Is there a space for federalism in times of emergency?

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What is at stake? Federalism as part of constitutionalism

Emergency is not a friend of constitutions. Whether or not constitutions regulate emergency powers, when critical situations occur the overall trends are always the same: fundamental rights are limited and a centralization of power takes place, both horizontally (from parliaments to governments) and vertically (from the subnational to the central level). All that can of course happen to different degrees, for longer or shorter periods of time, with heavy or limited stress on the system of the sources of law. In democratic societies, the divide between acceptable and intolerable limitations rests in the preservation of the rule of law, in the first place of judicial review, and of pluralism. One of the main lessons of the Covid-19 pandemic for the community of constitutional lawyers is that constitutions were generally little prepared to face the unexpected and unprecedented situation. Like most health care systems were. And like health care systems, also constitutions will probably need some adjustment to better cope with similar challenges.

All constitutions are in principle "good weather constitutions" (*Schönwetter-Verfassungen*). Some more, some less. The challenge is to better prepare them in order to tame more difficult conditions, be they a pandemic, but also terrorism, economic crises, the balance between mass migration and fundamental rights, secession, the climate change, the populist challenge. All that has already popped up in the first two decades of the new millennium, challenging the constitutional order, and is likely to spill over in future. Shall we conclude that constitutions are simply overstressed (as the scholarly debate often describes the Weimar Republic – *die überforderte Republik*) and accept that this can happen, or shall we acknowledge that the historical *raison d'être* of constitutionalism is to, step by step, constitutionalize phenomena that were previously in the exclusive realm of politics, progressively subjugating them to legal (more: constitutional) regulations? If so, there is a lot of work ahead in order to reinforce the banks of the river and to avoid floods in case of bad weather. Probably, as it has been appropriately argued, "small emergencies" need more attention than big ones.

One of the constitutional areas more severely affected by emergencies in general, and by the Covid-19 pandemic in particular, is that of the vertical division of powers. Call it federalism, to simplify, although no one can really define what federalism means beyond the generally accepted and quite vague formula of "self-rule plus shared rule" (Elazar). What we are talking about here is simply all the countries where at least two entities are part of a larger union, while at the same time enjoying political autonomy. Something much broader than the countries whose constitutions define them as "federations". What is at stake is precisely the political autonomy of the subnational entities, be they called states, *Länder*, cantons, regions, provinces, entities, territories, and the like.

Fighting a pandemic requires quick and coordinated action. The reason why horizontal and vertical centralization happens is because national governments are better suited to take such action. This is what has happened everywhere. Some commentators and political figures even rediscovered Carl Schmitt and his simplistic approach to sovereignty being vested where the power to decide on the state of exception lies and went as far as to praise the Chinese model (well, so far for the quick response…) in tackling the virus: strong, centralized power in the hand of the national government, even better if of its leader only. An approach that has had some followers in Europe too, to a more or less degree of intensity.

In such a context, deconcentration of powers has a hard time. Why have separate health care systems with different authorities introducing potentially different regulations? How is it acceptable to come up with different solutions in different parts of the territory if "we are all in the same boat"? How is it even thinkable that the protection of rights, including the more existential one, the right to life, can vary based on the territory where people live? (Of course, people means persons belonging to the same "nation", who cares about the others?). More levels of government mean negotiation and dialogue: why bother with that in times of crisis? And why bother with that at all, if it is ultimately "all talk and no action"? Isn't a centralized, unitary response much more effective after all? Such criticism has been voiced not only in countries where the "federal spirit" (Burgess) is lacking, i.e. a rooted culture, tradition and acceptance of federalism, but also where this is undoubtedly present. Is the pandemic going to kill federalism?

What has happened so far

Are forms of pluralism such as territorial pluralism really inefficient in times of crisis? Is the fact that they require dialogue and deconcentrate power something negative? If so, why should this be negative in times of crisis and cease to be so when the crisis is over? So, better doing away with pluralistic decision-making at all, using the emergency situation as a Trojan horse for a long awaited decision? And hey, is there such thing as a "regional virologist"? If complex political decisions are (partly or totally) to be outsourced to experts, this means putting into question the role of politics overall, let alone at subnational level. Scientific responses are supposedly identical in each place and therefore at odds with territorial divergence: the rules to contain the virus must be the same everywhere, as a matter of logic.

Such objections are widespread in the public debate and in several countries also among scholars. In many legal cultures, federalism is the real "F word". It stands for inequality, privileges, inefficiency. For many, there seems to be an inherent contradiction between the obvious requirement of a coordinated line of command in case of emergency and a pluralistic territorial structure. The growing conflicts in many countries between the central and the subnational governments as to the measures to be taken to fight the pandemic and – especially – to lift restrictions are seen as a confirmation of the damage a multilevel structure may cause.

Such assumptions are however undemonstrated. In fact, they simply apply old scepticism about (or even fear of) territorial pluralism to the new reality. A closer look at the comparative practice shows a different picture. Has federalism really been an obstacle to effective decision-making? Or rather the opposite?

First of all, every country, including federal or highly decentralized ones, has sufficient means to concentrate powers in case of emergency, thus avoiding inconsistent regulations and uncoordinated action. A few federal or quasi-federal countries declared the state of emergency, such as Australia, Ethiopia, Mexico, or to a certain extent Spain (state of alarm) and South Africa, which declared a state of disaster. Such rules obviously allow the centre to take control and the federal structure does not represent an obstacle to such procedure.

Interestingly, however, most federations did not make use of the state of emergency, but rather used the ordinary legislation. In Canada, Austria, Germany, Switzerland, Belgium, Brazil, Argentina, India, Pakistan, Russia, and others, action was taken under the regular constitutional provisions, making use of ordinary legislation on epidemy, disaster management, civil protection and the like. The intensity of the centralization of powers obviously varies from country to country and so does the degree of conflict that such centralization sparked.

In other words, federal structures per se do not pose a legal hurdle when certain urgent decisions have to be made with the overarching purpose of protecting public health and national security. More importantly, one can probably conclude that while it is always possible to streamline procedures and to shorten the line of command in exceptional cases, in federal systems this tends to be possible in a more regular way rather than derogating from the constitutional order.

Second, while federal structures occasionally witness conflicts between the centre and subnational entities, the reasons behind such conflicts need to be carefully pondered. Not infrequently, conflicts arise for reasons that have very little or nothing to do with federalism and a lot with political opposition. When armed people stormed the Governor's office in Michigan (apparently lawfully following some weird interpretation of the first amendment and of the right to bear arms), to protest against the lockdown declared in the state, this is not a federal, but rather a political (if not a criminal) conflict. And so is it when President Trump, after neglecting the pandemic for quite some time and omitting to take leadership to control the spread (including declaring a national state of emergency without attaching real measures to it), blames the states (notably those ruled by democrats) to be delinquent in their responsibility, without providing them with the necessary resources to meet the federal criteria for reopening. Therefore, "the slow U.S. response was not due to constitutional infirmities of federalism but to party polarization and lack of preparation" (Kincaid and Lackrone). Admittedly, the risk of scapegoating does exist when a conflictive and rather less responsible political culture prevails. But again, is this due to the federal structure or is the federal structure rather misused for political conflicts that would take place anyway?

Third, it is actually far more frequent that a federal or anyhow territorially composed structure increases the quality of decisions rather than the opposite. A glaring example in the Covid-emergency is Brazil, where the governors in 24 of the 27 states rebelled to President Bolsonaro and refused to lift the restrictions, constructively proposing a list of coordinated measures to fight the pandemic. In response, the President issued a provisional act to enlarge his powers. Also in Mexico governors have used their relative autonomy as a defense mechanism against federal governments that have been reluctant, at least initially, to take decisive measures to contain the spread of the disease.

Subnational units might be more suited to tailor the solutions to specific needs, especially in very diverse countries. In Italy, the government initially seized all power from the regions based on the state of emergency, but as the progression of the infection slowed down, many regions started to push for a differentiated solution. The conflict became harsh at times, but in the end the national government gave up its rigid position and an agreement was found allowing regions to move on asymmetrically, based on the respective needs and situations.

This is an interesting case in point. In Italy, like in many other countries, regional differences are immense not only in economic and social terms, but also regarding the capacity of the regional health care systems. Even more relevant in this case, the impact of the pandemic is extremely different among the regions (see here), with a few regions hit dramatically and others to a much lesser degree. Isn't it in that case meaningful to tailor the response to the different reality of different territories? A unitary response, i.e. the same rule for all, cannot but be tailored to the needs of the more affected areas. Is this necessarily the best approach?

The case for a pluralistic response

As constitutions will most likely face some adjustment in the aftermath of the pandemic, it is essential to reflect on whether the territorial division of powers has to be included in such changes, and if so, to what extent and in which direction.

The growing scepticism about federalism is nothing else than one part of the growing scepticism towards pluralism. Simplistic messages are easy to spread, such as the equation of more actors and more confusion. But the equally simplistic equation of more actors and more control is not made. Especially during the pandemic, federalism has often been described as a patchwork (*Flickenteppich* has become a slogan in the German debate) but the general assumption is that patchworks be negative instead of beautiful pieces of art or useful textiles in certain circumstances. The point is that effectiveness or failure of responses to the pandemic does not depend on the federal structure nor on the degree of decentralization of each country, although this can at times be a comfortable excuse to

sell politically. It depends on the quality of governance. The question is therefore to what extent the quality of governance depends on the territorial setting.

To measure the effectiveness and the performance of institutions is not an easy job for lawyers. It is not part of our training. But other methodologies can help and need to be looked at. In this context, for example, it has been argued, based on the comparative observation of the responses to the pandemics in Switzerland and in the UK, that there are some factors of multi-level arrangements that can contribute, when combined, to greater chances of positive practical outcomes in times of crisis: central capacity; decentralized capacity; mutual learning and its institutionalization; celebration of differences.

This is in the end the old debate about the (pre)conditions for a functioning federal system and when it can be an asset. Strong institutions and a cooperative political culture can enhance trust and minimize the risk of abusing a pluralistic decision-making for political purposes. Effective cooperation through intergovernmental relations and established procedures can integrate more voices into common decision-making, like singing as a choir. In the few cases when single voices stand out, this is not necessarily dystonic, but might improve the quality of the music: as famously stated as early as in 1932 by Justice Brandeis, subnational units (states) can serve as "laboratories of democracy" and "try novel social and economic experiments without risk to the rest of the country".

And federal decision-making does not mean that decisions must be different. It means that they might be different when and where this proves meaningful. Uniform decisions are certainly necessary to contrast a pandemic. Without opening the Pandora's box of the more appropriate level for uniform decisions (and of the dominant assumption that it has to be the nation state instead of, for instance, the EU), the key point is how to reach uniform decisions. The comparative observation of what is happening around the (federal) world shows that the quality of responses does not depend on the amount of powers vested in the subnational entities: as health care is almost everywhere a decentralized power, why did some system manage well and others not? Rather, the effectiveness of responses is proportional to the (political, institutional, procedural) quality of the cooperation among the levels of government.

Federalism (broadly understood) is in the end an accelerator. It tends to increase efficiency when this is already given, and it adds to confusion when this is the prevailing mood. Like any other constitutional tool, it cannot stand alone. For the same reason, limiting it might endanger the whole constitutional construct. If the virus will kill federalism, pluralism will die with it. Together with the essence of constitutionalism.

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