



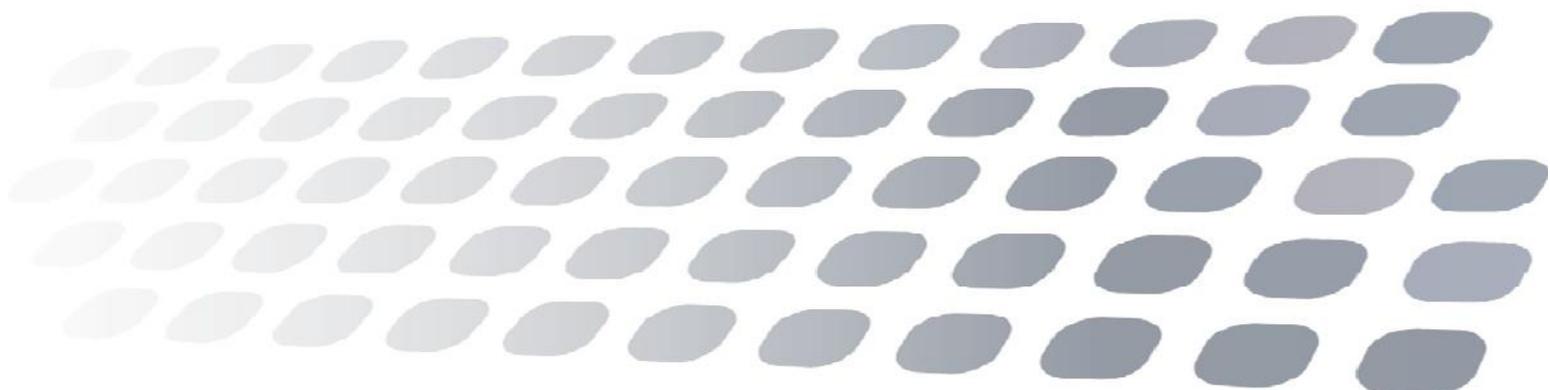
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TABLE OF CONTENTS

SPECIAL ISSUE

Re-exploring subnational constitutionalism

Edited by Giacomo Delledonne, Giuseppe Martinico and Patricia Popelier

FOREWORD

Continuing Sophistication in Subnational Constitutionalism

ROBERT F. WILLIAMS E- I-IV

EDITORIAL

Re-exploring subnational constitutionalismGIACOMO DELLEDONNE, GIUSEPPE
MARTINICO, PATRICIA POPELIER, E- V-X

ESSAYS

Subnational multilevel constitutionalism

PATRICIA POPELIER E- 1-23

Constitutional courts, constitutional interpretation, and constitutional subnational constitutionalism

ANNA GAMPER E- 24-44

The legal enforcement of the principle of subsidiarity

WERNER VANDENBRUWAENE E- 45-73

Strengthening state constitutionalism from the federal Constitution: the case of Mexico

JOSÉ MARÍA SERNA DE LA GARZA E- 74-88

The politics of sub-national constitutionalism and local government in Ethiopia

ZEMELAK AYTENEW AYELE E- 89-115

Crisis, Emergency and Subnational Constitutionalism in the Italian contextGIUSEPPE MARTINICO AND LEONARDO
PIERDOMINICI E- 116-140***Movement towards a Flemish Constitution: the Charter for Flanders, another failed attempt?***

SARAH LAMBRECHT E- 141-163

Answers to Spanish centrifugal federalism: Asymmetrical federalism versus coercive federalism

ESTHER SEIJAS VILLADANGOS E- 164-190

Constitutional bases in the federal conflict over the health care access restriction of undocumented migrants in Spain

IRENE SOBRINO GUIJARRO E- 191-215

Multilevel Systems and Sub-National Constitutional Politics in Germany: a Qualitative Comparative Analysis

WERNER REUTTER E- 216-243

The Role of Subnational Constitutions in Accommodating Centrifugal Tendencies



*within European States: Flanders,
Catalonia and Scotland Compared*

DIRK HANSCHER E- 244-271

*Subnational Constitutions: The Belgian
Case in the light of the Swiss experience*

OLIVIER VAN DER NOOT E- 272-298

*Intergovernmental relations in Spain and
the United Kingdom: the
institutionalization of multilateral
cooperation in asymmetric polities*

VÍCTOR CUESTA-LÓPEZ E-299-318

*The Evolutionary Economic Implications
of Constitutional Designs: Lessons from
the Constitutional Morphogenesis of New
England and New Zealand*

BENJAMEN F. GUSSEN E-319-346



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PERSPECTIVES ON FEDERALISM



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Foreword: Continuing Sophistication in Subnational Constitutionalism

by

Robert F. Williams*

Perspectives on Federalism, Vol. 6, issue 2, 2014



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E - I



Abstract

Giacomo Delledonne, Giuseppe Martinico and Patricia Popelier have edited a symposium collecting some of the papers presented at the latest IACL World Congress in Oslo.

The symposium tries to develop a framework for comprehensive analysis of subnational constitutions and offers a number of elements for further reflection.

Key-words

Subnational constitutionalism, subnational constitutions, legal comparison



Although comparative constitutional law has grown wildly as a field of study in recent decades, attention is almost always placed on national constitutional law with little mention of subnational issues. This myopia often results in an oversimplification of constitutional dynamics. Indeed, federal constitutional democracies almost always involve an overarching national constitution that reserves at least some constitutional choices to subnational units. This means that in most federal systems, constitutional decision-making occurs at both the national and *subnational* levels. Thus, a more complete and accurate understanding of constitutional law requires careful study of subnational constitutional dynamics as well as the relationship between national and subnational issues.^I

Giacomo Delledonne and Giuseppe Martinico have done it again! They edited the highly successful symposium in Volume 4, Issue 2 (2012) of *Perspectives on Federalism* growing out of the Workshop on Subnational Constitutions at the 2010 World Congress of the International Association of Constitutional Law (IACL) in Mexico City.^{II} Now, in this important symposium they and Patricia Popelier include articles developed for the Workshop on Subnational Constitutions at the IACL's World Congress in Oslo, Norway in the summer of 2014. Without the efforts of all of them much of the excellent research prepared for these workshops would not have been disseminated widely. Now it is easily available worldwide.

The comparative study of subnational constitutions in federal systems is still a relatively new undertaking. As Jonathan Marshfield noted above, until fairly recently most scholars and practitioners set their sights only on the national (or federal) constitutions even in countries organized according to the federal principal. This restricted view seriously oversimplifies the understanding of the complete constitutional systems in such countries. This long-standing oversight is now being recognized, and an entirely new field of comparative constitutional law is being developed, to include not only the national but also the subnational constitutions. This is in no small measure because of the efforts of Delledonne, Martinico and Popelier, as well as the IACL.

As a new field, comparative subnational constitutionalism is evolving rapidly both in the scholarly world and in real practice.^{III} For this reason, publications like *Perspectives on Federalism* are extremely important in bringing contributions concerning recent developments to readers in a timely manner. As Mila Versteeg and Emily Zackin have recently shown, the study of comparative constitutional law that includes only national



constitutions without considering the internal, subnational constitutions where they exist, can lead to serious misconceptions about countries' constitutional traditions.^{IV} There are, of course, questions about what sort of documents actually deserve to be called “constitutions,” and therefore subjects of these studies.^V

A careful study of subnational constitutionalism also may have lessons to offer the practice and study of *supernational* constitutionalism.^{VI} Finally, this new sub-category of comparative constitutional law will have to encompass the subnational constitutions of well-established federations, those that are newly emerging, or in transition, and those in which such constitutions are only now being suggested or proposed. All of these possibilities for academic research and practical understanding will be advanced by the contributions to this symposium.

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^I Marshfield 2013: 593 f.

^{II} <http://www.iacl-aidc.org/en/iacl-research-groups/subnational-constitutions-in-federal-quasi-federal-constitutional-states>.

^{III} Williams 2011.

^{IV} Versteeg & Zackin 2014.

^V Williams 2011: 1118; Saunders 2011; Delledonne and Martinico 2011.

^{VI} Gormley 2004; Fabbrini 2012.

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PERSPECTIVES ON FEDERALISM



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Re-exploring subnational constitutionalism

by

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Perspectives on Federalism, Vol. 6, issue 2, 2014



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E - V



Abstract

This special issue of the journal, which collects some of the papers presented at the latest World Congress of the International Association of Constitutional Law in Oslo, is entirely devoted to subnational constitutionalism. Its approach is mainly comparative and interdisciplinary.

The symposium is divided into three sections: theoretical problems, national reports, and comparative analyses. The papers deal with ever-recurring issues, as well as with emerging discussions (e.g., the debates about secession in Scotland and Catalonia, and the drafting of a “Charter” for Flanders).

Key-words

Subnational constitutionalism, comparative constitutional law, comparative federalism



It is with great satisfaction that we present a new special issue of *Perspectives on Federalism*, entirely devoted to subnational constitutionalism.

This special issue collects some of the papers which were presented at the latest World Congress of the International Association of Constitutional Law in Oslo. It was the third workshop on subnational constitutionalism organised in the framework of a IACL World Congress: this made it possible to build on the experience and results of the two previous workshops. The Oslo workshop offered sound evidence of the vitality of this area of constitutional studies. Meanwhile, it reflected a growing diversity in issues and approaches. At the previous World Congress – which took place in December 2010 in Mexico City – the constitutional handling of secessionist movements active in some Member States of the European Union had not come to the forefront yet. Another new issue is the impact of the financial crisis on the viability of subnational constitutional arrangements in many countries. Also, the study of subnational constitutions has resulted in theories of subnational constitutionalism, with an emphasis on principles as well as dynamics with other institutions or layers of authority, within and beyond the federal state. In this respect, finally, the embedding of subnational entities within a broader multi-layered environment has more prominently come to the fore. As far as methodological issues are concerned, we have been positively struck by the more frequent use of comparative and dynamic¹ analyses in this field of research. Moreover, subnational constitutionalism was approached from various angles, ranging from traditional constitutional law to legal theory, economics and political science.

That is why we have encouraged the participants in the Oslo workshop, if they wished to do so, to submit revised versions of their working papers for publication in this journal. The pieces accepted for publication have undergone a process of blind peer review. We think that the overall picture is quite impressive in terms of both quantity and quality.

As it had already happened in 2012, the main convenor of the IACL Workshop and Research Group on subnational constitutionalism, Prof. Robert F. Williams, has accepted to write an introduction to our special issue. We would like to thank him again for his generous support and steady encouragement.

As Prof. Williams himself has recently remarked, “[c]omparative subnational constitutional research is now covering both theoretical aspects as well as practical lessons



from subnational constitutions in one country to another”¹¹. The contents of this issue are organised along three main axes which positively reflect this claim.

The first section collects contributions dealing with theoretical questions.

Patricia Popelier makes some points about the role of subnational constitutionalism in light of present-day multilevel governance. She pleads for a broader understanding of the notion of subnational constitutionalism, which is defined not just by the power of subnational governments to adopt their own constitutional charters, but also by a power to define their position in relation to other layers of authority. This should allow adapting the discussion on subnational constitutionalism to a dynamic approach to the concept of form of state.

Anna Gamper looks into how subnational constitutional autonomy is shaped by different systems of constitutional review. The underlying issue is the tension between federalism and judicial interpretation, and the virtues and flaws of “interpretive federalism”.

Werner Vandebrouwaene also considers the dialectic tension between globalism and localism in the multilevel environment. He argues that the constitutionalisation of the principle of subsidiarity might be regarded as a proper solution for many of the actual and potential problems related to globalisation. Subsidiarity may play an important role to the solution of conflicts: it remains to be seen, however, whether its contribution is just politically enforceable. What happens when political negotiation among institutional layers cannot strike an adequate balance between the relevant stakes?

This issue also contains some national reports. Most of them, however, do not simply present the main features of subnational constitutionalism in a specific system (federalism, constitutional autonomy, etc.) but try to contextualise it in light of ongoing constitutional and political developments.

José María Serna de la Garza considers the development of state constitutionalism in Mexico in coincidence with the emergence of multi-party democracy in that country. This evolution has been mainly prompted by courts, which have tried to engage in protecting the “state constitutional space” actively.

Zemelak Ayele focuses on the relationship between the establishment of a local institutional layer by the Ethiopian federal government and the overall architecture and the overall architecture of Ethiopian federalism. The perceived inefficiency of a federalism



mainly organised along ethnic lines has thus led to further undermining of the regional level and its constitutional capacity.

Giuseppe Martinico and Leonardo Pierdominici consider the impact of the European economic and financial crisis on the architecture of the Italian regionalism. They claim that the emerging re-centralising trend is a product both of European and international anti-crisis measures and of typically national motives, which actually predate the crisis.

Sarah Lambrecht analyses the Charter for Flanders, a resolution passed by the Flemish Parliament on 23 May 2012. Her conclusion is that such a document has quite limited added value and this not only for its mainly symbolic status. A Charter for Flanders can also provide little help even from the viewpoint of clarity and transparency, as it is merely a consolidation of already existing documents.

Esther Seijas Villadangos has authored a paper in which the possible consequences of a federalisation of Spain are looked into. Two alternative outcomes are presented in detail: coercive federalism and asymmetrical federalism.

Irene Sobrino Guijarro analyses the different approaches of the Spanish State and Autonomous Communities to the right to free health care for undocumented immigrants. Should subnational entities share legislative powers to co-define how social policies should be fulfilled in their own territories? Decision no. 136/2012 of the Spanish Constitutional Court further confirms the complexity of this issue.

Werner Reutter uses the methods of quantitative comparative analysis in order to study constitutional politics in the German *Länder*. His piece is rich in conclusions – concerning, among other things, the role of political parties or the necessity of consensus – and points at a number of still open questions. German constitutional law scholarship has extensively looked into the constitutional law of the *Länder* – political science, in turn, has still to elaborate conceptual categories of its own in this field of research.

The third and final section contains comparative studies of specific aspects of subnational constitutionalism.

A key issue is the rise of secessionist movements throughout the EU's Member States. As the debate about the possibility of a constitution for Quebec has long shown, the relationship between the push towards constitutionalisation and the quest for independence is far from clear^{III}.



Dirk Hanschel's paper analyses the interplay between subnational constitutionalisation processes and centrifugal tendencies in Flanders, Catalonia and Scotland: in his opinion, subnational constitutional arrangements may help accommodate centrifugal tendencies within European states without stipulating or inviting secession.

Olivier Van der Noot compares the Flemish striving for constitutional autonomy with the Swiss experience of cantonal constitutions. His paper argues that the constituent activism of federated entities may somehow prove legally beneficial in terms of fundamental rights protection.

Víctor Cuesta-López develops a comparative analysis of the constitutional framework of intergovernmental relations in two asymmetric systems: Spain and the United Kingdom. In doing so, he underlines parallelisms – often deriving from participation in the European Union – and a common trend towards a greater formalisation of intergovernmental relations.

Benjamin F. Gussen's paper is a study in constitutional economics. It argues that the empowerment local government is crucial to enhancing economic prosperity in a globalising world. This claim is based on the comparative analysis of New Zealand's semi-federal provincial system – abandoned in the 1870s – and the federal architecture of the New England colonies, which has been in place since the 17th century.

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¹ Thereby meaning the notion of federalising processes, as devised by Friedrich 1968.

^{II} Williams 2011: 1125 f.

^{III} Wiseman 2010.

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Subnational multilevel constitutionalism

by

Patricia Popelier*

Perspectives on Federalism, Vol. 6, issue 2, 2014





Abstract

The embedment of states in a multilevel government environment created by rule-based international organizations, also impacts upon the position of subnational entities in federal and quasi-federal states. In this multilevel government environment, subnational constitutionalism is not merely defined by the power of subnational authorities to adopt their own constitution, but also by the power to define their position in relation to other layers of authority. This is in particular true for EU member states, considering the intensity of the European integration process. The European, national and subnational systems are thus intertwined. (Quasi-)federal constitutional systems adopt different strategies, ranging from a centralist to a dualist approach. A comparative analysis, using indicators for measuring these approaches, provides us with prototypes for a centralist approach (the UK), a gate-keeper approach (Germany) and a dualist approach (Belgium). At the same time, these indicators can be used to refine the model for the positioning of legal systems on a gliding scale from unitary to con-federal states.

Key-words

Federalism, dynamic approach, multilevel government, subnational constitutionalism, multilevel constitutionalism, European integration, regional involvement in EU affairs



Introduction

In the present era of globalization, federalist theory can no longer ignore multi-tiered dynamics beyond the nation state and its impact on inter-state relationships (Requejo 2010: 1). Embedment of states within multilevel government (MLG) environments created by rule-based international organizations such as, e.g., the World Trade Organisation, NAFTA or the European Union (EU), also impacts upon the position of subnational entities in (quasi-)federal states. In this MLG environment, subnational constitutionalism is not merely defined by the power of subnational authorities to adopt their own constitution, but also by the power to define their position in relation to other layers of authority. This is in particular true for EU member states, considering the intensity of the European integration process and its impact on national constitutions. European, national and subnational systems are thus intertwined. In this paper, this finding will first be analyzed as part of a larger theory on comparative federalism (Part 1). Subsequently, the paper will further analyze the power of subnational governments to define their position in relation to the EU (Part 2). A comparative analysis will differentiate three strategies for multi-tiered systems to respond to multi-layered challenges resulting from European integration.

1. Subnational constitutionalism: a theory of comparative federalism

1.1. Traditional federal theory: a critique

The claim that subnational constitutionalism is a defining feature of federalism (Gardner 2008: 325; Fasone 2012:176), is open to criticism (Popelier 2012: 43-54). It fits in the so-called ‘Hamilton tradition’, which classifies forms of state in categories of unitary, federal and confederate states according to their institutional features (Pinder 2007: 2). While this approach has the educational benefit of clarity, it is, in reality, not able to accommodate institutional variety, leading to endless discussions on the nature of Spain^I or the EU.^{II} For example, comparative analysis demonstrates that various systems widely recognized as ‘federal’, do not dispose of full subnational constitutional autonomy. In some systems, it is legally recognized, but hardly applied, or even discouraged. In other systems



the subnational constitutional acts are intertwined with the federal constitution. Examples are Belgium, Canada, Nigeria and South-Africa (Tarr 2009: 770-772).

The Hamilton approach, then, is considered an ‘epistemological obstacle’ for constitutional theorization (Gaudreault-Desbiens and Gélinas 2005: 5). As Halberstam (2012: 582) rightly noted, a strict demarcation between forms of state may serve as ‘rhetoric for political gain’, but is useless for the building of constitutional theory or for comparative analysis of multi-tiered legal systems. Indeed, while no one would claim that the UK is a federal system, comparative study of federal developments can hardly ignore UK devolution if it is to provide insight in the dynamics of state structures and the balances between central and sub-national entities. As Loughlin (2008: 476) admits: “*the federal/unitary distinction is too crude to capture the complexity of contemporary governance and the typological method may, in fact, be misleading.*”

One of the weak points of traditional federal theory, that explains its inaptness to capture new developments, is its reliance upon observations of institutional design in so-called ‘model’ federations, such as the USA, Australia, Canada, Switzerland and Germany (Choudry and Hume 2011: 357). This leads to a dubious distinguishing between ‘mature’ (Watts 2008: 29-38) and ‘incomplete’ federalism, but also conceals possible deviant developments in other legal systems (Choudry and Hume 2011: 358). It is striking how traditional federal theory bases a model of federalism upon the institutional design of integrative federal states of the previous centuries, while federalism of the twenty-first century consists mainly of disintegrating and multinational systems.^{III} If, for example, subnational constitutionalism is a feature of integrative federal systems, this is often due to the prior existence of the federated entities as independent states with their own constitutions (Tarr 2011: 1135-1136). This is different in disintegrating systems, where the conferral of subnational constitutional autonomy is part of the bargaining process. Moreover, disintegrating systems are often multinational systems. Federalism, then, serves as a form of conflict management in order to prevent secession (Choudry and Hume 2011: 366). In that respect, it is not obvious to confer sub-national constitutional autonomy. In Belgium, for example, francophone parties fear that the Flemish craving for subnational constitutional autonomy is part of a separatist agenda. This fear is not merely drawn from thin air, as political and institutional capacity appear to be factors that make separatism a realistic option.^{IV}



1.2. A dynamic approach to federal theory

The Hamilton approach is not shared by all. An influential definition (according to Halberstam 2012: 580), which emphasizes the existence of autonomous legislative powers at two layers, broadens the scope considerably, to include, for example, Denmark, in its relation with Greenland, or France, in its relation with some of its overseas territories (Swenden 2006: 6). While this definition helps us to do away with artificial fences between forms of state, it may seem too minimalist to give a comprehensive account of the functioning of federal states. For such account, we need to grasp the essence of federalism. The identification of this essence, namely the search for balance between ‘optimal plurality’ and ‘indefeasible homogeneity’ (Häberle 2006: 54), i.e. between autonomy of territorial entities on the one hand, and cooperation, cohesion or efficiency of central government on the other (Friedrich 1968a: 7; Friedrich 1968b: 193), lies at the heart of a dynamic approach to federalism (Burgess 2006: 36). The tension between autonomy and cohesion-seeking dynamics is not unique to federal states. All states can be described as ‘permanent fields of tensions between integration and differentiation’ (Couwenberg 1994: 102-104). Forms of state provide an institutional framework to solve these tensions. E.g., the UK devolution process can be described as a quest for a new balance between central government and territorial entities (see Cornes 2005: 415-440). What distinguishes federalism from other forms of states, is its endeavor to find an equal balance between central government and territorial entities.

Forms of state, then, can be situated on a gliding scale (Friedrich 1968b: 189). At the left side of the spectrum we find centralized unitary states, which try to solve the said tensions by creating a high level of cohesion and a minimal level of autonomy for territorial entities. At the right we find the loosest cooperative associations, with a high level of autonomy for territorial entities, and a low level of cohesion. In this approach, institutional features, rather than exhaustive qualifying criteria, are indicators^V for the positioning of states on the gliding scale. On the basis of this positioning, it is possible to select the relevant states for an in-depth comparative analysis which may give insight in contextual (economic, cultural, ethnic, ...) factors that determine the measure of integration or differentiation. A first set of indicators measures autonomy or differentiation. Indicative for the measure of autonomy is, e.g., the entrenchment of the existence and competences of territorial entities in rigid acts; whether the territorial entities dispose of representative



bodies, legislative powers, financial autonomy, a broad set of competences; and whether they participate in decision-making at the central level. A second set of indicators measures cohesion or integration. Indicators are, amongst others, the existence of free movement and a monetary and economic union within the legal system, mechanisms to deal with trans-boundary problems, instruments to prevent or solve conflicts of competences and conflicts of interests, or to prevent territorial entities from undermining central international policy.

In this approach, a neatly cut categorization of states is no longer possible. Along the scale, we cannot clearly identify the passage from unitary state to regionalized state, from regionalized state to federation, from federation to confederal system. More important is the question whether the institutional design aspires a balanced relation between central authority and territorial entities. Hence, the European integration process and the impact thereof upon the constitutional structures of member states and their subnational entities, are far more interesting than the debate of whether the EU is or is not a federal construction.

The issue of constitutional autonomy, obviously, belongs to the set of indicators to measure autonomy. However, it is only one indicator amongst others: subnational entities may dispose of subnational constituent powers but display a low score of autonomy when measured against other indicators, and *vice versa*. Hence, a legal system, although denying (large) constituent powers to territorial entities, may nevertheless be identified as ‘federal’ if regional autonomy is secured through other indicators. This is representative of reality, where specific institutional constructions result from package deals meant to maintain a certain balance in relations of power (Jackson 2005: 148-151). This package deal will determine how much ‘constitutional space’ is left for the territorial entities (Tarr 2009: 1133), as well as the extent of control which remains at the central level.

1.3. Federalism, subnational constitutional autonomy, and MLG

In the traditional approach to federalism, the embedment of (federal) states in a more global system of MLG is largely ignored. In a dynamic approach to federalism, on the other hand, indicators of autonomy and cohesion include multilevel dynamics.

In this approach, the concept of multilevel constitutionalism can be used to imply the subnational level. Pernice (1999: 707) defined a multilevel constitution as “a constitution of



legitimate institutions and powers at the EU level, which are complementary to the national constitutions and designed to meet the challenges of an evolving global society”. Pernice was concerned with the implications of a EU constitution for the constitutional autonomy of member states, rather than with the state structure of member states. His idea of multilevel constitutionalism, therefore, was confined to constitutional aspects of multilevel governance and did not concern federal theory. Nevertheless, we can bring in federal theory by adding a third dimension to the idea of multilevel constitutionalism as implying a set of constitutions at different layers which complement each other, to include subnational constitutions. Hence, subnational, national and European constitutional systems can be seen as complementary. This has the following three implications for the issue of subnational constitutional autonomy.

First, we cannot examine the constitutional system at one level without having regard for its impact on and interplay with the other levels. Hence, we need to take a holistic approach when issues of institutional design are discussed at the national, subnational or European level. E.g., one might question the appropriateness of a subnational catalogue of fundamental rights within the entire, multi-tiered system of fundamental rights protection, for example within the ambit of the Council of Europe. The process of mutual learning that may accelerate the innovation and modernization of fundamental rights,^{vi} already takes place at the European-national level. In particular where a national catalogue of fundamental rights already phrases specific national sensitivities to be taken into account by the European Court of human rights when balancing rights and interests, we might wonder what could be the additional value of a subnational catalogue of, mostly (Gardner 2008: 326), duplicated fundamental rights. Hence, in a particular federal system, the central authorities may deny territorial entities the power to recognize fundamental rights if they suspect that a subnational catalogue, rather than lending extra protection, pursues regional identity-building^{vii} and assess this as a threat to federal cohesion.

Second, federal and subnational constitutions are communicating vessels. If the federal constitution accommodates sub-national institutional preferences in an asymmetric federal design, there is lesser need for full subnational institutional autonomy (Tarr 2009: 187). Inversely proportional to this is the need to participate in the federal constitution amendment process. Constitutional autonomy, then, is not merely defined by the power of subnational authorities to adopt their own constitution, but also by the power to define



their position in the federal constitution. This can even be taken further to the point that subnational constitutional autonomy implies participation of the subnational entity in the federal legislative procedure in concurrent matters. Here, the federal constitution, instead of allocating powers on the basis of an implicit subsidiarity test, defers this test to the federal legislator in the exercise of concurring powers (see further: Vandenbruwaene 2013: 135-136), and hence – under the *Bundesrecht bricht Landesrecht* priority rule - leaves it to the federal legislator to decide on the exact extent of the subnational sphere of competences. In Germany, the use of concurrent powers was one of several factors that led to the erosion of *Länder* competences, but simultaneously strengthened the position of the *Bundesrat* at the federal level, captured under the devise of ‘compensation through participation’ (Moore, Jacoby and Gunlicks 2008: 395) or ‘compensatory federalism’ (Kotzur 2006: 280). Likewise, the recent reform in Italy combines a more ‘flexible’ distribution of competences with a stronger representation of the regions in the new Senate (Senate 2014, N 1429: 7).

Third, the same applies when the European and international dimension is taken into account. International treaties may impose obligations on member states in matters that are subnational competences within the domestic sphere. Hence, they limit the subnational sphere of autonomy, even if these treaties are concluded by the federal government. This is in particular relevant in the case of EU treaties, because of the far-reaching impact of European integration. Therefore, subnational constitutional autonomy includes the power of subnational entities to define their position towards foreign, international or supranational entities (Skoutaris 2012a: 241). In a EU context, this includes subnational participation in the EU legislative process, considering the responsibility of subnational entities to transpose and execute EU directives and regulations. Consequently, the German device of ‘compensation through participation’ was extrapolated to European affairs. As the European integration process intensified, the German *Länder* directed their efforts at strengthening participation in the federal decision making process regarding European relations, including the conclusion of EU treaties and Germany’s stance in the Council of Ministers (Börzel 1999: 583).

All this leads to a broad definition of subnational constitutionalism. Subnational constitutionalism has been defined as consisting of “charters of self-governance self-consciously adopted by subnational populations for the purpose of achieving a good life by



effectively ordering subnational governmental power and by protecting the liberties of subnational citizens”, with the addition, however, that practice matters more than documents (Gardner 2008, 328). In a context of MLG, it is obsolete to regard self-governance as the autonomy to act alone, independently from others. If subnational authorities claim a ‘strong role’ in subnational institutional design and in ordering society within their territory, they not only need the power to enact their own constitutional documents, but they also need the power to define their position *vis-à-vis* other layers of the MLG space.

Consequently, subnational constitutionalism is an indicator, measuring the autonomy of subnational entities in a dynamic approach to forms of states, that can be refined in several sub-indicators. These sub-indicators inquire whether subnational entities have the power to organize the composition and functioning of their legislative and executive institutions; whether they have the power to formulate fundamental rights; and whether or not central surveillance exist, in the form of the required consent of the federal government or the possibility of the federal government to interfere. But sub-indicators also inquire whether subnational entities participate in central constitution making power; or even in central law making power, in particular in concurrent or shared powers. Finally, they test to which extent subnational entities can have direct relations with other states and international organizations, and whether they participate in central decision-making regarding international relations. The different approaches that national multi-tiered systems adopt in this respect are explored in the next Part. Although the position of subnational entities towards international organizations is also relevant in other contexts, this paper focuses on the EU because of its particular integrative nature.

2. Subnational entities and the European Union: a comparative analysis

The European integration process resulted in a network of complex and interdependent relationships between national states, decentralized entities, supranational authorities, and non-state actors, generally described as a system of ‘multilevel governance’. Endeavors to comprehend the EU as a federal state ignore the specific nature of this enterprise as comprising both non-state actors and four layers of government: the subnational, the national, the supranational, and the international layer beyond the



supranational entity (for a more detailed and nuanced account of the relation federalism-EU-MLG: Vandebrouwaene 2014: 230-237). For this paper, the relations between the subnational, national and supranational entities, are of specific interest. The dynamics of MLG is characterized by the crossing of gates between territorial levels of authority (Piattoni 2010: 27, 32-50). Yet, the national state was indicated as “the only structure that can integrate all the strands of multilevel governance” (Peters 2007: 3. Comp. also Rittberger 2010: 247). The question then rises to which extent the national state is bypassed as ‘gate-keeper’ in the relations between the national and the EU level, and more particular, to which extent the constitution either enables direct relations between the subnational and the European level or indicates the national authorities as the sole gate-keeper in this respect. This will determine the extent to which subnational entities have the power to define their position in relation to the EU. As explained in Part I, this is one of several indicators to measure the constitutional autonomy of subnational entities.

Multi-tiered constitutional systems can adopt different strategies regarding this question, ranging from a centralist to a dualist approach. Several sub-indicators can be identified to classify such approaches. These include: whether and how subnational entities are involved in the approval of a EU treaty; whether and how subnational entities are represented in the Council of Ministers; whether and how subnational parliaments are involved in the subsidiarity procedure; and whether subnational entities have access to the Court of Justice through the federal government and, if so, whether they can oblige the federal government to take action. More detailed sub-indicators could even encompass the involvement of subnational entities in expert committees in preparation of the Commission’s proposal, or in other forms of European decision making, including Open Method Coordination.^{VIII}

There is no room for a detailed account of all these parameters in a broad comparative analysis. Instead, a rough overview of a limited set of sub-indicators suffices for the purpose of illustrating how a comparative scheme of indicators for the categorization of state structures and the identification of strategies within these structures can be conceived. What follows is a brief overview of the first three sub-indicators, applied to three legal systems which serve as prototypes for three different approaches. The UK, as a devolving but not yet federalized legal system, provides a model of a centralist approach. Germany gives evidence of a gate-keeper or federal approach. Belgium takes a more dualist or



confederal approach.

2.1. Three sub-indicators

The first sub-indicator analyses the involvement of regional entities in the entry to a EU Treaty. The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) can be amended or replaced according to an ordinary revision procedure or two (and even more) types of simplified revision procedures. The European treaties do not provide for the involvement of subnational entities, leaving this issue to the separate constitutional systems. According to the ordinary revision procedure, the European Council, by a simple majority, convenes a Convention to prepare a treaty that is to be ratified by all Member States in accordance with their respective constitutional requirements (Art. 48 (2-5) TEU). In addition, simplified revision procedures allow for a flexible regime of smaller, so-called ‘piecemeal’ revisions (De Witte 2011: 2). The observations in the comparative analysis below, also apply to the first type of simplified revision procedure, as decisions must still be approved by the Member States in accordance with their respective constitutional requirements (Art. 48 (6) TEU). In the second type of simplified revision procedure, which applies to changes to decision-making rules, each national parliament is given a veto right (Art. 48 (7) TEU). In addition, specific revision procedures exist for amendments to specific rules or protocols (for an overview see Peers 2012: 122-123). Finally, the European Treaties indicate specific legal acts which also require approval of the member states according to their respective constitutional requirements, e.g. the adoption of a common defense, the extension of EU citizenship rights or the amendment of the European Parliament electoral procedure (Art. 42(6) TEU, Art. 25, 223(1), 218(8), 262 and 311 TFEU).

The second indicator inquires into the involvement of subnational entities in the Council of Ministers. Article 16(2) TFEU allows for Member States to delegate a regional minister to the Council. Moreover, Article 5(3) permits an extended delegation, enabling a mixed delegation with central as well as regional representatives. It is for the Member States to use these options and to choose the formula. The Member States have indeed made use of these options in varying degrees (for a comparative overview, see Skoutaris 2012b: 216-222).

The third indicator concerns the involvement of subnational parliaments. Article 5(3)



TEU, which lays down the subsidiarity principle, refers to the capacity of the Member States to reach the objectives of proposed EU action, “either at central or at regional and local level”. The Protocol on the application of the principles of subsidiarity and proportionality (‘Protocol’) introduces an ‘early warning system’, allowing national parliaments to interfere in the EU lawmaking procedure, and compel the Commission to review a draft. Although, obviously, Member States do not need the EU’s permission to consult regions (Gamper 2013: 118), article 6 does explicitly leave room for the national parliaments to consult regional parliaments. The time-frame of eight weeks, however, is very limited, especially for regional parliaments which often lack staff to perform subsidiarity checks. For this reason, regional parliaments might just as well send their concerns to the national government instead of participating in the early warning system (Kiiver 2012: 41). In practice, Member States take different approaches, dependent on national context and institutional design (Borońska-Hryniewiecka 2013: 358-361). Art. 7(1) of the Protocol gives each member state two votes and allocates one vote to each chamber in the case of bicameral systems. Hence, it assumes that subnational interests are, as a rule, represented through the second chamber. In reality, however, this is not always the case.

2.2. A centralist approach: the UK

The UK gives evidence of a more centralist approach, where the central government’s stance is conclusive, and subnational entities are involved through consultation procedures but have no final say. This is reflected in the three sub-indicators.

TREATY REVISION – International relations reside under the exclusive competence of the UK government.^{IX} Under the Constitutional Reform and Governance Act 2010 the UK government can ratify treaties without the approval of Parliament.^X A stricter regime, however, applies to treaties which amend or replace the TEU or TFEU. According to the UK European Act 2011, such treaty that follows the ordinary revision procedure, can only be ratified if it is approved by an Act of Parliament and – in principle - a nation-wide referendum (Section 2 EUA 2011).^{XI} The referendum requirement applies to most, but not all amendments (for an overview see Peers 2012: 126-127). Likewise, approval of a decision of the European Council according to the first type of simplified revision procedure requires the approval by Act of Parliament and – in principle – a nation-wide referendum (Section 3 EUA 2011).^{XII} While this procedure, with its referendum requirement, implies a



limitation of the principle of parliamentary sovereignty in favor of the public,^{xiii} it does not provide for the involvement of subnational entities. On the contrary, the referendum requirement is more likely to outvote regional preferences without proper dialogue. Where the EUA 2011 was to soothe the Europhobic wing of the Conservative party (Murkens 2013: 396; Gordon and Dougan 2012: 18) and “*it can reasonably be presumed that the British public are unlikely to vote for any transfer of powers from the United Kingdom to the European Union*” (Peers 2012: 133), regions within the UK and in particular Scotland are much more supportive of European integration (Chacha 2013: 220).

This is not to say that devolved entities are entirely left out of the procedure. According to the Concordat on co-ordination of European Union policy issues, the devolved entities are involved in the formulation of a UK policy position “on all matters which fall within the responsibility of the devolved administrations”.^{xiv} The Joint Ministerial Committee functions as the principal mechanism for the consultation of devolved entities on UK positions on EU issues which affect devolved matters.^{xv} The concordats and agreements are political statements without legal effect (Memory of Understanding, 2010: 4, par. 2). Nevertheless, they lay down as a default procedure the consultation of devolved administrations in EU issues which touch upon devolved matters. Although the decision and responsibility remains with the UK government, the position of the devolved entities is, at least, discussed.

COUNCIL OF MINISTERS – According to the Common Annex of the Concordat, decisions on Ministerial attendance and representation at Council meetings are taken on a case-by-case basis by the lead UK Minister (B4.13 Common Annex of the Concordat on co-ordination of EU policy issues). The Joint Ministerial Committee, which convenes in advance of each European Council meeting, plays an important role. In principle, devolved entities are intensely consulted, but the final decision and responsibility remains with the UK Minister (Skoutaris 2012a: 260-261; Skoutaris 2012b: 219). Regional participation is therefore described as ‘dependent’ and ‘conditional’ (Bulmer, Burch, Hogwood and Scott 2006: 86). The Concordat allows for a mixed delegation at the European Council. However, the Concordat stresses ‘working as a UK team’, with the UK lead Minister retaining overall responsibility for the negotiations; even if Ministers from the devolved entities speak for the UK in Council, they do so for the UK according to the policy positions agreed upon ‘among the UK interests’ (B.4.14 Common Annex). The same



applies to the regional civil servants which may monitor Council meetings on matters within their competence, but who are considered to be working within a unitary framework (Hooghe and Marks, 1996: 77).

SUBSIDIARITY PROCEDURE – Regarding the third sub-indicator, but also regarding the veto right for national parliaments in the second type of simplified treaty revision procedure, it is important to note that the UK parliament, although bicameral, does not give specific representation to the devolved entities. The House of Commons does guarantee the representation of regional entities, as elections are based on geographical constituencies, but there is no institutional link with devolved parliaments or governments (for a proposal to transform the House of Lords into a territorial chamber, see Russell 2000: 283-290). Hence, the devolved entities do not dispose of a vote within the early warning system or a veto regarding a simplified treaty revision, through a second chamber. Consequently, under the early warning mechanism, regional parliaments are dependent upon the UK Parliament's willingness to consult. In this case, no cooperation concordat is concluded (Borońska-Hryniewiecka 2013: 360). The UK Parliament's stance is that regional parliaments are welcome to submit comments, on their own initiative.^{xvi} However, if the UK and devolved parliaments have different points of view, the UK Parliament has the final say.^{xvii}

2.3. A federal approach: Germany

Germany is one of the few bicameral systems – and one of the very few parliamentary systems – with a strong senate. This can be attributed to the *Bundesrat's* strong powers and its composition by representatives of the *Länder* executives (Art. 51 German Constitution).^{xviii} Each *Land* has three to six votes, dependent on population density, but votes may be cast only as a unit. The Constitution does not provide for a strictly binding mandate. The members of the *Bundesrat* are bound by their subnational government's position, be it, in practice, within a broad range of appreciation (Leunig 2011: 93). With respect to the three sub-indicators, the *Bundesrat* plays an important role as mediator between *Länder* and federal government. For this reason, Article 52(3a) of the Constitution provides for the establishment of a European Chamber within the *Bundesrat*, although in practice this chamber seems to play a rather subordinate role (Puttler 2012: 1086; Weber 2007: 1722). *Länder* interests are secured as a whole; specific interests of separate *Länder* do



not prevail (Puttler 2012: 1089).

Treaty Revision – Delegation of powers to the European Union is equated with a constitutional amendment (Puttler 2012: 1079-1080), requiring a two third majority in both the *Bundestag* and the *Bundesrat* for the delegation of powers to the EU (Art. 23(1) combined with Art. 79(2) German Constitution). Also, the implementation law provides for the right of the *Bundesrat* to be informed and to take position when its interests are affected, throughout the entire treaty negotiation procedure (§§ 2 and 3 Gesetz über die Zusammenarbeit von Bund und Länder in Angelegenheiten der Europäischen Union – GZBLAEU. See Suszycka-Jasch and H-C Jasch 2009: 1242-1246 regarding this law). The *Länder* effectively used their strong position in the *Bundesrat* to impact upon new EU treaties in order to secure participation rights in the European decision making process (Olivetti 2013: 327; Börzel 1999: 584).

The question then rises whether the 2/3 majority requirement in the *Bundesrat* applies to every treaty amendment, and whether it also applies to simplified revision procedures. Art. 23(1) German Constitution merely mentions the ‘delegation of powers’, while, for example, the first type of simplified revision procedure explicitly excludes amendments which increase the competence of the Union. If Art. 23(1) does not apply, Art. 32(2) German Constitution provides merely for a consultation requirement before the conclusion of a treaty “affecting the special circumstances of a State”; Art. 59 of the Constitution, moreover, requires the consent or participation of the *Bundesrat* if federal legislation on the matter regulated in the treaty would have required this body’s consent or participation. In doctrine, it is argued that a simplified revision procedure type 1 requires an (ordinary) majority in both *Bundestag* and *Bundesrat*, whereas the veto right of parliament according to the simplified revision procedure type 2 includes the *Bundesrat* dependent on the type of matters affected (Puttler 2012: 1083). The implementation act merely requires that the federal government takes into account the position of the *Bundesrat* and allows for the representation of subnational representatives at government conferences preceding a revision under Art. 48 TEU (Annex VII 1) GZBLAEU).

COUNCIL OF MINISTERS – Art. 23(6) of the German Constitution provides that the *Bundesrat* assigns a representative of the *Länder* as the German delegate in the European Council of Ministers. This is, however, limited to three exclusive regional matters: school education, culture, and broadcasting. Also, the provision explicitly requires participation of



and coordination with the federal government. In other exclusive regional matters, the federal government keeps the lead, but regional representatives participate in the delegation (Suszycka-Jasch and Jasch 2009: 1243). Also, if, in a domestic sphere, the regions would have had co-decisions rights through the *Bundesrat* or if regional interests are affected, regional representatives participate in the delegation ‘if possible’ (§ 6(1) GZBLAEU). In concurrent matters, where the Federation has legislative competences, and in exclusive federal matters when the interests of the *Länder* are affected, the federal government represents Germany, but it has to consider the statement of the *Bundesrat* (Art. 23(5) GZBLAEU). This implies that the federal government has to take the statement into account and has to justify possible deviations before the *Bundesrat* (Puttler 2012: 1085). In certain circumstances, the statement is decisive for the government: if legislative competences of the *Länder*, the installation of their agencies, or their procedures are centrally affected. However, if these matters possibly impact upon the Federation’s budget, the consent of the federal government is necessary. In all cases, as soon as a proposed measure would, as a domestic regulation, have been within the competence of the *Länder* or would have entailed the participation of the *Bundesrat*, the federal government has to involve a regional representative assigned by the *Bundesrat* in the discussions defining Germany’s position in the Council of Ministers (§ 4(1) ZGBLAEU). Hence, in most cases, the final decision remains with the federal government, even if a matter is situated predominantly within the legislative or administrative competences of the *Länder*. It should, however, regard the decision of the *Bundesrat* – provided with a 2/3 majority in cases of conflicting views – as ‘normative’ (*‘Massgebend’*, § 5 ZGBLAEU).

As, concerning the third sub-indicator, the national votes are allocated to both chambers in bicameral systems, the German *Länder* are involved in the early warning system through the *Bundesrat*. The *Bundesrat*, however, is composed of representatives of the *Länder* executives, not the *Länder* parliaments. *Länder* parliaments, then, can either instruct their government or remain dependent upon the willingness of the *Bundesrat* to consult (Suszycka-Jasch and Jasch 2009: 1252).

2.4. A confederal approach: Belgium

In Belgium, the constitutional power of subnational entities to define their relations with the European Union, is the most outspoken.



TREATY REVISION – Treaties require the approval of the Belgian parliament in order to obtain legal force within the domestic legal order (Art. 167, § 2 Belgian Constitution). Until May 2014, an ordinary majority in both the House of representatives and the Senate was required, as well as the approval of the subnational parliaments in the case of ‘mixed’ treaties such as the EU treaties (Art. 167, § 4 Belgian Constitution). The Belgian constituent did not seize the opportunity of transforming the Senate into a more complete chamber of the subnational entities, to simplify the procedure and give subnational parliaments the right of approval only through the Senate. Instead, the constituent power unequivocally opted for a veto right for each subnational parliament, even the smallest amongst them, and denied the Senate the power to give approval to treaties. Theoretically, the German Speaking Community Parliament or the Dutch language group in the Brussels Joint Community Assembly may obstruct the coming into force of a European Treaty, even though the first, with 75000 inhabitants, represents less than 1 per cent of the Belgian population and the latter even less than that (Rimanque 2002, 76).

While it could be argued that the same procedure applies to the simplified revision procedure type 1, the simplified revision procedure type 2 seems to have escaped the attention of the constituent powers. The Senate, from June 2014 on, has no competence to interfere. The Belgian Declaration No 51 (17 December 2008, *PB C* 306, 287) holds that the term ‘national parliaments’ in the EU Treaties encompasses subnational parliaments in the Belgian legal order, but no national procedure has been developed in order to apply this to simplified revisions of EU Treaties. Subnational parliaments do have the power to interfere directly in the federal legislative procedure by invoking a conflict of interests. This procedure presupposes that a veto by the parliament is considered a law, which follows the normal legislative procedure. In that case, a conflict of interests leads to a negotiation procedure, but the final say remains with the federal parliament. Also, it can only be invoked if the House intends to give a veto; the subnational parliaments cannot initiate a proposal to deliver a veto.

COUNCIL OF MINISTERS – In Belgium, direct representation of the regional minister in the European Council is the rule in matters assigned to the subnational entities on the basis of exclusivity, with agriculture as the only exception (Cooperation agreement of 8 March 1994). This covers a wide area of matters, as exclusivity is the principle technique for the distribution of competences in Belgium. In so-called ‘mixed’ matters, Belgium is



represented by a mixed delegation led by the federal or a regional minister, depending on whether the matter predominantly concerns a federal or a subnational matter (Cooperation agreement of 8 March 1994, Annex 1). Regional representation takes place according to a rotation system (Art. 7 Cooperation agreement). In either case, the regional and federal ministers meet beforehand in order to agree upon the Belgian stance. For this purpose, a coordination meeting precedes each Council meeting (Art. 2 Cooperation agreement). Even in exclusive regional matters, the federal authority is present. Every actor has a veto right, although a gentlemen's agreement inhibits the use of a veto by an actor who is not competent in the concrete case (Bursens 2005: 67).

The stance agreed upon is binding, unless during the deliberations within the Council of the European Union an adjustment is necessary for meaningful participation in the debate. In that case, the representative needs to take up contacts with the other entities. However, if time or consensus is absent, he can take a provisional position that "best fits in with the common interest" (Art. 6 Cooperation agreement). If the federal and subnational representatives can find no consensus, Belgium will have to abstain in the Council of Ministers. This results from the equal position awarded to each of the federal and subnational entities (Bursens 2005: 68). In practice, this situation rises only rarely.

SUBSIDIARITY PROCEDURE – In 2014, the Senate was transformed into a chamber of the sub-states ('communities' and 'regions'), but was deprived of its powers in international and European affairs. As mentioned above, the Belgian Declaration No 51 regards subnational parliaments in the Belgian legal order on an equal footing with 'national parliaments' for the application of EU Treaties. A cooperation agreement was signed in 2005 by the eight chairs of legislative assemblies and is applied in practice. However, it never formally entered into force and is in need of revision in light of the latest state reform and the transformation of the Senate. According to the 2005 cooperation agreement, each subnational parliament can submit a reasoned statement and votes are cast in such a way that federal and subnational opinions are positioned next to each other, without fostering institutional dialogue (Popelier and Vandenbruwaene 2011: 223). There is no reason to expect that a new cooperation agreement will differ in that respect.



3. Conclusion

In this paper, it was held that in a MLG environment, subnational constitutionalism is not merely defined by the power of subnational authorities to adopt their own constitution, but also by the power to define their position in relation to other layers of authority. This was embedded in a dynamic approach to forms of state, which employs institutional features as indicators to measure autonomy and cohesion, rather than as qualifying criteria. In such approach, the indicator that measures the autonomy of subnational entities was refined in sub-indicators. Three sub-indicators regarding the subnational involvement in EU affairs were used for a comparative analysis, to illustrate how different constitutional approaches position multi-tiered states on the gliding scale from more centralist forms of state to more confederal forms of state. The UK, Germany and Belgium were used as prototypes of, respectively, a centralist, a balanced federal, and a dual confederal approach.

There is not one optimal strategy for responding to the challenges that EU integration imposes upon domestic multi-tiered relations. All variations point to effective subnational involvement, but differ in degree. For example, even if devolved entities cannot represent the UK in the Council of Ministers, the Member State Minister gains much greater weight if (s)he can present the Member State's position as representing the interests of the entire state as well as each region within that state (Tatham 2008: 500-501). Also, evidence shows that devolved entities in practice do have real input in the subsidiarity procedure (Borońska-Hryniewiecka 2013: 360). Germany stands model for a constructive and integrated form of cooperation (Suszycka-Jasch and Jasch 2009: 1253), but is not very responsive to growing differentiation between the *Länder* (Bauer 2006: 29-32). Finally, while Belgium tries to uphold its dual federal nature, it cannot avoid closer cooperation in the face of European integration (Beyers and Bursens 2006: 49), for example in order to agree on a Belgian stance in the Council of Ministers, whether represented by a federal or a regional minister. In the end, cooperation mechanisms – through informal consultation or negotiation procedures or through a federal second chamber – emerge as the key to subnational constitutional autonomy in an environment of multilevel government.

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¹ E.g. Beaud (2012: 275) depicts Spain as a regionalist but not a federal state, whereas Sala (2014: 109-134), argues that Spain is indeed a federal system.



^{II} According to Forsythe (2007: 150), federalism is the EU's 'telos' – as if the EU would be a failed entity if it does not meet all the features ascribed to federal systems.

^{III} For that reason, Spain and Belgium were named the new models of federalism for the 21st century (Obinger, Castles and Leibfried 2005: 2).

^{IV} For a list of factors, see Anderson (2004: 7-10).

^V A model of indicators was already presented by Aubert (1963: 403). In his model, however, the second set of indicators did not measure cohesion, but the way in which states cooperate. Hooghe, Marks and Schakel (2010: 224 p.).

^{VI} Tarr (2009: 179) gives some examples in US constitutional law: access to government information, social dialogue and gender equality were first recognized in state constitutions.

^{VII} According to Tarr (2009: 185) subnational constitutional processes may appeal to citizens to participate in the constitutional debate and thus contribute to political socialization and identity-building.

^{VIII} See Tatham (2008: 493-515) for six channels of access for regional influence on the EU decision making process: the Committee of the Regions, the Council of Ministers, the Commission, the European Parliament, regional Brussels offices and European networks and associations.

^{IX} The devolved entities, however, can conclude so-called 'cooperation agreements' with other subnational entities.

^X Section 20 of the CRGA 2010 grants both Houses the right to protest, but the government may nevertheless ratify if it explains why it considers this necessary.

^{XI} Section 4 enumerates the circumstances which entail a referendum lock, such as the extension of EU competences or the conferring of new exclusive or shared competences to the EU. In principle, this does not cover accession treaties of new member states.

^{XII} Again, Section 4 enumerates the circumstances which entail a referendum lock. Section 3 (4), provides for an exception.

^{XIII} Gordon and Dougan (2012: 29) point out the risk of a 'spillover effect' on the constitutional life of the UK. Because of the conflict with the doctrine of parliamentary sovereignty, authors stress that the EUA – including the referendum requirement – can be repealed by a subsequent Act of Parliament. See Peers (2012: 131-132). Other authors defend a reinterpretation of the doctrine by a 'manner and form theory', see Gordon and Dougan (2012: 23-24).

^{XIV} Memory of Understanding and Supplementary Agreements, March 2010, Section B.4.3. of the Concordat on co-ordination of EU policy issues, Common Annex.

^{XV} Memory of Understanding and Supplementary Agreements, March 2010, Section A.1.9 of the Agreement on the Joint Ministerial Committee.

^{XVI} For an overview of stances and documents: National Assembly for Wales, European and External Affairs Committee, Discussion Paper, EUR(3)-03-10, 12 January 2010.

^{XVII} <http://extranet.cor.europa.eu/divisionpowers/countries/MembersLP/UK/Pages/3-Subsidiarity.aspx>. Last accessed on 27 August 2014.

^{XVIII} According to Sturm (2012: 724) this unique composition gives an unprecedented voice to subnational entities in the federal decision making procedure. At the same time, it distinguishes the Bundesrat from traditional second chambers in the sense of second elected bodies, see Kotzur (2006:257).

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Constitutional Courts, Constitutional Interpretation, and Subnational Constitutionalism

by

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Abstract

This paper analyzes the impact of courts and different systems of judicial review on subnational constitutional autonomy. Focus is put on the question on which interpretive guidelines courts may draw when they assess the compatibility of state constitutions with the federal constitution and whether there is potential for interpretive federalism in subnational constitutional contexts. Three cases where subnational constitutional provisions were respectively dealt with in civil law and common law jurisdictions with different forms of constitutional review have been selected: The first case relates to the Austrian Constitutional Court's views on subnational direct democracy. The second case discusses the Spanish Constitutional Court's decision on the Catalanian Statute. Thirdly, the paper examines US federal courts' decisions which have recently prevented a constitutional amendment of the Oklahoma Constitution. While the arguments and methodology used in these decisions cannot be generalized, they nevertheless raise awareness for the tensions between federalism and judicial interpretation.

Key-words

Constitutional courts, constitutional interpretation, subnational constitutionalism, Statute of Catalonia, direct democracy, religious freedom



1. Introduction

Discussing constitutional courts and their impact on subnational^I constitutionalism entails a discussion on constitutional interpretation: it is ultimately up to courts to construe the two main legal reference documents in this context, i.e. the federal constitution and the state constitutions, which are subordinate to the federal constitution (Saunders 2011: 869). Interpretation will be needed in order to measure the scope for subnational constitutions that is provided by the federal constitution, but also for ascertaining whether a subnational constitution goes beyond this scope or not.^{II}

For the purposes of this paper, it will first be necessary to conceptualize what the impact of courts and different systems of judicial review on subnational constitutional autonomy is and on which interpretive guidelines courts may draw when they assess the compatibility of state constitutions with the federal constitution. The paper will then critically analyze three cases where subnational constitutional provisions were respectively dealt with in civil law and common law jurisdictions with different forms of constitutional review, namely by the Austrian Constitutional Court, the Spanish Constitutional Court and US federal courts. In the conclusion, the paper will explore the potential for interpretive federalism in subnational constitutional context.

2. Courts, Judicial Review, and their Impact on Subnational Constitutions

In a functional sense, constitutional courts exist in almost all (quasi-)federal states.^{III} They regularly (Watts 2008: 159) follow either the specialized or the integrated model,^{IV} even though specific constitutional courts in an organizational sense are provided only under the former model. This difference has no immediate methodological impact on the interpretation of either federal or state constitutions, but may entail certain propensities for more homogeneity and centralism on the one hand and heterogeneity and decentralization on the other hand, even though authoritative interpretation will be entrusted to certain apex courts in both cases.



Some distinction must be made, however, between systems under the specialized model that allow for a divided judiciary, including both federal and state constitutional courts as specific institutions, such as in Germany (Oeter 2006: 149 ff, 154), and systems under the integrated model that provide for decentralized constitutional review in a twofold sense:^V decentralized in the sense, that there are no constitutional courts as specific institutions (neither at federal nor state level), but a variety of ‘integrated’ courts that, among other issues, may deal with constitutional questions as well; and in the sense, that such ordinary courts exist both at federal and state level.^{VI} Most, though not all, federal systems provide for the co-existence and intertwining of courts within a multilevel judicial system, where different courts at federal and state level may express different views on interpretation (Saunders 2006: 365 ff). Both federal and state courts might therefore be concerned with subnational constitutional issues, if at different appeal stages. The compatibility of a state constitution with the federal constitution, however, will usually remain a question to be ultimately resolved by an apex (constitutional or supreme) court; this depends, of course, on the admission of the parties to appeal to these courts.

Considering other types of judicial review in this context, *ex-ante* review interferes more with federalism than *ex-post* review,^{VII} as it may prevent state legislation from entering into force at all; and strong-form review more than weak-form review,^{VIII} while a flexible dialogue between state or federal courts on the one hand and state legislatures on the other might (though not necessarily) be encouraged to a larger extent in weak- than in strong-form cases (Tushnet 2011: 326 f).

To assess the impact of courts on subnational constitutional autonomy, also the selection of judges will have to be taken into account, i.e. whether federal constitutions provide that these judges (or part of them) must have a ‘federalist’ background, e.g. if they need to be proposed by the states or must have their permanent residence outside the capital (Gamper 2013: 110 f). Whether the existence of state courts, including state constitutional courts, demonstrates a higher degree or consciousness of subnational constitutionalism, is questionable.^{IX} State legislatures and state courts may have closer relationships than state legislatures and federal courts, but this can hardly be generalized, since all courts are expected to work independently and since state influence on the appointment of federal judges, especially those at top level, could have a similar impact. Moreover, much depends on possibilities for appeal: The establishment of state



constitutional courts will have much less ‘federalist’ impact if appeals against their decisions can be lodged at federal (mostly, apex) courts; again, this will be mitigated, if these latter courts serve, as Hans Kelsen (1927: 179 f) put it, as ‘joint’ bodies of both levels in a functional sense. Where judges are largely proposed and appointed by federal bodies (Watts 2008: 159 f), there will be little doubt that the organization of that court has a federal imprint, even if the federal constitution intends it to function as an independent umpire between both levels.

3. Federalism and Constitutional Interpretation

Federal constitutions vary as to the degree in which they determine subnational constitutionalism. Older constitutions, such as the US constitution, are generally less detailed than more modern constitutions, while younger constitutions rather seek to avoid possible interpretive conflicts by being more specific through the entrenchment of explicit interpretation rules or exhaustive lists of definitions of legal terms. Whether federal constitutions presuppose subnational constitutional autonomy implicitly and just impose explicit limits where required, or whether they explicitly allow for broad autonomy within certain limits or whether they combine both systems, cannot be offhandedly assessed as ‘centralistic’ or ‘federalist’. Several federal constitutions that explicitly allude to subnational constitutional autonomy are, for instance, more restrictive than the US Constitution which does not explicitly mention state constitutions at all, while it nevertheless imposes a few limits applicable to them.^X In contrast, the South African Constitution explicitly mentions the provincial legislature’s power ‘to pass a constitution’ for a province (Sec 104 para 1 subpara a), but at the same time states in Sec 143 what the provincial constitution, if enacted at all, may do, must do or must not do, while the provincial constitution has yet to be certified by the Constitutional Court in order for it to become law under Sec 144.

Tricky interpretive questions may thus arise as to whether subnational constitutional autonomy does exist at all and how to construe its scope and limits. The more explicit a constitution is on subnational constitutionalism, the more efficient will a literal understanding tend to be, although even a rich and detailed constitutional language can neither exclude ambiguities nor interpretation *per se*. In most cases, however, other interpretive techniques than just literal interpretation will be necessary. This may require



consideration of the original intent of a provision, systematic contextualization or consistency with international or foreign law.^{XI} Courts accordingly adopt an extensive or restrictive approach, including the conception of the constitution as a ‘living tree’^{XII} which entails a more dynamic sort of interpretation that goes beyond the classical Montesquieuan notion of the interpreting judge being just the ‘bouche de la loi’ (Montesquieu 1748: Livre 11, Chapitre 6). This can be deemed necessary before the background of old and rigid constitutions,^{XIII} but appears also in ‘juristocratic’ jurisdictions, e.g. in the European context. Where a selective observance or at least consideration of unspecified international or foreign law or of constitutional principles is stipulated, interpretation may become more cosmopolitan, but also less predictable.^{XIV}

Problems of ‘correct’ constitutional interpretation may arise both with regard to the interpretation of the relevant federal constitutional provisions, but also with regard to the interpretation of subnational constitutional provisions that need to be consistent with the former. Even where authoritative interpretation concerning both layers of law is entrusted to one and the same court, this court may feel it expedient to construe them in different ways. This could be the case, for instance, if federal constitution and state constitutions contained different rules on their own interpretation.^{XV} Explicit rules on constitutional interpretation are helpful to identify the constitutional law-maker’s intention of how the constitution should be interpreted and thus form part of the constitutional design.^{XVI} Still, however, such rules can be counteracted by *de facto* disobedient courts and, moreover, cannot evade a logically irresolvable interpretive circle, namely that the rules themselves need to be interpreted.^{XVII} While the explicit entrenchment of interpretation rules makes judicial interpretation more predictable and democratic, the judge’s interpretive scope gets more restricted; this scope could still decrease, however, if the law-maker used a highly casuistic language instead of entrenching more abstract interpretation rules. As regards the relationship between federal and state constitutions, the scope of subnational constitutionalism will surely become less opaque if precise rules of interpretation apply, but it need not therefore be larger. However, as component states are usually represented in federal constitutional amendment procedures either directly or through a federal second chamber, they probably have more influence on the constitutional entrenchment of interpretation rules than on ‘independent’ judge-made interpretation.



4. Interpreting Subnational Constitutional Scope: Three Cases Compared

4.1. A Homogeneous Democracy? Lessons from Austria

In 2001, the Austrian Constitutional Court^{xviii} repealed a provision^{xix} of the constitution of the Austrian *Land* Vorarlberg which had provided for ‘popular legislation’ at *Land* level. Accordingly, if a *Land* citizens’ initiative had been successful, but not been implemented by the *Land* Parliament, a referendum was obligatory. A successful referendum would have compelled the *Land* Parliament to implement the initiative by adopting a respective law. The instrument had never been used in practice, which, however, was irrelevant in the Constitutional Court’s view. The mere possibility that ‘popular legislation’ could become a ‘rival instrument’ to the ordinary parliamentary processes of law-making was strongly disapproved by the Court.

The most interesting facet of this case was that the Austrian Federal Constitution did not – and still does not – include any explicit provision on direct democracy at *Land* level. Neither does it include any explicit provision on the methodology of constitutional interpretation.^{xx} It does include, however, explicit provisions^{xxi} on plebiscites at federal level which, indeed, do not mention popular legislation. As regards direct democracy at local level, Art 117 para 8 of the Federal Constitutional Act explicitly leaves it to *Land* legislation to regulate this issue.^{xxii}

While the representative system at *Land* level, i.e. provisions on *Land* parliaments, governments, governors and legislative procedures, is regulated by the Federal Constitution,^{xxiii} the lacuna on the issue of direct democracy is obvious. As *Land* constitutions may complement the Federal Constitution, as far as they do not violate it, it is uncontroversial that the *Land* constitutions may regulate direct democracy at *Land* level;^{xxiv} the crucial question was to what extent.

According to the Constitutional Court, the *Land* constitutional provision on popular legislation went beyond the constitutional scope given to the *Länder*. Although the Constitutional Court did (and indeed could) not base this opinion on any explicit federal constitutional prohibition, the main argument focused on the ‘principle of democracy’, being one of the leading principles of the Austrian Federal Constitution, which have an even higher standing than pieces of ‘ordinary’ federal constitutional law. Being



programmatically mentioned in Art 1 of the Federal Constitutional Act – a provision, which does not itself distinguish between representative and direct forms of democracy –, the principle becomes manifest through sundry pieces of ‘ordinary’ federal constitutional law, that, bundled together, reveal the predominantly^{XXV} representative nature of democracy at federal level. The Constitutional Court concluded from the relationship between representative and direct democracy at federal level – which the Court elevated to ‘the’ model inherent in the overall principle of democracy – that it applied to the *Land* and local level, too; the Court remarked only briefly that the principle of federalism, which is a leading constitutional principle as well, and the states’ constitutional autonomy, as an element inherent in this principle, ‘found their limits in the core essence of the principle of democracy’. The remark is ambiguous since it suggests in a way that the principle of democracy ranks higher than the principle of federalism. Apparently, however, the Court just wanted to convey the opinion that, while both principles stood at equal level,^{XXVI} ‘popular legislation’ implied a harder attack on the principle of representative democracy than federalism would suffer from the repeal of the *Land*’s constitutional provision which presented just a small part of the scope of subnational constitutionalism.

This example shows how a federal constitutional lacuna may be as detrimental to subnational constitutionalism as an explicit ban on ‘popular legislation’ at *Land* level would have been. It may be even worse as a state constitutional law-maker cannot clearly anticipate the scope left to a state constitution. As this case shows, all depended on the interpretation of provisions that included no explicit reference to the issue at stake. Neither did any constitutional rule explicitly predict the interpretive method by which the Constitutional Court would be guided. As it turned out, the Court mainly based its argument on original intent, arguing that the Federal Constitution’s founding fathers had regarded ‘popular legislation’ as an inappropriate instrument. The Court could not show, however, that this view had been explicitly taken with regard to ‘popular legislation’ at *Land* level, since the historical references had focused on federal ‘popular legislation’. The crucial interpretive question – whether the original intent of the founding fathers extended to popular legislation at *Land* level, even if the federal constitutional wording did not – is answered by the Court perfunctorily:



‘Due to the fundamental importance which was obviously attached to this question [... in the historical reference materials] one has to act on the assumption that the ‘extraordinary restriction’ and ‘general repression of the referendum’ did not just serve as a federal constitutional rule targeted at the federal level, but also as a key element of the fundamental constitutional principle of representative (parliamentarian) democracy which also binds the *Land* constitutional legislature.’

The interpretive technique used here represents rather a *petitio principii* than a historical verification of all possible *teloi* of the historical constitution-makers. Neither did the Court adopt a ‘consistency presumption’ (Gamper 2012: 217 ff), which is often applied in cases where it is (more or less) doubtful that a federal or *Land* law is consistent with the federal Constitution.

As the political demands for ‘popular legislation’ at federal level have become more frequent recently,^{xxvii} the 2001 landmark case still stands out as a highly topical and significant warning to entrench such an instrument without, paradoxically, risking an obligatory referendum due to the ‘total revision’ of the Federal Constitution caused by a massive upheaval of representative democracy. At local level, however, several examples of such ‘popular legislation’ mechanisms still exist,^{xxviii} even though they do not concern ‘legislation’ in a strictly technical context, since local government is not vested with genuinely legislative powers. From a structural perspective, however, the instrument is the same insofar as a citizens’ initiative may require a referendum that either supplants a decision by the elected local council or forces the local council to implement the request of the people. As yet, the Constitutional Court has not had occasion to review these instruments, which are only entrenched in *Land* ordinary legislation, while doctrine^{xxix} is split in its assessment as to their constitutionality.

4.2. The Concept of Nation in Spanish Consistency Interpretation

The scope of subnational constitutionalism was also a highly controversial subject in Spain, where the Constitutional Court issued a decision on the compatibility of the Statute of Catalonia with the Spanish Constitution.^{xxx} A first difference to the Austrian case is, of course, the fact that Spain is no full-fledged federal system, but a strongly regionalized or quasi-federal system. Accordingly, the statutes of the Spanish Autonomous Communities



are no genuine^{xxxI} state constitutions since they cannot be created autonomously, but depend on the (central) state's consent. According to Art 81 and Art 147 para 3 of the Spanish Constitution these statutes may only be amended by the approval of the *Cortes Generales* through an organic law. Although the statutes have a 'constitutional' subject-matter – Art 147 para 1 of the Spanish Constitution stipulates that the statutes serve as the 'norma institucional básica' of each Autonomous Community, while Art 147 para 2 and other articles enumerate some of the issues that have to be regulated in a Statute –, they are no regional constitutions in the sense of constitutions created *by* the regions (and only them) themselves but rather constitutions *for* the regions.

The Spanish Constitution is one of the few European constitutions which entrench an explicit rule on their own interpretation. According to Sec 10 para 2, provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.^{xxxII} This rule does not refer to other parts of the Constitution, though, and it has not been applied^{xxxIII} by the Spanish Constitutional Court, when it decided on 28 June 2010 that several provisions of the Catalan Statute violated the Spanish Constitution. Other provisions were declared 'to be not unconstitutional if and when they are interpreted under the terms established in the Grounds of the judgment'. The Constitutional Court thus partly applied the 'consistency method' and, in this case, required a certain reading of these provisions which, however, could also be read in a different manner.

Courts often choose a 'consistent interpretation' in cases where two or more different interpretations, that suggest either a constitutional or an unconstitutional meaning of a legal norm, would be equally^{xxxIV} plausible;^{xxxV} the mere presumption of 'consistency' suggests the constitutional compatibility of a norm. In federal systems, 'consistent interpretation' seems to be more favorable from the state perspective, since the contested provision is presumed to be compatible with the federal constitution and thus remains in force, though the very need to restrict the intended meaning of a norm may make its continued existence less desirable.^{xxxVI} Even if a court authoritatively demands a 'consistent interpretation', moreover, the risk will remain that other authorities will not follow this interpretation, which could entail tedious processes of repeated authoritative interpretation. If the court chose an 'inconsistent interpretation' and repealed the norm on account of its at least



potentially unconstitutional character, this would at least formally more interfere with subnational constitutional autonomy, but enhance legal certainty.

The preamble of the Catalan Statute contains the following text:

‘El Parlamento de Catalunya, recogiendo el sentimiento y la voluntad de la ciudadanía de Catalunya, ha definido de forma ampliamente mayoritaria a Catalunya como nación. La Constitución Española, en su artículo segundo, reconoce la realidad nacional de Catalunya como nacionalidad.’

The Constitutional Court did not find this provision unconstitutional, but held that the interpretation of the references to ‘Catalonia as a nation’ and to ‘the national reality of Catalonia’ in the preamble had no interpretive (and, probably, no other) legal effect. The reasons given for this are hardly convincing, though: the Constitutional Court first explained that preambles had no normative value in the sense that they could be directly challenged as unconstitutional or have legally binding effect, but that they had legal value as guidelines for interpreting legal rules and even constituted a particularly relevant element for the determination of the meaning of legislative intentions, and, hence, for the adequate interpretation of legislation. Two illogical corollaries, however, follow: first of all, the Constitutional Court states that the interpretation deriving from the preamble will never be able to be imposed on the interpretation that, on a sole and exclusive basis and with true normative scope, could only be applied to the Court’s own interpretive authority. The Constitutional Court’s role as supreme interpreter is, however, perfectly compatible with ‘legislative intentions’ as enshrined in preambles. It is for the Court to identify their ‘legal value’ and arrange for a corresponding interpretation; it could also be possible for the Court to identify other interpretive guidelines in the Statute itself and balance them against the guidelines in the preamble. The legal value of the preamble does not, however, concern the question whether the Court is the supreme interpreter or not, since this is a question of competence and not a question of interpretive methodology. The second problem stems from the Constitutional Court’s argument that the contested terms in the preamble reappear in the Statute itself and that it must be in the light of the judgment of these provisions that the Court pronounces on the interpretive value of the preamble, depriving it, if necessary, of the legal value intrinsic to it. The Court thus on the one hand admits the



legal value of the preamble and denies it on the other; while preambles usually serve as guidelines for the interpretation of doubtful provisions, the court rather interprets the provisions within the Statute autonomously and uses this interpretation as a guideline to interpret the preamble as irrelevant for interpretive purposes (instead of, for instance, holding the contested terms of the preamble effective, but only in accordance with the ‘reduced’ meaning insinuated to the Statute itself). This would be admissible in cases where other interpretive guidelines (such as the wording of the Statute, original intent etc) clearly plead for another meaning that prevails over a meaning suggested by the less normative preamble. The provisions of the Statute, however, are as ambiguous as the preamble. The preamble, for example, mentions Catalonia as a ‘nation’, followed by the sentence that the ‘Spanish Constitution, in its second Article, recognises the national reality of Catalonia as a nationality’. Why a nationality should be a ‘nation’ and have a ‘national reality’, but nevertheless be conceived as nothing but a ‘nationality’ remains as unclear as the question whether the constitutional ‘recognition’ is mentioned in order to point out that the Statute does not want to go beyond the Spanish Constitution or just in order to demonstrate a certain difference. The same is true for the challenged provisions in the Statute itself, as, on the one hand, Art 1 confirms the status of Catalonia as a ‘nationality’, whereas Art 2 para 4, for example, mentions ‘the people of Catalonia’ from which the powers of the regional *Generalitat* emanate; if the basis for regional institutions were wholly to be found in the Spanish Constitution, however, these powers could emanate solely from the Spanish people, which is indeed proclaimed by Art 1 para 2 of the Spanish Constitution.^{xxxvii} The literal and systematic meaning of both the preamble and the text itself thus is ambivalent. The distinct use of the terms ‘nation’ and ‘nationality’, which to some extent (e.g. ‘national symbols’, ‘people’) reappears in the Statute, is striking. Nevertheless, the Court stressed in the same judgment that the contested terms, notwithstanding the literal expression of its provisions, had to be interpreted within the limits of the Court’s ‘legal philosophy and in the sense acquired over the last thirty years by the categories and constitutional concepts on which they are based’. These, however, are no new arguments, but circular reasoning: the Court alleges that the Statute *must* conform to the Constitution (as understood by the Court) and thus declares irrelevant all parts that seem to be inconsistent. Strangely enough, other parts of the Statute were nonetheless declared unconstitutional.



What the Court does, in effect, is to uphold the Statute as far as possible, alleging its compatibility with the Spanish Constitution, mostly for the reason that the Spanish Constitution would not allow for unconstitutional statutes. Though, at first glance, this may be a favorable interpretation from the perspective of Catalonia, it is detrimental to its interests insofar as the very distinction that was evidently sought for by the use of different words was pronounced to be legally ineffective.^{XXXVIII}

4.3. Saving the State, Abandoning Religious Freedom? Interpretation Rules Revisited

A third case refers to the proposed ‘Save Our State Amendment’ to the Constitution of Oklahoma. The proposed Art VII-Sec 1 C of this Constitution would have read as follows:

‘The Courts ... when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law ...’

The proposal was adopted in a state legislative referendum on 2 November 2010,^{XXXIX} but did not enter into force, since a plaintiff, an American citizen of Muslim belief, sought to enjoin its certification by the Oklahoma State Board of Elections alleging that the amendment would violate the Establishment Clause and the Free Exercise Clause of the First Amendment to the US Constitution. Both the US District Court for the Western District of Oklahoma^{XLI} and, on appeal, the Tenth Circuit^{XLI} granted a preliminary injunction. On 15 August 2013 a permanent injunction was granted by the US District Court for the Western District of Oklahoma finding that the Oklahoma State Election Board should be permanently enjoined from certifying the results of the referendum on the proposed Amendment.^{XLII} The Court argued that the defendants had failed to assert a compelling state interest to justify a discrimination among religions and that the



unconstitutional Sharia law provisions were not severable from the remainder of the proposed Amendment. The Court also found that the balance of harms weighed even more in favor of plaintiffs' having their constitutional rights protected, since the law that voters wished to enact would have been unconstitutional. The permanent injunction would not be adverse to the public interest, though the public had an interest in the will of the voters being carried out, as the public had a more profound and long-term interest in upholding an individual's constitutional rights.

A weighing of interests would not seem to be in place where a state constitution is clearly found to violate the Federal Constitution under *ex-post* judicial review. In this case, however, the Court did not decide on a state constitutional provision, but on a proposal for such a provision that had already been adopted in a referendum. An (either preliminary or permanent) injunction against a proposed state law, being an instrument of *ex-ante* judicial review, interferes with the principles of democracy and the separation of powers more strongly than *ex-post* judgments, since in this case a democratically created piece of legislation is not even admitted to come into legal existence; systems of preventive review are nevertheless known to other federal or regionalized states as well, including even forms of abstract review.^{XLIII}

While the US Federal Constitution hardly contains rules on its own interpretation *strictu sensu*,^{XLIV} most US state constitutions contain such rules,^{XLV} and Oklahoma was not the only state that wanted or still wants to entrench a ban on the use of foreign and religious law (Davis and Kalb 2011: 6, Resnik 2012: 531). The proposed Amendment would have *also* served as an interpretation rule since it would have prohibited courts from both applying and considering Sharia Law, international law and the legal precepts of other nations or cultures as guidelines for their decision-making. There is, however, a significant difference whether international law, foreign national law or religious law is excluded from any kind of application or consideration. In the first two cases there may be specific legal obligations to consider them, if we think, e.g., of ratified treaties or private international law, so that it will not be possible to generally exclude them by a subnational constitution (Davis and Kalb 2011: 6 ff). Religious law or the legal precepts of other cultures may be enshrined in foreign national law (in the case of states governed by the Sharia);^{XLVI} however, it may also be an 'internal' kind of law that is tied in with no nation, but with persons that may even be Oklahoma citizens. If there were legal obligations to consider these latter precepts as they



emanate from the religious freedoms embedded in the US Constitution, this would need careful verification. Much too little consideration has been given to the question whether international, foreign and religious law must not, need not, may or even must be observed, distinguishing also between ‘application’ and ‘interpretive consideration’. Very few constitutions worldwide contain explicit provisions on this issue,^{XLVII} even though cross-judicial dialogue is becoming more and more crucial to courts all over the world.^{XLVIII}

The injunction in the Oklahoma case clarified that it would be unconstitutional to let such a clause enter into force; but open questions remain that are at least as important: will courts have to or may they just use these precepts, even though they are not explicitly allowed to do so (neither under the Federal Constitution nor under any State Constitution)? Do they have discretion to decide on both whether and how they use them? As long as the Federal Constitution does not explicitly regulate this question, courts will be pretty free to answer these questions, in particular so with regard to the use of foreign (national), religious or cultural law which may overlap or not, since religious belief is not the same as nationality and as it will be difficult to assess what ‘other culture’ means in multicultural societies. Whether this enhances the predictability of judgments in states governed by the rule of law or whether this is democratic – especially where judges are not democratically elected –, may be doubtful.

The very lack of relevant interpretation rules in the Federal Constitution could indicate that courts have wide interpretive scope as far as federal constitutional issues, such as freedom of religion, are concerned, while subnational constitutions might be free to regulate their own interpretation in other respects. In fact, the crucial question here does not so much concern freedom of religion, but rather the separation of powers, which, however, has not been examined in the aforementioned decisions: namely, that a subnational constitution prevents courts from using an interpretive method (let alone *applying* certain legal sources) which, in the courts’ opinion, they are at least not prevented (though perhaps not obliged) to use by the Federal Constitution.^{XLIX} From the perspective of freedom of religion, what is the difference between a court that, in the absence of any explicit rules, denies consideration of Sharia law – and hardly any Western court usually considers Sharia law, for reasons of secularism, equality between men and women, ‘negative’ freedom of religion etc – and a legislature that expressly prohibits its use? We yet have to wait for a case where a plaintiff appeals against the decision of a court that, for



whatever reason, declined to use religious law in its interpretation, alleging that the court violated federal constitutional rights for not using these legal sources; this could even become more complex in cases where different (and conflicting) religious precepts were involved.

4.4. Comparative Synthesis

Admittedly, these decisions alone cannot indicate a general tendency towards centralistic or anti-subnational case law in (quasi-)federal systems.¹ Nevertheless, they raise awareness for the tensions between federalism and judicial interpretation. All three cases are examples where subnational constitutional provisions were held to be (at least partly) unconstitutional, even though either the (quasi-)federal constitution or the subnational constitution or both of them could be read in different ways. In all cases, the (quasi-)federal constitution did not explicitly prohibit the respective unconstitutional provision, since the scope of subnational constitutions was nowhere exhaustively regulated as to its positive or negative content, while it was also clear that they were not permitted to contravene the (quasi-)federal constitution. In neither case did an explicit rule of federal constitutional interpretation advise judges on how to interpret either the (quasi-)federal or the subnational constitution; in the Spanish and US federal constitutions, some rather marginal interpretation rules are explicitly mentioned, but they did not concern the relevant cases. All decisions thus depended on the autonomous interpretation of courts, which, seen from the subnational constitutional perspective, took an unfavorable turn in the Austrian and US case. In the Spanish case, the Constitutional Court adopted a differentiated approach, since only part of the contested provisions were held to be unconstitutional; the Spanish Constitutional Court used a ‘consistency interpretation’ to the utmost, which, however, was neither entirely convincing from a legal point of view nor region-friendly in a political sense, since this interpretation was an absolute rebuff of any attempt to construe a ‘Catalan nation’. Neither the Austrian Constitutional Court nor the involved US courts cogitated much about federalism and the question whether certain ambiguities and lacking explicitness at federal constitutional level could be construed in a way that would make the subnational constitutional provision (or proposed provision) compatible with the Federal Constitution. While the Austrian Constitutional Court just remarked that the principle of federalism found its limits in the principle of democracy, the US District Court, when it



granted the permanent injunction, only indirectly alluded to federalism in so far as it held the will of the voters of Oklahoma to be less in the public interest than the upholding of an individual's constitutional rights. In the Austrian case, however, the principle of federalism was not held to be strong enough to legitimize the subnational constitutional provision, whereas the balancing between interests in the US case was already based on the prior assumption that federal constitutional rights would be obviously violated by the proposed Amendment. Whereas the Austrian Constitutional Court held it to be irrelevant that the contested provision had never been exercised in practice, the US District Court thought it relevant that the concern the 'Save Our State' Proposal sought to address had yet to occur, since no court in Oklahoma had ever applied Sharia law.

5. Conclusions

Interpretive federalism concerns interpretation at both constitutional levels. It is remarkable that in the US several states have already entrenched such interpretation rules in their own constitutions¹¹. State constitutions could thus become innovative labs dealing with constitutional interpretation; their comparative experiences could become relevant in both a horizontal and a vertical dimension (Williams 2009: 352). The question remains, though, which kind of interpretation may be applied at state level, whether it may differ from federal constitutional interpretation and how to identify federal constitutional standards in this regard. A pluralistic approach would, however, not always permit 'consistency interpretation' which seeks to harmonize and uphold multilevel legislations as far as possible, even if this neglects the original intent of state legislation.

First and foremost, however, clarity on the federal constitutional interpretive methods and guidelines, including possible references to binding supranational or international law, is essential for identifying the dimensions of subnational constitutionalism, also with regard to its own interpretation, in a predictable manner. This would enhance legal certainty and democratic legitimacy of judgments, while it would save subnational constitutions from risky amendments and years of waiting for sometimes unpredictable ultimate decisions. Nonetheless, textualization of interpretation rules cannot serve as a panacea for all possible questions of interpretation, since also the texts of such rules will need to be interpreted. In all cases compared here, and in the absence of any explicit interpretation rules that could



have been relevant in their respective contexts, judges felt rather free to rely on their own (or other courts' preceding) legal concepts and interpretation, in which federalism played hardly any role. Written rules on federal constitutional interpretation would probably not have increased the scope of subnational constitutional autonomy. But, modifying the words of a famous judgment,^{LII} 'not only must interpretation be done; it must also be seen to be done.'

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^I In this paper, the term 'subnational' refers to both the constitutions of the constituent states in federal systems as well as to regional statutes in quasi-federal systems, even though they may be no genuinely regional 'constitutions' in the former sense; on distinctions between subnational constitutions see Saunders (2011: 854 ff).

^{II} On two levels of constitutional interpretation see Martinico (2012: E 271).

^{III} See Saunders (2006: 365 ff). An important exception is the Swiss Federal Court which has only limited constitutional jurisdiction.

^{IV} See Stone Sweet (2012: 817 ff), Ferreres Comella (2011: 265 ff).

^V See also Michelman (2011: 278 ff).

^{VI} From a comparative perspective, Saunders (2006: 365 ff).

^{VII} On both types, Stone Sweet (2012: 823). It was thus considered an important improvement for the Italian regions that regional laws were no longer subject to *ex-ante* review, when the constitutional reform of 2001 (gazz. uff. no. 248) entered into force.

^{VIII} The terminology was coined by Mark Tushnet, see, e.g., Tushnet (2008). A typically weak-form instrument in a federal system is the Canadian notwithstanding clause (Sec 33 of the Canadian Charter of Rights and Freedoms).

^{IX} See, on this question DelleDonne (2012: E 309 ff), Resnik (2012: 536).

^X See, on a comparative basis, Saunders (2011: 856 ff).

^{XI} From a comparative perspective, Gamper (2012), Barber and Fleming (2007), Sampford and Preston (1996).

^{XII} *Edwards v A-G Canada* [1930] AC 136.

^{XIII} With examples Smith (1995).

^{XIV} Sec 39 para 1 subpara a of the South African Constitution, for example, requires courts to promote 'the values that underlie an open and democratic society based on human dignity, equality and freedom' when they interpret the South African Bill of Rights. These very general terms ('an ... society'; similarly, the ECHR reservation clauses) could be understood in diverse ways, so that this rule, being itself an interpretation rule, will require further interpretation. I would argue that Sec 39 is a rule belonging to the Bill of Rights and thus subject to its own interpretation standards, as expressed in Sec 39, which, apart from subpara a, include the binding or voluntary consideration of international and, respectively, foreign law.

^{XV} With regard to the US, see below.

^{XVI} Federal Constitutions hardly contain them (Gamper 2012: 31 ff); see, however, the UK devolution Acts (Sec 29 para 3 and 101 Scotland Act 1998, Sec 94 para 7 and Sec 154 para 2 Government of Wales Act 2006, Sec 83 Northern Ireland Act 1998).

^{XVII} Gamper (2012: 312 ff), with further references.

^{XVIII} VfSlg 16.241/2001. See Gamper (2003: 45 ff).

^{XIX} Art 33 para 6 Constitution of the *Land Vorarlberg*.

^{XX} See, with more detail, Gamper (2012: 101 ff).

^{XXI} Art 41 para 2, Art 43, Art 44 para 3, Art 49b, Art 60 para 1 and 6 of the Federal Constitutional Act.

^{XXII} With more details on the relevant *Land* legislation, Gamper (2011: 68 ff).

^{XXIII} Art 95 et seq. of the Federal Constitutional Act.

^{XXIV} Rill and Schäffer (2001: 26).

^{XXV} One important exception, which was totally neglected by the Court, is constituted by Art 44 para 3 of the Federal Constitutional Act that requires a referendum in case of a 'total revision' of the Federal Constitution



(which will happen if at least one core element of one of the leading constitutional principles is seriously affected by a constitutional amendment). Even though this provision has another content than ‘popular legislation’, it is nevertheless regarded as a significant part of the democratic principle which, according to the prevailing opinion, could itself only be abolished via a ‘total revision’.

XXVI Other cases dealt with by the Austrian Constitutional Court show that leading constitutional principles are rather flexible in their position *vis-à-vis* each other, see Gamper (2008: 22 ff).

XXVII See, on this issue, recent legislative proposals which have, as yet, not been adopted: LA 2177/A Blg NR XXIV. GP; *Abänderungsantrag zu LA 2177/A XXIV. GP*, 28 June 2013, *Beilage 1/3*; *Antrag gemäß § 27 Abs 1 GOG-NR zu LA 2177/A XXIV. GP*, 28 June 2013, *Beilage 1/4*.

XXVIII See, e.g., §§ 124 et seq. *Steiermärkisches Volksrechtsgesetz*, §§ 44 et seq. *Innsbrucker Stadtrecht*.

XXIX See Pernthaler and Gstir (2004: 750), Gamper (2011: 69 f), Poier (2010: 31ff), Oberndorfer (2008), Mayer (1995: 341 ff), Öhlinger (2012: 1055).

XXX STC 31/2010, de 28 de junio [de 2010].

XXXI See above fn 1.

XXXII It is doubtful whether this is a rule just on *constitutional* interpretation, as the ‘normas relativas a los derechos fundamentales y a las libertades que la Constitución reconoce’ possibly include other provisions than these rights and liberties themselves. Nevertheless, it would be highly inconsistent to construe the relevant ordinary or organic legislation in accordance with the aforementioned international treaties, while the rights and liberties themselves, being superordinate to ordinary or organic law, would be excepted.

XXXIII Although Art 2 of the Spanish Constitution entrenches the right to self-government of nationalities and regions it would not appear that this is a norm relating to the fundamental rights and liberties which are recognized by the constitution, since this right is not included in the catalogue of fundamental rights and public liberties (Art 15-29). Moreover, little would have been derivable from an interpretation based on the referred international legal sources, since these do not regulate subject-matters such as those of the contested provisions of the Statute.

XXXIV Norms that are as unclear as to allow both a consistent and an inconsistent interpretation may, at meta-level, be unconstitutional for the very reason of their being too uncertain; however, this will depend on the individual degree of the rule of law required by a constitution.

XXXV Where constitutions worldwide include interpretation rules, this mostly concerns consistent interpretation in a human rights context (see Gamper 2012: 7 ff); a famous example is Sec 3 para 1 of the UK Human Rights Act 1998. A general rule on consistent interpretation is provided by Art 28 of the Hungarian Constitution.

XXXVI There are cases, however, where state constitutions explicitly require to be interpreted in conformity with the Federal Constitution (e.g., Art I Sec 12 and 17 of the Florida Constitution).

XXXVII On possible shortcomings of subnational constitutions with regard to popular sovereignty see Saunders (2011: 869 ff).

XXXVIII The question remains, however, if regional legislation could draw on the allegedly ‘ineffective’ provisions (or rather their interpretation) and insinuate another meaning to them, since the Court’s ‘consistency interpretation’ may be authoritative in a concrete case, but will not absolutely prohibit state legislatures from applying another interpretation when they enact future legislation; see also Martinico (2012: 277) and Delledonne (2011: N 12). It would seem that the federal constitutional law-maker, by an explicit regulation of the relevant issue, could resolve that conflict much more efficiently than a court.

XXXIX State Question No. 755, Legislative Referendum No. 355.

XL *Awad v Ziriax (Awad I)*, 754 F. Supp. 2d 1298 (W.D. Okla. 2010).

XL.I *Awad v Ziriax (Awad II)*, 670 F.3d 1111 (10th Cir. 2012).

XL.II *Awad v Ziriax (Awad III)*, CIV-10-1186-M (W.D. Okla. 2013).

XL.III See, e.g. Art 138 para 2 of the Austrian Federal Constitutional Act or the pre-legislative scrutiny on devolution issues according to the UK devolution Acts. From a comparative perspective, see Sonntag (2011).

XL.IV Such rules concern only selected matters, such as in Amendment IX.

XL.V See, with examples, Williams (2009: 352). Most of these rules, however, concentrate on the meaning of certain rights and sometimes just constitute legal definitions of constitutional terms.

XL.VI On this issue, Shinar and Su (2013: 74).

XL.VII See Sec 39 Constitution of South Africa, Art I Sec 3 Constitution of the Marshall Islands, Sec 11 para 2 Constitution of Malawi, Sec 39 Constitution of Papua New Guinea.

XL.VIII With examples, Groppi and Ponthoreau (2013).



XLIX A risk for judicial independence is seen by Davis and Kalb (2011: 10 f).

^L Constitutional courts do not always tend to centralistic case law (Schneider 2009: 14 f), though, with regard to selected examples, Sagar (2011: E 5). In spite of the judgment related above, the Austrian Constitutional Court, for instance, neither generally denied a certain scope of subnational constitutionalism nor the possibility to examine the compatibility of subnational legislation with subnational constitutions.

^{LI} See above fn xlv.

^{LII} *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233).

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What Scope for Subnational Autonomy: the Issue of the Legal Enforcement of the Principle of Subsidiarity

by

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Abstract

The transformation of a patchwork of Westphalian nation-states into a multi-level legal order where competences and responsibilities interlock, brings about the fundamental question as to who should do what? This paper argues that the principle of subsidiarity is one of the key components of a system of multilevel governance. Subsidiarity is commonly assumed to require power to reside ‘as close to those affected as possible’, but, from a legal perspective, requires the allocation and exercise of competences to adhere to the optimization of relative efficiency and democratic legitimacy in the specific case at hand. The paper will start with construing a legal conception of subsidiarity and how said principle performs a crucial function in securing legitimacy in a context of multilevel governance. Subsidiarity can thus help ascertaining the scope of subnational autonomous decision-making, if based on the set of arguments pertaining to efficiency and democratic legitimacy that together construe subsidiarity.

The second part of the paper addresses the problem of legal enforcement. Increasingly, subsidiarity surfaces in constitutional texts, but its enforcement remains anemic. It is widely held in the literature - and judicial praxis - that subsidiarity is constitutionally underenforced, and supposedly rightly so since it is but a political rule, either non-justiciable or very marginally. I will argue that subsidiarity is a legal principle, and will demonstrate through comparative studies how precisely it can and ought to be enforced. From a comparative study of subsidiarity-like clauses such as art. 72 II of the German *Grundgesetz*, the ‘peace, order, and good government’ clause of the Canadian Constitution Act, article 118 of the Italian Constitution, and article 5(3) of the Treaty on the European Union, I’d like to engage with the possible strategies for enforcement, which include *Better Regulation* programs, procedural mechanisms such as the EU protocol n. 2, and judicial review. These mechanisms, and their interaction, further the compliance with the principle of subsidiarity.

The conclusion will highlight possible future improvements to the enforcement of the principle of subsidiarity at the general level, and as applied to the EU. A better



enforcement of subsidiarity may help determining a more justified scope of autonomous exercise of powers by governmental levels - subnational levels included.

Key-words

Subsidiarity, multilevel governance, legitimacy, judicial review



As argued by Popelier in this Special Issue, subnational constitutionalism has to be perceived on a dynamic scale, positioning subnational levels of government vis-à-vis other levels (Popelier 2014: 19). The principle of subsidiarity contains a promising regulative optimization in this respect: it may determine the most proper level for the exercise of power in terms of relative efficiency and democratic legitimacy. The operation of this principle in a domain of shared competences may potentially allow both subnational and other levels of government to assume tasks and execute policy, subject to an ad hoc test justifying its aptitude as required by the principle of subsidiarity. However, the judicial enforcement of this principle is anaemic.

1. Introduction: the Problem of Constitutional Underenforcement of Subsidiarity

The research presented here studies the legal enforcement of the principle of subsidiarity. Though this principle is in ascendance throughout multi-tiered legal systems, its enforcement is suboptimal, especially constitutional review for compliance with subsidiarity. Frequently held to be non-justiciable for lack of clear standards, or even a mere political *Klugheitsregel*, judicial scrutiny of legislative acts for compliance with subsidiarity is inept. For instance, commentators have noted that the European Court of Justice considers the requirement of subsidiarity as laid down in article 5(3) TEU to be satisfied when the objective of the legislative act concerned is clear. Subsidiarity review appears thus reduced to a mere verification of legal basis in the Treaties.

Judge von Danwitz of the ECJ posited in 2010 that the “*judicial control of subsidiarity has to focus on what the ECJ in a meaningful way can review.*”^I (Von Danwitz 2010: 45). It appears that subsidiarity review entails such questions, related to efficiency and legitimacy of governmental action, which cannot be answered in a traditional doctrinal way. Constitutional judges hence, seem ill equipped to answer such questions. The Treaty of Lisbon indicated the widespread agreement on the lack of meaningful review of EU subsidiarity, and opted to install an additional legislative procedural mechanism, preceding judicial review, by endowing the National Parliaments with a scrutiny mechanism.^{II} This procedural mechanism grants the political bodies a role, which has led some to sustain that the principle in turn is of a political nature. However, one is hard pressed to find a norm in



a constitutional text that is not ‘political’, i.e. touching upon the will of democratically elected representatives. Indeed, the whole area of constitutional law aims precisely to regulate the political realm.

Other legal systems have struggled with the judicial enforcement of subsidiarity, too. The German harbinger of article 5(3) TEU, namely article 72, II *Grundgesetz* contains the necessity-requirement for the federal exercise of concurrent competences. From 1952 (first case before to *Bundesverfassungsgericht*) to the reform in 1994, review for compliance with this necessity-requirement was deemed ‘*eine nicht-justitiable Frage des gesetzgeberischen Ermessens*’. In other words, the assessment of the German federal legislator on the fulfillment of ‘necessity’ was sufficient and would only be scrutinized for a manifest error.

The two main arguments and have to be treated separately: a) the lack of meaningful and operable judicial standards precluding subsidiarity review, and b) the political nature of the principle, which requires a large degree of judicial restraint, and possibly even recourse to other enforcement mechanisms other than the traditional judicial policing of competence boundaries. The constitutional underenforcement of subsidiarity in systems where the norm is present relies principally on these two arguments. Both entail a serious challenge in order to present solutions ameliorating the legal enforcement of subsidiarity.

Before these questions can even be addressed, it is of great importance to offer semantic clarification with respect to this “principle of subsidiarity”. Although definitions vary, the commonly shared denominator of the principle of subsidiarity indicates the search for an optimal allocation and exercise of governmental authority in terms of efficiency and legitimacy. The next section will address the meaning of subsidiarity and its role in sustaining legitimacy in multilayered legal systems. Thereafter, a comparative selection of cases will be analyzed in order to provide an overview of judicial techniques for scrutinizing subsidiarity.

2. The Principle of Subsidiarity in a Context of Multilevel Governance

2.1. Legitimacy

Multilevel governance is the umbrella concept through which political science addresses the postmodern world where “the functions and the authority traditionally assumed by the nation-state are being diffused and fragmented among a wide range of



actors (both public and private) and at many different levels.” (Howse & K. Nicolaidis 2001: 1). An increase in the cross-border relationships and in global problems diminishes the connection between the territorial jurisdiction of the state and the bond with its citizens (Sieber 2010: 19). The term governance denotes “the regulations brought about by actors, processes as well as structures and justified with reference to a public problem” (Zurn, Wälti & Enderlein 2010: 2). The multilevel aspect signifies the interdependence of actors operating at different territorial levels – local, regional, national, supranational, global – while governance refers to the growing importance of non-hierarchical forms of policy-making, such as dynamic networks which involve public authorities as well as private actors. (Kohler-Koch & Larat 2009: 8). In a more positive sense, multilevel governance is a system by which the responsibility for policy design and implementation is distributed between different levels of government and special-purpose institutions.

At the root of modern constitutional thought lies the idea that the exercise of power is connected to the common good and the interests of the citizens constituting a jurisdiction. The simplicity of this circular conception of legitimacy from a user-perspective yields certain attraction. However, scaling down the level of abstraction in that statement reveals quite a bewildering complexity of institutions, constitutions, treaties, public entities, and governments. This complexity cannot be tamed through a hierarchical pyramid, but rather constitutes a heterarchical network (Ladour 1997: 33-54; Bernard 2002: 8-11; Piattoni 2010: 250-51). The *prima facie* lack of coherence threatens the basic notion of legitimacy that underlies democracy and the rule of law.

Multilevel governance challenges the normative underpinnings of traditional democratic legitimacy. A close-knit connection between the legality of a norm and its legitimacy does not suffice in a context of pluralism. Black-box concepts such as national sovereignty have become obsolete, and the essence of the democratic principle requires a recalibration in view of legal pluralism and multilayered interconnectedness. Moreover, as Walker argues, democracy becomes dislodged from the development of a self-conception of a common political community and is located instead in disaggregated and mobile virtues of institutional arrangements (Walker 2007: 253). In particular, Walker adds, epistemic, deliberative and practical considerations bring the importance of the output of a decision making process at par with the input (Walker 2007: 253). This language of differentiation, territorial or functional, reflects different sources of legitimacy: the



territorial nation-state tradition, and the civil society functional tradition (Piattoni 2010: 259). The context of multi-level governance urges a conception of legitimacy that is capable of addressing the abovementioned complexity at three dimensions: input (e.g. stakeholders and governmental levels), decision-making processes, and output (Scott 2009: 160-173). Hence, the design of multi-level governance in terms of legitimacy needs to orient itself towards a procedural perspective (Nicolaidis 2001: 443; Dawson 2011: 105-120). In this sense, legitimacy pierces through the black box understanding of sovereignty.

Post-Westphalian legitimacy is thus built upon classical concepts as positive and negative legality, and combined with input, output, and process legitimacy (Craig 2011: 13-40; Føllesdal 2008: 380-382; Popelier 2011: 555-569). Input and output legitimacy refer to specific characteristics of democratic legitimacy, judged respectively in terms of a legal system's responsiveness to citizen interests as a result of participation (input), and in the welfare-enhancing policy outcomes for the people. The third dimension, i.e. legitimacy as established in a procedural sense, assesses the quality of the governing process, by standards of deliberation, and of justification in terms of vertical institutional balance. In an interconnected environment, where multiple centers of authority co-exist and interact, this vertical balance forms an important aspect of the process-legitimacy of decision-making (Schmidt 2013: 2-22). The constitutional pluralism literature, theorizing the overlap of states^{III}, in particular connects to the vertical dimension of this broader legitimacy concept (e.g. Sarmiento 2012: 343-45). In this vein, a discursive and interactive process of constitutional argument constructs legitimacy at a meta-level. With these broad requirements of legitimacy in mind, how does the principle of subsidiarity relate to them?

2.2. Subsidiarity

The principle of subsidiarity regulates authority within a political order, directing that powers or tasks should rest with the lower-level sub-units of that order unless allocating them to a higher-level central unit would ensure higher comparative efficiency or effectiveness in achieving them (Kalkbrenner, 1972: 522; Höffe, 2007: 87; Føllesdal, 1998: 190; Carozza, 2003: 38). In other words, subsidiarity contains the proposition that action to accomplish an objective should be taken at the lowest level of government capable of effectively addressing the problem (Bermann 1993: 97). The principle of subsidiarity is viewed as the epitomic illustration of competence divisions in a multi-layered context.



Features of the measure at hand will connect to the characteristics of the most “apt” governmental level, and thus determine the *locus* of decision-making or execution of a measure (Trachtmann 1992: 469). The validity of competence-exercise is formally predetermined by the requisites of efficiency and legitimacy, the twin rationales of subsidiarity. Instead of opting for a fixed and rigid division of competences, subsidiarity thus requires and individual argumentation to ensure the optimal exercise of competences (Gamper 2006: 121-125).

The *ethos* of subsidiarity can be described as bipolar: on the one hand, it fosters the preservation of lower unit autonomy, and on the other hand, it furthers a centralizing tendency based on arguments of comparative efficiency (Biondi 2012: 220). The legal principle of subsidiarity demands that a trade-off is made and argued between the requirements of efficiency and democratic (input) legitimacy, as to bolster overall legitimacy by establishing the adequateness of the spatially situated rule-maker, and fostering power sharing and cooperation. Thus, subsidiarity is to be understood as a formal and structural principle, creating an argumentative space. As such, it provides a structured test of justifiability, not unlike the principle of proportionality.

This structured justification aligns neatly with the dimensions of legitimacy set out above. Subsidiarity requires a clear indication of the additional benefit of a legislative proposal (output). Where it calls for complementary action or a margin for lower level differentiation, subsidiarity furthers a vertical balance. Additionally, by requiring compliance with subsidiarity, the procedure is rendered legitimate since it takes the lower level interest or capacity into account (process legitimacy). Additionally, where particular mechanisms such as the EU early warning system for national parliaments are in place, the input legitimacy is enhanced.

3. Comparative Analysis of Subsidiarity Clauses

This section identifies several instances of the principle of subsidiarity in different legal systems. Each of these instances will be briefly discusses, with a focus on the enforcement mechanisms in place.^{IV}



3.1. Art. 72 II *Grundgesetz*

The concurrent competences, shared between the Länder and the Federal level are enumerated in art. 74 GG. Following the presumption of ar. 72 I GG, the Länder enjoy a *prima facie* competence in these domains. However, the federal level can exercise its competence, excluding regional powers, upon justifying the need requirement as laid down in the second paragraph of article 72.

Table 1: three consecutive versions of the necessity-requirement

1949	1994	2006
<p>The Federation shall have the right to legislate on these matters, to the extent that a requirement for federal regulation exist, insofar as</p> <ol style="list-style-type: none"> 1) a matter cannot be effectively regulated by the legislation of individual Länder, or 2) the regulation of the matter by a State law might prejudice the interests of other State(s) or the people as a whole, or 3) the maintenance of legal or economic unity, especially the maintenance of equality of living conditions beyond the territory of any one State, necessitates such regulation. 	<p>The Federation shall have the right to legislate on these matters, when and to the extent that the restauration of equivalence of living conditions throughout federal territory or the preservation of legal or economic unity in the interest of the nation requires a federal regulation.</p>	<p>The Federation shall have the right to legislate on matters falling within clauses 4, 7, 11, 13, 15, 19a, 20, 22, 25 and 26 of paragraph (1) of Article 74, if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.</p>

The initial version of the necessity clause required a mere ‘Bedürfnis’ (need). The scrutiny of this ‘need’ requirement and the criteria of § 2 by the *Bundesverfassungsgericht* has proved to be - at best - marginal.^V The Federal Constitutional Court, after one initial substantive judgment on subsidiarity^{VI}, declared the necessity-requirement a by its nature non-justiciable question. The case at hand concerned federal legislation on chimney sweeping^{VII}, and the Court declared concerning the need-requirement:

“Dabei ist zunächst zweifelhaft, ob das BVerfG das Vorliegen eines Bedürfnisses überhaupt prüfen kann oder ob es sich hier nicht [...] um eine nicht-justitiable Frage des gesetzgeberischen Ermessens handelt. [...] die Zuständigkeit des BVerfG zur Prüfung der Bedürfnisfrage – von Fällen eines Ermessensmißbrauchs durch den Gesetzgeber abgesehen – zu verneinen.”^{VIII}

Following suit to a constitutional revision in 1994 sharpening the necessity clause^{IX}, the



Bundesverfassungsgericht intensified its review. In the 2002 *Altenpflegegesetzurteil* the Federal Constitutional Court delineated its review of the newly shaped article 72 II GG.^X The Court distinguished between (a) the determinants of Art. 72 § 2 and their possible concretization, and (b) the legislature's discretion in the fact gathering and interpretation and the prediction of future developments (*Prognosen*). In order to give a concrete determination to the criteria a given by the GG in §2, i.e. the restoration of equivalent living conditions and the preservation of economic and legal unity in national interest, the Court focused on the objective, the *telos* of the federation: the interest of the nation and the benefits of integration.^{XI}

Regarding *the restoration of equivalent of living conditions*, the Court specified that in order to establish the necessity, the replacement of 'unity' (*Einheitlichkeit* in the old version) with 'equivalence' (*Geleichwertigkeit*) established a higher threshold for federal legislation. No mere discrepancy in, for instance, median income, would justify 'necessary' federal legislation. What was required, according to the Court, was that the living conditions in the Federation had diverged in a substantial manner, that they threatened the social system of the federation, or that such a development could be presumed to be imminent.^{XII} The federation was obliged to provide evidence in a dutiful manner to buttress this proposition.

Regarding *the preservation of economic and legal unity in national interest*, the Court emphasized that a mere divergence in legal unity was precisely a consequence of a federal system, and could therefore not constitute the required 'necessity'. What was required was a differentiation with problematic consequences (*Rechtszersplitterung mit problematischen Folgen*). With regards to economic unity, the Court required proof that individual *Länder* regulations (or the absence thereof) would constitute a substantial threat to the national economic system. This requirement had to be approached from the perspective of national, that is combined federal and *Länder* interest.^{XIII}

With regards to the legislative fact gathering and the forward-looking predictions, the Court specified that its power of judicial review also extended to the factual determinations of the legislature.^{XIV} The determination of necessity was fully justiciable, according to the Court. Nevertheless, there exists a certain margin of discretion, especially when it comes to future prognoses. The legislature does have to meet certain requirements when making forward-looking assessments: clarity, inclusion of all relevant options and elements, exclusion of irrelevant elements, and methodological consistency. The legislature cannot



simply state broad objectives; it has to differentiate and articulate separate concerns and objectives, when possible with empirical data: actual facts, forming the foundation for the prediction, have to be submitted.^{xv} When this legislative factual assessment, with or without forward-looking elements, forms part of a judicial inquiry, the *BVerfG* does grant a margin of discretion, but is not bound by the determinations of the legislature (Messerschmidt 2000: 946). Subsequent case law of the *BVerfG* has confirmed and strengthened the reasoning on the necessity requirement: in matters of criminal sanctions on dangerous dogs^{xvi}, shop trading hours,^{xvii} junior professors^{xviii} and student fees and unions.^{xix} In the latter case, Court repeated its criterion of the substantial effect on economic unity. Moreover, the Court's reasoning offers a prime example of judicial scrutiny of legislative predictions: the clarity, methodological consistency, and inclusion of relevant facts to construct these legislative future findings, have to support the 'substantial effect'. In this case, the Court found the evidence rendered lacking.

The federal reform of 2006 did not alter the wording of the necessity-clause, although it did restrict its material scope of operation by reducing the list of concurrent competences.^{xx} For our purposes here, the methodological approach of the Court still stands (Wagner 2011: 44) as confirmed in case on the *Gentechnikgesetz*.^{xxi}

3.2. Art. 5(3) TEU

Article 5(3) TEU requires the EU to enact legislative measures under the shared competences "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

i. Judicial enforcement

There is little added value in the comprehensively reiteration of the older case law from the 1990s.^{xxii} de Búrca concludes that two readings are possible from these older cases: one is that the standard for the judicial review of subsidiarity amounts to nothing more than 'showing an adequate Treaty basis for action'; the other possible reading is that although the Court did require detailed reasoning, and analysed the legislative reasoning in the recitals, it did so in an unsatisfactory manner (de Búrca 1998: 223-226). Specifically



regarding subsidiarity, the Edinburgh guidelines^{XXIII} and specifications remained absent from the Court's argumentation. Thus, the standard for review was very low indeed (Estella 2002: 156).

For the study of judicial review, the 2010 *Vodafone*^{XXIV} case is the most interesting. Especially the Opinion of the Advocate-General, M. Maduro,^{XXV} was extensive in its reasoning and provided a profound analysis. He proposed to elaborate upon the subsidiarity analysis with further indicators. First, the case clearly featured transnational aspects, since the Directive concerned roaming, retail and wholesale charges, and as such, captured roaming charges originating from providers in other Member States.^{XXVI} Further, the AG noted that the national regulators 'have no incentive to control the wholesale rates which will be charged to foreign providers and the customers of such foreign providers.'^{XXVII} Subsequently, he discussed the difference between retail and wholesale, noting the intimate connection between the two. Then, after identifying the objective of the directive, he approached subsidiarity in a legal fashion and emphasized the judicial role: 'In my view, neither the objective pursued by the Regulation nor the intent of the legislator is decisive for the purposes of assessing compliance with the principle of subsidiarity.'

Then the AG continued to scrutinize the arguments put forward by the Commission, by augmenting the burden of the obligation to state reasons:

'Price differences exist in almost any domain among Member States. Such differences in prices may or not entail competitive advantages for the economic operators of some Member States. As in many other areas, it may simply mean that prices vary between Member States. In this respect, there seems to be no clear difference from the market for domestic calls where economic operators may also be subject to different price ceilings. Furthermore, not all competitive advantages can necessarily be labelled as a distortion of competition. The Community legislator would have to develop an argument in support of this conclusion and it failed to do so.'^{XXVIII}

Decisive, according to the AG, were both the cross-border elements of the issue, and the functional suitability of the legislator.

'The decisive argument derives, however, from the cross-border nature of the



economic activity to be regulated. [...]. Due to the transnational character of the economic activity in question (roaming), the Community may be both more willing to address the problem and in a better position to balance all the costs and benefits of the intended action for the internal market.

It is the cross-border nature of the economic activity itself that renders the Community legislator potentially more apt than national authorities to regulate it even at the level of retail charges. Given that the vindication of Community law rights was at issue, the Community legislator may reasonably have concluded that national regulatory authorities may not have attached the degree of priority to such rights which the Community legislator thought necessary. [...] Moreover, roaming is a small part of those services and demand for roaming is less than demand for domestic communications. While regulating this market, one could expect that the focus of national regulators would be on the costs, and other aspects, of domestic communications and not on roaming charges. It is the Community, by virtue of the cross-border character of roaming, that has a special interest in protecting and promoting this economic activity. This is the precise type of situation where the democratic process within the Member States is likely to lead to a failure to protect cross-border activity. As such one can understand why the Community legislator intervened.^{XXIX}

This opinion elaborates on elements pertaining to the two criteria of article 5(3) TEU: the added value of EU action, and the insufficiency of Member State action. However, the extent to which the legal forum and actors are equipped to address such issues may vary, depending on the case at hand. The Court, for its part did not treat the arguments in a similarly extensive manner. However, it did show some improvement compared to earlier case law, particularly since the Court delved deeper into the justification offered by the legislature. It reviewed the crucial Recital (no.14) in this respect, which in turn referred to the impact assessment (Keyaerts 2010: 880). This was a crucial determinant for the subsidiarity review. The Court based its judgment on the factual consideration that a harmonisation of roaming charges necessitates both wholesale and retail charges, because of their high interdependence. The Court approached the question to subsidiarity in a two-stage process: first, the competence to coordinate retail charges was investigated and



scrutinised; secondly, the high interdependence, as apparent from the Recital, justified the broadening of the scope of applicability of the Directive.

The other case on subsidiarity of the past years, *Luxemburg v Council*,^{xxx} does not yield any further insights with respect to subsidiarity review.

The ECJ has been demonstrated cautious approach to subsidiarity, showing a high degree of deference to legislative discretion on the grounds of legitimacy or methodology. Subsidiarity seems to epitomize the political question doctrine in this respect.^{xxxii}

ii. Procedural enforcement: the Early Warning System

Protocol no. 2, annexed to the Lisbon Treaty, installs a complementary enforcement mechanism, endowing the National Parliaments an advisory role. This *Early Warning System* institutionalizes participation of national parliaments as a political safeguard (Schütze 2009: 256-265), primarily designed to protect national autonomy and providing a counterweight for dominance displayed by the executive organs in EU institutional design and policy-making.^{xxxiii} The *Early Warning System* sets up a collective monitoring system by National Parliaments, a compulsory form of consultation that increases the input legitimacy of EU legislation (Cygan 2013: 159).

Simultaneously, by informing the Commission of national impact and interests, it allows for the EU to interfere in a complex environment, which calls for the issuing of flexible and differentiated regulatory frameworks. The subsidiarity mechanism thus functions as prime tool for ‘bringing Europe closer to the people’, and enhancing transparency and the scrutiny of EU legislation (Kiiver 2012: 148). In this respect, the *Early Warning System* furthers an institutional dialogue and aims to foster a deliberative exchange. The lack of coordination mechanisms provided in the Protocol cast a shadow of doubt on the practical influence of the mechanism (Kiiver 2012: 132). The EWS however, does not elevate the collective National Parliaments as a third chamber of the EU legislature because of the absence of a veto right (“red card” in the jargon). Moreover, practice reveals that National Parliaments do not share a common conception of material subsidiarity scrutiny, and do not restrain themselves in the drafting of the reasoned opinion to a concise legal approach to subsidiarity. Instead, as was the case in the first yellow card on the right to take collective action^{xxxiii}, the arguments raised by the national parliaments triggering the yellow card pertained to legal basis, proportionality and/or the political merits of the proposal,



without assessing subsidiarity (Fabbrini & Granat 2013: 138).

From the perspective of legal enforcement, it seems that the current set-up and practice of the EWS still misses important aspects. Conversely, the political value of the mechanism, both enhancing transparency of EU legislative decision-making, and activating National Parliaments with respect to EU matters, is established.

3.3. Canada: Pogg and the Principle of Subsidiarity

Across the Atlantic, subsidiarity has also surfaced. In my opinion, two separate norms have to be analyzed: the judicial interpretation of the peace, order, and good government clause as a joint to allow for federal intervention in provincial powers, and the judicial invocation of the principle of subsidiarity in a foursome of cases in the last decade.

i. Peace, order and good government

The *pogg clause* of Section 91(1) serves to grant federal legislative authority in three ways, labeled ‘branches’: the gap branch, the national concern branch and the emergency branch (Swinton 1992: 126; Hogg 2007: 17-5; Baier 1997: 279). This clause contains a version of subsidiarity (Halberstam 2012: 594): under the ‘national concern’ interpretation, in order to determine whether the federal legislator is competent to act on a certain subject matter, the Court employs, amongst others, the provincial inability test to verify whether the issue is indeed better regulated at the federal level. This is a limited version of subsidiarity, in the sense that no inverse mechanism operates in favour of provincial autonomy (Brouillet 2011: 621). The premise is rooted in an evolutionary approach to division of powers, the Lords in the Privy Council held in 1896 that:

“ [...] some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion.”^{XXXIV}

After the Second World War, the national concern interpretation resurfaced, in the case *Canada Temperance Act* and was given its definition:

“[...] the true test must be found in the real subject matter of the legislation: if it is



such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole, then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specifically reserved to the Provincial Legislatures.”^{xxxv}

Examples of this ‘national concern’ inherent in a certain subject matter are aeronautics^{xxxvi}, the establishment of a national capital region^{xxxvii}, and the seabed natural resources.^{xxxviii} However, beyond endowing these particulars act with a degree of national concern, these cases offer no abstract criteria by which to judge the applicability of this branch of the pogg power. For instance, ‘inflation’ is too broad a description to qualify as a matter within the national concern branch of the pogg power.^{xxxix}

The controlling case and standing precedent is *R v Crown Zellerbach* where the Supreme Court offered a template to assess this attainment of national concern. The case concerned the federal Ocean Dumping Control Act, which prohibited dumping at sea, but was challenged on its application to marine waters within the Boundaries of the Province of British Columbia. The Court formulated the criteria to establish this national concern^{xl}, retaining the following determinants: (1) singleness, distinctness and indivisibility, (2) without being a mere aggregation of matters to differentiate it from matters of solely provincial concern, and (3) a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power.

To establish the first criterion, the Court added the test of provincial inability. Provincial inability seemed a more justifiable litmus test than the qualification of national concern. The Court took its cue from an article by Dale Gibson, and cited approvingly his definition:

“By this approach, a national dimension would exist whenever a significant aspect of a problem is beyond provincial reach because it falls within the jurisdiction of another province or of the federal Parliament. It is important to emphasize however that the entire problem would not fall within federal competence in such circumstances. Only that aspect of the problem that is beyond provincial control would do so. Since the “P.O. & G.G.” clause bestows only residual powers, the existence of a national



dimension justifies no more federal legislation than is necessary to fill the gap in provincial powers. For example, federal jurisdiction to legislate for pollution of interprovincial waterways or to control "pollution price-wars" would (in the absence of other independent sources of federal competence) extend only to measures to reduce the risk that citizens of one province would be harmed by the non-co-operation of another province or provinces." (Gibson 1976: 34-35).

Provincial inability serves as a bottom-up approach to establish the singleness, distinctness and indivisibility of a matter. A legislative matter of national concern needs the federal ability to impose uniform legislative treatment. This need for uniformity rests on the "interrelatedness of the intra-provincial and extra-provincial aspects of the matter".^{XLI}

Provincial inability was not a new concept in 1988. In a few cases, this test was proposed by the federal government defending its legislation under the national concern branch of the pogg clause, but as a necessary condition for the exercise of federal power. I.e. the test of provincial inability was not met by the federal government, national concern was excluded as a justification (Baier 1997: 289-290). *Schneider* is such a case, where the federal jurisdiction was rejected because

"there is no material before the Court leading one to conclude that the problem [...] is a matter of national interest and dimension transcending the power of each province to meet and to solve in its own way. Failure by one province to provide [...] will not endanger the interests of another province. The subject is not one which 'has attained such dimensions as to affect the body politic of the Dominion'."^{XLII}

Provincial inability seems attractive as a criterion to maintain a federal balance. The relationship between governmental levels as expressed through a subsidiarity calculus cannot rest on a singular analysis of the policy at hand. Nonetheless, the term is not clear by itself. Swinton wonders whether the Court addresses the legal capacity of the provinces to act, or political incapacity, or even unwillingness?^{XLIII} Such a supply-side analysis entails territorial and functional determinants, hardly fit for unequivocal reasoning *an sich*, without a clear and predefined framework.



ii. Jurisprudential development of subsidiarity

Canada is an interesting point of comparison for subsidiarity, since next to the jurisprudence on the pogg clause discussed above, the principle of subsidiarity features autonomously in a number of recent Supreme Court judgments. In the *Quebec Secession Reference*, the Court stresses the importance of the principle of federalism (see Gaudreault-DesBiens 2011: 93-94 on the question of legal status). The Court also explains the central objective of the principle of federalism: in a functional sense, federalism “facilitates democratic participation by distributing power to the government thought to be the most suited to achieving the particular societal objective having regard to this diversity.”^{XLIV} Implicitly, one may infer from the previous quote that subsidiarity as the legal obligation to enact legislation at the most suited governmental level, is presumed inherent in the federal system (Gaudreault-DesBiens 2011: 103). In other terms, the division of competences as enshrined in Sections 91 to 95 is underpinned by the principle of subsidiarity.

In *Spraytech* (2001), the prelude to the majority opinion by Justice L’Heureux-Dubré brings the cooperative *telos* of the principle of subsidiarity to the forefront.

“The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity. La Forest J. wrote for the majority in *R. v. Hydro-Québec* that “the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by **governments at all levels**” (emphasis added). His reasons in that case also quoted with approval a passage from *Our Common Future*, the report produced in 1987 by the United Nations’ World Commission on the Environment and Development. The so-called “Brundtland Commission” recommended that “local governments [should be] empowered to exceed, but not to lower, national norms”.

[...] Nevertheless, each level of government must be respectful of the division of powers that is the hallmark of our federal system; there is a fine line between laws that legitimately complement each other and those that invade another government’s protected legislative sphere. Ours is a legal inquiry informed by the environmental



policy context, not the reverse.”^{XLV}

This invocation of subsidiarity is colored by the Canadian particular emphasis on cooperative federalism, stressing the interplay between the competent governmental levels (Gaudreault-DesBiens, 2011, 96). Chief Justice McLachlin explained this holding in the *Assisted Human Reproduction Reference* (2010):

“[...] in an area of jurisdictional overlap, the level of government that is closest to the matter will often introduce complementary legislation to accommodate local circumstances. In *Spraytech*, for example, the town supplemented federal pesticide controls by further restricting the use of certain substances. L’Heureux-Dubé J. decided that the town could adopt higher standards for pesticide control because the local law complemented, rather than frustrated the federal legislation. She took this as an example of subsidiarity. Moreover, as developed above, a carve-out to a criminal law would not be paramount to stricter provincial regulations.”^{XLVI}

This strand, initiated in the field of environmental law, emphasizes the possibility of concurrent application of laws, by allowing each level of government to enact legislation on a subject matter in relation to its comparative advantage. The federal government may adopt legislation as to ascertain the incorporation of externalities, to ensure uniformity, to alleviate any possibility of strategic action frustrating the objectives of the legislation in point. The complementary competence for the more local level of government aims at securing convergence with local circumstances. This reading of subsidiarity allows only an interpretative and secondary function for the principle in constructing the concurrence of competences, and the scope of paramountcy (Newman 2011: 27; Gaudreault-DesBiens 2011: 105-111). There seems to be no room for the principle of subsidiarity in Canadian constitutional law to alter the allocation of competences (Arban 2013: 219).

These cases illustrate the operation of the principle of subsidiarity within the framework of federalism as a normative concept guiding the interpretation of several doctrines that actually render shape to federalism in concrete issues. Presuming a higher degree of efficiency embodied by a federal competence, consistent with the structure of the division of powers, subsidiarity is invoked to grant more attention to provincial autonomy,



both in economic matters, as in cultural matters. The usage of subsidiarity serves to underline the importance of diversity within the federal balance. Its emergence in the case law of the Supreme Court is explained by a gradual retreat from an excessive centralizing approach to the interpretation of the division of powers under the guise of efficiency.

3.4. Italy: Art. 118 Constitution

Following a constitutional reform in 2001^{XLVII}, triggered by pressure from EU developments and local actors (Fabbrini & Brunazzo 2003: 100-120), the distribution of powers between the regions and the federal/national level has been altered. The Federal State only has regulatory or administrative powers with respect to the 17 transversal powers listed as exclusive in article 117 subsection 2. However, the Federal State can depart from this classification of exclusive, concurrent and residual powers, and legislate in regional matters, based on the principle of subsidiarity. Residual regional powers and the concurrent powers entail administrative implementation by the Regions. Adding to this division of legislative competences, article 118 invokes the principle of subsidiarity and requires that administrative functions be exercised at the lowest level of government possible, regardless of the locus of the legislative competence. The principle of subsidiarity thus expressed entails a preference for administrative action at the level of municipalities (Tubertini 2006: 37). This presumption however, can be rebutted.

The Constitutional Court labels this version ‘ascending subsidiarity’, which has to be read in conjunction with the principles of adequacy and differentiation. In the seminal judgement nr. 303/2003, concerning public large-scale infrastructure, the *Corte Costituzionale* held that the national legislature is allowed to regulate and assume administrative functions in matters falling under the list of concurrent powers, when a uniform exercise of these administrative functions is necessary. This derogation is only allowed under three conditions: first, that the derogation of regional power is proportionate to the public interest that requires uniformity at the national level, second, that the law is not unreasonable, and third, that there exist a prior agreement with the region(s).^{XLVIII} The Court indicates that it considers the principle of subsidiarity as inspiring the division of administrative powers between the state and the regions.^{XLIX} Adding to this static division as laid down in the principal division in article 118, subsection 1, the principle of subsidiarity also contains a dynamic side, which authorises a certain flexibility.^L However,



the Court is careful to add, the mere invocation of subsidiarity does not suffice to alter the division of powers, since this would detract from the rigidity of the constitution. Subsidiarity as set out above needs to follow a procedural and consensual path (Groppi & Scattone, 2006: 137), meaning that a prior agreement with the region(s) is necessary before assuming a competence at the national level when regions should be competent.

4. Comparison of Enforcement Techniques

Table 2: overview of methods of judicial review

	ECJ	BVerfG	Italian Constitutional Court	Canadian Supr Court	
Norm	Art. 5 (3) TEU	Art. 72 II GG	Art. 118 (1) Const.	Pogg clause	Principle of subsidiarity
Textual determinants	Double test: added value and insufficiency of Member State action.	- Restoration of equality of living standards. - Legal unity. - Economic unity. - Necessity requirement.	None, supplemented with adequacy and differentiation	None	None
Form of scrutiny	Rather formal.	Moderately substantive.	Procedural	Moderately substantive	Formal
Interpretative aids	- Structural analysis. - Impact assessment to provide data.	- Threshold for justification requirement. - Burden of proof: problematic consequences. - Methodological standards for fact-finding	Requires proportionality, reasonableness and cooperation	'national interest' – provincial inability	Allows local divergence – restricting federal paramountcy
Exchange with other enforcement mechanisms	Early warning mechanism	- No ex ante mechanism ^{LI}	-	-	-

It appears from the overview of enforcement techniques and the methods of judicial review that subsidiarity is contrary to the assumptions, justiciable. The judicial review is



more intense, more substantive, when textual determinants have been put forward by the constitution. If these norms are not easily subsumed in legal reasoning, then interpretative aids such as an impact assessment yield benefits. Both the *BVerfG* and the ECJ (albeit implicitly) have referred to the obligation to gather data and provide an ex ante assessment in order to construe the relevant criteria triggering a competence.

In the absence of such criteria, as for instance in the Italian and Canadian cases, the Court has to develop its own framework, which is no easy task. The Italian Court made recourse to the procedural emphasis on cooperation, while the Supreme Court deployed the principle of subsidiarity to allow for a restriction of federal intervention, protecting local divergence. As to the pogg clause, the construction of the ‘provincial inability’ test displays a clear likeness to the EU subsidiarity reference to Member State inability. In both cases, this is a difficult determinant, which would benefit from a predefined framework.

5. Strengthening EU subsidiarity review^{LII}

The function of the justification requirement of art. 296 TFEU is to enable the ECJ to undertake judicial review. However, “subsidiarity cannot be easily validated by operational criteria.”^{LIII} This does not imply that the Court should refrain altogether from reviewing because it lacks a certain epistemic ability to deal with findings of fact. This is *a fortiori* the case when an indeterminate norm in a deliberate fashion conveys vagueness towards the interpreter of the text, in order to conceal constitutional disagreement. Coherent clarification becomes paramount.

The Court may rely on two mechanisms: one substantial and one procedural. In a substantial sense, in order to strengthen the Court’s handling of the material indicators construing subsidiarity, the ECJ may turn to the impact assessment. At the procedural plane, one needs to discern between the standard of proof required from the legislator, and a judicial decision whether primary decision-maker has attained this standard (Craig 2012b: 432-33).^{LIV} This second-order review, albeit of a marginal intensity, may not be overlooked. In other words, even if the Court defers to the legislative findings to constitute a subsidiarity assessment, it should not relinquish this secondary function.^{LIV}



5.1. IA as substantive aid to interpretation

Substantial benefit could be gained from the application of the tool of impact assessment (IA), as an instrument of *ex ante* evaluation, in judicial proceedings to enhance the Court's control of subsidiarity (Craig 2012a: 78). Indeed, subsidiarity was discussed in *Vodafone* with an indirect reference to the impact assessment. But are judges equipped to deal in a substantive manner with these instruments (von Danwitz 2010: 46; Bermann 1994: 392)? Alemanno encourages the recognition of instruments of Better Regulation as essential procedural requirements, reviewable by the Court, but recognizes the difficulty of reviewing substantive aspects (Alemanno 2009: 395). The Court could approach in a formal manner the assessment by the legislator of complex underlying socio-economic indicators, by using the preparatory studies by the Commission, the impact assessments.^{LVI} The impact assessment may serve as a veritable tool for dialogue in judicial proceedings^{LVII}, offering a framework for assessing socio-economic findings and reasoning. Because methodological standards form the very basis for the epistemic superiority of the legislator, they need to be implemented and fastidiously guarded.

5.2. Process review

A counterargument might be that orienting the subsidiarity review towards the IA merely relocates the problem of substantive assessment. Can the Court second-guess the IA? Is the Court obliged to accept whatever the IA concludes? Three points are in order to this gain an understanding of this aspect of the problem: firstly, legislative discretion is not eradicated by a procedural requirement to demonstrate the basis of evidence and rationality of the decision-making (Lenaerts 2012: 16). Instead, procedural requirements from the Better Regulation program aim at providing a rational basis for making policy-choices.

Secondly, the use of the IA has to be viewed in conjunction with other enforcement mechanisms on subsidiarity, such as the *Early Warning System*. There exists a possibility for mutual reinforcement of the *ex ante* Protocol mechanism and the judicial review of subsidiarity: the Reasoned Opinions of the National Parliaments might contain useful information in construing the arguments on subsidiarity.^{LVIII}

And, thirdly, the qualitative guarantees surrounding the IA have to be taken into account: the control by the Impact Assessment Board, and the methodological standards in the IA Guidelines. Minimum standards extracted from the IA Guidelines may be



incorporated through the self-binding effect of these ‘codes of conduct’ and based on the principle of careful preparation (Alemanno 2009: 392-393). Furthermore, and analogous to the standards for the use of partisan expert evidence in judicial procedures (Barbier de la Serre & Sibony 2008: 973-977), standards should be taken into account with respect to the methodology of subsidiarity IA: peer review (e.g. screening by the Impact Assessment Board), publication, and contestability.^{LIX}

6. Conclusion

An increasingly globalized world where the twin forces of globalization and localism urge a constant re-evaluation of the appropriate level of governmental action, requires a broad concept of legitimacy, combining input, output and procedural dimensions. The principle of subsidiarity can fulfill an important role in this context. In its constitutional form it can inspire a system of competence division, and in its legislative form, it can offer a flexible mechanism that allows for the exercise of powers at the most adequate level. However, besides its normative appeal, current legal practice seems to struggle with the issue of legal enforcement of this principle, in particular the issue of judicial scrutiny. The various arguments can be boiled down to two main currents: (a) subsidiarity is inherently political and therefore unfit for review and (b) subsidiarity entails an inquiry into socio-economic determinants with which judicial review seems to struggle.

This paper has analyzed different comparative examples of subsidiarity, highlighting the several techniques deployed in judicial review, ranging from substantive scrutiny to a more procedural emphasis. I have applied these findings to the EU setting, offering essentially three suggestions: first, the use of an *ex ante* evaluation tool, such as the impact assessment, to improve deliberation on socio-economic data, second, procedural points to reinforce and scrutinize legislative discretion, and third, making use of the interaction between different enforcement mechanisms, such as the EWS. These lessons may equally apply to the relationship between subnational levels within a federal setting, and specifically to intensify judicial scrutiny for compliance with subsidiarity.

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¹ “Die richterliche Subsidiaritätskontrolle hat sich also auf das zu konzentrieren, was der Gemeinschaftsrichter in diesem Rahmen sinnvoller Weise überprüfen kann.“



- ⁱⁱ This Early Warning System is set out in Protocol no. 2 to the Treaty of Lisbon, OJ C 306, December 17, 2007, 150.
- ⁱⁱⁱ Referring to “the capacity of constitutions to embrace multiple rules of recognition without combining them into a single legal rule that enables a state to contain multiple legal systems”, see Barber, 2013:182.
- ^{iv} The paragraphs on art. 5(3) TEU and art. 72 II GG draw on Vandenbruwaene, 2013b.
- ^v “unbegrunder starke Zurückhaltung” (untenable strong reluctance) according to Knorr, 1998: 85.
- ^{vi} *Südweststaaturteil*, of October 23, 1951, 1 BverfGE 14, 35-36, invalidating a federal law concerning the extension of the legislative session in the Länder Baden and Württemberg-Hohenzollerns, on grounds of incongruence with the terms of art. 72 II GG, specifically sub 1, since the Länder were perfectly capable of taking care of the problem themselves.
- ^{vii} *Schornsteinfegerurteil*, of April 30, 1952, 1 BverfGE 264.
- ^{viii} *Schornsteinfegerurteil*, of April 30, 1952, 1 BverfGE 264, para. 272.
- ^{ix} See the report of the mixed parliamentary commission on constitutional reform of November 5, 1993, indicating the explicit intention of sharpening the criteria in art. 72 II GG in order to “enhance the justiciability of the need-requirement” *Beschluß des Deutschen Bundestages* 12/6000, 33.
- ^x BVerfG, 2 BvF 1/01, judgment of October 24, 2002. For a discussion, see Rau, 2003; Taylor 2006; Jochum 2003; Brenner 2003.
- ^{xi} See section C. II, sub 5 of the decision, para. 317.
- ^{xii} para. 321.
- ^{xiii} para. 324-328.
- ^{xiv} para. 335 combined with para. 341, where the absence of limits in this scope of review is again confirmed.
- ^{xv} para. 343 and para. 345.
- ^{xvi} *Kampfhunde-Urteil*, BVerfG, 1 BvR 1778/01 of March 16, 2004 (the differing Länder penal legislation sanctioning the import and breeding of various species of dangerous dogs, was kept in place, but the federal law purported to add additional criminal sanctions to these penalties, and hence, by definition, the federal law did not bring about legal unity and failed to comply with art. 72 II GG).
- ^{xvii} *Ladenschluss-Urteil*, BVerfG, 1 BvR 636/02 of June 9, 2004 (the federal law holding minor adjustments to the opening hours of shops did not hold the required substantial effect on economic unity – see para. 102 of the judgment. However, the law was upheld on the transitional clause of Art. 125a para. 2 GG).
- ^{xviii} In the Junior Professors case, the Court distinguished between direct and indirect effects on the economy. It noted that the *Wirtschaftseinheit* addressed in Art. 72 II GG was not directly influenced by the legislation in point. The plea from the federal government of required unitary standards in the context of international competition was found by the Court to do exactly the opposite: namely, to reinforce the need for diversification and internal competition for better regulations. Hence, the necessity was not established. It should be noted that contrary to previously mentioned cases, this decision was not unanimous, but was decided on a 5-3 majority.
- ^{xix} *Studiengebühren-Urteil*, BVerfG, 2 BvF 1/03 of January 26, 2005.
- ^{xx} This intent is expressed in the proposal for constitutional reform: *Entwurf eines Gesetzes zur Änderung des Grundgesetzes*, March 7, 2006, Bundestag, Drucksache 16/813, 8-11.
- ^{xxi} *Gentechnikgesetz-Urteil*, BVerfG, 1 BvF 2/05 of November 24, 2010, para. 123-131.
- ^{xxii} ECJ, Case 415/93, *Bosman* [1995] ECR I-5040; ECJ, Case 84/94, *United Kingdom v Council* [1996] ECR I-5793; ECJ, C-233/94, *Germany v Parliament and Council* [1997] ECR I-2441; ECJ, Case 377/98, *Netherlands v Parliament and Council* [2001] ECR I-7149. These cases date from the late 1990s, and encompass a subsidiarity plea as accessorium. The arguments were essentially procedural, and the review was considered very shallow.
- ^{xxiii} The current impact assessment guidelines [SEC(2009) 92 at 23] stipulate five questions to assess compliance with subsidiarity. They employ the substantive criteria that were developed in the Edinburgh Guidelines (resulting in the Amsterdam Protocol), and subsequently disappeared in the Lisbon version. This reallocation of the substantive criteria to the realm of soft law (IA guidelines), and away from binding primary law (Treaties and Protocol), coincides with the emphasis on political and procedural enforcement.
- ^{xxiv} ECJ, C-58/08, *Vodafone* [2010] ECR I-4999.
- ^{xxv} Opinion of AG Poiares Maduro of 1 October 2009 *in re Vodafone* [2010] ECR I-4999.
- ^{xxvi} “Transnational dimensions” was a criterion under article 5 of the Amsterdam Protocol, and now relegated to the IA guidelines, SEC(2009) 92 at 23.
- ^{xxvii} Opinion, para. 27 *in fine*.
- ^{xxviii} Opinion, para. 31.



- XXIX Opinion, para. 33 and 34 (my emphases).
- XXX ECJ C-176/09, *Luxemburg v Parliament and Council* [2011] ECR I-3727 para. 73-83.
- XXXI Further exploration in Vandenbruwaene, 2012.
- XXXII The Working group I on subsidiarity addressed this twin objective of the early warning system through the national parliaments scrutiny for compliance with subsidiarity: ‘the monitoring by the national parliaments in relation to their governments should be strengthened as regards the determination of the position of the latter on Community questions’ (CONV 286/02 p. 3).
- XXXIII COM(2012)130.
- XXXIV *The Attorney General for Ontario v The Attorney General for the Dominion of Canada (Canada)* [1896] UKPC 20 (9 May 1896). Continuing: “But great caution must be observed in distinguishing between that which is local or provincial and that which has ceased to be merely local or provincial-, and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.”
- XXXV *The AG of Ontario and others v The Canada Temperance Federation (Ontario)* [1946] UKPC 2 at p. 3 (internal citations omitted).
- XXXVI *Johannesson v. West St. Paul* [1952] 1 SCR 292.
- XXXVII *Munro v. National Capital Commission* [1966] SCR 663.
- XXXVIII *Reference Re: Offshore Mineral Rights* [1967] SCR 792.
- XXXIX *Re: Anti-Inflation Act* [1976] 2 SCR 373 at p. 457 – 458. per Beetz J: “The “containment and reduction of inflation” does not pass muster as a new subject matter. It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory. I should add that inflation is a very ancient phenomenon, several thousands years old, as old probably as the history of currency. The Fathers of Confederation were quite aware of it.”
- XL *R. v. Crown Zellerbach Canada Ltd.* [1988] 1 SCR 401 at para. 33.
- XLI *R. v. Crown Zellerbach Canada Ltd.* [1988] 1 SCR 401 at para. 34.
- XLII *Schneider v The Queen* [1982] 2 SCR 112 at p. 131. Similar use of the provincial inability test as sole determinant of national concern in cases *R v Wetmore* [1983] 2 SCR 284 (specifically at p. 296) and *Labatt Breweries of Canada Ltd. v. Attorney General of Canada* [1980] 1 SCR 914 (at p. 945).
- XLIII Swinton, 1992: 126 and 133, adding: “The provincial incapacity here rests not only on problems of territoriality, although that is a consideration, but also on problems of limited vision, [...] skeptical of the provinces’ ability to adopt a national perspective that could transcend their own regional interests.”
- XLIV *Reference Re Secession of Quebec* [1998] 2 SCR 217 at para. 58.
- XLV *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)* [2001] 2 SCR 241 at para. 3 and 4 (internal citations omitted).
- XLVI *Reference re Assisted Human Reproduction Act* [2010] 3 SCR 457 at para. 70.
- XLVII Constitutional Law no. 3 of 18 October 2011. For a background, see Amoretti 2002.
- XLVIII *Corte Costituzionale*, Decision 303/2003, para 2.2.
- XLIX Id.: (transl. in French) “[le principe de subsidiarité] Enoncé dans la loi du 15 mars 1997, n° 59 en tant que critère à la base de la répartition légale des fonctions administratives entre l’Etat et les autres entités territoriales, et étant donc déjà opérative dans sa dimension purement étatique comme fondement d’un ordre préétabli des compétences [...]”.
- L Id. “Outre la dimension statique primitive qui est évidente dans l’attribution tendancielle de la généralité des fonctions administratives aux Communes, s’ajoute une vocation dynamique de la subsidiarité, l’autorisant à ne plus agir en tant que ratio directeur et à la base d’un ordre d’attribution établi et prédéterminé, mais comme facteur de flexibilité de cet ordre, en vue de satisfaire aux exigences unitaires.”
- LI Curiously, during the debates on the German federalism reform of 2006, it was proposed to install an early warning system as an ex ante political tool to avoid litigation on art. 72 GG: Selg 2009:106 and 175.
- LII This section draws on Vandenbruwaene 2013a.
- LIII European Commission, *18th Report on Better Lawmaking*, COM (2011) 344, 2.
- LIV See also the discussion of the German *Altenpflegegesetzurteil*, supra.
- LV See for an application of the Impact Assessment via procedural requirements and substantive review in the case of US administrative law: Revesz and Livermore 2008: 157-59. An exemplary case is *Owner-Operator Independent Drivers v FMCSA*, n. 06-1035 (D.C. Cir. 24 July 2007) 494 F.3d 188 (failure to explain the methodology of its studies renders two administrative decisions arbitrary and capricious).



^{LVI} For example, in *Afton Chemical*, (C-343/09, ECR I-7027 para. 27-42) the ECJ investigated the manifest error of assessment, argued by the litigant, on the basis of the Commission's impact assessment. The Court notes the broad discretion granted to the legislator on functional grounds, i.e. the legislature is better equipped than the Court to assess "highly complex scientific and technical facts". Hence the reduction of judicial review to a marginal control, to bar manifest errors of assessment. *Afton Chemical* submitted that the IA did not support the Commission's conclusions. The Court noted its non-binding character toward other institutions, it observed moreover the "scientific basis" that the Commission is to take into account, the obligation to take new evidence or data into account, and reiterated its view on the judicial review of legislative discretion.

^{LVII} And also in the *ex ante* Early Warning System, see Kiiver 2012: 96.

^{LVIII} Especially in the hypothetical case should the Commission maintain its proposal after a yellow card issued by 1/3 of the National Parliaments.

^{LIX} For instance, in case of controversy on the methodological rigour of an impact assessment, the ECJ may appoint assistant rapporteurs or external experts to review the drafting of the IA, possible under art. 24 of the Rules of Procedure of the Court of Justice.

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Strengthening state constitutionalism from the federal Constitution: the case of Mexico

by

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Abstract

In this essay, the author explores the way in which courts have played an important role in defining the shape of Mexico's federal system and state constitutionalism in that country's emerging multi-party democratic system. Specifically, three developments are examined: a) States' constitutional reforms defining their own catalogues of human rights; b) Decisions of the Federal Electoral Tribunal enforcing the standards established in the federal constitution on how electoral processes have to be organized at state level; and c) Decisions of the Supreme Court enforcing the standards established in the federal constitution that seek to protect independence and autonomy of state judges. These developments illustrate how states have tried to use their sphere of constitutional autonomy in more creative ways, and the way in which interactions between the federal and state normative orders are taking place under the new political context.

Key-words

Federalism, subnational constitutions, constitutionalism, Mexico



1. Introduction

Mexico's federal system is organized in two separate but articulated constitutional levels: federal constitutionalism and state constitutionalism. For the last (almost) 100 years, state constitutionalism has developed within the frame allowed by the federal constitution of 1917. However, federalism and state constitutionalism were weakened for decades by the centralizing logic of the hegemonic party system that existed until 2000.¹ Yet, since the 1970s diverse political forces pushed for a series of constitutional and legal reforms that eventually led to the collapse of the hegemonic party system, and these developments have had an impact on federalism and state constitutionalism. To be more precise, the hegemonic party system had established a series of political practices that produced a centralizing effect on the actual operation of Mexico's federal system, in spite of a constitutional arrangement that allowed state autonomy. A central factor was the circumstance that the president of the Republic was *de facto* the leader of the political party that controlled most seats in both houses of the federal Congress; the vast majority of state's executives; and most seats in state legislatures. Nevertheless, increased liberalisation and democratisation pushed by democratic political forces led to competitive elections and rotation at all levels of government, producing the collapse of the hegemonic party system and its centralizing logic. In turn, this process opened up the opportunity for increased autonomy of state governments vis-à-vis the federal government.

In this essay, I will explain how courts have played an important role in defining the shape of Mexico's federalism and state constitutionalism in the emerging multi-party democratic system. I will focus on three developments: a) States' constitutional reforms defining their own catalogues of human rights; b) Decisions of the Federal Electoral Tribunal enforcing the standards established in the federal constitution on how electoral processes have to be organized at state level; and c) Decisions of the Supreme Court enforcing the standards established in the federal constitution that seek to protect independence and autonomy of state judges. These developments illustrate how states have tried to use their sphere of constitutional autonomy in more creative ways, and the way in which interactions between the federal and state normative orders are taking place under



the new political context. Moreover, the last two developments might seem as an intrusion of the federal constitution into the realm of state constitutions. Nevertheless, it will be argued that they represent an attempt of the national political and judicial processes to strengthen democracy and constitutionalism in states that have lagged behind in terms of these two political values.

2. States' constitutional reforms defining their own catalogues of human rights

I would like to say a brief word on what could be rightly called a new trend in Mexico's constitutionalism, which was made possible by the breakdown of the hegemonic party system. This trend has to do with the revival of state constitutionalism, which basically has been characterised by: a) the emergence of systems for guaranteeing the supremacy of the State constitution; and b) the establishment of human rights catalogues into State constitutions.

Under the hegemonic party system, State constitutionalism was subordinated to national constitutionalism. In other words, constitutional change in the States occurred as a consequence, as a reflex reaction, to changes in the federal Constitution. In contrast, under a multi-party and competitive system, new room for manoeuvre has been created, allowing State political actors to shape their State constitution in original and creative ways, trying to solve and respond to local needs and demands.

This trend was inaugurated by the State of Veracruz in 2000, whose congress reformed its Constitution in order to include a Chapter on Human Rights that anticipates rights not included in the federal Constitution and a clause that incorporates at the State level rights established in international treaties signed by Mexico. In addition, the reform also created procedural mechanisms for the protection of the State constitution: a) the procedure for the protection of human rights (analogous to the federal *amparo*); b) an action of constitutional controversy (to resolve disputes of competences between State branches of government, between the latter and municipal governments, or between municipal governments); c) an action of unconstitutionality (as an abstract mechanism of constitutional review at the State level); and d) an action against legislative omissions (that



seeks to force the State congress to pass a piece of legislation whose omission thus far affects mandates of the Constitution of Veracruz).

The reform was challenged through an action of constitutional controversy filed by several municipalities of Veracruz (controlled by a political party different from that of the governor and of the majority of the State Congress). Yet, the Supreme Court decided that to the extent that the Constitution of Veracruz established human rights that were different from those foreseen in the federal Constitution; and considering that the new mechanisms of constitutional review were intended to guarantee only the rights foreseen in the State constitution, it did not breach the federal Constitution.¹¹

Moreover, in that same case, several Justices of the Supreme Court argued that the national constitution is a floor, and that state constitutions are allowed to establish higher ceilings of rights for individuals.¹²

The Supreme Court's decision in the Veracruz case encouraged other States to follow the same path. However, after a period of intense debate, and relevant efforts of institutional design and normative creativity, the new trend lost momentum, mainly because of the influence exercised by an older trend that has characterised Mexico's legal and justice system: the all absorbing federal writ of *amparo*, by which State courts' decisions derived from the new procedures, started to be reviewed by federal courts. Why should plaintiffs resort to State judicial review procedures, if the decisions rendered at this level could be later reviewed by federal courts through the writ of *amparo*?

Finally, it is important to note that as Mexico's legal community was discussing these issues, a series of developments changed radically the terms and coordinates of the debate. I am referring to: a) the influence of a series of judgments of the Inter-American Court of Human Rights and specifically its doctrine of 'control of conventionality';¹³ and b) the constitutional reform of 10 June 2011 on human rights and the understanding of Mexico's Supreme Court of Justice of all the implications of the country's incorporation into the Inter-American system on human rights. These developments have meant that all courts in the land, federal and from the States, have the power to 'disapply' statutes they deem contrary to human rights established in the Constitution or in international treaties signed by Mexico. This is an important step away from Mexico's traditional 'centralised' system of judicial review (control of constitutionality), towards a 'diffuse' system of constitutional justice.



3. Decisions of the Federal Electoral Tribunal enforcing the standards established in the federal constitution on how electoral processes have to be organized at state level

A relevant element of the dynamic of Mexico's democratisation process is the increasing importance of courts in the resolution of electoral disputes. This evolution has taken place against a historical background that long resisted the intervention of courts in electoral matters.

The role of the Supreme Court of Justice (SCJ) and the Federal Electoral Tribunal (FET) in the performance of their new functions has not been without tensions (both between these courts and between them and other actors). The judicialisation of political-electoral confrontations has produced responses on behalf of different actors participating in the political process, who have tried to set up limits to the Tribunal's increased powers. In the present section we shall examine how this has taken place, focusing first on the way in which the Supreme Court has applied the standards established in the federal Constitution to the rules for organising elections at State level; secondly, we shall study how the FET has exercised its power to review, through the proceeding for Constitutional-Electoral Revision, the constitutionality of acts and decisions of State agencies that organise State elections; and thirdly, we shall analyse how the FET has defined the scope of political rights through the so-called proceeding for the Protection of Political-Electoral Rights of the Citizen.

3.1. Federal Constitutional Standards and State Rules for Organizing State Elections

Since the end of the 1980s the federal government has gradually recognised opposition victories in State and municipal elections as a way of deflecting dissent from the national arena (Selee and Peschard 2010: 12). The recognition was the consequence of political negotiation, bargaining and give-and-take, rather than of the plain acknowledgment of the results in fair and truly competitive elections. For this reason opposition parties pushed for finding a formula that allowed democratisation at the State and municipal levels.

In this way, in 1996, article 116.IV of the Mexican Constitution was amended in order to introduce a series of standards that State constitutions and electoral laws have to follow.



According to the long and detailed list of standards established in article 116.IV:

- the guiding principles in the organisation of State elections shall be ‘certainty, impartiality, independence, legality and objectivity’;
- the authorities that organise elections and those that resolve electoral disputes in the States shall be autonomous in their functioning and independent in their decisions;
- State law shall establish remedies and proceedings to challenge illegal electoral acts and resolutions;
- State law shall also establish mechanisms to guarantee equity in the access of political parties to mass media;
- State law shall establish criteria to define limits to expenditure by political parties in political campaigns; as well as limits on money contributions by supporters;
- State law shall define which acts constitute electoral crimes and the corresponding penalties.^v

Apart from these standards, the constitutional reform of 1996 also opened up the possibility of filing actions of unconstitutionality to challenge State constitutions and statutes that contradict those standards. The use that political parties have made of this mechanism for control of constitutionality of State constitutions and electoral laws, has served to shape the latter according to the standards established in the federal Constitution.

In this way, for instance, the Supreme Court has concluded that:

A. A reform of the Constitution of the State of Chiapas which sought to extend the term of the incumbent State legislators and municipal authorities beyond their regular term in order to homologate State and federal elections was unconstitutional. The reason was that this decision violated the principle of no-re-election, the right to universal, free, secret and direct suffrage to elect authorities, and the right to political participation of citizens, all of which are granted by the federal Constitution.^{vi}

B. The reform of the Constitution of the State of Jalisco that sought to remove the members of that State’s Electoral Council was contrary to the federal Constitution, whose article 116 states that the members of those State authorities shall enjoy autonomy and independence.^{vii}

C. A constitutional reform in the State of Sonora related to re-districting for the purposes of State elections was unconstitutional. The reason was that the criteria used for re-designing electoral districts was a geographic one, rather than one that takes into



account the proportion of the State population in each district, as ordered by article 116.II of the federal Constitution.^{VIII}

In sum, since 1996, standards of the federal Constitution and the action of unconstitutionality have teamed (so to speak) in order to foster democratisation at State level. Yet, after 16 years of this reform, it is possible to say that democratisation has occurred in an asymmetric manner. Some States have truly democratised, while in others powerful authoritarian interests have been able to block the emergence and consolidation of political pluralism and fair electoral competition. Equity in elections is a pending matter in many States.

3.2. The Proceeding for Constitutional-Electoral Revision

The reform of 1996 introduced into the Constitution the so-called *Juicio de Revisión Constitucional Electoral* (Proceeding for Constitutional-Electoral Revision), through which the FET can hear claims against final acts and resolutions of the competent electoral authorities of the States charged with organising and certifying elections; or to resolve disputes that arise from them, which may be relevant for the development of the respective electoral process or for the final result of the election. This proceeding originates in article 99 of the Constitution and is regulated in its details in the Law on Contesting Electoral Matters.^{IX} In essence, its goal is to challenge the unconstitutionality of acts and resolutions of electoral authorities of the States in the election of governors, State legislatures, and chief of government of the Federal District and members of the latter's legislative assembly, as well as elected members of municipalities and local authorities of the Federal District. In practical terms, through this proceeding, political parties have standing to seek revision (by the FET) of decisions of State electoral authorities potentially 'captured' by State Executives.

Specifically, this proceeding has been used to review decisions of State electoral courts rendered in connection with disputes arising out of State elections. Nevertheless, as pointed out by Berruecos, the increased power of the FET has created tensions associated with federal intervention in local conflicts, especially as the Tribunal has broad scope to interpret State legislation and to review its application by State electoral courts (Berruecos 2003: 802).



A manifestation of this tension can be seen in the debate concerning the so-called ‘abstract cause’ to nullify an election, which has been a creation of the FET case law, and has no base on an express text of the Constitution. Essentially, it means that the FET can nullify State elections when it has found that a constitutional principle concerning the organisation of elections has been violated in a widespread way, creating reasonable doubt over the legitimacy of the relevant electoral process, even if the State legislation does not expressly foresee the possibility of nullifying the relevant election. This concept emerged in the context of a challenge against the election of governor of the State of Tabasco, filed by the PRD in 2000. The result was that the decision of the Tabasco Electoral Tribunal was reversed and the election for governor in the State of Tabasco was declared void by the FET, which also ordered the Tabasco legislature to appoint an interim governor, who was in turn to call a new election within six months.^x

The creation and use of the ‘abstract cause’ to nullify State elections by the FET (as it happened in Tabasco, 2000, in Yucatán, 2001 and in Colima, 2003) fuelled an intense debate on the proper scope of the Tribunal’s powers to interpret and apply the constitutional principles contained in the Constitution relating to the organisation of elections at State level. In fact, this debate led to an amendment to article 99 of the Constitution (as a part of the reform package of 2007), which today explicitly states that: ‘The Superior and Regional Chambers of the [Electoral] Tribunal shall only declare the nullity of an election on the basis of the causes expressly established in the statute laws’.

Yet, this addition to the Constitution, which intended to limit the FET’s power to nullify elections, has not ended debate on this issue. On the one hand, in several cases,^{xi} the Superior Chamber of the FET determined that the reform of 2007 meant that no longer could it nullify a State election invoking the ‘abstract cause’. On the other hand, in 2007 the Superior Chamber of the FET confirmed the decision of the Electoral Tribunal of Michoacán which nullified the election in the municipality of Yurécuaro, State of Michoacán, on account of the use of religious symbols and elements during the campaign of the winning candidate, which violated State electoral legislation as well as both the federal and State constitutions.^{xii} In this case, the winning candidate of the PRI challenged the decision of the Tribunal of Michoacán, alleging that the nullification of the election had been based on the ‘abstract cause’, which since the 2007 constitutional reform could no longer be applied. In response, the FET concluded that Michoacán’s Electoral Tribunal



had not decided the case on the basis of the ‘abstract cause’, but had directly applied the principle of separation of state and Church of article 130 and article 35.XIX of the Electoral Code of Michoacán, which specifically prohibited the use of religious symbols and expressions in electoral propaganda.

The debate is far from settled and is a manifestation of a tension between the Electoral Tribunal’s own conception of its role and scope of its power of constitutional interpretation; and attempts by political actors to set up limits on the Tribunal through the political process.

4. Decisions of the Supreme Court enforcing the standards established in the federal constitution that seek to protect independence and autonomy of state judges

States and the Federal District have their own system of courts, which apply the statutes passed by their respective legislatures. In addition, State courts also hear commercial disputes applying commercial statutes, which are federal.^{XIII} There are different kinds of courts within those entities. Typically, there are small-claims courts at the municipal level (normally with civil and criminal cases in the hands of the same judge); there are also courts of first instance (with jurisdiction to hear State law criminal and civil cases); and there is a Superior Court of Justice, which is the appellate level in the respective State (usually divided into several chambers, specialising in hearing on appeal criminal or civil cases, and in some jurisdictions family law cases). The *Tribunal Superior* of each State works *en banc* or in plenary sessions to resolve conflicts between its chambers.

As we can see, Mexico has a dual system of courts. Both systems are connected in the following way: the decisions of Superior Courts of the States and of the Federal District can be reviewed by federal courts (in general, by the so-called Collegiate Circuit Courts), through the writ known as *amparo casación*. This is one of the most important characteristics of Mexico’s courts system, which has had an impact on the definition of our judicial federalism (highly centralised) and on the constitutional evolution of the Supreme Court of Justice, as will be explained and discussed in section IV of this chapter.

It is relevant to mention that a constitutional reform of 1986 established standards for the organisation of State courts. Indeed, as a result of this reform, article 116.III of the



Constitution establishes a series of rules that seek to guarantee the independence and efficiency of State judicial powers. These rules refer to: job stability (State constitutions and laws have to establish the conditions for entry, training and tenure of the members of the Judiciary); the requisites to be appointed as State Magistrate (the same as those required to be a Justice of the Supreme Court, found in article 95 of the Constitution); life-tenure (Magistrates can only be removed for the causes and through the procedures foreseen in State constitutions and State laws on responsibility of public servants); economic stability (State Magistrates and judges' salaries cannot be diminished during their time in office). In general terms, the goal of the 1986 constitutional reform was to foster judicial autonomy and efficiency in the States of the Republic.^{XIV}

The writ of *amparo* has had an interesting evolution in connection with the rules contained in article 116.III of the Constitution mentioned above, which can be summarised as follows: though the action of *amparo* in principle was intended to protect private individuals (or juristic persons) against unconstitutional governmental acts and resolutions, it has been used by judges who seek protection against State governors (and State legislatures) who have tried to remove them, in violation of article 116.III 'judicial guarantees'.

The first (and leading) case is the *amparo* in revision 2639/96, filed by Mr Fernando Arreola Vega. In 1986, Mr Arreola was appointed by the legislature of the State of Michoacán, upon the proposal of the governor, as Magistrate to the Superior Tribunal of that State, in principle, for a period of three years. At that time, article 72 of Michoacán's Constitution established that Magistrates could be re-appointed, in which case they would enjoy life tenure. In the case of Mr Arreola, he remained as Magistrate for 10 years, but he was never expressly re-appointed nor removed from that position by three consecutive State legislatures.

In 1996 a new governor sought to appoint 10 new Magistrates of Michoacán's Superior Tribunal, which implied the removal of the same number of Magistrates in office (including Mr Arreola). Yet, via a writ of *amparo*, Magistrate Arreola challenged his removal and the appointment of a new Magistrate in his place on two grounds:

a) The very fact that he had remained as Magistrate for 10 years (throughout the term of three consecutive State legislatures) could perfectly be understood as a tacit re-



appointment, which in the light of article 72 of Michoacán's Constitution granted life tenure (protected by article 116.III of the federal Constitution).

b) In 1996 the State legislature had approved the appointment of new Magistrates without any sort of notification to Mr Arreola, nor with any kind of explanation concerning the legal basis and the motives for the removal (against article 16 of the federal Constitution which says that all acts of authority must express their legal basis and their motives).

In its decision, the Supreme Court stated that the case should be decided by seeking to protect the value of judicial independence. In this way, the Court saw an irregular situation that had to be resolved in favour of Mr Arreola: first, if his original period as Magistrate had expired without the designation of a substitute, and if the time required by the State constitution for obtaining the right to life tenure had passed, then it had to be understood that he had been tacitly re-appointed, and that in this way he had acquired the privilege of life tenure. To understand this situation in a different way – the Supreme Court reasoned – would involve subjecting tenure to the discretion of the other powers of the State government, to the detriment of judicial independence, because through that mechanism the members of the Judiciary could permanently be maintained in a situation of uncertainty in connection with their job stability. Moreover, the Court said that the removal of the Magistrate did require an evaluation report explaining the legal basis and motives for not re-electing him.^{XV}

In other *amparo* cases whose facts were similar to the case of Mr Arreola, the Supreme Court has expanded and refined its doctrine on the judicial independence of State Magistrates. In this way, it has considered that Magistrates have the following constitutional rights:

- a) To stay in their position for the entire time allowed by the State constitution;
- b) To be re-appointed whenever they have shown through their performance in the relevant office that they do have the qualities that were recognised in them when they were originally appointed;
- c) To life tenure; that is, the right not to be removed save for the reasons and procedures established by the Constitution and the corresponding State law on responsibility of public servants;



d) To continue in their functions while the new Magistrates are designated, and until they formally take office.^{XVI}

5. Conclusions

There has been little theoretical reflection on state constitutionalism in Mexico. One reason has to do with the centralized character of Mexico's federal system and political process. Thus, constitutional scholars have tended to focus on the national constitution only.

One of the few authors that has referred to state constitutionalism, views state constitutions as “derived” from the general constitution; this “derived” normative order moves within the margins, that can be wider or narrower, allowed by the “originary” constitutionalism (Valadés 1987: 80-81). The coordinates of this margin are formed by the residual powers clause of article 124 of the federal constitution;^{XVII} the prohibitions to the states that the latter defines in its articles 117 and 118; and the rules and standards that states constitutions have to follow in the organization of state and municipal political and administrative structures (found in articles 116 and 115 of the federal constitution respectively).^{XVIII}

This means that in Mexico there is less “subnational constitutional space” than in other federal states. In other words, Mexico's national constitution is more “complete” than many other federal constitutions (Williams 2011: 1110). Indeed, Mexico's federal constitution mandates quite a lot provisions and matters be contained in the state constitutions.

One of the main arguments of this paper is that decisions of the Mexican Supreme Court and Federal Electoral Tribunal may be seen as protecting that state constitutional space, even if defined in the federal constitution, from intrusions of state governments (mostly, from state governors).

The state constitutional space as defined in the federal constitution, has not been respected in many occasions by state governments (many of which are still dominated by powerful governors, scarcely controlled by the checks-and-balances that formally exist in state constitutions). This is related to the different rhythm in which transition to democracy has occurred at the federal level and at state level. In states that have lagged behind in



terms of rule of law and democratization, local forces resort to the national political and judicial process to make state governments to respect the "subnational constitutional space".

In general terms, subnational constitutions are similar to each other. As I said before, under the hegemonic party system, state constitutionalism was subordinated to national constitutionalism, and constitutional change in the States occurred as a consequence, as a reflex reaction, to changes in the federal Constitution. In turn, this led to great uniformity of state constitutions. However, the new room for manoeuvre created with the emergence of a multi-party and competitive system, at least since the year 2000, has allowed State political actors to shape their State constitution in original and creative ways, leading to some degree of differentiation.

One example mentioned in this paper is the creation of several subnational systems for the protection of state constitutions. As we mentioned in the paper, many states have a subnational judiciary that interprets the subnational constitution;^{XIX} yet, such interpretation can be reviewed by the national judiciary, following the tradition of centralized judicial federalism that Mexico has had for many decades, through the so called writ of *amparo*. In turn, this has discouraged the development and strengthening of subnational systems of constitutional justice.

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^I By hegemonic party system I mean one in which in spite of the existence of several political parties, one of them is clearly predominant and political-electoral competition is unequal and unfair, which in turn prevents the possibility of rotation in government. Under this kind of party system rotation cannot happen. See (Sartori 1976).

^{II} SCJ, Constitutional controversy 16/2000, *Semanario Judicial de la Federación y su Gaceta*, Ninth Epoch, Plenary session, XVI, August 2002, p 903. Published in the Official Gazette of the Federation on 21 June 2000. Thesis: P.XXXIII/2002.

^{III} Minority vote of Justices Juan Díaz Romero, José Vicente Aguinaco Alemán, Humberto Román Palacios and Juan Silva Meza, published in the *Semanario Judicial de la Federación y su Gaceta*, Ninth Epoch, vol. XV, June 2002, p. 406.

^{IV} The judicial doctrine of 'control of conventionality' appeared for the first time in the Inter.-American Court on Human Rights' judgment in *Almonacid-Arellano v Chile*: '124. The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of 'conventionality control' between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.' (Inter.-American Court on Human Rights, *Almonacid Arellano et al. v. Chile*, Judgment of 26 September 2006). Later on, the



doctrine was reframed in other decisions such as Inter-American Court of Human Rights, *Radilla Pacheco v United Mexican States*, Judgment of 23 November 2009.

^v The constitutional reform of 2007 amplified this list of standards, which today is formed of 14 paragraphs.

^{vi} SCJ, Action of unconstitutionality 47/2006 (and related actions 49/2006, 50/2006 and 51/2006).

^{vii} SCJ, Action of unconstitutionality 88/2008 (and related actions 90/2008 and 91/2008).

^{viii} SCJ, Action of unconstitutionality 18/2005.

^{ix} Articles 86–93.

^x Superior Chamber of the Federal Electoral Tribunal (FET). Thesis S3ELJ 23/2004. *Compilación Oficial de Jurisprudencia y Tesis Relevantes 1997–2005*, pp 200–201. FET, SUP-JRC-487/2000.

^{xi} FET, SUP-JRC-497/2007, SUP-JRC-500/2007 and SUP-JRC-165/2008.

^{xii} FET, SUP-JRC-604/2007.

^{xiii} This happens thanks to a rule in Mexico's Constitution which allows what is known as 'concurrent jurisdiction': when only private interests are involved in a dispute that fall within the scope of federal law, plaintiffs can choose to bring their action before State courts (article 104.II of the Constitution).

^{xiv} The Second Transitory article of the Reform Decree, gave State legislatures one year to reform their constitutions and corresponding statute law, in order to adapt them to the new constitutional standards of article 116.III.

^{xv} SCJ, *Semanario Judicial de la Federación y su Gaceta*, Novena Epoca, Plenary session, VII, April 1998, p 121, Thesis: P. XXX/98.

^{xvi} Moreover, the Court has stated that these are not just constitutional rights of the Magistrates, but also constitute the guarantee for Mexico's society to have independent, professional and high-quality justice.

^{xvii} Partially inspired by the Tenth Amendment of the United States Constitution, article 124 states that "it shall be understood that the powers not expressly attributed by this Constitution to the federal authorities, are reserved to the states." Nevertheless, the number of powers that are expressly attributed by the national Constitution to the federal authorities is very large.

^{xviii} Articles 115 and 116 provide a set of matters and issues- a checklist- that should be dealt with in any subnational constitution.

^{xix} Up to 2011, 20 out of 31 states had introduced subnational systems of constitutional justice.

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The politics of sub-national constitutions and local government in Ethiopia

by

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Abstract

The federal Constitution of Ethiopia provides the regional states - the constituent unit of the federation –with the power to draft, adopt and amend their own constitutions, thereby allowing each of the regional states to use its constitution, among others, to design and adopt a system and structure of local government fitting to its circumstances. This is particularly important since the regional states differ from each other in terms of territorial size, ethnic composition and economic and social circumstances, making a one-size-fits-all approach inappropriate to the design of local government. Nevertheless, all levels of government in Ethiopia are controlled, directly or indirectly, by one party; the Ethiopian Peoples' Revolutionary Democratic Party (EPRDF). Not only does it control all levels of government, the party has a highly centralised decision-making system founded on the principle of 'democratic centralism'. Under this system, the party's regional and local structures, which also control government institutions at those levels, are involved only in the execution of decisions passed by the centre. Given such a context, the establishment and empowerment of local government – which took place in two phases – were driven from the centre. The process of establishing local government was influenced by the political exigencies the ruling party faced at particular times and the choices it made in reaction to them. This has undermined the role of the regional states and the relevance of their constitutions in creating local government systems appropriate to their circumstances.

Key-words

Ethiopia, ethnic federalism, local government



1. Introduction

Local government, which in many federal states is an exclusive competence of sub-national units (states, cantons or provinces), is barely mentioned in the national constitutions of most federal countries, let alone recognised as an autonomous level of government.^I Local government units play a critical social and economic role in many such countries,^{II} and in Germany, India and South Africa,^{III} for example, their institutional integrity is constitutionally protected and their role recognised. Yet, even so, only a few national constitutions – such as that of South Africa – go so far as to specify the number of tiers of local government and define their institutional organisation and financial sources.^{IV} In the main, therefore, the task of defining the structure, powers, functional competences and resources of local government is left to the sub-national units, which often use their constitutions for doing so.^V

The same is also true of Ethiopia, a formerly centralised unitary state that became a federal state about two decades ago. Having created nine sub-national units^{VI} (commonly referred to as regional states) and a federal city,^{VII} the country's 1995 Constitution makes a passing reference to local government, only to instruct and authorise the regional states to establish local government and determine its tiers, powers and functions.^{VIII} To this and other effects, the Constitution also authorises them to draft, adopt and amend their own constitutions, thereby allowing each of the regional states to use its constitution to design and adopt a system and structure of local government fitting to its circumstances.^{IX} This is particularly important since the regional states differ from each other in terms of territorial size, ethnic composition and economic and social circumstances, making a one-size-fits-all approach inappropriate to the design of local government.

Nevertheless, all levels of government in Ethiopia are controlled, directly or indirectly, by one party; the Ethiopian Peoples' Revolutionary Democratic Party (EPRDF). Not only does it control all levels of government, it has a highly centralised decision-making system founded on the principle of 'democratic centralism'.^X Under this system, the party's regional and local structures, which also control government institutions at those levels, are involved only in the execution of decisions passed by the centre.



This paper argues that, given such a context, the establishment and empowerment of local government – which took place in two phases – were driven from the centre. The process of establishing local government was influenced by the political exigencies the ruling party faced at particular times and the choices it made in reaction to them. This has undermined the role of the regional states and the relevance of their constitutions in creating local government systems appropriate to their circumstances. The Ethiopian case is relevant since it shows that deprived of adequate recognition in a national constitution, local government in a federal system may fall victim of changes in political weather at national level.

The paper first describes the institutional structures, powers and functions of Ethiopia's federal and state governments. This is followed by a brief discussion of the ethnic, social, and economic contexts of the regional states, after which an overview is provided of the structure, functions and powers of local government in Ethiopia. The paper then discusses the political circumstances that led to the involvement of the EPRDF-dominated federal government in the process of establishing local government, the role that the government played and the consequences thereof.

2. Federal and state government in Ethiopia

The FDRE Constitution, true to Ethiopia's federal dispensation, provides for the establishment of two orders of government structured at federal and state level.^{XI} The federal government has two federal houses: the House of Peoples Representatives (HoPR) and House of Federation (HoF).^{XII} The HoPR, the lower house, is composed of elected parliamentarians and exercises legislative power.^{XIII} The HoF, the upper house, consists of representatives of the country's ethnic communities and deals with non-legislative matters pertaining to, among other things, self-determination of ethnic communities, inter-state disputes, the division of revenue, and resolution of disputes involving the interpretation of the federal Constitution.^{XIV} The federal government also has a parliamentary executive as well as a judiciary.^{XV}

In a similar fashion, a state government is established in each of the nine regional states. Each of them, except Hareri and the SNNPR (Southern Nations, Nationalities and People's Region), has a unicameral legislative house, called State/Regional Council, with



the power to adopt a state constitution and enact proclamations on state matters.^{xxvi} In the SNNPR an upper house known as the Council of Nationalities (CoN) has similar structural organisation and functions to that of the HoF.^{xxvii} In addition, each regional state has a parliamentary executive council^{xxviii} led by a regional chief administrator or president.^{xxix}

3. Political parties and elections

Ethiopia has more than 79 registered political parties, most of which are organised along ethnic lines.^{xxx} The ruling party, the EPRDF, is a coalition of four ethnic-based political parties: the Tigray Peoples Liberation Front (TPLF), Amhara National Democratic Movement (ANDM), Oromo People Democratic Organisation (OPDO) and Southern Ethiopia Democratic Movement (SEPDM);^{xxxi} the latter, in turn, is a coalition of 20 small ethnic-based political parties.^{xxxii} The EPRDF is the ruling party at federal level, while the ANDM, OPDO, SEPDM and TPLF control the Amhara, Oromia, the SNNPR and Tigray regions, respectively.

The country also has a number of other ethnic-based political parties which are affiliated to the EPRDF without formally being member organisations.^{xxxiii} They are the Somali People Democratic Party (SPDP), Afar National Democratic Party (ANDP), Benishangul-Gumuz Peoples Democratic Unity Front (BPDUF), Gambella Peoples' Unity Democratic Movement (GPUDM) and Hareri National League; these parties control the Somali, Afar, Benishangul-Gumuz and Gambella regions, respectively.

The remainders of Ethiopia's political parties are opposition groups claiming to have policies and programmes different to those of the EPRDF and its affiliates.^{xxxiv} Most are ethnic-based, operate either alone or in coalition with each other, and almost every ethnic-based party belonging or affiliated to the EPRDF seems to have a counterpart in the opposition camp.^{xxxv}

4. The regional states and their ethnic, social and economic contexts

Given that Ethiopia's federation is a 'federation of ethnic groups', the boundaries of the regional states are demarcated along ethnic lines.^{xxxvi} None of these states is ethnically homogenous, however, even though the level of ethnic heterogeneity varies from one



region to another.^{xxvii} The states of Amhara, Oromia, Tigray, Afar and Somali each bear the name of its dominant ethnic community, but in the other states no group has a majority; this is especially true of the SNNPR, Ethiopia's most diverse state, which has approximately 56 ethnic communities. In addition, urban areas in the regional states usually have populations of ethnic migrants that run into the hundreds of thousands, if not higher. In Oromia, for example, more than three million ethnic migrants inhabit the region's many cities.^{xxviii}

Regional states also exhibit wide variation in territorial and population size. Oromia is the largest region both in territorial and population terms, followed by the Amhara regional state;^{xxix} at the other end of the spectrum is Hareri, a small city-state with a little more than 150,000 inhabitants^{xxx}. The states differ, too, in their degree of social and economic development.^{xxxi} The communities in the highland regions, which include, Amhara, Tigray, Oromia and much of the SNNPR, have a sedentary agrarian economy, while those in the lowland regions eke out a pastoralist livelihood.^{xxxii} Compared to other parts of the country, the latter areas are characterised by extremely poor economic and infrastructural development, having been marginalised by previous national regimes.^{xxxiii}

5. Local government under Ethiopia's federal Constitution

As can be gathered from the above discussion, there are immense territorial, social, and economic differences among the nine regional states constituting the Ethiopian federation. In view of these factors, no single system of local governance is likely to suit all nine of Ethiopia's regional states. The FDRE Constitution thus duly envisages that each regional state establishes a system appropriate to it by means of its constitution. The Constitution envisages the establishment of two categories of local government; ethnic and regular local governments.^{xxxiv}

The ethnic local government, or more appropriately sub-regional government, is envisaged under Article 39 (3) of the FDRE Constitution. This provision recognises the right of each ethnic community in the country to territorial autonomy, without however implying that every ethnic community can have its own regional state. Implicitly the Constitution provides that the territorial autonomy envisaged under Article 39 (3) can be exercised through the establishment of ethnic-based sub-regional territorial and political



units.^{xxxv} The regular local government is envisaged under Article 50 (4) of the FDRE Constitution. The objective for the establishment this category of local government is enhancing the democratic participation of the public and the provision of service delivery. The Constitution envisages that all of the nine regional states would establish the regular local government on wall-to-wall basis, unlike the ethnic local government, which is to be established where territorially concentrated sub-regional ethnic minorities are found.^{xxxvi}

The Constitution leaves to the regional states the determination of the number of tiers and units of local government.^{xxxvii} The question, then, is whether the states have actually done so: Have they acted autonomously and effectively in exercising their power to draft and adopt constitutionally-designed systems of local government tailored to their individual circumstances? Before engaging with this issue, though, it is necessary to obtain a synoptic view of the structure, powers, and functions of local government in Ethiopia.

6. Local government under sub-national constitutions: A brief overview

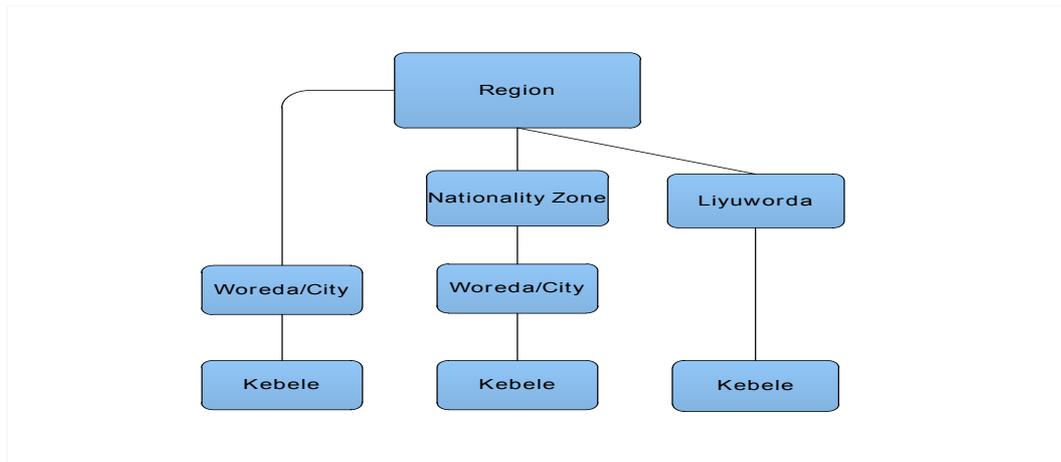
Each of the regional states has its own constitution. The regional constitutions were adopted soon after the promulgation of the federal Constitution in 1995 and underwent revision starting in 2000. They are supreme regional laws that, as discussed below, can be amended only in a special procedure, and each defines, inter alia, the structures of the local government units within the state's jurisdiction. These constitutions have established the regular or both the regular and the ethnic local governments.

6.1. The regular and ethnic local governments under the sub-national constitutions

The regular local government is made up of some 670 *woreda* and 98 city administrations.^{xxxviii} Only the *woreda* is created through the regional constitutions; cities are the creatures of ordinary regional statute. A *woreda* administration (or a *woreda*) – that is, a territorial area equivalent to a district with approximately 100,000 residents – is established in rural areas;^{xxxix} a city administration, as the term implies, is established in urban areas. *Woreda* and cities are established on a wall-to-wall basis and, as per Article 50 (4) of the FDRE Constitution, with a view to enhancing public participation and ensuring the provision of basic services.^{xl}



Fig. 2 Organisational structure of local government



Ethnic local government, made up of *liyu woredas* and nationality zones, is established as per Article 39 of the federal Constitution with the purpose of allowing intra-regional minority ethnic communities to exercise some form self-government.^{XLI} A *liyu woreda* is made up of a single *woreda*. It is called a *liyu* ('special') *woreda*, as opposed simply to a *woreda*, because its boundaries are demarcated along ethnic lines and it is meant to serve as a territorial area wherein the relevant ethnic community exercises self-government. A nationality zone is established to serve the same purpose as the *liyu woreda*, even though it is larger than *liyu woreda* as it covers two or more *woredas* inhabited by a particular ethnic community.^{XLII} A nationality zone or *liyu woreda* is not only an autonomous local unit; should the ethnic community for which it is established so prefer, it may also secede from the region where it is located to become a separate regional state.^{XLIII}

As Table 1 shows, *liyu woredas* are established in five regional states. The SNNPR (as stated, the most ethnically diverse regional state) has the largest number of nationality zones and *liyu woredas*. Amhara and Gambella have three nationality zones each. The constitution of the Benishangul-Gumuz regional state provides for the establishment of nationality zones, presumably for the region's five ethnic communities:^{XLIV} Berta, Gumuz, Mao, Komo and Shinasha. However, to date the settlement pattern of these communities has not allowed the actual establishment of nationality zones.^{XLV}



Table 1: Ethnic local government units in five regional states

Region	Nationality zones	<i>Liyu woredas</i>
Afar		Argoba
Amahara	Oromo, Himra, Awi	Argoba
Benishangul		Pawe, Mao-Komo
Gambella	Anywaa, Nuer, Majenger	Itang
SNNP	Hadiya, Gurage, Keffa, Sheka, Sidama, Silte, Wolayita, Dawro, Gedeo, Bench-Maji, Debub (South) Omo, Gamo-Gofa, and Kemabat-Tembaro	Alaba, Basketo, Konta, and Yem

Source: Regional constitutions and proclamations

6.2. Political and administrative institutions of local government

Local government units of both categories have a local council, referred to as a nationality zone council, *woreda* council, *liyu woreda* council or city council, depending on the designation of the specific local government unit. Members of the local council (save for members of the nationality zone council who, other than those in the SNNPR, are selected in a special procedure) are directly elected by the people.^{XLVI} In addition, each *woreda*, *liyu woreda* and nationality zone has an executive council, which is chaired by a ‘chief administrator’ elected by, and from among, members of the local council. A city administration has a mayor – elected by, and from among, members of the city council – and, as its executive organ, a mayoral committee.^{XLVII}

6.3. Functional competences and powers of local government

Under the regional constitutions, local government has no clearly defined competences except that the *woreda* is authorised, in general terms, to adopt and implement its own plans on matters relating to social and economic development.^{XLVIII} In practice, *woredas* exercise functions relating to the delivery of basic ‘state services’ such as education, water, agriculture and so on. Cities also provide what are referred to as municipal services – sewerage, garbage collection, urban roads – over and above providing state services



including water and education.^{XLIX} *Liyu woredas* and nationality zones are responsible for promoting the language and culture of the relevant ethnic communities. However, the specific competences they can exercise for achieving these purposes are not defined. What is clear is that, under the regional constitutions, they are authorised to choose their own working language and the language of instruction in primary schools.^L

Presumably to symbolise their special status, *liyu woredas* and nationality zones are consulted in the appointment of regional judges presiding within their territorial jurisdictions;^{LII} they also elect individuals representing the ethnic community or communities in the House of Federation (HoF).^{LII}

7. The establishment of local government and the role of the federal government

From the overview above, it is evident that there are different categories of local government in Ethiopia, each of which exists for a specific purpose. The local government units exercise powers and functions that apparently fit the purposes for which they are established. Depending on whether they are rural *woredas* or cities, the regular local government units take different forms and structures and exercise appropriate powers and functions. Moreover, only the regional constitutions of Amhara, Afar, Benishangul-Gumuz, Gambella and the SNNPR have provided for the establishment of ethnic local government; the others have not, clearly because they, the SNNPR in particular, are characterised by ethnic heterogeneity. At the same time this should not be taken to mean that other regions are ethnically homogenous. Ethnic heterogeneity in Oromia and Somali is most pronounced in their urban areas; since the latter cannot be managed through territorial schemes, no ethnic local government has been established in these regional states.

One may be tempted, therefore, to assume that each regional state has used its power effectively in adopting a sub-national constitution that delineates a system of local government suitable for managing the ethnic diversity of its people and ensuring efficient service delivery for local communities. While such a conclusion is not entirely unwarranted, it ignores the fact that the establishment of local government was driven by the central state and hence was not *per se* a regional response to regional challenges. The EPRDF-



controlled federal government drove the agenda for establishing local government, and did so in two phases. In the first, it focused on managing ethnic diversity through regional and local structures; in the second, guided by the declared aim of increasing the efficiency of service delivery and the undeclared one of settling political scores, the federal government often chose to empower regular local government at the expense of ethnic local government.

7.1. The first phase of decentralisation: Establishing ethnic local government

Decentralisation in Ethiopia began in the transitional four-year period between the EPRDF's accession to power in 1991 and the promulgation of the 1995 Constitution, a period that some scholars refer to as the 'first phase' of decentralisation and which culminated in the establishment of the federal system in 1995.^{LIII} Most of the current ethnic regional and local units were created in this phase, brought into existence by a national law at a time when the regional states did not yet have constitution-making power and regional constitutions had thus not been adopted.^{LIV}

The main political issue facing the EPRDF then was the 'nationality question', one it chose to address principally, if not exclusively, through territorial measures.^{LV} The organisation of sub-national and local territorial and political units was thus linked primarily to the need to respond to the ethnic question. As far as local government was concerned, efficiency in service delivery, administrative convenience and the like hardly featured in national policy documents until about 2000 – understandably so, because in the aftermath of 17 years of civil war, the 'nationality question' was the most pressing one of the time.^{LVI}

The constitutional principle for the creation of ethnically organised regional and local units was entrenched in the Transitional Period Charter (TPC), a constitutional document adopted at a conference hosted by the EPRDF and attended mainly by ethnic-based political movements.^{LVII} In addition, the Representative Council, the national legislative body in the transitional period, issued Proclamation 7/1992 which identified 63 territorially concentrated ethnic communities.^{LVIII} The Proclamation declared 47 of these 63 recognised communities capable of establishing their own self-government, starting at *woreda* (district) level,^{LIX} and authorised them to form self-governing areas at *woreda*, zonal, or regional level, depending on the size of each community.^{LX}



Accordingly, 14 ethnic-based self-governing regions and several other sub-regional units were established. Under Proclamation 7 (1992), minority communities in regional states with dominant ethnic communities could establish self-government at sub-regional level, beginning at *woreda* level. In accordance with this principle, the Himra, Awi and Oromo zones were established in the early 1990s in Amhara regional states. Moreover, smaller ethnic communities could join together by agreement to create a larger unit. Five of the 14 multiethnic regions opted to unite and form such a region, known today as the SNNPR.^{LXI} These formerly multiethnic regions were further divided into smaller units which have increased ethnic homogeneity and became ethnic-based sub-regional political units in the form of nationality zones and *liyu woredas*.^{LXII} *Woredas* (other than *liyu woredas*) and cities were established as deconcentrated units of the ethnic-based regions and nationality zones, without any autonomy. In this way the national transitional government, which was dominated by EPRDF, created ethnically structured territorial and political units at three levels: regional, zonal and *woreda* level.

Ethnicity continued to be a central, politically mobilising concern within the process that led to the adoption of the 1995 Constitution and the introduction of Ethiopia's current federal system.^{LXIII} The regions that were created in the transitional period were subsumed as constituent units of this system, with the exception of Addis Ababa, which became an autonomous federal city.^{LXIV} Moreover, the principle that allowed the continued existence of ethnic-based sub-regional units was entrenched in the federal Constitution.^{LXV} The FDRE Constitution, that is to say, formalised an ethnic federal system that in fact had been created during the transitional period.

Soon after the Constitution's promulgation, the regional states adopted their first sub-national constitutions, given that (as mentioned) the federal Constitution authorised them to do so. The highland regions, which are directly controlled by the EPRDF, were the first to adopt regional constitutions, followed by the lowland regional states. Some of the 1995 regional constitutions, most notably that of the SNNPR, provided that ethnic-based local units would be established at zonal and *liyu woreda* level.^{LXVI} The provisions in the regional constitutions dealing with nationality zones and *liyu woredas* purported to have created the ethnic-local units for the first time; however, most of the nationality zones or *liyu woredas* had already been established at the point when the regional constitutions were adopted. The regional constitutions therefore simply recognised the existing ethnic local



governments rather than brought them into being.

During the period under consideration, the EPRDF was willing not only to deal with the ethnic question in constitutional terms but to implement the constitutional principles by actually allowing the establishment of *liyu woredas* and nationality zones. A demand for an own nationality zone or *liyu woreda* was hence more likely to receive a positive response than be declined by regional and federal governments. Indeed, as Vaughn states, ethnic communities of ‘all sizes, claims, and credibility’ were ‘encouraged by the [EPRDF] to organise and mobilise ... for self-determination’.^{LXVII} Thus, having established political parties along ethnic lines (often prompted or assisted by the EPRDF itself), the elites of every ethnic community (or ‘ethnic entrepreneurs’) demanded their own nationality zones or *liyu woredas*.^{LXVIII} A further motive for doing so was to access the increased regional and federal funding that the establishment of such units was perceived to allow.^{LXIX} In the main, the EPRDF responded positively to such demands.

The EPRDF also used the establishment of ethnic local government units as its preferred way of settling inter-ethnic disputes in this period. For instance, the Wolayita, Gamo-Gofa and Dawro ethnic communities had been lumped together initially in one multiethnic entity known as the North Omo Nationality Zone, but violent conflict broke out in it when the Wolayitas demanded a separate nationality zone for themselves.^{LXX} The regional government acceded to the demand, with the result that the zone was divided into three nationality zones (Daro, Gamo-Gofa and Wolayita) and two *liyu woredas* (Basketo and Konta). In another case, the former Keffa-Sheka Nationality Zone was divided into the Keffa and Sheka nationality zones to resolve conflict between the Kefficho and Shekich communities.^{LXXI}

From the year 2000, however, the federal government’s ‘core agenda’ shifted from the ethnic question to ensuring ‘efficient service delivery’ and ‘equitable development’.^{LXXII} With this change in outlook, ethnic local government units came to be seen as impediments to achieving equitable development and efficient service delivery,^{LXXIII} and, having previously encouraged their creation, the EPRDF now undertook a volte-face on the matter. At first, it began to show hesitance about permitting new nationality zones and *liyu woredas*. Thus, the Silte ethnic community’s demand, based on the constitution of the SNNPR, for recognition as a distinct ethnic community and their own nationality zone was initially rejected,^{LXXIV} receiving acceptance only after lengthy litigation that involved the



HoF.^{LXXXV} Later, though, the EPRDF decided to curtail altogether any further establishment of ethnic-based territorial units. As Aalen writes:

[The Southern Ethiopian Peoples' Democratic Movement (SEPDM)] made a principled decision to separate 'identity issues' from 'administrative issues', stating that the request for new zone or special *woreda* administrations should from now on be considered from a purely administrative perspective, which was clearly separated from the right of nationalities to self-determination. It was decided that groups which before could argue that recognition of a separate ethnic identity should automatically give them the right to a separate administration would not be heard anymore.^{LXXXVI}

Hence, as will be discussed below, a process was initiated at the federal level to revise the regional constitutions. This revision, however, was not meant to abolish the existing ethnic local government units or formally proscribe the establishment of new ones as that would have been in clear violation of the federal Constitution. In fact, it was under the revised constitution of the Amhara region that the latter's three ethnic local units were recognised and their institutional organisation elaborately defined.^{LXXXVII} The revised constitution of the SNNPR also created the CoN in which the nationality zones and *liyu woredas* are represented, albeit indirectly.^{LXXXVIII}

Nevertheless, the sub-national constitutional principles allowing ethnic communities either to establish their own nationality and *liyu woredas* or to secede and form regional states became a 'dead letter' because the party decided not to implement them. So, instead of creating new ethnic local units, it began amalgamating some of the existing ones; for instance, initially the SNNPR had eight *liyu woredas*, including those for the Amaro, Burji, Derashe and Konso, but the latter were merged into one, the Segen zone.^{LXXXIX} The party has also snubbed several communities' demands merely to be recognised as distinct ethnic communities, with demands to this effect by the Raya, Qimmant, Wolene and other communities not been having granted thus far.^{LXXX} In the same vein, petitions by ethnic communities for regional states are met with swift rejection. For example, when the Berta community made such a petition, it was dismissed 'as an unpopular wish of the Berta political elite, not a genuine demand of the people'.^{LXXXI} The EPRDF has even intervened to prevent the Sidama Nationality Zone Council from going ahead with its decision to secede from the SNNPR.^{LXXXII}

Moreover, the process of revising the regional constitutions was used to weaken



nationality zones by transferring more powers and resources to regular local government units, this in order to discourage ‘ethnic entrepreneurs’ from demanding any more ethnic-based local units.^{LXXXIII} As mentioned, prior to the revision of these constitutions, the regular *woredas* and cities in each nationality zone were regarded merely as administrative units of the zones without any autonomy; thanks to the revision, they were established as local government units with a modicum of political and financial autonomy. In addition, before the second phase of decentralisation, regional financial grants intended for *woredas* were first transferred to the nationality zones, which retained for themselves whatever amount they pleased before transferred the balance to the *woredas* under their jurisdiction. Now the nationality zones are not allowed to retain more than five per cent of the regional block grants for themselves even if the grant is first transferred to them.^{LXXXIV}

The fact that most of the ethnic-based local units were created before the adoption of regional constitutions does not mean that these constitutions did not add value to them. The constitutions defined the structure of their political organs more clearly. Similarly, they defined the powers of nationality zones and *liyu woredas* to adopt their own working languages as well as the languages of instruction in primary schools. Regional constitutions also provide for the role that these local units play in the appointment of judges presiding in state courts within their territorial jurisdiction. It remains the case, however, that nationality zones and *liyu woredas* were not established originally at the initiative of the regional states themselves but were driven from the centre, leaving regional states with no choice but to recognise them constitutionally and keep them in operation. Now that the ruling party has decided not only to diminish the powers of these local units but to curtail any further establishment of them, the states once again have no option but to accede to the will of the centre and reject demands for own nationality zones and *liyu woreda*, notwithstanding that the demands are made on the basis of their own constitutions.

7.2. The second phase of decentralisation: Establishing regular local government

As described, during the transitional period *woreda* were established as the ‘basic’ unit of regular local administration within ethnically organised regional states and nationality zones.^{LXXXV} The 1995 regional constitutions created at regional level what Tsegaye calls ‘a unitary structure’ within which *woredas*, but *liyu woredas*, were merely deconcentrated units of the regional states and nationality zones, not autonomous local government units.^{LXXXVI}



This was maintained for several years even after the promulgation of the federal Constitution. Moreover, in all nine regional states the regular local administration had an almost identical structure consisting of three tiers: *kebele* (neighbourhood), *woreda* and zonal administrations. Cities remained as sub-units of *woreda* administrations, not autonomous units in their own right.^{LXXXVII}

The second phase of decentralisation sought to give *woredas* a degree of autonomy and was initiated at federal level when the Ethiopian government launched the District Level Decentralisation Programme (DLDP).^{LXXXVIII} At this stage, the official position was that empowering local government had become imperative because poverty reduction was now on the federal government's 'core agenda' and the ethnic issue, a secondary affair. The official explanation, again, was that the shift in priorities had been prompted by the country's extreme poverty and its commitment to the Millennium Declaration (also known as the Millennium Development Goals, or MDGs), which required poverty to be reduced by half in its various forms by 2015.^{LXXXIX} To achieve the goal, it was supposedly vital to enhance democratic participation by the people; this would be achieved in turn by decentralising more powers and resources from regional governments to *woredas* in order to empower the latter more fully.^{XC}

There were other, unofficial reasons for this second phase of decentralisation. The first, as mentioned, was to disempower ethnic-based local units and discourage the demand for them by 'ethnic entrepreneurs'. The second has to do with the internal power struggle in the EPRDF, more specifically within the TPLF, the most influential member of the EPRDF coalition. The political scuffle was between Meles Zenawi (the late Prime Minister and the Chair Person of both the EPRDF and TPLF) and some of the top brass of the TPL. Although the underlying reasons remain unclear, the dispute came to the fore in 2001,^{XCI} the same year that the EPRDF-led regional states began revising their constitutions with the alleged purpose of decentralising powers to *woredas*.^{XCII} Meles Zenawi apparently faced strong resistance from senior party members, including Gebru Asrat, the then president of Tigray region.^{XCIII} Furthermore, certain leaders of the other members of the EPRDF coalition and affiliate parties, including some regional presidents and senior regional politicians, sided with the dissenters following the split in the TPLF. This led to an extensive political 'purge' in the TPLF, the other EPRDF member, and affiliate parties. Dissenters were expelled from the TPLF and the EPRDF,^{XCIV} and those among them who



had been elected to represent the EPRDF at national and regional councils were 'recalled'.^{XCV}

The scuffle, it seems, also led to the structural reforms that were subsequently introduced, especially to those at regional and local government level, because the latter were aimed principally at diminishing the power of the regional government; in particular, the reforms targeted the regional presidents, who presented the most serious challenge of all to Meles Zenawi's authority.^{XCVI} These aims were served, inter alia, by empowering the regular local government units, in particular the *woredas*. Under the old regional constitutions, regional state presidents (also called chief administrators) were immensely powerful. Not only were they the head of a regional executive council but the speaker of the regional council, which gave them considerable influence over both branches of a regional government.^{XCVII} Moreover, the regional president had direct control over *woredas* and municipalities since, as explained previously, these were simply administrative units at the time – as opposed to local government units – and as such structurally subordinate to the regional government.^{XCVIII}

It would appear that it was thus decided that more powers would be transferred to *woredas* in order to diminish the power of the regional government.^{XCIX} To this effect, a process was initiated in 2000 to revise the regional constitutions of the four highland regional states. It should be noted that this revision took place in Meles' office, on his order, and without involving the regional authorities; indeed, it took place without their knowledge.^C Separation of powers was introduced in the revised regional constitutions between regional councils and regional executives; the regional chief administrator was thus no longer a speaker of the regional council. Furthermore, autonomous *woredas* were created over which the regional president ceased to have absolute control.^{CI} In short, it was not only the case that the central level determined how the regions should revise their constitutions; it literally made those revisions for them. This has had several consequences.

The first is that local government was designed on the basis of what the federal government prioritises. This can be seen in the manner that *woredas* and cities are treated under the regional constitutions. Until recently the development policies of the EPRDF were centred primarily on the rural areas. Agricultural Development-Led Industrialisation (ADLI) was the mainstay of the EPRDF's development policy.^{CII} Cities and municipalities were considered important in this policy only inasmuch as they contributed to the



development of agriculture and agriculture-based industrialisation.^{CIII} As a result, only *woredas* have been recognised by, and established through, regional constitutions; the nine regional constitutions barely mention cities, which are therefore the creation of ordinary regional statutes rather than the regional constitutions. This constitutional non-recognition of cities is not a mere oversight, however. It reflects both the developmental priorities of the EPRDF and the extent to which it controlled the processes leading to the adoption of the regional constitutions.

Moreover, the recognition of the *woreda* in the regional constitutions does not necessarily guarantee its continued existence as an autonomous local government unit. As mentioned above, the regional constitutions are supposedly supreme regional laws that may be amended only through a stringent procedure which requires an amending bill to be approved by a two-thirds majority in a regional council and by a simple majority (in some cases, a two-thirds majority) in the majority of the *woreda* councils in a particular region.^{CIV} The amendment of a regional constitution also requires the assent of the councils of nationality zones in the regions where they are found.^{CV} One may thus be inclined to assume that the regional constitutions not only guarantee the continued existence of *woredas* as autonomous local government units but also put *woredas* in a position where they can safeguard themselves from arbitrary abolition. However, as has been shown vividly above, in practice the regional constitutions are amended without strict heed being paid to the procedures they set out for this.^{CVI}

Another consequence and expression of the fact that Ethiopia's second phase of decentralisation was centrally driven is evident in the uniformity with which all of the regional constitutions structure the *woreda*. *Woreda* boundaries were defined, as per the federal policy papers, by taking population size as the principal, if not exclusive, consideration.^{CVII} The same criteria were used hence for the demarcation of the boundaries of the *woredas* both in the densely populated highland regions and in the sparsely populated lowlands; geographical factors were scarcely taken into account. Thus there are more than 105 *woredas* in the Amhara regional state, whereas there are less than 50 in the Somali region, which is almost twice its territorial size.^{CVIII} What is more, the differences in the economic activities of the highland and lowland regions were not taken into any serious consideration. The *woreda* system is therefore established both in the highland areas, where there is a sedentary agrarian economy, and in the lowland region, where the people are



mainly pastoralists constantly on the go from one place to another in search of pasture and water for their cattle.^{CIX}

Furthermore, the federal government determines the functions that *woredas* may exercise using various instruments, since the functional competences of the *woreda* are left undefined under the regional constitutions. The regional constitutions simply provide that a *woreda* may plan and implement ‘economic development and social services’ within its territorial jurisdiction, without actually defining the specific economic and social matters with respect to which *woredas* may exercise those powers.^{CX} It is hence in the federal policies, sectoral proclamations and the guidelines of the Ministry of Finance and Economic Development (MoFED) – rather than the regional constitutions – that the specific functional competences of the *woredas* are more clearly defined. The Sustainable Poverty Reduction and Development Programme (SPRDP) and the Plan for Accelerated and Sustained Development to End Poverty (PASDEP) state that a *woreda* exercises certain functions in the area of primary education, primary health care, rural water supply, rural roads and agriculture extension services;^{CXI} even so, this is not specifically indicated in the regional constitutions. Moreover, the now-defunct Ministry of Capacity Building (MoCB) had prepared a draft legislative document on the basis of which regional governments were supposed to enact their own legislation defining local government competences.^{CXII}

In its policy papers the federal government also determines the financial sources of *woredas*, given that the specific taxes *woredas* may impose, and the intergovernmental grants they are entitled to receive, are left undefined in the regional constitutions. In fact, all nine regional constitutions authorise *woredas* to collect, but not to decide on the rate of, land use fees and agricultural income tax, including royalties on the use of forests are designated as regional taxes.^{CXIII} However, the involvement of the *woredas* in connection with these taxes and fees is limited to assessing and collecting the taxes and fees on the regions’ behalf, since these are regional taxes under both the federal and regional constitutions.^{CXIV} Moreover, in terms of the regional constitutions, *woredas* are entitled neither to conditional nor unconditional intergovernmental grants.^{CXV} It is at the federal, not the regional, level that the policy was adopted requiring regional governments to transfer not less than 50 per cent of their annual revenue as unconditional block grants to *woredas*.^{CXVI} The four EPRDF-controlled highland regions first introduced a scheme of block grants and the other regions followed suit.^{CXVII}



The fact that regional states have no constitutional obligation to transfer block grants to *woredas* means that the transfer may stop at any time when there is a change in government or policy at the federal level. Such vagueness also allows regional states to deny block grants to *woredas* that fall under the control of an opposition party. This was precisely the case in the Sheko-Mejenger *woreda* of the SNNPR after the 2000 local elections, in which an ethnic-based opposition party, the Shako-Mejenger Democratic Unity Party (SMDUP), had won the majority of seats. The SEPDM, the ruling party at regional level, refused to transfer block grants to this *woreda* so that it would face ‘extreme budget allocation problems’ while under the control of the SMDUP.^{CXVIII}

7.3. A third phase of decentralisation?

In the past five years the EPRDF seems to have shifted its focus from rural to urban areas. It is a new and visible policy direction which is likely to impact on local government and hence the relevance of sub-national constitutions in regulating local governance. Some link this shift to the 2005 elections,^{CXIX} arguably the most contested in Ethiopia’s history, in which opposition parties achieved major success by winning more than 170 seats in the HoPRs. By its own admission, the EPRDF suffered harsh defeat in a number of cities, losing, for instance, all the seats in the Addis Ababa City Council to the opposition.^{CXX} Post-electoral disputes arose when opposition parties accused the EPRDF of vote-rigging and refused to join parliament. Violence broke out across the country, and opposition leaders were accused of, and jailed for, allegedly inciting it, though they were released later after a presidential pardon.

In what seems an attempt to regain the confidence of urban voters, the EPRDF began working soon after the 2005 elections on a new economic and development policy, one which was adopted by HoPRs as the ‘Growth and Transformation Plan’ (GTP) in the wake of the 2010 elections^{CXXI} in which the EPRDF and its affiliates claimed victory with 99.6 per cent of the seats in HoPRs under their control.^{CXXII} The GTP aims to transform the country’s largely agriculturally-based economy to an industrially-based one. Thus, in the past five or so years the federal government has paid special attention to cities, as evidenced by the massive infrastructural projects in Addis Ababa, Dire Dawa and regional capitals to do with roads, industrial zones, housing and the like. The colourful celebrations of ‘Cities’ Day’ (there is no such a thing as a ‘*woredas*’ day) that recently have been held



every year are sponsored by the Ministry of Urban Development, Housing and Construction (MoUDHC) and are a further sign of the attention the federal government is now lavishing on the country's urbanites.^{CXXIII}

With this transformation, however, it also seems to be showing ever less interest in rural *woredas*, and it is perhaps no coincidence that around the time the GTP was adopted, the MoCB – the Ministry responsible for spearheading the decentralisation programme and capacity-building at *woreda* level – was abolished. Nowadays a small office in the Ministry of Civil Service, staffed by a handful of people, deals with matters relating to *woredas*.^{CXXIV} Despite being recognised in the regional constitutions, the *woreda* is slowly but surely losing its position as the principal unit of local government; as its fortunes decline, so the relevance of these constitutions weakens as well – at any rate, as far as local governance is concerned.

8. Conclusion

The federal Constitution of Ethiopia empowers regional states to use their constitutions to design systems of local government appropriate to their unique circumstances. This is a critical necessity for them because their differences in ethnic composition and socioeconomic circumstances cannot be managed through a one-size-fits-all approach to local government structure. However, practice shows that the regional states play a diminished role in the establishment of local government units due to the fact that federal and regional governments alike are controlled by the EPRDF through its centralised decision-making system; the result is that the establishment of local government is instead pushed from the centre and used for implementing federal policies.

In the 1990s the EPRDF encouraged the establishment of local government units along ethnic lines, since managing ethnic diversity was considered the most serious challenge at the time. Ten years later, though, the party found that the overemphasis on ethnicity in the creation of regional and sub-regional political territorial units was leading to inefficiency in ensuring development and equitable service delivery. As such, it set out not only to disempower ethnic local governments and curtail their further creation but to amalgamate certain of the existing ones. In order to drive its agenda of achieving development, the federal government closely controlled the revision of the regional



constitutions and thwarted the implementation of the provisions of the regional constitutions dealing with ethnic local government units. In effect, the regional states are unable to decide autonomously on the system of local government they should to establish; by implication, the relevance of their constitutions to the task creating local systems is also diminished.

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^I In the classical federal systems of the USA, Canada, and Australia, local government is established as an institution of service delivery rather than a level of government with democratic pertinence. In the USA and Australia, local government is not even mentioned in their constitutions. In federal countries, such as Canada, where local government is mentioned in the national constitution, it is unambiguously stated that it is within the provinces' competence (Steytler 2005: 2; Young 2009: 113; Steytler 2009: 406).

^{II} Watts 2000.

^{III} Steytler 2009: 407; Watts 2000: 947.

^{IV} Chapter 7 of the Constitution of the Republic of South Africa, 1996.

^V Federal systems do differ, of course, from one to the next in the manner that sub-national constitutions deal with the local government. For instance, many state constitutions in the US define in detail the powers, functions, and finances of local government; by contrast, in Australia, for instance, state constitutions simply recognise the existence of local government without actually devolving any function to it (Steytler, 2009: 406-9).

^{VI} The constituent units are Afar Regional State (AfRS), Amhara Regional State (ARS), Benishangul-Gumuz Regional State (BGRS), Gambella Regional State (GRS), Hareri Regional State (HRS), Oromia Regional State (ORS), Southern Nations, Nationalities and Peoples (SNNP), Somali Regional State (SRS) and Tigray Regional State (TRS).

^{VII} In fact, there are two federal cities, Addis Ababa and Dire Dawa. However, only Addis Ababa is constitutionally recognised as a federal city. The Oromia and Somali regions have both claimed ownership of Dire Dawa. The federal state assumed power over this city because its residents are so ethnically diverse that it was considered inappropriate to place them under any of the two ethnic-based regional states.

^{VIII} The Constitution of the Federal Democratic Republic of Ethiopia (hereafter FDRE Constitution) 1995, Art 50 (4).

^{IX} FDRE Constitution, Art 50 (5).

^X See Vaughan 2005: 17.

^{XI} FDRE Constitution, 1995, Art 50 (1).

^{XII} FDRE Constitution, 1995, Art 53.

^{XIII} FDRE Constitution, 1995, Art 54 (1 & 2).

^{XIV} FDRE Constitution, 1995, Art 62.

^{XV} FDRE Constitution, 1995, Arts 72-79.

^{XVI} FDRE Constitution, 1995, Art 50 (3) & 52 (2).

^{XVII} See the SNNPR Constitution, 2001, Art 58 & 59.

^{XVIII} FDRE Constitution, 1995, Art 50 (6).

^{XIX} This is regulated in the regional constitutions.

^{XX} The website of the National Electoral Board of Ethiopia <http://www.electionethiopia.org/en/> (last visited on 19 March 2013).

^{XXI} Teshome 2008: 790.

^{XXII} South Ethiopian Peoples' Democratic Movement (SEPDM)



<http://www.eprdf.org.et/EPRDFE/faces/ssi/member.jsp?type=SEPDM> (last accessed on 28 January 2012).

xxiii Teshome 2009: 62-65.

xxiv Vaughan 2004: 17; Teshome 2009: 66.

xxv For instance, the Ethiopia Federal Democratic Unity Forum (FORUM) is composed of several ethnic-based opposition political parties. One of its members, the Southern Ethiopia Peoples' Democratic Coalition (SEPDC), is a coalition of ethnic-based parties claiming to represent certain communities in SNNPR. As such, the SEPDC may be regarded as the opposition's equivalent of the SEPDM. See Wondwosen Teshome, 2009.

xxvi Herther-Spiro 2007.

xxvii See Federal Democratic Republic of Ethiopia (FDRE) Population Census Commission (PCC) *Summary and Statistical Report of the 2007 Population and Housing Census Results, 2008*.

xxviii FDRE Census Commission, 2008; 93.

xxix More than 30 per cent of Ethiopia's population lives in Oromia. See FDRE Population Census Commission (2008).

xxx FDRE Census Commission, 2008.

xxxi Young 1999: 328.

xxxii Young 1999: 322-25.

xxxiii Young 1999: 322-25.

xxxiv See for Ayele and Fessha 2012: 92-95. Also see Ayele 2014: 128-131.

xxxv Ayele and Fessha 2012: 93.

xxxvi Ayele 2014: 153.

xxxvii Negussie 2006: 79.

xxxviii There are some 820 other urban centres, commonly referred to as 'municipalities', are not autonomous local government units but merely administrative units of the *woredas* and meant for providing municipal services. Federal Democratic Republic of Ethiopia (FDRE): Ministry of Works and Urban Development: *Plan for accelerated and sustained development to end poverty (2005/06-2009/10): Plan for Urban Development and Urban Good Governance, 2007*: 6.

xxxix Federal Democratic Republic of Ethiopia (FDRE): Ministry of Finance and Economic Development (MoFED) *Interim Poverty Reduction Strategy Paper 2000/01- 2002/03, 2000*, 13. There are, however, many *woredas* with far less than 100,000 residents.

xl Ayele 2014: 152-153.

xli AfRS Constitution, 2002, Art 43 (2); SNNPR Constitution, 2001, Art 45(2); ARS Constitution, 2001, Art 45(2); BGRS Constitution, 2002, Art 45(2); GRS Constitution, 2002, Art 46(2).

xlII See for instance ARS Constitution, 2001, Art 73 (1); BGRS Constitution, 2002, Art 45(2); GRS Constitution, 2002, Art 46(2).

xlIII FDRE Constitution, 1995, Art 47 (2) recognises the right to secession from a region. It provides that ethnic communities within the existing regions have the right to establish their own regional states.

xlIV BGRS Constitution (2002) 74(1).

xlV Van der Beken 2007: 126.

xlVI ARS Constitution, 2001, Art 74(1); BGRS Constitution, 2002, Art 75(1); GRS Constitution, 2002) Art 76(1).

xlVII In Oromia, a mayor is appointed by the regional president. See Magalata Oromia: A proclamation to amend Proclamation No. 65/2003 the urban local government of Oromia National Regional State Proclamation No. 116/ 2006.

xlVIII ARS Constitution, 2001, Art 84(1) AfRS Constitution, 2001, Art 74(1); GRS Constitution, 2001, Art 98 (1); SNNPR Constitution, 2001, Art 91(1); BGRS Constitution, 2002, Art 85(1); TRS Constitution, 2001, Art 72(1); ORS Constitution, 2001, Art 79(2) (a); SRA Constitution, 2002, Art 77(2) (a).

xlIX Ayele 2014: 163-168.

l ARS Constitution, 2001, Art 74(3)(a); GRS Constitution, 2002, Arts 78(3) (a); SNNPR Constitution, 2001, Art 81(3)(a).

lI ARS Constitution, 2001, 74(3)(g); BGRS Constitution, 2002, Art 75(3)(g); GRS Constitution, 2001, Art 78(3)(g); SNNPR Constitution, 2001, 76(3).

lII Federal Negarit Gazeta of the Federal Democratic Republic Ethiopia: Consolidation of the House of Federation and the definition of its powers and responsibilities Proclamation 251/2001: Art 47 (6).

lIII Gebre-Egziabher 2007: 1.



^{LIV} The TPC does not state anything that authorises regions to adopt their own constitutions. However, Regassa 2009 notes that the Tigray and Oromia regional states had adopted regional constitutions during the Transitional Period. It is unclear on what constitutional basis these regional constitutions were adopted.

^{LV} Fiseha 2007.

^{LVI} The Interim Poverty Reduction Programme, which articulated for the first time the role that local government may play in poverty reduction, was adopted in 1998. See MoFED, 2000.

^{LVII} The Charter recognised the right to self-determination of each ethnic community in Ethiopia as the country's 'governing political principle', a right that was to find expression in one or another form of territorial autonomy at regional or local level. The Charter also provided that the boundaries of the regional and local units were to be demarcated on the basis of these communities' geographical settlement patterns. The TPC thus laid the foundation for the establishment of ethnic local units. Negarit Gazeta Peaceful and Democratic Transitional Conference of Ethiopia: Transitional Period Charter of Ethiopia (TPC): Proclamation No. 1/1991; Preamble.

^{LVIII} Negarit Gazeta of the Ethiopian Transitional Government: A Proclamation to provide for the establishment of national regional self-governments No. 7/1992, Art 3 (1).

^{LIX} Proclamation 7/1992, Art 3 (1).

^{LX} The regions were named by number as 'region one', 'region two', etc. Regions one, two, three and four – each with a dominant ethnic community – later became the Tigray, Amhara, Oromo and Somali regional states, respectively. Regions six, seven, eight, nine, ten eleven and twelve were multiethnic regions with no particularly dominant community. Region 13 was the City of Harar (for the Harari community), while region 14 was Addis Ababa. The other 17 ethnic communities (also called 'minority nationalities') were found to be too small to exercise self-governance even at the lowest level, i.e. at *woreda* level. Proclamation 7/1992, Arts 3-5. See also Kinfu 1994: 26.

^{LXI} Vaughn argues that the amalgamation of these regions took place at the behest of the EPRDF. See Vaughn 2003.

^{LXII} For instance, the former Region 11 (also known as Keffa region), which had ten ethnic communities within it, was divided into four nationality zones when it joined the SNNPR (Keffa, Sheka, Bench and Maji) before it was re-amalgamated (see discussion below). Vaughn 2003: 269.

^{LXIII} See Fessha 2010.

^{LXIV} FDRE Constitution, 1995, Arts 47 & 49.

^{LXV} FDRE Constitution, 1995, Art 39 (3).

^{LXVI} See for instance the SNNPR Constitution, 1995, Art 68.

^{LXVII} Vaughn 2003: 249.

^{LXVIII} Vaughn 2003.

^{LXIX} Vaughn 2003.

^{LXX} The immediate cause of the conflict was the regional government's decision to combine the Wolayita, Daro, Gamo and Goffa languages to create what Smith calls an 'Esperanto-style language', *wogagoda*, named by mixing together the Amharic initial letters of the four languages. The new language was intended as a medium of instruction in primary schools. This infuriated the Wolayitas and led to a conflict in which dozens of people died. Smith 2008: 208.

^{LXXI} Vaughn 2003: 270.

^{LXXII} The tell-tale signs of the EPRDF's change of heart about establishing ethnic-based local units can be traced back to the late 1990s. For instance, when the Bench, Maji Keffa and Sheka nationality zones were amalgamated in 1996, it was done so in the name of that key word, 'efficiency'. Vaughn 2003: 269.

^{LXXIII} Aalen 2008: 128; Vaughn 2003: 249; Fiseha 2007: 347.

^{LXXIV} Previously the Silte ethnic community was viewed as a sub-unit of the Gurage ethnic community. The *woredas* in the present day Silte Nationality Zone also formed part of the Gurage Nationality Zone. It was only in a referendum held in April 2000 that the Silte were recognised as an ethnic community distinct from the Gurage. After the referendum the *woredas*, which were predominantly Silte, were incorporated into a new nationality zone.

^{LXXV} Vaughn 2003.

^{LXXVI} Aalen 2008: 128.

^{LXXVII} Regassa 2009: 61.

^{LXXVIII} The CoN has a similar structure and purpose to that of the HoF at federal level. Hence, it is not that the nationality zones and *liyu woredas* themselves are represented therein but rather the ethnic communities



- within these local units. However, members of the CoN are elected by the nationality zones and *liyu woredas*.
- LXXX Official website of the Southern Nations Nationalities and Peoples Regional State <http://www.snnprs.gov.et> (last visited on 19 March 2013).
- LXXX It was reported on 16 March 2014 that the Amhara regional government decided not to recognise the Qimmant community as a distinct ethnic community. It also resolved that, even were it to recognise this community, it would not permit the establishment of ethnic self-government. Protesting at the decision, about 300 people held a demonstration during which some 50 of them were arrested by the police. See www.ethiopianreporter.com (accessed on 10 March 2014). See also Goshu 2005 (Ethiopian Calendar).
- LXXXI Adegehe 2009: 164.
- LXXXII Aalen 2008: 164.
- LXXXIII Fiseha Habbib, 2010: 156.
- LXXXIV Garcia & Rajkumar 2008: 91-95.
- LXXXV Proclamation 7/1992, Art 5 (1).
- LXXXVI Regassa 2009: 55. See also Proclamation 7/1992, Art 3 (3).
- LXXXVII Regassa 2009.
- LXXXVIII Gebre-Egziabher 2002: 2.
- LXXXIX See Federal Democratic Republic of Ethiopia (FDRE): Ministry of Finance and Economic Development (MoFED) *Ethiopia: Sustainable Development and Poverty Reduction Program (SDPRP)*, 2002; United Nations General Assembly Millennium Declaration Resolution 55/2, 2000, Para 19.
- XC MoEFD, 2002.
- XCI The dispute allegedly dates back to 1998 when Ethiopia was still at war with Eritrea (Tadesse & Young 2003: 390).
- XCII Tadesse & Young 2003: 391.
- XCIII Those who opposed the prime minister allege that the disagreement was about how best to handle the Ethio-Eritrean war. Members of the dissenting groups claim they were in favour of a forceful regime change in Asmara, which Meles allegedly rejected. Meles and his supporters, on the other hand, maintain that the dispute related to corruption and lack of discipline in the party (Tadesse & Young 2003; Assefa 2007: 388).
- XCIV Tadesse & Young 2003; Assefa, 2007: 388.
- XCV Tadesse & Young 2003; Assefa 2007: 388.
- XCVI Fiseha 2007.
- XCVII Regassa 2003: 10.
- XCVIII Regassa 2009: 55.
- XCIX Ayele & Fessha 2012.
- C Regassa 2009: 55; Negussie 2006; 239.
- CI Medhane Tadesse & Young; 2003; Negussie 2006: 239.
- CII See MoFED (2002) and Federal Democratic Republic of Ethiopia (FDRE): Ministry of Finance and Economic Development (MoFED) *Ethiopia Plan for Accelerated and Sustained Development to End Poverty (PASDEP)* (2005).
- CIII Heymans & Mussa 2004.
- CIV ARS Constitution, 2001: Art 118 (2); BGRS Constitution, 2002: Art 119 (2); GRS Constitution, 2002: Art 123 (2) TRS Constitution, 2001: Art 107 (2); ORS Constitution, 2001: Art 112 (2); AfRS Constitution, 2002: 110 (2); SRS Constitution, 2001: (108).
- CV See, for instance, ARS Constitution, 2001: Art 118 (2); the SNNPR Constitution, 2001: 123 (3) (b).
- CVI Negussie 2006: 239.
- CVII MoFED (2002).
- CVIII See The official website of the Federal Democratic Republic of Ethiopia <http://www.ethiopia.gov.et> (last accessed on 28 March 2014).
- CIX To the credit of the National Electoral Board of Ethiopia, which is in charge of administering elections at all levels, local elections in the Somali regional state are held at a different time to the rest of the country in order to coincide with when pastoralists return from their search for pasture.
- CX See Zemelak Ayele & Yonatan Fessha, 2011: 99.
- CXI See MoFED, 2002).
- CXII See Federal Democratic Republic of Ethiopia (FDRE): Ministry of Capacity Building (MoCB) *Draft Woreda (Local Government) proclamation for Development by the Regional Government Public Sector Capacity Building Programme: District Level Decentralisation Programme*, 2007.



CXIII ARS Constitution, 2001 : Art 86 (2) (f); AfRS Constitution, 2001 : Art 77 (2) (f); SRS Constitution, 2001 : Art 77 (2) (h); GRS Constitution, 2001 : Art 90 (2) (f); ORS Constitution, 2001: Art 79 (2) (g); the SNNPR Constitution, 2001: Art 93 (2) (f); BGRS Constitution, 2002 : Art 87 (2) (f); TRS Constitution, 2001: Art 74 (2) (f).

CXIV See FDRE Constitution, 1995: Art 97. See also Solomon Negussie, 2006: 145.

CXV The regional constitutions vaguely hint that the regional governments may (but not necessarily must) allocate a certain portion from their annual budgets to *woredas*. ORS Constitution, 2001: Art 79 (2) (h); GRS Constitution, 2001 : Art 90 (2) (g); the SNNPR Constitution, 2001 : Art 93 (2) (g); BGRS Constitution, 2002 : Art 87 (2) (g); ARS Constitution, 2001 : Art 86 (2) (g); AfRS Constitution, 2001 : Art 77 (2) (g); SRS Constitution, 2002 : Art 77 (2) (i); TRS Constitution, 2001 : Art 74 (2) (g). Certain regional proclamations also provide that regional states may extend financial assistance to *woredas* (see BGRS Proclamation 86/2010: Art 93 (1); TGR Proclamation 99/2006: Art 56 (1)). However, it is not clear what form this 'financial assistance' takes and whether the regional states are legally enjoined to provide it. Put differently, constitutionally speaking, *woredas* may not as of right demand regional block grants.

CXVI See MoFED, 2002.

CXVII Garcia & Rajkumar, 2008: 22-23.

CXVIII Yilmaz S & Venugopal V *Local government accountability and discretion in Ethiopia* Georgia State University Andrew Young School of Policy Studies International Studies Program Working Paper 08-38 8, 2008.

CXIX See Lidetu Ayalew *Medlot* Addis Ababa, 2002 (Ethiopian calendar).

CXX See also Teshome 2009.

CXXI See Federal Democratic Republic of Ethiopia (FDRE): Ministry of Finance and Economic Development (MoFED) *Growth and transformation plan*, 2010.

CXXII National Electoral Board of Ethiopia (NEBE) (NEBE) *Official results of the 23rd may 2010 general election* <http://www.electionethiopia.org/en/> (last accessed on 27 May 2012).

CXXIII The 2013 'Cities' Day' was celebrated in Bahir Dar, the capital of Amhara region.

CXXIV In one of my visits to the building, previously occupied by the MoCB and now taken over by the Ministry of Civil Service, I noticed that reports, studies and other documents dealing with *woredas* were unceremoniously piled up in one corner of a small office. I was also told that many more such documents stored in digital format were inaccessible because the computers had been infected by viruses. In addition, most of the MoCB staff who worked on the decentralisation programme had transferred to other positions without handing over documents to their successors or storing them properly.

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Crisis, emergency and subnational constitutionalism in the Italian context

by

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Abstract

The aim of this article is to offer an account of the centralization and compression of subnational spaces of autonomy triggered by the economic crisis.

Scholars have already produced sound and detailed research on the incidence of the crisis on some specific aspects in the Italian legal context, and especially on the relationships between the coordination of budgetary and financial policies and the welfare state model. We shall limit ourselves to some reflections on the situation of emergency created by the crisis by showing the incremental and sometimes non-linear nature of the latest developments in the Italian regional law.

Key-words

Crisis, emergency, Italy, European Union, centralization



1. On the importance of the Italian case when dealing with Eurocrisis law

As comparative law shows (Wallis & Oates 1998: 156; Loubert 2012), crises have always played a key role in reshaping the relationship between the centre and periphery in regional, federal or quasi-federal contexts. The classical example is given by the New Deal which is still matter for discussion among scholars with regard to its impact over the American federalism, since “(I)t brought with it some fundamental and dramatic changes in the very character of American federalism, changes that would leave a permanent imprint on the intergovernmental system” (Wallis & Oates, 1998, p. 157).

This is true for the current Eurocrisis as well. It has become almost a *cliché* to read the current situation according to the deepest etymological sense of the word *crisis* (from Greek *κρίσις*, judgment, decision, election, choice), understanding it to be at the same time an opportunity and a threat to the constitutional mission of the EU, but ultimately an important moment of reflection over the very nature of the whole integration process.

Indeed, when looking at the relevant legal measures adopted to manage the crisis at supranational level, it is clear that the EU is currently struggling with its own constitutional limits,^I putting pressure on both supranational and national institutions and actors^{II} (in the case of the last point of view the Greek case is emblematic: Lindseth 2012). The repercussions of the management of the Eurocrisis were clearly visible in the Italian case, and having this in mind this article offers a fresh view of the Italian scenario in order to appreciate such an impact and to have an idea of the new equilibria present in the multilevel arena.

The Italian case is a fascinating example of the need, from a methodological point of view, to study the interconnections between constitutional levels - including supranational and subnational - in order to understand what is going on at the national one. It is relevant in this sense for at least three reasons: 1) it clearly demonstrates how factors that are, from a formal point of view, external to the political life of a Member State have actually significantly influenced the fate of the last four governments (Berlusconi IV, Monti, Letta and, eventually, Renzi^{III}); 2) the Republic experienced a constitutional reform entirely due to need to comply with a norm included in an international agreement (as we know the



Treaty on Stability, Coordination and Governance- TSCG- does not belong- entirely at least- to the realm of EU law), and in other supranational soft law measures, as we will see; 3) as we will also see, the crisis has induced an evident attempt of centralization, and of compression of subnational spaces of autonomy.^{IV}

We are going to focus in particular on the third point. More precisely, if scholars have already produced sound and detailed research on the incidence of the crisis on some specific aspects the Italian legal context, and especially on the relationships between the coordination of budgetary and financial policies and the welfare state model (see, for instance Morrone 2014; Gagliano 2013; Gambino & Nocito 2012; Griglio & Lupo 2012), we shall limit ourselves to some reflections on the situation of emergency created by the crisis by showing the incremental and sometimes non-linear nature of the latest developments in the area of subnational constitutional law.

A *caveat*: for the purpose of this article, in a special issue on the topic, we do not insist on why we consider the idea of subnational constitutionalism applicable to the Italian case, rather we consider this to have been comprehensively argued elsewhere (Delledonne and Martinico 2012). This is in line with a number of studies that have questioned the possibility of limiting subnational constitutionalism only to fully fledged federal contexts (for instance Popelier 2012).

Our conceptual framing is the following: crisis is one of the factors that can undermine the possibility of a thriving subnational constitutionalism, since it may induce central governments to reduce the contribution of subnational entities in decisions of constitutional significance, degrading their competences and their margins in which to develop autonomous policies.

This has been done in particular by employing an extensive concept of “emergency”, presented as a source able to justify every kind of intervention (Falcon 2012). Only by unpacking such concept of “emergency” in its different dimensions, we argue, can a better comprehension of the recent trends on subnational constitutionalism be grasped.

As for its structure, this article is divided into three parts: in a first moment we shall define the relationship between crisis and emergency, secondly we shall move to a brief overview of the anti-crisis measures taken in Italy to comply with supranational constraints and, finally, we will offer some conclusions trying to trace the Italian case back to a broader set of considerations.



2. Crisis and the different dimensions of Emergency in the Current Phase

In the social sciences the term “emergency” (*emergenza*, *urgency*, etc.) is used - not necessarily in a technical sense - to indicate sudden situations of difficulty or danger, which tend to be transient in nature (although not necessarily brief), and which involve a crisis of the institutions operating within a given social structure.^v

In the same vein, in legal terms, the idea of a “state of emergency” suggests, generally, a) the existence of factual circumstances, of special gravity for a certain community, producing such crisis, and b) consequent legal manifestations in the behaviour of institutions, sometimes as mere distorting epiphenomena of the impact of the crisis, sometimes as formalized recognition of the phenomenon and provision of specific correctional effects to guarantee the maintenance of a given legal system.

Two different, complementary forms of legal manifestations of emergency have in fact been studied by scholars (de Vergottini 2007): a «normalized» concept of emergency, in which a legal system acknowledges, through formal means, the existence of a threat, and prefigures the solutions to be implemented; and an always present «innovative» dimension of emergency, in which legal systems can only chase events, always with a sort of self-preservation instinct, but with an inevitable, distorting dose of unpredictability.^{vi}

These two different dimensions of emergency have, nonetheless, some aspects in common. They tend to create derogations (more or less extensive and more or less incisive) to the ordinary allocation of responsibilities, competences, powers between public authorities; moreover, they tend to be explicated, in particular, in a varied/altered use of the relevant sources of law.

It has already been highlighted in the past, in the context of general reflections on the concept of “emergency”, that the variety and the complexity of economic crises (as well as their difficult distinction from political or social ones) make it difficult to indicate what substantial measures can be typically used to address them (see again Pizzorusso 1993: 559). Indeed, when dealing with the current, multifaceted European crisis,^{vii} especially given the magnitude of the phenomenon, the observer is in fact faced by a vast congeries



of interventions, of various nature. This difficulty notwithstanding, we see, interestingly, that the clearest signs are for now at the formal level.

We noted first of all that the recognition of a “state of emergency” and the potential outcomes of the consequent legal effects (optimal or not, efficient or not) were in large part centralized at the EU level,^{VIII} and could be studied precisely through the lenses of the *extra-ordinem* nature of the measures, their provided derogations, a varied use of sources.^{IX}

At the national level, in our view, we can primarily find relevant legal epiphenomena of emergency: the first impression one receives is of the struggle of Member States to comply, in critical situations, with what we generally intend here as Eurocrisis law measures. There is no formal recognition of a “state of emergency”; but there are evident traces of the same idea of exceptionality and of a derogatory nature, and the same distorted use of sources.

In the following, we will explore precisely the impact of these two dimensions of legal manifestations of emergency on one of the most relevant examples for the Italian case in the last years: the much discussed, still ongoing process of reform of the constitutional system of territorial decentralization of the Republic. It is interesting to measure the impact of Eurocrisis law measures against this background.

3. The supranational formal recognition of emergency, and its impact on the Italian subnational constitutionalism

The explosion of the Greek crisis (Louis 2010; Hofmeister 2011; Katsikas 2012) forced the EU to find a solution to keep Greece within the euro. The Greek crisis triggered an escalation of measures that began with a Council Decision dated 10 May 2010^X and was then followed by a series of more structured but still incremental interventions (Ruffert 2011; Paliouras 2011).

The culmination of this series of measures was the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union – TSCG^{XI} signed by 25 European leaders at the beginning of March 2012. This Treaty represents just one of the links of a longer chain of measures adopted to fight the Eurocrisis (we refer to the creation of the European Financial Stability Facility [EFSF], European Financial Stabilisation Mechanism, [EFSM], the Euro Plus Pact, the amendment of Art. 136 of the TFEU, the European Stability Mechanism, [ESM], the so-called six and two packs,^{XII} among others^{XIII}). With all



these measures the EU intended to deal with very different aspects of the crisis by trying to achieve a new integrated surveillance system for budgetary and economic policies and a new budgetary timeline. The system insists on the establishment of clearer rules and of better coordination of national policies, and moreover has been provided with the power to impose swifter sanctions.

All these measures run in parallel. Some of them are part of the EU legal order (six pack, two pack), some of them external to it, some of them are interdependent (in some aspects the six pack and the TSCG), some of them are not (for instance, quite roughly, while the Euro Plus Pact is more about competitiveness, the TSCG is more about austerity). This explains why some Member States participate in some of these actions without necessarily being part of the others.

The contents of all these measures have been extensively analysed by scholars,^{xiv} and our aim here is not to offer a mere description of them. In this respect we focus on their nature in the recognition of a “state of emergency”, and at their interrelationship with subnational entities, with their autonomy, and with their competences.

In this respect, it is interesting to note that among the EU anti-crisis measures that drew most attention from constitutional lawyers is the TSCG, probably because of its Art. 3 which establishes a sort of forced constitutionalization of the so called “golden rule” and which triggered a series of constitutional or super-primary reforms at national level (Fabbrini 2013a). The TSCG was the solution chosen to manage the crisis after having evaluated a list of alternatives, amongst which was the revision of the EU Treaties, i.e. the Treaty on the Functioning of the EU (TFEU) and the Treaty on the European Union (TEU), and the use of enhanced cooperation as regulated under the EU Treaties. This is not an exhaustive list; authors like Beukers (Beukers 2013) for instance, identified a more complex scenario but the two options we identify are still at least partly topical, as the last provisions of the TSCG seem to confirm.

From our viewpoint, the most important clauses are represented by:

Art. 1, which is devoted to the aim of the Treaty, namely

“to strengthen the economic pillar of the economic and monetary Union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of economic policies and to improve the governance of the euro area,



thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion",

Art. 2 - which concerns the relationship with EU law and reaffirming the precedence of EU law over the Treaty, a point which is present in many other parts of the Treaty, – and

Art. 3.2 – which provides for the necessity for the States to codify the budget rule in national law “through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to”.

Article 3 of the TSCG, in fact, applies to both regional and local governments, as evidenced by the reference made by Article 4 of the TSCG to Protocol number 12, devoted to the procedure in the event of excessive deficit. Indeed, Article 2 of Protocol number 12 clarifies that “government means general government that is central government, regional or local government and social security funds, to the exclusion of commercial operations, as defined in the European System of Integrated Economic Accounts.”

To comply with TSCG, Article 81 of the Italian Constitution was amended to introduce an express mention of the “balanced budget”^{xv} principle through constitutional law 1/2012. Article 81 is central in this respect: in the Italian basic law, in the absence of a true “Economic Constitution”^{xvi} (according to the German definition of *Wirtschaftsverfassung*), rules of clear fiscal nature can be found in several constitutional dispositions, strictly linked to those protecting social rights, but article 81 was and is the one directly related to the budget process, «budgets and expenditure accounts», and «new taxes and expenditures».

Articles 97, 117 and, above all, the first paragraph of Article 119^{xvii} were also amended. Article 97 of the Constitution, the central article of the two related to Public Administration, and in particular with its historic statement of the «efficiency and the impartiality of administration», was changed by introducing the requirement that public administrations (all public administrations), in line with European Union directions, ensure “balanced budgets and public debt sustainability”. Article 117, one of the central articles of the recently reformed *Title V* on «Regions, Provinces, Municipalities», and in particular devoted to the legislative powers of the central State and the regions, was amended in paragraphs 1 and 2, granting the State exclusive legislative power over the “harmonization of public budgets”, whereas it was previously shared between State and regions. Article



119, again in Title V, on matters of regional and local finance, was changed with more stringent constraints on the local authorities. The wording of Article 119^{XVIII} clearly limits today the possible recourse to borrowing for Regions and other territorial entities. While with this provision seems to make it feasible for local authorities to finance investment spending, it also adds the necessity to comply “with the concomitant adoption of amortization plans and subject to the condition that budget balance is ensured for all authorities of each region, taken as a whole.”

Passing to the analysis of ordinary law measures, it is to be noted that the Italian government imposed many cuts, and some of these measures have also impacted on the regional structures: the case of law decree 138/2011, converted into law by Act number 148/2011 is emblematic. In fact, its Article 14 has reduced the number of members of Regional Councils (whose internal organization belongs to the exclusive legislative competence of Regions) and established incentives to induce Regions to make choices consistent with what is provided for in the decree (in this respect authors have talked of “financial blackmail.”).^{XIX} Indeed this provision was partly declared unconstitutional- by the Italian Constitutional Court in decision n. 198/2012, with regard to matters concerning Regions provided with special status^{XX}.

Other legal measures, such as law decree number 78/2010 (“Urgent measures for financial stabilization and economic competitiveness”), converted in to law by Act n. 122/2010, are also based on a dangerous vision of the notion of emergency as a sort of Trojan horse to justify massive interventions in the regional competences.

This discipline has been questioned in front of the Italian Constitutional Court, which, in the judgment 151/2012,^{XXI} rejected the very centrist interpretation that the State had given of the measures in law decree n. 78/2010, although the regional challenges against the latter were declared either inadmissible or unfounded in this case.

These are just a few examples showing the risk of centralization in the Italian system induced by *formal* EU anti-crisis measures, intended as structural interventions aimed at a “normalization” of the emergency.^{XXII}



4. National epiphenomena of emergency, and their impact on the Italian subnational constitutionalism

Italian subnational constitutionalism was not only threatened by the formal reforms set forth at the supranational level, in which we see, as said, a sort of formal recognition of a “state of emergency” in the continent; the Italian case is also interesting for its less-evident, but still relevant epiphenomena of emergency.

In this respect, the recent saga on the reform of its local authorities is paradigmatic.

There is a rich literature on the historical heritage of the profound fragmentation of the pre-unified Italian peninsula, and the influence of the French-Napoleonic model of decentralized local administration, which shaped the strong role traditionally attached to Italian municipalities (*Comuni*) and to the Provinces as superordinate territorial authorities.^{xxiii} The latter already existed in some pre-unification states, and had already been adopted in their existing model directly from the French system by the Kingdom of Sardinia in 1859,^{xxiv} then applied also in the Lombardo-Venetian and, by the interim dictators during the unification process, in the other southern and central territories.^{xxv} To cut a very long story short,^{xxvi} the coexistence of *Comuni* and *Province* was generally restated by the *Legge sull'amministrazione comunale e provinciale* of the 20th March 1865; and confirmed, decades later, by the Republican Constitution of 1948. This latter in fact not only included a cardinal Article 5 on the principles of autonomy and decentralization; but, in its *Titolo quinto* dedicated to the territorial organization of the State, added to *Comuni* and *Province* new entities with legislative and administrative powers, the *Regions*, modelled on the old compartments used for statistical purposes in the Kingdom.^{xxvii}

Right from the preliminary debate and the preparatory works of the Constituent Assembly the intention was for the Provinces to disappear with the introduction of the *Regions*:^{xxviii} but an inertial solution prevailed in the drafting of the Constitution, then in 1970 when the ordinary *Regions* actually came into existing,^{xxix} and later in all the rounds of constitutional reform occurred,^{xxx} and left the Provinces alive together with municipalities and *Regions*, despite a general, repeated debate at the political level on the middle layer's substantial futility.^{xxxi}

The Eurocrisis law has impacted strongly against this background.



The letter addressed by the then-President of the ECB Jean-Claude Trichet and his designated successor, then a member of the Executive Board of the ECB, Mario Draghi, to the President of the Italian Council of Ministers on 5th August 2011 explicitly emphasized, in fact, among the other things, the «need for a strong commitment to abolish or merge some intermediate levels of administration (such as provinces)»^{xxxii} - as a precursor of the conditioned application of the Securities Markets Programme (SMP) to Italy in 2011 and 2012 with the purchase of 102,8 billions of euro of Italian bonds.^{xxxiii} - As such, the inertia of decades was, in reality, broken by the supranational (co)action.

But this conversion was not the most surprising part of the story. As well known, a “technical” Government of so called “national commitment” led by Professor Mario Monti, with clear pro-European traits and a coherent mandate to solve the critical Italian situation,^{xxxiv} replaced in late 2011 the Berlusconi IV government after the latter’s resignation: an adherence to the supranational *desiderata* could, in this situation, be seen as the most likely outcome.

One of its first interventions, the Decree-law n. 201/2011, contained various «(U)rgent measures for growth, fairness and consolidation of public accounts»,^{xxxv} with which the new Government tried to comply with these (and other) suggestions of the ECB's letter. It dictated, *inter alia*, the transformation of Provinces into institutions with mere functions of direction and coordination of the municipalities, governed by a council and a president expressed by the municipalities themselves, and devoid of a collegiate executive and ultimately of autonomy.

From our perspective, the most relevant aspect is in the choice of the formal measure used to implement the reform, in which the (worrisome) shadow of an “innovative” emergency is quite visible.

Decree-laws are, in fact, in the Italian legal system, legislative acts of a temporary nature having the force of law, adopted directly by the Government in «extraordinary cases of necessity and urgency» pursuant to Art. 77 of the Constitution of the Italian Republic, with a post-hoc required intervention of the Parliament that must convert them into a formal Law within 60 days from the publication. They are therefore sources of law specifically designed for extraordinary cases, which require immediate action through normative interventions; designed to have a subsequent ratification by the legislature.



However, the worrying, and dubious, tendency has become the Government's greater use of Decree-Laws in a trivial manner, to circumvent the ordinary legislative procedure, with an heterogeneous content, with their reiteration.^{xxxvi} For all these cases, the Italian *Corte costituzionale* has often underlined the political discretionary dimension involved in these questionable practices,^{xxxvii} and has rarely struck down legislative measures for mere reasons of formal choice and misuse of the source and lack of the relevant criteria.^{xxxviii}

The Decree-law n. 201/2011 had a different fate. It was challenged - in its relevant parts, and together with the Decree-law n. 95/2012 (which set the basis for the reorganization of the Provinces' territorial constituencies) – autonomously and directly by a series of Regions before the *Corte costituzionale*. The two Decrees were actually converted into Laws by the legislature; and their norms could surely be considered, as suggested by the various appellants, as running against the various aspects of the concept of autonomy of territorial entities, ranging from the respect of their core competences to the principle of loyal cooperation also in the context of a radical reform.

But the Court's intervention (judgment n. 220/2013) explicitly left untouched the “merits of the choices made by the legislature”. It pointed precisely, and only, to the abnormality of the source of law employed.^{xxxix} The urgency invoked by the Government for the employment of a Decree-law was confronted by the judges with the explicit aim of an organic constitutional reform of the territorial organization of the Republic. This latter could be linked to the short-term necessity of immediate revenue savings,^{xl} but it inherently requires longer-term implementation processes, with the need of “suspensions of effectiveness, referrals and progressive systematizations”,^{xli} all ultimately difficult to reconcile with the immediacy of effects typical of the Decree-law according to the constitutional design. Moreover, the constitutional requirement, in Article 133, of an “initiative” of the interested *Comuni* (municipalities) for the modification of the Provinces' territorial constituencies was found to be radically breached by the same use of a Decree-law as relevant source, with a clear statement of “logical and legal incompatibility”.^{xlii}

The distorted use of a specific source was therefore sanctioned with the declaration of constitutional illegitimacy of the norms. The *Corte* highlighted, in doing so, the split between the transient nature of the Decree-laws and the salience of an organic constitutional reform; and, implicitly, the difference between the preordained *urgency*



inherent in the employment of Decree-laws and the extraordinary situation of *emergency* that the reform tried to face.^{XLIII}

The story did not end there.

In the meantime, another governmental Decree-Law, n. 188/2012,^{XLIV} was issued, to identify the new territorial constituencies of the Provinces: but it was never converted into law by the Parliament, and therefore its effects definitively decayed. A legislative bill to regulate the “second-order” elections of the Provinces' organs was also presented by the Government (in May 2012):^{XLV} but, also in this case, the parliamentary approval never came. The annulment of the relevant parts of the Decree-laws n. 201/2011 and n. 95/2012 by the *Corte costituzionale* led to a further stratification and complication of measures on the same matters treated.

In fact, in the same week of the hearing of the *Corte*, whose results were anticipated by a press release, the Council of Ministers deliberated on the approval of a constitutional bill, consisting of only three articles, intended to radically eliminate the Provinces from the Italian constitutional architecture.^{XLVI}

Moreover, new *interim* measures were considered necessary to consolidate, after the *Corte's* intervention, the effects of the other, non-annulled parts of the Decree-laws n. 201/2011 and n. 95/2012. Thus, the Decree-law n. 93/2013 (devoted to “Urgent provisions for civil security and to combat gender-based violence, as well as on the subject of civil protection and commissioned administration of the Provinces”:^{XLVII} a good case study of a heterogeneous Decree) confirmed the intervention in the dissolution of the organs of the (still existing) Provinces, the nomination of Government's Commissioners, and the efficacy of these latter's acts. The Law n. 147/2013 provided the same effects for those Provinces whose organs had natural expiration or early termination between 1st January and 30th June 2014.

A new Law n. 56/2014 has recently been approved, establishing the new *Città metropolitane* already envisioned in the constitutional reform of 2001 and dictating the discipline of the new *Unioni di Comuni* (“unions of municipalities”). There is a clear overlapping of competences between these new layers of territorial government and the Provinces; in fact, the Law n. 56/2014 also aims to establish a legal framework of the Provinces, whilst they remain in force, by transforming them in second-level authorities,



with no directly elected organs but composed of representatives of the relative municipalities.

There is a clear, and commendable, tendency towards optimization and expenditure restraint, for instance with regard of the emoluments of a whole layer of local representatives (Article 1, paragraph 84 of the Law explicitly provides for the non-remunerated nature of the political appointments at the Provinces' level).

Critical formal issues are nonetheless evident, again.

There are continuing doubts of the constitutionality on the merits of the reform as interpreted as an intrusion in the space of autonomy of a local authority, doubts not addressed or solved by the *Corte Costituzionale* n. 220/2013. Apart from these, there is a first, tangible aspect in the structure of the Law n. 56/2014, composed of a single Article 1, 151 (*si*) internal paragraphs and an attachment; in this sense, emergency is visible here in the paroxysmic use of an already infamous Italian drafting technique, aimed at a streamlining of the time of approval in the Parliament, but surely detrimental for the legislative quality.^{XLVIII}

Moreover, perplexity comes from the technique of the Law n. 56/2014 to rule with continuous reference to the «(P)ending» nature of the «reform of Title V of Part II of the Constitution and of its implementing rules (...)» (Article 1, paragraphs 5 and 51), and therefore also to the aforementioned constitutional bill of radical suppression of the Provinces. The approval of such reform is not only uncertain on both a legal and political plane at the current stage, but it has also been argued that the entire Law becomes, in this way, a disproportionate intervention - in the form of an organic reform - simply to make a new round of elections of Provinces' representatives impossible, again with no contextually clear fundamental choices about the overall structure of local government (Gigliani 2014).

To conclude briefly, in this episode we can see how a reform of evident constitutional significance for the Italian Republic has been undertaken with clear distortions of the relevant sources of law, and therefore with a pronounced use of an “innovative” concept of emergency.

A whole range of pathologies in the employment of sources is detectable, all of which intervene, suddenly, in matters which historically have been difficult to amend:^{XLIX} the patent misuse of Decree-laws, not converted or heterogeneous ones, withdrawn governmental bills, repeated *interim* measures to block elections, unconstitutional drafting



style of organic reforms, with dubious formal *renvoi* to uncertain constitutional amendments still to be approved.

The origin of all this in a letter by central bankers to the head of a national executive – a soft law measure^L or a precursor of the future «Partnerships for Growth, Jobs and Competitiveness», in form of contractual arrangements, discussed at the European Council of 19-20 December 2013 in Brussels?^{LI} - is just a detail, but which lets us further wonder on a multilevel phenomenology of emergency measures, of different origins, some traceable back to a formal recognition and a tentative normalization through consequent formal reforms, some alarmingly linked to secondary distorting manifestations produced by an inherently innovative dimension.

Additionally, it is to be noted that if there is a temptation to see in the Provinces' episode, at least, the symbol of a strong judicial opposition of the Constitutional Court to national legislative reforms prompted by the financial crisis, a comprehensive reading of the recent jurisprudence tells us, in fact, the opposite.^{LII}

It is for instance relevant to note that, in the same months of the judgment 220/2013 based on somewhat formal grounds, the Italian Constitutional Court started to strike down sections of regional laws that infringe Art. 81.4 of the Constitution on the balance between revenue and expenditure (see for instance the cases for Campania and Friuli-Venezia Giulia in the decisions n. 70/2012^{LIII} and 115/2012^{LIV}). Moreover, the Court rejected in the case n. 8/2013^{LIV} the complaint of two Regions against the provisions of a Decree-law of the State according to which the local authorities are divided into two classes based the parameters of proficiency, so that they participate in different degrees to the consolidation of public finances, stating that it is reasonable and legitimate to allow for "an evaluation of the adaptation of each local authority to the principles of rationalization of regulation".

Comparable judgments by the Italian Constitutional Court upholding national reforms came also in the fields of the redefinition (and optimization) of the geographical allocation of courts and tribunals (n. 237/2013^{LVI}), of the regional financial contributions to the 'spending review measures' (n.205/2013^{LVII}), or on the powers of control of the Court of Auditors on the local entities of the five Italian 'regions with special status' (n. 60/2013^{LVIII}). Moreover, and in the same vein, several judgments stroke down regional legislative measures considered as conflicting with the new national reforms: for instance the decision n. 28/2013^{LIX}, n.78/2013^{LX}, n. 138/2013^{LXI}, n. 180/2013^{LXII} n. 221/2013^{LXIII}.



5. Conclusion

In this article we tried to present an account of the Italian case by stressing the trends that have emerged in this context, the position of the different institutional actors that were asked to deal with the implementation of the relevant EU anti-measures crisis and their impact on the relationship between the centre and periphery. The cases reported here are just a few examples, though particularly significant, showing the risk of centralization in the Italian system induced by the EU/international anti-crisis measures.^{LXIV} Other similar examples come from Spain, although, as Ruiz Almendral pointed out, this centralization is only partly connected to what is happening at European level, as it has its roots in previous events, since the “Spanish State of Autonomies was already in a changing course of re-centralization”, so the new rules “may serve to accelerate the process.” (Ruiz Almendral, 2012)^{LXV}. These observations could apply to Italy as well, where despite the bombast of federalism and constitutional reforms employed by all recent Italian governments, the crucial issue of “fiscal federalism”^{LXVI} has not been realized completely, more than 10 years after the constitutional reform of 2001. This seems to reveal a more complex mosaic, where the EU is just one piece of a broader set of factors to be taken into account. Other possible evidence of the fact that this centralization is imputable to each State and cannot be automatically traced back to the EU’s intervention might be given by a recent Opinion of the Committee of Regions, where the Committee expresses “serious concerns about a contrary trend in some Member States in which the financial autonomy of local and regional authorities or the right to self-government at local level has been substantially curtailed”.^{LXVII} The “inappropriate” contents of the letter sent by the ECB to the Italian government^{LXVIII} might question this conclusion but as Fasone pointed out “it remains unclear to what extent the content of this letter was binding for Italy or rather made explicit previous commitment undertaken by the state in its relationship with the European Central Bank” (Fasone, 2014).

There is another factor that should be taken into account: as we saw the Italian Constitutional Court did not renounce its intervention in some of the most problematic conflicts created by the national measures taken to respond to the EU/international constraints, taking in any case a rather pro-centralistic position, and without nevertheless



questioning the consistency of the EU/international measures with its Constitution. This might be seen as a further evidence of the possibility of distinguishing the responsibility of the different levels on the reduction of subnational margins.

In any case, as scholars have pointed out (Russo 2013) the Italian reaction to crisis seems to see the institutional pluralism that is a product of a Regional State as a kind of unbearable cost to be limited or radically avoided. At the same time this attention paid to the *pars destruens* (liming, reducing and even abolishing territorial entities) does not seem to be accompanied by a real *pars construens* or, at least, this “negative strategy” is not always compensated by a real design aimed at re-discussing the functions concretely attributed to these entities. Indeed so far rationalization has been understood only in terms of cutback (Russo 2013).

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^I See Menéndez 2013.

^{II} Chiti and Teixeira 2013.

^{III} See Pierdominici 2014

^{IV} Morrone 2014a): 10, writes about a “centripetal twist” in the public budgets laws.

^V According to the definition by Pizzorusso 1993.

^{VI} de Vergottini 2007: 476.

^{VII} See Menéndez, 2013:453: “the European Union is not undergoing one crisis, but is instead suffering several simultaneous, interrelated, and intertwined crises - crises, which are global, not exclusively European. Put differently, the subprime crisis turned the economic, financial, fiscal, macroeconomic, and political structure weaknesses of the Western socio-economic order into at least five major crises”.

^{VIII} See for a similar reflection Beck 2013: 27: “In dealing with the threat to the euro and the European Union, the relevant players are effectively *negotiating about an exceptional situation whose ramifications are no longer confined to individual nation-states. Instead we are facing a 'transnational emergency'*, which can be exploited in various ways (legitimated by either democratic or technocratic means) by a variety of players, including national politicians, the unelected representatives of European institutions such as the ECB, social movements, or even the managers of powerful financial organizations” (emphasis added).

^{IX} For space constraints, we can only refer here to the interesting analysis by Chiti and Teixeira 2013 and on the formal point in particular, by Kilpatrick 2014.

^X Council Decision (2010/320/EU) of 10 May 2010.

^{XI} Peers 2012a; Besselink and Reestman 2012; Craig 2012a; Louis 2012; House of Commons European Scrutiny Committee 2012. Pernice 2012; Tuori 2012.

^{XII} The so-called six pack is composed of five Regulations (Regulations n. 1173/2011, n. 1174/2011, 1175/2011, 1176/2011 and 1177/2011) and one Directive (Directive n. 2011/85). The two pack is composed of the following regulations: Regulation n. 472/2013 and 473/2013; Kocharov 2012.

^{XIII} On this “jungle” of measures see: Bianco 2012.

^{XIV} See for instance the contributions included in de Witte- Heritier and Trechsel 2013. See also the first comments on the Pringle case of the CJEU: (Case C-370/12 Pringle, not yet reported); Craig 2013a; de Witte-Beukers, 2013; Kokott 2013



^{XV} Art. 81 It. Const. ("The State shall balance revenue and expenditure in its budget, taking account of the adverse and favourable phases of the economic cycle.").

^{XVI} On this debate see: Bognetti 1993 and Luciani 1990

^{XVII} Art. 97 It. Const. ("General government entities, in accordance with European Union law, shall ensure the balance of their budgets and the sustainability of the public debt."). The Italian Constitution goes on to limit the margin of Regions and Local Authorities in the field of matters of regional and local finance, by introducing new constraints on the local authorities. Art. 119 It. Const. For a discussion of these reforms, see 2012.

^{XVIII} Art. 119 It. Const. ('Municipalities, provinces, metropolitan cities and regions shall have revenue and expenditure autonomy, subject to the obligation to balance their budgets, and shall contribute to ensuring compliance with the economic and financial constraints imposed under European Union law. Municipalities, provinces, metropolitan cities and regions shall have independent financial resources. They set and levy taxes and collect revenues of their own, in compliance with the Constitution and according to the principles of co-ordination of public finance and the tax system. They share in the revenues from State taxes related to their respective territories. State legislation shall provide for an equalization fund - with no allocation constraints - for the territories having lower per-capita tax-raising capacity. Revenues raised from the above-mentioned sources shall enable municipalities, provinces, metropolitan cities and regions to fully finance the public functions attributed to them. The State shall allocate supplementary resources and adopt special measures in favor of specific municipalities, provinces, metropolitan cities and regions to promote economic development along with social cohesion and solidarity, to eliminate economic and social imbalances, to foster the exercise of the rights of the person or to achieve goals other than those pursued in the ordinary implementation of their functions. Municipalities, provinces, metropolitan cities and regions have their own assets, which are allocated to them pursuant to general principles laid down in State legislation. They may have recourse to borrowing only as a means of financing investment expenditure, with the concomitant adoption of amortization plans and subject to the condition that budget balance is ensured for all authorities of each region, taken as a whole. State guarantees on loans contracted by such authorities are not admissible').

^{XIX} Mazzola 2012. See also Law Decree 10 October 2012, n. 174 (It.), which, among other things, has extended some of the controls that in a first instance were applicable to State only performed by the Corte dei conti, 'an Institution with the role of safeguarding public finance and guaranteeing the respect of jurisdictional order.' CORTE DEI CONTI, http://www.corteconti.it/english_corner/chi_siamo/ (last visited May 21, 2013).

^{XX} In Italy the Constitution distinguishes between Regions with special and ordinary status. According to Art. 116 "Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige/Südtirol and Valle d'Aosta/Vallée d'Aoste have special forms and conditions of autonomy pursuant to the special statutes adopted by constitutional law. The Trentino-Alto Adige/Südtirol Region is composed of the autonomous provinces of Trento and Bolzano".

^{XXI} Italian Constitutional Court, decision n. 151, 2012, available at www.cortecostituzionale.it

^{XXII} See also Falcon 2012:11.

^{XXIII} See the comparative analysis by Vandelli 1990, and recently Mazza 2012.

^{XXIV} With the so called "Decreto Rattazzi", Law 3 October 1859 n. 3702 del Regno di Sardegna.

^{XXV} For details see Sandulli, and Vesperini 2011: 58.

^{XXVI} For a comprehensive study see Fabrizzi 2012.

^{XXVII} For several reasons, both theoretical and contingent: for comprehensive accounts see, *ex multis*, the pioneering studies of Amorth 1945, and Ambrosini 1957, and the recent summary by D'Atena 2013. In the literature in English, see now Mangiameli 2014.

^{XXVIII} Both the discussions in the context of the *Ministero per la Costituente* and in the *Commissione dei settantacinque* within the Constituent Assembly were in this sense: see Fabrizzi 2008.

^{XXIX} See for instance the rejected proposal of the Partito Repubblicano Italiano in 1977 "Soppressione dell'ente autonomo territoriale provincia: modifica degli articoli 114, 118, 119, 128, 132, 133 e della VIII disposizione di attuazione della Costituzione; abrogazione dell'articolo 129 della Costituzione", based explicitly on «a chain of negative findings on the institutional and administrative role of the province».

^{XXX} For instance, all the bicameral committees convened to draft organic reforms of the Italian Constitution (the Commissione Bozzi of 1983, the Commissione De Mita/Iotti of 1992, and the Commissione D'Alema of 1997) critically discussed the actual role and the very existence of the Provinces, but with no results: see Fabrizzi 2008.



XXXI Again at the end of June 2010, a proposal to abolish the Provinces with less than 220.000 inhabitants made its way in a draft of the Decree-Law n. 78/2010, but then disappeared from the official text; in July 2011, a new constitutional bill for their suppression (XVI Legislatura, AC n. 1990-1836-1989-2264-2579-A/R) was rejected.

XXXII See the full text, as revealed at the time by the Italian main newspaper, the Corriere della Sera, at the webpage http://www.corriere.it/economia/11_settembre_29/trichet_draghi_italiano_405e2be2-ca59-11e0-ae06-4da866778017.shtml.

XXXIII The largest quota among all the Eurozone members: see the details provided by the European Central Bank at its webpage http://www.ecb.europa.eu/press/pr/date/2013/html/pr130221_1.en.html.

XXXIV In itself seen by some observers as evidence of a state of exception, given the particularly active role of the President of the Republic in such appointment: see for an early reflection on the point Ruggeri 2011.

XXXV Law Decree 6 December 2011, n. 201 - Disposizioni urgenti per la crescita, l'equità e il consolidamento dei conti pubblici. (11G0247) (GU n.284 del 6-12-2011 - Suppl. Ordinario n. 251).

XXXVI For recent general reconstructions see, *ex multis*, Celotto1997; Simoncini 2006; on the most recent trends Calvano 2014; Simoncini and Longo 2014.

XXXVII See for instance Italian Constitutional Court, decision n 171/2007, at par. 4 of the *Considerato in diritto* available at www.cortecostituzionale.it.

XXXVIII This created a paradoxical convergence with the practice of the Fascist period, when a formal law, Law 31 January 1926, n. 100, explicitly provided for the exclusion of judicial review on the criteria of necessity and urgency, as “political questions”: see Benvenuti 2013.

XXXIX See Italian Constitutional Court, decision n. 220/2013, at par. 12.1 of the *Considerato in diritto*: “This ambiguity confirms the obvious inadequacy of the instrument of the decree-law to carry out a comprehensive and systemic reform, which (...) requires implementation processes necessarily of long term nature, with the need of suspensions of effectiveness, referrals and progressive systematizations, which are difficult to reconcile with the immediacy of effects inherent to the decree-law, in accordance with the constitutional design” (translation by the authors). Available at www.cortecostituzionale.it.

XL Doubts were in any case raised by local scholars, like Massa 2014 and by the national Court of Auditors: see Corte dei Conti - 2013.

XL.I See Italian Constitutional Court, decision n. 220/2013, at par. 12.1 of the *Considerato in diritto, supra*: “The above considerations do not intrude into the merits of the choices made by the legislature and do not imply the conclusion that a reform of local authorities can be done only by constitutional laws” (translation by the authors).

XL.II *Ibidem*, at par. 12.2: “It is clear from the previous reasoning that there is a logical and legal incompatibility - which goes beyond the specific subject of today's constitutional scrutiny - between the decree-law, which assumes the existence of extraordinary cases of necessity and urgency, and the necessary initiative of the municipalities” (translation by the authors). Available at www.cortecostituzionale.it.

XL.III See for an analysis of the two dimensions Bin 2013; Di Cosimo 2013.

XL.IV Law Decree 5 November 2012, n. 188. Disposizioni urgenti in materia di Province e Città metropolitane (12G0210) (GU n.259 del 6-11-2012).

XL.V Disegno di legge “Modalità di elezione del Consiglio provinciale e del Presidente della Provincia, a norma dell'articolo 23, commi 16 e 17, del Law Decree 6 December 2011, n. 201, convertito, con modificazioni, dalla legge 22 dicembre 2011, n. 214” (5210).

XL.VI Disegno di legge costituzionale: “Abolizione delle province” (1543), presented on the 20th August 2013 at the Camera dei Deputati: see the text at the webpage of the lower house of the Parliament http://www.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0009060.pdf

XL.VII Law Decree 14 August 2013, n. 93 Disposizioni urgenti in materia di sicurezza e per il contrasto della violenza di genere, nonché in tema di protezione civile e di commissariamento delle province (13G00141) (Gazzetta Ufficiale n.191 del 16-8-2013), convertito con modificazioni dalla L. 15 ottobre 2013, n. 119 (in G.U. 15/10/2013, n. 242).

XL.VIII And therefore for the prerogatives of the Parliament and for the certainty of the law: see on these points, *ex multis*, Pisaneschi 1988; Ainis 1997; Rescigno1998; Lupo 2007; Piccirilli 2009.

XL.IX See also Fabrizzi 2014.

^L As always existed in European integration history, also in rather relevant sectors: see, also for theoretical reconstructions on the concept and reflections on the transformation of soft into hard law, the classic studies of Wellens, and Borchardt 1989; Snyder 1994; Trubek, Cottrell and Nance2006.



^{LI} See the conclusions of the Council available at the webpage http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/140245.pdf

^{LII} See the reflections by Morrone 2014 and Tega 2014.

^{LIII} Italian Constitutional Court, decision No. 70/12 available at: www.cortecostituzionale.it

^{LIV} Italian Constitutional Court, decision No. 115/12 available at: www.cortecostituzionale.it

^{LV} Italian Constitutional Court, decision No. 8/13 available at: www.cortecostituzionale.it

^{LVI} Italian Constitutional Court, decision No. 237/13 available at: www.cortecostituzionale.it

^{LVII} Italian Constitutional Court, decision No. 205/13 available at: www.cortecostituzionale.it

^{LVIII} Italian Constitutional Court, decision No. 60/13 available at: www.cortecostituzionale.it

^{LIX} Italian Constitutional Court, decision No. 28/13 available at: www.cortecostituzionale.it

^{LX} Italian Constitutional Court, decision No. 78/13 available at: www.cortecostituzionale.it

^{LXI} Italian Constitutional Court, decision No. 70/12 available at: www.cortecostituzionale.it

^{LXII} Italian Constitutional Court, decision No. 138/13 available at: www.cortecostituzionale.it

^{LXIII} Italian Constitutional Court, decision No. 221/13 available at: www.cortecostituzionale.it

^{LXIV} Falcon 2012.

^{LXV} Ruiz Almendral 2013: 201. On Spain see also: Albertí Rovira 2013; Gordillo Pérez- Canedo Arrillaga 2013.

^{LXVI} See Scuto 2010 (discussing how this discipline is governed by law number 42/2009, which has been implemented through several legislative acts).

^{LXVII} Opinion of the Committee of the Regions on “Devolution in the European Union and the place for local and regional self-government in EU policy making and delivery”, (2013/C 139/08).

^{LXVIII} In that letter the ECB wrote that: “There is a need for a strong commitment to abolish or consolidate some intermediary administrative layers (such as the provinces). Actions aimed at exploiting economies of scale in local public services should be strengthened”. The text of the letter was also published by *Il Corriere della Sera* (http://www.corriere.it/economia/11_settembre_29/trichet_draghi_inglese_304a5f1e-ca59-11e0-ae06-4da866778017.shtml): On this see Olivito 2014.

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**Movement towards a Flemish Constitution:
the Charter for Flanders, another failed attempt?**

by

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Abstract

A Constitution for Flanders has been preoccupying Flemish politicians and scholars for over twenty years. On 23 May 2012, the majority parties presented in the Flemish Parliament the Charter for Flanders. Since Flanders only has embryonic constitution-making power, this is *not* a proposal for a Constitution but merely a proposal for a resolution. As a (non-binding) resolution, the Charter has no legal implications, but rather an important political value. First, the text reveals a strong connection with the EU. The Charter's drafters interwove the fundamental right provisions in the Belgian Constitution with those in the Charter of Fundamental Rights for the European Union, which resulted in an expansive fundamental rights catalogue. Furthermore, the Charter contains a clear political commitment; 'it gives the impetus to a Constitution of Flanders in the framework of the constitution-making Flanders ought to acquire'. The Charter's preamble also confirms that Flanders is a nation with its own language and culture. The lack of participation of opposition parties and citizens in the drafting process was met with fierce criticism. The dossier slumbered in the competent commission without any parliamentary debate for two years. In 2013, the Christian Democratic Party announced that the dossier would be reactivated. However, this did not occur before the 'Mother of all elections' (regional, federal and European elections) in May 2014. As a consequence, the proposal for a Charter expired. It is unclear if the new Flemish Government composed of the Flemish-Nationalists, the Liberals and Christian-Democrats will revive the Charter for Flanders. Hopefully, this reactivation will at least be accompanied with intense parliamentary debates and textual clarifications. Especially, since the drafters consider the Charter a stepping-stone to a (legally binding) Constitution for Flanders.

Key-words

Subnational constitution, Belgium, Flanders, federalism, constitution-making autonomy



1. Introduction

For more than twenty years politicians^I and scholars^{II} in Flanders have debated the creation of a Flemish Constitution. The case of Flanders is part of a larger movement in several European countries, such as Spain, Italy and UK, towards creating or further developing subnational constitutions. This movement towards subnational constitution-making is linked with a movement towards more subnational autonomy and even independence. However, the possibility of subnational constitution-making is complicated by the fact that all these countries are undergoing centrifugal developments. Centrifugal federal systems are more likely to allow less subnational constitutional space than centripetal federal systems and are likely to have the residual powers—including subnational constitution-making powers—contained at the national level (Tarr 2011: 1136). These complexities are clearly visible in Flanders. Even though subnational constitution-making power has been discussed for over two decades, Flanders still only has embryonic constitution-making power.

The article first describes the, still unsuccessful, road towards a Flemish Constitution focusing on the latest proposal for a Charter for Flanders drafted by the previous Flemish Government. Second, the drafting process and the negative impact this process had on the Charter's chances of success are examined. Third, the article explains why the Flemish Parliament can only adopt a non-legally binding Charter, instead of a Constitution for Flanders, and expands on the Flemish demand, also raised in the latest Charter for Flanders proposal, that Flanders ought to acquire full constitution-making power. Fourth, the content of the Charter proposal of the previous Government is examined, especially its choice to use the Charter of Fundamental Rights of the European Union as its frame of reference. Lastly, the article evaluates the added value of such a non-legally binding Charter.



2. A long road to nowhere?

The road towards a Flemish Constitution—or at least Charter—has not only been rocky due to the lack of full constitution-making power. For over twenty years, the Flemish political parties have not been able to agree on the contents of a Charter for Flanders. Already in 1996, the Flemish Parliament extensively discussed a book providing a draft constitution for Flanders.^{III} Subsequently in 1999, the petition ‘A Constitution for the Flemish state’ was filed, signed by 24 000 Flemings.^{IV} Thereupon, the Extended Bureau^V decided to assign several Flemish constitution law experts to design a proposal of a ‘Flemish Basic Decree’.^{VI} Two texts were presented to the Flemish Parliament. On the one hand, there was a proposal of a special decree concerning the matters that fell within the constitutive autonomy of Flanders, which resulted in the special decree on the Flemish institutions of 7 July 2009. A decree of the Flemish Parliament is a Flemish law and has the same legal value as a law of the Federal Parliament; a special decree is a law voted with a two-thirds majority. The special decree on the Flemish institutions solely coordinated the already existing constitutive autonomy. On the other hand, the experts presented a proposal of resolution concerning the Charter of Flanders.^{VII} Then President of the Flemish Parliament De Batselier (socialist party SP.A) did not take on the proposal of the constitutional law experts. Instead, he presented his own discussion text ‘Charter of Flanders’ in 2002,^{VIII} but this text received little support from the other parties as they considered it too one-sided.^{IX} To draw up a Charter for Flanders, the Flemish Parliament decided in 2005 on the proposal of the Extended Bureau to found the Commission Flemish Constitution.^X However, the majority could not agree on any proposed text and as a result the Commission was discontinued.^{XI} Nonetheless, the development of a Charter quietly continued.

On the Flemish holiday 11 July 2010, then Minister-President Kris Peeters (Christian democrat party CD&V) announced that his team had written a Charter for Flanders, which he would present to the Flemish parliament at the start of the coming parliamentary year to discuss collectively.^{XII} As announced, this presentation took place in September 2010.^{XIII} However, it would take nearly two years before the majority parties at the time—Christian democrat party CD&V, the Flemish nationalist conservative party N-VA and the socialist



party SP.A—could agree on its content. Especially the demand of the N-VA to include that Flanders is a nation sparked much discussion.^{xiv} The year 2012 ought to create a break-through. The Christian democrat party CD&V wanted to adopt the Charter for Flanders no later than 27 September 2012, on the 700-year anniversary of the signing by duke Jan II of Brabant of the Charter of Kortenberg.^{xv} This was the first ‘constitution’ on the European continent that described the freedoms of citizens.

The road to a Charter seemed to reach completion when, on 23 May 2012, the majority parties in the Flemish Parliament presented the Charter for Flanders. Finally, the majority parties had reached an agreement on the contents of the ‘foundational document by and for Flanders’^{xvi}. This glorious moment for the majority parties and then Flemish Minister-President Kris Peeters, the driving force behind the Charter, was short-lived. Strong opposition, especially with regard to the drafting process, prevented such momentum. As a consequence, the glossy press presentation quickly turned into a damp squib. In the meanwhile, the anniversary-year in Kortenberg has been long terminated without the anticipated adoption of a Charter for Flanders. The Charter was never even placed on the agenda in the Commission for General Policy, Finances and Budget.^{xvii} The announcement of the Christian Democrat Party CD&V to reactivate the dossier was not followed up.^{xviii} As a result, the proposal expired when new elections were held in May 2014.

The future of the proposed resolution is unsure. The new government, led by Minister-President Geert Bourgois (N-VA), is composed of the Flemish nationalist conservative party N-VA, the Christian democrat party CD&V and the liberal democrat party Open VLD. Possibly the proposal has hit a dead end, especially since its driving force, former Flemish Minister-President Kris Peeters, has migrated to the federal level. Nonetheless, there are still indicators that the resolution could be revived. First, the Flemish nationalist conservative party N-VA won, as predicted, the elections with a landslide. They almost tripled their seating in the Flemish Parliament from sixteen to forty-three seats by obtaining 32% of the votes. As their final objective is the independence of Flanders, it is not unlikely that they will push for a resolution that establishes Flanders as a nation and that strives for the acquirement of full constitution-making power for Flanders. Second, the composition of the government is quite similar as that of the previous government with the socialist



party SP.A having swapped places with the liberal democrat party Open VLD. As the Open VLD was the only opposition party consulted about the content of the resolution prior to its presentation, they might not be against supporting the resolution. There are however also counter-indications. First, several provisions enshrine the current structure of the Belgian state, such as the federal nature of Belgium, while the N-VA clearly strives to dissolve the Belgian state at least into a confederal state. It might be considered counteractive to adopt a resolution that enshrines the federal nature of Belgium. Nonetheless, these provisions could easily be amended when presenting a new proposal. Second, the government policy statement does not mention introducing a resolution,^{xix} although no mention was made of such a Charter in the government policy statement of the previous government.^{xx} Third, politicians might decide that it is an unwisely time to initiate talks on a Charter for Flanders, since the sixth state reform is currently being executed without changing much with regard to the embryonic constitution-making power.^{xxi} They might fear that the Flemings are tired of state reform talk and instead focus more on a socio-economic policy. Also, as will become apparent further in the article, a too nationalistic resolution might be perceived as a hostile action by the French-speaking politicians, which in turn might endanger the functioning of the federal government. This might be deemed too risky, as the same Flemish parties are also part of the federal government. Especially, since the added value of a Charter is limited, Flemish politicians might not deem such a risk worthy.

3. An identity card of Flanders or a coalition document?

The press presentation of the Charter on 23 May 2012 immediately caused political commotion. The opposition parties were apparently not involved in the drafting process and did not even catch a glimpse of the text before it was presented to the press.^{xxii} The liberal democrat party Open-VLD was the only opposition party that was slightly involved in the drafting process, as then Minister-President Kris Peeters had requested their cooperation. The remarks of the Open VLD would be presented to the coalition partners and subsequently the Minister-President would give feedback to Open VLD. According to Open VLD, the latter never took place, which they claimed to be due to the time-consuming discussions amongst the majority parties on the inclusion of the word



‘nation’.^{xxiii} The proposed Charter was thus far from a majority-transcending document. Nevertheless, Open VLD did not rule out the possibility that it would support the text after a parliamentary debate.^{xxiv} Such a debate, however, never took place before the May 2014 elections, causing the proposal to expire. Furthermore, the right wing-liberals LDD^{xxv} and the green party Groen^{xxvi} declared from the outset that they had no intention of approving the proposed Charter for Flanders. The Flemish nationalist extreme right wing party Vlaams Belang even introduced its own proposal for a Flemish Constitution.^{xxvii}

Regrettably, the keywords in the drafting process of an ‘identity card of Flanders, with a timeless character’^{xxviii} did not appear to be transparency, a wide support and public participation. As a result, the opinion pieces evaluating the proposal for a Charter were not enthused.^{xxix} Even though the text is not a proposal for a subnational constitution, it does constitute according to the drafters an impetus to it: a kind of non-binding version. Due to the potential importance of such a document, it is problematic that neither the opposition parties (except the Open VLD in a late stage), nor the Flemish citizens were involved in the drafting process. Such an approach did not only result in a false start, but will also have an impact on the potential end result. As research has shown, actors involved in the early stages have a probable disproportional impact on the end result (Ginsburg et al. 2009: 204).

The drafters never raised the question of how the drafting process should take place, at least not openly. Nonetheless, they could easily have acquired inspiration from the approaches taken by other countries. Precisely the question of the appropriate drafting process has raised—and still raises—fierce debates abroad.^{xxx} A trend can be discerned towards more direct participation of the population in the drafting process of constitutions to strengthen their democratic legitimacy (Ginsburg et al. 2009: 205-208; Harvey 2001: 61; Donald 2010: 461). Such direct participation can, for example, take place through a consultation of specific, often vulnerable groups, e.g. South-Africa (Sarkin 1999: 70-72), but also on the basis of general discussion papers, e.g. UK^{xxxi} and Northern Ireland, or in a more limited manner, e.g. Canada (Donald et al. 2010: 6-21). Abroad, these participation mechanisms were often accompanied with extensive media coverage and information campaigns (Donald et al. 2010: 45-47). However, the press presentation of the Charter for



Flanders was not accompanied with the start of a consultation or information campaign. Perhaps as a consequence, media coverage of the Charter faded quickly. The paralysation of the adoption process in parliament, because of the strong protest against the Charter and even more so against its drafting process, might thus be a blessing in disguise. It offers an opportunity for the new government to approach the drafting process differently and strive for broader support by engaging the Flemish population or at least opposition parties.^{xxxii} Lingering more openly and more thoroughly over the right approach to creating a Charter for Flanders will be necessary to allow for the evolvement of the current proposal to a true identity card of Flanders.

4. A stepping-stone to a Constitution for Flanders?

4.1. A Charter, not (yet) a subnational Constitution

Contrary to most sub-entities of federal states, the Flemish parliament is not competent to adopt a Constitution, or rather a Basic Decree,^{xxxiii} for Flanders (see amongst others Berx 1994; Rimanque 2004: 1001; Clement et al. 1996: 27-36; Popelier 2012: 38-41). This is due to Flanders' very limited constitution-making power, often referred to as merely embryonic.^{xxxiv} Since 1993, the Flemish Parliament, the Walloon Parliament and the Parliament of the French Community dispose of embryonic constitution-making power, named 'constitutive autonomy', regarding both the elections, the composition and functioning of their parliament (Art. 118§2 Belgian Constitution) and the composition and functioning of their government (Art. 123§2 Belgian Constitution) (Judo 2006; Velaers 2014a: 257). The Flemish Parliament has exercised its constitutive autonomy fully in the special decree of 7 July 2006 on the Flemish institutions and has been pushing for a considerable time for the expansion of its constitutive autonomy.^{xxxv} After the world's longest government formation (541 days) and a severe political crisis, the previous federal government shaped the sixth Belgian state reform. This reform, which is currently being executed, provides some changes to the constitutive autonomy of the subnational entities. First, the Parliament of the German-speaking Community and the Brussels-Capital Region have also been granted constitutive autonomy (Velaers 2014a: 257-260; Velaers 2014b: 966-976).^{xxxvi} Second, the constitutive autonomy has been slightly expanded, introducing for example the competence to determine additional composition regulations for their



respective parliaments and additional competences to regulate the regional elections, including the power to determine the duration of the term of their respective parliaments and the date of their regional elections (Velaers 2014a: 257-271).^{xxxvii} Nevertheless, no compromise was found on extending the subnational constitution-making power substantially.

Also, the state reform introduced a type of direct democracy at the subnational level. Regions can hold a non-binding plebiscite (Art. 39*bis* Belgian Constitution). The introduction of the competence to hold non-binding ‘referenda’ can have an impact on the type of democracy and consequently on the constitutional principles that underlie the political system. However, strict limitations were put in place. A regional plebiscite can only be held concerning matters within the region’s competences and not, for instance, on the introduction of a Flemish Constitution or the conversion of the Belgian State to a confederal state. Furthermore, the new article explicitly prohibits holding a plebiscite on matters that require a two-thirds majority, namely precisely those matters that concern the constitutive autonomy of the regions. To ensure compliance, the regions have to first submit the subject of the plebiscite to a control procedure before the Constitutional Court before they can organise one (Velaers 2014a: 243-257).

Despite Flemish demands, Flanders’ constitution-making power still does not surpass its embryonic character. For that, the constitution-making power of Flanders should reach much further than the current limited and fragmented institutional autonomy. Even after the sixth state reform, the scope of full constitution-making power is thus much more extensive than the constitutive autonomy granted to Flanders. Fully-fledged constitution-making power encompasses the power to both shape the organisation and functioning of its subnational public institutions (institutional autonomy) and to determine the relationship between these institutions and its citizens (including their fundamental rights) (Clement et al. 1996: 31). The lack of such full constitution-making power is attributable to the centrifugal character of the Belgian federalisation process (Peeters 2005: 38-39; Pas 2004: 168; *a contrario* Berx 1994: 193-194).

Because of this, the term ‘Charter’ was chosen at the beginning of the new millennium, after the example of the other (at the time) not legally binding Charter: the Charter of



Fundamental Rights of the European Union.^{xxxviii} Even though the Charter of Fundamental Rights of the European Union is now legally binding, the term ‘Charter’ remained a logical choice. The ‘Charter for Flanders’ departs from the Charter of Fundamental Rights of the European Union, because this is the most recent synthesis of the communal values of the member states of the European Union.^{xxxix}

Due to the lack of constitution-making competence, the Charter for Flanders was submitted as a resolution proposal. In a resolution, the Flemish Parliament usually makes recommendations to the Flemish Government regarding measures or policy options the Flemish Government should make. On the advice of Rimanque, politicians considered it expedient not to opt for a decree, because legally it could not be prevented that later on Parliament decides to deviate from it with a simple majority (Rimanque 2004: 1001). More importantly, the initiative could not be couched in a special decree or in a normal decree, since the content of the proposed Charter severely transgressed the limits of the constitutive autonomy of Flanders (Judo 2011: 258). Remarkable and hardly compatible with the nature of a resolution, is that the Flemish Government shaped the Charter instead of the Flemish Parliament. Only in the last phase, when the Charter was already drafted, the Charter was handed over to the President of the Flemish Parliament. As a result, the Flemish Government lets the Flemish Parliament make recommendations to the Flemish Government, which were drafted by the Flemish Government itself. A resolution contains no legal obligations for the Flemish Government, but has solely political authority. As a result, the preamble confirms that the Charter does not promulgate any legal rules.^{xl} The text is hence primarily symbolic.

4.2. ‘The constitution-making power that Flanders ought to acquire’

An important symbolic statement in the proposed Charter, reconfirming previous demands, is that the Charter ‘postulates an important political commitment, which forms the impetus for a Constitution for Flanders in the framework of the constitution-making power that Flanders ought to acquire.’^{xli} The former majority parties (CD&V, N-VA and SP.A) emphasize with this statement once more their desire to evolve from embryonic to full-fledged constitution-making power for Flanders.^{xlii} Such an evolution requires the inclusion of an express provision in the Belgian Constitution that grants constitution-



making power to (some of the) regions and/or communities (Clement et al. 1996: 29-30). Another option, which avoids such an explicit provision, requires two phases: first the Federal Government would need to create 'legal space' for the constitution-making power of the subnational entities and only after that the subnational entities could adopt and promulgate a subnational constitution. To achieve such a 'legal space' the federal lawmaker and constituent power would need to abolish the provisions in the Belgian Constitution and in the special law of 8 August 1980 to reform on the composition and functioning of the institutions of the subnational entities, creating a legal lacuna. If this is coupled with a simultaneous transfer of residual competences to the subnational entities, these entities implicitly obtain the constitution-making power. As a result, they could fill this legal lacuna with a subnational constitution.

The French-speaking parties have met the urge towards a Constitution for Flanders with distrust. They fear that this is part of a (hidden) Flemish separatist agenda (Popelier 2012: 41, 47-48; Berx 2007: 239; Peeters 2005: 39). This is clearly the case for the Flemish nationalist party N-VA and the Flemish nationalist extreme right wing party Vlaams Belang. These parties account for 49 of 124 seats in the Flemish Parliament (N-VA 32% and Vlaams Belang 6%) and 36 of 150 seats in the House of Representatives (N-VA 22% and Vlaams Belang 4%). The other Flemish parties emphasize that obtaining constitution-making autonomy is merely a logical step in the federal development of Belgium.^{XLIII}

In Belgian scholarship, constitution-making autonomy of subnational entities and the competence to adopt one's own (subnational) constitution is traditionally considered as an essential characteristic of federalism (Vande Lanotte & Goedertier 2010: 226; Judo 2006: 260; Berx 1994: 12; Berx 2007: 241; Ergec 1994: 55-58) or at least as the logical consequence of the goal of federalism, namely the possibility for regions of a federal state to organise themselves autonomously (Clement 1996: 28). However, in this journal Popelier has rightly refuted that this is a necessary characteristic of federalism (Popelier 2012: 43-44). Instead she employs a dynamic perspective on forms of state (Popelier 2008; see also similar Sala 2013). The problem with a static view on forms of state is that it fails to match the political reality of a country. Furthermore, a static view offers no insight in the true dynamics of a federal state (Popelier 2008: 421). Federal states can better be



understood as dynamic processes undergoing a continuous search for a balance of power between the federal level and the subnational entities. According to such a dynamic view, the division between federalism, regionalism and devolution is a question of gradation where multiple indicators mark where a state is situated on the sliding scale from a unitary to a confederalist state (Popelier 2012: 44). Popelier identifies sixteen indicators that measure the degree of autonomy of territorial entities (differentiation) and five that measure their coherence in a more global way (integration) (Popelier 2008: 427-433). In essence, the dynamic view emphasizes that a state does not need to fully meet a certain 'model' to be called a federal state. As a consequence, Belgium can be considered a federal state, even if the subnational entities lack full constitution-making power (Popelier 2008: 433). Subnational constitution-making power is merely one of the many indicators and the lack of this competence is in itself not determining for the categorisation of a state form.

Although the static model of forms of state has an important pedagogical function, too much emphasis on this model can make it evolve into a normative framework supporting political discourse (Popelier 2008: 416). Thus, one must be wary of being too fixated on the so-called 'perfect' federal state (Popelier 2008: 422). This ideal model can, as a result, shift from being solely descriptive to becoming normative. This is precisely what has occurred in the Flemish political discourse. The Flemish political discourse relies on this static model of federalism to justify and solidify its demand that Flanders ought to acquire full constitution-making power. For example, the Flemish Government's point of view in the 2008 'Octopus negotiations' was that 'constitution-making power is nothing more than a logical evolution in a federal state.'^{XLIV} Consequently, a Charter for Flanders is considered as a next step in the growth process to a mature and profound (con)federalism.

Popelier rightly concludes that the issue of subnational entities having or lacking constitution-making power is not so much a question of federalism, as it is one of historical and political reasons. Acquiring full constitution-making power is thus not essential for the federal nature of a state; rather it is one of the potential elements in a political package deal (Popelier 2012: 44). Historical reasons, namely the centrifugal nature of Belgian federalism, underlie the absence of subnational constitution-making power. Political sensitivities and balances of power explain why full subnational constitution-making power has failed to



crystallize in Belgium. These political sensitivities were clearly noticeable in the news coverage of the Charter proposal in the French-speaking media. The central question in their news coverage was if the Francophones should be worried or feel attacked by this initiative. The president of the Walloon Parliament, Patrick Dupriez, declared that this initiative was not surprising, considering the predominance of the nationalist movement in the north of the country.^{XLV} The input of the nationalist movement can also be detected in the content of the proposed Charter. The Flemish nationalist party N-VA wanted to include the definition of Flanders as a nation into the main articles of the Charter. The symbolic issue of including the term ‘nation’ into the Charter caused, however, much dispute. After lengthy negotiations a compromise was made; the symbolic issue of the self-definition of Flanders as a nation was settled through including it in the preamble.^{XLVI}

Political sensitivities can also be detected on the Flemish side. There has been great hesitation of Flemish politicians to grant constitution-making autonomy to the Brussels-Capital Region and the German-speaking Community because of the preference for a dual federal state structure (with a Flemish and Francophone component) (Nihoul & Bárcena 2011: 234; Popelier 2008: 54; Clement 1996: 37).^{XLVII} As above-mentioned, only since the 2012-2014 sixth Belgian state reform, the Brussels-Capital Region—except for the existing protection mechanisms for the Flemish minority—and German-speaking Community have also been granted constitutive autonomy (Velaers 2014a: 257-260; Velaers 2014b: 966-976). The Flemish nationalist party N-VA was very critical of this reform expressing disbelief during parliamentary debates that the Flemish majority parties had allowed such a development.^{XLVIII}

5. A patchwork Charter

The proposed Charter for Flanders primarily copies and bundles already existing provisions from the Belgian Constitution, the Charter of Fundamental Rights of the European Union and other (special) laws and decrees.^{XLIX} The corresponding articles in these documents are indicated after each article in the Charter. The Charter counts 120 articles and is divided in six parts: Title I ‘Flanders, sub-state of Belgium’, Title II ‘Rights and freedoms’, Title III ‘The powers’, Title IV ‘The cooperation’, Title V ‘Foreign affairs’



and Title VI 'Finances'. The Charter mirrors to a great extent the structure of the Belgian Constitution.

The preamble is a drawn out and little inspired text, starting off with the controversial phrase that Flanders 'forms a nation with its own language and culture' and finishing with the proposition that the Charter an 'impetus forms for a Constitution for Flanders'. Title I 'Flanders, sub-state of Belgium' confirms firstly that the purpose of the Charter is not connected to the independence of Flanders. Article 1 explicitly states that 'Flanders is a sub-state of the Federal State Belgium and is a part of the European Union.' Especially with the rise of the Flemish nationalist party N-VA, this clause might be one of the first ones to be amended in a future proposal. The N-VA's ultimate goal to create an independent Flanders and is currently trying to push for the development of Belgium into a confederal state. Furthermore, Title I states that Flanders is bound by the federal Constitution and international and European law (Art. 2) and that Brussels is the capital of Flanders (Art. 5). The reference to Brussels is a clear political choice to regard Brussels as a part of Flanders in the construction and fortification of a dual federal state structure (Clement 1996: 297-298).

Title II 'Rights and freedoms' comprises 51 Articles. The Charter of Fundamental Rights of the European Union is used as a frame of reference, given that the Charter of Fundamental Rights of the European Union is 'a contemporary synthesis which for the first time brings together all traditional civil and political rights, as well as economic and social rights in one single text'.¹¹ In addition, fundamental rights of the Belgian Constitution are woven into the text (e.g. freedom of education and the ban on censorship). The choice for the Charter of Fundamental Rights of the European Union is an important ideological choice. Currently, the ECHR as interpreted by the European Court of Human Rights plays a central role in the Belgian fundamental rights protection (Lambrecht 2013: 312-315). The Charter of Fundamental Rights of the European Union only has a limited EU scope. If the proposal for a Charter would evolve into a subnational constitution, the legal effect of the Charter of Fundamental Rights of the European Union would substantially increase.

Interestingly, the Commission of Venice in its opinion on the Hungarian Constitution advised against a (partial) incorporation of the Charter of Fundamental Rights of the



European Union. First, interpretations by the Court of Justice of the European Union could diverge from those given by the Hungarian Constitutional Court. Expanding the legal effect of the Charter of Fundamental Rights of the European Union can furthermore result in the Constitutional Court being inclined to follow the case law of the Court of Justice of the European Union and, as a consequence, sacrificing a part of the constitutional autonomy of the member state.^{LI}

Another issue with transferring the Charter of Fundamental Rights of the European Union is its focus on the EU sphere, which does not always translate smoothly to a subnational context. For example, the proposed Charter converted Article 12§2 EU Charter ‘Political parties at Union level contribute to expressing the political will of the citizens of the Union’ to ‘Political parties contribute to expressing the political will of the citizens’ (Art. 25 proposed Charter). This provision concerns the importance of ‘forming European political awareness’ (Art. 10§4 TEU) and is not just transferable. The question thus arises what the purpose is of a similar provision in the Flemish Charter. In Germany, a similar provision exists (Art. 21§1 GG). However, this provision is embedded in other provisions that enable amongst others the German Federal Constitutional Court to declare an anti-democratic party unconstitutional. Such an embedment or clarification is absent in the proposed Flemish Charter. Also, the focus on the Charter of Fundamental rights of the European Union has led to an excessive emphasis on the EU. For example, it includes that ‘every person may direct oneself in Dutch to the institutions of the Union’ (Art. 50§d) and ‘the right to petition the European Parliament’ (Art. 52 proposed Charter).

Furthermore, the fusion of two catalogues of rights—the Belgian Constitution and the Charter of Fundamental Rights of the European Union—led to a drawn-out and sometimes cluttered text. Hopefully, this will be remedied in a new proposal. This has also led to unnecessary duplications. For example, Article 8 stipulates ‘human dignity is inviolable’ (Art. 1 EU Charter) and Article 28 states ‘everyone has the right to live a dignified life’ (Art. 23 Belgian Constitution). Especially given that the didactic value and clarity of the document were used as arguments to underline the added value of a Charter,^{LII} a new proposal of a Charter for Flanders will hopefully take these issues into consideration.



With regard to the other chapters, Title III ‘The powers’ describes, after some general provisions, the composition, functioning and legal position of the Flemish Parliament and the Flemish Government, the elections of the Flemish Parliament, the decree-making and executive power and the local and decentralised institutions. Title IV concerns cooperation, including cooperation agreements, with other communities and regions and the international cooperation and representation. In Title VI ‘Finances’ the proposal stipulates that Flanders binds itself to a principled balance of budget and progressive taxation.

6. Added value of a Charter?

The question as to the added value of a Charter for Flanders resolution must be distinguished from the question as to the added value of a subnational constitution (Popelier 2012: 51-54; Clement 1996: 28; Berx 2007: 248-251). Contrary to a subnational constitution, a resolution has no legal value, but only political authority. Due to the lack of instrumental value (when it can be used to advance a particular right or set of rights) with the limited subnational space available, the focus is mainly on its symbolic value. Most importantly, the proposed Charter has a specific political purpose, namely the intention of transforming this rather symbolic document into one with an instrumental value. The proposed Charter for Flanders ‘postulates an important political commitment, which forms the impetus for a Constitution for Flanders in the framework of the constitution-making power that Flanders ought to acquire.’^{LIII} It also stipulates that ‘Flanders forms a nation with its own language and culture’. Furthermore, the drafters of the proposed Charter chose the Charter of Fundamental Rights of the European Union (in combination with the Belgian Constitution) as a basis for fundamental rights protection in Flanders. However, in parliamentary debates the usefulness of a mere symbolic Charter was questioned, instead it was raised that Flanders should perhaps devote itself to obtaining full constitution-making power so it can adopt a proper subnational Constitution.^{LIV}

A second added value raised by the drafters is that a Charter would be ‘a “statement” against the negative image of some people abroad of Flanders.’^{LIV} Although one can question if a non-binding Charter could have a real impact on the international image of Flanders.



Third, a subnational Charter allows for specific accents that are not expressed at the (inter)national level. Most remarkable in the proposed Charter is the choice to largely duplicate the fundamental rights catalogue of the Charter of Fundamental Rights of the European Union and to inscribe the obligation of a principled balance of budget and progressive taxation. Beyond that the Charter for Flanders is primarily a coordination exercise of different already existing documents and expresses few new accents.

Fourth, when presenting the Charter, its function as a timeless identity card was emphasized. Such a foundational document would create transparency and clarity of what Flanders represents and within which legal framework Flanders operates. As a consequence, it would have a didactic value. Nonetheless, one can wonder, especially considering the above-mentioned coordination problems, if coordination is truly the best path to transparency (Judo 2011: 256-257). Furthermore, the statement that the proposed Charter merely coordinates is false. Rather than merely clarifying within which legal framework Flanders operates, the proposed Charter goes much further. The legal effect of the Charter of Fundamental Rights of the European Union is currently limited to when Belgium is implementing Union law (Art. 51§1 EU Charter). The ideological choice of the drafters to primarily base the proposed Charter on the Charter of Fundamental Rights of the European Union has an important symbolic value, but does not reflect the current legal framework. In addition, it is doubtful if the drafting process of the proposed Charter was the proper road to lead to a timeless identity card for Flanders. To conclude, the presentation of the Charter was not accompanied with an information campaign that could solidify its didactic value. The lack of such campaign or media coverage contributed to the absence of a constitutional momentum, which probably resulted in the (temporary) silent death of the once noisily presented Charter.

In conclusion, a Charter for Flanders has limited added value. It has a clear symbolic value emphasizing the goal of obtaining constitution-making power for Flanders. Potentially it could have a didactic value, although the proposed Charter needs revision to be able to function as a didactic document. Moreover, one can wonder if the coordination mechanism is the best way to achieve transparency and clarity of what Flanders represents.



Instead, it appears to lead to a rather confusing document. Besides, the proposed Charter cannot be considered to be a coordination document as it goes much beyond mere coordination by basing itself on the Charter of Fundamental Rights of the European Union. If future drafters intend to truly create a timeless identity card for Flanders, they will also need to severely reconsider the drafting process.

7. Conclusion

A Constitution or at least a Charter for Flanders has preoccupying Flemish politics and scholarship for over twenty years. On 23 May 2012, the majority parties presented the Charter for Flanders. Finally, there appeared to be movement in this lingering dossier. However, the lack of participation by other political parties and the Flemish citizen caused strong criticism. After slumbering for two years in the competent Commission without any parliamentary debate, the submitted Charter expired. The announcement of the CD&V that the dossier would be reactivated, was never followed up. After the ‘Mother of all elections’ in Belgium in May 2014, a new Government is in place. If the new Government has plans to reactivate this dossier, it will hopefully pay more attention to the drafting process. Even if a Charter would finally be adopted, it would have no legal implication. As a (non-binding) resolution, it primarily has an important political value. The drafters of the Charter for Flanders closely connected Flanders to the EU, which is remarkable in a time of rising Euro-scepticism. An explanation for this could be that the EU framework creates a sort of safety net that facilitates the pursuit of further autonomy or even independence.^{1VI} Furthermore, the drafters clarify in the preamble that the Charter is merely a stepping-stone to a (binding) Constitution for Flanders.

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^I For example the information dossier ‘Flemish Constitution’ (Vlaamse Grondwet) of the Flemish Parliament, www.vlaamsparlement.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/index.html (closed off on 16 March 2007) and continued by the information dossier ‘Flemish Charter’, www.vlaamsparlement.be/vp/informatie/pi/informatiedossiers/vlaamshandvest/pers.html.

^{II} For example, Clement et al. 1996; Rimanque 2004; Senelle 2008.

^{III} Hoorzitting over de Proeve van Grondwet voor Vlaanderen [Hearing on the Draft of a Constitution for Flanders], *Parl. Acts* Flemish Parliament 1996-97, n° 527/1.

^{IV} Verzoekschrift betreffende ‘Een Grondwet voor een Vlaamse staat’ [Petition concerning ‘A constitution for a Flemish state’], *Parl. Acts* Flemish Parliament 1998-99, n° 101/1.



^V The Extended Bureau (*Uitgebreid Bureau*) coordinates the political functioning of the Flemish Parliament. It amongst others determines the agenda of the plenary meetings and coordinates the operation of the commissions. The Extended Bureau sits weekly and is composed of the Bureau and the fraction presidents of the recognised political fractions.

^{VI} The foundational note that sketches the political frame within which the experts had to operate can be found here: www.vlaamsparlement.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/527.pdf.

^{VII} This proposal was published in Rimanque 2004.

^{VIII} Voorstel van resolutie Handvest van Vlaanderen [Proposal of resolution Charter of Flanders], *Parl. Acts* Flemish Parliament 2002-03, n° 46/1.

^{IX} See X., 'De Gught veegt Vlaams handvest van tafel [De Gught brushes Flemish charter aside], *De Standaard* 17 December 2002; B. Eeckhout, 'De Batselier schrijft "Vlaamse grondwet" met SP.A hand [De Batselier writes "Flemish constitution" with an SP.A hand]', *De Morgen* 17 December 2002.

^X Hoorzittingen over een Vlaamse Grondwet [Hearings on a Flemish Constitution], *Parl. Acts* Flemish Parliament 2005-06, n° 813/1.

^{XI} None of the following proposals were approved: Voorstel houdende het Handvest van Vlaanderen [Proposal regarding the Charter of Flanders], *Parl. Acts* Flemish Parliament 2005-06, n° 623/1; Voorstel van resolutie betreffende de Grondwet voor Vlaanderen [Proposal of resolution concerning the Constitution for Flanders], *Parl. Acts* Flemish Parliament 2005-06, n° 747/1; Voorstel van bijzonder decreet houdende de invulling van de Vlaamse constitutionele autonomie [Proposal of special decree regarding the completion of the Flemish constitutive autonomy], *Parl.St.* VI.Parl. 2005-06, nr. 632/1; Voorstel van resolutie betreffende een proeve van grondwet voor de toekomstige onafhankelijke Vlaamse staat [Proposal of resolution concerning a draft of the constitution for the future independent Flemish state], *Parl. Acts* Flemish Parliament 2005-06, n° 726/1.

^{XII} For the speech, see www.krispeeters.be/actua/toespraken/11-juli-speech; V. Douchy, 'Peeters gaat voor Vlaamse Grondwet [Peeters is going for a Flemish Constitution]', *De Standaard* 11 July 2010.

^{XIII} G. Tegenbos, 'Vlaanderen krijgt Handvest [Flanders gets a Charter]', *De Standaard* 29 September 2010, 8. For the text, see www.standaard.be/extra/pdf/HANDVEST1.pdf.

^{XIV} G. Tegenbos, 'Vlaams Handvest struikelt nog over één woord [Flemish Charter still trips over one word]', *De Standaard* 4 July 2011, 5. Also in Catalonia including the self-definition as a nation caused severe discussion, see Orte and Wilson 2009: 427 and Muro 2009: 460.

^{XV} X., '700 jaar na Charter van Kortenberg', *De Standaard* 24 May 2012, 6.

^{XVI} Press statement by the cabinet of the Flemish Minister-President, www.krispeeters.be/sites/kp.warp.be/files/persmededeling_handvest_voor_vlaanderen.pdf, 2.

^{XVII} www.vlaamsparlement.be/Proteus5/showParlInitiatief.action?id=672429.

^{XVIII} B. Dewaele, 'CD&V haalt Vlaams Handvest van onder het stof [CD&V dusts off Flemish Charter]', *De Standaard* 19 March 2013.

^{XIX} Government policy statement of the Flemish Government 2014-2019, www.vlaamsparlement.be/vp/informatie/pi/pdf/vlaams_regeerakkoord_140723_.pdf.

^{XX} Government policy statement of the Flemish Government [Regeringsverklaring van de Vlaamse Regering], *Parl. Acts* Flemish Parliament 2009-10, n° 31/1.

^{XXI} For an overview of the changes to the constitutive autonomy of the communities and regions with the sixth state reform, see Velaers 2014a: 255-258.

^{XXII} Plenaire vergadering [Plenary meeting], *Parl. Acts* Flemish Parliament 2012-13, n° 35, 39-40; n° 36, 8-9; X., 'Handvest voor Vlaanderen: oppositie hekelt aanpak meerderheidspartijen [Charter for Flanders: opposition flays majority parties' approach]', *De Standaard* 23 May 2012.

^{XXIII} See X., 'Aanzet tot Vlaamse grondwet is klaar [Impulse to Flemish constitution is ready]', *Knack* 23 May 2012.

^{XXIV} X., 'Open VLD sluit steun aan Handvest niet uit na debat in parlement [Open VLD does not exclude support after debate in parliament]', *De Standaard* 30 May 2012.

^{XXV} X., LDD: "Onbegrijpelijk dat NV-A federale staat in Handvest betonneert" [LDD: "Incomprehensible that NV-A fixates federal state in Charter"], *De Standaard* 30 May 2012.

^{XXVI} F. Watteuw, 'Groen gaat "Vlaamse Grondwet" niet mee ondertekenen [Groen is not going to cosign "Flemish Constitution"]', *De Morgen* 30 May 2012.

^{XXVII} Voorstel van resolutie betreffende een proeve van grondwet voor de toekomstige onafhankelijke Vlaamse staat [Proposal of resolution concerning to draft of a constitution for the future independent



Flemish state], *Parl. Acts* Flemish Parliament 2011-12, n° 1396/1.

XXVIII Quote of Minister-President Kris Peeters' in amongst others X., 'Aanzet tot Vlaamse grondwet is klaar [Impulse to Flemish constitution is ready], *Knaak* 23 May 2012 (author's translation).

XXIX For opinion pieces on the Charter, see M. Reynebeau, 'Een Handvest voor Vlaanderen. We zijn dus een natie [A Charter of Flanders. So we are a nation.], *De Standaard* 28 May 2012, 40; S. Samyn, 'Tristesse', *De Morgen* 24 May 2012, 2; D. Castrel, 'Vlaamse grondwet neemt slechte start [Flemish Constitution made a bad start]', *GVA* 24 May 2012, 54; Storme 2012.

XXX With regard to sub-national constitutions, see for example Delledonne and Martinico 2012. With regard to national constitution, see for example Donald 2010: 461-464; Ginsburg et al. 2009.

XXXI For all the work of the Commission on a Bill of Rights and their discussion papers, see www.justice.gov.uk/about/cbr.

XXXII The necessity of creating support as broad as possible when reactivating the dossier was also mentioned by the leader of the CD&V fraction in the Flemish Parliament, see B. Dewaele, 'CD&V haalt Vlaams Handvest van onder het stof [CD&V dusts off Flemish Charter], *De Standaard* 19 March 2013.

XXXIII 'Basic Decree' (in Dutch *Gronddecreet*) refers to the term used in the note of the Extended Bureau of the Flemish Parliament that charged experts with the task of drafting a Basic Decree for Flanders, see www.vlaamsparlement.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/527.pdf.

XXXIV This term was used in Verslag voor herziening van de grondwet [Report for review of the constitution], *Parl. Acts* House of Representatives 1992-93, n° 725/6, 66: 'According to the minister, this constitutive autonomy forms an embryo of constitution-making power concerning the subnational entities.' (author's translation)

XXXV See the resolution of the Flemish Parliament, *Parl. Acts* Flemish parliament 1998-99, n° 1339/2.

XXXVI The constitutive autonomy granted to the Brussels-Capital Region is limited in two ways. First, the constitutive autonomy is not applicable to the guarantees granted to Dutch-speaking and French-speaking in the Parliament and the Government of the Brussels-Capital Region. For these matters, the special federal lawmaker remains competent. Second specific majorities are required to exercise the constitutive autonomy in the Brussels-Capital Region. Every ordinance requires not only a two-third majority, but also a majority in each language group.

XXXVII Special act of 19 July 2012 to amend the special act of 8 August 1980 to reform the institutions concerning the extension of the constitutive autonomy of the Flemish Community, the Walloon Region and the French Community, B.S. 22 August 2012. See also *Institutioneel akkoord voor de zesde staatsbervorming [Institutional agreement for the sixth state reform]*, 11 oktober 2011, www.lachambre.be/kvvcr/pdf_sections/home/NLdirupo.pdf, 9, 11-12

XXXVIII See Rimanque 2004: 1001; Voorstel van resolutie Handvest van Vlaanderen [Proposal of resolution Charter for Flanders], *Parl. Acts* Flemish Parliament 2002-03, n° 46/1.

XXXIX Voorstel van resolutie betreffende het Handvest voor Vlaanderen [Proposal of resolution concerning the Charter of Flanders], *Parl. Acts* Flemish Parliament 2011-12, n° 1643/1, 8 (author's translation).

XI. Ibid.

XI.I Ibid, 8 (author's translation), see also 2.

XI.II See already the resolution of the Flemish Parliament, *Parl. Acts* Flemish parliament 1998-99, n° 1339/2, 3.

XI.III See for example, Voorstel houdende het Handvest van Vlaanderen [Proposal regarding the Charter of Flanders], *Parl. Acts* Flemish Parliament 2005-06, n° 623/1, 3-4; Caluwé, at the time CD&V fraction leader, in M. Goethals, 'Zeg zeker niet grondwet, maar zeg handvest [Definitely do not say constitution, but say charter]', *De Standaard* 24 May 2012.

XI.IV The 'Octopus negotiations' took place in spring 2008 to draft the contours of the new Belgian state reform. The name originated from its original eight members; later on the commission was extended to eighteen Belgian senior politicians of several political families. For the Flemish Government's point of view, see <http://nieuwsbrief.cdenv.be/actua/persberichten/octopusoverleg-toelichting-minister-president-kris-peeters-op-werkgroep-staatshe> (author's translation).

XI.V X., 'Charte pour la Flandre: "Il n'y a pas lieu de se sentir agressé tout de suite"', *Le Soir* 23 May 2012; X., 'Finalisation de la "Charte pour la Flandre"', *Le Vijf* 23 May 2012; F. Grosfilley, 'La "constitution flamande" avance doucement mais surement', *RTL blog* 23 May 2012; C. Laporte, 'Une charte pour la Flandre', *La Libre* 26 May 2012.

XI.VI G. Tegenbos, 'Vlaams Handvest struikelt nog over één woord [Flemish Charter still trips over one word]', *De Standaard* 4 July 2011, 5.



^{XLVII} See also Vanlouwe (N-VA), Report, *Parl. Proc.* Senate 2013-14, n° 5-1752/3, 15-16: ‘Lors du débat relative à la revision de la Constitution de 1992-1993, les partis politiques, ceux-là mêmes qui proposent la modification actuelle, déclaraient que l’extension de l’autonomie constitutive à toutes les communautés et régions était rejetée afin de ne pas compromettre la pacification communautaire à la base de toute la revision de la Constitution. Eu égard à cette situation, il a été dit que les partis flamands ne souhaitaient pas que Bruxelles devienne une région à part entière, disposant d’une forme limitée d’autonomie constitutive. [...] M. Vanlouwe maintient que l’ensemble des propositions relatives à l’autonomie constitutive ouvre à nouveau la porte à un processus visant à mettre la Région de Bruxelles-Capitale sur un pied d’égalité avec la Région wallonne et la Région flamande.’

^{XLVIII} Ben Weyts (N-VA), Report, *Parl. Proc.* House of Representatives 2011-12, n° 2291/003, 43.

^{XLIX} Proposal of resolution concerning the Charter of Flanders [Voorstel van resolutie betreffende het Handvest voor Vlaanderen], *Parl. Acts* Flemish Parliament 2011-12, n° 1643/1, 2.

^L Ibid.

^{LI} See European Commission for Democracy through Law, *Opinion on three legal questions arising in the process of drafting the new constitution of Hungary*, nr. 614/2011, CDL-AD(2011)001, www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282011%29001-e, 7-8.

^{LII} See then Flemish Minister-President Kris Peeters (CD&V), Plenary assembly, *Parl. Proc.* Flemish Parliament 2010-11, 29 September 2010, n°3, 7; then Flemish Minister-President Kris Peeters (CD&V), Plenary assembly, *Parl. Proc.* Flemish Parliament 2010-11, 29 September 2010, n° 4, 40.

^{LIII} Ibid, 8 (author’s translation), see also 2.

^{LIV} Sven Gatz (Open VLD), *Parl. Proc.* Flemish Parliament 2010-11, 29 September 2010, n°3, 6.

^{LV} M. Goethals, ‘Zeg zeker niet grondwet, maar zeg handvest [Definitely do not say constitution, but say charter]’, *De Standaard* 24 May 2012.

^{LVI} With regard to Scotland see Walker 2013: 7.

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**Answers to Spanish centrifugal federalism:
Asymmetrical federalism versus coercive federalism**

by

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Abstract

The developing debate in Spain about its conversion into a federal State has now acquired an even greater relevance. Federalism, as a process of federalization, is subject to several descriptions with different intentions: the federalization of Spain implies a previous transition to federalism from a virtual field to a real field. We will review the main features in this transition. Post-conversion, we consider that there are two basic opposite alternatives: asymmetrical federalism and coercive federalism.

In our discourse about how asymmetrical federalism could be implemented in Spain we will focus on the risk of the evolution of asymmetries into *dissymmetries*, which we understand as a proportional situation that is broken in an anomalous way mainly with pro secession arguments or by other threats. Differential facts would be the headquarters of this asymmetric federal company.

From a different point of view, the path of coercive federalism might come from both the rejection by other territories of privileges, as a specific perception of asymmetries, and as the central answer to a proposal of self-determination or institutional disobedience.

Our main thesis is that a balanced proposal of democratic asymmetrical federalism is possible where differences can be seen as enriching the whole.

Key-words

Federal culture, Spanish virtual federalism, Constitution, dissymmetry, challenges, asymmetrical federalism, coercive federalism



1. Introduction

The debate about federalism in Spain has experienced an extraordinary growth in relevance in recent years. However, this approach has acquired a new dimension with the referendum of the separation of Catalonia scheduled for 9th November 2014.

The image of a triptych, which one could admire in the Prado Museum in the works of great artists like Velázquez, Murillo o the Bosco, illustrates our argument in a more visual or graphic context. The central panel features the consideration of the Spanish territorial system as an example of a federal state. Operating under this consideration, which we will describe as a *virtual federalism*, given that formal and constitutionally Spain does not have this feature, we will ask the question of which elements the Spanish territorial system resemble those of a federal state. Secondly, but perhaps more importantly, we will analyze steps that would be necessary in order to convert Spain into a federal State: the transition toward a federal State.

This transformation into a federal State can transpire in two distinct ways. Using again the image of the triptych, the viewer's gaze would shift to the two side panels, on each side of the center.

The first of these two contexts is developed by the territories which have differential facts and singularities of distinct characters (i.e. juridical, linguistic, economic, geographical...). The federal model that would respond to its aspirations would be an asymmetrical federalism. A brief dogmatic recapitulation of the characteristic principles of *asymmetrical federalism* will serve as a precursor to a subsequent description –based on this theoretical foundation- of the main challenges to asymmetrical federalism in a Spanish context. In the theoretical part of this chapter, we will introduce a neologism, *dissymmetries*, from which we will analyze the need to incorporate limits into the asymmetrical federalism proposal.

The second frame of reference in which this transformation to a federal system can occur, the other lateral panel, can be described as *coercive federalism*. The main protagonist in this context would be the central authorities, with the support of the other autonomous communities or territories that openly reject a privileged treatment offered based on the



presence of differential facts. A particularly important resource to coercive federalism is the deterrent measure against any reaction which presents a threat to the unity of the State.

In essence, this article attempts to reflect conceptually the most contradictory popular reactions to Spanish territorial organization: extreme asymmetry and pro-homogeneity coercion. It strives to communicate the doctrinal nature of the heated debate in which Spain currently finds itself. Separate from this popular polemic, our thesis aspires to build a concept of *democratic asymmetrical federalism* as a viable answer to this situation, however only if avoiding its malformations which we refer to as “*dissymmetries*”. This explanation will focus on identifying different pressures, through a dialectic approach to reflect upon the territorial issues in Spain.

2. Spanish virtual federalism

The first dilemma that we discuss reflects the tension between the current *status quo* and the future, whether to preserve the existing successful autonomous system (which would be more or less workable) *versus* the desire to adopt a federal system.

The long shadow of federalism has been cast over our State with different degrees of intensity from the very moment of the creation of the Spanish Autonomous System. However, we must recognize that the sole substantive reference to federation in the Spanish Constitution of 1978 is negative: Sec. 145.1 “Under no circumstances shall a federation of Autonomous Communities be allowed”. This has been described as the principle on “*non federality*” (González Trevijano 2014: 100). Nevertheless, it is very common that Spain has been considered federal, especially for academics: “Spain is a federation in all but name” (Elazar 1994: 222). The same argument has been made by other authors (Watts 1999: 30) or (Agranoff 1996: 386). According to Elazar’s description of federalism, “self-rule and shared-rule” (1987: 19), Spain could be considered as “federalism in the making” (Moreno 1999: 149), as “federalism with differential facts” (Aja 1999: 239), as “federal system in practice” (Burgess 2012: 19), as “federation-in-the making” (Palermo 2010: 12) or a protagonist of an “unfulfilled federalism” (Beramendi & Máiz 2004: 148-149).

Different substantive features of the Spanish territorial system support this conceptualization (Seijas Villadangos 2011a: 95): 1\ Spain has a system of shared powers



(sec. 148 and 149). 2\ the process of preparing Statutes of Autonomy has followed a covenant pattern with a keenly felt federal nature especially according to section 151.2. 3\ this federal nature is strengthened when we pay attention to LORAFNA, a Statute of Autonomy especially endorsed for the Navarra Foral Autonomous Community. 4\ the first final clause for closing the system of shared powers is very close to a federal proposal (sec. 149.3) “Matters not expressly assigned to the State by this Constitution may fall under the jurisdiction of the Autonomous Communities by virtue of their Statues of Autonomy”. 5\ the prevalence clause, (sec. 149.3) “State, whose laws shall prevail”. 6\ the system for controlling Autonomous Communities established by the Constitution is based on legal principles of jurisdiction. Sec. 153:

“Control over the bodies of Autonomous Communities shall be exercised by: 1. The Constitutional Court, in matters pertaining to the constitutionality of their regulatory provisions having the force of law. 2. The Government, after the handing down by the Council of State of its opinion, regarding the exercise of delegated functions referred to in section 150, subsection 2. 3. Jurisdictional bodies of administrative litigation with regard to autonomous administration and its regulations. 4. The Auditing Court, with regard to financial and budgetary matters”.

7\ finally, the Autonomous Communities participation in State decisions through the Senate (sec. 69), legislative process (sec. 87.2 and 109) or in planning general economic activity (sec. 131.2).

Having reconsidered these characteristics we can now argue that Spain is a *virtual federal State*, (Seijas Villadangos 2003: 457) according to the meaning of virtual, as “almost or nearly as described, but not completely or according to strict definition”. Consequently, we could consider “the federal appearance of the Spanish Autonomous system”. The hitherto backward-looking review of Spanish decentralization leads us to the next step. We will try to outline the main steps to complete a fulfilled federation, the *federal transition in Spain*.

In order to do so, we must first highlight that the origin of regionalization and our virtual transformation into a federal state is clearly driven by the pressure of certain territories (Catalonia, the Basque Country, and in the past the Canary Islands) in favor of their separation. Those territories are characterized by an impulsion to break away and disperse territorial organization (Burgess 2006: 18). For this reason one of the adjectives related to Spanish federalism is *centrifugal federalism*.



From a formal point of view, we have two alternatives: a constitutional reform or a constitutional implementation; or reframed in a federal sense, federal reform *versus* federal mutation (according to classic terms used in Constitutional Law). The former option will lead us to follow the regulated process fixed in Title X of Spanish Constitution, “too facile” if we pay attention to the last reform of sec. 135, against which scholars have argued for a long time (Ruiz Robledo 2013: 142, Seijas Villadangos 2014: 431). It is important to introduce the reform of this title so that the Autonomous Communities participation is included in future constitutional changes. The latter option would consist of interpreting the Constitution and the States of Autonomy in a federal way, through “deconstitutionalization”, a constitutional change without a formal constitutional reform. This option has been reinforced in the VIII and IX Legislatures (2004-2008/2008-2011) with the reforms of seven Statutes of Autonomy (Valencia, Aragon, Illes Balears, Catalonia, Andalucia, Castilla and León, and, finally, Extremadura) and by the absence of a consensus between the major political forces in Spain (Ortega 2005:53).

From a material perspective, the first proposal is to achieve a global consensus, with the same degree of support that the Constitution of 1978 received. That substantial change would have to include, at least, the following topics: identification of the federal States; a reform of the Senate in a symmetrical (USA pattern) or in an asymmetrical way, but never dissymmetrically. This asymmetrical reform means giving a qualitative application of differential facts, but never in a quantitative way. The essence of democracy is a change from quantitative items, number of votes, into qualitative decisions or policies. A transparent and stable system of intergovernmental relations and the inclusion of plural symbols in the State (plurinationalism) should be key elements in this reform. We now go on to argue that to achieve this transition three basics steps are required:

Firstly, *the creation of a federal culture*. The main target is to prepare civil society to assume the values of federalism connected to stability and unity. Political forces must communicate these ideas to the citizens in order to build a leadership culture linked to federal ideas. It would be a basic step that the federal approach and federal culture, would be able to gain the same support that, currently, nationalist culture enjoys (Burgess 2009: 8; Seijas Villadangos 2011b: 277; Bußjäger 2012: 24; Gagnon 2013:183-190).

Secondly, *a definition of the main characters and the main scenarios of federal evolution in Spain*. An advanced Spanish federal map would be focused on asymmetry, the union of functional



federalism and nationalist federalism, in a redefinition of the current autonomous system where differences would be minimized and linked only to real differential facts. With the slogan of “rolling back the States”, we would try to underline the advantages of recovering the common features of the central autonomous communities with a protagonist of national territories, close to a unitary federalism (García Roca 2012: 3). We are at the point when welfare of citizens must prevail, but such a drive would have to fight the strong desires of self determination that we find in some autonomous communities and the lack of confidence in federalism from the central autonomous communities. However, if the main challenge is making asymmetry workable and fair, we have to know the limits of asymmetry.

Thirdly, *translating the proposal to a legal challenge, especially at constitutional level*. The last point in this journey towards a Federal Spain is to consolidate it at constitutional level and, from the point of view of its legitimacy, with equally high degree of support which the present Constitution has enjoyed since its approval in 1978. (Cámara Villar 2012:24)

To federalize Spain does not mean weakening it, nor does it mean opening the door to disintegration or secession. Federalism means to emphasise union in a non centralized way. The resource of asymmetry is a tool for achieving harmonization, for managing the conflict, asymmetry is not an end in itself.

3. Asymmetrical federalism in Spain: the process of asymmetrical federalization

Asymmetry has always been central to federal theory, but it was in 1965 when Charles D. Tarlton rediscovered the importance of linking federalism to symmetry and asymmetry. The pragmatic implementation of federalism has required the creation of different ways of adapting flexible federal principles to the complex reality of several States.

This work has two targets: first, to recover a theory about the meaning of introducing asymmetrical elements into a federal system. Second, to resolve the main problems that it could create, especially connected to the acceptance of the formula for a State, with special attention to the case of Spain.

The format of what follows is outlined briefly at the outset. The first section is a general assessment of approaches to asymmetry through the answers to different capital



questions: Why, What, How and How many asymmetries? The second half is a brief discussion about the main issues of the Spanish decentralization, using the concept of asymmetry and the useful methodology of dilemmas or antithesis.

3.1. Can a federal system be asymmetrical? A brief review of theory about asymmetry in federal context

Symmetry in federalism refers to sharing by component units, whereas asymmetry expresses the extent to which component units do not share in these common features. Tarlton posited that “weakness” is the key concept, the reference for analyzing asymmetry, (Tarlton 1965: 864). This pathology should be treated or should be integrated in the State, in a way of cohabitation. Apart from studying the different types of asymmetries and their consequences, the main discussion must show how important it is to design a compatible way of federalism which could include several degrees of asymmetry and their limits. Now, we will speculate, reframing Tarlton’s arguments.

Why asymmetry? The main reason for asymmetrical functioning of a decentralized State is to search for an instrument in order to accommodate the differences for achieving a stable State. States with a variety of cultures, languages and religions could find in asymmetry a *modus operandi* for managing them. But asymmetry can neither be regarded a priori as useless nor a panacea. With that considered, We’ll try to justify the asymmetrical resource in these first paragraphs: Why a theory about asymmetry? Why asymmetry?

Why a dissertation about asymmetry? Tarlton wrote three interesting studies about federalism and asymmetry: “Symmetry and asymmetry as elements of federalism: a theoretical speculation” (1965) (which is the core of our article); “Federalism, political energy and entropy: implications of an analogy” (1967) and “The study of federalism: a skeptical note” (1971), for which the Voting Rights Act, a law that consolidated the idea of unique citizenship in North America, was his main reference. From this academic point of view we could subjectively differentiate three main stages in the study of asymmetry: the beginning of the concept, in Tarlton’s works; the consolidation of asymmetry in the theory about federalism, in Agranoff’s volume and finally with Watts and Burgess’s works, two capital references for any comparative study about asymmetrical federalism,

We’ll try to solve the beginning and the end of asymmetry: legitimacy and challenges of asymmetry. Looking back to history, we can find special differences in political



organizations, and hence maybe the ancestors of asymmetry: *foedera aequa-foedera iniqua*, German hegemonic federalism (Seijas Villadangos 2003: 222-251). These types of differences were justified with the Latin expression *exceptio firmat regulam*, that we adapt to a theory about asymmetry in exceptions help to fulfill rules. We link the legitimacy of asymmetry with the need of searching for an instrument to link the different parts of a State. A *pragmatic* approach in seeking to join the different units in a State legitimizes asymmetry. This is very close to the main challenge of asymmetry. The aim of asymmetry is to *integrate the different units*, in search of stability.

The notion of asymmetry refers to the situation where some territorial units should be allowed some scope for reflecting on their specific characteristics and needs.

In an etymological approach to asymmetry, we must refer to the Greek word *ασυμμετρία* that means disproportion. In other words, asymmetry is a lack of symmetry that implies another element for making a comparison. This is an aseptic meaning: a situation where a heterogeneous element is introduced, breaking the proportionality of the parts, between them and in relation to the whole. A second meaning, in a pejorative sense, what we call *dissymmetry* – the prefix *dis-* expresses negation or completeness or intensification of an unpleasant or unattractive action-, will be applied to those situations where a proportional or symmetrical situation was broken in an anomalous or faulty way (i.e. for political pressures, the threat of secession or self-determination, the confusion between powers –if you have differences in culture, religion, language... you could reach more powers in economy, social services or foreign policy or more representatives in State institutions-). When a territorial organization is based on *dissymmetries* we have to speak about the pathology of federations, meaning the failure of them (Watts 2006: 109-115). Spanish centrifugal federalism has been based on *dissymmetries* many times.

In Constitutional Law asymmetry is a form of state organization where territorial units with political autonomy enjoy a differentiated constitutional treatment, legitimized for the positive recognition of having different types of singularities (linguistic, juridical, fiscal...) with respect to the other units of the State.

The main aftermath of asymmetry is the qualitative intensification of powers of one unit without reducing the powers of the others, *ad intra*, and the reflection of these singularities in the state institutions and intergovernmental relations, *ad extra*. A proper



asymmetrical Constitution must include limits to the positive asymmetries regulated by supreme law. Because asymmetry is no less essential to federalism than symmetry, it is fundamental to strengthen the stability of the system from the periphery, to enhance a basic symmetry we need asymmetry. By way of illustration, it is interesting to think about the Golden Mean and the columns of the Parthenon in Athens¹. Connected to that issue we should think about the main limits of asymmetries: equality and solidarity.

How can we describe asymmetry? We wish to emphasize four features of asymmetry. Firstly, *singularity*: the root of any asymmetry has to be a differential fact that must not be shared with the remaining territorial units. Secondly, *identity*, it is not enough to speak about asymmetry to have or to create a differential fact. It is considered that an asymmetrical element is the channel to express the demands of citizens and its bond of union; thirdly, *gradual implementation and flexibility*: we could use asymmetrical arrangements according to the variety of situations that we could face. In other words, it could simply create more problems than solutions and it could be disastrous. In the development of policies or legislation according to an asymmetrical pattern, it is important to have some degree of flexibility within the constitutional system. Finally, *instrumental nature reflected in the Constitution*; linked to the essence of asymmetry, we stress its subsidiary feature, subordinated to fill other values and principles regulated in the Constitution and the reasons why it was adopted, namely, unity and stability.

The implementation of asymmetrical arrangements implies different measures concerning legislative powers, functions, distinct administrative status, Civil Law, Fiscal powers, representation in national parliament, reservations of posts in the national executive, language, distinct party system, religion or symbolism (Keating 1998: 196).

How many asymmetries? “Among the several states in a federal union, cultural, economic, social, and political factors combine to produce variations in the symbiotic connection between those states and the system” (Tarlton 1965: 861). We describe these types of factors as preconditions to asymmetry. We could simplify those types of preconditions of asymmetry to socio-economic and cultural-ideological. If we consider them separately, they only constitute a test of the differences that exist in a plural political organization, especially “federal systems”. We need to add the features that characterize asymmetry (*singularity, identity, gradual implementation, flexibility and instrumental nature reflected in the Constitution*) in order to consider them as asymmetrical.



Focusing only on asymmetries we distinguish different types, from a conceptual distinction that could be useful for a practical analysis: *De iure* and *the facto*^{II}, political and constitutional asymmetries^{III} (Watts 2006: 63), structural and relational asymmetries^{IV}, quantitative types of asymmetry^V or transitory and permanent asymmetries^{VI}.

Implementing asymmetrical federalism and the different types of asymmetries is essentially a dynamic approach. Its instrumental nature reinforces this view. It is not a single dose medication. We have expressed this proposal through the use of asymmetry in the search for symmetry and stability. According to Friedrich, these fluctuating relations are the essence of federalism:

“Federalism is also and perhaps primarily the process of federalizing a political community, that is to say, the process by which a number of separate political communities enter into arrangements for working out solutions, adopting joint policies and making joint decisions on joint problems, and conversely, also the process by which a unitary political community becomes differentiated into a federally organized whole” (Friedrich 1968: 7).

Thus, asymmetrical federalism is a combination of differentiated relations and integrated relations, a recurrent revision, a process of negotiation and renegotiation.

3.2. Asymmetric federalization in Spain: main challenges

Following the brief theory assessments about asymmetry that we have made in this article, we will try to change the perspective by adopting a practical point of view, paying attention to the situation of Spanish decentralization. To complete that objective we have chosen a dynamic method consisting of expressing the main issues through a series of dilemmas, according to a dialectic way of thinking and a pragmatic understanding derived from the consideration of federalism and asymmetrical federalism, (Agranoff 1994: 84) as dynamic, non-static processes (Watts 1966: 15).

The following dilemmas should illustrate more details of our proposal. First, the map of federal implementation could be a mixture of two types of federalism (functional federalism and nationalist federalism), where the result would be a type of asymmetrical federalism. Second, the major problem in Spanish decentralization: the combination between equality and asymmetry, and finally a warning about the main risk of the process:



the proliferation of elements of divergence. A final reflection about asymmetries and dissymmetries would lead us to fix a framework and limits to a proposal of asymmetrical federalism as an answer to different arguments against asymmetry.

3.2.1. National federalism versus functional federalism

In our attempts at sketching out the map of a future scene of a federal Spain, the only purpose is that of stimulating a debate on this issue; we will not advocate a particular model. Our line of reasoning is to propose a global idea that reflects our aim of searching for a workable proposal. The parameters we set are not to perpetuate and exacerbate old problems and, at the same time, not create new ones.

The fundamental issue is to link those parts of Spain with a strong nationalist feeling with the rest of Spain (ROS), which lacks this feeling, but at the same time maintaining their desire for the advantages of living in a decentralized system, in terms of democracy and social rights.

With the aim of accommodating linguistic, Civil Law and fiscal powers we could demand a federal pattern for the peripheries which support demands for autonomy: a *nationalist federalism*.

The rest of Spain could enjoy a functional federalism whose core elements were an efficient policy-making predicated on a basic equal status for citizens and which introduce the topic of equality and asymmetry. A functional federalism, especially in times of crisis, means a reduction of bureaucracy and institutions. At the same time, the cooperation between territories must increase in order to avoid superfluous duplication. Of course, intermediate administrative levels between citizens and states must be reduced or disappear.

3.2.2. Asymmetry versus equality

Diversity is inherent every process of decentralization and whilst not necessarily negative, can cause the risk of unequal treatments among Spanish citizens. The risk of inequality can be easily understood by testing different policies in health policy, education or civil servants' salaries.

One of the most important issues in a federal State is to clarify what equality means. Can we talk about the same equality in a unitary State or in a federal State? What happens



with equality in asymmetric federations?

There are two references for comparison: constituent units and citizens, and two conceptualizations of equality: arithmetic equality and geometric equality.

Arithmetic equality postulates absolutely equal treatment under law. On the other hand, geometric equality requires differentiation of treatment according to real differences. This was Plato's main theory. If we apply this theory to constituent units, under an arithmetic equality all these units would be considered absolutely equal under the law. If we differentiate the legal status between them according to real differences, such as territorial size, population, tradition, language and religion we should apply a geometric concept of equality. The justice of this application depends on the reality of these differences and on the limits to the consequences of the assignment of that singular status.

In the case of individuals we have to reinforce the jurisprudential concept of "fundamental juridical positions" (STC 37/1987, FJ.10). That cryptic expression refers to the heart of equality, its essence. This is the only way for making that concept compatible with asymmetry. In that case there is enough room for differences, but not for discrimination among citizens.

Connected to the study of equality, we have to take a look at the interesting question of its perception. First at all, asymmetry can cause grievances among citizens. A demand for symmetry would be necessary for counterbalancing the situation. It is quite common that a phenomenon of policy contagion happens. It means that policy choices made in one territorial unit may be copied in the rest. This could lead to a surrealistic situation, like we will see in the next paragraph, when the goal of copying other Autonomous Communities is only *per se* an asymmetric element (if you have your own language, then me too).

Another very important issue linked to equality and asymmetry is that there is a dilemma with respect to the distribution of resources and the way the territorial units are financed. The richest units perceive that they pay the price of decentralization. This is the case of Catalonia that has been clearly reflected in the amendments to section 135 of the Constitution in its recent reform; as evident in amendment 12 signed by the Catalan Group: "The State will ensure that under no circumstances will alter previous positions per capita contribution to gross domestic product by each Autonomous Community over the final positions in disposable income per capita adjusted for prices". (*Official Bulletin of the Congress of Deputies*, 05/09/2011).



Catalonia, Western Australia, and a long list of constituent units in federal States feel exploited as a cash cow. Their usual answer is to propose to secede from Spain, Australia... because of the high burden they had carried in financing poorer units. In Spain we have on the table, for the new Legislature, the proposal of “Catalan Fiscal Covenant”, similar to “*Basque Country Concierto*” and “*Navarra Convenio*”. This is a proposal that can be included in a type of federalism that Watts called “fend-for-yourself” (Watts 2006: 45); this is a clear root of a pathology of federalism. We have to remember again the two clear limits to asymmetric federalism: unity and solidarity.

3.2.3. *Asymmetry for everyone versus designed asymmetries*

The formula of “*Coffee for everyone*” has been one of the most democratic elements of Spanish decentralization, also one of the most criticized. The current preoccupation is in the adaptation of this famous slogan to an asymmetrical context, “asymmetries for everyone”.

Any interested party can check the recent reformed Statues of Autonomy, *i.e.* Castilla and León, LO 14/2007, 30th November, where it will be evident that there are plenty of asymmetrical references, even in the traditional center of Spain. Such an investigation uncovers singular reasons for the autonomy: different proper languages, “leonés”, “gallego” sec. 5; a Charter of Rights for the Castilian and León citizens (Title I); new territorial organizations inside the Autonomous Community, with a differential fact (El Bierzo sec. 46.3) and the legal recognition of internal plurality that determines the need for phasing out economic and demographic imbalances between the provinces and territories of the Autonomous Community (D.A. 2.^o). The time for asymmetries linked to differential facts (Aja 1999: 239) seems to have run out.

This is not the proper way to achieve federalism, but a choice for a failed formula. A federation is not a mechanism for manufacturing asymmetries, this path will lead to a disaster, and the system will start to crumble.

But, what can you do when political forces, especially those from the periphery, are boxing the State in and when the rest of Spain (ROS), in an effort not to be outdone, triggers further demands (*i.e.* Camps clause^{VII})? The strengthening of the integrative function of the State and horizontal cooperation are the main solutions.

We have to add another challenge, the dilemma between executive federalism and



participatory federalism. The statutory reform process and the constitutional reform have shown the absence of popular participation, for example the referendum on the Catalan Statute of Autonomy 18th June, 2006, which only achieved a 49 % participation. A federal model without the counterbalance of the people would be an autistic federalism.

3.2.4. Asymmetries versus dissymmetries: the need to set limits to asymmetrical federalism

A reflection about asymmetry should be completed with basic guidelines about what happens associated with its environment. We describe it as dissymmetry: dissymmetry applies to those situations in which the absence of a symmetrical or proportional situation occurs in a faulty or defective way.

The origin of dissymmetry is linked to the absence of constitutional legitimization agreed by consensus as a reference and the lack of a differential fact. Moreover, the manipulation of and growth in what we consider events or consequences of those peculiarities and the invention of new asymmetries in territories without differential facts in an effort to imitate them would be considered as dissymmetries. Those differential facts are strictly limited to, in the Spanish case, linguistic, “foral” or special law and “concierto vasco/convenio navarro” systems of financing (Aja 2014: 331-349).

The development of dissymmetrical expressions leads to various attempts to convert those asymmetries into quotas of power: through the acquisition of strategic competencies unrelated to their peculiarities and into organizational consequences through drives to non proportional composition of central organs and into or the right of veto on important issues. In those cases we would move in the field of pathologies of federations. The main strategy to be attempted is to set limits to asymmetries and as discussed these refer to unity, basic equality and solidarity and they should be ruled by the Constitution.

4. Coercive federalism in Spain: the way of imposition by central organs

Historical and traditionally conflicts between the center and the periphery have had three basic channels of resolution: negotiation, appeal to a tribunal and coercion of one party over the other (Aja 1985: 472). As an alternative to a dialogue path towards federalization, our constitutional order offers a clear way towards conflict resolution in regard of propositions which distance themselves from legality and democratic legitimacy



and which aim to change the constitutional order and its values. Various events have given importance to a constitutional precept, which has been relatively ignored by scholarship. With this proposal we are referring to article 155, related to *coercive federalism*.

“Article 155

1. If an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following approval granted by an absolute majority of the Senate, take the measures necessary in order to compel the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interests.

2. With a view to implementing the measures provided in the foregoing clause, the Government may issue instructions to all the authorities of the Autonomous Communities”.

The most recent context within which interest in this coercive dimension of federalism has been revived is in the calling for a secessionist referendum in Catalonia, to be held on 9th November 2014. The coming to power in 1999 by Ibarretxe in the Basque Country and his project regarding sovereignty amendments of the statute of autonomy (rejected by Congress on 1 February 2005) have also lead to a rise of importance of this article.

Away from the hypothesis, the reality is that only in 1989 the government of Felipe González, in the Resolution of Council of Ministers of 10 February, approved a request from the Canary Islands based on art. 155. The reason was the failure by the Islands of the implementation of the dismantling of a 15% tariff for goods originating in the European Community. A meeting between the two governments prevented the Senate from acquiring assent for processing procedure that would coercively limit the Islands’ autonomous powers.

From the normative point of view we would like to highlight the express provision of article 155, which came about as a consequence of constitutional reform, in 2011 (article 135) and the approval of the Organic Law 2/2012 regarding budgetary stability and financial sustainability. Its article 26 establishes measures for a forced compliance, in case



an autonomous community does not comply with certain demands related to financial sustainability and the reduction of public debt^{VIII}.

The situation in Catalonia regarding the proposal of call for a referendum of self-determination, announced on 27th September, 2012, revives the necessity to study the essence and nature of what we might call coercive federalism.

4.1. Definition and characterization of coercive federalism

Federal coercion, which in the case of Spain is State coercion, can be described following Hans Kelsen as “coercive action based on strict and collective liability and directed against a partial community of the Federation, as well as against individuals who make up that community” (Kelsen 1927/1981: 141). Spanish scholar Virgala Foruria (2005: 57), relates to the same issue as “the imposition from central organs of a composed state towards a territorial entity, politically autonomous, of fulfilling its constitutional duties”. This concept not only has been studied by European scholars, from the USA John Kincaid (2008:10) considers that “a federalism today can be described as “coercive” because major political, fiscal, statutory, regulatory and judicial practices entail impositions of many federal (i.e., national government) dictates on state and local government”. This description of coercive federalism includes a benevolent characteristic linked to the daily functioning of a composite state. However, what the Spanish Constitution considers state coercion is linked to an exceptional mechanism^{IX} to apply in emergency situations of threat to state unity through the subversion of constitutional order and the violation of general interest.

The first aspect to explain when considering coercive federalism is the necessity for its constitutionalisation, i.e. it is important that it has been regulated in a norm at constitutional level. Less acceptable would be its regulation in ordinary laws. This characteristic of positivization rejects an application of coercive federalism only in practice and curbs its arbitrary use.

The reason for the insertion of clauses regarding coercive federalism is linked to the essence of composite state, the balance between unity and autonomy. Unity is a concept that draws from other principles of constitutional integration, such as solidarity, homogeneity, equality of rights and duty, a unified market, whose aim is to achieve a unitary and common constitutional order in those spheres of life which are linked to the essence of a



state (Cruz Villalón 1984: 57). When the territorial entities create obstacles to challenge the satisfaction of these norms the possible answer would be coercive federalism.

4.2. References to coercive federalism in comparative constitutionalism

A breach of the constitutional obligations of territorial authorities in a composite state has had different responses, from the institution of federal intervention as a mechanism to maintain public order, to the extreme option of dissolving and abolishing the territorial unit. Between these two options, we can find the coercive federalism devised by German constitutionalism and integrated into the Spanish constitutional order.

The United States included in its Constitution a form of federal intervention (Gómez Orfanel 2005: 47), namely Article IV.4, in the event of public disorder and domestic violence. Legally it must be the Legislature of the constituent State or its executive which has to request such an intervention, but in practice it is produced without the request of the affected state. This is illustrated by a case that has gone down in history as “the Little Rock nine”, which followed the 1954 U.S. supreme Court decision that had declared school segregation on racial grounds unconstitutional leading to the decision by Eisenhower in September 1957, when to order the intervention of the federal army to guarantee the right of black students to enter the Little Rock School of Arkansas, against the will of Governor Faubus.

As regards content, essentially the Constitution of the United Mexican States is similar, where federal authorities are guarantors of the stability of a state, threatened by violence or foreign invasion or internal causes. Article 119 of the Australian Constitution acts much in the same way.

The radical option of responding to acts contrary to the Constitution or laws by a territorial unit of a composed state with its dissolution leads us to Italy^X, Austria^{XI} and Portugal^{XII}.

German federalism has generated and consolidated the institution of coercive federalism (*Bundeszwang*) or Executive federalism (*Bundesexekution*). According to Kelsen, if a Member State does not meet the constitutional or legal duties, the application of state power and coercion is imposed, “regardless of the desire and will of the men, and it may eventually prevail against their desire and their will” (Kelsen 1925/2002: 165). “A coercive act of the union that goes against any of its member states and is performed in the event of



any breach of the duties imposed by the constitution or any statute thereof, issued on the basis of this constitution” (Kelsen 1925/2002: 355). I.e., the mechanism of federal coercion is designed as the most radical guarantor of the Constitution, once the judicial guarantees have failed. In Germany this clause was incorporated in the Final Act of the Congress of Vienna, 1815 (Articles 19 and 31-34), the Weimar Constitution of 1919 (art. 48) and the Basic Law of Bonn (Article 37), which has been incorporated into the Spanish Constitution.

4.3. Justification and potential consequences of coercive federalism

The premise that justifies the application of an instrument of coercive federalism is the failure of the decentralized territory to fulfill its obligations arising from the Constitution and the laws. This breach must seriously affect the general national interest, an interest which must be linked to the welfare of its citizens, to the unity of the State and the fulfillment of its purposes. Thus, once a violation of a constitutional or statutory obligation has been observed, which generally carries with it a threat to order and security, the regional government is warned. This warning not being heeded, a stressful situation is produced that endangers public stability, and in consequence the *Raison d'État*, whereby measures to implement coercive federalism may be resorted to.

Whilst the Spanish Constitution is silent on the matter (Calafell 2000: 130-135), following Kelsen's *General Theory of State*, events that allow coercive actions are the following (Kelsen 1925/2002: 356): occupation of the territory of the rebellious State; requisition of food; occupation of government buildings, removal of state bodies, the arrest of those who resist and elimination of the rebels in case of encountering armed resistance. It should be pointed out that, even for Kelsen, these measures of state coercion were “primitive” in a radical sense, and their reading in light of the Constitution, in this case the Spanish Constitution, obliges their adaptation to constitutional principles and values. It is this circumstance that gives coercive federalism its two names: residual and subsidiary nature.

Because of this residual character the radical solution of federal coercion measures is only applied once legislative cooperation mechanisms have failed. Thinking in the Spanish actual situation, for example, the Catalan government could have been empowered by law to hold the referendum either by authorization under Art. 92 CE or by statutory reform,



backed by a previous constitutional amendment or by an appeal to Article 150 of the Constitution^{XIII}. In addition, once the judicial intervention mechanisms had failed, in the case of Spain and Catalonia, with the judgment of contempt of the Constitutional Court of 25 March 2014 (STC 42/2014)^{XIV} and the subsequent mechanisms of adoption of agreements between the executives had been exhausted, the path for using coercive federalism would be open. In respect of the second coercive federalism feature, constitutional requirements imply that all actions taken under the umbrella of coercive federalism are protected by the Constitution. Where appropriate for your application you need to check: first, that the particular case fits the constitutional definition of the offense; and second that, respect the procedural aspects of compulsive act are respected. We are facing a major legal problem, but this does give evidence of constitutional theory on political principles (Kelsen 1927/1981: 75).

4.4. Declaration of sovereignty, the people of Catalonia's right to decide and coercive federalism

Coercive federalism links theory and constitutional practice in an exemplary manner. So, the starting point is the *Declaration of sovereignty and the people of Catalonia's right to decide*, adopted by the Resolution of the Parliament of Catalonia 5 / X, 23rd January 2013^{XV} (Castellá Andreu 2013: 172).. This point has been reached by a process whose main events can be summarized as follows:

The adoption of the Spanish Constitution of 1978, which was supported by 91, 09% of the voters in Catalonia.

The creation of the Catalan Statute of Autonomy of 1979, which was supported by 88.15 % of voters in Catalonia. In 1980, the first regional elections were held in Catalonia, the winner being the political group *Convergència i Unió*, with the political figure of Jordi Pujol, who would remain in office until 2003.

In 2003, a tripartite Catalan government led by the Socialists, promoted the reform of the Catalan Statute of Autonomy. In 2006, the Organic Law 6/2006 of 19 July amended the statute, in which the “uniqueness of Catalonia within the Spanish State” (Tornos 2011: 16) was recognized.



2010 regional elections, in which *Convergència i Unió*, with Artur Mas, triumphed, started an ideological process with the slogan *La Casa Gran del Catalanisme* (Catalanism's Big House), which was linked to the right to decision in Catalonia.

In 2012 the Catalan Parliament approved the so-called “fiscal deal,” whereby Catalonia would be granted financial peculiarities similar to those granted to the Basque Country, but which were subsequently rejected by the central government.

The new elections in 2012 opened the door to the debate in the Catalan Parliament on the referendum, for which consensus on the contents was reached in December 2013 by means of the question: *Do you want Catalonia to be a State? If so, do you want Catalonia to be an independent state?*

On January 23, 2013, the Parliament of Catalonia approved a Declaration of Sovereignty and the right for the People of Catalonia to decide.

Decree 113/2013, of 12 February, created the Advisory Council for National Transition. Among the main functions assigned to the Council is “to analyze and identify all possible legal alternatives to the process of national transition,” as well as to disseminate knowledge of the Council among the international community and identify supporters.

We are still in an evolving process of evolution of events, but the most relevant opinion in constitutional terms, Constitutional Court's Jurisprudence, as recently declared in the sentence of 25th March, 2014 (STC 42/2014), allow us to make the following assessments. The decision of the Tribunal holds around two main arguments: firstly, the impossibility of attributing sovereignty to a fraction of the Spanish people, “only the Spanish people are sovereign, exclusively and indivisibly” (FJ 3). It follows that under the Constitution, “one region cannot unilaterally call a referendum on self-determination to decide its integration within Spain” (FJ 3).

Secondly, the recognition by the Court that “the Declaration does not exclude the possibility of following constitutionally established channels to translate the political will expressed in the Resolution into a legal reality,” i.e. there is the possibility of a constitutional interpretation of the right to decide. From a negative point of view, the right to decide would be unconstitutional if it is proclaimed as a manifestation of a right to self-determination which is not recognized in our Constitution. It also would be unconstitutional if were linked to the fragmentation of sovereignty of the citizens of each Autonomous Community, violating their attribution to the Spanish people in global terms.



From a positive point of view, an interpretation under the Constitution of the right to decide for the citizens of Catalonia is linked to it as “a political aspiration which can only be reached through a process adhering to constitutional legality with respect to principles of “democratic legitimacy,” “pluralism” and “legality” (FJ 4). The “right to decide expresses a political aspiration subject to being defended under the Constitution” (FJ.4). The means to do so must be the reform of the Constitution, the Legislative Assembly of an Autonomous community has the legitimacy to promote such reform (Articles 87.2 and 166 Constitution) “and the Spanish Parliament should participate in considering it”^{xvi}.

We can describe the response of the Constitutional Court as legally correct but politically complex. In the possible event of the process moving outside of channels designed by the Constitutional Court, the path to coercive federalism would be opened. Only then can we build a rigorous theory about it. At this point of our discourse we must remember that coercive measures are not our favorite, but they provide us with greater legal certainty. And, at the end of the day, it is the main argument of our constitutional vocation and our faith in the State.

5. Proposal and final reflection

Following this reasoning and applying it to a brief discussion of the quality of asymmetrical federalism in Spain and the possible application of coercive federalism mechanisms, certain interesting conclusions are reached:

We have developed the asymmetrical federalism theory, adding the category of *dissymmetry*. *Dissymmetry* can be applied to those situations where a proportional or symmetrical situation was broken in an anomalous or faulty way (i.e. for political pressures, the threat of secession or self-determination, the confusion between powers –because you have different culture, religion, language... you could reach more powers in economy, social services or foreign policy or more representatives in State institutions-). The risk of falling into a pathological federalism, founded in *dissymmetries*, is too high. All deceived federations could corroborate this premise.

We have suggested a list of stages for what we have called “the Spanish transition to federalism”: firstly, *to create a federal culture* where the main target is to prepare civil society to assume the values of federalism connected to stability and unity. Political forces must



communicate these ideas to the citizen in order to build a leadership culture linked to federal ideas. It would be basic for that federal proposal that a federal culture would be able to gain the same support that, currently, nationalist culture enjoys. It is crucial to emphasize the importance of limits. The essence of federalism -unity and self-government- is not compatible with secession.

Secondly, a *specification of the main characteristics and the main sceneries of the federal evolution in Spain* where an advanced Spanish federal map would be focused on asymmetry, a union of a functional federalism and nationalist federalism, in a redefinition of the current autonomous system where the differences would be minimized and linked only to real differential facts. With a slogan of “rolling back the States” we would try to underline the advantages of recovering the common features of the central autonomous communities without forgetting the importance of national territories. We are in the moment when the welfare of citizens must prevail. Such a redefinition would have to fight with the strong desires of self-determination that we find in some autonomous communities and the lack of confidence in federalism from the central autonomous communities. The main challenge is making asymmetry workable and fair, so we have to know the limits of asymmetry.

Thirdly, *translating that proposal to a legal challenge, especially at the constitutional level.* The last point in this journey towards a Federal Spain is to consolidate it at a constitutional level. This process must have the same high degree of support which our present Constitution has enjoyed since its approval in 1978.

Our last reflection refers to how difficult it is to find comprehensive answers to the questions raised by asymmetrical federalism. But this is not a valid excuse to stop trying. Our dilemmas or opposing paradigms may have contributed to this effort. One of the most drastic potential solutions is based on the principles of coercive federalism. This is a legal response whose greatest virtues are its constitutional recognition and deterrent effect. Now, we can see our triptych differently, assuming the role of each part may vary but all the elements are present to form a complex whole.

“The concept of federalism has been a major panacea in Western political thought for an incredible range of problems... Whenever events have seemed to demand cooperation and coordination, while interests and anxieties have held out for the preservation of difference and diversity, the answer has almost unfailingly been some form of federalism”



(Tarlton 1965: 874). In the future, it is possible for Spain to become federal, and this federalism could be an asymmetrical federalism based on a democratic dialogue, a “union forged by negotiation and renegotiation” (Keating 1998:213) and far away from coercion.

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^I The architecture of the Parthenon, especially its columns, reflects the pursuit of symmetry through asymmetry. Thus, different distance between columns, its inclination towards the inside or to have a wider base offers a symmetric appearance in the view of a reasonable observer. The theory of the Golden Mean is one of the explanations that have been made. This comparison illustrates our position about the instrumental nature of asymmetry.

^{II} *De iure* asymmetry refers to those asymmetries formally entrenched in constitutional level and in other types of laws, *i.e.* in the Spanish case, Statutes of Autonomy, so that territorial units are treated differently by the law maker. The *facto asymmetries* refer mainly to political practice or intergovernmental relations where asymmetrical preconditions are reflected. One of the most important the *facto asymmetry* is the existence of different territorial units, according the size or the population of each unit. Those preconditions produce a diversity of factors of power in every State, and reflect in the perception that everyone has of the others, supremacy and, on the other side, fear and distrust of the less powerful units.

^{III} Very close to the former category, Watts has distinguished Political and constitutional asymmetries. Political asymmetry, which is a common feature in all federal systems, refers to relative influence of the various constituent units within a federation that arises from the impact of cultural, economic, social and political conditions. Constitutional asymmetry implies the constitutional assignment of different powers to different constitutional units, which is not such a common feature in many federal systems.

^{IV} Structural and relational asymmetries are the result of considering the scope where they are implemented. Structural asymmetries are the result of a static analysis of a plural State and refer to the differentiated position of the territorial units due to different factors like population, race, culture, religion... From those conditions it's determined a singular position of those territorial units in the State which affects decisively the general policy. *i. e.* elections, fiscal policy... Relational asymmetries are the consequence of projecting those structural asymmetries *ad extra*. They determine the special status of a territorial unit. *i.e.* the bilateralism in the relations between the center and those States or Regions.

^V The different degree of asymmetrical outcomes has generated quantitative types of asymmetry. For instance, a Constitution could provide an asymmetric assignment of powers to the various territorial units to increase provincial or regional autonomy. On the other hand, a Constitution, a sub-constitutional law or a political decision could establish an increase in national or federal powers over specific territorial units for some specific functions, *i.e.* very expensive powers like health care or education. This was a claim of several Spanish Autonomous Communities (*i.e.* Valencia, Madrid and Murcia), sustained from the summer of 2011. The consideration of Autonomous Communities, treated as responsible for the crisis and not treated as victims, has forced that situation. Nonetheless, this isn't new because in 2009, Canary Islands proposed to give back to the State the autonomous power over immigrant children. Times of crisis and economic difficulties are times for withdrawing to the State.

^{VI} The existence of asymmetries which could be described as transitory or permanent is explained according to the circumstances of acceptance or refusal that generate the integration of differentiated elements inside the State. Time is the key question in these types of asymmetries. The different ways of reaching autonomy in Spain are an excellent example.

The permanent asymmetries are entrenched in the Constitution or at a sub-constitutional level, and its aftermath is to define the system qualitatively

^{VII} D.A. 2.º, LO 5/1982, 1st July, (reformed LO 1/2006, 10th April) “1. Amendments to the law of the State, in general and at the national level, involving an extension of the powers of the Autonomous Communities shall apply to Valencia, considered in those terms extended its powers. 2. The Valencia will ensure that the level of self-government established in this Statute is updated on equal terms with other autonomous communities. 3. For this purpose, any extension of the powers of the Autonomous Communities which are not assumed in this Statute or have not been allocated to it, transferred or delegated to Valencia earlier will force, if necessary, to institutions of self-government legitimized promote appropriate initiatives to that update”.



^{VIII} Art. 26, LO 2/2012, 27th April, Budgetary Stability and Financial Sustainability. It develops different coercive measures concerning to Autonomous Communities. Three cases: The failure in reaching budgetary stability and financial sustainability in the event of an Autonomous Community not complying with the provisions laid down in the LO 2/2012 about Agreement of non-availability of loans, the non-constituting of obligatory deposits established by article 25, or the non-implementation of measures proposed by the expert commission (article 26).

^{IX} Spanish Constitutional Court, STC 49/1988, 22nd March, F.J. 31.

^X Art. 126 Italian Constitution.

^{XI} Arts. 100 and 146 Austrian Constitution

^{XII} Art. 234 Portuguese Constitution

^{XIII} Article 150.2 Constitution: “The State may transfer or delegate to Self-governing Communities, through an organic act, some of its powers which by their very nature can be transferred or delegated. The law shall, in each case, provide for the appropriate transfer of financial means, as well as specify the forms of control to be retained by the State”.

^{XIV} “The Court accepts the merits of the appeal because the political nature of Parliament’s resolution does not exclude legal nature, further reinforced by producing legal effects”. (FJ 1). (available at http://www.tribunalconstitucional.es/es/salaPrensa/Documents/NP_2014_026/2013-01389STC.pdf) (access on 15th September 2014)

^{XV} Boletín Oficial del Parlamento Catalán, n. 13, 24 January. (available at <http://assemblea.cat/sites/default/files/documents/sovereignty.pdf>) (access on 15th September 2014)

^{XVI} On 18th and 19th September, 2014 the Parliament of Principado de Asturias Autonomous Community exercised that opportunity to push for a constitutional amendment, something unheard of in the Spanish constitutionalism (available at <http://anleo.jgpa.es:8080/documentos/Boletines/PDF/9A-1614.pdf>) (access on 25th September, 2014).

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Constitutional bases in the federal conflict over access to health care of undocumented immigrants in Spain

by

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Abstract

In Spain, over the last thirty years, the powers of “Autonomous Communities” to guarantee welfare and social rights have witnessed exponential proliferation. Such expansion has occurred within the wider processes governing the transfer of powers from the central level and the consolidation of the political autonomy of “Autonomous Communities.” For instance, the vast majority of legislative powers in the social sphere are allocated to different levels of government according to a shared pattern, whereby the central level establishes framework legislation to be complemented and implemented by each of the “Autonomous Communities”. However, the practical difficulties of determining the scope of legislative competences within such a shared logic are a permanent source of intergovernmental and constitutional conflict in Spain.

This paper seeks to analyse some of the constitutional coordinates that frame the federal tensions that have arisen from the last national legal reform, which have drastically curtailed the right to free health care for undocumented immigrants in Spain. The Spanish case illustrates the efforts of the Constitutional Court to conciliate unity and diversity in the legal design of health care, and highlights the crucial constitutional role of the subnational levels of government in preserving social inclusion policies in a context of general welfare retrenchment.

Key-words

Federalism, “Autonomous Communities”, right to health care protection, irregular immigrants, human rights



1. Introduction

The “social” orientation of the Spanish State is configured as a constitutional goal whose fulfilment is not only binding upon the central level of government, but, very importantly, it also entails a constitutional responsibility for each of the seventeen “Autonomous Communities” comprising the Spanish asymmetrical federalism. In this regard, the “welfare state” principle involves legislative commitments at both levels of government in accordance with the constitutional allocation of powers. At the subnational level of government, the competences on welfare and social rights have witnessed an exponential proliferation within the wider processes of transfer of powers from the central level and the consolidation of the political autonomy over the last thirty years. In particular, the vast majority of competences on the social sphere is allocated according to a shared or concurrent pattern between the two levels of government. The practical difficulties to determine the scope of legislative competences on each subject and, specifically, the complaints of the “Autonomous Communities” (hereinafter, *AA.CC.*) over the interference of the central level in their own sphere of legislative power, have constituted a permanent source of intergovernmental constitutional conflict.

This paper seeks to analyse some of the constitutional coordinates that frame the federal tensions over the last national legal reform that drastically curtailed the right to free health care for undocumented immigrants in Spain. Specifically, the Spanish case illustrates both the complexities and the recent constitutional dialogue between the levels of government and the Constitutional Court on the federal conciliation of unity and diversity on welfare, where subnational entities share legislative powers to co-define how social policies should be fulfilled in their own territories. **Part I** provides an overview of the legal amendments on the access to health care for undocumented immigrants in Spain. In **Parts II** and **III** the constitutional parameters defining the content and scope of the right of undocumented immigrants to receive health care attention in Spain are identified. To this end, firstly, it is carried out an analysis of how the International and European instruments of human rights protection that have been ratified by Spain articulate this question. Secondly, the Spanish constitutional case-law on the rights’ of foreigners and on the allocation of shared competences on health care are examined and explained. In **Part IV**



the main parameters at issue (i.e. rights and competences) are contextualized within the specific terms that have channelled the constitutional conflicts between the central Government and some of the *AA.CC.*, paying particular attention to the Basque Country case and the upholding of the Constitutional Court of its measures addressed to keep on granting health care to irregular immigrants.

2. Summary of the legal reform

On April 2012, a structural reform of the Spanish National Health Care system was enacted. The reform was introduced by *Royal Decree-Law 16/2012* of 20 April 2012, concerning *urgent measures to guarantee the sustainability of the National Health System and to improve the quality and safety of its services* (hereinafter, *RDL 16/2012*)^I. On its Preamble, the *RDL* justified the amendments as required measures for a stricter health spending control, in order to increase the sustainability of the system and the efficiency in its management. Fundamentally, the changes to regulations on the provision of health care were applied on the three following areas: (1) the concept of insured persons entitled to health care and that of the beneficiaries of those persons, (2) the portfolio of health services provided by the National Health Care system, which got divided according to different categories, and (3) the financial contributions to be made by the insured person and their beneficiaries to pharmaceutical services (by introducing the so-called “co-payment”).

One of the changes introduced by the *RDL* is the requirement of legal residence to non-EU migrants in order to have access to free health care, limiting such access for irregular migrants to emergency, maternity and childcare. This has entailed a deep transformation of the legislative framework existing so far in Spain, taking into account that from 2000 and until 2012 migrants without a legal residence were fully entitled to health care in the same conditions as Spaniards, provided they were registered with their local census (*Padrón Municipal de Habitantes*).^{II} This former regulation, which did not link health provision to legal residence, represented the start of a process towards the universalization of health protection in compliance with the constitutional design of health care as a public and universal service (Article 43 SC).

According to an earlier legislative scenario on the subject (since 1986), foreigners enjoying legal residence in the Spanish territory were entitled to health care assistance,



while the non-resident would only be entitled to this right insofar and in the extent provided by legislation and international covenants^{III}. The Organic Law 4/2000 on foreigners in Spain conducted a radical change for these to have access to health care, since it replaced the requirement of legal residence with that of mere registration on the local population census^{IV}. On the grounds that the registration on the aforementioned local census did not require the legal residence in the country, but just a permanent home address, the right to health care got decoupled from the requirement of legal residence and, therefore, irregular immigrants could be included within the personal scope of the right to health care. Until 2012 this was, in a nutshell, the articulation of the basic regulatory framework that allowed foreigners to have access to health care in the same conditions as Spaniards, provided the requirement of registration in the local census was fulfilled.

Undoubtedly, the recent reform, by conditioning access to free health care to the fulfilment of legal residence, has implied a substantive regression on such a process of universalization. Specifically, since 2012, the concept of “insured” persons entitled to health care refers to employees, to those who receive any type of periodic social security benefit, and to people whose unemployment benefits have run out. Additionally, the new legislation defines a residual entitlement on health care for those who cannot be considered “insured” according to those parameters and, provided they reside legally in Spain, have an annual income below a certain economic threshold^V. Consequently, it has been suppressed the previous legal possibility to access health care for migrants that were registered at a local census and provided evidence of insufficient economic capacity.

Exceptionally, the new regulation allows for undocumented migrants to gain access to health care should they be in any of the following “special situations”: (a) in case of urgency because of a serious illness or accident; (b) assistance to pregnancy, childbirth and postpartum and, finally, (c) full access to free health care will be provided to those migrants who have not attained eighteen years of age.

Additionally, in the event that the conditions to be considered “insured” or “beneficiary” entitled to health were not met, health services could alternatively be provided through the payment of the actual cost of the health service, or through the payment of a subscription fee within the framework of any of the “special agreements” established by the health reform. As a prerequisite allowing for the subscription of the agreement, it is necessary to have enjoyed a prior one-full year inscription on the local



census, thus irregular immigrants could theoretically fit into this option. The subscription of any of the “special agreements” would grant access to the basic common portfolio of health services provided by the National Health system. Besides, the “Autonomous Communities”, in accordance with the decentralized provision of health care, may complement the national basic range of health services with additional services and benefits.

Some social organizations have criticized the restrictive character of the protection channelled by these agreements. Among other questions, it is underlined that they would not allow the subscribers to access either the additional or the common portfolio of accessory health services, which therefore should be defrayed by the immigrant^{VI}. At the same time, the legal requirement of sustaining a continuous payment of certainly high fees would entail a further hurdle for social groups particularly prone to suffer severe economic and labour precariousness^{VII}. Furthermore, the fees legally established have a basic or minimum nature for the whole country, which implies that these could be eventually raised in the territory of any given “Autonomous Community”. The absence of either standardized fees for the whole country, or a maximum ceiling for the fees that could be required by Health Administrations of the *AA.CC.*, further deepens on the weakened legal protection and material obstacles to access health care by one of the most vulnerable groups in society^{VIII}.

3. Human rights law and health protection of irregular immigrants

The aim of the following section is to identify the core of binding elements in the area of access to health care for undocumented immigrants, arising from some of the International and European conventions to which Spain is a party. The relevance of these instruments as binding interpretative tools is certainly prominent since, according to Article 10.2 SC, the fundamental rights recognised by the Constitution must be interpreted in conformity with the international treaties of human rights protection ratified by Spain.

3.1. International human rights instruments

Numerous international instruments recognize the right to health care, with independence of the individual legal status or nationality. The Universal Declaration of



Human Rights enshrines that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services” (Article 25)^{IX}. In a more specific way, the International Covenant on Economic, Social and Cultural rights adopted by the United Nations in 1966 and that has been ratified by all Member States of the European Union, establishes in its Article 12 “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. The interpretation that the Committee on Economic, Social and Cultural Rights (CESCR) has applied to this Article departs from the assessment of health as “a fundamental human right indispensable for the exercise of other human rights”^X. According to the Committee, the content of the right to health would entail the right to enjoy a series of services and necessary conditions to attain the highest possible level of health. Specifically, the States parties must guarantee that the provision of health care contains the essential elements of availability, accessibility, acceptability and quality^{XI}. The specific content of the concept of accessibility, which is divided into four dimensions, is particularly interesting: (a) non-discrimination, health facilities and services must be accessible to all, especially to the most vulnerable or marginalized sections of the population; (b) physical accessibility; (c) economic accessibility (affordability) of health services for all, including socially disadvantaged groups, in a way that the poorer households should not be disproportionately burdened with health expenses as compared to richer households; (d) information accessibility to questions related to health issues. Very importantly, the CESCR establishes the specific legal obligation for States to respect the right to health by refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services^{XII}. Therefore, the Committee defines a content of the right to health in which the collective of irregular immigrants is included. Also, the minimum content of the right to health includes a more complete range of health services, going beyond the mere emergency attention.

The “International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families”^{XIII} is an important instrument of international human rights protection that specifically deals with the protection of the needs of migrant workers, either with a regular or irregular status. Its Article 28 recognizes the right of migrant workers to receive any urgent medical care that shall not be refused by reason of any



irregularity with regard to stay or employment. According to literature, the most important aspect of this Article is the prohibition of States parties to refuse urgent health care to undocumented migrants. However, two questions should be emphasized. In the first place, medical assistance is limited to the emergency one, thus either the medical follow up or the preventive health care would not be included here (Bell 2010: 156-157; Cholewinski 2005: 48; Da Lomba 2004: 379). In the second place, it must be underlined as well that this Treaty has not been ratified yet by any of the main immigrant-receiving countries in Europe or by North America. One of the reasons justifying the lack of ratification in the EU may lie in the fact that the individual ratification by any of the Member States could potentially enter into conflict with the nucleus of policies related to the control of immigration in the Union (Bell 2010: 157).

3.2. European human rights instruments

1. *European Convention of Human Rights*

In contrast with the numerous complaints existing on the subject of social security, very scarcely the European Court of Human Rights has had the chance to deliver decisions over complaints where the applicant has claimed the right to health care services on the grounds of the State's direct or indirect responsibility causing any illness or worsening of health conditions (Clements and Simmons 2008: 417). In particular, Decisions regarding the scope of the right to health of irregular immigrants have been very few, since most of the cases were circumscribed to residence rights, typically when the immigrant was contesting a national decision to be removed to a third country (Bell 2010:159). However, out of the existing decisions, it is possible to identify some jurisprudential body with relevant interpretative criteria for the area of health assistance of undocumented migrants.

Firstly, the Court of Strasbourg has held that the denial of medical treatment under circumstances of urgency may constitute a breach of the obligation of the State to protect the right to life enshrined in Article 2 of the European Convention of Human Rights. However, the identification by the Court of positive obligations from public powers with regard to the provision of health care (“when there is a real an effective threat to life”)^{XIV}, has remained on a theoretical level since the Court did not infer the existence of a violation of Article 2 in the submitted complaints so far^{XV}.

Secondly, the Court has held that the suffering caused by an illness, physical or mental,



may be included within the protective scope of Article 3 (prohibition of torture, inhuman or degrading treatment or punishment) when it is, or risks being, exacerbated as a result of conditions of detention, expulsion or any other measure for which the authorities can be held responsible^{XVI}. Therefore, under certain circumstances, the refusal to provide health care to an immigrant has entailed a violation of Article 3 from the State^{XVII}. However, more recent cases show that Decisions considering the violation of Article 3 within the context of decisions of expulsion affecting individuals with aggravated health conditions have been applied very strictly and therefore, have an exceptional nature^{XVIII}.

Finally, the Court has also held that the decision to remove from the country a immigrant with a serious pre-existing mental illness could constitute a violation of the right to private life (Article 8 of the Convention), on the grounds of the adverse consequences that the administrative decision may have on the mental stability, considered by the Court as an element of the moral integrity protected by Article 8^{XIX}.

While these Decisions have held the public power responsibility to grant certain levels of health care for irregular immigrants, it has to be noted that the factual contexts in which the Court has identified violations of Articles 1, 3 and 8 have in common the existence of extreme seriousness of the medical conditions of the immigrants. It thus shows that the threshold set by the Court to affirm the public power responsibility on the health circumstances is certainly very high (Clements and Simmons 2008: 419; Da Lomba 2004: 385).

2. *The European Social Charter*

The European Social Charter, adopted in 1961 and revised in 1996^{XX} is an instrument of human rights protection that complements the European Convention of Human Rights by recognizing a catalogue of social and economic rights. Specifically, Articles 11 and 13 of the Revised European Social Charter enshrine the right to health^{XXI}. One of the hurdles for its application to irregular immigrants lies in its personal scope of application, which is restricted to foreigners who are nationals of other Contracting Parties and who are lawfully resident or working regularly within the territory of the Party concerned^{XXII}. Therefore, the rights contained in the Charter are not extensive to third countries nationals.

In the case *International Federation of Human Rights Leagues (FIDH) v. France* (2003)^{XXIII}, the complaint questioned whether a legal reform in France limiting the health assistance of



irregular immigrants was contrary to the European Social Charter. According to the new regulation, any person without lawful residence who had stayed in France for less than three months would only receive medical treatment in case of emergency where there was a life threat. In those cases where the residence in France was longer than three months, medical assistance would be applicable, but the expenses would be covered by the patient: a flat-rate charge would be payable in respect of non-hospital treatment and a daily charge for hospital stays.

FIDH claimed that France had violated the right to medical assistance (Article 13) by ending the exemption for illegal immigrants from charges for medical and hospital treatment. Additionally, the complainant alleged that the rights of children and young persons to protection (Article 17) were contravened by the legal reform that restricted access to medical services on children of illegal immigrants.

While Charter rights do not extend to undocumented immigrants, the European Committee of Social Rights emphasized that the Charter must be interpreted in a manner that is consistent with the principles of individual human dignity and that any restrictions should consequently be read narrowly. Regarding the personal scope restriction, the Committee departs from the premise that it has a differentiated impact on each of the social rights and, under the circumstances of the case, it affirmed that it “treads on a right [right to health care] of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being”^{XXIV}. By considering that “health care is a prerequisite for the preservation of human dignity”, the Committee held that any legislation that “denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter”^{XXV}. In particular, the Committee found no violation of Article 13, on the grounds that illegal immigrants could access some forms of medical assistance after three months of residence, while, in the rest of the cases, illegal immigrants could at any time obtain treatment for emergencies and life threatening conditions. However, the Committee did find a violation of Article 17, since the fact that children shared similar restricted conditions to access health care as adults according to the legal reform, meant an infringement on the general and reinforced protection that the Revised Charter granted to children and young persons, including minors, to care and assistance^{XXVI}.

Although this Decision held the possibility of extending the rights of the Charter to



illegal immigrants, it has been to date the only case in which the Committee has applied an extensive interpretation of the personal scope. Therefore, it has been pointed out that, arguably, the application of this principle may be limited to those rights that are intimately linked to protecting fundamental human dignity (Bell 2010: 159).

4. Immigrant's fundamental rights and competences on health care: constitutional case-law

4.1. Constitutional case-law on the rights of foreigners in Spain

Article 13.1 of the Spanish Constitution establishes that “*Foreigners in Spain shall enjoy the public freedoms guaranteed by the present Title, under the terms to be laid down by treaties and the law*”. The Spanish Constitutional Court has interpreted this provision, setting up a threefold classification of the aliens’ rights^{XXVII}. According to the Constitutional Court, Article 13.1 SC grants the legislator a remarkable freedom to regulate the rights of foreigners in Spain, by enabling the establishment of specific conditions for their exercise. However, the scope of legislative manoeuvre would be shaped by three basic parameters: a regulation of this type should take into account, firstly, the degree of connection of certain rights with the guarantee of human dignity (Art. 10.1 SC); secondly, the compulsory content of the right when it is recognised that foreigners are directly entitled to it according to the Constitution, and thirdly, in any case, the content defined for the right by the Constitution and international treaties (Art. 10.2 SC). Finally, the conditions for the exercise of the rights provided by the law should lead to the preservation of other rights, property or interests which are constitutionally protected, and are suitably proportionate to the final purpose.

In the first place, the Constitutional Court has identified a group of rights that corresponds to foreigners through constitutional mandate and where any legislative treatment other than the one accorded to Spaniards would not be possible. The entitlement to exercise such rights belongs to the person as such and not as citizens, since they are essential to ensure human dignity. This group would include the right to life, physical and moral integrity, ideological freedom, but also the right to effective judicial protection, the right to free legal aid and the right not to be discriminated against on grounds of birth, race, sex, religion or any other personal or social condition or circumstance.



The second group refers to those rights directly recognized by the Constitution for foreigners (specifically with respect to the rights to assembly and association). According to the Constitutional Court, this implies that the law cannot deny such rights to foreigners, although it can establish “additional conditioning factors” with respect to the exercise of those rights by foreigners. However, in all cases constitutional prescriptions should be observed, as the legislator cannot freely configure the content of the right when this has been directly recognised by the Constitution as a right of foreigners.

The Constitutional Court has identified a third category of rights to which foreigners are entitled to the extent and in the conditions established in treaties and laws. These rights are not directly attributed by the Constitution to foreigners but the legislator may extend to non-nationals “although not necessarily in identical terms to those described for Spaniards”. In regulating such rights lawmakers enjoy wider freedom, as they would be able to modulate the conditions of their exercise “based on the nationality”. This would be the case of the right to work, the right to health and the right to receive unemployment benefits. However, it is important to underline that, according to the Constitutional Court, the possibility for the legislator to establish “restrictions and limitations” is not unconditional, since those measures cannot affect the rights that are essential to ensure human dignity (Art. 10.1 SC), or the content defined for the right by the Constitution or international treaties to which Spain is party. Moreover, the legislative freedom is also restricted in that the conditions for exercising these rights and freedoms of foreigners will only be constitutionally valid if they are designed to preserve other rights, property or interests which are constitutionally protected and which are proportionate to the intended purposes.

4.2. Constitutional case-law concerning the allocation of powers on health care

The Spanish Constitution enshrines the “social” character of the State in its Preliminary Title: “*Spain is hereby established as a social and democratic State subject to the rule of law, and advocating as higher values of its legal order, liberty, justice, equality and political pluralism*” (Art. 1.1). The constitutional commitment with a social state refers to the entire political organization and, therefore, it is equally addressed to both the central political level and to the subnational political levels in Spain.



The social nature of the political organization as a whole is configured as a transversal fundamental goal that is shaped through different constitutional clauses throughout the entire text. In this regard, it should be underlined Article 9.2, which imposes upon all public powers the obligation to promote the conditions ensuring that the freedom and equality of individuals and of the groups to which they belong, may be real and effective. Additionally, the respect and protection of the “*Governing Principles of Economic and Social policy*”, which include most of the social and economic rights, are addressed to public authorities in general.

In congruence with this framework, the constitutional regulatory frames of the *AA.CC.* (the so-called “Statutes of Autonomy”) do enshrine the social and democratic character of their political organizations. One of the most remarkable characteristics of the last wave of reforms of the Statutes of Autonomy -starting in 2006- has consisted on the incorporation of wide bills of social rights as mandates for positive actions by the public powers, although only exceptionally they do also entail proclamations of subjective rights in the stricter sense^{XXVIII}.

From the viewpoint of the allocation of powers between the two political levels, the centre of gravity regarding the implementation of social policies lies in the subnational level of government. However, the central state is constitutionally granted a reinforced legislative position with regard to the design of the nuclear questions of social competences, which are structured according to a generic “shared logic”: either through the “*concurrent*” or the “*shared*” powers. Under the “concurrent” competences both levels exercise their legislative powers on the same subject, but focusing on diverse aspects of its regulation. The issue is thus shared, dividing it into functional spheres (competence on the “legal bases” for the central state/ competence on the legislative development and administrative implementation for the *AA.CC.*). In general terms, this is the case for education (Art. 149.1.30 SC), health care (Art. 149.1.16 SC) and social security (Art. 149.1.17 SC). In the case of the “shared competences”, the State exercises its legislative powers on the subject while the *AA.CC.* exercise their executive powers on it. This pattern is applied, for instance, on labour legislation (Art. 149.1.7 SC), and on the external health measures and legislation on pharmaceutical products (Art. 149.1.16 SC). In addition, the national level has very often resorted to the so-called *transversal* or *horizontal* powers, aimed to guarantee either a certain degree of equivalence or uniformity in the basic conditions of



exercise of rights in the whole country (Art. 149.1.1. SC), or the possibility of a regulatory intervention in questions that have an impact on the general economic policy (Art. 149.1.13 SC).

This synthetic description of the coordinates along which the legislative definition and implementation of social policies take place, already suggests an intertwined constitutional scenario prone to generate conflicts over competences between the two political levels of government. In this context, the interpretative role of the Constitutional Court has been decisive in order to determine the actual scope and limits of both the national level and the *AA.CC.* in the joint exercise of the shared powers. The right to health protection is recognized in Article 43.1 of the Spanish Constitution. The second paragraph of this provision adds that it is incumbent upon the public authorities to organise and safeguard public health by means of preventive measures and the necessary benefits and services. In addition, public authorities will promote health education, physical education and sports, as well as the proper use of leisure time. Health is, therefore, recognized as a constitutional value that should be protected by the legislation, both in its individual dimension (right to health protection), and in its collective one (public health protection).

The right to health care belongs to the constitutional category of the “*Governing principles of economic and social policy*” (Arts. 39-52 SC), which must be recognized, respected and protected by the substantive legislation, judicial practice and actions of the public authorities, of both the central level and the “Autonomous Communities”. However, the binding effect of these principles is downgraded since they may only be invoked in the ordinary courts in the context of the legal provisions by which they are developed (Art. 53.3 SC).

In addition, the individual appeal for protection to the Constitutional Court (“*recurso de amparo*”) is restricted as a constitutional procedural guarantee for the so-called “*fundamental rights and public liberties*” (Arts. 14-30 SC). Nevertheless, in light of the constitutional case-law, some of the social rights have enjoyed this protection on the grounds of their connection to different fundamental rights, as it is the case with the right not to be discriminated of Article 14, the fundamental right to the effective judicial protection of Article 24, and various fundamental civil and political rights (Díaz Crego 2012).

As it was mentioned above, according to the constitutional case-law on the constitutional rights of foreigners in Spain, the right to health care is framed within one of



the categories where the legislator enjoys a wider margin to determine the conditions for their exercise. In this regard, the legal reform on health has amended the conditions for non-EU migrants to enjoy the right to health care, by replacing the requirement to be registered in the local census by that of legal residency. Additionally, the access to health care on the grounds of insufficient economic capacity has become equally subjected to the legal residency.

From the viewpoint of the allocation of powers on health, the political and constitutional praxis of the “concurrent” logic on this matter has turned out to be particularly complex and has generated a high quantity of conflicts of competence between the two political levels of government. One of the origins of this complexity is due to the high degree of vagueness with which the Spanish constituent designed the model of distribution of competences. Questions such as the content, the scope or the intensity of the concept of the basic or framework competence, were left almost completely undefined, leaving the problem opened to a further concretion by the Constitutional case-law.

Another cause of the high degree of confrontation lies in the own logic of this mechanism: the determination of the space of intervention of one of the legislators directly conditions the space of intervention of the other one. It thus implies a situation of reciprocal dependence where the theoretical scope attributed to the notion of “legislative or legal bases” constitutes a fundamental parameter, as it is going to determine the space of intervention of both legislators.

The Spanish Constitutional Court has adopted from an early case-law a concept of “legal bases” in which a “material” and a “formal” dimension coexist: the scope of the regulation must be oriented and limited by certain principles (*material* dimension of bases), and at the same time these must be legislated by the country’s Parliament (*formal* dimension).

The Constitutional Court’s case-law regarding the basic competence on health care has been particularly relevant, since it has had an impact beyond this concrete subject and has contributed to the shaping of a general doctrine on “legal bases” focused on a greater intensification of its formal elements^{XXIX}. However, with regard to the material component of the “legal bases”, the subject of health care has not been subtracted to the recurrent problems that arise from the criteria used by the Court in order to identify the *material* scope of the “basic legislation”.



Particularly, the constitutional case-law has identified the basic legislation on health care with the “minimum regulation” that can guarantee the “equality of all citizens in the exercise of the right to health”; or with the one that provides “unity” to the health system, or “establishes a common denominator in the subject”. Certainly, these criteria do project imprecise and too wide definitions concerning what should be considered as the content of the “basic legislation”. The application of these parameters has also been regarded as highly unsystematic and casuistic, making it difficult to infer a conceptual scheme that may act as an effective guarantee for the *AA.CC.* to legislate on the concurrent powers.

Logically, there is a complex set of problems associated to the goal of achieving certain objective and abstract definitions of the scope of the “basic legislation”. Unanimously, the doctrine acknowledges the impossibility for the constitutional case-law to configure a strict and detailed determination of what the “basic legislation” is. Fundamentally, that is due to two reasons. In the one hand, the formulation of what is “basic” on a certain subject is likely to be altered by the changing reality and needs regarding a specific sector (García Morillo 1996: 127). But the question that hinders in a greater extent the establishment of objective definitions of the “basic legislation” lies in the intrinsic risks of *aprioristic* determinations of the legislative margin left for both the central state and the regional lawmakers^{xxx}.

In light of this context, some scholars have put forward possible solutions aiming to reduce the negative impact that the inherent characteristics of the basic legislation have had on the safeguard of legal certainty for *AA.CC.* (Alberti Rovira 1991: 333-334; García Morillo 1996: 134). In a nutshell, part of the literature holds that the case-law should establish certain constitutional parameters with objective and reasonable stability, resulting from a process of clarification and systematization of the rules that the constitutional case-law has been applying within the framework of the conflicts of competence.

Another sector of the literature deems necessary the use of a “principle-oriented conception” to define the scope of central state power on “basic legislation” (De Otto 1988: 233; Viver i Pi-Sunyer 1990: 77). According to this viewpoint, the bases should be “norms of principles” addressed to the *AA.CC.*, containing the general principles, the guidelines or criteria of any given activity that should guide the regulation of a certain subject and would therefore channel its implementation: “*its definition must be based, not on the*



material elements needing of a standard regulation, but on the statement of the principles that the AA.CC. should respect when establishing the legislative development (...) (Viver i Pi-Sunyer 1990: 97).

5. Constitutional appeals: the Basque Country case and the response of the Constitutional Court

Numerous *AA.CC.* lodged appeals of unconstitutionality against some of the most significant modifications carried out by the *RDL 16/2012, 29 of April* on the health care system^{xxxI}. The claims against the legislative restricted interpretation of the conditions to access health care are present in all of them. On this specific question, there are fundamentally two main legal arguments in the appeals to sustain the lack of conformity with the Constitution of the health care amendment. In the first place, it is argued that the exclusion from free health care of certain social groups, as it is the case of undocumented migrants, entails an infringement of the “*Governing principle*” of Article 43 SC (that recognizes the right to health protection) interpreted together with Article 15 SC (right to life) and Article 14 SC (non- discrimination). In the second place, it is claimed that the centralized definition of the insured and the conditions of access to health care are too exhaustive and leave scarce legislative room for the *AA.CC.* to complement such a “legislative framework” of the central level.

The Government of the Basque Country, in addition to bringing a constitutional appeal to challenge the recently enacted legislation, took a further measure by passing a new regulatory framework on health care (*Decree 114/2012, 26 of June, on the provision of health care services by the National Health Care System in the territory of the Basque Country*). With regard to the personal scope of the right to health care, the goal of the Decree is to react before the recently enacted legislation. Specifically, it extends the scope of personal protection of the central state provisions, by granting access to health care to those people that have been registered in any local census in the Basque Country for at least a year, lack any alternative access to public health protection and provide evidence of insufficient economic capacity (Arts. 2 and 3 of the Basque Decree). As a result, the subnational regulation complements and widens the “basic legislation” on the access to health care, by applying the equivalent parameters on its territory (i.e. mere registration at the local census) that existed at the national level prior to the reform^{xxxII}.



On the 20 of July, the Government of Spain appealed the constitutionality of the Basque Decree by lodging a conflict of competence before the Constitutional Court. The Government alleged that, by diverging from the State's definition on the entitlement to access the health care provision, the Decree was interfering with the competence of the central level to establish the "basic" regulation on health care. As a consequence of the constitutional procedural privilege that the Government may resort to when contesting a regulation of an "Autonomous Community" (Article 161.2 SC), the effects of the Basque Decree were temporarily suspended.

The Basque Government appealed before the Constitutional Court the suspension of the contested provision. The Court, in light of the arguments put forward by the "Autonomous Community", upheld the Basque request and lifted the suspension of the Basque Decree through the *Order 239/2012, 12 of December*. It is necessary to underline that the Order of the Constitutional Court that upheld the request of the Basque country did not imply a final judgment on the substantive issues regarding the conflict of competence on health care between the central Government and the Basque Country. However, the reasoning of the Court at this point is very relevant insofar as it makes the universal access to health care prevail over the efficiency economic reasons claimed by the Government of the Nation to keep the suspension.

Specifically, the Constitutional Court, in order to assess the Basque Country request to lift the suspension on its Health Care Decree, carries out a balance of the general and particular interests at stake in the case. In this regard, the Court identifies a general interest in the economic benefits linked to the costs savings derived from the national measures restricting the access to health care. At the same time, it is recognized another general interest that lies in the public guarantee of health care, both in a collective dimension (public health) and in the individual right to health^{xxxiii}. The Constitutional Court emphasizes the close interrelation between, on the one hand, the "*Governing Principle*" on the right to health protection (Art. 43 SC) and, on the other hand, the fundamental right to life and to physical and moral integrity (Art.15 SC), on the basis of what has been previously stated in its case-law and in the European Court of Human Rights^{xxxiv}. The Court argues that "the general and public interests linked to the promotion and guarantee of the right to health care, do constitute interests associated to the protection of constitutional goods which are particularly sensitive". In particular, it reasons that, should



the suspension on the Basque Country Decree be kept, there could be concrete injuries “to the right to health and to physical integrity of the groups affected by the measure [specifically, the undocumented migrants, that would be prevented to keep on receiving free health treatments in the Basque Country], as well as public health risks for the whole society”. The Court deems that the “singular importance of the interests at issue cannot be undermined by eventual cost saving arguments on health care that have not been put into concrete terms”^{xxxv}. In this regard, the Constitutional Court argues that the lack of further specification from the central Government concerning the alleged economic efficiency of the measure restricting the access to health care, may be likely due to the actual inexistence of any sort of cost-saving deriving from the new legislative framework. The Court puts forward the thesis that restricting access to health care, far from implying a financial saving operation, may arguably just imply a transfer of costs from primary care to emergencies care.

In light of these considerations and carrying out a balance of the interests at issue, the Court claims that the concrete risks that the suspension of the Decree exerts on particularly important constitutional goods are not superseded by some abstract economic benefits that are not specified by the central Government. In coherence with this legal reasoning, the Court upheld the request of the Government of the Basque Country to lift the suspension of its Decree on health care that extended the level of entitlement to free health care granted by the central level.

6. Conclusions

It still remains uncertain what the actual reasoning of the Court will be on the pending conflict of competence between the Government of Spain and the Basque Country, as well as on the appeals of unconstitutionality lodged by numerous *AA.CC.* against the national health care reform. There are, however, certain interpretative patterns that have been implemented by the Constitutional Court and that may allow us to identify some of the constitutional coordinates that channel the federal tension between unity and diversity in the Spanish decentralized fulfilment of welfare state, focusing on the particular area of the articulation of access to health care.



With regard to the impact of the legal reform on the *constitutional fundamental rights*, it is possible to infer some concepts that should determine the material confines for the normative action and that, from the territorial viewpoint, should be respected on a nation-wide basis. As it was pointed out above^{xxxvi}, according to the constitutional case-law, the limits for the legislator to establish the conditions for the exercise of the right to health protection by foreigners in Spain, would consist of the content defined for the right by the Constitution and human right treaties, but it would also be contingent upon an assessment of proportionality criteria. In our opinion, the consideration of the legal reform in light of these parameters provides solid interpretative tools to sustain its unconstitutionality.

Both the Constitutional Court and the ECHR have stressed the close bond between, on the one hand, the right to health and, on the other hand, the fundamental right to life and physical integrity^{xxxvii}. In particular, this singular connection would underlie the generalist formulation of the right to health in the Spanish Constitution (*“the right to health protection is recognized”*, Art. 43 SC), which seems to recall the universalist terminology applied by human rights international treaties with regard to personal scope to health care protection. In a striking contrast with this approach, the legislative restriction of access to health care for undocumented migrants would not project any kind of integrative notion of health care provision. Actually, the new legislative conditions of access to health care do not just imply an increase of the *degree* or *level* of restriction for undocumented migrants. Instead, they entail a *substantial* change of the entitlement to access free and public health care, while projecting a real risk of exclusion over a whole social group whose legal status is actually defined by its irregular presence in the territory. Furthermore, the requirement to pay certainly high fees in order to subscribe the special agreements could contravene the “economic accessibility” as a essential part of the material scope of the right of everyone to health (Art. 12, International Covenant of Economic, Social and Cultural rights) as interpreted by the CESCR.

In addition, the new request of legal residency to access health care raises doubts about its constitutional validity from the viewpoint of the proportionality of such a reform with regard to its purpose. In this context, and given the instrumental connection between the protection of health and the right to life, it is highly questionable that the economic benefits portrayed as part of the general interests that the new measure may bring, can prevail over the damage to essential constitutional values and fundamental rights at issue.



Analysing the questions at issue from the viewpoint of the *allocation of shared competences* (i.e. legal bases from the State/legal implementation by the *AA.CC.*), the Constitutional Court has stated that the determination of the conditions that entitle the persons to have access to health care, together with the definition of the common portfolio of health care services, belong to the conceptual sphere of the “bases”, since these are addressed at establishing a “common legal ground that guarantees a uniform and equal access to health care for all citizens regardless of their place of residence within the country”^{xxxviii}. The constitutional role of the central level to establish the standardized or minimum conditions of access to fundamental rights for the whole territory is a common feature in current welfare states. The complexities of this question arise when the national legislation has to be contextualized within the natural dynamics of a federal system, where subnational levels of government share legislative powers to co-define how welfare state should be fulfilled in their own territories.

With regard to the allocation of competences on immigration, the Constitutional Court in its Decision on the Statute of Autonomy of Catalonia (31/2010, 28th of June) addressed for the first time the scope of the national level powers on immigration (Art. 149.1.2 SC). The Court declared the constitutional compatibility between the exclusive power on immigration reserved for the central level, and the *AA.CC.*'s exercise of their exclusive and shared powers on social areas (e.g. on health, education, social assistance, housing and culture) to promote the social integration of the immigrant population^{xxxix}. Yet, regarding the specific delimitation of the social shared competences, the Spanish case lacks a clear constitutional or univocal doctrinal definition of the scope of “legal bases”, which is one of the major sources of conflicts between levels of government, as it has been brought to light in the case of health care.

In this respect, should “legal bases” (i.e. the persons entitled to public and free health care) be interpreted as a national “minimum common denominator” that could be extended, enhanced or supplemented by the subnational political levels that are also in charge of fulfilling the constitutional right on health care (Art. 43 SC)? Or, on the contrary, are “legal bases” in this case a uniform and fundamental set of rules that does not allow for any decentralized legislative improvement by the *AA.CC.*?

In our opinion, the role of the central state to uniformly guarantee a minimum and equal access to health care is in any case granted by its legislative power to define those



who, in any event and in a nation-wide scale, should be granted health care and which the common health services should be. Nevertheless, the subnational levels of government, on the grounds of the political autonomy constitutionally guaranteed, should be allowed to enhance or complement that minimum or standard level in their own territory, in conformity with the mandates to enforce a real and effective equality enshrined in the Constitution and in the Statutes of Autonomy.

As it has been analysed in detail, the Basque Country's initiative to complement the national protection regarding the access to health care has been temporarily endorsed by the Constitutional Court on the grounds of the extraordinary significance of the right to health care in the constitutional system of values. Debates of this nature show the complexities of a territorially decentralized fulfilment of the welfare state but, more importantly, they highlight the crucial constitutional role of the subnational levels of government to preserve social inclusion policies in a context of general welfare retrenchment.

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^I This *Royal Decree-Law* was partially instituted by *Royal Decree 1192/2012 of 3 August 2012 regulating the status of insured persons and beneficiaries for the purpose of receiving publicly funded health care in Spain through the National Health Service*, which entered into force on 4 August.

^{II} Article 12 of the *Organic Law 4/2000 of 11 January, on the rights, freedoms and social integration of foreigners in Spain*.

^{III} *General Health Law 14/1986*, Article 1, paras. 2 and 3.

^{IV} Article 12, *Organic Law 4/2000*. In some cases, irregular immigrants would be exempted from the requirement to be registered in a local census (cases of urgencies, accidents or serious illness; minors and pregnant women. For a detailed explanation of the legal conditions attached to the local census registration, see García Vázquez 2007: 166-170.

^V Specifically, below one hundred thousand euros, *Royal Decree-Law 1192/2012 of 3 August 2012*.

^{VI} Therefore, among others, the following services would be covered by the health care "special agreements": activities involving the prevention, diagnosis, treatment and rehabilitation carried out in medical centres. However, fundamental questions such as the needed medication to treat chronic illnesses (e.g. VIH or cancer) or any pharmacological treatment that should be followed once left the medical centre should be entirely defrayed by the patient (Article 8 of the *Law 16/2003*). See "Foro para la Integración Social de los inmigrantes", 2012a, 3.

^{VII} The monthly fees set for the "special agreements" on health care provision are 157 euros/month for those older than 65, and 60 euros for the rest. See, *inter alia*, "Foro para la Integración Social de los Inmigrantes" 2012b: 19-21, 37.

^{VIII} In this respect, see "Foro para la Integración Social de los Inmigrantes", 2012a, 3-4. Furthermore, according to "*Médicos del Mundo*" (*Argumentario. La reforma sanitaria y las personas inmigrantes*, 2012), since the health reform entered into force in Spain, one of the most recurring problems have been represented by immigrants who (1) suffered chronic diseases but did not get the periodic controls and/or with interruptions in their treatments, (2) had transmissible pathologies that have not been accompanied by the corresponding protocols (HIV or tuberculosis) or that had (3) mental illnesses without any sort of medical follow up.

^{IX} The right to health to everyone is also enshrined in the same terms in various international instruments, among others, in the "International Convention on the Elimination of All Forms of Racial Discrimination", 1965 (Art. 5), in the "Convention on the Elimination of All forms of Discrimination against Woman", 1979 (Arts. 11 and 12), and in the "Convention on the rights of the Child", 1989 (Art. 24).



^x CESCR General Comment no. 14: “The Right to the Highest Attainable Standard of Health (Art. 12)” E/C.12/2000/4, para 1.

^{xi} *Ibid.*, para. 12.

^{xii} *Ibid.*, para. 34.

^{xiii} Enacted by the United Nations in 1990. It entered into force in 2003.

^{xiv} ECHR, *Osman v. United Kingdom* [GC], 28 Oct. 1998, no. 23452/94, para. 116.

^{xv} For instance, in the following ECHR decisions on admissibility, the applicants requested their respective States to cover the costs of certain medical treatments under the legal obligation of Article 2 of the European Convention of Human Rights, ECHR *Nitecki v. Poland* (dec.), 21 March 2002, no. 65653/01; ECHR *Scialacqua v. Italy* (dec.), 1 July 1998, no. 34151/96.

^{xvi} ECHR, *Pretty v. United Kingdom*, 29 April 2002, no. 2346/02, para. 52.

^{xvii} ECHR, *D. v. United Kingdom*, 2 May 1997, no. 30240/96.

^{xviii} ECHR, *N. v. United Kingdom* [GC], 27 May 2008, no. 26565/05, and ECHR, *Arcila Henao v. The Netherlands*, 24 June 2003, no. 13669/03.

^{xix} ECHR, *Bensaid v. United Kingdom*, 6 Febr. 2001, no. 44599/98: paras. 46 and 47.

^{xx} Up to date, Spain has not ratified the revised version of the European Social Charter of 1996.

^{xxi} Article 11, European Social Charter: “With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake [] to take appropriate measures designed *inter alia*: 1) to **remove** as far as possible the causes of ill-health; 2) to **provide** advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; 3) to **prevent** as far as possible epidemic, endemic and other diseases”.

^{xxii} Para. 1, Appendix to the 1996 revised European Social Charter.

^{xxiii} ECSR, Complaint no. 14/2003, 8 Sept. 2004.

^{xxiv} para. 30.

^{xxv} paras. 31 and 32.

^{xxvi} The Committee specifies that some provisions of Part I of the Revised Charter also grant protection to children, in addition to the fact that the Charter is directly inspired by the UN Convention on the Rights of the Child, aiming therefore to protect in a general manner the right of children and young persons, paras. 35 and 36.

^{xxvii} See *Decisions of the Constitutional Court* 107/1984 (LB 3, 4) and 236/2007 (LB 3, 4).

^{xxviii} As an instance of the few social rights that have been configured as subjective claims enforceable in the Courts of Justice, see the *Andalusian Statute of Autonomy*, Article 22.2. on “health care”, which states that patients and users of the Andalusian health system have the right to: “*b*) *The free choice of doctor and health centre*”; “*b*) *Avail of a second advisory opinion about their illnesses*”; “*i*) *Access to palliative care*”. Equally important, on the constitutional nature of the rights provided by the “Statutes of Autonomy”, see *Decision of the Constitutional Court* 31/2010, LB 16. See also De la Quadra-Salcedo Janini 2008.

^{xxix} See, for instance, the following Constitutional Court decisions regarding conflicts of competence on health care: 32/1983, 69/1988, 80/1988.

^{xxx} The Constitutional Court Decision 156/1995 expressly states that such an assessment should be done case by case, and that it would be unfeasible to shape *a priori* theoretical structures that could be meaningful for future cases (3 LB). In a similar respect, see the *Decisions* 141/1993 (5 LB) and 206/1997 (7 LB).

^{xxxi} The RDL has been appealed by the following *AA.CC.*: Andalusia, Asturias, Canarias, Catalonia, Navarre and the Basque Country. Also, different social and professional organizations, such as the General Council of the Spanish Bar Association, “Médicos del Mundo”, and the “Platform of the International Cooperation for Undocumented Migrants” (*PICUM*), have manifested their discrepancy over the restriction of access to health care for irregular migrants in Spain.

^{xxxii} The Health Departments of several Autonomous Communities (Catalonia, Asturias and Andalusia) have also adopted instructions in order to grant access to health care for undocumented immigrants.

^{xxxiii} *Order of the Constitutional Court* 239/2012 (LB 5).

^{xxxiv} See, for instance, *Decisions of the Spanish Constitutional Court* 53/1985 (LB 11 and 12); 119/2001 (LB 6). ECHR *Osman v. United Kingdom* (1998); ECHR, *Bensaid v. United Kingdom* (2001). For a more detailed explanation, see Part II above.

^{xxxv} *Order of the Constitutional Court* 239/2012 (LB 5, *in fine*).

^{xxxvi} See Part III.

^{xxxvii} Furthermore, the European Committee of Social Rights in *International Federation of Human Rights*



Leagues v. France stressed the connection between the right to health and the very dignity of the human being. For all, see Part II above.

^{XXXVIII} *Decision of the Constitutional Court 136/2012, LB 5.*

^{XXXIX} *Decision of the Constitutional Court 31/2010, LB 83*, on the interpretation of Article 138.1 of the Catalan Statute of Autonomy.

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**Multilevel Systems and Sub-National Constitutional
Politics in Germany: a Qualitative Comparative
Analysis**

by

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Abstract

Are sub-national constitutional politics shaped by multilevel structures or by sub-national factors? That is the question I am tackling with in this paper. In order to answer this question I will examine 23 decision-making processes in German *Länder* and try to find out how far their outcome has been determined by multilevel and / or sub-national factors. Notably, I will refer to three policy areas in which the two levels of the German federal system interact in different ways. While the Basic Law determines the sub-national constitutional space with regard to capital punishment and the debt brake comprehensively and in detail, the *Länder* have significant constitutional leeway with regard to European integration. In addition – and maybe even more importantly – the paper explores unknown methodological territory. I apply a new empirical tool to the research question at hand by using Qualitative Comparative Analysis (QCA). Qualitative – or Configurational – Comparative Analysis is supposed to better contextualize the effects of causes for an outcome than conventional quantitative methods. Overall the study will bring to the fore that as far as political science is concerned the analysis of constitutional politics in the German *Länder* is still in its infancy. We have to refine our theoretical models and improve our empirical tools. Only then we will be able to better understand how the multilevel system, party politics, and constitutional features impact on sub-national constitutional politics.

Key-words

Sub-national constitutions, German federalism, German *Länder*, multi-level system, European integration, Qualitative Comparative Analysis



1. Introduction^I

According to James A. Gardner there are “several grounds upon which one might plausibly think that in many places around the globe the conditions for subnational constitutionalism exist. Whether it has in fact arisen in such places, however, is another question” (Gardner 2007: 17 f.). Gardner's critical observation is based on the premise that a constitution as a written document does not necessarily live up to what we expect from constitutionalism as a “doctrine concerned with the form of government, the limitation of power, and the protection of rights relating to the different entities which comprise the nation (or the State)” (Pinheiro 2010: 8). In this perspective sub-national constitutionalism is nothing but the principle of national constitutionalism applied to the sub-national level (Gardner 2007: 3-4). The American tradition represents the paradigmatic example in this respect. In the USA, Gardner highlights, constitutionalism rests on two pillars: on the people’s claim for self-governance and on the protection of liberty (Gardner 2007: 2-3). In this view a constitution is a “kind of charter of living”. Accordingly, an “ideology of subnational constitutionalism (...) conceives of state, provincial, or regional constitutions as charters of self-governance self-consciously adopted by subnational populations for the purpose of achieving a good life by effectively ordering subnational governmental power and by protecting the liberties of subnational citizens” (Gardner 2007: 3).

This clearly is an intriguing and ambitious concept as it assumes that both national and sub-national constitutionalism makes the same claims about similar issues and should, hence, theoretically be dealt with in the same manner. As a matter of fact, for many scholars German sub-national constitutions are manifestations of territorially defined “identities” and important for the stability of the political order in general and the federal system in particular (Dombert 2012; Jesse et al. 2014: 53-55; Vorländer 2011; Lorenz 2011). In this perspective German Land constitutions not only set up the rules of the game for political self-determination but they also provide a means for social integration. In short: German Land constitutions are complimentary to the Basic Law because they have to conform to the “principles of a republican, democratic, and social state governed by the rule of law, within the meaning of [the] Basic Law” (Art. 28 par. 1 Basic Law).^{II} However, as far as German *Länder* are concerned the idea to ascribe sub-national constitutions



normative and ideological power raises a number of important questions which support Gardner's skeptical view on the chances to find constitutionalism in sub-national units. For example, as Patricia Popelier has pointed out, in multilevel systems – and German federalism is such a multilevel system – we can hardly speak of “self-governance” when we refer to sub-national units because we cannot clearly separate the different levels from each other (Popelier 2014). In addition, the majority of German Land constitutions have neither been adopted “self-consciously”, nor have the sub-national “people” in all Länder agreed to their respective constitution in a referendum (Lorenz and Reutter 2012; Pfetsch 1990; Lorenz 2013). Finally, not all German sub-national constitutions include human rights or provisions in order to effectively protect liberty. In consequence, from this angle the crucial question is how in such an institutional setting constitutional change can occur. Or to put it differently: How is constitutional politics linked to multilevel structures?

In this paper I will tackle with this question. However, while respective research mostly focuses on national constitutions in federal states^{III} I will address the question at hand by taking sub-national constitutional politics in the German Länder as empirical reference. More precisely, I will examine decision-making processes and try to find out how far their outcome has been shaped by multilevel and / or sub-national factors. Notably, I will refer to decisions addressing provisions on: the capital punishment, the debt brake, and European integration. The paper will not only deal with theoretical issues, though, but – maybe even more importantly – with methodological questions, as well. As a matter of fact, the paper is notably insofar innovative as it tries to provide an empirical answer to the research question at hand by using Qualitative Comparative Analysis (QCA). Qualitative – or Configurational – Comparative Analysis which has originally been designed by Charles C. Ragin^{IV} is supposed to better contextualize the effects of causes for an outcome than conventional quantitative methods. In consequence, the paper not only tries to give an answer to the aforementioned research question but it also makes a pledge to introduce a new methodological tool to the study of constitutional politics. It goes without saying that such an attempt is open to further discussion and critique.^V

In order to answer my research question I will, firstly, discuss the main approaches explaining constitutional change in German *Länder* (table 1). On this basis I will develop three hypotheses about causal links addressing constitutional change in German *Länder*. In a second step I will briefly present the method used for the analysis: the “crisp-set



Qualitative Comparative Analysis” (csQCA). Thirdly, I will use this method in order to compare respective decision-making processes and try to identify necessary and / or sufficient conditions that are supposed to explain the outcome of these processes. In my conclusion I will summarize my findings and indicate some possible theoretical and methodological trajectories for future research on sub-national constitutional politics. Overall I will pursue two goals with this paper: I will examine whether and how far sub-national politics are linked to the multilevel system and I will step on new methodological territory as far as the study of sub-national constitutional politics is concerned.

2. Explaining Sub-National Constitutional Politics in Germany: Theoretical Framework and Hypotheses

2.1. Federalism, *Länder* and Sub-National Constitutional Politics in Germany: Theoretical Approaches

It goes without saying that there is a vast and diverse amount of literature on constitutional change and on subconstitutionalism (Lorenz 2008; Williams 2011; Ginsburg and Posner 2010; Duchacek 1988; Dinan 2008; Tarr 2000; Delledonne 2012; Popelier 2014; Gardner 2007). However, as far as German Land constitutions are concerned the number of either theoretical or empirical studies is rather limited. There are, of course numerous legal studies (cf. eg. Stiens 1997; Pestalozza 2014; Dombert 2012) but only few political scientists have tackled with the question as to how and why sub-national constitutions have been altered in spite of the fact that the number of amendments vary greatly among the *Land* constitutions (table 1) (Lorenz and Reutter 2012; Flick 2008; Hölscheidt 1995; Reutter 2008a: 37 ff.; Reutter 2008b). But that is exactly the question this paper is tackling with. Notwithstanding the rudimentary research landscape we still can distinguish: structuralist, institutionalist, and actor-centered approaches that aim at explaining sub-national constitutional politics in Germany.



Table 1: Features of German Land Constitutions (as of Dec. 2013)

	Year when constitution entered into force	No. of articles (year of adoption)	No. of articles (2013)	No. of amendments (until 2013) ^{a)}	Amendments per year	Article change rate ^{c)}
BW	1953	95	101	20	0.33	0,70
BAV	1946	189	196	12	0.19	0,87
BER	1950	102	103	39	0.62	2,49
BB	1992	118	119	8	0.37	1,26
HB	1947	156	158	27	0.41	1,86
HH	1952	77	78	16	0.26	1,83
HES	1946	151	164	8	0.12	0,19
LS	1951	78	82	18	0.19	0,46
MW	1993	81	84	4	0.29	0,58
NRW	1950	93	97	20	0.31	2,19
RP	1947	145	154	37	0.55	2,41
SLD	1947	134	129	27	0.41	2,60
SAX	1992	123	124	1	0.05	0,14
SAA	1992	102	102	1	0.05	0,42
SH	1950	60	66	18	0.28	0,11
TH	1992	107	108	4	0.20	0,45

BW = Baden-Württemberg, BAV = Bavaria, BER = Berlin, BB = Brandenburg, HB = Bremen, HH = Hamburg, HES = Hesse; LS = Lower Saxony, MW = Mecklenburg-Westpomerania, NRW = Northrhine Westphalia, RP = Rhineland Palatinate, SLD = Saarland, SAX = Saxony, SAA = Saxony-Anhalt; SH = Schleswig-Holstein, TH = Thuringia

a) The newly drafted constitutions of Berlin, Lower-Saxony and Schleswig-Holstein have been counted as amendments;

b) we counted the number of words with the windows word program; c) number of articles changed per year.

Source: my compilation; websites of Land parliaments.

(a) *Structuralist approaches* represent the prevailing view on German sub-national constitutional politics. They explain the content and the outcome of respective decision-making processes with the principles and the functioning of German cooperative federalism.^{VI} In this perspective, the Basic Law ascribes the *Länder* only limited competencies as far as their constitutions are concerned^{VII} because Art. 28 of the German Basic Law (BL) requires *Land* constitutions to conform to the principles of a republican, democratic, and social state governed by the rule of law, within the meaning of the Basic Law. Due to this “principle of homogeneity” many scholars see Land constitutions “overshadowed by the Basic Law” (Möstl 2005; Stiens 1997; Pestalozza 2014). From this angle, the BL is a superordinate legal framework authoritatively allotting constitutional space to the *Länder*, prescribing the content of *Land* constitutions, and overruling regulations contradicting the BL. As pointed out, according to this widespread view among respective scholars the BL “overshadows” sub-national constitutions which are at best of secondary importance and should have no relevance for politics. Furthermore, sub-national representative bodies have no say in policy-making, at all. In essence, this approach



“explains” respective sub-national constitutional politics “top down” either as a functional effect of cooperative federalism or as a sort of appendix to the Basic Law. In addition, such a multilevel system is supposed to cause intertwined decision-making, favor unitary policies and privilege the executives. European politics are to have the same impact (Reutter 2006; Reutter 2015). In this perspective “Europe” overrules the principle of subsidiarity and “colonizes” policy areas that the *Länder* used to regulate (e.g. higher education). This, once again, leads to: intertwined policy-making, an overriding influence of the executives, and shrinking legislative and thus constitutional powers of *Land* parliaments (Thaysen 2005; Abels 2011; Abels 2013).

However, as far as constitutional politics are concerned this approach shows important shortcomings and lacunae. Firstly, similarly to institutionalist theories structuralist concepts fail to include political parties and parliaments at the sub-national level into their concepts. They explain sub-national constitutional politics “top down” and ignore regional or political interests as well as political constellations at the *Länder* level (Lorenz 2013). Admittedly, actors play no explanatory role in this concept. On the contrary, it is the Basic Law and “Europe” that are to determine the frequency, the content, and the scope of sub-national constitutional amendments. Secondly, these concepts assume a sort of constitutional hierarchy in which the European, the national, and the sub-national level are separated. However, as Popelier (2014) has highlighted in multilevel systems it is not possible to clearly distinguish between levels. The different levels are mixed up, overlap each other, or create a sort of intermeshed structure. As far as constitutional politics are concerned Popelier, thus correctly points out: “[W]e cannot examine the constitutional system at one level without having regard for its impact on and interplay with the other levels” (Popelier 2014: 7). For my research question this means that when we examine sub-national constitutional politics we always have to take the impact other levels produce into account. Hence, when we analyze sub-national constitutional politics we have to bear in mind that the Basic Law might grant different degrees of constitutional space to different areas. This assumption can be brought to the fore when we describe how sub-national constitutions are affected by the Basic and European Law in the three policy fields I will include into the analysis: capital punishment, debt brake, European Union. I picked these three topics because they differ in one crucial dimension: The Basic Law rules out capital punishment, prescribes specific contents for debt brakes in *Land* constitutions, and says



nothing about how the Länder want to constitutionally deal with European integration. Hence, we should find some indications on how sub-national constitutional politics tackle with variations in a multilevel system.

- *Capital Punishment*: As a matter of fact, when the Basic Law came into being in 1949 there were already five *Land* constitutions allowing capital punishment: In Baden (Art. 85),^{VIII} Rhineland-Palatinate (Art. 3), Bremen (Art. 121), Bavaria (Art. 47), and Hesse (Art. 21) the constitutions had come into force in 1946 or 1947. They allowed the death penalty to be applied if the crime had been most severe.^{IX} While Rhineland-Palatinate, Bremen, and Bavaria eliminated the respective article from their constitutions in the nineties,^X the constitution of Hesse still stipulates that capital punishment is possible if the crime is severe enough. Yet Art. 102 of the Basic Law overruled these provisions in the Land constitutions and since 1949 nobody has been sentenced to death any more in Germany.^{XI} Hence, with regard to the death penalty, the *Länder* have no option at all. Even if a *Land* would reintroduce the death penalty this would be unconstitutional and not applicable.^{XII} With regard to this issue the Basic Law allots no constitutional space to the *Länder*, at all (Hötzel 2010).
- *Debt Brake*: It is slightly different with regard to the debt brake. As is generally known, since 2009 the Basic Law includes strict rules with regard to budgetary deficits for the federation and the *Länder*. Art. 109 par. 3 BL now rules that in “principle” the budgets of the Federation and the *Länder* “shall be balanced without revenue from credits”. Based in this provision the federation has to have balanced budgets without taking out any loans or producing any deficits from 2016 onwards and the *Länder* from 2020 onwards. Evidently, the European stability and growth pact has been the template for the debt brake in Germany (Ciaglia and Heinemann 2012; Sturm 2011; Steinbach and Rönicke 2013; Berlitt 2011; Buscher and Fries 2013). However, the *Länder* retained a limited leeway in this domain because they may “introduce rules intended to take into account (...) the effects of market developments that deviate from normal conditions, as well as exceptions for natural disasters or unusual emergency situations beyond governmental control and substantially harmful to the state’s financial capacity. For such exceptional regimes, a corresponding amortisation plan must be adopted“ (Art. 109 par 3 BL). In other words if a *Land* abstains from amending its constitution the



respective provision of the BL applies directly (Sturm 2011).^{xiii} As a matter of fact, the *Länder* reacted differently to the default set by the Basic Law. Until March 2014 half of the *Länder* altered their constitution accordingly, the other half did not. This brings another question to the fore: Why did some *Länder* vote for an amendment while others did not? Or following up on Robert F. Williams': Are constitutional politics "outside the scope of 'normal politics'?" (Williams 1999: 639). And in Germany "normal politics" mean party politics. As a matter of fact, just the Left party and the FDP stuck to the same policy in all *Länder*. The Left party always opposed respective constitutional bills; the FDP always supported such a debt brake. The other parties sometimes were in favor of a respective bill, sometimes they rejected it. Important for our research question is, however, the multilevel character of this issue. As pointed out, due to the Basic Law the *Länder* have only limited options in order to deal with this issues in their constitutions: Either the provision of the BL directly applies if a *Land* does not change its constitution or a *Land* alters its constitution but only as far as the Basic Law allows. In sum, in this case the BL allots constitutional space to the *Länder* because it is the cause for respective changes and it determines the content of respective amendments.

- *Europe*: European integration affected sub-national constitutional politics in several ways. Some constitutions entitled citizens of EU member states to participate in local elections; other constitutions mention Europe as a sort of public goal the state has to take into account in its policies; and two constitutions lay down that the parliament have the right to mandate their governments at the federal or the European level if the competency of a *Land* to pass laws is affected. Even though this is a controversial issue very much debated by legal scholars Bavaria and Baden-Württemberg included respective provisions in their constitutions (Eberbach-Born 2013: 289 ff.; Grimm and Hummrich 2005). Both entitle their parliaments to instruct their governments if parliamentary legislative prerogatives are affected.^{xiv} In other words: If legislative competencies of the *Länder* are about to be transferred to the national or EU level, the *Landtage* of Bavaria and Baden-Württemberg can instruct their governments to oppose or support this policy. As pointed out, some legal scholars doubt that a parliament has the right to "order" its government in a mandatory fashion thus limiting core competencies of the executive. In addition, the political ramifications of such a



provision are unclear (Kropp 2010: 199 ff.). Nonetheless, the crucial point here is that the BL does neither prescribe nor exclude such provisions. Hence, this part of sub-national constitutional politics is yet not overshadowed by the national constitution. The BL does not allot constitutional space in this respect. It is part of the constitutional autonomy sub-national units have in the German federal state.

Overall this short review of respective areas already brings to the fore that the Basic Law allots constitutional space to the *Länder* to different degrees depending on the subject. In addition, in the German federal system the *Länder* enjoy constitutional autonomy. Hence, they are not to be deprived of the privilege to change their constitutions and pass amendments at their will. Both elements provide the *Länder* with constitutional leeway and give actors the chance to pursue their strategies. Hence, an empirical analysis has to account for multilevel systems affecting sub-national constitutional politics in different ways and to varying degrees.

(b) *Institutionalist theories* explain the number of constitutional amendments by the features of a constitution. For example, Martina Flick examined constitutional change in the German *Länder* in an institutionalist perspective without, however, being able to confirm the widespread hypothesis that the rigidity and the length of sub-national constitutions had significant effects on the number and scope of amendments (Flick 2008).^{xv} This branch of theory sees formal or informal rules or structures determining the behavior of political actors. Or: We have to study just the institutions in order to explain social or political phenomenon because institutions constrain actions and define options as well as evolutionary paths. This concept can easily be applied to constitutional politics. In this perspective a constitution is nothing but an institution. A constitution sets the rules of the political game. It thus prescribes to parties how to act, it determines the majority necessary for an amendment, and it lays down the specific procedures. In addition, constitutions contain politically salient issues.

(c) *Actor-centered approaches*: Obviously, both institutionalist and structuralist approaches fail to include actors into their explanations. Actors just follow institutional rules or execute some “objective” premises. Notably Lorenz takes a different stance on the issue at hand, though (Lorenz 2013; Lorenz 2008). She stresses the role parties play in constitutional politics. Parties have the power to shape constitutions at the *Länder* level. At the same time they decide how to incorporate change linked to multilevel systems into sub-national



constitutions and they are able to overcome the institutionalist hurdles laid down in constitutions that demand supermajorities. Overall these are the elements supporting the view that there is a sub-national logic of constitutional politics. Actors, institutions, and decision-making processes are sub-nationally shaped in spite of the effect of multilevel systems, federal law, and European integration.

This short review of the prevailing theories and concepts trying to explain the scope, the frequency, and the content of sub-national constitutional change in Germany already makes clear that we need a specific methodological approach in order to do justice to the complexity of the respective decision-making processes. In order to find out how far the multilevel system affects sub-national constitutional politics and what role parties play in this policy field we need a methodological tool that is open and flexible enough to give the single cases its due share and still make cross-case comparisons possible. Qualitative comparative analysis provides this tool. However, before outlining the basic features of this method I will develop three basic hypotheses about sub-national constitutional politics in Germany.

2.2. Hypotheses

The following hypotheses that will be “tested” in the analysis are being deduced from the theories just presented. Overall they describe a sort of explanatory model combining the three theoretical threads just mentioned. However, to my knowledge this is the first attempt to translate these theoretical concepts into what QCA has coined “conditions”, i.e. empirical features of configurations. By combining these elements I try to do justice to the fact that constitutional change normally has multiple causes. QCA gives credit to this kind of complex causal configurations.

Hypothesis 1 – Multilevel systems: As mentioned above, the prevailing view about sub-national constitutional politics is that it is “overshadowed” by the Basic Law. In consequence, the *Länder* should have no leeway at all as far as their constitutions are concerned. At the same time we found that the Basic Law allots constitutional space to varying degrees to the *Länder* depending on the issue at hand. From that assumption we can deduce: If the theory of multilevel systems and cooperative federalism is correct we should find that the aforementioned differences should somehow systematically affect sub-national constitutional politics. Or to put it more concretely: The more unitarian a national



constitutional provision is the more homogeneous sub-national constitutional politics should look like.

Hypothesis 2 – Institutions as a cause for constitutional change: As mentioned above the institutionalist theory takes a specific stance on the issue at hand: Its basic assumption is that the features of a constitution explain why and how often the very same legal document is amended. From this angle, it seems logical that the larger the majority required for an amendment the less likely it is that a change will occur, all else being equal (Lutz 1994; Roberts 2009; Lorenz 2008: 28 ff.). The causal link between these two configurational elements can, hence, be put like a traditional hypothesis and runs as follows: The more “rigid” a constitution is the fewer amendments we should find. As a matter of fact, Lutz was able to confirm this hypothesis in his seminal article (Lutz 1994: 358 and 360 ff.). However, as far as national constitutions are concerned Lutz’ findings have been challenged by other scholars. Thus, Lorenz found in statistical terms the rigidity of a constitution not very good at predicting the frequency of constitutional change. On the contrary, using data from 38 countries for the period between 1993 and 2002 Lorenz sees her assumption confirmed (Lorenz 2008: 72 f.). Martina Flick (2008) drew similar conclusions referring to German Land constitutions. She was not able to confirm Lutz findings, as well. Hence, it might be worthwhile to reexamine the causal link between rigidity and constitutional politics based on a qualitative comparative analysis.

Hypothesis 3 – Politics: In most cases the institutional set up prescribes a supermajority for a constitutional amendment to be passed. In most cases two thirds of the members of a Land parliament have to vote in favor of such an amendment. In other words parties that compete with each other and which support and oppose the incumbent government at the same time have to cooperate. However, it is difficult to measure such a consensus. I assume that it is telling whether such a supermajority is already being mustered before the bill has been submitted to the floor of a parliament. Or: the larger the majority among the parties that submit a bill to a parliament the more likely it is that this bill will be adopted. Obviously, an important threshold in this respect is the necessary supermajority. Hence, if the parliamentary parties submitting the bill already muster more than this majority I believe it as very likely that the amendment will eventually be adopted.

Overall these are elements supporting the view that there is a sub-national logic of constitutional politics which, however, are linked to multilevel systems. Actors, institutions,



and decision-making processes are sub-nationally shaped but multilevel federal law and European integration also come into play in order to explain constitutional change. We have, hence, a fairly complex configuration combining a “bottom-up” with a “top-down” perspective. Before being able to analyze these causal links and identify sufficient and necessary conditions I have to explain the method I will use in order to find out how far these features can explain the outcome at hand.

3. Qualitative Comparative Analysis: An Introduction

Basically, there are three ways to verify or “test” the aforementioned hypotheses: with case studies, with statistical techniques, and with qualitative comparative analysis.^{xvi} As pointed out I will try to find out whether the multilevel system, institutional factors, or sub-national actors have been the cause for constitutional change by using the last method. Furthermore, in order to analyze the causes for sub-national constitutional change in Germany I will refer to a specific variation of Qualitative Comparative Analysis, to crisp-set Qualitative Comparative Analysis (csQCA)^{xvii} which Charles C. Ragin who invented this method took as a tool to “simplify complex data structures in a logical and holistic manner” (Ragin 1987: viii; cf. also: Rihoux and De Meur 2009: 33 ff.). As this method is not very well known I will provide a short introduction and describe the steps to be taken. This short introduction is neither a detailed description of this method nor a manual for social scientists. I will just highlight the major elements of this method and indicate how I used it for the analysis of constitutional politics in the German *Länder*.

According to leading scholars QCA is not only a technique in order to analyze data but an encompassing research approach that is “based on specific requirements on core issues of research design, such as case selection, variable specification, and set membership calibration“ (Schneider and Wagemann 2010: 2). In line with this broad understanding QCA may be used in order to summarize and check the coherence of data, to “test“ hypotheses, or theories, or conjectures, and to develop new theoretical concepts (Berg-Schlosser et al. 2009: 15 ff.). In this paper I will address all aspects but will mostly use QCA as a technical tool in order to summarize and check the coherence of data. Hence, I will not be able to exploit the whole potential of this method and limit my analysis to some important aspects. The most basic goal of QCA, though, is to produce “a meaningful



interpretation of the patterns displayed by the cases under examination” (Wagemann and Schneider 2007: 3).

Sehring et al. (2013) see case orientation, a holistic view of cases, and detailed knowledge of cases as typical features of QCA. The logical basis of csQCA is Boolean algebra which knows “true” or “false” as the only possible conditions.^{xviii} Hence, csQCA allows identifying necessary and sufficient conditions in order to explain outcomes, and “mapping out similarities and differences between various configurations of conditions and cases” (Marx and Dusa 2011: 104). According to Marx and Dusa (2011: 104-106) QCA consists of three central features (cf. also: Sehring et al. 2013; Wagemann and Schneider 2007; Schneider and Wagemann 2010): It is case oriented, it is comparative, and it is systematic.

- *Case studies* accept the fact that outcomes are rarely due to just a single variable. Accordingly, case studies give the complexity of causal links its due share and understand cases rather in a configurational sense. QCA shares this premise. It believes in a holistic view on cases. In order to accomplish this goal in QCA cases are transformed into complex “configurations” including complex causal conditions. The comparative method focuses, hence, on “configurations of conditions; it is used to determine the different combinations of conditions associated with specific outcomes or processes” (Ragin 1987: 14; cf. also Rihoux and Ragin 2009). It goes without saying that case selection is a crucial element also for this method (Berg-Schlusser and De Meur 2009; King et al. 1994: 51 ff.; Geddes 2003: 89 ff.).
- *Comparative* is QCA because it strives to go beyond single cases. Studies using QCA attempt to identify cross-case patterns using Boolean algebra, which is the “algebra of logic” and the “algebra of sets” (Ragin 1987: 85). It is, hence, not probabilistic, but deterministic. To put it differently: QCA tries to keep the complexity of cases and still attempts to find general patterns in different cases. QCA is, therefore, a tool to generate general explanations about causal relations among different cases. Or as Charles C. Ragin has put it: The goal of csQCA is to “integrate the best features of the case-oriented approach with the best features of the variable-oriented approach” (Ragin 1987: 84). QCA thus tries to avoid the pitfalls of strictly inference-oriented quantitative studies that tend to limit their analysis of causal links to two variables: the



independent and the dependent variable. QCA has the capacity to examine complex configurations. This is the more important as social phenomena normally do have more than just one cause or a cause may trigger more than just one effect. That is the reason why case studies are still very popular among political scientists. Cases are “intrinsically complex, multifaceted, often with blurred boundaries“ (Rihoux and Ragin 2009: XVIII). With QCA we are able to account for such complex configurations that are “a specific combination of factors (...) that produces a given outcome“ (Rihoux and Ragin 2009: XIX). In addition with QCA we can identify necessary and sufficient conditions for an outcome. Insofar QCA avoids the pitfalls of the prevailing approach of quantitative social science that tries to disaggregate cases into isolated variables as well as single case studies that stresses the idiosyncratic nature of a case. In essence, QCA “allows for equifinality or multiple conjunctural causation” (Marx and Dusa 2011: 105; cf. also: Ragin 1987, Schneider and Wagemann 2007: 19-30).

- Finally, QCA is *systematic* because it uses the “Boolean logic” in order to identify cross-case patterns, explores causal conditions, and reduces the information gathered on single cases in such a way as to make them comparable (Marx and Dusa 2011: 105 f.). With Boolean logic it is possible to minimize the case description and come to the leanest equation that has to be interpreted by the researcher. Hence it fosters parsimonious explanations. In addition, QCA aims at exploring and understanding relations between sets. Most statements in social sciences can be reformulated in this sense. For example, if we say that stable democracies normally presuppose a huge middle class for being stable then all stable democracies are a subset of all states with such a middle class. But by reformulating the aforementioned statement as a set relation social scientists can easier link empirical findings to general theories. This is one reason why QCA is supposed to better link theory to data than quantitative methods. In addition, causal relations can be restated as set relations. Necessary conditions are a subset of the causal condition; “sufficiency” indicates that the causal element is a subset of the outcome (Berg-Schlusser et al. 2009: 6 ff.; Schneider and Wagemann 2007: 19 ff.). With QCA we are able to better understand and conceptualize “the relation between the different causes and how they combine in a given context“ (Sehring et al. 2013: 2, cf. also: Schneider and Wagemann 2007: 31 ff.).



Overall, we can say that Qualitative Comparative Analysis is a method that tries to bridge the gap between quantitative and qualitative research (Berg-Schlosser et al. 2009: 3 ff.; Fiss 2014). In addition QCA is able deal with an intermediate number of cases (between 5 and 50). Five cases that each study using QCA should include as a minimum seem to be too many for purely qualitative research. Fewer than fifty cases, however, seem too few for statistical techniques (Schneider and Wagemann 2007: 19 ff.; Fiss 2014: 6). Hence, originally QCA was supposed to cover the intermediate number of cases even though in the meantime we also find studies including up to 200 cases.

As already pointed out, QCA covers various methodological approaches. The approach I will use in this paper is called “crisp set Qualitative Comparative Analysis” (csQCA). csQCA knows only two options for determining which element is member of a set or not: an element is either “in” or it is “out”, meaning it is either member of a set [1] or it is not a member of a set [0]. Thus, determining the criteria for membership is a crucial part of csQCA. Furthermore, csQCA rests on comparing all logical combinations of conditions that are part of a data set with those that have been identified in case studies. As csQCA just knows dichotomous values the number of all possible combinations can be calculated by 2^k (k = number of conditions). Not all logically possible combinations can always be found in reality, though. In other words if we have four conditions we will get 16 logically possible configurations ($= 2^4$). These 16 logical configurations then have to be checked against the cases described by the original data. Based on this operation we might find out whether a given cause is logically associated with a specific outcome and how many cases this logical configuration is able to explain. Please note, that csQCA not only allows to include conditions lead to the outcome to be explained but it can identify the causes that make the outcome impossible, as well. In addition we also can examine effects if the conditions are not present.

One last remark on terminology is necessary, though. Eventually the causal links are to be expressed in Boolean logical terms (Rihoux and De Meure 2009: 34 f.; Schneider and Wagemann 2007: 31 ff.). The basic conventions of Boolean algebra are that uppercase letters indicate that a condition is present [1], while lowercase letters mean that it is absent [0]. As basic operators Boolean algebra uses “AND” which is, oddly enough, represented with the sign for multiplication [*], and “OR” which is represented by [+]. The arrow symbol links a set of conditions with the outcome we want to explain. For example, let us



assume that amendments (Outcome = 1) in the German *Länder* occur if and only if the Basic Law prescribes respective changes (MLS = 1), constitutional rigidity is low or absent (RIG = 0), and party consensus encompassing (CON = 1). This could be expressed in Boolean terms as follows $MLS * rig * CON \rightarrow O$.^{XIX}

4. Sub-National Constitutional Politics and csQCA

The research question of this paper shares main features with csQCA just described. Firstly, the analysis covers only a limited number of cases. Overall I include 23 decision-making processes covering three issues: the debt brake, capital punishment, and Europe (see appendix). In order to find cross-case patterns we need a method that is able to retain the complexity of these processes, which is a major advantage of QCA. Secondly, both my research question and QCA assume that outcomes may have multiple causes and causes may trigger different effects. It is even feasible to assume that different combinations of factors lead to the same result (Sehring et al. 2013; Marx and Dusa 2011: 105; Schneider and Wagemann 2007). And that methodological premise of QCA very much fits with the aforementioned research question which refers to structural, institutional, and political conditions that might influence sub-national constitutional decision-making. With QCA we can take into account the complexity of such case “configurations” and we can identify “necessary” and “sufficient” conditions for a respective outcome (Schneider and Wagemann 2007: 90 ff.). As far as my research question is concerned this for example could mean that sub-national constitutional amendments can have their causes in the Basic Law, in the rigidity of a sub-national constitution, or in political constellations in the *Land* parliament. The Basic Law or the structure of the multilevel system can, hence, be a sufficient condition for sub-national constitutional change or a necessary one. At the same time, sub-national constitutional change can fail to happen due to the rigidity of a constitution or because the parties were not able to muster the required supermajority.

In order to correctly use csQCA for the analysis of respective decision-making processes different steps are to be taken and “good practices” have to be complied with (Schneider and Wagemann 2010). As a matter of fact, there are various guidelines and examples showing how such an analysis is supposed to be done (Wagemann and Schneider 2007, Schneider and Wagemann 2010; Rihoux and De Meur 2009; Schneider and



Wagemann 2007: 85-172; Schring et al 2013). As a matter of fact I will not be able to perform all the steps in the recommended way but I will describe every one as detailed as possible.

The analysis requires data describing the combinations of features that are supposed to cause the outcome to be explained. Or to use QCA terminology, we have to create a complex configuration in which “conditions” are causally linked to the outcome. As pointed out, I assume three conditions determining whether respective decision-making processes have led to an amendment: the multi-level system, the rigidity of sub-national constitutions and the capacity to create consensus among parties before the formal legislative process has been set in motion. These features of the case configurations are theoretically grounded and difficult to operationalize. In order to be as transparent as possible I will describe how I designed the original data sheet (appendix) and how I dichotomized the respective values. It has to be noted that this transformation of empirical data into dichotomized values makes it mandatory to determine how theoretically complex causal relations can empirically be described in an adequate manner. These data have, then, to be translated into membership scores as QCA is “the examination of set-theoretic relationships between causally relevant conditions and a clearly specified outcome” (Wagemann and Schneider 2007: 3). In QCA terms this transformation of data into membership scores is called: calibration of sets which is supposed to be based rather on theoretical arguments than on empirical qualifications (Schneider and Wagemann 2010: 7).

For the analysis this means:

- Outcome: The outcome is straightforward and consists either in a constitutional change [1] or not [0]. Hence, the goal is to find out whether and under what conditions a sub-national constitution has been changed or whether we can identify configurations which exclude amendments. However, I do not take into account the specific content of respective amendments which clearly is something future research has to address in a more adequate manner. For example the precise provisions on debt brakes could vary between *Länder* and correspond more or less to the stipulations in the Basic Law.
- Impact of the multilevel system: Far more difficult to “measure” – or to “calibrate” – is the impact the Basic Law respectively the multilevel system may have on sub-



national constitutional politics. The crucial point here is whether the Basic Law includes provisions that either apply directly or overrule respective stipulations in *Land* constitutions. Debt brake and capital punishment do have such an effect on sub-national constitutional politics. Both define exhaustively and in detail the constitutional space of the *Länder*. In these cases I ascribe the value “1” to the condition. It is different with regulations triggered by European integration. Here the *Länder* are free and not bound neither by national nor by European rules [0].

- Rigidity: Flick (2008: 232-234) defined the rigidity of a constitution by adding up two requirements: the share of votes actually cast and the share of members of parliament necessary for an amendment to be passed. For example the *Landtag* of Baden-Württemberg can pass an amendment if the majority of the cast votes is in favor of the amendment and if at least two thirds of all members of the *Landtag* attended the vote. The sum of $1/2$ and $2/3$ equalizes to $7/6$ which is 1.17. In most cases the constitution can be changed with a supermajority of two thirds of all members of the respective parliament and only if two thirds of all members are present at the vote. In consequence the rigidity in most cases is 1.33 ($2/3 + 2/3$). Even though constitutional rigidity does not show great variations among *Länder* it seems logical to regard the two-thirds majority of all members of a Land parliament as a sort of crucial threshold because this forces the parties in parliament to find a consensus beyond party lines. Hence, when the index of Flick is 1.33 I will ascribe this condition the value [1]. If the rigidity is less than 1.33 the condition will get an [0].
- Party consensus: As pointed out, parties in parliament have to muster the necessary majority for each amendment. As a rule incumbent governments cannot rely on such a supermajority allowing them to change the respective Land constitution at will simply because they lack this kind of majority. In consequence, respective bills not only have to be endorsed by ruling parties but also by parties in opposition. In other words: We need a sort of “oversized coalition” including parties that eventually strive to unsettle the government in the next election. However, it is difficult to measure such a consensus. Sometimes it might be based on a package deal, sometimes it might be due to the fact that all parties support the amendment



in the first place. I take a consensus as given when parties submitting a respective bill already can muster the necessary majority, i.e. if they represent more seats than necessary for the amendment being passed. Even though this might seem trivial or a matter of course it still tells us something about the capacity of the legislative process to create such a majority if this is lacking.

Table 2: Data Matrix: Features on 23 Decisions in German Land Parliaments

CASE-ID	Explanatory Conditions			Outcome
	MLS	CON	RIG	
Issue	Share of seats for parties that submitted the bill	Rigidity	Amendment	
BAV_DB_1	1	1	1	1
BAV_DB_2	1	0	1	0
BW_DB_1	1	0	0	0
BW_DB_2	1	0	0	0
BB_DB_1	1	0	1	0
HB_DB_1	1	0	1	0
HH_DB_1	1	0	0	0
HH_DB_2	1	0	0	1
HES_DB_1	1	0	0	1
MW_DB_1	1	0	1	1
LS_DB_1	1	0	1	0
LS_DB_2	1	0	1	0
NRW_DB_1	1	0	1	0
RP_DB_1	1	1	1	1
SAX_DB_1	1	0	1	1
SH_DB_1	1	0	1	1
SH_DB_2	1	0	1	0
TH_DB_1	1	0	1	0
RP_DP_2	1	0	1	0
HES_DB_2	1	0	0	0
BAV_EU_3	0	1	1	1
BW_EU_3	0	1	0	1
BW_EU_4	0	1	0	1

The table in the appendix shows the original data and provides some additional information that might be telling for the cases in question. Table 2 represents just the dichotomized data matrix for the conditions laid out in chapter 2, i.e. for the effect I ascribed to the multilevel system (MLS), the degree of consensus (CON), and how rigid the constitution is (RIG). In QCA terms this step is called “calibration” – in quantitative studies it is “measurement” – and is clearly a crucial step in determining the quality of the



analysis. And it goes without saying that this being the first attempt to use QCA for constitutional politics the way I “calibrated” the different conditions is clearly open to critique and improvement. In order to analyze the data matrix we have to transform table 2 into a truth table. A truth table can tell us whether a combination of conditions is logically valid or not and whether logically valid configurations are empirically existent. The truth table for this study is composed of one column for each condition, one column for the outcome and a column for the cases fitting the configuration. In addition, the table shows how often the explanatory conditions triggered the respective outcomes. Each row of the truth table contains one logically possible configuration. As each condition can take the value 1 or 0 we have eight possible configurations (2^3).

Table 3: Truth Table for 23 Decisions

	MLS	CON	RIG	O	Freq0	Freq1	Cases
1	1	1	1	1	0	2	BAV_DB_1; RP_DB_1
2	1	1	0	-	-	-	-
3	1	0	0	C	4	2	BW_DB_1; BW_DB_2; HH_DB_1; HES_DB_2; HH_DB_2; HES_DB_1
4	1	0	1	C	9	3	BAV_DB_2; BB_DB_1; HH_DB_1; LS_DB_1; LS_DB_2; NRW_DB_1; SH_DB_2; TH_DB_1; RP_DB_2; MW_DB_1; SAC_DB_1; SH_DB_1
5	0	1	1	1	0	1	BAV_EU_3
6	0	0	1	-	-	-	-
7	0	1	0	1	0	2	BW_EU_3; BW_EU_4
8	0	0	0	-	-	-	-

MLS = Impact of Multilevel system

CONS = Consensus among parties

RIG = Rigidity

Freq0 = Number of configurations without an amendment

Freq1 = Number of configurations with an amendment

Calculated with TOSMANA 3.1

According to the truth table (table 3) there are three configurations that led to an amendment (rows 1, 5, and 7). Formally this can be put as follows: $MLS*CON*RIG + mls*CON*RIG + mls*CON*rig \rightarrow O$. However, as the outcome occurred with and



without MLS and RIG they can neither be regarded as “necessary” nor as “sufficient”. Only “CON“ figures in all three configurations as a condition. Still, we cannot conclude that consensus is a necessary condition because apparently the outcome also occurred when this condition was not present (rows 3 and 4). However, CON is sufficient because the constitution has always been amended when CON figured as condition.

Still, these are preliminary conclusions because the number of cases eventually explained by the different configurations is very low. Even though each case explained with a configuration matters for QCA (Berg-Schlosser et al. 2009: 9) it is telling that eventually only five outcomes could be unequivocally linked to the conditions. And that includes negative outcomes which only found inconsistent explanations. Therefore, the truth table rather than providing an answer to my research question raises conceptual and methodological issues which are the reason why I deviate from the recommended “good practices”. Methodologically, three aspects are to be mentioned in this respect.^{xx} Firstly, there are three “logical remainders“, that are rows with a configuration without empirical reference. These configurations are laid out in rows 2, 6 and 8. These remainders can be due to case selection, the configurations of conditions or – even more likely - due to the fact that mostly a supermajority is constitutionally required. Anyway, logical remainders happen in many studies using QCA. Secondly and as already mentioned, two configurations lead to contradictory outcomes (rows 3 and 4). Both combinations “MLS*cons*r_{ig}” as well as “MLS*cons*RIG” triggered in sum 13 cases an amendment and in 5 cases the outcome did not occur. Normally, these contradictions are to be resolved by adjusting the configurations, including new or removing existing causal conditions, adding new cases, or recalibrating the data (Rihoux and De Meur 2009: 48 ff.; Ragin 1987: 113 ff.; Marx and Dusa 2011: 109 ff.). However, this would mean to change the model that is to explain the outcome. Thirdly, I believe the calibration of conditions far from being perfect. Future research using this kind of method will have to think about how to describe respective conditions.

5. Conclusion

Maybe James A. Gardner is right in his skeptical view on sub-national constitutionalism. Nonetheless, at least in Germany Land constitutions are supposed to



positively impact on the stability and the functioning of democracy (Lorenz 2011; Vorländer 2011; Dombert 2012). The more surprising it is that we still do not know very much about the causes of sub-national constitutional change (Lorenz and Reutter 2012). The same lacunae Ran Hirschl spotted in research on comparative constitutional law can be found in studies on sub-national constitutional politics. Many respective studies still lack a consistent and encompassing theory and what Hirschl (2005: 12) coined “coherent methodology”. In my paper I try to fill this gap by using QCA – at least a little bit. It has to be pointed out, though, that to my knowledge this is the first time that QCA has been used in order to analyze constitutional politics in the German *Länder*. It might, hence, not come as a surprise that such an approach still faces methodological and theoretical problems. It surely does not fulfill the criteria for “Good Practices” (Wagemann and Schneider 2007; Schneider and Wagemann 2010). Nonetheless analyzing constitutional politics in German *Länder* with QCA brought some important aspects to the fore and highlight challenges for future research.

Firstly, the analysis of the aforementioned 23 decision-making processes did not create a clear cut answer to the question about the causes for constitutional change. Neither rigidity nor the different impact I ascribed to the multilevel system turned out to be necessary or sufficient conditions neither for the amendments nor for failed decisions. The only feature that was necessary for any kind of positive outcome was consensus. This, of course, is hardly a surprising result, but it stresses once more that any theory explaining constitutional change in sub-national units has to take actors into account. Insofar the results of our analysis very much reflects observations made by Dirk Berg-Schlosser et al. (2009: 10) who state that conclusions of any empirical analysis depend on how the conditions have been operationalized and on which cases have been selected. “Yet, if several competing theories try to explain the same result, QCA techniques will quickly disqualify the theories that are unable to discriminate correctly between cases with and without the outcome under study. This will be indicated by the presence of so-called contradictory configurations (...)” (Berg-Schlosser et al. 2009: 10).

Secondly, party consensus seems a crucial element for explaining amendments as well as for failed attempts to change sub-national constitutions. Such a consensus is only possible if parties agree to cooperate. However, there are also five amendments without such a consensus. This might raise the question as to how parliaments can influence the



outcome of respective decision-making processes. Hence, it will be up to future research to find out under what conditions parties in parliament are inclined to compromise either before or after submitting a bill to parliament. This might be due to the content of the bill, to package deals, but also to tradition or to the structure of the party system.

Thirdly, it has to be pointed out that we still have to find out how to combine the impact of multilevel systems and the actor-centered approach. Patricia Popelier has rightfully highlighted that in a multilevel “environment subnational constitutionalism is not merely defined by the power of subnational authorities to adopt their own constitution” (Popelier 2014: 19). Even though Popelier stresses the involvement of sub-national units at the national or European level this also highlights how the different levels are intermeshed. However, based on the analysis we still do not know how the German federal system affects sub-national constitutional politics and how we are supposed to “measure” such an effect. Or: why is there still a provision about capital punishment in the constitution of Hesse while Bavaria, Rhineland-Palatinate, and Bremen changed their constitutions accordingly – in spite of the fact that for all *Länder* the same legal framework was in place? That is to say, that the very same multilevel structure led to different outcomes. This raises theoretical and empirical questions.

Overall, the study made clear, that as far as political science is concerned the analysis and the explanation of constitutional politics in the German *Länder* are still in its infancy. There are important and intriguing concepts, though, but so far we are not able to theoretically conceptualize and empirically examine how the multilevel system, party politics, and constitutional rigidity affect sub-national constitutional politics in a systematic manner.

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^{II} For an English translation of the Basic Law see: <<https://www.btg-bestellservice.de/pdf/80201000.pdf>>

^{III} Cf. Benz 2013; Behnke and Benz 2009; Benz 2011; Benz and Colino 2011; Lorenz 2008: 28 ff.

^{IV} The first seminal study on this method was published in 1987; since then this approach has been changed and improved; cf. Ragin 1987; 2000; 2010; Rihoux and Ragin 2009; Schneider and Wagemann 2007.

^V An extensive list of publications on the topic can be found on the homepage of COMPASSS (COMPARative Methods for Systematic cross-caSe analySis): <<http://www.compass.org>>.

^{VI} For a general overview on the German federal system cf. e.g. Kropp 2010; Laufer and Münch 2010.

^{VII} We explain this argument in more detail in: Lorenz and Reutter 2012.

^{VIII} In 1952 Baden, and Württemberg-Baden amalgamated with Württemberg-Hohenzollern into: Baden-



Württemberg whose constitution entered into force in 1953; it did not include a provision on capital punishment.

^{IX} Between 1946 and 1949 in Baden, Bavaria, Bremen, and Hesse nobody has been sentenced to death. Only in Rhineland-Palatinate and Württemberg-Baden a number of criminals had been executed. In Berlin capital punishment remained possible until 1990. This was due to the status of the Land until 1990. In Berlin the supreme power rested with the Allied powers until unification. Hence, in theory the Allied powers could have applied the death penalty which, however, they never considered after the Basic Law had come into being.

^X The provisions on the death penalty have been eliminated in 1994 (Bremen), 1998 (Bavaria), and 1991 (Rhineland-Palatinate).

^{XI} However the Allied Powers executed war criminals until 1951 on German soil. In addition, it should be noted that the East German constitution allowed death penalty until 1987.

^{XII} This is also due to European and international treaties and human rights conventions.

^{XIII} Art. 31 Basic Law stipulates: „Federal law shall take precedence over Land law.“

^{XIV} Since January 1, 2014 Art. 70 par. 4 of the Bavarian Constitution stipulates: „Ist das Recht der Gesetzgebung durch die Übertragung von Hoheitsrechten auf die Europäische Union betroffen, kann die Staatsregierung in ihren verfassungsmäßigen Aufgaben durch Gesetz gebunden werden. Ist das Recht der Gesetzgebung durch ein Vorhaben der Europäischen Union betroffen, hat die Staatsregierung bei ihren verfassungsmäßigen Aufgaben die Stellungnahmen des Landtags maßgeblich zu berücksichtigen.“ The respective provision in the Constitution of Baden-Württemberg reads as follows (Art. 34a par 2): „Sollen ausschließliche Gesetzgebungszuständigkeiten der Länder ganz oder teilweise auf die Europäische Union übertragen werden, ist die Landesregierung an Stellungnahmen des Landtags gebunden. Werden durch ein Vorhaben der Europäischen Union im Schwerpunkt ausschließliche Gesetzgebungszuständigkeiten der Länder unmittelbar betroffen, ist die Landesregierung an Stellungnahmen des Landtags gebunden, es sei denn, erhebliche Gründe des Landesinteresses stünden entgegen. Satz 2 gilt auch für Beschlüsse des Landtags, mit denen die Landesregierung ersucht wird, im Bundesrat darauf hinzuwirken, dass entweder der Bundesrat im Falle der Subsidiaritätsklage oder die Bundesregierung zum Schutz der Gesetzgebungszuständigkeiten der Länder eine Klage vor dem Gerichtshof der Europäischen Union erhebt. Im Übrigen berücksichtigt die Landesregierung Stellungnahmen des Landtags zu Vorhaben der Europäischen Union, die Gesetzgebungszuständigkeiten der Länder wesentlich berühren.“

^{XV} The seminal study using the aforementioned variables is: Lutz 1994; cf. also Lorenz 2005.

^{XVI} I cannot discuss the different methodological schools in detail; for a brief review of this issue cf., Ragin 1987: 1 ff.; Schneider and Wagemann 2007: 19 ff.

^{XVII} The label QCA covers three main methodological variants. The original version is called csQCA (cs stands for „crisp set Qualitative Comparative Analysis“); „multi-value“ and „fuzzy set“ versions are known as „mvQCA“ and „fsQCA“; Rihoux and Ragin 2009, p. XIX f.

^{XVIII} Short introductions into this field of mathematics can be found in: Ragin 1987: 89 ff.; Rihoux and De Meur 2009: 34 ff.; Schneider and Wagemann 2007: 31 ff.

^{XIX} There are three software packages (QCA-DOS, TOSMANA and fsQCA) that can be downloaded and used for free. All three software packages can compute csQCA and can be retrieved either from:

<<http://www.compass.org/software.htm>> or
<<http://www.socsci.uci.edu/~cragin/fsQCA/software.shtml>>. There are also manuals for the software, cf. Cronqvist 2006; Ragin et al. 2006a and 2006b; Drass 1998; Drass and Ragin 1992. I used TOSMANA.

^{XX} For a discussion of critiques focussing on QCA and notably on csQCA cf. De Meur et al. 2009.

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**The Role of Subnational Constitutions in
Accommodating Centrifugal Tendencies
within European States:
Flanders, Catalonia and Scotland Compared**
by
Dirk Hanschel*

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Abstract

Looking at federalism (Belgium), quasi-federalism (Spain) and devolution (United Kingdom), this paper shows that regional autonomy of Flanders, Catalonia and Scotland may be strengthened through a strong empowerment to establish fully-fledged subnational constitutions and through the active use of that empowerment. The author argues that subnational constitutions, whilst not acting as a panacea, may serve as important focal points for regional identification and be part of suitable autonomy arrangements within the State. They may help accommodate centrifugal tendencies, as long as the empowerment stems from a coherent and transparent central constitutional framework which clearly defines and entrenches the subnational constitutional space and its inherent limitations.

Key-words

Subnational constitutions, federalism, devolution, autonomy, independence



1. Introduction

This paper argues that subnational constitutions^I may help accommodate centrifugal tendencies within European States without stipulating or inviting secession.^{II} Looking at federalism (Belgium), quasi-federalism (Spain) and devolution (United Kingdom)^{III}, the analysis shows how regional autonomy of Flanders, Catalonia and Scotland may be strengthened through the empowerment to establish fully-fledged subnational constitutions and by subsequent use of that empowerment, as for instance in Germany or Switzerland.^{IV} This may contribute to a resolution of existing vertical power conflicts and to a robust subnational autonomy that accommodates the demands of the majority of the regional population.^V The paper intends to add a fresh perspective to the current constitutional debate which, with regard to Scottish independence, has been mostly focused on a written constitution *outside* the UK framework. In light of the outcome of the referendum on 18 September 2014,^{VI} the question has become even more pressing how to accommodate persisting quests for greater autonomy *within* the existing State. Taking a comparative perspective, the paper draws conclusions for Flanders and Catalonia, as well, where the constitutional future appears as uncertain as in Scotland.

2. Subnational Constitutional Power in Flanders

2.1. Overarching Constitutional Framework

The original Belgian Constitution of 1830 was designed in a unitary way. Whilst decentralization commenced in 1970, Belgium only declared itself a fully-fledged federation in 1993, consisting of “the Flemish Community, the French Community, and the German-speaking Community” (Art. 2 of the Constitution^{VII}), as well as the “Flemish Region, the Walloon Region, and the Brussels Region” (Art. 3 of the Constitution^{VIII}).^{IX} Hence, two sets of “overlapping sub-states” with different competences were created.^X Whilst communities deal with “education, culture, person-related matters and the use of languages”, regions mainly have powers on “social-economic and territory bound matters”.^{XI}



Belgian federalism hence devised a complex system.^{XII} Its distinction between regions and communities (as stipulated in Art. 1 of the Constitution^{XIII}) makes the Belgium federation unusual.^{XIV} It is important to understand that the territories of the communities and the regions are not identical, but merely overlap.^{XV} Different powers are attributed to them, even though these may have become more blurred in recent practice.^{XVI} The latter has particularly happened in Flanders, where the Community and Region have practically merged.^{XVII} The opposite effect has occurred with regard to the South of the country, since the Walloon Region encompasses two linguistic communities (French and German), and the unity of the Walloon Community suffers from the lack of identification by the French speaking population of Brussels.^{XVIII} Brussels itself is, due to its lack of a single linguistic or cultural identity, not a community, but a distinct region.^{XIX} As a further complication, community powers can be exercised by the regions; in the case of the Walloon Region this means that the resulting acts will only be valid for those parts of the region that correspond with the community that transferred the matter.^{XX}

This leads to a complex system of community and regional interaction and of multiple layers of government, which may even lend itself as an example of constitutional pluralism.^{XXI} This situation is aggravated by the fact that there is no rule of precedence of federal over regional laws.^{XXII} The resulting compromise may have been suitable to appease the various contributors to the Belgian federation initially, but enduring conflict seems to suggest that this model has not been very successful.^{XXIII} The delicate balance of powers and representation requires constant negotiation and readjustment and hence does not appear to provide a clear and transparent system of governance. The constitutional structure has not proven to be very successful in easing tensions and accommodating quests for greater autonomy.^{XXIV}

In light of that, future constitutional reform could serve to organize the federal system in a more coherent way, by abandoning either the community or the regional structure whilst granting strong minority rights within each of the entities. Hence, suggestions have been made to delete the communities and to have four regions instead of that.^{XXV} These could be Wallonia, Flanders, the German-speaking region and Brussels. However, the two main ethnic groups of Flanders and Wallonia are competing over their national influence,



and without strong recognition of both groups effective governance of the country might be impossible.^{XXVI} This is particularly difficult in Brussels where the two main ethnic groups “meet (or confront) each other”.^{XXVII} Reform prospects are further hampered by the high hurdles regarding constitutional amendment set up by Art. 195 of the Constitution, essentially requiring three stages of legislation coupled with a two-third majority of both Houses.^{XXVIII} As a consequence, Belgium may well illustrate the limitations of constitutional responses to centrifugal tendencies. However, the recent Sixth State Reform strengthens fiscal autonomy of the regions, cedes further powers in the fields of economic and social policy and hence shows that Belgian federalism is dynamic and not averse to reform.^{XXIX}

2.2. Subnational Constitutional Power within that Framework

Subnational constitution-making power in Belgium is merely “embryonic”.^{XXX} Whilst the Flemish Community as well as the Flemish Region, the French Community and the Walloon Region have a limited degree of quasi-constitutional autonomy, the Brussels-Capital Region and the German Community have lacked that autonomy so far.^{XXXI} As *Pas* stresses, “[c]ontrary to the general rule in almost every federal State, the Belgian federated entities have no proper constitutions of their own”.^{XXXII} One reason for that might be that Belgium is a rare example of a federation that was not built on previously independent States, but which resulted from a process of decentralization within a once unitary framework.^{XXXIII}

This has not hampered a certain degree of institutional autonomy, labeled as *constitutive* instead of *constitutional* autonomy.^{XXXIV} The latter is confined to the “election of the parliaments and to the composition and functioning of the parliaments and their government”.^{XXXV} These powers have been conferred upon the regions through the federal parliament, which is an arrangement that resembles devolution rather than federalism.^{XXXVI} The Constitution empowers the federal Parliament to specify these matters (Art. 118 (2) and 123 (2) in conjunction with Art. 4, para 3)^{XXXVII}, which it did according to Art. 35 (3) of the Special Majority Act of 8 August 1980.^{XXXVIII} In essence, this means that the degree of constitutional autonomy is legally apportioned in each case and not guaranteed by the federal Constitution.^{XXXIX} In addition, the transfer of powers is limited by the Constitution



itself and by the Special Majority Act.^{XL} The resulting powers of regional legislation must be “exercised through special majority decrees passed by a two-thirds majority vote in the council concerned”.^{XLI} This has led only to minor deviations from the federal set of rules, such as the extension of the election period from four to five years, the non-dissolution of subnational parliaments, or the elimination of the role of the King in the formation of government.^{XLII} Hence, even the limited regional constitutional powers have clearly not been fully exhausted.

This rather weak constitutional autonomy is not well-suited to help solve conflicts resulting from quests for greater autonomy, as it fails to provide the regional units with a strong feeling of identity. A way forward might be combining a more stringent and transparent organization of Belgian federalism as suggested above with enhanced regional constitutional autonomy. In addition to its important symbolic function, full subnational constitutional power might allow identifying, defining and addressing regional concerns in a more effective way without having to unravel the federation as such.^{XLIII} In this context, the “slippery slope” argument might be tackled by clearly defining the limitations of such power in the Belgian Constitution and by retaining original sovereignty at the central level.

To the extent that demands for greater regional autonomy are driven by economic reasons, this autonomy might include a right to levy additional regional taxes, either exclusively or in conjunction with the federation (as for instance in Switzerland).^{XLIV} In addition, the current situation whereby the center retains the residual powers, i.e. those not transferred to the regions, could be reversed.^{XLV} Such powers would have to be primarily established by the Belgian Constitution, but might equally be reflected at the regional constitutional level, hence strengthening regional identification. In spite of the high hurdles for constitutional amendment, reform in the direction of stronger subnational constitutional powers does not appear completely unrealistic.^{XLVI} There is currently a major movement towards a subnational constitution, in particular in the Flemish parliament, the latest step being a Draft Charter for Flanders as completed in 2010.^{XLVII} This might help create the necessary thrust to prompt further constitutional reform.



3. Subnational Constitutional Power in Catalonia

3.1. Overarching Constitutional Framework

The current Spanish Constitution of 1978 retains Spain as a unitary State which distinguishes it from the federal model whilst providing a high degree of autonomy to the regions.^{XLVIII} Art. 2 of the Constitution stipulates on the one hand that “[t]he Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards”; on the other hand it “recognizes and guarantees the right to autonomy of the nationalities and regions of which it is composed and the solidarity amongst them all”.^{XLIX} Whilst “nationalities” and “regions” are mentioned separately, these terms are not defined differently by the law, nor are they listed anywhere in the Constitution.^L Art. 137 organizes the Spanish State by distinguishing between “municipalities, provinces, and Autonomous Communities that may be constituted”.^{LI} Further provisions within the same Title VIII of the Constitution lay out procedures regarding “access to autonomy”, powers of Autonomous Communities and their essential rules of governance, as well as a central parliamentary approval process.^{LII} The latter happens through a so-called organic law according to Art. 81 para 1.^{LIII} The autonomy initiative according to Art. 143 et seq. requires drafting and adopting a “Statute of Autonomy” (Art. 146 et seq.)^{LIV}, which constitutes the “basic institutional document” whilst forming “an integral part of the constitutional legal order”.^{LV} Pursuant to Art. 147 para 2. d), each Statute needs to lay out, inter alia, “[t]he powers assumed within the framework established by the Constitution and the basic conditions for the transfer of the services corresponding to them”.^{LVI} Amendments to the Statute shall “conform to the procedure established therein and shall in any case require the approval of the Cortes [i.e. Parliament] through an organic law”.^{LVII} Art. 148 provides a list of powers that the provinces may assume, whereas Art. 149 retains other powers at the central level. Within the limits defined by these provisions, subsequent expansions of regional powers may be undertaken after five years (Art. 148 para 2), unless a fast-track procedure (Art. 151) is used which provides a higher degree of democratic legitimation, in particular through a referendum.^{LVIII}



As the Constitution establishes little more than a blueprint of regional powers^{LIX}, the actual structure of the Autonomous Communities varies, depending mainly on whether the slow track (Art. 143) or the fast track (Art. 151) was chosen.^{LX} The latter can be combined with Art. 2 of the Interim Provisions listed in Title XII of the Constitution. According to this norm, “territories which in the past have, by plebiscite, approved draft Statutes of Autonomy, and which at the time of the promulgation of this Constitution, have provisional autonomous regimes, may proceed immediately in the manner provided in clause 2 of Art. 148, when agreement to do so is reached by an absolute majority of their pre-autonomous higher corporate bodies, and the Government is duly informed”.^{LXI} There are additional rules stipulating involvement of the federal Parliament, e.g. Art. 144 a) (authorization of Autonomous Communities not exceeding the size of full provinces), Art. 144 b) (autonomy for territories outside provinces) and Art. 150 (2) (transfer of competences).^{LXII} Finally, the First Additional Provision of the Constitution provides protection to the former statutory foral regions (“fueros”), whereas the Fifth Interim Provision allows for the “cities of Ceuta and Melilla” to “set themselves up as Autonomous Communities”.^{LXIII} This structure suggests a form of asymmetric autonomy which facilitates tailor-made subnational constitutional setups.^{LXIV} Placing a lot of responsibility in the hands of the regions comes, however, at the price of a high degree of fragmentation and complexity.

3.2. Subnational Constitutional Power within that Framework

This incomplete and complex framework has led to a certain patchwork of subnational powers, with regions achieving autonomy through various combinations of the above-mentioned rules, resulting in 17 Autonomous Regions and 2 Autonomous Cities.^{LXV} The patchwork character appears to be owed rather to historical circumstances than to rationality or transparency. The scattered nature of relevant constitutional provisions reveals that the arrangement attempts to square the circle in accepting strong competing claims for integration and autonomy.^{LXVI} When the Spanish State was re-launched after the end of the Franco regime, this framework may have been a useful compromise in order to achieve a constitutional settlement in the first place.^{LXVII} However, it lacks the necessary detail and clarity to accommodate current regional claims for autonomy in an equitable and transparent manner.^{LXVIII} This is aggravated by the fact that the Spanish Constitution



confers powers onto the regions without elevating them to the status of federated entities. Art. 148 and 149 leave substantial scope for regional competences, but the Constitution merely provides statutory instead of full subnational constitution-making power. In subjecting the precise scope of powers to the choice of each province, Spain constitutes a very specific model of asymmetric federalism, not in the sense that it would grant different powers to the regions (with the exception of the Basque country and Navarre)^{LXIX}, but by setting up an à la carte model which, to a certain extent, invites the regions to make their individual choices.^{LXX} This creates a subnational constitutional space which can be cultivated autonomously by the regions in cooperation with the central Parliament through the approval process.

The resulting Statutes can be quite far-reaching in practice.^{LXXI} It is therefore important to note that the extent of constitutional autonomy is thoroughly checked by the Spanish Constitutional Court. Through a number of landmark decisions, the Court has defined and limited regional autonomy by stating that this autonomy is of a political and not merely administrative nature, but must not compromise national unity.^{LXXII} Constitutional autonomy has been a particularly thorny issue in a recent controversy relating to Catalonia's new Statute of Autonomy passed in 2006, which characterized Catalonia as a nation in the Preamble and contained far-reaching rules on regional autonomy.^{LXXIII} In essence, the Constitutional Court rejected 14 and read down 27 out of the 114 articles.^{LXXIV} The Court emphasized that “statutes of Autonomy are rules subordinated to the Constitution, as it [*sic*] corresponds to normative provisions that are not an expression of a sovereign power, but of a devolved autonomy based on the Constitution, and guaranteed by it, for the exercise of legislative powers within the framework of the Constitution itself”.^{LXXV} Relying on this framework, the Court went on to ascertain several constitutional functions of the Statutes, stipulating that “[t]he first constitutional function of the Statutes of Autonomy lies therefore in the diversification of the Legal System through the creation of devolved regulatory systems, all hierarchically subordinated to the Constitution and organized among them in accordance with the criterion of competence”.^{LXXVI} Second, “it has the function to attribute powers that define, on the one hand, an internal remit for the regulation and exercise of public powers by the Autonomous Community, and help to outline, on the other hand, the scope of regulation and powers inherent to the State”.^{LXXVII} In a nutshell,



the Court has thus secured the supremacy of the national Constitution, whilst emphasizing the important constitutional functions of subnational Statutes of Autonomy.^{LXXVIII}

As in Belgium, subnational constitutional power of the Spanish regions exists merely in a wider sense. Admittedly, the Statutes of Autonomy come much closer to subnational constitutions than the Belgian Special Majority Act and subsequent decrees.^{LXXIX} Furthermore, the Spanish regions have more influence over the actual scope of their subnational constitutional powers than the Belgian regions or communities. But the authorization provided is still weaker than the far-reaching empowerment of regions in Germany or Switzerland that were able to establish fully-fledged constitutions. The quest for independence in Catalonia may be too vigorous to be successfully accommodated by a subnational constitution,^{LXXX} and some of the more nationalistic elements of its latest Statute of Autonomy could not be valid parts of such a constitution, either.^{LXXXI} Still, authorization of regional constitution-making in a more formal sense might serve as an additional focal point for intra-state identity. As in Flanders, economic motives for further autonomy might be addressed by a subnational constitutional autonomy that includes an enhanced power to levy regional taxes.^{LXXXII} Such empowerment might be less suitable to deal with the more emotional side of the argument, although one should not underestimate the potential for national identification with a constitution (including its symbolic value) as an expression of regional self-determination, even if constrained by the overarching national framework.^{LXXXIII} However, feasibility of subnational empowerment through required constitutional change at the central level is limited by the fact that amendments would have to be carried out by a three-fifths majority in each legislative chamber (Art. 167), which posits a slightly lower hurdle than the Belgian Constitution - unless a more fundamental constitutional revision is undertaken which even requires a two-thirds majority plus a successful referendum (Art. 168 para 1).^{LXXXIV} Since its adoption in 1978, the Spanish Constitution has not been reformed, even though it has been affected by a number of changes at the regional level.^{LXXXV} This does not invite a very optimistic assessment of chances for systematic reform.^{LXXXVI}



4. Subnational Constitutional Power in Scotland

4.1. Overarching Constitutional Framework

The UK Constitution has grown over the centuries without having ever been laid down in a single inclusive document.^{LXXXVII} It represents a cluster of statutes, treaties, common law and constitutional conventions.^{LXXXVIII} Due to the lack of comprehensive codification, there is disagreement as to what precisely qualifies as constitutional, i.e. is “important or significant enough to be included”.^{LXXXIX} This has been clarified by the House of Lords Constitutional Committee according to which the Constitution consists of “the set of laws, rules and practices that create the basic institutions of the State, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual”.^{XC} This should include rules dealing with the distribution of powers between the UK and the Scottish parliaments and governments. After a long period of being an independent nation, Scotland came to be part of the Kingdom of Great Britain in 1707 through the Articles of Union.^{XCI} Through the Act of Union in 1800, the United Kingdom of Great Britain and Ireland (later to be reduced to Northern Ireland) was established.^{XCII} Scottish autonomy was increasingly established through devolution as stipulated by Westminster Parliament, in particular through the Scotland Acts 1998 and 2012.^{XCIII} With Wales and Northern Ireland having obtained devolved powers, as well, the devolution settlement increasingly resembles a quasi-federalist setting.^{XCIV}

Devolution has been strengthened by the *Sewel* Convention according to which Westminster legislation in devolved areas requires the consent of the Scottish Parliament.^{XCV} In order to accommodate this in practice, the Scottish Parliament has started passing *Sewel* resolutions which authorize Westminster to legislate “on its behalf”.^{XCVI} Since constitutional conventions are merely politically binding, the resulting entrenchment of devolved powers does not appear very strong.^{XCVII} However, when assessing the quality of devolved powers, one should take into account that conventions are usually adhered to and valued highly,^{XCVIII} whereas the tendency towards strict legal entrenchment in other countries is not dominant in the British legal culture.^{XCIX} Instead, a strong trust in political arrangements appears to stabilize expectations regarding permanent



devolution in a similar way as legal entrenchment by enumerated constitutional powers and constitutional court supervision does in other legal orders. The effectiveness of entrenchment as a means of conflict resolution does not hinge on its legal quality, but on the perceived level of stability and reliability it generates. This requires a broader conceptualization of law's role in a society, the basic contention being that legal cultures diverge substantially in this regard.^C

Further entrenchment might result from limitations to parliamentary sovereignty in a legal sense.^{CI} Their effectiveness will depend on how intensely they can be scrutinized by the courts.^{CI} In that sense, the classical view of *Dicey* has begun to be challenged by several judges, e.g. *Lord Justice Laws* who claimed in *Thoburn* that “constitutional statutes”, i.e. statutes on matters of particular importance, would not be subject to implicit, but only to explicit repeal.^{CI} Similarly, in *Jackson*, *Lord Justice Steyn* stated that “[w]e do not in the United Kingdom have an uncontrolled institution”, pointing to the EU membership, the Scotland Act and to the Human Rights Act.^{CI} *Lord Justice Hope* even expressed the view that “...Parliamentary sovereignty is, if it ever was, no longer absolute”.^{CI} Finally, in *H v Lord Advocate* the Supreme Court indicated that the Scotland Act 1998, due to its “fundamental constitutional nature”, cannot be impliedly repealed.^{CI} Whilst these statements were only made obiter dicta, *Tierney* sees them as “significant cracks in what has traditionally been a monolithic acceptance by senior judges of Westminster’s untrammelled legislative power”.^{CI} Referring also to European Union (EU) membership and the Human Rights Act, he views the devolution settlement as having “the potential to become the most stark example of how a devolved territory can use existing powers and the historical legacy of a distinct juridical identity to push for further constitutional space to an extent that the narrative of undivided sovereignty becomes less and less sustainable as an explanation for the nature of divided powers in such a heavily decentralized state”.^{CI}

This assessment is not uncontested.^{CI} Firstly, recent Supreme Court decisions have elsewhere confirmed Westminster’s parliamentary sovereignty vis-à-vis the Scottish Parliament.^{CI} Secondly, repealing the European Communities Act might violate the treaties (although even that is now doubtful due to the exit option introduced by the Lisbon Treaty^{CI}), but from the domestic perspective it might still be covered by parliamentary



sovereignty.^{CXII} Thirdly, the European Convention on Human Rights and Fundamental Freedoms (ECHR) does not even claim to take supremacy over domestic law, and the implementing Human Rights Act does not allow the courts to set aside primary legislation, but limits them to declarations of incompatibility.^{CXIII} Finally, any EU or ECHR related limitations of sovereignty would be motivated by international obligations instead of domestic settlements and therefore hardly lend itself for valid conclusions as to the constitutional repercussions of the latter. To conclude, potential inroads into parliamentary sovereignty appear to be either challengeable or ill-suited to prove the existence of a legally entrenched subnational constitutional space.

4.2. Subnational Constitutional Power within that Framework

Elements of a Scottish Constitution have been able to develop during a long period of history.^{CXIV} The Union with England did not terminate that process entirely, but gradually superseded it through acts of Westminster Parliament, court decisions and conventions addressing the Union as a whole.^{CXV} The House of Lords assumed appellate jurisdiction over civil law cases, and the development of public law was transferred into the hands of the UK Parliament.^{CXVI} At the same time, the Union preserved and formalized some elements of Scottish sovereignty, including the “independence of Scottish private law and the judiciary”.^{CXVII} Whilst the Union did not explicitly recognize Scottish constitution-making powers, such powers can arguably be assumed to predate the Treaty of Union and to have been implicitly recognized by the UK Constitution. In that sense, the Treaty of Union may be read as a constitutional document providing or implicitly recognizing a certain Scottish constitutional space.^{CXVIII}

The Scottish Constitution does not take a clearly established form and is far from complete, but was further strengthened through the devolution settlement.^{CXIX} The Scotland Act 1998 devolved a number of powers to Scotland, whilst reserving others to Westminster.^{CXX} As a consequence, the Scottish Parliament was elected and has passed legislation on a wide range of issues ever since.^{CXXI} Its creation shows how Scotland started to occupy the constitutional space.^{CXXII} *Murdison* concludes that “the Scottish constitution continues to develop alongside the British constitution, and it has received more room to grow” even though “Westminster continues to control important aspects of



sovereignty”.^{CXXIII} One should be cautious not to overstate this point, as devolution has been formally effectuated by the UK Parliament, hence by a process that has not been legally controlled by the Scottish constituency (even though it is the consequence of political negotiations between the Scottish and the UK government). However, to the extent that Scotland continued to fill the resulting enlarged space by legislating on essential matters of regional governance, its Constitution continues to develop. This is due to the fact that the understanding of the Constitution is broader than in Belgium or Spain so that even legislation that does not assume a certain formal quality as the Spanish Statutes of Autonomy can qualify as constitutional as long as it carries a substantial weight as stipulated by the House of Lords definition given above. Interestingly, this expands the subnational constitutional space per definition rather than by actual empowerment.^{CXXIV}

In line with the binary nature of the referendum process (independence/non-independence), recent drafting efforts have almost been exclusively limited to the design of an independent Scotland’s constitution, whereas a written constitution within Scotland has hardly been discussed. This may change now that the independence question has been answered in the negative, at least for the time being.^{CXXV} The current avenue of strengthened regional powers points towards greater fiscal autonomy,^{CXXVI} which could be reflected in the Scottish Constitution as well as in Scottish statutory legislation. The reinvigorated discussion on a potential federal set-up not only for Scotland, but also for Wales, Northern Ireland and potentially even for parts of England, in combination with the traditional reluctance to codify the UK Constitution, might further spur such entrenchment at the regional level. At the same time, a federal arrangement is hardly conceivable without a more formalized central constitutional framework than what is currently available.^{CXXVII}

In spite of the boost that it provided for Scottish autonomy, the Scotland Act 1998 clearly did not provide any answer as to the future of Scotland’s Constitution.^{CXXVIII} The same applies to the subsequent Scotland Act 2012 which devolved further powers.^{CXXIX} Facing the outcome of the independence referendum, nothing in the current UK Constitution prevents the devolution of further competences or a further entrenchment of existing ones.^{CXXX} This would not be tantamount to embracing the notion of “devomax”^{CXXXI}, the precise content of which appears to remain somewhat blurred and



subject to interpretation. The point would be not to achieve a maximum, but rather an optimum which tackles the conflict resulting from competing claims for integration and disintegration by accommodating both as far as possible and by respecting their underlying motives.^{CXXXII} To that end, stronger fiscal autonomy would be an important step.^{CXXXIII} Powers regarding energy policy, in particular oil and gas, and the accruing revenues could be added to the package,^{CXXXIV} although this must not create an imbalance to the detriment of the UK as a whole.^{CXXXV} Ultimately, Scotland might proceed to create its own written constitution within the UK constitutional framework.^{CXXXVI} Such a basic document might lay down a number of fundamental principles of government, a list of legislative powers, rules on legislative process and fundamental rights.^{CXXXVII} Looking at the current elements of the Scottish Constitution, it would stipulate rules on the Scottish Parliament, including elections and legislative powers; the Scottish government as led by the First Minister; the Scottish court system, in particular the Court of Session; and potentially rules on referendums for fundamental questions.^{CXXXVIII} It could also encapsulate fiscal powers alongside rules on budgetary self-responsibility and accountability. Even if such a document might initially have little more than a declaratory function (namely to the extent that it merely restates the pre-existing in a more comprehensive fashion), it could nevertheless provide an important reference point for constitutional identity. At the same time, it might serve as a platform for the further development of Scottish (constitutional) autonomy, as currently envisaged through negotiations with the Westminster government.^{CXXXIX} Due to the lack of specific hurdles for constitutional amendment in the UK, such changes might even be carried out by simple legislation and remain “entrenched” through the existing constitutional convention, although a referendum and the creation of a single document would strengthen the constitutional character of that process.^{CXL} In that sense, the UK might, against many odds, experience a fresh constitutional moment leading to a more formally entrenched constitutional setup both at the national and the regional levels, maybe even with a (quasi-) federal outcome.^{CXLI}

It remains to be seen whether these suggestions might help accommodate the continued thrust for greater self-determination. This depends to a large extent on the motives behind this plea. In this regard, *Thomsen* convincingly argues that “[w]hereas nationalist movements are often fuelled by emotional demands for ‘natural’ self-



determination, ... [in the case of Scotland] surrendering independence was a pragmatic or, some would argue necessary response to a critical social and economic situation”.^{CXLII} Likewise, in light of changed circumstances, the Scottish quest for independence appears to be “an explicit accentuation of concerns about political and socio-economic advantages and disadvantages of political nationalism – that is the stressing of pragmatic reasoning over ethno-cultural affection”.^{CXLIII} Such pragmatic concerns might be easier to address by a well-designed and entrenched form of devolution including substantial financial autonomy (and corresponding accountability), whereas more emotional motives could be more difficult to tackle.^{CXLIV} At the same time, one of the assets of a written subnational constitution would be its high symbolic value which might appeal not only to the minds, but also to the hearts (which seem to play a major role in the Scottish independence debate, as well).

5. Conclusions

This paper has set out to show that formal subnational constitutional power and its use can help accommodate quests for greater autonomy and independence, no matter whether they are fuelled by more rational or more emotional motives. It has suggested that such power can serve as a focal point for national identification and provide a coherent framework for regional self-determination. Subnational constitutional power should be seized and used actively.^{CXLV} Where it lacks or is deficient (as in Belgium and, to a lesser extent, in Spain), it should be provided or strengthened within the overall constitutional setup, since it can be part and parcel of a more fine-tuned response to centrifugal tendencies than independence, or at least serve as a compromise where independence is currently not attainable. Provided the central constitution clearly defines the limitations of that empowerment and its exercise and retains original sovereignty, fears regarding a slippery slope towards unilateral secession appear less warranted than the actual risks associated with insufficient accommodation of legitimate quests for self-determination within the State.

At the same time, this shows that anchoring subnational constitutional power at the national level requires a coherent and transparent central constitutional framework. In that



sense, the complex Belgian Constitution and the somewhat fragmented character of the Spanish Constitution might benefit from a substantial reform that, due to the existing thresholds for constitutional amendments, is rather difficult to achieve. This stands in contrast to the UK Constitution which, due to its informal nature, can be changed much more readily. This, of course, comes at the cost of formal entrenchment so that the effectiveness of the future Scottish Constitution in accommodating claims for self-determination will depend on the societal trust in political forms of securing subnational constitutional space. As *Tierney* has aptly put it, “the United Kingdom seems to be a dynamic laboratory to test the role played by sub-state territories in effecting constitutional change in an environment that is neither entirely unitary nor federal”.^{CXLVI}

One should emphasize that subnational constitutional power cannot operate as a “panacea”.^{CXLVII} First of all, regional powers do not necessarily need to be reflected in regional constitutions, but may also be expressed through ordinary statutes (sometimes classified as constitutional) or administrative action. Subnational constitutional power as provided by a central constitution can be far-reaching and its effectiveness in accommodating centrifugal tendencies hinges on its specific exercise, although the latter may again be restrained by the central constitution, e.g. by stipulating homogeneity requirements.^{CXLVIII} Even where such power has been granted and used in a more complete sense as for instance in Germany or Switzerland^{CXLIX}, its effectiveness in accommodating centrifugal tendencies may be limited or at least difficult to assess – be it because such tendencies have been minor or because there are many other factors that may equally contribute to the accommodating effect. Furthermore, such federal arrangements usually demand a high level of entrenchment through a written constitution at the national level that delineates the respective regional and central powers. If the United Kingdom opted for a federal solution, creating such a written constitution would be a key challenge. Another one would be how to deal with an asymmetry that may facilitate fine-tuned subnational autonomy, but also enhance complexity and raise issues of fairness.^{CL} Finally, where societal gaps have become as apparent as in Spain or Belgium, the accommodating effects of constitutional responses (where they can be attained) may be limited, as illustrated by the quasi-constitutional Catalan Statute of Autonomy.



With all of that in mind, a case for constitutional engineering can still be made.^{CL1} Where independence is (currently) unattainable, strong and entrenched subnational constitutional power can be one out of several tools for a suitable constitutional compromise that adequately responds to centrifugal tendencies without inviting secession. Where such quests for internal self-determination are strong enough, they may eventually generate the majorities for constitutional reform, in spite of existing amendment hurdles. Ultimately independence might not be identified as the best option for strong regions within an integrated Europe that recognizes them - whilst being itself evidence of the fact that decisions increasingly require transnational coordination and take effects beyond the domestic realm.

* Reader, School of Law, University of Aberdeen. Email: dirk.hanschel@abdn.ac.uk. The author wishes to thank his colleagues at Aberdeen law school as well as Eibe Riedel for their comments and suggestions. The paper (for a draft version see <https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws2/w2-hanschel.pdf> (last accessed on 30 November 2014)) was further refined in light of feedback received at the IXth World Congress of the International Association of Constitutional Law in Oslo in June 2014 and at the Society of Legal Scholars Annual Conference 2014 in September in Nottingham. Final thanks go to the reviewers for their feedback and suggestions.

^I By using the term “subnational” this paper relates regional constitutions to those of sovereign states, without disregarding that some regions may in fact consider themselves as nations, as well. For the research context see Tarr et al. 2004, as well as <http://www.iacl-aidc.org/en/iacl-research-groups/subnational-constitutions-in-federal-quasi-federal-constitutional-states> (last accessed on 30 November 2014); see furthermore Williams 1997; for a broad understanding of constitutional arrangements see Saunders 1999: 23.

^{II} On this approach see, for instance, Williams and Tarr 2004: 15. The paper thus implicitly suggests that responding to quests for greater autonomy can have an accommodating effect at all instead of necessarily fuelling further-reaching demands; on this debate see, with regard to “post-conflict federalism”, Choudhry and Hume 2010: 356 et seq.; with regard to devolution as a potential “slippery slope to separation” and the question whether “the demands of the Scots and the Welsh [could] be contained within the traditional parameters of the British constitution”, or whether “devolution [would] involved constitutional upheaval on a massive and unpredictable scale” see Bogdanor 2009: 34. He also addresses the problem of the inherent “asymmetrical” nature of devolution, begging the question whether it might “lead to new discontents and prove a springboard for further grievances” (p. 34 et seq.), see furthermore *ibid.*, p. 94 et seq.; for a specific EU perspective on the issues see Closa 2014; for a critical account on secession as a solution in light of centrifugal tendencies see Brown-John 1999: 594 et seq.; conversely on the viability of constitutionalizing secession see Haljan 2014.

^{III} On current centrifugal tendencies within these regions see for instance “Scottish Independence”, <http://www.theguardian.com/politics/scottish-independence> (last accessed on 28 November 2014); “Spanish Parliament Rejects Catalan Independence Vote”, <http://www.bbc.co.uk/news/world-europe-26949794> (last accessed on 28 November 2014); <http://www.flemishrepublic.org> (last accessed on 28 November 2014); “Catalonia, Scotland and Flanders Force Separatism Back on the EU Agenda”, <http://blog.gmfus.org/2012/12/06/catalonia-scotland-and-flanders-force-separatism-back-on-the-eu-agenda> (last accessed on 28 November 2014); on the value of comparative constitutional analysis in this field as well as on the inherent limitations see Himsworth 2013: 349; for a comparison of federalism and devolution see von Andreae 2005; on the classification of the Spanish constitutional system as “quasi-federal” see Rius-Ulldemolins and Zamorano 2014.

^{IV} On Germany see for instance Stiens 1997; Menzel 2002; on Switzerland see Fleiner 1995: 57; Nuspliger 2000: 66 et seq.; on both countries see furthermore Hanschel 2012: 117 et seq., 478 et seq., for a comparative



analysis of subnational constitutions see for instance Watts 1999.

^V On the notion of conflict resolution in federations from a comparative perspective see Hanschel 2008 and 2012, including persisting challenges for the German federal system.

^{VI} See <http://www.bbc.co.uk/news/events/scotland-decides/results> (last accessed on 28 November 2014).

^{VII} See http://www.const-court.be/en/basic_text/belgian_constitution.pdf (last accessed on 1 December 2014).

^{VIII} See http://www.const-court.be/en/basic_text/belgian_constitution.pdf (last accessed on 1 December 2014).

^{IX} Popelier 2012: E39; on the series of State reforms leading to this result and beyond see Peeters 2012: 164; see furthermore http://www.belgium.be/en/about_belgium/country/history/belgium_from_1830/formation_federal_state (last accessed on 28 November 2014); on the importance of the Fifth State Reform which transferred a number of powers to the Regions and the Communities see Sinardet 2012: 135 et seq.; on the recent Sixth State Reform see Reuchamps 2013: 375.

^X Popelier 2012: E39.

^{XI} Idem.

^{XII} See Pas 2004: p. 161.

^{XIII} See http://www.const-court.be/en/basic_text/belgian_constitution.pdf (last accessed on 1 December 2014).

^{XIV} Pas 2004: 163.

^{XV} Pas 2004: 163; Popelier 2012: E 39.

^{XVI} Pas 2004: 163 et seq.

^{XVII} Pas 2004: 164; Peeters 2012: 168.

^{XVIII} Idem.

^{XIX} Pas 2004: 164 et seq.; Peeters 2012: 168, with further details on its complex status.

^{XX} Pas 2004: 165; Peeters 2012: 168.

^{XXI} Generally on the notion of constitutional pluralism see for instance Walker 2002: 317 et seq.

^{XXII} Peeters 2012: 165.

^{XXIII} On the powers of the Constitutional Court in solving such conflicts see Art. 141 et seq. of the Belgian Constitution, see http://www.const-court.be/en/basic_text/belgian_constitution.pdf (last accessed on 1 December 2014). On continued political negotiations and crisis see for instance <http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/10/01/589-days-with-no-elected-government-what-happened-in-belgium> (last accessed on 28 November 2014)

^{XXIV} See for instance <http://www.flemishrepublic.org> (last accessed on 28 November 2014).

^{XXV} Peeters 2012: 167.

^{XXVI} Peeters 2012: 167 et seq.

^{XXVII} Idem.

^{XXVIII} Contiades 2013: 39 et seq.; see furthermore Behrendt 2013: 35 et seq.; for Art. 195 see http://www.const-court.be/en/basic_text/belgian_constitution.pdf (last accessed on 1 December 2014). Part of the Sixth State Reform was the insertion of a transitional provision in Art. 195; for a critical account of that provision, which lowers the requirements for amendment, see <http://belgianconstitutionallawblog.com/2014/11/17/revision-constitution-sixth-state-reform> (last accessed on 30 November 2014).

^{XXIX} See Reuchamps 2013; for the text of the agreement see http://www.lachambre.be/kvvcr/pdf_sections/home/FRtexte%20dirrupo.pdf (last accessed on 1 December 2014); see furthermore <http://www.flanderstoday.eu/politics/historical-constitution-reforms-will-create-new-belgium> (last accessed on 28 November 2014); http://programmedestabilite.be/en/Institutional_reform.htm (last accessed on 30 November 2014); for the resulting changes in the Constitution see http://www.const-court.be/en/basic_text/belgian_constitution.pdf (last accessed on 1 December 2014).

^{XXX} Popelier 2012: E39, with further references; see furthermore Peeters 2012: 165, and in more detail at 169 et seq., where he describes constitutive autonomy as “rather limited compared to other federal states and [...] not [as] a sufficient legal basis for the communities and regions to adopt their own constitutions” (170). As Popelier 2012: E41, points out this limitation is essentially due to the fear of the “French-speaking parties” that the Flemish might use such a constitution as a tool for a “separatist agenda”.



- XXXI Pas 2004: 165; Popelier 2012: E40. Constitutive autonomy is, however, now being extended to them as a result of the Sixth Belgian State Reform, see Reuchamps 2013: 387.
- XXXII Pas 2004: 165.
- XXXIII Peeters 2012: 166 et seq.
- XXXIV Peeters 2012: 165.
- XXXV Pas 2004: 165; Peeters 2012: 169.
- XXXVI On this assessment see Pas 2004: 165; Peeters 2012: 164.
- XXXVII See http://www.const-court.be/en/basic_text/belgian_constitution.pdf (last accessed on 1 December 2014).
- XXXVIII Pas 2004: 168; Popelier 2012: E40. The Act (as displayed at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=1980080802) was amended by subsequent legislation, see http://www.galilex.cfwb.be/fr/leg_res_00.php?ncda=8739&referant=100&bck_ncda=5108&bck_referant=100 (last accessed on 28 November 2014).
- XXXIX Popelier 2012: E40.
- XL Ibid.
- XLI Pas 2004: 165.
- XLII Pas 2004: 169.
- XLIII For a detailed account of the pros and cons of subnational constitutions for Belgium, albeit with a more cautious result, see Popelier 2012: E 42 et seq.
- XLIV On the importance on taxation and the complex current system see for instance Peeters 2012: 169; on progress in this direction through the Sixth Belgian State Reform, e.g. in relation to energy tariffs, see <http://www.ffw.com/publications/all/articles/belgian-state-sixth-reform.aspx> (last accessed on 28 November 2014). This reform shows that fiscal autonomy does not require subnational constitutions, but the latter may help to organize the resulting subnational regulatory space in a way that secures societal identification and unity.
- XLV See Peeters 2012: 171 et seq., who points to the fact that Art. 35 of the Belgian Constitution already makes provision for that option once a list of enumerated federal powers has been created.
- XLVI Pas 2004: 169; on the chances for reform see also Peeters 2012: 171 et seq.; on the Sixth State Reform see Reuchamps 2013.
- XLVII Idem; see furthermore Popelier 2012: E41 et seq.; for the actual text see <http://www.vlaanderen.be/int/sites/iv.devlh.vlaanderen.be.int/files/documenten/Charter%20For%20Flanders.pdf> (last accessed on 28 November 2014).
- XLVIII Ruiz Vieytez 2004: 135 et seq.
- XLIX See <http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx> (last accessed on 1 December 2014).
- L Ruiz Vieytez 2004: 136 et seq.
- LI See <http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx> (last accessed on 1 December 2014); see furthermore Ruiz Vieytez 2004: 137.
- LII Ruiz Vieytez 2004: 137.
- LIII See Cabellos Espiérrez 2009: 56 et seq.
- LIV See <http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx> (last accessed on 1 December 2014).
- LV Ruiz Vieytez 2004: 138; on the proliferation of such statutes in recent years see Martinico 2010.
- LVI See <http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx> (last accessed on 1 December 2014).
- LVII See Art. 147 (3) of the Constitution, <http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx> (last accessed on 1 December 2014); on the importance of parliamentary approval see Viver 2012: 226 et seq.
- LVIII As Ruiz Vieytez 2004: 139, states, this operates on a “semi-contractual nature” and allows for “the possibility of attaining a higher degree of competence from the very beginning of the autonomous system”; more generally on the admissibility of referendums under the Spanish Constitution see Martín Núñez 2012. For the relevant constitutional provisions see <http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx> (last accessed on 1 December 2014).



LIX See Colino and Olmeda 2012: 191 et seq.; on the “dispositive principle” as one important, but heavily criticized feature of the Spanish governance system see Viver 2012: 223.

LX Ruiz Vieytez 2004: 139.

LXI See <http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx> (last accessed on 1 December 2014).

LXII See Ruiz Vieytez 2004: 140 et seq.; see <http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx> (last accessed on 1 December 2014).

LXIII See <http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx> (last accessed on 1 December 2014); see furthermore Ruiz Vieytez 2004: 140 et seq.

LXIV On asymmetric autonomy see for instance Weller and Nobbs 2012.

LXV Ruiz Vieytez 2004: 140 et seq., see in particular the Chart on p. 142; see furthermore Colino and Olmeda 2012: 191, who speak of “decentralization *à la carte*”; on recent reforms “related to devolution of competences, redistribution of resources and symbolic issues” see *ibid.*, 192; on the lack of completeness of the constitutional framework and how the regional Statutes have filled the gaps see Viver 2012: 222 et seq.; see furthermore Flores Juberias 2013: 232 et seq., who describes the Spanish Constitution as an “open-ended model”.

LXVI As Colino and Olmeda 2012: 191, put it: “It is a devolutionary and evolutionary federalism, which has produced at the same time a dynamic entailing both a centrifugal and differentiating tendency and a centripetal and equalizing one.”

LXVII Hence, it has been “praised and advocated as the best way to accommodate a country perceived by some minorities as multinational”, see Colino and Olmeda 2012: 191 et seq., with further references.

LXVIII As Viver 2012: 220, points out there is a “failure to complete the constitutionalization of the system of political decentralization, that is, to incorporate into the Spanish Constitution provisions pertaining to the territorial power structure. Whereas in other constitutions such provisions normally appear in the federal constitution, in Spain they are relegated above all to the statutes of autonomy and to legislation.”

LXIX Viver 2012: 233 et seq.

LXX See Colino and Olmeda 2012: 191; see furthermore Viver 2012: 232 et seq., as well as 232 mentioning the heavily criticized “dispositive principle” of the Spanish Constitution; on the powers assumed by the Provinces see the list by Ruiz Vieytez 2004: 144 et seq.

LXXI See Viver 2012: 224 et seq.: “it should be stressed that the statutes of autonomy are not limited to assuming powers not reserved by the central government.”

LXXII See generally Cabellos Espiérrez 2009: 43 et seq.; on the most recent decision against the intended Catalan independence referendum and the reaction of the Spanish Parliament see <http://www.theguardian.com/world/2014/apr/08/spain-set-to-reject-catalonia-independence-referendum> (last accessed on 28 November 2014); on the referendum which was ultimately carried out without permission see <http://www.cataloniavotes.eu> (last accessed on 28 November 2014); for a critical account regarding the strong emphasis that the Spanish government places on rule of law arguments in this regard and for a plea in favor of a political solution see Casals and Krisch at <http://blogs.lse.ac.uk/europpblog/2014/11/04/using-spanish-law-to-block-catalonias-independence-consultation-may-simply-encourage-catalans-to-construct-their-own-alternative-legality> (last accessed on 28 November 2014).

LXXIII See http://www.parlament.cat/porteso/estatut/estatut_angles_100506.pdf (last accessed on 28 November 2014); generally on the Catalan Autonomy Statutes see Flores Juberias 2013: 235 et seq.

LXXIV See Colino and Olmeda 2012: 198 et seq.; for the actual judgment see <http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2862010en.aspx> (last accessed on 28 November 2014); on the judgment see furthermore Delledonne 2011: N2, who finds it to be “succeeding in not condemning as illegitimate most of its controversial provisions by means of interpretation consistent with the Constitution”, whilst contending that precisely this weakening of their legal significance might invite further conflict.

LXXV See <http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2862010en.aspx> (last accessed on 28 November 2014), para. 3, subpara 1. To some extent, this may be contrasted with the Court’s decision on the Charter of the Valencian Community, where it had complemented the principle of subordination by referring to Statutes of Autonomy as integral parts of the Constitution, see Tribunal Constitutional Case no. 247/2007, <http://hj.tribunalconstitucional.es/docs/BOE/BOE-T-2008-638.pdf> (last



accessed on 28 November 2014), p. 18; see furthermore Delledonne 2011: N7.

LXXVI See <http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2862010en.aspx> (last accessed on 28 November 2014), para 4, subpara 3.

LXXVII Idem, para 4, subpara 4.

LXXVIII Similarly Colino and Olmeda 2012: 198 et seq.

LXXIX Hence, the Catalan Statute of Autonomy (2006), both in its contents and its form, shows a certain similarity with subnational constitutions, see http://www.parlament.cat/porteso/estatut/estatut_angles_100506.pdf (last accessed on 28 November 2014). As Tarr et al. 2004: 5, claim, Statutes of Autonomy “do seem to exhibit some of the attributes of constitutions, but that term is studiously avoided in Spain”.

LXXX See the recent quarrels on the legality of the intended Catalanian referendum on independence, <http://www.bbc.co.uk/news/world-europe-29390774> (last accessed on 28 November 2014).

LXXXI See again the judgment of the Spanish Constitutional Court at <http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2862010en.aspx> (last accessed on 28 November 2014)

LXXXII Currently, only the Basque Country and Navarre have far-reaching tax autonomy, see Viver 2012: 233 et seq. According to Art. 157 para 1 (a), additional fiscal autonomy can also be conferred by statute, without requiring a change of the Constitution.

LXXXIII On identity clauses within the current Statutes of Autonomy, whilst stressing the danger of the slippery slope, see Ruggiu 2012.

LXXXIV Barrero Ortega and Sobrino Guijarro 2013: 304 et seq.

LXXXV Viver 2012: 218, 219 et seq.; on the vain attempts to reform the Constitution see Viver 2012: 220 et seq.

LXXXVI The Spanish Prime Minister recently invited Catalonia to seek constitutional reform, see <http://www.reuters.com/article/2014/11/12/us-spain-catalonia-idUSKCN0IW17520141112> (last accessed on 28 November 2014); for a critical account on the prospects of such change see Casals/Krisch at <http://blogs.lse.ac.uk/europpblog/2014/11/04/using-spanish-law-to-block-catalonias-independence-consultation-may-simply-encourage-catalans-to-construct-their-own-alternative-legality> (last accessed on 28 November 2014).

LXXXVII See Blackburn 2013: 359 et seq.

LXXXVIII For an overview see, for instance, Himsworth and O’Neill 2009: 15 et seq.; specifically for the potential status of the Treaty of Union as a constitutional document see *ibid.*, p. 110; on the “sources and nature” of the UK Constitution see furthermore Bradley and Ewing 2011: 8 et seq.

LXXXIX Himsworth and O’Neill 2009: 15; for further attempts to define constitutions from the British perspective see Bulmer 2011: 31 et seq.

XC <http://www.publications.parliament.uk/pa/ld200102/ldselect/ldconst/11/1103.htm> (last accessed on 28 November 2014).

XCI See Himsworth and O’Neill 2009: 38 et seq.; Murdison 2010: 444; Ford 2007: 106 et seq.

XCII See Himsworth and O’Neill 2009: 38 et seq.; Bradley and Ewing 2011: 37 et seq.

XCIII On the Scotland Act 1998 see <http://www.legislation.gov.uk/ukpga/1998/46/contents> (last accessed on 28 November 2014); regarding the literature see for instance Mullen (2009), p. 33 et seq.; Himsworth and O’Neill 2009: 54 et seq.; Blackburn 2013: 364 et seq.; more broadly on the historical development of devolution see Tierney 2012: 196 et seq.; Murdison 2010: 444 et seq. The Scotland Act 2012 implemented the recommendations of the Commission on Scottish Devolution (see <http://www.commissiononscottishdevolution.org.uk/> (last accessed on 28 November 2014)) and devolved further matters to Scotland, including taxation powers (see <http://www.legislation.gov.uk/ukpga/2012/11/contents/enacted> (last accessed on 28 November 2014)).

XCIV Tierney 2012: 207. Bogdanor 2009: 89, even asserts that devolution “has transformed Britain from a unitary state to a quasi-federal state”. On the asymmetric character of devolution in the United Kingdom see Himsworth 2013: 355 et seq.; McGarry 2012: 148 et seq.

XCv Mullen 2009: 34; Himsworth 2013: 375 et seq.; <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-02084.pdf> (last accessed on 28 November 2014).

XCvi Tierney 2012: 212.

XCvii On the classification of constitutional conventions see, for instance, Bradley and Ewing 2011: 19 et seq.



xcviii On the general observance of constitutional conventions see *ibid.*, p. 24 et seq.

xcix For a cautious approach regarding legal constitutional entrenchment in the event of a “yes” vote in the September referendum see Tierney, ‘Constituting Scotland: Retreat from Politics?’, in *Constitutional Law Blog*, 8 April 2014, <http://ukconstitutionallaw.org/blog/> (last accessed on 28 November 2014).

c For a rich debate on the role of legal cultures with regard to constitutional transfer see generally Frankenberg (2013), with critical contributions e.g. by Michaels 2013: 56 et seq.

ci See Tierney 2012: 203 et seq.; for an account of pertinent statements by judges see also Himsworth and O’Neill 2009: 108 et seq.

cii On the reasons for the lack of litigation before the Judicial Committee of the Privy Council see Hazell 2009: 66 et seq., 76 et seq. Jurisdiction has meanwhile been transferred to the Supreme Court, see <http://supremecourt.uk/procedures/practice-direction-10.html> (last accessed on 28 November 2014). For the first devolution case regarding distribution of powers see <http://www.bailii.org/uk/cases/UKSC/2010/10.html> (last accessed on 28 November 2014); see furthermore *Imperial Tobacco Limited*, Judgment Given on 12 December 2012, [2012] UKSC 61, as well as *AXA General Insurance Limited and Others*, [2011] UKSC 46, Judgment Given on 12 October 2011, in particular paras. 43 et seq. (on the scope of judicial review).

ciii *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), para. 63; see furthermore Tierney 2012: 204.

civ *Jackson v Attorney General* [2005] UKHL 56, para. 102; see furthermore Tierney (2012), p. 204.

cv *Jackson v Attorney General* [2005] UKHL 56, at para. 104.

cvi *H v Attorney-General* [2012] UKSC 24, para. 30.

cvi See Tierney 2012: 205.

cviii *Idem.*

cix See, for instance, Himsworth and O’Neill 2009: 106 et seq.

cx See *AXA General Insurance Limited and Others*, [2011] UKSC 46, para. 46: “Sovereignty remains with the United Kingdom Parliament. The Scottish Parliament’s power to legislate is not unconstrained. It cannot make or unmake any law it wishes.”

cxii See Art. 50 TEU.

cxii This needs to be distinguished from the question whether primary legislation breaching EU law without explicitly repealing it can be set aside by the House of Lords (now the Supreme Court), as answered in the affirmative in the case of *Factortame*, see Himsworth and O’Neill 2009: 115 et seq.; see furthermore Bogdanor 2009: 28 et seq., who emphasizes the limiting effect of EC membership on parliamentary sovereignty whilst asserting that this effect has never found major acceptance amongst the population.

cxiii Section 4 of the Human Rights Act 1998, see <http://www.legislation.gov.uk/ukpga/1998/42/contents> (last accessed on 28 November 2014); see furthermore Bogdanor 2009: 59 et seq., who points to the fact that the Human Rights Act only limits the parliamentary sovereignty to the extent that Parliament has to be explicit when deviating from it.

cxiv On Scottish constitutional history see Murdison 2010: 445 et seq.

cxv See Murdison 2010: 451: “It is no surprise that the dominant nation, England, imposed its own legal philosophy on Scotland through acts of Parliament and through judicial decisions...”

cxvi Murdison 2010: 456.

cxvii Murdison 2010: 456 et seq.; for a detailed historic account on different viewpoints regarding the constitutional quality of certain provisions see Ford 2007: 130 et seq.

cxviii See Himsworth and O’Neill 2009: 110 et seq.; for a more cautious account see Bogdanor 2009: 11, who points out that “[i]n practice...the fundamental characteristics of the state remained unchanged”, whilst conceding that “there are certainly those in Scotland who regard the Act of Union as a constitutional document”. He stresses the Great Reform Act of 1832 as more as “[p]erhaps...the nearest that Britain has ever come to a constitutional moment”.

cxix Murdison 2010: 463 et seq.

cxx Murdison 2010: 463; Mullen 2009: 33 et seq.; Himsworth and O’Neill 2009: 101 et seq.; Himsworth 2013: 376 et seq.; for an overview of reserved and devolved matters see Hazell 2009: 69.

cxxi Murdison 2010: 453 et seq.

cxxii See Tierney 2012: 195 and 201; on the process of creating the Scottish Parliament see, for instance, Himsworth and O’Neill 2009: 58 et seq., and on its powers 121 et seq.; on the role of the Scottish Constitutional Convention in that process see <http://www.scotland.gov.uk/About/Factfile/18060/11550> (last accessed on 28 November 2014).



- CXXIII Murdison 2010: 465; for a list of reserved matters see Mullen 2009: 41 et seq.
- CXXIV See Fn. XC above.
- CXXV On the result of the referendum see <http://www.bbc.co.uk/news/events/scotland-decides/results> (last accessed on 26 November 2014)
- CXXVI <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-25626977> (last accessed on 28 November 2014).
- CXXVII See for this the LibDem Report “Federalism: The Best Future for Scotland”, Report of the Home Rule and Community Rule Commission of the Scottish Liberal Democrats, October 2012; for a rather critical account of such a federal solution (as compared with Germany), see <http://www.theguardian.com/commentisfree/2014/sep/22/federalism-germany-britain-federal-system-uk> (last accessed on 28 November 2014); for a plea in favor of a national constitutional convention see <http://www.theguardian.com/commentisfree/2014/sep/21/not-fear-f-word-federal-britain-confederal-europe> (last accessed 28 November 2014), as well as <http://ukconstitutionalallaw.org/category/constitutional-reform> (last accessed on 26 November 2014); for an alternative approach see for instance the project “Constitution UK”, as displayed on <http://blogs.lse.ac.uk/constitutionuk/introduction> (last accessed on 28 November 2014).
- CXXVIII Mullen 2009: 37.
- CXXIX <http://www.legislation.gov.uk/ukpga/2012/11/contents/enacted> (last accessed on 28 November 2014).
- CXXX Mullen 2009: 41.
- CXXXI See, for instance, <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-26245611> (last accessed on 28 November 2014).
- CXXXII On the role of Scottish nationalism both in entering and potentially leaving the Union see Thomsen (2010), p. 43, 228; on Scottish identity see more generally Reicher et al. 2009: 17 et seq.
- CXXXIII See Mullen 2009: 43 et seq. Meanwhile this has been partially granted by Part III of the Scotland Act 2012 (see <http://www.legislation.gov.uk/ukpga/2012/11/contents/enacted> (last accessed on 28 November 2014)), but could be further expanded.
- CXXXIV See for instance <http://www.scotland.gov.uk/Topics/Business-Industry/Energy/Facts> (last accessed on 28 November 2014).
- CXXXV See, for instance, point 3.117 of the Calman Report 2009, at <http://www.commissiononscottishdevolution.org.uk/uploads/2009-06-12-csd-final-report-2009fbookmarked.pdf> which talks about a “pooling of risks and resources” (last accessed on 28 November 2014).
- CXXXVI On recent attempts to devise a constitution, albeit for an independent Scotland, see Himsworth and O’Neill 2009: p. 2 et seq.; Bulmer 2011: 119 et seq.; on recent discussion regarding this model see <http://constitutionalcommission.org/blog/?p=319> (last accessed on 28 November 2014). However, the Constitutional Commission does not take a clear stance on independence, but aims “to promote the constitutional and civic-democratic government of Scotland; whether that be in the form of an independent Scottish State or in the form of a revised union is up to the people of Scotland to decide”, see <http://www.constitutionalcommission.org/about.php> (last accessed on 28 November 2014). Rather critically on a detailed and entrenched written Scottish Constitution Tierney, ‘Constituting Scotland: Retreat from Politics?’, in Constitutional Law Blog, 8 April 2014, <http://ukconstitutionalallaw.org/blog> (last accessed on 28 November 2014). According to Bogdanor 2009: 14, “[t]here is no point in having a constitution unless one is prepared to abandon the principle of sovereignty of Parliament, for a codified constitution is incomplete with this principle.” However, this point is not valid for a subnational constitution respecting the sovereignty of the national Parliament, as this is usually expressed by supremacy clauses, e.g. in the federal context.
- CXXXVII For parallels see the suggestions on a Scottish Constitution outside the UK framework made by Himsworth and O’Neill 2009, and Bulmer 2011.
- CXXXVIII The recently published Draft Constitution for an Scottish Independence Bill continues these elements, as well, see <http://www.scotland.gov.uk/Resource/0045/00452762.pdf> (last accessed on 28 November 2014); see furthermore the work of the Constitutional Commission at <http://www.constitutionalcommission.org> (last accessed on 30 November 2014).
- CXXXIX On the process within the Smith Commission see <https://www.smith-commission.scot> (last accessed on 28 November 2014); on the report published on 27 November see http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf (last accessed on 28



November 2014). The report stresses, inter alia, the strengthening of powers of the Scottish Parliament, further devolution of fiscal powers coupled with enhanced budgetary accountability, a statutory basis for the Sewel Convention and the devolution of further legislative and administrative powers; on the possible consequences of this report see for instance <http://ukconstitutionallaw.org/2014/11/27/stephen-tierney-is-a-federal-britain-now-inevitable> (last accessed on 30 November 2014).

CXL Generally on the constitutional amendment process as carried out by ordinary parliamentary legislation see Blackburn 2013: 366; on “[i]nformal methods of constitutional amendment”... “notably judicial decision-making in matters of public law and changes in the constitutional conventions regulating the system of government” see *ibid.*, p. 370 et seq.; on the evolving practice of having referendums for constitutional changes see Tierney 2012: 213 et seq.; see furthermore Bogdanor 2009: 7 who claims that there can be little doubt that the referendum has become an accepted part of the constitution”; on constitutional changes since 1997 see *ibid.*, p. 4 et seq., claiming (p. 6 et seq.) that in a “country with a codified constitution, the framework must be visibly and noticeably altered either by an amendment to the constitution or through a decision by judges which in effect re-interprets the constitution. In Britain, by contrast, the framework can be gradually adapted to create a wholly different constitution almost without anyone noticing”; generally on the issue of a national constitutional convention see above Fn. CXXII, CXXVII.

CXLI On this, see for instance, Timothy Garton Ash at <http://www.theguardian.com/commentisfree/2014/sep/21/not-fear-f-word-federal-britain-confederal-europe> (last accessed on 28 November 2014); on the notion of “constitutional moments” in the US American context see Ackerman 1991.

CXLII Thomsen 2010: 42.

CXLIII *Ibid.*, p. 228.

CXLIV As Bogdanor 2009: 12, observes, constitutional changes have not appeared to be very popular in the UK in the past, unless they are perceived to deliver concrete services to the population.

CXLV On the tendency to underutilize subnational constitutional power see Tarr et al. 2004: 14 et seq.

CXLVI Tierney 2012: 196.

CXLVII Tarr et al. 2004: 16; for a quite critical account regarding the role of subnational constitutional power see Popelier 2012: E43 et seq., with further references.

CXLVIII See, for instance, Art. 28 para. 1, cl. 1 of the German Basic Law; on this see furthermore Hanschel 2012: 117 et seq. The Swiss Federation leaves more autonomy in this regard, see Hanschel 2012: 478 et seq.

CXLIX See, for instance, Hanschel 2012: 117 et seq., 478 et seq.

CL For a rather critical account of asymmetry see Woodman and Ghai 2013: 479 et seq.: “If the national government is inclined to support autonomy, it may have to generalise the conditions for the grant of autonomy.” (p. 480); for a more positive view see Palermo (2009), for a mixed account pointing out chances and risks see Weller 2012: 298 et seq.; for a critical reflection on this contribution, in particular with regard to minority issues, see in turn Palermo 2010: 763 et seq.

CLI On the notion of constitutional engineering see more broadly Sartori 1997 and Contiades 2013.

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**Subnational Constitutions:
The Belgian Case in the Light of the Swiss Experience**

by

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Abstract

Although Belgian federated entities do not have constituent power, Flanders has recently envisaged the adoption of a “proto-subnational Bill of Rights”, called the Charter for Flanders. This study briefly recalls that process, explains the legal nature of the resulting (unadopted) text, determines to what extent this text can be called “paralegal”, tries to show – in the light of the Swiss experience – what Belgium could gain from fully-fledged subnational Constitutions in terms of fundamental Rights protection and of legal certainty if such Constitutions were authorized and assesses the hypothesis of a linkage between the federated Charters debate, on the one hand, and the project to “update” title II of the Federal Constitution, *i.e.* the Belgian Bill of Rights, on the other hand.

Key-words

Subnational constitutions, Belgium, Flanders, paralegality, update



1. Introduction

Belgium is known for its centrifugal federalism. In the current state of law, its federated entities do not have constituent power (Popelier 2012: 39, Lambrecht: this issue). However, in Flanders and Wallonia, two of these entities, works and reflections have recently been conducted about the possibility to adopt, *de lege lata*, subnational ‘proto-constitutional’ texts. In Wallonia, these works and reflections have been abandoned at an early stage^I. In Flanders, on the contrary, they have led, in 2012, to a proposition of formally non-binding text, called the « Charter for Flanders » (Handvest voor Vlaanderen) and presented, as explained hereunder, as what one could call a Flemish “Bill of Rights”. This proposition, which has eventually not been adopted by the Flemish Parliament, shall be analysed in six steps. Firstly, the process that has led to its elaboration will be described. Secondly, the legal nature of the proposed text will be briefly and critically examined. Thirdly, the same text will be related to “paralegality”, a concept forged by the Belgian Professor Hugues Dumont. Fourthly, the added value of hypothetical Belgian subnational Constitutions in terms of fundamental rights protection^{II} will be studied through a brief analysis of Swiss constitutional law. Fifthly, the advantages Belgium could gain from such Constitutions in terms of legal certainty shall be analysed on the basis of a dialectical theory of law. Finally, the merits of a connection between the federated constitutional debate and a reboot of the project to “update” title II of the federal Constitution will be assessed.

2. An ongoing process: the Flemish Charter project^{III}

The first explicit manifestations of a Flemish “federated constitutionalism” date back to the second half of the 1990s. The publication, in 1996, of a book entitled “Proposition of Constitution for Flanders”, forms a significant figure of this ‘movement’ (Clement *et al.* 1996. Adde Bex 1994 and 2007). Even though it recognized the legal invalidity of such a “constitution” *de lege lata*, this study conceived, *de lege ferenda*, a model of federated fundamental law composed of seven institutional titles^{IV} and one dedicated to fundamental rights^V. In the continuity of a “discussion note” approved by the Flemish Government on the 29th of February 1996, the authors of that book were invited to present their work to



the Flemish Parliamentary Commission for State Reform and General affairs on the 16th of October 1996^{VI}. Three years later, on the 3rd of March 1999, a resolution of the Flemish Parliament related to the State reform mentioned that Belgian federated entities should acquire their own constitutional autonomy^{VII}. Addressed to the Flemish Parliament on the 8th of September and judged inadmissible 21 days later^{VIII}, a petition called “a Constitution for a Flemish State” led this assembly to create a workgroup specifically devoted to the redaction of a text inspired by the dismissed petition. Six months after the submission of a project established by external experts consulted by this workgroup^{IX}, the President of the Flemish Parliament proposed, in December 2002, a draft “Charter of Flanders”^X, which was updated^{XI} on the 23rd of March 2004^{XII}.

After a long period of uncertainty^{XIII}, the two versions of the draft^{XIV} state that, if a Flemish Charter was to be adopted, it should preferably not take the form of a “decree”, *i.e.* a federated (binding) norm of legislative nature. As the president of the Flemish Parliament rightly underlines, “It would be misleading, in the current state of Belgian constitutional law, to give the shape of a decree to a list of principles concerning the rights of citizens and the main orientations of policy. Indeed, even if this decree were adopted with a broad factual majority in [a federated] parliament, one could not prevent that a smaller majority deviates from it later on. (...) Moreover, this decree would raise delicate legal questions of competence repartition, because the communities and regions are, according to [the Belgian constitutional Court]^{XV}, not entitled to repeat rules from which they can not legally depart ([constitutional] Court, 20 December 1985)”^{XVI}. As one of the authors of the aforementioned 1996 book rightly confirmed during another parliamentary hearing where he was invited, “if one chooses for a decree, than there is in any case the risk of a case before the [constitutional] Court or for competence objections to be invoked”^{XVII}. On the basis of article 65 of the regulation of their assembly, the commented documents then retain the idea of a “resolution”, *i.e.* a non-legislative parliamentary legal text, exempt from the scrutiny of the aforementioned constitutional court. The first consequence of this lexical choice may prosaically be found in the official qualification of the analysed documents as “propositions of resolution”. As to the content, these propositions notably insist on fundamental Rights and on the related policy options that Flanders should follow, essentially echoing the relevant European and International legal sources and adapting



them to the competences of Flanders as a federated entity. In addition, the last articles of the texts mention elements such as the Flemish coat of arms, flag, anthem and “celebration day” (“feestdag”)^{xviii}.

On the basis of a proposition of the Enlarged office^{xix} of the Flemish Parliament founded on a note of its President^{xx}, the plenary decided, on the 19th of October 2005, to establish a Commission “Flemish Constitution” within the assembly and chaired by its president^{xxi}. After having been partly modified^{xxii} and confronted to alternative propositions by two political parties^{xxiii}, the 2004 version of the proposition of resolution endorsing a Charter of Flanders was taken in charge by this newly established Commission, which raised no major developments of the dossier. This situation changed on the 11th of July 2010, when the Flemish Minister President announced its government wanted to re-launch the ‘constituent’ process in cooperation with the assembly^{xxiv}. Rapidly welcomed by the deputies^{xxv}, that announcement led, after the dismissal of a parallel proposition^{xxvi}, to the presentation, on the 23rd of May 2012, of a proposition of resolution (in fact elaborated by the Flemish government) containing a “Charter for Flanders” by the three leaders of the regional majority^{xxvii}. Formally introduced to the assembly on the 30th of May, this proposition of resolution has not been adopted yet, due to a lack of political support by the opposition. This new proposition still included an entrenched Bill of Rights^{xxviii} and took more openly inspiration from the Charter of Fundamental Rights of the European Union. Complemented by a comprehensive institutional part, it placed the dispositions related to the arms, flag, anthem and national day of the region in its first title (article 4), notwithstanding the fact that it referred to Flanders as a “nation” in its preamble.

3. Legal nature of the proposed Flemish Charter “resolution”

The process described hereabove is obviously nothing trivial. Among the issues it could raise, one might, for instance, include the question whether the draft resolution of 2012, assuming it was adopted by the Flemish assembly, would have satisfied the criteria generally required for a text to be called a parliamentary “resolution”. This question calls for a negative answer. Indeed, a resolution is generally defined, in a negative way, as a text adopted by a Parliament (or by one of its chambers, when there are several) and which is



not a “law”, be it in the formal or material sense. This definition fully corresponds to the meaning given to the word by the Flemish authorities: “In a resolution, the Flemish Parliament usually does recommendations to the Flemish Government on actions or policies that the government should take. A resolution implies no [legal] obligations for the Flemish Government, but has political authority (...)”^{XXIX}. In other words, a resolution of the Flemish parliament is, with possible exceptions, addressed to the Flemish government and is, without possible exception, deprived of any binding effect in law.

The hypothetical resolution at stake would have deviated from this definition in at least two respects^{XXX}. Firstly, it would have contained a catalog of fundamental rights supposed, by definition, to have direct or at least indirect effects on the population living on the territory of Flanders. Therefore, the scope *ratione personae* of the proposed resolution would have gone far beyond the Flemish Government alone. Secondly, the content of such a theoretical resolution would have been largely similar to the dispositions of the Charter of Fundamental Rights of the European Union^{XXXI}, which came into force with the Treaty of Lisbon. As one knows, this European legal source benefits from a legal binding force on the territory of Belgium in the areas governed by the law of the Union. By partly reproducing its provisions, the discussed resolution would thus have been, at the same time, formally non-binding and materially similar to a binding source of Belgian law, notwithstanding the fact that it would not have been submitted to the *ratione materiae* limitations affecting the EU Charter. In view of the foregoing, it must be admitted that a Charter for Flanders based on the 2012 model would be materially closer to a constitutional standard than to a classical parliamentary resolution. Paradoxically enough, it would nevertheless remain formally exempt of any judicial review by the Constitutional Court.

4. The potential Flemish Charter resolution as an example of “paralegality”?

At first, the interest shown by the Flemish parliament and Minister President for a Charter-like resolution might be considered surprising, be it from a legal or political point of view. It could however be partly explained with an appropriate theoretical tool. The



concept of “paralegality” precisely provides such a tool. Developed by Professor Hugues Dumont on the basis of the socio-legal theories of legal change elaborated by Professors Jean Carbonnier and André-Jean Arnaud (Carbonnier 1978: 213, Arnaud 1981), this concept refers to “standards which, even though unconstitutional, are considered legitimate and are actually practiced by a social movement or elite. Sometimes these standards remain outside of state law. (...) Sometimes these standards have successfully managed to establish themselves, despite their unconstitutionality, within the state legal order, be it at the legislative, regulatory or case law level” (Dumont 2012a: 639). As emphasized by Professor Dumont, an important feature of this form of unconstitutionality, in addition to being considered legitimate by a social movement or elite, is that it is not “accidental”. On the contrary, it constitutes a real, “major clash that affects properly structural data” and makes part of “an alternative principle, regime or legal order, not only contrary to a cardinal component of the whole State (...) constitutional system, but also able to put pressure on this system and, if necessary, to subvert it” (Dumont 2012a).

As this definition suggests, the notion of paralegality assumes the existence of an indisputably unconstitutional “practice” that the timely and ambivalent adoption of a Flemish Charter is obviously not. Furthermore, the maintained hypothetical character of a Charter-like resolution prevents, by definition, to empirically notice or confirm its ability to “put pressure on [the existing legal system] and (...) to subvert it”. For these reasons, it appears theoretically excluded to qualify that kind of text “paralegal” for the time being. Such an observation does not imply, however, that the promotion of a Charter, *i.e.* the interest its authors and supporters show for its adoption, is not of paralegal kind or inspiration. Three elements may be put forward in that regard. Firstly, a Charter resolution would result, although modestly, from the material exercise of a “substantial constitutional autonomy” that Belgian federated entities do not formally receive from a federal Constitution according to which all powers come from the Nation and are exercised in accordance with the Constitution^{xxxii}. Thereby, such a text should, strictly speaking, be considered materially unconstitutional. Furthermore, it would also embody, although in a relatively inconspicuous way, a legally structural clash in regard to the constitutional limits of Belgian federalism^{xxxiii}. Secondly, a Charter would very probably be considered legitimate by “a social movement or elite”. This support would, in this case, arise from the



so-called “Flemish movement”. In that regard, it is worth noticing that this movement, which exists since the nineteenth century and finds means of expression in a very large number of channels (like pressure groups, non-profit associations or political parties)^{xxxiv}, had several representatives at the different stages of the proto-constituent process described here above^{xxxv}. Thirdly, a resolution of the envisaged kind, far from being “accidental”, would, as shown by some parliamentary declarations^{xxxvi}, call for a practice of reference to its provisions and could, moreover (and/or thereby), be presented as a first milestone on the road leading to the official recognition of federated constitutional autonomy by the Federal State. This extract of the preamble of the 2012 proposition illustrates this last point with an undeniable clarity: “(...) the accompanying text provides for an important political commitment, which forms the starting point for a Constitution for Flanders based on the constituent power that Flanders must acquire”^{xxxvii}.

At this point, our analysis has shown that the adoption of a Flemish Charter resolution is currently neither likely nor consensual, be it legally or politically. The improbability and the many problems attached to such a hypothetical paralegal text (Lambrecht 2013: 368 and 369) do not necessarily imply, however (Warnez 2012: 144), that the establishment, in Belgium, of fully-fledged federated Bills of Rights, or even of “full option” subnational Constitutions, would be deprived *per se* of any added value from the legal-scientific point of view, be it in terms of fundamental Rights protection (Gardner 2008) or, more broadly, in terms of legal certainty. It is precisely what this paper intends to show in the two following sections. In order to do so, it will, especially as far as the issue of fundamental Rights protection is concerned, take the Swiss case as a source of inspiration. The reason for this choice is that, if one accepts to take foreign legal systems seriously, the way Swiss law addresses the discussed issue may provide particularly valuable information in that regard, notably because of a recent cantonal dynamism regarding constitutional Bills of Rights (Chablais 1999).



5. What Belgium could gain from fully-fledged subnational Constitutions in terms of fundamental rights protection. Reflections inspired by the Swiss case

5.1. The legal status of cantonal Constitutions

In Swiss law, the constitutional autonomy of the cantons receives an explicit constitutional recognition. The first sentence of article 51, paragraph 1 of the Federal Constitution stipulates unequivocally that “Each Canton shall adopt a democratic constitution”. According to the second sentence of the same paragraph, such a cantonal constitution must have been accepted by the people, must be revised if the majority of the electorate demands it and must be guaranteed by the Confederation, this warranty being given if the text is not contrary to federal law. In other words, “the Federal Constitution determines, to some extent, the instrumental part of the formal cantonal constitutions. A canton is thus not legitimate to grant a Constitution containing only substantive rules” (Martenet 1999: 110). With this exception, the cantonal constitutional autonomy remains largely unspoilt by the federal constitution. This broad discretion given to the cantonal constituent forms an expression of the principle contained in Article 3 of the Federal Constitution, following which “The cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution (...)”. According to the historical and teleological interpretation usually retained, this provision does not establish a genuine sovereignty but only a high degree of autonomy.

5.2. The legal status of cantonal Bills of Rights

1. *The limits of federal law*

The question whether the legal significance of the “substantial” dimension of the constitutional autonomy of Swiss cantons, *i.e.* mainly their faculty to formally consecrate constitutional Rights, is more than purely formal, deserves to be taken seriously. At first glance, this question seems to call for a negative answer. Indeed, Federal case law on concurrence of international, federal and cantonal Human Rights dispositions seems particularly reluctant to put federated provisions in position to get ‘real’ or ‘proper’ legal effects. To analyse this issue, three situations can be distinguished (Martenet 1999: 420 f.) and, in each case, accompanied by critical remarks.



Firstly, it follows from the October 6, 1976 “Buchdruckerei Elgg” decision of the Federal Tribunal^{xxxviii}, as well as from the settled case-law which confirms it since then^{xxxix}, that the cantonal fundamental Rights whose content is *equivalent* to the rights recognized in applicable federal and international sources receive “no autonomous meaning”. Also defended by a certain doctrine (Eichenberger 1986: 56; Aubert 1991: 124, Müller 1995: 31) and by the federal political authorities, the position of the High Court means practically that the cantonal provision at stake is not cancelled, but suspended as long as the scope of international and federal law is not reduced. Regardless of the artificiality it gets from the quite hypothetical nature of such a “range reduction”, the position of the Federal Tribunal is characterized by a very ‘textualist’ approach to cantonal, federal and international rights. In order to fulfil its role of sanction of cantonal rights, foreseen by Article 189 paragraph 1 letter d of the 1999 Federal Constitution, the Federal Tribunal can not neglect the fact that the application of the main methods of legal interpretation to *a priori* similar texts can sometimes lead to different results (Martenet 1999: 421). This is the cantonal constitutional judge’s responsibility to ensure the Federal High Court realizes that. This is not an insurmountable task. A decision made on the 11th of August 1975 by the Administrative Court of the Canton of Aargau in the field of freedom of the press can be seen as a significant precedent in this respect^{xl}.

Secondly, a constant jurisprudence of the Federal Council, acting as guarantee provider of cantonal constitutions, states that the federal warranty “can not be granted where the canton, by an express and binding prescription, provides less protection than the Confederation by its written or unwritten constitutional rights”^{xli}. According to a well-established doctrine (Martenet 1999: 429), this case-law should be abandoned for three reasons. First, it indirectly contradicts the freedom of the cantons not to consecrate fundamental rights in their formal constitution. Second, this case law disregards the maintained ability of individuals to invoke supra-cantonal law before the judge. Third, this jurisprudence is hard to conciliate with the practice of the Federal Council not to deny warranty to cantonal constitutions whose individual freedoms no longer meet federal standards due to the passage of time. The case law at stake is all the more reprehensible that the less generous recognition of a fundamental Right in a cantonal constitution is



likely, while respecting both the constitutional autonomy of the federated states and the principle of the overriding power of federal law, to provide an additional resource to the judge having to decide whether or not to validate a restriction of this Right by the cantonal authorities. Should one object that such an intra-federal diversity of status of fundamental rights is counteracted by a rather “homogenizing” international human Rights jurisprudence? At the European level, the existence of ECHR decisions recognizing a “regional margin of appreciation” to the Swiss cantons allows to doubt it^{XLI}.

Thirdly, the decisional practice of the Federal Tribunal on the principle of favour is, to a certain extent, reluctant to recognize the possibly more protective character of cantonal Rights. This jurisprudential trend mostly arises from the rarity of such recognition and from a sometimes restrictive interpretation of fundamental Rights formally enshrined in federated constitutions, even at the cost of a breach of the express will of the federated constituent^{XLIII}. According to the Federal High jurisdiction, this type of restrictive interpretation must be understood as a reference to the responsibility of the cantonal judge to ensure the respect of cantonal Rights by federated authorities rather than as a refusal to acknowledge the more protective nature of these rights^{XLIV}. If we look more closely, however, it is not certain that these two theoretically distinct attitudes do not converge in practice. One may think so for at least two reasons. On the one hand, the exercise of cantonal constitutional jurisdiction is limited, in most Swiss Federated States, to the sole hypothesis of the refusal, by cantonal executive and judicial authorities, to apply cantonal and, more rarely, federal rules considered contrary to superior law. In other words, cantonal constitutional justice follows, in a large majority of cases, a less ambitious – or more limited – model than its federal counterpart, for which the technique of abstract control plays a way more important role. On the other hand, the cantonal constitutional provisions enshrining fundamental Rights have traditionally played a marginal role in federated constitutional jurisprudence as reference norms. According to a certain doctrine, the main reason for this is that the cantonal constitutional judge largely “draws in and aligns on the jurisprudence of the Federal Tribunal covering, be it partially, the matter he has to settle. It's so much easier and faster. This prevents him from being contradicted by Lausanne judges, that he considers, especially due to his lack of experience, unmatched in terms of performance” (Auer 1990: 21). Jurisprudential reality confirms this analysis.



2. *Cantonal room for manoeuvre*

It follows from the foregoing that federal case law and, more broadly, federal law, do not do much to provide the substantial constitutional autonomy of the cantons a more than purely formal status. This does, however, not preclude the existence of such a status. According to many authors, the cantons themselves could indeed concretize this status by showing dynamism and innovation concerning the consecration and judicial protection of federated fundamental Rights. In recent decades, this type of dynamism and innovation has characterized the constitutional practice of many Swiss cantons. In a very large majority of cases, this movement was part of a broader wave of “total revision” of the cantonal constitutions (Bolz 1992).

On the basis of the broad constitutional autonomy granted to Helvetic federated entities, the 26 cantonal constitutions provide, since their initial adoption, for the possibility of their total revision in the provisions relating to their revision procedure. In general, such a total revision may be requested by the cantonal legislative authority (Grand Council) or by popular initiative. If the total revision is requested, a preliminary popular vote decides whether it must take place and, if so, whether the text should be written by the Grand Council or by a constituent assembly^{XLV}. Since 1960, 23 out of 26 cantons have made a total revision or have adopted a new fundamental law. Half-cantons of Obwalden and Nidwalden opened the floor by totally revising their constitutions in 1965 and 1968. Although it is not a complete revision, the creation of the canton of Jura in 1977 led to the adoption of its constitution the same year. The next cantonal constituent experiences were all total revisions. They respectively took place in Aargau in 1980, Basel-Land and Uri in 1984, Solothurn in 1986, Thurgau and Glarus in 1988, Berne in 1993, Appenzell Outer-Rhodes in 1995, Ticino in 1997, Neuchâtel in 2000, St. Gallen in 2001, Vaud and Schaffhausen in 2002, Graubünden in 2003, Fribourg in 2004, Zurich and Basel-Stadt in 2005, Lucerne in 2007, Schwyz in 2010 and Geneva in 2012. To date, only Appenzell Inner-Rhodes, Zug and Valais have not followed this trend. This last canton, however, expressly chose in 1997 to perform the total revision of its fundamental law “step by step”, *i.e.* through a series of partial revisions^{XLVI}.



It would of course be difficult to give a complete image of the several evolutions generated by these constituent moves in Swiss fundamental Rights law. Some particularly striking examples may however be considered representative of the legal benefits cantonal constitutions may produce in this field. With due regard to its limited nature, this paper shall focus on two of these examples, respectively grounded in the law of Neuchâtel and Bern.

The first aforementioned example illustrates the possibility, for federated constitutions, to foster the deepening of the protection of one determined Right. Following the example of the very innovative Berne constitution of 1993, the new fundamental law of Neuchâtel enshrines, in its article 12 II, the freedom to choose a form of common life other than marriage. Concretely, this Right aims at consolidating the legal status of non-married partners in a certain number of cantonal matters, for instance by giving them the right to consent to a medical intervention on the partner or the right to benefit a favourable succession tax rate as member of a couple. In a decision taken in 1997, *i.e.* a few years before the adoption of the new constitution of Neuchâtel, the Federal Tribunal had considered that a 30% difference between the succession tax rate applicable to married and unmarried couples was not discriminatory^{XLVII}. By consecrating the discussed freedom, the constituent of Neuchâtel indirectly but clearly encouraged the cantonal legislative power or, at least, the cantonal or federal judiciary, to better the fiscal situation of non-married couples in that regard by lowering this rate difference (Aubert 1998: 27). This encouragement has been heard by the legislative, as the current lowered rate difference shows^{XLVIII}.

A second example of the added value of cantonal Constitutions in the field of Human Rights law, more precisely in relation to the procedural issue of acceptable restrictions to protected freedoms, may be found in article 28 of the 1993 Berne Constitution. As confirmed by a more than constant case law of the European Court of Human Rights related to the second paragraph of articles 8 to 11 of the Convention, such restrictions may only take place when a legal base allows it, when prevalent private and public interests justify it and when the principle of proportionality is respected. In Berne, the commented article does not only posit this rule as a general principle for the application of cantonal



constitutional Rights, but also adds that the notion of “legal base” must be understood in the formal sense^{XLIX}, which is not required in Strasbourg. The degree of precision that must be reached by the required formal law can, furthermore, be appreciated by the judge in charge on the basis of the criteria exposed in the preparatory works of the disposition. Finally, the constitution itself identifies the exceptional situations in which the legal base condition may be considered satisfied in absence of any formal law (“general police clause”). Concretely, such a legal regime partly channels the appreciation power of the judge, fully conforms to the European sources of Swiss law and fruitfully raises the level of protection of a majority of cantonal Rights by protecting them from restrictions deprived of any formal legal base. The fact this disposition has been imitated in many other cantons as well as in the new Federal Constitution of 1999 may be analysed as a significant hint of the potential of federated entities as driving forces of Human Rights Law, at least in a federal context.

5.3. *De lege ferenda* considerations. Milestones for a Belgian reflection

1. *The legal status of hypothetical Belgian federated Constitutions and Bills of Rights*

In Belgium as in several other countries, the – legally virtual – idea of federated “Constitutions” is generally considered with particular cautiousness^I. The same goes for subnational Bills of Rights and the provisions they contain, as if the latter couldn’t be more than ‘mere’ non-binding – or ‘soft law’ – principles^{LI}.

In our view, such cautiousness could and should be tempered to the extent the concept of Constitution is not monolithic but gradual. One could for instance conceive the kind of federated text at stake as a Constitution in the “broad” formal and the “strict” material sense^{LII}. This would at the same time be more in line with a logic of constitutional pluralism (Gardner 2008: 332; DelleDonne and Martinico 2011: 16 and 19 *in fine*) - perfectly compatible with the “ethnocultural” pluralism that some relate to the emergence of federalism in Belgium (Gardner 2008: 334) - and a dialectical theory of legal sources^{LIII}. This is at least a first lesson that one can draw from the Swiss case, in which this gradual approach is *de facto* prevailing. The scope of this lesson should however not be overextended as far as the relation between such texts and federalism is concerned: as rightly underlined by professor Patricia Popelier, Federalism can perfectly exist without



subnational Constitutions, which are by no means “inherent” to the former but rather form a decisive “indicator” of it (Popelier 2008: 43 and 44).

2. The relationship between the federal and federated rights and the case for subnational Bills of Rights in Belgium

As far as Rights are concerned, a first line of arguments that could be raised in Belgium against a federated Bill is that it would (Delpérée 2002: 12) or, at least, could^{LIV} be discriminatory to provide citizens with different levels of protection according to the part of the country where they find themselves. Notwithstanding the fact most national judges reject this argument –sometimes referring to the principle of subsidiarity of European and International Human Rights law (Verdussen 2001) –, the commented Swiss experience, as well as the American “New judicial federalism” (Williams 1999: 633; Gardner 2008: 333; Dinan 2012), teaches that such level variations are by no means discriminatory insofar they rather upgrade Sub-states by making them “laboratories” or “workshops” (Häberle 1994) for Rights protection *above* a maintained common federal “floor”^{LIV}.

A second line of arguments is that it would be hard for federated entities to consecrate Rights in a more original or protective way than the federal constituent (Popelier 2012: 49). A twofold answer may be given here. First, the main issue to be dealt by a hypothetical Belgian federated constituent would probably not be material Rights, but “transversal clauses”, especially in the event such clauses would remain absent from the Federal Constitution (Brems 2007). Second, the diverging and changing^{LVI} interpretations given to material rights like, for instance, linguistic freedom, could be a case, as it was some Swiss cantons, for constitutional nuancing at the federated level above the limit represented by the aforementioned federal “floor”.

A third possible argument is that the introduction of federated Bills of Rights in Belgium is neither “urgent” nor “necessary” (Popelier 2012: 46; Gardner 2008: 341 and 342). Further, the very “added value” of such sub-national – and even national (Popelier 2012: 49) - Bills would be arguable. In our view, this arguments translate a pragmatist approach to law that must not hide the fact, more or less openly assumed in the commented Swiss cantonal experiences, that legal phenomena are always caught between



the “cost-benefit” logic of effectivity, the “ideal” logic of legitimacy and the “formal-technical” logic of legality (Ost and van de Kerchove 2002). It is precisely between these three poles that the requirement of legal certainty, which forms the object of our next section, deserves to be apprehended.

6. What Belgium could gain from fully-fledged subnational Constitutions in terms of legal certainty. Insights from a dialectic theory of law

6.1. Legal certainty rethought

Among the several elements that one could attribute – or oppose – to the “added value” of hypothetical Belgian subnational Constitutions, the formulation of a dialectically adjusted answer to the requirement of legal certainty may be pointed out as a figure of particular importance. Before attempting to circumscribe such a formulation – and in order to justify its interest for the examined case –, a preliminary synthesis of the theoretical debate from which the underlying reflection emerges deserves to be briefly undertaken.

More than “mere” food for abstract thought, the requirement or, in more Kantian terms, the “regulator ideal” of legal certainty, has become, with the emergence of increasingly complex and intricate legal sources and discourses, a key figure in the case law of most national and supranational jurisdictions, including of course the Courts of Strasbourg^{LVII} and Luxembourg. As a recent doctoral research (Van Meerbeeck 2014 [*infra*: VM]) has shown it with particular clarity – and to take only one example –, this last praetorium, even though the contours of its jurisprudence on the topic remain “blurry” when considered as a whole (VM: 138), tends, in several rulings, to privilege a “cartesian” and “political” approach to legal certainty. According to such an approach, the satisfaction of the discussed requirement ideal-typically calls for a comprehensive and top down effort, by the polity, to free the legal system of all elements susceptible to harm the postulated clarity of the general and abstract texts composing it and the predictability of their “application”, in order to favour the optimal carrying of public action (VM: 370 f.). As the author of the aforementioned research rightly suggests, such an approach to law can, without high risks of error, be associated to the pyramidal paradigm and to the “myths”



(VM: 374) that the “pure” legal theory defended by Kelsen eloquently embodies. In the aftermath of the so-called “pragmatic turn” of legal thought, notably characterized by a decisive critic of the clear text theory and by the relativisation of the hierarchical and systemic principles as milestones of the legal “field” (VM: 352 f., esp. 362), the defence of the aforementioned “Cartesian” views tends to become an uncomfortable exercise. Rooted in a philosophical legacy going back to the Greeks (VM: 382), this evolution provides the discussed author with firm theoretical grounds to defend an alternative, “fiduciary” and “subjective” conception of legal certainty. This concretely leads him to a (much) more “supple” or “soft” comprehension of this requirement, defined, in the voluntarily and expressly “interpersonal” perspective of what he calls a “case thought”, as the responsibility, for the judge, to give every case he settles the chance to be an “event”, *i.e.* an occasion to make law evolve after having met its limits in a particular and concrete situation, in order to favour the optimal protection of the individual (VM: 612 f.).

This fiduciary and subjective approach to legal certainty undoubtedly brings a stone to the edifice of a law “in network” – or even a centrifugal law – that would remain careful to preserve, in the name of a “finality” or orientation that would be and remain its own, an overall coherence and previsibility for the benefit of the citizen^{LVIII}. By no means should it, however, be considered as an ending point: its conceptor himself very humbly underlines that his approach to the topic does not form a last word on it but rather translates a “particular vision of society and law” (VM: 646), announcing others yet to come and always already open to debate. The question then raises how to take up the torch and continue to think legal certainty after or, rather, in the light of its “fiduciarisation”. A possible answer can be formulated on the basis of a dialectical theory of law, which aims at making the various dimensions of this concept emerge from the tensioning of the opposing views related to it, thereby embracing a logic of “included third”^{LIX}. In this case, the mobilisation of such a theory leads to envisage that the effort to satisfy the regulatory ideal at stake would derive from the interplay between the flexibility and continued openness for reassessment of established solutions characterizing a fiduciary “case thought”, on the one hand (rediscussion pole), and the general and abstract reaffirmation of the founding rules and principles of the legal system when they blur or evolve, on the other hand (stability pole)^{LX}.



6.2. The case of Belgian Subnational Constitutions

Even if it may not reveal “self-evident” in the field of EU law – even though this assertion would certainly deserve to be considered very carefully –, the effect of the aforementioned “stability pole” in the Belgian legal order might prove to be more than crucial. This essentially stems from the growing gap, recently deepened by the sixth State reform^{LXI}, between the materially expanding scope of the constitutive autonomy of federated entities and the formal maintaining of the paralegal nature of hypothetical subnational legal systems. Be it from an institutional perspective or, maybe more critically, in the field of fundamental rights, one can at least point the limits of the Belgian tendency to conceal this kind of gaps, as well as the sometimes drastic interpretation conflicts it generates, behind the convenient screen of the “pragmatic” intervention of federal constitutional case law.

Although regularly blamed for ‘crossing the limits’ of legal interpretation to play a role of shadow legislator –or even constituent –, Belgian^{LXII} constitutional judges sometimes publically assume such intervention in the name of their responsibility to preserve the Belgian legal order, be it from political cleavages^{LXIII} or from a potential disorder derived from the plurality of its sources^{LXIV}. Instead of framing the reflection around the democratic aspects of the question, one could depict this attitude as partially reflecting a “straightforward” fiduciary approach to legal certainty. In our view, this approach would maybe win to make place for a dialectical “revisitation” of the “Cartesian” model, ultimately incarnated, as was the case in Switzerland, by a renewed vigour of the federal derived constituent combined with the establishment of legal texts inspired by subnational constitutionalism^{LXV}. In Belgium, such a revisitation has been partly envisaged at the federal parliamentary level in the first half of the noughties. The state of advancement of that enterprise forms, with the possibility of its inscription in a more genuinely federal perspective, the object of the next (and last) section of this paper.



7. Reframing the debate. For an enlarged reboot of the project to “update” Title II of the Belgian Constitution

As indicated above, the Flemish constitutional “movement” has known, ten years ago, an equivalent in the federal parliament. Between the 13th of December 2004 and the 11th of December 2006, a working group established within the Chamber of Representatives of Belgium has indeed delivered an in-depth “review” of Title II of the Constitution, *i.e.* the Belgian “Bill of Rights”. At the end of this period of little less than two years, this effort led, with the substantial assistance of the academics and “experts” Jan Velaers and Sébastien Van Drooghenbroeck, to the production of two final reports. With a total length of about 550 pages, these documents related, on the one hand, to “transverse clauses on human rights and freedoms”^{LXVI}, *i.e.* clauses related, for instance, to the restriction or derogation from these Rights considered as a whole and, on the other hand, “human rights guaranteed by the Constitution in view of international instruments of protection of fundamental rights”^{LXVII}. As stated in the preamble of the experts note which opens the first of these two documents, the “review” in question fell within the broader context of “a reflection on the 'modernization' / 'Update' / 'Recodifying' of title II of the Constitution (...), on the model of what [had] been done for example by the Swiss constituent in 1999 or by the drafters of the Charter of fundamental Rights of the European Union (...)”^{LXVIII}. After the official publication of that first outcome, this reflection has been – temporarily?– put on hold. It must at least be noted that the constitutional amendments proposed in the aforementioned reports have, until now, not been made, undertaken or even envisaged by any derived (pre)constituent (“*pré-constituant dérivé*”).

Openly inspired by the regulatory ideal of legal certainty (Van Drooghenbroeck 2001b: 147 f.), this federal project, even though its promoters never envisaged its enlargement to the promotion of subnational Constitutions, would gain a lot from such a broadening and would, furthermore, form a particularly appropriated vehicle for it. There are two main reasons for this^{LXIX}. Firstly, the undeniable support from which the second project benefits in the northern part of the country, especially – but not exclusively – in the ranks of the Flemish movement, could, in case of linkage of the two projects, provide the first one with a way forward and, thereby, with means to stave off the characterised unwillingness of the



derived constituent to undertake long term and comprehensive enterprises (Van Drooghenbroeck 2001b: 152). Secondly, the defence – and, ultimately, the carrying out – of a federal “update” would constitute an ideal occasion to address the issue of federated Constitutions, to the extent their validation by the derived constituent remains the unavoidable preliminary to their potential establishment, by means other than paralegal, in the Belgian legal system (Popelier 2012: 40; Lambrecht, this issue). If this second argument does not contradict the concept of “update”, which deliberately makes room for modernisation or innovations of that kind^{LXX}, it would still require an exceeding of the narrow limits of the already cited title II of the Constitution. Such an exceeding is overtly defended by the upholders of a federal update, due to the fact that the title at stake does not contain all constitutional dispositions related to fundamental Rights (Van Drooghenbroeck 2001b: 151), notwithstanding the other fact that the very nature of (re)codification projects implies a tendency to cover a maximum part, if not the entirety, of the envisaged legal field (de Béchillon 1998: 175). As Sébastien Van Drooghenbroeck transparently summarizes it, it would thus be indicated, if an update was to be considered, “to advise the pre-constituent to proceed like its Swiss counterpart, by opening, ‘as a precaution’, the review of all provisions of the Constitution” (2001b: 151).

At first glance, a plea for the “total revision” of the federal fundamental law may appear highly preoccupying from the specific perspective of the revision procedure consecrated by article 195 of the same legal act. It must at least be noted that this particular type of constitutional writing is not formally mentioned by the supreme source of the Belgian legal order. Should this silence be interpreted as an insuperable obstacle to the already mentioned update? According to a majority of authors, this question constitutionally calls for a positive answer. The main reason for this would be that the text of the first sentence of article 195 uses the singular to enunciate, in all its linguistic versions, that “such” (“telle” in French, “zodanige” in Dutch, “eine” in German) constitutional provision can be declared revisable by the legislature. By doing so, the original constituent would have banned all revision other than “partial” (Delpérée 2000: 77). This classical reading is not undisputed. Indeed, some authors do not share the view according to which a total revision should automatically be considered as a constitutional “revolution” or a threat, by the “synchronic people”, to the “diachronic people”. In fact,



they believe that this formulation only requires the derived constituent to formally identify each article he intends to revise, without posing any quantitative threshold regarding the list of dispositions at stake^{LXXI}. In our view, this formality would even not be required if a total revision was envisaged in Belgium. There are at least three reasons for this absence of procedural obstacle to the kind of update we advocate. Firstly and to reason by *reductio ad absurdum*, if the singular formulation at stake was to be taken seriously, only “one-article” declarations of revision should be considered valid – especially due regard to the German version of the text –, which would of course constitute a rather counterfactual interpretation. Secondly, the “duty to preserve the general economy of the Constitution”^{LXXII}, that one could identify as an aspect of the historical *ratio* of the analysed formulation, would nowadays be better respected by a comprehensive reshaping of the whole text than by what Marc Verdussen (Verdussen 2006. *Adde* Velaers 2006) calls constitutional pointedness – “pointillisme constitutionnel”, in French. Thirdly, it would be excessively formalist and pragmatically arguable to prevent the derived constituent from total revision when bluntly unconstitutional behaviours such as implicit revisions and “grafts” have practically become its daily bread – or rather its bad habit. Besides, it is far from certain that a total revision limited to its more « formal » dimension would be radically different from the constitutional coordination procedure, organised by article 198 of the fundamental law (Bourgaux 2003).

8. Conclusion

It appears from the Swiss part of this contribution – *i.e.* part 4 – that even in a national context characterized by a deeply rooted centripetal dynamic, the constituent activism of federated entities may, although restrictively, prove legally beneficial in terms of fundamental Rights protection. Furthermore, the innovative cantonal enshrinement of constitutional Rights promisingly demonstrates the political compatibility of the classically opposed aspirations of federalism and Human Rights protection (Woehrling 2007). It remains, however, that the progressive Helvetic tendency described here above could rely on a very favourable background, not only composed of constitutional flexibility and aggregative federalism, but also made of inter-cantonal emulation and of more punctual elements such as windows of opportunity opened by events like, for instance, the territorial



modification of a canton (Jura, Berne) or a ‘round’ anniversary of its entry into the Confederation (Vaud). As shown in the legal and political analysis carried out in parts 1 to 3 of this study, the current equivalent of similar developments in the Belgian or, more specifically, in the Flemish case, appears relatively limited. This does not mean, however, that the advantages linked to the establishment of subnational Constitutions – or Bills of Rights – will always remain inaccessible within the Belgian legal order. It is indeed not prohibited to hope that Belgian federalism will achieve, in the medium term, a sufficient maturity to let itself be inspired by the finest achievements of its foreign equivalents. The extent to which such an evolution could constitute, in a future to be determined^{LXXIII}, the condition of possibility of the long waited “update” of the second title of the Federal Constitution, *i.e.* the (aging) Belgian national Bill of Rights, can not be underestimated. Defended in part 6 of this paper, that idea provides, at least – and as shown in part 5 –, constitutional law research with an original way to address the question of legal certainty and, more broadly, with an occasion to re-think the very role and nature of Constitutions in an increasingly “networked” legal paradigm.

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^I See *i.a.* proposition de décret spécial instituant une Constitution wallonne, *Doc. Parl.*, Parl. wallon, sess. ord. 2005-2006, n°367.

^{II} On the relevance of such a focus on subnational fundamental rights, see *i.a.* Gardner 2008: 334 *in fine*.

^{III} For a detailed account, see Lambrecht 2014.

^{IV} Title 1 Foundations, Title 3 The Powers, Title 4 The decentralised authorities, Title 5 Finances, Title 6 Cooperation, Title 7 General dispositions, Title 8 Revision of the Flemish Constitution.

^V Title 2, Rights and Freedoms.

^{VI} Parl.St. VI.Parl. 1995-1996, n°253/1, p. 14.

^{VII} Parl.St. VI.Parl. 1998-1999, n°1339/3, p. 3, n° “8°”.

^{VIII} This decision was taken after three meetings which respectively took place on the 12th and the 21st of October as well as on the 9th of November 1999. The first author of the petition and his legal counsellor, prof. Mathias Storme, were heard during the second of these meetings.

^{IX} The proposed experts were Jan Velaers (UA), Kaat Leus (VUB), Frank Judo (KUL) and Paul Van Orshoven (KUL).

^X Parl.St. VI.Parl. 2002-2003, n°46/1.

^{XI} The platform www.vlaamshandvest.be was one of the tools mobilised for the participation of citizens to this update.

^{XII} Parl.St. VI.Parl. 2003-2004, n°46/1.

^{XIII} This period lasted from 1996 to December 2002.

^{XIV} The full version of the commented documents may be found on the following website:



- <http://www.vlaamsparlament.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/index.html>
- ^{xv} At the time, this jurisdiction was still officially called the “Court of Arbitration”.
- ^{xvi} De Batselier, Discussion text written in December 2002 and reproduced on the 10th of January 2003, with small adjustments, in Parl.St. VI.Parl. 2002-2003, n°46/1. See especially p. 3 and 4 of the latter document (our translation).
- ^{xvii} Van Nieuwenhowe *in* Parl.St. VI.Parl. 2005-2006, n°813/1, p. 16 (our translation).
- ^{xviii} They also indicate that “every child receives, before the end of its obligatory education, an exemplary of the text of the Charter of Flanders and of the Federal Constitution”. In the 2004 version of the proposition, see articles 68 and 69.
- ^{xix} PV Enlarged Office, 17th of October 2005. As explained by Lambrecht 2013: 360, the role of this “office” is to “coordinate the political working of the Flemish Parliament” (our translation). See also Lambrecht 2012: 20.
- ^{xx} Note, 13th of October 2005.
- ^{xxi} Hand. VI.Parl. 2005-2006, 19 oktober 2005, p. 38.
- ^{xxii} Parl.St. VI.Parl. 2005-2006, n°623/1, p. 1-78.
- ^{xxiii} Voorstel van Bijzonder Decreet houdende de invulling van de Vlaamse constitutionele autonomie, Parl.St.VI.Parl. 2005-2006, n°632/1, p. 1-6 (VLD, now Open VLD); Voorstel van resolutie betreffende een proeve van grondwet voor de toekomstige onafhankelijke Vlaamse staat, Parl.St. VI.Parl. 2005-2006, n°726/1, p. 1-21 (Vlaams Blok, now Vlaams Belang).
- ^{xxiv} www.krispeeter.s.be/actua/toespraken/11-juli-speech, cited by Warnez 2012: 1.
- ^{xxv} Hand. VI.Parl. 2010-2011, 29 september 2010, p. 6-8.
- ^{xxvi} Voorstel van resolutie betreffende een proeve van grondwet voor de toekomstige onafhankelijke Vlaamse staat, Parl.St. VI.Parl. 2011-2012, n°1396/1, p. 1-23 (Vlaams Belang).
- ^{xxvii} Parl.St. VI.Parl. 2011-2012, n°1643/1, p. 1 to 36.
- ^{xxviii} On the notion of “entrenched Bill of Rights”, see Darrow and Alston 1999: 484 and f.
- ^{xxix} <http://www.vlaamsparlament.be/vp/informatie/begrippenlijst/resolutie.html> (our translation). *Adde* Rimanque *in* Parl.St. VI.Parl. 2005-2006, n°813/1, p. 11.
- ^{xxx} On the fact that this resolution was *de facto* elaborated by the Flemish government and thus not by MPs, see Lambrecht 2014.
- ^{xxxi} *Ibidem*.
- ^{xxxii} Article 33 of the Belgian Constitution (our translation).
- ^{xxxiii} For reflections on these limits in the specific field of linguistic freedom, see Weerts, to be published: 587 of the polycopied version.
- ^{xxxiv} For an overview, see WILS 2009.
- ^{xxxv} For instance, the first author of the petition brought before the Flemish parliament in 1999 precisely presented himself as a representative of this movement. Besides, one of the three majority parties that have supported the 2012 proposition, namely the NVA, considers itself closely linked to this movement.
- ^{xxxvi} See, for instance, Parl.St. VI.Parl. 2005-2006, n°813/1, p. 15, where one of the authors of the aforementioned 1996 book insists on the necessity for the Rights to be formulated in a legally realistic way, so that the authority or the judge can protect it efficiently.
- ^{xxxvii} See also Lambrecht 2014.
- ^{xxxviii} ATF 102 Ia 468.
- ^{xxxix} For a synthesis, see ATF 108 Ia 155, esp. 157.
- ^{xl} This decision has been published in *ZBl*, 1976, p. 36 and f. (see in particular p. 38). *Adde* Kälin 1987: 246.
- ^{xli} FF 1989 III 839 and 840, with our accent and translation.
- ^{xlii} ECHR., *Müller e.a. v. Switzerland*, 24 May 1988, Series A, n° 133, § 36: “It may (...) be true that Josef Felix Müller has been able to exhibit works in a similar vein in other parts of Switzerland and abroad, both before and after the “Fri-Art 81” exhibition (see paragraph 9 above). It does not, however, follow that the applicants’ conviction in Fribourg did not, in all the circumstances of the case, respond to a genuine social need, as was affirmed in substance by all three of the Swiss courts which dealt with the case.”. *Adde* ECHR., GC, *Mouvement raélien suisse v. Switzerland*, 13 July 2012, § 64.
- ^{xliiii} See ideal-typically ATF 121 I 267, 269-272.
- ^{xliiv} *Ibidem*, 272.
- ^{xlv} See for instance the Constitution of Neuchâtel, art. 101.
- ^{xlvi}



http://www.vs.ch/Data/vos/docs/2013/10/2013.11_Révision%20CC%20Libertés%20individuelles%20et%20droits%20fondamentaux_RAPP_COM.pdf.

XLVII ATF 123 I 241.

XLVIII This rate difference has, more precisely, been reduced of 10 %. For more details, see <http://www.ne.ch/autorites/DFS/SCCO/successions-donations/Pages/taux-imposition-successions-donations.aspx>.

XLIX See also Constitution of Berne, art. 69.4, second sentence on delegations of power.

L Delledonne and Martinico 2011: 4 (“the phrasing of subnational constitutions tends to be ‘less constitutional’ than the language of the federal ones”) and, about in the Italian and Spanish Cases, 15 (« we are dealing with clear examples of ‘constitutionalism without constitution’ »).

LI On the Spanish case, see Delledonne and Martinico 2011: 15, citing Spanish Constitutional Court, *sentencia* n° 247/2007.

LII See *i.a.* Dumont 2012b.

LIII On this theory, which gradually conceives sources between pure (formal) statism and pure (material) dynamism as well as between pure empirism and pure ‘idealism’, see X., *Les sources du droit revisitées. Volume 4: théorie des sources du droit*, Bruxelles, Anthemis-Presses de l’Université Saint-Louis – Bruxelles, 2013.

LIV On that topic, see Popelier 2012: 48 and 49 as well as Delledonne and Martinico 2011: 19.

LV See Verdussen 2005: 189. For a link with the new mechanism of regional referenda in Belgium, Popelier 2012: 54; Delledonne and Martinico 2011: 3 *in fine*. Compar. Gardner 2008: 338 *in fine* and 339; Delledonne and Martinico 2011: 2 *in fine*.

LVI On the issue of legal certainty, see *infra*.

LVII See in particular the leading cases of ECHR, *Marckx v. Belgium*, 13 June 1979, n°6833/74, § 58 and ECHR, *Sunday Times*, 26 April 1979, n°6538/74, §47 and 49. For a detailed analysis, see Van Drooghenbroeck 2001a: 667-683.

LVIII On the theory of law as a network, see Ost and van de Kerchove 2002. On the relationship between legal certainty and the potential “finalities” of law, see OST, *A quoi sert le droit? Etsi jus non esset?*, to be published.

LIX In favour of such a theory, see Ost and van de Kerchove 2002: 36 f.

LX For a presentation of such poles as constituent parts of the finalities of law, see Ost, *op. cit.*

LXI For an overview, see Velaers *et al.* 2014.

LXII For Italian and Spanish echoes, see Delledonne and Martinico 2011: 3 and 16.

LXIII For examples in the field of linguistic Rights, see Dumont 1985. About education rights, see El Berhoumi 2013.

LXIV For a discussion of cases in which the Belgian constitutional Court used the “conciliatory conform interpretation” technique to diminish the higher level of Rights protection provided by a constitutional disposition with a view to making this disposition comply with international Human Rights law, see Delgrange 2014: 156 f. See also Popelier and Van de Heyning 2011.

LXV The idea, discussed hereunder, according to which the regulator ideal of legal certainty could or should be partly protected, in Belgium, from excessive judicial activism through the linkage of “the ‘update’ (title II of) the Federal Constitution”, on the one hand, and of “the (subsequent) adoption of subnational Constitutions”, on the other hand, presupposes that the latter may be considered without excessively ‘complicating’ the general economy of the legal system and, thereby, without – involuntarily and paradoxically – harming the regulator ideal at stake. On that topic, see. *i.a.* Clement *et al.* 1996: 65.

LXVI *Doc. parl.*, Ch., sess. ord. 2004-2005, n°2304/001.

LXVII *Doc. parl.*, Ch., sess. ord. 2006-2007, n°2867/001.

LXVIII *Doc. parl.*, Ch., sess. ord. 2004-2005, n°2304/001, p. 4.

LXIX On the federal constitution as a mean to avoid conflict by preserving an opportunity for federated entities to debate on sensitive matters, see Popelier 2012: 53.

LXX *Doc. parl.*, Ch., sess. ord. 2004-2005, n°2304/001, p. 5: “Il parait impossible, au-delà d’un certain stade, de ‘codifier à droit purement constant’”.

LXXI Masquelin 1972: 104; Orban 1908: 706 (“Il nous semble donc certain que (...) la procédure de révision pourrait être étendue à un nombre illimité d’articles” – although this author paradoxically and arguably adds that “Ce que l’article 131 [195 actuel] n’autorise pas, c’est la révision totale de la Constitution, la mise en question de la Constitution tout entière”); Van Drooghenbroeck 2001b: 151.

LXXII One could also invoke a “duty of reserve” or the dworkinian concept of “intergrity”.

LXXIII On the institutional ‘fatigue’ in contemporary Belgian politics as an obstacle to short term realisation of



a (sub)national constitutionalist project, see Lambrecht 2014 (*this issue*). On other potential obstacles of that kind, see Popelier 2012: 41, 47, 54 (distrust of the French-speaking as an expression of the so called linguistic cleavage, especially due regard to the ‘symbolic’ function of constitutional texts) and 48 (overlap of territory of several Belgian federated entities). Adde Delledonne and Martinico 2011: 1 and 2 (risk of attempt to the symbolic function of the national Constitution).

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**Intergovernmental relations in Spain and the United
Kingdom: the institutionalization of multilateral
cooperation in asymmetric polities**

by

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Abstract

Considering their dynamic and asymmetric character, the Spanish and British territorial constitutions seem particularly suitable for a comparative analysis. As regards the framework for intergovernmental relations (IGR), the traditional pattern of cooperation in both countries has been mainly limited to bilateral and ad hoc interactions between the central government and the government of each devolved territory. Even if asymmetry incentives bilateral IGR, Spain and Great Britain have followed parallel paths in order to institutionalize multilateral cooperation. This paper offers a comparative approach to the evolution of IGR in Spain and the UK and, particularly, to the progressive institutionalization of the multilateral ministerial meetings (the Sectoral Conferences in Spain and the Joint Ministerial Committees in the UK). The paper also analyses the recent developments of the Spanish IGR (formalization of bilateral committees; enhanced cooperation for the governance of the long-term care services) and the prospects for their implementation in the UK.

Key-words

Devolution, asymmetric federalism, intergovernmental relations, ministerial meetings



1. Introduction: dynamic and asymmetric devolution in Spain and Great Britain

Spain and the United Kingdom (UK) are both complex multinational polities that have firmly embarked on the path to political decentralisation. Considering their own political and legal traditions, these two devolved systems have explored diverse and very particular constitutional formulas in order to grant the self-government to its territories. The right to self-government (*autonomía*) of the Spanish ‘nationalities and regions’ was granted by the Spanish Constitution of 1978 (art. 2) that also set up the conditions and procedures^I regarding the foundation of the Autonomous Communities (ACs) and the rules for the reallocation of legislative and executive competences^{II}. Between 1979 and 1983, all the Spanish regions and nationalities exercised the right to self-government adopting their own Statute of Autonomy, ‘the basic institutional rule of each AC’ (art. 147 SC), that were formally enacted as constitutional laws^{III} by the national parliament (*Cortes Generales*). While in Spain the autonomy of nationalities and regions has been granted by the Constitution, in the UK, politically founded on the principle of parliamentary sovereignty, the devolution to the Celtic nations materialized by means of ordinary Acts of Parliament. The Scotland Act 1998, the Northern Ireland Act 1998, and the Government of Wales Act 1998 and 2006 contain nowadays the territorial constitution of the UK establishing and defining the functions of the devolved bodies^{IV}. We should notice that the sovereignty of the UK Parliament remains formally unaffected by the devolution settlements so Westminster preserves the right to amend the devolution Acts and to debate, enquire and legislate on devolved matters. Nevertheless, we should take into account that a political compromise, known as Sewel convention, has determined that ‘the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature’^V.

The constitutional formulas allowing the self-government of the Spanish and British territories are essentially diverse but the devolution processes in these countries have both resulted highly dynamic and more flexible than the traditional federal systems. Despite the fact that the articles of the Spanish Constitution regarding the territorial organisation have



never been amended, the State of the Autonomies has significantly evolved since its foundation through the reforms of the Statutes of Autonomy promoted by the ACs^{VI}. The progressive enhancement of the ACs' executive and legislative powers has again been confirmed by the statutory amendments introduced during the last decade -Valencian Community and Catalonia (2006), Balearic Islands, Andalusia, Aragon and Castile and Leon (2007), Navarre (2010), and Extremadura (2011). Although it could be argued that some of these reforms have already exploited the scope of self-government allowed by the SC, renewed political pressures coming from territorial nationalisms evidences that the devolution dynamic could even exceed its current constitutional boundaries. As an illustration, the Resolution of the Catalan Parliament on self-determination adopted on 27 September 2012 questions the principle of national sovereignty (art. 1.2 SC) and the 'indissoluble unity of the Spanish nation' (art. 2 SC) when it affirms 'the necessity of the Catalan people to decide freely and democratically their collective future and calls on the government to hold a consultation first and foremost within the next legislature'. As Giordano and Roller conclude about the Spanish case, 'devolution is a contingent process that changes, develops, and evolves over time, sometimes throwing up unexpected consequences' (Giordano and Roller 2004: 2179).

The legal framework of devolution has also extensively evolved in the UK. As in Spain, we could easily identify a constant and progressive enhancement of the devolved administrations' executive and legislative powers. The evolution of devolution in Wales clearly evidences this trend. The Government of Wales Act 1998 originally established the National Assembly as a corporate body and limited its functions to the enactment of secondary legislation in certain areas^{VII}. The Richard Commission, established by the Welsh Government in 2002, recommended the separation of the executive and legislature as individual legal entities and the enhancement of the National Assembly Legislative's powers. The Government of Wales Act 2006 allowed the National Assembly to gradually assume primary legislative powers in defined areas. The transfer was done in practice by means of Legislative Competence Orders approved by the National Assembly and the UK Parliament (from 2006 till 2010, 15 orders transferring power). The 2006 Act also provided for the National Assembly to assume full legislative powers through an affirmative vote in a referendum that was finally held on 3 march 2011. The Scottish devolution settlement



has also been recently modified by the Scotland Act 2012. Following the recommendations of the Calman Commission, the 2012 Act increases the level of fiscal autonomy and introduces specific taxes including a new Scottish rate of income tax. Considering the great flexibility of the uncodified political constitution of the UK, the British devolution process could develop in any direction. The referendum on independence for Scotland that was held last September is the best example of the absence of constitutional constraints for devolution in the UK. Even if the Scottish rejected the independence, the political agreement between the three main British political parties promising “extensive new powers” for the Scottish Parliament anticipates further deepening of the self-government. Undoubtedly, the ongoing political challenge posed by the diverse national identities within the UK and Spain demanding a proper constitutional accommodation explains the highly dynamic character of devolution in both countries. As Tierney has clearly observed, ‘in plurinational states the political aspirations of sub-state national societies for recognition by the state, for self-government, and for a fuller representational role within the central organs of the state, have increasingly mobilized as demands for constitutional reform in a lively period of politico-constitutional activity over the past 25 years’ (Tierney 2006: 17).

Asymmetry is another common and distinctive feature of devolution in Spain and Britain. The recognition of the historical, cultural and political territorial particularities has resulted in a specific and unique devolution arrangement for each devolved administration. The Spanish Constitution originally envisaged different procedures for the regions and nationalities in order to adopt their Statute of Autonomy and found their respective AC (art. 142, 151 SC). Each of these procedures led to a significantly different initial degree of self-government. We should notice, however, that following the political agreements of 1992 between the two major national parties (*Acuerdos Autonómicos*), clearly inspired by the rationale of territorial harmonization, the asymmetry attenuated during the 90s^{VIII}. Nevertheless, the amendments of the statutes of autonomy that came into force from 2006 have evidenced again the differences between the devolution arrangements. On the whole, as Fossas argues, ‘the asymmetry *de facto* which supposes the pluri-national composition of the State has raised the possibility of an asymmetry *de jure*, which implies the setting-up of legal-formal differences between the units of a federation with respect to their powers and obligations, the form of the central institutions, or the application of the federal laws and



programmes' (Fossas 1999: 5). Asymmetry is even more pronounced in the UK. Firstly, the English regions have not followed the devolution path and the system of government of England remains accordingly centralized under the management of the UK Government and Parliament^{IX}. As a matter of fact, devolution in Great Britain only affects a small proportion of the population (15%). Secondly, reflecting the differences in the historical and institutional background of Scotland, Wales and Northern Ireland, the devolution arrangements, the powers and functions of the devolved institutions, differ profoundly from one territory to another^X.

2. The unavoidable intergovernmental relations

Another common feature of the Spanish and British devolution is the relevance and the extent of the concurrent powers shared between the different tiers of government. The proliferation of overlapping functions and the consequent need for a minimum coordination in the provision of public services has strongly stimulated interdependence and the progressive formalization of intergovernmental relations (IGR) in both countries^{XI}. In fact, 'it is a common argument in federal research that the more powers that are assigned to 'close watertight' compartments, the weaker the incentives for cross boundary interaction. Vice versa, the more the constitution provides for wide areas of concurrent powers, the stronger they are' (Bolleyer 2006: 387).

The large list of shared and concurrent competencies enunciated in the Spanish Constitution (Art. 148 – 149 SC) and the Statutes of Autonomy, which includes essential public policies such as education and health, has irremediably fostered intergovernmental interactions^{XII}. Bolleyer has pointed out that other factors such as the fiscal dependency of the ACs^{XIII} and the pressure of europeanization operate as strong incentives for IGR (Bolleyer 2006: 387). In addition, the weakness of the Spanish second chamber, the Senate, has increased the need for alternative intergovernmental *fora* granting the representation of territorial interests. The complex distribution of devolved and retained functions in the UK has also stimulated interaction between devolved administrations and the UK Government. Many policies or initiatives of one level of government will require some degree of contact between the devolved administrations and the UK Government. In some



cases joint action may be required^{XIV}. McEwen, Sweden and Bolleyer highlight the need of governmental interaction in order to address ‘the disputes, interdependencies and spillover effects resulting from constitutional overlaps’ as well as the need ‘to develop common positions in advance to EU negotiations’ (McEwen, Sweden and Bolleyer 2012: 323).

Even though interdependence is an inherent feature of the Spanish and British devolution, their territorial constitutions did not originally provide a comprehensive institutional framework allowing stable and permanent intergovernmental relations. The traditional pattern of cooperation in Spain and the UK had been mainly limited to irregular and *ad hoc* interactions between the central government and the government of each devolved territory. In Spain, the political priority of the ACs’ governments has traditionally been the reinforcement of their autonomy. The regulation and development of the mechanisms for cooperation were initially postponed in the decentralization process and consequently, IGR were limited to irregular meetings. Regarding the UK, the main concern of the advocates of devolution was also the reinforcement of the self-government and national distinctiveness (McEwen, Sweden and Bolleyer 2012: 323). As a result, the IGR in the UK have been characterized ‘by informality, limited use of informal mechanisms and framework on a heavy reliance on goodwill’ (Trench 2009: 125).

The asymmetric character of the British and Spanish devolution, and therefore the specific institutional arrangements and concerns of each devolved administration, originally led to the preeminence of bilateral relationships^{XV}. For instance, the political significance of the Catalan and Basque nationalisms in Spain has constantly favored the bilateral negotiations about the transference of competences to the respective ACs. In the UK, each devolved territory has specific concerns to deal with the UK’s Government and ‘there is little scope to form a common front with the other devolved institutions’ (Trench 2004: 171). In the case of Wales, ‘there was greater need for intergovernmental co-operation given the National Assembly’s dependence on Whitehall and Westminster for legislative change’ (McEwen, Sweden and Bolleyer 2012: 329). Even though informal, irregular and bilateral IGR have traditionally prevailed in Spain and the UK, both countries have followed parallel paths in order to institutionalize multilateral cooperation. This paper proposes a comparative approach to the evolution of IGR in Spain and the UK and to the



progressive consolidation of the institutional arrangements that frame multilateral relationships, particularly the multilateral ministerial meetings^{XVI}.

3. Building an Institutional Framework for Multilateral IGR

3.1. The principles regarding IGR

Neither the Spanish Constitution nor the Statutes of Autonomy envisaged a framework for IGR. Between the scarce references to IGR in the SC, we could mention the principle of coordination between all the public administrations (art. 103.1 SC)^{XVII} and the severe conditions required for the horizontal cooperation agreements between ACs (art. 145 SC)^{XVIII}. Nevertheless, the Constitutional Court determined in the early 80s that the principle of cooperation 'is implicit in the very essence of the form of territorial organization of the State that is implanted in the Constitution'^{XIX}. We could also mention the resolutions of the Constitutional Court that have declared the duty to share information (Constitutional Court Judgment 80/1995, of June 5) and have concluded that collaboration and coordination is not an excuse to recentralize the competences of the ACs (Constitutional Court Judgment 68/1996, of April 4). The principle of cooperation, as well as the principle of loyalty between all the public administrations, was finally declared in the Law 30/1992 on the Legal System of Public Administrations and Common Administrative Procedure^{XX}. We should notice, however, that in this statute cooperation refers to the relations between administrative bodies and it has not been properly conceived as a principle governing the political interactions between national and regional governments.

The arrangements for IGR in the UK 'rest on a non-statutory basis' (House of Lords Select Committee on the Constitution, 2003:11). The principles underlying the relations between the UK Government, the Scottish Executive, the Welsh Assembly Government and the Northern Ireland Executive are settled in a soft-law code, the *Memorandum of Understanding and Supplementary Agreements* (MoU), first published in 2001 and then amended in 2010, 2012 and 2013. The MoU defines itself as a 'statement of political intent' and consequently it 'should not be interpreted as a binding agreement. It does not create legal obligations between the parties'^{XXI}. The principles that should guide the IGR are consultation, communication, cooperation and confidentiality (the four C's). Regarding the



principle of communication, the MoU specifies that it operates ‘especially where one administration’s work may have some bearing upon the responsibilities of another administration’^{XXII}. With respect to cooperation, the four administrations declare the intention to ‘work together in matters of mutual interests’ - including the possibility ‘to undertake activities on each other’s behalf’^{XXIII}. In order to operate effectively, the administrations are also committed to providing each other scientific, technical and policy information. As regards the principle of confidentiality, each administration is bound to ensure that ‘the information it supplies to others is subject to appropriate safeguards in order to avoid prejudicing its interests’^{XXIV}.

3.2. The ministerial meetings: the Sectoral Conferences (*Conferencias Sectoriales*) and the Joint Ministerial Meetings

Considering that political autonomy had extended to all nationalities and regions before the end of 1983, the Spanish legislation tried to overcome the constitutional shortcomings establishing an institutional framework for cooperation that integrated all the ACs. A very significant step was the creation of the Sectoral Conferences that were conceived as multilateral *fora* where ‘high ranked officials and political representatives of both central government and *Comunidades Autónomas* meet to discuss sectoral matters in order to maximize intergovernmental cooperation and avoid conflicts’ (Moreno 2002: 405). Even if we find the first reference to the sectoral conferences in the Law 12/1983 on the Autonomic Process (art. 4), the scarce rules governing their composition and functioning are nowadays established in the Law 30/1992 on the Legal System of Public Administrations and Common Administrative Procedure (art. 5). The Sectoral Conferences correspond to a model of vertical cooperation where the Ministers of the Spanish government, who convene and chair the meetings, have ensured a prominent role at the expense of horizontal cooperation between regions. At first, the sectoral conferences were perceived by some ACs as a way to control and to confine their self-government. In fact, the Basque Country and Catalonia’s governments argued before the Constitutional Court that the institutionalization of the sectoral conferences had to be considered as an unconstitutional intervention in their sphere of autonomy. The Constitutional Court confirmed the constitutionality of the sectoral conferences but, at the same time, ruled that the sectoral conferences could not replace the decision-making powers of the ACs over its



own competencies (Constitutional Court Judgment 76/1983, of 5 August). Consequently, the functions of the sectoral conferences were mainly restricted to the exchange of information and the joint examination of problems concerning their shared policies.

The Memorandum of Understanding is supplemented by an agreement (Supplementary Agreement A) on the establishment of a Joint Ministerial Committee (JMC) consisting of UK Government, Scottish, Welsh and Northern Ireland Ministers. The JMC is a consultative body that coordinates the overall IGR and it could convene in plenary meetings or in more specialized functional formats. According to the Supplementary Agreement A, the Plenary JMC will meet at least annually and consist of the Prime Minister (or his representative), who will take the chair, and the Deputy Prime Minister, the Scottish and Welsh First Ministers, each together with one of their Ministerial colleagues, the Northern Ireland First Minister and Deputy First Minister, and the Secretaries of State for Scotland, Wales and Northern Ireland. The post of the Secretaries of State and their offices are conceived as key liaison figures to manage intergovernmental relations. The agreement does not specify a number of functional formats and only refers to a couple of examples: JMC Europe or JMC Domestic. Other functional JMCs have met in areas of health, poverty or knowledge economy. The JMC's terms of reference are: '(a) to consider non-devolved matters which impinge on devolved responsibilities, and devolved matters which impinge on non-devolved responsibilities; (b) where the UK Government and the devolved administrations so agree, to consider devolved matters if it is beneficial to discuss their respective treatment in the different parts of the United Kingdom; (c) to keep the arrangements for liaison between the UK Government and the devolved administrations under review; and (d) to consider disputes between the administrations'. The JMC are 'the highest and most visible part of a network of a broader collaboration between governments, involving preparation by senior and, below them, more junior officials' (Trench 2008: 237). The Committee of Officials consisting of at least one representative from each administration and a representative of the Secretaries of State for Scotland, Wales and Northern Ireland shadow the JMC and prepares its meetings. The Supplementary Agreement also includes an Annex on the Secretariat to the JMC (Annex A2) comprising staff from the UK Cabinet Office and the devolved administrations.



3.3. The disuse of the ministerial meetings

The number of Sectoral Conferences, which have been created at the political initiative of the Spanish government or through ordinary legislation, has progressively increased over the years. A total of 39 Sectoral Conferences cover nowadays all kind of public policies. Nevertheless, the political distrust from the CAs towards the sectoral conferences -strongly directed by the national government-, their limited functions and the irregularity of the meetings initially determined their inefficiency as forums for real cooperation. Moreno considers that the ‘underdeveloped organizational structure of the Sectoral Conferences is one major core of these weaknesses’ (Moreno 2002: 405). Other scholars point out that ‘most of the time the Conferences serve as a forum in which the central government informs the ACs about its programmes and activities, while the ACs can only protest without any substantial impact’ (Bolleyer 2006: 400). As a result, most of the vertical IGR continued to take place on a bilateral and *ad hoc* basis.

Although the plenary JMC was set to be convened annually, it met during the first years (September 2000, October 2001 and October 2002) and then ground to a halt. The functional JMC for Health Policy, the Knowledge Economy and Poverty that were established in 1999 also ceased rather quickly^{xxv}. Regarding the JMC’s functional format for poverty, Trench has shown the reluctance of the devolved administrations that were being asked to commit themselves to the UK Government policy proposals ‘without any extra funding being made available, or any other sort of benefit or reward for devolved compliance’ (Trench 2009: 128). The dominance of Labour across the three governments (UK, Scotland and Wales) has been frequently pointed out as a cause of the disuse of the JMC: ‘When there was political congruence between governments it was often better to cooperate as need be bilaterally, and iron out any problems politically. Little purpose was seen to be served by JMCs, and after 2002 they fell into desuetude’ (Gallagher 2012: 201). As a result, IGR have been mainly informal, bilateral and ‘dominated by the issues of the day rather than anything more strategic or long term’ (Trench 2009: 129)^{xxvi}.



4. The EU integration as an incentive for multilateral cooperation

Nevertheless, the effectiveness of the Sectoral Conferences, their regularity and the outcome of the meetings, can strongly vary from one to another. Considering that the ACs depends on the Spanish Government in order to access to EU decision-making and the central-state administration relies on the ACs for the effective implementation of EU policies, we could venture to suggest that the progressive Europeanization of the domestic competences has created considerable incentives for both the Spanish government and the ACs to strengthen its cooperative relationships.

In fact, the institutionalization of the Sectoral Conference on European Affairs (1992), and, particularly, the Agreement on the Participation of the CAs on European Matters through the Sectoral Conferences (1994) have significantly favored the cooperative interactions between the two layers of government in those domestic matters affected by the EU competences. This agreement has provided a reliable framework for regular information and participation of the ACs in the formulation and the implementation of EU policies. It has also been defined as a ‘cooperative procedure’ that ‘provides the regions with participatory rights in central-state decision making’ (Börzel 2000: 41). Another agreement of the Sectoral Conference on EU affairs signed on December 9, 2004 made possible the participation of the ACs in four different formations of the EU Council of Ministers: Employment, social policy, health and consumer affairs; Agriculture and fisheries; Environment; Education, Youth, Culture and Sport Council.

In sum, Börzel has convincingly shown how Europeanization ‘drives the emergence of multilateral intergovernmental cooperation’ and favors the transit from ‘competitive regionalism’ to ‘cooperative federalism’ (Börzel 2000: 41).

The framework for IGR on EU policy issues in the UK is also fairly complete. The MoU contains a specific section on EU relations that urges the UK Government to involve the devolved administrations ‘as fully as possible in discussions about the formulation of the UK’s policy position on all EU and international issues which touch on devolved matters’^{xxxvii}. In addition, the Concordat on Co-ordination on EU policy issues (Supplementary Agreement B, MoU) sets out in some detail the arrangements for the provision of information, participation in the formulation of UK policy, attendance at EU



Council of Ministers and related meetings, implementation and enforcement of EU obligations, infraction proceedings, representation in Brussels and links with EU institutions, nomination of representatives in the Committee of the Regions and the Economic and Social Committee, and the scrutiny of EU legislation. The JMC(E) has met regularly since 1999, usually about four times a year just before the meeting of the European Council of Ministers (Gallagher 2012: 201). The EU has created a similar need for regular discussions of agriculture matters, particularly while the restructuring of the Common Agriculture Policy has been in the Agenda of the Council of Ministers.

5. The recent evolution of the IGR

Progressively, the sectoral conferences have gained political relevance and, even though the regularity and the outcome of the meetings strongly vary from one conference to another, many of them have a prominent role in drafting legislation on shared competencies or adopting common criteria for the implementation of joint plans and programs as well as their funding regime. Up to now, a network of 39 sectoral conferences that cover practically all the policy domains have been set up and they normally rely on the work of committees where national and sub-national officials deal with technical matters. León and Ferrín clearly describe the significant functions that nowadays have been assumed by the Sectoral Conferences: '(a) to agree on the implementation of national legislation that affects regional powers (e.g. education); (b) the approval, follow-up and evaluation of *Planes y Programas Conjuntos* (joint plans and programmes), whereby the central administration and regional governments decide to cooperate for a specific period in the development and financing of a plan or programme in areas where they share responsibilities and have common objectives; (c) to put in place funding regimes (*convenios*) for joint projects; (d) to exchange information between central-state and regional governments; and (e) to formulate joint positions that will be formally considered by the Spanish government at European level, and for the transposition of European policies at regional level' (León and Ferrín 2011: 515).

In order to assess the recent evolution of the multilateral relations in Spain we should mention the case of the governance of the long-term care services granted by the System



for the Autonomy and Care for Dependency (SAAD). A first approach to the institutional framework envisaged for the implementation of the SAAD evidences the strengthening of the cooperative relations in this social policy domain. The functioning of the Territorial Council of the SAAD, where the General State Administration and the ACs can jointly reach binding decisions by majority rule, clearly exemplifies the change of the traditional pattern of multilateral cooperation. The SAAD does not limit the interactions between the central-state administration and the ACs to the mere coordination of their respective functions. A particularly significant function assigned to the Territorial Council is the establishment of the criteria determining the intensity of protection that must be guaranteed to each of the beneficiary of the SAAD (according to his degree of dependency)^{xxviii}. In order to guarantee a minimum level of protection across the country, the binding decision adopted by the Territorial Council about these criteria will be finally enacted by the Spanish Government by means of Royal Decree. Even if the hard-law resolution formally corresponds to the Spanish Government, it is also clear that the Territorial Council has been conferred, for the very first time, with an actual decision-making power. We could argue, however, that the *sui generis* normative power of the Territorial Council of the SAAD could contradict the Constitutional Court decision that confined the sectoral conferences functions to the exchange of information and the joint examination of problems concerning their shared policies (Constitutional Court Judgment 76/1983, of 5 August). Another important difference between the Territorial Council of the SAAD and the multilateral sectoral conferences, where decisions are always reached by consensus, is that the formal agreements and the political proposals could be finally adopted by the affirmative vote of a majority of the representatives of the General State Administration and a majority of the representatives of the ACs (article 12.2 of the Rules of Process). The majority rule dramatically alters the traditional consensual character of the multilateral relationships.

The trend towards multilateral cooperation seems to be confirmed by the ever-growing amount of joint agreements (*convenios*) between the central and the autonomic administrations and other initiatives at the highest political level such as the Conference of Presidents. This forum, convened for the first time in October 2004 by the Spanish Prime Minister Zapatero, brings together the Presidents of the ACs and the cities of Ceuta and



Melilla and has been conceived to reach consensus and adopt political resolutions on matters of particular relevance to the autonomic system. The rules of procedure adopted during the fourth meeting held on December 2009 provided the institutionalization of the Conference of Presidents which should be convened by the Prime Minister at least once a year. Nevertheless, after that meeting the Conference has only met one more time (October 2012) showing that this attempt of institutionalization has clearly failed.

The progressive consolidation of the multilateral cooperation in Spain does not mean, however, that bilateral relations are no longer significant. Particularly if we consider that the Statutes of Autonomy amended during the last decade have institutionalized the bilateral commissions which are intended to enable permanent collaboration between the individual ACs and the Spanish government. For instance, the Statute of Autonomy of Catalonia adopted in 2006 (which has clearly inspired the successive statutory reforms) entrusts the *Generalitat* - State Bilateral Commission with the deliberation and the adoption of joint agreements regarding a long list of matters that could affect the interests and powers of the *Generalitat* (art. 183). This legislative strategy enhancing the bilateral relations, and consequently the asymmetry of the State of the Autonomies, is supported by another provision of the Catalan Statute which declares that ‘the *Generalitat* is not bound by decisions taken within the framework of multilateral voluntary collaboration mechanisms with the State and with other autonomous communities with regard to which it has not manifested its agreement’ (art. 176.2).

In recent years, the institutionalization of multilateral IGR has progressed in the UK too. The JMC Plenary sessions have been held annually since 2008. The JMC has begun meeting in a new and more functional format, the JMC (Domestic), that convenes the Deputy Prime Minister and the most relevant portfolio Ministers of each devolved administration two or three times a year. In 2010, the JMC (Domestic) commissioned the revision of the Memorandum of Understanding that has settled additional mechanisms for dispute resolution. In addition, the administrative machinery supporting the intergovernmental meetings has grown. According to McEwen, Sweden and Bolleyer, ‘the resurrection of the JMC plenary form and in the incarnation of its domestic format necessitated a modest increase in investment in the resources required to service IGR’



(McEwen, Sweden and Bolleyer 2012: 328). One factor that may have contributed to the formalization of IGR is the end of the political congruence between UK Government and the devolved administrations. The arrival of nationalist parties to the Scottish and Welsh governments in 2007 and the establishment of the conservative-liberal-democrat coalition government in the UK have influenced the dynamics of the IGR. The informal channels, traditionally supported on political reliance, could have conceded some space to the formalized structures in order to channel the increasingly adversarial relations. Nevertheless, ‘party political incongruence has had a modest, but not overwhelming, impact of the formal processes through which IGR are conducted’ and consequently the ‘renewed intergovernmental machinery has not replaced the day-to-day informal interaction’ (McEwen, Sweden and Bolleyer 2012: 328). Many scholars continue to demand a more consistent system of IGR: ‘The greater use of formal mechanisms of intergovernmental relations would create a forum to air and resolve some of the thorny issues of divergent citizenship rights that are starting to emerge’ (Trench 2009: 133). It is also clear that further institutionalization would ensure greater democratic control, visibility and transparency of IGR

6. Final remarks

We could derive some concluding remarks from this comparative analysis. Spain and Great Britain have followed parallel paths in order to institutionalize multilateral cooperation. In both countries, the ministerial meetings have been conceived as the main institutional *fora* for multilateral cooperation. The Spanish Sectoral Conferences and the British JMC are consultative bodies, ruled by a widely open legal framework, that were mainly promoted by the central states in order to convene all the devolved administrations. Nevertheless, and considering the asymmetric character of the devolution settlements, the particular interests of each devolved administration have always favored ad hoc and bilateral IGR. We have also shown how the EU integration process has contributed to strengthening multilateral cooperation and the formalization of IGR in both countries. In fact, the intensity and regularity of the ministerial meetings on those matters affected by the EU integration seems considerably higher.



The recent evolution of IGR in Spain and the UK confirms the trend towards further formalization. However, the proliferation of ministerial meetings and the institutionalization of multilateral IGR are more pronounced in the case of Spain. We could argue that this is the result of a more dilated experience of devolution and that Britain might follow a similar path in the years to come. But we have to consider some structural differences pointing in another direction. First, the high number of Spanish devolved administrations makes bilateralism an unsustainable way to maintain IGR. The UK Government could more easily continue to manage bilateral interactions with the three devolved administrations. We should also mention that asymmetry is much deeper in Great Britain: ‘the UK will remain a state of unions, and relationships within it will continue to have the characteristics of a set of bilateral deals’ (Gallagher 2012: 211). Finally, the use of informal mechanisms based on political reliance is a feature of the UK constitutional culture and ‘provides a strong illustration of the UK concept of good governance and its reliance on soft law or quasi-legislation’ (Oliver 2003: 252).

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^I As Arganoff and Ramos have clearly explained, ‘the route to regional autonomy was faster for the historic territories (based on their Second Republic statutes and plebiscites) of Catalonia, the Basque Country, and Galicia. These three territories and Andalucía acceded to AC status through the fast route and became known as Article 151 ACs (...) whereas the other, Article 143.1 territories took on regional powers more slowly and somewhat differently. By 1983, however, all of Spain's fifty provinces were divided into seventeen ACs’ (Arganoff and Ramos Gallarín 1997: 3)

^{II} It should be noted that the ‘SC does not establish a territorial design of the nationalities and regions but rather lays out the conditions by which the regions may decide to proceed with the practice of self-government’ (Giordano and Roller 2004: 2167)

^{III} According to the Spanish Constitution (art. 81) the constitutional laws (*leyes orgánicas*) “are those relative to the exercise of fundamental rights and public liberties, those approved by the Statutes of Autonomy and the general electoral system, and the others provided for in the Constitution”. The approval, modification, or repeal of constitutional laws require an absolute majority of the House of Representatives in a final vote on the entire bill.

^{IV} ‘The powers of the Scottish Parliament (and Northern Ireland Assembly) are framed so that all matters are within their legislative competence except for those that are reserved to the UK (in Scotland) or excepted or reserved (in the case of Northern Ireland). Therefore, they can do anything except what is expressly forbidden’ (Trench 2007a: 50-51).

^V ‘The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will



be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government' (MoU, para. 14)

^{VI} 'The process of the decentralization of the Spanish state has not ceased with the drafting and eventual enactment of the 1978 Constitution. It has been one of evolution, in which the regions have negotiated and renegotiated their statutes and competencies with the central government' (Giordano and Roller 2004: 2178-2179)

^{VII} 'The Shortcomings of the initial arrangements in which the Assembly, including the Administration, constituted as a single body corporate, were widely acknowledge, most notably in the Richard Commission Report published in 2004' (House of Commons 2009: 8).

^{VIII} 'The second Autonomy Agreement of 28 February 1992 subscribed to by the Spanish Socialist Party (PSOE) and the Popular Party (PP), and their translation into the Organic Law 9/92, of 23 December, through which the powers of several Autonomous Communities were broadened. The form and content of this legal-political operation provoked a long debate, not so much about the 'widening' but about the 'equalisation' of powers' (Fossas 1999: 4-5).

^{IX} 'Originally, the Labour government had intended the devolution project to be extended to English regions if there was popular support. Consequently, in May 2003, the Regional Assemblies (Preparations) Act was passed, paving the way for referenda to be held across England to gauge support for elected regional assemblies. In the event, following an unexpected 'No' vote in the first such referendum held in the Northeast of England, plans for English devolution effectively have been shelved' (Bulmer et al. 2006: 75-76)

^X 'Asymmetry runs through every clause and schedule of the devolution legislation, from the fundamentals of powers and functions down to the niceties of nomenclature (Hazell 2000: 268); 'it is very hard to generalize about what devolution means. It is different for each of Scotland, Wales and Northern Ireland, in many important respects. The devolution arrangements as a whole are profoundly asymmetric' (Trench 2007a: 55).

^{XI} Agranoff defines IGR as 'the working connections that tie central governments to those constituent units that enjoy measures of independent and inter-dependent political power, governmental control and decision making' (Agranoff 2004: 26); According to Bolleyer et al., 'the term 'relations' can refer to exchanges between governments, to patterns of interactions and to structures that channel government interaction' (Bolleyer et al. 2010: 3).

^{XII} 'In Spain only 4.8% of the policy areas (2 of 42) belong to this type of competencies; at the same time, country experts point out that concurrency in the Spanish case is much more pronounced than these figures indicate. In fact, referring to the importance of competencies, core jurisdictions, such as education and health, are concurrent' (Bolleyer 2006: 387).

^{XIII} 'The limited taxing power of the Autonomous Communities (ACs) and their dependency on grants provides a strong stimulus to co-operate with the centre. Accordingly, the two Spanish territories Navarre and Basque Country, which have more extensive taxing rights than the other ACs, participate far less in *convenios*, AC-federal agreements than do the other territories' (Bolleyer 2006: 389).

^{XIV} House of Lords Select Committee on the Constitution, 2003: 11.

^{XV} It has been commonly argued that 'symmetry is more conducive to multilateral interaction, regular co-decision and the institutionalization of IGR than asymmetry, which puts a strong premium on bilateralism and flexibility' (Bolleyer et al. 2010: 6).

^{XVI} As Giordano and Roller have noted, 'evolution in the UK is an ongoing process, which is why is vital to compare the experiences of other European countries that share longer histories of devolution and can offer potentially important insights for the future trajectories of change in the UK' (Giordano and Roller 2004: 2163).

^{XVII} Art. 103.1 SC: The Public Administration shall serve the general interest in a spirit of objectivity and shall act in accordance with the principles of efficiency, hierarchy, decentralization, deconcentration and coordination, and in full subordination to the law' (art. 103.1 SC).

^{XVIII} Art. 145 SC: The Statutes of Autonomy may provide for the circumstances, requirements and terms under which Self-governing Communities may reach agreements among themselves for the management and rendering of services in matters pertaining to them, as well as for the nature and effects of the corresponding notification to be sent to the *Cortes Generales*. In all other cases, cooperation agreements among Self-governing Communities shall require authorization by the *Cortes Generales*.

^{XIX} Constitutional Court Judgment 18/1982, of May 4.

^{XX} Articles 3.2 and 4.1 of the Law 30/1992 on the Legal System of Public Administrations and Common Administrative Procedure.



^{XXI} MoU, paragraph 2.

^{XXII} MoU, paragraph 4. In particular, ‘the administrations will seek: to alert each other as soon as practicable to relevant developments within their areas of responsibility, wherever possible, prior to publication; to give appropriate consideration to the views of the other administrations; and to establish where appropriate arrangements that allow for policies for which responsibility is shared to be drawn up and developed jointly between the administrations’ (MoU, paragraph 5).

^{XXIII} MoU, paragraphs 8 – 9.

^{XXIV} MoU, paragraph 12.

^{XXV} ‘The Knowledge Economy and Health formats met several times in 1999 and 2001, then simply stopped. (...) The poverty format also met several times in 1999-2000 then stopped, only to meet again in October 2002, announce an ambitious work program for the coming year, and then not meet again. In late 2002 there were plans, behind the scenes, for a format of the JMC for the Economy – but this has never met either. This pattern suggests that the chief factors behind such meetings are the concerns and priorities of UK senior ministers. If they can embrace the JMC in the service of one of their initiatives, well and good; if it does not serve that purpose, they will not use it’ (Trench 2007b: 166 – 167)

^{XXVI} ‘Intergovernmental relations consist of nothing other than ad hoc interactions triggered by the issues of the day (which usually arise in London rather than in the devolved capitals). It means that there is no setting to deal with one of the key functions of the JMC – to consider how non-devolved functions affect devolved matters and *viceversa*. Given the structure of the devolution settlement this is a serious absence; not only is it harmful in itself, but it sends a signal to Whitehall officials that such issues are unimportant. The informality of intergovernmental relations makes it all the harder to the devolved administrations to make their voices heard on matters which affect them but which at retained at UK level’ (Trench 2009: 131)

^{XXVII} MoU, paragraph 19

^{XXVIII} We should also mention that, because of the persistent economic crisis, the Spanish Government adopted a Royal Decree (*Real Decreto-ley 20/2012, de 13 de julio*) that has sensibly reduced the maximum amount of the financial help for the dependents’ care and has simplified the intergovernmental structures blending the Territorial Council of the SAAD with the preexistent Sectoral Conference of Social Services.

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**The Evolutionary Economic Implications of
Constitutional Designs:
Lessons from the Constitutional Morphogenesis of
New England and New Zealand**
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Abstract

This paper examines the constitutional morphogenesis of New England and New Zealand to determine the effects on their respective economic development—specifically in terms of economic complexity. New England had revolted against a dominion that limited the local autonomy of its colonies; alternatively, almost 200 years later, New Zealand abolished a quasi-federal provincial system in favour of a unitary state. Constitutional economics, through the works of its founding father, James Buchanan, is employed to explain the effects of these constitutional choices. The paper argues that empowering local government is the key to economic prosperity in a globalising world, where the role of the nation-state is increasingly marginalised. Nourishing local autonomy is important for constitutional aspirations.

Key-words

Subsidiarity, federalism, economic development, constitutional economics, globalisation



1. Introduction

This paper provides a comparative analysis of the constitutional instruments that prevailed in New England and New Zealand in the seventeenth and nineteenth centuries respectively. The hypothesis is that these constitutional choices had a lasting effect on economic development (*qua* economic complexity) in these jurisdictions. The analysis is grounded in the historical context of New England and New Zealand, and should not be interpreted as providing a general analysis on the effect of subsidiarity on economic development. It elaborates on James Buchanan's normative signals on the size of polities, and uses the economic complexity index, and the effect of globalisation on local governance, to advocate for subsidiarity as a guiding principle for constitutional designs in New Zealand.

New Zealand's early constitutional instruments were partly inspired by the New England colonies (Morrell 1932: 6):

[The New Zealand Company] believed the principle of individuality of settlement to be an important element in successful colonisation. In New England, the greatest colonising achievement of the Old Empire, which in many ways [the Company] took as their model, there had been at least five independent colonies ... established between the forty-first and forty-third parallels of latitude within a period of twenty years; and the social unity to which the [Company], like the Puritans of New England, attached great importance was merely another aspect of this principle of individuality?

This principle of individuality is closely related to the principle of subsidiarity; both are forms of bottom-up decentralisation through existing geo-social governance structures. This is especially relevant to the colonisation of both New England and New Zealand. Moreover, the analogy between New Zealand and New England aides understanding the rationale for introducing and abolishing a quasi-federal provincial system in New Zealand. Over time, the New England colonies evolved into states (subdivided into municipalities) under the (loose) control of a central council. This evolution was also envisaged for the



New Zealand colonies, at least by the New Zealand Company, as an optimal vehicle for systemic colonisation and hence economic development.

This analogy is strengthened not only by the relative similarity in size between New Zealand (268,000 square kilometres) and New England (187,000 square kilometres),¹ but also in the way their constitutional choices were influenced by Great Britain. In 1686, King James II introduced and appointed the office of Governor General to what he termed ‘the Dominion of New England’, which dispossessed the New England colonies of their colonial legislatures and placed power in the hands of the Governor General. However, these actions led to a rebellion, ending the Dominion only three years after it was introduced (1686–1689). Given the separatist movements in New Zealand (Wood 1965: 29; Herron 1959: 367), it is reasonable to suggest that abolishing the provincial system was intended to ensure a similar scenario would not materialise.

Early New Zealand constitutional instruments illustrate a clear commitment to localising legislative powers, at least within provinces. Later there was a shift towards centralisation. In New England, a similar shift was only short-lived. This commitment to local autonomy helps explain the differences in economic development, measured in terms of economic complexity, between the two polities (Hausmann *et al.* 2011).

The paper is structured as follows. Section two introduces the analytical lens through which I compare the merits of constitutional designs in New England and New Zealand. The following sections examine these designs in relation to two cases. Section five discusses further the economic implications. The paper ends with a call for making local autonomy a constitutional priority in New Zealand.

2. Insights from Buchanan’s constitutional economics

Defined broadly, constitutional economics involves the economic analysis of the law. It draws on the political economy of regulation, new economic history, the economics of property rights, and public choice—that is, it applies economics to political science (Buchanan 1987: 585).¹¹ I employ Constitutional Political Economy (CPE), the normative branch of constitutional economics, to understand how states *ought to be* constituted. For the purposes of this paper, I focus on insights from James Buchanan, the father of constitutional economics, on how polities *should be* constituted. Later in the paper, I use



these insights to analyse the constitutional evolution of New England and New Zealand between unitary and (quasi) federal choices.^{III}

CPE is based on the analogy between markets and politics (Buchanan 1991).^{IV} The exchange component of this analogy carries ‘relational’ tones. In a Foucauldian sense, power (and hence politics) is relational (Foucault 2000: 324). In markets, such relational tones are reserved to meso communities, and are beyond the micro of the individual or very small groups (Silberbauer 1993: 17–18).

Sovereignty, one possible form of power relations, is at the centre of CPE discourse (Macdonald and Nielsson 1995; Rabkin 2005: 38, 51). CPE (in Buchanan’s conception) does not accept the Hobbesian assumption of absolute sovereignty (Buchanan and Brennan 2000: 13–14). Nor does it accept the German tradition emphasising the organic nature of the state (Buchanan and Tullock 1962: 12).^V Instead, CPE follows the Roman model whereby the state never has a distinct personality (Buchanan 1991: 109). This Wicksellian idea is at the foundation of CPE: the state is the sum of its citizens (Wicksell 1994).

To understand the form of sovereignty endorsed by Buchanan’s CPE we need to look at the scalar calculus involved.^{VI} There is a relationship between the scale of a polity and its ability to afford its members’ choice in the decision-making process (Gussen 2013: 19).^{VII} In particular, there are two separate and distinct elements in the expected costs of any human activity (Buchanan and Tullock 1962: 43–44, 62, 107). The first are ‘external costs’ that an individual is expected to endure because of the actions of others (within his political group), and over which he or she has no direct control. The expected present value of these costs is downward sloping with respect to the number of individuals required to take collective action (Buchanan and Tullock 1962: 61). The second element in the expected costs of any human activity is ‘decision-making costs’, which the individual expects to incur because of his or her participation in organised activity. These costs are upward sloping (Buchanan and Tullock 1962: 65). The objective of political organisation is to minimise these costs. Figure 1 shows these costs. The group size increases to N , and this cost curve is shown in Figure 1 Panel I. When the size increases to \tilde{N} the limit cost (dotted line) will be higher than that for the size N group. However, the curve rise for the \tilde{N} group will be less steep. This can be attributed to the increased choices (options) from which a



consensus of N members of the group can be made. Hence, at N there is a lower cost under the larger group.

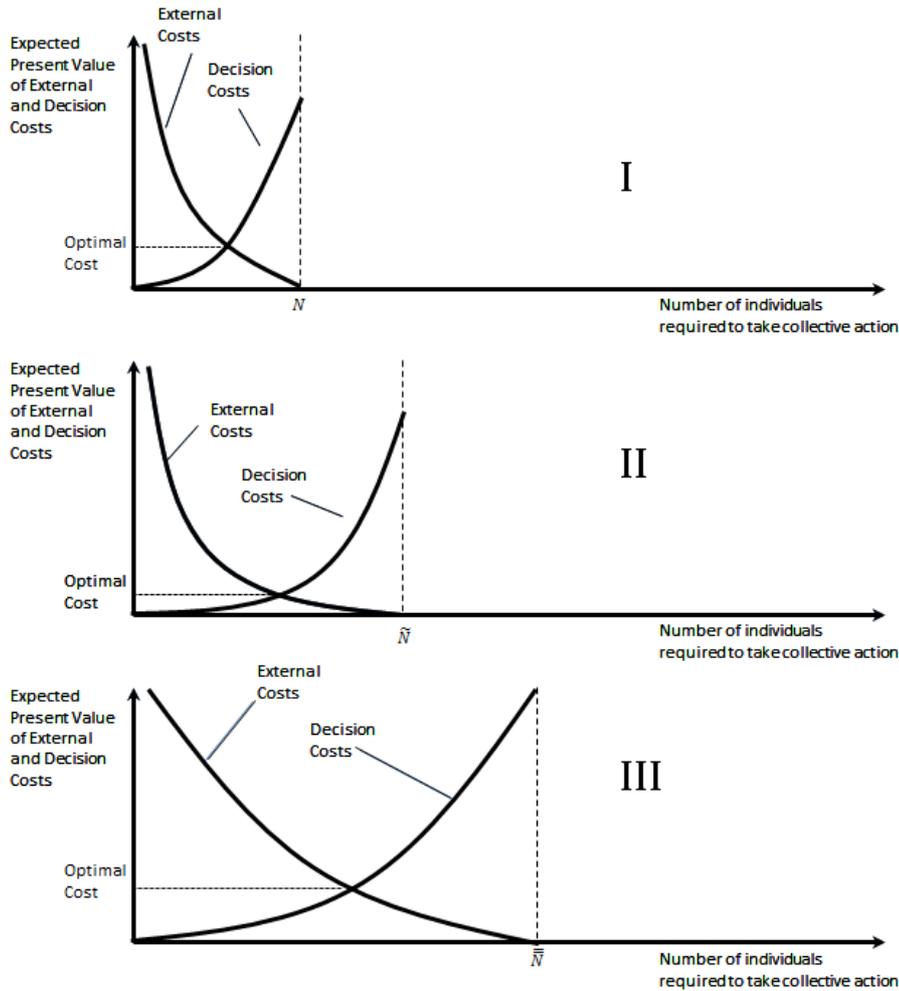


Figure 1: The External Costs and Decision-Making Costs Functions

Similarly, Figure 1 shows the external cost curves. The reason for the upward shift in these curves is similar to that for the decision costs—namely, the increase in uncertainty is due to the larger number of possible combinations (choices), which increases the costs for each group size.

As shown in Figure 2, these two effects produce a ‘smile’ curve, which suggests an optimal scale at which the expected present value of total costs is minimised. I will refer to this as the ‘optimal size’ for the political group.

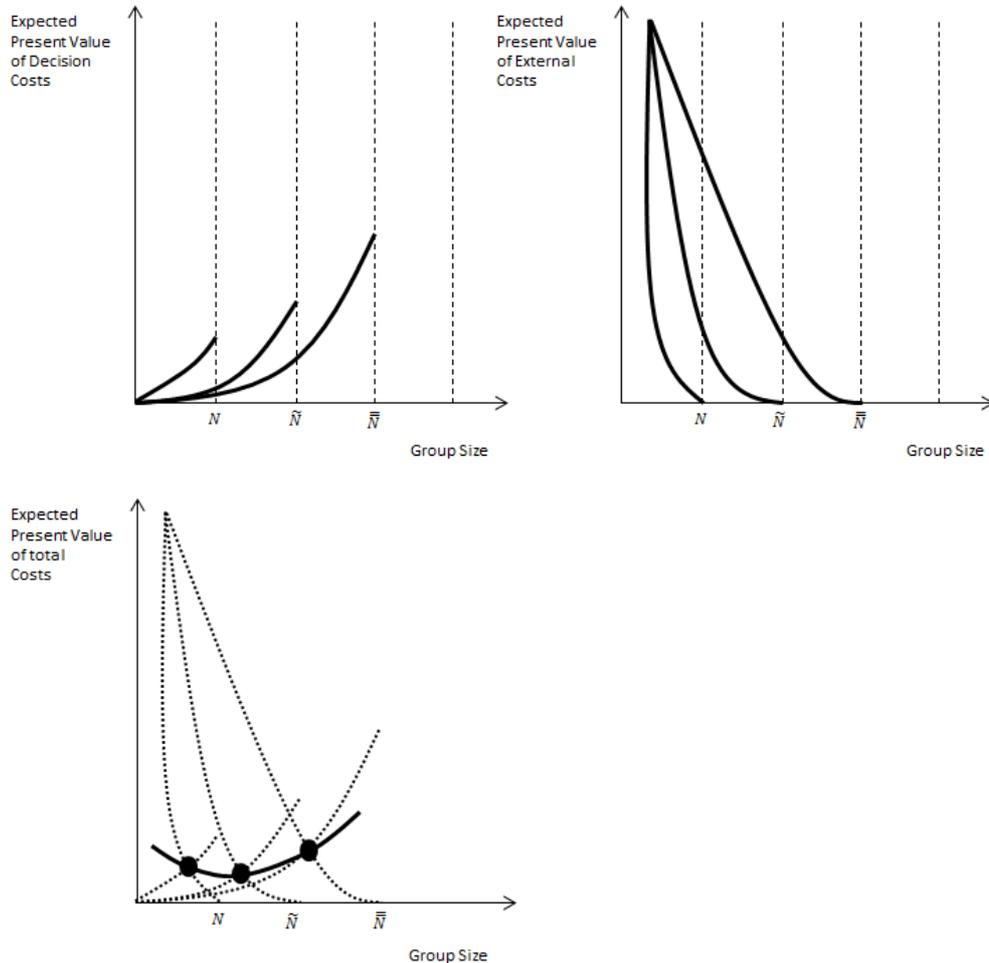


Figure 2: The Cost Curves as a Function of Group Size

The final analysis concludes with the following: ‘if the organisation of collective activity can be effectively decentralised, this decentralisation provides one means of introducing marketlike [sic] alternatives into the political process’ (Buchanan and Tullock 1962: 109). Therefore, ‘[b]oth the decentralisation and size factors suggest that, where possible, collective activity should be organised in small rather than large political units’ (Buchanan and Tullock 1962: 110).

CPE endorses the principle of subsidiarity, which has its origins in ancient Greece (Millon-Delsol 1992: 15; Gosepath 2005: 157 & 162; Floriani 2012: 82–83),^{VIII} as a form of



collective activities from the bottom up (Macdonald and Nielsson 1995: 10; Backhaus 1999: 136–8).^{IX} The difference between decentralisation and subsidiarity is that the latter includes an ethical rationale that goes beyond the economic ‘efficiency’ inherent in decentralisation theories (Breton, Cassone and Frascini 1998: 21).^X The principle places a constitutional responsibility on higher levels of government not only to enable the autonomy of lower levels, but also to provide these lower levels with necessary support (Herzog 1998, 482).^{XI} Under subsidiarity, decentralisation (and federalism) takes the shape of legislative powers at municipal or provincial levels. In other words, subsidiarity places decentralisation within existing geo-social structures.^{XII}

The inextricable relationship between subsidiarity and the state does not suggest complementarity between subsidiarity and sovereignty. On the contrary, sovereignty is subsidiarity’s polar opposite. Subsidiarity ‘does not reconstitute the sovereign state as the object of its concern. It explicitly contemplates intervention and assistance for the purpose of protecting human dignity’ (Carozza 2003: 58). While sovereignty implicitly gives permanence to the national scale, the strong version of subsidiarity removes that permanence (Hopkins 2002: 29).

Subsidiarity is a wider concept than federalism.^{XIII} One way of limiting sovereignty is by vertically dividing sovereignty between different levels of government and then attempting to centralise some functions at the federal level. The rise of the federal states as exemplified by the United States saw a shift in the analysis towards this possible *divisibility* of sovereignty.^{XIV} However, sovereignty can also be limited by local autonomy in a ‘quasi-federal’ arrangement where the central (federal) government continues to support lower levels of government. Under subsidiarity, there is a political exchange that sees a wide margin of local autonomy permeating multi-level governance structures.

CPE therefore emphasises limited sovereignty shared among small-scale jurisdictions. This confirms the concept as defined by Spinoza (Gussen 2013; Spinoza 1854; Buchanan and Tullock 1962). It is in opposition to Hobbesian sovereignty, which is absolute, and consequently cannot be shared or divided. Buchanan identifies the reality of the *Leviathan* state today with constitutional failure (Buchanan 1991: 2). He explains his idea of federalism as ‘diversity among separate co-operative communities, of shared sovereignty, of effective devolution of political authority and, perhaps most importantly, of the *limits on* such authority’ (emphasis in the original) (Buchanan 1991: 3–4). His use of ‘shared



sovereignty’ rather than ‘divided sovereignty’ is closer to a model of subsidiarity rather than federalism.^{xv}

To inhibit the overextension of government, others also suggest separate jurisdictions with some protected powers within a constitutional federation (Van den Hauwe 1999: 112). Where migration is facilitated between such separate jurisdictions, there are similarities with the Tiebout model in relation to sorting individuals according to their preferences (Tiebout 1956: 416). There are also parallels in the scholarship of Elinor and Vincent Ostrom. Elinor’s ‘nesting principle’, which refers to community-based environmental management at the local level, can be extended to larger scales through subsidiarity (McKean 2002: 80). For Vincent, polycentric ‘connotes many centres of decision-making which are formally independent of each other...[but] may be said to function as a “system”’ (Ostrom, Tiebout and Warren 1961: 831).^{xvi} However, both polycentricity and the nesting principle have a strong functional ‘taste’ largely divorced from the power calculus at the heart of divided sovereignty—that is, from capping jurisdictional footprints in a framework of non-contiguous states.

3. Subsidiarity in New England and New Zealand

This section considers the New England and New Zealand constitutional designs based on the normative signal discussed earlier. These are the New England Confederation and the Treaty of Waitangi. A historical reconstruction of these designs expounds their relevance to the principle of subsidiarity.

3.1. The United Colonies of New England (1643-1684)

The first experiment in supra-national integration in America was a loose confederation of four New England colonies (Plymouth, Massachusetts, Connecticut and New Haven), created in 1643 under the name ‘The United Colonies of New England’. The creation of the Confederation was nothing less than an act of absolute sovereignty on the part of the colonies (Palfrey 1865: 618). The Confederation originated in Plymouth and was probably inspired by the ‘Republic of the Seven United Netherlands’, which dominated world trade in the seventeenth century (Adams 1843: 31). The latter lasted from 1581 to 1795, when Napoleon set up a puppet state that later became the Kingdom of Holland. Each province



had its own legislative body and functioned independently. The supra-national government (*Staten-Generaal*) consisted of representatives of the seven provinces and was responsible for the common lands, which constituted only one fifth of the Republic's territory (Israel 1995: 276).

However, unlike the Dutch Republic, the chief purpose of the New England Confederation was security rather than trade—the ability to respond militarily to external threats from the Dutch, the French and the indigenous population. The Articles of Confederation stipulated a ‘perpetual league...for offence and defence, mutual advice and *succor* upon all just occasions both for preserving and propagating the truth and liberties of the Gospel and for...mutual safety and welfare’ (article 2; emphasis added). The objective was military cooperation in proportion to each colony's capabilities. The Confederation also dealt with the extradition of runaway criminals and servants (article 8).

Arguably, the Confederation had its origins in Puritan theology (Perue 2004), and the Confederation was a new version of the historical Puritan covenant doctrine (Miller 1961: 478). Parallels can be drawn between the logic of this union and the principle of subsidiarity, with its origins in similar ethical considerations.^{xvii} Johannes Althusius's writing (1557–1638) supports this argument, both on the principle of subsidiarity (in its territorial interpretation) and the covenant doctrine,^{xviii} as do the Articles of Confederation themselves, for these are in the spirit of subsidiarity as envisaged by CPE (see the previous section). A rule of assistance can be discerned in the preamble: ‘to enter into a present Consociation among ourselves, for mutual help and strength in all our future concernments’. Similarly, article 2 stipulates ‘mutual advice and succor’ (Thorpe 1909). Each colony maintained its independence in managing internal affairs. The colonies were willing to give up a limited amount of autonomy in exchange for improved security.

This Confederation was an evolutionary progression of *de facto* self-governance (Osgood 1902: 206). Isolated from England, New England colonies evolved representative governments through town meetings and deputy houses. Under the written constitution of the Confederation, each colony retained its local government. A rule of non-interference is evident in article 3 of the Articles of Confederation:^{xix}

‘It is further agreed that the Plantations which at present are or hereafter shall be settled within the limits of the Massachusetts shall be forever under the Massachusetts



and shall have peculiar jurisdiction among themselves in all cases as an entire body, and that Plymouth, Connecticut, and New Haven shall each of them have like peculiar jurisdiction and government within their limits?.

As discussed in the previous section, CPE posits a similar arrangement whereby jurisdiction is preserved at the local scale. Each of the six colonies had its own legislative powers and was sovereign in relation to internal affairs. A commission of eight men, two from each colony, ran the Confederation. A vote of six was required to carry a measure, and their vote was final (William 1904). The commission functioned as a legislative body, although its powers did not develop beyond making recommendations and overseeing administration. The ultimate power remained in the hands of the general courts, leaving the commission with no prospects of evolving legislative powers (Ward 1961: 60). This design aligns with that envisaged by CPE in terms of the bottom up approach to governance and the subsidiary role of central government (the commission).

3.2. The United Tribes of New Zealand and the Treaty of Waitangi (1840)

This section analyses the New Zealand Confederation of 1834 and the Treaty of Waitangi through the lens of autonomy. The analysis illustrates a commitment to distributed legislative powers in relation to the aboriginal population of New Zealand: the Māori.

The Confederation was a union between the Māori tribes in the North Island of New Zealand. Just like the New England Confederation, it came about through concerns of security and trade. Similar to the New England context, the French were considering part of the North Island for colonial expansion. With the help of the British Resident, James Busby, the tribes signed a Declaration of Independence (*He Wakaputanga o te Rangatiratanga*) in 1835; and, like the New England colonies, declared themselves sovereign. William IV recognised the Confederation in 1836.

The English text of the Declaration started with article 1, in which the tribes declared their independence and the independence of their state. The second article assigned '[a]ll sovereign power' to the Confederation exclusively. Article 2 explicitly stated that the Confederation:



‘will not permit any legislative authority separate from themselves in their collective capacity to exist, nor any function of government to be exercised within the said territories, unless by persons appointed by them, and acting under the authority of laws regularly enacted by them in Congress assembled’.^{XX}

Article 3 elaborated on the functions of the Congress, which included ‘the preservation of peace and good order’ and ‘the regulation of trade’. This article also invited the Southern tribes to join the Confederation. The fourth article went on to request William IV acknowledge the Confederation and its flag, and become its ‘Protector from all attempts upon its independence’. These two articles served as the basis for what became known as the Treaty of Waitangi, which expounded on the inclusion of the Southern tribes and the protection provided by the English monarch. Nevertheless, after the signing of the Treaty of Waitangi, the Confederation was largely assimilated into the settlers’ government, due largely to power imbalances between the tribes and the British settlers. Notwithstanding, the Declaration helped reconstruct the subsidiarity dimensions flowing from the Treaty (Moon 2002).

In New Zealand, the Declaration of Independence in 1835 played the same role as the Articles of Confederation of 1643 did in the New England context. Both were precursors to supra-national constitutional arrangements in the form of the Treaty of Waitangi in 1840 and the Declaration of Independence in 1776. The Articles of Confederation were a first step towards imagining a new American identity beyond the regional confines of New England (Conforti 2001). The Treaty of Waitangi was a similar extension of a novel concept of national identity towards Māori tribes in the South Island. It refined article 3 and 4 of the Declaration by delineating the architecture of New Zealand governance.^{XXI}

A teleological reading of the Treaty suggests that the Māori were to be given wide legislative powers, in line with the Declaration of Independence in 1835 (Gussen 2012).^{XXII} In the following, the praxis of this local autonomy is analysed as an example of the principle of subsidiarity (Millon-Delsol 1992).

The preamble to the English text of the Treaty deemed it necessary to recognise the British monarch as the New Zealand sovereign. This was ‘to protect [the] just Rights and Property [of Māori] and to secure them the enjoyment of Peace and Good Order’ and ‘to establish a settled form of Civil Government with a view to avert the evil consequences



which must result from the absence of the necessary Laws and Institutions'. Article 1 of the Treaty ceded the sovereignty as envisaged in the preamble; while article 3 confirmed that the sovereign 'extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects'. This accorded with the invitation issued to the English monarch under article 4 of the Declaration: 'to be the parent of their infant State,' and to 'become its Protector from all attempts upon its independence'.

This is an instance of a political exchange analogous to exchanges in markets under constitutional economics. The exchange is evident in the wording of article 3, which starts with the words '[i]n consideration thereof'. There is an exchange of sovereignty for a bundle of rights and privileges.

In article 2, the sovereign:

'guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess'.

The purpose of the Māori text of the Treaty was to provide a government while securing tribal autonomy; under article 1, Māori leaders gave the Queen 'te Kāwanatanga katoa', or complete government over their land.

In the Māori text, article 2 stated that Māori were guaranteed 'te tino rangatiratanga', or the unqualified exercise of their chieftainship over their lands, villages and all their property and treasures, echoing the language used in article 2 of the Declaration. Article 3 of the Treaty, similar to the English text, assured Māori people of the Queen's protection and all the rights (tikanga) accorded to British subjects.

The Treaty can be understood as emanating from the core principle of subsidiarity.^{xxiii} The transfer of sovereignty to the nation of New Zealand (under the British monarch) would have negated the possibility of territorial divisions enjoying state-like autonomy. However, this does not eliminate the possibility of subsidiarity as understood through its three sub-principles.



The first sub-principle of subsidiarity is the ‘rule of assistance’, which requires the central government to support local communities where they cannot perform the functions of governance. The Treaty referred to this positive aspect of subsidiarity in the preamble and in articles 1 and 3. The Treaty intended first to establish a central government that could ‘avert the evil consequences which must result from the absence of the necessary Laws and Institutions’ and then provide protection, peace and order. In this sense, the Treaty was intended to assist the local communities in carrying out their tasks.

Article 2 contains the second sub-principle, the ‘ban on interference’, in which ‘full exclusive and undisturbed possession’ and unqualified exercise of chieftainship was imparted to the Māori as representative of the local communities. The qualifier ‘undisturbed’ is a clear indication of the ban on any interference in the affairs of local communities.

The third sub-principle, ‘helping local governments help themselves’, occurs simultaneously in articles 1 and 2. The Treaty envisaged putting in place laws and institutions to help the Māori to help themselves in their ‘exclusive and undisturbed possession’ and their exercise of their chieftainship. This sub-principle emphasises the evolutionary and dynamic aspects of subsidiarity within which local governments improve their ability to govern over time.

An interpretation of the Treaty through the principle of subsidiarity reconciles the differences between the English and Māori texts. The possibility of ceding sovereignty to the British monarch does not distract from the intended subsidiarity platform; while it could be possible to have subsidiarity where the constitutional design envisages a divided sovereignty, it does not follow that where sovereignty is otherwise, there could be no subsidiarity. Through the principle of subsidiarity, the difference between the English and Maori texts is between a weak and a strong version of subsidiarity.

The local autonomy rationale of the Treaty of Waitangi flowed through to the design of New Zealand’s early constitutions of 1846 and 1852. In the following section I trace the centralisation efforts in both New England and New Zealand to demonstrate the approach and outcome in each jurisdiction.



4. Centralisation in New England and New Zealand

In 1643, delegates from Plymouth, Massachusetts Bay, Connecticut and New Haven, met in Boston and formed a confederation intended as a defence alliance. The Confederation was dissolved after the Massachusetts charter was revoked in 1684. In 1686, the Crown created a highly unpopular Dominion of New England. By 1689, the advent of the Glorious Revolution, *inter alia*, ended the Dominion. By 1754, another exigency for defence, the French and Indian War, would see these colonies consider the Albany Plan of Union, a proposal for a federated colonial government. This eventually led to the American Revolution.

Similarly, the 1846 and 1852 New Zealand Constitution Acts were intended to furnish a constitutional design in the spirit of the Treaty of Waitangi. Those who shaped these Acts called for local autonomy in the form of municipal corporations with wide legislative powers,^{xxiv} mimicking strong sentiments for autonomy in New Zealand in the 1850s (Morrell 1932: 15). The final designs, however, provided a ‘quasi-federal’ constitutional architecture for New Zealand (Morrell 1932: 2; Herron 1959: 1; Watts 2002).^{xxv} The ‘quasi’ qualifier is necessary as there was no formal division of sovereignty, and ‘the provinces were financially very much dependent on the General Assembly’ (Morrell 1932: 55–57). The Constitution was ‘quasi-federal’ in a way not very different from the British North America (BNA) Act 1867, which evolved into the Canadian federal system we know today (Mallory 1967: 127).

Section 4.1 below traces local autonomy, beginning with the shift from confederation to dominion in New England. Section 4.2 traces a similar shift through the creation and abolition of a quasi-federal system in New Zealand between 1852 and 1876.

4.1. The New England Dominion (1686-1689)

Just before the 1689 Glorious Revolution, the English government under James II believed its colonies had been granted too much latitude in observing the Navigation Laws passed in 1662 under Charles II (from the original ordinance of 1651). These laws restricted the use of foreign shipping for trade between England and its colonies to ensure that the colonies traded only with England or other English possessions. The laws also prohibited the colonies from manufacturing goods produced in the mother country. For



England, poor enforcement of these laws resulted in lost taxes and higher prices. The continuing military threat posed by the other European powers (especially France) was an additional reason to tighten control of the colonies.

To rectify the situation, James II supported a ‘royalisation’ of New England, and imposed the status of dominion, inspired by the French administrative model, an instrument for a *Leviathan*-style absolute sovereignty. The Massachusetts charter was annulled in 1684, in practice disestablishing the New England Confederation. In 1686, all the constituent units of New England were joined together in an administrative merger. Joseph Dudley served briefly as the first president of the Dominion (from May to December 1686), but was replaced by Sir Edmund Andros. In 1688, New York, East Jersey, and West Jersey were also added to the New England Dominion. The Dominion established a large jurisdictional footprint (*qua* territory), from the Delaware River in the south to Penobscot Bay in the north—in a reversal of the prior normative principle of small-scale jurisdictions discussed earlier in this paper. With the addition of New York and the New Jerseys, the Dominion was almost the size of the modern day Federal Republic of Germany (around 350,000 square kilometres) and double the size of the disestablished Confederation.

The Royal Governors wanted to centralise the legislative powers, which were in the hands of locally elected officials. The Dominion was to be governed with the assistance of an appointive council that was to replace the colonial assemblies. The colonies resisted this usurpation of their independence and liberties, and as a result efforts to consolidate the administration in the Dominion were unsuccessful. Dudley was unable to raise revenues in the Dominion due to the repeal of existing revenue laws by the colonies in anticipation of the revocation of their charters, and his inability to introduce new revenue laws (Barnes 1960: 59–61). Similarly, the lack of funding proved fatal to Andros’ efforts to unify colonial military responses.

The Dominion’s effect on economic growth in New England was disastrous. Between 1650 and 1680, there was a rapid increase in real wealth per capita, which stemmed primarily from increases to productive capacity and a rise in accumulated savings. However, the last three decades of the seventeenth century showed little or no growth (Anderson 1975: 171; Anderson 1979: 243). Given that the first step towards establishing the Dominion was in 1683, with the legal proceedings towards vacating the Massachusetts



charter, and that another charter for Massachusetts began operating only in 1692, I would suggest that the Dominion had a central role in slowing economic activity in New England. The 1680s saw the per capita income in New England drop to 25.5 English pounds sterling, compared to 39.5 in the motherland (Anderson 1975: 171).^{xxvi}

External forces precipitated the end of the Dominion. James II wanted to return England to Catholicism. When his Queen gave birth to a potential Catholic heir in 1688, his government invited Protestant Holland's leader William of Orange, who was married to James' daughter, to invade England and force James off the throne. The Revolution in England legitimised the overthrow of the Dominion. The Dominion collapsed with the removal of James from the throne in the bloodless revolution of 1688–1689 and the ensuing Puritan rebellion. The same Puritan ideals would form the intellectual heritage that imbued the American revolutionary era in the eighteenth century. The revolution that brought about the American constitution had its genesis in the regionalism exemplified by New England. It was the constitutional acknowledgement of the importance of regionalism that brought about what came to be known as the United States (Conforti 2001: 57–59).

In summary, the Confederation was a bottom up constitutional design: it emerged from its constituent parts and was only as dominant as the parts were willing to allow it to be. The Dominion was a top down design imposed externally to strip the colonies of autonomy and independence. Only the Confederation embodied the constitutional design norms I explained in the previous section.

While the colonial governments displaced by the Dominion returned to power, they were not to be formally united again until 1776, when as newly formed states they declared themselves independent in a larger (but not yet federalist) union called the United States. England never again attempted a large-scale unification experiment in the American colonies (Miller 1968: 459). However, a similar consolidation in New Zealand has endured over the last 138 years (from 1876 to 2014). The following elaborates on this constitutional development.

4.2. The New Zealand Provincial System (1852-1876)

In 1845, a speech by a British politician, John Arthur Roebuck, provided a clear articulation of the reasoning adopted by those advocating for centralised legislative powers:



‘New Zealand should govern itself, not by giving to it municipal powers...a course which would split the country into sections—into a north and South Island—which would make an Ireland and an England, a Rhode Island and a Connecticut, of it; but, if they kept the country one, with one central government, with a county administration, with no municipal, that is to say, with no legislative powers, then there would be a chance of governing the country well, and of rendering it prosperous’.^{xxvii}

Hence, when the Premier, Sir Julius Vogel, attempted to create a major afforestation plan for New Zealand, and encountered hostility from provinces unwilling to transfer lands to the General Government, he supported the abolition of the provinces and public opinion, made up largely of new settlers, sided with him. The call to abolish the provinces was debated in the General Assembly as early as 1871. This was finally enacted by the Abolition of Provinces Act 1876. By 1907, New Zealand, by Royal Proclamation, changed its name to reflect its dominion status. The royalisation process was complete in 1953 when the British monarch proclaimed a separate Royal Title for use in New Zealand.

There are no accurate figures on the real wealth per capita in New Zealand before and after the abolition. However, the following excerpt provides an understanding of the effect, describing how one of the most prosperous provinces at the time, Otago, located in the South Island of New Zealand, would be affected (McIndoe 2014: 86):

‘Another effect will be that those Provinces which have been making the greatest strides in prosperity and advancement will be checked, and brought to a stand-still in their career. Otago will be by far the greatest sufferer ... till now it stands far before any of the rest, both as regards population, revenue, commerce, productions, industries, and institutions, so that by the entire removal of its own affairs from its own territory to a distant and jealous centre, there will be a re-action on its prosperity to a greater extent than on any other of the Provinces’.

In 2001, the nominal per capita figure for Otago was around 25,000 New Zealand dollars,^{xxviii} well below the national average of around 31,000. The regions that had the highest per capita were in the North Island.

Arguably, New Zealand was suffering from problems that necessitated the introduction



of the provincial system only as an *interim solution*.^{xxx} In the 1850s, there was insufficient settlers able and willing to make politics a profession (Wood 1965: 1, 64–65). Moreover, New Zealand's social fabric was rapidly changing (Morrell 1932: 263), and the concept of provincialism became insufficiently rooted in, and supported by, the new settlers. Soon afterwards, the public developed a strong sentiment that the provinces should be abolished.^{xxx} These demographic changes also fomented a (perceived) risk of political fission (Wood 1965: 29, 367). Additionally, well-documented transportation problems facing the first New Zealand Parliament (Wood 1965: 37; Herron 1959: 389) and communication technologies available at the time meant that in the early stages of New Zealand's colonisation, it was difficult to keep settlers abreast of intended legislative measures. Later, technological advancements made it feasible to govern through a central government.

The reason often given for the abolition of the provincial system is public finance (Attard 2012: 101), and it is conceded that the provinces' large-scale borrowing precipitated the budget deficits. However, there is also an argument to be made regarding the General Government's role in this financial instability. When the General Government intervened, through the Provincial Audit Act 1866, to take a more active role in regulating provincial borrowing and expenditure, it left many provinces dependent upon hand-outs. A closer look at provincial finances shows that financial difficulties were due to the '[General] Government's borrowing policy that provided both the incentive to and the means of indulging in the land-gambling which caused the private debts' (Condliffe 1959: 33). Moreover, the abolition was not a panacea for the financial difficulties New Zealand was facing at the time. In particular, it did not result in the promised savings nor changed the need for subsidies to local bodies (Morrell 1932: 252).

Today, New Zealand has a three-tier governance structure under the Local Government Act 2002 and its amendments, where the authority of the central government creates regions. Local government in New Zealand has only the powers conferred upon it by Parliament (Local Government Act 2002). These powers have traditionally been distinctly fewer than in some other countries. For example, police and education are run by central government, while providing low-cost housing is optional for local councils. Many councils once controlled gas and electricity supply, but nearly all of that was privatised or centralised in the 1990s.



5. The Economic evidence today

The reason for the creation of the New England Dominion has strong parallels with the abolition of the New Zealand provinces—even with the New Zealand we know today:

‘A trend toward a closer control of [New England] by England appeared in the Revenue Act of 1673...A single government...would be far less expensive to England than the maintenance of six or eight separate colonies...if England established a uniform, all-powerful government over [New England,] its resources might be developed so as to divert the people from manufacturing and foreign trade. They might develop lead and copper mines and produce hemp and naval stores, thus obtaining staple raw materials that could be exchanged directly for English manufactures’ (Curtis 1963: 297; Barnes 1960: 29).^{xxxI}

This analysis partially explains why New Zealand never excelled in manufacturing. The New Zealand colonies carried out independent trade with Great Britain but had little trade between them (Morrell 1932: 13). Their trade was largely in whaling, sealing and timber (Condliffe 1959: 16). For the period from 1853 to 1873, 95 per cent of total exports came from forestry, agriculture, gold mining and pastoral development. Gold mining alone accounted for 60 per cent of the exports, while agricultural products accounted for 30 per cent (Condliffe 1959: 516). To this day, machinery constitutes less than two per cent of all New Zealand exports (Hausmann *et al.* 2011: 259). In contrast, New England exports consist mainly of weapons and machines (US Department of Commerce 2002).

The provincial system was intended to ensure New Zealand’s successful colonisation. After its abolition, other forms of local government were instituted to ensure the same outcome. It does not take a huge leap of faith to see that what came to be known as ‘economic development’ is an extension of colonisation (Nafziger 2012; Galbraith 1964; Blair & Carroll 2009). Both aim to grow the economic activity in a given locale to improve its standard of living. Both require an empowerment of ‘meso’ levels of political organisation that modulate the power between the individual and the nation-state.

Today New England has a GDP of around one trillion US dollars, compared to a GDP



of USD 125 billion for New Zealand. The New England per capita is around USD 66,000 compared to USD 35,000 for New Zealand. In terms of the Economic Complexity Index (ECI), New Zealand is ranked 42th (in 2012), below Turkey and above Bosnia and Herzegovina (Hausmann *et al.* 2011); by comparison, the New England economy is seven times larger than that of New Zealand, and being a microcosm of the US economy, it ranks twelfth in the world in terms of economic complexity (Hausmann *et al.* 2011).

External factors promoted the constitutional designs in New England and New Zealand. Today globalisation (*qua* economic integration) is ushering in a new era of local autonomy. Globalisation encompasses a complex array of factors, including economics, technology, cultural convergence and indigenous renaissance. But it carries a common denominator of increased mobility and dependence across the globe. The 2008 Global Financial Crisis (GFC) attests to this dynamic of complex interrelations between nation-states. Decision making is migrating towards supra-national organisations. The widely held belief is currently that nation-states are unable to tackle issues that have ramifications on a global scale; climate change is a prime example. Globalisation hence provides a normative signal of weakening national sovereignty (Lee 2006: 29). Instead the increased integration is proceeding through nodes of urbanisation—alpha and beta cities that are functioning as connectors in a global network (Sassen 1991; Kearney 2012), and where citizens are embedding decision making in local structures.

Some argue, however, that states never enjoyed complete sovereignty, and that the concept of sovereignty itself is too nebulous to suggest that sovereignty *per se* is undermined (Krasner 1999: 34). The claim that sovereignty is being undermined by globalisation is usually made through an analysis of its effect on Westphalian sovereignty as a benchmark. In particular, the claim is that the universality of human rights discourses promoted by globalisation has brought the Westphalian system under unprecedented assault. However, historically (from the middle of the seventeenth century to the first part of the nineteenth century) external scrutiny of sovereignty is evidenced, specifically through concerns about religious tolerance (Krasner 1999: 43; Helleiner and Gilbert 1999: 151-152).

A more convincing argument is that sovereignty is not the absolute it used to be (Loughlin 2006: 107–8; Buchanan and Tullock 1962: 301). It is now relative, divided and shared. A large body of literature suggests that the nation-state is not the best organisational level for socio-economic activities—the nation-state is obsolete and is no



longer the optimal unit for organising economic activity (Ohmae 1995; Guehenno 1995; Chernilo 2007; Smith, Solinger and Topik 1999). A decentralised political community would better meet heterogeneous individual preferences (Buchanan and Tullock 1962; Hayek 1983; Bell 1991; Barnett 1998). A new conception of the nation-state has emerged: the state as a network (Agnew and Corbridge 1995: 89; Allen and Cochrane 2007: 1161; Morgan 2007: 1238). Here the emphasis is on maximising constitutional options rather than deciding among constraints (Frey and Eichenberger 1999).

Such non-contiguous states are at the centre of Spinoza's discourse (Prokhovnik 2001: 300–1; Spinoza 1951: 347–8, 356–7, 370, 383, 384). Buchanan echoes Spinoza when he explains his idea of *federalism* as 'diversity among separate co-operative communities, of shared sovereignty, of effective devolution of political authority and, perhaps most importantly, of the *limits on* such authority' (Buchanan 1990: 3-4) (emphasis in the original). Buchanan envisaged a 'federal union within which members of separate units cooperate' and share sovereignty, where constitutional requirements guarantee free trade, and with a monetary constitution based on competing national currencies. However, Buchanan was clear that the European Union should not follow the centralised US model in the post-Lincoln era (Buchanan 1990: 6, 17). Specifically, Buchanan warned that '[e]xcessive Europe-wide regulations, controls, fiscal harmonization, fiat-issue monopoly...would...destroy much of the gain that economic integration might promise' (Buchanan 1990: 18).

The evolving global importance of local governments 'manifests itself in international legal documents and institutions, transnational arrangements, and legal regimes within many countries' (Blank 2006: 264). Localities are now given domestic jurisdiction based on international law instruments.^{xxxiii} International organisations such as the World Bank and supra-national entities such as the European Union (EU) promote subsidiarity. A new world order is evolving in which local governments are becoming the key actors on the 'international' stage (Blank 2006: 269). This trend is increasing the need for coordination between localities and suggests a growing need for local governments to have a say in creating and adjudicating 'international norms' (Blank 2006: 272-273). The question now is 'who will grant [localities] the global "charter" to incorporate, and under what conditions?' (Blank 2006: 278) The principle of subsidiarity and Spinoza's rendition of sovereignty could provide the platform for answering this question.



6. Conclusion

The paper promotes local autonomy as a backbone for constitutional design based on economic considerations, and as delineated in the constitutional evolution of New England and New Zealand.

Normative signals from constitutional economics (in Buchanan's conception) endorse small jurisdictional footprints (territories) where sovereignty is shared in an Althusian strand of subsidiarity based on existing geo-political communities and inspired by Puritan theology. Signs of these signals are evident in the Articles of Confederation of 1643 and the Declaration of Independence in 1835. The Declaration played a role in New Zealand analogous to that played by the Articles of Confederation in the United States. Both instruments led to imagining new supra-national identities in the form of the Treaty of Waitangi in 1840 and the Declaration of Independence in 1776.

Unfortunately, New Zealand abandoned a semi federal provincial system in 1876 in favour of a unitary state, whereas a similar attempt for centralisation was successfully resisted in New England (1689). The economic ramifications can be ascertained in that historical context, but more so today. A comparison between the economic complexity of New England and New Zealand (as a proxy for economic development) provides evidence as to the contra-evolutionary effect of the dominion option followed in New Zealand.

Today, there is a growing emphasis on local autonomy. In New Zealand, this suggests giving increasing power to local governments. Moreover, it is argued that the introduction and subsequent abolition of the provincial system were largely driven by external considerations. The whole experiment exemplified a pragmatic approach to constitutional change. If this proposition is correct, New Zealand is heading to another constitutional change driven by external considerations. This time, globalisation would see a shift of power from the central government towards municipal governments, resulting in an arrangement similar to that envisaged under the *original* 1852 constitutional design—that is, municipal corporations with wide legislative powers.

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^I The North Island alone is around 114,000 square kilometres, while the South Island is around 150,000 square kilometres.

^{II} For a better understanding of constitutional economics see Leipold 1990: 47, Tiebout 1956, and Ostrom, Tiebout and Warren 1961.

^{III} My reference to CPE should be limited to the works discussed in this paper, saliently the works by James Buchanan.

^{IV} See also Buchanan 1990. Also of interest is Hayek 1976, Wiebe 2010, Long 2008, and Wiseman 1990. There are important insights on the scalar anchor in Buchanan's works from his *Economic Theory of Clubs*. These however will need to be addressed in a separate paper. For my purposes here I focus on his contribution to constitutional economics. For a review article on Club Theory see Sandler and Tschirhart 1997, and Buchanan 1993: 69.

^V See generally Chapter 2. See in contrast Udehn 2001: 100, and Weber 1981: 159. See also Bodin, 1955 [1576]: IV, 6. Contrast with the work by Vincent Ostrom where not every decision by the individual is voluntary; where in the post-constitutional phase 'self-governing institutions can exercise authority over members'. See for example Herzberg 2005: 191. Also refer to Buchanan 1991: 40 (ft 13).

^{VI} I delineate the arguments based on the work by James Buchanan and others.

^{VII} For a more theoretical treatment see also Friedman 1990, and Kohr 1978: 59.

^{VIII} Note that subsidiarity is not limited to any particular number of levels of government. A useful account of subsidiarity can also be found in Evans and Zimmermann 2014.

^{IX} In the context of Catholic teachings, see Leo XIII 'Rerum Novarum: Encyclical Letter on Capital and Labor' (May 15, 1891) in Carlen 1990a: 250–251, para 36; Pius XI 'Quadragesimo Anno: Encyclical Letter on Reconstruction of Social Order' (May 15, 1931) in Carlen 1990b: 421 at paras 79–80.

^X For a more radical view see also Livingston 1996.

^{XI} See also Carozza 2003. For a critique of the principle of subsidiarity in the context of the European Union see Kirchner 1998.

^{XII} Other salient models leading to similar conclusions include Dahl and Tufte 1974; Ostrom, Tiebout and Warren 1961; and Tiebout 1956. For the closely connected principle of polycentricity see Aligica and Tarko 2012.

^{XIII} This explains why the US and Australia constitutions do not make provision for local government.

^{XIV} See *Chisholm vs. Georgia*, 2 Dallas 435 (1792), and Merriam 1900: 163 for other pronouncements by US Courts. See also Jackson 2006: 21.

^{XV} See also Wagner 2002: 115 and 120. On the mutual exclusivity between liberal and social democracies refer to 116. See also Augustine 1958; Hayek 1983: 46; Wagner and Gwartney 1988: 32 and 35. Jane Jacobs suggests city-regions as the appropriate territorial footprint. See generally Jacobs 1984 and Hayek 1967.

^{XVI} Also see the analysis in Wagner 2005.

^{XVII} For a detailed account of the theological origins of subsidiarity, and for its counterpart in Calvinism, see Van Til 2008.

^{XVIII} See Friedrich 1932. See also the subsidiarity taxonomy provided by Føllesdal 1998. See also Endo 1994.

^{XIX} Available at the Lillian Goldman Law Library, The Avalon Project, Yale law School (10 September 2014) http://avalon.law.yale.edu/17th_century/art1613.asp.

^{XX} The Articles of Confederation of the United Colonies of New England, Lillian Goldman Law Library, The Avalon Project, Yale law School (10 September 2014) http://avalon.law.yale.edu/17th_century/art1613.asp.

^{XXI} The nature of the relationship between the Treaty and the Declaration is currently under review by the Treaty of Waitangi Tribunal, under the *Te Pāparahi o te Raki inquiry* (Wai 1040), filed by Nga Puhū iwi of Northland in 2010.

^{XXII} This analysis takes a wide interpretation of Māori as representing all local communities in New Zealand.

^{XXIII} Subsidiarity is also evident in Treaty of Waitangi jurisprudence. The principles that emanated from *New Zealand Māori Council v. Attorney-General* [1987] 1 NZLR 641 all emerge from the principle of subsidiarity. I do not pursue this point in detail in this paper, preferring instead to leave this to future enquiry. For the sub-principles of subsidiarity see for example Gosepath 2005: 162, Floriani 2012: 82–83.

^{XXIV} Morrell 1932: 22. See also the views of Sir Robert Peel and Lord John Russell (19 June 1845) 81 GBPD HC 934 and 950, and Sir John Pakington (2nd Baronet) (4 June 1852) 122 GBPD HC 18.

^{XXV} According to Watts, quasi-federalism is where 'the overall structure is predominantly that of a federation but the federal or central government is constitutionally allocated some overriding unilateral powers akin to



those in unitary systems that may be exercise in certain specified circumstances' at xx.

^{xxvi} Note that per capita income here is synonymous with per capita GDP.

^{xxvii} (30 July 1845) 82 GBPD HC 1236.

^{xxviii} Statistics New Zealand figures.

^{xxix} Similar arguments can be seen in relation to the role of concurrent powers under s51 of the Commonwealth of Australia Constitution Act 1900 (Imp).

^{xxx} (23 July 1875) 17 NZPD HC 50.

^{xxxi} See also Nettels 1963: 263, and Barnes 1960: 29.

^{xxxii} *Lee v. Hudson (Ville)* [2001] 2 SCR 241.

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