

# The “Federal Spending Power”

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Report

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## INTRODUCTION

This document presents an analysis of the federal spending power, a power often invoked by the federal authorities in Canada when they spend in fields of legislative jurisdiction attributed to the provinces under the Constitution, thereby giving rise, directly or indirectly, to a normative effect.

Chapter 1 of this document examines whether there is some basis in law for the existence of such a power in Canada, either in the *Constitution Act, 1867* and its subsequent amendments or in the precedents established by the Privy Council, the Supreme Court and even lower courts having jurisdiction in the field. This analysis will show that not only does the federal spending power in the fields of jurisdiction of the provinces not appear in the *Constitution Act, 1867* and its subsequent amendments, it is not recognized in the precedents in this field. Moreover, the fact that the *Constitution Act, 1867* makes no mention of the spending power while it is constitutionalized in most federations that make use of it, strengthens the contention that it was intentionally left out of our constitutional context.

Chapter 2 of this document examines the spending power of central authorities in nine other federations or quasi-federations, chosen by reason of the characteristics that they share with Canada, namely Germany, Australia, Belgium, Spain, the United States, Italy, the United Kingdom, Switzerland and the European Union.

On the one hand, this exercise will make it possible to show that in the classic federations formed within the context of British colonialism and in the quasi-federations that are the result of administrative decentralization, the “spending power” or its counterpart is subject to little or no control by judicial mechanisms, which cannot attribute any decision-making power whatsoever to the authorities of federative or regional entities. On the other hand, it will be noted that in the other federations, a series of political mechanisms seeking to grant real powers to the constituent units of the federation permit a certain control over the use of this spending power by the central authorities.

However, although some of these mechanisms enable the constituent authorities of certain federations to control the collection of tax revenues, none of the mechanisms grants these authorities an individual veto right with respect to federal expenditures in their fields of jurisdiction. Consequently, these mechanisms do not resolve the problem that arises from the exercise of the “federal spending power”, as it manifests itself in Canada. This observation is in no way surprising, given the fact that the various federal constitutions and the provisions therein governing fiscal issues reflect different contexts and address problems that have arisen differently. Hence, it is on the basis of the particular constitutional context in Canada, and notably Québec’s specific situation, that the Canadian federation must find solutions to its own problems.



## **THE “FEDERAL SPENDING POWER” IN CANADA**

To properly determine the relations that exist between the spending power and the fiscal imbalance, which is the focus of the Commission’s mandate, it is first necessary to have a definition of the second concept, already set out in the Commission’s *Report*, and of the first concept – which will be addressed here, but not without having first provided as a backdrop to this exercise a broad sketch of the division of powers in the Canadian Constitution (section 1), even if we have to return later to its distinctive features in fields that are more closely related to our mandate, such as health. It is only against this backdrop that it will be possible to determine the current scope of the spending power within the context of Canadian federalism (section 2).

### **1. THE DIVISION OF POWERS**

#### **1.1 Initial distribution**

In Canada, the *Constitution Act, 1867*, which establishes the federation, provides for an initial distribution of legislative powers, the bulk of which are found in sections 91 to 95. Section 91 has as its title “Powers of the Parliament” comprises 29 subsections ranging from the debt and public property to general residual competence, and including unemployment insurance, the raising of money by any mode or system of taxation, as well as even quarantine and the establishment of marine hospitals, to name but those subjects linked to the concerns of this Commission, to which must be added old age pensions, inserted in 1951 by section 94A (which nonetheless gives precedence to provinces’ legislation in this respect), as well as paramount jurisdiction over natural resources exports, inserted by section 92A in 1982.

Moreover, section 92 is entitled “Exclusive Powers of Provincial Legislatures” and lists 16 subjects, including, for the purposes of the Commission, direct taxation within the province in order to the raising of a revenue for provincial purposes, the establishment, maintenance and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals, as well as a residuary powers specific to its sphere concerning generally all matters of a merely local or private nature in the province. To this list must be added education, which is covered separately in section 93, the provincial portion of the power over resources provided for in section 92A, and the joint powers stipulated in section 95 over immigration and agriculture.

By contrast, the powers of the executive are the subject of a few provisions scattered throughout the text of 1867, which incorporate the powers already granted to the executives of the colonies that would form the federation, while specifying other powers that notably concern certain judicial appointments and the expropriation of provincial lands for defense purposes. But the spending power of the federal executive is not mentioned therein, just as no mention is made of the spending power of the provinces. Seized with a dispute that involved the question of the division of the powers of the executive, the Privy Council ruled however that these powers were distributed along the line of division of legislative powers stipulated in the *Constitution Act, 1867*, in a decision<sup>1</sup> whose contemporary scope was reiterated by the Supreme Court in the *Reference Re Secession of Québec*.<sup>2</sup>

## 1.2 Growing centralization

But it is not so much the initial constitutional text that is responsible for the current centralization, in the Canadian Constitution, of the distribution of legislative powers – and consequently, of the executive powers related thereto. Rather this centralization ensues from the judicial interpretations to which this division has given rise, and from government practices that have developed at its margin.

### 1.2.1 Interpretative theories

By reason of its colonial origins, the Canadian Confederation had a paradoxical judicial system for a very long time: a foreign authority was responsible for ruling on the conflicts of interpretation that inevitably arose as a result of the distribution of legislative powers between the federal Parliament and several provincial legislatures on our territory for many years. Indeed, it was the Judicial Committee of the Privy Council which, in London, decided these matters in the last resort until 1949, even after the establishment of the Supreme Court of Canada. All constitutional scholars agree that the precedents established by this colonial court were the most decentralizing that our Constitution has ever known: André Tremblay considers that it is the Council that best actualized the federal potential of the Canadian Constitution by affirming a dualistic model of federalism capable of attenuating the centralizing elements of the *Constitution Act, 1867* and of guaranteeing the provinces against the erosion of their autonomy.<sup>3</sup>

This phenomenon is explained by the foreign status of the tribunal: London did not lose the powers that the Council confirmed as being those of the provinces, unlike in the case of the Canadian government, which incidentally appoints the justices of the Supreme Court. Throughout this period, the Privy Council affirmed the legal autonomy of the provinces with respect to any federal tutelage, and even more so the strict compartmentalization of the

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<sup>1</sup> *Liquidators of Maritime Bank v. Receiver General of New Brunswick*, [1892] A.C. 437 (P.C.).

<sup>2</sup> *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 56.

<sup>3</sup> TREMBLAY, A., "Judicial Interpretation and the Canadian Constitution", (1991/92) 1 N.J.C.L. 163, p. 165. This section of the text draws much of its inspiration, with the author's consent, from this article, which is an excellent summary of this period.

division of powers: there was a broadening of the provincial powers listed and a parallel narrowing of the federal powers liable to encroach on these provincial powers, such as those dealing with peace, order and good government, and trade. Yet before handing over the reigns to the Supreme Court, the Privy Council had already devised some of the tools that would reverse its own trend.

Hence, it was through the construction of interpretative theories, devised as the practical necessities arose and still applicable according to the characteristics of the disputes, that the Privy Council created centralization tools of which the Supreme Court would subsequently make use when defining a federalism that was successively unilateral, dialogic and normalizing.<sup>4</sup> There are five main tools, the first three of which are linked to the constitutional text itself: namely the ancillary power, federal paramountcy and residuary powers, whereas the other two present themselves as exceptions to the application of the stipulated division: the national dimensions theory and emergency powers. Without analyzing here the judgments that gave rise to these theories and which subsequently applied them, it is important to show how all these theories promote centralization.

### **Ancillary power**

Ancillary power allows the federal Parliament to legislate in fields of "exclusive" provincial jurisdiction if the effective exercise of its powers so requires.<sup>5</sup> The intrusive effect of this technique would have required a strict interpretation of the criterion of necessity and the logic of the concept should have meant that the provincial legislatures would also benefit from this power: such was not the case.

### **Federal paramountcy**

In case of conflict between two legislations, one provincial, the other federal, both validly founded at the outset, dealing with an identical subject and being incompatible in their application, the Council decided<sup>6</sup> that the federal legislation would prevail. Subsequently, as may be seen, the Canadian courts would extend the scope of this theory by applying it to conflicts of potential application between two standards.<sup>7</sup>

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<sup>4</sup> On this question, see: LAJOIE, A., P. MULAZZI, and M. GAMACHE, "Political Ideas in Quebec and the Evolution of Canadian Constitutional Law", in Lajoie, A. and I. Bernier (ed.), *The Supreme Court of Canada as an Instrument of Political Change*, coll. "The Collected Research Studies/Royal Commission on the Economic Union and Development Prospects for Canada", Toronto, University Of Toronto Press and Supply and Services Canada, 1986, pp. 1-110.

<sup>5</sup> *Cushing v. Dupuy*, (1880) 5 A. C. 409 (P.C.).

<sup>6</sup> *A.G. Ontario v. A.G. Canada*, [1896] A.C. 348.

<sup>7</sup> *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121.

## Residuary powers

The Council also affirmed the federal competence over any remaining subject, namely any subject not stipulated in the list of provincial powers, unless it involves a matter that is clearly local in nature.<sup>8</sup> One can easily imagine the centralizing effect of this theory one and a half centuries after the drafting of the Constitution, when unnamed subjects – either because they did not exist at the time or because they did not lend themselves to being governed by the liberal State of the 19th century – have since taken on such importance in contemporary legislation.

## National dimensions

Only one step would be needed to go from residuary powers competence to the theory of national dimensions, a step outside the constitutional text, which the Council blithely took, by stating as falling under federal legislative competence a law that prohibited the sale and public consumption of alcohol on the grounds that this scourge had taken on “national dimensions”.<sup>9</sup> Combined with emergency powers, from which it is still not clearly distinguished, this theory would be applied on several occasions thereafter. It has made a comeback recently due to its correlation with the concept of subsidiarity.<sup>10</sup>

## Emergency powers

Subsequently, emergency powers were invoked on their own and without the support of the theory of national dimensions<sup>11</sup>. What is more, it served as a basis for “*special measures to deal with crisis situations, whether they originate from civil unrest, insurrections, wars or economic disruptions. In fact, Canada has been subject to some form of emergency legislation for approximately 40% of the time since it was passed*”<sup>12</sup> OUR TRANSLATION.

These theories must be assessed cumulatively: what remains for the constituent States of a federation when the central authorities can legislate first in their own field, then on residual subjects, and finally in the field of “exclusive” provincial jurisdiction each time that this is “necessary” for the exercise of the central authorities’ jurisdiction, that there is a potential conflict of application with respect to the same subject, that the subject involves “national dimensions” or that a state of emergency is feared?

As a complement to these extensive and centralizing legal interpretations of the constitutional text, a number of government practices have developed in the constitutional field. Those to which the Canadian State limited itself up until the last world war were at least authorized by the Constitution, whereas

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<sup>8</sup> *John Deere Plow Co. v. Wharton*, 1915 A.C. 330 (P.C.).

<sup>9</sup> *Russell v. The King*, (1882) 7 A.C. 829 (P.C.).

<sup>10</sup> *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 401; *Friends of the Oldman River v. Canada*, [1972] 1 S.C.R. 3.

<sup>11</sup> *Fort Frances Pulp and Paper Co. v. Manitoba Free Press*, [1923] A.C. 330 (P.C.).

<sup>12</sup> CHEVRETTE, F. and H. MARX, *Droit constitutionnel*, Montréal, P.U.M., 1982, p. 389. Our translation.

other practices have developed at the margin of the Constitution, even in contradiction to the principles which, according to the Supreme Court, underlie the Constitution. Their pervasive character is such that certain federal powers can be described as being indefinitely extendible.

### 1.2.2 Government practices

Federal political, legislative and administrative authorities have also used the power granted to them under the Constitution to centralize control of the territory, followed by the economy as a whole. Several tools have successively been employed: power to disallow, declaratory power and public property, as well as other unilateral interventions, including the spending power, which is the focus of our concerns here.

#### **Disallowance**

The *Constitution Act, 1867* made provision in sections 56 and 90 for the Governor General's power to disallow legislation, including provincial Acts. This involves the discretionary cancellation of an Act in the two years following its passage by way of a message to the Houses or a proclamation by the Governor General. Used mainly in relation to the legislation of the Western provinces in the early days of Confederation, the power to disallow fell into disuse, the principle of federalism having rapidly prevailed after 1867, according to the recent opinion of the Supreme Court<sup>13</sup>.

#### **Declaratory power**

Provided for in the constitutions of several federal countries, the "declaratory power" involves the power of a federal parliament to modify on its own initiative, to the detriment of the constituent members of the federation and without their consent, the sphere of its legislative power by extending it to the "works" that the federal parliament declares to be to the general advantage of the federation.

In Canada, its wording in section 92 (10) c) of the *Constitution Act, 1867* authorizes discretionary declarations. Parliament has proclaimed 470<sup>14</sup> such declarations concerning not only railroads, roads and other means of intra-provincial transportation, but also the tramways of Montréal, Québec City and Ottawa, local bus networks, hotels, restaurants and theaters, businesses active in the wood trade, stock-rearing, construction, factories manufacturing liquid air, chemicals, metal refineries, aqueducts, parks, not to mention the Montmorency Falls<sup>15</sup>: is there any need to further emphasize the effects of this mechanism, to which the Courts have been willing accomplices, by refusing to exert control over Parliament's discretion?

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<sup>13</sup> *Reference Re Secession of Quebec*, quoted supra, fn. 2, par. 55.

<sup>14</sup> LAJOIE, A., *Le pouvoir déclaratoire du Parlement, augmentation discrétionnaire de la compétence fédérale au Canada*, P.U.M., 1969, pp.123 and following.

<sup>15</sup> *Id.*, pp. 67 and following.

### **Acquisition of public properties**

Because Parliament has legislative power over public property, the government simply needs to acquire buildings to subject them to such power. Later, governments would use expropriation for these purposes, but before the last world war, the federal authorities generally limited themselves to purchases, notably in the downtown areas of the country's largest cities. Officially planned to permit the construction of federal public buildings, these acquisitions in fact sought to control urban development – a local matter if ever there was one – and by reason of this fact originally vested in the provincial jurisdiction. This jurisdiction was sidestepped by the combined interplay of public property and the theory of federal paramountcy. These practices, added to the granting of public lands to crown corporations, in particular in the transportation field, along with their established jurisdiction over ports and national airports, gave federal authorities mastery over the development of the urban territory of the provinces at a crucial time when States had not yet privatized their land planning powers.

### **Other unilateral interventions**

Several unilateral federal interventions also strengthened the centralized character of the Canadian federation: the unilateral patriation of the Constitution and the adoption of the “Social Union without Québec” are examples, set against the backdrop of the successive “Meech” and “Charlottetown” failures, and of “Shaping Canada’s Future Together”. But the most persistent of these unilateral interventions is undoubtedly the spending power.

## **2. THE SPENDING POWER**

Having established the general framework of the centralization tools that have been incorporated in the Canadian Constitution, the definition and scope of the spending power<sup>16</sup> may now be addressed in their true context.

### **2.1 Its definition**

The very label of this federal centralization tool leads to confusion, giving rise to one of the most spectacular effects of the ideological legitimization of the constitutional vocabulary: indeed, what could be more normal than for a government to spend? Can a government act in any way whatsoever without spending? It is possible to imagine that federalism may imply that the governments of a federation have no spending power? Of course not, such that by presenting its spending power as the basis for an intervention, a

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<sup>16</sup> The text of this section takes up in part, updating it, data found in: LAJOIE, A. « L'impact des Accords du Lac Meech sur le pouvoir de dépenser », in R. Forest (ed.), *L'adhésion du Québec à l'Accord du Lac Meech*, Montréal, Éditions Thémis, 1988, pp. 163-180 and “The Federal Spending Power and Meech Lake”, in Swinton, K.E. and C.S. Rogerson (ed.), *Competing Constitutional Visions*, Toronto, Carswell, 1988, pp.175-187.

federal government invokes by association constitutional icons and seems to confer on its action irrefutable validity.

To make matters worse, this is partly justifiable: indeed, it is clear that both the federal and provincial authorities can spend in the sphere of their respective legislative powers as this is an essential method for implementing the legislative measures that they adopt. For example, the federal authorities can pay the expenses of the army, foreign affairs or the post office, whereas the provincial authorities can pay those of the public service, the courts, prisons and hospitals without violating the Constitution.

This is also the case when the Constitution makes express provision therefore, as with equalization payments introduced in section 36 (2) of the *Constitution Act, 1867* by the *Constitution Act, 1982*.<sup>17</sup>

*Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.*

But far from designating these valid practices, the expression "spending power" as consecrated by Canadian constitutional jargon refers to the ideological affirmation of a non-existent power invoked by Canadian federal authorities, in particular within the framework of Established Programs Financing (EPF) and later the CHST.

## 2.2 Its scope

Legal doctrine is divided on the federal spending power in fields of provincial jurisdiction, and it is important to dwell on this point before showing that this power is not part of our constitutional law as it currently reads, even though the question of its constitutionality is still open for want of a binding Supreme Court decision, and the direction the Court would take if confronted with the problem is quite uncertain as the law now stands.

### 2.2.1 A divided legal doctrine

Since the time when Pierre Trudeau was still alive, the spending power has drawn the attention of leading constitutional scholars, both legal scholars and political scientists, and even economists. Some of them (Pierre Blache<sup>18</sup>, Pierre Fortin,<sup>19</sup> Stephan Dupré<sup>20</sup> and André Tremblay,<sup>21</sup> in particular) have

<sup>17</sup> *Constitution Act, 1982, Schedule B to the Canada Act, 1982*, (U.K.) 1982, c. 11.

<sup>18</sup> BLACHE, P., « Le pouvoir de dépenser au cœur de la crise constitutionnelle canadienne », (1993) 24 R.G.D. 29-64.

<sup>19</sup> FORTIN, P., "The Meech Lake Accord and the Federal Spending Power: A Good Maximin Solution", in K.E. Swinton and C.S. Rogerson, *op. cit.*, fn. 16, pp. 213-223.

<sup>20</sup> DUPRÉ, S., "Section 106A and the Federal-Provincial Fiscal Relations" in Swinton, K.E. and C.S. Rogerson, *op. cit.*, fn. 16, pp. 203-211.

<sup>21</sup> TREMBLAY, A., "Federal Spending Power", in Gagnon, A.G. and H. Segal, *The Canadian Social Union Without Québec*, Montréal, IRPP, 2001, pp. 155-189. It should be noted that the author's position at

not expressed an opinion on its constitutional validity, contenting themselves on promoting it from a normative position, one that will not be the focus of our attention here.

Others have considered that the spending power of the federal State in fields of provincial jurisdiction is not part of our constitutional law. They are P.E. Trudeau,<sup>22</sup> Jean Beetz,<sup>23</sup> Jacques Dupont<sup>24</sup> and, more recently, Andrew Petter<sup>25</sup> and, as their arguments largely confirm arguments developed further on in support of the non-constitutionality of the “spending power”, there is no need to dwell on these arguments here before proceeding to make an initial analysis of the constitutional bases suggested by those authors who believe that the spending power is already validly entrenched in our Constitution.

The predominant current among the advocates of the constitutionality of the spending power grounds it in the “gift” theory: federal authorities, once they are owners of tax revenues, would be allowed to distribute such revenues as they see fit, as a gift to the provinces or to legal or natural persons who are under no obligation to accept these revenues – and hence who are not involuntarily subject to the normative conditions that the authorities may establish – either by virtue of the royal prerogative and *common law*, according to the oldest position held by Frank Scott<sup>26</sup> or, more often, by virtue of their legislative power over public property, provided for in section 91 (1A) of the *Constitution Act, 1867* (among others: Hogg,<sup>27</sup> Smiley and Burns,<sup>28</sup> Haussen<sup>29</sup> and Schwartz<sup>30</sup>). In summary, in both these cases as well as in the cases that follow, the advocates claim that the ownership of public funds gives the government the right to spend these funds as it sees fit, including by imposing normative conditions.

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the time of the Meech Lake Accords implicitly approved the constitutionality of the spending power, the scope of which he sought to limit by clarifying it.

<sup>22</sup> TRUDEAU, P.E., « Les octrois fédéraux aux universités » in *Le Fédéralisme et la société canadienne française*, Montréal, Éditions H.M.H., 1967, pp. 79-103. It should be noted that the author, who reaffirmed here a position that he had first adopted in *Cité Libre* in February 1957, would implicitly dissociate himself therefrom two years later at a time when his government published a working document entitled Federal-Provincial Grants and the Spending Power of Parliament, Ottawa, Queen's Printer, 1969. Initially, he already felt that his reasoning only applied to federal revenues from taxes, stating that the federal State could dispose, as it saw fit, of its “private revenues” (sic) from the public domain, spoils of war and profits of Crown corporations.

<sup>23</sup> BEETZ, J., « Les attitudes changeantes du Québec à l'endroit de la Constitution de 1867 » in Crépeau, P.A. and C.B. MacPherson (ed.), *The Future of Canadian Federalism / L'avenir du fédéralisme canadien*, Toronto, Montréal, U. of T. Press/P.U.M., 1965, pp. 113 and following.

<sup>24</sup> DUPONT, J., « Le pouvoir de dépenser du gouvernement fédéral : A Dead Issue ? », (1967) U.B.C.L.R./C. de D. pp. 69-165.

<sup>25</sup> PETTER, A., “Meech Ado About Nothing? Federalism, Democracy and the Spending Power” in Swinton, K.E. and C.S. Rogerson, *op. cit.*, fn. 16, pp. 187-201 and “Federalism and the Myth of the Federal Spending Power”, (1989) 68 C.B.R. 448.

<sup>26</sup> SCOTT, F., “The Constitutional Background of the Tax Agreement”, (1955) 2 Mc Gill L.J. 667.

<sup>27</sup> HOGG, P., “Analysis of the New Spending Provision (Section 106A)” in Swinton, K.E. and C.S. Rogerson, *op. cit.*, fn. 16, pp. 155-162.

<sup>28</sup> SMILEY, D.V. and R.M. BURNS, “Canadian Federalism and the Spending Power: Is Constitutional Restriction Necessary?”, (1969) *Canadian Tax Journal*, 468.

<sup>29</sup> HANSEN, K., “The Constitutionality of Conditional Grant Legislation”, (1966-67) 2 Man. L. J. 191.

<sup>30</sup> SCHWARTZ, B., *Fathoming Meech Lake*, Winnipeg, Legal Research Institute of the University of Manitoba, 1987, pp. 150-207.

Other authors add other sources of revenues that would permit conditional spending. Peter Hogg<sup>31</sup> – who incidentally is willing to justify the spending power based on the fact that it has been practiced constantly by the federal government – also invokes in its support the grounds of an isolated decision of the Court of Appeal of Alberta,<sup>32</sup> namely, the powers dealing respectively with the levying of taxes (section 91 (3)), and appropriations for the public service (section 106), by virtue of which the federal authorities can levy taxes to pay the expenses of the public service and presumably, in their opinion, spend these taxes as they see fit. This latter line of argument is also invoked by Dreiger,<sup>33</sup> jointly with the power to create the *Consolidated Revenue Fund* (section 102). Finally, François Chevrette<sup>34</sup> considers that the spending power is part of our constitutional law because it is necessary and because it is impossible to dissociate the expenses that a government incurs as a government from those that it would incur as a simple legal entity. Some authors have adopted an intermediate position whereby the law is undecided on the question, although the first of them, Gérald Laforest,<sup>35</sup> has leaned towards the constitutionality of the spending power, whereas the second, Michel Maher, would like to see its constitutionalization to control this power.<sup>36</sup>

A common origin unites all these lines of argument proposed for the federal spending power in fields of provincial jurisdiction. In all cases, it involves a specific source of revenues contributing to federal public property – the Consolidated Revenue Fund (Hogg, Smiley, Haussen, Schwartz); monies other than income tax: public domain, spoils of war, profits of Crown corporations (Trudeau); appropriations for the public service (Hogg, Dreiger).

The favourite source of each author would then produce revenues that could be spent by the federal State under the conditions of its choice, either by virtue of its prerogative (Scott), as the result of legislative power over public property (Hogg, Smiley, Haussen, Schwartz), or because the State has a legal personality of general jurisdiction (Chevrette) and may, as such, dispose of the "resources" of which it is "the private holder" (Trudeau), as if public funds were not part of the public domain and could be considered as private.

<sup>31</sup> HOGG, P., *op.cit.*, fn. 27.

<sup>32</sup> *Winterhaven Stables v. Attorney General of Canada*, (1986) 29 D.L.R. (4th) 394 (Alta. Q.B.) for which the permission to appeal was rejected by the Supreme Court – [1988] S.C.C.A. (Quicklaw) n° 543 (S.C.C.).

<sup>33</sup> DREIGER, E. A., "The Spending Power", (1981-82) Queen's L. J. 135.

<sup>34</sup> CHEVRETTE, F., « Contrôler le pouvoir de dépenser : un gain ou un piège ? » in Costi, A. (ed.), *L'adhésion du Québec à l'Accord du Lac Meech*, Montréal, Éditions Thémis, 1988, pp. 153-161.

<sup>35</sup> LAFOREST, G.V., "The Allocation of Taxing Power under the Canadian Constitution", (1980-81), *Canadian Tax Papers*, vol. 65, n° 50, in which the author favours the constitutionality of the spending power, while admitting that it has not been decided by the courts. Subsequently, following *Reference Re Canada Assistance Plan*, he would consider in *obiter* in *Eldridge* that the spending power had been constitutionalized: See *infra*, fn.59 and 61.

<sup>36</sup> MAHER, M., « Le défi du fédéralisme fiscal dans l'exercice du pouvoir de dépenser », (1996) 75 C.B.R. 404.

The problem (or perhaps this is a solution) is that none of these theories – undoubtedly valid in a unitary State – stands up within the context of a federation. Indeed, the Privy Council confirmed that prerogative and the powers of the executive are divided on the line applying to legislative powers;<sup>37</sup> the Council also indicated that the fact that the federal State has legally collected the taxes in no way implies that it may dispose of them as it sees fit.<sup>38</sup> Nothing in the constitutional attributions of federal powers relating to the consolidated fund or to appropriations for the public service authorizes conditional expenditures in fields of provincial jurisdiction.

As for the claim that the legal personality of the State is not limited in its legal capacities by the Constitution and should be seen like that of a private individual, this claim does not take into account, just as do not the other arguments raised thus far, the federal character of the Canadian Constitution, with which they are totally incompatible. We will see that the precedents established by the higher courts do not lean in the same direction, but instead reinforce the position whereby the spending power is still not part of Canadian constitutional law. Their precedents will be examined here in a historical perspective, by inserting the negotiations of agreements, none of which thus far has resulted in changes to the constitutional status of the spending power.

### 2.2.2 *Inconclusive judicial discourse*

Initially, in the 1930s, our Supreme Court had favourably commented on the constitutionality of the spending power in the *Reference Re Unemployment Insurance*,<sup>39</sup> but it has not been confirmed on that point by the Privy Council which, in the same case, held a different view, expressed in these terms:

*But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.*<sup>40</sup>

Such a statement left the question expressly open, and Professor Laforest – as he then was – acknowledged that it still remained so as late as 1981, even though his personal normative position had evolved since then.<sup>41</sup> Since the *Reference Re Unemployment Insurance*, other courts have rendered decisions without settling the question, either because they skirt it, or because the scope of their decision was not that of a precedent. The decisions rendered in *Central Mortgage*<sup>42</sup> and *Porter*<sup>43</sup> followed the Supreme Court decision in the *Unemployment Insurance Reference* which, as noted,

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<sup>37</sup> *Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick*, quoted supra, fn. 1. Also see: LAJOIE, A., *Expropriation et fédéralisme au Canada*, Montréal, P.U.M., 1972, pp. 43 and following.

<sup>38</sup> *Attorney General of Canada v. Attorney General for Ontario*, [1937] A.C. 355, 366 (P.C.).

<sup>39</sup> *Reference Re The Employment and Social Insurance Act*, [1936] S.C.R. 427.

<sup>40</sup> *Attorney General of Canada v. Attorney General for Ontario*, quoted supra, fn. 38.

<sup>41</sup> LAFOREST, G.V., "The Allocation of Taxing Power under the Canadian Constitution", *loc. cit.*, fn. 35.

<sup>42</sup> *Central Mortgage and Housing v. Cooperative College Residences*, (1974) 44 D.L.R. (3d) 662 (Ont. High Ct) and (1977) 71 D.L.R. (3d) 183 (Ont. C.A.).

<sup>43</sup> *Porter v. The Queen*, [1965] Ex. C.R. 200.

was not upheld by the Privy Council. Although these two decisions and that in *Angers*<sup>44</sup> were on record when Laforest re-edited his work on fiscal powers in 1981, he nevertheless concluded that the question was still open, as the basis of the first decisions had not been upheld by the Privy Council and as the latter decision did not emanate from the Supreme Court.<sup>45</sup> What is more, he refuted the Exchequer Court which, in *Angers*, had attempted to base the spending power upon the residual legislative competence of Parliament.

Three other decisions settle disputes in which this question, although indirectly raised, was skirted. In the *Lofstrom*<sup>46</sup> case, the Saskatchewan Court of Appeal decided that no individual right to social benefits derives from the federal-provincial agreements providing for the setting up of shared-cost programs in this field, because only governments are parties to these agreements. Therefore, the status of beneficiary is for the provinces to define, a position confirmed by the Supreme Court in the *Alden*<sup>47</sup> case. But in that case, Mr. Justice Ritchie, stopped short of any pronouncement on the constitutionality of the agreement, as did Mr. Justice Le Dain in the case of *Finlay*.<sup>48</sup> At the same time a pronouncement was made by Justice Pigeon in the *Reference Re Agricultural Products Marketing Act*,<sup>49</sup> where he declared unconstitutional even unconditional federal expenditures in a field of provincial jurisdiction. This statement is part of the *ratio* of a majority opinion of the Court, but it has gone unnoticed in the spending power debate undoubtedly because it was pronounced in a case that, although concerned with federal spending in a provincial sphere, did not deal with a shared-cost program.

Mention must also be made, without granting them the scope of precedents, of two pronouncements emanating respectively from courts of the first instance of Saskatchewan and Alberta, both issued in the context of declaratory actions. The first<sup>50</sup> deals with the provincial spending power and only throws light on the matter of concern to us by analogy. Provincial grants in the international field had been contested. Although the judge had linked these grants to the federal legislative jurisdiction over external affairs, he nevertheless concluded that the appropriation bills were valid from a constitutional standpoint. The *ratio* of this decision, supported by two other decisions of the same level, obviously not having the status of a precedent,<sup>51</sup> seems to be that the Legislature did not purport, in such an appropriation, to regulate activity under federal legislative competence. This same line of argument was again invoked in *Lovelace*<sup>52</sup>, making it possible to conclude that the spending power of the provinces was confirmed only in their

<sup>44</sup> *Angers v. Minister of National Revenue*, [1957] Ex C.R. 83.

<sup>45</sup> See LAFOREST, G.V., *op. cit.*, fn. 35.

<sup>46</sup> *Re Lofstrom and Murphy and al.*, (1972) 22 D.L.R. (3d) 120 (Sask. C.A.).

<sup>47</sup> *Alden v. Gaglardi*, [1973] S.C.R. 199.

<sup>48</sup> *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607.

<sup>49</sup> *Reference Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198.

<sup>50</sup> *Dunbar v. Attorney General of Saskatchewan*, (1985) 11 D.L.R. (4th) 374 (Sask. Q.B.).

<sup>51</sup> *Dow v. Black*, (1875) L.R. 6, P.C. 272 and *McMillan v. City of Winnipeg*, (1919) 45 D.L.R. 351 (Man. K.B.).

<sup>52</sup> *Lovelace v. Ontario*, [2000] 1 S.C.R. 950.

legislative competence, an interpretation that is universally accepted and has not given rise to controversy.

Without going into the question of whether the attribution of such grants falls within federal jurisdiction,<sup>53</sup> it must be noted that the grants were unconditional and therefore did not qualify as an exercise of legislative power within the substantive field of their attribution, regardless of the holder. Consequently, the effect of such decision, even though it emanated from a higher court, would not extend to conditional grants, the issue with which we are concerned in the present context.

In contrast, the last of these decisions<sup>54</sup> confronts directly this question. In a declaratory action, the Court of Appeal of Alberta had in fact ruled constitutional certain sections of the federal *Income Tax Act*.<sup>55</sup> The monies the collection of which these sections authorize are subsequently transferred to the provinces under statutory provisions that impose conditions on the recipient provinces in the application of shared-cost programs in the fields of health, welfare, and post-secondary education, all matters within exclusive provincial legislative authority. The Court considered that all these laws were valid because they concerned, “*in pith and substance*”, raising money by taxation, without reference to the provincial purposes for which such money would be earmarked. The whole issue posed by the federal spending power in fields of provincial jurisdiction being one of characterization, the relevant question in this instance is to know if Mr. Justice Medhurst correctly characterized the purpose of the contested Act and, whether it is permissible for Parliament to do indirectly what the Constitution directly prohibits. At any rate, despite its thorough treatment of the question, this isolated decision from a court of appeal from a province cannot settle the question for all of Canada.

Such was the state of the law when two attempts were made to constitutionalize the spending power, included respectively in the Meech Lake Accord (1987) and the Charlottetown Agreement (1992) which, not having been ratified, did not alter the constitutionality of the spending power. Since then, four other Supreme Court decisions have addressed the subject, but only indirectly, such that they have not altered the substantive law on this question.

In the first of these decisions, *YMHA Jewish Community Center v. Brown*<sup>56</sup>, Madam Justice L'Heureux-Dubé wrote on behalf of the Court: “*While Parliament is however free to offer grants subject to the conditions that it deems appropriate.*”<sup>57</sup> This statement is not part of the *ratio* of her decision but rather an *obiter*, which Madam L'Heureux-Dubé confirmed as such in the

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<sup>53</sup> Indeed certain international activities fall under the jurisdiction of the provincial authorities, when they are directly linked to matters of exclusive provincial jurisdiction. See MORIN, J.-Y., « La personnalité internationale du Québec », (1984) 1 *Revue québécoise de droit international*, 265.

<sup>54</sup> *Winterhaven Stables v. Attorney General of Canada*, quoted supra, fn. 32.

<sup>55</sup> S.C. 1970-71-72, c. 63.

<sup>56</sup> (1989) 1 R.C.S. 1532.

<sup>57</sup> *Id.*, p. 1549. Our translation.

presence of several other justices of the Supreme Court and of the Court of Appeal at a session of the Association of Comparative Law at McGill University in 1990.

The second opinion handed down since 1987 by the Supreme Court and which implicitly concerns the spending power was rendered by Justice Sopinka in the *Reference Re Canada Assistance Plan*.<sup>58</sup> It involved an appeal in which British Columbia alleged that the federal law reducing the grants awarded to the provinces in the health field constituted an invalid breach of contract. In this case, the Court upheld the standing doctrine whereby Parliament has jurisdiction to cancel or modify past contracts of the Crown.<sup>59</sup>

In fact, this pronouncement can be seen as being implicitly based on the prior validity of the federal-provincial agreement dealing with these grants, but the validity of this agreement had not been called into question by British Columbia which on the contrary, seeing no other way to obtain the funds from the federal authorities, demanded the performance of the contract, or by the federal authorities who wanted to continue governing health in the provinces. On this basis it may hardly be concluded that the Court has confirmed the validity of the federal power to spend conditionally in spheres of provincial jurisdiction without even discussing the question, which incidentally had not been raised before it. Furthermore, the contrary opinion of Justice Laforest in *Eldridge*<sup>60</sup> does not change matters, given that he had made an express *obiter* ("I emphasize in passing," he wrote), pronounced in a case which, moreover, involved not the "spending power" but the application of the Canadian Charter to provincial laws. What is more, neither the mere withdrawal of federal grants from the provinces, nor the limiting of the growth of these grants, which was addressed in the *Reference Re Canada Assistance Plan*, is equivalent to passing legislation in the field of provincial jurisdictions; it goes without saying that to stop doing what is unconstitutional is not itself unconstitutional, on the contrary. By stating this obvious point, the Court is not necessarily giving an opinion on the constitutionality of the activity to which the federal executive is putting an end by withdrawing from shared-cost programs.

Finally, more recently, the *Lovelace*<sup>61</sup> case dealt with the spending power of the provinces. Decided entirely within the context of the right to equality enshrined in the Constitution under section 15 (2) of the *Canadian Charter of Rights and Freedoms*, this judgment states that the casino project put forward by Ontario and contested by some First Nations does not affect the essence of aboriginality (which falls under federal jurisdiction) but falls within the spending power of the province and that the province in no way encroached on the jurisdictions of the federal government. In other words, this case, like the *Dunbar*<sup>62</sup> case, involves the provincial spending power in the field of

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<sup>58</sup> *Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525.

<sup>59</sup> LAJOIE, A., *Contrats administratifs : jalons pour une théorie*, Montréal, Éditions Thémis, 1984.

<sup>60</sup> *Eldridge v. A.G.B.C.*, [1997] 3 S.C.R. 624.

<sup>61</sup> *Lovelace v. Ontario*, quoted supra, fn.52.

<sup>62</sup> Quoted supra, fn. 50.

provincial jurisdictions, which is indeed perfectly valid from the standpoint of the Constitution and is not the focus of the Commission's concerns.

In short, as far as the Supreme Court is concerned, two *obiter*, including one pronouncement on the withdrawal of a federal intervention in a field of provincial jurisdiction – moreover stated in a reference – and a decision dealing with the spending power of a province in its own field of legislative powers cannot have as their effect to dissociate the Court from earlier judgments to the contrary by the Privy Council, and even less so to amend the Constitution on this subject. The federal spending power, which imposes conditions that are equivalent to the exercise of normative power in fields of provincial jurisdiction, is still not part of this Constitution, unless more weight is given to a decision of the Court of Appeal of Alberta than to all of the precedents of the Privy Council and of the Supreme Court. In light of the direction and scope of all these decisions, it still seems accurate to say that the law is not yet decided on the matter of the constitutionality of the federal spending power in areas falling under provincial legislative jurisdiction.

A final element, and not the least, must be kept in mind; it is the fact that all these decisions must be read in light of the principle of federalism that the Court has reiterated several times in its recent precedents. Admittedly, the federalism concept is not completely unequivocal and most Canadian constitutional scholars are not very prolific, to say the least, on the subject of the theory of federalism<sup>63</sup> and especially on the differences between federalism and administrative decentralization. They all agree, however, on a threshold below which there may be no real federalism: that line is drawn when local authorities are subordinate to central authorities.<sup>64</sup> Some authors even specify that this independence in relation to the central authorities needs to be constitutionalized.<sup>65</sup> Except for Rémillard<sup>66</sup> who gears his discussion towards the federation/confederation dichotomy and who does not even address the question of the minimal requirements of federalism, all Canadian constitutional scholars are in agreement concerning this threshold.<sup>67</sup> Some even mention that local authorities must have sufficient fiscal powers to guarantee this independence.<sup>68</sup>

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<sup>63</sup> Except BRUN, H. et G. TREMBLAY, *Droit constitutionnel*, Cowansville, Éditions Yvon Blais, 1982, who devote an important chapter to this question.

<sup>64</sup> See HOGG, Peter W., *The Concept of Law*, Oxford, Clarendon Press, 1961, p. 230; BRUN, H. and G. TREMBLAY, *op.cit.*, fn. 64, p. 294; TREMBLAY, A., *Précis de droit constitutionnel*, Montréal, Éditions Thémis, 1982, p. 88; CHEVRETTE, F. and H. MARX, *op. cit.*, fn. 12, p. 219; FINKELSTEIN, N., *Laskin's Canadian Constitutional Law*, 5th ed., vol. 1, Toronto, Carswell, 1986, p. 16; BEAUDOIN, G.-A., *Le partage des pouvoirs*, 2<sup>nd</sup> ed., Ottawa, Éditions de l'Université d'Ottawa, 1982, p. 11; MAGNET, J.E., *Constitutional Law of Canada*, Toronto, Carswell, 1983, p. 1.

<sup>65</sup> See TREMBLAY, A., *op. cit.*, fn. 64, p. 88.

<sup>66</sup> RÉMILLARD, G., *Le fédéralisme canadien*, t. 1, « La Loi constitutionnelle de 1867 », Montréal, Éditions Québec/Amérique, 1983, p. 48.

<sup>67</sup> See supra, fn. 63 et infra, fn. 68.

<sup>68</sup> See WHYTE, J. and LEDERMAN, W.R., *Canadian Constitutional Law*, 2nd ed., Toronto, Butterworths, 1977, pp.1-19.

But within this context, it is mainly the opinions of the Supreme Court that matter, where it recently restated on three occasions in landmark decisions<sup>69</sup> the principle of federalism, in the very words used by Lord Watson in *Maritime Bank*<sup>70</sup> in the last century:

*The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. **The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities.** It would indeed offend the federal principle that a radical change to... (the constitution) (be) taken at the request of a bare majority of the members of the Canadian House of Commons and Senate.*

At the end of this up-to-date examination of the precedents of the Privy Council, the Supreme Court and even the lower courts of competent jurisdiction, it may be stated that the constitutionality of the federal spending power in fields of jurisdiction of the provinces has not given rise to a favorable pronouncement having the scope of a precedent.

Nor is it the recent conclusion of the *Canadian Social Union "without Québec"*, to plagiarize a title that has rightly become famous,<sup>71</sup> that may have changed things. This agreement is expressed as an administrative agreement and not a constitutional amendment, whose formal procedures, prescribed by the *Constitution Act, 1982*, the agreement did not even try to follow. What is more, even if the temporary nature of this agreement were to dissolve within renewed continuity, it would not constitute, for Québec at least, a "constitutional convention" within the meaning that the Court gave this instrument in the *Reference Re the Constitution of Canada*,<sup>72</sup> because it does not meet the condition that the Court deems the most important to establish a convention, namely the acceptance or the recognition of such a convention by the actors in a context where the constitutional amendments involved must receive the approval of the provinces whose legislative power is being affected.

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<sup>69</sup> *Reference Re Secession of Quebec*, quoted supra, fn. 2; *Re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, 819; *Re Manitoba language rights*, [1985] 1 R.C.S. 721.

<sup>70</sup> Quoted supra, fn. 1, pp. 441-442. Bold characters added.

<sup>71</sup> GAGNON, Alain-G. (ed.), *L'Union sociale canadienne sans le Québec – huit études sur l'entente-cadre*, Montréal, Éditions St-Martin, 2000.

<sup>72</sup> [1982] 2 S.C.R. 793.



## **THE “SPENDING POWER” IN OTHER FEDERATIONS AND QUASI-FEDERATIONS**

### **1. INTRODUCTION**

Comparative law is a delicate and potentially very confusing subject. This is mainly due to two factors: the interdependence between legal rules and the relationship between law and society. In this chapter, we will briefly explore these two factors before comparing what we designate in Canada as “spending power” and its counterpart in certain other federations and quasi-federations, the choice of which we will then have to justify. To get this comparison off on the right foot, it is also worth dwelling for a moment on the multiple meanings of the term “federation” and its relationship to “spending power”, defined as the way in which federal authorities spend within the jurisdiction of federated entities as stipulated in their constitution, thereby directly or indirectly exercising a normative power in those fields of jurisdiction.

#### **The interdependence between legal rules**

The first factor is based on the fact that one cannot compare *in vitro* a legal norm, a practice or an institution from one system of law, to a legal norm, a practice or an institution — by all appearances similar and dealing with the same apparent object — from some other legal system; obviously, a legal norm, a practice or an institution does not have an objective meaning, but must be construed within the context of the entire legal system under study.

To engage in valid comparative law, even from a positivist standpoint, ideally one should have a fair knowledge of the entire legal system of the countries under comparison. However, few examples of such comparisons exist, with one remarkable exception, namely the monograph by Professor David on the law of contracts in common law,<sup>73</sup> which bears witness to an exceptional mastery of private law in both countries. In the absence of such exhaustivity, for this incursion into the constitutional law of each of the countries in question, the most workable strategy consists in identifying the purpose of the legal norm, practice or institution under comparison in order to pinpoint the corresponding phenomenon in each legal system.

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<sup>73</sup> DAVID, R., *Les contrats en droit anglais*, Paris, L.G.D.J., 1973.

This study has therefore attempted to identify which constitutional mechanisms other federations, and which legal mechanisms quasi-federations, have used to reach the same objective as that pursued in Canada through a “constitutional expedient”,<sup>74</sup> namely the “spending power”, defined as the exercise by federal authorities of a normative power within the constitutional jurisdictions of federated entities or, conversely.

### **The relationship between law and society**

The second factor is based on the fact that legal norm, practices and institutions determined by the constitution of a country are intimately tied to the historical, cultural, political and economic conditions that characterize that country. The societies of some federal countries are very different from our own, and their institutions cannot serve as models for ours. But even if we overcome this first obstacle and construct a workable description of how federations – whose societies are similar enough to our own to justify a comparison – have prevented or limited the circumventing of their own constitutional distribution of powers, there is nonetheless no evidence that such means could be applied here. This study is thus limited in scope: at best, it may provide us with examples to avoid or to follow, once their applicability to our own cultural context and to our own political and economic situation has been verified.

### **Federations and quasi-federations selected for this study**

Our choice of Germany, Australia, Belgium, Spain, the United States, Italy, the United Kingdom, Switzerland and the European Union was dictated by the above-mentioned factors. The purpose is primarily to study the centripetal and centrifugal forces characteristic of all federated systems that are adopted by various countries whose societies – occidental, democratic, liberal – resemble our own. In the following paragraph, we will also see that the term “federation” has multiple meanings, some examples of which are often difficult to distinguish from certain forms of administrative decentralization, from which they sometimes evolve or towards which they regress. Included in this list are both long-standing federations, so-called classical ones (Australia, the United States, Germany, Switzerland, to which we must add Belgium, whose recent constitution is far from classicism, but is nonetheless federal) and the more recent cases of quasi-federated unitary states tending toward decentralization (Spain, Italy, United Kingdom), without mentioning the unclassifiable case of the European Union. Our purpose is to offer the widest possible selection of comparable federated systems to stimulate our thinking.

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<sup>74</sup> GOUIN, L. M. and B. CLAXTON, *Legislative expedients and devices adopted by the Dominion and the provinces*, study prepared for the Royal Commission on Dominion-Provincial Relations, Ottawa, Printer to the King, 1939.

### **Federation: meanings in the eye of the beholder**

In theory, classic federalism designates a constitutionalized state organization in which legislative jurisdictions and executive powers, including taxation, are divided between centralized authorities and those in federated units, including taxation. Federalism should thus first be distinguished from territorial administrative decentralization; in the latter, the division of powers and/or duties among central and territorial authorities is not constitutionalized and may, consequently, be amended at the discretion of the central authorities invested with such power.

Furthermore, the term "federation" implies that a group of constituent states shares a central structure while preserving their internal sovereignty. For example, the constitutions of certain European countries (Switzerland, Germany) bind together equally strong national minorities, thus preventing these federations from adopting a strong centralized model as dictated by the dominant majority of Nation-States, such as France and Italy, as well as by some former colonies of the British Empire (the United States, Australia, Canada, South Africa, among others). In reality, federalism sometimes proves to be quite different. Indeed, despite its many appreciable qualities, this system offers one particularity, also found in matrimonial law. *"It can be burdensome and somewhat superfluous when the parties are in agreement. Conversely, when conflicts arise, it proves unable to solve them"*.<sup>75</sup> Seen from yet another angle, federalism is a balancing act between the centripetal and centrifugal forces of a system that tugs in opposite directions at the very fabric of the State. In other words, *"it is a system of government whose ideal workings presuppose the existence of conditions that have fewer chances of materializing in federated countries [...] than in countries that can do without such a system"*.<sup>76</sup>

Yet the ideological connotations of shared sovereignty stemming from the federalism label, which still adequately describes the constitutional make up of Switzerland and Germany, and perhaps even that of Belgium, have led several countries to continue using the label even though they have drifted away from this form of government (among others, Australia, and to a lesser extent, the United States). In addition, these connotations have led several others – whose constituent units aspire to the same degree of, as yet, unachieved autonomy – to associate with this form of government under the label of quasi-federalism (Spain, Italy, the United Kingdom).

But these latter groups set themselves apart from true federalism, but not in the same manner. The first group, whose written constitutions still formally adopt the constitutionalized federal structure including a division of legislative jurisdictions and executive powers, and autonomous fiscal resources for constituent and central units – drift away from federalism in practice by

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<sup>75</sup> LAJOIE, A., *Expropriation et fédéralisme au Canada*, Montréal, Les Presses de l'Université de Montréal, 1972, p. 1.

<sup>76</sup> LAJOIE, A., *Le pouvoir déclaratoire du Parlement, augmentation discrétionnaire de la compétence fédérale au Canada*, *op. cit.* note 14, p. 1.

means of explicit constitutional provisions (Australia) or judge-made interpretations (the United States). These countries were once federations, if only in the ideological imagination of those who drafted their constitutions, yet they are regressing and forever drifting away from this form of government. On the contrary, the second group (Spain, the United Kingdom, Italy, the European Union) are gravitating towards federalism, which they have not yet attained. They are satisfied for the moment with a form of non-constitutionalized territorial administrative decentralization often directed to the sharing of sectors of activity and to delegated duties. Generally speaking, this is called the “*agency model of decentralization*” in which federated units are the agents of federal authorities, agents who implement policies established by the federal legal authority and, in the best of cases, who may make limited adaptations to such policies.

### **“Spending power” and federations adrift**

Clearly all these forms of federalism or quasi-federalism are not interchangeable, especially regarding their interrelations with “spending power”. We will come back to them by analyzing the legal norm, practices or institutions, which in these constitutions, eventually take on various forms of what we designate here as “spending power”. But first we must dwell for a minute on the literally paradoxical relationship between “spending power” and federalism. Let us first consider that a legal practice that seeks to allow central authorities to indirectly impose the latter’s prescriptions through subsidies or conditional transfers in the field of the exclusive and constitutionalized jurisdictions of federated units, cannot by its very definition be implemented in a unitary state.

It is indeed conceptually impossible to assert that the central authorities of a monist state may conditionally spend in the, by definition nonexistent, field of exclusive and constitutionalized jurisdictions of its potential units, even when they are administratively decentralized (for instance: regions, municipalities). The legislator of such a unitary state may always, under the same statute by which he authorizes the central authorities’ conditional spending, similarly decrease the non-constitutionalized administrative autonomy of these decentralized units. He who proclaims “spending power”, as defined in Canadian constitutional law and which serves as the departure point for our comparison, is then necessarily referring to a federation.

This said, two comments are in order.

First, whereas “spending power” cannot exist without federalism, this power bears the seeds that will inevitably lead to the destruction of the federation: on the one hand, the abolition of the first criterion of federalism, namely the distribution of powers between the federation and its federated units, and on the other, the elimination of the second criterion, i.e. the autonomous access to fiscal resources.

Furthermore, not all forms of federalism can give rise to the exercise of a “spending power”. Only the classical forms of federalism are characterized by

the materialization of such a power, at least in appearance, even when these forms arise in part from the agency model. In the case of quasi-federations, whether agents or others, the constitution confirms, by the very form of the distribution of powers enshrined in it, the existence of this power and its validity.

With these precautions in mind, we may now compare the “spending power” with its potential counterparts in other federated countries and some quasi-federations, selected for their similarities to Canada (Section 4). This comparison will be made in two stages, by first establishing the relationship with classical federations (Section 2) and then with quasi-federations (Section 3). The respective borderline case will be included in each category, namely Belgium for the first and the European Union for the second.

## **2. “SPENDING POWER” IN CLASSICAL FEDERATIONS**

If the existence of a classical federation is a prerequisite for the development of a practice or a constitutional norm implementing a “spending power”, it is not the only prerequisite, since this power does not exist in all classical federations. Indeed, in the classical federations in our sampling, we have only noted the presence of an uncontrolled “spending power” in Australia and the United States, while in Germany, Switzerland and Belgium, this power is nonexistent or is framed in such a manner that it cannot be exercised without the consent of the federated units.

### **2.1 A constitutionalized ‘spending power’ in Australia and the United States**

In Australia and the United States, the “spending power” is not only, as in Canada, a practice in the margin of the Constitution that has never been recognized by the courts and is not a part of positive constitutional law. On the contrary, in Australia this power has always formed a part of the written constitution, although in different forms, while in the United States, the courts have constitutionalized it.

#### **2.1.1 Australia**

The Australian federation is perhaps the most centralized one in the world,<sup>77</sup> to the point of reducing it to a unitary state: how else may one describe a country whose constitution provides, despite the residuary granting to the constituent states of their original jurisdictions, for federal precedence in *all* cases of conflicting jurisdictions between State legislation and that of the Commonwealth.<sup>78</sup> In cases where some residual power falls to the States, the

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<sup>77</sup> WATTS, R.L., *Comparing Federal Systems*, 2nd. ed., McGill/Queens University Press, Kingston, 1999, p. 16.

<sup>78</sup> “When a law of a State is inconsistent with a law of the Commonwealth, the latter prevails, and the former shall, to the extent of their inconsistency, be invalid” – *Commonwealth of Australia Constitution Act 1900*, 109.

Commonwealth may override them by using the “spending power”, and so act under the authority of constitutional texts that have evolved since the creation of the federation.

At the outset, Section 96 states:

*During a period of ten years after the establishment of the Commonwealth and thereafter until Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.*<sup>79</sup>

Indeed, to ensure the viability of the newly founded federation, the former British colonies that had become constituent of the Australian Commonwealth states had ceded revenues from customs and excise taxes to the new commonwealth authorities. This had previously been their main source of revenue, in exchange for which the Commonwealth agreed to transfer certain revenues to the States over a five-year period on the basis of a complex but fixed calculation.<sup>80</sup>

At the end of this transitional period, under Section 96, the Commonwealth was then free to unilaterally determine the amount and the criteria for distributing these fiscal revenues. Since then, the Commonwealth has continued to do so, and although its transfers were somewhat predictable in some eras, they were nonetheless conditional under statutes stretching at intervals from 1910<sup>81</sup> and whose validity<sup>82</sup> has been confirmed by the courts. In some cases,<sup>83</sup> it also negotiated the forms of the transfers, even to the point of temporarily making health care transfers unconditional between 1981 and 1985 using this power.<sup>84</sup>

To deal with fiscal imbalances created by this tax collection and revenue redistribution system (in 1981 the Commonwealth collected 75% of Australian fiscal revenues, but only spent 60% for its own purposes), the Commonwealth and the States signed in 1999 an agreement, the Intergovernmental Agreement of Commonwealth-State Financial Relations

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<sup>79</sup> Sections 118 to 120 of the *Constitution Act, 1867* [1867, 30 & 31 Victoria, c. 3 (U.K.)] do not have the same significance. Section 118, repealed by the *The Statute Law Revision Act* (14 George VI, Ch. 6, U.K.), making provision for transfers based on a *per capita* criterion, could be considered as the predecessor of equalization payments and had no normative effect on provincial jurisdictions. Sections 119 and 120 deal with the Maritime Provinces and only allow the federal authorities to impose formal requirements (“*in such form and manner as may from time to time be ordered by the Governor General*”). Conversely, the provision that institutes the Australian spending power focusses on the fundamentals: “*on such terms and conditions as the Parliament thinks fit*”. It is important to note that the difference between the two texts, adopted by the same British Parliament in the same era, indicate that the latter voluntarily omitted the “spending power” from the *Constitution Act, 1867* – Our emphasis.

<sup>80</sup> *Id.*, s. 87, 89, 93 and 94.

<sup>81</sup> *Surplus Revenue Bill Act 1910* (Cth), n° 8; *Commonwealth and States Financial Agreement Act 1927 Act* (Cth), n° 3554; *Income Tax (War-time Arrangements) Act 1942* (Cth), n° 21; *States Grants (Income Tax Reimbursement) Act 1942* (Cth) repealed by *States Grant Tax Reimbursement Act 1946* (Cth), n° 1.

<sup>82</sup> *South Australia Commonwealth*, (1942) 65 C.L.R.373.

<sup>83</sup> *States (Personal Income Tax Sharing) Act 1976* (Cth), n° 122.

<sup>84</sup> *States (Tax Sharing and Health Grants) Act 1981*, n° 99 of 1981, cancelled by the States' First ministers Conference in 1985.

(IGA),<sup>85</sup> under which the States would receive Specific Purpose Payments and the proceeds from their goods and services tax would be collected by the Commonwealth under a formula determined by the Commonwealth Grants Commission. It is noteworthy that this commission, whose members are appointed by the Governor General following an informal process in which the Commonwealth treasurer and state treasurers participate, only has powers of recommendation as regards Parliament, which controls the amounts thus distributed and their assignment.

Having undergone a complex, convoluted evolution since the creation of its federation, Australia has kept a constitutional structure in which federal authorities have almost total control over state revenues and their use: this is the only example of express constitutionalization of “spending power” that we have found in our sampling. At first sight, this extreme centralization seems to have been possible owing to the exceptionally homogeneous population, despite the presence of an aboriginal minority. Moreover, there were only minor disparities between the fiscal capacity of member states. In this case, formal federalism territorial administrative decentralization stemming from the exceptional expanse of the territory.

### 2.1.2 United States

The United States presents a different case where the “spending power” is not mentioned in constitutional texts, but rather is constitutionalized through the case law of the Supreme Court. This difference not only extends to the constitutional source of such power, but to the instruments through which the power is exercised, namely cost-sharing programs, as was formerly the case in Canada, rather than through the levying of taxes for direct redistribution to the states by federal authorities, as in Australia.

Indeed, in the 1930's, the courts began to validate attempts by federal authorities to spend conditionally within the “State's legislative” of jurisdiction to ensure the implementation of social programs to cope with the economic crisis. The American Constitution, which does not mention the “spending power” as such, nonetheless opened the door to this trend. First by imposing no limits on federal authorities regarding the spending of revenues that they are otherwise expressly authorized to raise “*for the common defence and general welfare of the United States*”,<sup>86</sup> in which the Supreme Court construed a valid<sup>87</sup> federal jurisdiction despite the residuary powers of the States.<sup>88</sup> Then by means of the ancillary powers, already confirmed in the 19th century,<sup>89</sup> in virtue of which Congress may adopt “*all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United*

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<sup>85</sup> *Intergovernmental Agreement of Commonwealth-State Financial Relations (IGA), Schedule 2 to A New Tax System (Commonwealth-State Financial Agreements) Act, 1999, No. 110, 1999.*

<sup>86</sup> U.S. Const., s. 1, cl. 8.

<sup>87</sup> *United States v. Butler*, 297 US 1 (1936).

<sup>88</sup> *Charles C. Steward Machine Co. v. Davis*, 301 US 548 (1937).

<sup>89</sup> *McCulloch v. Maryland*, 17 U.S. 316 (1819).

States, or in any department or officer thereof”.<sup>90</sup> Not to mention the *Interstate Commerce Clause*,<sup>91</sup> which the court succeeded in validating even for social policies.<sup>92</sup>

In principle, the regulation of the field to which transfer and subsidy conditions apply is not always authorized on these grounds: the legal provisions associated with these payments will only be valid if they are necessarily related to tax collecting, namely to the objective within a federal jurisdiction for which such taxes are collected. In practice however, few cases where the courts have deemed that the conditions imposed were not “*necessary and proper*” can be found.

The measures adopted under this jurisprudential construction of a “spending power” by the federal authorities in the field of State powers were mainly introduced in joint programs known as “matching grants”, to which certain federal taxes (gasoline, airports, excise) were pre-assigned, even though there is no formal federal revenue collection from the States as in Australia. For this reason and considering the inherent limits of ancillary powers (*necessary and proper* clause), one may conclude that the “spending power” is more restricted in the United States than in Australia.

Moreover, it does not appear to have been made possible for exactly the same reasons: the population of the United States, contrary to that of Australia, was certainly not homogeneous in the beginning and has become even less so, since a solid Spanish-speaking minority now stands alongside the black minority, without integrating into the general population as did previous waves of immigrants. If, however, the federation has not avoided progressive centralization, for which the “spending power” is just one among other instruments, it is undoubtedly because, until now, its minorities have either been well assimilated or, at least, dispersed over the entire territory, thereby implicitly waiving the States’ leverage. Nonetheless, despite these differences of source, scope and implementation of their respective “spending power”, Australia and the United States have both constitutionalized this means of centralization, thus setting them apart from other classical federations, namely those in Europe.

## **2.2 “Spending power” absent from or controlled in European federal constitutions**

The three European countries in our sampling (Germany, Switzerland and Belgium) have, as with the two preceding ones, classical federal constitutions, at least in as much as legislative jurisdictions and executive powers are divided amongst the federal and federated authorities that respectively have the power of taxation needed for exercising them. Nonetheless, centralization in these countries is less and different – implemented through a mixture of shared fields of activities and tasks – and

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<sup>90</sup> U.S. Const., s. 1, cl. 8, §18.

<sup>91</sup> *Id.*, par. 3.

<sup>92</sup> *United States v. Derby*, (1991) and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

the “spending power” is absent from or countered by the “federal loyalty principle”, the means of collecting taxes or even the procedure for authorizing expenditures.

### 2.2.1 Germany

In the German constitution, powers are divided between the federation and the *Länder*. The latter, who in some ways act as the agents of the federation, nonetheless exercise these powers in their own right,<sup>93</sup> while exercising other specific powers in health, education, culture, regional development, public safety and residuary issues.<sup>94</sup>

In addition, they collect all income taxes, of which a portion is returned to the federation.<sup>95</sup> Moreover, the *Länder*’ jurisdictions<sup>96</sup> are often shared with the federal authority, and the federation has two legislative chambers, the second of which, the *Bundesrat*, is made up of members of the *Länder* governments. It is this second Chamber that must authorize expenditures that the federation makes in the *Länder* area of jurisdiction,<sup>97</sup> so that the “spending power” is moderated by the control of the *Länder* affected by it. Lastly, this “spending power” is also limited by the “federal loyalty principle” or *Bundesrue*, a legal principle of which it has been written that it crosses “*the borderline between enforcing the law and preaching good behaviour*,”<sup>98</sup> and according to which the constituent States must not encroach upon each others’ jurisdictions, and the States and the federation must mutually respect and help one another.

### 2.2.2 Switzerland

The Swiss constitution, similar to the German one, is doubtlessly even more decentralized, at least from a formal standpoint. The division of powers indeed provides that the residuary powers are first granted to the Cantons, which must consent to a constitutional amendment for any transfer to the federation. When federal authorities claim to exercise a jurisdiction, the burden of proof thus falls upon them. These transfers are also subject to the principle of subsidiarity by which the “tasks” performed by the communes may only be transferred to the Cantons – and the tasks of the Cantons granted to the federation – when the former may no longer carry them out “efficiently”, and only following a constitutional amendment subject to a referendum.<sup>99</sup>

Consequently, most issues do not entirely fall under the jurisdiction of either of them, since it is the “tasks” that are shared. The result is a cooperative federalism in which the Cantons, and especially the communes, sometimes

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<sup>93</sup> *The Fundamental Law of the Federal Republic of Germany*, from May 23, 1949, s. 83.

<sup>94</sup> *Id.*, s. 30.

<sup>95</sup> *Id.*, s. 106 (3).

<sup>96</sup> *Id.*, s. 51.

<sup>97</sup> *Id.*, s. 104 (a).

<sup>98</sup> KISKER, G., “The West German Federal Constitutional Court as a Guardian of the Federal System”, (1989) 19 *Publius* 35, 40.

<sup>99</sup> *Constitution fédérale de la confédération suisse*, of April 18, 1999, s. 138.

act as agents, implementing federal framework legislation, according to the “agency” model. Yet education, including university level (except for the Federal Polytechnics), mainly comes under the jurisdiction of the Cantons, even if the communes are responsible for administering buildings belonging to the primary and secondary school levels and for the payment, based on the Canton’s wage-scale, of professors’ earnings<sup>100</sup>. The same applies to culture, sports, health, environment and roadways, which on the whole form a part of the canton and commune budgetary envelopes, whereas defence and foreign affairs are within the federation’s envelope.<sup>101</sup>

As for taxes, the complex and detailed division of fiscal powers has brought about a progressive overlapping of budgets of the three governmental administrations.<sup>102</sup> Setting the limits of taxes that the federation can levy and obliging it to keep the budget balanced over the long term, the constitution furthermore reserves tax collection for the Cantons. In these conditions, it is understandable that the “spending power”, not expressly provided for in a constitution for which it has so few affinities, cannot either be exercised through informal constitutional practices, which would clash with the requirement of the Cantons’ consent for constitutional modification.<sup>103</sup>

### 2.2.3 Belgium

The Belgian Constitution, a deliberately complex and ambiguous document,<sup>104</sup> seeks to negotiate the coexistence of three logical lines of reasoning based respectively on the protection of the French-speaking minority, the economic interests of three regions (Flanders, Wallonia, Brussels-Capital), and the protection of three communities (Flemish, French and German-speaking people<sup>105</sup>). The federation and each of these entities are granted jurisdictions that are not very clearly defined. Indeed, although the communities and regions have jurisdiction over residuary issues,<sup>106</sup> the federal State is primarily invested not only with its own jurisdictions but also with others that are of specific interest to “spending power”: federal cultural and scientific institutions, employment and labour, pensions and public health,<sup>107</sup> including certain other jurisdictions that appear to be exceptions from the jurisdictions granted to regions and communities, namely the people-oriented issues of teaching, health and personal assistance.<sup>108</sup>

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<sup>100</sup> DAFFLON, B., “Fiscal Federalism in Switzerland: A Survey of Constitutional Issues. Budget Responsibility and Equalization”, manuscript, University of Fribourg, Switzerland, p. 12.

<sup>101</sup> *Id.*, p. 10.

<sup>102</sup> *Id.*, p. 35.

<sup>103</sup> *Constitution fédérale de la confédération suisse*, previously cited note 99, sections 126 to 135.

<sup>104</sup> UYTTERDAELE, M., « La Belgique, un modèle de fédéralisme panaché », in JAUMIN, S. (ed.), *La réforme de l’État... et après ? L’impact des débats constitutionnels en Belgique et au Canada*, Bruxelles, Éditions de l’U. de Bruxelles, 1997, p. 131.

<sup>105</sup> BAYENET, B., M. FERRON, V. GILBERT and F. THYS-CLÉMENT, *Le fédéralisme budgétaire, mode d’emploi*, Bruxelles, Éditions de l’U. de Bruxelles, 2000, p. 10.

<sup>106</sup> *La Constitution Belge - Texte coordonné du 17 février 1994*, s.35. This is what is stipulated by this article of the constitution, but in fact, the federal Parliament conserves the residuary jurisdiction until its own jurisdiction is more clearly defined. See on this subject, BRASSINE, J., *La Belgique fédérale*, CRISP 1994, File No. 40.

<sup>107</sup> *Id.*, s. 77.

<sup>108</sup> *Id.*, s. 127 (1), 2nd. and *Special act of August 8, 1980 respecting institutional reforms* (M.B., August 15, 1980), s. 5 (1) II.

The model is therefore based on a complex division of areas and subjects of state intervention and, exceptionally, between tasks with regards to a single subject (specific federal jurisdiction in the setting of academic standards, minimum conditions for issuing diplomas, teachers' pension plans).<sup>109</sup> In this respect, it is closer to classical federalism than to the agency model in which constituent entities become agents for federal authorities in applying national standards, although the aforementioned exception introduces this model, characteristic of quasi- federations.

Moreover, the despite centralization of the collection of taxes, redistributed among the federated units according to the contributory capacity or equity principle,<sup>110</sup> the financial autonomy of the federated entities is ensured by the fact that the portion of the federal tax – calculated on the basis of “budgetary appropriations previously granted for these same jurisdictions in the national budget” – may then in principle be freely assigned to their expenditures.<sup>111</sup> There are nonetheless two examples of conditional subsidies that respectively deal with the measures for developing the international role of Brussels-Capital<sup>112</sup> and the specific plan concerning regional programs for getting the unemployed back to work, also determined by special statute.<sup>113</sup> In this regard, it has been estimated that “the set of conditions determined under Section 35 tends to make this action by the federal State a conditional subsidy”.<sup>114</sup> This autonomy is however protected in theory by the “federal loyalty principle”, written into the Constitution,<sup>115</sup> which provides that “the federal State, communities, regions and the Common Community Commission, all act in respect of federal loyalty to avoid conflicts of interest.

Belgium is in fact a borderline case, much closer to classical federalism than to territorial administrative decentralization, yet characterized by a hybrid division of powers of intervention and tasks. In principle, the “spending power” is not constitutionalized, but it is a practice that emerges on the borderline of the Constitution and is implemented by the aforementioned two conditional subsidies, as well as the lump-sum grants of federal funds in the area of regions, which imprints an external orientation to their priorities. What puts Belgium into the category of classical decentralized federations, therefore, is a division of powers based more upon the objects of intervention than on tasks, the federal loyalty principle, the absence of express constitutionalization of the “spending power” and the exceptional character of conditional transfers. These are the elements that distinguish this last federation from the quasi-federations, with which Belgium nonetheless shares in their evolutive character.

<sup>109</sup> *La Constitution belge*, previously cited note 106, s. 127 (1), 2nd. par.

<sup>110</sup> ILZKOVITZ, F. and F. THYS-CLÉMENT, “La Belgique dans un double processus de fédéralisme économique”, in JAUMIN, S., *op. cit.* note 104, p. 208.

<sup>111</sup> LEBRUN, J. and A. NOËL, « Le financement des communautés et des régions », in DELPÉRÉE, F. (ed.), *La Belgique fédérale, Bruxelles*, Bruylant, 1994, pp. 360-68.

<sup>112</sup> *Loi spéciale du 12 janvier 1989 relative aux institutions bruxelloises*, s. 46.

<sup>113</sup> *Loi spéciale du 13 juillet 2001 portant refinancement des Communautés et extension des compétences fiscales des Régions* (M.B. August 3, 2001), s. 47.

<sup>114</sup> LEBRUN, J. and A. NOËL, *loc. cit.* note 111, p. 382.

<sup>115</sup> *La Constitution Belge*, previously cited note 106, s. 143 (1).

### 3. “SPENDING POWER” IN QUASI-FEDERATIONS

The essential difference between federations and quasi-federations must, however, be found elsewhere. For federations, one looks to the constitutionalization of the division of powers. In quasi-federations which are characterized by administrative decentralization, one notes this division is subject to legislative amendments emanating from the central authority – more or less discretionary as the case may be. Three European countries in our sampling (Spain, Italy and the United Kingdom) thus deserve the title of quasi-federations, owing to the degree of nonconstitutionalized decentralization enjoyed in varying degrees by their regional entities. The same qualifier may also be given to the European Union, but with a wholly different meaning, as we will soon see.

To sum up the relationship between these quasi-federations and the “spending power”, it could be asserted that by adopting the territorial administrative decentralization model, the introduction of the “spending power” becomes useless. In other words, administrative decentralization has the same effect on the “spending power” as the latter has on classical federations: destruction. Indeed, when the constitutional structure already expressly allows the central authority to entirely control the main areas of the “spending power” (health, education, social policies), or targets distinct and compatible tasks within the areas of state intervention rather than these areas as a whole – for instance, when central authorities can adopt framework legislation that the constituent units apply – the ultimate goals of “spending power” are reached without having to use this device.

Lastly, in these unitary states, the population is often in favour of decentralization (from a central monist state to a degree of pluralism via devolution), even if legally the sub-state entities are still controlled by the centre, whereas on the contrary in many federations, there is a desire for further centralization.

#### 3.1 *Spain*

Virtually as rigid as the constitutions of some classical federations, the constitution adopted by Spain in 1978<sup>116</sup> integrates the agency model to a great extent and is characterized by its flexible territorial administrative decentralization. The Spanish State has indeed two levels of autonomous communities: the “fast-track communities” (Andalusia, the Basque Country, the Canary Islands, Catalonia, Galicia, Navarre and Valencia) and its “slow track communities”.<sup>117</sup> Provided for in the Constitution, they are nonetheless created under domestic law by organic statutes whose adoption, however, requires special procedures that differ according to the categories of communities and that must also be respected for any amendment of their status or jurisdictions.<sup>118</sup> In addition, the Constitution does not expressly

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<sup>116</sup> *La Constitution espagnole de 1978*, B.O.E. num. 311.1, of December 29, 1978.

<sup>117</sup> *Id.*, s. 151.

<sup>118</sup> *Id.*, s. 147.3 and 152.2.

distinguish the jurisdictions of these decentralized units and those of the Spanish State, limiting itself to the establishment of distribution rules according to which each organic statute of autonomy will determine the jurisdictions of the autonomous Community that it creates.

This is a system where the Central State have exclusive jurisdiction to begin with,<sup>119</sup> whereas the communities may only assume jurisdictions if they are ready to do so in accordance with specified constitutional conditions.<sup>120</sup> As such, the “fast-track communities” have benefited – upon the return to democracy and owing to their cultural and historic particularities – from enhanced jurisdictions (education, health, police), whereas the “slow track communities” have only benefited from “initially limited jurisdictions”, but they too must also assume enhanced jurisdictions<sup>121</sup> in time: namely education and health, over the coming three to four years. This model doubtlessly results from the fact that Spain is undergoing a constitutionally evolutionary process, namely that of a former centralized unitary state that is progressively transferring its jurisdictions to constituent units,<sup>122</sup> without however having yet crossed the borderline into federalism.

Thus, the Central State generally keeps the power to create policies, even in areas entrusted to communities, which then in turn – by following a now familiar model – become its agents. The Central State may even go so far as defining the very conditions for applying its policies, to which the communities can only make complementary add-ons. From the taxation standpoint, this centralization is favoured by the fact that – except for the Basque Country and Navarre, both collecting their own and the State’s taxes on their territory – until recently the autonomous communities depended for up to 80% of their needs upon resources from the central state, one half of which were in the form of credit appropriations and the other half, in the form of joint programs.<sup>123</sup> In these circumstances, the courts confirmed the validity of the Central State’s intervention in the communities’ areas of jurisdiction on behalf of economic coordination or equality of Spaniards in the exercising of their rights.<sup>124</sup>

If the jurisdictions in question were constitutionalized, there would be reason to speak of a true federation and, consequently, of a true “spending power.” But such is not the case, and even though the organic statutes that determine the status of the jurisdictions of the various communities cannot be unilaterally amended by a statute passed through the Spanish Parliament and are adopted under special procedures that include those provided for in their own status, these are not formally constitutionalized rules.

<sup>119</sup> *Id.*, s. 149.

<sup>120</sup> *Id.*, s. 148 and 149.

<sup>121</sup> *Id.*, s. 143.

<sup>122</sup> *Id.*, s. 150.1 and 150.2.

<sup>123</sup> *Ley Organica 8/1980, de 22 septiembre de Financiacion de las Comunidades Autonomas*, B.O.E. October 1, 1980; and OECD, “La gestion publique à travers les différents niveaux d’administration – Espagne” at <http://www.oecd.org/puma/malg97/sp-fr.pdf>, first on line December 15, 1998. This dependency has been reduced however by the new financing agreement by the Autonomous Communities (2002-2006), adopted in 2001.

<sup>124</sup> *La Constitution espagnole de 1978*, previously cited note 116, s. 149 (1)-1 and 149 (1)-13.

## 3.2 Italy

Despite changes introduced by the adoption on October 7, 2001 of a constitutional act amending the status of regions,<sup>125</sup> the context is different in Italy, where the easy amendment of the division of powers until now combined with a highly centralized administration to create progressive centralization. Before the war, Italy had one of the most flexible constitutions in the Western world,<sup>126</sup> which included the possibility of amendment by decree that allowed the fascist regime to come to power. Italy has not yet completely extracted itself from this cultural and political context, which does not favour the stable constitutional determination of institutions, and consequently, encourages national authorities to centralize the jurisdictions and powers of the sub-central policy structures. Until recently and despite the fact that the Italian Constitution has drawn up the legal regime for 15 ordinary status regions and five regions with a special status, this regime has been largely completed by laws that, contrary to the Spanish experience, have been ordinary statutes that Parliament could amend at its discretion, a power it apparently has not hesitated to exercise.<sup>127</sup>

Consequently, of all the quasi-federations currently studied, Italy undoubtedly stands out, owing to its *à la carte* territorialized administrative decentralization, as the one best corresponding until now to the agency model and perhaps the most centralized. But the parameters have recently shifted, at least in part. Henceforth, the regions may choose certain jurisdictions under the Constitution – as it currently reads – that include health and social policies, of specific interest to us.<sup>128</sup> Nonetheless, they continue only to be able to exercise them within the limits set by the national legislator, who is in turn henceforth bound within the framework of this limitation by the “national interest” criteria. In all, the changes may be summed up as details, which in turn are minced into further details.

Monies that were intended for regional purposes – transferred unconditionally as a lump sum at the outset on the historic basis of the cost of national programs devolved to the regional level in 1972, had for a long time already become conditional. Thus, in many cases, the national legislation granting resources needed for the financing of regional operations defined by framework legislation made these transfers conditional not only at their inception, but also during their utilization, which remained under the control of the national administration.<sup>129</sup> Furthermore, the portion represented by these

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<sup>125</sup> We would like to thank Prof. Nino Olivetti, professor of comparative constitutional law at Padua, who was so kind as to explain the general meaning of this text, until now available only in Italian.

<sup>126</sup> BRYCE, J., “Flexible and Rigid Constitutions”, in *Studies in History and Jurisprudence*, vol. 1, Oxford, Clarendon Press, 1901.

<sup>127</sup> FURLONG, P., (1991) “Parliament in Italian Politics”, WEP.

<sup>128</sup> *Costituzione della repubblica italiana* (1961) (pubblicata dalla Gazzetta Ufficiale del 7 dicembre 1961), s. 117.

<sup>129</sup> LUPO, S., “The Changing Mezzogiorno: Between Representations and Reality”, in GUNDLE, S. and S. PARKER, Routledge, 1996.

amounts in regional budgets, which had increased between the 1970's and 1990's from 85% to 95%, has since then regressed considerably.<sup>130</sup>

Recently however, the fiscal autonomy of the regions based upon "their need to cover expenses related to the exercising of their ordinary operations",<sup>131</sup> until now constitutionalized only insofar as defined by the laws of the Republic,<sup>132</sup> has been redefined by the new constitutional law of October 7, 2001, in terms so ambiguous, however, that Italian specialists refuse to interpret them before the Constitutional Court gives a ruling on them, which it will most likely do.

Indeed, even the previous division of powers had stirred up substantial litigation before the Constitutional Court, constantly tied down tracing the borderline between matters of national interest and the requirements of regional autonomy. It is in the area of health care that regional autonomy was most often challenged, and the system inaugurated in 1978 remained up until last year and even after many modifications in 1992, 1997 and 2000, sufficiently centralized to be described as national rather than regional.<sup>133</sup>

But, as one cannot fail to note, the new constitutional act of October 7, 2001, adopted in the wake of prevailing neo-liberalism, finds itself indirectly inverting this prior centralization trend, not in the name of the principle of subsidiarity, but as an indirect consequence of the privatization of a large part of health care services, which consequently risks impacting the decisions of the Constitutional Court. In such circumstances, although one may not formally speak of a "spending power" – as defined here – as involving the transgression of constitutionalized sharing of jurisdictions, it must be noted that the Italian Constitution had already obtained such ends by other means.

Indeed, until the new constitutional act takes effect, there is no point in speaking of transgression by the central administration of a division of powers whose constitutionalization has not been completed. But precisely because Italy has until now only been a quasi-federation – which to a large extent it still remains – the tangible result is similar to the one that characterizes the "spending power". Namely, where national authorities define the rules by framework legislation that the regions will apply in areas, which, in federations, constitute the pivotal basis of "spending power", especially in health and social policies. It remains to be seen what privatization – and the constitutionalized decentralization that it seems to have created – will change in this situation following the upcoming interpretations of the Constitutional Court.

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<sup>130</sup> FRASCIHINE, A. and F. OSCULTATI, « Controlling Local Government : the Italian Experience », in OWENS, J. and G. PANNELLA (ed.), *Local Government : An Institutional Perspective*, OCDE, Amsterdam, 1991.

<sup>131</sup> *Costituzione della repubblica italiana* (1961), previously cited note 128, s. 119 (2).

<sup>132</sup> *Id.*, s. 119 (1) "The regions shall be granted financial autonomy **within the forms and limits established by the laws of the Republic, which shall coordinate this regional autonomy with the finances of the State, of the Provinces and of the Municipalities.**" Our emphasis.

<sup>133</sup> HINE, D., "Federalism, Regionalism and the Unitary State", in *Italian Regionalism*, 1996.

### 3.3 The United Kingdom

If Italy has a “flexible” constitution, then speaking of flexibility within the context of the United Kingdom means usurping, and doubtlessly not perchance, Britain's national figure of speech: the understatement. Genuine hard-line positivists – for whom the law may only be written and constitutions may not be amended by ordinary statutes, themselves subject to constitutional review – would even say that the United Kingdom does not have a Constitution.

Nonetheless, in the common law system, to which it is fitting to refer here, nothing prevents the Constitution from not being written, but based solely on customs, general principles and precedents. This is the case of England, where as everyone knows, the supreme principle is precisely the supremacy of Parliament by virtue of which any statute emanating from the Parliament of Westminster may amend the prior “constitutional” situation resulting from informal and implicit sources. And the foregoing may be done without fear of a constitutional review, impossible under the British Constitution indeed too imprecise for such a task. One must in fact go back into the constitutional history of Britain back to 1610 to find an assertion of the possibility of constitutional control of legislation: *Bonham's Case*,<sup>134</sup> where Lord Coke stated that a statute could be invalidated for being contrary to a fundamental principle of law. But the precedents upon which he based this opinion proved not to support his contentions, and this doctrine was abandoned thereafter,<sup>135</sup> such that it was only in 1991 that a British court would censure Parliament, not in the name of the Constitution, but with regard to directives from the European Community.<sup>136</sup>

In such circumstances, even if one admits that the United Kingdom has a constitution, this constitution is amendable at the discretion of an ordinary law passed by Westminster, and the recent statutes on “devolution”,<sup>137</sup> as they so modestly designate administrative decentralization in this country, has changed nothing. Hence, the status and jurisdictions of Scotland, Northern Ireland and Wales may be amended at will by the central authority of Westminster, only limited by the potential political consequences of such statutes, which otherwise remain perfectly valid from a legal standpoint.

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<sup>134</sup> (1610) 8 Rep. 118.

<sup>135</sup> PLUNCKNETT, T., *A Concise History of the Common Law*, 5th. Ed., London, Butterworth, 1956, p. 336.

<sup>136</sup> *Factortame Ltd. and others v. Secretary of State for Transport (No. 2)*, [1991] 1 All E.R. 71. This decision was rendered in the context of “a marked increase in litigation beginning in the second half of the 80s” (our translation) according to GUARNIERI, C. and P. PEDERZOLI, *La puissance de juger*, Paris, Michalon, 1996, p. 134. These authors point out that generally speaking “[...] Community law now forms a true transnational legal order” (free translation), p. 133; similarly, M. DELMAS-MARTY, writes in “Le rôle du juge européen dans la reconnaissance du *justice commune*, *Signification et limites*”, in *Mélanges Rolv Ryssdal*, Köln, Éditions Carl Heymanns-Verlag, 1997: “The agreement has become ‘the constitutional tool of the European order’, which gives the Court [European Court of Human Rights in Strasbourg] a status comparable to that of a supra national constitutional court”.

<sup>137</sup> *Scotland Act 1998*, Chapter 46; *Government of Wales Act 1998* (C.38), Chapter 38 ; *Northern Ireland Act 1998*, Chapter 47.

The current state of the division of powers provides that Scotland has true legislative jurisdiction and general administrative jurisdiction to the extent of adapting amendments of British laws applicable to its territory,<sup>138</sup> whereas Wales does not have legislative jurisdiction but only restricted administrative powers for financing and managing social security agencies, defining academic programs, providing financial support for companies, managing European structural funds and applying health care policies.<sup>139</sup> As for Northern Ireland, it has received residuary jurisdictions subject namely to those of the Community and of the United Kingdom, as well as to local adaptations of British laws,<sup>140</sup> but its current status is too unstable at the time this text is being written for us to qualify its status.

The division of fiscal powers accentuates even more the vulnerability of regional entities, whose financing is 80% dependent upon appropriations by Westminster. Nonetheless, once they are granted by London, the amounts issuing from these appropriations are in principle administered by the decentralized units. This is even more true with regard to “income support subsidies”, nonetheless determined on a discretionary basis by the central government based upon the estimated cost of basic services,<sup>141</sup> whereas specific subsidies are “*implemented as a means to insure that the central government's priorities are taken into account (by means of strict conditional provisions) under which the money is used for the purposes for which it is intended*”.<sup>142</sup>

When the domestic status – non constitutionalized and in addition constitutionally non invalidable – of the decentralized entities of a unitary country copies to this extent not only the effects, but the very form of the “spending power”, why should one need such a device, all the more oxymoronic outside of true federations? The paradox, found in all quasi-federations studied here, is merely apparent: it is no wonder that one finds in unitary constitutions a level of centralization sought after in certain federated countries by the proponents of centralization who are the defenders of the “spending power”.

### **3.4 European Union**

But the paradox is all that much greater in the European Union, which does not have a constitution and is not a federation — except in the minds of the constructivists who are prepared to consider that there is therein a federal constitution in the making — notwithstanding the fact that the treaties founding it form a part of the constitution of all the constituent States and grant the Union prevailing legislative jurisdictions so invasive that they would make unitary constitutions tremble, without the control that the constituent countries have via the European Union Council. It is well worth our while to

<sup>138</sup> *Scotland Act 1998*, Chapter 46, s. 28.

<sup>139</sup> *Government of Wales Act 1998* (C.38), Chapter 38, s. 22 à 33.

<sup>140</sup> *Northern Ireland Act 1998*, Chapter 47, s. 6.

<sup>141</sup> The Institute on Governance, “Les relations financières intergouvernementales : perspective internationale”, Report, Ottawa, February 24, 1998, p. 45.

<sup>142</sup> *Id.*, p. 45. Italics added. Our translation.

sort out this imbroglio, if only to circumscribe the interest and the limits of this model that seems so attractive to the current government in Quebec.

First of all, the European Union is not a country governed by a constitution, but rather a group of 15 countries (Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, the United Kingdom and Sweden), all bound by three successive treaties: Rome,<sup>143</sup> Maastricht<sup>144</sup> and Amsterdam.<sup>145</sup> These treaties, which from the outset are instruments of international law, are in addition integrated into the domestic constitutional order of all member countries, such that they may in a certain way be qualified as “external constitutions” of these countries. The result is the nullity of any national constitutional provisions incompatible with these treaties and the supremacy of directives from the Community over national legislation.<sup>146</sup>

Since the Union’s jurisdictions are also drafted not as areas of State intervention or even for that matter as “tasks”, but rather as objectives to attain and means for doing so, we are already in the presence of exceptional centralization instruments, especially if we consider the scope and imprecision of these ways and means.

Indeed, the objectives encompass nothing less than the promotion throughout the entire Community of the harmonious, balanced and sustainable development of economic activities, a high level of employment and social security, gender equality, sustainable and noninflationary growth, a high level of competitiveness and convergence in economic performances, a high level of protection and enhancement of the quality of life, economic and social cohesion, and solidarity among Member States.<sup>147</sup>

As for the categories of actions authorized for attaining these objectives, they include prohibiting customs duties, promoting common economic policy, free circulation of goods, persons, services and capital, a common policy in the fields of agriculture, fisheries, transportation, a fair trade policy, the harmonization of national legislations insofar as necessary for the operations of the common market,<sup>148</sup> without excluding any action that seems necessary for attaining these objectives within the framework of the common market that is one of the objectives of the community.<sup>149</sup> Who goes one better? Obviously, the courts do. They have recognized ancillary powers attached to these explicit powers.<sup>150</sup>

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<sup>143</sup> Treaty creating the European Community, signed in Rome, March 25, 1957.

<sup>144</sup> Treaty on European Union, signed at Maastricht, February 7, 1992.

<sup>145</sup> TEC, s. 249.

<sup>146</sup> TEC, s. 249.

<sup>147</sup> *Id.*, s. 2.

<sup>148</sup> *Id.*, s. 3.

<sup>149</sup> *Id.*, s. 308.

<sup>150</sup> European Community Court of Law, 29.11 1956, *Fédéchar*, aff. 8/55, Rec. 291.

So, we would find ourselves in the presence of a quasi-federation, potentially hypercentralized, were it not for a division of fiscal powers that, in the absence until now of a European fiscal administration, entrusts member states with the collecting of 99% of resources,<sup>151</sup> the levying of which is moreover submitted to a unanimous vote of the European Union Council. As for the budget, it is submitted for the approval of the Parliament of the European Union Council, which rules by a qualified majority in such matters.<sup>152</sup> This device concretely excludes the existence of any taxation instrument equivalent to a "spending power", which is already formally inconceivable in the absence of a classical federal constitution.

But this padlock that the Union Council has by its veto on the collecting of revenues needed for Union expenditures, which has already been the subject of abolition proposals during the unfruitful negotiations of the Treaty of Nice, could be cracked open with the extension of the Union towards the countries of Eastern Europe. In such circumstances, the European Union would have no envy to harbour of French Jacobinism.

#### **4. A COMPARATIVE SYNTHESIS**

A certain number of distinctive features may be culled from this analysis of the "spending power" in other federations and quasi-federations. Indeed, three groups of countries may be observed as regards the relationships of their constitution with the "spending power" (4.1), so as to then classify them according to their degree of integration of this process (4.2), prior to circumscribing the factors that are likely to explain these differences (4.3). It then becomes possible to examine in the conclusion the potential relevance for the mandate of the Commission of one or another organizational procedure of the "spending power", whether formal or not, that is found in these other federal or quasi-federal constitutions.

##### **4.1 Three groups of countries**

The "spending power" does not enjoy the same status – when it has one at all – in all the countries we sampled. In this respect, we may distinguish classical federations issuing from the former British Empire, European classical federations, and quasi-federations.

###### **4.1.1 Classical federations issuing from the former British Empire**

Australia and the United States share in common a constitutionalized distribution of powers, centred on areas of intervention, as well as a population that, if not completely homogeneous, is at least excluding the territorialization of its minorities. The "spending power" is constitutionalized in the text in Australia and by legal precedent in the United States. It is

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<sup>151</sup> 94/728/CE, Eurotom, Decision by the Council, October 31, 1994, regarding the resources proper to the European Communities.

<sup>152</sup> TUE, s. 203 and 251.

noteworthy that there is a trend towards progressive centralization, which is more accentuated in Australia than in the United States.

#### *4.1.2 European classical federations*

These federations have in common a constitutionalized distribution of powers centred, in all cases, both on areas of State intervention and on tasks within some of these fields, the absence of a recent colonial past at the time of the federalization and a population containing more than one minority, territorialized to varying degrees. The "spending power" is absent (Switzerland), conditional on the agreement of federated entities and also limited (Germany) or exceptional and limited in theory, but progressively gaining ground (Belgium). In the first two countries, one notes a decentralization that is far greater than in classical federations issuing from the former British Empire. The Belgium case is more subtle, to say the least: If decentralization there is increasing, two-thirds of public spending is still under the power of federal authorities, whose transfers towards local administrations also represent two-thirds of the revenues of the latter.

#### *4.1.3 Quasi-federations*

Quasi-federations have in common the absence of constitutionalization of their respective division of powers and a more or less important territorial administrative decentralization, resulting from a division of powers centred more on tasks than on areas of intervention (Spain, United Kingdom), except in the case of the European Union, where the model seems inverted, and Italy, where recent constitutional amendments show a trend towards the constitutionalization of jurisdictions until now at the mercy of ordinary legislation.

### **4.2 Two revealing classifications**

From these data, we can establish two classifications, whose comparison proves quite revealing. The first one reflects the penetration of the formal "spending power" in federal constitutions, whereas the second one also takes into account the possible counterparts of "spending power" in these same countries.

#### *4.2.1 The penetration of formal "spending power"*

This first classification, which arranges countries according to a decreasing degree of penetration of formal "spending power" in federal constitutions, draws attention to its redundant absence in quasi-federations, which come under territorial administrative decentralization.

### **Australia**

"Spending power" constitutionalized expressly in the constitutional text since the beginning of the federation; no actual control over it for the constituent States, that only have power in this respect through the informal procedure of appointing members of a purely consultative commission. Total vulnerability of the constituent States with regard to the Commonwealth, which makes the final decision and levies 75% of taxes.

### **United States**

"Spending power" constitutionalized by legal precedent, weakly controlled under the "necessary and proper clause" and the principle of subsidiarity, also of case-law origin. No political control procedure.

### **Germany**

Constitutionalized "spending power" but effectively controlled by the jurisprudential federal loyalty principle and especially by the necessity for federal authorities to obtain a majority agreement of *Länders* within the *Bundesrat* to spend conditionally in their fields of jurisdiction.

### **European Union**

"Spending power" not constitutionalized for lack of a constitution and federalism, but conditional spending in the field of national jurisdictions submitted to the approval of the Parliament and the Union Council.

### **Belgium**

"Spending power" not constitutionalized expressly and limited by the constitutionalized federal loyalty principle, but the presence of equivalent practices appearing outside the constitution.

### **Switzerland**

Unconstitutionalized "spending power", difficult to practice owing to the obligation to amend the constitution by a process, which implies the assent of the Cantons for any transfer to the federation of basic residuary jurisdictions that are granted to them.

### **Spain**

Nonfederal territorial administrative decentralization of the agency model, hence an absence of "spending power" for lack of federalism. Equivalent result obtained by the agency model. Financing of regions by central authorities up to 80%.

## Italy

Territorial administrative decentralization following the agency model, very centralized, via conditional transfers controlled when transiting, evolving however towards a regional fiscal autonomy in a process of constitutionalization. In brief, there is also an absence of "spending power" for lack of federalism. Financing of regions by central authorities up to 79% for special regions and 42.6% for ordinary regions.<sup>153</sup>

## The United Kingdom

Nonfederal highly limited territorial administrative decentralization. Absence of "spending power" for lack of federalism. Financing of regions by appropriations from Westminster up to 80%.

### 4.2.2 *The presence of conditional transfers*

This second classification – which notes the equivalence between federalism amended by a formal "spending power" and simple territorial administrative decentralization – arranges the same countries according to a decreasing degree of actual presence of conditional transfers on the part of their central authorities in the granted fields – whether constitutionally or by domestic legislation – in their constituent units. This is where we see the destruction of federalism inherent in "spending power".

On this new basis, we may regroup the same countries differently into three sets: those where conditional transfers of federal authorities to constituent units are performed without control, those where they are weakly controlled, and those where they are effectively controlled.

### **Conditional transfers without control**

The countries where conditional transfers are authorized without control include Australia, Spain, the United Kingdom and Italy, in short a classical federation where formal "spending power", constitutionalized in the written text, has destroyed the federal character of the constitution, two quasi-federations that are only decentralized territorially, and a last one evolving towards a constitutionalized federalization.

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<sup>153</sup> RAIMONDO, L., "The Process of Decentralization in Italy: A Focus on Regional Governments", document submitted to the *Commission sur le déséquilibre fiscal* for the cancelled symposium planned for September 13, 2001.

### **Conditional transfers weakly controlled by legal precedent**

This category brings together the United States, where conditional transfers – constitutionalized by legal precedent – are important and controlled only by the "necessary and proper clause", and Belgium, where conditional transfers, not authorized under the constitution that attempts to control them by the federal loyalty principle, begin nonetheless to be seen as a practice on the borderline of the constitution.

### **Conditional transfers controlled effectively by political means**

In Germany, the European Union and Switzerland, possible conditional transfers on the part of central authorities towards constituent units are controlled by generally effective institutional political procedures: the requirement for a majority agreement of German *Länders* within the *Bundesrat*, the agreement of Parliament and the European Union Council, or a referendum needed for amending the Helvetian constitution.

#### **4.3 Factors likely to explain these differences**

Factors likely to explain these differences issue from these constants, and it would be surprising if they were the result of random occurrences. It would however be careless, even pretentious, here more than ever, to allude to causality from such a restricted and selective sampling of federations. But these historical, cultural, structural and institutional constants deserve at least to be presented here as documented hypotheses that would be potentially interesting to verify for all federal countries worldwide.

##### **4.3.1 Historical and cultural factors**

It is noteworthy that the "spending power" is really constitutionalized without effective limitation, in this sampling, only in the former British colonies (Australia and the United States), which came to be federated in obviously different contexts, yet where the imperial power was transferred to central authorities that were not going to give up their domination. These facts tend to document, if not confirm, the hypothesis according to which the means for centralization found in the "spending power" can only find its way into a federal constitution if there is a lack of balanced equalitarian power between the federated units and the federation, a condition which is more readily seen in countries that have been subject to colonization than countries that entered into federation on equal terms.

Indeed, by contrast, the "spending power" is absent or inoffensive in European federations regrouping formerly autonomous minorities that have voluntarily federated and for quite different reasons. The issue was precisely that of avoiding colonization (Switzerland), competing with the Commonwealth, which brought together a market capable of allowing economies of scale out of the reach of small isolated principalities (Germany),

competing with the United States in similar circumstances (European Union), or avoiding to fall apart (Belgium).

It seems quite likely that these voluntary federalisations, brought about outside a colonial context by groups enjoying a stable balance of opposing forces, resulted in rather decentralized federations, tightly excluding or controlling "spending power", while the federalization imposed by the British Empire (which was doubtlessly just as busy "dividing and conquering" as being respectful of minorities situated outside their metropolitan territory), and accepted distantly by the populations in question, evolves towards an increasing centralization in the hands of central authorities that have, in this respect, inherited the imperial power, and that constitutionalize the "spending power" as one of the means of this centralization.

#### *4.3.2 Structural factors*

The most important structural factor is obviously the constitutionalization of the division of powers, which distinguishes classical federations from quasi-federations, and at the same time sets the dividing line that the formal "spending power", which involves transgressing a constitutional rule, will not cross for lack of such a barrier. In quasi-federations, which in fact issue territorial administrative decentralization, the subordination of federated units can be brought about by an ordinary domestic statute, and there is no need to transgress a constitutional barrier to do so.

This does not mean that constitutions do not procure the same concrete results by other means, which adequately demonstrates how territorial administrative decentralization in quasi-federations is equivalent in fact to the constitutionalization of the "spending power" in classical federations: only the legal procedure differs, whose choice is dictated by history, where federations seek centralization, and quasi-federations move towards progressive decentralization. But at the centre of the road where both sides meet, the ultimate result is the same.

We could have been led to believe that another structural factor, namely the exact choice between available legal procedures for bringing about different forms of decentralization, inserted into classical federations as well as quasi-federations, would also have had an effect on how these different constitutions react to the "spending power". Here, we are referring to the alternative between division of powers centred respectively on fields of intervention and on the tasks to be performed in any of these fields. It seems that this factor does not count, at least in classical federations. Indeed, if in quasi-federations, the agency model of decentralization brings about redundantly the exact replica of the "spending power", in classical European federations, next to the sharing of fields of intervention, the presence of the sharing of tasks, however close to the agency model, still does not constitute the integration of a "spending power" into their constitution or even into their constitutional practices. It seems, in these cases, to be because control over the "spending power" is obtained by institutional factors.

### 4.3.3 Institutional factors

Some specific institutions under certain constitutions differentiate classical federations issuing from British colonialism from some of those in Europe that, outside this context, bring together minorities whose balance of opposing forces is more egalitarian: this refers to the German *Bundesrat*, made up of members of the *Länders'* governments, which has a vetoing right over conditional spending, and the European Union, where the co-decisional procedure reserved for the adoption of expenditures calls for a qualified majority in the European Union Council and an absolute majority in the European Parliament.<sup>154</sup> These institutional peculiarities are naturally a reflection of the historic and cultural factors, which brought the German federation and the European Union together. But they add a dimension, which stresses decentralization and makes it possible to eliminate the "spending power" or to make it less invasive.

## 5. CONCLUSION

In winding up this analysis, which has made it possible to emphasize and attempt to explain the permanent features found in the constitutionalization of the "spending power" in the constitutions of certain federal countries and in the institutionalization of their counterparts in quasi-federations, whose societies are comparable to those of Canada, we come to an interesting divide in the road. On one hand, classical federations issuing from British colonialism and quasi-federations emanating from administrative decentralization, where the "spending power" or its counterparts are controlled only slightly or not at all by mainly judicial procedures which cannot grant decision-making power in any form to the authorities of federated or regional entities. On the other, in Europe, other classical federations and states are brought together by treaties in which political procedures granting true powers to constituent units make it possible to control potential conditional transfers from central authorities.

Canada is a former British colony and in this respect is closer to the situations in Australia and the United States, except for the fact that, as in Belgium, "spending power" is not constitutionalized, neither in writing nor by legal precedent, but constitutes an important practice outside the constitution. This difference can doubtlessly be explained owing to the presence of the French-speaking minority, mainly territorialized in Québec, as is the case of the territorialized minorities in European federations, which contrasts with the homogeneity of the Australian population and the non-territorialization of American minorities.

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<sup>154</sup> See [http://europa.eu.int/comm/budget/budget/index\\_en.htm](http://europa.eu.int/comm/budget/budget/index_en.htm)

Québec and other Canadian provinces obviously have nothing to envy to the subordinate status of minorities in quasi-federations, which, when faced with the conditional spending of central authorities in regional fields of jurisdiction, receive no protection from administrative decentralization under the agency model. Nor would Québec have anything to gain with respect to its autonomy by taking inspiration from the structure of conditional transfers that are quite common in other federations issuing from the British colonialism.

As for the legal principles of subsidiarity and federal loyalty, the first one is harmful and the second, not particularly useful. The subsidiarity principle, which attempts to cut a path in the rulings of our Supreme Court, is constitutionalized in the United States, Switzerland, Belgium and in the European Union. It raises two problems. On one hand, it destroys the constitutional protection of the constituent units' jurisdictions, thereafter subject to variations based on the presumed "efficiency" of one or another decision-making level regarding a given field of intervention, object or task. On the other, it suppresses the true critical stake of federalism or decentralization, which is precisely the determination of the place where power is to be exercised, and which cannot be chosen only on the basis of economic efficiency.

The second of these principles is constitutionalized in Germany and Belgium. In the latter, where the status of the "spending power" is very close to its counterpart in Canadian constitutional law, the rule of non-binding politeness characteristic of the "federal loyalty principle" has not, once again, succeeded in containing the "legislational" ambitions of central authorities, which began outside the constitution as a practice of conditional transfers. At most, we are led to believe that this principle has a supplemental role in Germany, where it joins with an otherwise effective institutional procedure.

What then remain are the structural political procedures that characterize two classical European federations and the European Union. This may involve all tax collections by federated units, with remittance to federal authorities of amounts needed for exercising their jurisdictions, implemented in Switzerland, Germany, the European Union and in Spain for the Basque Country and Navarre. This procedure might be useful here insofar as it would require federal authorities to constitutionally justify the expenditures that they plan to make; this could be the beginning of a certain control over the "spending power".

Our thinking also turns to the stopping power that arises in Switzerland from the need to amend the constitution in order to authorize the federation to impose statutory conditions on the Cantons. Apparently effective in this country, such an amendment is in theory also required in Canada, where we see how federal authorities have managed to sidestep the issue... In the same vein, the necessary authorization of the German *Bundesrat*, along with the near exclusivity in collecting taxes that the *Länders* enjoy, seems interesting at first sight. Moreover, as long as it is upheld, the rather weak veto for member countries of the European Union that results from their obligation to have their proceeds approved by the European Union Council,

also seems at first sight to offer an interesting solution. But even if this constitutional amendments were within the reach of a minority that cannot even obtain respect for a constitution that is far less restrictive for the Canadian majority, a veto on the collection of taxes along with a simple and/or qualified majority in budgetary matters would not settle the problems caused here by the "spending power".

