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**Tunisian Constitutional Reform and Decentralization:
Reactions to the Draft Constitution of the
Republic of Tunisia**

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“Tunisian Constitutional Reform and Decentralization: Reactions to the Draft Constitution of the Republic of Tunisia”

Abstract

This paper is a commentary on the system of decentralized government set out in the draft Tunisian Constitution of 22 April 2013. It raises a number of general issues relevant to the notion of decentralized government and provides some reactions to the system of local government as envisioned by Chapter 7. The commentary begins by investigating the fundamental objectives of Tunisian constitutional reform, and how a system of decentralization might assist in realizing those objectives. The commentary then assesses the system as it is constituted in the April 2013 draft Constitution in light of the objectives of constitutional reform.

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Tunisian Constitutional Reform and Decentralization: Reactions to the Draft Constitution of the Republic of Tunisia

Jörg Fedtke

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Preliminary observations

These comments are based on English versions of the three drafts of the Constitution of the Republic of Tunisia, respectively dated 14 August 2012, 14 December 2012, and 22 April 2013,¹ subsequent amendments and comments (particularly those submitted by the Committee on General Provisions with respect to Chapter 1), and a commentary on the Tunisian constitutional reform process and decentralization by Mustapha Ben Letaif, entitled “Decentralization in the New Tunisian Constitution.”² The paper raises a number of general issues relevant to the notion of decentralized government (Part I) and provides some reactions to the system of local government as currently envisioned by Chapter 7 of the April 2013 draft Constitution (Part II). The analysis will track closely the text of the April 2013 draft Constitution itself. All references are to the April 2013 draft Constitution, unless otherwise stated. The paper should, however, be read bearing in mind that further amendments might occur in the course of the drafting process.

Part I: General issues

1. *Constitutional vision*

The discussion of any specific form of federalism, regionalism or decentralization in a given country must start with the constitutional vision or paradigm that the rules in question are designed to pursue. Despite much overlap in terms of their aims, these three concepts (and any other approaches such as the idea of devolution found in the United Kingdom) can differ quite considerably with respect to the balance systems are trying to achieve between the central level of government and any sub-national units that might exist in a country. Any analysis of the structures and rules contained in a (draft) constitution must therefore attempt to answer an initial question – *what are the authors of the document trying to achieve?*

The Preamble to the April 2013 draft Constitution, which enjoys the same status as the main text of the document (Art. 138), does not offer much insight as to the vision of its drafters. The image of a “participatory” regime and a reference to the “principle of separation and balance of powers” are relevant but not specific to the organization of sub-national governmental structures. More important is the repeated emphasis of national unity or the unity of the state, which appears both in the Preamble and in a number of substantive articles (see Arts. 9, 16, 18 and 123). Apart from stressing the value of the nation and indicating a bias in favor of central authority, it too offers little guidance as to the specific nature of any future sub-national system of governance in Tunisia.

The first provision that addresses more specifically the design of Tunisia’s governmental structures is Art. 9. The provision states that the state is obliged to “apply decentralization” throughout the country, while maintaining the *state’s unity*. Article 9 is part of Chapter 1, which contains – arguably – provisions of a general and more fundamental character. This gives some weight to the notion of decentralization in Tunisia – it is not just a concept of internal administrative convenience, to be changed at any time by executive fiat, but rather a constitutional principle that takes part in the enhanced status of the document as a whole. As such, decentralization must be taken seriously. Just as important, however, is what the April 2013 draft Constitution does *not* say. Decentralization does *not* determine the *nature* of the Tunisian State (Art. 1); and other legal terms of art which could have been used to invoke more muscular concepts of sub-national government – such as federalism or regionalism – were, it seems, deliberately avoided. On the scale between strong forms of federal government (such as, for example, Germany or the United States), countries with an intermediate design (such as South Africa or the United Kingdom), and systems with weaker (mainly administrative) types of sub-national structures (such as France), Art. 9 seems to place Tunisia at the lower end of the scale.

That said, federalism, regionalism and decentralization *do* share a number of common aims that distinguish these approaches from unitary systems that might also establish local or regional branches of its centralized administration for reasons of efficiency. These aims include, inter alia, some degree of (vertical) separation and balance of powers; the exercise of government closer to and more in tune with the needs of the people; and – often – a measure of local or regional democratic control and participation. In order to achieve these aims, sub-national structures of government will enjoy some level of executive and (possibly) legislative, or at least regulatory, authority; control a share of a country's administrative assets (facilities, equipment, and personnel); command at least some sources of revenue (own or allocated); recruit administrative and political personnel from the local or regional levels; and offer citizens opportunities to participate in the exercise of power through elections to local and regional councils. There may also be an attempt to represent local or regional views on the national level. Local and regional government will usually focus on the provision of services (utilities such as water, energy, solid waste management, roads and bridges, transportation, general health care, or basic education), the regulation of local business (such as markets, tourism, private taxi companies, or restaurants and bars), local urban planning, local environmental protection, and/or local/regional economic development. In addition to these areas, many central administrative services are provided, in practice, by local or regional authorities (e.g., the issuing of passports and drivers licenses, or the granting of various commercial permits).

The difference between federalism, regionalism and decentralization, then, is one of degree. There is no magic formula that might help us distinguish clearly one concept from the other, and much will depend on the specific design of the system in question. There can be considerable overlap between these models. The use of the term “decentralization” in Art. 9 – coupled with the repeated emphasis of unity throughout the April 2013 draft Constitution – makes it clear, however, that the system of government envisioned is tilted quite strongly in favor of the central exercise of authority. This approach seems to be in line with past Tunisian experience in this area.

2. Past experience and the expectations of the Tunisian Revolution

The report by Mustapha Ben Letaif sets out well the history and mixed track record of decentralization in Tunisia. The report also highlights the existence of national legislation that already determines the organization and authority of sub-national governmental structures today. The central message of this analysis seems to be one of historically strong central control coupled with limited resources and inefficiency on the local and regional levels. Sub-national governance does not seem to have been taken very seriously in the past. The report also conveys a powerful message regarding the future of decentralization in Tunisia, which is said to require a “*radical adjustment* in the new constitution that aims at laying the ... groundwork for a genuine *devolution* of power that is democratic both in its nature and practice”.³ The development of a regional level of administration, which is capable of taking into account regional differences and of promoting a more equitable economic development across the country, is identified as a priority in the constitutional reform process; it is said to have been one of the “most galvanizing motives behind the Tunisian Revolution”.⁴ Sustainable development is one important aspect of this narrative, and although the April 2013 draft Constitution does not include an explicit right to sustainable development (as the December 2012 draft did), Art. 8 enjoins the state to “seek to achieve social justice, sustainable development, and balance between regions.” Further, Art. 9 itself provides that decentralization throughout the country is intended to “support development opportunities.” These provisions suggest that the new constitutional infrastructure, while falling short of a federal system, should reflect (in the view of at least some parts of Tunisian society) a fairly radical break with past policies regarding decentralization – democratic participation on the lower tiers of government and a

stronger involvement of elected bodies in day-to-day administration, in particular, seem to be important demands that should inform the constitutional reform process.

3. Transferring authority and resources

In the light of the above analysis, it is important to stress that any constitutional change will only have a real effect on the ground if lower tiers of government are given the authority and resources necessary to exercise whatever functions they are envisaged to perform within the new constitutional framework. Reality must reflect constitutional vision if reforms are to succeed. Some systems that have moved from centralized to more decentralized structures have attempted to safeguard this change by setting out in some detail how particular assets and lines of authority are actually transferred from one level to the other.⁵ Other systems have only changed the constitutional rules while leaving old administrative structures basically intact both in terms of procedures/authorities and assets. This can jeopardize change.⁶

The continuous existence of pre-constitutional municipal and regional entities in Tunisia brings with it a risk that changes on the constitutional level might not translate into a different (and hopefully improved) reality on the ground. The system might simply continue to function along known lines. Transitional constitutional arrangements that organize and safeguard the passage from old to new forms of decentralized public administration might thus be worth consideration.

A second – closely related – aspect concerns the link between elected local or regional bodies/councils (pre-constitutional or newly created), which enjoy *political* legitimacy, and the actual *administration* in the form of a professional, multi-tiered and (often) very specialized public service. If elected bodies are to have any meaningful influence on certain areas of public administration, they must be given the resources and legal tools to actually exert authority over what was (and often continues to be) a centralized system of administration. Democratic involvement of citizens on lower tiers of government otherwise risks being frustrated by a conservative-minded public service that continues to take orders exclusively from the center and within the old/traditional procedures and forms of communication.

4. The viability of local government

Local government – however defined in terms of law – must be capable of efficiently exercising any powers allocated to it. Decentralization is not an end in itself. For the concept to work well, sub-national entities require careful design – their geographical location, size, population, basic infrastructure (e.g., roads, ports, airports, schools, hospitals, water and power plants) and economic potential (among many other factors) will to a large extent determine the outcome of any decentralization effort. Fairly balanced units, whether on the municipal or regional level, are certainly desirable. A second powerful element of success or failure is the internal social coherence of sub-national entities. Local government can thrive on – and reinforce – cultural, ethnic, or religious ties among certain parts of a country's population. That said, strong local affiliations within regions (less so within municipalities due to their much smaller size) may pose a potential threat to national unity. Articles 9 and 123 acknowledge this possibility and attempt to combine decentralization with respect for the unity of the state.

The outcome of decentralization efforts is not always entirely predictable. The central level should therefore retain influence on the local tiers of government and be given the possibility to intervene directly if developments so require. Intervention should be restricted to absolutely necessary measures, however, and be limited in terms of time. Political and legal control of such measures (through the

involvement of a second legislative chamber or other form of local representation on the national level and/or a constitutional court) is highly desirable.

Large differences in the ability of certain parts of a country to sustain efficient local government raise the possibility of an asymmetrical approach to decentralization. This is certainly possible. While most systems (especially those that follow a more federal pattern) tend to establish symmetrical relationships between the central level and each sub-national entity, the experience of countries like Spain or the United Kingdom suggest that asymmetrical structures can work equally well.

5. General principles or detailed provisions

A division of power – on the constitutional level – between a central authority and sub-national entities can be achieved in a number of ways.

One technique is to rely on broad principles that leave the allocation of specific powers and resources to the ordinary (national) legislator. The obvious advantage of this approach lies in its flexibility; changing circumstances, especially with a view to the ability of sub-national levels of government to actually perform certain functions efficiently, can easily be taken into account without the need for constitutional amendment. The main disadvantage is the risk that true decentralization will in fact not take place – a risk that is exacerbated if the lower tiers of government lack adequate representation on the national level.

A second technique is to allocate specific powers and responsibilities to each sphere of government. This will usually take the form of more or less detailed catalogues that set out (again more or less comprehensively) which level will be responsible for certain functional areas of governance. The types of powers are usually defined as *exclusive* (either to the central or sub-national levels), *shared* (joint responsibility of two or more levels) or *concurrent* (exercise by one level with the possibility of an intervention, under certain conditions, by another level). A fourth – unspecified – category comprises those powers not specifically mentioned in the constitution (*residual*). Residual powers will again rest with one or the other level of government.⁷ The main advantages and disadvantages of this approach mirror those discussed previously in the context of broad constitutional principles. Catalogues are less flexible but, on the upside, provide a fairly clear allocation of powers and responsibilities. They will arguably carve out more effectively an area for local or regional administration. Some measure of flexibility can be retained within this system if one level (usually the center) is given opportunities to intervene – under specified conditions – in functional areas assigned to other levels. South Africa and Germany provide good examples in this respect. The national level in South Africa may sometimes intervene in *exclusive* provincial powers.⁸ The national levels in South Africa and Germany both enjoy the right to legislate, under certain conditions, in the area of *concurrent* powers.⁹

Two other approaches that can be useful in distributing powers more flexibly between different levels of government are worth consideration: a general clause that expresses the principle of subsidiarity; and rules that allow extraordinary intervention by the national level if particular sub-national entities fail to fulfill their executive obligations.

The principle of subsidiarity creates a general bias in favor of the lower tiers of government by committing the central level to exercise restraint whenever a certain matter can be dealt with sufficiently by the lower tiers of a system.¹⁰ It is, to some extent, a mirror image of the right of the central level to intervene in the lower spheres of government *only* if certain (specified) conditions are met.

Article 100 of the South African Constitution of 1996 allows the national executive to intervene in provincial administration when a province cannot or will not fulfill an executive obligation imposed on it

directly by the Constitution or by national legislation. One example here is a failure to meet established minimum standards of service provision.¹¹

6. Intergovernmental relationships

Federalized, regionalized or decentralized systems require some degree of co-ordination between the various levels of government – both vertically (especially with the center) and horizontally (between municipalities or regions). Many practical issues that usually fall within the functional areas of local and regional government can be addressed more efficiently if municipalities or regions combine forces. Co-operation thus frequently occurs, for example, with respect to solid waste management, education, local health care, or urban planning. Strategies to develop the economy will need co-operation on all levels. Combined efforts will also give public administrations a better position for negotiations with private companies wherever public-private partnerships might be an option.

A second dimension of the intergovernmental relationship focuses on the prevention of conflict. Co-operative federalism, a concept developed in Germany, seeks to co-ordinate political and administrative efforts of the federal and state levels in order to minimize the negative effects of power sharing. One key aspect is the political will to co-operate beyond what any specific constitutional or legal obligations might require. Joint activities of the states such as regular meetings of their chief executives (Prime Ministers) and the heads of key departments (interior, finance, economy or education) serve not only to foster co-operation in many areas but also to exchange information and experience, strategize, and allow discussion of contentious issues before real conflicts arise. Annual conferences that bring together municipal representatives from across the country attempt to replicate this approach on the lowest tier of German public administration.

South Africa has neatly summarized the concept of co-operative government in sections 40 and 41 of the Constitution of 1996. These provisions, which have received much international attention, provide an excellent framework for co-operative government and intergovernmental relations.¹²

Part II: Chapter 7 of the April 2013 draft Constitution

1. Level of detail

The language of Chapter 7 is very succinct. This is, in itself, not an issue. Indeed, many constitutions (including those of the United States and Germany) follow this approach. Other constitutions, for example the Constitution of South Africa, set out the powers and responsibilities of the various spheres of government in much greater detail. While these differences may result in substantively different degrees of constitutional protection especially for the lower tiers of government, less detailed constitutions might also invite – or require – a more active role of the courts: the more specific a provision, the less leeway judges will, in general, enjoy in interpreting the powers and responsibilities of the various levels of government. Both approaches can work well in practice but the different dynamics resulting from different levels of constitutional detail should be kept in mind.

2. Article 123 of the April 2013 draft Constitution – basic principles

Article 123 of the April 2013 draft Constitution reiterates the basic principles of decentralization in Tunisia – it is *local* (defined as municipal, district and regional) and organized within the confines of *the*

state's unity. The April 2013 draft Constitution allocates the power to actually divide the nation into municipalities and regions to the central level and leaves undefined the criteria according to which boundaries should be drawn in practice. The right to social justice (Art. 8), however, might require the central level to draw territorial municipal and regional boundaries in such a way that provides fairly equal opportunities to all citizens. It provides:

The state shall seek to achieve social justice, sustainable development, and balance between regions, and to make good use of national riches.

Article 9, in a similar vein, emphasizes that decentralization must provide development opportunities and raise the quality of life for “all citizens.”

The April 2013 draft Constitution does not openly address the possibility of municipal and regional re-organization (reform). The power to draw boundaries and to create new local authorities will, however, likely include the authority to merge or completely redesign the system at a later point. Decentralization cannot be completely abolished, however, without constitutional amendment. Given the constitutional status of decentralization, some form of local government must always remain.

3. Limited financial and administrative independence

Local authorities enjoy the status of legal personalities and must have financial and administrative independence (Art. 124). Article 127 reinforces this independence by granting local authorities access to original (“self-generated”) and allocated (central) financial resources. These are not specified, however, and it is left to the central level to actually identify sources of financing and the rules of public accounting *by law*. While local authorities are given no direct say in the allocation of resources by the center or much independence with respect to generating their own income, Art. 127 *does* tie the creation of *new tasks* and the *transfer of existing central tasks to lower tiers of government* to the allocation of sufficient resources. This principle, which follows the French model,¹³ may turn out to be one of the April 2013 draft Constitution’s most important safeguards for local authorities. The central level is also required (“shall”) to balance more generally the resources available to local government with the tasks performed by that level (“local burdens”). This “principle of solidarity,” established in Art. 128, complements Art. 127 and should be placed within that provision. Local authorities are granted much more freedom when it comes to expenditure, which is subject only to the rules of good governance and control by the “financial judiciary” (Art. 129; see Art. 111 on the Court of Audit).

Other systems (such as Germany or the United States) allocate on the constitutional level *specific* sources of revenue to the various tiers of government. This approach tends to provide more protection and financial independence to local authorities but can run into difficulties if the income generated by specific sources decreases over time or fails to cover any additional responsibilities that might be handed down by the central level. The mechanism set out in the April 2013 draft Constitution is more flexible but may, in practice, give too much leeway to the central level when it comes to the allocation of central funds or self-generated revenue. Much will depend here on the Supreme Council of Local Authorities (Art. 133), which is given authority to advise on questions related to the local budget and local financing issues. The details of the Council’s composition and mandate should be specified as soon as possible and should perhaps be regulated in the April 2013 draft Constitution directly.¹⁴ This body could also be involved in the allocation of additional funds on the basis of solidarity (Art. 128), which seems to be some kind of financial equalization mechanism. It is suggested that the details of this mechanism (especially the criteria for the allocation of additional funds) be set out by law.¹⁵

Local authorities enjoy some freedom in the exercise of their duties; Art. 124 grants “administrative independence” and “free discretion” in dealing with local interests while Art. 129 speaks of “dispositional power” in the exercise of local functions. The level of freedom will likely depend, however, on the type of power exercised by a local authority. Co-managed and transferred functions (Art. 126) are likely to attract more ex-post supervision with respect to the substance and legality of local decisions (Art. 130) than will functions that might be defined as “originally local” (self-managed). These different levels of supervision should be specified in more detail and preference given, wherever possible and subject to legality, to the decisions of the local level.

An important question already raised above concerns the influence that the elected local councils (municipal and regional) are to exercise over local administration. While Art. 125 calls for the election of these bodies, it is not clear what their powers would be in detail and how they are to interact – beyond “the mechanisms of participatory democracy, and the principles of open governance” (Art. 131) – with any units of the professional public service operating directly within their territory or the respective ministries on the central level. Would local councils have the power to enact (local) legislation? Would they have the authority to create local administrative structures? Would they be able to recruit personnel or acquire the assets necessary to discharge certain functions? Would they be able to monitor and suggest changes to the way central authorities operate within their area? These are important questions which the April 2013 draft Constitution leaves open.

4. Powers of local government

The April 2013 draft Constitution does not in any way specify the functional areas (terms of reference) that municipalities or regional bodies are to deal with. Article 135 merely says that local authorities enjoy original/own (“self-managed”), co-managed, and transferred powers/competencies. The report by Mustapha Ben Letaif sets out in great detail the subject matters that could be allocated to one or the other level, and recommends that the constitutional text state:

only principles, namely the principle of devolution, and leave it for the common legislator to promulgate detailed provisions in the Law on Decentralization. The constitution should only enshrine fundamental laws and essential principles, and leave the rest to the common legislator so as to provide the legislator with the necessary flexibility to accommodate the specificities of the Tunisian society and the changes it undergoes.¹⁶

This is certainly a viable approach that is also followed in other decentralized countries such as France. Most other systems will, however, seek to identify in more detail the powers that the various levels of government are to exercise (this is true not only for federal countries like Germany but is also the approach followed by more ‘intermediate’ systems like South Africa or the United Kingdom). In light of past Tunisian experience with respect to the legislative control of local affairs, which seems to have led to a strong limitation of at least municipal power,¹⁷ it is suggested that the competencies of the local level be identified in greater detail rather than through mere principles.

A different question concerns the desirability of shared powers. International experience suggests that it may be better, in terms of efficiency and clear responsibilities, to allocate tasks either to one or the other sphere of government.

Finally, the April 2013 draft Constitution does not specify the relationship between the municipal and regional levels of government. Article 126 seems to indicate that the distribution of powers (at least in terms of co-managed and transferred items) could follow the traditional top-down model of public

service, accompanied by an allocation of separate “self-managed” powers to each level. If this is indeed a correct understanding of Art. 126, it may be helpful to set out in greater detail how (if at all) the two levels of local government are to interact with each other (and with the center) with respect to shared and transferred responsibilities. Some kind of interaction between the municipal and regional levels may also be necessary with respect to the composition and functioning of the Supreme Council.

5. Partnerships and foreign relations (Art. 132)

Article 132 of the April 2013 draft Constitution contains a welcome reference to the possibility of horizontal co-operation (both within Tunisia and – on a local level – with partners outside the country). It is suggested that more general principles of co-operative government (as found, for example, in South Africa) could be included in the context of this provision. More problematic with a view to the obvious importance attached to national unity is the proposed ability of local authorities to join international and regional unions. Membership in such international or regional organizations could be made subject to approval by the Chamber of Deputies.

6. Supreme Council of Local Authorities (Art. 133)

The proposed Supreme Council of Local Authorities could play an important role with respect to financial issues (discussed above) but also – more generally – in the co-ordination of administrative efforts on the various levels of government and in the avoidance and resolution of any more general (day-to-day) disputes that might arise in the context of decentralization. These are functions that many second legislative chambers perform in other (usually more federal) systems. The potential importance of this body and, more importantly, the large number of local authorities likely to emerge in Tunisia make it difficult to determine its composition and mandate. Despite these challenges, it may be preferable to decide these details directly in the Constitution rather than to defer them to a law.

* * *

Notes

¹ Draft Constitution of the Republic of Tunisia, 22 April 2013, unofficial English translation prepared by International IDEA, available online at <http://constitutionaltransitions.org/wp-content/uploads/2013/05/Tunisia-third-draft-Constitution-22-April-2013.pdf>.

² Mustapha Ben Letaif, “Decentralization in the New Tunisian Constitution” (International IDEA, 2012), available online in the original Arabic from the International IDEA website, at www.IDEA.int (forthcoming 2013).

³ Ibid, para. 49 (emphasis added).

⁴ Ibid, para. 58.

⁵ See, for example the transitional arrangements in the (Interim) Constitution of South Africa (1993), sections 235 (*transitional arrangements concerning executive authorities*), 236 (*transitional arrangements concerning public administration*) and 239 (*transitional arrangements concerning assets and liabilities*). Germany faced similar issues in the context of reunification in 1990, which required the allocation of assets of the former German Democratic Republic to entities that were created within the framework of the German Basic Law and newly enacted state constitutions.

⁶ Iraq is today still struggling with the gap that exists between its (new) constitutional paradigm, closer –, at least according to the wording of the Constitution of 2005 – to a federal model, and its basically unchanged (pre-constitutional) administrative structures and procedures.

⁷ Residual legislative authority in Germany thus lies with the 16 Länder (States). South Africa allocates residual legislative authority to the national level.

⁸ Section 44(2) of the South African Constitution of 1996 declares:

Parliament may intervene, by passing legislation in accordance with section 76(1) [the procedure for ordinary bills affecting provinces], with regard to a matter falling within a functional area listed in Schedule 5 [exclusive provincial legislative competence], when it is necessary

- (a) to maintain national security;
- (b) to maintain economic unity;
- (c) to maintain essential national standards;
- (d) to establish minimum standards required for the rendering of services; or
- (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

⁹ Article 72 of the German Basic Law declares:

(1) On matters within the concurrent legislative power, the Länder shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law.

(2) The Federation shall have the right to legislate on matters falling within clauses 4, 7, 11, 13, 15, 19a, 20, 22, 25 and 26 of paragraph (1) of Article 74, if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.

(3) If the Federation has made use of its power to legislate, the Länder may enact laws at variance with this legislation with respect to:

1. hunting (except for the law on hunting licenses);
2. protection of nature and landscape management (except for the general principles governing the protection of nature, the law on protection of plant and animal species or the law on protection of marine life);
3. land distribution;
4. regional planning;
5. management of water resources (except for regulations related to materials or facilities);
6. admission to institutions of higher education and requirements for graduation in such institutions.

Federal laws on these matters shall enter into force no earlier than six months following their promulgation unless otherwise provided with the consent of the Bundesrat. As for the relationship between federal law and law of the Länder, the latest law enacted shall take precedence with respect to matters within the scope of the first sentence.

(4) A federal law may provide that federal legislation that is no longer necessary within the meaning of paragraph (2) of this Article may be superseded by Land law.

Section 146(2) and (3) of the South African Constitution of 1996 deploys a very similar technique:

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

- (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.
- (b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing
 - (i) norms and standards;
 - (ii) frameworks; or
 - (iii) national policies.
- (c) The national legislation is necessary for
 - (i) the maintenance of national security;
 - (ii) the maintenance of economic unity;
 - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labor;
 - (iv) the promotion of economic activities across provincial boundaries;
 - (v) the promotion of equal opportunity or equal access to government services; or
 - (vi) the protection of the environment.

(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that

- (a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or
- (b) impedes the implementation of national economic policy.

¹⁰ Subsidiarity enjoys increasing support in the European Union. Article 5(3) of the Treaty on the European Union declares:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Article 72 of the French Constitution of 1958 expresses a similar idea by allowing territorial communities to take decisions in all matters arising under powers that can best be exercised at their level.

¹¹ Article 100(1) of the Constitution of South Africa (1996) declares:

When a province cannot or does not fulfill an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation, including –

- (a) issuing a directive to the provincial executive, describing the extent of the failure to fulfill its obligations and stating any steps required to meet its obligations; and
- (b) assuming responsibility for the relevant obligation in that province to the extent necessary to
 - (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
 - (ii) maintain economic unity;
 - (iii) maintain national security; or
 - (iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.

Subsection (2) of the provision allows the second national legislative chamber, the National Council of Provinces, to disapprove of the measure and end the intervention.

¹² Section 40 of the Constitution of South Africa (1996) declares:

- (1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.
- (2) All spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.

Section 41 of the Constitution of South Africa (1996) declares:

- (1) All spheres of government and all organs of state within each sphere must–
 - (a) preserve the peace, national unity and the indivisibility of the Republic;
 - (b) secure the well-being of the people of the Republic;
 - (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
 - (d) be loyal to the Constitution, the Republic and its people; (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
 - (f) not assume any power or function except those conferred on them in terms of the Constitution;

- (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
 - (h) co-operate with one another in mutual trust and good faith by
 - (i) fostering friendly relations;
 - (ii) assisting and supporting one another;
 - (iii) informing one another of, and consulting one another on, matters of common interest;
 - (iv) co-ordinating their actions and legislation with one another;
 - (v) adhering to agreed procedures; and
 - (vi) avoiding legal proceedings against one another.
- (2) An Act of Parliament must—
- (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
 - (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.
- (3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.
- (4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

¹³ Article 72-2 of the French Constitution of 1958 declares:

Whenever powers are transferred between central government and the territorial communities, revenue equivalent to that given over to the exercise of those powers shall also be transferred. Whenever the effect of newly created or extended powers is to increase the expenditure to be borne by territorial communities, revenue as determined by statute shall be allocated to said communities.

¹⁴ A commission with similar financial responsibilities is envisaged in Art. 106 of the Iraqi Constitution of 2005 but has thus far not been established.

¹⁵ See Art. 72-2 of the French Constitution of 1958: “Equalization mechanisms intended to promote equality between territorial communities shall be provided for by statute.”

¹⁶ Ben Letaif, “Decentralization in the New Tunisian Constitution” (n 2), para. 80.

¹⁷ Ibid, para. 96.

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