WHY (THE RESEARCH ON) FEDERALISM MATTERS

by Anna Gamper

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Research on federalism existed even before the first federal state emerged. It is an epic tale about leagues and unions, covenants and constitutions, loyalty and subsidiarity. But federalism is also about peace-making, vertical separation of powers, compound democracy, multi-layered governance and minority protection. It is not by chance, therefore, that almost all federal states are liberal democracies.

Although a plethora of academic literature has been written on federalism, including many classical works of leading academics in the fields of constitutional law and social sciences, the research has never been exhaustive. Not only the many variants of federal states, innovative young federations as well as hybrid systems such as the European Union, but also the vast interdisciplinarity and comparative design of federal studies have been inspiring to scholars of federalism.

Given this wide landscape in which research on federalism is embedded, it is indeed difficult to say on which particular field modern research should focus. Apart from the many comparative volumes and handbooks on federalism in general, some institutional topics, such as the distribution of powers or federal second chambers, have always attracted much notice. Apart from these traditional issues, however, many others have gained attention in more recent times: among these, we find secession, multiethnic/cultural states, minorities, financial equalisation, the dynamics of federalist parties or the case law of apex courts in federal countries.

As a scholar of constitutional law, I have been growing particularly interested in this latter topic over the last years. Apart from the formal amendments that federal constitutions are submitted to, are there other changes, too, through which federal systems are transformed? In this context, are constitutional or supreme courts legitimized when they interpret federal constitutions in a manner that is mostly not regulated expressly in the federal constitution itself (see, however, the explicit rules enacted in the UK’s Devolution Acts regulating the interpretation of devolved powers)? Do they enter into a (critical) dialogue with the federal and constituent legislatures? Can their case law be described as centralistic or federalist, and what are the main influences behind it? Mere empirical data analysis is not sufficient for a more profound analysis, even though we need the data in order to get more insight from comparative perspective. The task is certainly not easy, since a representative survey cannot be limited to just two or three courts and since the analysis cannot exhaust itself with considering just the outcome of decisions, but must rather look at the constitutional reasoning. While constitutional reasoning is supposed to be ultimately in line with the constitutional text, to what extent does it rely on the federalist or centralistic construction of judges? Does the selection and appointment of judges or do other factors play a role here, and have these factors a more constitutional or political basis?

This is, however, just an illustrative example of how much further research would be needed in order to examine important aspects of federalism from a more detailed point of view. Due to the dynamics of federal systems, including the ever-growing case law of
their apex courts, it is clear that no final thoughts can be given on this issue, but that ongoing research is needed.

Lastly, I would like to mention the recent jubilee of Austrian federalism, the celebration of which covers the period from 2018 to 2020. One hundred years ago, in October 1918, the Republic of (German-)Austria was founded. In the following weeks, most of the later Austrian Länder declared their will to join the new Republic. There has been much scholarly discussion on the question whether the Länder (that had possessed historical identity even under the Austro-Hungarian monarchy) co-founded the new state or whether their declarations were "mere" political documents. It stands without doubt, however, that the Länder acted as constitutional engineers during the two years that led to the enactment of the Federal Constitutional Act of 1920. The design of this constitution had not been uncontroversial, but finally been decided in favour of federalism.

Federalism surely matters – and new young scholars are very welcome to its study!