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Methods of Interpreting Competence Norms: Judicial Allocation of Powers in a Comparative Perspective

By Maribel González Pascual[*]

A. Introduction

The comparative constitutional analysis of federalism is particularly complex. On the one hand, "[e]ach federal bargain is in important respects unique to the parties' situation," in contrast to constitutional provisions asserted to guarantee fundamental rights.[1] On the other hand, "provisions concerning federalism may have different historical meanings in a particular polity, tied in different ways to the political compromises."[2] In addition, the federal system relies on an "interrelated package of arrangements."[3] Therefore, no element should be considered isolated from other elements of the federal compromise. As a consequence, in order to compare federalism issues it may be necessary to evaluate "the entire interrelated structure."[4]

Hence, the comparative approach must have a modest aim and take into account the institutional and political background of each federal system. This paper seeks to offer an in-depth understanding of the interpretation methods that may be applied to the determination of the extent of the competence norms. This comparative analysis enables an increase in the palette of applicable methods. Nonetheless, in order to give a more accurate explanation of the role of each constitutional court, the paper will briefly consider the interrelation between the method applied and the institutional background of each constitutional system.

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[1] Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 273, (2001) (internal quotation marks omitted).

[2] *Id.*

[3] *Id.* (internal quotation marks omitted).

[4] *Id.* at 274.

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For the purpose of this article, federalism is a doctrine whose "basic tenet is that the power will be divided between a central authority and the component entities of a nation-state [,] so as to make each of them responsible for the exercise of their own powers."[5] This simple definition is fully applicable to the German, Italian and Spanish systems even though only the German system is, strictly speaking, a Federal State. Therefore, when in this article I refer to the above-mentioned constitutional systems in general terms, the expressions applied will be federal principles, Central State and Component Entities. When the article discusses the German case the terms used will be Bund and Länder whereas in the Italian and Spanish cases the dichotomy between Regions and Central State shall be preferred.[6]

B. The Role of Courts in the Allocation of Powers: The Competence Norms

A competence norm is a basic and crucial element of the law. Perhaps for that reason, it is taken for granted that it is both a well-known and an established concept. Nonetheless, the legal term *competence norm* may be deemed to encompass several different meanings, all of which share one key feature: They imply the restraint of power. In other words, whenever a competence norm is discussed, the actual concern is, in fact, the limits of such a power.[7]

For the purposes of this study, a competence norm will be defined as the constitutional provision that confers the power to perform an activity in a specified sector to a subject or institution. This statement may seem quite simple, but whenever a subject or institution claims to have jurisdiction on a matter, there are two elements which should be defined in order to assess whether it is the relevant authority indeed: (1) The sector in which the activity is performed and (2) the activity itself.

Generally speaking, it is accepted that the interpretation of competence norms has its own idiosyncrasy. In principle, the interpretation of competence norms is very well structured and the method and parameters to determine their content and extent are linked to the type of competence, these being (1) objective competence norms and (2) teleological competence norms.[8]

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[5] Koen Lenaerts, *Federalism: Essential Concepts in Evolution—The Case of the European Union*, 21 FORDHAM INT'L L.J. 746, 748 (1997).

[6] For the purpose of this article, the differences between *political autonomy* and *federal principle*, as well as between *regions* and *autonomous regions* are set aside.

[7] Franz C. Mayer, *Die drei Dimensionen der europäischen Kompetenzebatte*, 61 ZEITSCHRIFT FÜR AUSLÄNDICHES ÖFFENTLICHE RECHT UND VOLKERRECHT [ZaöRV] 577, 580 (2001).

[8] Nonetheless, it has been observed that objective competence norms usually refer to aims as well. *See* Armin von Bogdandy & Jürgen Bast, *The European Union's Vertical Order of Competences: The Current Law and Proposals for Its Reform*, 39 COMMON MKT. L. REV. 227, 240 (2002).

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I. Objective Competence Norms

An objective norm confers power whenever the factual and technical elements of the field quoted by the competence norm are fulfilled by the content of the decision disputed. In other words, the sector must be textually defined and its extent legally specified by a court in case of dispute. According to this understanding of the competences, it has been stated, for example, that a regional statute that establishes the minimum price of products during a sales period "is against the power of the Central State over the commercial legislation, because the price is a main element of a purchase agreement."[9]

II. Teleological Competence Norms

A teleological competence norm attributes the necessary powers to fulfill a specified aim, which defines the content and extent of the decision disputed. In line with this, an institution is the relevant authority, which decides whether it is necessary to pursue the objective that the competence norm states. Such an objective "may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review. Those factors include the aim and content of the measure."[10]

Theoretically, the interpretation methods used to establish the extent of the objective competence norms are quite different from the methods needed to design the scope of teleological competence norms. In general, although there is no evidence to sustain this assertion,[11] it is assumed that the teleological competence norms are vaguer and leave more room for courts to determine their content and scope.

In fact, when political arrangements are fragile, it is common to encourage the creation of a detailed and exhaustive list of objective competences norms in order to restrict any

[9] S.T.C., Feb. 14, 2011 (B.O.E., No. 63, p. 37 (Spain) (originating from the Spanish Constitutional Court).

[10] Comm'n v. Council, CJEU Case C-300/89, 1991 E.C.R. I-2867, para. 10. For further discussion, and an explanation of why the Data Retention Directive was adopted under the basis of Article 95 EC (Article 191 TFEU), see Ireland v. Parliament & Council, CJEU Case C-301/06, 2009 E.C.R I-593, para. 71–72.

> T]he differences between the various national rules adopted on the retention of data relating to electronic communications were liable to have a direct impact on the functioning of the internal market . . . . Such a situation justified the Community legislature in pursuing the objective of safeguarding the proper functioning of the internal market through the adoption of harmonized rules.

Id.

[11] Mayer, *supra* note 7, at 582.

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margin of appreciation of the counterpart or the courts in the future.[12] This system of allocation of powers attempts to determine the reasoning of the court in all cases. Thus, a mere application of the Constitution would suffice to keep the foundational agreement intact. In contrast, the drafting of teleological competence norms is preferred whenever a flexible system of allocation of powers is considered more adequate. The understanding of the ongoing agreements as a basic element of the system and the trust in the courts create a favorable atmosphere for the implementation of methods of interpretation that could be less foreseeable in principle.

In general, the stability of the political arrangements of a country determines the type of competence norm used, and, consequently, the method and parameters of interpretation that constitutional courts will most likely apply. Nonetheless, the relationship between those methods and the role of the court are neither unchallenged nor straightforward.

The allocation of powers in Federal States stems from the arrangements between the main political actors during both the foundation and the development of decentralization. Nonetheless, courts play a crucial role for the allocation of powers when a referee is needed to solve the conflicts of competence. Courts face particularly awesome restraints when they deal with the interpretation of competence norms. Competence means power. To interpret the allocation of powers may involve sharing the power amongst political actors who are often antagonists. Thus, interpreting the conflicts of powers could easily impinge upon the legitimacy of courts.

Further, the interpretation tools are particularly weak in conflicts of powers. Courts cannot rely on values or principles, such as the ones that are normally applied with regard to fundamental rights, which could justify or reinforce their interpretation. The human being is at the core of the constitutional system; therefore, any restriction on his or her freedom must be justified. This statement is a decisive tool in the interpretation of fundamental rights, but nothing similar exists in the field of allocation of powers.

The political strength of political actors determines the allocation of powers, and this is reflected in the constitution. The system of powers must be interpreted as a whole in order to take into account the decentralization enshrined in the constitution. Apart from this statement, there is no constitutional value or principle that requires an interpretation in favor of the Central State or vice versa.[13] The competences of all the actors must equally be evaluated. Hence, the constitutional space of the Central State must be preserved by

[12] *See* Wilfried Swenden, *Is the European Union in Need of a Competence Catalogue? Insights from Comparative Federalism*, 42 J. COMMON MKT. STUD. 371, 375 (2004).

[13] In fact, the reinforcement of the powers of the Component Entities relying on the pre-eminence of their autonomy before the Central State has failed. *See* Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1724 (2002).

the constitutional court to the same degree as the constitutional space of Component Entities.[14]

As a consequence, courts have few tools to reinforce their reasoning, even though their decisions may undermine their own position in the system. The only way to escape from such a dilemma is to build a reasoning accepted by the antagonistic political actors. In other terms, courts must choose an interpretative method both logically and legally convincing in each case. Because this goal is probably unattainable, the reasoning is often hidden beneath the theoretically indisputable cloak of legal logic.

That is, courts either pretend to be completely rational, enhancing the legal reasoning of their decisions, or they decline jurisdiction. To enhance the legal reasoning, courts first make an exhaustive legal definition of each and every one of the terms of the competence norm and of the disputed rule. Second, they subsume the disputed norm of the competence norm before finally presenting their decision as if their reasoning were logical, irrefutable and the only one that is admissible in light of the constitution.[15] Courts may sometimes shy away from making a decision by assessing it as a political question that cannot be decided by a judge. Therefore, the competence norm must be interpreted by the institutions that exercise the competence or in an agreement among the political actors. In any case, it seems that political actors, not courts, decide the scope of the competence norm. Nonetheless, it could be argued that where the court empowers one of the contenders, or fixes, or even changes the actual balance among powers, the court can still be said to have made the decision itself.

A court's approach is selected according to both the capacity of the actors involved in an arrangement and the controversy of the competence norm invoked. Where relations among political contenders are scarce or even problematic, the court may try to decide in an uncontroversial way by following a textual argument. Alternatively, courts may give the stage to political actors if there is a wide social consensus concerning the matter, or if they consider it more adequate to force an agreement among the contenders involved.

With regard to the competence norm that must be interpreted, certain competences are much more controversial and disputed than others. In order to analyze thoroughly the methods and parameters of interpretations chosen by courts, the following requisites should be fulfilled by the competence norm: (1) Its scope must be particularly difficult to define, and (2) courts must interpret it by using different methods and parameters. Hence, the concurrence of these requisites may provide different complex proposals and opposite

[14] Hans D. Jarass, *Allgemeine Probleme der Gesetzgebungskompetenz des Bundes*, 19 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NZWV] 1089, 1092 (2000).

[15] For a critical overview of the textualism approach, see Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415–25 (1989).

outcomes on the same issue. Thus, valuable information for the understanding of the role of courts in Federal States might be drawn from a comparative study.

These requisites are fulfilled by clauses that attribute a competence to the State or the Federation if their actions are necessary to reach equality among the citizens throughout the country in Germany, Italy, and Spain: Articles 72.2 Basic Law (BL),[16] 149.1.1 Spanish Constitution (SC)[17] and 117.2 m Italian Constitution (IC).[18]

Even though there are important differences among these articles, all three recognize a competence to the Central State only if its acts are necessary to ensure throughout the territory either a certain measure of equality in a broad sense (Spanish and Italian Constitutions[19]), or equivalent living conditions (Basic Law).[20] That being the case, these articles empower the Central State to homogenize a basic level of rights, understood as a general life standard.

With regard to the definition of their scope, these competence norms refer to an aim pursued by any public power through all its tasks: Equality among citizens. Furthermore, these clauses are related to a broad sense of equality because they refer to the equal access and enjoyment of services and opportunities.[21] In other words, the scope is not

[16] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 72(a) (Ger.) ("The Federation shall have the right to legislate if and to the extent that the establishment of equivalent living conditions throughout the federal territory . . . renders federal regulation necessary in the national interest.").

[17] CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311, art. 149(1)(1), Dec. 29, 1978 (Spain) ("The State holds exclusive competence over the following matters: Regulation of the basic conditions guaranteeing the equality of all Spaniards in the exercise of their rights, and in the fulfillment of their constitutional duties.").

[18] Art. 117(a) Costituzione [Cost.] (It.) ("The State has exclusive legislative powers in the following matters: . . . Determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory.").

[19] The Spanish article refers to the basic conditions that guarantee the equality of all Spaniards in the exercise of rights and the fulfillment of constitutional duties, while the Italian Constitution alludes to the basic level of benefits related to civil and social entitlements to be guaranteed throughout the national territory.

[20] Actually, in the Italian and Spanish Constitutions these articles set a competence in literal terms. The German case is relatively different because the equivalence of living conditions is a requisite to empower the Federation to approve a rule concerning a limited number of areas. Hence, it is not a competence in itself, but a premise of several federal competences.

[21] The Central State has been empowered to rule over the prices of medicine, the quality of public housing, the requirements to enter an occupation, to receive a medical treatment or to get several kinds of subsidies, the participation entitlements in educational institutions, etc.

limited to ensuring a basic equality with regard to the exercise of fundamental rights.[22] This makes their extent particularly difficult to define.

As long as these constitutional provisions are considered to be teleological competence norms, it should be expected that courts apply the teleological method to define their scope but, paradoxically, they have followed different methods. In fact, three main interpretative parameters can be observed in their case law: (1) Textual interpretation, (2) almost absolute decline of jurisdiction, and (3) teleological interpretation. Different courts have followed very different interpretative methods to establish the extent of the power of the Central State to achieve a general life standard. Their judgments have been heavily criticized for either modifying the political agreements that grounded the design of the allocation of powers or for destabilizing the system by making it dependent on unpredictable court decisions. The following pages will focus on these interpretative parameters to point out what their outcomes have been.

C. Textual Interpretation of Competence Norms: Spanish Case Law

The Spanish Central State is empowered to establish the basic conditions that guarantee equality of all citizens in the exercise of their rights and the fulfillment of their constitutional duties.[23] The Spanish Constitutional Court has determined the extent of this article as if it were an objective competence norm. Hence, the Court has tried to textually define the sector in which the Central State is entitled to perform an activity.

This competence norm projects onto any field in which a right might be involved. In fact, there are numerous heterogeneous sectors[24] in which the Central State is entitled to guarantee the basic equality of citizens, and no matter has ever been excluded *per se* by the Constitutional Court. The Court has defined the basic conditions needed to guarantee a general standard of life in the country, instead of fixing the sectors in which the Central State is empowered.

[22] In the Spanish and Italian cases, fundamental rights lead to the centralization of the system mainly because there is only one Constitution. In the German case, though, the Federal Constitutional Court has developed a doctrine so wide and detailed concerning fundamental rights that it has thoroughly restrained the legislative powers of Länder. *See* Konrad Hesse, *Wandlungen der Bedeutung der Verfassungsgerichtsbarkeit für die bundesstaatliche Ordnung*, *in* IM DIENST AN DER GEMEINSCHAFT. FESTSCHRIFT FÜR DIETRICH SCHINDLER ZUM 65. GEBURTSTAG 723, 730–31 (Alfred Kölz, Georg Müller & Daniel Thürer, eds., 1989).

[23] C.E., B.O.E. n. 149(1)(1), Dec. 27, 1978 (Spain).

[24] In this regard, the competence of the Central State to achieve equality has been projected upon rules over environment, education, civil service, cinema, social security, consumer rights, public health system, the stock market, several kinds of fines, subsidies and registers, etc.

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The Court established that the Central State is empowered only if its decision is necessary to guarantee equality, but no conclusion has been drawn from this statement. Instead, the Court has decided the general life standard, which must be preserved above the powers of the Regions on a case-by-case basis. Moreover, the textual definition of the provision disputed in the cases was the very point that determined the judgment.

The best example to understand the reasoning followed by the Court is the judgment of the Spanish Constitutional Court over the Town Planning Act. This judgment attempted to state the interpretation of Article 149.1.1 SC and it can be considered a leading case regarding equality as a competence norm.[25]

The Town Planning Act comprehensively applies to town planning for the whole territory, although only the regions are empowered to deal with this field. Yet, the Constitutional Court considers the Central State to be the relevant authority to determine the basic conditions that guarantee equality with regards to urban property.

The Court asserts that the basic conditions are the only ones needed, or even indispensable, to guarantee this equality. Nonetheless, it states that "the object or field in which the public activity is generally performed, the minimum duties or basic conditions required to exercise the right, the indispensable requisites or the minimum structure which make the exercise of the right easier, etc." are included among these conditions.[26] Clearly, the Court does not define either the basic conditions or the equality in the exercise of the rights.[27] It enumerates vague and extremely abstract elements relatively close to the exercise of a right. Therefore, this list is useless and the judgment of the Court actually relies on a textual analysis of the Town Planning Act.

The Court identifies the basic conditions relying on a vague understanding of the competence of the regions over town planning; therefore, the Central State can neither establish the only suitable tool to achieve the planning goals nor rule in detail on the planning. As a consequence, the Court sets up a new competence of the Central State: To regulate property in the framework of town planning.[28] The determination of the extent of

[25] MARIBEL GONZALEZ PASCUAL, EL PROCESO AUTONÓMICO ANTE LA IGUALDAD EN EL EJERCICIO DE LOS DERECHOS CONSTITUCIONALES 83 (2007).

[26] S.T.C., Mar. 20, 1997 (B.O.E., No. 99, p. 38) (Spain) (originating from the Spanish Constitutional Court).

[27] The following are considered basic conditions (among others): The determination of land use, the guarantees of public engagement in landing policy, the duties of the owners to maintain and repair structures of the building as well as the facilities therein, the deadlines of the building licenses, the expropriation grounds, the fair distribution of burdens and profits during the planning.

[28] Agustín de Asis Roig, *El Artículo 149.1.1º de la Constitución como fundamento de la Intervención del Estado en materia urbanística*, *in* EL URBANISMO, HOY. REFLEXIONES A PROPOSITO DE LA STC 61/1997 Y EL NUEVO PROYECTO DE LEY ESTATAL 103, 158, 166 (Luciano Parejo Alfonso et al. eds., 1997).

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the competence norm recognized in Article 149.1.1 SC failed because the considerations of this judgment are only applicable to town planning. In fact, the Court determines the extent of the competence relying on the content of the disputed rule in every case it examines.

The textual definition of the competence norm may, at first glance, seem to be a logical and technical subsumption, but it has not provided any general parameter that allows foreseeing future judgments of the Constitutional Court. Hence, the Court decides on the extent for each case individually and it sometimes applies unconvincing parameters because the common or legal sense of the words may look to be quite an appealing reasoning, but it is particularly problematic and ambiguous. First, the meaning of a rule is not just the sum of the meaning of its words. Second, even the most common words have several meanings. Finally, the meaning of a word depends on the context in which it appears.[29] Actually, the textual interpretation entitles the Court to fully design the allocation of powers because even the tiniest detail may need a judgment from the Court.

There are three interconnected problems arising from this reasoning of the Constitutional Court. First, the Central State is, theoretically, empowered to rule over any field. Therefore, it may claim to be the relevant authority whenever there is no judgment of the Court—or even if there is—because the judgments have relied so much on the circumstances of the cases that there are no real guidelines to decide on the extent of the competence. Second, the regions may challenge the central rule for the same reason; because the powers of the Central State are not well determined, it is easy to dispute the competence. Third, the never ending spiral of conflicts of powers puts the legitimacy of the Court itself at risk. As a consequence, the Court becomes the only designer of the allocation of powers. Hence, the exhaustive definition of the constitutional provisions leaves no room for political arrangements.[30]

Questionable judgments fill the lack of political arrangements with a theoretically legal logic. The difference existing between the definition of an indeterminate legal concept and a discretionary decision is not convincing,[31] even less so if the former is considered a kind of mathematical operation. The Spanish Constitutional Court has tried to settle the conflict of powers between Central State and regions by relying on the textual interpretation. Nevertheless, indeterminate legal concepts are likely to be ambiguous and disputable. This leads to a rather paradoxical result: While the Constitutional Court's definition of the

[29] Olof Ekelöf, *Teleological Construction of Statutes*, *in* 2 LEGAL REASONING 359, 378–79 (Aulis Aarnio & D. Neil MacCormick eds., 1992).

[30] Rainer Wahl, *Der Vorrang der Verfassung*, 20 DER STAAT 485, 507 (1981).

[31] Indeed, whenever an authority is in charge of making the meaning of a disputed legal term concrete, a certain discretionary power is conferred on that authority. *See* Horst Emhke, "ERMESSEN" UND "UNBESTIMMTER RECHTSBEGRIFF" IM VERWALTUNGSRECHT 26–28 (1960).

competence norm remains open to debate due to its controversial foundations, the Court rules out the possibility of future changes. Such a denial of boundaries to its interpretative methods impinges upon the Court's legitimacy and draws even more criticism towards its reasoning.

D. Decline of Jurisdiction

Courts are particularly cautious concerning the interpretation of competence norms; therefore they normally choose their method of interpretation carefully, even if it's not an easy decision to make.

Generally, textual interpretation has been criticized and refuted, but teleological interpretation is also quite problematic. It means interpreting allocation of powers using similar parameters to those that are usually applied in the field of fundamental rights, but the discretion of the court is lower with regard to interpreting competence norms. In principle, the court decides which authority is relevant to perform an activity, but not how it should be performed.

Therefore, courts are faced with a complicated dilemma whenever they interpret a competence norm. Obviously, in the case of a cross sectors competence norm, which empowers the Central State to guarantee a general life standard, this dilemma is critical. One way to avoid this difficulty is to decline jurisdiction stating that the need to achieve equality or even the means to do so is a political decision.

I. The Empowerment of the Central State to Determine the Extent of Its Own Competence: Previous German Case Law

Over a period of forty years, the German Federal Constitutional Court considered that the federal legislative power could decide freely on the need to achieve uniformity in living conditions. The Court simply stated that it could not dispute the opinion of the Bund because it was a political decision.[32] The Court controlled whether the Bund had abused this power. In fact, the Court only examined if this power had been clearly misused without any further requirement. Indeed, several judgments only stated the power of the Bund to

[32] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvF 760/57, 13 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 237, 239 (Nov. 29, 1960) (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 1/64, 26 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 338, 382, 383 (July 15, 1969); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 9/85, 78 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 249, 270 (June 8, 1988).

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assess the need of the measure.[33] No federal statute was ever declared unconstitutional for not fulfilling the requisites of Article 72.2 BL.

As long as the uniformity of living conditions was a requisite to legitimize several federal competences, this interpretation implied that it never worked as such a requisite. This article was thought to limit the federal power but only the Bund itself decided if it was allowed to use it. Under these conditions, this constitutional provision could never fulfill its task of limiting the Bund's powers, and in practice the Bund had full powers over several matters, although the Basic Law had not conferred it. The outcome was a modification of allocation of powers in favor of the constitutional space of the Bund. Indeed, Article 72.2 BL played an important role in the well-known unification process of the German federalism.[34]

II. The Agreement among the Central State and the Component Entities to Determine the Executive Function: Italian Case Law

According to the Italian Constitutional Court, Article 117.2.m IC confers a cross sector competence to the Central State.[35] Therefore, the Central State is empowered to determine the basic level of benefits relating to civil and social entitlements in any sector. Nonetheless, the Constitutional Court has articulated neither the definition of *basic level* nor the reach of the *civil and social entitlements*.[36]

The mandatory cooperation to perform a governmental act seems to be the only boundary of this competence norm. In fact, the Italian Constitutional Court even required an agreement between the Central State and the Regions on a definition of the basic standard to be pursued.[37] The Central State needs to reach an agreement with the Regions or it will not be allowed to perform the governmental activity. Therefore, if a statute establishes the need for a decision of the central government to achieve a general life standard in a

[33] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvL 23/81, 1 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 63, 65 (Jan. 12, 1983).

[34] KLAUS STERN, 2 DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND 278 (1976).

[35] Corte Costituzionale, 26 June 2002, n. 282/2002, GIUR. COST. 2002, 2034, *available at* http://www.giurcost.org/decisioni/index.html.

[36] In the judgment 166/2008, the Italian Constitutional Court stated that the Central State is entrusted with the establishment of the minimum life standard "inherent in the core of human dignity." The Constitutional Court has not yet drawn any guidelines from this general assertion, though. *See* Corte Costituzionale, 23 May 2008, n. 166/2008, *available at* http://www.giurcost.org/decisioni/index.html.

[37] Regarding standards of basic levels of health care, see Corte Costituzionale, 27 Mar. 2003, n. 88/2003, *available at* http://www.giurcost.org/decisioni/index.html. *See also*, Corte Costituzionale, 31 Mar. 2006, n. 134/2006, *available at* http://www.giurcost.org/decisioni/index.html.

certain field, the statute must impose cooperation among the Central State and the Regions.

Actually, the constitutional reform of 2001 has encouraged cooperation among the Central State and Regions. With regard to the basic standard of social and civil entitlements, Article 120 IC empowers the Central Government to act instead of bodies of the Component Entities, "in particular to guarantee the basic level of benefits relating to social and civil entitlements."[38] Nevertheless, this subsidiary power must be exercised "in compliance with the principle of subsidiarity and loyal cooperation."[39]

The Constitutional Court stated that this cooperation should imply an agreement, and therefore declared central statutes unconstitutional that only established the right of Regions to be heard by the Central State. Hence, the Constitutional Court strengthened the executive powers of Regions by imposing their effective participation in the final decision of the Central State. Nonetheless, this reasoning is not applicable to the legislative powers because they cannot be restrained by the cooperation.

In other words, the Italian Constitutional Court has avoided making an interpretation of the scope of Article 117.2.m by stressing the cooperation between Regions and the State.[40] Nonetheless, the outcome of its reasoning is an almost unlimited legislative competence and a shared executive competence of the Central State to achieve a general life standard, the content of which has not been defined.

Therefore, the judgments of the German and the Italian Constitutional Courts have shaped the allocation of powers by entrusting the Central State with the achievement of equality almost without boundaries. Because this competence norm may affect any field, it needs boundaries; otherwise, the whole allocation of powers could be rewritten. In fact, in both cases, the Component Entities have the power to legislate insofar as the Constitution does not confer legislative power on the Central State (Article 70.1 BL and Article 117.4 IC). Nonetheless, if the Central State is empowered to decide freely about the need for equality, it is actually empowered to rule over any conceivable area.[41] The balance of powers might be indeed overturned.

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[38] Art. 120 Costituzione [Cost.] (It.) ("The Government can act for bodies of the regions, metropolitan cities, provinces and municipalities . . . . whenever such action is necessary . . . to guarantee the basic level of benefits relating to civil and social entitlements, regardless of the geographic borders of local authorities.").

[39] *Id.*

[40] Alessandro Antonio, *I livelli essenziali delle prestazioni sanitarie nella Sentenza della Corte Costituzionale 13-27 Marzo 2003, N. 88.,* 8 FEDERALISMI.IT 1, 11 (2003), http://www.federalismi.it.

[41] Silvio Gambino*, L'Ordinamento Repubblicano: Fra Princìpi Costituzionali e Nuovo Asseto Territoriale dei Poteri*, *in* DIRITTO REGIONALE E DEGLI ENTI LOCALI 3, 13 (Silvio Gambino ed., 2003).

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E. Teleological Interpretation of the Competence Norm: Current German Case Law

In 1994, the Basic Law was amended to reverse the case law of the Federal Constitution Court with regard to the power of the Bund to establish the uniformity of life conditions.[42] To accomplish such an aim, a new paragraph was added to Article 93 BL according to which the Federal Constitutional Court shall rule in the event of disagreements on whether a law fulfills the requirements of Article 72 .2 BL. The purpose of this new paragraph was to persuade the Federal Constitutional Court not to decline jurisdiction.

In addition, Article 72 BL was deeply amended.[43] For the purposes of this work, the only relevant change was the proposal of a new reasoning to the Court. In that concern the word *Erforderlichkeit* replaced the term *Bedürfnis* in Article 72 BL in order to put forward a different understanding of the constitutional provision, because it would then bear a certain resemblance to the principle of proportionality.[44]

The Federal Constitutional Court dealt with this reform in 2000 and explicitly recognized that its case law had been profoundly criticized and that the constitutional amendment had to lead to a new interpretation of Article 72 BL.[45] In order to structure a new interpretation of the competence norm, the Court followed a reasoning used in the field of administrative law to establish the boundaries of the governmental discretion when applying a statute: The functional qualification of a rule. This approach takes into account the aim and the real effects of a governmental act to decide if it has respected the legal framework.[46] Still, this reasoning is extremely complicated in the field of constitutional adjudication because it relies on the unpredictable outcomes of a public policy to establish whether a statute is constitutional.

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[42] *See* Karl Peter Sommermann, *Die Stärkung der Gesetzgebungskompetenzen der Länder durch die Grundgesetzreform von 1994*, 17 JURISTISCHE AUSBILDUNG [JURA] 393 (1995).

[43] *See* Rüdiger Sannwald, *Art. 72*, *in* KOMMENTAR ZUM GRUNDGESETZ 74 (Bruno Schmidt-Bleibtreu & Franz Klein eds., 11th ed. 2011).

[44] It is difficult to translate the reach of this reform into other languages because both *Bedürfnis* and *Erforderlichkeit* mean necessity. Nevertheless, according to the German Constitutional Federal Court, a measure is proportional whether it is *geeignet, erforderlich und angemessen*. That is why it was a very important change because it could mean that a kind of proportionality principle—at least the two first stages—should be applied, and, actually, this was the intention of the reform.

[45] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 1/01, 106 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 61 (Oct. 24, 2002).

[46] Rupert Scholz, *Ausschließliche und Konkurrierende Gesetzgebungskompetenz von Bund und Ländern in der Rechtsprechung des Bundesverfassungsgerichts, in* 2 BUNDESVERFASSUNGSGERICHT UND GRUNDGESETZ 252, 261 (Christian Starck ed., 1976).

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In fact, the functional qualification of a statute implies an evaluation of legislative facts and a prediction about their future effects. With regard to the legislative facts, constitutional courts rely on the legislative records to state if the Legislative Power has made a complete evaluation of all the facts which justify the need for a statute or not.[47] Courts may control the Parliament's degree of care by taking into account which facts have been evaluated, the reports have been asked for, or the experts that have been consulted, among others. Thus, it is a control of the legislative procedure.

Nevertheless, the forecast about the outcomes is to a large extent a political decision. By definition, a political decision is nothing more than an attempt to influence the future development of the world.[48] Nonetheless, the judiciary may control the rationality of this prediction. In fact, the control of decisions based on predictions is not alien to constitutional courts, and several parameters have been designed to balance the need for a judicial review with an advisable deference to the constitutional space of the Legislative Power.

The Federal Constitutional Court has determined the scope of Article 72.2 BL by following the functional qualification of statutes. Hence, the Bund may not approve a statute to establish a general life standard if the equivalence of living conditions throughout the territory is in danger. Such equivalence may only be in danger if the development of the living conditions in the Länder "were so different and damaging that it were a menace for the social structure of the Federal State."[49]

Therefore, to determine that the Bund has the power to enact a law related to the equivalence of living conditions, it must be established that such equivalence is at stake due to a development that is current and specific or – if it were future and hypothetical- that's is very likely to occur. In addition, the legislation enacted by the Bund is required to be necessary to avoid such risk. Hence, the Bund is empowered to approve a statute to achieve a general life standard when its aim is in accordance with the rationale of Article 72.2 BL. The content of the statute should be consistent with the aim of the constitutional provision and its reach cannot go beyond it. Moreover, only a decision of the Bund can avoid such a menace. Otherwise, Länder are entrusted with the achievement of a general life standard.

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[47] Fritz Ossenbühl, *Die Kontrolle von Tatsachenfeststellungen und Prognoseentscheidungen durch das Bundesverfassungsgericht*, *in* 2 BUNDESVERFASSUNGSSGERICHT UND GRUNDGESETZ 458, 483 (Christian Starck ed., 1976).

[48] *Id*. at 501.

[49] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 2/01, 113 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 167 (July 18, 2005).

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Therefore, the Federal Constitutional Court decides on the basis of predictions: Will the equivalence of the living conditions probably be at stake? Will Länder be able to settle this problem? Would a federal statute be likely to achieve the equivalence of living conditions? To answer these questions, the Court analyzes whether the Parliament has tried to solve them and, if so, which procedure was followed to find the most suitable answer. In other words, the point cannot be what the most adequate prediction is, but if the Parliament was aware of the boundaries imposed by the competence norm and if it took enough measures to respect them.

For example, the Careers for the Elderly Act did not fulfill the requirements of Article 72 BL. The Bund alleged that a federal statute was necessary to rule over the training of careers for the elderly throughout the territory because geriatric care was deficient. The Federal Constitutional Court stated that geriatric care was indeed a living condition and that the improvement of the training of careers for the elderly could easily lead to better geriatric care. Notwithstanding, this assertion was insufficient to pass a federal statute.

The Bund did not provide any kind of reports, statistics or data to support its assertion that equality concerning geriatric care was at stake. It simply assumed that the differences among the rules of Länder were damaging for geriatric care. The Bund did not try to establish whether living conditions were in fact damaged because of different rules of Länder neither in the legislative procedure nor in the plea before the Constitutional Court.[50]

Similarly, the federal statute that forbade university fees in public institutions was also declared unconstitutional because it did not fulfill the requirements of Article 72.2 BL. The Federal Constitutional Court considered that the Bund had not properly analyzed whether the living conditions were at stake or, if they ever were, if the Länder may have resolved the problem by taking additional measures.[51]

This case law has been heavily criticized. According to the critics, whenever the Constitutional Court analyses the content of the statute and the foreseeable development of its provisions, it is applying a kind of proportionality principle to a conflict of powers. As a result, the Court would not only encroach on the legislative power but it would also apply an unpredictable principle to a matter that requires clarity and stability.[52]

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[50] *Id.*

[51] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case. No. 2 BvF 1/03, 112 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 226 (Jan. 26, 2005).

[52] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case. No. 2 BvF 2/02, 111 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 226 (July 27, 2004) (Osterloh, J. and Lübbe-Wolfe, J., dissenting).

Actually, Article 72 BL was amended again in 2006 because of the case law of the Federal Constitutional Court,[53] among other reasons. From the standpoint of the Bund, the guidelines of the Federal Constitutional Court were so vague and abstract that several federal competences were at stake. The Bund claimed that it could not know with a reasonable certainty whether, and to what extent, it was empowered to pass a statute to achieve the equivalence of living conditions. The amendment did not repeal Article 72.2 BL but it limited the impact of the clause by decreasing the areas in which it is applicable.[54] Therefore, the Federal Constitutional Court has not changed its interpretation,[55] but the effect of the clause has been softened.

F. Equality as a Competence Norm: Interpretation of Principles Framed as Conflicts of Powers

The differences among citizens are a logical consequence of the political decentralization of power. Otherwise, the federal principle would not make much sense. Even more, theoretically, the required homogenization has already been established through the allocation of powers. In fact, if the Central State were empowered to approve a rule whenever the equality among citizens might be in danger, the system of allocation of powers could be rewritten.

Important reforms have taken place in the German, Italian, and Spanish constitutional systems concerning the decentralization of the political power. These reforms have a common scope and, to some extent, a common goal also. Indeed, the three systems experienced their deepest reform of the allocation of powers between the Central State and the Component Entities. Also, in the three cases, the asymmetries among the Component Entities and their competences were disputed. In line with this, one of the main concerns of these reforms was whether the future differences among citizens would be acceptable for society.

In particular, a question asked recently regarding the undeniable degradation of equality of the citizens of each country independently from the region in which they live. In other words, what are the living conditions that the Central State should provide to unify the citizenry? This is why, as already explained, the constitutional articles that refer to a basic level of equality among citizens in any Component Entity were amended (Article 72 BL), included (Article 117.2 m I. C) or discussed (Article 149.1.1 SC).

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[53] Rudolf Hrbek, *Auf dem weg zur Föderalismus-Reform: die Kommission zur Modernisierung der Bundesstaatlichen Ordnung*, 2004 JAHRBUCH DES FODERALISMUS 147, 147.

[54] *See* Rupert Stettner, *Art. 72*, *in* 2 GRUNDGESETZ KOMMENTAR 1345 (Horst Dreier ed., 2006).

[55] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2185/04, 125 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 141 (Jan. 27, 2010).

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Most probably, these clauses should not exist because they are the result of unfinished political arrangements between the Central State and the Component Entities. The pressure to achieve a higher asymmetry has been counterbalanced by the inclusion of open clauses that may be used if the differences seem unbearable in the future in the allocation of powers system.[56] They are an evidence of the distrust and misunderstanding that exists between these bodies.

The incapacity of the political actors to design a lasting balance of powers is changing the role of the constitutional courts by forcing them to decide on detailed, deeply political controversial questions that are framed as conflicts of powers. Constitutional courts should not be asked to decide, but, if they are, they must answer.

Competence norms are at the same time the source and the boundary of power. In other words, defining the extent of competence norms is determining the limits of powers. In fact, conflicts of powers used to have priority over other constitutional questions. This task has become less important, though, because of the increasing significance of fundamental rights and the decrease of the differences among Component Entities in several countries.[57]

In Germany, a unitary Federal State was built in order to perform uniform public policies in the framework of the Cold War, the European Integration and in the expanding Social State.[58] In this context, the first case law of the Federal Constitutional Court is understandable. Transformations in the federal system after the reunification, though, made a change of the case law necessary.[59] The dynamics underlying the federal process had a bearing on the interpretation of allocation of powers by the Federal Constitutional Court.

With regard to the Italian case, the Italian Constitutional Court has usually encouraged cooperation between the Central State and Regions.[60] Generally, the Italian Constitutional Court has supported the need for cooperation in order to promote the role of political

[56] Massimo Luciani, *I diritti costituzionali tra Stato e Regioni (a proposito dell'art. 117, comma 2, lett. m, della Costituzione)*, 2002 POLITICA DEL DIRITTO 345, 353.

[57] Hesse, *supra* note 22, at 729.

[58] Joachim Wieland, *Deutchland Zukunft als Bundesstaat*, *in* FREIHEIT DES SUBJEKTS UND ORGANISATION DER HERRSCHAFT 79, 88 (Christoph Enders & Joachim Massing eds., 2006).

[59] Christian Callies, *Kontrolle zentraler Kompetenzausübung in Deutschland und Europa: Ein Lehrstück für die Europäische Verfassung*, 2003 EUROPAISCHE GRUNDRECHTE ZEITSCHRIFT [EuGRZ] 181, 194.

[60] Tania Groppi, *Giustizia Costituzionale e Stati Decentrati. L'esperienza della Corte Costituzionale Italiana,* 2005 REVISTA D'ESTUDIS AUTONOMICS I FEDERALS 11, 19.

actors instead of its own.[61] This case law in favor of cooperation is particularly clear after the constitutional reform. As a matter of fact, this case law is a response to a constitutional amendment that has established a form of dual federalism.[62]

The Italian constitutional reform has clearly separated the competences of Regions and the Central State but it has also upheld a reinforced cooperation.[63] Because most legal scholars have commented upon the failures of dual federalism systems, the Italian Constitutional Court attempts to make the current system more flexible.[64]

This case law may be adequate in the field of executive acts, but as already explained, it cannot replace an accurate definition of the scope of Article 117.2 m IC with regard to legislative powers. Otherwise, the powers of Regions would be undermined. The Italian Constitutional Court must bear in mind the former German case law and its consequences.

The Spanish case law is much more problematic. A misconceived legal logic has replaced political arrangements. Law has pretended to replace politics, but the textual interpretation of the law is indeed "a strategy that reflects a choice among competing possibilities."[65] Paradoxically, this method has been proposed to reinforce the powers of Regions.[66] Nonetheless, the outcome is not a clear limitation of the powers of the Central State in favor of Regions, but the prominence of the Constitutional Court.[67]

The Spanish allocation of powers may be characterized as a detailed list of competences contained in a constitution, whose amendment is *de facto* extremely complicated.[68] In addition, the textual interpretation leaves no room for political actors. Both the

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[61] For comment on this case law, see Andrea Gratteri, *La Faticosa Emersione del Principio Costituzionale di leale Collaborazione in* LA RIFORMA DEL TITOLO V DELLA COSTITUZIONE E LA GIURISPRUDENZA COSTITUZIONALE 416, 423—28 (E. Bettinelli & F. Rigano eds., 2004).

[62] The dual federalism is based on the idea that the Central State and Component Entities operate independently in their respective sphere. Therefore, allocation of powers relies on a division of powers into two mutually exclusive spheres. *See* Robert Schutze, *Dual Federalism Constitutionalised: The Emergence of Exclusive Competences in the EC Legal Order*, 32 EUR. L. REV. 3 (2007). It must be observed, though, that the share competences still play a key role in the Italian allocation of powers after the reform.

[63] Gratteri, *supra* note 61, at 441.

[64] BENIAMINO CARAVITA, LINEAMENTI DI DIRITTO COSTITUZIONALE FEDERALE E REGIONALE 138 (2009).

[65] Sunstein, *supra* note 15, at 424.

[66] *See* CARLES VIVER PI- SUNYER, MATERIAS COMPETENCIALES Y TRIBUNAL CONSTITUCIONAL: LA DELIMITACION DE LOS AMBITOS MATERIALES DE LAS COMPETENCIAS EN LA JURISPRUDENCIA CONSTITUCIONAL 37–46 (1989).

[67] Luis López Guerra, *El futuro del Estado de las Autonomías*, *in* CUADERNOS DE DERECHO PUBLICO 11, 14–15 (2007).

[68] Swenden, *supra* note 12, at 378.

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prominence of the Constitutional Court and the myth of the plain meaning of the Constitution have blocked the constitutional system. Currently, the allocation of powers can only be designed by a Constitutional Court whose legitimacy is being disputed.[69]

G. Interpreting Competence Norms in European Federalism

The understanding of the federal principle underlies the interpretative methods that constitutional courts follow to determine the scope of competence norms. There is a clear relationship between the method of interpretation chosen and the role that the court is actually willing to play. A court may seek a secondary role by declining jurisdiction. It follows the textual interpretation when it is wholly burdened with the determination of the allocation of powers. It may follow the teleological interpretation if a new balance among actors is required.

In this regard, the German Federal Constitutional Court has explicitly recognized that its current approach is aimed at the maintenance of the powers of Länder.[70] In fact, the teleological method may leave more room to the powers of the Component Entities than the other methods of reasoning followed by constitutional courts.

The application of the teleological interpretation may create some instability and restrain the legislative power in favor of courts, but it derives from changes of the federalism system in these states. The German constitutional reform highlighted the need for new case law. And in Italy and Spain, the courts deal with significant reforms. The conflicts of powers can therefore now be seen as an important task for constitutional courts.

With regard to Article 72.2 BL the German Federal Constitutional Court follows a three-step reasoning. Firstly, it must be analyzed if the equivalence of living conditions is at stake.[71] Secondly, it must be checked if a Bund's statute is required to avoid such a risk, and the content of the statute must be consistent with the achievement of the aim.[72] Thirdly, it must be assured that only a decision of the Bund can avoid such a menace.[73] This reasoning stems from the function that these articles profess to fulfill: To guarantee a certain standard of living if it were at stake.

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[69] Maribel González Pascual, *La posición de los Estatutos de Autonomía en el sistema constitucional (Comentario a la STC 31/2010)*, 27 TEORIA Y REALIDAD CONSTITUCIONAL 503, 507 (2011).

[70] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 2/01, 113 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 167 (July 18, 2005).

[71] *Id.*

[72] *Id.*

[73] *Id.*

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This function and the federal principle should both be taken into account. In this regard, in the Italian and Spanish cases, it would be necessary to follow the systemic argument before applying the teleological one,[74] and take into account the place of these competence norms within the constitutional framework. As long as Articles 149.1.1 SC and 117.2.m IC enshrine a guarantee of equality throughout the territory, the Central State should be empowered to provide a general life standard only if the Constitution has not prescribed other means to achieve it. The role of Articles 149.1.1 SC and 117.2.m IC must be subsidiary.

Therefore, the Central State may not claim its competence to achieve equality in fields in which it is empowered to rule by other constitutional articles. Articles 149.1.1 SC and 117.2.m IC restrain the power of the Central Sate to the basic conditions or the basic level needed to achieve a minimum general life standard, therefore its extent should generally be more limited than the extent of the rest of the competence norms.[75] Besides, equality must be pursued by all the public activities. Thus, the Central State must achieve equality whenever it enacts a rule. Generally the Central State guarantees equality among citizens through its legislative power without needing to rely on Articles 149.1.1 SC and 117.m IC. In fact, the Spanish Constitutional Court has followed this reasoning successfully in several cases.[76] This reasoning should lead to a systematic reading of the whole constitutional system in a wide sense because the basic equality can also be achieved by a European rule. In such case, the general life standard is not endangered.[77]

The exposed proposal—the application of teleological and systemic arguments—seeks a reinforcement of the competences of Component Entities. Undoubtedly, just as the methods discussed above are strategies, the author recognizes this proposal as a strategy too. The German Constitutional Reforms of 1994 and 2006, the Italian Constitutional Reform of 2001 and the recent Reforms of Seven Autonomy Statutes in Spain have sought to increase the powers of Component Entities and, even though the goal of equality is quite appealing, the federal principle ought to be preserved.

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[74] In the German case, the achievement of the equivalence of living conditions is a premise of the federal competence.

[75] For example, if the Central State is empowered to rule over the general principles of the health system (Art. 117.3 Costituzione [Cost.] (It.)), or over the basis of health matters (Art. 149.1.16 Constitución Espanola [C.E.] (Spain)), it should not need the powers conferred by Articles 149.1.1 (C.E.) and 117.2.m (Cost.) to guarantee an equal enjoyment of health care.

[76] PASCUAL, *supra* note 25, at 166.

[77] Nonetheless, the Spanish Constitutional Court has established that the Central State must rule over the conditions to get European funding and grants to achieve the equality of a general life standard. *See* Rafael Bustos Gisbert, *La Ejecución del Derecho Comunitario por el Gobierno Central*, 2003 REVISTA VASCA DE ADMINISTRACIÓN PÚBLICA Sept.–Dec. 2003 163, 179.

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In general, the balance between equality and federal principle has quite often simply been struck by asserting that once the Central State has provided a right, Component Entities may improve this entitlement.[78] This assertion is useless if Component Entities need to decrease public spending. It was indeed a too simple answer to such a complicated question.

Courts must construct a proper reasoning, taking into account the equality and the federal principle. This reasoning should leave room for all the main actors to participate in the federalism process. This task is both intricate and problematic. The reason to give preference to an interpretation method may be not so much the argument itself, but instead the "values which underlie" it.[79] The first step must be for courts to admit that the adoption of one or another method of interpretation is not a neutral decision. Their second step must be a search for the outcomes of each of the applicable methods. For this purpose, the comparative constitutional approach may be a valuable tool.

[78] Corte Costituzionale , 24 Apr. 2003, n. 467, *available at* http://www.giurcost.org/decisioni/index.html.

[79] Neil MacCormick & Robert S. Summers, *Interpretation and Justification*, *in* INTERPRETING STATUTES 511, 528 (Neil MacCormick & Robert S. Summers eds., 1991).

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