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Exploring Subnational Constitutionalism: A Special Issue

by

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(eds.)

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Abstract

This special issue of the journal is entirely devoted to subnational constitutionalism. To do so, it tries to adopt a comparative and interdisciplinary perspective and to identify constitutional patterns in those federal or regional contexts where subnational polities do not have a legal document formally called “constitution”.

Some contributions have a national focus (on Belgium, Spain, Germany, Argentina, Ethiopia, and Macao). Other pieces, instead, consider the phenomenon from a comparative perspective, focusing on the external relations of subnational polities, the distinctive aspects of legislatures and legislative power at this institutional level, and the role of ordinary and constitutional judges.

Key-words

Subnational constitutionalism, Comparative constitutional law, Comparative federalism



It is a pleasure for us to edit this special issue of Perspectives on Federalism which is entirely devoted to subnational constitutionalism.

Subnational constitutionalism, in the words of one of the most important scholars in this field “is nothing more than the application of the principles of constitutionalism at the subnational level. An ideology of subnational constitutionalism accordingly 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”¹ irrespective of the institutional form of the polity (whether federal, confederal, regional, etc).

Subnational constitutionalism differs from the traditional definition given to federalism with regard to the “form” of the discipline concerning the protection of the constitutional goods protected at subnational level and insists on the distinction between constitution and constitutionalism.

In other words: one may have subnational constitutionalism even in contexts where the subnational units (or polities) do not have a document formally called “constitution” (history is full of examples: Spain, Italy, Belgium etc). Another interesting distinction can be found: on the one side, there can be subnational fundamental charters that have constitutional ambitions without a formal constitutional status in the legal system, as happened in Italy or Spain. On the other side, there may be no legal documents at all, as is the case of (federalized) Belgium.

Of course subnational constitutionalism requires at least “autonomy” (sovereignty seems to us a quite nostalgic notion in times of global interactions and interdependence) but it may be found even in contexts that are not *stricto sensu* federal. The rise of regional identities clearly plays a crucial role in the development of these processes, as Ilenia Ruggiu argues in her contribution.

Starting from this assumption we gathered a good number of interesting contributions aimed at exploring this phenomenon from different angles and covering many geographic varieties (Africa, Asia, Europe, America(s)). We also collected some contributions whose primary goal is to look into the topic from a comparative perspective.



The chemistry given by this combination seems to us promising and we hope that this special issue may contribute to focus attention on a scholarly trend which is indeed growing even beyond the US.

We also had the honour to have an Introduction to this issue written by Prof. Robert Williams, Convenor of the IACL (International Association of Constitutional Law) research group on “Subnational Constitutions in Federal and Quasi-Federal Constitutional States”: it is indeed a pleasure and we would like to thank him also for his support to this initiative.

As said at the beginning, one of the crucial questions addressed in this issue concerns the possibility to talk about subnational constitutionalism in contexts that are not characterized by a real “constitutional power” and the contribution by Patricia Popelier – devoted to the Belgian context – address this question by challenging some established views in this field.

Spain and Italy are another two examples of this trend: in these legal orders the substate entities do not have fully fledged “constitutions” but despite this, their Basic Laws (that have experienced a round of reforms recently) are full of references to very demanding concepts like “fundamental rights” and “identity” (see again Ruggiu’s piece).

Another important point is how the original federal model – entrenched in the 1787 Constitution of Philadelphia – was “exported” to Latin America. Ricardo Ramírez Calvo provides us with an analysis of the specific features of Argentine federalism and provincial constitutionalism, their similarities with the U.S. model and some possible reasons for their eventual lamentable operation.

Another feature of the literature in this field concerns the “cases” normally taken into account (US, Switzerland, to a lesser extent Canada, and other federal countries), while in this issue we are going to deal with other interesting – but usually neglected – experiences: African federalisms and Macao are emblematic from this point of view, as Yonatan Fessha and Paulo Cardinal and Yihe Zhang show in their excellent pieces.

The former presents subnational constitutionalism as a “method” to improve the protection of national minorities, addressing the question of whether “the institutional design of states can be used to respond to the challenges of minorities within minorities”.



In the latter contribution the Authors investigate the nature and content of the Basic Laws of Hong Kong and Macau, which serve as subnational constitutions in these unique post-colonial contexts, offering a very detailed account.

As for the disciplinary aspect, we have tried to avoid an exclusively legal focus. That is why one of the best-known cases of subnational constitutionalism – *Landesverfassungen* in Germany – has been dealt with by two political scientists, Astrid Lorenz and Werner Reutter, who have written a very interesting contribution on the “waves” of constitutional politics in the German *Länder*.

Another focus in this special issue consists of the attention given to some selected matters that have been traditionally neglected at subnational level: the essay by Cristina Fasone is emblematic in this respect since it offers a fresh view on the theme of the balance of powers, particularly between the Legislative and the Executive branches, and the frame of government.

Katia Blairon’s contribution deals with the particular features of legislative power in sub-national contexts, arguing that “the definition of the various characteristic elements of this legislative power influences the extent of regional constitutional power” itself.

Another subject worthy of analysis is undoubtedly that of the external power of subnational entities. Actually, “foreign affairs have been traditionally seen as an exclusive competence of the central governments”, as Skoutaris writes at the beginning of his comparative overview focusing “on the treaty-making powers of the sub-state entities, the mechanisms that allow their participation in the foreign policy making of the central government and the implementation of the international treaties”.

The last part of this issue is devoted to the role of judges in contexts of subnational constitutionalism with the essays written by Giuseppe Martinico and Giacomo Delledonne.

The first piece analyses the role of lower courts in cases of conflicts between the principles of the subnational level and the constitution. The idea is that consistent interpretation may have a crucial role in solving the issue of legal conflicts.

The second piece, instead, focuses on Constitutional Courts, analyzing the role of constitutional review and constitutional enforcement within subnational legal orders and its significance to the meaning of subnational constitutionalism and its fitness to be meant as subnational constitutional law.



¹ Gardner 2007: 3

References

- Gardner James A., 2007, “In Search of Sub-National Constitutionalism”, paper presented at the 7th World Congress of the International Association of Constitutional Law, available at <http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop11/Gardner.pdf>.