CHAPTER 2

From a Formal to a Substantial Approach: Sources of Law and Fiscal Federalism

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1 Introduction

In all multilevel states,¹ the arrangements regarding the raising, sharing and spending of resources are critically important, both politically and economically, for the functioning of the system as a whole. In addition, the way in which financial powers are assigned can significantly influence the allocation and exercise of legislative and administrative powers. Thus, guarantees of adequate financial resources and distribution mechanisms, fiscal and monetary powers as well as equalisation and solidarity funds are important for the functioning of each level of government, as they may create or prevent intergovernmental conflicts. More recently, the overall responsibility of the central state vis-à-vis subnational entities has been emphasised due to financial and fiscal conditionality, in particular for those states that are members of the Eurozone.

This chapter does not focus on the content of the various financial arrangements, which will be dealt with in the following chapters of this volume. Instead, attention will be given to an often-underestimated aspect: the sources of law regulating the financial settings in a selection of case studies and their possible effects, if any, on the design of the financial measures adopted within each legal system. The final aim is to draw a conclusion on how the “form” can influence the “substance” of a legal system.

2 "Financial Constitutions": A Difficult Compromise between Legal Certainty and the Need for Flexibility

While constitutional and legislative guarantees are fundamental for legal certainty and economic management, there is also a need for flexible adaptation to changes in the economic and financial context. Since responsibilities related to both revenues and expenditures tend to change over time, no “financial constitution” can be expected to remain permanent. It is therefore challenging to find a compromise between legal certainty and flexibility that establishes mechanisms that are capable of adjusting, from time to time, the system of fiscal relations.

The expression “financial constitution” comes from the German notion of the Finanzverfassung as an evolution of the concept of a “fiscal constitution” elaborated by James Buchanan and Richard Wagner, which specifically relates to the discipline of fiscal decisions in the US federal system. The concept refers both to the rules defining the financial relationships between the different levels of government and the rules on the allocation of the tax authority between national and the subnational governments.

With limited exceptions, financial relations in multilevel states are first settled in constitutional documents. Nonetheless, there are broad discrepancies within this common pattern.

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