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## Subnational multilevel constitutionalism

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## 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<sup>I</sup> or the EU.<sup>II</sup> 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.<sup>III</sup> 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.<sup>IV</sup>



## 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<sup>V</sup> 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,<sup>vi</sup> 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<sup>vii</sup> 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: Vandenbruwaene 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.<sup>VIII</sup>

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.<sup>IX</sup> Under the Constitutional Reform and Governance Act 2010 the UK government can ratify treaties without the approval of Parliament.<sup>X</sup> 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).<sup>XI</sup> 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).<sup>XII</sup> While this procedure, with its referendum requirement, implies a



limitation of the principle of parliamentary sovereignty in favor of the public,<sup>xiii</sup> 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”.<sup>xiv</sup> 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.<sup>xv</sup> 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.<sup>xvi</sup> However, if the UK and devolved parliaments have different points of view, the UK Parliament has the final say.<sup>xvii</sup>

### 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).<sup>xviii</sup> 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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<sup>1</sup> 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.



<sup>II</sup> 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.

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

<sup>IV</sup> For a list of factors, see Anderson (2004: 7-10).

<sup>V</sup> 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.).

<sup>VI</sup> 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.

<sup>VII</sup> 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.

<sup>VIII</sup> 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.

<sup>IX</sup> The devolved entities, however, can conclude so-called 'cooperation agreements' with other subnational entities.

<sup>X</sup> 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.

<sup>XI</sup> 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.

<sup>XII</sup> Again, Section 4 enumerates the circumstances which entail a referendum lock. Section 3 (4), provides for an exception.

<sup>XIII</sup> 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).

<sup>XIV</sup> Memory of Understanding and Supplementary Agreements, March 2010, Section B.4.3. of the Concordat on co-ordination of EU policy issues, Common Annex.

<sup>XV</sup> Memory of Understanding and Supplementary Agreements, March 2010, Section A.1.9 of the Agreement on the Joint Ministerial Committee.

<sup>XVI</sup> 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.

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

<sup>XVIII</sup> 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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