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Re-exploring subnational constitutionalism

by

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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.

² Williams 2011: 1125 f.

³ Wiseman 2010.

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