CHAPTER 6

The Principles of Separation and Correspondence, the Comparative Method and the Problem of Semantic Change

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What's in a name? That which we call a rose
By any other name would smell as sweet.¹

Economics is a much more important factor than politics in motivating language change among the general population [...]²

1 Naming the Variety: Financial Relations, Denominational Issues and Comparative Studies

This essay analyses the principles of separation and correspondence, i.e., the main principles upon which financial arrangements are built and fiscal relations are shaped in different constitutional contexts and designs. Furthermore, it ascertains how the principles in question work under diverse federal arrangements and therefore govern intergovernmental financial relations in both federal and regional states.³

Before examining both principles, however, I will share some reflections on the multifarious institutes and mechanisms that scholars usually include under the umbrella of 'intergovernmental financial relations'. In-depth analyses have already been dedicated to the topic, as well as to their applicability to different types of federalism⁴—and yet there is room left for comparative surveys.

The principles of separation and correspondence must be scrutinised by taking into account the broader federal constitutional contexts that they operate within. To this extent, these principles link the two constitutive parts of financial relations (i.e., the revenue and expenditure

¹ W. Shakespeare, *Romeo and Juliet* (II, ii, 1-2).

² D. Crystal, *The Stories of English* (London: Allen Lane, 2004), 243.

³ See art. 104a.1 of the German Basic Law (*Grundgesetz*—hereinafter GG); para. 2 of the Financial Constitution Act of 1948 of Austria (*Finanz-Verfassungsgesetz*—hereinafter F-VG); art. 2 of the Swiss Constitution; s. 92.2 of the Constitution Act 1867 of Canada; schedule VII to the Constitution of India. The rule also applies to regional constitutions, such as those of Spain and Italy: see arts. 156.1 and 119.3, respectively. In the United States, the principles are not expressly mentioned in the Constitution. Despite this, they have been applied to the distribution of finance since the inception of the Federation.

⁴ See, among others, C. Murray and R. Simeon, "South Africa's Financial Constitution: Towards Better Delivery?", *South African Public Law*, 15 (2000) 477–504; R.L. Watts, *Comparing Federal Systems* (3rd edn., Montreal: McGill–Queen's University Press, 2006), 106; A. Shah, "Introduction: Principles of Fiscal Federalism", in A. Shah and J. Kincaid (eds.), *The Practice of Fiscal Federalism: Comparative Perspectives* (Montreal: McGill–Queen's University Press, 2007) 3–43; P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2011), 6–2ff.; G. Anderson, *Fiscal Federalism: A Comparative Introduction* (Oxford: Oxford University Press, 2009).

sides) to what, paraphrasing Friedrich, we may call “federalising and regionalising processes”.⁵ Indeed, revenue and spending powers—as well as solidarity mechanisms—allow subnational units and local government to finance and carry out their functions. The different tiers of governments are thus enabled “in achieving their policy objectives within their constitutionally assigned legislative and executive responsibilities”.⁶

When considering the correspondence rule, proceeds transferred from the national level to constituent units under equalisation mechanisms count as a part of revenues. Solidarity complements revenue-raising mechanisms and provides subnational units with additional funds that are aimed at increasing their fiscal capacity, i.e., constituent units’ ability to generate revenue.⁷ To put it differently, levying taxes, imposing fees and equalisation allow constituent units to fully finance their constitutional responsibilities. A *correspondence* is thus established between revenues, expenditures and competences, and this enables constituent units to discharge such responsibilities without any interference from the central level of government, i.e., according to the principle of *separation*.⁸ Separation then enhances both fiscal responsibility and accountability of the constituent units, and it preserves their constitutional “sphere of guaranteed autonomy”.⁹

However, a rapid survey of the different federal (and regional) constitutional designs discloses a great variety of financial arrangements. It could be argued that each federalising process has its own forms of financial relations, which indeed vary from state to state and take different forms in different constitutional contexts. The linguistic factor also affects this huge variety of forms of financial relations: each constitutional design assigns its own label to the variety of financial forms, and a legal approach must take this into account.¹⁰ We have to examine the Babel of the naming, and then try to accommodate correspondence, separation,

⁵ See C.J. Friedrich, “New Dimensions of Federalism”, *Proceedings of the American Society of International Law at Its Annual Meeting (1921–1969)*, 57 (1963) 238–240; C.J. Friedrich, *Trends of Federalism in Theory and Practice* (New York: Praeger, 1968), 24; M. Burgess, *In Search of the Federal Spirit: New Comparative Empirical and Theoretical Perspectives* (Oxford: Oxford University Press, 2012).

⁶ Watts, *Comparing Federal Systems*, *supra*, at 106.

⁷ See, among others H.H. Landreth, “The Measurement of Local Fiscal Capacity”, *The Journal of Finance*, 16 (1961) 105–106; J. Mikesell, “Changing State Fiscal Capacity and Tax Effort in an Era of Devolving Government, 1981–2003”, *Publius*, 37 (2007) 532–550; T. Besley *et al.*, “Weak States and Steady States: The Dynamics of Fiscal Capacity”, *American Economic Journal: Macroeconomics*, 5 (2013) 205–235. Concerning the interrelations between equalisation mechanisms, revenues, and fiscal capacity is apparent in Canada, see B. Dahlby and L.S. Wilson, “Fiscal Capacity, Tax Effort, and Optimal Equalization Grants”, *The Canadian Journal of Economics/Revue canadienne d’Economie*, 27 (1994) 657–672.

⁸ On the manifold mechanisms through which federal and regional governments affect the autonomy of constituent units, see Shah, “Introduction: Principles of Fiscal Federalism”, *supra*, at 21.

⁹ G. Sawer, *Modern Federalism* (London: Watts, 1969), 27. See also W.W. Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown & Co., 1964), 6.

¹⁰ On “the rich variety of forms of legal language, with their various rhetorical, ethical, political, and logical implications”; on the functions of legal language, which is “therefore [that] of ordering in the sense of creating order as well as in the sense of giving orders”; on the “interrelationships of national languages with each other and with the particular types of languages of various [...] disciplines or activities”; see H.J. Berman, *Law and Language: Effective Symbols of Community*, edited by J. Witte, Jr. (Cambridge: Cambridge University Press, 2012), 75, 77, and 63 respectively. For a comprehensive approach to global variation in English linguistics, see R. Hickey (ed.), *Standards of English. Codified Varieties around the World* (Cambridge: Cambridge University Press, 2012).

and linguistic variety. This is due to the fact that such variety reflects how constitutions term their ‘domestic’ mechanisms for the allocation of fiscal powers and the distribution of the estimates of revenue to be raised throughout the country.

2 From Language to Law: Correspondence, Separation and the Variation of Forms

On the one hand, linguistic variation is complemented by a great deal of ‘financial’ forms; on the other hand, it is also extremely differentiated on domestic grounds. When it comes to comparing financial mechanisms, the process of naming raises the following questions: does the linguistic variation really reflect a variety of forms? Does this cross-referential constitutional vocabulary entail differentiated concepts of ‘financial relations’? Or, as I contend, does it merely “confound [the] language [of constitutions], [such] that they may not understand one another’s speech?”¹¹

This is not to deny that variations in naming can really reflect different ways of interpreting financial relations in different constitutional contexts. This assumption is held when federations try to reconcile the allocation of financial powers and the distribution of responsibilities between tiers of government. Although federal and regional states share the rationale of financial arrangements, there is no homogeneity between the ways such arrangements are enhanced. The pendulum swings between two notions of ‘financial relations’: they can be conceived as a subject matter included in the list of specified heads of legislative powers assigned to the different levels of government, or they are the presupposition for the discharge of (legislative and administrative) responsibilities constitutionally assigned to units in order to meet the needs of their respective communities.

The vast majority of constitutions consider financial relations as presuppositions that allow such responsibilities to work. Canada and South Africa are the most relevant exceptions to the rule. In Canada, financial powers are considered a subject matter to be distributed among the different levels of government. Hence, section 92.2 of the Canadian Constitution Act 1867 expressly limits provincial taxing power to “the raising of a revenue for provincial purposes”.¹² This holds true as far as South African intergovernmental financial relations are concerned. First, sections 214–215 and 228 of the 1996 Constitution refer to several acts to be passed by the national parliament, and provincial taxing and revenue power have been progressively reduced by national legislation.¹³ Second, subject matters like ‘public finance’, the ‘general

¹¹ Ge. 11:7, in *Holy Bible: King James Version* (Cambridge: Cambridge University Press, 2006), 10.

¹² See Hogg, *Constitutional Law of Canada*, *supra*, at 6–21. See also *Reference Re Legislative Jurisdiction of Parliament of Canada to Enact the Employment and Social Insurance Act (1935, c. 48)*, [1936] S.C.R. 427, at 434–435, per Duff C. J. Dissenting. The words “for provincial purposes” might be given a restrictive operation: “the power to legislate for taxation [...] is concerned with taxation for the purpose of raising monies for the exclusive disposition of the local legislature”.

¹³ Under s. 228.2 of the Constitution, provincial taxing powers are limited by the Provincial Tax Regulation Process Act (No. 53 of 2001), which was passed upon the advice of the Financial and Fiscal Commission. The limitation of taxing powers is compensated by the distribution of an equitable share of the revenues raised nationally and provincially under the annual Division of Revenue Act (s. 214 of the Constitution), whose adoption is conditioned by the Intergovernmental Fiscal Relations Act (no. 97 of 1997). Finally, the budgetary process falls under the umbrella of the Public Finance Management Act (no. 1 of 1999), see s. 215 of the

budgetary process’, and an ‘equitable share of revenue raised during the financial year’ fall under the umbrella of section 214 of the Constitution, and therefore are reserved to the exclusive competence of the national government. Finally, the South African Constitutional Court has interpreted revenue-raising powers as a legislative subject matter. In two leading cases,¹⁴ it stated that only the national parliament enjoys plenary legislative power within the bounds of the Constitution, whereas:

the legislative authority of provinces is circumscribed [...] Provinces have no power to legislate on a matter falling outside Schedules 4 and 5 unless it is a matter [...] expressly assigned to the province by national legislation [...] Financial management of provincial legislatures is a matter that is listed neither in Schedule 4 nor in Schedule 5 to the Constitution. It follows, therefore, that it is a matter that falls within the legislative competence of Parliament.¹⁵

It does not follow from this that the allocation of finance, in general, and of revenue-raising powers, in particular, are immune from how constitutions distribute responsibilities. First, financial autonomy entails fiscal responsibility—each level of government must rely on appropriate proceeds in order to finance its own powers. Second, taxing powers are the major—but not the sole—sources of proceeds. In order to carry out their functions, units usually combine different revenues: licence fees, direct and indirect taxation, equalisation mechanisms, grants and so on. Third, the different levels of government do not recognise any limitations on their spending powers, which cannot therefore be considered as a subject matter, and this assumption is held both in Canadian and US case law.¹⁶

Fourth, financial relations, on the one hand, and legislative and administrative powers, on the other, are interrelated under the principle of correspondence. On the one hand, legislative powers indicate which responsibilities must be financed through revenue powers; on the other hand, legislation is essential for enacting spending policies and raising funds by taxation. Both appropriation of funds and taxing must necessarily be exercised through legislation: the

Constitution. See P. de Vos and W. Freedman (eds.), *South African Constitutional Law in Context* (Oxford: Oxford University Press, 2014), 305ff.

¹⁴ *Premier: Limpopo Province v. Speaker of the Limpopo Provincial Legislature* 2011 (6) S.A. 396 (C.C.) (‘Limpopo I’) and *Premier: Limpopo Province v. Speaker of the Limpopo Provincial Legislature* 2012 (4) S.A. 58 (C.C.) (‘Limpopo II’).

¹⁵ *Limpopo I*, at para. 21. See N. Steytler and R.F. Williams, “Squeezing out Provinces’ Legislative Competence in *Premier: Limpopo Province v. Speaker: Limpopo Provincial Legislature & Others I and II*”, *South African Law Journal*, 129 (2012) 621–637.

¹⁶ *Smylie v. The Queen*, [1900] 27 O.A.R. 172 (ONCA); *Ontario v. Board of Transport Commissioners*, [1968] S.C.R. 118; *Alberta v. Canada (Transport Commission)*, [1978] 1 S.C.R. 61. For U.S. case law, see *United States v. Butler*, 297 U.S. 1 (1936), at 65. See also *Steward Machine Co v. Davis*, 301 U.S. 548 (1937); *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947); *Fullilove v. Klutznick*, 448 U.S. 448 (1980). See W.F. Fox, “The United States of America,” in Shah and Kincaid, *The Practice of Fiscal Federalism*, *supra*, 344–368, at 349ff.; J.V. Corbelli, “Tower of Power: *South Dakota v. Dole* and the Strength of the Spending Power”, *University of Pittsburgh Law Review*, 49 (1988) 1097–1126, at 1101ff.; T.H. Verhuizen, “*United States v. American Library Association: The Supreme Court Fails to Make the South Dakota v. Dole* Standard a Meaningful Limitation on the Congressional Spending Power”, *South Dakota Law Review*, 52 (2007) 565–604.

principle of correspondence thus govern the distribution of both tax bases and legislative powers related thereto, since taxes must be levied or collected under the authority of law.¹⁷

This interrelation between legislation and revenue-raising powers is particularly apparent when it comes to the principle of separation. Because of the correspondence between proceeds and legislative powers, each level of government should *in principle* levy taxes and collect proceeds within the scope of the responsibilities it has to discharge.

However, the application of the principle of separation varies according to the different constitutional contexts. *Dual federalism* still reflects the above-mentioned correspondence between taxation powers, the scope of the responsibilities to be discharged and legislative powers. As these powers are allocated at different levels, they are separated as if they were in watertight compartments: the different levels of government can only impose taxes in those fields the constitution assigns to them, and national and subnational taxing powers are limited to the raising of revenues only for their respective purposes.¹⁸ This was the case in the USA prior the 16th Amendment (1913), in Canada and in Australia, where financial autonomy and the discharge of responsibilities matched the distribution of legislative powers. This approach is still the operational rule in Switzerland,¹⁹ where the federal constitution resorts to a ‘mixed rule’, where competition, solidarity, and cooperation merge. The 2004 Swiss constitutional reform combined competition and solidarity: the three pillars of this ‘new’ Swiss fiscal dualism rest on a stringent distribution of taxing powers between the federation and the cantons (article 127ff.), on the application of fiscal responsibility, and correspondence between revenues and expenditures (art 47.2), as well as on equalisation mechanisms, which are aimed at correcting the competition among cantons (art 135)²⁰.

Further, how the *principles* of correspondence and separation work is due to the tremendous changes that federations underwent in the course of the twentieth century. Whereas in some federations these changes were arranged without having recourse to formal constitutional amendments, such as in Canada and Australia,²¹ in others countries, constitutional amendments

¹⁷ See, among others, ss 91.3, 92.2 and 92.9 of the Constitution Act 1867; s. 83 of the Commonwealth of Australia Constitution Act 1900; s. 265 of the Indian Constitution; s. 96 of the Constitution of Malaysia.

¹⁸ See *Pollock v. Farmers’ Loan & Trust Company*, 158 U.S. 601 (1895). See L.H. Tribe, *American Constitutional Law* (New York: Foundation Press, 2000), 842–843; Fox, “The United States of America”, *supra*, at 349ff.

¹⁹ See art. 47.2 of the Federal Constitution (amended in 2004 and entered into force in 2008): “the Confederation shall leave the Cantons with sufficient sources of finance and contributes towards ensuring that they have the financial resources required to fulfil their tasks”. See G. Kirchgässner, “Swiss Confederation,” in Shah and Kincaid, *The Practice of Fiscal Federalism*, *supra*, 318–343, at 329; G. Kirchgässner, “Finanzföderalismus in der Schweiz”, in Peter Bußjäger (ed.), *Perspektiven des Finanzföderalismus in Österreich* (Innsbruck: Studienverlag, 2013) 39–70, at 46ff; R. Kägi-Diener, “Art. 47”, in B. Ehrenzeller *et al* (eds.), *Die schweizerische Bundesverfassung* (Zürich: Dike-Schulthess, 2008) 875–881.

²⁰ See Kirchgässner, “Finanzföderalismus in der Schweiz”, *supra*, at 56ff.

²¹ The centralising effects of World War II favoured the creation of a new set of intergovernmental financial relations and the abandonment of dual federalism. In Canada and Australia, “it is true that the framers of the Constitution could hardly have foreseen the rise of the welfare state with its enormous growth in [subnational] responsibilities”. See Hogg, *Constitutional Law of Canada*, *supra*, 6–18. For Australia, see A. Morris, “Commonwealth of Australia”, in Shah and Kincaid, *The Practice of Fiscal Federalism*, *supra*, 43–72, at 71 note 2.

altered the forms of correspondence and separation vis-à-vis dual federalist contexts.²² But the major constitutional reflexes of the passing of dual federalism²³ were due to the advent of cooperative intergovernmental financial relations. This entailed an alteration of the same meaning of correspondence and separation that we may call ‘social federalism’: the national government had to ensure minimum standards of income, health, education and welfare to all citizens, and the possibility of enjoying comparable services must not be submitted to excessively different tax rates.²⁴

As a consequence, centralisation narrowed units’ taxes in those fields the constitution assigned to them, and triggered a continuation of highly centralised fiscal arrangements. Since shared costs assure a high minimum level of some important social services, units’ taxing powers must be inevitably complemented by equalisation mechanisms (grants, tax rental agreements, vertical and horizontal equalisation). This means that all “[r]evenues raised from the above-mentioned sources shall enable [constituent units] to fully finance the public functions attributed to them”, and shall count as proceeds in accordance with the principles of correspondence and separation.²⁵

Variation is even greater in Austria, where the allocation of revenue-related legislative powers matches neither the distribution of responsibilities to be financed nor the revenue powers. Whereas the distribution of legislative powers is enshrined in the federal Constitution (*Bundes-Verfassungsgesetz*—hereinafter B-VG), revenue powers are set forth in the F-VG—to which Article 13 B-VG expressly refers—according to hugely differentiated criteria.²⁶

3 “What’s in a Name?” Comparative Legal Studies and the Unitary Function Underpinning ‘Financial Linguistic Variation’

Comparative legal studies are usually entrusted with the goal of dealing with the variety of forms and denominations that characterise intergovernmental financial relations. On the one hand, these studies contribute to filling in the gaps between written provisions and the practice of law—and the flaw between black-letter constitutions and rules in action in living constitutions is clear when it comes to financial relations.

On the other hand, this method makes it possible to examine a vast array of constitutional regimes and operational rules, and therefore to propose classifications that are the outcome of a cross-national analysis of federal systems. Comparative legal scholars are indeed accustomed to examining a vast array of forms of financial relations, to grouping them on the grounds of

²² For example, the 16th Amendment to the U.S. Constitution and the 1955 constitutional amendments to the German Basic Law. See below, section 4.

²³ See E.S. Corwin, “The Passing of Dual Federalism”, *Virginia Law Review*, 36 (1950) 1–24.

²⁴ See Watts, *Comparing Federal Systems*, *supra*, at 108; Morris, “Commonwealth of Australia”, *supra*, at 55.

²⁵ See art. 119 of the Italian Constitution. The same holds true in Spain. See art. 156 of the 1978 Constitution. For an examination of the principle of correspondence in regional countries (as well as in times of social federalism), see M. Nicolini, “Principio di connessione e metodo comparato”, in F. Palermo *et al* (eds.), *Federalismo fiscale: una sfida comparata* (Padua: CEDAM, 2011) 97–120; E. Aja, *Estado Autonomico y reforma federal* (Madrid: Alianza Editorial, 2014), 235ff.

²⁶ See P. Bußjäger, “Reforms on Fiscal Federalism in Austria”, in G. Robbers (ed.), *Reforming Federalism—Foreign Experiences for a Reform in Germany* (Frankfurt am Main: Peter Lang, 2005) 59–67; M. Stelzer, *The Constitution of the Republic of Austria: A Contextual Analysis* (Oxford: Hart Publishing, 2011) 153.

their common traits and to devising “prescriptive models” that are “a synthesis of complexity by logical categories” useful for the advancement of comparative legal studies.²⁷

Further, the comparative method has proven to be extremely useful, e.g., it has made it possible to include the multifarious forms of financial relations under three basic categories: ‘revenue powers’, ‘equalisation mechanisms’, and ‘spending powers’.²⁸

The comparative method thus exhibits an impressive ability to deal with legal complexity; furthermore, it proves capable of achieving the goal of accommodating the variety of forms that financial relations take under different constitutional designs. It does not follow from this, however, that this method is aimed at reducing and oversimplifying such variety; by contrast, it is capable of comparing and contrasting different forms of financial relations, detecting analogies and differences between them and devising models through which subnational responsibilities are financed.

This means that the comparative method not only presupposes both legal and linguistic variation, but that linguistic variation cannot be considered an obstacle to comparative studies. The method indeed allows scholars to get beneath linguistic labels and grasp the commonalities among them. The variety of languages, then, does not confound the interpreter: paraphrasing Shakespeare, “that which we call *distribution of finance* by any other name would perform the same function.”

What does make this possible is termed the functional approach. This approach goes beyond the financial and fiscal machineries that characterise a specific financial constitutional regime. Instead of focusing on variation, the approach in question is centred on the function that the principles of separation and correspondence tend to attain under different constitutional frameworks: “Institutions, both legal and non-legal, even doctrinally different ones, are comparable if they are functionally equivalent, if they fulfill similar functions in different legal systems.”²⁹

In this respect, the search for commonalities and analogies may help in the process of highlighting mutual borrowings, the historical evolution of financial relations in specific constitutional contexts, as well as transplants.³⁰ In other words, this analysis is aimed at

²⁷ See L. Pegoraro, “The Comparative Method and Constitutional Legal Science: New Trends”, in A. Mordechai Rabello and A. Zanotti (eds.), *Developments in European, Italian and Israeli Law* (Milan: Giuffrè, 2001) 113–129, at 117 and 126. See also R. David, *Les grands systèmes de droit contemporains* (Paris: Dalloz, 1974); R. Sacco, “A Dynamic Approach to Comparative Law (Installment I of II)”, *The American Journal of Comparative Law*, 39 (1991) 1–34; R. Sacco, “A Dynamic Approach to Comparative Law (Installment II of II)” *The American Journal of Comparative Law*, 39 (1991) 343–402; K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (Tübingen: J.C.B. Mohr, 1996), 31ff.; P.G. Monateri (ed.), *Methods of Comparative Law: An Intellectual Overview* (Cheltenham: Edward Elgar Publishing, 2012).

²⁸ Scholars consider these three features as the constitutive parts of financial relations. See Watts, *Comparing Federal Systems*, *supra*, 95ff.; R.L. Watts and J. Kincaid, “Introduction”, in R.L. Watts and R. Chattopadhyay (eds.), *Emerging Issues in Fiscal Federalism* (New Delhi: Viva Books, 2008) xi–xvii.

²⁹ Zweigert and Kötz, *Einführung*, *supra*, at 33ff. See also R. Michaels, “The Functional Method of Comparative Law”, in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 339–382, at 340.

³⁰ A. Watson, *Legal Transplants: An Approach to Comparative Law* (Athens: The University of Georgia Press, 1993); D. Berkowitz *et al*, “The Transplant Effect”, *The American Journal of Comparative Law*, 51 (2003) 163–203.

detecting the dissemination of principles and mechanisms that govern financial relations, as well as their subsequent adaptation. However, the devising of prescriptive models does not support the homogenisation–unification of these diverse solutions adopted under different federal constitutions. I have already contended that comparative legal studies presuppose linguistic and legal variety; furthermore, and looking at how financial relations actually work, the functional approach encourages the practice of the “comparative law as a subversive discipline”.³¹ The subversive character of comparative studies reveals the fallacy of the presence of “new universals” in what has become a globalised world,³² and therefore shows how legacies and transplants exhibit an elevated degree of resilience in federal contexts that act as recipients of a transplanted solution in the field of financial relations.

To sum up, the comparative method thus highlights the unitary function of financial relations: levying taxes, imposing fees and equalisation mechanisms are functionally oriented to provide constituent units with the appropriate proceeds in order to fully discharge their constitutional responsibilities.³³ Once more, what unifies the different forms of financial relations and makes them functionally equivalent—what, poetically, makes them “smell as sweet”, notwithstanding the naming—is the principle of correspondence, whose constitutional (linguistic and legal) regimes I will examine in the following sections through the lenses of the comparative legal method.

4 The Correspondence Rule: Its Constitutional Regime, Its Operational Rule and the Principle of Fiscal Equivalence

The comparative method is also aimed at outlining the *constitutional regime* of financial relations, which is indeed inherent to every federalising process. As Alexander Hamilton stated:

A complete power, therefore, to procure a regular and adequate supply of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution.³⁴

This holds true as far as intergovernmental financial relations are concerned. Questions arise, however, when constituent units do not possess the amount of resources that is necessary to fully finance (and therefore discharge) their constitutionally assigned responsibilities. This is due to the centralising effects that the advent of social federalism has triggered, as well as to the presence of *de facto* imbalances—both ‘vertical’ and ‘horizontal’³⁵—which call for the

³¹ G. Fetcher, “Comparative Law as a Subversive Discipline”, *American Journal of Comparative Law*, 46 (1988) 683–700; H. Muir Watt, “Further Terrains for Subversive Comparison: The Field of Global Governance and the Public/Private Divide”, in P.G. Monateri (ed.), *Methods of Comparative Law*, *supra*, 270–288, at 270.

³² Muir Watt, “Further Terrains for Subversive Comparison”, *supra*, at 272.

³³ Watts, *Comparing Federal Systems*, *supra*, at 106; Hogg, *Constitutional Law of Canada*, *supra*, at 6–21ff.

³⁴ A. Hamilton, “No. 30 (Concerning Taxation)”, in A. Hamilton *et al*, *The Federalist: The Gideon Edition*, edited by G. W. Carey and J. McClellan (Indianapolis: Liberty Fund, 2001) 145–149, at 146.

³⁵ Vertical imbalances (or the ‘vertical fiscal gap’) highlight that “the revenues of the constituent units are inadequate to fulfill their constitutionally assigned expenditures responsibilities”. See Watts, *Comparing*

correction of “the fiscal inefficiencies and regional inequities arising from the differential fiscal capacities of various jurisdictions” by providing them with additional or further sources.³⁶

The outcome is twofold: on the one hand, such changes cause a mismatch between subnational revenue-raising capacity and expenditure obligations;³⁷ on the other hand, they can alter the way principles of correspondence and separation function, and therefore “break the nexus between taxing and spending, with implications for accountability with both spheres of government”, i.e., national and subnational.³⁸

This is the case of aggregative federations, such as the USA, Canada, and Australia, which have rarely modified their constitutional texts in order to accommodate the law in the books to the law in action concerning financial relations. As a consequence, the

design of the Constitution [according to which] each sphere of government [would] raise taxes for their own purposes and [would] be democratically accountable for both taxing and spending³⁹

was progressively modified without altering the constitutional framework. Fiscal dualism was thus superseded by innovative, fluid intergovernmental financial relations but that are not constitutionally enshrined, which both confer a new role on the federation. The federation has “revenue resources that far outstrip its expenditure responsibilities” because it levies taxes throughout its federal and state territories and transfers part of the total amount to the subnational (and local) levels of government.⁴⁰

This means that a rigorous approach to financial relations is not confined to a mere sketch of the relevant constitutional provisions; by contrast, it tries to accommodate the disparities between the black-letter constitution and the operational rules governing their respective constitutional regimes. Pointing out discrepancies between the *law in the books* and the *law in action* of financial relations⁴¹ expands the variety of forms.

Federal Systems, *supra*, at 103. Horizontal imbalances concern the relations between the different units: the variation in their revenue-raising capacities makes them “not able to provide their citizens with services at the same level on the basis of comparable tax levels”. See Hogg, *Constitutional Law of Canada*, *supra*, at 6–2. As a consequence, there are differential net fiscal benefits across the country, which can determine “unequal treatment of citizens with identical private incomes depending on their place of residence”. See Shah, “Introduction: Principles of Fiscal Federalism”, *supra*, at 10.

³⁶ See Hogg, *Constitutional Law of Canada*, *supra*, at 6–8; Watts, *Comparing Federal Systems*, *supra*, at 98; Shah, “Introduction: Principles of Fiscal Federalism”, *supra*, at 13.

³⁷ As in Australia. See C. Walsh, “Federal Reform and the Politics of Vertical Fiscal Imbalance”, *Australian Journal of Political Science*, 27 (1992) 19–37.

³⁸ C. Saunders, “The Interdependence of Federalism and Democracy in Australia”, in F. Palermo and E. Alber (eds.) *Federalism as Decision-Making: Changes in Structures, Procedures and Policies* (Leiden: Brill-Nijhoff, 2015) 20–39, at 33.

³⁹ Saunders, “The Interdependence of Federalism and Democracy”, *supra*, at 32.

⁴⁰ *Ibid.*, at 33.

⁴¹ These discrepancies are caused by “the tension between black-letter law and rules ‘in action’”. See J.-L. Halpérin, “Law in Books and Law in Action: the Problem of Legal Change”, *Maine Law Review*, 64 (2011) 46–76, at 47.

The practice of comparative law discloses that such flaws between the constitutional regime and the operational rule of financial relations are also inherent to those countries that have modified the constitutional provisions by which the principle of correspondence is governed.

As already mentioned, comparative law as a subversive discipline reveals that *correspondence* can be considered neither a “new universal” nor a “prescriptive grammar” in the field of financial relations; by contrast, it has multifarious functional equivalents. It is true that in the United States of America, Canada, Australia and Switzerland, the correspondence rule still entails that federal and units’ expenditures match revenues, and their respective constitutions require correspondence between revenues, expenditures and responsibilities. In other countries, however, this principle is no longer considered the backbone of the system, and its application is confined to the mere correspondence between expenditures and responsibilities, such as in Germany.⁴²

This is the constitutional reflex of the passing of dual federalism and of the advent of cooperative, intergovernmental financial relations. The original text of the Basic Law did not set down any exception to the correspondence rule, which was contemplated by former Article 106 GG—the framers of the Basic Law adopted fiscal dualism. This was then overridden by the 1955 constitutional amendments, which modified Articles 106 and 107 GG and introduced revenue-sharing mechanisms for income tax and corporate tax. The trend towards a more cooperative set of financial relations culminated in the 1969 constitutional reform, which set down manifold exceptions to the principle of correspondence. In the 1990s and 2000s, the incorporation of *Länder* carved out from the former Democratic Republic of Germany, as well as the fiscal distress of several *Länder* led to the 2006 and 2009 constitutional reforms, which deeply altered Germany’s ‘fiscal constitution’.⁴³

The German Basic Law provides us with the most accurate and precise definition of the principle of correspondence, which Article 104a GG articulates in two distinct principles. The first is the ‘principle of separation’. On the one hand, the federation and *Länder* separately finance the expenditures resulting from the discharge of their respective responsibilities (art. 104a.1 GG). This means that *Länder* must bear the costs of their own activities. On the other hand, the discharge of the constitutionally assigned responsibilities prescribes that *Länder* be attributed an appropriate amount of funds.⁴⁴

The second principle is the *principle of connection*, which imposes stringent correspondence between revenues, responsibilities and expenditures related to the same responsibilities.⁴⁵ An application of this principle can be found in Article 104a.2 GG: when *Länder* act on behalf of the *Bund*, the latter will finance the expenditures *Länder* are called on

⁴² See .H. von Armin, “Finanzzuständigkeit” in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrecht der Bundesrepublik Deutschland*, vol. VI, *Bundesstaat* (3rd edn., Heidelberg: C.F. Müller, 2008) 843–874; U. Häde, *Finanzausgleich* (Tübingen: Mohr Siebeck, 1996), 48–62; C. Pielke, *Das Konnexitätsprinzip in der deutschen Finanzverfassung* (Hamburg: Dr. Kovac, 2010).

⁴³ See the *Gesetz zur Änderung des Grundgesetzes*, passed on 28 August 2006 (BGBl 2006, Teil I, Nr. 41, S.2034), also known as “Föderalismusreform”. See L.P. Feld and J. von Hagen, “Federal Republic of Germany”, in Shah and Kincaid, *The Practice of Fiscal Federalism*, *supra*, 126–149, at 127.

⁴⁴ Among them, see BVerfGE 72, 330.

⁴⁵ This expression is a translation of the German *Konnexität von Aufgaben und Ausgabenverantwortung*. See H.-U. Erichsen, *Die Konnexität von Aufgaben und Finanzierungskompetenz im Bundes-Länder-Verhältnis* (Berlin: Bad Hamburg, 1968).

to implement.⁴⁶ Article 104a.2 GG refers to the administrative federalism mechanisms: *Länder* generally execute federal laws in their own right (article 84 GG); but, as the case may be, the Basic Law provides that administrative responsibilities shall be vested in the *Bund*, unless it entrusts the execution of federal laws to *Länder* (article 85 GG). As a consequence, the federal government may issue general administrative rules and send *Land* authorities instructions for the accurate implementation of federal laws. Furthermore, the *Bund* grants *Länder* governments appropriate funds, with the purpose of bearing the costs deriving from the implementation of federal legislation. The Basic Law permits administrative inter-delegation, which, however, cannot affect constituent units' financial responsibility and political responsibility, i.e., the principles of separation and connection.⁴⁷

Not only does the principle of correspondence not match the “prescriptive grammar” stemming from a “universal” correspondence rule, but it does not correspond to the principle “revenue follow functions” either, a principle developed by US economists in the second half of the twentieth century.⁴⁸

In this regard, the Basic Law establishes so many exceptions to the principle of the correspondence rule⁴⁹, so that equivalence between spending powers and revenue powers is not ensured: indeed, both types of powers are allocated at different levels of government.⁵⁰ This also means that the correspondence does not match the economic *principle of fiscal equivalence*, according to which the quest for optimality examines the “logically possible relationships between the ‘boundaries’ of a collective good and the boundaries of the government that provides it”.

Further, it is evident that:

[t]here will be no modification of the principle of fiscal equivalence when the government unit with boundaries that match those of the collective good it provides happens to be of just the right size to produce the collective good at the lowest point on the average cost curve. Neither is there any objection to fiscal equivalence when a government whose boundaries are determined by this principle produces its collective good under conditions of decreasing costs.⁵¹

Such ‘equivalence’, however, corresponds neither to the constitutional regime nor to the operational rule of financial relations in Germany. The constitutional reforms that altered the principles of correspondence and separation broke the nexus between taxing, spending and responsibilities, which are allocated according to the discretionary public choice of the political branches.

⁴⁶ See J. Hellermann, “Artikel 104a,” in H. von Mangoldt *et al* (eds.), *Kommentar zum Grundgesetz, Band 3: Artikel 83 bis 146* (München: Verlag Franz Valen, 2010) 1089–1186.

⁴⁷ See Hellermann “Artikel 104a”, *supra*, at 1117.

⁴⁸ See M. Olson Jr, “The Principle of ‘Fiscal Equivalence’: The Division of Responsibilities among Different Levels of Government,” *Papers and Proceedings of the Eighty-first Annual Meeting of the American Economic Association*, 59 (1969) 479–487.

⁴⁹ See below, section 5.

⁵⁰ See Hellermann “Artikel 104a”, *supra*, at 1117.

⁵¹ Olson Jr, “The Principle of ‘Fiscal Equivalence’”, *supra*, at 483 and 485, respectively.

Finally, it should be mentioned that the principle of correspondence also affects the financial responsibilities of local governments: it indeed governs financial relations at the level of local government in Germany (see Articles 6 and 83.3 of the Constitution of Bavaria), in Belgium (Articles 41, 162 and 170 of the Constitution), and in South Africa. As the Constitutional Court of South Africa held:

The purpose of a municipality's revenue-raising powers is to finance a municipality's performance of its constitutional and statutory objects and duties as set out in sections 152(1) and 153 of the Constitution. These include the provision of services to communities in a sustainable manner, promoting social and economic development and providing for the basic needs of the community. These objects are integral in the task of constructing society in the functional areas of local government.⁵²

5 Exceptions to the Correspondence Rule and the Shift towards Administrative Connection

The flaws between the constitutional regime and the operational rule of the correspondence principle are even more troublesome when we consider that federal and regional constitutions establish numerous exceptions to the applicability of the same correspondence rule.

In Germany, for example, the Basic Law establishes four relevant exceptions. First, the principle of correspondence applies to both legislative responsibilities and administrative inter-delegation: if a federal competence is delegated to the *Länder*, the federation has to cover the related costs (*Auftragverwaltung*: Article 104a.2 GG). Second, a federal law assigning money grants (*Geldleistungsgesetze*) can also force *Länder* to assume the costs deriving from the implementation of federal legislation (article 104a.3 GG). Third, federal laws can oblige the *Länder* to provide grants, benefits or comparable services to third parties only with the approval of the *Bundesrat* (article 104a.4 GG). Fourth, conditional federal grants (*Finanzhilfen*) can be assigned to *Länder* provided that: 1) they avoid disturbing the overall economic equilibrium; 2) they equalise differing economic capacities within the federal territory; 3) they promote economic growth (article 104b GG).⁵³

Articles 91a-91e GG establish additional exceptions. The *Bund* co-finances the responsibilities of *Länder* in several areas (improvement of regional economic structures, agrarian structure, coastal preservation, research), which are termed "common tasks".⁵⁴ The exceptions to the correspondence rule alter the constitutional distribution of powers, but federal laws allowing such derogations require the consent of the *Bundesrat*.

The same assumption holds true as far as Austria is concerned. Article 4 F-VG expressly requires that Austrian *Länder* must have the appropriate amount of funds in order to finance their tasks. However, *Länder* do not have any form of fiscal responsibility, and exceptions to the principle of correspondence derive from the criteria distributing legislative, administrative

⁵² *Liebenberg NO v Bergrivier Municipality* 2013 (5) SA 246 (CC), at 40. See also, *Democratic Alliance v Masedo NO* 2003 (2) SA 413 (CC), at 17.

⁵³ On these exceptions, see Hellermann "Artikel 104a", *supra*, at 1132ff.; J. Hellerman, "Artikel 104b," in von Mangoldt *et al*, *Kommentar zum Grundgesetz, Band 3*, *supra*, at 1187ff.

⁵⁴ See Feld and von Hagen, "Federal Republic of Germany", *supra*, at 132.

and financial powers between *Bund* and *Länder*. To this extent, legislative and administrative powers do not follow the criteria that allocate revenue powers: “the allocation of powers [...] is done in a very complicated way, being, therefore, sometimes subject to [a] highly controversial interpretation”.⁵⁵

We have already noticed that criteria allocating revenue-raising and taxing powers are set forth in the F-VG. Under the F-VG, “the federal parliament has to assign each tax [...] and thus decides who is responsible for legislation and execution” thereafter.⁵⁶ Furthermore, “federal law must assign taxes within an abstract constitutional framework of various types of shared or exclusive tax allocation”: exclusive federal taxes, taxes divided between federal, state and local level, exclusive state taxes and exclusive municipal taxes.⁵⁷

On the one hand, fiscal powers are then in the hands of the federation; on the other hand, the distribution of taxing powers does not match the distribution of legislative and administrative responsibilities. The former is ultimately determined by a federal legislative act, the “Fiscal Equalization Act” (*Finanzausgleichgesetz*, hereinafter FAG), which is periodically renewed. Before passing the act, however, the federation must try to enter into an agreement with the *Länder*. This is the sole mechanism through which *Länder* can influence the federal decision-making process over the distribution of finance: “it is remarkable that the second chamber of the Austrian federal parliament, the federal council, has in these essential matters for *Länder* only a suspensive veto”.⁵⁸

To sum up, the federation is responsible for enacting the majority of tax laws, whereas *Länder* have limited taxing powers and only participate in the distribution of revenues raised. The outcome is a system of intergovernmental financial relations, where the principle of correspondence is thoroughly disregarded.

Relevant exceptions to the correspondence rule characterise regional countries, such as Italy and Spain, as well as devolutionary federal countries, such as Belgium and South Africa. Although the constitutions of Italy, Spain, Belgium and South Africa vest constituent units with taxing and expenditure powers, these provisions require implementation through national legislation.⁵⁹

As far as South Africa is concerned, we have already noticed how national legislation limits provincial limited revenue-raising powers: “allowing provinces to choose applicable tax rates and tax bases could result in tax competition [...] thus reinforcing economic disparities”.⁶⁰ Further, section 220 of the Constitution establishes a Financial and Fiscal Commission, which has to be consulted, for example, for approving the national legislation regarding:

⁵⁵ Stelzer, *The Constitution of the Republic of Austria*, *supra*, at 153.

⁵⁶ For further references, see *ibid.*, at 159.

⁵⁷ Bußjäger, “Reforms on Fiscal Federalism in Austria”, *supra*, at 69.

⁵⁸ *Ibid.*, at 60.

⁵⁹ Articles 175–177 of the Belgian Constitution require an entrenched federal law for the implementation of the constitutional provisions over finances. The Italian national parliament shall have recourse to an ordinary act at the legislative level (article 119.2). The Spanish national parliament does the same approving the LOFCA financial organic law passed by a majority of votes cast in the lower chamber in the final vote on the bill as a whole (article 157). See J. López-Laborda *et al.*, “Kingdom of Spain,” in Shah and Kincaid, *The Practice of Fiscal Federalism*, *supra*, 288–316, at 296ff.

⁶⁰ See above, section 2.

the equitable division of revenue raised nationally among the national, provincial and local spheres of government [...] the determination of each province's equitable share of the provincial share of that revenue: and any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.⁶¹

This upholds the idea of the mismatch between the legal and the economic fiscal federalism, and therefore the possibility of applying an economic-oriented concept of the correspondence rule.

Finally, exceptions to the correspondence rule originate from administrative federalism, which indeed derogates to the dual-federalist principle, since the distribution of finance does not reflect the allocation of legislative functions.

In federal and regional countries, the administration of a substantial portion of federal legislation is now constitutionally assigned to the government of the constituent units, such as in Switzerland, Austria, Germany, India and Malaysia.⁶² Hence, the functioning of the principle of correspondence shifts from legislative responsibilities to administrative powers: the latter must then be fully financed in order to discharge the functions related thereto.⁶³ If we consider that taxes are levied or collected under the authority of law, the shift from legislative responsibilities to the administrative powers can be considered both as an outcome of Pound's "discrepancy between doctrine in books and empirical data about law",⁶⁴ and as an acquisition of the practice of comparative law as a subversive discipline.

6 "How and Why Words Change Meaning": The Shift From (Legal) Correspondence to (Economic) Equivalence

The principle of correspondence has been undergoing an even more remarkable shift that is having an impact not only on its constitutional regime and operational rule—and therefore the nexus between taxing, spending and responsibilities—but also the meaning of the principle at stake. This is what linguists call "semantic change":⁶⁵ the shift is not related to the linguistic variety through which *correspondence* and *separation* display their function but, instead, impacts the lexical semantics of the legal language, i.e., the function of the correspondence rule itself.

We have already highlighted how the subversive character of comparative legal studies presupposes the complexity and diversity of (both linguistic and legal) forms. Furthermore, we have pointed out that the comparative method accommodates diversity by grouping such a variety of forms because they are functionally equivalent, i.e., they fulfil similar functions in different legal systems.⁶⁶ To put it another way, comparative legal studies reveal a fallacy in

⁶¹ B. Khumalo and R. Mokate "Republic of South Africa," in Shah and Kincaid, *The Practice of Fiscal Federalism*, *supra*, 263–285, at 265.

⁶² See, for example, s. 83 of the Constitution of India.

⁶³ See Watts, *Comparing Federal Systems*, *supra*, at 100.

⁶⁴ Halpérin, "Law in Books", *supra*, at 46.

⁶⁵ See C. Kay and K. Allan, *English Historical Semantics* (Edinburgh: Edinburgh University Press, 2015), 70ff.

⁶⁶ See above, section 3.

current research related to financial relations. This fallacy is not concerned with the variety and heterogeneity of the forms such relations take under federal constitutions; rather, it concerns the idea that there is “at the least a global legal language” capable of expressing such variety, and that “global legal language [is necessarily] based on economic models”.⁶⁷

Such a shift in semantics is due to the intrinsic feature of legal language:

the language of laws and statutes is characterised by neutrality and generality; it avoids subjective and personal attitudes and strings regional marking. To ensure correct and unambiguous transmission of information it must be conservative in its choice of structure and lexis and hostile to stylistic variation.⁶⁸

And yet, these features “represent anonymous authority and power”:⁶⁹ external factors, such as economic ones, may thus challenge the meaning of the legal lexicon related to the distribution of finance, and therefore impose a new sense (the language of economics) on existing lexical items.

How this change in meaning occurs is due to pressure of economic models, which focus on “the problem of allocative efficiency rather than [on] questions of stabilization and income redistribution”.⁷⁰ The process of semantic change affects the existing lexemes, because these adopt an additional meaning that complements the old one.⁷¹ This entails a shift from the ‘legal’ principle of correspondence towards the ‘economic’ principle of fiscal equivalence,⁷² whose application requires that funds and proceeds be definitively allocated at the central/national level of government, which is capable of ensuring such efficiency.

The shift is even more significant when the substitution of meaning is complemented by the substitution of the word, i.e., when economic lexemes replace legal jargon. This is apparent when it comes to the allocation of revenue powers, which is termed the “tax-assignment problem”.⁷³

The linguistic change is even more apparent as far as the expression “financial relations” is concerned. To this extent, scholars also resort to a widespread selection of terms: “distribution of finance”, “fiscal relations”, “financial (or fiscal) arrangements”, “fiscal

⁶⁷ Muir Watt, *Further Terrains for Subversive Comparison*, *supra*, at 272.

⁶⁸ M. Rissanen, “Standardisation and the Language of Early Statutes”, in L. Wright (ed.), *The Development of Standard English 1300–1800: Theories Descriptions Conflicts* (Cambridge: Cambridge University Press, 2000) 117–130, at 120.

⁶⁹ *Ibid.*, at 121.

⁷⁰ See Olson Jr, “The Principle of ‘Fiscal Equivalence’”, *supra*, at 482.

⁷¹ See D. Kastovsky, “Vocabulary”, in R. Hogg and D. Denison, *A History of the English Language* (Cambridge: Cambridge University Press, 2006) 199–270, at 215.

⁷² See above, section 3.

⁷³ See C.E. McLure (ed.), *Tax Assignment in Federal Countries* (Canberra: Australian National University, 1983); R.A. Musgrave, “Who Should Tax, Where and What?”, in McLure, *Tax Assignment in Federal Countries*, *supra*, 2–19. For a critical approach to the tax-assignment problem, see C.E. McLure, “The Tax Assignment Problem: Ends, Means, and Constraints”, *Public Budgeting and Financial Management*, 9 (1998) 652–683; R. Bird, “Tax Assignment Revisited”, in J.G. Head and R.E. Krever (eds.), *The 21st Century: A Volume in Memory of Richard Musgrave* (The Hague: Kluwer Law International, 2009) 441–470.

federalism”, “fiscal” or “financial constitution” and so on.⁷⁴ The meanings of the expressions in question depend on whether financial relations are examined through the lens of economics or from a legal perspective.

This is evident in the case of the expression ‘fiscal federalism’.⁷⁵ Although it is very common among political scientists and jurists,⁷⁶ its use is very contentious. ‘Fiscal federalism’ pertains to a “subfield of public finance”, and therefore denotes “which functions and instruments are best centralized and which are best placed in the sphere of decentralized levels of governments”.

Fiscal economists consider “state and local finance as a field of research”⁷⁷ for the allocation of revenue and expenditure powers, and address the following questions: “which taxes are best suited for use at the different levels of government?”; “placed in a context of a federalist government, should distribution be a national or a local responsibility?”⁷⁸

These questions denote fields of research that are very different from those characterising comparative federal studies. Public finance indeed has a normative approach, and ‘fiscal federalism’ is therefore an expression that entails a non-legal definition of financial relations:

there is a need for every collective good with a unique boundary, so that there can be a match between those who receive the benefits of a collective good and those who pay for it. This match we define as ‘fiscal equivalence’.⁷⁹

The expression does not consider the legal features—in particular, the constitutional ones—related to the allocation of financial powers. Fiscal federal studies are aimed at maximising the efficiency of public policies and services by establishing an appropriate distribution of revenue powers.

On the contrary, comparative federal studies have a different approach to financial relations. ‘Legal’ fiscal federalism analyses the constitutional foundations of financial powers and the mechanisms through which national and subnational levels appropriate funds in order

⁷⁴ Watts, *Comparing Federal Systems*, *supra*, at 95, employs the expression “distribution of finance”; Hogg, *Constitutional Law of Canada*, *supra*, at 6–1, uses the expression “financial arrangements”; H. Klug, *The Constitution of South Africa: A Contextual Analysis* (Oxford: Hart Publishing, 2010), 216, uses “fiscal constitution”.

⁷⁵ See W.E. Oates, “An Essay on Fiscal Federalism”, *Journal of Economic Literature*, 37 (1999) 1120–1149, at 1120–1121. The expression was first used in R.A. Musgrave, *The Theory of Public Finance* (New York: McGraw-Hill, 1959) and then in subsequent studies. See R.A. Musgrave, “Economics of Fiscal Federalism”, *Nebraska Journal of Economics and Business*, 10 (1971) 3–13; W.E. Oates, *Fiscal Federalism* (New York: Harcourt Brace Jovanovich, 1972). See also G. Färber, “Was ist Finanzföderalismus?”, in Bußjäger, *Perspektiven des Finanzföderalismus*, *supra*, 11–38.

⁷⁶ Among others, see Shah and Kincaid, *The Practice of Fiscal Federalism*, *supra*; Watts and Kincaid, “Introduction”, *supra*, at ix; E. Ahmad and G. Brosio, *Handbook of Fiscal Federalism* (Cheltenham-Northampton: Edward Elgar, 2006); R. Boadway and A. Shah (eds.), *Fiscal Federalism: Principles and Practice of Multi-order Governance* (Cambridge: Cambridge University Press, 2009).

⁷⁷ Musgrave, “Economics of Fiscal Federalism”, *supra*, at 3.

⁷⁸ See Oates, “An Essay on Fiscal Federalism”, *supra*, at 1125, and R.A. Musgrave, “Devolution, Grants, and Fiscal Competition”, *The Journal of Economic Perspectives*, 11 (1997), 65–72, at 67. See also R.M. Bird and F. Vaillancourt (eds.), *Perspectives on Fiscal Federalism* (Washington: World Bank Institute, 2006).

⁷⁹ Quotations are from Olson Jr, “The Principle of ‘Fiscal Equivalence’”, *supra*, at 482, 483, 485, respectively.

to finance their constitutional responsibilities. It also examines revenue raising and revenue distribution, as well as equalisation and the scope of spending powers. Financial autonomy, solidarity and spending powers are the most relevant fields of research in ‘legal’ fiscal federalism.⁸⁰

In this regard, the expression ‘fiscal federalism’ seems a mere projection of the above-mentioned principle of fiscal equivalence, and underpins the idea that legal financial relations must be governed by budgetary policies and therefore by economic theories.

Public finance, in general, and fiscal equivalence, in particular, express what I have already termed the ‘efficiency rule’, that is, the optimisation of the allocation of proceeds, the strengthening of fiscal responsibility, as well as the promotion of an equilibrium between the estimates of revenues and expenditures. But such an efficiency rule does not match ‘legal’ fiscal federalism, which upholds the idea that the budgetary position of federal and regional states should be balanced or in surplus.

The normative (i.e., theoretical) approach of public finance budgetary is not the result of the economic reflexes of the legal correspondence rule: as for the revenue side, *de facto* imbalances, social federalism and democratic accountability are not considered as necessary presuppositions that allow the allocative efficiency model to work. If we turn to the expenditure side, the public finance model is challenged by the lack of legal limitation in the exercise of spending powers. To sum up, both taxing and spending powers are in the hands of the political branches, and the effective amount of money to be raised by taxation and collected under the authority of law depends on the economic situation.

The ‘legal’ applicability of the ‘economic’ principle of balanced budgets in financial relations thus depends on whether it is enshrined in federal and regional constitutions, such as in Switzerland. The budget must to be balanced both at the federal level (art 126 of the Constitution)⁸¹ and at the cantonal level. For instance, the cantonal constitutions of St Gall, Solothurn, Grison and Appenzell Outer-Rhodes prescribe that governments “accumulate savings in order to equalize revenue fluctuations over the business cycle [and] to build up reserves in good times and to eliminate structural deficits”.⁸² This holds true in the United States of America, where state constitutions require that expenditures match revenues: the ‘golden’ budgetary rule imposes that a surplus of revenues be accumulated in “good economic times” as “‘rainy day’ funds that can cover what would otherwise be fiscal deficits in bad economic times”.⁸³ The same occurs in Brazil, where the Fiscal Responsibility Act 2000 established several mechanisms that are aimed at enforcing constituent units’ fiscal discipline.⁸⁴

Changes in financial relations are due to the fact that economic budgetary principles are offshoots of economic-oriented representations of law, which promotes the global economic

⁸⁰ See Watts and Kincaid, “Introduction”, *supra*, at ix ff.

⁸¹ T. Stauffer, “Art. 126”, in Ehrenzeller *et al*, *Die schweizerische Bundesverfassung*, *supra*, 1944–1957.

⁸² Kirchgässner, “Swiss Confederation,” *supra*, at 328. See also Kirchgässner, “Finanzföderalismus in der Schweiz”, *supra*, at 46ff.

⁸³ M. Tushnet, *The Constitution of the United States of America: A Contextual Analysis* (Oxford: Hart Publishing, 2015), 161.

⁸⁴ F. Rezende, “Federal Republic of Brazil”, in Shah and Kincaid, *The Practice of Fiscal Federalism*, *supra*, 74–97, at 82–84.

legal language ‘spoken’ by international financial actors, i.e., the above-mentioned process of semantic change that is affecting comparative legal studies. Against this background, additional efforts in the practice of subversive comparison are required, and scholars should highlight the change in legal lexical semantics, and therefore warn against the application of public finance budgetary principles to financial relations.

Finally, the shift from ‘legal’ correspondence to ‘economic’ fiscal equivalence was triggered by the ongoing economic and financial crisis. The assumption is held when we consider how, in the course of this crisis, several EU member states have amended their constitutions to introduce the principle of a balance between revenue and expenditure. This occurred in nearly all EU federal and regional countries, such as Austria, Germany, Spain and Italy.⁸⁵ Thus, limitations on subnational financial powers are the outcome of the entrenchment of economic budgetary policies, since the above-mentioned constitutional reforms ensure that the budgetary position of the member states is balanced or in surplus according to Article 136 TFEU and to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union’ (TSCG) signed in Brussels on 2 February 2010 also known as the ‘*fiscal compact*’.

In this respect, EU constraints on budgetary rules deriving from the TSCG can be conceived as part of the federal-like integration process resting upon economic principles that progressively deprive member states of their constitutional *Kompetenz-Kompetenz*. The outcome is twofold.

On the one hand, the EU has not yet fostered the elaboration, transmission or adaptation of a common thick constitutional identity. This is particularly true when it comes to those abstract commitments to human rights, rule of law and democracy that are enshrined in Article 2 of the EU Treaty: in this regard, the EU is merely indicating allusive, vague circumlocutions that do not contribute to the formation of a thick, common constitutional identity. In this *thin commitment*, “there is nothing specifically European”.⁸⁶ Allusiveness is thus the allegory of the present of the EU. The creation of a thick cultural, social, literary identity cannot merely resort to abstract commitments and to machineries governing financial governance; public discourse cannot be limited to those financial elites supporting an overturn of the foundations of the European integration process. When addressing a financial crisis, a constitutional identity-building process cannot rest on the mere creation of mechanisms for financial governance, such as those established by the TSGC. The US constitutional/federal experience might certainly provide Europe with additional solutions to face the economic crisis. The financial divide between the EU member states reveals the lack of a sole *demos*, and impedes narratives similar

⁸⁵ For Austria, see art. 13.2 B-VG, as inserted by the 2008 constitutional reform (BGBl. I 1/1008). For Germany, see arts. 109 and 110 GG, as amended by the 2009 constitutional reform. For Spain, see art. 135 of the Constitution, amended in 2011. For Italy, see arts. 81 and 119.1 of the Constitution, as amended by constitutional (amendment) act no. 1/2012. See T. Groppi, “The Impact of the Financial Crisis on the Italian Written Constitution,” *Italian Journal of Public Law*, 4 (2012) 1–14.; D.D. Ramos, “La reciente constitucionalización de la estabilidad presupuestaria ¿Una reforma necesaria?”, *Revista de Derecho Político*, 87 (2013) 317–352.

⁸⁶ M. Kumm, “The Idea of Thick Constitutional Patriotism and its Implications for the Role and Structure of European Legal History” in H. Porsdam and T. Elholm (eds.), *Dialogues on Justice: European Perspectives on Law and Literature* (Berlin: Walter de Gruyter, 2012) 108–137, at 109.

to those leading to the establishment of an ever more perfect union in the United States, i.e., those narratives that persuaded Alexander Hamilton to “successfully [restructure] America’s crippling sovereign debt in the 1790s by ‘federalizing’ the states’ debt”.⁸⁷

On the other hand, the shift not only entails a change in the nexus between democracy, accountability and financial responsibilities but also the deletion of constructs purporting one of the main core values upon which constitutionalism was erected, that is, the idea of the supremacy of those same constitutions:

The stability treaty not only requires ... constitutional changes in each of the signatory states, but also raises significant questions about its relationship with EU law and the extent of the discretion left to member states to make fundamental decisions about taxation and spending.⁸⁸

7 The Third Shift: From Economic Equivalence to Multilayered Government

Intergovernmental financial relations are not limited to the federal and intermediate tiers of government; they also encompass the regulation of local financial powers and their interrelation with the federal and intermediate levels.

The shift towards a principle of correspondence inclusive of all the tiers of government is evident in aggregative federations and in regional states, where constitutions entrench the sphere of guaranteed autonomy attributed to local authorities and set down an exhaustive regulation that national and subnational legislation has to subsequently enforce.

As a consequence, economic ‘fiscal federalism’ does not adequately outline the role attributed to the different tiers of government in the distribution of finance. The ‘economic’ approach to the correspondence rule merely focuses on the ‘efficiency rule’ for the best allocation of functions between the central and the decentralised levels of governments, but it does not legally define *which* are the decentralised levels of government concerned.

Moreover:

the traditional theory of fiscal federalism lays out a general normative framework for the assignment of functions to different levels of governments and the appropriate fiscal instruments for carrying out these functions.⁸⁹

On the contrary, comparative legal studies do differentiate between federal, state and local governments. In this respect, the origins—aggregative or devolutionary—and the basic features of federal and regional constitutions assign different institutional responsibilities to constituent units and local authorities. In aggregative federations, member states have exclusive jurisdiction over municipal institutions:

⁸⁷ A. Loubert, “Sovereign Debt Threatens the Union: the Genesis of a Federation”, *European Constitutional Law Review*, 8 (2012) 442–455, at 442.

⁸⁸ S. Peers, “The Stability Treaty: Permanent Austerity or Gesture Politics?”, *European Constitutional Law Review*, 8 (October 2012) 404–441, at 404.

⁸⁹ Oates, “An Essay on Fiscal Federalism”, *supra*, at 1120–1121.

the idea of federal intervention into municipal ... affairs seems inconsistent with the conception of municipalities as creatures of the state of which they are political subdivisions.⁹⁰

In Latin American federations and in regional states, constitutions expressly entrench the local autonomy and constrain the legislative powers over constituent units.⁹¹ In some cases—as in Italy and South Africa—the central state has the major legislative power, and constituent units have a limited jurisdiction over local government.⁹²

The outcome is an intricate concurrency between national and subnational jurisdictions, and therefore national and subnational legislative powers affecting the principle of correspondence at the local level of government frequently overlap. In the United States of America, the federal order of government has recourse to several instruments—such as conditional and unconditional grants, tax agreements, etc.—in order to bypass the state level and allocate funds to the local one, thus ‘influencing’ state–local relations.⁹³ In Germany, the proceeds of local governments are part of the total amount of money the *Bund* transfers to each *Land* as a share of total revenue from joint taxes (article 106.7 GG). As a consequence, revenues and expenditures of municipalities are deemed to be revenues and expenditures of the *Länder* (article 106.9 GG).

In most cases, financial relations give rise to a “three-layered federalism” and a multi-layered principle of correspondence,⁹⁴ such as in Belgium, Italy, Spain, South Africa, Russia, Brazil and Austria. In Austria, Article 3 FAG allows the *Bund* to have recourse to grants in order to transfer money to municipalities for specific purposes. This assumption holds true for Spain, where Article 142 of the Constitution and law No 39/1998 on local fiscal management

⁹⁰ C.P. Gillette, “Fiscal Federalism, Political Will, and Strategic Use of Municipal Bankruptcy”, *The University of Chicago Law Review*, 79 (2012) 281–330, at 298. The assumption according to which local authorities are ‘creatures’ of the constituent units can be traced back to several constitutional provisions: see the 10th Amendment (1791) to the U.S. Constitution, s. 92.8 Constitution Act 1867 of Canada, art. 50.1 of the Swiss Constitution, arts. 28 and 104a GG, art. 115.2 B-VG.

⁹¹ Articles 115 and 115-I of the Mexican Constitution; art. 123 of the Argentinian Constitution; arts. 1, 18, 29, 30, 35 of the Brazilian Constitution; arts. 243 and 243Q of the Constitution of India; arts. 137, 101, 141, 149.1.18 of the Constitution of Spain; art. 162 of the Constitution of Belgium, as implemented by the ‘special’ law of 13 July 2001, which enables regions to set the basic organisational features of Belgian local government.

⁹² See arts. 117.2.p, 118.1.2 and 123.4 of the Italian Constitution; s. 40 of the Constitution of the Republic of South Africa 1996. It should be recalled that the five Italian ‘autonomous’ regions (Trentino-Alto Adige/Südtirol, Friuli-Venezia Giulia, Aosta Valley/Vallée d’Aoste, Sicily and Sardinia: art. 116.1 of the Constitution) have exclusive jurisdiction over local authorities situated within their boundaries. See F. Palermo, “Asymmetric ‘Quasi-Federal’ Regionalism and the Protection of Minorities: the Case of Italy”, in G.A. Tarr *et al* (eds.) *Federalism, Subnational Constitutions, and Minority Rights* (Westport, CT: Praeger, 2005) 107–131, at 109. See also Chapter 14 of this volume, “Local Governments in African Federal and Devolved Systems of Government”, by N. Steytler and Z. Ayele.

⁹³ See Fox, “The United States of America”, *supra*, at 364.

⁹⁴ Bußjäger, “Reforms on Fiscal Federalism in Austria”, *supra*, at 61.

establish that the central level and the autonomous Communities must provide local governments with an adequate amount of funds to fully finance their responsibilities.⁹⁵

Both federal and regional constitutions allow local authorities to levy taxes in order to finance their responsibilities. In Canada, “municipalities levied taxes before any provincial tax was enacted”.⁹⁶ In the United States of America, local authorities have been imposing property taxes in order to generate their own revenues from the inception of the federation.⁹⁷ Under Article 106.6 GG, revenues from taxes on real estate and commerce, from local taxes on consumption accrue to the municipalities.

Furthermore, local authorities levy taxes, impose fees, have recourse to public debt and receive financial transfers from national and intermediate levels of government: these mechanisms grant local entities the appropriate amount of resources in order to address the needs of their communities.

Questions arise, however, when we try to specify the basic features—established by either constitutional or legislative provisions—of local taxing powers. The first point at issue is represented by the fact that, when it comes to local taxing policies, the principle of correspondence requires the intervention of the central or intermediate legislative branch. Indeed, the principles of “no taxation without representation” and of legality prescribe that a legislative act allows municipalities to appropriate funds through taxation and to raise proceeds. This limits local financial autonomy: indeed, local government may levy, collect, appropriate taxes and determine additional rates in accordance with the principles set forth by federal and subnational law.⁹⁸

The second point at stake is related to the constitutional regime of the principle of correspondence as far as local financial powers are concerned. To this extent, the constitutions establish highly differentiated rules regarding local financial responsibility and accountability. In aggregative federations, the constitutions only establish the basic features of local financial powers, and then confer upon subnational legislatures the duty of specifying which powers are actually assigned to local authorities. The German Basic Law establishes the principle of local financial autonomy (article 28); it sets several mechanisms for federal intervention in financial relations between *Länder* and municipalities (articles 106, 107 GG)⁹⁹; it provides that a share of the revenue from income tax shall directly accrue to the municipalities (art 106.5 GG). The implementation of this constitutional provision is then committed to paragraphs 6.1, 7.1.2, 8, 9.3, 13 and 17 of the *Gesetz über den Finanzausgleich zwischen Bund und Ländern (FAG)*, i.e., the federal law on equalisation.¹⁰⁰

⁹⁵ F. Velasco Caballero, “Kingdom of Spain”, in N. Steytler (ed.), *Local Government and Metropolitan Regions in Federals Systems* (Montreal: McGill–Queen’s University Press, 2009) 299–328, at 314ff.

⁹⁶ Hogg, *Constitutional Law of Canada*, *supra*, at 6–2.

⁹⁷ See Fox, “The United States of America”, *supra*, at 354.

⁹⁸ See arts. 106 GG, 7.5 and 8.5 F-VG, s. 243H of the Constitution of India, arts. 117 and 119 of the Italian Constitution.

⁹⁹ See P.J. Tettinger and K.-A. Schwarz, “Artikel 28,” in H. von Mangoldt *et al* (eds.), *Kommentar zum Grundgesetz, Band 2: Artikel 20 bis 82* (München: Verlag Franz Valen, 2010) 567–641, at 629ff.

¹⁰⁰ See M. Burgi, “Federal Republic of Germany”, in Steytler, *Local Government and Metropolitan Regions*, *supra*, 137–165, at 148ff.

Finally, several federal constitutions entrench the sphere of guaranteed autonomy attributed to local authorities, and then set down an exhaustive regulation of local government that national and subnational legislation has to enforce.¹⁰¹ This is apparent in South Africa: in *Liebenberg*, the court states:

A municipality's authority to impose rates and levies is derived from section 229 of the Constitution. The purpose of a municipality's revenue-raising powers is to finance a municipality's performance of its constitutional and statutory objects and duties as set out in sections 152(1) and 153 of the Constitution. These include the provision of services to communities in a sustainable manner, promoting social and economic development and providing for the basic needs of the community. These objects are integral in the task of constructing society in the functional areas of local government.¹⁰²

9 Crossing the Public–Private Divide: The Principle of Correspondence as a Guarantee to be Traded in Equity Markets?

Like the overlapping tiles of a roof, the three shifts in the operational rule of the correspondence principle uphold a huge transfiguration of the same rationale of financial relations.

As already mentioned, this transfiguration was caused by the financial crisis, and the outcome has been a paradox: the efficiency rule and the economic models are now causing centralisation in financial relations. However, fiscal equivalence policies still presuppose multilayered federalism, where units count as financial recipients:

it is already evident that both the 'centralizing' and 'decentralizing' ideologies are wrong, or at any event entail inefficiency. Only if there are several levels of government and a large number of governments can immense disparities between the boundaries of jurisdictions and the boundaries of collective goods be avoided.¹⁰³

The shift from legal to economic principle of correspondence allows make "comparative law by numbers".¹⁰⁴ On the one hand, there is the idea that:

¹⁰¹ See ss. 40 and 220 of the South African Constitution, arts. 156 and 159, para. 3 of the Brazilian Constitution; s. 243H of the Indian Constitution for *Panchayats*. As for Brazil, see Rezende, "Federal Republic of Brazil", *supra*, at 80. Under the 73rd and the 74th constitutional amendments (1992), "each of the [Indian] state governments has devolved powers to levy certain taxes and fees [on] local bodies": see G. Rao, "Republic of India", in Shah and Kincaid, *The Practice of Fiscal Federalism*, *supra*, 152–177, 156.

¹⁰² *Liebenberg NO v Bergrivier Municipality*, *supra*, at 40.

¹⁰³ Olson Jr, "The Principle of 'Fiscal Equivalence'", *supra*, at 483.

¹⁰⁴ R. Michaels, "Comparative Law by Numbers? Legal Origins Thesis, *Doing Business* Reports, and the Silence of Traditional Comparative Law", *The American Journal of Comparative Law*, 57 (2009) 765–795.

‘law matters’: legal institutions have an impact on economic growth. This is in tune with neoclassical law and economics, which is based essentially on the idea that law should be measured by the incentives it sets for welfare-maximizing conduct.¹⁰⁵

On the other hand, the *Doing Business Reports* of the World Bank, i.e., “cross-country comparisons including rankings of the attractiveness of different legal systems for doing business”,¹⁰⁶ have led to the idea that it is possible to evaluate the economic performance of legal systems by applying quantitative methodologies and numeric indicators:

The promise of evidence-based policy-making is that it is not only more objective and less prone to misuse, but also more transparent, more democratic, and more open to public debate than decisions taken by politicians and business leaders with references to qualitative forms of knowing.¹⁰⁷

And “yet, the creation of these systems is rarely transparent of public”.¹⁰⁸

The application of indicators complements the public finance budgetary principles, the economic-oriented representation of the law, the global legal–economic language and requires highly centralised and efficient decision-making processes as regards fiscal powers.

Such a trend has been accentuated by the steady increase of the spread that upset the European Union, in general, and Spain and Italy, in particular, in recent years. These two countries are the only EU member states with a regional government framework. The growing spread between their bonds and those issued by Germany entailed an increase in the interest to be paid for refinancing the public debt. This led to the approval of extraordinary measures undermining Italian and Spanish regional financial powers. Indeed, the necessity of restricting any increase in the public debt resulted in the adoption of severe cuts on the amount of grants transferred to regions, provinces and municipalities, thus limiting regional and local spending powers.¹⁰⁹

Needless to say, the increase in interest rates had a severe backlash throughout the European economic and monetary union,¹¹⁰ and the EU adopted several measures that gave legal relevance to the budgetary policies we examined above.

This change in the meaning of financial relations, in general, in the applicability of the principle of correspondence, in particular, is threefold. First, there is a shift between

¹⁰⁵ *Ibid.*, at 768.

¹⁰⁶ *Ibid.*, at 766.

¹⁰⁷ R. Rottenburg and S.E. Merry, “A World of Indicators: The Making of Governmental Knowledge through Quantification”, in R. Rottenburg *et al* (eds.), *The World of Indicators: The Making of Governmental Knowledge through Quantification* (Cambridge: Cambridge University Press, 2015) 1–14.

¹⁰⁸ See *ibid.*, at 1–2. See also H. Blöchliger, “Measuring Decentralisation: The OECD Fiscal Decentralisation Database”, in J. Kim *et al* (eds.), *Measuring Fiscal Decentralization. Concepts and Policies* (Paris: OECD Publishing, 2013) 15–36.

¹⁰⁹ See F. Palermo and A. Valdesalici, “Italy: Autonomism, Decentralization, Federalism, or What Else?,” in J. Lluch (ed.) *Constitutionalism and the Accommodation in Multinational Democracies* (Oxford: Palgrave MacMillan, 2014) 180–199.

¹¹⁰ See V. Borger, “How the Debt Crisis Exposes the Development of Solidarity in the Euro Area”, *European Constitutional Law Review*, 9 (2013) 7–36.

centralisation, which seems to reflect the anxiety towards the creation of a global legal language and common regulation of financial relations in decentralised countries and markets. Second, there is an even more remarkable shift towards the efficiency rule, whose application requires that funds and proceeds be definitively allocated at the central/national level of government, which is financially responsible *vis-à-vis* financial markets and international investors—to put it differently, the national government is accountable as far as global economic governance is concerned. Third, financial global dominance causes a shift from the political to the economic sphere: and the discretionary powers of political branches in levying taxes and appropriating funds rest on a new form of “confidence” between the political power and the sovereign financial market, where “distressed sovereign debt can be sold on private equity markets and the debtor [is] subjected to the harsh economics of private law”.¹¹¹

It follows that there has been a complete overturn in the political debate and in the meaning of accountability, responsibility and capability of appropriating funds in federal states. The current financial crisis is thus undermining the same concepts of intergovernmental financial relations, as well as the same presuppositions of the federal-like EU integration process. The lack of a legal narrative representing the supranational body politic is manifest when it comes to the current economic and financial crisis. This is undermining the same presuppositions of the EU integration process and, to a bigger extent, the same identity-building process.

In this regard, the crisis gives rise to issues that are related to global economic governance. Hence, international financial actors such as the World Bank and the International Monetary Fund,¹¹² as well as private-sector investors, endorse the transformation of the legal and economic premises of financial relations. In particular, international financial actors suggest the adoption of a model capable of supporting a capitalist socioeconomic model, but that totally departs from the model of *Soziale Marktwirtschaft* (i.e., social market economy) enshrined in Article 3 TEU.¹¹³ This is caused by international investment law, which “shifts power and authority from states to investors, tribunals and other decision-makers”, and “[t]hese shifts produce outcomes that only partially support global policies”, as well as the transfer of power and authority to decision-makers who are not democratically accountable.¹¹⁴

As this essay has highlighted, the principle of correspondence has both an economic-oriented significance and a new, subversive meaning, which crosses the public/private divide, and is subsequently enforced under private-law mechanisms. In this respect, centralising trends must now cope with two necessities in economic-oriented systems of financial relations. On the one hand, the ‘correspondence rule’ requires the application of the efficiency rule to the revenue–responsibilities equation and to the necessity of ensuring the homogeneity of

¹¹¹ Muir Watt, *Further Terrains for Subversive Comparison*, *supra*, at 286.

¹¹² It is “remarkable” that the institutions of the World Bank Group “have reached their present status as the premier source of both development finance and economic research and information without introducing any major change in their constituent charters”. See I. Shihata *et al* (eds.), *The World Bank in a Changing World. Selected Essays* (Dordrecht: Martinus Nijhoff Publishers, 1991), 15.

¹¹³ On the negation of the *Soziale Marktwirtschaft* model in Germany, the country where the model was invented, see M. Ruffert, “Public Law and the Economy: A Comparative View from the German Perspective,” *International Journal of Constitutional Law*, 11 (2013) 925–939.

¹¹⁴ T.-C. Cheng, “Power, Authority and International Investment Law,” *American University International Law Review*, 20 (2005) 465–520, at 469.

economic and social conditions. On the other hand, this rule must cope with the new ‘legal’ budgetary policy—budgetary positions must be balanced or in surplus—that percolates through the whole federal constitutional design.

This entails a reconfiguration of federal and regional financial relations: the principle of correspondence now rests on the sustainability of what we may call “financial equivalence”, which can be traded in global equity markets. Further, this imposes an extreme connection between the powers of levying taxes, of imposing fees and equalisation mechanisms in order to allow constituent units to fully discharge their constitutionally assigned responsibilities under the budgetary guardianship of an ever more invasive central level of government.