tool if compared to another.

Bearing this in mind, the measurement of the autonomy 'in books' is integrated with a reading of the financial settings, which considers the effective functioning of each single instrument. The result of this process can be considered to be the degree of responsibility 'in action'.

For this purpose, the following table (tab. 6) includes the economic data of the revenue generated by the different legal tools. They are average data, as they refer to the intermediate layer as a whole[135].

Table 6. Economic data, in absolute and relative values[136], year 2013[137].

	OWN TAXES		SURTAXES		TAX-POWER SHARING			TAX-REVENUE SHARING ON A TERRITORIAL BASE		ALL CATEGORIES	
	GERMANY	SPAIN	GERMANY	SPAIN	GERMANY		SPAIN	GERMANY	SPAIN	GERMANY	SPAIN
Legal tools	own taxes of the Länder	own taxes of the ACs	n.a.	surtaxes of the ACs	tax on acquisition of real estate	exclusive taxes of the Länder and shared taxes (without tax on acquisition of real estate)	ceded taxes, with legislative competences	exclusive taxes of the Länder and shared taxes	ceded taxes, without legislative competences	All legal tools	All legal tools
Total revenue (absolute values)	0	1793.92	0	12	8394	186078	42396.58	0	37796.5	194472	81999
Total revenue (relative values)	**0**	**0.02**	**0**	**0**	**0.04**	**0.96**	**0.52**	**0**	**0.46**	**1**	**1**

[134] *K* is the number of legal tools taken into account for each Country. See *supra* tab. 3.

[135] Making use of the economic data of each single entity, one could calculate the degree of responsibility for each of them.

[136] The total amount included in the table refers only to the sum of revenue generated from the tools taken into consideration (that is the revenue coming from the legal tools mentioned in table 1). This means that they are partial economic data, if compared to the overall revenue of the intermediate layer of government in each respective country. Further, in Germany it includes all sixteen Länder, while in Spain the data refers only to the fifteen autonomous Communities of common regime.

[137] The sources of the economic data are the following: for Germany, BUNDESMINISTERIUM DER FINANZEN, *Finanzbericht 2015*, 2014, http://www.bundesfinanzministerium.de (last access 23.03.2016); for Spain, MINISTERIO DE HACIENDA Y ADMINISTRACIONES PÚBLICAS, *Las haciendas autonómicas en cifras 2013*, 2013, http://www.minhap.gob.es

The evaluation is obtained by weighting X_i^* - that is the degree of autonomy *'in books'* of the single tool (tab. 5, last row from above) - with the relative weight of each instrument if compared to the others (tab. 6, last row from above). The following formula is applied:

$$t_i = X_i^* \cdot w_i, i = 1, \dots, k$$

where w_i is the relative impact of the single tool in relation to all others. The relative economic burden is calculated for each Country making reference to the sum of the revenue coming from all tools taken into examination.

Then, the total degree of responsibility 'in action', to be considered as the use made of the tools altogether considered, is calculated for each single Country. The following formula is applied.

$$T = \sum_{i=1}^{k} t_i = \sum_{i=1}^{k} (X_i^* \cdot w_i)$$

where $\sum_{i=1}^{k} w_i = 1$.

The variable *T* represents the measure of the degree of responsibility *'in action'* applicable to each single Country and can vary from min 0 to max 1. If the rating is multiplied by 100, it translates to percentages.

For Germany, it is equal to 0.507, and it is based on the following calculation:

(0.92*0+0*0+0.67*0.04+0.5*0.96+0.5*0)=0.507

For Spain it amounts to 0.394, and it is based on the following calculation: (0.92*0.02+0.67*0+0.50*0.52+0.25*0.6)=0.394

The table below (tab. 7) represents an overview of all ratings obtained, including both intermediate and final results.

(last access 23.03.2016). Some remarks are due with reference to the above-included economic data. 1. The entry 'own taxes of Länder' is equal to 0, as the related revenue is devolved to municipalities. 2. Under the general category '*surtaxes*' there is no specific entry for Germany because Länder are not assigned the power to set surtaxes on top of a federal tax (see section 8). 3. The amount related to the entry '*exclusive taxes of the Länder and shared taxes (without the tax on acquisition of real estate)*' has been calculated deducting the revenue generated from the tax on acquisition of real estate (included in the previous column) as well as a the 25% of the quota of the VAT which accrues to the Länder as a whole (i.e. 65.873 instead of 87.831 millions of euro). This is due to the fact that these revenues are not distributed on a territorial base (not even in theoretical terms as can be considered the distribution on a per-capita base). Conversely, these are apportioned in favour of poor Länder only (those with an under-average fiscal capacity) and thus pursue a redistributive function (equalization). 4. The value applicable to the entry '*exclusive taxes of the Länder and shared taxes*' would be equal to the sum of the amount included in the entry 'tax on real estate acquisition', plus the one of '*exclusive taxes of the Länder and shared taxes (without the tax on acquisition of real estate)*', plus the 25% of the quota of the VAT, which accrues to the Länder as a whole (that is excluded on the basis of the same reasoning above-illustrated). However, the amount in the table is equal to 0, as it was not possible to consider the same revenue twice. The choice of placing them in the general category 'tax-power sharing' instead of 'tax-revenue sharing on a territorial base' is linked to the margin of discretion. The option has fallen in favour of the category, in which the extension of autonomy is wider.

Table 7. Degree of responsibility 'in action', per legal tool and per country.

	OWN TAXES		SURTAXES		TAX-POWER SHARING			TAX-REVENUE SHARING ON A TERRITORIAL BASE		ALL CATEGORIES	
	GERMANY	SPAIN	GERMANY	SPAIN	GERMANY		SPAIN	GERMANY	SPAIN	GERMANY	SPAIN
Legal tools	own taxes of the Länder	own taxes of the ACs	n.a.	surtaxes of the ACs	tax on acquisition of real estate	exclusive taxes of the Länder and shared taxes (without tax on acquisition of real estate)	ceded taxes, with legislative competences	exclusive taxes of the Länder and shared taxes	ceded taxes, without legislative competences	All legal tools	All legal tools
Degree of autonomy 'in books' Normalized values (min=0; max=1)	0.92	0.92	0	0.67	0.67	0.5	0.5	0.5	0.25	0.52	0.58
Total revenue (relative values)	0	0.02	0	0	0.04	0.96	0.52	0	0.46	1	1
Degree of responsibility 'in action'	0.000	0.020	0.000	0.000	0.029	0.478	0.259	0.000	0.115	0.507	0.394

9.5. A comparative evaluation of the measurement results

If the ratings of the previous paragraph are put into relation with each other, some comparative remarks can be made.

Having a look at the degree of autonomy 'in books', for instance, it appears that the Spanish financial constitution confers upon autonomous Communities a major level of autonomy in comparison to the German model. While the maximum extension allowed is equal to 1, Germany ranks at 0.52 and Spain at 0.58, with a gap of 0.06 between them.

Comparing the evaluation of each individual tool (tab. 5 above), the significance of this gap is further pronounced. A major difference stems from the lack of a provision in the German financial constitution that would confer upon the intermediate tier the power to set a surtax on top of a federal measure. This determines an additional rating for the ACs of 0.67. Nonetheless, such a discrepancy is compensated in the assessment related to the tax on real estate acquisition, where the Länder enjoy a degree of autonomy exactly equal to 0.67. The same applies to the other tools included in the category 'tax-power sharing'. The divergent institutional solutions hosted by the two cases result in different partial rates, but find compensation in the overall evaluation, which ranks at 0.5 for both. Finally, a difference emerges in the last category 'tax-revenue sharing' (0.5 for Germany vs. 0.25 for Spain). This can be traced back to the level of participation of intermediate layer in the decision-making process at central level: only the German constitution provides for an overall mandatory and binding involvement of the Länder, when it comes to the enactment of a legal act in tax (and, more generally, in financial) matters.

Conversely, when referring to the 'responsibility in action' the outcomes on a country-base are upside down. Germany ranks first with a value equal to 0.507, while Spain is second with a rating of 0.35 (tab. 7 above).

The two rates (in books and in actions) can be compared only within limits. For instance, it is not possible to calculate the deviation of the two by simply deducting one from the other. This is due to the fact that only the second one is a weighted value. However, they can be read in relation to

one another. In doing so, one can ascertain that in Spain 'autonomy in books' ranks higher than 'responsibility in action', while in Germany it is the other way round. By and large, this means that the examined legal tools have worked better in the German legal system than in the Spanish one. The overall picture discloses that the community of the Länder has shown more responsibility at the margin. It reveals that something has not functioned in the case of the ACs, or put differently that something has functioned better for the Länder. However, it does not explain the underlying reasons.

Herein lies the major limit of law-measuring. This is even more relevant when it comes to legal areas in which one can identify a wide gap between *law in books* and *law in action*. As a matter of fact, the dormant elements of a system hide precisely in the depth of such a gap and cannot easily be isolated through exercises of law-measuring.

10. Concluding remarks

A real understanding of the phenomenon and of its causes requires an examination of the compound legal system as a whole, as single tools tend to interact with one another. Put simply, rules show their real meaning only when they are applied within the context of reference.

The assumption above calls for a far-reaching analysis that takes into account the way in which these instruments function. Only by adopting this approach, one can attempt to detect the factors that have impacted the degree of 'responsibility in action'.

If the respective constitutional orders are investigated from such a perspective, the need to consider the system of guarantees that favour the compliance with the rules emerges. The basis of this is the assumption that adequate rules ensure wider implementation of constitutional provisions, while reducing the gap between *law in books* and *law in action*. Bearing this in mind, one can provide a twofold classification of such guarantees. These can be of substantial or formal nature.

The first group encompasses the system of economic and legal incentives. The idea is that territorial entities should bear the economic and political costs of their decisions, as this nexus would foster democratic control.

In Germany the link between decision-making and related financial endowment is particularly strong when it comes to the allocation of the power to determine the tax rate on acquisition of real estate to the Länder (art. 105, par. 2a GG). As a matter of fact, the redistribution of the 25% Länder quota of the VAT has to take the potential fiscal capacity as a parameter and not the revenue effectively collected from the tax. In doing so, the increase or the decrease of resources is entirely left in charge of the single entity, which has to bear the costs of its decision.

The same does not apply to Spain, where the linkage is broken due to the introduction of forms of compensation of both legislative and economic nature. On the one hand, if the autonomous Communities do not make use of the assigned legislative competences on ceded taxes, the State legislation finds application as a subsidiary means. On the other hand, the equalization of resources takes place disregarding disregarding the way in which the ACs have effected their legislative powers on ceded taxes. As a matter of fact, the parameter is neither the effective fiscal capacity nor the legislative fiscal capacity on a territorial basis. Its calculation roots on the legal framework set forth at the central level.

The second group includes elements of formal nature, that is, the system of sources of law and the decision-making procedures.

First of all, a more detailed constitutional document reinforces the guarantee of subnational autonomy and enhances its overall justiciability[138]. In this respect the German financial constitution represents (almost) a *unicum* in the comparative landscape[139]. On the contrary, the Spanish constitution provides only the general principles of the financial regime, *de facto* leaving the further definition of the system in the hand of the central level. From a political perspective, however, it is difficult for this to happen. The State legislator can hardly disregard the position of the ACs reached within the Financial and Fiscal Policy Council or in the bilateral Commissions State-AC.

Secondly, it is pivotal to consider the extent to which territorial entities are involved in the decision-making process at the central level. This affects the safeguards of the margin of autonomy, conferred respectively upon the central and the intermediate tier of government. In this respect, the requirement of the Bundesrat approval to all constitutional and ordinary laws in financial matters comes to the fore. These kinds of decision-making schemes ensure an equal role of both the (community of) the Länder and the Bundestag and in this way provides a strong safeguard of the margin of autonomy of the intermediate level as well as of its own financial endowment. As a matter of fact, the federal level cannot modify the federal pact without the consent of the Länder.

The same does not apply in the Spanish system, even though in financial affairs the Financial and Fiscal Policy Council is vested with a consultative role that turns out to be politically binding. In fact, this pattern does not offer effective legal guarantee to the financial autonomy of the autonomous Communities: due to the composition and functioning of the Council, the central level holds a predominant position. Additionally, the Spanish Senate cannot truly be considered a second chamber of territorial representation. Indeed, it is assigned very limited legislative powers, which are never equal to the ones the first chamber is vested with. Most notably, this unequal role applies even to constitutional revisions.

The above-mentioned factors are only illustrative. Nonetheless, they highlight the importance of looking beyond the single legal tools and taking into consideration the interactions between the systems of the substantial incentives on the one hand, and of the procedural guarantees on the other hand. Altogether, these elements can foster a proper functioning of the legal order and thus tend to reduce the gap between 'autonomy in books' and 'responsibility in action'.

However, even this broader perspective is not exhaustive, as there are other variables, which affect the actual way in which the system functions. *Law in action* is, in fact, not only limited to the interactions between the sources of law, the case-law and the scholarly interpretation. According to Rodolfo Sacco some legal formants may be completely hidden[140]. Such invisible legal formants are the so-called cryptotypes and belong to 'silent law', which exists '*in the DNA and in the human culture*'[141].

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[138] On the application of this concept to the Spanish and German financial constitutions see, respectively: R. PROKISCH, *Die Justiziabilität der Finanzverfassung*, Nomos, Baden-Baden, 1993; M. MEDINA GUERRERO, *Financiación autonómica y control de constitucionaildad (algunas reflexiones sobre la STC 13/2007)*, in *REAF - Revista d'Estudis Autonòmics i Federals*, no. 6, 2008, 92-124.

[139] Together with Switzerland.

[140] Thoroughly on legal formants: R. SACCO, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, in *American Journal of Comparative Law*, no. 39, 1991 1-34; and ID., *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II),* in *American Journal of Comparative Law,* no. 39, 1991, 343-401.

[141] In this respect, R. SACCO, *Introduzione al diritto comparato*, V edition, Utet, Torino, 1992.

Elements of this nature seem to hide in the gap between 'autonomy in books' and 'responsibility in action'. More properly, it appears that the comparatively lower gap of the German legal system could be traced back to the existence of a truly federal culture. Notwithstanding the extreme uncertainty which characterizes these mute components, a clue of its relevance for the purpose of the study comes from the lack of a positivization of the principle of financial autonomy of the Länder in the German Basic Law. This seems to reveal that autonomy belongs to the cultural tradition of the Country as an inherent and essential element of the federal pact. This is valid *a fortiori* if referred to a legal order based on a consolidated positivistic tradition, like Germany.

The nexus between federal culture and 'responsibility in action' is revealed if one observes the cryptotype in its functioning. The federal culture binds the Länder to respect '*the mutual obligation to take in due consideration the interests of the Federal State as a whole*'[142], while pursuing their own territorial affairs. If interpreted in this sense, it favours a harmonious coexistence between the statehood of the single units and the unity of the system as a whole, and, as a consequence, it fosters more responsible behaviour of the single components and impacts the degree of 'responsibility in action'.

[142] In this sense, BVerfG decision of 15th November 1971, BVerfGE 32, 199, (218) - *Richterbesoldung II*; and also, BVerfG decision of 8th February 1977, BVerfGE 43, 291 - *numerus clausus II*.

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