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**Towards a comparative framework for  
intergovernmental relations: gleanings  
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# **Towards a comparative framework for intergovernmental relations: gleanings from two experiences**

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## **Abstract**

Despite a great amount of static and dynamic differences among the countries characterized by a relevant degree of territorial pluralism, the constant diffusion of *intergovernmental relations (IGR)* structures and devices (understood as cooperative relations among Executive branches) is a very notable data. The paper analyzes *Canada's* and *Spain's* IGR experiences stressing their analogies and pinpointing their differences in order to find the variegated, profound and specific reasons of their apparent success.

## **Key-words**

Intergovernmental relations, intergovernmental agreements, *Conferencias sectoriales*, Canada, Spain.

# Towards a comparative framework for intergovernmental relations:

## gleanings from two experiences\*

Marco Mazzearella\*

### 1. Introduction

*On method: terminology, fields and purposes of the research.*

Everyone can have a comparative worldwide outlook, rapid as well as superficial, on a large number of countries characterized by several kinds of division of powers among different territorial levels. We could refer, for instance, to “multilevel States”, or “multi-layered States”<sup>1</sup>, but both these locutions, for different reasons, appear a little ambiguous, so it seems to be favourable to speak about “compound States”<sup>2</sup> or “territorial pluralisms”<sup>3</sup>. It is not difficult to state a very wide diffusion of forms of *intergovernmental relationships*, but I will give a more limited meaning to this expression: not *all kinds of cooperative relations occurring among territorial different polities* that compose these legal orders<sup>4</sup>, but only the ones *provided by their respective Executive branches*, apart from any

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<sup>1</sup> As preferred by POIRIER J., *The functions of intergovernmental agreements: post-devolution concordats in a comparative perspective*, in *Public Law*, 2001, p. 139.

<sup>2</sup> See, *ex multis*, LUTHER J., *The search for a constitutional geography and historiography of Second Chambers*, in ID., PASSAGLIA P., TARCHI R., *A World of Second Chambers*, Milano, Giuffrè, 2006, pp. 3 ff.

<sup>3</sup> See, in the end, CARROZZA P., *I rapporti centro/periferia: federalismi, regionalismi e autonomie*, in ID., DI GIOVINE A., FERRARI G.F. (a cura di), *Diritto pubblico comparato*, Roma-Bari, Laterza, 2009, p. 763.

<sup>4</sup> This seems to be the meaning used by OPESKIN B., *Mechanism for intergovernmental relations in federations*, in *International Social Science Journal (ISSJ)*, 2001, 167, pp. 129 ff.: the Author, in fact, divides his lucid analysis of intergovernmental mechanisms on the basis of the three traditional

consideration on the nature of the used competences<sup>5</sup>. That is in acceptance of a broad and subjective notion of “Executive federalism”, typical of American scholars<sup>6</sup>, therefore in opposition to the meaning of the so-called *Vollzugsföderalismus*, i.e. that type of federalism in which the legislative competences are assigned to the centre, while the administration and execution of laws remain within the peripheral jurisdiction<sup>7</sup>. This approach tends to overcome the usual terminological distinction between Anglo-Saxon federal systems’ scholars - which would rather refer to “intergovernmental relations” - and the other scholars - more fond of expressions like “co-operation” *et similia*<sup>8</sup>. As a result, any further typology of intergovernmental connection (for instance, certain particular kinds of legislative powers, such as the Spanish “*legislación básica*”) can be certainly useful, but perhaps as context data only.

This phenomenon takes place by availing itself of an interesting variety of forms, but, at first sight, the most surprising result is its diffusion in spite of some sharp differences among constitutional frames, institutional structures and historical evolutions of these countries. Then, it above all stimulates the investigation of the possible reasons of the success (at least apparently) of this organisational and operational method, in spite of the various contexts which can be found in the world.

The research, still at its embryo stage, derives from the following impression: internal intergovernmental relations form a polyvalent pattern, capable of giving support to several, heterogeneous institutional dynamics. The main objective of this working paper is to build (and try to test) a criteria-framework to stimulate the initial steps of an analysis upon some of these institutional mechanisms, in order to discover which *profound reasons* (iridescent or not) are able to pool all of the

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Montesquieu’s branches in which it is possible to divide the powers he calls “governmental”. Nevertheless, it is clear that “Legislative mechanisms” are only a sort of appendix of the always pre-eminent Executive ones.

<sup>5</sup> The notion here used is widely approved by POIRIER J., (*supra*, note 1), p. 136.

<sup>6</sup> See, *ex multis*, CAMERON D., SIMEON R., *Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism*, in *Publius: The Journal of Federalism*, 32:2 (Spring 2002), p. 49.

<sup>7</sup> See CARROZZA P. (*supra*, note 3), pp. 790-791.

<sup>8</sup> As referred by POIRIER J., (*supra*, note 1), p. 136.

interested countries together into a sort of “intrastate federalism” (*rectius*, “intra-polity territorial pluralism”).

Methodologically, this implies the investigation of the practical usefulness of such an articulate pattern (and some of its important shades, as well) in a selected number of Countries, and in addition, the attempt to perceive the concrete impact of intergovernmental relations on policy-making processes.

First of all, I need to specify that some of my choices could appear a bit arbitrary, especially regarding the criteria used to select *the countries* to be considered. All of these methodological choices find their roots in the fact that this brief paper is a fragment of a larger work (which is in progress) concerning *comparative intergovernmental relations*: it is necessary to exclude many examples from the inquiry, so I prefer to focus upon two experiences. However, they are very relevant and interesting, mainly due to the fact that they belong to different “families” in more than one way: the intergovernmental systems taken into major consideration are Canada’s and Spain’s, although there are certainly plenty of experiences rich in history and influential scholars’ contributions, so likewise worthy of consideration in the following developments of my inquiry: first of all United States, Australia, Germany, Switzerland, Austria, but also Italy, Belgium and United Kingdom, and further experiences like Mexico, Argentina, Brazil, India and the Russian Federation).

Similar caveat have to be affirmed, on the one hand, regarding *the levels of government focused on*, which are mainly two, the so-called “national” level, which has various names (Federation, or State, *etc.*, depending on the traditional category of territorial pluralism), and the level of government which is just below (Province, *Comunidad Autónoma*, and so on): the increasing role (sometimes Constitution-based) played everywhere by various types of *municipalities* is not considered<sup>9</sup>. On the other hand, I will not take into consideration all the *types and scopes of public functions and activities considered*, but only the ones which are the closely related to some delicate constitutional issues (such as the constitutionally guaranteed vertical division of powers, as will be

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<sup>9</sup> For analogous choice and complaint, see POIRIER J., (*supra*, note 1), p. 135 and CAMERON D., SIMEON R. (*supra*, note 6), p. 69.

stressed further), despite the fact that all of us are conscious of the much larger spectrum of activities in which it is possible to observe phenomena of intergovernmental relations.

Having taken into account all of these options, it is not necessary to specify that the depth of the analysis cannot be absolute: there is no space, among the aims of this paper, for an investigation capable of entirely embracing the topics involved and their connected problems, so I will only focus on the relevant, basic characteristics of each legal system.

*On method: criteria of analysis.*

On a methodological level, the idea is to apply to a complex comparative stress to each experience, with the preliminary building of a kind of *framework*, by isolating certain relevant *dichotomies*, or simply *distinctive criteria*, drawn from legal and institutional contexts. The selection of these criteria is not so simple, and it is in theory very difficult to separate such criteria from a legal orders' analysis; the selection derives from the observation of such orders, and at the same time it is also its pre-eminent tool. In abstract, it should be the most important part of the whole theoretical elaboration, but looking at this paper it also appears to be the most implicit.

Here it is only necessary to form a hypothesis: in consistency with the purpose of seeking the variegated reasons behind this kaleidoscope pattern, the main path to follow seems to be the concrete aims pursued. Note that this element, together with the fields of intergovernmental cooperation (with a particular stress on the *legal typology of the public functions so exercised*) and the (constitutional) legal bases subtended, could embody *the three summits of a triangle*. As far as I am concerned, in fact, these three elements must be kept separated: on the one hand, there is not necessarily an exact correspondence between the fields of cooperation and the various constitutional duties which intergovernmental tools are used to satisfying (as can be clearly seen when having a look at the recent Italian experience<sup>10</sup>); on the other hand, not all episodes of cooperation are constitutional duties.

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<sup>10</sup> The Corte Costituzionale, in fact, is clearly oriented to deal with the different functions in a fungible way, notwithstanding the fact that the distribution criteria introduced within the Constitution in 2001 vary depending on the typology of the public functions distributed. In particular, the Corte tends to satisfy the *Regioni's* requirements to protect their legislative powers violated by the *Stato's* statute laws by guaranteeing them certain regulatory or administrative powers, with the ultimate aim to leave the central

The first step which allows us to discover a few clues about the *specific functions to be accomplished* seems to be the following: pinpointing the *identity of the involved public actors*. As a consequence, it appears that the most relevant dichotomy is “vertical relations” vs. “horizontal relations”<sup>11</sup>. Every intergovernmental episode and phenomenon analysed here, such as *committees* and *acts* (intended in very broadest meaning, regardless of their exact typology and nature), can join together politics all belonging to the same level of government (“horizontal” relations), or to more than one level (“vertical” relations). It is necessary to beware that frequently certain committees among Regions (or member States of Federations, and so on) are actually forums devoted to providing mutual confrontation in order to prepare a sort of “common front” in the prospect of further vertical dialogue: these are not examples of genuine horizontal relations, as they are “vertically-oriented”<sup>12</sup>.

In both cases, the relations can be *multilateral* (usually comprising all of the components in the involved level of government) as well as *bilateral*, depending on certain specific, institutional and historical variables<sup>13</sup>.

A third, relevant distinction concerns the specific, organisational method: the “tool-box of intergovernmental relations”<sup>14</sup> essentially contains *relations by acts* and *relations by organs*, which can be intended in two ways. *Relations by acts* always consist of various types of acts signed by the representatives of the different levels, such as *opinions*, or *conventions/concordats/accords/agreements/compacts (et similia)*; *relations by organs*, instead,

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Legislature free to determine the “first step” of a great variety of policies and to provide the *Regioni* with only a sort of implementing and subsequent role, non-constantly following the constitutional distribution of powers.

<sup>11</sup> See CECCHERINI E., *Le relazioni intergovernative in Austria, Belgio, Germania e Spagna*, 2006, in *Amministrare*, 1-2/2006, pp. 260 ff..

<sup>12</sup> See CARROZZA P. (*supra*, note 3), pp. 799-800, although with reference to the U.S. experience of the National Governors’ Association.

<sup>13</sup> See POIRIER J., (*supra*, note 1), pp. 135 ff., whose analysis, just concerning *the functions* of these instruments, starts exactly from this distinction, asserted to be the first to be taken into consideration.

<sup>14</sup> See POIRIER J., (*supra*, note 1), p. 136.

simply indicate organs formed by the cooperating polities, regardless of the activity produced<sup>15</sup>. Nevertheless this second type is differently configured by other scholars, as it can also consist of common organs formalized as partnerships whose role it is to carry out their own specific functions: the decision-making entities<sup>16</sup> are only involved in the first part of the process (the selection of the components of the joint organ), then these organs are free to carry out their solid attributed legal competences on the basis of the majority principle<sup>17</sup>. Here it is also important not to rely on the mere surface: plenty of examples of apparent “organic” solutions hide real “acts” solutions, because these committees are often simply places of dialogue (although institutionalized), where acts that are expression of the political contributions from the participant polities are produced.

Obviously intergovernmental relations must also be analyzed by following other criteria; but the three above-mentioned principal lines of classification act as a guide for the *essential framework*, thanks to the fact that they are more easily set up as dichotomies. Further features to be used in order to implement our “matrix” could be the following (dichotomies, where existing, are the result of a simplification and do not harm the possibility of mixtures):

- the *concrete fields of activity* and *legal typology of the functions exercised*;
- the *unitary vs. sectorial* way of treating the political issues to be faced by cooperation;
- the *political vs. technical* pre-eminent tone of committees’ composition or acts’ issues;
- the *level of formalisation*, i.e. the *legal status* of cooperation and of its results (*constitutional consideration*, both implicit and explicit; legal and political *procedural framework*; *compulsory vs. voluntary* use of the cooperation tools; *legal vs. merely political effect* of the decisions; ensuing *judicial protection* for each cooperating party);

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<sup>15</sup> CECCHERINI E., *I rapporti tra Federazione e Province in Canada: l’esperienza delle relazioni intergovernative*, in *Diritto pubblico comparato ed europeo*, 2/2002, p. 672.

<sup>16</sup> This incisive expression is borrowed from POIRIER J., (*supra*, note 1), p. 135.

<sup>17</sup> See, over all, DESIDERI C., TORCHIA L., *I raccordi tra Stato e Regioni. Un’indagine per casi su organi e procedimenti*, Milano, Giuffrè, 1986, pp. 111 ff. and AZZENA A., *Conferenze Stato-Autonomie territoriali*, in *Enc. dir., Agg. Vol. III*, 1999, p. 440.

- the *concrete impact* of cooperation outcomes on the enforced policies.

This framework will be further implemented, in **Paragraph 4**, with elements which do not directly refer to intergovernmental relations themselves, but which are inherent to the whole constitutional and institutional context.

*Subsequent structure of the paper.*

**Paragraphs 2 and 3** constitute only a primarily descriptive component, but it is a bit critical as well: I will give a concise yet complete explanation of *the most important forms expressed by intergovernmental connections* in each chosen legal order. I will proceed in a vertical way, that is *country by country*, although following the characteristics of the intergovernmental relations listed above, by first using the *three minimal dichotomies* seen above, and then the *remaining features*.

**Paragraph 4**, therefore, will be dedicated to an attempt to search for *the profound reasons which are at the root of each intergovernmental relationships' system*, crossing the offered descriptions with some fundamental elements concerning each system. I will cut the concrete intergovernmental experiences horizontally, by introducing certain *hypothetically relevant context elements* into the criteria-framework sketched above. In particular, these institutional (and more generally constitutional) data must be used to intercept the previous criteria, in order to discover and point out the expected and the concrete effects which each institutional variable has. Theoretically, some relevant elements could be the following:

- the presence, at the central level, of a *Second Chamber* devoted to representing the second-level territorial interests within the national policy making process;
- the traditional category of *territorial pluralistic patterns* (essentially, *federal* vs. non-*federal*);
- the static and dynamic *vertical distribution of powers, and its evolution in praxis and case-law*;

- the form of government of each cooperating polity (i.e. the horizontal division of powers within each of them), from both static and dynamic points of view, with particular regard to the centre;
- the political party system and its national or territorial dimension<sup>18</sup>;
- the fiscal drain and expenditure regime;
- the tone of asymmetries prior to and after cooperation;
- further features concerning more generally the constitutional asset (e.g. the concrete level of constitutional rigid tone) and the entire legal system (e.g. common vs. continental law systems)<sup>19</sup>;
- the historical evolution of the system, especially concerning the dynamics of the passage from previous different assets to the present ones;
- the pressure exercised by the evolving international context (e.g. globalization, European integration process, etc.).

Clearly, even if not all the elements worthy to be considered can be sufficiently investigated, the globally resulting framework is very broad, so not all of its elements will be immediately relevant in order to anatomize each legal order here chosen.

This third part will result also devoted to the outcomes collection, stressing the ones which could merit to drive further and more thorough comparative inquiries.

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<sup>18</sup> This aspect is widely unfolded in MEEKISON, J.P., *Intergovernmental Relations in Federal Countries* (IGR), Forum of Federations - Ottawa, Canada, August 2002; see also RUGGIU I., *Contro la Camera delle Regioni. Istituzioni e prassi della rappresentanza territoriale*, Napoli, Jovene, 2006, p. 257, with a rapid reference to the Spanish political party system and BIFULCO R., *Partiti politici e autonomie territoriali*, XXIII Convegno dell'Associazione italiana dei costituzionalisti su *Partiti politici e società civile a sessant'anni dall'entrata in vigore della Costituzione*, Alessandria, 18 novembre 2008, draft version, available at [http://www.associazionedeicostituzionalisti.it/materiali/convegni/aic200810/BIFULCO\\_AIC2008.pdf](http://www.associazionedeicostituzionalisti.it/materiali/convegni/aic200810/BIFULCO_AIC2008.pdf).

<sup>19</sup> See FLEINER T., *Different "federalisms" according to the different legal systems: common law and continental law*, intervention at *The Federal Idea: A Conference in Honour of Ronald L. Watts* on October 18 - 20, 2007, at the Donald Gordon Conference Centre in Kingston, Ontario, available at <http://www.queensu.ca/iigr/conf/Watts/papers/Fleiner.pdf>. This variable is one of the most difficult to evaluate and assess, so in this paper it is merely mentioned.

## 2. *Overview on the Canadian system of intergovernmental relations.*

The experience of intergovernmental relations in Canada shows a great number of instruments and episodes of “interstate federalism”<sup>20</sup>: nowadays there is a wide range of heterogeneous devices, gradually stratified starting from 1867<sup>21</sup>. So, the system surely deserves to be considered, thanks to the presence of nearly the entire spectrum of possible Executive federalism solutions; moreover, taken into account its long-lasting experience, it can absolutely be considered the native land of intergovernmental bodies<sup>22</sup>.

At first, we must notice both a **multilateral** and **bilateral** cooperation, although it does not deserve the degree of our *summa divisio*, as the latter appears strongly subordinate to the other, as will be clarified later on in this paper.

### *Multilateral vertical relations.*

It is possible to start with **vertical relations** (“FPT”, in jargon; horizontal relations, therefore, are denoted as “PT”<sup>23</sup>), a massively multi-shaped field we can further divide, in accordance to the distinction explained above, starting by describing the **relations by acts**.

The *First Ministers’ Conference* (FMC) is probably the most ancient intergovernmental committee in the world, as it is commonly considered as the direct descendent of the *Dominion-Provincial Conference* known to have taken place for the first time in 1867<sup>24</sup>.

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<sup>20</sup> See, *ex multis*, CECCHERINI E., (*supra*, note 15), p. 683.

<sup>21</sup> For a summary of the Canadian intergovernmental relations system historical evolution, see CAMERON D., SIMEON R., (*supra*, note 6), pp. 50-54; see also RUGGIU I., (*supra*, note 18), pp. 236-241 and ZORZI GIUSTINIANI A., *Competenze legislative e federalismo fiscale in sei ordinamenti liberaldemocratici*, in *Quaderni costituzionali*, 1/1999, pp. 48 ff..

<sup>22</sup> See RUGGIU I., *Il sistema delle Conferenze nel diritto comparato*, in BARBERA A., GIUPPONI T.F., *La prassi degli organi costituzionali*, Bononia University Press, Bologna, 2008, p. 462.

<sup>23</sup> See CAMERON D., SIMEON R., (*supra*, note 6), p. 55; obviously, “P” and “T” correspond respectively to “Provincial” and “Territorial”.

Joining together, generally once a year, the First Ministers of both levels (the Federation; the ten Provinces and the three Territories), this *main FPT Institution*<sup>25</sup> occupies the top level in a scale of intergovernmental arrangements going from the most political to the most administrative and technical<sup>26</sup>. It reached the zenith of its success between the 1960s and the 1980s, a period in which the First Ministers usually were accompanied by “phalanxes of ministers and officials”<sup>27</sup>. But its unlucky reception by public opinion (that is the famous polemic against a system consisting of “11 white men in a suit” which occurred between the 1980s and 1990s<sup>28</sup>) brought about a change. Since 1991 the longstanding ceremonious Conferences have left their place to simpler *First Ministers’ Meetings*, less formal and transparent (thus avoiding the publicizing of their results) and sometimes even without any public agenda issuance<sup>29</sup>. Anyway, a forum which is considered by its advocates as the “pinnacle of the intergovernmental system”<sup>30</sup> is the ideal place to draft and draw up certain general *intergovernmental agreements* regarding broad initiatives concerning most of the policy areas, and especially *framework agreements*, to be implemented by means of further *sub-agreements*, which can either be multilateral or bilateral (see below).

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<sup>24</sup> See CANADIAN INTERGOVERNMENTAL CONFERENCE SECRETARIAT, *Premiers’ Conference 1887-2002*, 2003, I, available at [http://www.scics.gc.ca/pubs/premiers\\_report\\_e.pdf](http://www.scics.gc.ca/pubs/premiers_report_e.pdf); RUGGIU I., (*supra*, note 18), p. 236; RUGGIU I., (*supra*, note 22), p. 462.

<sup>25</sup> So qualified by JOHNS C.M., O’REILLY P.L., INWOOD G.J., *Intergovernmental Innovation and the Administrative State in Canada*, in *Governance: An International Journal of Policy, Administration, and Institutions*, 4/2006, October, p. 632, together with a few of *joint FPT agencies*.

<sup>26</sup> For an exhaustive panorama which is exposed following just that criterion, see JOHNS C.M., O’REILLY P.L., INWOOD G.J., (*supra*, note 25), pp. 630 ff.. The Authors distinguish three levels of intergovernmental relations: one joining together (at least) Ministers, another (called “IGR”) concerning administrative officials belonging to intergovernmental ministries and central agencies, and lastly a third level (called “IGM”) composed by arrangements occurring among members of the administration interacting with one other by sector.

<sup>27</sup> See CAMERON D., SIMEON R., (*supra*, note 6), p. 61.

<sup>28</sup> See RUGGIU I., (*supra*, note 18), p. 240.

<sup>29</sup> See CANADIAN INTERGOVERNMENTAL CONFERENCE SECRETARIAT, *First Ministers’ Conference 1906-2004*, 2005, 94 ff., available at [http://www.scics.gc.ca/pubs/fmp\\_e.pdf](http://www.scics.gc.ca/pubs/fmp_e.pdf), which, however, recognizes some essential information about almost a century of meetings; see also CAMERON D., SIMEON R., (*supra*, note 6), p. 61 and JOHNS C.M., O’REILLY P.L., INWOOD G.J., (*supra*, note 25), p. 632, who even conceal mainly the Conferences, mentioning briefly the Meetings only.

<sup>30</sup> So CAMERON D., SIMEON R., (*supra*, note 6), p. 62.

Just below the highest level, we can find the family of the *ministerial meetings*, which are becoming more and more important. Their level of institutionalization varies a little (just over 20 of them are institutionalized<sup>31</sup>), so the expression used above seems to be generic enough to comprise all of them, without any sort of ambiguity<sup>32</sup>, although a significantly high number of other denominations still exist<sup>33</sup>. These bodies are formed by the ‘Ministers Responsible’ for the two levels (depending on the topics discussed) and accomplish any mandate given to them by the First Ministers<sup>34</sup>; the meetings are co-chaired by both levels, and this is an important sign of their equality<sup>35</sup>.

In addition to each ministerial meeting, there are many “*deputy minister committees*”, “*assistant deputy minister committees*” and “*technical subcommittees*”<sup>36</sup>, structures all sited at the hedge of this typology<sup>37</sup>. These committees join political weight and accountability, specialization, ability to interact with groups of interest (the latter usually complain to be carefully excluded both from the higher and from the lower levels<sup>38</sup>) and an ever-improving day-to-day ability to react to problems<sup>39</sup>: these factors have made the ministerial meetings “the real workhorses of the system”<sup>40</sup>.

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<sup>31</sup> See JOHNS C.M., O'REILLY P.L., INWOOD G.J., (*supra*, note 25), p. 636.

<sup>32</sup> So CAMERON D., SIMEON R., (*supra*, note 6), p. 62 and the official web site of the Intergovernmental Affairs (IGA) at the Privy Council Office of Canada (<http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&page=relations&doc=context/context-eng.htm>).

<sup>33</sup> Besides “*Meeting*”, the most frequent, it is possible to find “*Conference*” and “*Council*”, but also “*Forum*”, “*Committee*” and “*Summit*”, also variously combined together. A sufficient sample of this plurality can be observed leafing through the list of the three last years meetings served by the *Canadian Intergovernmental Conference Secretariat (CICS)*: see [http://www.scics.gc.ca/confer07\\_e.html](http://www.scics.gc.ca/confer07_e.html), [http://www.scics.gc.ca/confer08\\_e.html](http://www.scics.gc.ca/confer08_e.html) and [http://www.scics.gc.ca/confer09\\_e.html](http://www.scics.gc.ca/confer09_e.html).

<sup>34</sup> See JOHNS C.M., O'REILLY P.L., INWOOD G.J., (*supra*, note 25), p. 636.

<sup>35</sup> See CAMERON D., SIMEON R., (*supra*, note 6), p. 63.

<sup>36</sup> See JOHNS C.M., O'REILLY P.L., INWOOD G.J., (*supra*, note 25), pp. 636-637.

<sup>37</sup> See ADAM M.-A., *The creation of the Council of the Federation*, in *Democracy and Federalism Series 2005 (I)*, Institute of Intergovernmental Relations (IIGR), School of Policy Studies., Queen's University, available at <http://www.queensu.ca/iigr/working/Interdependence/Adam2005.pdf>, p. 1 refers that in 2003 took place 117 “federal and provincial-territorial conferences”, not including senior nor lower ranking, nor bilateral, nor regional forums.

<sup>38</sup> See CAMERON D., SIMEON R., (*supra*, note 6), p. 67.

<sup>39</sup> See a sample list of their meetings (focused on the 2009 ones served by the *Canadian Intergovernmental Conference Secretariat (CICS)*) at [http://www.scics.gc.ca/confer09\\_e.html](http://www.scics.gc.ca/confer09_e.html).

Ministerial meetings join ministers in charge of “social-policy renewal, forestry, transportation, education, and the environment”<sup>41</sup>, but also ministers concerned with health, finance, agriculture and trade<sup>42</sup>. Their activity consist of drawing up and publishing position papers and in elaborating strategies concerning their own policy areas, but first of all they represent the most important bodies in which the Ministers forge the greatest tools of Canadian territorial dialogue, the *sectorial intergovernmental agreements*.

Now it is possible to focus a bit of attention on this fundamental and versatile tool, the *intergovernmental agreements*: they are the ultimate objective of the “light” organizations described so far, considering that there is a total of 1,000-1,500 agreements in force as of 5 years ago (horizontal agreements included)<sup>43</sup>.

The intergovernmental agreements try to reach some general and indispensable aims, recognizable as “harmoniz[ing] policy”, “solv[ing] problems that require joint initiative”<sup>44</sup> and “minimizing duplication and overlapping in order to achieve greater efficiency and cost saving”<sup>45</sup>. These goals deserve to be pursued in every field of activity, and consequently we can find, in particular, *partnership agreements* (a type which does not consist of programs and service delivery, but of shared objectives, decision making and costs)<sup>46</sup>: they are stipulated in shared policy areas (such

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<sup>40</sup> So CAMERON D., SIMEON R., (*supra*, note 6), p. 62.

<sup>41</sup> *Ibidem*; the Authors indicate the *Provincial/Territorial Council on Social Policy Renewal* as one of the most active ministerial Meetings. JOHNS C.M., O'REILLY P.L., INWOOD G.J., (*supra*, note 25), pp. 637-638 mention the *Canadian Council of Ministers of the Environment (CCME)*, the *Agreement on Internal Trade (AIT) Secretariat* and a “FPT conference system of ministers” in health.

<sup>42</sup> See JOHNS C.M., O'REILLY P.L., INWOOD G.J., (*supra*, note 25), p. 636; CAMERON D., SIMEON R., (*supra*, note 6), pp. 55 ff..

<sup>43</sup> See JOHNS C.M., O'REILLY P.L., INWOOD G.J., (*supra*, note 25), p. 640.

<sup>44</sup> *Ibidem*.

<sup>45</sup> So CAMERON D., SIMEON R., (*supra*, note 6), p. 63.

<sup>46</sup> See JOHNS C.M., O'REILLY P.L., INWOOD G.J., (*supra*, note 25), p. 639.

as agriculture and immigration) but also and increasingly in fields of provincial exclusive jurisdiction (e.g. health, education and natural resources)<sup>47</sup>.

Apart from relations with the aboriginal communities<sup>48</sup>, which always have as counterparties both levels of Canadian public authorities, so escaping from intergovernmental relations in the strict meaning of the word, two more very relevant areas deserve to be remembered. First, the case of international relations on foreign trade (overall NAFTA and GATT, then WTO), which are subject to dense relations in both the “ascendant” and “descendent” phases, although it is a matter pertaining to the federal exclusive jurisdiction<sup>49</sup>. But this is only an example of how the fields of public intervention as defined in the Constitutions can “expand” a lot under the pressure of new economic and historical trends, with a resulting overlapping; as a consequence, the simple exercise, by any territorial entity, of its own power has more and more unavoidable effects on the jurisdictions of the other territorial levels.

Constitutional matters represent our second most important group of fields which can help us to understand the reasons for the success of these instruments. As it is known, intergovernmental vertical phenomena are strongly and perhaps primarily linked to the particular constitutional evolution of the Canadian system, widely known as a “constitutional odyssey” (Peter Russell)<sup>50</sup>. The fundamental role, sheltered by a *constitutional convention*, of the FPT dialogue as the very first step of the Canadian constituent phase is recognized<sup>51</sup>, and the same has to be said about every attempt to further intervene on constitutional matters<sup>52</sup>; but, especially since the failures of Meech Lake City

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<sup>47</sup> See JOHNS C.M., O'REILLY P.L., INWOOD G.J., (*supra*, note 25), p. 640.

<sup>48</sup> Mentioned by CECCHERINI E., (*supra*, note 15), pp. 680-681.

<sup>49</sup> *Ibidem*.

<sup>50</sup> See, *ex multis*, MEEKISON J.P., *Council of the Federation: an idea whose time has come*, in *Constructive and Co-operative Federalism?*, 2003 (9), Institute of Intergovernmental Relations (IIGR), Queen's University; Institute for Research on Public Policy (IRPP), Montreal, available at <http://www.irpp.org/miscpubs/archive/federation/meekison.pdf>, p. 4.

<sup>51</sup> See *Reference re a Resolution to amend the Constitution* (1981), although it set it is sufficient even a “substantial degree of provincial consent” only, instead of unanimity of them.

<sup>52</sup> For a brief reconstruction of the historical events, see CECCHERINI E., (*supra*, note 15), pp. 679-680.

(1987) and Charlottetown (1992), “the collaborative model is also an alternative to constitutional change”<sup>53</sup>. Any progress, or any change, concerning *economic union* (AIT, 1994), *social union* (SUFA, 1999), *federal spending power* and *updated powers adjudication* slid down the Olympus of constitutional forums towards inter-state negotiation arenas, as intergovernmental agreements were the needed “non-constitutional solutions to constitutional problems”<sup>54</sup>, also in the prospective of avoiding dealing with certain constitutional difficult problems<sup>55</sup>.

We have spoken about the fundamental role of FPT dialogue in both procedures (constitutional reform and intergovernmental agreement alternative), so further elements must convince Provinces and Territories to prefer such a dialogue. Surely, an important role has to be assigned to the “closed-doors” approach<sup>56</sup> which has been followed more and more by the FPT, as we already mentioned when speaking about the change-over from the First Ministers’ Conference to the Meetings: there could even be great development in welfare and economy, but without any publicity, allowing the parties to be freer from public opinion pressure. But the very key we are looking for is elsewhere: it is the *juridical status* of intergovernmental “*agreements*”, or “*accords*”, or “*declarations*”. The scholars unanimously shape these acts as not legally binding, thus remaining mere political settlements of interests which every party always has the right to breach<sup>57</sup>. This way it is possible to accept even asymmetrical solutions that would be, on the contrary, absolutely intolerable, and therefore rejected, if formalized into constitutional amendments<sup>58</sup>. Any agreement which would

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<sup>53</sup> So CAMERON D., SIMEON R., (*supra*, note 6), p. 55.

<sup>54</sup> So POIRIER J., (*supra*, note 1), p. 140.

<sup>55</sup> *Ibidem*.

<sup>56</sup> So CAMERON D., SIMEON R., (*supra*, note 6), p. 57.

<sup>57</sup> See CAMERON D., SIMEON R., (*supra*, note 6), p. 55; JOHNS C.M., O’REILLY P.L., INWOOD G.J., (*supra*, note 25), p. 636; CECCHERINI E., (*supra*, note 15), p. 684; BONFIGLIO S., *Le Seconde Camere nei sistemi federali. Può il sistema delle conferenze prospettarsi come soluzione alternativa alla Camera delle autonomie territoriali?*, in *Diritto pubblico comparato ed europeo*, 4/2007, p. 1561; for a critical view, see POIRIER J., *Une source paradoxale du droit constitutionnel canadien: les ententes intergouvernementales*, in *Revue Québécoise De Droit Constitutionnel*, 1/2008 (*L’evoluzione du droit constitutionnel au Canada et au Québec: un retour aux sources*), available at [http://www.aqdc.org/volumes/pdf/poirier-une\\_source\\_paradoxale.pdf](http://www.aqdc.org/volumes/pdf/poirier-une_source_paradoxale.pdf).

<sup>58</sup> See POIRIER J., (*supra*, note 1), p. 140, who presents the example of some recent vertical bilateral agreement on labour.

require any legal modifications will be enshrined in both legal systems, after having been presented to the respective legislatures, which can amend the agreement partially or even completely<sup>59</sup>. “If this appears to deprive the Agreement of binding effect or mutuality, which are both features of ordinary contracts, it must be remembered that *this is not an ordinary contract but an agreement between governments*”: this was the fundamental *punctum juris* stated by the Supreme Court (*Reference Re Canada assistance Plan*, 1991). This solution is very coherent with the historical role agreements always played, but it allows us to notice deep tension which harshly divides democratic sovereignty of Parliament, so far winning, and the logic of cooperation, which would imply a mutual accountability under the aegis of the common Constitutional pact, especially in Federal systems<sup>60</sup>. This principle cannot apply to the broad “grey area” of public activity carried out at the Executive-administrative level only, not affecting Parliamentary prerogatives; but, apart from that, this principle seems to suffer from some derogations only when the final solutions that are in contrast with the agreement represent a breach of the Constitution under other aspects. In particular, we can mention the *Finlay v. Canada (Minister of Finance)* case (1986, with a second episode in 1993): it clearly shows the perspective of the Court when it clarifies that FTP questions usually involve “*issues that are not appropriate for judicial determination, but the particular issues of provincial non-compliance raised by the respondent’s statement of claim are questions of law and as such clearly justiciable*”. In other words, the Provincial diversion in contrast with a fundamental right constitutionally adjudicated to the claimant is a case of application of the famous idea subtended to article 16 of *Déclaration des droits de l’homme et du citoyen* (1789). The vertical separation of powers itself is not, up to now, a reason to apply the *pacta sunt servanda* principle. For a complete confirmation of this position, it is possible to mention the assumption affirmed by the Supreme Court itself in 1991 (*Reference Re Canada Assistance Plan*): the Federation can legitimately breach an intergovernmental agreement in force

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<sup>59</sup> See CAMERON D., SIMEON R., (*supra*, note 6), p. 62; this implies therefore the expulsion of Legislatures from the very political core of the negotiation, in those cases in which, at the same time, the alternative duty (to repeal the agreement completely) appears too heavy, but to open again the negotiations with the Provinces appears too difficult as well: see CECCHERINI E., (*supra*, note 15), p. 677.

<sup>60</sup> See ELAZAR D.J., *Federalismo: unire autogoverno e governo condiviso*, in LORETONI A., VARSORI A., *Unire e dividere, unire o dividere. Gli Stati tra integrazione e secessione*, Firenze, Aida, p. 14.

(which compels it to supply the Provinces until a defined amount) by deciding unilaterally to raise its own financing, because the Parliamentary sovereignty cannot be bound by any previous compact occurred among the Executive branch, notwithstanding that the promoter of the legislative initiative was the Executive itself<sup>61</sup>.

Moving on to some examples of **relations by organs**, we can preliminarily state that in this area the Canadian peculiarity (which is to involve nearly all levels of officials and other administrative operators in the intergovernmental matrix) reaches its completion. At first, it is possible to affirm the abstract relevance, within this category, of the *joint FPT agencies*, although they are more theoretical than practical tools. These can be defined as “institutions established by both levels of government either multilaterally or bilaterally, which have joint accountability relationships to FPT ministers, cabinets, or legislatures, and are resourced and staffed jointly”<sup>62</sup>; they have been instituted in a very low number, despite having usually been previewed by certain statutes and despite their suitability to work within shared jurisdictions. As a result, it is necessary to broaden the notion in order to be able to include a couple of historical examples<sup>63</sup>.

A further effort that is necessary in order to face the permanent (and increasing) need to build joint policies by means of joint administrative organs is represented by the recent attempt to rely on *restructured federal Agencies*, achieved by not incorporating any Provincial delegates as principle components, but by only incorporating intergovernmental arrangements<sup>64</sup>. Their ensuing strong federal

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<sup>61</sup> For a summary, see PICIOCCHI P., *Le relazioni finanziarie intergovernative in Canada: tra regole costituzionali e prassi cooperative*, in *Diritto pubblico comparato ed europeo*, 2007, fasc. 3, p. 1248 ff.

<sup>62</sup> So JOHNS C.M., O'REILLY P.L., INWOOD G.J., (*supra*, note 25), p. 632.

<sup>63</sup> JOHNS C.M., O'REILLY P.L., INWOOD G.J., (*supra*, note 25), pp. 632-633 refer to the *Canadian Institute of Health Information (CIHI)* and the recently created *Health Council of Canada (HCC)*, hinting to some others bodies.

<sup>64</sup> See JOHNS C.M., O'REILLY P.L., INWOOD G.J., (*supra*, note 25), p. 634 refer to the following cases: the *Canada Food Inspection Agency* (created in 1996 with the ambitious perspective to make it a real national agency), the *Canada Pension Plan Investment Board* (1997) and the *Canada Customs and Revenue Agency* (1999, now the *Canada Revenue Agency*): these last two agencies account to the Federal Minister of finance, in consultation with peripheral homologues by means of the duty to ask a Provincial representative board for advice.

dominion of these agencies does not make them very attractive to the Provinces, and this is symmetrical to the federal unwillingness to always take the FMCs seriously<sup>65</sup>.

But the real “cornerstone of intergovernmental administrative relations”<sup>66</sup> stands elsewhere: it is formed by a complex cluster of *Central Agencies with intergovernmental mandates*<sup>67</sup> and several sectorial *intergovernmental committees*<sup>68</sup> and *intergovernmental Ministries*. The latter are Ministries, instituted by the Federation and by each Province or Territory (with the only exception of Ontario<sup>69</sup>) with the specific (but deeply horizontal) function of ensuring a constant interface between the other Ministries (to be coordinated as well) and all the arenas of intergovernmental interaction.

#### *Multilateral horizontal relations.*

Remaining within the field of **multilateral relations**, we now have to explain a few things on **horizontality**.

Similarly to the vertical relations, there are horizontal relations not involving the Premiers, but only the ministers, as demonstrated by the flourishing development of *Provincial-Territorial ministerial councils*<sup>70</sup>. Anyway, we also must mention some multilateral forums at the Premiers’ level, mostly operating since the 1970s, which are multilateral without joining together all the entities, but only certain adjacent Provinces and Territories: this is the case of the *Western Premier Conference* (British Columbia, Alberta, Saskatchewan, Manitoba, Northwest Territories, Yukon and

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<sup>65</sup> As argued by CAMERON D., SIMEON R., (*supra*, note 6), p. 62.

<sup>66</sup> So JOHNS C.M., O’REILLY P.L., INWOOD G.J., (*supra*, note 25), p. 635.

<sup>67</sup> This tool differs from both the *joint FPT agencies* (which are, or better would be, bodies belonging to both levels’ administrative block, while these ones belong to the Federation only but carry out mandates born into intergovernmental cradles) and the *restructured federal Agencies* (which are Federal organs, but they are previously charged of further aims).

<sup>68</sup> The difference from the “*deputy minister committees*”, likewise specialized, is as much evident: both components (IGR level) and activity are coherent to the fact that the second are forums of policy building, while the first are organs of direct administrative supply, operating along the policy lines outlined by the other ones.

<sup>69</sup> See [http://www.scics.gc.ca/govts\\_e.html](http://www.scics.gc.ca/govts_e.html) and [http://www.ontario.ca/en/your\\_government/004974](http://www.ontario.ca/en/your_government/004974).

<sup>70</sup> See CAMERON D., SIMEON R., (*supra*, note 6), p. 62.

Nunavut) on the one hand; the *Council of Atlantic Premiers (CAP)*, the *Council of Maritime Premiers (CMP)* and the *Conference of New England Governors and Eastern Canadian Premiers (NEG/ECP)* (all formed by New Brunswick, Newfoundland and Labrador, Nova Scotia and Prince Edward Island) on the other<sup>71</sup>. Notice, anyway, the with the important exceptions of Ontario and Québec, which, overall, are the richest and most populated Provinces.

Anyway, the first relevant institution is the *Annual Premiers' Conference*: under the strong influence of Québec, it was founded in December 1960, just a few months after Lesage's Liberal Party victory in the Provincial elections; it represents the institutionalization of meetings held since 1887. During the 1960s it was "little more than a summer retreat for premiers and their families"<sup>72</sup>, but in the following decades its importance grew, in proportion to FMC's progressive decline.

Under Québec's pressure once again, at the end (or simply at the apogee) of a long and uneven path through several attempts to reform a broadly unsatisfactory system<sup>73</sup>, in 2003 the APC turned itself into the *Council of the Federation (COF)*, a sort of permanent and more institutionalized version of the APC itself<sup>74</sup>, and absorbed two important formerly existing bodies (the *Premiers' Council on Canadian Health Awareness* and the *Secretariat for Information and Co-operation on*

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<sup>71</sup> This sort of "trio" outlets significantly a traditional stubborn preference even for only a faded idea of a sector specialization rather than political unitary vision in the context of unique organs: here they are three distinct councils (CAP is the youngest, as it was born in May, 2000) formed by the same four Provincial Premiers, which are charged to deal with matters not identical, but not impossible to melt together too, and which are even served by an unique web site (<http://www.cap-cpma.ca>); but each of these bodies have all the same achieved its own specific (as well as little incisive) name, in spite of the evident difficulty to find so many expressions.

<sup>72</sup> So CAMERON D., SIMEON R., (*supra*, note 6), p. 61.

<sup>73</sup> See MEEKISON J.P., (*supra*, note 50) for a complete and critical outlook to the proposals' long evolution.

<sup>74</sup> This institutional development has been deeply focused since before its appearance (October 2003) by some of the most important experts on federalism (D.M. BROWN, R.L. WATTS, A. BURELLE, H. TELFORD, H. LAZAR, R. GIBBINS, C. RYAN, G.P. MARCHILDON, J.P. MEEKISON, A. NOËL, F. ABELE, M.L. PRINCE, B. RAE, T. KENT, T. COURCHENE, C. RYAN) on the initiative of the Institute of Intergovernmental Relations (IIGR) at Queen's University and the Institute for Research on Public Policy (irpp.org) in Montreal. See "2003 Special Series on the Council of the Federation", Institute of Intergovernmental Relations (IIGR) at Queen's University; Institute for Research on Public Policy (IRPP), Montreal, available at <http://www.queensu.ca/iigr/working/CouncilFederation/FedEN.html> and <http://www.queensu.ca/iigr/working/CouncilFederation/FedFR.html>

*Fiscal Imbalance*)<sup>75</sup>. Its promoter's original idea was, withal, to create a new FMC more inclined to giving itself some decision-making rules<sup>76</sup>. The objective was not exactly to overcome (or at least to weaken) the traditional "asterisk/footnote federalism"<sup>77</sup>, but, on the contrary, to break a highly fragmented and episodic system: the idea was to strengthen the efficacy of the already existing mechanisms to reach a "common understanding among provinces and territories", with the ultimate aim of "improv[ing] the latter's position *vis-à-vis* Ottawa"<sup>78</sup>. The COF still shows this characteristic (not only in its name, but first of all) in its expressly stated<sup>79</sup> purposes, which a scholar has summarised as follows: the aim of the COF is to resemble a lobby as much as possible, with the primary aim to drain more and more funds from the Centre<sup>80</sup>. Anyway, it undoubtedly represents a typical horizontal body whose objectives and activities are mostly vertically-oriented. It is very interesting to notice that the same phenomenon takes place, for instance, in the relations between the *Council of Atlantic Premiers (CAP)*, seen above, and the APC: as a consequence, these four Provinces operate within a series of different bodies all comprised in a sort of functional sequence starting from their own "domestic" horizontal Conference towards the all-inclusive PT Conference, and then towards the interface with the centre (*CAP*→*APC*→*COF*)<sup>81</sup>.

These horizontal political laboratories first of all deal with issues mainly which fall within Provincial jurisdiction, but also deal with border-line issues, not only in view of the preparation of "a

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<sup>75</sup> *Council of the Federation Founding Agreement*, December 5, 2003, articles 18 and 19.

<sup>76</sup> See MEEKISON J.P., (*supra*, note 50), p. 3.

<sup>77</sup> See RUGGIU I., (*supra*, note 18), p. 242. This expression gushed out from the almost constant presence, in the text of intergovernmental agreements, of sentences like "this agreements does not applies to Québec", in spite of its presence to all the previous phases of the negotiation, as testified by CAMERON D., SIMEON R., (*supra*, note 6), p. 63.

<sup>78</sup> So ADAM M.-A., (*supra*, note 37), p. 2.

<sup>79</sup> *Council of the Federation Founding Agreement*, December 5, 2003, article 4.

<sup>80</sup> See BURÈLLE A., *The Council of the Federation: From a Defensive to a Partnership Approach*, in *Constructive and Co-operative Federalism? 2003 (3 English)*, Institute of Intergovernmental Relations (IIGR), Queen's University; Institute for Research on Public Policy (IRPP) Montreal, available at <http://www.irpp.org/miscpubs/archive/federation/burelle.pdf>, p. 6.

<sup>81</sup> See article 1.2.1 of the *Memorandum of Understanding Establishing the Council of Atlantic Premiers* of 15<sup>th</sup> May, 2000.

common front”<sup>82</sup> to face Ottawa, as we have just seen, but also in view of the search for certain solutions capable of *avoiding any federal intervention*. This represents the fundamental field of standards, especially in welfare fields such as education, labour and health care, and it is clear that in a self-calling “federal” Constitutional system (yet driven by certain provisions which deliver an inherently centripetal trend) some asymmetries legitimate the federal enticements towards activism<sup>83</sup>. It is true that, from the general point of view of the Provinces, the lack or failure of horizontal cooperation (autonomy as self-government, to some extent) can be remedied by vertical intergovernmental relations (autonomy as shared-government)<sup>84</sup>, before arriving at the need for unilateral federal initiative: “more than other federation, Canada relies on intergovernmental negotiation to help resolve political differences”<sup>85</sup>. But the “front” is more jagged than it might appear, as some existing differences are at the root of the long-lasting “footnote” trends seen above: in particular, Québec’s position is to totally refuse standards, as “national standards and norms emerging from intergovernmental consensus are little better in principle than federal unilateralism”<sup>86</sup>. So, horizontal and vertical relations appear strongly heterogeneous to Québec: the horizontal relations are all fine for Québec, whereas when the Provinces are asking the Federation for something, Québec wants to be treated differently.

#### *Bilateral vertical and horizontal relations.*

Finally, we must mention the presence of **bilateral relations** as well. They seem to run essentially through **acts**, and they are represented in both **vertical** and **horizontal** relations. *Bilateral vertical agreements* have been used so far to bypass some difficulties encountered during broader,

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<sup>82</sup> So MEEKISON J.P., (*supra*, note 50), p. 4.

<sup>83</sup> See QUÉBEC, *Report of the Royal Commission of Inquiry on Constitutional Problems*, 1956, Vol. 3, Bk. 2 (the so-called *Tremblay Commission Report*), p. 302, quoted by MEEKISON J.P., (*supra*, note 50), p. 4.

<sup>84</sup> The distinction is clearly stressed by ELAZAR D.J., (*supra*, note 60), p. 13.

<sup>85</sup> So MAGNET J.E., *Constitutional law of Canada*, I, Edmonton, Juriliber, 1993, p. 107, cited by CECCHERINI E., (*supra*, note 15), p. 678.

<sup>86</sup> So CAMERON D., SIMEON R., (*supra*, note 6), p. 63.

multilateral negotiations<sup>87</sup>, but also to implement, in more physiological situations, previous *multilateral framework agreements*, conjugating more patterns of intergovernmental relations. ***Bilateral horizontal agreements***, withal, can concern a various range of issues, as can be observed by mentioning, for instance, the recent *Framework Cooperation Agreement between the Government of New Brunswick and the Gouvernement du Québec* (18<sup>th</sup> April, 2006).

### **3. Overview on the Spanish system of intergovernmental relations.**

The Spanish intergovernmental system contains some interesting features: first of all, the general *plurality* and *heterogeneity* of the devices, with an interesting as well as disharmonic mixture of different solutions<sup>88</sup>; second, the alternation of both *political* and *legally solid* tools; and lastly, the co-existence of *fragmentation in centralising policy-approaches* and *bilateral effervescence*, suggested, respectively, by political and administrative path-dependant trends and by some complex constitutional arrangements, with a further complication caused by the *strong role played by national statute law* and *Estatudos Autonómicos*<sup>89</sup>.

The wide range of the intergovernmental tools comprises both **vertical** and **horizontal** relations, despite the enormous difference between their respective volumes and importance. Moreover, the system contemplates the further **multilateral-bilateral** dichotomy as well, and in this case it is necessary to point out a high level of practical usage for both, and as a result this distinction can act as the criterion to our *summa divisio*. Finally, both **acts** and **organs** are currently used as

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<sup>87</sup> That was the case of the pricing policy during the 1970s: the division broken out within the multilateral meetings brought Ottawa to shift to a cluster of bilateral agreements, drawn between it and each Province; see CECCHERINI E., (*supra*, note 15), p. 678, note 40.

<sup>88</sup> See AJA E., *La Conferencia de Presidentes del Estado Autonómico*, in *Informe sobre las Comunidades Autónomas*, 2005, Barcelona, IDP, 2006, available at [http://www.pcb.ub.es/idp/cat/10\\_iccaa/2005/conferenciapresidentes.pdf](http://www.pcb.ub.es/idp/cat/10_iccaa/2005/conferenciapresidentes.pdf), p. 10 speaks about a “*universo complicadísimo*”.

<sup>89</sup> See, although with reference to the *convenios de colaboración* only, ALBERTÍ ROVIRA E., *Los convenios de colaboración*, in *Anuario jurídico de La Rioja*, ISSN 1135-7096, 8/2002, p. 155.

solutions for cooperation<sup>90</sup>. An ubiquitous characteristic is the strongly sectorial approach, notwithstanding some recent evolutions mentioned below.

### *Multilateral vertical relations.*

In conformity with the warning about the low application of the withal existing multilateral tools in order to accommodate cooperation within the *Comunidades Autónomas* (CCAA) level, we must reserve most of our explanation to the **vertical** cooperation. All of these instruments find deep consideration in the text now in force of *Ley 30/1992*<sup>91</sup>.

The most relevant tools for cooperation between the *Estado* and the *Comunidades Autónomas* are the *Conferencias sectoriales*.

These important bodies have undoubtedly always been the engine for the development of Spanish *Estado Autonómico*<sup>92</sup>: they appeared in the very early stages of its building process (the first *Conferencia* was instituted in 1981), and benefit from a general regulative frame now contained in certain norms still in force in *Ley 12/1983 (Ley Orgánica de Armonización del Proceso Autonómico – LOAPA)* and moreover in articles 4 to 10 of *Ley 30/1992 (Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común – LRJAPPAC)*. Article 5, subsection 3 of *Ley 30/1992* which is now in force (as modified by the intervention of *Ley 4/1999*) gives the following definition of the *Conferencias sectoriales*: “*Los órganos de cooperación de composición multilateral y de ámbito sectorial que reúnen a miembros del Gobierno, en representación de la Administración General del Estado, y a miembros de los Consejos de Gobierno, en representación de las Administraciones de las Comunidades Autónomas*”.

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<sup>90</sup> For a terminologic clarification, particularly important in a system which maintains separate (adding distinct legal treatments) *nomina juris* like *cooperación*, *colaboración* and *coordinación*, see TAJADURA TEJADA J., *El principio de cooperación en el Estado autonómico: concepto, presupuestos y fines*, in *Anuario jurídico de La Rioja*, ISSN 1135-7096, 8/2002, pp. 73 ff., available at [http://dialnet.unirioja.es/servlet/fichero\\_articulo?codigo=646292&orden=60103](http://dialnet.unirioja.es/servlet/fichero_articulo?codigo=646292&orden=60103).

<sup>91</sup> See GARCÍA MORALES M.J., *Los instrumentos de las relaciones intergubernamentales*, in *Activitat Parlamentària*, ISSN 1577-7162, 15/2008, p. 50.

<sup>92</sup> Scholars tend to be unanimous with regard to this assessment: see, *ex multis, ibidem*.

The predominant characteristic of the *Conferencias* is perhaps their surprising sector-limited scope of activity and the resulting operative fragmentation: at the moment, there is an incredible number of existing *Conferencias sectoriales* - thirty-six to be exact. They are all listed below, in Tables 1 and 2, and in addition there is some further information concerning the annual number of reunions held so far by each one. One of the most evident results is that the *Conferencias* differ a lot from one another in importance and volume of activity, as there is no mechanism capable of ensuring their continuity: this seems to be the most relevant reason for such a surprising asymmetry.

The *Conferencias* are political bodies that allow dialogue and negotiation between the two levels, which are represented by their respective Executive members who hold the *ratione materiae* competence; in some *Conferencias*, these members, moreover, cannot be substituted by anyone<sup>93</sup>. The “multilateral” feature mentioned above does not require the participation of the entire *partèrre* of the CCAA as a duty, and in fact their composition sometimes varies, due to “technical reasons” (such as the single CA’s persistent lack of any competence to be exercised in the cooperative context<sup>94</sup>, in coherence with the particular Spanish mechanisms regulating the CCAA’s assumption of powers), but also as a consequence of certain political choices (I am alluding to the traditional technique, known as “empty chair”, sometimes used by *País Vasco*<sup>95</sup>).

With regard to the *legal status* of these bodies it is possible to notice that there are no provisions concerning their institution: despite the 1992 provision (article 5, subsection 3, last period) that remits the definition of the specific legal status to an *acuerdo*, some *Conferencias* have been created by national statute laws, even after that date, and only a slight majority have been created by agreements between the two levels<sup>96</sup>. However, it is interesting to note the complete lack of any link

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<sup>93</sup> See DUQUE VILLANUEVA J.C., *Las conferencias sectoriales*, in *Revista española de derecho constitucional*, ISSN 0211-5743, 79/2007, p. 127.

<sup>94</sup> See DUQUE VILLANUEVA J.C., (*supra*, note 93), p. 124.

<sup>95</sup> See, *ex multis*, AJA E., *Autonomies: Reflexiones sobre la Conferencia de Presidentes*, in *Revista valenciana d’estudis autonòmics*, ISSN 0213-2206, 43-44/2004 (*Ejemplar dedicado a: Europa en la encrucijada*), p. 62.

<sup>96</sup> See DUQUE VILLANUEVA J.C., (*supra*, note 93), pp. 123-124. For a complete frame of the existing *Conferencias* under this aspect, see the Documentation provided by the *Ministerio de administraciones*

with the concrete volume of activity (rather oscillating)<sup>97</sup>, as clearly emerges from Table 1. Anyway, they do not belong neither to the *Estado* nor to the CCAA administrative systems, and thus occupy a sort of grey-area<sup>98</sup>. Moreover, the explicit legal qualification as “*órganos de cooperación*” (articles 5, subsection 1, *Ley 30/1992*) is reserved to the *Conferencias*: in particular, that quality is expressly denied to the “*órganos colegiados creados por la Administración General del Estado*”, which are specifically regulated (artt. 22 to 27) and appear to be functionally similar to the cooperative organs, but are different due to the fact that they are part of the central administration and to the ensuing simple consultant nature embodied by the CCAA delegates within the bodies<sup>99</sup>.

In order to further clarify the “*órganos de cooperación*”: Table 1 (but also *Ley 30*) avoids any name-based distinction among the bodies (*Conferencia, Comisión, Consejo*), while a scholar position - taking a certain degree of terminological imprecision into due consideration - argues that at least the organs called *Comisión* or *Consejo* should correspond to the *Estado* exercise of a *coordinación* power<sup>100</sup>, where the latter is constitutionally assigned<sup>101</sup>. In fact, all of the *Comisiones* and *Consejos* have been instituted by the *Estado* unilaterally (by means of a *ley* or a *ley orgánica*<sup>102</sup>), because in this case, clearly, it is not necessary to reach any agreement with the CCAA; but it should also be pointed

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*públicas*, available at the website of the *Ministerio de política territorial*: [http://www.map.es/documentacion/politica\\_autonomica/Cooperacion\\_Autonomica/Coop\\_Multilateral/Conf\\_Sectoriales/Documentacion/Conf\\_Sect\\_exist/parrafo/0/document\\_es/CONF\\_SECT\\_Marzo\\_2008.pdf](http://www.map.es/documentacion/politica_autonomica/Cooperacion_Autonomica/Coop_Multilateral/Conf_Sectoriales/Documentacion/Conf_Sect_exist/parrafo/0/document_es/CONF_SECT_Marzo_2008.pdf).

<sup>97</sup> See DUQUE VILLANUEVA J.C., (*supra*, note 93), p. 124: notice only that the *Comisión nacional de salvamento marítimo* has met only once since its legal institution seventeen years ago, and that the *Conferencia sectorial de política patrimonial*, the only one never reunited yet, has been created by law in 2003.

<sup>98</sup> DUQUE VILLANUEVA J.C., (*supra*, note 93), p. 126.

<sup>99</sup> A complete list of these organs is available at [http://www.map.es/documentacion/politica\\_autonomica/Cooperacion\\_Autonomica/Coop\\_Multilateral/Conf\\_Sectoriales/parrafo/00/text\\_es\\_files/file1/01%20REGIMEN%20JURIDICO%20ORGANOS%20PARTICIPACION.pdf](http://www.map.es/documentacion/politica_autonomica/Cooperacion_Autonomica/Coop_Multilateral/Conf_Sectoriales/parrafo/00/text_es_files/file1/01%20REGIMEN%20JURIDICO%20ORGANOS%20PARTICIPACION.pdf).

<sup>100</sup> See AJA E., *Los organos mixtos de colaboracion*, in *Informe sobre las Comunidades Autónomas*, 2008, Barcelona, IDP, 2009, p. 2.

<sup>101</sup> See artt. 149, subsection 1, numbers 13, 15 and 16, and 156, subsection 1, Spanish Constitution.

<sup>102</sup> That is the case of the *Consejo de política fiscal y financiera de las comunidades autónomas*, the *Conferencia sectorial de educación* and the *Consejo de política de seguridad*.

out that certain *Conferencias* have been created by law<sup>103</sup>. Anyway, notwithstanding to the name<sup>104</sup> or to the founding act, all the bodies composed of representatives of both levels put in a position of equality deserve to hold the *nomen juris* “*órgano de cooperación*”, with the ensuing application of the provisions regarding the *Conferencias*, because they contain the further elements of the “*composición multilateral*” and “*àmbito sectorial*”, as we have just seen.

Each *Conferencia* should approve its own internal regulation, but only approximately half of them have accomplished this duty so far<sup>105</sup>; this does not prevent them from availing themselves of article 5, subsection 6, which gives them the power to supply themselves with the necessary *comisiones* and *grupos de trabajo*, a sort of satellite-bodies created “*para preparación, estudio y desarrollo de cuestiones concretas*”<sup>106</sup>.

Both the Presidency and the power to call the reunions, after having filled in their agenda, are reserved to the competent *La Moncloa* Minister<sup>107</sup>: it is a legal choice that the *Tribunal Constitucional* has long approved (STC 76/1983, i.e. the famous judgement on the LOAPA), although it is still perceived by the scholars as one of the most delicate aspects of the multilateral system of

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<sup>103</sup> That is the case of the following *Conferencias*: *Conferencia sectorial de educación*, *Conferencia nacional de transportes*, *Conferencia para asuntos relacionados con las comunidades europeas*, *Conferencia sectorial para asuntos laborales*, *Conferencia sectorial de administración pública* and *Conferencia general de política Universitaria*.

<sup>104</sup> For confirmation, see DUQUE VILLANUEVA J.C., (*supra*, note 93), p. 122.

<sup>105</sup> See the regulations collection provided by the *Ministerio de administraciones públicas*, available at [http://www.map.es/documentacion/politica\\_autonomica/Cooperacion\\_Autonomica/Coop\\_Multilateral/Conf\\_Sectoriales/Documentacion/Conf\\_Sect\\_Regl/parrafo/0/document\\_es/REGL\\_CONF\\_SECT\\_TEXT\\_COMP\\_LETOS.pdf](http://www.map.es/documentacion/politica_autonomica/Cooperacion_Autonomica/Coop_Multilateral/Conf_Sectoriales/Documentacion/Conf_Sect_Regl/parrafo/0/document_es/REGL_CONF_SECT_TEXT_COMP_LETOS.pdf).

<sup>106</sup> For an updated list of them, see MINISTERIO DE ADMINISTRACIONES PÚBLICAS, *Informe sobre la actividad de las Conferencias sectoriales durante 2007*, available at [http://www.map.es/documentacion/politica\\_autonomica/Cooperacion\\_Autonomica/Coop\\_Multilateral/Conf\\_Sectoriales/Documentacion/Conf\\_Sect\\_anuales/parrafo/0/document\\_es/08\\_04\\_03\\_Inf\\_Conf\\_Sect\\_2007.pdf](http://www.map.es/documentacion/politica_autonomica/Cooperacion_Autonomica/Coop_Multilateral/Conf_Sectoriales/Documentacion/Conf_Sect_anuales/parrafo/0/document_es/08_04_03_Inf_Conf_Sect_2007.pdf), 6 ff..

<sup>107</sup> It is easy to note that the total number of the *Conferencias* is more than double to the number of the Ministries now forming the second Zapatero Cabinet (seventeen): this data seems to sufficiently enlighten the low level of harmonization within the whole system.

cooperation<sup>108</sup>. Moreover, this legal choice in at the basis of some interesting dogmatic conceptualizations about the general classification of the Committees<sup>109</sup>, and seems to resist in spite of certain recent glimmers of change, which in some circumstances could prevent the central Ministers from continuing to impose inertia on certain *Conferencias*<sup>110</sup>.

**Table 1**

<i>Conferencias sectoriales</i>	1981 - 1991	1992 - 2006	2007	2008	Total
<i>Comisión de coordinación del Consejo de coordinación Universitaria</i> <sup>111</sup>	44	69	-	-	<b>113</b>
<i>Comisión de recursos humanos del Sistema Nacional de Salud</i>	-	1	0	0	<b>1</b>
<i>Comisión nacional de salvamento marítimo</i>	-	1	0	0	<b>1</b>
<i>Conferencia general de política Universitaria</i>	-	-	3	3	<b>6</b>
<i>Conferencia nacional de transportes</i>	5	7	0	0	<b>12</b>
<i>Conferencia para asuntos relacionados con las comunidades europeas (CARCE)</i>	5	45	0	1	<b>50</b>
<i>Conferencia sectorial de administración pública</i>	-	4	0	0	<b>4</b>
<i>Conferencia sectorial de agricultura y desarrollo rural</i>	29	88	6	4	<b>127</b>
<i>Conferencia sectorial de asuntos sociales</i>	4	33	1	1	<b>39</b>
<i>Conferencia sectorial de ciencia y tecnología</i>	-	1	0	0	<b>1</b>
<i>Conferencia sectorial de comercio interior</i>	-	11	1	0	<b>12</b>
<i>Conferencia sectorial de consumo</i>	5	17	3	1	<b>26</b>
<i>Conferencia sectorial de cultura</i>	4	10	2	2	<b>18</b>
<i>Conferencia sectorial de educación</i>	13	38	1	1	<b>53</b>
<i>Conferencia sectorial de industria y energía</i>	-	8	0	0	<b>8</b>
<i>Conferencia sectorial de infraestructuras y ordenación del territorio</i>	-	4	0	0	<b>4</b>
<i>Conferencia sectorial de la inmigración</i>	-	-	-	1	<b>1</b>
<i>Conferencia sectorial de la mujer</i>	-	20	1	1	<b>22</b>
<i>Conferencia sectorial de la pequeña y mediana empresa (PYME)</i>	-	12	1	1	<b>14</b>
<i>Conferencia sectorial de medio ambiente</i>	4	34	2	1	<b>41</b>

<sup>108</sup> See DUQUE VILLANUEVA J.C., (*supra*, note 93), p. 129; AJA E., (*supra*, note 95), p. 71, although with reference to the *Conferencia de Presidentes*.

<sup>109</sup> See the interesting notions of horizontal or vertical *Conferencias* appointed by AJA E., (*supra*, note 95), p. 64, regarding in particular the profile of their working way, which brings the *Conferencia de Presidentes* to be considered vertical if any co-chair mechanism is denied to the peripheral entities. The same terminology has been used by CARROZZA P., *Commento all'art. 24*, in BRANCA G., PIZZORUSSO A., *Commentario della Costituzione*, AA.VV., Art. 128 Supplemento. Leggi 8-6-1990, n. 142 e 25-3-1993, n. 81, Bologna, Zanichelli, pp. 306 ff., by CASSESE S., *La rete come figura organizzativa della collaborazione*, in PREDIERI A., MORISI M. (a cura di), *L'Europa delle reti*, Torino, Giappichelli, 2001, pp. 43 ff. and by TORCHIA L., «Concorrenza» fra Stato e Regioni dopo la Riforma del Titolo V dalla collaborazione unilaterale alla collaborazione paritaria, in *Le Regioni*, 4/2002, pp. 647 ff..

<sup>110</sup> See DUQUE VILLANUEVA J.C., (*supra*, note 93), p. 143: the Author refers an interesting Sentencia 27<sup>th</sup> September 2006 by the *Sección Cuarta de la Sala de lo Contencioso-Administrativo de la Audiencia Nacional*, which recognizes to a minority (if indicated within the internal regulation, like in the situation *sub judice*) of the members the right to obtain the call and the previous agenda-filling.

<sup>111</sup> Substituted by the *Conferencia general de política universitaria* from the year 2007.

<i>Conferencia sectorial de pesca</i>	-	33	2	2	<b>37</b>
<i>Conferencia sectorial de política patrimonial</i>	-	0	0	0	<b>0</b>
<i>Conferencia sectorial de telecomunicaciones y sociedad de la información</i>	-	1	1	0	<b>2</b>
<i>Conferencia sectorial de turismo</i>	2	14	1	0	<b>17</b>
<i>Conferencia sectorial de vivienda y urbanismo</i>	3	20	3	2	<b>28</b>
<i>Conferencia sectorial del agua</i>	-	-	-	1	<b>1</b>
<i>Conferencia sectorial del juego</i>	-	1	0	0	<b>1</b>
<i>Conferencia sectorial del plan nacional sobre drogas</i>	7	13	1	2	<b>23</b>
<i>Conferencia sectorial en materia de administración de justicia</i>	-	13	2	2	<b>17</b>
<i>Conferencia sectorial para asuntos laborales</i>	-	32	4	3	<b>39</b>
<i>Conferencia sectorial para asuntos locales (CSAL)<sup>112</sup></i>	-	2	0	0	<b>2</b>
<i>Consejo consultivo de política agrícola para asuntos comunitarios</i>	-	64	10	11	<b>85</b>
<i>Consejo consultivo de política pesquera para asuntos comunitarios</i>	-	37	7	6	<b>50</b>
<i>Consejo de política de seguridad</i>	0	1	0	0	<b>1</b>
<i>Consejo de política fiscal y financiera de las comunidades autónomas</i>	25	36	3	2	<b>66</b>
<i>Consejo interterritorial del sistema nacional de salud</i>	25	51	4	1	<b>81</b>
<i>Consejo territorial del sistema para la autonomía y atención a la dependencia</i>	-	-	5	1	<b>6</b>
<b>Total</b>	<b>176</b>	<b>720</b>	<b>64</b>	<b>50</b>	<b>1,010</b>

Data taken from AJA E., (*supra*, note 100) and from the website of the *Ministerio de política territorial* ([http://www.map.es/documentacion/politica\\_autonomica/Cooperacion\\_Autonomica/Coop\\_Multilateral/Conf\\_Sectoriales/Documentacion.html](http://www.map.es/documentacion/politica_autonomica/Cooperacion_Autonomica/Coop_Multilateral/Conf_Sectoriales/Documentacion.html)) and then elaborated.

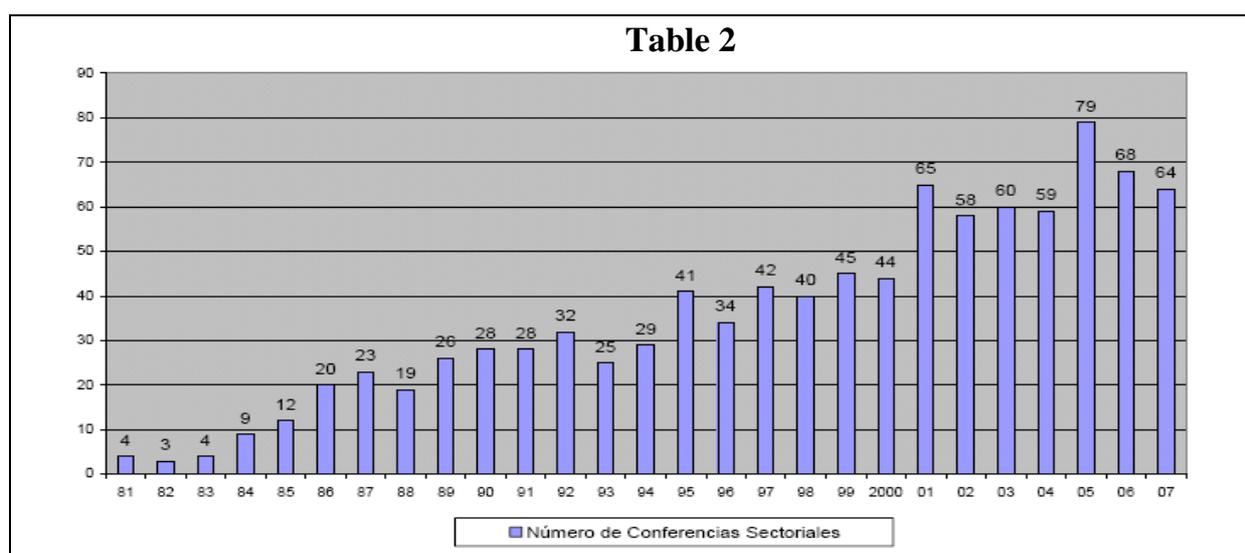


Table drawn from *Informe sobre la actividad de las Conferencias sectoriales durante 2007* (*supra*, note 106), p. 31.

Moving on to the *functions* of the *Conferencias*, notwithstanding here to the material scope reserved to each, and in spite of the obvious differences produced by their specific regulations (where

<sup>112</sup> For a first commentary about this new *Conferencia* (and about the internally articulated *Conferencia de Ciudades*), see MEDINA ALCOZ L., *La Conferenza settoriale per gli affari locali e la Conferenza delle Città: due nuovi meccanismi di collaborazione dell'ordinamento spagnolo*, in *Le istituzioni del federalismo*, 5/2005, pp. 953 ff..

adopted), we can synthesize by asserting that they are classifiable both as acts-relations forums and as real cooperative organs.

*Ley 30/1992* itself previews and disciplines some of the most important acts and activities, but plenty of them remain hidden to the statute-only-observer's eyes, so we must discover them. First of all, in the context of the *Conferencias sectoriales* the participating CCAA are involved in the fundamental elaboration of central legislation - including the sub-legislative legal tools - concerning their *competencies* or their *territorial interests* (the CCAA draft legislation is instead usually excluded from any kind of negotiation), by requesting the *Conferencias* to express opinions (*consultas*, or *informes*) on each draft act submitted to them. Other important functions are: discussing the results of the existing-legislation monitoring, particularly with regard to its execution; dual entendre information activity; "debate function", that is to submit to discussion the broad lines of the respective incoming policies, both central and peripheral, but also the quality of the central administration within the fields of the *Estado's* competence, but capable of provoking interferences with peripheral interests<sup>113</sup>. Finally, the *Conferencias sectoriales* are the most suitable forums for adopting "*criterios comunes por los poderes públicos para la ejecución de políticas propias de sus respectivos ámbitos competenciales*"<sup>114</sup>.

*Ley 30* provides a general instrument to set the results of political convergence, called *acuerdo*. Article 5, subsection 5 limits its own contribution to the imposition of the formal requisite of the *Ministro's* and the (favourable) *Consejeros'* signatures, but the elements needed to complete the legal framework can be drawn from the internal regulations or from different sources of interpretation. First of all, in some cases the approval *quorum* is fixed on *unanimity* of the *intervened CCAA*, with the subsidiary provision in favour of their *majority*, while others prefer a *majority* criterion directly, shifting from simple to variously qualified kinds; in case of dissent, particular vote expressions can be added. All these choices are undoubtedly questionable, but they seem to find a key in the most

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<sup>113</sup> For all of these submerged but fundamental functions, see DUQUE VILLANUEVA J.C., (*supra*, note 93), pp. 131-132.

<sup>114</sup> So *Informe sobre la actividad de las Conferencias sectoriales durante 2007* (*supra*, note 106), p. 21 ff.

important element needed to define the nature of these acts: their legal efficacy. On the one hand, the existing internal regulations tend to state that the obligation is limited to the signers only (a sort of *opting out*)<sup>115</sup>; on the other hand, an *a contrario* argument starting from article 7, subsection 4 (which regards the effects of a special sort of *acuerdo*: more different than special, as argued below) allows the interpreters to affirm the lack of any *legal* effect in this case<sup>116</sup>.

The special kind of *acuerdo* we have just mentioned is the *acuerdo aprobatorio de un plan o programa conjunto*: article 7 states that in each *Conferencia* the two levels can put in force plans and programs to reach any common aims, with the peculiarity that the related act, which is an *acuerdo*, is *binding* for the parties, who are, as usual, the signers only.

The praxis assigns to the *acuerdos*<sup>117</sup> another function which deserves to be remembered, also due to the related intertwining among different cooperation tools and the relationship with the relevant statutory provisions. This function concerns the *distribución de los créditos estatales* in order to fund actions pertaining to the scopes of (administrative) competence of the CCAA, that is, in short, the Spanish version of *federal spending power*. On the basis of article 86, subsection 2, *regla segunda* of *Ley General Presupuestaria 47/2003*<sup>118</sup>, each *Conferencia* must find the necessary “*compromisos financieros*” on the distribution criteria among the CCAA, to be later approved by means of “*acuerdos del Consejo de Ministros*”, in the particular (but mostly frequent) case of *traspasos*. This is not exactly the tool indicated by article 86, subsection 1, and also suggested by consolidated *Tribunal Constitutional* doctrine<sup>119</sup>, for the general hypotheses of *subvenciones*: both refer to the duty to set the

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<sup>115</sup> See DUQUE VILLANUEVA J.C., (*supra*, note 93), p. 144 and CECCHERINI E., *Le relazioni tra Governo centrale e Governi territoriali nell’esperienza spagnola*, in *Le Regioni*, 5/1999, p. 914.

<sup>116</sup> For confirmation, see DUQUE VILLANUEVA J.C., (*supra*, note 93), p. 146.

<sup>117</sup> See *Informe sobre la actividad de las Conferencias sectoriales durante 2007* (*supra*, note 106), p. 40 ff. and GARCÍA MORALES M.J., *Convenios de colaboración entre el Estado y las Comunidades y entre Comunidades Autónomas*, in *Informe sobre las Comunidades Autónomas, 2008*, Barcelona, IDP, 2009, pp. 5-6.

<sup>118</sup> And, from 1997 to 2003, on the basis of article 153 of *Real Decreto Legislativo 1091/1988 (Texto Refundido de la Ley General Presupuestaria)*; the previous norm, in short, provided the application of this cooperation mechanism only when annual *Ley Presupuestaria* did not establish itself the distribution criteria.

<sup>119</sup> See DUQUE VILLANUEVA J.C., (*supra*, note 93), p. 135.

criteria by means of (regulative norms or) *convenios de colaboración* (to be intended as the *multilateral* instruments regulated by article 6, *Ley 30*). Well, the interesting profile is that the system, without any particular criticism by the scholars<sup>120</sup>, prefers a third solution for both types of *subvenciones*, combining a previous *multilateral* decision, taken within each competent *Conferencia* in the form of *acuerdo* (which by this way gains a sort of legally binding effect necessary to respect the seen doctrine), with a further *cluster* of *convenios bilaterales* (with their subsequent management organs: see below), because the management of the further ensuing subvention flow from the *Estado* to each *CA* is remitted by praxis to “*convenios subvencionales*”<sup>121</sup> between *La Moncloa* and each *CA*, i.e., exactly, *convenios bilaterales*. The latter are the only legally binding tools of this little systems of devices, but the way to carry out central spending power is only apparently bilateral: without the premise of previous multilateral consent, reached regardless the modalities legally provided, it could seem to be completely unmanageable, due either to the conflict arising among the *CCAA* or, alternatively, to the devastating effects upon the central financial system.

A different tool is the *convenio de Conferencia sectorial*: it is similar to the article 7 *acuerdo* due to its legal binding effects, but it is similar to the general *acuerdo* as well, because it shares a completely voluntary tone. *Ley 30* mentions the *convenio de Conferencia sectorial* in articles 5, subsection 5 and 8, as the most relevant innovation introduced in 1992, but it is a *species* of the general means called “*convenio de colaboración*”<sup>122</sup> and regulated by article 6, which offers the general discipline explained below framing it as a bilateral tool. Here it is possible to notice that the

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<sup>120</sup> See the explanation offered by GARCÍA MORALES M.J., *Convenios de colaboración del Estado y las Comunidades y entre Comunidades Autónomas*, in *Informe sobre las Comunidades Autónomas, 2007*, Barcelona, IDP, 2008, available at [http://www.pcb.ub.es/idp/cat/10\\_iccaa/2007/convenios2007.pdf](http://www.pcb.ub.es/idp/cat/10_iccaa/2007/convenios2007.pdf), p. 4.

<sup>121</sup> They are not the unique types of *convenios bilaterales con compromisos financieros*: see GARCÍA MORALES M.J., (supra, note 120), p. 3, who individuates two further *species*, not involving any central spending power properly intended. Anyway, the *convenios subvencionales* cover over the 50 per cent of the global annual number of them: see GARCÍA MORALES M.J., the chapters regarding the *convenios de colaboración Estado-CA* of the *Informe sobre las Comunidades Autónomas*, Barcelona, IDP (2002-2008). For the device called *convenio bilateral*, here relevant, see a little below.

<sup>122</sup> See DUQUE VILLANUEVA J.C., (supra, note 93), p. 132.

use of this instrument is nearly non-existent<sup>123</sup>, but the reasons for that do not imply the failure of multilateralism, as we will see below.

To complete the functions issue, the fields in which the two levels can decide to form a *Conferencia* are indicated by *Ley 30*, but they are so broad, that the relevance of the theoretically central question of the subtended set of vertical division of powers is weakened as a result. Article 4, subsection 5 and article 7, subsection 1 refer, respectively, to the notions of “*competencias compartidas*” and “*competencias concurrentes*”, but the further indication of the “*interrelación competencial*” criterion (article 5, subsection 1) induces the interpreter to conclude that the two previous terms are used regardless of their specific meanings<sup>124</sup>. Different are, instead, the conclusions to which we should come with regard to a series of bodies for which neither “*Conferencias*” (i.e. the name sometimes used in praxis) nor “*órganos the cooperación*” (the more generic name preferred by article 5, subsection 1 of *Ley 30*) appear so suitable names: that is the case of the bodies instituted in order to allow the *Estado* to exercise and implement certain constitutionally assigned powers of “*coordinación*”. As seen above, *Ley 30* avoids any distinction, but the legal status of the acts approved (and to be approved as well) must be different.

To conclude about the *Conferencias*, the issue of the participation of the CCAA in the European integration process would deserve a deeper analysis<sup>125</sup>: here it would be sufficient to explain that this issue is a sort of horizontal theme which avails itself of the variety of tools previously seen, without compromising the centrality of each *Conferencia* which is competent case by case, act by act,

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<sup>123</sup> See DUQUE VILLANUEVA J.C., (*supra*, note 93), p. 133.

<sup>124</sup> See DUQUE VILLANUEVA J.C., (*supra*, note 93), p. 120.

<sup>125</sup> See BORZEL T.A., *From Competitive Regionalism to Cooperative Federalism: The Europeanization of the Spanish State of the Autonomies*, in *Publius: The Journal of Federalism*, 30:2 (Spring 2000), pp. 17 ff.; GONZALBEZ PEQUEÑO H., *Los actos de la Conferencia para asuntos relacionados con las Comunidades Europeas: naturaleza y régimen jurídico*, in *Revista Vasca de Administración Pública. Herri-Arduralaritzako Euskal Aldizkaria*, ISSN 02119560, 59/2001, pp. 221 ff.; CORCUERA ATIENZA F.J., *Colaboración y cooperación en el sistema autonómico español: reflexiones tras el fracaso de la propuesta de Ley General de Cooperación Autonómica*, in *Anuario jurídico de La Rioja*, ISSN 1135-7096, 8/2002, pp. 221 ff.; DUQUE VILLANUEVA J.C., (*supra*, note 93), pp. 136 ff.; CECCHERINI E., (*supra*, note 115), pp. 916 ff.; the chapters entitled *La Conferencia para asuntos relacionados con la Unión Europea* of the *Informe sobre las Comunidades Autónomas*, Barcelona, IDP, by ROIG MOLÈS E. (2002-2004) and DONAIRE VILLA F.J. (2005-2008).

policy by policy. It is true that, among the *Conferencias*, one of the most important and active is the *Conferencia para asuntos relacionados con las comunidades europeas*, which started to run in 1988 long before its legal formalization (*Ley 2/1997*; in between, the important *Acuerdo* of 1994 took place<sup>126</sup>), but we must note that it essentially operates as a coordinator among the other *Conferencias*, adding to this withal important role the further function of following up the general development of the European integration process, and a residual competence for the matters not easily falling into any field specifically assigned to the other *Conferencias sectoriales*. As a consequence, the rationalization induced by the European process progression is only partial.

This was the consolidated, stratified and fragmented context in which, five years ago, a totally new body blossomed out: the *Conferencia de Presidentes*.

This new *Conferencia* differs from the other due to the fact it is a forum (rather than a real body) finally devoted to join together all the *Premiers* of both levels, instead of their single Ministers<sup>127</sup>. No regulation takes into consideration this new device, which was called for the first time by the *Estado* Premier Zapatero, just arisen to the *La Moncloa*, on October 24<sup>th</sup>, 2004 (the main issue was the system of relationships between the CCAA and the European Union<sup>128</sup>). The fact that the *Conferencia* was comprised within the political program of the PSOE is not meaningless: it was a surprising situation, not only for its contrast with the tendency to exclude such institutional themes from the arenas of the party conflicts, but especially for the infrequency to see such a development driven by the centre<sup>129</sup>.

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<sup>126</sup> For a resume of its contents, see DUQUE VILLANUEVA J.C., (*supra*, note 93), pp. 136 ff.. This *acuerdo* was refused by *País Vasco*, which preferred to become part of an *ad hoc Comisión Bilateral* (see, *ex multis*, CECCHERINI E., (*supra*, note 115), p. 917), as well as by *Cataluña* and *Canarias*.

<sup>127</sup> Included, in addition, the representatives of the Executives of *Ceuta* and *Melilla*; critically on this point, DUQUE VILLANUEVA J.C., (*supra*, note 93), p. 149.

<sup>128</sup> Remember that, only five days after this first reunion would have been the signature, in Rome, of the Treaty establishing a Constitution for Europe, further aborted.

<sup>129</sup> See GARCÍA MORALES M.J., (*supra*, note 91), p. 58.

Since this first episode, the *Conferencia* has been called two further times only, in 2005 (main issues: immigration and financial supply for health care) and in 2007 (dealing with immigration again, water preservation policies and I+D+I, an important national tech development plan in force since two years before)<sup>130</sup>. Taken into account the very limited “luggage” of historical and institutional experience, it is mostly interesting to focus on the scholars’ reactions to this important innovation, mingling their assessments of the first performances with their suggestions about the future development the *Conferencia* should have.

After its first reunion, but before the following, the *Conferencia* was positively assessed: the brilliant overcoming of the several dangers of failure involved in it<sup>131</sup> and the unavoidable historical-moment atmosphere, perhaps stressed by the location context (the *Senado*)<sup>132</sup> has affected a lot the first meeting: if it has been more or less a symbolic ceremony<sup>133</sup>, its peculiarities let the scholars imagine (and hope) that the following would have been very different from more than one point of view<sup>134</sup>.

The suggestions proposed derive from a specific idea about the functions to be carried out by the new body: like it happens in the three “Germanic” federal experiences, also in Spain the *Conferencia de Presidentes* should compensate the CCAA from the lack of a genuine territorial *Senado*, so it must be suitable for referring to the central policy-making the territorial interests<sup>135</sup>. That position implies a series of consequences on the fundamental profiles of the issues to be treated by the *Conferencia*, certain aspects of its legal status (or, better, its concrete tenure in general), the internal organization, the relationship with the *Conferencias sectoriales* system (*recte*, “*una maraña*”<sup>136</sup>, i.e. a

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<sup>130</sup> See GARCÍA MORALES M.J., (*supra*, note 91), p. 57.

<sup>131</sup> In particular, the doubt about the behaviour of the *Presidente* of *Pais Vasco*, the opposition displayed during a preparatory meeting by the *Presidentes* belonging to the adversarial *Partido Popular*, unusually speaking by means of a voice only, in breach of a traditional trend, and, finally, the mere fact to be in absolute the first meeting of the entire history of the *Estado Autònomico*: see AJA E., (*supra*, note 95), p. 62.

<sup>132</sup> As stressed AJA E., (*supra*, note 95), pp. 65 and 61.

<sup>133</sup> So argues RUGGIU I., (*supra*, note 18), p. 256.

<sup>134</sup> For a neutral prediction of discontinuity, see AJA E., (*supra*, note 95), p. 61.

<sup>135</sup> That is the opinion offered by GARCÍA MORALES M.J., (*supra*, note 91), p. 61.

<sup>136</sup> So AJA E., (*supra*, note 88), p. 10.

tangle, or a complex and disharmonic heap), but also the procedures and the context and modes of activity. The *Conferencia* should deal with any topic that the CCAA could consider worthy of receiving attention within such a high context, regardless neither to the specific kind of competence involved nor to the legal status of the decision to take<sup>137</sup>. But this effect can be reached only if the formation of each reunion agenda become a shared function<sup>138</sup>, so that the *Conferencia* does not slip towards a “vertical”<sup>139</sup> kind of committee.

At the same time, however, the issues should be concrete, because too broad themes expose the *Conferencia* to the risk to be considered not so incisive even by its own members, and increase the possibility of being infected by the politicization<sup>140</sup>. Anyway, the *Conferencia* should avoid falling into the opposite extreme, which is to chase the utopia of covering systematically all of the *Estado Autonómico* themes, included the *de minimis* ones<sup>141</sup>: this would represent an exhausting and impossible, as well as harmful pretention, because the body would result really overwhelmed with plenty of issues and micro-issues, with the result of losing the control of the major themes. The appropriate issues should be determined *a priori* as themes permanently comprised into the agendas, in order to ensure that the *Conferencia* can always deal at least with the greatest financial decision which would concern or merely affect the CCAA<sup>142</sup>, the broad projects regarding the fundamental aspects of the autonomic system<sup>143</sup>, the great policy programs, the CCAA-European Union relationship and the most relevant draft “*leyes basicas*”<sup>144</sup>.

The referred approach is devoted to ensure that certain issues will be treated without having to rely on the specific agenda-fillers, but it represents also a self-limited approach: the latter

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<sup>137</sup> See AJA E., (*supra*, note 95), p. 66 and GARCÍA MORALES M.J., (*supra*, note 91), p. 59.

<sup>138</sup> See AJA E., (*supra*, note 95), p. 71 and GARCÍA MORALES M.J., (*supra*, note 91), p. 60.

<sup>139</sup> Using the word in the above seen meaning proposed by AJA E., (*supra*, note 95), pp. 64-65.

<sup>140</sup> See AJA E., (*supra*, note 95), pp. 65-66 and GARCÍA MORALES M.J., (*supra*, note 91), p. 61.

<sup>141</sup> See AJA E., (*supra*, note 95), p. 66.

<sup>142</sup> See AJA E., (*supra*, note 95), p. 67.

<sup>143</sup> *I.e.* the draft constitutional reforms and the draft *Estatutos de Autonomía*, see AJA E., (*supra*, note 88), p. 13.

<sup>144</sup> These are the proposals advanced by AJA E., (*supra*, note 88), p. 12.

configuration is completely linked to another fundamental theme (or perhaps *the* theme), i.e. the relationship with the existing *Conferencias sectoriales*. The new *Conferencia* should embody the unitary device within the *maraña* of the sectorial system, acting as a sort of “*Conferencia de conferencias*”<sup>145</sup>, with the specific function of clarifying the system by dividing the multilateral from the bilateral relations (today mixed together within certain *Conferencias*) and the collaboration functions from the coordination ones<sup>146</sup>. Absolutely far from usurping their role, on the one hand it should outline the principle address leaving the *Conferencias sectoriales* free to unfold the ensuing development; on the other, the *Conferencia de Presidentes* should follow the activity of the others, in order to have the control to the most delicate issues of each of them: that is the premise to act as an “*instancia de desbloqueo*”, set within a system of mutual remittal<sup>147</sup>.

Also in order to avoid the sense of improvisation perceivable during the II and the III *Conferencias*<sup>148</sup>, the *Conferencia* will necessitate a minimal administrative structure composed of people politically close to the members<sup>149</sup>, thus capable of acting as a permanent institutional “info-point” for both levels participating<sup>150</sup>, of preparing the agenda, of searching the necessary political convergence on the question submitted and of controlling the correct execution of the decisions<sup>151</sup>.

The deliberations should follow the unanimity principle, and have a merely political status<sup>152</sup>. Despite the further suggestion of avoiding tightening itself by approving any self-discipline<sup>153</sup>, the III *Conferencia* reached the intent to draw up its own internal regulation<sup>154</sup>.

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<sup>145</sup> That is a sort of “*órgano director de la actual red de Conferencias sectoriales*” - GARCÍA MORALES M.J., (*supra*, note 91), p. 59 -, or its “*cúspide*” (AJA E., (*supra*, note 88), p. 11). See also DUQUE VILLANUEVA J.C., (*supra*, note 93), p. 150.

<sup>146</sup> See AJA E., (*supra*, note 88), p. 10.

<sup>147</sup> So AJA E., (*supra*, note 95), pp. 67-68.

<sup>148</sup> See AJA E., (*supra*, note 100), pp. 22-23.

<sup>149</sup> See AJA E., (*supra*, note 88), pp. 14-15.

<sup>150</sup> See AJA E., (*supra*, note 95), p. 70.

<sup>151</sup> See AJA E., (*supra*, note 88), p. 15.

<sup>152</sup> See GARCÍA MORALES M.J., (*supra*, note 91), p. 60.

<sup>153</sup> See AJA E., (*supra*, note 95), p. 69.

Finally, the working context: apart from the peculiarity of the first reunion, perhaps necessarily characterized by a too high sense of ceremony and by a strongly limited dialogic structure<sup>155</sup>, the *Conferencia* should be held far from excessive publicity and with a high level of “*privacidad*”<sup>156</sup>.

#### *Bilateral vertical relations.*

The cooperation tool-box provides the bilateral relations with two important instruments, which are on the whole used a lot; the *Comisiones bilaterales de cooperación* and the *convenios (bilaterales) de colaboración*: they are respectively organic and act devices, both contemplated by *Ley 30/1992*.

The *Comisiones bilaterales de cooperación* are *stricto-sensu*-organs which have been gradually instituted by agreement of the *Estado* with each single *CA*, in the context of a wide as well as disharmonic phenomenon which started in 1984<sup>157</sup> and arrived to cover all *CCAA* in 2000<sup>158</sup>. They have been created naturally, first as “*Comisiones de traspasos*” accompanying the complex development of the series of mechanisms provided to allow the *CCAA* to get from the *Estado* the functions gradually assumed in accordance with articles 147 and 148 of the Spanish Constitution<sup>159</sup>. Since its modification due to *Ley 4/1999*, the *Comisiones* have resulted to be mentioned by article 5, subsection 2 of *Ley 30/1992*: the norm defines them as “*Los órganos de cooperación de composición bilateral y de ámbito general que reúnan a miembros del Gobierno, en representación de la*

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<sup>154</sup> See AJA E., (*supra*, note 100), p. 23.

<sup>155</sup> Each *Presidente* was able to speak once only, and in addition that the whole reunion had a very low duration; for a complaint, see AJA E., (*supra*, note 95), p. 66.

<sup>156</sup> So AJA E., (*supra*, note 88), p. 16.

<sup>157</sup> AJA E., (*supra*, note 100), p. 15.

<sup>158</sup> See RAMOS J.A., *Federalization and Institutionalized Bilateral Intergovernmental Interaction in Spain: The Comisiones Bilaterales de Cooperación (1984-2002)*, Paper presented at the annual meeting of the The Midwest Political Science Association, Palmer House Hilton, Chicago, Illinois Online, 2005-04-07, available at [http://www.allacademic.com/meta/p86635\\_index.html](http://www.allacademic.com/meta/p86635_index.html), Table 1, p. 18.

<sup>159</sup> See AJA E., (*supra*, note 100), pp. 14-15.

*Administración General del Estado, y a miembros del Consejo de Gobierno, en representación de la Administración de la respectiva Comunidad Autónoma*”, remitting their discipline to an *acuerdo*. These organs work by means of deliberations, but also *acuerdos*: anyway, generally speaking, these acts are not binding<sup>160</sup>.

Up to now, the praxis has brought the *Comisiones* to have the pre-eminent function of conciliating the parties (or preventing them from beginning the conflicts themselves) in case of judicial conflict elevated against each other on statute laws in front of the *Tribunal Constitucional*: this function is accomplished by trying to persuade the clamant to interrupt unilaterally the judiciary process withdrawing the appeal, but after *Ley Orgánica* 1/2000<sup>161</sup> it is also possible to stipulate a preliminary *acuerdo* within the *Comisión*, which gets certain interesting legal effects<sup>162</sup>.

Premised that the juridical question of the sources of law capable of stating the discipline of the *Comisiones* can be easily overcome<sup>163</sup>, the new reform season of the *Estatutos de Autonomía* (from 2006 to now) has already opened certain relevant development possibilities for these bodies, both making them really permanent bodies and providing them with legal binding tools, besides the traditional *acuerdos*<sup>164</sup>. Particularly interesting appear the contents of the new *Estatuto de Cataluña*, approved in 2006: it assigns to the *Comisión Bilateral Generalitat-Estado* the functions of deliberating, of formulating any kind of proposal and of stipulating *acuerdos* concerning a series of

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<sup>160</sup> See BASSU C., *Stato e Comunità autonome in Spagna*, in *Amministrare*, 3/2004, p. 427.

<sup>161</sup> Which modified article 33, subsection 2 of *Ley* 2/1979 (*Ley Orgánica del Tribunal Constitucional*). This modification induced all the *Comisiones* to start to reform their own internal regulations: see GARCÍA MORALES M.J., *Las relaciones intergubernamentales en el Estado Autónomo: estado de la cuestión y problemas pendientes*, in EAD., MONTILLA MARTOS J.A., ARBÓS MARÍN J., *Las relaciones intergubernamentales en el estado autonómico*, Centro de Estudios Políticos y Constitucionales, 2006, ISBN 84-259-1345-4, available at [http://www.cepc.es/include\\_mav/getfile.asp?IdFileImage=1302](http://www.cepc.es/include_mav/getfile.asp?IdFileImage=1302), p. 22.

<sup>162</sup> For a commentary on the new mechanism, see GONZÁLEZ BEILFUSS M., *La resolución extrajudicial de las discrepancias competenciales entre el Estado y las Comunidades Autónomas: el mecanismo del artículo 33.2 LOTC*, in *Informe Comunidades Autónomas, 2007*, Barcelona, IDP, 2008, available at [http://www.pcb.ub.es/idp/cat/10\\_iccaa/2007/art33\\_2.pdf](http://www.pcb.ub.es/idp/cat/10_iccaa/2007/art33_2.pdf).

<sup>163</sup> See GARCÍA MORALES M.J., (*supra*, note 161), p. 24 and MONTILLA MARTOS J.A., *El marco normativo de las relaciones intergubernamentales*, in GARCÍA MORALES M.J., ID., ARBÓS MARÍN J., (*supra*, note 161), p. 82.

<sup>164</sup> See GARCÍA MORALES M.J., (*supra*, note 161), p. 23.

central acts specifically regarding *Cataluña* (draft statutes, economic programs, judicial conflicts, cooperative means themselves, European and international issues, etc.)<sup>165</sup>.

Besides the *Comisiones bilaterales de cooperación* has been gradually created **further bilateral bodies** which lack the requisite of having a general scope of interest, rather focusing on specific matters depending on the competences gained by certain CCAA, particularly *País Vasco* and *Cataluña*: it is the case of taxes, safety and police, European issues and immigration<sup>166</sup>.

The *Comisiones bilaterales* are the last organic cooperation devices we have to deal with, as the following, apart from some instrumental bodies, are cooperation-by-acts tools. So, it is time to add that two further important typologies of bodies deserve to be mentioned: on the one hand, *Ley 30*, after having defined *Comisiones Bilaterales de Cooperación* (subsection 2) and the *Conferencias sectoriales* (subsections 3 to 5), at article 5, subsection 7 opens the category of the intergovernmental “*órganos de cooperación*” ensuring that the two levels can build **any further sort of bodies (both multilateral and bilateral)**, composed by the respective “*responsables de la materia*” (a locution that seems to refer to *political* levels again), in order to deal with certain *specific issues* enucleated case by case.

On the other hand, each central Minister has the possibility of creating **second level organs (both multilateral and bilateral)**: they represent a great number of *Estado’s* bodies<sup>167</sup> joining together bureaucratic components belonging to the *Ministerios* and to the *Consejerías*<sup>168</sup>: they tend to receive a negative assessment by the scholars, who highlight that the enormous numbers and, moreover, the astonishing, alluvial dynamic driving their every-year creation (approximately twenty

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<sup>165</sup> See first of all the synthesis provided by AJA E., (*supra*, note 100), pp. 15 ff..

<sup>166</sup> See GARCÍA MORALES M.J., (*supra*, note 161), p. 22.

<sup>167</sup> See CECCHERINI E., (*supra*, note 115), p. 916, who refers that at the end of the year 1995 the total amount of these organs reached 359 bodies.

<sup>168</sup> In order to this kind of tools, it seems to be meaningless any distinction between the “*órganos de cooperación*” and the “*órganos colegiados*”.

new bodies per year<sup>169</sup>) are able even to generate a deep confusion around the legal status applicable to each bodies, which should oscillate a little depending on the “*cooperación*” or “*coordinación*” nature they have<sup>170</sup>.

The last relevant instrument for bilateral cooperation is the *Convenio de Colaboración*. It finds its legal discipline within articles 6 and 8 of *Ley 30/1992*, which first of all impose certain simple formal requisites (two years before already sketched within an *Acuerdo*<sup>171</sup>) to this vertical, versatile arrangement<sup>172</sup>. The fundamental points of the legal status are the *voluntary stipulation*, in accordance with certain *Tribunal Constitucional* doctrine<sup>173</sup>, and the *binding effect*, which is expressly affirmed and is also equipped with justiciability (article 8, subsection 3)<sup>174</sup>.

The binding effect, instead, is expressly excluded by subsection 4, in which, in 1999, has been introduced a distinct arrangement called “*Protocol general*”: it is an instrument of political settlement on matters of interrelated jurisdiction or common and shared interest, devoted to set some intents of the parties regarding the cooperative development of several and broad fields.

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<sup>169</sup> Data referred by AJA E., (*supra*, note 88), p. 10.

<sup>170</sup> *Ibidem*.

<sup>171</sup> See BASSU C., (*supra*, note 160), p. 428.

<sup>172</sup> Notice that, similarly to the seen phenomenon occurred with regard to the *Comisiones bilaterales*, this device has been taken into consideration by certain new *Estatutos*, consistently to the nature of *Ley 30*, which is a *Ley básica* (GARCÍA MORALES M.J., *Relaciones de colaboración con las Comunidades Autónomas*, in *Informe sobre las Comunidades Autónomas, 2006*, Barcelona, IDP, 2007, available at [http://www.pcb.ub.es/idp/cat/10\\_iccaa/2006/convenios\\_2006.pdf](http://www.pcb.ub.es/idp/cat/10_iccaa/2006/convenios_2006.pdf), p. 7): some of these sources of law focus their own contribution on disciplining the procedure to be followed to form the conventional will of each CA - ALBERTÍ ROVIRA E., (*supra*, note 89), p. 155 -. In particular, the *Estatuto catalano* (article 177, subsection 1) and the *Estatuto aragonés* (article 88, subsection 4) remit this function to a *Ley autonómica*, refusing to maintain the current merely regulatory discipline. Notice also the confirmation, by the *Estatuto valenciano*, of the already previewed necessary ratification by the CA Assembly (article 11, letter i)).

<sup>173</sup> See *STC 96/1986* and *13/1992*: see ALBERTÍ ROVIRA E., (*supra*, note 89), p. 154.

<sup>174</sup> For all these points, see DUQUE VILLANUEVA J.C., (*supra*, note 93), pp. 132-133.

One of the necessary contents listed by the subsection regards the express decision to institute or not an *ad hoc organ specifically devoted to manage the convenio*, which is usually created<sup>175</sup>: therefore, it is an instrumental organ provided with a very specific scope of action, not to be confounded absolutely with either the above seen *Comisiones bilaterales* or with the “*órgano mixto de vigilancia y control*” (subsection 3), instrumental as well, but functionally different. The management organ can assume the legal nature of *consorcio*, or to be a **company**<sup>176</sup>.

These norms avoid any distinction between multilateral and bilateral *convenios*, but we have mentioned above the low level of the use of this arrangement as a multilateral tool (therefore, substantively, as *convenio de Conferencia sectorial*<sup>177</sup>): this data is in striking contrast with the enormous number of *convenios bilaterales* globally stipulated so far, whose amount overcomes 11,000<sup>178</sup>, with a strong increase in the last years, as it emerges evidently in Table 3. But there is something to stress which does not stand out having regard to the numbers only: the multilateral tool suffers from a sort of usurpation by the *convenios bilaterales*, as the “*convenios subvencionales*” paradigm, seen above, is very widespread. In fact, about 70 per cent of the *convenios bilaterales* which are stipulated every year<sup>179</sup> are very similar (or identical) one another, because everyone usually refers to a unique “*convenio modelo o tipo de subscripción múltiple o generalizada*”<sup>180</sup>, whose political contents are always set out previously by the competent *Conferencia*, and then “formalised” within *ad hoc acuerdos*<sup>181</sup>, so only formally the bilateral tool takes the place of other<sup>182</sup>.

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<sup>175</sup> See GARCÍA MORALES M.J., (*supra*, note 172), p. 3.

<sup>176</sup> See GARCÍA MORALES M.J., (*supra*, note 91), pp. 51-52.

<sup>177</sup> But the norm allows also *convenios* multilateral stipulated regardless the *Conferencias sectoriales*, and the praxis outlets some examples: see GARCÍA MORALES M.J., (*supra*, note 172), pp. 17-18.

<sup>178</sup> See GARCÍA MORALES M.J., (*supra*, note 91), p. 50. The data is updated by means of a personal elaboration based on the data contained in GARCÍA MORALES M.J., (*supra*, note 120), p. 1.

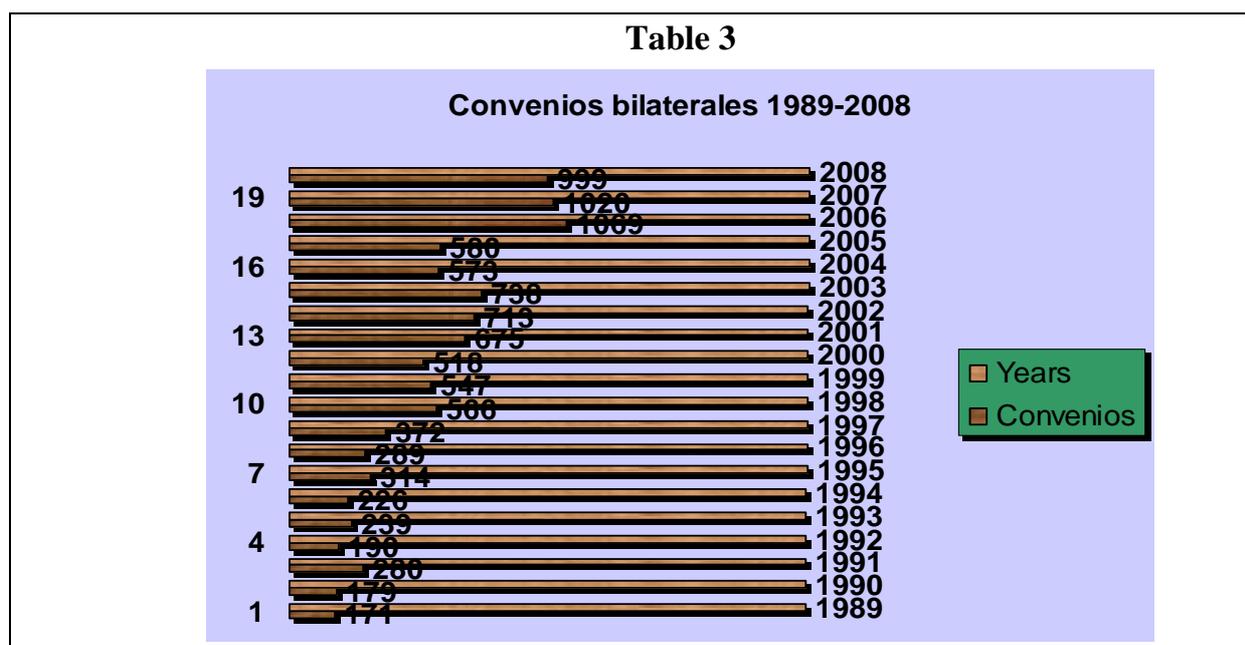
<sup>179</sup> So GARCÍA MORALES M.J., (*supra*, note 91), p. 52.

<sup>180</sup> See GARCÍA MORALES M.J., (*supra*, note 120), p. 2 and DUQUE VILLANUEVA J.C., (*supra*, note 93), p. 134.

<sup>181</sup> *Ibidem*.

<sup>182</sup> This fact is taken into consideration by MONTILLA MARTOS J.A., (*supra*, note 163), pp. 78-79 to demonstrate that the real level of cooperation is actually much more low than the appearing.

Thus, there is no real competition between the *convenios de Conferencia sectorial* (multilateral) and the *convenios de colaboración* (bilateral), and, more in general, the appearing triumph of bilateralism hides actually a *substantive multilateralism*<sup>183</sup>: only rarely the *convenios bilaterales* concern contents which interest to single CCAA only<sup>184</sup>. Among other things, that is one of the reasons of the relatively homogeneous distribution of the *convenios bilaterales* among the CCAA, with the exception of *País Vasco* and *Navarra*: the latter, however, cannot be explained simply by using the argument of the traditional eccentric position assumed by some CCAA, because *Cataluña* stands out for its massive use of *convenios bilaterales*<sup>185</sup>. Another reason is expressed by article 7, subsection 4: the *convenios bilaterales* are explicitly taken into consideration as the preferred instruments to implement the *acuerdos aprobatorios de un plan o programa conjunto*, often with an interposed *Protocol General*<sup>186</sup>.



Data gained from ALBERTÍ ROVIRA E., (*supra*, note 89), p. 151 and from the contributions provided by GARCÍA MORALES M.J. within the *Informe sobre las Comunidades Autónomas*, Barcelona, IDP (2002-2008).

<sup>183</sup> See CECCHERINI E., (*supra*, note 115), p. 921 (with the contributions there quoted) and GARCÍA MORALES M.J., (*supra*, note 91), p. 52.

<sup>184</sup> See GARCÍA MORALES M.J., (*supra*, note 172), p. 2, who mentions the *convenios* concerning *Expo Zaragoza 2008*.

<sup>185</sup> See, *ex multis*, ALBERTÍ ROVIRA E., (*supra*, note 89), p. 153, Table 4 (year 2000) and GARCÍA MORALES M.J., (*supra*, note 172), pp. 44-45.

<sup>186</sup> See, *ex multis*, GARCÍA MORALES M.J., (*supra*, note 172), p. 23.

The *convenio bilateral* is a functionally polyvalent device, and when the choice among the possible, several functions, is not directly previewed by the statute laws<sup>187</sup>, it is totally remitted to the parties<sup>188</sup>. Anyway, it is possible to insulate a wide range of frequent types<sup>189</sup>: from certain points of view, the most interesting is the mutual obligation to approve certain legal norms coherent to the contents agreed and set in the *convenio*<sup>190</sup>. Anyway, cutting horizontally the just cited classifications, over 50 per cent (obviously comprised within the 70 per cent seen just above) of the annual amount of the *convenios bilaterales* are the “second step” of the above seen mechanisms for territorialising the central “*subvenciones*”<sup>191</sup>, which present the peculiarity to have an only annual duration, so a great number of the *convenios* signed each year are actually mere accounting prosecutions of broader and more enduring policy issues already in progress<sup>192</sup>.

The fields of intervention cover an interesting variety, which someone carries on until to say that the *convenios bilaterales* affect almost every fields of policy<sup>193</sup>: the most involved areas are certainly *social service* and *education* (overall), then *health care*, *agriculture* and *industry*<sup>194</sup>, although it is possible to find some exceptional peaks in certain matters, depending on the year<sup>195</sup>. The interesting point is that these fields are mostly comprised within areas of CCAA exclusive jurisdiction<sup>196</sup>, so that the pre-eminent aim of this cooperative device is not to solve certain strict

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<sup>187</sup> See GARCÍA MORALES M.J., (*supra*, note 120), p. 3.

<sup>188</sup> For confirmation, see MONTILLA MARTOS J.A., (*supra*, note 163), p. 82.

<sup>189</sup> See ALBERTÍ ROVIRA E., (*supra*, note 89), p. 152 and the contributions provided by GARCÍA MORALES M.J. within the *Informe sobre las Comunidades Autónomas*, Barcelona, IDP (2004-2008).

<sup>190</sup> Signaled in particular by CECCHERINI E., (*supra*, note 115), p. 921.

<sup>191</sup> See GARCÍA MORALES M.J., (*supra*, note 120), p. 4 and GARCÍA MORALES M.J., (*supra*, note 117), p. 4.

<sup>192</sup> See GARCÍA MORALES M.J., (*supra*, note 172), p. 2.

<sup>193</sup> See GARCÍA MORALES M.J., (*supra*, note 91), p. 50.

<sup>194</sup> See ALBERTÍ ROVIRA E., (*supra*, note 89), p. 152, Table 3 (year 2000); for the most recent years, see GARCÍA MORALES M.J., (*supra*, note 117).

<sup>195</sup> See, *ex multis*, GARCÍA MORALES M.J., (*supra*, note 172), p. 48, who points out the exceptional increase of area “Culture” from 2005 to 2006.

<sup>196</sup> GARCÍA MORALES M.J., (*supra*, note 172), p. 20; GARCÍA MORALES M.J., (*supra*, note 120), p. 8.

problems concerning variously shared jurisdictions, but more exactly to make the central spending power less constitutionally questionable.

*Multilateral and bilateral horizontal relations.*

We have mentioned above that the Spanish intergovernmental cooperation experience shows an appreciable development from the vertical point of view only, because the horizontal relations are so limited that that it is possible to conclude that they do not almost exist<sup>197</sup>.

This situation could sound a little curious<sup>198</sup>, taken into account that the only constitutional express provisions concerning intergovernmental relations are devoted just to certain horizontal devices, and particularly to two tools both belonging to the **relations by acts** category: the *convenio entre las Comunidades Autónomas* and the *acuerdo de cooperación entre las Comunidades Autónomas*.

Both instruments are previewed and disciplined by article 145, subsection 2 of the Constitution: the *convenio* regards the field of service management and delivery, and, once it has been signed by the parties (two or more CCAA), it has to be communicated to the *Senado*. The *acuerdo* can concern, instead, any other topics, and must be sent to the *Senado* for getting its authorization. There is nowadays a scholastic consensus on the abstract difference between the two notions: it is inclined to limit the extent of the *convenios* within the mere administrative management, so that all further and more politically important and delicate issues must be covered by means of *acuerdos*<sup>199</sup>. Anyway, both the *Tribunal Constitucional*<sup>200</sup> and the *Senado* can give own interpretations of the contents of each

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<sup>197</sup> See CECCHERINI E., (*supra*, note 11), p. 621; ALBERTÍ ROVIRA E., (*supra*, note 89), p. 157 ff.; GARCÍA MORALES M.J., (*supra*, note 161), p. 32; GARCÍA MORALES M.J., (*supra*, note 91), p. 49.

<sup>198</sup> As argued by ALBERTÍ ROVIRA E., (*supra*, note 89), p. 150.

<sup>199</sup> GARCÍA MORALES M.J., (*supra*, note 161), p. 41.

<sup>200</sup> ALBERTÍ ROVIRA E., (*supra*, note 89), p. 158 mentions *STC 44/1986*, which declared a *convenio* between *Cataluña* and *Murcia* void insofar it was actually an *acuerdo*, so it should have been submitted do the *Senado* for authorization.

tool, regardless of the qualification previously offered by the CCAA signers (or only one of them<sup>201</sup>): therefore, not even the path which brings to the *convenios* is in absolute so easy. Further, apart from the elements directly disciplined by the Constitution, it is necessary to notice that the *Estatutos* are the sources individuated by article 145, subsection 2 as competent to set the further discipline: certain of them make the procedure more rigid again, providing some important procedural hurdles essentially consisting of a generalized, previous Parliamentary authorization, symmetrically to the existing constitutional disposition<sup>202</sup>.

The result of such a severe discipline, perhaps too inclined to configure the horizontal arrangements as further central control instruments<sup>203</sup>, is that, up to now, about forty *convenios*<sup>204</sup> and only one *acuerdo*<sup>205</sup> have been approved. However, it is interesting to warn that in 2008 ten *convenios* have been communicated to the *Senado*: an amount evidently overcoming the annual average.

The *convenios* join together almost always two adjacent CCAA and concern moreover the fields of *fire emergencies*, *mutual health care* to be ensured to the inhabitants of the other, *inter-autonomic public transport tickets* and *linguistic cooperation*<sup>206</sup>.

In its turn, the strong difficulty to use the provided formal frames, far to induce the CCAA to renounce to cooperate, rather brings towards the search of some different channels for bypassing such obstructions, so addressing to informal arrangements (*Protocolos/Declaraciones de colaboración/intenciones*, *Convenios-marco*, *Protocolos generales*<sup>207</sup>), which can remain completely

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<sup>201</sup> With any kind of ensuing, possible problems: see, *ex multis*, GARCÍA MORALES M.J., (*supra*, note 161), p. 46, who reminds the *qui pro quo* occurred in 1998 between *Castilla-La Mancha* and *Castilla y León* about the qualification of a *Protocolo* on road network.

<sup>202</sup> See ALBERTÍ ROVIRA E., (*supra*, note 89), p. 159.

<sup>203</sup> As argued by GARCÍA MORALES M.J., (*supra*, note 161), p. 41.

<sup>204</sup> See GARCÍA MORALES M.J., (*supra*, note 91), p. 54 (until 2007) and GARCÍA MORALES M.J., (*supra*, note 117), p. 13 (up to now).

<sup>205</sup> GARCÍA MORALES M.J., (*supra*, note 161), p. 42.

<sup>206</sup> GARCÍA MORALES M.J., (*supra*, note 161), pp. 34-35.

<sup>207</sup> See GARCÍA MORALES M.J., (*supra*, note 161), p. 45; GARCÍA MORALES M.J., (*supra*, note 172), p. 41.

unpublished, or to private law tools<sup>208</sup>. It is obvious that the mere change of names cannot prevent from the application of the constitutionally due procedures, so the *Protocolos (et similia)* cannot act as complete substitutes of the formal tools; nonetheless, the referred informal arrangements increase the level of confusion among the different figures: in fact, several arrangements have been recently communicated in spite of their not immediately applicable contents, which is a typical characteristic of the *Protocolos*<sup>209</sup>. This “circle” appears very hard to be broken: taken into account the almost “untouchable” nature of the Spanish Constitution, it is clear that the only margin of change available to the *Estatutos* is to eradicate the internal hurdles at least<sup>210</sup>.

Finally, only a few remarks have to be spotted about the horizontal **by organs relations** tools, simply because such kind of bodies do not exist.

This persistent anomalous situations is in striking contrast with certain important compared experience of vertically-oriented horizontal relations<sup>211</sup> and, moreover, causes certain material difficulties: for instance, the central Ministers are often compelled to suspend the meetings of the *Conferencias sectoriales* and go out temporarily in order to allow the CCAA, *seduta stante*, to consult each others for finding a common point of view<sup>212</sup>, although all of them is always put in condition to have a timely knowledge of the meeting agenda.

The necessity to overcome this situation is perceived by the scholars, who propose to create a network of horizontal *Conferencias sectoriales*, parallel to the vertical system, or (as a first step rather than an alternative) to avail of the existing *Conferencias* for the horizontal coordination as well: similar is the solution sketched in 2004 within the *Conferencia para asuntos relacionados con las*

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<sup>208</sup> See ALBERTÍ ROVIRA E., (*supra*, note 89), p. 159; GARCÍA MORALES M.J., (*supra*, note 161), pp. 44-45.

<sup>209</sup> See GARCÍA MORALES M.J., (*supra*, note 161), p. 46.

<sup>210</sup> See GARCÍA MORALES M.J., (*supra*, note 161), pp. 43-44 and EAD., (*supra*, note 91), p. 57.

<sup>211</sup> See, *ex multis*, AJA E., (*supra*, note 95), p. 65; GARCÍA MORALES M.J., (*supra*, note 161), pp. 33 ff..

<sup>212</sup> The surprising praxis-data is referred by RUGGIU I., (*supra*, note 18), pp. 255-256.

*comunidades europeas*<sup>213</sup>. Another example of reaction is the experience of the three *Encuentros de Comunidades Autónomas* up to now held by the *Consejeros* belonging to the 6 CCAA which are already equipped with a new *Estatuto*. Last February the participants adopted an interesting internal regulation, which is positively assessed also for being viewed as a clue of a future horizontal *Conferencia de Presidentes*<sup>214</sup>, in spite of certain (reasonably) sceptical provisions currently expressed previously<sup>215</sup>.

#### ***4. Constitutional context variables and intergovernmental relations: some brief reflections.***

The just described systems need to be completed by briefly highlighting their fundamental features; at the same time, I will add any sort of reflections about the relationship with certain cardinal features of the constitutional contexts in which the intergovernmental systems live, by mainly following the framework criteria listed in the Introduction.

The **Canadian system** of intergovernmental relations shows a complex coexistence of both vertical and horizontal relations, but the latter are evidently instrumental to the former, in a dual way. On the one hand, the PT dialogue belongs mostly to the vertically-oriented horizontal relations pattern, in order to gain more solid common positions to present to the federal counterpart. On the other hand, the vertical projection is also recognizable in the strategy inherent to the horizontal mechanisms capable of reducing any kind of disparity within the PT level, because it is a simple way to remove the most relevant typology of reasons which can legitimate central interventions. Both aims are more and more central within the PT *parterre*, as revealed by the recent attempts to innovate the

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<sup>213</sup> See GARCÍA MORALES M.J., (*supra*, note 161), pp. 39-40.

<sup>214</sup> That is the omen formulated by AJA E., (*supra*, note 100), pp. 33 ff..

<sup>215</sup> See GARCÍA MORALES M.J., (*supra*, note 91), p. 58.

intergovernmental dialogue set, by founding the COF in 2003. COF actually represents an exception in a context characterized by a strong institutional path dependency: this means a low level of general innovation<sup>216</sup>, but, at the same time, despite certain unsatisfactory performances<sup>217</sup>, this assures that intergovernmental cooperation is perceived as *the* policy-making pattern.

The peculiar, asymmetric position of certain Provinces (Québec, essentially) is only an element of complication: this Province constitutes a sort of exception which could be put in brackets<sup>218</sup>, or perhaps...in a “footnote”. In its relationship with the cooperative settlements, it acts as a factor of general encouragement, but it is mostly refractory to the results of cooperation. Anyway, Québec partially shares the logic summarized above, and not only for the historical role played with regard to both the APC in the 1960s and the COF in 2003. Québec shows a particular opting out technique, which is very far from being a total refusal to participate: it prefers the very different option of combining cautious presence with the renouncement to sign the agreements which the other Provinces and Territories stipulate with the Federation. That is particularly true with reference to the asymmetrical position of Québec regarding the intergovernmental fiscal settlements on federal spending power, whose general nation-building effects have become more and more intertwined with certain “nation-destroying tension between Québec and the rest of Canada”<sup>219</sup>, enlarging, as a result, the Québécois asymmetry.

This functional asset is confirmed by the far stronger weft of multilateral rather than bilateral cooperation, as well as the broad areas of policies and activities which rely on intergovernmental relations. As we have seen, despite its oscillating ability to achieve its own aims concretely, cooperation is fundamental in any sort of field of policy, which is both constitutionally assigned to the Federation and, moreover, to the Provinces; the intergovernmental relations concern all levels of

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<sup>216</sup> That is the outcome of the research presented by JOHNS C.M., O'REILLY P.L., INWOOD G.J., (*supra*, note 25), see in particular the assessment on p. 642.

<sup>217</sup> JOHNS C.M., O'REILLY P.L., INWOOD G.J., (*supra*, note 25), p. 638, about the global impact of the SUFA.

<sup>218</sup> So ZORZI GIUSTINIANI A., (*supra*, note 21), p. 57.

<sup>219</sup> So POLLIO E., *From nation-building to “coercive federalism”: the role of the federal spending power in the United States and Canada*, STALS Research Paper 12/2008, available at [http://www.stals.sssup.it/site/files/stals\\_Pollio.pdf](http://www.stals.sssup.it/site/files/stals_Pollio.pdf), p. 15.

intervention, from the high political settlements (to be further submitted to the respective Legislatures) to the service delivering administrative structures. Two context elements can be introduced here as possible keys for understanding the atmosphere surrounding intergovernmentalism: the constitutional distribution of powers (and its subsequent case-law and political overcoming, more than settlement) and fiscal matters.

On the one hand, the BNA itself avoids any distinction based on the legal nature of public functions, so encouraging to mingle such functions within a sort of flexible parallelism between legislation and administration: as a consequence, it is not surprising that intergovernmental patterns concern any level and typology of public intervention: in fact, the parties are free to avail themselves both of by acts relations (as a tool for top political levels) and by organs solutions (for the day-to-day management of the policy programs), as well as both unitary and by matter treatment of the issues, with a widespread combination of multilateral policy-frames and local, bilateral developments.

On the other hand, the constitutional solutions originally adopted by Canada joined a strong stress on the Federal position (it is an infrequent feature for an experience belonging to the new federal pattern) with the guarantee of an important involvement of the Provinces in the processes regarding constitutional matters. The Centre can rely on a great possibility of using broad exclusive powers, but also every residual power capable of satisfying the wide clause opening article 91, BNA (“*to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces*”), but, at the same time, the Provinces have jurisdiction on certain important fields of economic and social matters, in correspondence to a privileged consideration concerning the fiscal drain regime<sup>220</sup>. A dated case-law tendency to give certain favourable interpretations to the Provincial jurisdictions<sup>221</sup> and to impede certain important federal macroeconomic interventions carried out unilaterally<sup>222</sup>, imposed that further welfare development run only through a sort of negotiated way in order to overcome the

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<sup>220</sup> ZORZI GIUSTINIANI A., (*supra*, note 21), pp. 52-53.

<sup>221</sup> ZORZI GIUSTINIANI A., (*supra*, note 21), p. 51.

<sup>222</sup> Such as the so-called *Bennet program*: see POLLIO E., (*supra*, note 219), p. 8.

constitutional adjudication of both substantive competences and fiscal powers. By this time, intergovernmental agreements (and particularly the ones involved since the 1940s in the development of the federal spending power experience) have brought the system very far from the constitutional portrait of how Canada should have been (and still should be now), which, in its turn, has shown to be absolutely impossible to modify (and it is true even more so recently): political accommodation techniques have been the pillar of the evolution of the Canadian federal fiscal system<sup>223</sup>. The progressive expansion of the federal fiscal capacity (and its subsequent power to condition PT policies by means of its intrusive spending power) in view of the welfare development has been an appreciable achievement, but the only way to achieve such expansion (maintaining a certain consistency to the Constitution) was to cooperate. It is true that, by means of the financial picklock, the Federation has become capable of impressing its own address on the PT policies<sup>224</sup>; but it is possible only thanks to previous agreements dating back to Second World War period which allowed the Federation to share Provincial fiscal drain instruments. Anyway, the total amount of federal transfers and the conditional grants in particular, once again put Canadian fiscal federalism in a separate position within the federal panorama<sup>225</sup>; moreover, as a consequence of Ottawa's *deficit* increase between the end of the 1990s and the middle of the this decade, federal spending power further decreased, with a contemporary strong improvement in the pattern known as "co-determination model" (Keith Banting). It is legitimate to hypothesize that the equitable position of the parties in FPT is a consequence of federal impossibility of being more pervasive, and consequently that such a situation is ready to disappear as soon as possible<sup>226</sup>; but it is still difficult to affirm that the recent enhancement of the federal financial situation has caused an immediate re-birth of the "coercive" methods, thus demolishing the co-

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<sup>223</sup> For confirmation, see POLLIO E., (*supra*, note 219), p. 10.

<sup>224</sup> See, *ex multis*, ADAM M.-A., (*supra*, note 37), p. 1.

<sup>225</sup> See, *ex multis*, BALDI B., *Stato e territorio. Federalismo e decentramento nelle democrazie contemporanee*, Laterza, 2006, pp. 86-87, Tables 3.2 and 3.3.

<sup>226</sup> In coherence with certain provisions referred but not supported by CAMERON D., SIMEON R. (*supra*, note 6), p. 67.

determination pattern<sup>227</sup>. For instance, the first budget surplus has been merely used to raise the federal contribution to the health care entitlement towards previous levels<sup>228</sup>.

In this prospective, both the almost complete lack of formalization of the negotiating processes and, moreover, the absence of any legal status of the agreements destined to be accepted by Legislatures, seem to be a delicate solution chosen by the Supreme Court to leave the parties freer to use their respective political autonomies to build a more and more efficient network of *Politikverflechtung*. Certainly, there is tension with public opinion, which is absolutely far from tolerating such an incoherent configuration of the Parliament: the formal centrality of its sovereignty is solemnly reaffirmed, as a legal limit to intergovernmental omnipotence; but at the same time there is a deep tendency to leave the Assemblies out of the concrete decision forums. This tendency is the consequence of the political incentives springing from both Federal and PT forms of government; an entirely different story is the habit of extending the same low level of formalisation to the relationship between public powers and citizens, whose legal guarantees are often very limited<sup>229</sup>.

Many of the above-made reflections about Canada can be extended to the **Spanish system** of intergovernmental relations, although there are some exceptions, mainly due to their respective specificities. Generally speaking, this convergence can be regarded as a consequence of the eccentric position which the two systems occupy within their respective institutional patterns: once more, the dogmatic distinctions nowadays appear to maintain only a conceptual and historical meaning, but they no longer seem able to drive any sort of classification.

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<sup>227</sup> Listed by CAMERON D., SIMEON R. (*supra*, note 6), p. 67-69.

<sup>228</sup> See FRANCE G., “*Le implicazioni del federalismo per l’interesse nazionale nella sanità*”, in AA.VV., *Quarto Rapporto annuale sullo stato del regionalismo in Italia*, Milano, Giuffrè, 2007, par. 4, available at <http://www.issirfa.cnr.it/3865.908.html?PHPSESSID=e34823b97ace1a0a0600ae2d963fbe42>.

<sup>229</sup> See the criticized status of certain devices provided by the SUFA in LAZAR H., *The Social Union Framework Agreement: Lost Opportunity or New Beginning?*, Institute of Intergovernmental Relations (IIGR), School of Policy Studies, Queen’s University, available at <http://www.queensu.ca/iigr/working/miscellaneous/LazarSocialUnion.pdf> and [http://www.queensu.ca/sps/publications/working\\_papers/03.pdf](http://www.queensu.ca/sps/publications/working_papers/03.pdf).

First of all, it is necessary to highlight a striking difference concerning the mixture of vertical and horizontal dynamics: the evident imbalance inherent in the Spanish horizontal arrangements constitutes a notable exception if compared to compound States in general. The scholars are aware of that, and currently highlight the lost opportunities involved in such behaviour: a stronger resistance against re-centralization processes, a weaker ability to build a common position in relationship to the central power, and the possibility of improving the efficacy of the management of certain fields of activity<sup>230</sup>; obviously the latter achievement is important in general, and perhaps it is the most important from the citizens' point of view. But the peripheral choice of avoiding a high level of horizontal cooperation finds some strong roots among certain relevant features of the Spanish system, and in particular in its historical evolution: the entire central-peripheral dialogue revolves around the process of the “*traspasos*”<sup>231</sup>, which necessarily has always been very deep as a consequence of the strong centralism induced by the dictatorial regime up until 1975-1978, but it has been greatly increased by the Constitution itself, which configures a long list of powers which each *Comunidad, on its own*, can deprive the *Estado* of. Anyway, an important role is also undoubtedly played by a poor cooperative culture<sup>232</sup>: a widespread problem as easy to be complained of as difficult to be solved<sup>233</sup>.

Anyway, it is true that the mechanism described above (along with a strong role played in certain CCAA by nationalist political parties<sup>234</sup>) is very abstractly coherent with a preference towards vertical relations which develop primarily through bilateral negotiations. But the harsh complications induced by the several typologies of central legislative and administrative powers, such as the pervasive central coordination powers, the “*leyes de armonización*” and the “*legislación básica*”, concern every CCAA in (not identical, but) similar proportions: as a consequence, they act as strong incentives for the CCAA to set up their relations with the *Estado* *horizontally* and *multilaterally*.

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<sup>230</sup> See, *ex multis*, GARCÍA MORALES M.J., (*supra*, note 161), pp. 33-34.

<sup>231</sup> See, *ex multis*, AJA E., (*supra*, note 95), p. 64 and GARCÍA MORALES M.J., (*supra*, note 91), pp. 49 and 52.

<sup>232</sup> Denounced in GARCÍA MORALES M.J., (*supra*, note 161), pp. 38 and GARCÍA MORALES M.J., (*supra*, note 91), p. 56.

<sup>233</sup> That is the assessment proposed by MONTILLA MARTOS J.A., (*supra*, note 163), p. 80.

<sup>234</sup> GARCÍA MORALES M.J., (*supra*, note 91), p. 52.

Moreover, as a matter of fact, we have already pointed out that multilateralism is a feature which is not reserved to the *Conferencias sectoriales* (even if it is limited by the fact that participation in the *Conferencias* concerns only the CCAA equipped with the necessary competences), but it also characterizes the *convenios bilaterales*.

An interesting analogy which links the two countries analyzed is that, in order to select the activities to be carried out through cooperation, the distribution of powers provided by the Constitution and by the statute laws does not play a crucial role: both the typologies of the functions and the substantive issues form a rainbow capable of covering almost the entire policy sky. Rather, we must assign a more evident key role to central spending power, which the two competent Courts configure as almost limitless, as long as it respects a shared territorialisation process: both Courts follow a case-law line which tends to overcome the frontier, even in the presence of strong context differences, and sometimes even lands in contexts characterized by more strict limits expressly imposed by the Constitution, as in the Italian case.

Both in Canada and Spain, but also elsewhere, the central spending power is one of the most clear fields in which cooperation shows how easy it is that it acts actually as “a tool[...] of centralisation under the guise of compromise and consensus”<sup>235</sup>.

Similarly to Canada’s, the Spanish intergovernmental relations unfold both by acts and by organs, mingling and alternating, with a certain balance, further political and technical approaches. But there are some differences. First of all, an astonishing higher level of sectorial approach is evident in Spain, which is perhaps its most peculiar feature, and corresponds to one of the most dangerous features, according to certain positions<sup>236</sup>. We have already noticed that over the last 30 years the sectorial approach has displayed the alluvial dynamic of a restless creation of bodies and arrangements; and it is not necessary to point out that this exasperated attempt to divide the scopes of

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<sup>235</sup> This warning is by POIRIER J., (*supra*, note 1), p. 142.

<sup>236</sup> The alluding addresses to RUGGIU I., (*supra*, note 22), pp. 467-468.

activity of each *Conferencia* falls into an illusion very close to the one which was the first feature of the “ancient” dual federalism, as well as the first reason of its failure.

Perhaps (this is my impression) this tendency has been further aided by a certain ideal confusion, within the Ministerial bureaucracies, between the cooperation organs properly intended and the “*órganos colegiados*”, and it is a phenomenon which does not even seem to be decisively remedied by the internal organizational effects of the running European integration process, neither by some recent innovations, such as the *Conferencia de Presidentes*, taken into consideration its minimal activity, as well as the strong and exclusive dependency from the Central political “rhythm”.

Another difference embeds within the different topic of the formalization, at least at the top levels: if both the Canadian and Spanish systems, at the lower, technical and administrative levels, contemplate both institutionalized bodies and plenty of informal meetings, the top political level in Spain has a broadly different institutionalization. Moreover, an even more relevant legal status of cooperative relations is perceivable analyzing the resulting acts: but, in this case as well, the parties tend to prefer the non-binding agreements, especially in multilateral relations.

Neither Canada nor Spain’s intergovernmental relations are sheltered by any constitutional provisions, apart from the great and delicate question about the ensuing guarantees for the cooperating polities, but we can here refer to an important exception regarding Spain, which is linked to a common feature: we have seen that the Spanish Constitution provides the *CCAA* with certain horizontal tools, but the rigid configuration given to them causes the series of problems we have referred to, and, in short, makes the use of such tools difficult for the *CCAA*. Well, taken into account the concrete impossibility of changing the Constitution, both in Canada and Spain, the result is that in the end the Canadian constitutional silence seems to be much less problematic.

Both Canadian and Spanish systems rely on parliamentary assets as a source to empower many cooperation tools, thanks to the legal and political position ensured to the Executive within their own Assemblies; but we need certain clarifications. First of all, an impression of the true nature of the Executive’s instruments: perhaps the Canadian rigidity with regard to the Parliament’s power to

modify the contents of positions previously agreed upon at the intergovernmental level is a mere consequence of the lack of institutionalization. The only instrument known by Canadian negotiators is the *intergovernmental agreement*, which must be interpreted in the light of the pre-eminent common law atmosphere of the general legal system. The point is that many Canadian “agreements” should or could be covered by a different legal configuration, that would bring them very close to the Spanish *consultas* or *informes* (or *acuerdos*, perhaps) which *La Moncloa* often requests to the *Conferencias* on draft statute laws. By accepting this impression, the Canadian system appears more similar to the Spanish, where the peripheral polities can only rely on the political strength of *La Moncloa*, which is supplied with a decisive role within the *Cortes Generales*, but this role is merely political, while the legal devices are not so relevant, and moreover it is unlikely that the Executive uses further tools concerning the fiduciary relationship<sup>237</sup>.

Another feature which unites partially Canada and Spain, as we have already seen, is a relevant level of asymmetry, although the two countries seem to outlet far different relationships between asymmetries and cooperation. As a matter of fact, their respective “mavericks” seem to affect differently the general cooperation experiences: generally speaking, not only the Spanish cooperation appears rather independent from its respective complex asymmetric panorama, but, in Spain, it seems to be a far less destabilizing element than in Canada, and if we have to give an opinion, we might stress a certain anti-asymmetric effect.

The last reflection deserves to be dedicated to the relationship connecting intergovernmental relations and the Second Chamber, i.e. intergovernmental (inter-state) and parliamentary (intra-state) territorial representation, which is a classical issue concerning not only the system provided with any kind of central parliamentary devices for territorial-interest representation, but also the countries which still lack of them. Focusing on Canada and Spain, despite the traditionally (and constitutionally) asserted “federal” nature of Canada and the solemn affirmation that “*El Senado es la Cámara de*

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<sup>237</sup> See, in the end, IACOMETTI M., *La Spagna*, in CARROZZA P., DI GIOVINE A., FERRARI G.F. (a cura di), *Diritto pubblico comparato*, Roma-Bari Laterza, 2009, who, on pp. 260-261 and 250, remembers a low level of use of both Executive legislative acts (until the very recent experience concerning the remedies to the still lasting financial crisis, we must add) and the “*cuestión the confianza*”.

*representación territorial*” (article 69 of the Spanish Constitution), it is currently recognized that neither Canada nor Spain’s systems contemplate an authentic Second Chamber for territorial representation: so this is not the ideal location for answering that question. We can only highlight that Canada and Spain belong to that great group of compound States in which the impossibility for the territorial interests to rely on parliamentary representation can be interpreted as one of the factors which facilitate the development of any intergovernmental tools which can at least partially accomplish a similar role<sup>238</sup>. Here it is not possible to test the functions concretely unfolded by the intergovernmental device in the presence of an authentic Autonomies’ Chamber (assuming that such a device actually exists *in mundo*<sup>239</sup>), highlighting the mutual effect on their respective roles. We can only to mention a few general observations about this complex question.

Firstly, a relevant part of intergovernmental relations would not be able to be affected by the presence of a Second Chamber, because at least a great part of the episodes of non-vertically-oriented horizontal relations seem independent from the vertical phenomena.

Secondly, there are plenty of political decisions which generally escape from the possible fields of action of any Second Chamber (especially taking into consideration that they usually take no part in the fiduciary relationship, where it exists, with the central Executive), because they (due to the Constitutions, the statute laws and the praxes) tend to remain within the jurisdiction of the Executives<sup>240</sup>: for instance, that is the case of some important financial powers<sup>241</sup>.

Moreover, the existing Second Chambers tend to work on the basis of the majority principle<sup>242</sup>, and as a result they do not seem suitable for ensuring strong guarantees to each *single* represented territorial polity.

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<sup>238</sup> Such a position is disclosed by GARCÍA MORALES M.J., (*supra*, note 91), p. 61.

<sup>239</sup> See LUTHER J., PASSAGLIA P., TARCHI R., *A World of Second Chambers*, Milano, Giuffrè, 2006.

<sup>240</sup> As noticed by RUGGIU I., (*supra*, note 22), p. 465.

<sup>241</sup> That is the first element pointed out by POIRIER J., (*supra*, note 1), pp. 137-138.

<sup>242</sup> As observed also by AJA E., (*supra*, note 88), pp. 9-10.

In addition, the nationalisation of the approach to any issue induced by the presence at the central parliamentary level tends to increase the logic of politicization within the Second Chambers, overshadowing the territorial issues, even in the “*Bundesrat* pattern”<sup>243</sup>.

Furthermore, the legal guarantees of which, somewhere, certain peripheral polities take advantage seem to be able to result even more weak within the frame of the parliamentary contexts, taken into account the traditional deference that, still nowadays, many Courts (the Canadian Supreme Court, for instance) hold towards the Legislatures in case of dealing with questions concerning *iter legis*. But, at this time, it is clear that the peripheral polities can no longer rely on “political safeguards” only.

Lastly, the ideal aim of a Second Chamber is to bring the territorial *interests* within the central legislative making process, whereas the far different objective of intergovernmental cooperation tends to reduce to *coordinate* (the word is used in a generic meaning) the powers assigned to the different levels: the latter aim might be (positively) affected by a the correct working, genuine Second Chamber, but indirectly only.

It is clear that the ensuing conclusion that intergovernmental relations are not destined to decline in the future brings to agree in principle with the positions which are primarily concerned about the need to empower their the democratic tone<sup>244</sup>.

Apart from the latter reflections (*rectius*, impressions), the limited and light comparative effort accomplished has revealed that, notwithstanding some irreducible peculiar characteristics, broadly speaking, to similar context features tend to correspond similar intergovernmental relations solutions

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<sup>243</sup> See CARROZZA P., *Audizione del 28 gennaio 2003*, pp. 14-15, in CAMERA DEI DEPUTATI, *Indagine conoscitiva sulle tematiche inerenti le modifiche all’art. 117 della Costituzione*, available at [http://legxiv.camera.it/dati/leg14/lavori/stencomm/01/indag/articolo\\_117/2003/0128/s000r.htm?posrit=/dati/leg14/lavori/stencomm/01/indag/articolo\\_117/elenco.htm?campo=/legxiv.camera.it/dati/leg14/lavori/stencomm/01/indag/articolo\\_117/elenco.htm](http://legxiv.camera.it/dati/leg14/lavori/stencomm/01/indag/articolo_117/2003/0128/s000r.htm?posrit=/dati/leg14/lavori/stencomm/01/indag/articolo_117/elenco.htm?campo=/legxiv.camera.it/dati/leg14/lavori/stencomm/01/indag/articolo_117/elenco.htm), p. 15 and CARROZZA P. (*supra*, note 3), p. 798.

<sup>244</sup> See CAMERON D., *Las estructuras de las relaciones intergubernamentales*, in *International Social Science Journal* (ISSJ), 167/2001, p. 142.

and phenomena, and the same can be said concerning the differences. Perhaps the most important, little result is that, reversing the sequence, emerges that intergovernmental relations themselves can act as (a fragment of) a sort of “litmus paper” for comparisons among several territorial pluralistic experiences.