

Alberto López-Basaguren
Leire Escajedo San-Epifanio *Editors*

The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain

Volume 1

 Springer

The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain

Alberto López-Basaguren • Leire Escajedo
San Epifanio

Editors

The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain

Volume 1



Erakunde autonomiaduna
Organismo Autónomo del
EUSKO JAURLARITZA
GOBIERNO VASCO



Editors

Alberto López-Basaguren
Leire Escajedo San Epifanio
Fac. Social Sciences and Communication
University of the Basque Country
Leioa - Bizkaia
Spain

ISBN 978-3-642-27719-1 ISBN 978-3-642-27720-7 (eBook)
DOI 10.1007/978-3-642-27720-7
Springer Heidelberg New York Dordrecht London

Library of Congress Control Number: 2013938613

© Springer-Verlag Berlin Heidelberg 2013

This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed. Exempted from this legal reservation are brief excerpts in connection with reviews or scholarly analysis or material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work. Duplication of this publication or parts thereof is permitted only under the provisions of the Copyright Law of the Publisher's location, in its current version, and permission for use must always be obtained from Springer. Permissions for use may be obtained through RightsLink at the Copyright Clearance Center. Violations are liable to prosecution under the respective Copyright Law.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

While the advice and information in this book are believed to be true and accurate at the date of publication, neither the authors nor the editors nor the publisher can accept any legal responsibility for any errors or omissions that may be made. The publisher makes no warranty, express or implied, with respect to the material contained herein.

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Foreword

It is my pleasure to introduce a publication that involves the participation of an important group of acknowledged specialists in federal studies from various countries, and many of the most acclaimed specialists on the Spanish autonomous system. The functioning of federal systems and the challenges they face is the common object of reflection; however, in this context, reflections upon the horizons of territorial autonomy in Spain occupy a relevant field. I trust—and hope—that these reflections will transcend academic frontiers and contribute towards improving our political organisation, helping to reinforce peaceful coexistence.

In the case of Spain, this publication appears at a critical moment. We have already seen over thirty years of development of the system of territorial autonomy. Very few years in comparison with the long life of the federal systems that should act as a reference for us; but many in the context of our political history. Never so much as now have we been in a position to build a stable democratic system, comparable with the best democratic systems in our environment, and, above all, destined to last beyond the generation that created it. We must be aware of both circumstances at the same time. Both should spur us on to persevering in eliminating the flaws we perceive in the development of our political system, without jeopardising it in the name of a purely idealised better future, disconnected from reality.

The long life of the most solvent federal systems in our environment should serve as an example for us to follow; it must show us that a long continued existence in conditions of democratic stability is a very achievable goal. And their experience should help us find the best path for our future to be equally promising. However, we must never forget that, unfortunately, as a country we have been incapable of conserving the best political systems, when we have been able to create them. Our history demands of us restraint, prudence, in order to preserve what we have already achieved. However, we cannot be paralysed by our obsession with the past. We must also look to the future so we may, whilst maintaining our system of political coexistence, revitalise its virtues and seek to reduce its shortcomings.

The construction of the Territorial Autonomy in Spain was very successful. However, at the end of the 1970s, it was not clear which would be the path to

follow. More than thirty years of life of the Autonomous Communities have considerably clarified the picture; although, at the same time, they have presented us with other problems. At the point on the road where we find ourselves, there is a growing conviction that the Spanish system of autonomy represents a peculiar form of federal system; and this is also the opinion of acknowledged experts in federalism from various other countries.

There is no doubt, given the process experienced, that our system has important specific characteristics. However, so has each federal system, as has each political system. Some of these unique features must be preserved because they are directly connected with our reality. And we cannot forget that, if we wish to be successful, we must find a solution to our own problems. In these conditions, we need to stop being a kind of embarrassed federal system, which does not dare to acknowledge and proclaim its own nature. This is not merely a question of coherence but of interest and practicality. We must be capable of improving our system of territorial autonomy, tackling the functional problems that arise; and we must be capable of doing this in the best possible way.

In this task we have two options: to think that we are unique and embark alone upon a journey of uncertainty, or to assume without complexes or false obsessions of difference our place, our fellow travellers, our friends, learning, benefitting from the experience of systems that have demonstrated a proven capacity to survive over time, thanks to their ability to provide suitable answers to the problems they have faced. On this journey, our references can be none other than the federal systems of our legal-political environment, because our problems are the same as their problems and our system responds to the same assumptions and has the same objective: the recognition of internal diversity as fundamental to the stability and strength of the democratic system.

Recent years have seen the development of a process of radical reform of the Statutes of Autonomy, which has opened a new phase in the development of the State of the autonomies. The Catalan reform, with the approval of a new Statute in 2006, has been, without any doubt, the driving force behind this process. For various reasons, this phase of development of the autonomous system has left unresolved most of the objectives of the reform. And Euskadi, the Basque Country, decided to remain on the sidelines, directing its energies towards the purely idealised objectives of a section of the nationalist population, rather than contributing to resolve the real and practical problems posed by our political system. They expected us to forget the here and now, forgetting our own history and the very shaping of Basque society, for the sake of a supposed political paradise that exists only in the minds of a group of the converted. The development of this new phase of the evolution of the autonomous system, with its triumphs and its failures, must help us to draw lessons that will enable us to face the future in a better position and with greater chances of success. Looking to the past to learn for the future.

The approval of the new Statutes of Autonomy and the decisions of the Constitutional Court with regard to these have not ended any process. The process of development, of evolution of the State of autonomies remains open; the evolution

of political systems is, to a greater or lesser extent, a permanently open process. However, not in order to periodically turn everything upside down.

The soundest political systems are those that, having successfully established their foundations, are reinforced by their maintenance of a continuous process of improvement. We succeeded in 1978 and 1979 when we approved, respectively, the Constitution and the Statute of Autonomy. However, we have to persevere in order to continually improve its performance, providing solutions for the problems that arise and eliminating the flaws that become apparent. In this task, we should look no further than towards the federal countries of our environment. And amongst them, those that have evinced over a lengthy history their capacity to respond to the demands of their own country. In this task, Euskadi has a special interest in contributing towards finding the most fruitful path in the development of our system of territorial autonomy.

Euskadi has unique characteristics, some of them particularly relevant. And we want a federal system that will integrate, incorporate, and protect them, as the Spanish Constitution has. However, unlike those who believe that Euskadi should follow a route that ignores the evolution of the Spanish system, we are convinced that a politically solvent future for Euskadi can only be achieved, today, within a solid federal system in Spain. We would like to contribute with our effort towards the optimum evolution of the Spanish autonomous system, above all else, because this is in our own interest. And at the same time, we want to ensure that in this development the unique character of Euskadi is preserved. And we believe that the best way to do this is from within, fully involving ourselves in the process, instead of standing to one side, without the sensation of participating in the system. We require the trust of others. We seek loyalty towards ourselves via our loyalty towards others. Because we are all sailing in the same boat; and its future affects us all equally.

Idoia Mendia
Minister for Justice and Public Administration,
Basque Government

Acknowledgments

The origins of this publication are to be found in the concern over the developmental crisis that affects the Spanish system of territorial autonomy and the conviction that its evolution should be along the paths being followed by more established and consolidated federal systems. Comparative studies have a long tradition. However, it was a question of crossing the border of the accumulation of analyses of different legal-political systems in an attempt to promote what Sujit Choudhry has called *The Migration of Constitutional Ideas* (Cambridge University Press, 2006).

The Spanish system has its roots in the formal rejection of federalism, which was formalised in the Constitution of 1931 (Second Republic). However, its evolution after the approval of the first Statutes of autonomy in 1979, following the approval of the Constitution of 1978, has transformed it profoundly and has situated it within the sphere of federal systems. At a point marked by the failure, since the Constitutional Court Ruling of June 28, 2010, of the attempts at reform represented by the new Statute of autonomy of Catalonia (2006), it is more necessary than ever to look at systems that, in spite of the differences and peculiarities particular to each one, respond to the same basic circumstances. This similar nature renders easier, without a doubt, the *migration of constitutional ideas* between them; and makes more necessary the *dialogical* method advocated by Choudhry. In the case of the Spanish system, which is in need of reinforcement, this contrast is more essential than in systems with a tradition that has endowed them with greater solidity.

With this idea in mind, in October 2011, Bilbao hosted, at the University of the Basque Country (UPV/EHU), a Conference about the paths of federalism and the horizons of territorial autonomy in Spain. It was attended by a group of specialists in federalism from different countries around the world and by specialists in the Spanish system of territorial autonomy. It sought to open a line of work where analysis of the problems facing the Spanish system might be performed in the context of neighbouring federal systems, in the light of their experience.

The conference addressed a wide range of themes for reflection, which embraced the most important problems currently posed in Spain, especially, the separation of powers, intergovernmental relations, and the management of diversity. It involved specialists from different countries analysing the current situation and the

challenges faced by their respective political systems in these spheres; and Spanish specialists doing the same with regard to the Spanish system of territorial autonomy.

The academic encounter was very well received by scholars—*seniors* and juniors—from a large number of countries and universities. Along with the plenary contributions, the most exciting moments of the meeting took place during the presentations of their contributions by the *junior scholars*, to whom the organisers are particularly grateful. This publication is a compilation of the works presented there.

The Bilbao Conference and this publication form part of the activities of the Research Project “Federal System between Integration of Diversity and Stability,” financed by the Ministry of Science and Research—now Ministry of Economy and Competitiveness—(ref. DER 2010-20850) and the Research Group of the Basque University System IT509-10 (Directorate of Scientific Policy. Department of Education, Universities and Research of the Basque Government).

The Bilbao meeting—and this publication—have been possible, thanks to the enthusiastic support of the Department of Justice and Public Administration of the Basque Government—and its Head, the Minister Idoia Mendia—and of the Basque Institute of Public Administration (IVAP)—and its Director, Encar Etxazarra and her colleagues. Furthermore, we have enjoyed the support of the Ministry of Science and Research of the Government of Spain, the Department of Education, Universities and Research of the Basque Government, of the Vice-Rectorate of Research of the University of the Basque University (UPV/EHU), and of the Manuel Giménez Abad Foundation. The organisers would like to thank them all. And, in particular, we would like to express our acknowledgments to the members of the Scientific Committee, who ensured the quality of the contributions presented.

Alberto López-Basaguren

Contents

Part I General Overview. Federal Challenges in the Era of Globalization

Opening Pandora’s Box: Process and Paradox in the Federalism of Political Identity	3
Michael Burgess	
Contradiction and Crisis in the Federal Idea	15
Carlos De Cabo Martín	
From Competitive Federalism to Global Market Federalism	29
Miguel Ángel García Herrera and Gonzalo Maestro Buelga	
Multilevel Constitutionalism and Federalism: Reflections upon the Congress on “The Path to Federalism in the State of Autonomies”	61
Teresa Freixes	
Constitutional Courts in Federated States and Entities	73
Dian Schefold	
Beyond Institutional Design: The Political Culture of Federalism (A Normative Approach)	83
Ramón Máiz	
Balancing Self-Rule and Shared-Rule: Sources of Tensions and Political Responses in Contemporary Political Systems	103
André Lecours	
A Federalist’s Defence of Decentralization	115
Ian Peach	

Democracy-Coated Authoritarianism: How Federalism May Act as a Cover for Undemocratic Governments	125
J. Castro-Rea	
The Challenges of the Federative Principle in the Twenty-First Century	135
X. Díez de Urduvía	
Global Federalism: A Solution for the Global Economic Crisis?	145
José Angel Camisón	
Defending the Federation: The Federal Challenge to National Defence Policy Making in Canada	155
Allan Craigie	
Some Questions Regarding Responsibility for Non-compliance with International Obligations in Federal States and in Spain	165
Roberto Uriarte Torrealday	
The Spanish Autonomous Model in Poland? The Political Concept of the Silesian Autonomy Movement	179
Małgorzata Myśliwiec	
“Sustainable Differentiation”: The Twenty-First Century Challenge to Decentralization (A Comparative Study of Italy and Spain, with Special Attention to Constitutional Case Law)	191
Sabrina Ragone	
Participation of the German Länder and Autonomous Communities in the European Union: A Comparative Analysis	201
Cristina Elías Méndez	
The Construction of German Fiscal Federalism vs. the Deconstruction of Spanish “Fiscal Federalism”	219
Susana Ruiz Tarrías	
The Senate: Chamber of Territorial Representation. Reasons for Its Existence	233
María Marta Cerro	
Reinventing the European Union: The Financial Crisis, an Opportunity for a Federal Model	241
José Chofre-Sirvent	
Spanish State of Autonomies and Economic Freedom: Challenges of the European Economic Constitution Paradigm	255
Ainhoa Lasa López	

Part II The Ways of Federalism in Western Countries and the Division of Powers

The Once and Future Challenges of American Federalism: The Tug of War Within 267
 Erin Ryan

The Historical and Contemporary Challenges of Canada’s Division of Powers 303
 Gerald Baier

In Search of a Proper Federal Balance Between the Two Orders of Government: The Case of German Federalism 313
 Rudolf Hrbek

Current Challenges Faced by Swiss Federalism 333
 Regula Kägi-Diener

The Road Towards Federalism in Italy? 351
 Silvio Gambino

The Current Challenges on the Belgian Federalism and the Sixth Reform of the State 375
 Min Reuchamps

Part III The Division of Powers and the Horizons of Territorial Autonomy in Spain

Current Issues Around Territorial Autonomy in Spain 395
 Alberto López-Basaguren

Division of Powers, Distribution of Competences, and Configuration of Public Spheres in the Autonomous State Integrated in Europe 421
 F. Balaguer Callejón

A Complex Model for Distributing Competences That Requires Further Safeguards 437
 Paloma Biglino Campos

The Distribution of Competences in Spain a Year After the Ruling 31/2010 of the Constitutional Court: The Reaffirmation of the Unitary State? 451
 Carles Viver Pi-Sunyer

A Ruling on the Federalisation of the State 467
 Juan José Solozabal Echavarria

The Inevitable Jurisprudential Construction of the Autonomous State	481
Francesc de Carreras Serra	
The Distribution of Competences in Federal Systems: A Proposal for a Hypothetical Constitutional Reform in Spain	501
Joaquín Tornos Mas	
The Function of the Constitutional Court in the Distribution of Competences: A Critical Vision	527
José Antonio Montilla Martos	
Autonomous State Reform in the Face of Challenges from Regulation and Integration	545
José Tudela Aranda	
Exclusive vs. Concurrent Legislative Power in the Federal Republic of Germany	565
Antonio Arroyo Gil	
The Competences and Faculties of the Autonomous Communities in the Area of Justice: Progress, Limits, and Alternatives for Reformulation	579
Miguel Angel Cabellos Espiérrez	
Organic Laws of Transfer or Delegation (Article 150.2 SC): An Open Door to the Modification of the Constitutional Distribution of Competences	599
Juan María Bilbao Ubillos	
One Feature of the Spanish Territorial Model: The Distinction Between Laws Rules That Assign Competences and Rules That Merely Delimit Them	619
Tomás de la Quadra-Salcedo Janini	
The Authority Over the Administration of Justice in Spain: Current and Future Distribution Between the State and the Self-governing Communities	635
Alberto Saiz Garitaonandia	
The Power-Distribution Nature of the Reserves of Organic Law in the Constitutional Case Law: The Case of the Organic Law of the Judiciary	645
M. del Mar Navas Sánchez	
The Role of the State in the Realisation of the Right to Housing	655
Pilar Garrido Gutiérrez	

Contributors

Antonio Arroyo Gil Facultad de Derecho, Universidad Autónoma de Madrid, Ciudad Universitaria de Cantoblanco, Madrid, Spain

Gerald Baier Department of Political Science, University of British Columbia, Vancouver, BC, Canada

Francisco Balaguer Callejón Facultad de Derecho, Granada, Spain

Paloma Biglino Campos Facultad de Derecho, Universidad de Valladolid, Valladolid, Spain

Juan M^a. Bilbao Ubillos Facultad de Derecho, Universidad de Valladolid, Valladolid, Spain

Michael Burgess University of Kent, Centre for Federalism Studies, Canterbury, Kent, UK

Miguel Angel Cabellos Espiérrez Departamento de Derecho Público, Facultad de Derecho de la Universidad de Girona, Girona, Spain

José A. Camisón Yagüe Área de Derecho Constitucional, Dpto. de Derecho Público, Facultad de Derecho, Universidad de Extremadura, Cáceres (Extremadura), Spain

Julián Castro-Rea Department of Political Science, University of Alberta, Edmonton, AB, Canada

M. Marta Cerro Facultad de Derecho de la UNT, San Miguel de Tucumán, Argentina

José Chofre Sirvent Facultad de Derecho, Universidad de Alicante, Alicante, Spain

Allan Craigie Department of Political Science, University of British Columbia, Vancouver, BC, Canada

Carlos de Cabo Martín Departamento de Derecho Constitucional, Universidad Complutense de Madrid, Madrid, Spain

Francesc de Carreras Serra Facultad de Derecho, Universidad Autónoma de Barcelona, Bellaterra (Cerdanyola del Vallés), Spain

Tomás de la Quadra-Salcedo Janini Facultad de Derecho, Universidad Autónoma de Madrid, Ciudad Universitaria de Cantoblanco, Madrid, Spain

Xavier Díez de Urduy Facultad de Jurisprudencia, Universidad Autónoma de Coahuila, Saltillo, Coahuila, México

Cristina Elías Méndez Facultad de Derecho, Departamento Derecho Constitucional, UNED, Madrid, Spain

Teresa Freixes Sanjuán Departamento de Ciencia Política y Derecho Público, Universidad Autónoma de Barcelona, Bellaterra (Cerdanyola del Vallés), Spain

Silvio Gambino Dipartimento di Scienze Giuridiche, Università della Calabria, Rende, Italia

Miguel A. García Herrera Department of Constitutional Law and History of the Political Thought, University of the Basque Country, Bilbao, Spain

Pilar Garrido Gutiérrez Department of Constitutional Law and History of the Political Thought, University of the Basque Country, Bilbao, Spain

Rudolf Hrbeek Universität Tübingen, Institut für Politikwissenschaft, Tübingen, Germany

Regula Kägi-Diener School of Law, St. Gallen University, St. Leonhardstrasse 20, Postfach 123, 9001 St. Gallen, Switzerland

Ainhoa Lasa López Cátedra Interuniversitaria de, Derecho y Genoma Humano, Universidad de Deusto, Bilbao, Spain

André Lecours School of Political Studies, Faculty of Social Sciences, Ottawa, ON, Canada

Alberto López-Basaguren Department of Constitutional Law and History of the Political Thought, University of the Basque Country (UPV-EHU), Campus of Leioa (Bizkaia), Post Box 644, Bilbao 48080, Spain

Gonzalo Maestro Buelga Department of Constitutional Law and History of the Political Thought, University of the Basque Country, Bilbao, Spain

Ramón Máiz Suárez Departamento de Ciencia Política y de la Administración, Universidad de Santiago de Compostela, La Coruña, Spain

José A. Montilla Martos Universidad de Granada, Facultad de Derecho, Granada, Spain

Malgorzata Mysliwiec Departamento de Ciencias Políticas y Periodismo, Universidad de Silesia, Katowice, Poland

María del Mar Navas Sánchez University of Málaga, Faculty of Law, Boulevard Louis Pasteur, Málaga, Spain

Ian Peach Faculty of Law, University of New Brunswick, Fredericton, NB, Canada

Sabrina Ragone Università di Bologna, Bologna, Italy

Min Reuchamps Institut de sciences politiques Louvain-Europe, Université catholique de Louvain, Place Montesquieu 1, L2.08.07, 1348, Louvain-la-Neuve, Belgium

Susana Ruíz Tarrías Facultad de Derecho, Universidad de Almería, Almería, Spain

Erin Ryan Lewis & Clark Law School, Portland, OR, USA

Alberto Sáiz Garitaonandia Unidad Delegada de la Facultad de Derecho, Universidad del País Vasco, Bilbao, Spain

Dian Schefold Universität Bremen, Bremen, Germany

Juan J. Solozábal Echavarría Facultad de Derecho, Universidad Autónoma de Madrid, Ciudad Universitaria de Cantoblanco, Madrid, Spain

Joaquín Tornos Mas Facultat de Dret, Universitat de Barcelona, Barcelona, Spain

José Tudela Aranda Fundación Giménez Abad de Estudios Parlamentarios y del Estado Autonómico, Zaragoza, Spain

Roberto Uriarte Torrealday Department of Constitutional Law and History of the Political Thought, University of the Basque Country, Bilbao, Spain

Carles Viver i Pi-Suñer Institut D'estudis Autonòmics, Barcelona, Spain

Part I
General Overview. Federal Challenges
in the Era of Globalization

Opening Pandora's Box: Process and Paradox in the Federalism of Political Identity

Michael Burgess

Introduction: The Twentieth Century as the Short Century

The Berlin Wall fell in November 1989 signalling the end of the Cold War and ushering in—or so it seemed—a new dawn in both European and world politics. The implications of its impact were as colossal as they were many-sided and two decades later, we are still trying to come to terms with what happened. However, if the consequences of rediscovering Europe were undoubtedly extensive, the subsequent impact of the implosion of the Soviet Union in December 1991 to reveal ‘Mother Russia’ guaranteed that we were also witnessing a seismic shift in the tectonic plates of world politics. The former was very much a European affair, while the latter—marking the end of bipolarity—was of global significance. In a short book titled *Age of Extremes: The Short Twentieth Century (1914–1991)*, which appeared in 1994, Eric Hobsbawm chose to reconfigure this century largely in terms of a Marxist ideological unity stretching from the Russian Revolution in 1917 to the collapse of the Soviet Union in 1991 and to see in it a distinct historical epoch, and an experiment that had run its course (Hobsbawm 1994).

The post-1991 interaction between European and world politics has been complex and complicated, and we are still too close to these events to appreciate and understand fully the precise nature of their contemporary significance. What we know remains fragmentary and still lacks a sense of ordered interpretation. The so-called ‘stable disorder’ of world politics can have little real meaning until or unless we can have some further distance from these events and circumstances. However, it is precisely this sense of the unknown that forms the inescapable background context for our subject here. Scholars in history, political science, economics, sociology, and constitutional law are confronted with a series of dilemmas when

M. Burgess (✉)

Centre for Federalism Studies, University of Kent, Room: Rutherford N4.7, Canterbury, Kent CT2 7NZ, UK

e-mail: M.D.Burgess@kent.ac.uk

it comes to addressing many of the implications of the events identified above. Practice has in so many respects outstripped theory. We are left with very few familiar signposts to guide us or footsteps for us to follow. There are no doubt historical continuities but they have nonetheless to jostle for position in our evolving explanations of the implications of what happened two decades ago. Continuity and change remain in perpetual relations of both complexity and simplicity spawning both highly sophisticated alongside elementary understandings and interpretations of what is now so often referred to as the 'post-Cold War era', a phrase whose accuracy tells us very little at all about where we are now. However, it is precisely at this difficult intellectual destination that we must situate the subject of process and paradox in the federalism of political identity. This refers to the resurgence of the federal idea as one important outcome of this convulsive period of contemporary history. For the moment, we will leave aside the reasons for the remarkable rekindling of this particular form of human association and look briefly at the empirical evidence for this claim.

The Resurgence of the Federal Idea

In retrospect, the immediate aftermath of the end of the Cold War witnessed an astonishing revival of not just a novel federal discourse in domestic and international politics but also an unprecedented appearance of what I have called the 'new federal models'. The evidence for this is incontestable. Belgium crossed its Rubicon in 1993 followed by the Russian Federation in the same year, while European integration entered a dramatic new phase with the ratification of the Treaty of European Union (TEU), widely known as the Maastricht Treaty, which arguably set the European project on a federal trajectory. The European idea was always a federal idea.

In 1994, Argentina adopted its new constitution that looked to federal values and principles, while in the same year, South Africa produced its first provisional constitution that also incorporated these notions in an attempt to reach a political consensus on how to recognise difference and diversity in its post-Apartheid age. In 1995, Ethiopia and Bosnia and Herzegovina (BiH) were reconfigured as new federal models, the former in order to hold together a multiethnic—some might say a multinational—society and the latter in order to create an oasis of post-conflict political stability based upon a veritable kaleidoscope of territorial, religious, multi-lingual, and multinational properties in a new state diarchy. In 1996, the new Constitution of South Africa was formally ratified and introduced its novel 'spheres of governance' displaying evident federal elements, while in 1999, Nigeria formally adopted its sixth constitution since it gained independence in 1960 and correspondingly reintroduced civilian government in another federal model that has so far stood the test of time. Thus, collectively, Belgium, the Russian Federation,

European Union, Argentina, Ethiopia, Bosnia and Herzegovina, South Africa, and Nigeria strongly suggest evidence of a resurgence of the federal idea in the decade of the 1990s in world politics.

However, the narrative does not end here. In Spain, Italy, and the United Kingdom (UK), as formally non-federal states, there have been significant movements in the same direction. Clearly, the point of departure is crucial. From the perspective of two parliamentary monarchies in Spain and the UK, and what we might describe as a 'regional' state in Italy, there has been a gradual but an indisputable devolution of powers and competences to legitimate sub-state political authorities that could be construed as movement in a federal direction—even if the ultimate goal is not a new federation. Some scholars prefer to see in these three cases a process of *federalising* or *federalisation* that suggests a slow, piecemeal, incremental but ultimately inexorable movement toward some sort of federal or quasi-federal destination. For those who remain anxious about the federal prescription, this approach to understanding what is happening might be seen in terms—to paraphrase a description once used to simplify neo-functionalism in European integration theory—of 'federalism without tears!' For once again, the practice—federal practices—seems to have outstripped the constitutional theory. In such circumstances, we seem to be able to see federalism everywhere.

The notion of federalisation as *process* was first introduced into federal theory—or what passes for it—by Carl Joachim Friedrich whose devotion to it derived from his obsession with Johannes Althusius, the late sixteenth and early seventeenth century German Calvinist Magistrate—and now widely regarded as the father of the Continental European federal tradition—whose principal concern was the construction of political communities, characteristically from the bottom upwards rather than the typical top-down centralist hierarchical perspective. Unfortunately, Friedrich's consistent attempt throughout his academic career to utilise the concept of process as a way to capture the dynamics of *becoming federal* contained too many ambiguities and vague generalisations to constitute, on its own, a convincing theory of federalism, although its conceptual utility might need to be reassessed and reappraised in the light of our new federal models (see Burgess 2012).

Before we conclude this section on the empirical evidence for the resurgence of the federal idea in the late-twentieth century, it is important for us to mention the fifth Annan Plan of the United Nations (UN) as a federal plan for Cyprus (2004) and to add both Iraq (2005) and Nepal (2007) to our growing list of new federal models, while also keeping an eye on both Pakistan and Somalia, and perhaps even Afghanistan in the future however unlikely it seems at the moment. If we now take stock of this list, we can see that there is an extremely impressive body of evidence suggesting that *something is happening* to the federal idea in the new twenty-first century that began in 1991. Let us probe a little further into this body of evidence. Let us venture into the new world of difference and diversity.

The New World of Difference and Diversity

It is clear that in the post-Cold War and post-9/11 era, the twenty-first century has just woken up to a new age of danger and uncertainty unprecedented in its ubiquity. It is an unstable cocktail of possibilities and probabilities. However, these dangers and uncertainties are not confined solely to military and security definitions of reality, nor are they necessarily to do with threats of terrorism, drug- and human-trafficking, AIDS, and illegal immigration. Instead, they are rooted in social realities that have always been immanent in the modern state but have often lain dormant or passive for many years. The new millennium has coincided with the unleashing of powerful forces of cultural-ideological differentiation that have acquired a dramatic political salience across the world and can no longer be complacently ignored, suppressed or violently eradicated. From Indonesia and Sri Lanka to Nigeria and the Sudan, from Cyprus and Russia to Iraq and Somalia, we are witness to the politics of identity: the struggle for new forms of self-determination, tolerance, and civil and human rights and freedoms. We have entered a new era of constitutional and political minoritarianism. Turkish Cypriots in Cyprus, Tamils in Sri Lanka, Chechens in Russia, Kurds in Iraq, and until 2011 Darfur in the Sudan, and many other minority identities have formally joined the chorus of voices clamouring for official recognition and formal accommodation in the polity.

Today, we are confronted by an increasing number of states whose societies display all the indelible features of multiculturalism, multilingualism, and multinationalism. It is true that many of these contemporary trends and developments are not novel; they have been evident for decades and some for much longer. However, this imperative of social differentiation has recently been accelerated and accentuated in certain parts of the world. Its contemporary political significance has been underlined by the widespread media coverage that has successfully linked it to Western values, interests, and preconceptions of conflict management. Arising out of this new world of difference and diversity has been both the intellectual and practical political impetus to address this remarkable concatenation of events, trends, and developments so that new questions are posed and old ones reformulated in new circumstances.

One question that has emerged and is quite striking in this context is the following: ‘What has changed about the world of states that has served to increase the contemporary significance of the federal idea?’ The following four reasons, which are interrelated in a complex fashion, offer us some clues toward an explanation:

- A reassertion of the politics of difference and self-determination, especially but not solely in central and Eastern Europe and increasingly in the states of the Middle East, for example, the cyclical efforts to address the Israeli–Palestinian conflict.
- A new international emphasis upon the legitimacy and recognition of social differentiation and heterogeneity, even within Islam, that strongly suggests a

need for constitutional and political accommodation, for example, the Sunni and Shiite Muslims in Iraq.

- The recognition of human rights and freedoms and the morality of United Nations (UN) humanitarian intervention in the internal affairs of independent sovereign states, especially those deemed to be 'failed' states. This includes the collective rights of whole communities, for example, Dafur in the Sudan and the self-determination of Kosovo.
- The spread of new democratisation processes, partly triggered by the US invasion of Iraq, in the Middle East, e.g. Lebanon, Tunisia, Egypt, Bahrain, Yemen, Libya, Syria, and even in Saudi Arabia. However, the likelihood of these cases ushering in a new age of liberal democracy must be considered with a great deal of caution in countries with little or no culture and experience of democratic values.

These discernible contemporary trends and developments prompt those of us interested in the practical relevance of federalism in the world today to reflect upon this new political recognition of difference, diversity, and democratisation. It also impels us once again to think carefully about the nature of conflict, the meaning of diversity, and the sort of unity that can be forged from what are usually unpromising circumstances. Context, it is often said, is everything but the links of similarity between the events and circumstances identified here in Europe, Africa, and the Middle East suggest that something is happening which, at the very least, has revived an international federal discourse. Consequently, there is now a real need to rethink and reassess some of our basic conceptual categories in the light of comparative perspectives.

The Federal Character of Political Identity

In each of the new federal models identified above—whether formally federal or formally non-federal—we can see with remarkable clarity that all of them exhibit a distinct tendency to utilise some aspects of *federal practice*. Whether or not the creation of a new federal model has emerged as the result of a 'constitutional moment' (albeit an 'imposed' moment) with little or no democratic political culture, as was the case with Bosnia and Herzegovina, or has for a long time been in the making as symptomatic of an incremental federalising process in an established liberal democracy, as in Belgium, the reconstruction and reconfiguration of an existing state into a more 'federal-type' arrangement (including consociational mechanisms, procedures, and practices) there is something in the nature of the federal idea that makes it in many important respects ubiquitous.

If it is true, as Murray Forsyth once wrote, that 'with sufficient effort we can find federalism everywhere', this tells us something about the innate flexibility and malleability of the federal idea in its seemingly infinite capacity to adapt and adjust to different circumstances (Forsyth 1981). Its chameleon-like ability to blend into a

variety of different social contexts and political cultures in different parts of the world strongly suggests that it somehow reaches down into the very core of human existence. In short, it endures precisely because it is deeply rooted in fundamental human values and principles of political organisation—with the way that we organise human relations. Althusius, as we have already observed, construed this idea as ‘political’ in terms of community-building, ever upwards and onwards in ascending fashion from the bottom to the top of the polity.

However, I think that it is important for us to pause for a moment to reflect upon what, at least on the surface, is an existential question. If the federal idea is essentially an organising principle, it is used in unending fashion to organise and reorganise human beings in both their individual and collective capacities so that we are able to live together in political communities that furnish the dual basis of cooperation and self-determination: of the sort of unity and autonomy that led Daniel Elazar to refer to ‘self-rule and shared rule’ (Elazar 1987). In other words, the federal idea becomes an idea that is indissolubly connected to who and what we are (or who we think we are or even who we would like to be). This conveys the sense of dynamic change, that is, we evolve as human beings always in the process of becoming. In a nutshell, it is part and parcel of our political identity. It provides the answer to the question ‘Who am I’ and ‘What is my political identity in terms of both my individual and collective capacities?’ However, it also underlines the fluidity, plurality, and complexity of political identity.

If this reasoning is right, the notion of political identity—of who I am in the polity or political community—is in a state of constant flux. Without wanting to address the complex issue of identity-formation here, it is important for us, at this juncture, to emphasise the essentially *moral* character of the federal idea. It is moral in the sense of its conception of the polity as being grounded in a distinctive set of values and principles that collectively provide the basis for human beings to live together peacefully in their difference and diversity. Difference, we are reminded, produces federalism. There is no time or space to include a detailed survey of these values and principles here but let us nonetheless identify the basic values, as we can see them: human dignity, liberty, equality (of citizens, including ‘the Other’), diversity, tolerance, and political empathy. From the presence and interaction of these *federal values*, we can derive a set of *federal principles* that could include, *inter alia*, terms such as partnership, bargain, agreement, contract, and compact in what the leading Canadian political theorist, Charles Taylor, has called ‘the politics of recognition’ and has spawned an assortment of words, phrases, and shorthand definitions of federalism, such as self-rule and shared rule, *Bundestreue* (including comity and loyalty), reciprocity, and internal self-determination (Taylor 1992). These federal values and principles are intimately and intricately bound up with each other. Often invisible, they work together toward the creation of a federal polity that functions in a particular way to forge a compound identity comprising a variety of constituent identities that some Spanish scholars, such as Ferran Requejo, have called *plurinational* or multinational value pluralism (Requejo 2005). This seeks to capture and convey the complexity of political identity that—like federalism itself—has many subtle meanings and emphases.

At its core, then, political identity has a federal character. Whether or not it has dual, triple or multiple dimensions matters less here than the fact that it has a moral basis to it in terms of how we live together, associate, and engage in political community-building.

Federalism and Liberal Democracy

None of these things, it has to be said, can flourish and develop in anything other than a liberal democratic state. Federal values and principles in any case correspond to and inhere in liberal democracy and are—at least theoretically—mutually reinforcing. To speak of a military federation, as William Riker did in 1987, or to seek to fuse together the authoritarian character of a dictatorship with the federal idea, as the military strove to do for long periods in Nigeria, is frankly absurd (see Burgess 2008). It vitiates the federal idea at its very source. Consequently, it stretches credulity to claim that the Soviet Union, Czechoslovakia, and Yugoslavia were examples of 'failed' federations for the simple reason that they were never federal states in the first place. The argument for this lies in the fact that the values and principles we have just identified cannot produce genuine freedom, autonomy, and internal self-determination other than what is at the behest of the central political authority. And if they contained federal elements to any extent, in embracing the outward constitutional and institutional features common to federations, they were in reality led by single party dictatorships that controlled, or sought to control, all the lines of political communication in the state. They were, in short, impostors.

This is not to say that all past and present federations will necessarily meet the conceptual and theoretical requirements of *federal democracy*; we would have a hard time in attempting to justify the claim that all of the new federal models, especially those in Russia, Ethiopia, Bosnia and Herzegovina, and Iraq are fully functioning federal democracies, but in this they are certainly not alone if we reflect upon the flawed democratic practices in the established federal systems in Malaysia (1963) and India (1950), and this is in any case hardly surprising if we also consider their recent historical legacies, which are living legacies that retain a contemporary significance. Indeed, it might be that the introduction of liberal democracy—with all of its conventional features including the rule of law, constitutional principles, human rights and freedoms, and capitalist market economics—and the process of democratisation are more important in such cases than the focus upon federalism.

And here lies the main problem that is likely to determine success and failure in these new models. Is it possible to construct and sustain new federations that at the outset lack a democratic political culture? What are the theoretical and empirical implications of this recent phenomenon whereby the federal idea is introduced in a set of circumstances that are not or do not appear to be conducive to its practical success? Historical experience suggests that among the so-called pre-conditions of classic federal state formation and the subsequent processes of (multi)nation and

state building there have been present in the social reality of difference a series of factors—such as territorial contiguity, congruent social and political values and institutions, and shared goals—that are nonetheless common to each federal experiment. However, our new federal models do not in general possess these pre-conditions. Indeed, they each have an authoritarian military heritage that does not seem to furnish the basis for creating and sustaining a viable federal political community. There is little or no democratic experience. Democratic values are therefore extremely shallow. In short, there is no democratic political culture wherein the federal idea can flourish.

If this historical logic is broadly correct, it will be necessary to reverse history and—having created a federal constitution—seek first to *create* a democratic political culture where the construction of a federation can be firmly cemented. The practical implication for the new federal models in Bosnia and Herzegovina and Iraq, then, is that democratic values and practices via the *process of political socialisation* will have to be introduced over a long period of time if they are ultimately to become self-sustaining. The public policy consequences are therefore self-evident. The agents of this socialisation will be education policy, media competition and institutionalised democratic practices designed to channel and canalise conflict in peaceful, non-violent pathways. In turn, one conceptual implication of this novel phenomenon is the revival of both *political socialisation* and *political culture* as useful instruments of empirical and normative descriptive analysis. We have already begun to witness an increase in references to these terms in the emerging literature on contemporary federal models. Their resurgent conceptual utility derives directly from the practical realities of our new federal models.

To summarise this section, it is important to consider that the peculiar context wherein the new federal models are located can produce an interesting paradox: federation is both the means and the end of democratisation just as democratisation is a necessary instrument of a self-sustaining federalism. They are, in short, mutually reinforcing influences.

Process and Paradox in the Federalism of Political Identity

If we return to look at the federal character of political identity in terms of our new federal models, what does it tell us about both the practical possibilities and limitations of contemporary federalism? As we will see, the post-Cold War context of these models ensured that they would emerge out of and alongside the larger process of democratisation or, to be more specific, that the federal idea would facilitate this process. Therefore, it is appropriate to revisit the approach to federalism that we have called *federalisation*.

The notion of *process* in political science denotes a continuous, indeed an endless, dynamic of change. In federal studies, as we have already seen, it is associated with the theoretical approach of Carl Friedrich. His desire to escape

from what he saw as the constitutional and legalistic character of federalism that lent the impression of a static conception of this subject prompted him to seek a different way of understanding it. Instead of the conventional idea of the word 'federal' being handcuffed to the notion of the state—the federation or federal state—he wanted to expand its meaning in order to detect other forms and manifestations of the federal idea. Clearly, he believed that there was more to the federal idea than just the federal state and in this particular respect he has been followed by both Daniel Elazar and Ronald Watts (see Elazar 1987; Watts 2008). In consequence, he sought to identify different states and political systems on a spectrum or continuum of federalism that he could locate appropriately in terms of their level and scope of *federalisation*. This enabled him to bridge the gap between the domestic state level and the international level of political authority, thus equating the *constitution* as the language of the state with the *treaty* as the language of international relations. Both in his view constituted federalisation.

Leaving aside the conceptual flaws and ambiguities inherent in this approach to understanding federalism as a continuous process of federalisation, Friedrich's conception did nonetheless have the merit of conveying the essentially dynamic nature of federalism. Moreover, in introducing the idea that the subject extended beyond the state to include what he called *international federalism*, he clearly foreshadowed the later contributions of both Elazar and Watts to federal theory in the extent to which he included federal *arrangements* and *relationships* that existed independently of the formal state structure. In the 1960s, it was and remained a highly idiosyncratic, not to say eccentric, way of looking at the world of states and non-state actors although Friedrich had been developing this concept of federalisation since at least 1950.

How and why would Friedrich's process approach to federalism—his notion of federalisation—be reassessed and restored as a conceptually useful way of explaining the emergence of the new federal models? On what grounds can we utilise it in order to come to terms with contemporary change?

In a sense, we have already underlined the basis for this application of old wine in new bottles. The post-Cold War world has changed to such an extent that we find most of the classic theories of federal state formation and their subsequent maintenance simply redundant. They do not help us to understand and explain the appearance of the new federal models so that this would seem to be another example—such as that of the EU—of the practice having outstripped the theory. Just as the EU works in practice but not in theory, so the new federal models exist collectively as a contemporary reality that has no apparent theoretical basis.

However, there is another aspect to this notion of federalisation that is worth more than a moment's reflection. There are good reasons to construe what has been happening in three of our new federal models as the process of federalisation: Belgium, Bosnia and Herzegovina, and the EU. In the first case, it took Belgium approximately a quarter of a century before it crossed the constitutional Rubicon from a decentralised parliamentary monarchy to a formally full-fledged federation. Meanwhile, the period 1995–2012 in the evolution of Bosnia and Herzegovina has clearly been a process of incremental federalisation in terms of its post-civil war

reconciliation and reconstruction. It is now a unique federal diarchy comprising one unitary constituent unit—the Republic of Serbia—and the federation of Bosnia and Herzegovina with ten constituent cantons. The latter is, in other words, a federation within a larger overarching dual or binary federation. Finally, the EU has always been the current institutional expression of a long process of European integration that can be accurately construed as a piecemeal, incremental process of federalisation. In these three cases, Friedrich's notion of federalisation would seem to be the most helpful conceptual approach to understanding what is or has been happening both within and without the state in Europe.

There is further empirical evidence that might justify our resort to the concept of federalisation and support Elazar's claim that it is the federal relationships that are important rather than their formal incorporation in a written constitution. It is clear from our introductory section that there has also been a significant contemporary trend toward federalisation in three formally non-federal states in Europe. Vernon Bogdanor identified the process during the late 1990s of what he called 'federal devolution' in the United Kingdom (Bogdanor 2009). This is sometimes described as territorial decentralisation or constitutional sub-national autonomy, within formally non-federal states in Europe and its relevance to both Italy and Spain is incontestable. What the use of these terms and phrases indicates is an effort to avoid the (understandable) assumption that there is a federal teleology in these states and that their evolution is necessarily toward a federal destination as a terminal end-point.

However, how can we really know if this is what is happening in Spain? While the application of the federalisation concept to Spain still leaves the door to formal federation open, it does not necessarily imply that it is in any sense inevitable. The pace and scope of territorial decentralisation during the last 30 years is certainly movement in a federal direction, especially if both senate and fiscal reform are introduced in the future to accompany the existing evolution of bilateral intergovernmental relations and the further enhancement of the Autonomous Communities (ACs) in terms of their informal horizontal cooperation and powers. Small wonder that many scholars of constitutional law and politics refer to contemporary Spain as a 'federation in disguise' or 'a federation in the making'. It is hard to resist the temptation to classify it in conventional terms, even if the prefix *quasi-federal* is preferred.

However, this temptation must be resisted for the simple reason that Spain is not and may never be formally a federation consecrated by a written constitution. What matters is how its political system works in practice. Not for the first time do we witness the chasm between constitutional theory and practice. Friedrich, Elazar, and Watts would find a happy consensus in the conclusion that the current Spanish federal model is just that: a peculiarly Spanish invention. And if, like Italy and the UK, it remains difficult to classify Spain according to our conventional understanding of federal states, this suggests that we must rethink and reconceptualise our classificatory categories rather than try to squeeze this new federal model into some kind of outdated conceptual framework. From the perspective of federal theory,

then, Spain is another of these new evolving federal models that is compelling us to seek a new classification.

Turning to the related question of paradox in the federalism of political identity, the similarities in the social cleavage structure in these new federal models is quite striking but for different reasons. One of the major features common to them all is the visceral nature of their cultural–ideological diversities. All of them are characterised to some degree and in different ways as combinations of multi-ethnicity, multi-nationalism, multiculturalism, multi-religiosity, and multilingualism. So the hallmark of federalism as the institutionalisation of political identity in these federal models is primarily to do with ethnic, national, religious, and language issues that are notoriously difficult for all political systems (not just those that are federal) to process. This is because they are in many ways non-bargainable public policy questions that often involve zero-sum conflicts and this is precisely where we can locate one of the several paradoxes in federal studies.

The paradox in relation to the federalism of political identity is the following: why do state builders consciously construct federal communities on the foundations of difference and diversity that will be predictably difficult to manage and inherently unstable at the outset? Indeed, why would anybody seek deliberately to build a new state on social cleavages with political salience that will constitute major fault-lines in the polity and be a constant source of conflict and division that is likely to constitute an obstacle to the unity and integration of the state? Put in plain language, it seems like this is literally asking for trouble. Wrapped inside this paradox is of course a real conundrum for political scientists, namely, do these new federal models sustain and aggravate conflicts that already existed or are they actually responsible for creating them? In turn, do they create the conditions for secession in the future? However, this question is a subject for a different paper.

Conclusion: Opening Pandora's Box?

If we look back at this short survey that has as its main focus the emergence of new federal models after the end of the Cold War, it does seem to call not only for new empirical and theoretical perspectives having significant implications for comparative federalism, but also for a root and branch revision of classic federal theory to accommodate theoretical pluralism. This can be formulated from a synthesis of the old theories—taking from them what is relevant to the new age of federalism—to produce a revisionist theory with much greater explanatory capacity than existing approaches.

The role and scope of federalism in the world of the new millennium must be synchronised with its novel hopes, fears, and expectations. This presents fresh challenges to the federal idea and means that its innate flexibility, built upon core values and principles, is likely to be tested in new ways that will serve further to provoke our imagination in constitutional and institutional design, decision-making processes, and conflict management procedures. New federal experiments will