



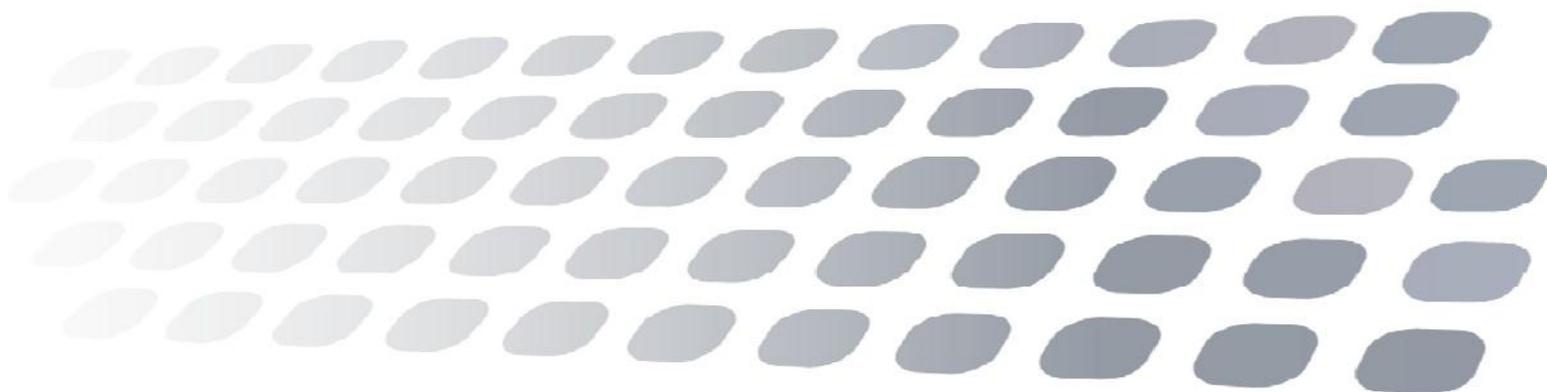
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PERSPECTIVES ON FEDERALISM



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## Foreword: Taking Subnational Constitutions Seriously

by

Robert F. Williams\*

Perspectives on Federalism, Vol. 4, issue 2, 2012



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I



## **Abstract**

Subnational constitutions are constitutions within constitutions. They constitute governments that work within larger, national governments. Their characteristics, the subject of comparative study, differ in each federation.

A group of younger scholars such as Giuseppe Martinico and Giacomo Delledonne have picked up the cause and are bringing new life to the scholarly enterprise, as indicated by this Special Issue. Many of those appearing in this Special Issue have not published, at least in English, on the topic before.

## **Key-words**

Sub-national constitutions, special issue, subnational constitutionalism



Giuseppe Martinico, Giacomo DelleDonne and *Perspectives on Federalism* are to be commended for taking subnational constitutions seriously. Federal states in many instances utilize two different kinds of constitutions: federal (national) and subnational. Until recently, scholars of federalism, constitutional law and comparative constitutional law have followed an exclusive focus on the national constitutions of these federal states. What about the subnational constitutions of Länder, cantons, provinces, regions and states? These are real constitutions too, and only now are receiving long-overdue scholarly attention. This Special Issue will make a major contribution to this new branch of comparative constitutional law.

Subnational constitutions are constitutions within constitutions. They constitute governments that work within larger, national governments. Their characteristics, the subject of comparative study, differ in each federation. First, each country that permits or authorizes its component units to adopt their own constitutions will vary in the amount of “subnational constitutional space” that it permits or recognizes.<sup>I</sup> Such space may be quite wide, as in the United States, or quite narrow, as in South Africa. Subnational constitutional space is demarked both by the texts of national constitutions and by authoritative interpretations thereof, and can change over time. In other words, this space or competence can be expanded or contracted through constitutional amendment to the national constitution or changing interpretations of it.

Next, within each of these countries the extent to which the component units actually utilize their subnational constitutional space, and how they utilize it to adopt their own constitutions will vary. Therefore, even within a single federal state the subnational constitutions may reflect wide differences in their content, the processes for their adoption and amendment, and mechanisms for their interpretation. Some component units may not even adopt constitutions at all even though they have such competence. In addition to such variation within federal states, there is also great variation across federal states. All of these features have been ignored in the past, with very few exceptions.

Now, after years where comparative constitutional law and federalism scholars analyzed only national constitutions, the fledgling subfield of comparative subnational constitutional law is emerging.<sup>II</sup> A group of younger scholars such as Giuseppe Martinico and Giacomo DelleDonne have picked up the cause and are bringing new life to the scholarly enterprise,



as indicated by this Special Issue. Many of those appearing in this Special Issue have not published, at least in English, on the topic before.

Comparative research and analysis of subnational constitutions is important because political interest in regionalism is increasing with the pace of globalization. There are, of course, other forces that may push in the other direction, causing a simultaneous reduction in importance of subnational constitutions.<sup>III</sup> Still, these constitutions are the highest form of law within subnational, component entities. There are important lessons to be learned from a comparative study of their characteristics. Those of us who pursue these studies will have will have to master the methodologies of comparative constitutional law, modified to fit the analysis of subnational constitutions.<sup>IV</sup> This special Issue is the next important step in the development of this sub-field of comparative constitutional law.

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\*Distinguished Professor of Law, Rutgers University School of Law, Camden, New Jersey; Associate Director, Center for State Constitutional Studies, [camlaw.rutgers.edu/statecon/](http://camlaw.rutgers.edu/statecon/); Convenor, International Association of Constitutional Law Research Group on Subnational Constitutions in Federal and Quasi-Federal Constitutional States.

<sup>I</sup> Williams - Tarr, 2004.

<sup>II</sup>Williams, 2011.

<sup>III</sup>Gardner, 2008.



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<sup>IV</sup>Williams, 2011, 1109-1110.

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PERSPECTIVES ON FEDERALISM



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# Exploring Subnational Constitutionalism: A Special Issue

by

Giacomo Delledonne and Giuseppe Martinico

(eds.)

Perspectives on Federalism, Vol. 4, issue 2, 2012



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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”<sup>1</sup> 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.



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<sup>1</sup> Gardner 2007: 3

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CENTRO STUDI SUL FEDERALISMO

PERSPECTIVES ON FEDERALISM



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# Building Subnational Constitutionalism Through Identity Narratives. The Case of Spain

by

Ilenia Ruggiu

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E - 7



## Abstract

This paper analyses the process of reform of the Statutes in Spanish Comunidades Autonomas, which began in 2006, in order to stress the role that an identity narrative takes in it. Almost every Statute inserts clauses regarding culture, tradition, historical rights and institutions of the region. After an analysis of some of the main Statutes, the paper focuses on the reasons that have caused this attitude in legal text. In general, identity can be read: as a consequence of the crisis of the National State in favour of local belonging; as a form of reaction toward globalizing process; as a post-materialist value. In the case of Spain all these general causes are present, but the conclusion to which the paper arrives is that identity is played strategically as a tool to obtain more authority. The imitation of the Catalan model, a model of success in obtaining through the years more autonomy by stating ‘reasons of identity’, pushed the other CAs to play this card as well. If this is the main political reason that underlines the reform, the case of Spain is interesting at a more general level to show the pervasive role that regional cultural identity plays in building subnational constitutionalism as a source of legitimization of more powers, and more symbolic strength for the Regions. Rhetoric narratives, such as historical rights (to self government, to a regional legal and justice system, to regional institutions) or the fact of having an autonomous cultural order from the central state, implement the idea of regions as subjects in search of their own constitutional identity often in contrast with the broader constitutional order. In this sense judgment 38/2010 by the Spanish constitutional court took a clear position in this contrast

## Key-words

Identity, legal narrative, regionalism, statutes, culture, traditions



## 1. Identity and Constitutional law

The debate on identity started over 30 years ago in several social sciences (Remotti, 1996; Fabietti, 1995; Lai, 1988; Thiesse, 1999; Bodei, 1987; Anderson, 1983; Benhabib, 1994; Vitale, 2001), but only recently has this debate found reflections in juridical texts, especially of constitutional level. Generally, constitutions did not include any rule on collective and cultural identity; constitutions provided a protection for cultural minority, but the constitutional covenant and contract was founded on other narratives, different from cultural identity. According to Rosenfeld this kind of neutrality in front of identity is the consequence of the creation of a superior “constitutional identity” that transcends all the pre-existing identities, including cultural identity<sup>1</sup>. Identity was kept out from the horizons of constitutionalism also because the liberal and individualistic approach that underlines many constitutions, together with the fears against the Ethical State, suggested that cultural identity was a private matter, to be kept out from law. The silence of law on identity is also the consequence of the eclipse of the category of “community”. Actually, for a long time, other categories and *cleavages* crossed Western societies, such as the struggle of classes, the great ideologies of the XX century, belonging to parties, struggles for civil and social rights. Compared to these scenes, many things have changed in recent years and identity discourses have penetrated constitutional and sub-constitutional law.

Among the several Constitutions that contain a reference to cultural identity there are: the Constitution of Poland<sup>11</sup> (1997) that mentions “the cultural heritage as source of identity of the Polish people” (art. 6); the Constitution of Nigeria (1990) that mentions “the cultural and spiritual identity”. The phenomenon has a multi-level dimension. The European Union demonstrates a growing attention to the building of its own identity as well. A European identity is considered essential for creating a European *demos*, and to protect both National identity and regional and minority identities within the member States.

By a multilevel perspective, the Regions within several territorially plural States are building identity narratives often in opposition or in dialectic with the National identity from which Regions seek differentiation. Sub-national constitutionalism tries to reinforce itself through identity narrative.



The evaluation on this “return to identity” has deeply divided the constitutional scholars all over the western world.

The protection and legislating of identity has a positive and progressive evaluation when we think of multiculturalism and its idea of guaranteeing symbolic recognition to oppressed minorities. This kind of approach is similar to the movements that created the National States in the XIX century: the myth “one Nation, one State” was a romantic idea to give freedom to oppressed people (Thiesse, 1999, 55). Today, identity plays a progressive role in the idea of promoting diversity in society, and in the anthropological idea that humankind needs ethno-diversity, as nature seeks for biodiversity, as was stated, for instance, in the Unesco Declaration on Diversity of 2001.

*Communitarian* scholars strongly supported the importance of identity explaining that the “sources of the self” are not only individualistic, but come from membership in a group. If the group is not recognized the individual may suffer a lack of recognition as well, and may find difficulties in achieving authenticity (Taylor, 1989). Protection of collective identities appears to be an important tool to protect individual rights and, in this context, a new right is forged: the right to cultural identity.

In his theory about the cultural law, Häberle sees in culture something that frees the law from economy and technocracy, bringing law into the construction of human dignity (Häberle 2006).

By Italian scholars as well, regional identity has been read as a factor perfectly compatible with a civic and political identity, in the sense that a stronger regional identity can improve the feeling of belonging to a political community and to the public sphere, and even help to better protect some important values such as environment and cultural heritage (Malo 1999).

But identity has got a negative side as well: with the growth in new-nationalism and with the fear for a clash of civilizations (Huntington 2006), identity has been seen as a vehicle of violence (Sen 2006).

There is a third idea of identity, different from the two ideas mentioned above (identity as a tool of symbolic recognition; identity as a tool of division and cultural clash)<sup>III</sup>. This third idea of identity is rooted in the post-materialistic view (Inglehart, 1977). This scholar sees identity as a product of the search for new values, typical of post-industrial societies that has already conquered their wealth and their welfare State and are looking for



new values. In this sense, identity hides the search for a meaningful community and for new narratives in peaceful constitutionalism (Palermo 2007).

In the majority of western Constitutional States the struggle for civil, political and social rights is completed; they enter then in what we could call “post-constituent era” in which new narratives arise in the attempt to give new life to the symbolic part of the constitutional text. If identity can become a tool of violence in non-peaceful contexts, in western sub-constitutions it appears almost as a “luxury product” of opulent and rich juridical societies that have resolved the problem of social conflict and that can concentrate on new values such as restoring the past, tradition and the cultural dimension.

This post-materialistic reading of identity avoids many of the apocalyptic scenes that scared scholars, but at the same time it seems to be too optimistically ignoring some of the problematic consequences.

First of all the diffusion of these narratives is a sign of a crisis in the political class, and in political parties that seek in identity a new source of legitimisation, in order to hide other themes that should be more important in the political agenda.

Second, some political parties completely invented new regional identity, without any connection with an historical past. It is probably true that all communities, including the State, are “imagined communities” (Anderson 2000), nevertheless any strategy of representation of a new emerging identity should tell an at least meaningful and coherent story. Often regional identities appear anachronistic, completely forged on the past, and completely invented (e.g. the creation of Padania by the political party of *Lega Nord* in Italy (Diamanti 1995 and 1996).

Third, identity claims can be used as an excuse, a strategy to ask for more authority and power. In this sense they are not always “genuine”, but they are a tool to search, in reality, other political aims. Anticipating some conclusions of this work, one of the main reasons that underlines the Spanish Statute reform started in 2006, and its insisting on cultural identity is the will by the other CCAA to copy the Catalan and Basque model of autonomy that, in past years, by applying identity claims, has been of success in increasing authority and resources. There is nothing wrong in this, but we must be aware in order to distinguish authentic identity claims from strategic ones.



Last but not least, there is the risk that, under identity narratives, is hidden the egoistic claim to not participate in sharing resources within the broader national political community.

The appearing of identity in constitutional and sub-constitutional juridical texts deserves specific attention as regards the structure of the norms and of the juridical language. Norms on identity are not part of the classic categorization between rules and principles. They can better be classified as symbolic norms. The juridical texts enrich their structure with more and more detailed Preambles (Bonachela Mesas, 2010) of uncertain juridical value. Often some of their parts are explicitly mention or reported in part of the Regional Statute. This fact may be a proof of their prescriptive nature. The entry of identity in the regional Statutes produces a certain literature style, a narrative style (Ruiz-Rico Ruiz , 2005)<sup>IV</sup>. These aspects do not mean that norms like these only have symbolic effect: for example, according to these symbolic parts, many resources can be distributed looking at the identity relevance of some projects.

In this paper, as an example of this landscape described above, I will take one of the most powerful and prevalent cases of spread of identity narrative in sub-constitutional texts: the case of the reform of the Statute of the Spanish regions that started in 2006, continued through 2007 and 2008, until the final judgement no. 31/2010 by the Constitutional Court on the Catalan Statute. I will analyse this process, trying to give an answer, in the conclusions, to these two questions: is the identity narrative in the Spanish Statute compatible with a broader constitutional identity? What are the reasons that support this narrative and that make it spread even to regions without any independent or ethno-regional party?

## 2. The 2006 process of reform of the Statutes in Spain

The Spanish regional Statute can be defined as “the basic institutional law” of the CCAA, and as the most important “source of production” of the regional legal system (Aguado Renedo 1996)<sup>V</sup>. Their legitimization is not original, deriving from the Constitution. The process for their creation includes two legislative organs: regional Parliaments and the national Parliament that has to “ratify” the Statute through an organic law.



The position of the CCAA Statutes in the source system is debated in Spanish scholarship divided between scholars that affirm the simple nature of “laws” (Aguado Renedo 1996) regulated by the principle of competence, and others that state their hierarchy, defining them as “secondary constitutional sources” (Rubio Llorente, 1989), part of the block constitutional (*bloque constitucional*).

The 17 *Comunidades autonomas* (CAs) of Spain enacted their Statutes/organic law in 1980, giving rise to the *Estado autonómico*.

The process of reform of these Statutes started in 2005, when the Basque Country presented to the National Parliament a project of radical reform of its own Statute that was rejected<sup>VI</sup>. In 2006 Catalonia enacted its own Statute that was approved. Following these processes, almost every CA started to write proposals of reform. The use of identity language strongly used in the Catalan Statute as a tool to obtain more competences, and to legitimize in a new way the autonomy, spread all over the CCAA as well.

In this paper I will analyse the Statutes of the following *Comunidades autonomas*: Valencia (organic law 10 April 2006, n. 1), Catalonia (organic law 19 July 2006, n. 6 as modified by the Judgment enacted 18 July 2010 by the Constitutional Court), Balearic Islands (organic law 28 February 2007, n. 1), Andalucia (organic law 19 March 2007, n. 2), Aragon (organic law 20 April 2007, n. 5); Castiglia y Leòn (organic law 12 dicembre 2007). Other proposals of Statutes (e.g. Canarian and the Castilla La Mancha) were either rejected by Congress or retired by the same Regional Parliaments.

These are the main general characteristics of the Statutes after the reform: more extended dimension (each statute has now around 250 articles); the presence of a broad list of regional rights, especially social rights completely absent in the former Statutes; introduction of the legislative decree and law decree as new regional sources of law; more fiscal autonomy; a new discipline of the State-Region cooperation more focused on bilateral conferences, and of bilateral agreement (Carmona Contreras 2007); and, last but not least, a new list of authorities or powers, written in great technical detail, in order to obtain the maximum of clarity when sharing with the State (Balaguer Callejòn 2007). Through this new list of authorities, the CCAA aimed to achieve what Spanish scholarship defines as *blindaje de las competencias*: this is the inclusion in the Statute of authorities that were previously regulated in laws (*leyes de transferencias o delegaciòn*) enacted by the central State according to art. 150.2 of the Spanish Constitution. As the State could decide to



change and derogate to these laws, these authorities of the CCAA were “unsafe”. Writing them in a secure list, contained in the Statute, is a way to consolidate, and fix (*blindar*) them in a safer way.

Every Statute includes several articles dedicated to identity. While the Statute enacted in 1980 contained very short norms defining the *Comunidad autonoma*, now the identity narrative dominates all the Preambles, is present in the general principles by which the public policies must be inspired, and is present in the list of regional rights, and in the list of regional authorities and powers.

The two regions that have promoted this new Statutory “era” are the Basque Country, and Catalonia, in search of new strategies for representing their political communities with the aim of more political autonomy, co-sovereignty and even independence. Despite the different approaches and feelings in regional society towards the broader national identity (in all the other CCAA there are no independent movements, the ethno-regionalist parties have no strong political representation, and feeling of identity was limited to a socio-cultural dimension without a political translation), almost all the regions have followed this model of identity narratives.

There are mainly 5 sectors through which the identity narrative is developed in the 2006 Statutes that are examined in this paper.

Taking the order in which they appear in the Statutes, the first element is History.

Every *Comunidad autonoma* aims for a detailed reconstruction of its history, quoting a history based on ancient Kingdoms (*reinos*), absolute monarchies, political communities of the middle ages, previous to the Spanish unification and to the Spanish Constitution. In the same way, even pre-Roman history is quoted as a source of identity. These historical reconstructions not only have a cultural dimension but have an echo in the articles of the Statute as pre-constitutional institutions and law that the Statute declares wanting update and bring to new life. As we will see, they try, in some way, to find a new source of legitimate autonomy outside the 1978 Constitution<sup>VII</sup>.

The second sector in which identity is developed is the one referred to the self-qualification and self-definition that the *Comunidad autonoma* gives itself<sup>VIII</sup>.

The Statute enacted in 1980 contained similar clauses that, for example, states autonomy as expression of “historical identity” (Andalucia, Aragon, Valencia, La Rioja, Balearic Islands), or references to the “historical regional identity” (Extremadura, Mursia) or to an “historical



bond” (Castilla Leòn). In the 2006 reform, the lexicon is much stronger, and expressions emerge such as: nation, national reality, nationality, historical nationality, national entity, historical community, national identity (Sejas Villadangos, 2003; Blasco Valdes, 2005).

The third sector of identity narratives consists of the precise list of the elements that constitute regional identity.

Contrary to what happened in 1980, Statute regional identity in 2006 is described in all its parts such as: reference to ancestors, one or more historical foundational moments, the language, the cultural monuments, folklore, symbolic places that identify the community, a typical landscape, a literature, a set of symbols (flag, regional hymn) even a character, a personality, and all these distinguish people that live in that *Comunidad autonoma*. To quote more precisely the texts we read as forming part of regional identity, “an urban system”, the “*flamenco*”, the “*Real Monasterio de Santa María de la Vallidigna*” as symbolic places that resume “the spirit of Valencian people”; the “geographical position” as a bridge between cultures. Language is certainly one of the most important elements of identity narrative, in fact when a *Comunidad autonoma* does not have its own language but speaks only castellan language, the Statute still inserts a reference to the “linguistic modalities” or the local “ways to speak” (*hablas*). These are not even dialects, but simply accents or phonetic variations of castellan, perfectly understandable.

A forth element of the identity narrative is the statement that identity is considered one of the “essential values” of the regional legal system, and is inserted as one of the most important “political aims”. Identity enters in the “civic education” to be taught at school.

A fifth new feature is the enrichment of regional symbols: while in the previous Statute the only symbol mentioned was the regional flag, in the 2006 Statute the hymn, the regional feast, monuments, and other symbolic elements are codified as well.

What are the reasons that, in Spain’s regionalism, have created this strong attention to the regional identity? Is it just an imitation of the Basque and Catalan Statutes, strategically followed in order to obtain more authorities, or does this kind of rhetoric express true needs that are eradicated in all the regions of plural Spain? Can these Statutes be read as part of a broader comparative movement that seeks to strengthen regional identity or are they just a tool in the hands of the Spanish regional parties to legitimise themselves? Does the presence of these strong narratives put at risk the constitutional



identity or, on the contrary, does it serve to consolidate it given that the spread of lots of identity tends to diminish the subversive impact that Catalan and Basque identities contain?

I will try to answer these questions, analysing some selected Statutes under the five elements chosen: history, self qualification, and the main elements that constitute identity; political aims; cultural rights; competences founded on identity; regional symbols. After this analysis, mainly descriptive, I will analyse which are the main reasons of the spread of identity rhetoric in Spanish *Comunidades autonomas* Statutes.

In the statutory process we can distinguish two basic and general approaches: the Catalan sort that takes the identity model to its extreme consequences, asking for a completely bilateral relation with the State; the Andalusian model and of other regions that, has a more mixed and social conception of identity. These different approaches are in dialogue. In fact every Statute is, in some sense, an answer, often controversial, to the other in a dialectic view of what is identity. There are processes of imitation, but also of contrast between each Statute. For example, to the strong nationalistic discourse in the Catalan Statute, the Andalusian Statute answers with an identity that can coexist within a broader Spain, and in which a solidarity between all the 17 *Comunidades autonomas* is sought. Castilla León adopts an attitude against all the others region, claiming the importance of a Spanish identity. These are only a few examples of the dynamics that we can see in the Spanish process of reform<sup>IX</sup>.

### **3. Identity narratives in Spanish Statutes. The Catalan Statute: before and after the Constitutional Court judgement 31/2010**

The Catalan Statute has acted as the reference of all Statutes that were enacted after 2006. In fact, after the failing of the Basque Statute in 2005, it was Catalonia that re-opened the Statutory process of reform. In September 2005, the Catalan Parliament approved by 90% of votes the proposal for a new Statute to be submitted to the National Parliament to become organic law. The Statute was enacted on 19 July 2006 after a popular referendum in which only 48% of the population participated. After 4 years, the Constitutional Court of Spain resolved the constitutional inquires on the text concerning different aspects suspected to be unconstitutional. In the 31/2010 judgment, 12 articles were declared unconstitutional, while 27 were saved but completely interpreted by the Constitutional



Court in a way that abolishes the original meaning that Catalonia intended giving them. Another 120 articles were considered not contrary to the Constitution (Fossas Espadaler, 2011)<sup>X</sup>. The 31/2010 judgement clarifies the role of the Statute as law, and its constitutional function, with special regard to its “material content” (Fossas Espadaler, 2011<sup>XI</sup>); the judgment states the impossibility to call Catalonia a nation, and to use Catalan as a preferred language (Alonso de Antonio, 2011); it reduces the power of *derechos históricos* as tool to legitimize autonomy stating that the Statute cannot be regarded as an original Constitution derived from a constituent power, being a law derived from the Spanish Constitution (Tejadura Tejada<sup>XII</sup>) it distinguishes the role of statutory rights, and fundamental rights (Expósito Gómez, 2011<sup>XIII</sup>) it limits the role of regional judicial power (Torres Muros, 2011), and it clarifies the role of the Statute definition of competences, the bilateral relations State and Regions and the financial system.

Spanish scholars had different reactions to this judgment. Some scholars considered it “a breach in the constitutional covenant” that is in favour of a decentralized State because it affects the “central core of autonomy” (Perez Royo, 2011; Lopez Aguilar, 2011; García Roca, 2011). Other scholars, on the contrary, see in the judgment a restoring of the constitutional landscape (Castellà Andreu, 2011).

When the Catalan Statute was enacted, all the other CAs started a race to not be left behind Catalonia in the level of autonomy. In this sense Catalan Statute is the matrix of this reform that, according to some scholars, will create a second State of autonomies (*secundo Estado autonómico*). The fact that it was imitated by other regions creates a peculiar effect. While Catalonia has its own language and institutions, other CAs were deprived of them, and so they started to reinvent them by restoring them from a mythical past in a quite artificial way (Blanco Valdès, 2006).

My analysis focuses on identity narrative in this Statute. I will list them, and after each of them I will describe how they have been interpreted in the 31/2010 Judgement or if they have been declared unconstitutional.

The Preamble of the Statute is largely historical. It quotes the creation of the *Cortes* of Cervera in 1359, a proof of the “constant vocation for self government” of Catalonia. The *Decreto de Nueva planta* of 11 September 1714 marks the date in which Catalonia was annexed to the Kingdom of Castilla and lost its institutions of self-government. The most important part of the Preamble is the one that defines Catalonia as a “nation” and a



“national reality”. With respect to these statements, the Constitutional Court declared that these expressions “have a lack of juridical interpretative value”.

Inside the text of the Statute, the clauses of self-definition speak of “nationality” (art. 1). The rhetoric of the Statute specifies in the statement that the foundations of autonomy are not only in Constitutions, but in the “historical rights of Catalan people” (art. 5) (Rey Martinez, 2005). From this right derives the “recognition of a peculiar position of Generalitat in civil law, language, culture, education system, and institutional system in which Generalitat organizes itself”. The reference to this pre-constitutional foundational moment is a way through which Catalonia affirms its difference with respect to the others CAs, even though, as will emerge in the following pages, this kind of rhetoric has been copied from almost all the other CAs. The category of historical rights is completely new in the Statute language. It evoked dead institutes, completely eliminated by the modern Constitutional State.

With respect to this article the Constitutional Court stated in 2010 that “it would be explicitly unconstitutional if it pretends to find a source of autonomy outside the Constitution”, then the Constitutional Court says that the article should be interpreted in another meaning.

Art. 3 of the Statute states the principle that “relationships between Generalitat and the State are founded of the principle of mutual institutional loyalty and are rooted in the general principle that *Generalitat* is a State”. “Catalonia has its own geographical and political space in the Spanish State and in European Union”.

The main identity element is constituted by language. The Constitutional Court declared unconstitutional the statement that Catalan is the preferred language (*uso preferente*) (art. 6) to be used by the public administration.

Art. 6 established the “duty to know Catalan”, as well. Through a complex interpretation, the Constitutional Court decided that the norm can stay in the Statute but interpreted in the sense that this duty is not at all compulsory.

In art. 8 there are described the “national symbols”. In this article we find the description of the flag, shield, hymn, and the feast of 11 September 1714 in order to remember the loss of the self-government Catalan Institutions. The article has been interpreted by the Constitutional Court that stated in 2010 that it is not unconstitutional, in the use of the word nation, in so far as “national” is referred to a nationality rooted in the absolute unity



of Spain. Given the fact that the use of the word Nation in the Preamble does not have any juridical effect, this adjective “national” cannot be interpreted in a way that evokes a Nation.

Art. 33.5 establishes the “right of all Catalans to write in Catalan to all the National Constitutional organs and with the judicial power at National level... these institutions must receive the writings in Catalan, consider them valid”. In this sense, the border of regional identity and language transcends and involves national public sphere as well. Through a complex interpretation, the judgment 31/2010 conserves this norm, but completely emptying it of meaning.

Art. 36 recognizes the “Occitan language of Aràn”. It is a disposition conforming with the fight to protect minority languages that are all at risk faced with the expansion of Castilian. Even the Catalan administration must receive documents in Occitan.

Other identity profiles are the reference to the Catalan citizenship evocated in several parts of the Statute; the reference to Catalan communities abroad (art. 13).

### 3.1 The Statute of Andalusia: from social identity to “flamenco”

Both in the history of Spanish regionalism and because it is the most populated region, the Andalusian Statute represents an important part of the reform. This Statute is in part an imitation of the Catalan one because of the political intent (sought by the PSOE, the left political party that governs Andalusia) to “normalize” the Catalan model. There are anyway important differences from the Catalan model.

The first is the attempt to build a social identity. Andalusia has been a region with a strong rich-poor divide and still today its society and political class has a strong socialist tradition. During the debate to re-write the Statute, the proposal to define Andalusia as a “social and democratic community”<sup>XIV</sup> was strong. This expression reproduces the same expression inserted in the 1978 Constitution of Spain, demonstrating the constitutional ambition of the Statute. While many *Comunidades autonomas* affirm their distinguishing elements (*hechos diferenciales*), such as the recovering of their original *fueros* and languages, Andalusia affirms its historical delay in development (*deuda historica*) in front of the Spanish State.



A second difference consists of the fact that the Andalusian Statute reaffirms two essential values in opposition to the asymmetric choice of Catalan model: the unity of the State, and the equality of all regions in access to autonomy: “the existing *hechos diferenciales* cannot be used to accord privileges to some regions”, the Statute states<sup>xv</sup>.

A third difference is the proposition of a more open identity model. The Preamble starts by stating that “Andalusia has forged along its own history *a robust and solid identity* that gives a *peculiar character* to its people”. This identity consists of a “social and cultural heritage unique in the world” whose key element is “inter-culturalism in practice, customs, and way of life”. It is the synthesis of different cultures that designs an “Andalusian personality built on never exclusive universal values”. “The Andalusian culture” can bring a “high contribution of civilization to contemporary society”. The historical civilizations are all mentioned in the Statute: “the proofs of history – Tartes, Betic, Califfs in Granada, Seville, Cordoba, Jaen – are the elements of Andalusian identity”. After this first “defining part”, a section, similar to the Catalan statute, describes the “history” of Andalusian autonomy. Blàs Infante is mentioned as “father of the country” and events such as the Antequera Federal Constitution of 1883, the Ronda Assembly of 1918 (in which the Andalusian flag was created), the creation of the Andalusian hymn in 1933 during the Second Republic, the date of 28 of February of 1980 in which an historical referendum through which Andalusia obtained a quick way of accessing autonomy “against those who did not want that we were a nationality”. The Statute also states that Andalusia is the only *Comunidad* that was directly legitimised by means of a referendum about its own autonomy.

The Statute self-qualifies the region as a “national reality” and, in the Preamble, as “historic nationality”. These definitions were used, instead of the “nation” one, by Blàs Infante in the Andalusist Manifesto of Cordoba, 1919. Andalusia proclaims itself an historical nationality “within the unity of Spanish nation” (art. 1). We can see a sort of hierarchy in the symbolic order of self-definitions in all the Statute narratives: from nation and national reality to historical nationality or nationality. All the expressions contained almost in all Statutes (except for the word nation) must today be interpreted according to the 31/2010 Judgement of the Constitutional court.

Contrary to the Catalan model, whose main element of identity is language, in Andalusia there are several elements of identity, while language is less strong.



Among the 24 basic aims that the *Comunidad autonoma* aims to achieve, in article 10 we can read: 3) the strength of “the feeling of Andalusian identity and culture through the knowledge, discovery, research and diffusion of the historical, anthropological and linguistic heritage”; 4) the defence, promotion, study and prestige of the “way of speaking of Andalusian people in all its variety”; 6) the creation of the conditions to encourage emigrant Andalusians return home.

A specific mention should be made about the way of speaking in Andalusia. Andaluz is not a language, not a dialect, but is classified by linguistic scholars as a way of speaking castellan. At first sight this statement seems an attempt to imitate the Catalan model, but it has another aim. The idea is to “give prestige to the Andaluz way of speaking” and to avoid that “inferiority complex” which is always associated with the way of speaking of Andaluces.

Art. 33 states the “duty to respect and preserve the Andalusian cultural heritage”. Art. 37 contains a list of 25 principles that should animate public policies and they include: the conservation and valorisation of the cultural, historical, artistic heritage, especially regarding flamenco” (p. 18); the religious, social, and cultural coexistence of every people in the respect of cultural diversity, creed, convictions (p. 17); the promotion of cultural relationships while fully respecting values and constitutional principles (p. 23).

Finally the identity narratives come back again in art. 68 that disciplines the competence of Andalusia on culture, stating the exclusive regional power on “promotion and diffusion of the cultural, historical, artistic and monumental heritage of Andalusia” and the exclusive power on “knowledge, preservation, formation, diffusion of *flamenco* as elements specific to the Andalusian cultural heritage”. When this disposition was enacted, the nearby region of Extremadura, in which *flamenco* is a strong cultural element as well, complained that Andalusia was claiming an exclusive power. And what will happen if another *Comunidad autonoma* or the State wants to organize a flamenco festival? The case of *flamenco* is very interesting because it shows how complex are the dynamics of identity. First of all *flamenco* is not an original and authentic feature of Andalusia, being imported by *gitanos* people (gypsies), secondly it has now spread beyond the regional borders to become a heritage of national identity (the whole of Spain is associated with *flamenco*) and even at international level: there are strong schools of *flamenco* in Japan, for instance<sup>XVI</sup>.



Generally the identity that a region wants defend, are identities at risk, oppressed in the symbolic order. But in the case of *flamenco*, this element of Andalusian identity transcended the region to become part of the Spanish identity. The idea of claiming a sort of “ownership” on *flamenco* is quite peculiar.

Anyway a similar approach is the one chosen by Castiglia Leòn that affirms, as a regional element, the castellan. While it is true that the roots of castellan were, in the middle ages, settled in this region, it is quite peculiar to affirm a language that is national, and that is the third language spoken all over the world as an element of regional identity! The incapacity to share identities, and to accept that they can be spread all over the world creates norms quite difficult to understand.

Another identity element is quite new, and it consists of landscape and of the urban-environmental identity: the Preamble says that Andalusia “created a very human urban system”.

The Andalusian statute also describes the flag, the shield, the motto “Andalusia for itself, for Spain and for humankind”; the hymn, the Andalusian national day fixed in 28 of February in order to celebrate the date of the 1980 approving of the first Statute (Estatuto de Carmona) (art. 3). Andalusian abroad can ask for “the recognition of Andalusian identity” (art. 6). This is a norm we can find almost in every statute and it is a sign of reification of identity in so far it is even possible to “certify it”.

### **3.2. The Statute of Valencia: bringing back the pre-constitutional law and institutions**

While the majority of regions enacted completely new Statutes, Valencia chose to reform the old 1980 text. For this reason the number of articles is not so high (93 articles). From the Preamble it is possible to see the attention to the dimension of identity and to the Catalan roots of this identity (Maluenda Verdù, 1999). The Preamble pays extensive attention to history: the origins of autonomy are rooted mainly in two conceptions: “the Valencian tradition coming from the historical Kingdom of Valencia” and “a modern conception of the *Pais Valencià*”. These two movements of thought “include everything that is Valencian as a peculiar concept”. The exercise of the right to autonomy has permitted the development of “self government and the affirmation of Valencian identity”.



In the main political aims of the Statute there is the “recovering of the *Fueros* of the Kingdom of Valencia that were abolished with decree of the 29 June 1707.

Art. 1 of the Statute declares that “Valencian people, historically organized in the Kingdom of Valencia, are constituted as *Comunidad autonoma* within the unity of Spanish nation, as an expression of its own identity that is different in terms of historical nationality and its right to self-government”. A few lines later we can read another self definition, very rare, in which Valencia defines itself as a “region of Europe” that shares European values.

The elements that characterize Valencian identity are mainly two: a proper law, previous to Constitutional state, and a language distinctive from castellan. The law is taken from a very remote past: the aim is to recover old *fueros* and laws that existed in the Kingdom of Valencia and its institutions (art. 7). There is the aim to implement the *derecho foral civil* to be applied to all Valencian residents (art. 4) and which application is the duty of the Superior justice tribunal of the Comunidad (art. 37). The expressions *fueros* and *derecho foral* indicate a special juridical regime: after the 1978 Constitutions only Basque Country and Navarra recognized such kind of separate regime, even though in the past Valencia, Balears, Aragón and Catalonia also had these types of institutions and laws that the Statute aims to bring back to life.

These statements found a mirror in further articles dedicated to competences in which we can read: “the conservation, development and change of the foral civil law of Valencia” (art. 49, p. 2). The restoring of pre-constitutional institutions and pre-constitutional law is one of the most problematic aspects of the new Statutes: the ancient *fueros* remained intact only in Navarra and in the Basque Country and so, in the other *Comunidades autonomas*, it seems that the *fueros* are artificially re-discovered, often consulting old historical archives.

The second element of Valencian identity is, as said, the language. In article 6 it is possible to read that: “the own language of Valencia Region is Valencian. This is the official language of Valencia, such as castellan, that is the official language of the state. Everybody has the right to use these languages and to receive education ‘on and in’ the Valencian language”. In this norm we can note that Valencian is presented as the language of the regional community, while Castellán is the language of the state, as separated from the original community. In the same article it is said that “a special protection and respect to restore the Valencian language is guaranteed” (art. 6, p. 5) and that “a law will indicate



the territories of the *Comunidad* in which it is possible to make an exception to the teaching of Valencian, and in which one or the other language shall dominate” (art. 6 p. 7). This Statute is a break from the bilingual equality in the sense that admits a sort of “linguistic map” in which to divide the territory according to the major presence of one language over another.

A new norm contained in the Statute regards the Valencian Academy of the Language, as “a normative institution of the Valencian language” (art. 6 p. 8) that will enact the rules of the official standard of Valencian to be used in public administrations. Art. 20 considers this academy as part of the political-juridical institutions of the Comunidad.

In a completely new chapter of the Statute dedicated to regional rights there is a reference to the fact that “*Generalitat* will protect and will defend the identity and values of the Valencian people and will defend the respect of cultural diversity within the Comunidad Valencian and of its historical heritage”.

The symbols of the Region are the flag, and the *Real Monasterio de Santa María de la Valldigna* defined as the “spiritual, historical, and cultural temple of the ancient Kingdom of Valencia” and “symbol of the strength of the Valencian people recognized as an historical nationality” and “place of meeting of all Valencians and centre of research to revive the history of the Valencian community” (art. 57).

Valencians that emigrated abroad have the recognition of their “valencianidad” that is “the right to participate, collaborate and share the social and cultural life of the valencian people” (art. 4).

The Statute establishes the transformation of all the name of institutions in the Valencian language<sup>XVII</sup>.

### 3.3. The Balearic Islands Statute: island identity and Catalan languages

Autonomy in Balear Islands is influenced by a strong competition between the main four islands that form the archipelago: Minorca, Ibiza, Formentera and Majorca. The last one is often accused of being centralistic (Oliver Araujo and Calafell Ferrà, 2007). These kinds of tensions create a model that is not concentrated in one Regional parliament, but that is found in 4 Island Councils (*Consejos insulares*). This geographical feature is reflected in subnational identity as well. In fact there is not one compact identity, but 4 identity



narratives that describe and emphasize the differences and the peculiarities of each island that compose the archipelago. The self qualification as “multi-island reality” (*realidad pluri-insular*) is declined both at an institutional and at an identifying level.

The Preamble of the new Statute enacted in 2006 starts with history: “along all their history, the Balearic Islands have forged their identity with the contributions and energies of many generations, traditions, and cultures that join together in this land of welcoming”. This creates a “dynamic society” with a cultural heritage “unique in the world. The historic nationality constituted by the islands of Majorca, Minorca, Ibiza and Formentera pay its tribute to the “past generations” that worked to “preserve the identity of our people”. In this narrative there is a strong reference to ancestors, an element which is similarly often used in building national identity.

The Preamble indicated, even if not in a systematic manner, the elements that compose identity: “the Catalan language as spoken in the Balearic Islands and our culture are elements that define our society and as a consequence, they are elements that give backbone to our identity” together with “insularity”.

The Preamble’ statements are better developed in the articles of the Statute. Art. 1 contains an auto-defining clause: “the historical nationality constituted by the Islands of Majorca, Minorca, Ibiza and Formentera as an expression of collective will and of the right to self-government is constituted as Comunidad autonoma”. In this passage we can appreciate the will to differentiate the single Islands that compose the Unity.

Art. 3 entitled “Insularity” defines insularity as the “distinguishing element (*hecho diferencial*) that deserves special protection” through inter-territorial solidarity. The Balearic Islands, in fact, cannot remain in this factor behind other CAs.

Art. 4 states that “the Catalan language spoken in the Balearic Islands, together with the Castilian language, will have official character. Everybody has the right to know and to use Catalan and nobody can be discriminated”. Art. 14 establishes the right to use both languages with Public administrations that will be trained to know Catalan.

Art. 119 establishes the possibility to fix protocols and agreements especially with the “regions that share the same language and culture”.

In the Balearic Statute there is also an attempt to recover the *derechos forales* (foral rights) pre-existing to the Spanish Constitution of 1978. In the exclusive power of the CA



there is “the preservation, modification and development of the civil law proper of the Balearic Islands included its own legal system sources”.

The protection of identity is also an underlying aim of norms dedicated to regional rights and to powers.

Art. 18, entitled “rights in cultural context and in relation with the identity of the people of the Balearic Islands and on creativity” recognizes that public powers must “defend identity, values and interests of the Balearic people and respect its cultural diversity and historical heritage”.

Art. 34 and art. 35 give to the CA power to protect and promote native culture, to teach local language with the aim of “normalising” Catalan and guaranteeing its equality with Castellan, respecting, at the same time, the “diverse linguistic modalities” in which Catalan is spoken in the Islands.

The University of the Balearic Islands becomes the organ to be consulted for linguistic policies (art. 35).

Art. 6 defines the CA symbols but at the same time admits that every Island can have “its own flag, feast and symbols to be decided by the 4 *Consejos insulares*”.

Other provisions state that Balearic citizenship is acquired through residence (art. 9), and recognize the “original personality” of the Balearic communities outside the regional territory (art. 11).

### **3.4. The Aragon Statute: *derecho foral* (foral law) and languages.**

Narratives rooted in history, where the regional communities that previously arrived in “Spain” are very common in Spanish Statutes. The Preamble of the Aragon Statute participates in this rhetoric stating that “the Kingdom of Aragon refers to an extensive history of Aragon people that for centuries contributed to the expansion of the Aragon Crown. Identity elements of this history are the *derechos forales* (foral rights) founded on original rights, that reflects the Aragon values of loyalty and freedom. This foral character reflects in the Caspe Compromise of 1412”. The reference to ancestors and founding moments is clear.



The CA is self-defined as “historical nationality” that “within the Spanish constitutional system shows a proper identity because of its traditional institutions, foral rights and culture” (art. 1).

Linguistic modality “constitutes one of the highest proofs of the historical and cultural heritage of Aragon and a social value of respect, coexistence and mutual understanding” (art. 7). The protection of the different dialects within Catalan and of the different way of speaking Castilian is sometimes a sort of reaction to discrimination and jokes suffered for not speaking the standard Castilian of Valladolid; other times it seems to be a way to create identifying elements in a region in which the old languages have been completely forgotten.

In Aragon, as in Valencia and contrary to Catalonia, the model of language protection is diverse and allows for different solutions according to the territories both for teaching and for use in public administrations (art. 7).

Foral law is restored and applied to everybody whose residence is in Aragon (art. 37).

In the norm dedicated to powers and competences, the educational system must take account of the “peculiarities of Aragon” (art. 21) and the return to the region of all its historical heritage, not only from abroad, but from other CAs as well (art. 22 e 71). This is a proof of a weakening of a National identity in favour of a subnational sense of culture.

The Aragon Statute affirms exclusive power on “preservation, change and development of foral law and the legal system; procedural law; language and linguistic modalities (art. 71).

Flag, shield and regional feast are indicated in the Statute (art. 3).

There is no mention of regional citizenship but of a “political condition” of Aragon that is acquired with residence, and that can also be given to all Aragon people living abroad that require it (art. 4).

### **3.5. The Castilla León Statute: the defence of Castilian language and the idea of Spain**

Given the described spread of identity narratives, what happened to those CAs, such as Castilla Leon and Castilla La Mancha, which were at the core of the expansion of what would have become Spain? It was from the Kingdom of Castilla that the



“oppression” and “conquering” of the other Kingdoms, that were later to become Regions, started. It was from the Kingdom of Castilla that the “idea of Spain” spread.

The fact that other regions started to claim their specific identifying elements against the broader National identity had the effect of encouraging Castilla Leòn to enter in the narrative to claim its own Regional identity. But, in this way, what is supposed to be a common heritage, becomes a heritage only of this region.

The Statute<sup>XVIII</sup> has a large historical Preamble that states: “the CA originated from the union of the historical territories of Leòn and Castilla”. Two main historical facts are mentioned: “the process of colonization of the Duero Valley in IX and X centuries and the development of urban life all along the Camino de Santiago and the Via de la Plata”. Since then the lands of Castilla and Leon have been a symbol of coexistence and respect and have created a legal system constituted by the “Leon Fueros” and the “use and costumes of Castilla”. A long list of historical accomplishment follows: 1188 celebration of the first European *Cortes*; 1265 that marks the writing of the *Siete Partidas* by King Alfonso XII; the creation of the Castilian language from Latin; the origin of the first Universities. The Region claims the origins of the Spanish Nation by mentioning: “the union of the 2 crowns in 1230... which was to decisively lead to discovering the Americas later on”.

In this process of “regionalizing” National Identity, art. 1 defines Castilla Leon as “an historical and cultural place that has its origin in the two kingdoms of Castilla and Leon and that contributed in a decisive manner to the formation of Spain as Nation.

Not having a language different from Castilian, the Statute searches anyway to build an identifying element by stating in art. 4 (entitled “essential values”) that “Castilian language and historical, artistic and natural heritage are essential elements of the identity of the Community”. Art. 5 states that “Castilian is part of the historical and cultural heritage of the region, extended to all national territory and to other states”. The region promotes the “correct use of castellan” and “its international diffusion”. In this sense we can notice a sort of symmetry between these narratives and those of other Statutes, but the consequence is quite a paradox: as shown with flamenco, an element of Spanish identity is claimed as a regional element merely for the fact of originating there. There is a sort of *horror vacui identitatis*, a fear of remaining without an identity that encourages every region to seek one.



In the part dedicated to regional rights, the social rights provide for a “guaranteed rental of citizenship” for the poor (art. 13, c. 8) together with the right to “live in and work his/her own land” (art. 16 c. 8). Art. 8 states the possibility to be acknowledged as of “castellan origin”.

Again symbols of “exclusive identity” are described, such as the flag and the shield which are both meticulously described (art. 6).

Public institutions must fight for the return of the cultural heritage that is conserved in other territories.

#### **4. Behind Identity: plural Spain, and the fight to not remain held back to the Catalan competences**

After the description of the identity clause that exists in the Statutes analysed, we can move back to the two questions asked at the beginning: is the identity narrative in the Spanish Statute compatible with a broader constitutional identity? Which are the reasons that support this narrative and that make it spread even in regions without any independent or ethno-regional party?

Regarding the first question we should note that the identity narrative in the Spanish Statute present three criticisms. The first is the choice of founding subnational identity mainly on traditional elements, reaffirming the bond with pre-constitutional realities, that were, in the end, absolute monarchies, very far from the values of constitutionalism. This create a romantic past, a nostalgia of it, but its dark side, and the positive value that Constitutionalism and Union with Spain create, is put in the shadow. Without the 31/2010 constitutional judgment, this break between constitutional and regional identity would have been very serious, especially regarding the sources of autonomy.

The second aspect of criticism is the bilateralism, and the exclusivity that every CA seeks. Instead of seeing itself as a part of a broader regional system, every CA runs itself in its own way, often claiming its own identity as being above others, and seeking a bilateral relationship with the State. There is in some Statutes an incapacity to read the identity in a



multilevel contest in which other identities coexist; such as European, international, or even cosmopolitan.

As observed at the beginning of this work, the return of identity in legal narratives has many progressive aspects in term of recognition and mutual respect. If this identity stays within a superior constitutional identity, there is no risk from the meeting of national and regional different cultural horizons<sup>XIX</sup>, but if it transforms itself into egotism and not related to others, problems may arise.

Regarding the second question, in trying to discover the reasons for this sudden and strong trend towards identity in all Spanish regions, the answer is more complex.

According to a first interpretation (Blanco Valdes, 2007), the spread of the lexicon of identity is the juridical expression of an old sociological element: the nature of Spain as an “invertebrate” State denounced by Ortega y Gasset (1922). This lack of a national feeling causes the explosion of subnational identity. The same idea of a “Plural Spain”, of “Spain of nationalities”, and of *Estado autonómico*, shows that there is not an integrative national identity (D’Andrea, 2000). Under these sociological circumstances, the destiny of Spain is to become more and more autonomous between its parts (Alvarez Ossorio Micheo, 2007).

A second interpretation, agreed by almost all Spanish scholars, is based on a socio-political answer. The reason why almost all the CCAA have used identity narratives has to do with the fact that both Catalonia and the Basque Country have succeeded in recent decades in increasing their autonomy and in assuming new competences, using this kind of identity rhetoric. The constant threat of “secession” from Spain, the idea of a cultural diversity that would have difficulty in being integrated in the Spanish State have had a political translation in ethno-regionalists parties, such as *Convergència i Unió* in Catalonia, that have been crucial to the coalitions of national parties. Over the years, their cooperation in national governments has been recompensed by more authority. This results in mobilising other regional parties to embrace the same rhetoric even in regions with no separatist or secessionist movements such as Andalucía, Asturias or Valencia.

Why this time Catalonia sought the reform of the Statute as a juridical tool to obtain more autonomy – creating this indirect “*domino* effect” in the other CCAA – instead of using the methodology of political negotiation, is explained by Spanish scholars in this way: “The reform of the Catalan Statute was the ‘juridical exit strategy’ from the political



claims for more self-government, and for having more asymmetry in order to promote the Catalan specialty”. The choice of the Statute was given due to the impossibility to use other remedies such as political negotiation (that had already been used to obtain the maximum of autonomy, and did not have a strong symbolic impact) or constitutional reform (there was not a sufficient majority in National Parliament). In the case of Catalonia, the choice was due to an important political circumstance as well: the electoral win of the Three-Party Catalan Government, and the electoral win of the socialist party, PSOE in central government” (Castellà Andreu, 2010). This favoured the political agreement between Catalonia and the central state on the Statute.

According to this view, identity narratives are often used strategically to seek other results. The main reason underlying the Statutory reform is to increase the powers of the regions in order to enter in a new *Estado autonomico*. The insistence on identity narratives has been a powerful tool to affirm that no CA must be inferior to others (the reference was particularly to Catalonia) and to establish a sort of “principle of equality” between all the regions: as all of us have our own identifying elements, all of us deserve the same. In this respect, there is a very significant section of the Valencia Statute stating that the region will assume all the powers that the State legislation gives to other CCAA. In this norm there is an implicit reference to the competences that Catalonia can obtain through its Statute. A similar statement is present in the Statute of Andalucía.

In conclusion, we can say that more than a reflection of Nationalism or claiming for independence, the identity lexicon is a strategy for not being held back in the race to autonomy, and its aim is to obtain not only more symbolic recognition but more powers. Through identity, CAs search for the same treatment in sharing of money and resources as well.

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<sup>1</sup> “As constitutionalism is wedded to pluralism, it must take the other into proper account, which means that constitution makers must forge an identity that transcends the bounds of their own subjectivity” (Rosenfeld, 1995 (Rosenfeld 2005; Rosenfeld 2010; Palombella 2012; Shachar 2010; Tushnet 2010; Walker 2010). The concept of “constitutional identity” finds an echo in the “theory of integration” developed by Rudolf Smend (Smend, 1928). Integration is a feeling of community, of sharing common values that join together different members of society. This feeling of community can be reinforced through three dimensions of integration:



personal (through the king or other persons), functional (through institutions, and procedures), and material (flags, national symbols) R. Smend, *Constitución y derecho constitucional* (1928), Madrid, 1985.

<sup>II</sup> References to identity can be found in the following Constitutions: Portugal (1976), Lituania (1999), Bulgaria (1991), Hungary (1949-90), Macedonia (1992), Romania (1991), Slovenia (1991), Senegal (1992), Mali (1992), Colombia (1991), Uruguay (1992), Burundi (1992), Moldavia, (1994), Guatemala and Albania.

<sup>III</sup> There are of course other explanations for the return of identity, for example the economic explanation (identity serves to create a structure larger than the Nation-State) or the reaction to globalization explanation, sustained respectively by Thiesse (1999) and Bauman (2003).

<sup>IV</sup> On the value of these declarations in Italian statutes Bin (2005).

<sup>V</sup> The scholar describes the different processes (ordinary and special) to reform the Statutes, and observes how the Statutes represent a break in the general principle *nemo plus iura transferre potest quam ipse habet*, given the fact that they can prescribe part of the process of their own creation, 169. According to Aguado Renedo the relation between the Statute and the other national laws does not fill the hierarchy test, and it must be read as ruled by the competence principle.

<sup>VI</sup> The Pais Vasco Statute was completely rejected by the Cortes on 1<sup>st</sup> February 2005 because its hypothesis of a confederal “free association” of Basque countries with Spain was considered unconstitutional,

<sup>VII</sup> The principle that the Statutes are legitimised in the Constitution was not discussed in Spanish scholarship since this new attempt by the CCAA. Aguado Renedo (1996) clearly affirms that the Constitution is the norm of recognition of the Statutes, 167.

<sup>VIII</sup> The 1978 Constitution reserves the word “nation” for Spain and states that territory can be divided into “regions” and “nationalities” “regioni” e “nazionalità”. To this last concept must be added the idea of “historical nationality” reserved for the 4 regions that, during the Second Republic, adopted their own statutes (1931-1936): Paese Basco, Catalogna, Galizia e Navarra. Andalusia conquered the possibility to be an historical nationality through a referendum in 1980.

<sup>IX</sup> For an analysis of the Italian Statutes that, from 2001, were enacted with similar identity narratives as in Spain, see Benvenuti (2006); Bin (2004); Lippolis (2005) Vespaziani (2005). For a comparison between the two narratives in Spain and Italy, see Della Donne and Martinico (2011).

<sup>X</sup> For a comment on the judgment, see the contributors in the monographic volumes: *Revista de Teoria y Realidad Constitucional*, n. 27/2011, and *Revista Catalana de Derecho Público*, n. 43/2011 dedicated to the subject: *Justícia constitucional i estats compostos: reflexions a partir de la sentència del Tribunal Constitucional sobre l'Estatut d'autonomia de Catalunya*.

<sup>XI</sup> According to the author the judgment “drastically reduces their constitutional function, marginalizing those characteristics that give them their distinctiveness as a law”; this will lead to “a reduction of the role that statutes of autonomy play in the configuration of the Spain’s system of decentralization.”

<sup>XII</sup> According to the author this was the central and most important question affecting the same legitimizing process of Catalan autonomy. In this sense, the author appreciates the choice by the Constitutional Court to pronounce on the Preamble as well, despite the problem – discussed in Spanish scholarship – of whether the Preamble can be object of a Constitutional Court decision.

<sup>XIII</sup> The author explains how the Constitutional court admits the possibility of a regional catalogue of rights, but limited just to the spatial and subjective context of the region, strictly connected to the competences, and different in status from fundamental rights. See also Agudo Zamora (2011) which is more optimistic on the possibility that regional rights play an effective role in the future, even with the limits stated in the judgment.

<sup>XIV</sup> The proposal was contained in the document *Bases para la Reforma del Estatuto de Autonomia para Andalucía*, by *Junta de Andalucía* december 2005.

<sup>XV</sup> In the Preamble we can read: “these differences cannot be used in order to obtain privileges. Andalusia respects and shall respect diversity, but will not permit inequality”. On the principles of unity and equality as the main characteristics of the Andalusian Statute, see Perez Royo (2004-2005).

<sup>XVI</sup> Blas Infante, inventor of andalusism, an autonomist movement, never sought independence from Spain given that, according to him, “Andalusia is the essence of Spain”.

<sup>XVII</sup> There are around 20 substitutions spread all over the Statute such as: Generalidad valenciana substituted with Generalitat, Asamblea with Corts, Gobierno valenciano with Consell; Consejo de cultura with Consell valencià de cultura; Sindicatura de cuentas with Sindicatura de comptes; Comitè economico-social with Comitè econòmic i social; Diario oficial de la Generalidad valenciana with Diari oficial de la Generalitat.

<sup>XVIII</sup> Ley Orgánica 14/2007, de 30 de noviembre, de reforma del Estatuto de Autonomía de Castilla y León.



<sup>XIX</sup> According to ROSENFELD (1995): “federalism must mediate between a national identity shaped by federal interests and various state identities. Accordingly, neither the national identity nor that of the states can prevail as the self-identity that encompasses the polity as a whole”.

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**The need for sub-national constitutions in federal  
theory and practice.**

**The Belgian case**

by

Patricia Popelier\*

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## Abstract

Comparative constitutional scholarship identifies sub-national constituent power as one of the defining features of federal systems. Moreover, according to public choice theory, devolutionary federal systems are expected to favor the creation of sub-national constitutions. For these reasons, the absence of real constitutional power for the sub-states in Belgium appears to be an anomaly. The research question of this paper explores the validity of this approach. More generally, the question is: how important is it in a federal state for sub-states to have their own sub-national constitutions? Arguments pro and contra are analyzed and applied to the Belgian case. I argue that sub-national constitutionalism is a matter of political balance between national and sub-national powers, rather than a principle of federal theory

## Key-words

Sub-national constitutions, federal theory, Belgium, devolutionary systems



## Introduction

Belgium is a federal state, composed of two types of sub-states: communities and regions. The very first article of the Belgian Constitution informs the reader of this feature of the Belgian state structure. Nevertheless, the Belgian sub-states do not or only embryonically possess constituent power. Moreover, Flanders is the only sub-state demanding more constitution-making power. The first section of this paper will describe this current state of affairs in Belgium. It will mainly consider the question of whether Belgium is an anomaly in federal theory. The research question in this paper therefore is of a more general nature: how important is it in a federal state for sub-states to have their own sub-national constitutions? For this purpose, Belgium is used as a case-study.

At first sight, the absence of sub-national constitutions in Belgium seems counter-intuitive, for two reasons. Firstly, comparative constitutional scholarship identifies sub-national constituent power as one of the defining features of federal systems (Gardner 2008: 325). Secondly, according to public choice theory, devolutionary federal systems, such as the Belgian one, are expected to involve the creation of sub-constitutions (Ginsburg and Posner 2010: 1601, 1624). As will be argued in the second section, however, the Belgian situation is less remarkable than one would expect. The question can then be reversed. Why should sub-states, such as Flanders, strive for constitutional power? Before looking into these reasons, in section four, I will first make clear in section 3 that sub-constitutional powers are not self-evident. The next section, in turn, will try to identify more arguments for the added value of sub-national constitutions. The last section will conclude that subnational constitutions are a matter of political balance between national and sub-national powers, rather than a principle of federal theory.

### 1. The Belgian case: state of affairs

#### 1.1. Legal position

Belgium was founded in 1830 as a unitary state. Although a devolutionary trend in Belgium started in 1970, the constitution has only since 1993 declared Belgium to be a



federal state, consisting of six sub-states: <sup>I</sup> the Flemish Community, the French Community, the German-speaking Community, the Flemish Region, the Walloon Region and the Brussels Region. The federal structure is unique in that Communities and Regions are two types of overlapping sub-states, differing as to the set of competences transferred to them. Communities are competent to regulate matters concerning education, culture, person-related matters and the use of languages, while Regions are competent for a detailed list of other responsibilities, mainly social-economic and territory-bound matters. Communities and Regions overlap as to their territory: the territory of the Flemish Community overlaps with the territory of both the Flemish Region and the territory of the Brussels Region, the territory of the French Region overlaps with the territory of the German Community and the French Community minus Brussels, while the territory of the French Community overlaps with the territory of the French Community and the Brussels Region.<sup>II</sup> The institutions of the Flemish Region, however, have merged with the institutions of the Flemish Community, making for one Flemish Parliament and one Flemish Government, competent in the Brussels Region only in the case of Community matters.

The state reform of 1993 also granted an embryo<sup>III</sup> of constitution-making power to some (but not all) sub-states. This does not imply the absence of sub-national constitutionalism. As has been observed in literature, national and sub-national constitutions are interconnected, in the sense that the less complete the national constitution is, the more important sub-national constitutions are, and *vice versa*. Hence, sub-state constitutional arrangements can be entrenched in more “complete” national constitutions (Williams 1999: 635; Williams and Alan Tarr 2004: 4; Beaud 2007: 190 -198). This is the case in Belgium. The most important constitutional aspects are regulated by the federal constitution and federal laws. The federal constitution contains a list of fundamental laws, and establishes a number of principles concerning the institutional design of the sub-states, such as the principle of a parliamentary system, direct and periodic elections, a legislature of five years for parliament without the possibility of earlier dissolution,<sup>IV</sup> and criminal proceedings against members of sub-state governments. Further details are left to the federal law maker. In most cases, a special majority is needed, consisting of a majority in both the French and the Dutch language group in the federal Parliament, the total number of votes in favor, cast in both language groups, having to



equal at least two thirds of the votes cast. In other cases, and especially when the institutional design of the German Community is concerned, an ordinary law suffices. Hence, federal laws describe the competences<sup>V</sup> of the sub-states, as well as the institutional arrangements. It comes as no surprise that the institutional design of the sub-states mirrors the federal institutional design, minus a few exceptions.<sup>VI</sup>

The Belgian constitution does allow the federal law-maker to designate, in a law adopted by a special majority, those matters relating to the election, composition and functioning of the parliament and to the composition and functioning of the governments of the Flemish Community, the French Community and the Walloon Region, which are regulated by the sub-state parliaments by law adopted by a two-thirds majority.<sup>VII</sup> Four observations can be made.

Firstly, not all sub-states dispose of institutional autonomy. More specifically, until now,<sup>VIII</sup> the German Community and the Brussels Region lack any form of constituent power;<sup>IX</sup> the former because of insufficient political significance (Nihoul and Bárcena 2011:219; Pas 2004:168); the latter because of an excess of political significance. As the Flemish political parties always fear that a strong Brussels Region would provide for French-speaking dominance in the overall federal system, they generally opposed autonomy for the Brussels Region on an equal footing with the other sub-states.<sup>X</sup>

Secondly, the making of a subnational constitution in Belgium requires two steps. In the first part of the process, the special majority law needs to designate the specific institutional matters which can be regulated by the sub-national parliaments.<sup>XI</sup> Hence, the federal lawmaker decides on the actual extent of the sub-national institutional autonomy. This is atypical, as in most federal states sub-national constituent power is provided by the constitution (Gardner and Ninet 2011: 505). In the second part of the process, the sub-national parliaments can regulate these matters by means of a law adopted by a two-thirds majority. There is no consensus as to the question of whether the federal lawmaker can (Peeters 2005: 53) or cannot (Rimanque 1993: 186) afterwards redraw institutional competences.<sup>XII</sup>

Thirdly, the institutional autonomy is limited both in quantity and importance. First of all, the Constitution limits the autonomy to elections, as well as the composition and functioning of the parliament and government. Secondly, most matters designated by the special law concern minor issues, such as the expenses of the members of parliament or the



designation of the main location of an electoral district, issues the constitutional nature of which can be put to doubt (Rimanque 1993: 185). More important matters, such as the designation of electoral districts, are accompanied by substantial limitations or conditions, such as respect for the proportionality principle and regional borders. Remarkably, the political agreements recently concluded in the framework of the sixth state reform, express the intention to allow for the introduction of regional advisory referenda concerning regional “interests”. If “interests” are not restricted to regional “competences”, these advisory referenda have an important discordant potential, adding instability to Belgian federalism.

Fourthly, in so far as the sub-national institutional autonomy does concern important matters – such as the functioning of the government and its relation with parliament - the question has been posed whether the requirement of a mere two thirds majority of the votes cast, abstentions not included, entails a sufficiently strong entrenchment for the execution of constituent power (Peeters 2005: 51; Rimanque 1993: 185). This practice, however, is in line with Ginsburg and Posner’s (2010: 1600) hypothesis, according to which sub-national constitutions generally require weaker amendment procedures due to a reduction of agency costs. More surprising in the Belgian case is that even minor issues require a qualified majority.

## 1.2. The Flemish longing for a sub-national Constitution

The constituent autonomy of the sub-states has remained limited, due to the distrust (Peeters 2005: 39; Uyttendaele 1993: 221) of French-speaking parties, fearing the Flemish craving for its own constitution as a sign of a separatist agenda. This has not prevented the Flemish Parliament and Government from forming initiatives aimed at the construction of a Flemish Constitution, containing both institutional autonomy and the declaration of fundamental rights.<sup>XIII</sup> In 1996, the Flemish Parliament discussed a governmental discussion paper presenting the prospect of the enlargement of institutional autonomy and the laying down of fundamental principles regarding the relationship between citizens and government.<sup>XIV</sup> In 1999, the Flemish Parliament expressed its demand for full-fledged constitutional power, implying more institutional autonomy, in the first of five resolutions which have been crucial for the position of Flemish political parties in the negotiations on



further state reform.<sup>xv</sup> In 2002, three experts assigned for this purpose by the Flemish Parliament presented their draft of a Flemish constitution, bringing together the sub-national stipulations issued by the Flemish Parliament in execution of its institutional autonomy and the federal stipulations open to amendment by the Flemish Parliament.<sup>xvi</sup> Although this document is only a coordination of existent provisions concerning the elections and the composition and functioning of the Flemish Parliament and Government, such a ‘Flemish Charter’ was described in the 1996 discussion paper as a symbol heralding the enlargement of constituent powers. Another expert was designated to analyze which constitutional provisions should be submitted to amendment in order to realize the establishment of fully-fledged constitutional power.<sup>xvii</sup> Draft resolutions and proposals were also initiated in Parliament based upon expert advice regarding a Flemish Charter on fundamental rights (Rimanque 2003-2004: 1001, 1016). In 2005, a parliamentary commission, “Flemish Constitution”, was established in order to draft a Flemish Charter, laying down the fundamental principles of Flemish government, rights and policy.<sup>xviii</sup> A Special Flemish Decree of 7 July 2006 (*Moniteur belge* 17 October 2006) coordinated the regulations enacted in execution of the Flemish constituent power. According to Nihoul and Bárcena (2011: 232), this law illustrates a more comprehensive vision on the Flemish side, compared to the rather casuistic approach in Wallonia. In 2010, the Flemish Minister-President handed over to the president of the Flemish Parliament a draft Charter for Flanders, containing a collection of fundamental rights laid down in the federal Constitution and the EU Charter.<sup>xix</sup> Hence, the Flemish aspirations clearly concern fully-fledged constitutional power, exceeding the mere demand for institutional autonomy.

## **2. The absence of sub-national constitutions: assessment in the light of constitutional theory**

The absence of sub-national constitutions in Belgium is not in line with conventional assumptions in constitutional theory. According to constitutional theory, sub-national constituent power is a distinctive feature of federal systems (Section 2.1.). Moreover, public choice theory expects that sub-national constitutions emerge, particularly in devolutionary federal systems (Section 2.2.).



## 2.1. Subnational constituent power as a distinctive feature of federal systems? Traditional vs dynamic constitutional theory

As mentioned in the introduction, constitutional theory identifies sub-national constituent power as one of the main distinctive features of federal systems. In federal theories at the beginning of the twentieth century, this was part of an endeavour to distinguish federal systems from territorial decentralized systems without abandoning a central sovereignty concept (Jellinek 1921: 489-491; Kelsen 1925: 193). In comparative constitutional theory it is observed that sub-national constitutionalism exists in most federal states. In the ‘Hamilton tradition’, forms of states are classified in categories of unitary, federal and confederate states according to their institutional features.<sup>xx</sup> Based on comparative analysis, the existence of sub-national constitutions and sub-national constitution-making power is also regarded by Belgian academics as a determining element of federal systems (Bex 1994: 12; Ergec 1994: 55-58; Judo 2006: 260; Vande Lanotte and Goedertier 2010, 226; Veny et al. 1991: 51). Others regard sub-national constitutionalism as a “necessary” and “essential” feature of federal systems. Bex (1994: 17) detects a “fundamental contradiction” in the concession of sub-national autonomous regulatory power on the one hand, and the denial of institutional autonomy on the other.

This theory, however, is not entirely convincing, for three reasons.

First of all, as the concept of sovereignty is beginning to fade as a paradigm for constitutional theory in the case of federal and other multilevel systems (Beaud 1998: 83-122 and 2007: 39-55), the need to distinguish federal from territorial decentralization is less urgent.

Secondly, the ‘Hamilton approach’ has become an “epistemological obstacle” in constitutional discourse (Gaudreault-Desbiens and G  linas 2005: 5), which is not only far from reality, but also hinders insight into the dynamics of forms of state as a continuous process to restore a balance of power. In modern federal theory, federal states are understood as a dynamic process in search of a proper balance between autonomy of the federated states on the one hand, and efficiency of central government on the other hand (Lenaerts 1990: 207; Pinder 2007: 14). When extended to general constitutional theory, the distinction between federalism, regionalism and devolution remains merely a matter of gradation. In this dynamic approach, states are defined as permanent fields of tension



between integration and differentiation (Couwenberg 1994: 102-104). This leads to the enumeration of indicators, which position states on a gliding scale from unitary states to confederate organisations (Hooghe et al. 2008: 123-142; Popelier 2008: 427-433), by measuring autonomy of sub-entities on the one hand, and central cohesion or integration on the other. The existence of sub-national constituent power, being only one of many indicators, is in itself not determining for the categorizing of a state. A state might find itself positioned on the left side of the scale for one indicator and on the right side for another. This agrees with the observation that in reality, a specific institutional construction results from a ‘package deal’ meant to maintain a certain balance in relations of power (Jackson 2005: 148-151). Hence, the observation that a so-called regional system, such as the Italian one, provides for more sub-national constituent power than the Belgian federal system, is not unsettling in the light of constitutional theory. Nor is the absence of sub-national constituent power in contradiction with the existence of autonomous regulatory power. Other indicators might provide for compensation. Even in traditional doctrine, this “compensation” is sometimes diminished to the ‘participation of sub-states in federal constitutional law-making concerning their institutional design and competences’ (Van Damme 2008: 274). In Belgium, there is a minimalist participation of the sub-states as such, but on the other hand, the French and Dutch linguistic groups, which define the entire state organisation, both dispose of a veto power.<sup>XXI</sup>

Finally, the identification in comparative constitutional scholarship of sub-national constituent power as a distinctive feature of federal systems is based upon false empirical observations. Sub-national constituent power is present in a majority, though not in all federal systems, e.g. Canada or India (Williams 1999: 630). Moreover, the presence of sub-national constituent power is often linked with the integrative nature of most federal systems, originating from independent states with pre-existing constitutions. Belgium, on the other hand, is a devolutionary system, originating from a unitary state with a pre-existing central constitution. In this system, sub-national competences, including eventual constitutional powers, are attributed to the sub-states. Hence, the attribution of constituent powers, instead of being an essential part of federalism, is part of the ‘package deal’.



## 2.2. Constitutional powers in devolutionary federal systems

The question then remains why sub-national constitutionalism has only been minimally included in the Belgian ‘package deal’. This runs counter to expectations in public choice theory. According to Ginsburg and Posner, sub-national constitutionalism tends to become stronger in devolutionary federal systems. Their argument is that if the central state loses power, the loss of restrictions on the exercise of these powers at the federal level should – from the perspective of agency control - be compensated by greater restrictions in the constitutions of the sub-states (Ginsburg and Posner 2010: 1601). This argument applies all the more as devolutionary federalism often comes with a system of attribution of competences based upon exclusivity. In Belgium, moreover, the sub-states are positioned on an equal level with the federal state. For this reason, federal interference, which, according to the authors, compensates for weaker sub-national constitutions in integrative federal systems, does not decrease the risk of agency costs in the Belgian sub-states.

If agency control is at the heart of this reasoning, however, there is no necessity for these restrictions to be included in sub-national constitutions, provided that the sub-national authorities are submitted to federal constitutional law. Ginsburg and Posner (2010: 1593) define amendment procedures as an indicator to distinguish strong constitutions from weak constitutions. In Belgium, restrictions on sub-national authorities are so strongly entrenched in federal constitutional and quasi-constitutional law, that they are not able to amend them of their own accord.

Thus, leaving out of account the question whether the public choice theory is generally valid, the Belgian case does not disprove it.

## 3. Arguments against the transfer of sub-national constitutional powers

It follows from the former section that the existence of sub-national constitutions cannot be claimed to be essential to federal systems. Also, restrictions in federal law explain why the absence of sub-national constitutions in the devolutionary Belgian federal system does not increase the risk of agency costs. Other arguments support opponents of sub-



national constitutions. These arguments relate to both fundamental aspects of constitutionalism, i.e. institutional organization and fundamental rights.

### 3.1. Institutional autonomy

As for institutional organization, Ginsburg and Posner (2010: 1598) state that sub-national constitutions are in general weaker than federal constitutions, i.e. they are easier to amend and they lay down weaker voting rules, e.g. by preferring ordinary majority, direct democracy and unicameralism. The authors (at p. 1594) consider this the result of a reduction of agency risks, due to four factors. The first - the stakes are lower because of the transfer of powers to the federal level - and the second – federal monitoring – do not apply to the Belgium system. They express a distrust of federal authority compared to sub-national authorities which are considered to be more democratic. In devolutionary systems such as Belgium, however, powers are transferred from the federal level to the subnational level. Therefore, the stakes at the subnational level increase, while federal monitoring becomes weaker, which suggests that there is less need for federal monitoring. The other two factors, however, can be applied to the Belgian situation. Firstly, sub-states risk losing citizens, business and capital to other states if they adopt bad policies. Secondly, the population of a Belgian sub-state is smaller and generally more homogeneous than many equivalent political entities elsewhere.

The authors' assumption (at p. 1597) is that in the end, sub-national constitutions will merely duplicate federal constitutional rules. In Belgium, indeed, Judo (2006: 261-262) notes "with some irony" that the first act of constituent power exercised by the Flemish Parliament consisted in the duplication of the federal regulation regarding offices incompatible with parliamentary membership.

The question arises why newly created sub-states in devolutionary systems would strive for their own constituent power, if, from the perspective of agency costs, there is no urgent need for a set of rules which is distinct from the federal constitution and difficult to adjust. The same is true if we translate the perspective of agency costs into more principled terms of constitutionalism, in the sense of giving protection against arbitrary use of government power (Gardner 2008: 327). There is no need for sub-national constitutions to protect citizens against government interference, since guarantees are entrenched in both



the federal constitution and international treaties. In Belgium, every interested citizen can ask the Constitutional Court to review Acts of federal or subnational parliaments against the constitution or fundamental rights treaties. Moreover, the European Court of human rights provides for additional judicial protection.

However, Ginsburg and Posner's arguments do not explain why sub-states should *not* have institutional autonomy. They merely explain why sub-national institutional rules are not necessarily included in a constitutional act which is difficult to amend. In fact, they do admit that the institutional design at sub-state level might differ from the federal level, precisely because fewer restrictions are needed. In Belgium, the federal institutional design applicable to the sub-states in general mirrors the federal institutional design. The exceptions to that observation reduce restrictions: sub-national parliaments are unicameral instead of bicameral, they do not contain language groups (apart from the Brussels Parliament), and deviations from the ordinary majority requirement are rare. The question then remains why subnational states shouldn't be allowed to decide themselves on the level of protection against the risk of agency costs.

In Belgium, specific reasons explain why the thought of sub-national constitutions makes politicians nervous. These specific reasons lie in the devolutionary and bipolar nature of the Belgian federal system, creating a dynamic towards separation, and in the overlap of territory.

The bipolar nature of the system relates to the linguistic cleavage in Belgium between Flemish and French-speaking communities.<sup>xxii</sup> This linguistic cleavage – accompanied by differences in culture and preferences – incited the devolutionary trend in Belgium and is mirrored in the federal institutional design, featuring linguistic groups in administration, parliament, government, Council of State and Constitutional Court. Moreover, the regionalization of economic policy – originally a Walloon demand – has led, as Van Goethem (2011: 40) puts it, to “a radically different socio-economic profile for both regions” with a “visibly poorer Wallonia”. As a result, the French-speaking and the Flemish sub-states oppose each other, rather than defending common interests against the federal level.<sup>xxiii</sup> In literature, sub-national rivalry is considered a threat to sustainable federalism (Gardner and Ninet 2011: 493). The devolutionary and bipolar dynamic explains why the French-speaking community fears the promotion of policy competition between the sub-states and considers the Flemish aspiration for its own constitution to symbolize a hidden



separatist agenda. The bipolar nature of the Belgian system also explains why, as noted above (Section 1.1.), the Flemish politicians fear an autonomous Brussels Region, on an equal footing, including constituent powers. At first sight, it may seem ridiculous that sub-states are denied the right to decide for themselves small institutional matters such as name giving.<sup>xxiv</sup> So, for example, an amendment of the federal constitution was needed in order to change the name of sub-national representative bodies from “council” into “parliament”. On the other hand, a recent intention on the French-speaking side to change the name of the French Community into “Fédération Wallonie-Bruxelles”, was met by indignant reactions on the Flemish side, regarding this as a provocative claim on Brussels by the French-speaking parties (Moonen 2011: 16). This demonstrates that even naming can be a sensitive matter in Belgium, for which entrenchment in federal law offers guarantees to both linguistic parties.

Finally, the overlap of territory constitutes an obstacle for complete institutional autonomy. The most striking example is the territory of the Brussels Region, which also forms part of both the Flemish and the French Communities. For this reason, when a competition was launched for the best essay on a proposal for a fully-fledged Flemish Constitution, the contest winners explained that in order to redesign the Flemish institutions, they also had to propose amendments in the constitutional structure of other sub-states (Clement et al. 1996: xv). Therefore, where institutional autonomy is actually given to the Belgian sub-states on substantial issues, this is mostly on a conditional basis, requiring respect for institutional balances regulated on the federal level.

### 3.2. Fundamental rights

Flemish aspirations are not limited to institutional autonomy. Apparently, the Flemish Community also aspires to enact a Flemish fundamental rights charter. The question then arises as to the added value of such an act.

Delledonne and Martinico (2011: 19) warn of the incorporation of fundamental rights in subnational charters “because it could produce asymmetries in the guarantees of rights, providing the ground for differentiated policies, which in turn could discriminate between citizens because of their belonging to one specific region rather than another”. National enactment of fundamental rights, however, does not hinder the creation of differentiated



policies. For example, the constitution may leave the implementation of fundamental rights, especially in the field of social, economic and cultural rights, to the sub-states. Every government should, nevertheless, respect the core of fundamental rights. The Belgian Constitutional Court considers that any violation of a fundamental right constitutes at the same time a violation of the equality and non-discrimination principle. This was important particularly when, prior to 2003, the powers of the Constitutional Court were limited to the review against power-allocating rules, rights concerning education and the equality and non-discrimination principle laid down in Articles 10-11 of the Belgian Constitution. The Constitutional Court could still review indirectly possible cases of breaches against fundamental rights, linked to Articles 10-11 of the Constitution. In that case, the Constitutional Court skipped the comparability test.<sup>xxv</sup> This strategy is still used by the Court in order to review cases involving fundamental rights protected by an international treaty and not by the Constitution.<sup>xxvi</sup> If the message is clear – the fundamental nature of rights entails their enjoyment by every citizen – it is difficult to envisage a sub-national charter of rights recognizing rights for some citizens and not for others, depending on whether they live in one sub-state or another.

The argument can be carried even further, to the extent that the added value of a national charter of fundamental rights can be put to doubt. In Belgium, every court can review laws, including primary legislation, against international treaties. Moreover, the Constitutional Court, *via* Articles 10 and 11, reviews Acts of Parliament against fundamental rights protected by international treaties. Constitutional rights are interpreted in the light of international treaties and particularly in the light of the European Treaty of human rights and the case law of the European Court of human rights, resulting in a europeanisation of constitutional rights (De Wet 2008: 276-282; Popelier 2011: 154-156).

A national charter of fundamental rights, of course, may contain rights which relate to country-specific peculiarities or dynamics. Most fundamental rights protected by the Belgian Constitution, however, are mirrored in international treaties. There are only a few exceptions, such as the neutrality of education. It is, however, difficult to imagine fundamental rights specific to one region in Belgium and not to another. In general, as Gardner (2008: 326) notes, “rights-protective provisions of sub-national constitutions seem merely to duplicate similar provisions contained in the national constitution”. Also, the Flemish Charters which have been constructed up until now (without formal legal force)



generally duplicate fundamental rights protected by the national constitution or international treaties.

According to Brems (2007: 382), the enactment in the national constitutions of fundamental rights, already protected by international treaties, only has added value when the constitutional clause adds wider protection. In that case, dynamics between national and international mechanisms may result in an overall improvement of fundamental rights protection. Regarding the national-sub-national relations, the phenomenon experienced in the US, where overlapping sub-state constitutional rights are interpreted to provide more expansive protection, is called “new judicial federalism” (Williams 1999: 633). The enactment of non-overlapping fundamental rights is considered by Delledonne and Martinico (2011: 19) as “a sort of a process of mutual learning between levels of government which permits an improvement in the guarantees of fundamental rights”. It remains doubtful, however, whether fundamental rights protection in Belgium is in urgent need of this kind of national-sub-national dynamics. There already exist sufficient mechanisms to keep national fundamental rights protection up-to-date, due to the protection offered by the European Court of human rights (ECtHR) and the fact that constitutional rights are interpreted by the Constitutional Court in the light of international treaties in general, and the case law of the ECtHR in particular. It seems unlikely that people are more inclined to view sub-national units, rather than national and transnational institutions, as playing a significant role in the protection of human rights (Gardner 2008: 342).

Considering the case law of the Belgian Constitutional Court mentioned above, it remains difficult to differentiate between rights and rights protection in national – sub-national relations, on a more fundamental level than merely implementation policies. On the other hand, no principled objection can be discerned against conferring to the sub-states the power to declare fundamental rights which are already protected in the national constitution or in international acts which bind the Belgian state. Gardner (2008: 335-336) even discerns added value of sub-national constitutions duplicating the federal charter, in that they provide a guarantee of protection if the national power fails to sufficiently protect a right. The author sees advantages in this system, especially in the case of shared competences. In Belgium, however, most powers are granted on the basis of exclusivity.



#### 4. Arguments in favor of the transfer of sub-national constitutional powers

In an article on sub-national constitutions in Belgium, Berx (2007: 248-254) gives four reasons in favor of the creation of sub-national constitutions in Belgium: avoiding a federal debate on intrinsic sub-national matters, avoiding degradation of the concept of a constitution, the promotion of transparency and the symbolic function of the constitution. These arguments imply an additional argument, namely the particularity of institutional preferences, as will be explained below. Pas (2004: 169) adds still another argument, referring to the value of competition. In this section, the merits of these arguments are analyzed.

The second and third arguments can be discussed very briefly, as they are less convincing.

**Avoiding degradation of the concept of a constitution.** Berx derives an argument from the observation, noted above (section 1.1.), that many of the institutional aspects, conferred to the regulating power of the sub-states, concern only minor issues. The author (2007: 251) considers that both the two-third majority and the terminology of a “sub-national constitution”, downgrades the meaning of the concept of a constitution. Berx, however, does not explain why substantial sub-national constitutional competences should, in her view be conferred on the sub-states. She seems merely to be expressing subjective disappointment as to the embryonic nature of the transfer of sub-national constituent power in Belgium. Besides, as noted above (section 1.1.), the Flemish Community, the French Community and the Walloon Region are also competent to regulate a number of more substantial constitutional matters, even to the degree that it was questioned whether the two-third majority provides for sufficient entrenchment.

**Transparency.** The third argument stresses the fragmented nature of Belgian sub-national constitutions, the regulations whereof are spread out over the federal constitution, federal laws and sub-national regulations. Berx (2007: 251) considers this dubious from a democratic point of view, as it is difficult for the citizen to have access to the sub-national constitution. Again, this argument criticizes the phased sub-national constitution-making procedure in Belgium, but does not explain why sub-states should dispose of constituent power. Moreover, sub-states can establish coordinated versions of the sub-national



constitution in the form of a resolution, as has been done in Flanders (Section 1.2.). Also, the claim that citizens are in need of an accessible sub-national constitution may be overrated. For example, inquiries have highlighted the low-visibility of sub-national constitutions in the United States (Williams 1999: 637).

More interesting are other arguments, including the possibility that sub-states might have particular preferences for their institutional design.

Particular preferences for institutional design. According to Gardner (2008: 334), ethno-cultural self-determination by subpopulations in a federal system “may lend plausibility to the premises of sub-national constitutionalism.” Therefore, although it was stated above that in general, sub-national constitutions will most often duplicate the national constitution, for certain aspects sub-states, based upon subpopulations, might have specific preferences. This is clearly the case in Belgium (Clement et al. 1996: 28; Pas 2004: 169). For example, while article 1 of the Belgian Constitution states that Belgium is a federal state composed of Communities and Regions, there is a Flemish preference for an institutional design based upon Communities, whereas a Region-based structure is preferred on the French-speaking side.

However, the federal constitution and constitutional law takes these differences into account, providing for a tailor-made design (Peeters 2005: 39, 44). For example, Flanders has made use of the option to merge the institutions of the Flemish Community and the Flemish Region, providing for one Flemish Parliament and one Flemish Government,<sup>xxvii</sup> whereas on the French side the parliament and government of the French Community still function apart from the parliament and government of the Walloon Region. The French Community, for its part, makes use of the possibility to transfer some of its competences to, on the one hand, the Walloon Region, and, on the other hand, the French Community Commission in Brussels.<sup>xxviii</sup> Likewise, the political agreements concluded in the build-up to the sixth state reform, while bringing sub-state, federal and European elections together, allow for the sub-states to hold the regional elections at a separate date, as a reply to the Flemish fear that simultaneous federal elections may overshadow regional elections. If federal law leaves room for sub-national constitutional preferences, the need for sub-national constitutions diminishes.

Avoiding a federal debate on intrinsically sub-national matters. Berx (2007: 249), while admitting the tailor-made nature of the sub-national design in federal constitutional



law, questions the entrenchment of this design in federal law, because it gives each language group participatory and even veto rights regarding the sub-national constitutional structure of the other language group (also Uyttendaele 1993: 221).<sup>xxix</sup> Thus, one group can make amendments in the institutional design of the other group's sub-national structure dependent upon concessions regarding other matters external to the institutional debate (Berx 2007: 249). This is especially problematic in Belgium, as the bipolar structure evokes regular conflict and deadlock (Pas 2004: 166).

While this argument is valid on the one hand, other arguments explain why the Belgian institutional debate is, for the largest part, conducted on the federal level. It was demonstrated above that even harmless-seeming institutional matters, such as name-giving, can become sensitive matters in the relations between the two dominant language groups in Belgium. Therefore, it is appropriate for the other language group to keep a say in these matters.

This counter-argument, however, does not explain why until for a long time, even the slightest constituent power was denied to the German-speaking Community, which is not part of the sensitive and delicate institutional balance based upon the struggle between the French and the Flemish language group. Moreover, as the federal parliament only contains a Dutch and a French language group, guaranteeing only one seat in the Senate to a member of the German-speaking Community, the German-speaking Community was not even permitted to participate in the construction of its own institutional design. Recent political agreements, however, provide for the conferring of sub-constituent power to both the German-speaking Community and the Brussels Region.

The symbolic function of the constitution. Berx (2007: 254) presents the symbolic nature of the constitution as a function determining its content. Pas (2004: 169) uses this as an argument for the construction of sub-national constitutions, when he claims that sub-national constitutions are “necessary”, because they “express the fundamental choices of a society”. Thus, sub-national constitutions in devolutionary federal systems function as a symbol of sub-national state construction. As Delledone and Martinico (2011: 3) observe, it is also the case in Spain and Italy that sub-national constitutions have the purpose “of claiming sovereignty rather than simple authority, or to challenge in a way the central sovereignty of the super-state”. Hence, if the Flemish Community strives for constitution-making powers and invests in resolutions declaring a Flemish fundamental charter, the



main reason can be formulated in terms of a political struggle for power. The earlier argument claiming that sub-national institutional issues should not be part of federal negotiations external to the institutional debate, can also be regarded from this perspective. A sub-national entity with specific institutional needs is stronger when engaging in institutional bargaining, if these needs are not included in the federal package deal.

Sub-national constitutions in Belgium are a sensitive issue precisely for these symbolic and political reasons. It has been explained above (section 1.2.) that the French-speaking parties fear that a Flemish constitution stands as a symbol for a separatist agenda rather than expressing sub-national autonomy in a federal structure. The symbolic nature of the constitution explains why the Flemish parties, while aiming towards the construction of a Flemish Constitution, deny the Brussels Region even the slightest form of constituent power (section 3.1.). As Nihoul and Bárcena (2011: 234) noted, while the Flemish have aspirations for constituent powers and the French-speaking parties do not, paradoxically the latter demand constitutive autonomy for the Brussels Region and the German-speaking Community, while the Flemish parties, until recently, refused this. The reason for this is a difference in preference regarding the structure of the Belgian federal state, composed of two communities (the Flemish wish) or three regions (the Francophone wish).

Sub-states as laboratories. In this article, the dynamics between state and sub-states has already been mentioned regarding the evolution of fundamental rights. This argument has also been used regarding institutional design. Gardner (2008: 331) formulates this in terms of “an arena of intergovernmental contestation” or competition. In Belgium, Pas (2004: 169) notes that subnational constitutions may provide for fresh ideas for the modernization of the federal constitution. This argument gains strength with his observation that “the social, economic, and political dynamics in Belgian society have almost completely shifted to the regions and communities, as a consequence of the deadlock on the federal level”. Until now, the sub-states have not shown many signs of creativity in this regard, but this may be due to the limited scope of their constituent autonomy. In this respect, the conferring of the power to introduce regional referenda may operate as lever for new forms of government. The introduction of referenda at the federal level, however, remains doubtful given the fact that it is difficult to reconcile with the bipolar and consociational architecture of Belgian federalism (Popelier 2005: 115-116).



## 5. Conclusion

While there are no principled reasons for the existence of sub-national constituent power, there also seem to be no strong principled objections. It is less urgent for sub-states to entrench guarantees against the risk of agency costs or arbitrary interference by the government in a constitution, when these guarantees are already entrenched in federal constitutional and quasi-constitutional law, leaving room for sub-state peculiarities. There is no need for the recognition of fundamental rights at the level of sub-states. Indeed, the principle of equality and non-discrimination even opposes the recognition of new fundamental rights in sub-national constitutions, based upon the principle of equality and non-discrimination. However, there is no principled objection against the declaration in sub-national constitutions of fundamental rights which are already protected in national or international acts. In the end, the existence of sub-national constitutions may even offer some added value if it succeeds in creating constitutional dynamism.

Therefore, sub-national constitutionalism can better be explained as a matter of history and politics, rather than as a matter of federal principle. In Belgium, historic reasons for the (quasi) absence of sub-national constitutions relate to the devolutionary nature of Belgian federalism, originating from a unitary state with a national constitution. Political reasons for both the absence of sub-national constitutions and the presence of Flemish aspirations for a Flemish constitution, can be explained as a struggle for power, which is intensified by the bipolar conflict model which shapes the Belgian federal state. The symbolic function of constitutions plays an important part in this struggle, along with the fact that in Belgium, due to the overlap of territories, the institutional design of one sub-state may impact on the institutional design of another sub-state.



\* The author is professor in constitutional law at the University of Antwerp and co-director of the research group on government and law.

<sup>I</sup> Two other entities (the French Community Commission and the Common Community Commission) have some autonomous powers in Brussels and can therefore be considered additional sub-states, but they will not be dealt with in this paper as this would make the paper more complex than is necessary, considering their minor importance compared to the regular sub-states.

<sup>II</sup> As the French and the Flemish Community are both competent to regulate community matters and are both competent to act in Brussels territory, in order to avoid conflicts of competence, they can only regulate unilingual institutions in Brussels. The regulation of community competences applied to bilingual institutions and persons is left to the Common Community Commission (person-related matters) and the federal state (other community competences).

<sup>III</sup> Term used in the parliamentary debates, cf *Annales* House of Representatives, 1992-1993, 8 February 1993, n° 32, p. 1286; *Parl. Doc.* House of Representatives, 1992-1993, n° 725/6, 66.

<sup>IV</sup> According to the political agreements concluded in the build-up to the sixth state reform, the sub-states will be conferred a limited right to decide on the exact date of the elections, thereby allowing them to deviate from the elections for the European Parliament and, in the future, the federal elections.

<sup>V</sup> The Constitution makes the Communities competent for cultural matters, education, person-bound matters and the use of languages, with some restrictions, but, except for education, the special federal law enumerates which specific matters fall under these categories. The Constitution is silent about the substantive competences of the Regions.

<sup>VI</sup> For example, unlike the federal Parliament, the parliaments in the sub-states are not bicameral. Furthermore, only the federal and the Brussels Parliament contain two language groups, as this is not necessary in the other, more homogeneous sub-states. Moreover, the sub-states do not acknowledge a King as head of state.

<sup>VII</sup> Art. 118 § 2 and 123 § 2 of the Belgian Constitution.

<sup>VIII</sup> The political agreements concluded in the build-up to the sixth state reform, mention the conferring of constituent powers to the German speaking Community and the Brussels Region.

<sup>IX</sup> Declarations for the revision of the constitution in 2003, 2007 and 2010 envisaged to include these entities as barrier of constituent autonomy but have never lead to any result (Judo 2011: 246-247).

<sup>X</sup> See also M. Nihoul and F-X Bárcena (2011: 219) for this reason, despite specious arguments referring to the international position of Brussels and its status as capital.

<sup>XI</sup> For an overview of these matters, see Berx (1994: 183-190) and Rimanque (1993: 183-185).

<sup>XII</sup> According to Judo (2006: 268) a minor reduction already occurred.

<sup>XIII</sup> For an overview until 2007, see <http://www.vlaamsparlement.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/index.html>.

<sup>XIV</sup> Discussion paper on further state reform, approved by the Flemish Government on the 29<sup>th</sup> of February 1996 and discussed in the Flemish Parliament. See *Parliamentary Documents*, Flemish Parliament (1995-1996) n° 253/1, at p. 14

<sup>XV</sup> *Parliamentary Documents*, Flemish Parliament (1998-1999) n° 1339.

<sup>XVI</sup> Report submitted by J. Velaers, K. Leus, F. Judo and P. Van Orshoven, <http://www.vlaamsparlement.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/528.pdf>.

<sup>XVII</sup> Report submitted by K. Rimanque, <http://www.vlaamsparlement.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/529.pdf>.

<sup>XVIII</sup> PV 17 October 2005, [http://www.vlaamsparlement.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/vp\\_ub\\_17\\_oktobe\\_r\\_2005.pdf](http://www.vlaamsparlement.be/vp/informatie/pi/informatiedossiers/vlaamsegrondwet/vp_ub_17_oktobe_r_2005.pdf). This resulted in not more than a hearing and a couple of resolution and proposals.

<sup>XIX</sup> It lasted until 2012 before a proposal for a resolution for 'a Charter for Flanders' was initiated in Parliament (Flemish Parliament, 2011-2012, Doc. No. 1643). However, several political parties oppose the document, because they have not been consulted and criticize the text either for presenting Flanders as a 'nation' in the preamble or for its lack of legal value.

<sup>XX</sup> The term refers to one of the authors of *The Federalist* who emphasized the institutional requirements for the establishment of an American federal state, see Pinder (2007: 2).

<sup>XXI</sup> This is *de jure* the case in so far as the institutional design of the sub-states is regulated in special majority law, and *de facto* the case in so far as it is regulated in the federal constitution. The German-speaking minority, however, is ignored in this construction.



XXII For a historical account see Van Goethem (2011: 21-43).

XXIII Recent developments bring an exception to light: regarding the completion of the Dexia dismantlement proceedings, and more specifically the management of the holding covering the Dexia municipality shares, the position of the Regions is opposed to the position of the federal government.

XXIV See for a similar case in Italy G. Delledonne and G. Martinico (2011: 8-9).

XXV E.g. Const. Court No 16/91, 13 June 1991.

XXVI E.g. Const. Court No 171/2008, 3 December 2008; Const. Court No 142/2009, 17 September 2009.

XXVII The Brussels members have no voting right for regional matters, as the Flemish Region, unlike the Flemish Community, has no territorial competence in Brussels.

XXVIII The Walloon Region has no competence in Brussels. Therefore, the same competences are also transferred to the French Community Commission, which is created as a decentralized body for the implementation of French Community laws, but which functions as an autonomous sub-state for these matters transferred to it by the French Community.

XXIX A striking example occurred in 1988, when the Flemish wish to have a proportional Flemish government required agreement of the French-speaking language group.

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# Sub-National Constitutionalism in Argentina. An Overview

by

Ricardo Ramírez Calvo\*

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## Abstract

Argentine federalism and sub-national constitutionalism is a very interesting case study for anybody trying to establish a federal system in any country around the world. Not because of its success, but precisely because of its failure.

A federation on paper, Argentina is a highly centralized country, in which economic dependence of the Provinces from the central government has destroyed any kind of autonomy of the sub-national entities.

This article aims to investigate the most important features and contradictions of the Argentinean federalism

## Key-words

Argentina, federalism, subnational constitutionalism



## 1. Historical Background

Argentina has one of the oldest federal systems in the world. The original framework was established in the Constitution in 1853. Although the Constitution has been amended 5 times<sup>I</sup>, the basic structure adopted in the original Constitution remains unaltered. It was created as a sort of compromise between two opposing forces that had fought a long civil war: the centralists or *unitarios* and the federalists or *federales*. The tension between both forces surfaced almost at the very beginning of our independent life, when the country cut its ties with Spain on May 25, 1810<sup>II</sup>.

The old Spanish colonial administration was highly centralized. Almost all authority, saved for purely municipal matters, was in the hands of the Viceroy in Buenos Aires. In addition, the Spanish authorities imposed a strict control over foreign trade, which could only be carried through the port of Buenos Aires. This provoked stagnation of the economies of the provinces and favoured an unequal development between Buenos Aires and its sisters. The problem would eventually become more acute in the future and is currently one of the main factors of distortion of the federal system.

On the other hand, the disappearance of the central authority of the Viceroy brought a greater degree of autonomy to the provinces, which slowly started to develop their own political institutions<sup>III</sup>. Thus, the tradition of centralization, inherited from Spain, was counterbalanced by the decentralization experienced during the period between the May Revolution and the enactment of the Federal Constitution in 1853.

From the very beginning, some of the founders of the country regarded the United States federation as a model, whose principles should be followed in the constitutional organization of the country<sup>IV</sup>. Mariano Moreno, one of the main actors of the May Revolution, even prepared a draft constitution based on the United States Constitution<sup>V</sup>. However, strong forces opposed this vision and its mentor was forced into exile<sup>VI</sup>.

The confrontation continued for over 40 years, becoming at times a bloody civil war. In that period, two attempts were made to enact a national constitution: in 1819 and in 1826. Both constitutions created a centralized government sitting in Buenos Aires, the former



quasi monarchical with the expectation of inviting a European prince to become king of the country.

Both constitutions were roundly rejected by the majority of the provinces. After the rejection of the 1826 Constitution, the national authority was dissolved and the provinces were left to govern themselves. But already after the rejection of the Constitution of 1819, some provinces had started to enact constitutional documents. The first of those documents was the Provisional Statute of the Province of Santa Fe of 1819<sup>VII</sup>, followed by the Constitution of the Federal Republic of Tucumán in 1820 and the Constitution of the Federal Republic of the Province of Córdoba in 1821<sup>VIII</sup>. Other constitutional documents were enacted in most of the provinces until the enactment of the Federal Constitution in 1853.

The importance of those early documents does not rest in their particular provisions or structures, which in most cases were extremely elementary. In fact, none of those documents inspired any provision of the Federal Constitution<sup>IX</sup>. However, they are evidence of the high degree of autonomy enjoyed by the provinces during the period 1810-1853 and they mark the date of birth of sub-national constitutionalism in Argentina. It predates national constitutionalism.

As we stated above, the federal constitution was adopted in 1853, creating the Argentine Confederation, which in fact was a federal state, rather than a confederation of states. However, at that time, the Province of Buenos Aires seceded and remained separated from the rest of the country until 1860, when, after a short war between Buenos Aires and the Confederation<sup>X</sup>, the former was allowed to propose amendments to the Constitution and the country was reunited. The importance of those amendments, in particular regarding federalism, has led many authors to refer to the original constitution as the Constitution of 1853/60.

This historical evolution has great importance for understanding Argentine federalism. Argentina is not a centralized country which underwent a devolution process, by which the central government assigns some of its powers to the local governments. In Argentina, the provinces predated the federal government and in fact created it, by delegating some of their powers to a common government. But, in doing so, they reserved for themselves the vast majority of the governmental powers.



## 2. The Argentine Federal System

When a new attempt was made to enact a Constitution at national level in 1852, its drafters carefully tried to combine the opposing forces of centralization and federalism, creating a federal state, as opposed to both, a confederation or a unitary state. In a sense, this process is very similar to the one experienced by the United States of America when, after the failure of the Articles of Confederation, a strong federal government was created.

Our founders used the Constitution of the United States as a model. This influence has been discussed a great deal, with many authors denying the fact that it occurred. But as we have proven with great amount of evidence, such denial is based on political reasons (what we have called the “anti-American obsession”) and not on facts. Of course, there are differences between both constitutional systems, but those differences have been greatly exaggerated.

The basic principles on which both systems are based remain identical:

- (i) A written constitution which is a legal instrument with supremacy over the rest of the legal system and not a mere political document without legal value;
- (ii) A government of enumerated and limited powers;
- (iii) The separation of powers with its checks and balances;
- (iv) Presidentialism, with the popular election of the President, whose term of office is independent from that of the Legislature;
- (v) Federalism, with two distinct levels of authorities and jurisdictions, which are autonomous each in its respective area of competence;
- (vi) The distinction between constitution making power and constituted powers;
- (vii) Judicial review of the constitutionality of laws; and
- (viii) A bill of rights directly enforceable by the courts which works as a limit for the government.

This undeniable fact has been forgotten and our Constitution has been wrongly construed, and European doctrines, which are alien to our system, have been applied. French administrative law, which denied judicial review and established a hierarchical and centralized system, has been consistently applied in Argentina to justify powers not conferred to the Federal Government. More recently, the Spanish Constitution has been



used as a model, ignoring the fact that Spain is a centralized country that has been decentralized in autonomous regions, a procedure exactly opposite to what occurred in Argentina, where the provinces concurred in creating the federal authority. This fact is of great importance and should not to be overlooked. The basic constitutional principle regarding federalism in Argentina is that, like in the United States, the provinces retain all powers not delegated to the federal government. Article 41 of the Argentine Constitution, which regulates environmental protection and was incorporated in the 1994 Constitutional Amendment, is based in article 149.1.23 of the Spanish Constitution and attributes to the Federal Government the power to enact legislation containing the minimum protection standards applicable throughout the entire country. The provinces may enact legislation complementing those minimum standards. This system of distribution of competences is alien to Argentine federalism. It is a consequence of the Spanish system, in which the distribution of competences is not fixed in the Constitution but may be determined by the *Cortes Generales* when approving the *Estatutos Autonómicos*. In Argentina, the distribution of competences is fixed in the Constitution and both the Federal Government and the Provincial Governments have little or no leeway (at least theoretically) for modifying it. Section 41 of the Argentina Constitution introduces a different type of distribution of competences, one that is not determined by the Constitution and may be modified by the Federal Congress.

The Constitution acknowledges the pre-existence of the provinces and creates a federal government with enumerated and limited powers. In our system, two different authorities coexist: the federal government and the provincial governments<sup>XI</sup>. Each government has its own area of authority, which, theoretically, may not be curtailed by the other. Section 121 of the Constitution establishes the main principle of Argentine federalism:

*The Provinces retain all powers not delegated by this Constitution to the Federal Government, and those they have expressly reserved by special covenant at the time of their incorporation.*

This section was adopted in the original Constitution in 1853 and has remained unaltered until today. It makes clear that the residual power remains with the provinces. Unlike the devolution process of certain European countries, the powers of the federal



government come from the provinces through the Constitution. In case of doubt, the interpretation must be in favour of the authority of the provinces.

Gorostiaga, the main drafter of the Constitution, explained this feature in the following words: “The authority delegated by the Argentine people in the Constitution has been conferred upon two entirely different governments: the national and the provincial governments. Since the national government has been created to respond to great general needs and to care certain common interests, its powers have been defined and are small in number. On the contrary, since the provincial government reaches all parts of society, its powers are undefined and great in number, extending to all matters of business and affect the life, liberty and prosperity of the citizens. The provinces retain all the power not delegated to the federal government. The government of the provinces is the rule and shapes the common law of the land. Federal law is the exception”.

As we anticipated above, this key principle has been neglected in practice and, consequently, its foundations have been corroded. Federal law has become the rule and provincial law is the exception.

### 3. The Basic Rules on Federalism in the Argentine Constitution

Federalism appears from the very beginning in the Argentine Constitution. The preamble makes clear that the delegates to the Constitutional Convention had been appointed by the provinces. Section 1 states that Argentina adopts a republican representative and federal system of government. Section 5 of the Constitution introduces what has been called the “federal guarantee”. Pursuant to such provision, the provinces shall enact a provincial constitution pursuant to the republican representative system of government, in which they shall abide by the principles, declarations and guarantees contained in the Federal Constitution and shall organize the judicial system, the municipal government and basic education. Under these conditions, the federal government warrants the Provinces the free exercise of their institutions.

Pursuant to the original Constitution of 1853, the Provincial Constitutions had to be submitted to the Federal Senate for approval. However, this requirement was eliminated in the 1860 constitutional amendment, thus reinforcing the autonomy of the Provinces.



Sections 122 and 123 of the Federal Constitution reassert the principle stated in Section 5: the former provides that the Provinces create their own local institutions and elect their own authorities, without any intervention of the Federal Government. The latter repeats the requirement for the Provinces to enact their own constitutions.

Section 31 of the Federal Constitution contains the supremacy clause, pursuant to which federal legislation (including the Federal Constitution, federal laws and international treaties entered into by the Federal Government) have priority over provincial legislation. However, this provision must be construed in accordance with the principle that all powers not delegated to the Federal Government are retained by the Provinces. Thus, not all legislation passed by the Federal Government has a higher rank than provincial legislation. Only legislation enacted in accordance with the Federal Constitution, i.e. dealing with matters under federal jurisdiction, is supreme. Otherwise, the supremacy clause would destroy federalism by authorizing the Federal Government to regulate matters not delegated to it by the Provinces.

As we stated above, the general principle is that the provinces retain all powers not delegated to the Federal Government. Following such principle, the Constitution enumerates the exclusive powers of the Federal Government, which may not be exercised by the Provinces. In addition, there are powers retained by the Provinces, powers that can be exercised both by the Provinces and the Federal Government, powers that have to be exercised jointly by the Federal Government and the Provinces and powers that can be exercised exceptionally either by the Federal Government or by the Provinces.

Mainly, following the United States example, the exclusive powers of the Federal Government are related to foreign and military affairs and interprovincial matters. However, there are matters which, unlike in the US system, have been delegated by the Provinces to the Federal Government. For example, the Federal Congress is empowered to enact the Civil, Commercial, Criminal, Mining and Labour Codes which shall be applicable in the entire country. Notwithstanding, the Constitution makes clear that, although enacted by Congress, the codes do not constitute federal legislation. They are considered common legislation, to be applied and construed by the provincial courts. Their application does not give jurisdiction to the federal courts.



The Provinces are autonomous and deal with their matters independently from the Federal Government. However, section 6 of the Constitution entitles the Federal Government to intervene in a Province to guarantee the republican form of government or in case of foreign invasion and, at the request of the provincial authorities to reinstate them had they been deposed. This procedure, called “federal intervention” was viciously used by the Federal Government throughout Argentine history, as an excuse to replace duly elected provincial governments which the Federal Government disliked. The misuse of such procedure is one of the causes of the failure of federalism in Argentina. In addition, the Supreme Court ruled that the decision to intervene a Province is a political question and not subject to judicial review, a doctrine which in fact gave the Federal Government a blank check to use such procedure discretionally. The 1994 Constitutional Amendment made it clear that Congress is the only one entitled to decide a federal intervention and that the President is not allowed to intervene a Province by decree.

Federalism is also combined with judicial review of the constitutionality of laws, decrees and other types of legislation. This combination means that any court, whether provincial or federal, is entitled to review the constitutionality of any piece of legislation or action by the Government (both Federal and Provincial) in any given case. Like in the United States, an actual case is required, in which a party invokes a damage caused by the challenged legislation. But the challenge must be incidental and may not be abstract. In other words, the case brought before a court must not have as its main purpose the declaration of unconstitutionality. Cases started in a provincial court must be finally decided in those provincial courts, and only after a judgment is issued by the relevant Provincial Supreme Court, can appeal be made to the Federal Supreme Court. As it is easily recognizable, the system described above followed the US example very closely.

Another important feature of Argentine federalism is the Senate, which has also been modelled following the US example. In the Senate, all Provinces have equal representation. Until the 1994 constitutional amendment, each Province appointed 2 senators. The referred amendment increased such representation to 3. Originally, the senators were elected by the Provincial legislatures. Since 1994, senators have been popularly elected, two of them corresponding to the most voted list of candidates and the remaining to the second most voted list of candidates. This system reflects the fact that the senators no



longer represent the interests of their Provinces, but the political parties to which they belong.

As in the United States and unlike the European systems, the Senate has equal standing to the House of Deputies. Although each chamber has distinct powers in certain matters, the consent of both Houses is required for the approval of any kind of legislation. The distinct powers referred to above are only with respect to bills of attainder, which have to be initiated in the Lower House, and certain consents for the appointment of judges and other officers, which are exclusive of the Senate. Additionally, the impeachment process has to be initiated in the House of Deputies, but it is the Senate that acts as tribunal. There are no matters of legislation reserved for approval by only one of the Houses.

#### 4. Provincial Constitutionalism in Argentina

Argentina is composed of 23 Provinces and the City of Buenos Aires. Although the City of Buenos Aires is not a Province, it has a special status under the Federal Constitution which allows it to be considered a sub-national entity for the purpose of the study of sub-national constitutionalism in Argentina. In fact, the Federal Constitution, after its amendment in 1994, gave the City of Buenos Aires much broader powers than any other city or municipality in Argentina<sup>XII</sup>. The City of Buenos Aires even elects senators for the Federal Senate and representatives to the House of Deputies, which have exactly the same rights as those appointed by the people of the other 23 provinces.

Usually, the provincial constitutions have been drafted, enacted and amended by conventions specially elected for such purpose. One notable exception occurred in 1949 as a consequence of the amendment of the Federal Constitution. The Federal Convention which approved such amendment, known as the Peronist Constitution, granted a one-time authorization to the Provincial Legislatures to amend the Constitutions of their respective Provinces to reflect the changes made to the Federal Constitution. This authorization was part of the effort of a fascist government<sup>XIII</sup> to impose a model of constitution tailored to perpetuate its authoritarian rule.

In some Provinces, legislatures are entitled to make amendments to one or two articles of the Constitution without having to convene a convention, but such amendments need to be approved on a referendum by the people of the Province.



The system of government adopted at federal level greatly influenced the Provincial Constitutions that were enacted after the Federal Constitution entered in force in 1853. They all adopted a system of separation of powers that resembles the American system of separation of powers, although they are not required to do so. The obligation set forth in section 5 of the Federal Constitution, that the Provinces enact their constitutions pursuant to the republican representative form of government, doesn't mean that they have to exactly replicate the provisions of the Federal Constitution.

Following the system separation of powers of the Federal Constitution (and also the examples of the States' Constitutions in the United States of America, the Provincial Constitutions created three separate branches with mutual checks and balances: the legislative, executive and judicial branches.

The majority of the Provinces (15) and the City of Buenos Aires have unicameral legislatures, although 8 Provinces have bicameral legislatures, which replicate the Federal Congress with a Senate as upper house and a House of Deputies or Representatives as the lower house.

Professor Hernández has stated that a federal system does not require the existence of bicameral provincial legislatures, as shown by the example of Germany and Brazil<sup>XIV</sup>, an opinion with which we concur. It is a matter of constitutional design that does not affect the foundations of a federal system. In fact, a provincial senate in small sub-national entities does not make much sense, although that does not mean that a unicameral legislature should be the rule. Other reasons, besides territorial representation, may justify the existence of bicameral legislatures<sup>XV</sup>.

Where a provincial senate does exist, it usually has similar powers to those of the Federal Senate. For example, they are required to give consent to appointments of judges. In addition, they act as tribunals in the impeachment process.

A Governor is entrusted with the executive power in all the Provinces, except in the City of Buenos Aires where the head of government receives the title of chief of government. The Governor is the highest officer in the Province and has powers very similar to those given to the President of the Republic to exercise the executive power. Governors are heads of government and the top ranking officer in the provincial administration. As the President, they have the right to submit bills to the Legislature for



discussion and approval and have veto right over any legislation approved by the Legislature.

They also have the power to issue decrees implementing legislation duly enacted by the Legislature and, in certain Provinces, to issue legislative decrees in cases of emergency, a power which has been extremely abused both at federal and provincial level. This abuse has led to the Governors becoming the main legislator at provincial level, which completely subverts the system of separation of powers. This may not raise concerns in a parliamentary system, at least from a theoretical point of view. In such type of government, the issuance of legislative decrees by the cabinet, which in the end is a committee of the parliament, doesn't create much tension in the system, provided there is no abuse. In addition, the system provides a solution in case of a fundamental disagreement between the cabinet and the parliament by way of a vote of no confidence or the dissolution of the parliament. In a system of separation of powers, the exercise by the executive branch of powers that belong to the legislative branch creates a tension with no escape. The legislature is not entitled to remove the executive, except through impeachment which is an extremely cumbersome procedure. On the other hand, the executive is not entitled to dissolve the legislature. Thus, such a tension has no gateway. In practice, it has led to the President and the Governors becoming quasi absolute rulers and Congress and Provincial Legislatures being mere registrars with no real power to counterbalance the executive.

Governors are popularly elected. In a few cases, notably the City of Buenos Aires, an absolute majority is required to be elected governor. Failure to obtain such a majority, leads to a second voting or *ballotage* (to use the French word) between the two most voted candidates. But the general rule is that, in most of the Provinces, a simple majority suffices to be elected governor. In all cases, together with the Governor, a Deputy Governor is elected, who replaces the Governor in case of temporary or permanent vacancy.

Term of office is always 4 years, with the majority of the Provinces allowing re-election at least for one consecutive period. Only two Provinces do not allow consecutive re-election: Mendoza and Santa Fe. A notable case is the Province of Salta, which allows three consecutive terms. Other Provinces allow indefinite re-election<sup>XVI</sup>.

Governors are assisted by ministers, who are freely appointed by them and removed at will. The constitutional importance of ministers is secondary. They are completely subordinated to the Governors and do not represent any kind of limitation to their powers.



One of the main requirements with which the Provinces have to comply is the organization of the court system. Section 5 of the Federal Constitution expressly imposes such obligation on the Provinces when enacting their Constitutions. In compliance with such requirement, all Provinces have organized their judicial branches following the model of the Federal Judiciary which in turn followed almost to the letter the United States Constitution. All Provincial Constitutions create a Supreme Court of Justice, which receives different names depending on the Province.

Judges are generally appointed by the Governor with the consent either of the Senate (in the Provinces with bicameral legislatures) or of the unicameral legislature. Since the reinstatement of constitutional government in Argentina in 1983, many Provinces incorporated into their Constitutions a Judicial Committee<sup>XVII</sup>, following the example of Spain and Italy. This Committee selects candidates to be appointed judges of the lower courts (i.e. all courts except the Supreme Court) and submits lists of three candidates from which the Governor selects those to be appointed as judges. The Committee performs other less important administrative functions related to the Judiciary.

Judges are usually removed by impeachment, although the procedure is generally no longer done by the Legislature, but by a special jury composed by judges, lawyers and politicians.

The organization of the Judiciary is a power that has not been delegated by the Provinces to the Federal Government. Thus, it is the prerogative of each Provincial Legislature to create courts and determine their jurisdiction and to enact rules of procedure. Each Province has enacted its own code of procedure, both in criminal and civil and commercial matters.

The main constitutional role of the Judiciary in Argentina, both at Federal and Provincial level is judicial review. Also in this subject, the Provinces have followed the pattern of the Federal Constitution and have adopted the US model of judicial review. This fact is not diminished by the existence of certain procedures in the Provinces that allow petitions to be directly filed for judicial review to be decided only by the Supreme Courts (*acción directa de inconstitucionalidad*). These procedures still retain the basic features of judicial review.



## 5. The Flaws of Argentine Sub-national Constitutionalism

With all its fundamental importance, provincial constitutionalism has been unable to escape from the tendency of decline that affects Argentine constitutionalism in general. The process of deconstitutionalization experienced by Argentina started in 1930, with the first military coup. Such coup was inspired by a corporatist movement, which in turn found its model in the fascist movements in vogue in Europe at that time. Such movements were extremely critical of liberal constitutionalism, the ideology that inspired the Argentine Federal Constitution. Those corporatist movements later developed into the Peronist Movement which was elected to government in 1945 and took office at the beginning of 1946. The 1949 Constitutional Amendment was the first attempt to reflect those tendencies in the Constitution.

However, anti-liberal tendencies did not care very much about constitutional provisions. The deconstitutionalization process had greater success in altering the constitutional framework through interpretation and borrowing of legal doctrines notoriously alien to our system, without changing a single word of the constitutional text. Legislative decrees issued by the President, which were mentioned above, are just an example. Although clearly unconstitutional, administrative scholars justified their use quoting the authority of Italian authors of the fascist era.

Provincial constitutionalism was a particularly fertile soil for those incompatible transplants. For example, the direct petition of unconstitutionality, to be decided only by the Supreme Court of the Province is a good example of such improper borrowings. The direct petition was inspired by French administrative law. The codes of administrative procedure of the Provinces of Córdoba and Santa Fe were inspired in the *recours pour excès de pouvoir* and the *recours de pleine juridiction*, taking these two remedies and providing that they could only be filed with the Supreme Court of the Province. They evolved into the direct petition mentioned above, with the result that the lowest courts of those Provinces are entitled to decide upon the constitutionality of a law of the Federal Congress, but they are prevented from deciding if an action of the Governor of the Province is unconstitutional.



Another incompatible borrowing which first took place at provincial level and was later adopted in the Federal Constitution is the Judicial Committee or *Consejo de la Magistratura*. The Committee is entrusted in the different Provinces with the power to select the candidates to be appointed as judges for the lower courts by the Governor, but in many cases also with the power to manage the budget of the Judiciary, exercise disciplinary powers over judges and to decide which judges should be accused before the impeachment jury to be removed. This Committee was created with the purported intention of reducing political involvement in the Judiciary. However, the practice has shown that it was a tremendous failure and provincial judiciaries are, with few exceptions, controlled by the political branches, in particular by the Governor.

The failure at provincial level was not enough to convince the framers of the 1994 Constitutional Amendment to refrain from making the same mistake at federal level, and the Judicial Committee was incorporated to the Federal Constitution. Of course, it also failed. These constitutional borrowings forget that compatibility is a key feature in order for those transplants to be able to work properly.

But the decay of sub-national constitutionalism in Argentina and of federalism as a whole should not be attributed only to wrong constitutional design. A recent survey of *Poder Ciudadano*, a non governmental organization, shows that, in 8 of the 24 sub-national entities, the same party has remained in power since 1983. Clientelism is a major feature in Argentine Provinces.

## 6. Closing Remarks

Argentine federalism and sub-national constitutionalism is a very interesting case study for anybody trying to establish a federal system in any country around the world. Not because of its success, but precisely because of its failure. The first study of sub-national constitutionalism was published in Argentina in 1853 by Juan Bautista Alberdi<sup>XVIII</sup>, an influential figure in the framing of the Federal Constitution. More than 100 years have passed since the School of Law of the University of Cordoba created a chair for the study of provincial constitutionalism. However, all these years of hard work and profound studies by bright scholars have not been able to help us create a functional federation.



A federation on paper, Argentina is a highly centralized country, in which economic dependence of the Provinces from the central government has destroyed any kind of autonomy of the sub-national entities. Governors are in many cases little more than puppets controlled by the President with the power of the purse.

Administrative law has played an important role in the process of centralization. Inspired by French administrative law, a highly centralized country, such example, transplanted without caution, paved the way for the courts to accept violations of provincial autonomy.

The result is a deadly combination of the worse of federalism and none of its great advantages. Enormous provincial bureaucracies have been created, to help build an evil system of clientelism. But important decisions are all made by the Federal Government. Anybody daring to disobey presidential orders, faces the risk of losing all financial support from the Federal Government.

The trend is very difficult to change. However, the fact that Argentine federalism has failed, does not diminish the importance of studies on federalism and sub-national constitutionalism in Argentina. On the contrary, careful study of Argentine federalism and sub-national constitutional law would give any serious scholar on those subjects a clear view of the difficulties faced in order to bring a federal system into operation, in a country with important economic imbalances between the different regions. In addition, the Argentine example shows that a clear distribution of competences between the federal and provincial governments is a key factor for a federal system to work properly. In particular, a balanced distribution of economic resources must be achieved, to guarantee the chance of development by all regions.

A large number of studies in sub-national constitutional law have been produced in Argentina. Such vast literature covers all aspects of both federalism and provincial constitutionalism. Comparative scholars, particularly those from countries in which a decentralization process is being conducted, would certainly benefit from it, in order to anticipate the troubles that decentralization faces. But the lessons of Argentine sub-national constitutionalism extend also to national constitutionalism. For instance, the issue of unlimited re-election in a system of separation of powers and the continuing modification of electoral systems find numerous examples in Argentine provinces.



In the end, as judge Learned Hand said “liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it”. This is exactly what happened with federalism (and constitutionalism) in Argentina. But at least the failure of our federal system may help others to avoid the mistakes we made.

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\* Professor of Constitutional Law Universidad del Salvador Escuela de Abogacía del Estado Buenos Aires, Argentina.

<sup>I</sup> We refer here only to those amendments still in force today, i.e. the amendments of 1860, 1866, 1898, 1957 and 1994. Two other amendments are no longer in force: the reform of 1949, known as the Peronist Constitution because it was inspired by the authoritarian government of General Perón, and the amendment of 1972, imposed by the military government then in power. The former was abrogated after the Peronist regime had been overthrown and the latter lost validity when it was not ratified by a constitutional convention within the term provided therefore.

<sup>II</sup> On May 25, 1810 (the May Revolution), a meeting of the city council of Buenos Aires declared that the authority of the Viceroy of the River Plate, appointed by the King of Spain, had ceased. The members of the city council argued that, since the King of Spain and his entire family were in France in custody of Napoleon, who had appointed his brother José in his place, the Viceroy could no longer claim to represent the Government of the metropolis. Thus, so they argued, in absence of the legitimate King, the authority reverted to the people. The city council of Buenos Aires also claimed that, due to the emergency, it was entitled to act in the name of all the provinces of the Viceroyalty of the River Plate. Formal independence was not declared until July 9, 1816.

<sup>III</sup> Strictly speaking, the first provinces were created between 1814 and 1815.

<sup>IV</sup> See a lengthy discussion of this matter in García Mansilla and Ramírez Calvo 2006: 57 ff.

<sup>V</sup> Dürnhöfer 1973: 19.

<sup>VI</sup> Officially, Mariano Moreno left the country on a diplomatic mission to the United Kingdom but died during his journey in the middle of the Atlantic. In fact, the mission was just a façade to hide the fact that Moreno had lost the struggle for power and had been forced to leave.

<sup>VII</sup> General José Gervasio Artigas drafted a constitution for the Province of Uruguay, then part of United Provinces of the River Plate. This draft has been generally ignored by the great majority of the authors in Argentina (see Demicheli, 1955: 561 ff.).

<sup>VIII</sup> Prof. Hernández, the leading authority in federalism in Argentina today, has noticed that this first Constitution of the Province of Córdoba was strongly influenced by the draft constitution for Uruguay referred to in note VII above (Hernández 2005: 21).

<sup>IX</sup> García Mansilla and Ramírez Calvo 2008: 48 ff.

<sup>X</sup> The armies of the Confederation, led by General Urquiza, clashed with the forces of the Province of Buenos Aires, led by General Mitre in the Battle of Cepeda on October 23, 1859. As a consequence of this battle, the San José de Flores Pact (also known as the National Union Pact) was signed between the Confederation and the Province of Buenos Aires. Further military actions followed between both sides even after the amendment of the Constitution until the battle of Pavón on September 17, 1861.

<sup>XI</sup> The Constitution also recognizes the existence of municipalities. In addition, the constitutional amendment of 1994 granted a special status to the City of Buenos Aires, which is briefly discussed below. Hernández identifies 4 different types of authorities in Argentina: (i) the federal government, (ii) the provincial governments, (iii) the government of the City of Buenos Aires, and (iv) the municipal governments



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(Hernández 2004: 698 ff.).

<sup>XII</sup> Hernández 2005: 39.

<sup>XIII</sup> This statement, which may seem exaggerated, is based on undeniable facts. General Perón was a great admirer of Mussolini, the policies of which were imitated in many fields during his dictatorial regime.

<sup>XIV</sup> Hernández 2005: 58.

<sup>XV</sup> I.e. to give minorities a better chance to obtain representation in the legislature.

<sup>XVI</sup> An interesting study of re-election tendencies in Argentine Provinces is the one by Almaraz 2010.

<sup>XVII</sup> *Consejo de la Magistratura* in Spanish.

<sup>XVIII</sup> Alberdi 1853.

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**Federalism, the subnational constitutional framework  
and local government: Accommodating minorities  
within minorities**

by

Yonatan Tesfaye Fessha\*

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## Abstract

Not a single federation has been successful in demarcating the territorial matrix of the federation into ethnically pure subnational units. This includes federations that are primarily designed to accommodate ethnic diversity. There are usually ethnic minorities scattered in the midst of subnational majorities. The focus of this contribution is on how the institutional design of states can be used to respond to the challenges of minorities within minorities. This article proposes the adoption of constitutional principles that would guide ethnically plural subnational units in their dealing with internal minorities. A subnational constitutional framework that is based on the constitutional principles of self-rule (and possibly shared rule), this article argues, represents the best hope in addressing the majority-minority tension that characterizes subnational units in multinational federations

## Key-words

Minorities, federalism, subnational constitution, local government



## 1. Introduction

The translation of the self rule and shared rule elements of federalism into tangible institutional arrangements goes a long way in terms of accommodating ethnic diversity within the context of geographically concentrated ethnic groups. This is particularly true in multi-national federations where some or all of the subnational units are roughly congruent with ethnic boundaries, thereby, enabling ethnic communities to manage their own affairs.<sup>I</sup> It is, however, widely accepted that it is impossible to create an ethnically homogenous subnational unit. Not a single multi-national federation has been successful in demarcating the territorial matrix of the federation into separate ethnically defined territorial units. In cases where territorial autonomy within federalism is possible for concentrated ethnic groups, there have usually been ethnic minorities scattered in the midst of regional majorities. In the case of India, for example, the federation “has done a lot in containing ethno-linguistic diversity tension by reorganizing the states to reflect language diversity, yet such reorganization has still left minorities within the state boundaries at the mercy of the states”.<sup>II</sup> Both assimilation and the extreme measure of ethnic cleansing have also not been able to leave us with ethnic groups that neatly and precisely fall into separate geographical units. The extensive movement of citizens across internal borders also contributes to the rarity of an ethnically pure political unit. Intra-substate minorities are therefore present in most, if not all, federated units. As Cairns remarks, the vision of a federal system with coinciding ethnic and subnational boundaries is “chimerical”.<sup>III</sup>

The impractical reality of creating an ethnically pure subnational unit brings to the fore issues about the majority-minority tension at the level of the constituent units. It invokes the problem of minorities within minorities as there is often a fear that minorities face stronger discrimination from regional authorities than they usually encounter from central government. As Choudhry points out

*“One of the arguments frequently advanced against the accommodation of minorities nationalism through federalism is that it may lead to the creation of local tyrannies. Ethnocultural minorities who constitute a local majority might view the subunit as belonging to them rather than to each one of the subunit’s residents. A possible result might be a “sons of the soil” politics encouraging and, perhaps,*



*legitimizing discrimination against internal minorities in the framing of public policy, the delivery of public services, contracting, and public employment.”<sup>IV</sup>*

The focus of this contribution is on how the institutional design of states can be used to respond to the challenges of minorities within minorities.<sup>V</sup> It, in particular, examines the relevance of local government in responding to the multi-ethnic challenge. It examines the relevance of local government as institutional solution to the tension that exists between regionally empowered groups and their internal minorities. Based on similar institutional principles that federalism specifically makes available for the purpose of accommodating ethnic diversity, this article proposes the adoption of constitutional principles that would guide multi-ethnic subnational units in their dealing with internal minorities. A subnational constitutional framework that organizes local government based on the same constitutional principles of self-rule (and possibly shared rule), this article argues, represents the best hope in addressing the majority-minority tension that often characterises subnational units in multi-national federations.

A few caveats are in order. First, the adoption and implementation of the constitutional principles does not necessarily represent a panacea to the majority-minority tension that characterizes subnational units in multinational federations. Rather, the framework, by providing additional means to channel and regulate ethnic claims, serves to mitigate the harms that flow from ignoring the status and treatment of those who do not belong to the empowered regional majority. Second, it is well established that the success of a political system in responding to the challenges of ethnic diversity depends on the interplay of a host of factors, including the rule of law, democracy and the culture of human rights. This contribution does not focus on these processes and structures. The focus is on constitutional/institutional design and how it can be used to address the plight of internal minorities.

This article proceeds in four stages. First, it discusses the limitation of the bill of rights approach in addressing the plights of internal minorities. The article proceeds to discuss the option of territorial solution, with special focus on local government. This is first discussed by outlining the status of local government in multi-national federations. The article then discusses the inclusion of counter-majoritarian elements, including the local government solution, in a federal constitution in a form of constitutional principles that



specifically guide subnational units in their relation with internal minorities. Finally, the article briefly discusses the ‘collateral’ dangers of localizing ethnicity in the effort to address the plight of internal minorities and provides few general remarks.

## 2. Bill of Rights as a device to protect internal minorities

Judicially enforceable bills of rights are often regarded as instrumental in protecting internal minorities. A number of rights are relevant, directly or indirectly, to accommodate the needs of persons belonging to minorities. With respect to rights related to ethnic relationships, the bill of rights guarantees the rights of the individual to use his language or exercise his culture alone or in any form of association with others. The non-discrimination clause is also often invoked to protect minorities. Discrimination against anyone based on language, religion or the way of life that is followed as a result of his or her association with a certain ethnic or national group is often prohibited. The bill of rights imposes on the state the duty to respect, among other things, these and other related rights.

The judiciary plays an important role in ensuring that the government fulfills the duty to respect and protect the rights of the individual. Canada, for example, relies on the constitutionally entrenched bill of rights in order to protect regional minorities. An array of both individual and groups rights are included in the 1982 Charter of Rights and Freedoms. Among the included groups rights are rights of minority language and educational rights, which are judicially enforceable. As Choudhry notes, “[t]hrough its provisions for equality rights and interprovincial mobility rights, the Charter of Rights and Freedoms rules out policies that openly discriminate on the basis of ethnic identity or against recent migrants from other provinces”.<sup>VI</sup> The application of these protective measures was discussed in a case that involved the decision of the Quebec government to adopt a law that attempted to elevate the regional language, French, to a majority status.

In 1977 the Parti Quebecois government adopted the Charter of the French Language, famously known as Bill 101. The Charter sought to promote the use of French and at the same time restrict the use of English. It obliged both immigrants and Canadians moving to Quebec to send their children to a French school and mandated the display of commercial signs in French only. Some of these restrictions were challenged before the Supreme Court



of Canada. The rights included in the Charter of Rights and Freedoms were instrumental in successfully challenging these restrictions. Based on aspects of the bill of rights included in the Charter, court decision abrogated part of the legislation. The Supreme Court, in 1979, decided that provisions making French the only official language of legislation and justice violate section 133 of the British North America Act, 1867, which guarantees legislative and judicial bilingualism in Quebec. Part of the law that restricted the rights to education in English was struck down entitling not only people who had been educated or whose parents had been educated in English in Quebec but also those who had been educated English elsewhere in Canada to have their children receive education in that language. The Court in 1998 also struck down the rule that imposes French as the only language to be used on commercial signs on the ground that it represents unjustifiable limitation of freedom of expression (See Swinton 1995).<sup>VII</sup> This particular experience of Canada suggests that a bill of rights, enforced with a strong and independent judiciary, can provide some level of protection to internal minorities.

The problem with the bill of rights approach is that it only provides for negative rights, which protect individuals against discrimination and majoritarian abuse.<sup>VIII</sup> As noted by Pildes,

*“[j]udicial review operates at best as an ex post check or negative veto on the exercise of political power. It can afford, perhaps, a defensive shield. But judicial review rarely is capable of ensuring a fair distributional allocation of goods or of providing affirmative benefits to minority groups. It also does not respond fully to the expressive demands for recognition that are so often central to ethnic minorities and to the legitimacy and stability of democratic institutions across ethnic groups”.<sup>IX</sup>*

The bill of rights approach becomes especially insufficient when there is an important minority that may not be satisfied with negative rights, even more so when that minority is generally territorially concentrated and have deep historical roots in the subnational unit in which they are living. Such minority groups do not want to be treated as guests whose rights must be respected. Often, they demand powers that allow them to participate in the management of the constituent units. They demand the provision of mechanisms for political participation and representation. They, as a result, often emphasize the deficiency of the individually oriented bill of rights in protecting regional minorities. In this respect,



the bill of rights and the judiciary are regarded as relatively insufficient institutional responses that cannot adequately address the concerns of internal minorities. Effective protection of minorities requires the judicially enforceable bill of rights to be complemented by other protective mechanisms. It requires “credible institutional commitments” that are “built directly into the structures of political governance, within either or both the legislative and executive branches”.<sup>x</sup>

The major criticism levelled against the bill of rights approach is, however, that it is an approach that is based on the assumption that the state can be neutral on ethnic and cultural matters. That cultural matter can be left to the private sphere, with the state neither promoting nor inhibiting a particular group. It is now, however, well established that the state cannot remain neutral with regard to ethnic relationships.<sup>xi</sup> There is no way that the state can avoid recognizing and promoting the identity of a particular ethnic group. A state that claims to follow a policy of neutrality often ends up identifying itself with a particular ethnic group. This is particularly the case with ascriptive identity like, for example, language. A government has to adopt the language of government business. When a government opts to use a certain language as the official language, “it is providing what is possibly the most important form of support needed by [a particular language group], since it guarantees the passing on of the language and its associated traditions and conventions to the next generation”.<sup>xii</sup> Simply put, a multi-ethnic state cannot remain neutral to ethnicity or in matters where ethnic relationships are concerned.

From the foregoing, it is clear that the bill of rights is not sufficient to deal with the concerns of minorities. To be precise, the bill of rights is relevant in addressing the concerns of minorities within minorities. But it cannot effectively respond to the challenges of such minorities and certainly it cannot be the only institutional solution. It must be complemented by other institutional measures.

### 3. Territorial solution

The inadequacy of the bill of rights to respond to the multi-ethnic challenge raises the question of whether a territorial solution should be sought to address these challenges. Of course, this option assumes that the minorities within the sub-national state are generally



territorially concentrated. There are two ways that a state can go about implementing a territorial solution to these specific challenges.

The first option is to allow the ethnic group to break away from the sub-national unit and establish a subnational unit where it is in the majority. In other words, it provides for internal secession. Two such examples come to mind. In Switzerland, a new canton, Jura, was established in 1980 out of the Berne Canton in response to demands for greater autonomy.<sup>XIII</sup> Another federation that provides a constitutional framework for internal secession is Ethiopia. Although it has not been put into practice to date, a major guarantee for the protection of internal minorities in Ethiopia comes from the recognition of the Constitution that the configuration of the state has not resulted in separate ethnically pure subnational units. Article 47(2) of the Constitution provides that ethnic groups within the nine subnational units have the right to establish, at any time, their own subnational unit or state, as they are called in Ethiopia. It provides for a procedure according to which an ethnic group can secede and establish its own state.<sup>XIV</sup>

Although the division of subnational units in response to internal demands for self government by internal minorities is one possible option, it cannot be a “constitutional routine”<sup>XV</sup>. Admittedly, this particular solution might not always be available and not even advisable. In line with the old adage that says not every nation can have a state (MacCormick, 1996),<sup>XVI</sup> not every ethnic group, albeit territorially concentrated, can have its own subnational unit. To begin with, this is not practically possible in many multi-ethnic countries that are inhabited by copious ethnic groups. In a country where there are numerous ethnic groups, it is practically impossible to provide each group with a ‘homeland’ of its own. Even where possible, this option might entail the creation of micro-subnational units that are too small to achieve the status of a self-governing subnational unit.

In addition, the internal secession option incorrectly presumes that providing an autonomous territorial unit for each aggrieved ethnic group is the way forward. Ethnic groups do not necessarily require a subnational unit of their own. They may only be satisfied with the establishment of an inclusive subnational government that provides the different ethnic groups inhabiting the subnational unit a means for political participation and representation. It is only after this and other options are exhausted that one may resort to the internal secession option. Otherwise, the internal-secession-option would represent a



knee-jerk response and a simplistic approach to a very complex question. Furthermore, throwing the status of a subnational unit to each disgruntled ethnic group would simply send the wrong message that each ethnic group is entitled to a 'homeland' of its own. Considering the associated benefits of power, influence and representation, this could open the floodgate for persistent demands for the status of a subnational unit. This is problematic as it can easily play into the hands of ethnic entrepreneurs who would use the demand for territorial autonomy as a mask to advance their political ambitions rather than protect the identity of the community they ostensibly represent.

The limits of the internal secession option direct one to examine the second territorial solution. Unlike the internal secession option, this option does not require the reconfiguration of the subnational boundaries of the state. It is concerned rather with the territorial subdivisions of the subnational units in which disgruntled ethnic minorities reside. In particular, it inquires whether a territorial solution in the form of local government can be used to respond to the challenges that emanate from the intra-subnational diversity of the state.

The literature on federalism and ethnic diversity has rarely touched on the relevance of local government in addressing the multi-ethnic challenge. Of course, the suitability of local government to address these concerns is not straightforward. The issue is complicated by the often jealously guarded autonomy of subnational units in multinational federation and the status of local government in relation to the autonomous subnational units within which they are situated. Thus, determining the relevance of local government in addressing the challenges of ethnic diversity requires going one step back and examining the place of local government in multi-national federations, federations that are designed to address the challenges of ethnic diversity.

### **The place of local government in multi-national federations**

Federations were often viewed and constitutionally organised as a two-tier structure, involving a federal government and subnational units. In this classical view of federalism, the discussion of autonomy was confined to the territorial, legislative and sometimes, financial authority of subnational units. The concept of autonomous local government enjoying powers that directly emanate from the Constitution was unknown to many



federations.<sup>XVII</sup> In fact, local government was regarded as a stepchild of national and subnational governments.

Recent developments in the world of federations suggest an increasing role and autonomy for local government. Some have even moved towards making local government a full member of the federal partnership. The leading country on this front, South Africa, adopted a three-tiered government, with its constitution providing a considerable degree of legislative and financial autonomy to local government.<sup>XVIII</sup> Nevertheless, the enhanced status and role of local government has been and remains deeply contested. It is far from being a universal and widely accepted notion of organising a multi-level government. Yet, all the available evidence strongly indicates that the trend that suggests an ever-increasing place for local government is here to stay.<sup>XIX</sup> Notwithstanding these developments, the role and place of local government in addressing the challenges of accommodating ethnic diversity has received scant attention. Local government is often viewed as the means to bring government closer to the public and as an engine for economic growth and development. Its relevance in addressing the multi-ethnic challenge has not been addressed. The matter is not, of course, simple or straightforward.

The viability of autonomous local government protecting minority interests is complicated, as indicated earlier, by the strongly defended autonomy of subnational units in multinational federations. Thus, the point of entry here is obviously to determine the status of local governments in multi-national federations compared to those in mono-national federations, especially with regard to their relationship with the subnational units within which they are situated. The next step after that is to identify the implications of the relationship between subnational units and local government in multi-national federations for the capacity and relevance of local government to deal with the concerns of internal minorities. Based on the different premises that underlie the two types of federations mentioned above, this article suggests that a local government in multi-national federation should have a status that is distinct from its counterpart in mono-national federations. More specifically, the logic of multi-national federation implies a local government whose measure of self-rule is bounded by the autonomy of subnational units. This casts doubts on the likelihood of multi-national federations joining the bandwagon of federations that are experiencing the emergence of local government as a full member of the federal partnership, alongside the national and subnational government.



The basic distinction between mono-national and multi-national federations lies in how the basic premises of the two federations view the society they seek to regulate.<sup>XX</sup> The mono-national dispensation views the state as a constituting one society or people. This monolithic conception of the state presents the inhabitants as undifferentiated homogenous group, representing a singular national identity. A multi-national federation, by contrast, accepts the existence of more than one *demos* or nation within the state. In the realm of federations, these contrasting views of the state and the society they seeks to regulate often finds expression in the institutional organisation of the state and more specifically in the territorial structure of the federation. In mono-national federations, boundaries are often drawn according to geographical or administrative convenience. Based on its premise that the various communities form a common society, a mono-national federation declines to reflect its ethnic diversity in the territorial division of the state.<sup>XXI</sup> In multi-national federations, on the other hand, the demarcation of territorial boundaries takes communal bonds into account. In this form of territorial division, “ethno–regional communities are considered as most appropriately represented through their spatial compartmentalization (states, cantons, provinces, communes), predicated on the belief that ethno–regional or national communities should receive due territorial recognition”.<sup>XXII</sup> The boundaries of the territorial units of a multi-national federation, more or less, coincide with cultural and ethnic boundaries.<sup>XXIII</sup>

In the context of multi-national federations, thus, the autonomy of subnational units represents the territorial and political autonomy of ethnic communities. In other words, the recognition of ethnic communities is expressed in the legislative, financial and political autonomy of the subnational unit in which they are in a majority or that is defined as belonging to them. That makes subnational units in multi-national federations communities and not mere political units or administrative divisions. This is also evident from the manner in which interferences from the national government is often perceived by such subnational units.<sup>XXIV</sup> Centralisation of powers by the Spanish national government would invoke little or lesser anger from the 14 autonomous communities as it would among the other three ethnic-based subnational units (i.e. the Catalonians, the Basque country or Galicia), and, most importantly, not for the same reason. If any of the 14 Spanish communities object to the centralisation policy proposed by the central government, it would most probably be on the grounds of efficiency or democracy. Ethnic-based units



would, however, resist such centralisation policy based on the ground that these policies pose a threat to the very survival of their respective communities.<sup>XXV</sup> In Canada, for example, the financial dominance of the federal government is regarded by the government of Quebec not as a mere interference with the autonomy of the Quebec province but also as an “invasion [that]...poses a threat to the cultural distinctiveness of the Quebec nation”.<sup>XXVI</sup> This indicates the way autonomy is understood or perceived by subnational units in multi-national federations is quite different from those in mono-national federations. This, of course, relates back to the fact that subnational units in multi-national federations are regarded not as mere administrative divisions but as an embodiment and recognition of the distinct-society-status that these ethnic communities are said to possess in the body politic.

With respect to the organisation of local government, two important consequences flow from this specific understanding of autonomy in multi-national federations. First, it suggests that a subnational unit in multi-national federations, being a self-governing community, has the sole authority to decide on the organisation of administrative structures within its territory. As a self-governing community, the subnational unit may decide to use its territorial structure to reflect its particular identity. In the case of ethnic community where the practice of traditional authority is widespread, for example, the community may decide to establish local governments that are either based on traditional authority or, at least, accommodate, traditional authority in their governance system. This suggests that the organisation of local government must be a matter left to the subnational units. The subnational government decides on the structure, including type and number, of local governments within its territorial jurisdictions. In short, local government becomes the jurisdiction of subnational governments. This includes the nature and scope of autonomy enjoyed by local governments. This does not mean that local governments in multi-national federations must not be entrusted with some level of autonomy. The point is rather that the logic of multi-national federations suggests that local government exercise their autonomy within the frameworks stipulated by subnational governments.

Secondly, this particular understanding of autonomy implies that the national government should have little or no power to interfere in matters of local government. This prohibits the national government from using local government as a backdoor to interfere with the autonomy of the subnational unit. A constitutional system that allows the



national government to interfere in the power and functions of local government places the former in an ideal position to circumvent the constitutional autonomy of subnational units. Policies that, for example, allow the federal government to directly fund local government would be problematic. Such policies will not only allow local government to “emerge from the shadow of” the subnational units<sup>xxvii</sup> but also allow the federal government to undermine the autonomy of the subnational units. That is why subnational units often “perceive the growth of local autonomy...as a zero-sum game in relation to their own powers since an increase in local powers means a decrease in their own”.<sup>xxviii</sup>

From the foregoing, it is clear that local governments in multi-national federations must be the jurisdictions of subnational units. The organisation of local government must be left to the subnational units. This also applies to subnational units that have territorially concentrated minorities in their midst. This means reliance on the policy and legislative framework of subnational governments regarding the accommodation of their internal minorities. This is not necessarily a bad idea. The subnational unit, in order to accommodate its internal diversity, may put in place constitutional and legislative measures that protect the cultural and political identity of its minorities.

As indicated at the outset, however, the experience in multi-national federations is not encouraging. Regional majorities rarely sympathize with their minorities. They often impose their language and culture on regional minorities. In India, for example, the Constitution declares Hindi and English as the two official languages. At subnational level, however, the decision on the use of language for official purposes is left to each state. Unlike the South African Constitution that, for example, requires each province to at least adopt two of the official languages, the Constitution leaves the matter of language regulation to each state. The Constitution does not, for example, oblige the states to adopt minority languages for official purposes. Bihar and Uttar Pradesh are states with a large number of Muslim residents where the predominant mother tongue is Urdu. Despite this reality, the two states did not initially adopt Urdu as the language of government business, putting pressure on Urdu speakers to assimilate to the language and culture of the majority. As Adeney (2000, 15) notes, “Urdu was only introduced in these states in the 1980s through an ordinance by the central government”. Furthermore, subnational majorities often exclude internal minorities from political representation and participation. As Cairns puts it, regionally empowered majorities are prone to see regional minorities in their midst



as practical challenge to their cultural integrity – as the enemy within – and often “hostile to whatever cultural or other difference the minority individual possesses”.<sup>XXIX</sup> Ironically, this is even the case with new majorities that, in the recent past, experienced cultural and political domination by national majorities. These new majorities tend to have a short memory. Despite their own first-hand experience of the horrors of cultural and political domination, they subject ethnic minorities to this very treatment as they pursue their agenda of promoting national ideologies and common identity, which are often articulated in the images (i.e. culture, history and language) of the numerically dominant group.<sup>XXX</sup>

To recap, the strong nature of the autonomy of the subnational units in multi-national federations means that the national government cannot have free rein in the affairs of the former in the name of protecting internal minorities. At the same time, the experience of many ethnically plural federations exposes the dangers of leaving the fate of internal minorities in the hands of regionally empowered ethnic groups. Based on these two points, this article argues that a more plausible response to the challenges of accommodating intra-substate minorities can be found in the adoption of a constitutional framework that guarantees some measures of accommodation to internal minorities. More specifically, it proposes the inclusion of counter-majoritarian elements, including the local government solution, in the federal constitution in the form of constitutional principles that specifically guide subnational units in their relation with internal minorities.

#### **4. Constitutional principles for accommodating internal minorities**

The idea of constitutional principles to guide the constitutional framework is a concept borrowed from South Africa. In that country, the drafting of the 1996 Constitution or the ‘Final Constitution’, as it is often referred to in South Africa, had to comply with a set of 34 Constitutional Principles which were agreed upon by the negotiators and which were made part of the Interim Constitution. The Constitutional Principles were adopted as a guarantee for the negotiators that the counter-majoritarian elements of the Interim Constitution would be maintained in the Final Constitution. The Constitutional Principles included, among other things, a guarantee that the final constitution would acknowledge and protect the diversity of languages and cultures including the recognition of provincial constitution and the right to self determination. For the ‘Final Constitution’ to come into



effect, it was agreed that the Constitutional Court had to certify its conformity with all Constitutional Principles.

Similarly, this article suggests that a federal constitution for a multi-ethnic state can include constitutional principles that would constitute the normative framework for the treatment of internal minorities. The proposed normative framework would stress that ethnically plural subnational states are sharing with the federal state the same challenges of accommodating ethnic diversity but only at a lower level and that they, like the federal government, have to come to terms with their ethnic diversity. This means, among other things, those subnational units must be guided by the same principles that the federal state relied on when responding to the multi-ethnic challenge; principles, which if adopted, would signify a commitment to equal treatment of internal minorities.

One such principle that the federal constitution can require the subnational units to adhere to is the principle of self-rule. This principle requires the subnational unit to provide its internal minorities a full measure of self government. It must allow them to manage their own affairs. Although there are different ways in which to give effect to the principle of self-rule can be given effect to through different ways, it basically requires the subnational unit to provide ethnic minorities that are territorially concentrated some form of territorial autonomy, a delineated part of the subnational unit in which ethnic minorities manage their own affairs.<sup>XXXI</sup> This means the territorial configuration of the subnational unit and especially the organisation of local government has to take ethnicity into account. This would result in a situation where territorially concentrated ethnic minorities have a local government in which they are in a majority. This provides ethnic minorities with the territorial space that is often necessary to promote language and culture. It also provides ethnic groups a means for a political participation and representation. The ethnically diverse subnational units in Switzerland have used their ‘ethnically more or less homogenous municipalities’ to provide their internal minorities some level of self rule. In the trilingual canton of Grison, for example, one can find “small Romansh-speaking Catholic and Romanish-speaking Protestant municipalities and German-speaking Protestant as well as Catholic municipalities side by side within a small area”.<sup>XXXII</sup>

Of course, providing territorial autonomy to internal minorities does not mean that the entire local government territorial matrix must be guided by a demarcation process that takes ethnicity as its main point of departure or sole criterion. In any multi-ethnic state, not



all ethnic communities demand self-government. In most cases, a state would be composed of communities that, due to historical reasons, demand a certain level of autonomy and others that merely regard themselves as part of a single national identity and do not have any aspiration for self-government. Such disparities are available among the communities that inhabit most subnational units and the territorial design cannot ignore but must take these factors into account. In such cases, an asymmetrical arrangement that allows the provision of differentiated treatment to particular ethnic communities can be considered.

In so far as the institutional translation of the principle of self-rule is concerned, the potential relevance of the territorial arrangement in responding to particular ethnic claims and, hence, accommodating ethnic diversity, cannot be solely based on the nature of the territorial configuration of the subnational state but also on the powers and competences that are accorded to these local governments. In most federations, the powers of local governments are limited to the provision of basic social and economic services. The list of functions a typical run of the mill local government performs includes the provision of utilities, such as water, sewerage and electricity, local amenities, abattoirs, refuse removal, sanitation, fire fighting services, social welfare, roads and traffic, health services and the like.<sup>XXXIII</sup> It is very unlikely that a disgruntled ethnic community can be satisfied by a local government that is only responsible for the provision of basic utilities to the neighbourhood. As the experience of multi-national federations suggests, most politically mobilised ethnic groups often demand control over matters that are relevant to them, which are usually identity-related matters. This implies that the principle of self rule that seeks to respond to ethnic claims cannot avoid including a sub-principle that suggests a division of power, which entrusts the relevant local governments with competence on matters that are of particular relevance to their community. Such an entitlement allows each local government and, hence, the community, to preserve and promote its identity as well as freely pursue its own cultural development. In this regard, the experience of multi-national federations suggests that the identity-related competences on which such a local government should exercise control are, broadly speaking, language, culture and education. This usually extends to institutions and structures through which these areas find further practical expressions. This, for example, refers to schools, museums, libraries, theatres, broadcasting agencies and the like.



The question is, however, to what extent the identity-related functions mentioned above can be performed by a local government. This is both about the capacity and suitability of local government to discharge these responsibilities. In as much as the suggestion appears to go too far in empowering local government, there is enough evidence to show that local governments, in many countries do, in fact, perform most of these functions. The local governments in Ethiopia that are specifically designed to address the concerns of minorities have the power over language policy both for the purpose of government business and education at the local level. They are also empowered with the power to promote and preserve the culture of the community on whose behalf they are established. Municipalities in Scotland have public holidays that are distinct from the state-wide public holidays (Keating, 2001, 105). Most local governments exercise control over primary and secondary education; Local governments that exercise control over culture and, by extension, museums and libraries are also not uncommon.<sup>XXXIV</sup>

From the foregoing, it is clear that a local government is a suitable locus of authority to promote language as it can designate the language of government business at the local level. It can also adopt policies that help to promote and preserve the culture of its community. This extends from the simple power of designating particular days as public holidays to controlling libraries and museums which help to preserve the cultural heritages of a community. The local government can also exercise control over education although the extent of this power can be contested. To be precise, local government can exercise control over primary and secondary education, including the medium of instruction. On the other hand, the extent to which local government can either design or influence educational curriculum is debatable. Nevertheless, the point remains that there is little to doubt that local government cannot effectively discharge responsibilities that are related to identity-related matters.<sup>XXXV</sup>

Reality check! Adopting lofty constitutional principles and simply trusting multi-ethnic subnational units to realise the principle of self rule could be a pious wish. The literature on multi-national federations is awash with evidence that amply demonstrate the capriciousness of subnational units to give effect to such types of constitutional stipulation. This calls for an independent and impartial enforcement mechanism that does not solely rely on subnational units. One such option is to give the national government supervisory authority, which may include the power to ensure that subnational units comply with the



self rule and shared rule principles envisaged in the constitutional framework. This may include the power to take any appropriate steps to ensure the fulfilment of constitutional principles and obligations implied thereto. This might range from the rather soft measure of writing notices and directives to the subnational government, outlining the extent of the failure to meet its obligations and stating any steps required to meet its obligations, to the more extreme measure of intervening in the works of the subnational government and taking over the responsibilities of the subnational government with regard to the enforcement of the relevant constitutional principle/s.<sup>XXXVI</sup> This option views the national government as the guardian of minority rights. It would allow the central government to assume a Big Brother role to regulate or supervise the policy and practice of sub-national governments towards minorities. An example in this regard comes from India where the President is “empowered to appoint a special officer for linguistic minorities”, thereby, providing “a procedure for minorities to complain to the national government”.<sup>XXXVII</sup>

However, one can easily identify few problems with the approach that posits the national government as the guardian of minority rights. First, not only would this supervisory power of the federal government be unacceptable by the regionally empowered group, it would also become a continuous source of tension and conflict between the two tiers of government, creating a perennial stress on the federation. Secondly, there is no guarantee that the federal government may not use and abuse this power to circumvent the constitutional autonomy of subnational units. A good example of partisan abuse of such ‘intervention powers’ comes from India where Article 356 of the Constitution allows the central government, and particularly the President, to suspend the state government and take over its responsibilities on the ground that ‘the state cannot be governed in accordance with the Constitution’. Between 1967 and 1987, the central government made use of Article 356 to suspend state government for a staggering 72 times. On more than half of “these occasions”, “the power of the central government was invoked by the ruling national party to undermine a state government which was in the hands of a party or coalition that was opposed to the national party”.<sup>XXXVIII</sup>

The other alternative is to ensure the enforcement of constitutional principles, including the settlement of disputes that may arise from the implementation thereof, through the establishment of an impartial body. This could take the form of a court or a panel that is composed of individuals who are qualified and well-suited to adjudicate such matters. This,



of course, is now new. An impartial adjudicating body, either in the form of a constitutional court or Supreme Court, is an important feature of many multi-national federations.<sup>xxxix</sup> As is evident from the experiences of these federations, these adjudicating bodies play an important role in maintaining the balance between unity and diversity. Thus, an independent court (Supreme Court or a constitutional court) or panel seems to be an ideal candidate to ensure the implementation of the constitutional principles. Such a body can be entrusted with the power to decide on issues relating to the right of ethnic communities to exercise self-rule and achieve representation in important subnational decision-making bodies. Members of an ethnic group who claim marginalization and suppression in the hands of subnational majority can present their application to this body. But, most importantly, laws and actions of subnational government affecting the identity of internal minorities can be subject to the process of ‘certification’, which determines their compliance with the constitutional principles. An interesting example again comes from South Africa. As indicated earlier, the adoption of the Final Constitution was made subject to its compliance with the Constitutional Principles. The duty of deciding whether the final draft complies with the Constitutional Principles was left to the Constitutional Court. A similar power of certifying the laws and actions of the subnational government on matters that affect internal minorities can be given to an impartial body, which, as mentioned earlier, could be a court (a constitutional court or a special court) or a panel.<sup>xl</sup>

## 5. Conclusion

As indicated at the outset of this article, a geographical configuration of a federal state, including one that heavily relies on ethnicity in the making of subnational units, does not leave us with separate ethnically pure territorial units. Be it indigenous ethnic groups (i.e. indigenous to the area they inhabit) or ethnic migrants, there will always be ethnic minorities that are scattered in the midst of regional majorities. A multinational federation that grants a mother state to a numerically dominant ethnic group within a territorial unit often exposes minority groups to discriminatory policies of the regionally dominant group. Such an arrangement would only move the locus of interethnic conflict and tension from the central government to the level of the constituent units.



It is submitted that addressing the anxieties of regional minorities requires the state to accept that the constituent units share with the larger state the same problem of accommodating ethnic diversities but only at a constituent unit level. The constituent units, recognising their multi-ethnic character, can apply, to the extent possible, processes and institutions of both self rule and shared-rule. This tentative normative framework has one obvious danger. There is often a potential danger in using ethnicity as a basis to organise the subnational state. The use of ethnicity to demarcate internal boundaries has the potential to freeze ethnicity and territorial boundaries, elevating ethnic identity to a primary political identity. In such a system, ethnicity becomes the dominant lexicon of political discourse, creating conducive conditions for ethnic entrepreneurs. The implication is that the normative framework suggested above would only move the locus of ethnic tension from the subnational to the local level. This begs the general question of when and how ethnicity should be used as a basis to organize local government. This is not a question that is unique to the phenomenon of ethnicity-based local government. It pertains to any multi-ethnic state that seeks to address the challenges of ethnic diversity but is perplexed by the dilemma of using ethnicity to respond to those same challenges. A response to this dilemma has obvious implications for any system that seeks to use the territorial matrix of subnational units and hence local government to respond to the demands of internal minorities without merely 'localizing ethnicity'.

As argued elsewhere, in as much as there is a need to recognize ethnic diversity, there is no inherent/compelling reason to use ethnicity as the sole and/or prime means of organising the state.<sup>XII</sup> The likelihood that ethnic differences will translate into political divide that warrant recognition in the public sphere is dependent on the historical and political circumstances that attend the state formation process. This says ethnic cleavage does not necessarily translate into a political divide, and hence the contingent nature of politicised ethnicity. This suggests that a state, to the extent possible, should attempt to accommodate ethnicity without making the latter an explicit principle of state organisation.

In the realm of local government, the contingent nature of politicised ethnicity would mean that the primary focus should be on creating an inclusive subnational system without elevating ethnicity into a primary means of political organisation. In terms of configuration of local government, the system can provide territorial autonomy to ethnic groups without, however, explicitly defining it as an ethnic local government. This can be done, for



example, by dividing an internal minority into a number of viable homogeneous local governments rather than demarcating the entire members of a particular internal minority into one territorial unit. This can be further facilitated by avoiding nomenclatures and other indicators that posit the local government as an 'ethnic local government' and a language policy that regards the different linguistic groups as equal members of the subnational unit. This provides room for intra-ethnic competition as the territorial configuration of local government avoids the emergence of ethnic identity as a sole means of political mobilization.<sup>XLII</sup> Such innovative mechanisms have the advantage of avoiding the elevation of ethnicity into a primary political identity in the political battles of the subnational unit.

Finally, it must be emphasised once again that the normative framework proposed in this article does not ensure the prevention or eradication ethnic tensions or the creation of disgruntled internal minorities. Rather, the framework serves to mitigate the harms that flow from ignoring the plight of internal minorities.

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\* Senior Lecturer, University of the Western Cape. LLB (Addis Ababa), LLM (Pretoria), PHD (Western Cape). The author thanks Professor Leonard Besselink under whose guidance the early drafts of this paper was prepared. The article has also benefited greatly from the comments of Profs. Nico Steytler, Francesco Palermo and Jaap de Visser. I would like to thank Prof Robert Williams for the important link with the editors of this journal.

I Some refer to such federation as an ethno-federal state. For more, see Hale 2004. Ethnic federalism is another term that is often used to refer these federations (Turton 2006).

II Brass 1991: 26.

III Cairns 1995: 26.

IV Choudhry 2008: 153.

V The terms ethnic minorities, intra-substate minorities, internal minorities and minorities within minorities are used interchangeably to refer to those who do not belong to the regionally empowered group. For the sake of brevity and consistency, we will stick to the term internal minorities.

VI Choudhry 2008: 153.

VII Swinton 1995.

VIII The most common positive right that the bill of rights often provide is a constitutionally guaranteed minority language education right.

IX Pildes 2008: 184.

X Pildes 2008: 185.

XI See Patten 2005. For a discussion on citizenship and identity, see also Kymlicka 1995: 11; Choudhry 2008: 153; Rosenfeld 2010.

XII Kymlicka 1995: 11.



XIII This was done through an amendment of the federal constitution (Linder 2010). See also Smith 1995: 15.

XIV According to the procedure outlined in article 47(3) of the Constitution, the demand for statehood must be approved by a two-thirds majority of the members of the Council of the ethnic group concerned. After receiving a written demand, the state council, from which both ethnic groups want to secede, organises, within a year, a referendum for members of the relevant ethnic group. For an ethnic group to have a state of its own, only a majority of the voters' vote in favor of secession is sufficient. Once this is achieved, the state council will transfer its powers to the ethnic group that made the demand and the new state created by the referendum will automatically become a member of the federation. For more, see A Fiseha Federalism and the accommodation of diversity in Ethiopia (2005).

XV Cairns 1995.

XVI As aptly noted by MacCormick, “[t]he attempt to match up nations with states, and then to accord sovereignty to each state may be the true source of the evils we perceive. [...] There cannot be a perfect match between the nations that exist in the world and any possible set of sovereign states that have absolute authority over exactly demarcated territories. [...] [I]f it is injudicious to increase excessively the number of states, it may in the alternative be possible to diminish their pretensions, and thus to adjust the position between those nationalities who have and those who have not a fully sovereign state of their own. The principle of subsidiarity springs to mind as a useful principle for liberal refecction in this context” (MacCormick 1996: 566).

XVII As noted by Steytler, “[t]he Constitution of the United States of 1787 was silent on the matter, as was the Swiss Constitution of 1848. In the Canadian Constitution of 1867, local government was mentioned only as a provincial field of competence. The Australian Federal Constitution of 1901, being silent on the matter, had the same effect – making local government a creature of state power.” (Steytler 2005: 1).

XVIII For more on South African local government, see De Visser 2005.

XIX The entrenchment of local autonomy and the increasing transfer of power to local government have received impetus from a chorus of international institutes like the World Bank and the IMF that encourage the devolution of power to local government as a key component of good governance and a sound development policy.

XX Kymlicka 2007. See also Burgess 1991; Resnick 1994.

XXI Kriek 1992.

XXII Smith 1995: 6.

XXIII Smith 1995: 6.

XXIV Kymlicka 2001.

XXV They might, of course, also disapprove of such policies based on the same reason that other non-ethnic based units do. The converse, however, is not usually true.

XXVI Telford 2003.

XXVII Steytler 2009: 433.

XXVIII Steytler 2009: 433. Steytler notes that the long term development of “hourglass” federalism, with strong central and local governments and a declining state government in the middle, is feared and resisted by states”. Although this is common to all federations, as indicated earlier, the urge and motivation to resist the empowerment of local government by the federal government and protect the autonomy of subnational units in multi-national federations are stronger. The extent to which ethnic-based subnational units jealously guard their powers in the face of attempts of greater centralisation by federal governments is a major indication of this fact.

XXIX Cairns 1995: 33.

XXX A parallel development can be noted in the case of ethnic groups that have recently achieved their independence and autonomy after decades of political and cultural subordination. In most of the new states that were created following the sudden break-up of the Soviet Union, for example, ‘old and new minorities’, like the formerly empowered Russian population, are often treated as second-class citizens in many states. For more, see Kymlicka 2002: 16.

XXXI Norman 2006: 101 notes that the question of how to demarcate internal boundaries ‘goes to the heart of the federalist ‘solution’ for minority self-determination’.

XXXII Fleiner and Basta Fleiner 2009: 609.

XXXIII Steytler 2009: 413.

XXXIV Steytler 2009: 413. The critical role of financial autonomy cannot also be ignored. Local governments may have the necessary legislative and administrative powers in order to manage their own



affairs. However, all these powers will be hollow if they are not accompanied with the necessary financial resources. The institutions that they intend to use as a vehicle to preserve and promote their identity will also be of no use if they do not have the constitutional mandate to raise and mobilise revenue. Financial autonomy is thus another critical component of the self rule principle that the proposed normative framework must consider in entrusting ethnic communities with a right to manage their own affairs.

XXXV In as much as it is important to provide minorities some level of self-government, it is also equally important to ensure their participation and representation in the institutions of subnational government. The federal constitution can require the subnational units to be guided by the principle of shared rule in organizing the institutions of subnational government. This requires the subnational government to provide internal minorities with adequate opportunity for political participation and representation at the level of subnational government. The principle of shared rule can be concretised in different institutions of the subnational government including the subnational legislature and executive. The representation of minorities in subnational government does not have to be made based on explicit constitutional criteria. It might suffice if the federal constitution, in general terms, requires the subnational unit to, at least, guarantee, in its constitution, that the subnational government must reflect the diversity of the subnational unit. The requirement must apply both to the legislative and executive branches of the subnational government. The inclusion of internal minorities in subnational government helps them feel that they are not merely 'others' that are simply tolerated by the regional majority group but also equal members of the society that participate in the management of the subnational unit. It also ensures that the system does not simply focus on the autonomy of the different ethnic groups but also ensure that the subnational state belongs to all who live in it. This also ensures that sufficient attention is given both to ethnic diversity and the promotion of social cohesion and that these considerations filters through the federal territorial matrix and shape the governance structure of subnational units as well.

XXXVI Similar measures, albeit in a different circumstances and for different reason, are available for the national government in South Africa, outlined in s 100 of the South African Constitution.

XXXVII Adeney 2000: 15.

XXXVIII Chibber 1995: 74.

XXXIX Tierney 2004.

XL An equally important issue is the representation of the different ethnic groups in such adjudicating body.

XLI Fessha 2010.

XLII In terms of shared rule, it includes a subnational government that reflects the diversity of the different ethnic groups that inhabit the country and thus provides a means for political participation and representation. This does not have to take a strict quota system but an inclusive political practice as the former has the tendency to entrench ethnicity as a primary political divide.

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**Subnational Constitutionalism in The Sars of the  
People's Republic Of China.  
An Exceptional Tailored Suit Model?\***

by

Paulo Cardinal - Yihe Zhang

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## Abstract

Macau and Hong Kong Special Administrative Regions of the People's Republic of China enjoy, via a complex web of constituent legal instruments (international treaties, norms of the PRC Constitution and, last but not the least, the Basic Laws), a remarkable high level of autonomy – namely in key areas such as fundamental rights, the continuation and evolution of a distinct legal system, including an almost universal range of legislative power *stricto sensu*, an independent judicial system, the economic and financial dimensions, including taxation, and also, at least to some extent, in the spheres of political organization based on elements of separation of powers doctrines and openness to pluralism, and an international law capacity - which provides the condition for the existence and ongoing evolution of subnational constitutionalism.

The extent, scope and nature of these two imaginative and pragmatic autonomy arrangements clearly show that they do not fit in any classical model, whether federal or of territorial autonomy. Its results, albeit imperfect, are deemed positive so far. Hence, can these exceptional cases present themselves as a model, even if tailored in origin, in the research and consecration of subnational constitutionalism in other geopolitical arenas?

The Basic Laws of Hong Kong and Macau serve basically as subnational constitutions, which lay down the foundation for continuing development of subnational constitutionalism. The sovereign constitutional norms are the same and the Basic Laws – such as the Joint Declarations - are essentially identical; that is, the normative superstructure has a high degree of similarity. However, the dynamics of constitutionalism show certain divergences that appeared in the two regions with a first decade of evolutionary praxis pointing to somehow different avenues that may, by the end of the day (2047 and 2049, respectively), result in different SARS profiles and different sedimentation of the autonomic traits of Macau and of Hong Kong

## Key-words

Subnational constitutionalism, autonomy, comparative constitutional law, China, Macau and Hong Kong



## 1. Introductory Remarks on Subnational Constitutionalism

Multilevel constitutionalism denotes the constitutional *Ideas*, institutions, principles, norms and practices applied to settings beyond the State (Walker, 2009: 1). It indicates that constitutionalism does not require the framework of the State to be meaningful. Constitutionalism can be seen as both a symbolic frame and a normative frame of reference which registers substantive values such as democracy, accountability, equality, separation of powers, rule of law and fundamental rights, as well as procedural values of institutional specification, interpretation and balanced application of these values (Walker, 2003: 32-35).

In short, subnational constitutionalism means ‘the application of constitutionalism at the subnational level’ (Gardner, 2008: 327, Siqueira, 2010). The condition for the existence of subnational constitutionalism is ‘a degree of autonomy sufficient to make them efficacious representatives and agents of subnational populations, and their constitutions meaningful documents of self-governance that provide to some significant degree for independence from processes of self-governance employed at national level; by the national polity’ (Gardner, 2007: 4). Or, in other words, one can refer to political autonomy in which the capacity of decision, namely via legislative power, has a high degree of *margin of decision* (Garcia, 2005: 44). Therefore when we try to search for subnational constitutionalism, the first target is the scope of autonomy it has (Tarr, 2010).<sup>1</sup>

Other than this commonality, or starting point, what we can find is the diversity of subnational constitutionalism. This diversity appears in the form and content of the subnational constitutions. Regarding the form, some subnational constitutions are independent and formal constitutions made by subnational units themselves, as the national constitution only provides framework and allow the subnational units to make their own constitutions. The constitutional arrangements of some subnational units are an integral part of their national constitutions, especially in those federations resulted from devolution (Williams, 2004: 1). The cases of some territorial autonomies such as Spain, Italy and the SARS also pose natural differences in their form. Regarding the content, the differences can be the scope of autonomy the subnational units have, the model used to resolve competency disputes between national level and subnational unit level, the



amendment procedures, *etc.*<sup>II</sup> The main factor producing this wide diversity is the different conditions giving rise to different forms of subnational autonomy (Watts, 1999: 945). Some subnational units come into being after a devolutionary process, which means that a unitary state existed precedent and instituted the subnational units internally<sup>III</sup>, while there are subnational units which precede the aggregated union or federation<sup>IV</sup>. It is also very possible that the constitutions of the subnational units of the same country are asymmetric, even if the primary juridical equality of the subnational units is a structural principle of the sovereign unit constitution; and even though this may beg the question of whether the asymmetric federal state is compatible at all with the classic concept of federal state (Pernthaler, 1999). Robert F. Williams has pointed out that the reasons behind this asymmetry might be the different time the constitutions were produced, the subsequent amendments, and the regional differences (Williams 2004: 12, Pernthaler, 1999: 35).<sup>V</sup>

As Neil Walker (Walker, 2003: 32) says, to defend the translation of constitutionalism, it shall be proved whether anything of value that can be achieved by developing a more general conception of constitutional translation from the state to other contexts. In other words, there must be a point of translation. It must be demonstrated that there is something of value in our statist constitutional heritage that is worth preserving and applying to the non-state context.

We can give a positive answer to this question, considering the functions of subnational constitutionalism. The functions can be generalized into three aspects. Firstly, in general as we said, subnational constitutions regulate the behavior of subnational governments. They establish the basic organs, specify their powers and responsibilities, and the relationship among these organs. They establish the mechanism to solve constitutional disputes and political disputes. Also, they can establish the rules governing the relationship between the governments at subnational level and the local governments inside subnational units. Subnational constitutions can be the primary tools to check the accountability and transparency of subnational organs. Secondly, subnational constitutions can provide a list of rights or a specific charter of rights of citizens and therefore realize the direct or indirect protection of liberty through the independent body of subnational power (Gardner, 2007: 14).<sup>VI</sup> In federal countries, the subnational constitutions are frequently celebrated as an alternative source of justiciable substantive rights. The rights prescribed in subnational constitutions often duplicate those in national constitutions, and sometimes constitutional



powers of the nation and the states are distributed to overlapping spheres. In both cases, subnational constitution can step in and provide protection when there is lack of efficient implementation of national constitution.<sup>VII</sup> Thirdly, in some cases, it can provide peoples with distinct identity and ethnicity and language minorities in various countries the opportunity for self-government and better protection of human rights. It usually offers more opportunity for the ethnic minorities to participate in the decision-making process.

Although the existence of subnational constitutions is not a new phenomenon, research on subnational constitutionalism is still at an early stage, and at this stage there are far more questions than conclusions. At the beginning, this subject mostly centred on the study of the constitutions of the states in United States, interlinked with American federalism.<sup>VIII</sup> Since then it has been challenged by Robert F. Williams and G. Alan Tarr who called to get away from the traditional approach of studying constitutional federalism from the top-down perspective, which focuses simply on the federal constitutional arrangements, instead adopting a perspective of the subnational units to focus on the subnational units' constitutional arrangements and their dynamics (Williams, 2004: 4). In addition, more questions are raised regarding the qualifications of a subnational constitution, the constitutional competency of subnational units, the relationship between the national constitutions and subnational constitutions (Saunders, 1999), the evolution of subnational constitutions, and more specifically, the function of subnational constitutions in enhancing protection of human rights<sup>IX</sup>, etc.

However, as we observe, current research on subnational constitutionalism has been narrowly focusing on the subnational units of formal federate states. We think it can be broadened to include research on certain autonomous units under non-federal arrangements, since, for instance, there are cases where national states adopt highly pragmatic and inventive choices.<sup>X</sup>

It is now truly undeniable that, even when faced with classic federal or regional autonomies models, there is no crystal clear separation between them. It is a given fact that the multitude of solutions was put forward in composite states, whether federal or regionalist. In contemporary times the once clear-cut division between federations *versus* regionalized states has become a tenuous blurred and even intermixed borderline<sup>XI</sup>. It is not needed to point out significant differences at various levels among the federal legion, for example between Germany and Argentina<sup>XII</sup>, nor between the regionalized states, as



between Portugal and Spain. And it is not necessary also to advise on the strong powers enjoyed by Italian and Spanish autonomous regions (irrespective of their designation, which also varies considerably) that make some authors place them in the federalism path. It is also well known that, for several reasons, both federal and regionalized forms are gaining much ground and becoming more topical than ever (Häberle, 1998)<sup>XIII</sup>.

However, none of the above has posed a more complex challenge to the theorization of the composite state forms as the SARs of the People's Republic of China, and that is why a question is raised whether *an anonymous federalism* has been created (Cardinal, 2008a).

## 2. A panoramic characterization of the SARs: the Subnational Units of China with “Exceptional” Autonomy<sup>XIV</sup>

China is the birthplace of the One Country, Two Systems principle (Deng, 1993). Hong Kong and Macau were returned to China in 1997 and 1999 respectively, under the framework of Sino-British Joint Declaration and Sino-Portuguese Joint Declaration, and the Basic Law of each region, via the open gate created by article 31 of the PRC Constitution<sup>XV</sup> in order to accommodate diversity under unity. Thereafter, they have been special administrative regions of China, enjoying a high degree of autonomy, except in foreign affairs (this is however, with significant exceptions) and defence, besides a few delimited powers such as appointments of certain government officials as well as typified mechanisms of interaction such as the ones regarding (official) interpretation of some aspects of the Basic Law.

The Joint Declarations first stipulated that the government of the People's Republic of China would resume the exercise of sovereignty over Hong Kong and Macau with effect from 1 July 1997 and 20 December 1999 respectively thus allowing for the accomplishment of reunification with China, and consequently the establishment of the SARs enjoying high autonomy, integrated with, but separate from, the PRC.<sup>XVI</sup> The SARs are the juridical persons that embody the new autonomic reality within Chinese sovereignty. In this way, the Joint Declarations present a framework for SARs' internationally *plugged* autonomy<sup>XVII</sup>, in the sense that the autonomy does not rely solely upon a domestic act and the sovereign power, but comes from an international treaty, which resulted from the free will of two sovereign states in each case of the SARs. The



Joint Declarations were and continue to be the genesis, the anchor and the guarantee of Hong Kong and Macau's autonomy. On the other hand, and in accordance with the JDs, it was necessary to further detail the contents of the policies/principles agreed, thus the necessity of a domestic legal act—the Basic Law.

The Basic Laws state that the SARs are *authorized* to exercise a high degree of autonomy. This is to be realized through the SARs' enjoyment of a range of powers: executive, legislative and independent judicial power, including that of final adjudication; the power independently to conduct, in accordance with the Basic Law, 'relevant external affairs', to use English (in the case of Hong Kong), and Portuguese (in Macau) as an official language of the SARs; and to maintain public order in the SARs. To this end, the socialist system will not be practiced in the SARs, and they are to keep their own system. The Basic Laws provide for the system to be used in the SARs: including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems. In addition, the PRC's national laws will not apply, apart from those listed in Annex III to the Basic Laws. In order to protect SARs' autonomy, the Basic Laws specify that 'No department of the Central People's Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong SAR/MSAR administers.' These are just some of the items from an enormous list that is presented in the chapters on the economy, culture and social affairs, and on external affairs.

Concerning foreign affairs, one must point out that, in spite of the general exclusion clause, that exclusion is in fact qualified in the sense that it allows for considerable areas of exception. It provides an autonomy that is, in some ways, more extensive than other autonomies elsewhere. 'Perhaps the most distinctive feature of the agreement is the extensive authority granted to the (...) SAR in the area of foreign relations and participation in international organizations', says Hurst Hannum (Hannum, 1996: 140). A point to underline is that the Basic Law seems to contain the possibility of expanding the SARs' autonomy. It states, that '(the SARs) may enjoy other powers granted to it by the National People's Congress, the Standing Committee of the National People's Congress or the Central People's Government.'<sup>xviii</sup> Such powers, one would assume, would not be those dealing with the already existent autonomy, but ones that cross the boundaries of autonomy and deal with reserved subject matters like, for example, external relations.



As to the limitations of autonomy, one has to say that the autonomy envisaged by the Joint Declaration has certain natural limits, and the Basic Law also expressly provides for certain other limitations that were initially expressed in the treaty. First of all, the SARs are part of the Chinese territory, and the People's Republic of China has resumed the exercise of sovereignty over it. Sovereignty now resides solely in the Chinese state, both in its title and in its exercise, as exemplified by the power of the central government to take charge of defence of the SARs. The form of the autonomous entity is that of a special administrative region, while the legal domestic document is a basic law enacted by the central authorities and not by the autonomous entity<sup>XXIX</sup>. Second, there is a temporal limitation: the principle of the internationalized autonomy (and of continuity) will remain in force for fifty years, and hence it is guaranteed only for that period of time. Finally, the appointment and removal of Chief Executive and the principle officials by the Central Government, the political nature of ‘*constitutional review*’ by the National People’s Congress, the restrictive rules on proposal for amendment of the Basic Laws from the side of SARs, the authoritative interpretation by the Standing Committee of the National People’s Congress are the specific limitations on autonomy designed in Basic Laws.<sup>XX</sup>

After analysis of the scope and limitations of the autonomy of the SARs, we come to characterize its nature. It seems clear that one can, obviously, find elements of regionalism and of federalism (Rolla, 2009: 472-475) in the SARs of the People’s Republic of China. Bearing in mind what is written *supra*, namely about the powers of the SARs, some characteristics can be deemed as almost federal or as incorporating a proto-federal phenomenon<sup>XXI</sup>. But that does not seem to worry the PRC as long as it is still labelled as a normal unitary state and the formula works. In truth, it seems that the SARs are vested with characteristics that go beyond any substate entities and resemble a (*non integrated*) State in some circumstances.

This augmented set of powers makes us lean towards the idea that, in a sort of counter balancing exercise, it *rearranges* the whole picture and pushes up the framework of the SARs from a *mere* formal region lacking some characteristics connatural to federations to something else. And that is why we ask if the SARs’ autonomy incorporates a sort of ‘new’ federalism, albeit anonymously. Faceless, just like a bottle of mineral water without a label but still filled with that liquid. Do we have here *an anonymous new federalism?* (Cardinal, 2009: 244 and ff)<sup>XXII</sup>



In short, and turning what was written elsewhere (Cardinal, 2009), one can propose the following melting pot on the characterization of the SARs' status:

- *Less* than (political) regionalist elements: The Chief Executive – as well as the principal officials of the government and the Procurator General- is appointed by the centre and shall be accountable to the Central People's Government.

- As for regionalist elements of the SARs: The formal labelling of both the SAR and the PRC – the first is stated to be a region and the latter proclaims that it is a unitary state. The lack of power of the SAR to decide on its constitutional law by itself, since the competence to enact and change the Basic Law is deposited outside the SAR – although as seen before, this is limited by reason of an international treaty and the impossibility of secession from the SARs. *Authentic* interpretation of the autonomy chart resides outside the SAR.

- Federal elements of the SARs: The existence of a political system<sup>xxiii</sup> and organizational framework with its own legislative, executive and judicial power. Both defence and, as a rule, foreign affairs remain with the centre. Existence of a constitution, at least in a material sense, named Basic Law.

- Statehood elements of the SARs: Among others, existence of judicial power including that of final adjudication, and hence the non possibility of any competence, be it *prima facie* or by way of appeal mechanisms of any courts of the Mainland. A self contained system of fundamental rights and the non application of the centre Constitution, a key feature even more when in comparison with traditional regional autonomies where the centre Constitution does apply including naturally the norms on fundamental rights. The non application of the Chinese Constitution to the *private sphere* in Macau, and residents of Macau are as such not under the scope of application of the Chinese Constitution, whether in the fundamental rights sphere or as tax payers, etc. The non application of the centre laws as a rule and the exceptions are subjected to the regime contained in the Basic Law. Hence, as in above, the basic rule is that Macau residents are in no way subject to Mainland laws thus meaning that the issue of supremacy of centre laws vis-à-vis regional ones is not even an issue.

The international law personality. The existence of total separateness of finance and tax systems. The issuing of its own currency. A separate customs. The separateness of its own social system.



- *Uncategorized/unique* elements: The measurement of the international law capacity of the SARs goes far beyond what is present in autonomous regions, in ‘regions’ with *shared* sovereignty, such as New Caledonia (Dormoy, 2000, Bihan, 2006), and even in federated states (Nabais, 2001, Henders, 2000)<sup>xxiv</sup>. However, it has less capacity than an independent State and has a domestically drawn line of what is and what is not in its sphere. The accession of Hong Kong and Macau to the centre is bilateralized as in federations; however, it was in a horizontal fashion (Nabais, 2001: 31) rather than a vertical fashion (no matter in ascending or descending move). Besides, it was the result of an international treaty in which it took no part; so instead, it was not the subject of it, but its object. The autonomy frame is internationally *plugged/guaranteed* as in some known cases of regional autonomies, but this is done in a more detailed manner on the one hand, and with a limited timeline on the other hand.

### 3. The autonomy of the SARs Versus that of Ethnic Autonomous Regions in China

To better understand the SAR’s ‘exceptional’ autonomy, it is relevant to compare them with another form of autonomy arranged in China’s political system — the ethnic autonomies. The policy of ethnic autonomies is implemented in areas where people of ethnic minorities live in compact communities. The purpose of establishing those autonomous areas is to solve the ethnic problem and to provide the minorities with the right to govern themselves.<sup>xxv</sup> Ethnic autonomous areas are established at different levels, including autonomous regions, autonomous prefectures and autonomous counties, depending on how large are the populations of the ethnic groups and how much territory they occupy. Currently, there are five provincial-level ethnic autonomous regions<sup>xxvi</sup>.

The rules applied to ethnic autonomous areas in general are provided in articles 112 to 122 of the Constitution of China and the Law of the People’s Republic of China on Regional Ethnic Autonomy. The organs of self-government of ethnic autonomous areas shall apply the principle of democratic centralism<sup>xxvii</sup>, must guarantee that the Constitution and other laws are observed and implemented in these areas<sup>xxviii</sup>, shall lead the people of the various nationalities in a concentrated effort to promote socialist modernization, shall



place the interests of the State as a whole above anything else and make positive efforts to fulfil the tasks assigned by State organs at higher levels<sup>xxix</sup>, shall rationally readjust the relations of production and the economic structure and work hard to develop the socialist market economy, under the condition of adhering to the principles of socialism.<sup>xxx</sup>

It is immediately very clear that the economic and political system applied in the ethnic autonomous areas is the same as the one applied in China, all pertaining to socialism, democratic centralism and socialist market economy. It is different from the Hong Kong and Macau SARs which are implementing the second system, different from the general one applied in China.

The self-government organs of autonomous areas exercise the functions and powers of local organs of state and at the same time exercise the right of autonomy within the limits of their authority as prescribed by the Constitution, the law of regional national autonomy and other laws, as well as implement the laws and policies of the state in the light of the existing local situation.<sup>xxxi</sup> The self-government organs have the power to enact autonomous regulations and separate regulations, administer local finance and taxes, use the revenues accruing to the national autonomous areas, manage local economy and education and culture affairs, use their own ethnic language, etc. To avoid repetition, it only needs to be emphasized that the Hong Kong and Macau SARs have their own currencies, separate fiscal and economic policies, own official languages, and the right to conduct certain external affairs on its own in accordance with Basic Laws.

It should be noted that the legislative power held by the autonomous areas is very limited. The people's congresses of national autonomous areas have the power to enact regulations on the exercise of autonomy and separate regulations, in the light of the political, economic and cultural characteristics of the nationality or nationalities in the areas concerned. These two kinds of regulations are subject to the approval of the Standing Committee of the National People's Congress. The regulations on the exercise of autonomy and separate regulations of autonomous prefectures and autonomous counties shall be submitted to the standing committees of the people's congresses of provinces, autonomous regions or municipalities directly under the Central Government for approval before they go into effect, and reported to the Standing Committee of the National People's Congress and the State Council for the record.<sup>xxxii</sup> The requirement of approval largely compromises the legislative power of the ethnic autonomous areas, which directly



leads to the underdeveloped situation of legislation by self-governing organs of autonomous areas (Chen Shaofan, 2005; Dai, 2002). It is widely commented that the legislative power is not authentic or it is only semi-legislative power. The autonomous areas often take a passive standing in legislation because of the rigid requirements on its approval. It must be said that the review by the superior organs is not only limited to the legitimacy of the regulations, in other words, its compliance with superior laws, but also includes the appropriateness of substantial content, to see whether they are adapted to the concrete situation and practical needs of the areas. In addition, there are no rules on the time limit of the review of Standing Committee of the NPC and the standing committees of the people's congresses at provincial level: in practice, there is a serious problem of delay of approval. In this aspect, the legislative power of ethnic autonomous areas are even less independent than the ordinary administrative units of PRC, since the latter's local regulations only need to be reported to the Standing Committee of the National People's Congress for the record.<sup>xxxiii</sup>

It is important to note that national laws and regulations by the superior administrative governments are applied in ethnic autonomous areas. If a resolution, decision, order, or instruction of a state agency at a higher level does not suit the actual conditions in an ethnic autonomous area, the local organs can either implement it with certain alterations or cease implementing it altogether, only after acquiring the approval of that higher level state agency.<sup>xxxiv</sup> However, even the use of this flexibility is rather limited.<sup>xxxv</sup> In contrast, the national laws applied in Hong Kong and Macau SARs are specified in a rather restricted list in Annex III of the Basic Laws, and enter into force in the SARs by way of promulgation or legislation by the Region.

Regarding the judicial system, the ethnic autonomous areas don't have independent judicial power. The local courts are constituents of the unitary court system of China and shall be supervised by the Supreme People's Court and by People's Courts at higher levels.<sup>xxxvi</sup> Needless to say, the ethnic autonomous areas have the socialist legal system, while the Hong Kong and Macau can preserve their own distinct legal systems.

Regarding the relationship between central government and the autonomous regions and the SARs, the difference lies in the scope and nature of the central power in these two types of regions. The Basic Laws provide high autonomy for the SARs, and stipulate that the central government is responsible for the foreign affairs relating to the SARs and the



defence of the SARs. On the other side, the division between central government (or superior government) and ethnic autonomous areas is not clear in the Law of the People's Republic of China on Regional Ethnic Autonomy. The provision that organs of ethnic autonomous areas shall make positive efforts to fulfil the tasks assigned by State organs at higher levels, and the chapter on the responsibility of state organs at higher levels to help ethnic autonomous areas develop, further emphasize the authority of central or higher administrative organs and their right to intervene in local affairs, and diminish the autonomy the ethnic autonomous areas have.

In brief, the comparison reveals that the SARs enjoy a much higher autonomy than that of ethnic autonomous regions at provincial level as well as a different nature and foundation. The ethnic autonomous regions have to implement national policies, albeit with the power to make certain changes in some cases. Their own autonomy is restricted because of the limitations on their legislative power<sup>xxxvii</sup> and the wide-ranging and intrusive central power. Therefore one does not find a case of subnational constitutionalism. In short, these two autonomy systems are based on different rationales, one is to let the ethnic minorities govern themselves, under the same system, and the other is to allow and assure the prosperity of the other system with its values and principles, especially the open market (Ghai, 2000a).

#### 4. The Constitutional Order of the SARs

Since China is not a formal federal state, the question arises whether it makes any sense at all to refer to a principle of having a Constitution for the SARs. One should not refer to a constitutional autonomy in its full sense in a federalist manner, namely the power to produce its own constitutional texts<sup>xxxviii</sup>. One could imagine that the Macau and Hong Kong solution be just enough to apply the Chinese Constitution in its entirety and, on a lower level, ordinary legislation, whether centralized or local. This choice however was put aside as we all well know and international law, via the Joint Declarations, intermediated and shaped a completely different avenue. China's attitude towards the questions of Macau and Hong Kong *legated by the past* was extremely pragmatic (and innovative) thus imposing a similarly infused analysis. It was said that 'Constitutional autonomy is also the possibility of an autonomous territorial being – state, region – granting itself a "constitution" ("statute", "basic law") in order to stabilise its own organization and define its identity. In the case of



Macau there was no real constitutional autonomy in this sense (and, wherever it exists, it is always limited), but the Joint Declaration and the Basic Law aim at finding the essential dimensions of organizational stability and the political, historical, economic and social identity of the territory.’ (Canotilho, 2009: 748-749).

The Joint Declarations stated that the basic policies and the elaboration of them in Annex I will be stipulated in a Basic Laws of the SARs. This explains the constitutional principle of obedience to the Joint Declaration basic policies, which will be mentioned below. Along with this, one must underline that the constituent power of the sovereign was not unlimited and unrestricted but, on the contrary, owes allegiance to the international treaty it signed with a counterpart sovereign state. In this sense, the so-called constituent power of the Chinese body competent to enact the SAR Basic Law has limitations and it is not absolute. This is one of the several imaginative operative schemes envisaged for the SARs to be functionalized, we believe, to contribute to the success of the formula even if meaning a contained rupture of the domestic absolute domain of the Chinese Constitution.

As a very brief summary one can say that we envisage the composition of the SARs constitutional order as built in aggregation by several different juridical texts: firstly—not necessarily above all, quite the opposite—the most comprehensive, structure, detailed, and in-depth one, the Basic Laws, plus, as seen, the Joint Declarations—as the hetero foundation and demanding 12 commandments, among other roles—and naturally the PRC constitution, in part, such as article 31<sup>xxxix</sup>. We have thus a multilevel and *multicomposite* constitutional order.

The Basic Laws constitute the formal domestic legal instrument that details the constitutional organization of the SARs, including political system, autonomy, as well as the non-organisational constitutional frameworks such as in the fields of fundamental rights, economy, and social issues. These two legal documents have the appearance and the structure of a formal constitution and have been called a ‘mini-constitution’ or a ‘para-constitution’. To us, the main point to stress, with or without ‘mini’ or ‘para’ or other similar qualification expressions, is that the Basic Laws are, in the SARs legal systems, a constitutional law thus naturally part of the SARs constitutional order. They are material constitutions if not even formal ones (Raz, 1998)<sup>xi</sup>. In fact, if one looks at the legal order of the SARs, the Basic Law is the highest source of the domestic legal system. This role is clearly indicated in the Basic Laws<sup>xli</sup>. Besides, as Giancarlo Rolla put it, ‘Further evidence



of the constitutional nature of Basic Law is provided by the fact that its revision may be carried out only by way of a special procedure, a “reinforced” procedure, (...) which cannot be amended by the National People’s Congress except following specific procedures. (Rolla, 2009: 475)<sup>7</sup>. In short, we call it a *lato sensu* constitution.<sup>XLII</sup>

An interesting query might be the amendment and interpretation of subnational constitutions. As we pointed out above, the Joint Declarations constrains the power to amend these two subnational constitutions. This leads to the relatively immutable character of the Basic Laws in the period prescribed in the Joint Declarations. And also, the Joint Declarations serve as an authoritative reference for their interpretation.

Another characteristic is the role of national government, as the constituent power, and the subnational units in the amendment and interpretation of the subnational constitution. As the Basic Laws by nature are national laws made by the national legislature, its amendment is in the hands of the national power. Both central and subnational have the power to initiate amendments, but with different conditions. When the amendment is from the Standing Committee of the National People's Congress (NPCSC) and the State Council, there is no requirement for it to be referred to any institutions of the SARs for comment. When the proposal is from the delegation of the Regions to the National People's Congress, it has to obtain the consent of two-thirds of the deputies of the Regions to the National People's Congress, two-thirds of all the members of the legislative organ of the Regions, and the Chief Executives.<sup>XLIII</sup> It means that it is possible for the central government to amend the Basic Laws without any formal consultation, not to mention the consent of, the SARs, but the strict requirement on raising the amendment proposal from the side of SARs make it very difficult for them to change the arrangement .

The power of authoritative interpretation of the Basic Laws is with the Standing Committee of the NPCSC. The courts within SARs have also the power to interpret, as they are authorized to interpret on their own, in adjudicating cases, the provisions of the Basic Laws which are within the limits of the autonomy. The courts of the SARs may also interpret other provisions in adjudicating cases. However, the courts shall seek an interpretation from NPCSC if, when adjudicating cases, they need to interpret the provisions concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, through the Court



of Final Appeal. Further, the courts of the SARs, in applying those provisions having been interpreted by the NPCSC, shall follow its interpretation.<sup>XLIV</sup> The power to authoritatively interpret Basic Laws in practical set an upper *political jurisdiction* for the SAR's constitutional interpretation and review, which may incites the risk of infringing the juridical autonomy of the SARs.

It can be seen that through this design, the central authority has been introduced to the level of subnational units and acquires an important role, if not say dominative, in the evolution of subnational constitutions. The national force becomes an integrated part of the subnational constitutional politics.

## 5. The Entrenched Constitutional Principles

As was stated at the beginning, this tentative glance of the constitutional principles will be done from the perspective of the periphery or, if one prefers, from the standpoint of the subnational unit and not from the centre<sup>XLV</sup>. This explains, for example, why we elected the 'two systems' segment and not the 'One country' counterpart. We are not in any way diminishing the paramount importance of either the 'one country' or the 'two systems', or questioning the idea of Chinese sovereignty.

One should also point out that there is a complex interrelation of the principles, and thus making it sometimes not so easy to draw a division between them – when one ceases to give room to another. Sometimes, a given principle is *no more* than a corollary of another more ample one, making it, at times, somewhat difficult to grant it independent status; for example, the principle of having a constitution should presuppose the constitutionality principle at the risk of the former not being true or merely a paper constitution, which is not the case.

In general, these are what one can mention in relation to the constitutional system: the principle of obedience to the Joint Declaration's basic policies; the principle of a constitution; the principle of continuity; the principle of the second system within the one country, two systems; the principle of autonomy; the principle of democratization; the principle of an own and distinct legal system; the principle of constitutionality; the principle of legality; the principle of separation of powers; and the principle of independent judiciary. We will not address all of the above. On the other hand, by virtue of simplifying the



written discourse we will have Macau has a departing point of reference; however, unless stated otherwise, the following paragraphs do apply to Hong Kong.

### 5.1. The principle of obedience to the Joint Declaration basic policies

The Joint Declarations established a group of basic policies that will shape the Hong Kong and Macau SARs for fifty years. The *twelve commandments* are mandatory and cover several main features. Hence, when analysing and interpreting the Basic Laws, the first step must be to see how the subject in question is dealt with in the Joint Declarations<sup>XLVI</sup>. Failing to do so would make the Joint Declarations meaningless and eliminate the source of all the distinctive features of the SARs. We are faced with a relationship between these two preeminent sources of law of an exceptional nature, which together may be considered as forming the constitutional block of the SARs (along with article 31 of the PRC Constitution), with special links and cross-references to the commands and nature of the Joint Declarations; the *regulatory* function of the Basic Laws vis-à-vis the Joint Declarations; *the pacta sunt servanda principle*; and the material limitation imposed on the revision procedures of the Basic Law: *no amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong/Macau*. This is a proviso that imposes itself on both the sovereign and the regional bodies – although on the latter in a moderate way since there is no power of amendment but only some power of proposing amendments.

The Joint Declarations are undoubtedly international treaties, despite the unusual branding it receives<sup>XLVII</sup>, with all the legal consequences that they imply. They set out the fundamentals of the process of the transfer of sovereignty (with implications for the legal system; public administration; exercise of sovereignty powers; political structure; judiciary; and fundamental rights, among others). Without question, the Joint Declarations constitute a limitation on the exercise of sovereignty over the peripheral reunited territories. These international treaties are echoing a certain spirit of a *Kantian perpetual peace*<sup>XLVIII</sup>, a limitation freely created and desired by the contracting sovereign states in the normal exercise of their international legal powers, or, in other words, ‘Under the Joint Declarations (JDs), the PRC was reduced in its sovereign competences, these purporting only to external sovereignty: defence and foreign affairs.’ (Isaac, 1999).



The Joint Declarations remain as a prominent source of law for the SARs (Oliveira, 1993: 24-25, Cardinal, 1993: 80, Katchi, 2005: 14, 93). The norms prescribed in the Joint Declarations, characterised as ‘policies’ embodying China’s obligations, may genuinely constitute *material limits* on the legislative power responsible for drafting as well as amending the Basic Laws. The continuing validity and efficacy of the Joint Declaration is in fact, as seen, assumed by the Basic Law itself.<sup>XLIX</sup> In a sense, the Basic Laws *do no more* than detail the policies stated in the Joint Declarations<sup>L</sup>.

In short, we can say that the Joint Declaration works as a *grundnorm* for the Basic Laws and consequently for SARs’ autonomous constitutional, legal, political, social and economic system<sup>LI</sup> until 2047 and 2049, respectively. All the obligations created by the international treaty emanate guarantees that are proclaimed in the Joint Declarations and, in accordance with the *pacta sunt servanda* principle, none of these guarantees may be violated within the timeframe prescribed by the international treaty. Of course, the Joint Declarations contain no mechanism for its enforcement, but respect for that *jus cogens* principle is a strong element and the international community in general, and United Kingdom or Portugal in particular, should have a say in case of a breach of either Joint Declaration.

## 5.2. The principle of continuity

A paramount principle in general as well as in the fundamental rights area is the principle of continuity. ‘The current social and economic systems in Macau will remain unchanged, and so will the life style. The laws currently in force in Macau will remain basically unchanged.’<sup>LII</sup> This means the continuity of the social system, of the economic system and also of the normative acts basically unchanged<sup>LIII</sup>. Or, as one author put it, it was envisaged a ‘*high degree of continuity*’ (Crawford, 2005: 29).

However, this principle does not affirm itself as absolute, meaning that the principle of continuity does not have to be read as meaning intangibility. It does not claim to be synonymous with intangibility inasmuch as the contracting parties had intended to prevent an undesirable sclerosis of the legal system (Cardinal, 2006: 32). In truth, this characteristic of elasticity, though limited one must say, and of the principle of continuity, consists as an added guarantee to the effective survival of the legal system since it allows it, without abdicating its essential characteristics<sup>LIV</sup>, to adapt to the natural and unexpected



evolution of the social system where it is inserted.<sup>LV</sup> If it is the *veritas* that the legal system will have to be maintained, although not in absolute terms, it is equally true that it could only be modified in respect to the limits established in the Joint Declaration (Cardinal, 2006). Besides, as another author points out, if Macau fails to keep and develop its own legal system the One country, two systems principle would be lacking its sense and purpose (Mai Man Ieng, 2001: 2).

The limit to the fullness of the principle of continuity cannot be reduced to only the thesis of the maintenance of the laws, save for opposing the Basic Law or that it will be subject to posterior alterations; otherwise, that will simply mean carrying out the emptiness of that apex principle and consequently be rendered useless. To us, one has to admit the possibility of the introduction of those alterations, even though it is not permissible for these alterations to consubstantiate basic changes<sup>LVI</sup>. With this we mean that the general principles that characterize/shape the Macau legal system cannot be disregarded, and neither can the diverse legal regimes be disregarded - for example, of the fundamental rights in general and of each right in itself - they cannot have their ratio deviated or overwhelmed.

### 5.3. The principle of the second system (within the one country, two systems global one)

Article 5 of the Basic Law announces that ‘The socialist system and policies shall not be practised in the Macau Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.’ Furthermore, article 11, 1, reassures that ‘the systems and policies practised in the Macau Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executives legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law’.

In these two norms, the separation line between the sovereign and the subnational unit is clearly drawn. This means that in the sphere of the above mentioned *systems*, its design, enforcement, application and development must be made in accordance with the values and aims of the granted and tolerated values in the second system and not by way of importation of the correlative ones in force in the Mainland. For an assertive position, ‘Given the contradictions between them, then to what extent is the Constitution applicable



in Hong Kong? The argument that it applies as a whole to Hong Kong must be rejected because the Constitution allows only one system. A more popular argument is that it applies only partially, but this theory is difficult to apply. A convenient, but not principled, argument is that the Basic Law is a national law passed by the congress, when decided, pursuant to an international treaty, to exercise its supreme power only through the framework of that *de facto* constitution. It is now settled that, as far as Hong Kong courts are concerned, the Basic Law forms the only valid constitutional cord connecting Hong Kong's laws to the national constitution. There is no other official means by which Chinese laws (including the Constitution) may be applied in Hong Kong.'(Fu and Cullen, 2006)<sup>LVII</sup>.

In these fields, the core of Macau's autonomy, the second segment of the one country, two systems principle, is in command in the political system, in the legal system and its sources, in the judicial system and in the fundamental rights – one is not allowed to implement a socialist system or policies to downgrade the value of fundamental rights of an instrumental status and unceremoniously and unrestrictedly subordinate it to a given *societal* value that is propagated by the government without any real balancing of the potentially conflicting interests at stake.

#### 5.4. The principle of an own and distinct legal system

Contrary to what, to a certain extent, is common, the legal order of the centre applies, or so tends to, unlimitedly and unrestrictedly to the subnational entities, at least in the subject matters reserved to the centre, as well as in other areas. For instance, the legal order of the centre applies in issues such as central taxes, central system of justice, monetary matters, and several others, and thus forming a strong component of the subnational legal system formation process. Although varying immensely in shape and scope, one fact seems certain: there is competitiveness between national and subnational units in forming the latter's legal system. We are faced with two domains of competence that contribute to one single legal system.

However, with the SARs example, we do not find such schemes except for some limited PRC constitutional norms, the Basic Law (and in here with constraints applicable to the sovereign power) and a few *sovereignty* legislations that must be identified and, in a sense, incorporated by the Basic Law itself and with a special procedure of application.



The Basic Law provides for the system to be used in Macau and it includes: the social and economic systems; the system for safeguarding the fundamental rights and freedoms of its residents; and the executive, legislative and judicial systems. In this sense, there is an extremely limited and low grade intervention in the subnational legal systems, and hence a *non dual* domains system of sources of law as a rule. Marco Olivetti stated that ‘It is a strict consequence of the principle “one country, two systems” that the Chinese legal order does not find application in the territory of the two SARs’, and thus addressing an ‘immunity from Chinese Law’ (Olivetti, 2009: 793). Or, in other words, ‘The Macau legal system is normatively self-closed and self-referential due to the immanence of those Basic Policies’ (Isaac, 2007) (enshrined in the Joint Declaration).

### 5.5 The principle of constitutionality

The most aprioristic and immediate role of the constitutionality principle is clearly indicated in Article 11, 2, of the Macau Basic Law, in a fashion rooted in Romano-Germanic legal systems: ‘No law, decree, administrative regulations and normative acts of the Macau Special Administrative Region shall contravene this Law.’<sup>LVIII</sup> Article 8 reinforces the principle vis-à-vis the previous normative acts: ‘The laws, decrees, administrative regulations and other normative acts previously in force in Macau shall be maintained, except for any that contravenes this Law.’ Within Macau’s own domestic legal system, a hierarchy is established and the apex role of its constitution is safeguarded, namely with the mechanism envisaged in article 17, 3<sup>LIX</sup>. This makes the Basic Law function as the norm parameter and the domestic constitutional platform.

This plane, along with other dimensions of the principle, is established in the Basic Law in many other articles. All those dimensions mean that the SAR is not above or outside the Basic Law; it is, instead, subjugated to it as in the fashion of any modern constitutional states. This submission embodies the idea of Constitution proper (Canotilho and Moreira, 2007: 216.)<sup>LX</sup>.

### 5.6. The principle of Protection of Fundamental Rights<sup>LXI</sup>





The Basic Laws establish a wide catalogue of fundamental rights and several principles imbued with a *westernized* approach and thus contribute to one more ground of differentiation vis-à-vis the sovereign besides the usually more adulated group of economic differentiations.<sup>LXII</sup> Besides, as noted before, one must underline the fact that, contrary to traditional regional autonomies and federated states, the fundamental rights system of the SARs – norms, principles, guarantees, limitations, courts, etc. – rest solely on the Basic Law and local legislation as well as applicable international instruments and does not allow room for the application of the national Constitution.

As seen, Article 4 of the Basic Laws solemnly states that the Special Administrative Regions *shall* safeguard the rights and freedoms of the residents and of other persons in the Region. This normative principle is in line with provisions of the Joint Declaration as well as other norms of the Basic Law, such as article 11<sup>LXIII</sup>. It definitely commands an *idea* of safeguarding the rights and freedoms, especially the fundamental ones, and thus not allowing for policies that will undoubtedly position themselves as anti fundamental rights. The safeguarding of fundamental rights is a mandatory general principle of conduct. Its connection with the continuity principle is self-evident and together they form a structural rector principle (and philosophy) of respect of fundamental rights, which is in line with the legate transferred to the new juridical person – the SAR – in the new constitutional order. This principle of safeguarding does not distinguish, nor should it, the origin of the fundamental rights or its christening. It extends its protective command to any fundamental right whether established in domestic law or in international law, whether vested with the robes of fundamental rights or with the cosmopolitan robes of human rights.

We tentatively identify several principles underlying the fundamental rights constitutional subsystem or component<sup>LXIV</sup>. They are<sup>LXV</sup>: the principle of safeguarding, the principle of self containment and of exclusivity<sup>LXVI</sup>; the principle of a charter of rights; the principle of continuity of fundamental rights; the principle of equality<sup>LXVII</sup>, the principle of non discrimination<sup>LXVIII</sup>; the principle of safeguarding human dignity<sup>LXIX</sup>; the principle of legality of fundamental rights in general and on restrictions in particular; the principle of reception of at least minimum international standards; the principle of self-executing constitutional norms; the principle of *local* philosophy interpretation and integrative methods; the principle of effective judicial protection; the principle of proportionality; the



principle of overture to other rights in the Basic Law; the principle of overture to other rights outside the Basic Law; and the principle of extension to collective persons.<sup>LXX</sup>

Together with the constitutional principles that we have elaborated which have or may potentially have a contributory role in establishing and guaranteeing the fundamental rights system, they constitute the protective web of the fundamental rights system, shaping it into a potential and formal *pro libertate* one, from the perspective of the periphery or, if one prefers, from the standpoint of the subnational unit.

### 5.7. The principle of separation of powers

One can very briefly say, and we quote, that ‘Under the Basic Law, there is a clear and sharp separation between the executive and the legislature’ (Ghai, 1999: 263), and subsequently, there are some mechanisms, albeit not perfect, of checks and balances. Articles 2, 16 and 17, among other articles, reflect the separation of powers in Macau. Even if there is a dominance of the executive over the legislature as it is the case<sup>LXXI</sup>, one knows that the event of absolute power does not fit in the Basic Law schematics. Absolute power negates true fundamental rights, whereas separated and controlled powers lay the carpet for the possibility of real fundamental rights. What varies is the scope and quality of those rights.

On the other hand, one must bring to the subject the fact that Macau and Hong Kong are constitutionally guaranteed with an independent judiciary. The principle of independent judiciary is present in the Basic Law, which is in line with the Joint Declaration, and it emphatically states that Macau (and Hong Kong) enjoys independent judicial power, including that of final adjudication. Immediately, one can see two dimensions at stake: the judicial power is independent from other *intrasystemic* powers and it is also independent from the central sovereign powers, and thus the final adjudication. Needless to stress, having an independent judiciary in the safeguarding of the constitutional system and of the fundamental rights system<sup>LXXII</sup> is paramount.

## 6. Comparing the core of the Chinese SARs: Homogeneity of Norms

The constitutional space that is allotted to Hong Kong and Macau is fundamentally the same, as they are created by similar Joint Declarations and the same Chinese



Constitution. The Basic Laws of the two regions are essentially identical, regarding the general structure, major principles, and wording. They were drafted in 1985-1990 and 1988-1993 respectively. Most of the drafters of the Hong Kong Basic Law from the mainland have been absorbed by the Drafting Committee for the Macau Basic Law and brought along same method and approach.<sup>LXXIII</sup>

Notwithstanding the similarity, there are some differences appearing in the content. It is also natural when the Basic Law of Macau, which was drafted later, tended to avoid some uncertainties from a technical point of view. The drafters also tried to make the Basic Law adapt to the society of Macau and reflects its own characteristics. For example, there is a provision regarding the policies on tourism and recreation which, in *the real world*, means casino industry, the sector giving most revenue to the government.

However, there are some differences that are more remarkable. Macau has a more complete list of fundamental rights than Hong Kong<sup>LXXIV</sup>. Whereas in Hong Kong the Basic Law states in article 25 that all Hong Kong residents shall be equal before the law, the corresponding article in Macau states the same principle, densifies and expands on it to cover the non-discrimination clause<sup>LXXV</sup>, stating that all Macau residents shall be equal before the law, and shall be free from discrimination, irrespective of their nationality descent, race, sex, language, religion, political persuasion or ideological belief, educational level, economic status or social conditions. Macau Basic Law also adds the principle of human dignity to the chapter of fundamental rights. This principle constitutes a standard of universal protection and operates as an interpretation clause and a criterion of balancing fundamental rights and other relevant constitutional values (Canotilho and Moreira, 2007: 198; Rolla, 2002: *passim*; Cardinal, 2010a).

Another difference is put in the evolution of method of selecting the Chief Executive and formatting the legislature. For Hong Kong, the ultimate aim is to achieve universal suffrage for selecting the Chief Executive and electing all members of legislature, for Macau these provisions are absent. That only a majority of legislators are to be elected directly was put into the Macau Basic Law. It shall be borne in mind that this different treatment was put earlier in the Joint Declarations; the Basic Law was just to implement the policies enshrined in Joint Declarations. The differences might reflect different bargaining power of the British and the Portuguese governments, and different degrees of domestic



desire for democracy (Ghai, 2000b: 192). This difference leads to a different democratization pace as appeared in the SARs which would be elaborated later.

## 7. The dynamics and divergences in the constitutionalism of the twin regions: some items

### 7.1 Constitutional Review

The Basic Laws established a complicated dual system of constitutional review. One is the review conducted by the NPCSC, the other is the judicial review by the courts. The NPCSC can invalidate the laws enacted by the legislatures of the SARs which it considers are not in conformity with the provisions of Basic Laws regarding affairs on the relationship between the central authorities and the region, by returning them.<sup>LXXVI</sup> This power to review constitutionality has two restrictions. The first is it can only review and invalidate the laws that fall into the scope as provided and the second is the laws are only limited to the laws enacted by the legislatures of the SARs, excluding the administrative regulations enacted by the Chief Executive.<sup>LXXVII</sup>

But the courts' power of constitutional review is not without restrictions. One restriction is it has to be subject, within the limits and scope prescribed by the Basic Laws, to the authoritative interpretation of the NPCSC and it might be overruled by the interpretation from the NPCSC which, as we will see later, happened in Hong Kong SAR.

The Basic Laws of the SARs stipulate that no law enacted by the legislatures shall contravene Basic Law, which can be regarded as a foundation for constitutionality review. However, the Basic Laws didn't establish a unitary system for judicial review and a constitutional court, or some such equivalent which is charged specifically with the responsibility of adjudicating on constitutional challenges, in the SARs.

In Hong Kong, the Court of Final Appeal has readily and consciously assumed a role of the implementer of the Basic Law and the guardian of fundamental rights. The Court of Final Appeal (CFA) has taken a robust approach to constitutional review. From the very first case, it has declared in no uncertain terms that:

'in exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that Law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of an



obligation, not of discretion, so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency'.<sup>LXXVIII</sup>

At the beginning, there were some conflicts between the CFA and the NPCSC on understanding the power of the CFA to constitutionally review the acts of NPC and NPCSC, and the interpretation of Basic Law itself (Tai, 2002). As rightly commented by some authors (Clarke, 1999), the Court tried to delineate the scope of the HKSAR's judicial autonomy from the central government. The Court was concerned to establish its constitutional jurisdiction as widely as possible and to assert the independence of its judicial power as forcefully and expansively. It asserted itself as the guardian of the Basic Law and a champion of the legal autonomy of HKSAR and the rights of its residents. It tried to erect a 'firewall' around Hong Kong's judicial autonomy by placing the interpretation and enforcement of the Basic Law primarily under its own control and limiting the requirement to seek an authoritative interpretation from NPCSC in article 158 of the Basic Law.

There were a handful of constitutional adjudications, which compounded the constitutional jurisprudence. The courts employed a wide range of remedies, including the traditional ones like declaration of unconstitutionality, reading in and reading down, as well as the innovative ones, such as temporary suspension of a declaration of unconstitutionality (Zervos, 2010). And the courts are willing to give access to applications of constitutional review by carefully interpreting the procedural rules. In one case, the Court of Appeal established exceptional rules to entertain the application for judicial review by an applicant who had not been charged with any offence and was not affected by any executive decision, which would be normally regarded as lack of *locus standi*.<sup>LXXIX</sup> The Court stated that 'where the constitutionality of laws is involved, the court should be more eager to deal with the matter. Put bluntly, if a law is unconstitutional, the sooner this is discovered, the better.'<sup>LXXX</sup>

In interpreting Basic Law, the CFA has carefully taken a distance from the Chinese approach and insisted on its common law approach. In the case of *Chong Fong Yuen v Director of Immigration*<sup>LXXXI</sup>, the CFA attempted to define the relations between the Hong Kong courts and the NPCSC in interpreting the Basic Law. It concluded that, according to Chinese law, the interpretation by the NPCSC is legislative in nature, as NPCSC is a



legislative body. Since a common law court would generally not consider how the Legislature will respond to the courts' interpretation of a particular statutory provision, which is considered as the exclusive power of the court, when Hong Kong courts interpret the Basic Law, they will not take into account how the NPCSC would interpret the Basic Law under Chinese law, or how it would respond to their interpretation. In this way, the CFA tried to insist the primacy of common law principles in interpreting Basic Law (Chan, 2007: 412).

Regarding to the role of guardian of human rights<sup>LXXXII</sup>, one commentator has generalized two major themes evolved from the judgments of the CFA.

'The first theme is its eagerness to position itself as a liberal constitutional court protecting fundamental rights. In a line of decisions, the Court gradually established firm jurisprudence on the approach to fundamental rights that is in line with contemporary liberal thinking on human rights. The second theme is to maintain continuity with the previous system. The establishment of the SAR is not the creation of a new regime as such, but a continuation of the previous regime, and the court should be slow to disturb such continuity.' (Chan, 2007: 415)

Hong Kong courts have considerably used international treaties and international and comparative jurisprudence to ensure that domestic laws and policies comply with international human rights norms (Cardinal, 2010d and forthcoming). This has constituted an important element for internationalizing Hong Kong's constitutional law or, in other words, internalizing international human rights law in Hong Kong (Chen Albert, 2009a). Since the enactment of the Bill of Rights in 1991, the human rights norms in International Covenant on Civil and Political Rights have constitutional force in Hong Kong and are used as yardsticks for constitutional judicial review. This system was maintained after 1997 when ICCPR was incorporated in article 39 of the Basic Law to bring the ICCPR into the Basic Law's framework for the protection of human rights. To construe and apply the ICCPR, the use of international norms in general and of the case law on the European Convention on Human Rights (ECHR) has proved to be the single most important source of reference for the Hong Kong courts (Chen Albert, 2009a: 247), even though the ECHR is not part of the law of the land. Apart from the jurisprudence of the ECHR, Hong Kong courts have also sometimes referred to and relied on a wide range of other international decisions namely from the Inter-American Court of Human Rights, the Human Rights Committee, the International Court of Justice in deciding human rights cases, as well as



referring to the general comments and concluding observations of treaty-monitoring bodies.<sup>LXXXIII</sup> And, to some, perhaps even more remarkably, ‘Indeed, compared to the record of the Hong Kong courts before 1997, Hong Kong courts in the post-1997 era have been even more open, active and receptive than before in the use of international and comparative materials in the domain of human rights law.’ (Chen Albert, 2009: 248)

Compared with their counterparts of Hong Kong judiciary, the Macau judiciary, especially the Court of Final Appeal (TUI), demonstrated earlier a timid role in protecting fundamental rights and in constitutional review, notably in its first years of operation.<sup>LXXXIV</sup> However, Articles 11 and 145 of the Basic Law on the supremacy of the Basic Law over any ordinary norm and the principles of justice and of the effective protection proclaimed in Article 36 of the Basic Law demanded a different attitude — one that could easily be reached in Hong Kong — even in the absence of a branded and expressly established judicial procedure. Besides, as stated in Article 83 of the Basic Law, the courts shall be subordinate to nothing but law, and the first law is the Basic Law of Macau. Therefore, the absence of a specific set of procedural rules on constitutionality issues<sup>LXXXV</sup> cannot be seen as impairing the competence of the court to implement the constitutionality principle and safeguard the Basic Law. The political mechanisms can coexist with normal judicial ones, as is the case in Hong Kong which has to follow, in this aspect, the same type of rules in its Basic Law, and the CFA has been active in these crucial fields. On the other hand, in Macau, the TUI suffers a problem of invisibility.

As was said, there were initial oppositions to the assumption of constitutional review, however, a ruling by the TUI promisingly and clearly affirms that it has the competence to scrutinize the conformity of any rule vis-à-vis the Basic Law, further stating that, in the cases adjudicated, the courts cannot apply norms inserted either in laws or administrative regulations that are in violation of the Basic Law or its settled principles. This is, from several angles, an apex decision that should merit further study and may indicate a certain shy deviation from a previously *conservative stance* by the court.<sup>LXXXVI</sup> Time will tell.

In the field of fundamental rights, in which there are relatively few cases, the tentative conclusion is that the Court usually opts for a moderate or shy approach, with little densification of the fundamental rights enshrined in the Basic Law, in the Joint Declaration such as the principle of effective judicial protection or the continuity principle,



and in international law<sup>LXXXVII</sup>. There is a lack of deepening of important general principles and concepts, such as proportionality, usually simply acknowledging it in an administrative law context. In short, the Court does not engage an in-depth, proactive and liberal stance, although it does not present itself as being anti human rights.

An example of a rigid and detached approach, perhaps even an insensitive one, is the case in which the internationally established family reunification right was dismissed, and the Court serenely advocated that if a parent wish to be reunited with its sibling so instead of bringing the child to Macau the parent — legal immigrant worker — could instead simply cease to work in Macau and move back to his Southeast Asian homeland<sup>LXXXVIII</sup>. Finally one more example would be the Ao Man Long case and the dismissal of his right of appeal, also internationally guaranteed<sup>LXXXIX</sup>.

In some cases, however, most notably in habeas corpus ones, the TUI clearly assumed a guarantor role. More recently, in several cases related to freedom of demonstration, TUI has demonstrated a more suitable approach as guarantor and *densifier* of fundamental rights.

Whereas one can see a clear active and widely respected *pro libertate* judicial activity in Hong Kong, one fails to see such enthusiasm in Macau<sup>XC</sup>, at least in the same dimension that can be seen on the other side of the estuary of the Pearl River. However, as said, there might be a new tendency encompassing a *friendlier* approach to fundamental rights issues.

## 7.2. The democratization process

The issue of democratization of the SARs has to be put into a wider historical context to be discussed. In Macau, the democratization took place shortly after the Portuguese revolution in 1974, but it became stagnant during the 1980s and the 1990s. The Organic Statute passed in 1976 established a 17-member legislature with six directly elected members, six elected by occupational groups and five appointed by the Governor. There was a division of legislative power between the Legislative Assembly and the Governor. In Hong Kong, only until 1985, the Legislative Council introduced members elected by functional constituencies. Before that all members were appointed by the Governor. The common characteristic of the political system of Macau and Hong Kong is the overarching powers of the governor and the relatively little accountability to the legislature.



The Joint Declarations, based on compromises between two parties, stipulated that the government and the legislature shall be composed of local inhabitants and the chief executive will be appointed by the central government on the basis of the results of elections or consultations to be held locally. The legislature shall be constituted by direct elections in the case of Hong Kong, and for Macau majority members of the legislature shall be directly elected. In both cases, the executive shall be accountable to the legislature.

The Basic Law gives the Chief Executive an important role in the legislative process. The Chief Executive can also prevent the submission of legislative bills relating to government policies by not giving his or her consent. The Government has a reserved right to initiate legislative proceedings dealing with public expenditure, political system and the operation of the government.<sup>XCI</sup> The Chief Executive can veto the bill approved by the legislature and ask them to reconsider it.<sup>XCII</sup> If the same bill gets approved with qualified majority, the Chief Executive can dissolve the legislature.<sup>XCIII</sup> Other than power regarding legislative issues, the legislature has the power to examine and approve budgets introduced by the government; to receive and debate the policy addresses of the Chief Executive; to raise questions on the work of the government; to debate any issue concerning public interests; to receive and handle complaints from residents; and to summon, as required when exercising the powers and functions, persons to testify or give evidence.<sup>XCIV</sup> The legislature may pass a motion of impeachment of the Chief Executive by a two-thirds majority of all its members, although it has to be reported to the central government for the final decision.<sup>XCV</sup>

It can be concluded that the Chief Executive does have wide-ranging powers, but a system of checks and balances exists. The legislature can play a role of monitoring and balancing the power of the executive based on rules provided in Basic Law, although a lack of substantial powers turn the pre-eminence to the executive side, without however deleting the separation of powers principle .

The post-handover democratization of Hong Kong SAR has been mainly centred on the reform of electoral rules of Chief Executive and the Legislative Council<sup>XCVI</sup>. The progress achieved until this moment is that the election of the Chief Executive in 2017 may be implemented by the method of universal suffrage and, after the Chief Executive is selected by universal suffrage, all the members of the Legislative Council may be elected by universal suffrage. It depends on the internal players to create conditions and materialize



these objectives.<sup>XCVII</sup> Macau's case is different from Hong Kong because the universal election of the Chief Executive and all the members of the Legislative Assembly was not put into the Basic Law.<sup>XCVIII</sup> Also Macau lacks political parties *stricto sensu* and a strong civil society, as well as a certain lack of primary social identification with Macau proper due to strong and recent immigration from mainland China, which might be reasons influencing its democratization process.

### 7.3. Exercise of External Autonomy

Hong Kong and Macau SARs enjoy a high degree of international legal capacity based on their autonomy, internal and external (Chan and Lim, 2011: 77-81). The Basic Laws accord the SARs the power to conduct relevant external affairs on their own, while the central government is responsible for the foreign relations relating to the SARs.<sup>XCIX</sup> To conduct relevant external affairs, the SARs can maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields.<sup>C</sup> SARs may, as members of delegations of the People's Republic of China, participate in international organizations or conferences in appropriate fields limited to states and affecting the Region, or may attend in such other capacity as may be permitted by the Central People's Government and the international organization or conference concerned, and may express their views, using the name 'Hong Kong, China' or 'Macau, China'. This gives the SARs the opportunity to promote their interests through key international organizations. The SARs can also participate in their own capacity under the name 'Hong Kong, China' or 'Macau, China' in international organizations and conferences not limited to states.<sup>CI</sup>

It all left the SARs governments the chance to make full use of their wide external affairs powers, which concerns their international recognition. It can be generally observed that Hong Kong has more vigorously taken an active role and is a visible player in the international arena compared to Macau, especially in the fields of commerce and trade, by



participating in more intergovernmental organizations and non-intergovernmental organizations and establishing more overseas Economic and Trade Offices.

Hong Kong participates in 26 international organizations which are only open to sovereign states, sending representatives as members of delegations of China. These organizations include important ones such as Food and Agriculture Organization, Group of Twenty, International Atomic Energy Agency, International Civil Aviation Organization, International Labour Organization, International Monetary Fund, The World Bank Group, World Health Organization, World Intellectual Property Organization, etc. Hong Kong participates in 39 intergovernmental organizations not limited to states, such as Asia - Pacific Economic Cooperation, Asian Development Bank, International Maritime Organization, Organization for Economic Co-operation and Development - Trade Committee, World Meteorological Organization), World Customs Union, World Trade Organization, etc. It also participates in more than 170 non-intergovernmental organizations. Hong Kong has been an active participant in international and regional economic and trade forums, such as World Trade Organization and Asia - Pacific Economic Cooperation. Some important international organizations maintain offices in Hong Kong, such as the Commission of the European Communities, the Bank for International Settlements, the International Monetary Fund, the International Bank for Reconstruction and Development and the International Finance Corporation. All these external relations and activities help it to construct and maintain its prominent position as a leading commercial, communications, financial, logistics and transportation centre.

Macau's *de facto* participation in international organizations is more limited. Macau has used the channel of having representatives as members of delegations of China to mainly participate in UN meetings. Macau is a member of 13 intergovernmental organizations not limited to states, such as World Trade Organization, World Tourist Organization, World Health Organization, etc<sup>CII</sup>. And participates in more than 29 non-intergovernmental organizations. It should be emphasized that, due to its unique historical and linguistic advantages, Macau is selected as the base for the Permanent Secretary of Forum Economic and Trade Co-operation Between China and Portuguese-Speaking Countries, and participates in the activities through members in the delegation of China.

Regarding the application of international treaties, the differences between the two SARs are more mitigated. In fact, 243 multilateral treaties are applicable to the HKSAR,



while 190 multilateral treaties to the Macau SAR, and a quantity of those multilateral treaties applied in the SARs, do not apply to mainland China. HKSAR is also party to more than 140 bilateral agreements with 60 countries, including Air Services Agreements, Investment Promotion & Protection Agreements, Mutual Legal Assistance Agreements, Surrender of Fugitive Offenders Agreements, Transfer of Sentenced Persons Agreements and Double Taxation Avoidance Agreements.<sup>CIII</sup> Macau SAR is also party to more than 141 bilateral agreements, the majority of which concern diplomatic and consular relations, air transport service, and visa abolition.<sup>CIV</sup> Up to October 2011, there are 59 Consulates-General, 62 Consulates and 5 Officially Recognised Bodies in Hong Kong<sup>CV</sup>, and most of these representations extend service to Macau. Hong Kong also has established its Economic and Trade Offices in its major trading partners, namely, Australia, Belgium (the EU), Canada, Germany, Japan, Singapore, Switzerland, the UK and the US.<sup>CVI</sup> Macau only established three overseas Economic and Trade Offices in Portugal, Brussels (European Union), and Geneva (World Trade Organization).

## 8. Some final remarks

As Robert F. Williams and G. Alan Tarr (2004: 12) pointed out, ‘documenting how subnational constitutions within a particular country are similar to, or different from, each other is a crucial first step. However, the really interesting question is explaining the reasons for the differences among subnational constitutions.’ Hong Kong and Macau’s Basic Laws, as their subnational constitutions, are created under similar historical background and based on similar international treaties, namely, the Sino-British Joint Declaration and the Sino-Portuguese Joint Declaration, which therefore entrenched similar principles for them and ensured the constitutional values such as rule of law, protection of human rights to continue survive and develop on these two lands consecrating a *Rechtsregion*. But constitutionalism is living and evolving; and it is more a matter of a constitutionalising process. A variety of reasons result in different degrees of constitutionalism present in societies having similar constitutions.

As seen, the extent, scope and nature of these two imaginative and pragmatic autonomy arrangements clearly show that they do not fit in any classical model, either



federal or of territorial autonomy. Its results, albeit imperfect, are deemed positive so far. Hence, can these exceptional cases present themselves as a model in the research and consecration of subnational constitutionalism in other geopolitical arenas? Answering the question of considering Macau (and Hong Kong) autonomy as a model (Goncalves, 1996), Giancarlo Rolla (2009: 472) considers that, ‘from the viewpoint of the comparative law theory, it is incorrect to refer to Macau as a model’ since, ‘In summary, two elements concurring to the establishment of a model are: on the one hand, an experience that becomes obvious on account of its efficiency, and on the other, the experience’s aptitude to circulate in other countries and legal systems. Regarding Macau, I believe we can confirm the presence of the first prerequisite element but not the second. Therefore, it may be more appropriate to speak of Macau as a “tailored suit”: that is, a constitutional measure that is suitable for solving a specific situation but is one that can hardly be generalized.’ (Rolla, 2009: 472 and 473).

Even if the Macau – and Hong Kong – autonomy solution only complies with the first element, efficiency<sup>CVII</sup>, one could already accept that solution envisaged in the One Country, Two systems maxim, as mission (basically) accomplished. We do believe however that the internationalized autonomy arrangements of the SARs do have the potential to be exported, that is to circulate in other legal systems, other countries thus allowing to, in a *pacta* and Kantian *perpetual peace* stance, accommodate diversity in unity. In peace. In mutual respect. Safeguarding the fundamental rights of the citizens of the subnational unit.

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\* The opinions expressed here are solely those of the authors and do not reflect the views of any institution to which they are affiliated. Thanks are due to Luís Pessanha, who offered many suggestions. The usual disclaimers do apply. Paulo Cardinal, LicLaw (Lisbon), PostGrad (Macau), PhD candidate (Coimbra), Invited Lecturer, Faculty of Law, University of Macau; Coordinator Legal Adviser of Macau Legislative Assembly, [paulocardinal@yahoo.com](mailto:paulocardinal@yahoo.com). Yihe Zhang, LLM (University of Macau), LLB(ECUPL PRC), Legal Adviser of Macau Legislative Assembly, [janezhangyihe@yahoo.com](mailto:janezhangyihe@yahoo.com).

<sup>I</sup> Tarr (2010) has given an approach in the analysis of subnational constitutionalism: firstly, there should be an essentially legal assessment of the amount of subnational constitutional space, competency, or autonomy that the component units are allotted, and then the question is how a federal system polices the outer limits of subnational constitutional-making space allotted to component units.

<sup>II</sup> On studies on subnational constitutionalism in different countries and collective works encompassing comparative law approaches, see *e.g.*, Gunlicks, 2000; Brand, 2000; Delledonne, 2011; Marshfield, 2008; Williams, 1999; Murray and Maywald, 2006; Moreno, ‘Subnational Constitutionalism in Spain’; Häberle, 2006;



Valadés and Serna de la Garza, 2005; Aparicio, 1999.

<sup>III</sup> See particularly the case of South Africa and also of Kenya.

<sup>IV</sup> See the cases of the United States and Switzerland.

<sup>V</sup> Also see reasons put forward by Perenthaler (1999: 35 and ff.), such as the autonomy of the subnational units as justification.

<sup>VI</sup> On subnational constitutions and protection of rights, see William, 1977; Pollock, 1983; Tarr, 1997; Tinoco and Sosa, 2008; Galligan, 2007, in which the author discussed the rights protection by subnational governments under three models of federalism: traditional constitutional federalism, multinational federalism and asymmetric federalism. For a case study of Mexico subnational constitutions and rights protection, see for example, Tinoco, 2010; Rojas, 2008.

<sup>VII</sup> In explaining the supplementary function of protecting human rights by state constitutions of United States, Pollock (1983: 709) pointed out, ‘the Bill of Rights in the United States Constitution establishes a floor for basic human liberty. To carry forward that metaphor, the state constitution establishes a ceiling. A state may supplement federally granted rights, it may not diminish them through a more restrictive analysis of the state or federal constitution.’ For more about this function, see Brennan, 1977.

<sup>VIII</sup> See Ginsburg and Posner, 2010, Tarr and Williams, 1999. Elazar (1982: 3) explains: ‘The United States does have a living and active tradition of taking state constitutions seriously, if not always seriously enough. That tradition is reinforced by the continuing processes of constitutional design: regular referenda on state constitutional amendments in most states, periodic constitutional conventions to achieve major constitutional revisions or comprehensive constitutional change, and state supreme court decisions which shape state constitutional law.’

<sup>IX</sup> See Fercot, 2008, Castellá Andreu, 2007. For the Macau, and Hong Kong, cases, Cardinal, 2009 and 2010d.

<sup>X</sup> An inspiring research on subnationalism in Italy and Spain autonomies can be found in Delledonne and Martinico, 2011. Regarding the Chinese SARs, for example, see Cardinal, 2007.

<sup>XI</sup> García (2009: 412), says, that ‘In recent decades, doctrine has shown a confluence between the concepts of federal state and regional state due to the centralisation processes undergone in the first, and the qualitative and quantitative increase in the powers of the second.’ See also, for example, Vergottini, 2004.

<sup>XII</sup> An example among others, Hernandez (2005) tells us of a deep process of centralization in Argentina contrary to the federal model envisaged in its Constitution.

<sup>XIII</sup> In this work one is given several reasons for this advance of the composite state, such as the ‘Europe of the Regions’ factor.

<sup>XIV</sup> Parts of this section are drawn from Cardinal, 2009.

<sup>XV</sup> That reads, ‘The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s Congress in the light of the specific conditions.’

<sup>XVI</sup> Sino-British Joint Declaration Point 3(1) and reaffirmed on Point I of Annex I; Sino-Portuguese Joint Declaration Point 2 (1) and reaffirmed on point I of Annex I.

<sup>XVII</sup> The case of South-Tyrol is a point of reference and comparison for the autonomies of Macau and Hong Kong. Surprising as it may seem, that case shares more of the ‘uniqueness’ of the Macau and Hong Kong autonomies. In fact, they have in common a transfer of sovereignty—at least to a certain degree—from one sovereign state to another sovereign state; that transfer was agreed and laid down in an international legal agreement; those agreements were deposited at the UN; thus, the foundation of the autonomy is primarily internationally based; in these cases one finds that there are at least two official languages within the juridical boundaries of the autonomies, the language of the ‘new’ sovereign as well as the language of the previous one. On this, see Peterlini, 2009. In general and providing several examples and nuances, both historical (such as Memel) and contemporary (such as South-Tyrol), see Dinstein, 2005.

<sup>XVIII</sup> Art. 20 of Hong Kong Basic Law and Macau Basic Law. Canas (2001: 244) makes this point despite considering the article an enigma.

<sup>XIX</sup> Although as seen, the external *pacta* source must be complied with meaning that sovereignty resides solely in China and in no other, but it is delimited by the Joint Declaration.

<sup>XX</sup> For detailed discussion on the limitations of autonomy, see, Cardinal, 2008b: 671-681. It shall also be noted that the absence of a conflict resolution mechanism has been seen as a limitation, or an impediment, to the autonomy. To be clearer, there is no independent judicial forum for the determination of jurisdictional disputes between the central government and the SARs, while the Standing Committee of National People’s Congress, a political organ, undertakes ‘*constitutional review*’, and interprets the Basic Laws. See, Chen Albert,



2009: 760-762.

<sup>XXI</sup> Nabais (2001: 33-34) describes a high degree of complexity and originality that does not fit any previous models. Olivetti (2009: 783) puts it 'In the case of the SARs, the lack of homogeneity not only is allowed or tolerated, but it is directly imposed to the Regions by their Basic Laws, up to the point that they couldn't even reduce or remove it (e.g. adopting a socialist system). Here lies in my opinion the core problem of every attempt to classify the SARs using the models created in the literature over territorial distribution of powers. None of these models and none of existing experience allows such a difference of political structure, of socio-economic model and of fundamental rights regulation between the centre and the autonomous entities like the one foreseen by the Hong Kong and Macao Basic Laws.'

<sup>XXII</sup> Jeong (2004: 233-234) says that the regime of the SARs under the one country, two systems framework brings to the centralized state system some federalist characteristics, and concludes that China now has a combined system of federalism and unitary state. Underdown (2001) uses the interesting expression '*federalism Chinese style*'. Davis (1999) poses the question of federalism in China and of confederacy and proposes a concept of economic federalism already in force but unaccompanied by a formal constitutional one. Zheng (2007: 213) referred to China as a 'de facto federalism' or a 'behavioral federalism'. 'China does not have a federalist system of government (...) Constitutionally, the country is a unitary state. Nevertheless, within China's cultural context, a formal institutional perspective can hardly help us understand the country's central-local relations properly. A better understanding of China's central-local relations should begin with a behavioral perspective. Such a perspective will enable us to see China's de facto federal structure.' See also, Cheung, 2007.

<sup>XXIII</sup> Again, an item embodying the 'second system', even if this new system marks disruptions in several issues with the previous 'colonial' political system, which is less marked in the case of Hong Kong. The main reason is that the Macau model was copied from Hong Kong. See, for example, Cardinal, 2002, and 2008b: 678-681. For Hong Kong's case, see Ghai, 1999.

<sup>XXIV</sup> Henders compiled the data related to the nonstate actors activity in international law and both Macau and Hong Kong are high in the rankings and in the case of Hong Kong it is surpassed only by a will be State - Palestine - and an associated one.

<sup>XXV</sup> China has since imperial times adopted the notion of ethnic autonomy. For a historical analysis and the origin of current ethnic autonomy, see Phan, 1996.

<sup>XXVI</sup> They are the Inner Mongolia Autonomous Region, the Xinjiang Uygur Autonomous Region, Guangxi Zhuang Autonomous Region, Ningxia Hui Autonomous Region and Tibet Autonomous Region.

<sup>XXVII</sup> Article 3 of the Law of the People's Republic of China on Regional Ethnic Autonomy.

<sup>XXVIII</sup> Article 5 of the Law of the People's Republic of China on Regional Ethnic Autonomy.

<sup>XXIX</sup> Article 7 of the Law of the People's Republic of China on Regional Ethnic Autonomy.

<sup>XXX</sup> Article 26 of the Law of the People's Republic of China on Regional Ethnic Autonomy.

<sup>XXXI</sup> Article 115 of the Constitution of PRC.

<sup>XXXII</sup> Article 116 of the Constitution of PRC.

<sup>XXXIII</sup> Article 3 of the Constitution of PRC.

<sup>XXXIV</sup> Article 20 of the Law of the People's Republic of China on Regional Ethnic Autonomy.

<sup>XXXV</sup> Up to 2002, there are 13 laws which authorized the ethnic autonomous areas the right to alter implementation, but the alterations have been practically done only to 4 laws (Marriage Law, Election Law, Inheritance Law, and Forest Law) by some ethnic autonomous areas.

<sup>XXXVI</sup> Article 46 of the Law of the People's Republic of China on Regional Ethnic Autonomy.

<sup>XXXVII</sup> For analysis of the limited role the autonomous legislative powers can play in solving central-local conflicts of interests distribution and in extending autonomous power, see Xia Chunli, 2008.

<sup>XXXVIII</sup> One does not forget the inexistence of some classical features of federalism, such as the *Kompetenz-Kompetenz*, see, Cardinal, 2009. Gouveia (2002: 1997) warns that, in spite of the extraordinary scope of autonomy and the existence of powers that not even federated states have, the Macau SAR cannot be deemed as something similar to a state in a federation since it lacks an essential power, that is the power to enact its own constitution. It is important to note though that historically not all constitutions were the result of a self constituent power but rather *granted* by a superior entity, be it a monarch or the international community, e.g., the Constitution of Bosnia and Herzegovina has come into being as Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina of the Dayton Agreements, see Yee, 1996, on legitimacy and undemocratic questions.

<sup>XXXIX</sup> We could question if other normative documents integrate the constitutional order of the SARs such as



the ICCPR, by virtue of article 40 of the Macau Basic Law and 39 of the Hong Kong one stating: 'The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.'

<sup>XI</sup> Raz (1998: 153-154) presents a seven characteristic criterion in order to ascertain the existence of a constitution in a thick sense: it contains the definition of powers of the main organs of government; is meant to be of long duration, that is it is stable or aspire so; it is written; it is a superior law; there are judicial procedures to implement that superiority; it is entrenched; and, finally, it purports principles of government that usually express common values of the community, such as human rights, democracy, *etc.* The Basic Laws conform to all of the above with some deficiency regarding one, the judicial mechanisms of implementation. For further see Cardinal, 2010a.

<sup>XI.I</sup> Article 11 of Hong Kong Basic Law: No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law. Article 11 of Macau Basic Law: No law, decree, administrative regulations and normative acts of the Macau Special Administrative Region shall contravene this Law.

<sup>XI.II</sup> In truth, as explained and detailed in the text, we view the Basic Law as the Macau Constitution, see Cardinal, 2010a and b. However, we do know that actually in mainland doctrine this view is not shared, see e.g. Liu and Han, 'The Basic Laws of HK and Macao SARs aren't Subnational Constitutions in China'. Apparently an approach is favored filled with traditional and old-fashioned concept of absolute, or unlimited, and indivisible sovereignty, basically in the footsteps of the way paved by Jean Bodin in the XVI century. Further, for a good summary of the division between Hong Kong scholars and mainland scholars on the nature of the Basic Law, see Chen Albert, 2002: 381, footnote 25. 'Mainland scholars think the Basic Law is one of the basic laws enacted by the National People's Congress according to the Chinese Constitution, and don't regard it as constitutional instrument or constitutional law. (...) Hong Kong scholars generally think the Basic Law is the constitutional law or constitutional instrument. The Judiciary also shares this opinion, and adopts general principles of interpreting constitution to interpret the Basic Law, and general principles of constitutional review to review the compliance of laws enacted by Legislature with the Basic Law.' For relevant jurisprudence relating to the nature of Basic Law as the constitution of Hong Kong SAR, see Lo, 2011: 14-15.

<sup>XI.III</sup> Basic Law of Hong Kong: Article 159; Basic Law of Macau: Article 144.

<sup>XI.IV</sup> Basic Law of Hong Kong: Article 158; Basic Law of Macau: Article 143.

<sup>XI.V</sup> For further see Cardinal, 2009 and 2010c, papers that have parts that are closely followed in this section.

<sup>XI.VI</sup> For instance a hypothetical revision of the Basic Law to eliminate the right to strike would not be possible since this right is directly protected by the umbrella guarantees established in the Joint Declaration. The same can be said, naturally, if in a revision of the Basic Law a proposal to abolish the high degree of autonomy were put forward.

<sup>XI.VII</sup> Sharing the same opinion, Ramos, 1998; Chen Zhizhong, 2001. For Hong Kong, Mushkat, 1997: 140-1; Crawford, 2005: 3 - 4, says 'It is true that it is termed a Joint Declaration and much of it is in declaratory mode. But the name given to a treaty is a matter of indifference. (...) There is no difficulty from the point of view of international law in seeing the Joint Declaration as a treaty. Moreover the declaratory mode does not mean that the Joint Declaration is a mere declaration or recital without legal force. Much that is in the Joint Declaration is actually being constituted, or at least being agreed to be constituted.'

<sup>XI.VIII</sup> Kant purported an idea of universal hospitality and this resulted in strong disagreement towards colonialism. The Joint Declarations ended colonialism and the inhabitants of Macau and of Hong Kong of Portuguese or British background are seen as permanent residents of the SARs in (almost) total parity with Chinese nationals. See, Cardinal, 'A Tale of Two Cities - The Judicial Protection of Fundamental Rights in the Exceptional Autonomous Regions of Macau and Hong Kong of The PR of China and the Role and Influence of International Law Instruments on Human Rights', forthcoming; Cardinal, 2010a: 741 - 748.

<sup>XI.IX</sup> Preamble and in Art. 144 stating that the basic policies of the People's Republic of China regarding Macau have been elaborated by the Chinese government in the Sino-Portuguese Joint Declaration and that no amendment to the Basic Law shall contravene the established basic policies of the PRC regarding Macau. For Hong Kong, article 159.

<sup>L</sup> Chen Zhi Zhong (2001: 92) writes that the Basic Law codifies the 12 points in JD Art. 2. In the decision on



process 96/2002, the TSI (Macau Court of Second Instance) a reference is brought to the densification of the Joint Declaration made by the Basic Law.

<sup>LII</sup> ‘Macau’s legal system will have a new constitutional Grundnorm: the JD itself, which is the body of principles and rules defining its autonomy as an SAR and limiting Chinese sovereignty’, Armando Isaac (1999, 3). It is important to note again that the Basic Law must nonetheless follow the provisions of the Joint Declaration, although in some cases it has failed to do so; see for example Cardinal, 1993; for Hong Kong, Ghai, 1999: 146.

<sup>LIII</sup> Joint Declaration, Point 2 (4) and see also I and III of Annex I with some differences in the language of the late norms. Alves (2001: 207) asserts that ‘As for the concept of “laws in force” we understand it in a broad meaning, encompassing not only the formal aspect – written laws – but also the spirit of the legal system, its internal logic, its own dogmatic concepts and all the rest that provides life and sense to the legal order previously existent at the date of transfer of the exercise of sovereignty.’

<sup>LIII</sup> One should note that, contrary to what might be perceived, the whole idea of continuity of a given legal system is far more common – and adequate if not necessary in many cases – than the sole cases within Chinese context. These phenomena can be witnessed in a multitude of situations by which some shift of sovereignty occurs. Be it by transfer of sovereignty over a given territory, access to independence or other situations historically existent.

<sup>LIV</sup> Wang (1999: 180) tells us about the necessity of the new sovereign to acknowledge the existence of a differentiated legal system in Macau and of the local social customs. Its worth mentioning some of the following ideas: the creation of new legislation imposes that it should be prudently taken in consideration the relationship between the Basic Law and the laws previously in force, but also the maintenance of the European continental legal system characteristic as a way of underlining the typical style of Macau, and, it should be mentioned that one of the messages contained in the One country, two systems is the admissibility of a regime left by a foreign State in the condition that it is not in violation of the Basic Law, Sun, 2002.

<sup>LIV</sup> It should be pointed out that from the perspective of legal transplant and legal culture, some legal scholars made an analogy between ‘the theory of possession’ - a concept in civil law - and preserving the transplanted legal regime and rules, and asserted ‘for a jurisdiction built upon legal transplant, existing legal rules and legal theories should be preserved unless they are proven to be not suitable for the society or not corresponding to the common norms of the human society.’ See Tong and Wu, 2010: 670, who consider this *continuity* a result or phenomenon rather than a principle. We think that, by the end of the day, it actually concurs with what we advocated here about continuity and elasticity.

<sup>LVI</sup> Lok (2002: 61) seems to be purporting a somehow similar idea by proposing a difference between the *spirit* of the laws and its basic value as opposed to the specific writing of the normative rules. This later ones would be changeable. One can assume that those would not.

<sup>LVII</sup> Or in the words of Wu (2002: 74) ‘Under the principle “One country, two systems”, the socialist principles and policies established in the Constitution are not applicable in the Regions (SAR). This means that the Constitution is applicable in the MSAR, except for those rules that are related to the socialist principles and policies and the ones referred in article 11 of the Basic Law’.

<sup>LVIII</sup> Rao, 2006, states that ‘The Basic Law has constitutional status and dominates all other Hong Kong laws. (...) The Basic Law dominates all local statutes of the territory, and enjoys constitutional status, namely, as a charter which cannot be defied and one that guarantees social stability and steady economic development. In light of this, all governmental institutions, organizations and individuals must strictly adhere to the Basic Law.’

<sup>LIX</sup> Note, however that such constitutionality mechanism of control does not extend to administrative regulations enacted by the Government. On this subject see also, article 145 ‘Upon the establishment of the Macau Special Administrative Region, the laws previously in force in Macau shall be adopted as laws of the Region except for those which the Standing Committee of the National People’s Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the provisions of this Law and legal procedure.’

<sup>LX</sup> As Ribeiro (2002: 57) points, the principle of *Rechtsstaat* - or of a *Rechtsregion*, in a similar sense of a *Rechtsstaat* as P. Cardinal has been long referring to, - is present in the Basic Law, albeit maybe not so immediately, namely in an indirect way via the separation of powers, the administrative legality, the guarantee of the judiciary remedies, *etc.*

<sup>LXI</sup> At this stage we are not caring about properly differentiating the concepts of fundamental rights and of human rights. One is aware of various possible distinctions between human rights and fundamental rights but



for the current purpose we use both expressions as synonyms and as interchangeably unless otherwise stated. Anyway, some are already questioning the distinction today, based namely on the growing fact that legal systems are plural having to coexist domestic and international orders in a given jurisdiction, and pointing out possible negative effects of it, see, for example, Cavallo, 2010: 15 and ff.

<sup>LXII</sup> Note, as Crawford (2005: 3) states that ‘that autonomous economic system implies the rule of law [...] together with an immediate guarantee of individual rights’.

<sup>LXIII</sup> It is emblematic, and some substance must arise from it, that in Chapter I of the Basic Law on general principles, two of them expressly address the fundamental rights issues in general. Cristina Ferreira (2010: 423, 424) reads article 4 as a *lato sensu* safeguard by encompassing the responsibility of guaranteeing the effective enjoyment of the fundamental rights, e.g. by juridically establishing those rights, promoting them, and establishing judicial and quasi-judicial mechanisms of guarantee.

<sup>LXIV</sup> On the history, continuity of fundamental rights and maintenance of its western, liberal, *pro homine* legacy of the fundamental rights system in Macau, see Cardinal, 2010b.

<sup>LXV</sup> On detailed elaboration of these principles, see Cardinal, 2010c.

<sup>LXVI</sup> Meaning that no norms from the Chinese Constitution are to be imported in the field of fundamental rights. This key element is a crucial difference from other subnational constitutionalisms, be it in federal or regional examples. We know that even in sub state entities such as autonomous regions, it is possible to find a detailed chapter on fundamental rights incorporated in the autonomy act. But it also shows us that those regional rights are connected to, and owe obedience to, the fundamental rights inserted in the sovereign constitution. They share a scope of application and they do not preclude one another. In federal states, one finds similar situations whereby a given citizen is the recipient of a double origin set of fundamental rights – the state constitution and the federal constitution. In some cases, the state constitution does little more than to declare that the federal fundamental rights are received by the subfederal constitution; in other cases, the local constitutions provide for a rich catalogue of fundamental rights but still open the door for the application of the federal based fundamental rights. Naturally, in regionalist states, the absence of fundamental rights in the local basic law is more widespread, and evidently, the rule of the application of fundamental rights established in the (centre) Constitution is intangible. In view of all this, one can thus talk about a domestic multilevel protection in fundamental rights, as, for example, Castellá Andreu (2007) advocated for Spanish case. The situation of the Chinese SARs, as already mentioned, is very different. The centre constitution simply does not have a say in establishing fundamental rights in the regional level. For further see Cardinal, 2010c: 244 and ff.

<sup>LXVII</sup> For Macau see, e.g. Ac. TUI pr. ° 5/2010, and Reports of the Permanent Commissions of the Legislative Assembly of Macau: 1.<sup>a</sup> Comissão Permanente - Parecer N.° 2/IV/2010 and 3.<sup>a</sup> Comissão Permanente - Parecer N.° 4/IV/2010. Regarding Hong Kong, for example, Secretary for Justice v Yau Yuk Lung, [2007] 3 HKLRD 903 (Court of Final Appeal).

<sup>LXVIII</sup> In the Basic Law of Hong Kong the principle of non discrimination is not textually established in contrast to what occurs in the Macau Basic Law. On the latter see, for example, Sena, 2010: 154 and ff.

<sup>LXIX</sup> Note that the principle of human dignity is constitutionalized expressly only in Macau, and not in Hong Kong, *ex vi* article 30 of the Basic Law, inserted in the Fundamental Rights and Duties of the Residents chapter that states ‘The human dignity of Macau residents shall be inviolable’.

<sup>LXX</sup> For further developments see Cardinal, 2010c, Ghai, 1999.

<sup>LXXI</sup> And if there is dominance, primacy or lead of one over another than one must have a separation established. One does not dominate, prevail or lead over oneself. Hence, it is not understood how can possibly be argued that due to a primacy of the Executive over the Legislative the separation of powers does not exist in the Basic Law design.

<sup>LXXII</sup> Gouveia (2005: 1091-1092) states, ‘Simply said, without the implantation of mechanisms of practical order destined to its defence, never this concretization could pass out of the paper and penetrate in the constitutional reality of the day-by-day of the citizens that would have been disturbed in the title and exercise of these rights. It is therefore that the protection of the fundamental rights cannot be enough with its mere existence, for more numerous and rich that is its constitutional list. (...) It became indispensable to count on the contribution of two instances of the public power that can play an undeniable role (...) in the fundamental rights guardianship: the non judicial guardianship and the judicial guardianship.’

<sup>LXXIII</sup> However, the rigid copy of Hong Kong model did cause some confusions as Hong Kong and Macau operate under different legal system. One under common law, and the other civil law system. See, Cardinal, 2008: 686.



LXXIV For detailed discussion, see Cardinal, 2010c. Cotton (2000) also tells us about a ‘greater precision’ on the norms concerning the fundamental rights.

LXXV In itself an open and evolving clause thus opening the way to new items of non discrimination.

LXXVI Laws enacted by the legislatures of the SARs must be reported to the Standing Committee of the National People’s Congress for the record, but the reporting for record shall not affect the entry into force of such laws. Article 17 of Hong Kong Basic Law and Macau Basic Law.

LXXVII The NPCSC can also invalidate the laws previously in force in Hong Kong by declaring them in contravention of the Basic Laws. However, this is a power to be executed only at the time of the establishment of the SARs. If any laws are later discovered to be in contravention of the Basic Laws, they shall be amended or cease to have force in accordance with the procedure as prescribed by the Basic Laws.

LXXVIII *Ng Ka Ling v Director of Immigration*, [1999] 1 HKLRD 315, para 61.

LXXIX *Leung T C William Roy v. Secretary for Justice*, [2006] 4 HKLRD 211. The judge based his argument carefully to prove that the court can determine on a case by case basis whether sufficiently exceptional circumstances exist to enable it to exercise the discretion to hear cases notwithstanding that future conduct or a hypothetical situation is involved. And in this particular case, the court held that the applicant has sufficient interests involved to challenge the law.

LXXX *Leung T C William Roy v. Secretary for Justice*, [2006] 4 HKLRD 211, para 30.

LXXXI *Director of Immigration v Master Chong Fung Yuen*, [2001] 2 HKLRD 533.

LXXXII For an examination of the constitutional rights cases of the first decade in the CFA, see Young, 2008. For an updated version, see Young, 2009.

LXXXIII We are following closely Chan, 2007 and Chen, 2009.

LXXXIV In this part we closely follow Godinho and Cardinal, 2010.

LXXXV It is not necessary here to recall the enormous inconveniences that the situation of lack of such procedure entails.

LXXXVI It is of relevance to take a further look to recent judicial decisions from TUI on this subject as well as to its nuances. For example, in *Ac. TUI*, proc. 8/2007, it is said that ‘When courts adjudicate cases, they are subject to law only. In consequence, if the court deems the law applied is against a law of higher hierarchy, the court shall apply the law of superior hierarchy or other legal norms, not the illegal norm of lower hierarchy. Unless the law provides otherwise, no matter what type of the case, which instance and which procedural phase, the court applying the law can review its validity on its own initiative or upon request of a party, particularly if there is a violation of a higher law, provided the case is within its jurisdiction. If it confirms this breach of law, the court cannot apply the rule which should be applied otherwise but was deemed illegal, and shall apply other legal rules in order to pass a ruling within the scope of the plaintiff’s petition. However, it shall be emphasized that the conclusion that a norm is in violation of law of superior hierarchy is merely an integral part of the courts’ reasoning, or one step on the logical process leading to the final decision, and it does not constitute the content of the ruling. The court cannot pass a ruling that a norm is illegal with a general binding force. The sentence is only valid in the case itself, and does not produce any effect toward other cases and other courts. The norm considered illegal does not become invalid because of this particular ruling. It shall be noticed that a preliminary issue is one question, and the issue of unconstitutionality (at another level) is another question. Unconstitutionality is not an incidental issue or issue of procedural law, but a preliminary issue or issue of substantive constitutional law. But it is brought incidentally in proceeding which has other different issues as object.’ See also, *Ac. TUI*, pr. 9/2006, ‘In the legal system of Macau SAR, the courts in hearing cases can consider the conformity of laws with the Basic Law. And in compliance with Article 11 of the Basic Law, the courts cannot apply norms which infringe the Basic Law or principles it establishes, without prejudice to Article 143 of the Basic Law. In the legal system of Macau SAR, there is no specific procedure to review the conformity of laws with the Basic Law, therefore courts can consider this issue only in the proceedings of specific cases.’ The tendency is positive and consolidating, although with justifiable doubts and cautions in the absence of legislation. It is still, however, insufficient and short reached, namely by refusal of assuming a power to declare *erga omnes* the unconstitutionality of norms.

LXXXVII When it does so, in some cases, is to reduce the scope of a right, such as in the right of appeal regarding criminal cases, in the *Ao Mao Long* case, a former member of the Government that was accused of several serious white collar crimes.

LXXXVIII *Ac. TUI*, pr. 36/2007, regarding article 9 of the UN Convention on the Rights of the Child ‘The Macau SAR does not impose the separation of the appellant from his son. This (the child) solely does not



have the right to reside in Macau. The appellant can keep living with his son. It can simply stop working in Macau and return to his country of origin'. This sort of icy consideration is to be avoided in such formal acts as a judicial decision of a supreme court and one fails to see the technical enlightenment that may have been intended to bring.

<sup>LXXXIX</sup> By the ICCPR, article 14(5), in force in Macau and not subjected to any reservation or similar act and constantly reaffirmed in formal reports of competent international institutions, see, for example, Molinero, 2003, and documents in it referred.

<sup>XC</sup> See, for example, Torres (2009: 318) states 'there is a particular need for a permanent rethinking for judicial decisions, especially (but not only) when human rights are involved and this should start at the highest level.'

<sup>XCI</sup> Basic Law of Hong Kong: Article 74; Basic Law of Macau: Article 75.

<sup>XCII</sup> Basic Law of Hong Kong: Article 49; Basic Law of Macau: Article 51.

<sup>XCIII</sup> Basic Law of Hong Kong: Article 50; Basic Law of Macau: Article 52.

<sup>XCIV</sup> This list summarized the powers that the legislature of Hong Kong SAR and Macau SAR both have, which is prescribed in Basic Law of Hong Kong: Article 73; Basic Law of Macau: Article 71. But according to the same articles, the Legislature of Hong Kong SAR also has the power to endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court, and the Legislature of Macau SAR doesn't have the power to approve public expenditure.

<sup>XCV</sup> Basic Law of Hong Kong: Article 73.9; Basic Law of Macau: Article 71.7.

<sup>XCVI</sup> For an account of the constitutional reform of Hong Kong, see Chan and Harris, 2005; Tai, 2002 and 2009; Chen Albert, 2010, 2009, 2008 2007, 2006.

<sup>XCVII</sup> In 2010 the Legislative Council has passed a law proposal to expand the size of the Election Committee for the Chief Executive and increase the number of seats in the Legislative Council. It is regarded as one of the preparatory steps for the universal suffrage of the Chief Executive and all members of the Legislative Council.

<sup>XCVIII</sup> For a discussion on Macau's political system and electoral reform, see, Godinho, 'Political Representation in Macau', forthcoming.

<sup>XCIX</sup> Article 13 of Hong Kong Basic Law and Macau Basic Law.

<sup>C</sup> Hong Kong Basic Law: Article 151; Macau Basic Law: Article 136 (This article added the "technology field" upon the above list.)

<sup>CI</sup> Hong Kong Basic Law: Article 152; Macau Basic Law: Article 137.

<sup>CII</sup> For the list of intergovernmental organization in which Macao SAR enjoys independent Status, see web page of Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in the Macao SAR: <http://www.fmcoprc.gov.mo/eng/gjzzhy/t189359.htm>

<sup>CIII</sup> For the lists of multilateral treaties and bilateral agreements in force, see the Hong Kong SAR Department of Justice's Bilingual Laws Information System" (BLIS) web page at <http://www.legislation.gov.hk/choice.htm#bf>

<sup>CIV</sup> For the lists of multilateral treaties and bilateral agreements in force in Macau SAR, see the web page of Law Reform and International Law Bureau: <http://www.dsrjdi.ccrj.gov.mo/cn/tratadoscn.asp>

<sup>CV</sup> For information about consular posts and officially recognized representatives, see the webpage of Hong Kong Protocol Division Government Secretariat at <http://www.protocol.gov.hk/eng/consular/index.html>

<sup>CVI</sup> <http://www.gov.hk/en/about/govdirectory/oohk.htm>

<sup>CVII</sup> Dual, that is to say efficiency for the sovereign and efficiency for the subnational unit.

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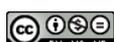


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**Subconstitutionalism in a Multilayered System.  
A Comparative Analysis of Constitutional Politics in  
the German Länder**

by

Astrid Lorenz - Werner Reutter\*

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## Abstract

Even though there have been some revaluations of the *Länder* in the last two decades German debates on federalism hardly take subnational constitutional politics into account. For example, textbooks on federalism deal with amendments of the German constitution, i.e. the Basic Law, but they mostly fail to address constitutional adjustments at the subnational level or causal interrelations between the two constitutional levels.

In this paper we will, of course, not be able, to fill that rather huge gap. Taking G. Alan Tarr's highly intriguing paper on "Subnational Constitutional Space" as a blueprint, we analyze German "subconstitutionalism" in three steps. First, we will describe and compare *Land* constitutions in order to highlight differences between them and similarities among them (1.). Second, we will present some explanations for these differences and similarities (2.), and finally we analyze some issues concerning changes of *Land* constitutions (3.).

## Key-words

Germany, subnational constitutionalism, *Länder*, Basic Law



“Subconstitutionalism” understood as the arrangement between the constitution of a “superstate” and the constitutions of subordinate states (Ginsburg/Posner 2010) necessarily presupposes a multilayered system. In such a system sovereign rights are allocated among at least two levels. Obviously, such an arrangement has a number of significant political ramifications. For example, it affects and modifies the separation of powers, the leverage of governments in the political system, the role of parliaments, or minority rights (Tarr et al 2004; Tarr 2000; Tarr 1996; Williams/Tarr 2004; Thomsen 1989: 1064 f.). Regardless of these essentially political ramifications, political scientists rarely address “subconstitutionalism”. Mostly, political scientists either regard subnational constitutions as irrelevant or just take them as “minor twins” of the constitution of the respective “superstate”. This is notably true for the German case (Gunlicks 1998; Möstl 2005; Stiens 1997; Hölscheidt 1995; Reutter 2008b). Even though there have been some reevaluations of the *Länder* in the last two decades German debates on federalism hardly take subnational constitutional politics into account. For example, textbooks on federalism deal with amendments of the German constitution, i.e. the Basic Law, but they mostly fail to address constitutional adjustments at the subnational level or causal interrelations between the two constitutional levels.

In this paper we will, of course, not be able, to fill that rather huge gap. Taking G. Alan Tarr’s (2007; cf. also Williamson 2011) highly intriguing paper on “Subnational Constitutional Space” as a blueprint, we analyze German “subconstitutionalism” in three steps: First, we will describe and compare *Land* constitutions in order to highlight differences between them and similarities among them (1.). Second, we will present some explanations for these differences and similarities (2.), and finally we analyze some issues concerning changes of *Land* constitutions (3.).

Notably, we reject the idea that in Germany subconstitutional politics in the *Länder* exclusively took place in the “shadow of the Basic Law“ (Möstl 2005), as many assume. Land constitutions are not to be qualified as a sort of „derivative“ or second-class constitutional law only determined by the German national constitution. On the contrary, we believe *Länder* can only claim to having state quality if their constitutions are manifestations of popular sovereignty, are adopted in a formal process, determine the



political order in the *Länder*, and shape – at least partly – the relationship between the people of the *Länder* and the state. To put it differently: Land constitutions can only provide legitimacy to a political order if they are linked to the will of the people of the respective Land and if they effectively govern the political process. It goes without saying that in federal systems people of the *Länder* are not absolutely free in their will. They have to respect the constitutional framework of the “superstate”. In contrast to other studies we take subnational constitutions as being political rather than legal documents. Constitutions and their amendments are, hence, results of politics shaped and characterized by specific features (Lorenz 2008; Lorenz 2009; Benz 1993; Maravall/ Przeworski 2004; Dinan 2008).

**Table 1: Lengths of Land Constitutions and Year of First Adoption**

	Year when first constitution entered into force	Number of articles in the year of adoption	No. of articles in the year 2010
<b>Land constitutions adopted before the Basic Law</b>			
Hesse	1946	151	161
Bavaria	1946	189	194
Saarland	1947	134	128
Rhineland-Palatinate	1947	145	151
Bremen	1947	156	158
<b>Land constitutions adopted after the Basic Law</b>			
Schleswig-Holstein	1950	60	60
North Rhine-Westphalia	1950	93	94
Berlin	1950	102	102
Lower Saxony	1951	78	80
Hamburg	1952	77	77
Baden-Württemberg	1953	95	101
<b>Land constitutions adopted after reunification</b>			
Saxony-Anhalt	1992	102	101
Thuringia	1992	107	106
Brandenburg	1992	118	117
Saxony	1992	123	141
Mecklenburg-West Pomerania	1993	81	80
<b>Basic Law</b>	1949	146	192

## 1. Subnational Constitutions and the German Basic Law: Homogeneity and Differences

Art. 28 of the German Basic Law lays down the principle of homogeneity. It enshrines the most basic rule shaping the relationship between the federation and the *Länder*



(Gunlicks 1998; Dinan 2008). It 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. Based on that constitutional stipulation, many take subnational constitutions as a sort of derivative or secondary constitutional law “overshadowed by the Basic Law” (Möstl 2005; Stiens 1997). In consequence, it seems just logical to assume a hierarchy between the two constitutional levels in Germany also because Art. 31 BL gives precedence to federal law over *Land* law. According to this legal perspective, the Basic Law allots constitutional space to the *Länder* in the sense that the constitution of the German “supersate” prescribes the content of and precedes or overrules regulations in *Land* constitutions. From such a “top-down” perspective we would expect two features characterizing Land constitutions: On the one hand *Land* constitutions are just “minor twins” of the Basic Law they should neatly fit into the constitutional framework created by the BL, and on the other hand they should be similar with each other. Surprisingly enough, though, both assumptions turn out to be false. Land constitutions differ not only from each other but also from the Basic Law. A comparative analysis brings these features to the fore.

Already the length or the size of constitutions – measured by the number of articles in the year of adoption – varies significantly (table 1).<sup>1</sup> While the Basic Law counted 146 articles in 1949, the length of Land constitutions varied between 60 (Schleswig-Holstein) and 189 articles (Bavaria) in the year of their adoption. These differences are at least partly due to the historical period in which Land constitutions came into being. As a matter of fact, constitutions taking effect before the Basic law came into force were on average longer than the ones passed in the early fifties (Gunlicks 1998: 111 ff.). The constitutions adopted in 1946/47 included on average 156 articles, those from the fifties were only half that long (they had on average 84 articles). Even though one might argue that the Basic Law helped to make Land constitutions of the early fifties shorter than the ones from the forties. However, the Basic Law did not have the same effect on Land constitutions passed after reunification in 1990. Those were again fairly longer than the ones from the forties. However, the Basic Law did not have the same effect on Land constitutions passed after reunification in 1990. Those were again fairly longer than the ones dating back to the fifties. Those had on average 107 articles. Already these differences highlight the fact that the BL can only be one factor explaining the shape and content of *Land* constitutions.



More importantly the content of Land constitutions vary significantly, as well (table 2). In order to make German Land constitutions comparable and examine which relevance a constitution gives to a specific matter, we use data originally compiled by Martina Flick. Flick counted the number of articles a constitution dedicates to matters like: basic rights, objectives of the state, state organs, financial issues etc. We regrouped and updated Flick's data under four headings: basic principles, state organs, state functions and other matters. Even though further research is necessary in order to improve and refine this rather simple content analysis our findings already allow some important conclusions.

While for example the Bavarian constitution dedicated 93 articles to such topics as:

**Table 2: Structure and Content of German Land Constitutions**

	Articles on								No of articles (year of adoption) Abs.
	Basic principles <sup>a)</sup>		State organs <sup>b)</sup>		State functions <sup>c)</sup>		Other matters		
	Abs.	(%)	Abs.	(%)	Abs.	(%)	Abs.	%	
<b>Land constitutions passed before the Basic Law</b>									
Hesse	65	(43,0)	41	(27,2)	35	(23,1)	10	(6,6)	151
Bavaria	93	(49,2)	47	(24,9)	38	(20,1)	11	(5,8)	189
Bremen	69	(44,2)	53	(34,0)	28	(17,9)	6	(3,8)	156
Saarland	65	(48,5)	33	(24,6)	31	(23,1)	5	(3,7)	134
Rhineland-Palatinate	77	(53,1)	28	(19,3)	32	(22,1)	8	(5,5)	145
<b>Land constitutions passed after the Basic Law</b>									
Schleswig-Holstein	9	(15,0)	27	(45,0)	21	(35,0)	3	(5,0)	60
North Rhine-Westphalia	30	(32,3)	35	(37,8)	24	(25,8)	4	(4,3)	93
Berlin	38	(37,3)	21	(20,6)	37	(36,3)	6	(5,9)	102
Lower Saxony	6	(7,7)	34	(43,6)	31	(39,7)	7	(9,0)	78
Baden-Württemberg	27	(28,4)	31	(32,6)	27	(28,4)	10	(10,5)	95
Hamburg	6	(7,8)	42	(54,5)	25	(32,5)	4	(5,2)	77
<b>Land constitutions passed after reunification</b>									
Brandenburg	55	(46,6)	34	(28,8)	25	(21,2)	4	(3,4)	118
Mecklenburg-West Pomerania	20	(24,7)	32	(39,5)	26	(32,1)	3	(3,7)	81
Saxony	51	(41,5)	31	(25,2)	31	(25,2)	10	(8,1)	123
Saxony-Anhalt	41	(40,2)	33	(32,4)	26	(25,5)	2	(2,0)	102
Thuringia	48	(44,9)	31	(29,0)	25	(23,4)	3	(2,8)	107

a) Basic rights and obligations, social life, foundations of the state; b) government, parliament, c) legislative, executive (incl. finances), and legal branch; d) conclusion and transitional provisions.

Sources: Flick 2008: 224 f.



basic rights and obligations, regulations on social life etc., the constitutions of Hamburg and Lower Saxony (both passed in the fifties) needed just six articles for the same matters (table 2). Arguably, at first sight this might be explained by the fact that the passing of the Basic Law limited the space the Land constitutions of Hamburg and Lower Saxony could fill. However, the constitutions of the new *Länder* bring to the fore that the differences were not only due to the legal framework but also to social and political factors. In other words, constitution makers transformed social and political issues into varying stipulations according to historical circumstances. That is why those constitutions adopted after historical “ruptures” – i.e. after the end of WWII and the revolution in the GDR – were significantly longer. By guaranteeing encompassing political and social rights the “new” political forces tried to make sure that the new democratic system would work perfectly well.

In addition, constitution-building in Baden-Württemberg and Berlin was very much shaped by regional and political circumstances, as well. Baden-Württemberg’s constitution reflected the amalgamation of three former autonomous *Länder* and the political compromises that had to be made in order to realize this territorial reform. In addition, it included and still includes relatively extensive parts on issues like religion and education only briefly dealt with in the Basic Law. In this sense, there seems to be constitutional space left open by the Basic Law rather than deliberately allotted to *Länder*. That pretty much corresponds with the understanding that in Germany the central state just recognizes the constitutional autonomy of the *Länder* within the federal system. In consequence, the legal autonomy of the *Länder* neither derives from the federation nor is it allotted by the federation to the *Länder* (Gunlicks 1998: 113).

West Berlin is another good example in this respect. Until 1990 this city-state was constitutionally not a full member of the Federal Republic of Germany. Until German reunification West-Berlin’s supreme power rested with the Allied Forces. The Berlin constitution of 1950 which – symbolically – claimed to be a constitution for both parts of the city, included extensive basic rights also in order to prove the supremacy of Western democracy to its Eastern counterpart. Reunified Berlin stuck to this legacy. In 1995 it adopted a new constitution by referendum without reducing these extensive basic rights. On the contrary they even had been enlarged although the political and legal context had radically been changed.



Table 3: Land Constitutions and Direct Democracy

	Year when first constitution entered into force	Year when direct democracy was included into the constitution	No. of petitions for a referendum	No. of referendums
<b>Land constitutions adopted before the Basic Law</b>				
Hesse	1946	1946	1	0
Bavaria	1946	1946	18	5
Saarland	1947	1979	0	0
Rhineland-Palatinate	1947	1947	1	0
Bremen	1947	1947	4	0
<b>Land constitutions adopted after the Basic Law</b>				
Schleswig-Holstein	1950	1990	5	2
North Rhine-Westfalia	1950	1950	2	0
Berlin	1950	<sup>a)</sup> 1995	4	2
Lower Saxony	1951	1993	2	0
Hamburg	1952	1996	12	5
Baden-Württemberg	1953	1974	0	0
<b>Land constitutions adopted after reunification</b>				
Saxony-Anhalt	1992	1992	3	1
Thuringia	1992	1994	4	0
Brandenburg	1992	1992	8	0
Saxony	1992	1992	4	1
Mecklenburg-West Pomer.	1993	1993	1	0

a) The Berlin constitution of 1950 provided the possibility for referendums but the bill necessary in order to transform the constitutional stipulation into a practical consequence had never been passed. The respective article was been deleted in 1964.

Source: Rehmet 2009.

At the same time this points to an important function of Land constitutions in Germany. They are sometimes used in order to infuse change into a supposedly static constitutional order. That is the reason why many Land constitutions nowadays include more political and social rights than the Basic Law. Based on respective stipulations in Land constitutions applied to the Federal Constitutional Court and made it clarify the status of these rights. According to several rulings of the Federal Constitutional Court, the *Länder* may provide more encompassing rights to its people than the Basic Law (Lorenz 2011). In this perspective, Land constitutions not only complete and enlarge stipulations of the Basic Law but they also create an intra-federal dynamics into constitutional politics.

The way direct democracy was constitutionally dealt with is another example showing that the conventional narrative about German constitutional history is far too simple (table 3). This narrative typically takes the Basic Law as an anti-Weimar constitution. In this



perspective the parliamentary council that drafted the Basic Law and was composed of representatives of the *Länder* was driven by one overarching aim: to avoid all the loopholes of the Weimar constitution. The Basic Law was to make the so called Bonn Republic constitutionally as stable as possible. Therefore, the Basic Law created a representative system in a very strict sense by limiting the role of the people to its most basic right, i.e. to vote. In other words there are no elements of direct democracy in the Basic Law. Surprisingly enough, though, most Land constitutions passed in 1946/47 *included* parts on direct democracy. It were only those Land constitutions adopted in the early fifties which mirrored the federal model and established purely representative systems. Constitutional assemblies drew, hence, very different “lessons from Weimar” (Jung 1994). This is also true for the East German *Länder*. When they drafted their constitutions in the early nineties they followed up on the idea of the *demos* as a main political force and codified various instruments of direct democracy. These stipulations in the East German constitutions triggered a constitutional dynamics in the West German *Länder*, as well. All West German *Länder* successively amended their constitutions accordingly after 1990. Today, all *Land* constitutions include elements of direct democracy like referendums, law proposals and the like. Once again, these differences were not due to the BL (alone) but rather due to historical and regional circumstances and processes of policy-learning between federal units.

Finally, the governmental systems of the *Länder* vary substantially, as well (table 4). E.g. until 2000, the Bavarian parliament consisted of two chambers, including a Senate which did not mirror the logic of the federal upper chamber at all. The Bavarian Senate consisted of representatives of social groups. It was, therefore, rather a legacy of a corporatist system. Furthermore, contrary to the federal level the Land constitutions of Berlin, Hesse, Rhineland-Palatinate, and the Saarland do not include a constructive vote of no confidence. And eight Land parliaments not only have to elect the prime minister like the Bundestag at the federal level but also to confirm members of the cabinet (either each minister individually or the cabinet as a collective body). The Bavarian *Landtag* even lacks the right to bring down a government by a vote of no confidence. It can neither oust the prime minister nor the government by a parliamentary vote. According to the Bavarian constitution, the prime minister „has to step down“ if the political circumstances inhibit a trustful cooperation between him (or her) and the Bavarian *Landtag* (Art. 44 par. 3 of the

**Table 4: Land parliaments and Land governments: Constitutional regulations**

	Land parliament has to ...				Ousting of prime ministers possible with ...	
	elect the head of government	confirm the cabinet	confirm single ministers	confirm the ousting/ appointment of new ministers	vote of no confidence	constructive vote of no confidence
BW	✓	✓	...	✓	...	✓
BAV	✓	✓	...	✓	...	...
BER	✓	...	...	✓	✓	...
BRB	✓	...	...	...	...	✓
BRE	✓	...	✓	✓	...	✓
HAM	✓	✓	...	✓	...	✓
HES	✓	✓	...	✓	✓	...
MV	✓	...	...	...	...	✓
LS	✓	✓	...	✓	...	✓
NRW	✓	...	...	...	...	✓
RP	✓	✓	...	✓	✓	...
SLD	✓	✓	...	✓	✓	...
SY	✓	...	...	...	...	✓
SAT	✓	...	...	...	...	✓
SH	✓	...	...	...	...	✓
TH	✓	...	...	...	...	✓

Abbreviations: BW = Baden-Württemberg, BAV = Bavaria, BER = Berlin, BRB = Brandenburg, BRE = Bremen, HAM = Hamburg, HES = Hesse, MV – Mecklenburg-West Pomerania, LS = Lower Saxony, NRW = North Rhine-Westfalia, RP = Rhineland Palatinate, SLD = Saarland, SY = Saxony, SAT = Saxony-Anhalt, SH = Schleswig-Holstein, TH = Thuringia.

Bavarian Constitution). Formally this turns the Bavarian system into a non-parliamentary form of government (Steffani 1979; Reutter 2009: 194 ff.).

To wrap up our findings und draw some preliminary conclusions: When the German *Länder* adopted their constitutions they did not just copy a federal blueprint but made their own choices. The same is true for later amendments of the constitutions. Full-fledged constitutions or just "instruments of government", own catalogues of basic rights or mere references to the rights guaranteed by the Basic Law, including instruments of direct democracy or adhering to the national default of a strictly representative form of government – these were some of the issues the constitutional assemblies of the *Länder* had to decide upon. Arguably, the BL played an important role for the content of German *Land* constitutions. Legally, the BL actually defined the constitutional space of *Länder* and shaped



the content of Land constitutions. However, the existence of the BL can neither explain the differences between *Land* constitutions nor the differences between *Land* constitutions and the BL.

Theoretically, this supports an understanding of Land constitutions as manifestations of regional popular sovereignty. And sovereignty is not imaginable if constitutions are determined by external factors like the BL. To put it differently: We can only explain the shape and the content of subnational constitutions in Germany, if we complete our analysis by looking at other reasons than the BL. “Subconstitutionalism” in Germany can only be understood and explained if we combine a top-down perspective with a bottom-up perspective and thus make a first step towards a multilayered theory on subnational constitutional politics.

## 2. Explaining Differences between Land Constitutions in Germany and how Ideas Travel in a Multilayered System

According to G. Alan Tarr it is a crucial first step to describe differences between and similarities among *Land* constitution. “However, the really interesting inquiry is explaining the reasons for the differences among subnational constitutions, i.e. why subnational units have made more or less use of the constitutional space available to them” (Tarr 2007: 15). The Basic Law, as we have seen, is only one factor explaining such differences. As pointed out, we suggest an approach that combines a top-down with a bottom-up perspective, taking into account how constitution-making and constitution-amending took place in the *Länder*. This leads to questions like how ideas travel between constitutional assemblies, how institutions and procedural rules shape the outcome of constitutional reflections, how political parties influenced constitutional regulations and how political constellations and compromises during constitution-making influence later constitutional changes. By stressing the bottom-up perspective we will focus on: (1) historical circumstances or the era, in which subnational constitutions were discussed and adopted; (2) procedural rules, and (3) different political majorities in the assemblies (Tarr 2007: 15). In other words: We assume that it has been ideas, institutions and interests that shaped *Land* constitutions (apart from the Basic Law, of course).



Table 5: Adoption of Land Constitutions

Land	Entry into force on	Adoption of the constitution by			
		Constitutional Assembly		Referendum	
		Percentage of the votes cast	Percentage of all members	Percentage of votes cast	Percentage of all eligible voters
<b>American Zone</b>					
Bavaria	08.12.1946	90,7	75,5	70,6	49,6
Bremen	22.10.1947	96,4	81,0	72,4	45,1
Hesse	01.12.1946	93,2	91,1	76,8	48,8
<b>French Zone</b>					
Rhineland-Palatinate	18.05.1947	69,3	55,1	52,9	35,2
Saarland	17.12.1947	98,0	96,0	-	-
<b>British Zone</b>					
Hamburg	<sup>d)</sup> 01.07.1952	97,3	89,2	-	-
Lower Saxony	01.05.1951	77,5	71,8	-	-
Northrhine-Westfalia	11.07.1950	53,1	50,9	61,8	40,8
Schleswig-Holstein	12.1.1950	91,8	64,3	-	-
<b>New Länder<sup>e)</sup></b>					
Brandenburg	21.08.1992	82,8	81,8	94,0	44,8
Mecklenburg-Westpomerania	23.05.1993	85,5	80,3	60,1	38,4
Saxony	06.06.1992	87,4	82,5	-	-
Saxony-Anhalt	18.07.1992	75,5	75,5	-	-
Thuringia	16.10.1994	84,6	84,1	74,2	50,5
<b>Special Cases</b>					
Berlin	01.10.1950	100,0	80,0	<sup>d)</sup> 75,1	48,0
Baden-Württemberg	20.11.1953	89,5	64,2	-	-

Source: Reutter 2009: 48.

(1) **Ideas:** As already pointed out, the era in which Land constitutions were adopted had had significant effects on the shape and the content of the constitutions. Since 1945 three periods might be distinguished (table 1).

- In the five *Länder*<sup>II</sup> in which the constitutions had come into force *before* the Basic Law the respective debates were shaped by regional political configurations. Some of these ideas originally developed at Land level have traveled bottom-up to the federal level. For example, Karlheinz Niclauß (2008) found evidence that the debates on second chambers that took place in the constitutional assemblies of the



*Länder* influenced the discussions in the parliamentary council. Adolf Birke (1977) came to similar conclusions when he reconstructed the respective debates on the constructive vote of no confidence in the different constitutional assemblies. He found that it was not only the parliamentary council that shaped the discussions in the constitutional assemblies of the *Länder* but quite often also the other way round. From that the question arises how the respective ideas traveled between the two constitutional levels in Germany. The first and most obvious reason was that many members of the parliamentary council also belonged to constitutional assemblies of the *Länder*. But it will be the task of future research to explore this matter further.

- Between 1950 and 1953, six *Länder* adopted their constitutions. The constitutional assemblies in Schleswig-Holstein, Lower Saxony and Hamburg focused on regulations concerning the organization of state power. Also the constitutions of Baden-Württemberg and North Rhine-Westphalia had only few articles on basic rights, while regulations about social life and the economic system (incl. family, education, religion) were dwelled upon more extensively. As already pointed out, this was mostly due to the perception that the Basic Law seemed to make basic rights in a *Land* constitution superfluous. The exceptions to this rule – Berlin and Baden-Württemberg - bring to the fore that constitutions also have an important symbolic function in a multilayered system. They represent the political identity of a *Land* and manifest the sovereignty of its people. In addition, these examples make clear that constitutional ideas were institutionally and historically filtered. The lessons drawn from the failure of the Weimar Republic led to different solutions.
- The reunification of Germany implied an amalgamation of territories in which different constitutional ideals had grown. East German constitutions mirror an inclination to the Rousseauian ideal of democracy, to extensive human right catalogues and regulations on public objectives. These differences were ignored at the federal level.. Therefore, constitution-making in the new *Länder*, once again, referred to the symbolic function. It had to balance out missing constitutional debates at the federal level. This deficit at the federal level led to extensive social



rights in the constitution in Brandenburg or to the mentioning of parliamentary opposition in some constitutions.

(2) **Institutions:** Notwithstanding some striking differences, constitution-making in the Länder followed similar institutional trajectories. Preceded by a “preparliamentary” stage, in which interest groups, legal scholars, or individuals could freely participate, constitutional debates became quickly “parliamentarized”, i.e. they were channeled into formal assemblies. As soon as constitutional assemblies had been set up the debates had to follow formal and procedural rules and mainly took place in committees and other institutional structures. Plenary meetings of the respective constitutional assemblies were supposed to resolve existing controversies and provide the upcoming constitution with the largest majority possible. Even though in most cases the constitutions were adopted by large majorities, in North Rhine Westfalia the parliament mustered just a majority of 53.1 percent (table 5). And that was even worse if a constitution required a referendum. Once again, the percentage of votes cast in favor of a constitution looks in most cases quite impressive; very often it lies beyond 70 percent. However, there are just one people that approved their constitution with a majority of the eligible voters: In the year 1994 in Thuringia 50.5 percent of all voters cast their vote in favor of the constitution. In all other Länder only a minority of the eligible voters approved the constitution. In Rhineland-Palatinate only 35 percent of the voters were in favor of the constitution. Again, it will be up to future research to explore whether and how far these differing institutional and procedural rules had any effect on the content and the legitimacy of a constitution. So far we would assume three possible effects: First, with the institutionalization the debates become more “rational” and technical. In an institutional setting, experts will play a more important role. Second, discussions that take place in parliament privilege political parties. They are represented in parliaments, have developed respective ideas and concepts, and can also mobilize support for their positions. Thirdly, referendums seem to be of rather secondary importance for the content and the stability of constitutions.



**Table 6: Political Composition of Constitutional Assemblies in the *Länder* (Percentage of Mandates)<sup>a)</sup>**

Land	Year	<sup>b)</sup> Christian Parties	<sup>c)</sup> Social Democrats	<sup>d)</sup> Liberal Parties	<sup>e)</sup> Communist Parties	<sup>f)</sup> Green Parties	<sup>g)</sup> Others
<b>American Zone</b>							
• Bavaria	1946	60,6	28,3	1,7	5,0	-	4,4
• Bremen	1946	15,0	65,0	4,0	4,0	-	12,0
• Hesse	1946	38,9	46,7	6,7	7,8	-	-
<b>French Zone</b>							
• Rhineland-Palatinate	1946 22.10.1947	55,1	36,2 96,4	1,6 81,0	7,1 72,4	-	- 45,1
• Saarland	1947	56,0	34,0	6,0	4,0	-	-
<b>British Zone</b>							
• Hamburg	1949	18,3	54,2	14,2	4,2	-	9,2
• Niedersachsen	1947	20,1	43,6	8,7	5,4	-	22,1
• Northrhine Westphalia	1947	42,6	29,6	5,6	13,0	-	9,3
• Schleswig-Holstein	1947 01.05.1951	30,0	61,4 77,5	0,0 71,8	0,0 -	-	8,6 -
<b>New Länder</b>							
• Brandenburg	1990	30,7	40,9	6,8	14,8	6,8	-
• Mecklenburg-West Pomerania	1990	43,9	31,8	6,1	18,2	0,0	-
• Saxony	1990	57,5	20,0	5,6	10,6	6,3	-
• Saxony-Anhalt	1990	45,3	25,5	13,2	11,3	4,7	-
• Thuringia	1990	49,4	23,6	10,1	10,1	6,7	-
<b>Special Cases</b>							
• Berlin	1950	20,0	58,5	13,1	8,5	-	-
• Baden-Würtbg.	1952	41,3	31,4	19,0	3,3	-	5,0

a) At the beginning of the assembly; b) CDU, CSU, BCSV, CDP, CVP; c) SPD, SP, SPS; d) FDP, DP, LDP, DVP, DPS; e) KPD, KPS, PDS; in Berlin the representatives of the East German SED did not accept their mandate; f) Bündnis 90/Die Grünen; Neues Forum; g) WAV, BDVP, Z, NLP/DP, DP, DKP, SSW, BHE.

Quelle: W. Reutter, *Föderalismus*, op. cit, p. 62.

Source: Reutter 2009: 48.

(3) **Interests:** As just pointed out, political parties played a crucial role in constitutional assemblies. Based on the guidelines of the Western Allies or the decisions made by the respective Land parliaments parties recruited members, developed programs and drafts for constitutions, integrated social interests, provided the venues for debates and – most importantly – had to make sure that the drafts received the necessary majorities in constitutional assemblies (Pfetsch 1985: 133; Pfetsch 1990).

In most cases the majority of the legal members of a Land parliament were sufficient in order to adopt a constitution for the first time. Christian-democratic parties owned such a



majority in four *Länder*, the SPD mustered such a majority in Berlin, Bremen, Hamburg, and Schleswig-Holstein (table 6). And these majorities left their imprints on the constitutions. In those *Länder*, where christian-democratic parties dominated Christian values received a prominent role in the constitution. It was different in Bremen, Hesse, and Berlin where the social democracy owned a majority in the Land parliaments. In these *Länder* regulations on the economic system and the social order found a more prominent place in the constitution than in *Länder* with a weak social-democratic party. Political parties also held different views on a “good political order” or on the role direct democracy was supposed to play.

Even though these are still tentative thoughts on the reasons why Land constitutions differ from each other they show the necessity to combine a top-down with a bottom-up perspective. It is under this premise that the multilayered underpinning of constitution-making in the German *Länder* can be adequately dealt with and included into a prospective theory on subnational constitutional politics in Germany. The relevance of the bottom-up perspective is once more proven if the changes of German Land constitutions are examined.

### **3. Constitutional Change: On the Inadequacy of Institutional Theories in Order to Explain Constitutional Amendment Rates in the German *Länder***

The analysis of the “ease with which subnational units can either revise or amend their constitution” (Tarr 2007: 15) shows once again that Basic Law has only a limited impact on subnational constitutional politics in Germany. Of course, sometimes amendments of the Basic Law or rulings of the constitutional court triggered changes of Land constitutions, as well (e.g. in the financial system). But to look at the Basic Law is neither necessary nor sufficient in order to explain the amendment rates in the German *Länder* (table 7). This leads us to the assumption that institutionalist theories are inadequate in order to explain constitutional amendment rates in the German *Länder*. To put it differently: It is not the constitutional framework that counts for the differences between the amendment rates. We rather think that actor-centered approaches, highlighting interest struggles and the flow of

**Table 7: Land Constitutions: Amendment Rates (until 2010)**

	# of changes until 09/1990		# of changes between 10/1990 and 12/2010		# of changes until 12/2010	
	# of bills	Change every ... year	# of bills	Change every ... year	# of bills	Change every ... year
BW	15	2,5	4	5,1	19	3,0
BAY	5	8,8	6	3,4	11	5,8
BER	20	2,0	17	1,2	41	1,6
BRB	-	-	6	3,1	6	3,1
HB	6	7,2	12	1,7	23	3,5
HH	5	7,7	5	4,1	12	5,9
HES	2	21,9	5	4,1	7	9,2
MV	-	-	2	8,8	3	8,8
NDS <sup>b)</sup>	9	4,4	7	2,9	17	3,7
NRW	14	2,9	5	4,1	19	3,2
RP	29	1,5	9	2,3	36	1,7
SLD	17	2,5	5	4,1	24	2,9
SAN	-	-	0	-	0	-
SAT	-	-	1	18,5	1	18,5
SH	8	5,1	8	2,5	22	3,8
TH	-	-	4	4,3	4	4,3
BL	35	1,2	22	0,9	57	1,1

Abbreviations: see table 4.

ideas, are far more promising. Testing assumptions about the causes for amendments of national constitutions we conclude that there seems to be an original logic of subnational constitutional change in Germany. In any case, the changes of Land constitutions seem to contradict two of the most common assumptions about the causes for constitutional change.<sup>III</sup>

(1) It is almost a commonplace to assume a causal link between constitutional rigidity and the number of changes of a constitution. In other words, most often it is hypothesized that the higher the hurdles for constitutional change the less frequent a constitution is changed (Roberts 2008; Lutz 1994; Flick 2008; Lorenz 2005, 2008). This assumption has been applied to German Land constitutions as well (Pestalozza 2005: 26). German Land constitutions have been changed between indefinitely (Saxony) and 1.6 years (Berlin). And these differences cannot be explained by stipulations in the Land constitutions themselves. As a matter of fact, there is not much of a difference as far as the rigidity of subnational constitutions is concerned. In most cases Land constitutions can be changed with a

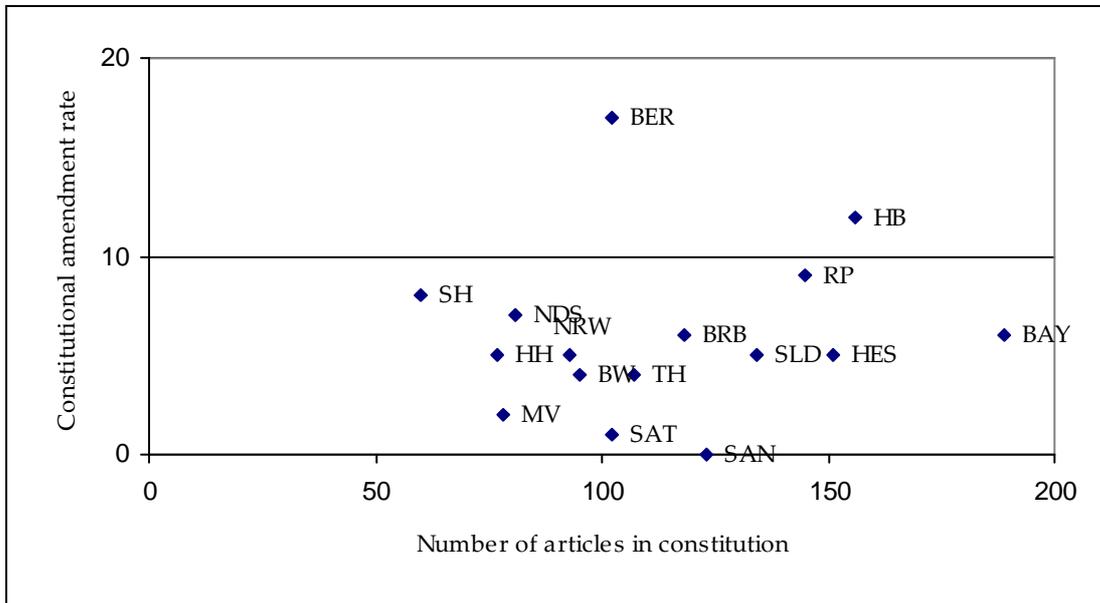


majority of two thirds of the members in parliament. In Bavaria and Hesse a subsequent referendum is obligatory, and in Baden-Württemberg and Hamburg a constitutional amendment requires just the half of all MPs (even though two third of the votes actually cast has to be in favor of the constitutional change).<sup>IV</sup> In short: The constitutional rigidity is quite similar in the German Länder (Flick 2008). But even though we find similar constitutional rigidities in the German Länder, the constitutional amendment rates vary significantly. Correspondingly, the constitution of Hamburg can comparatively easily be amended and has only been altered twelve times between 1949 and 2010 (table 7). At the same time *Land* constitutions including a higher rigidity have been changed more often. A statistical analysis confirms this impression. There is no significant correlation between constitutional rigidity and the frequency of constitutional change.

(2) A second hypothesis states that the longer a constitution actually is the more often it will be changed (among many others, Lutz 1994; Flick 2008). That seems quite logical. If you have more articles and regulations in a constitution the need for changes seems to increase necessarily. But already the scatter plot brings to the fore that there is no link between these two variables (figure 1). The longest constitution, the one from Bavaria, has only been changed 6 times since 1990, while constitutions that were much shorter (e.g. from Berlin, Lower Saxony) had been changed far more often. In other words: The length of a constitution does not affect the number of changes.



Figure 1: Length of Constitutions and Constitutional Amendment Rates (1990-2010)



#### 4. Is There a Genuine “Logic of Subnational Constitutional Politics in Germany”? – Some Tentative Conclusions on Future Research on Constitutional Politics in Multilayered Systems

The basic questions arising from our findings and reflections are: Is there a genuine “logic of subnational constitutional politics”? And how does the fact that constitutional politics in the German *Länder* takes place in a multilayered system affect German subnational constitutional politics? From our findings and reflections four tentative conclusions can be drawn.

Firstly, we explored the relationship between the national and the subnational constitution and addressed the question as to how far the Basic Law determines the constitutional space allotted to the *Länder*. Even though the „principle of homogeneity“ (Art. 28 BL), requires the constitutional order in the *Länder* 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 we brought to the fore that Land constitutions differ significantly from the Basic Law and each other. In consequence, the aforementioned principle of homogeneity can at best partly explain the content and shape of *Land* constitutions. The



differences highlighted in our first part confirmed this assumption. Theoretically this links constitution-making to popular sovereignty. As sovereign entities, the people in the *Länder* cannot be deprived of their right to adopt constitutional stipulations that differ from the BL and from other Land constitutions. However, even though the Basic Law cannot rule out constitutional stipulations contradicting the Basic Law it inhibits that these stipulations in *Land* constitutions can come into effect. We have, hence, clearly to distinguish between the making of constitutions on the hand and their effect on the other.

Secondly, we not only assumed two distinct spheres of popular sovereignty and governmental authority (Tarr 2007: 4) but also discussed tentatively varying factors explaining the contents and shape of subnational constitutions in Germany. In order to explore how the *Länder* filled their constitutional space we referred to historical, procedural, and political factors, i.e. to ideas, institutions and interests. It will have to be the task of our future research to explore how these factors contributed to the making and the shaping of constitutions in multilayered systems. From our preliminary findings and reflections it should be evident that we privilege actor-centered approaches and we think it crucial to combine a top-down with a bottom-up perspective.

In a third step, we analyzed changes of *Land* constitutions. Our findings show that constitutional amendments in the *Länder* cannot be explained by the Basic Law. Even more importantly, none of the variables highlighted in seminal studies on national constitutions can satisfactorily explain the number and dynamics of constitutional change in the German *Länder*. So, we assume that not only the making but also the amendment of Land constitutions in Germany follows its own rules. Once again, that points to the bottom-up perspective frequently referred to in our paper.

Finally, our future research will strongly depend on methods of comparative constitutional politics (Law/Versteeg 2010) and should include theoretical findings of research on constitutional change in multi-layered systems which, however, until now focus at the federal proceedings (Benz/Behnke 2009; Hönnige/Kneip/Lorenz 2011; Benz/Colino 2011). In order to explore the role of interests and institutions as well as the importance of ideas we will have to rely on comparative case studies. With these methodological tools we will embark on the project to build a theory on subnational constitutional politics in multilayered systems.



\* Prof. Dr. Astrid Lorenz, Universität Leipzig, Department of Political Science, Beethovenstraße 15, 04107 Leipzig. Email address: [astrid.lorenz@uni-leipzig.de](mailto:astrid.lorenz@uni-leipzig.de). PD Dr. Werner Reutter, Humboldt-Universität zu Berlin, Department of Social Sciences, Unter den Linden 6, 10099 Berlin. Email address: [werner.reutter@rz.hu-berlin.de](mailto:werner.reutter@rz.hu-berlin.de).

<sup>I</sup> We operationalize the length of a constitution by the number of articles in the year of adoption. This is not the best indicator, though. It would be better to also include the number of paragraphs or even words. In addition, we excluded the constitutions of Baden, Württemberg-Hohenzollern, and Württemberg-Baden as well as the constitutions of the *Länder* of the GDR. The Land constitutions of the GDR went out of force in 1952/3. The three *Länder* of the Federal Republic amalgamated in 1952 and adopted a new constitution in 1953.

<sup>II</sup> As a matter of fact, there were eight *Länder* that adopted a constitution before the Basic Law came into force. However, three *Länder* – Baden, Württemberg-Baden and Württemberg-Hohenzollern – amalgamated into Baden-Württemberg that adopted its new constitution in 1953. Furthermore there were preliminary constitutions in Berlin and Hamburg as well as constitutions in the then five *Länder* of the GDR. None of these constitutions will be included in the analysis.

<sup>III</sup> There are, of course, other assumptions about the reasons for constitutional change; cf. Elster et al. 1998; Lorenz 2010.

<sup>IV</sup> There are a few exceptions, though. In Hesse you have to have a simple majority but also a referendum on the constitutional change; in Bremen you needed 100 percent of the votes in the parliament until 1994, since then Bremen has joined the other *Länder*. In Baden-Württemberg, Hamburg and Lower Saxony (until 1993) a simple majority of the members of the Land parliament was sufficient.

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**What Role for Regional Assemblies in Regional States?  
Italy, Spain and the United Kingdom in Comparative  
Perspective**

by

Cristina Fasone\*

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## Abstract

The article aims to underline firstly the trend towards the homogenization of the subnational forms of governments, at regional level, across regional States, focusing on Italy, Spain and the United Kingdom (UK). This is only marginally the outcome of constitutional provisions and jurisprudence, but it is mainly caused by the passive attitude of the Regions, which either remain inactive to the opportunity of reforms and adaptation or decide to adopt institutional solutions already experimented or ‘constitutionally prepackaged’, without any changes.

Secondly, it is highlighted that, with the exception of the UK, regional Assemblies with legislative powers have experienced a process of progressive weakening, especially on the side of the legislative function. Also in order to counteract this tendency, Regions of the three States are trying to enhance the role of legislative Assemblies as *trait d’union* between voters and institutions at subnational level, on the one hand, testing tools which are inherited at State level; on the other hand, strengthening the position of standing committees within the Assemblies

## Key-words

Subnational forms of government, Regional States, Regional legislative Assemblies



## 1. Introduction

The balance of powers, particularly between the Legislative and the Executive branches, at subnational level has rarely interested constitutional scholars, with some exceptions. For instance, James Madison in *Federalist Paper no. 47* blamed the New Jersey Constitution of 1776 for having ‘blended the different powers of government’ (Williams 1997-1998: 1037-1038),<sup>i</sup> even though nowadays most subnational Constitutions, especially in the United States, acknowledge the importance of the principle of separation of powers and other cornerstones of contemporary constitutionalism.

Depending on the constitutional order, and especially on the way the Executive branch is appointed and operates – whether it is chosen directly by citizens or indirectly by the Legislature and if it bases its legitimacy on the confidence relationship –, representative Assemblies are deemed to play a more or less prominent role in the subnational institutional architecture. To this purpose, also the party system, the electoral system and the internal organization of legislatures are crucial elements.

Indeed legislatures, and above all those established within small territorial communities, are by definition the institutions which act closest to the people; and therefore they are (or should be) able to capture social demands and represent them along the decision-making process.<sup>ii</sup> This is why having strong or weak legislatures at subnational level makes the difference also in terms of ‘democratic performance’ of a certain constitutional system (Tarr 2004: 4-7).<sup>iii</sup>

The aim of the article is to analyse the role of Assemblies in subnational systems of government, looking at how the relationship with the Executives is shaped. The article focuses on the comparison of three European regional States: Italy, Spain and the United Kingdom and their regional legislative Assemblies. In fact, the choice of these countries is justified by several aspects: firstly; all of them are expression of the European subnational constitutionalism (Delledonne-Martinico 2011: 2-3); secondly, in the three contexts, regionalization began within unitary States and is perceived as an ongoing process towards the strengthening of the subnational units, at least according to what the written norms require (mainly the Constitution); thirdly, the three States are always depicted as examples



of asymmetrical regionalization, where not all the subnational units are equally empowered; fourthly, notwithstanding this last feature, these are the only European countries to be provided with a legislative Assembly in all their established Regions whose forms of government was definitely conditioned by decisions taken at central level. Thus the case selection follows the paradigm of the prototypical case logic, being Italy, Spain and the UK three prototypes of Regional States in Europe (Hirschl 2005: 125-155).

The comparison amongst systems of government in Regional States has been even less frequent than those regarding Federal states, probably because Regions are usually less autonomous than Member States in setting their institutional devices. Notwithstanding this premise and observing the (central) Constitution, the Regions considered (20 in Italy, 17 in Spain and 3 in the UK) have developed their own institutional specific features,<sup>IV</sup> sometimes departing from the only institutional model at their disposal and provided by the Constitution itself or by the national legislature (as for the Westminster model). Sometimes the novelty of the institutional solutions proposed at regional level has become a model for the central government or for other subnational units in that country.

Of course the definition of regional institutional arrangements has not been a 'peaceful' process everywhere. Indeed, on some occasions, constitutional Tribunals, such as the Italian constitutional Court, banned the content of regional Statutes on governmental organization, being inconsistent with the Constitution (see further, para. 4); on other occasions, such as in Northern Ireland, the devolution process was suspended and the direct rule was restored (between 2002 and 2007) because of the escalation of tension between unionists and nationalists.

Three main trends can be found when looking at the position of regional legislative Assemblies in each of the three States: the first is the tendency towards homogeneity. When suitable (as said before, the Northern Ireland Assembly is quite a unique case that is unlikely to move closer to that of the Scottish Parliament and the Welsh Assembly), the functioning of the regional Assemblies and the regulation of regional legislature-executive relationship resemble one another amongst different Regions of the same State; the second trend relies on the influence of the combined effect of the electoral systems, of the party systems and of the internal organizations on the strength of regional legislatures; the third element is the shift of focus from the legislative function of regional Assemblies to the oversight function and the attention paid to open their procedure to the public.



The article is devised as follows. Section 2 tries to underline to what extent the concept of subnational constitutionalism can be extended to regional States and the importance of the constitutional autonomy of Regions; section 3 briefly describes the nature of regionalism in the three States and the influences exerted on the establishment of the regional legislatures; section 4 looks at the structural features of the regional Assemblies in Italy, Spain and the UK (how they are named, how they are elected, their size, and their internal organization); section 5 will consider the status of the regional legislative Assemblies *vis-à-vis* their Executives (the confidence relationship and the bodies involved as well as the autonomy of the Assembly); finally, section 6 will take into account the poor performance of regional Assemblies as law making authorities and the need to re-orient their role.

## 2. The issue of subnational constitutionalism in regional States

Italy, Spain and the UK are deemed to be regional States (Olivetti 2003; Contreras Casado 2006; Bogdanor 1999; Leyland 2011), formed through a process of decentralization of a unitary State (*contra*, on the Spanish case, Aguado Renedo 1996: 189).<sup>v</sup> Regions enjoy political autonomy – which means that their political institutions are directly or indirectly chosen by people independently by national elections –, administrative and legislative powers, within the limits set by the national Constitutions (Volpi 1995: 389). The conferral of legislative authority to Regions and particularly to their Assemblies is what distinguishes regional States from other decentralized systems (like Poland and to a certain extent France).

Nowadays scholars unanimously agree on the fact that the differences between federal and regional states have substantially reduced throughout the years, and they are more quantitative – regarding the number of issues to be regulated at subnational level, which is usually wider in federal States – than qualitative in nature.

However, some features still remain diverse. Indeed, contrary to federal States, Regions in States like the three considered remain apart in the process of constitutional revision, where the agreement of subnational units is not formally required. Moreover, other factors may concur in defining regional States: the judiciary is usually organized at national level



only; Regions are normally excluded from representation in the Second Chamber of the national Parliament, thus they do not participate in the national legislative process (although this can happen also in federal States, like Canada) (Férrandez Segado 1996: 271-292);<sup>VI</sup> and the position of subnational entities is not binding in the appointment of national constitutional bodies (they can participate in the process, but mainly with an advisory power), like Constitutional Courts.

What is more, the basic document of the Regions in the three States, defining the institutional architecture and the policies to be addressed by the regional institutions, is not exactly a Constitution. It is not named ‘Constitution’, but *Statuto* (in Italy), *Estatuto* (in Spain) and Devolution Act (in the UK), and above all it does not have the form and the content of a Constitution.

The form of the Constitution lacks because the Statutes of the 17 Spanish Autonomous Communities are formally organic laws of the national Parliament (*Cortes Generales*), though adopted and revised following a process started within the Autonomous Parliaments (Olivetti 2003: 71-77);<sup>VII</sup> because in the UK, the Devolution Acts (also those reformed) are formally Acts of the Westminster Parliament; and because the special Statutes of the five Italian Regions enjoying a peculiar status (Sicily, Sardinia, Friuli-Venezia-Giulia, Valle d’Aosta, Trentino Alto Adige, with the two autonomous Provinces of Trento and Bolzano) are constitutional statutes approved by the national Parliament. Before the reform of 1999 of the Italian Constitution (const. law no. 1/1999), Art. 123 It. Const., the original version of 1948, provided that the Statutes of the remaining ordinary Regions were adopted – once approved by the Regional Councils – through a national ordinary law. After 1999 Regions with ordinary Statutes are entitled to adopt their basic document on their own in the Regional Councils, provided that the procedure fixed in the new Art. 123 Const. is respected. Therefore only these 15 Regions have as Statutes regional sources of law, as expression of constitutional autonomy: according to Art. 123, the Statute lays down ‘the form of government and basic principles for the organisation of the Region and the conduct of its business’.

However, also in those Italian, Spanish and UK Regions whose Statutes are national sources of law, the content of those Acts is never defined solely by the State, but is negotiated between State and each Region.<sup>VIII</sup> In Spain especially the provisions of the Autonomous Statutes are basically defined by Regions and, as happened with the new



Statute of Catalonia of 2006, it passed, despite the Popular (PP) and the Socialist Parties (PSOE),<sup>IX</sup> the two major parties at national level, not agreeing with many of its contents, even after the draft Statute had been significantly amended compared to the initial version approved by the Autonomous Parliament.<sup>X</sup>

As for the content of the regional Statutes or Devolution Acts, they do not comply *stricto sensu* with the traditional definition of ‘Constitution’ provided by Art. 16 of the French Declaration of the rights of man and citizen, and requiring the protection of rights and the separation of powers in order for a legal system to be considered ‘constitutional’.<sup>XI</sup>

Indeed, it is well-known that the *Scotland Act 1998*, the *Government of Wales Act 2006* and the *Northern Ireland Act 2006* are devoid of a catalogue of rights. The Italian Regions and the Spanish Autonomous Communities tried to insert provisions on rights in their Statutes, but their attempt was blocked by the two Constitutional Courts (Balaguer Callejón 2008: 11-31; Castellà Andreu 2010),<sup>XII</sup> by treating those provisions as if they were not legally binding. More precisely, whereas the Italian Constitutional Court denies entirely their legal value (Morana 2009), the Spanish Constitutional Court considers the fundamental rights provided in the Statutes as mandates to the public authority (*mandatos a los poderes públicos*) (Serramalera Mercè 2009).

From this perspective looking only at the Statutes could be misleading in assessing whether the features of subnational constitutionalism can be found at regional level, too (not only at State level in Federations). Indeed, dealing with rights, the activity of Regional Assemblies in Italy, Spain and the UK considerably affects them. For instance, very often regional legislation concerns the right to education, to health care, to dwelling, all matters falling within the Regions’ remit (differently named, as reserved, shared and residual, depending on the constitutional system).

Also on institutional matters, regarding separation of powers, Regional Statutes only provide a partial picture, though important. The provisions on the regional governments contained in the Statutes have to be complemented by the constitutional norms, where existing (only in Italy and in Spain), by regional legislation detailing the content of the Statutes (this is particularly significant in the Spanish Autonomous Community) (Balaguer Callejón 2007),<sup>XIII</sup> by the Rules of procedure of the Regional Assemblies, by the regional electoral laws.



All these provisions represent the set of the regional constitutionalism in Italy, Spain and the UK. As pointed out by Elazar referring to State Constitutions, this patchwork of norms, produced both at regional and at national levels, performs the fundamental functions of subnational Constitutions, a) defining ‘the overall frames of government for polities’; b) ‘expressing the purposes of government’; and c) ‘reflecting the public conceptions of the proper role of government and politics’ (Elazar 1982: 11).

For the purpose of the present article the first dimension is the most relevant, regarding the regional frames of government in the light of the position occupied the regional legislative Assemblies.

### **3. The nature of the three Regional States and the influence exerted on the Regional legislative Assemblies**

The process of regionalization and devolution in Italy, Spain and the UK has developed in different timeframes.

In Italy, it was a top-down process defined within the Constituent Assembly and then in the Constitution of 1948. Though entitled to exercise legislative powers, Regional Councils (the regional legislative Assemblies) could adopt ‘legislative norms’ only in the subject-matters listed in Art. 117 It. Const. and providing that they complied (in those matters) with the fundamental principles fixed in national legislation. But the fact that the Italian regionalization process was centre-driven is confirmed also by the circumstance that, except for the 5 Special Regions – established immediately and entitled to exercise wider legislative competences – Regions with ordinary Statutes (15) were established as subnational entities only 22 years later, in 1970, due to the political deadlock at national level. After the administrative reforms of the Nineties, the turning point for the Italian Regions and their Assemblies were two constitutional reforms, in 1999 (through const. law no. 1/1999) and in 2001 (const. law no. 3/2001). The first reform, as already mentioned, provided ordinary Regions with the power to adopt their own Statutes and to define their form of government and institutional arrangements in respect of the Constitution (in practice, Regions have not been guaranteed a significant margin of manoeuvre and they have not been able to use it properly) (Gianfrancesco 2009: 193-237). The second reform – for what is relevant to the article – in principle enhanced significantly the role of the



Regional Councils as legislators, reversing the previous criterion of distribution of legislative competences and giving to the Regions the general power to legislate (Art. 117, para. 4, It. Const.), except in those fields reserved to the State (Art. 117, para. 2, It. Const.) or submitted to the shared competence between State (defining the fundamental principles of the matter) and Regions (regulating the remaining issues). However, in practice, the constitutional jurisprudence has undermined the effectiveness of these new provisions, often neglecting the existence of these residual competences to the detriment of regional legislatures (Parisi 2008: 1601-1602).

Though started many years ago, the Italian process of regionalization is still far from being concluded. On the one hand, two Regions, Basilicata and Molise, do not have a new Statute in force yet and many others have not implemented many provisions of their new Statutes so far.<sup>XIV</sup> On the other hand, the division of legislative competences, compared to what is written in Art. 117 of the It. Const., has been interpreted by the Constitutional Court in a way which requires further settlement by the Regions and the State.<sup>XV</sup>

In Spain the process of regionalization is ongoing, too. It started immediately in 1978, with the democratic Constitution, but contrary to Italy, can be depicted as a bottom-up regionalization. The three 'historical nationalities' (*nacionalidades históricas*) – País Vasco, Catalonia and Galicia –, which had already approved their Statutes during the Spanish Second Republic (1931-1939), plus Andalucía, which was established as an Autonomous Community complying with a very complex procedure set in Art. 151, para. 1, Sp. Const. and requiring a large agreement of municipalities and of citizens through local referenda, since the beginning obtained the highest level of autonomy. In terms of legislative competence, and thus of legislative power for their Autonomous Parliaments, those Communities could (and can) legislate on all the subject-matters not expressly reserved to the State by Art. 149 Sp. Const. and listed in their Autonomous Statutes. Moreover the Constitution (Art. 143) assures the possibility to establish other Autonomous Communities on the initiative of local entities set up in their territory: this is why Spanish regionalization has been conceived as an open process deferred to the input of local communities.

Thirteen Communities have been formed since the Eighties on the basis of the right to autonomy and self-government guaranteed by the Constitution (Art. 2 Const.). However, these (initially) 'second-ranking Communities' in the first five years of their existence could only legislate on a close list of subject matters (Art. 148 Sp. Const.), subsequently



expandable using the residual clause of Art. 149 Const., like the historical Communities, and amending their Statutes. Following the negotiation and the conclusion of political agreements in 1981 and 1992 (*Pactos autonómicos*) among the main national political parties and the government of these Autonomous Communities, the Communities established by means of Art. 143 Const. procedure subsequently enjoyed a remarkable enlargement of their competences. Finally, since 2006 a new wave of reforms of Statutes has started, involving both historical and ‘ordinary’ Autonomous Communities,<sup>XVI</sup> also aiming at re-defining the regional institutional arrangements and the balance of powers between regional legislatures and executives.<sup>XVII</sup>

The same developing nature of regionalization highlighted in Italy and Spain can be found in the UK devolution, which prominent scholars even consider as the cause ‘of ongoing constitutional change at many levels’ and sectors (Leyland 2011: 252). However, compared to the other two States, the devolution in the UK shows some specific features for its origins. The process is very recent, started officially after the political election of 1997 and the new Labour dominance (after the failed attempt to create devolved entities in the Seventies), and was intended to address the request of self-government by regional communities, particularly in Scotland and in Northern Ireland (though within different political and social contexts). Moreover the UK devolution is geographically limited, England remaining excluded exactly because its population voted against it in the referendum held in November 2004.<sup>XVIII</sup> The content of the Devolution Acts, Acts of the Westminster Parliament, for Scotland, Northern Ireland and Wales, were negotiated between national Government and the political parties representing the self-governing claims at regional level and finally approved through regional referenda. Thus devolution started as a bottom-up process, but became reality only when the central authority accepted it.<sup>XIX</sup>

A new subnational entity was created, the devolved authority in between the State and the local levels, endowed with political autonomy, administrative and normative powers – also legislative in Scotland and Northern Ireland – but devolution was and remains in many regards centre-driven in its functioning, at least considering legislation. Westminster retains the power to legislate also on devolved matters (provided that the devolved authority agrees, using the so-called Sewel motion) and national legislation cannot be challenged for being *ultra vires* on the basis of the distribution of competences. In practice any piece of



legislation, whether coming from Westminster (as happens most of the time) or from a regional Assembly is the result of a bargaining between central and devolved authorities, according to a sort of ‘procedural manual’ settled in political agreements.<sup>xx</sup>

Devolution was constructed as a step by step process, depending on the context to which it applies. Devolution in Scotland is probably the most successful experiment and the outcome of a ‘struggle’ for more autonomy dating back to the Seventies (Mitchell 2010: 98-116), whereas in Northern Ireland devolution was imagined as a possible solution to the long standing problems of coexistence between unionists (Protestants) and nationalists (Catholics) (Wilford 2010: 134-155).<sup>xxi</sup> It arose by the Belfast Agreement 1998, between Northern Ireland parties and central Government, and then by the Northern Ireland Act 1998; it stopped between 2002 and 2007 because it was impossible to find a compromise to govern between the opposite factions and the ‘direct rule’ was applied; it was re-launched by the St. Andrews Agreement 2006 and the Northern Ireland Act 2006 (then amended in 2009).

Instead, in Wales, devolution was more ‘instantaneous’ in the sense that it was not intended either to satisfy historical requests of self-government or to appease violent political tensions, but just to recognize cultural and linguistic peculiarities (impacting also on the education system) of that Region. This is why the devolution of competences was very cautious towards Wales (Rawlings 2011: 54-80).<sup>xxii</sup> The absence of a lengthy process of deliberation, as happened in Scotland, resulted in poorer performance of Welsh devolution than in Scotland and the need to amend the Government of Wales Act (Trench 2010: 117). The Government of Wales Act 2006 finally conferred legislative authority to the Welsh Assembly and provided for the approval of the proposal in a referendum, which succeeded in 2011.

What is very interesting in relation to regional Assemblies is that one of the tenets of the devolution process, on which the regional communities insisted more before the adoption of the Devolution Acts – fixing both the distribution of competence and the devolved form of government –, was the idea to rebalance the relationship between legislature and executive at subnational level, departing from the Westminster model. Even though many differences exist amongst the three devolved authorities, proportional (as formula or as results) or mixed electoral systems were chosen, the Executive and particularly the Head of the Executive have to be selected by the Assembly from its members and the Assembly



cannot be dissolved by the Executive. There was the deliberate aim to create consensual governments at devolved level opposite to traditional majority party government at Westminster, and particularly in Ireland, the government was conceived as ‘consociational’ (Wilford 2010: 136).<sup>xxiii</sup>

The so-called ‘new politics’ of devolved authorities was also based on particular features of their Assemblies, which differentiate them completely from the Westminster Parliament at the end of the Nineties (nowadays, probably because of the reforms of the legislation and of the House of Commons Standing Orders, Westminster has moved closer to the devolved Assemblies). What distinguishes the two realities is immediately visible to the members of the devolved Assemblies, since most of them were also MPs (dual mandates are not allowed anymore as of 2011). For instance, Mr. David Steel, Presiding Officer (*Speaker*) of the Scottish Parliament (*Holyrood*) between 1999 and 2003, but also MPs for three decades, listed twelve main differences between the two Parliaments: Amongst them it is worth mentioning the existence of the fixed parliamentary term for *Holyrood* (very recently introduced, in September 2011, by the Fixed-term Parliaments Act 2011 also for Westminster); the election of *Holyrood* by ‘proportional representation’ and the multipartitism, in contrast with the first-past-the post system and the tendency towards a bi-party system at Westminster (though of the results of the 2010 political elections); ‘*Holyrood* has a U-shaped chamber designed to promote consensus’ in contrast with the opposing benches at Westminster, fostering the political struggle; in *Holyrood* standing committees scrutinise the bills before they get to the Floor and oversee the Executive’s departments, whereas at Westminster most bills are considered by the Committee of the Whole or by *ad hoc* committees and departmental select committees only exercise the oversight function (Lord Steel of Aikwood 2009).

Therefore the institutional arrangements of the devolved authorities in the UK seem to run contrary to the general trend in decentralized States whose institutional structure in the various levels or orders of government tends to resemble each other (Sturm 2006; Trench 2010: 117). The same applies to Italy when we look at the national form of government and at the relationship among Regional Councils, Presidents of the Region and Executives, after the constitutional reform in 1999: the institutional architectures at the two levels of government are differently shaped. In Spain, instead, even though the legal provisions in the Constitution, in the Statutes, in regional legislation and in parliamentary rules of



procedure differ between the central Government and the Autonomous Communities they usually resemble each other in practice (and the resemblance has become more evident in the new Statutes).<sup>xxiv</sup>

While this difference exists when we compare the form of government and the legislative Assemblies vertically, from the State to the Regions, diversities almost completely disappear when comparing horizontally the forms of government of subnational units in the three States. This result could depend to some extent on constitutional constraints mandatory upon regional authorities. However this is only partially true. As is shown in paras. 5 and 6, in Italy and Spain the Constitution leaves the floor to different institutional solutions and even when, like in Italy, a provisional institutional arrangement was provided, the door was left open in order to change the model. But alternative solutions were not attempted at all or were declared inconsistent with the Constitution (see para. 5).

In the UK, lacking a Constitution, devolved authorities have approached one another in terms of institutional settlement, amending the Assembly's rules of procedure or, directly, the Devolution Acts, as was the case for Wales and its 'movement' towards Scotland.<sup>xxv</sup>

Finally it is possible to find a common tendency in Italy, Spain and the UK in this regard. Although it was not obvious at all at the origins of the regionalization processes, there has been a trend towards the homogenization of the regional forms of government within each country. The case of Wales and Scotland has been just mentioned. In Spain the Autonomous Communities established by the Art. 143 Const. procedure looked at the historical Communities – mainly at Catalonia – as a model to imitate, and it was a voluntary choice because they could have headed in different directions (Jover 2009: 171-191). In Italy the distinction between the forms of government of Regions with ordinary Statutes and of those with special Statutes substantially came to an end by const. law no. 2/2001.<sup>xxvi</sup> Indeed this constitutional law introduced amendments to the Statutes of the five special Regions aiming at following the 'model' of form of government already provided to ordinary Regions by const. law no. 1/1999 (the same that changes the procedure for the adoption of regional ordinary Statutes), pending the adoption of the new regional Statutes.



## 4. Structural features of the Regional Assemblies in Italy, Spain and the United Kingdom

### 4.1. The *nomen*

Reflecting on the name assigned to a regional legislative Assembly could seem a too formalistic exercise. Nonetheless the choice made and the autonomy guaranteed by the Constitution to the Regions in naming their own institutions mirrors a certain understanding of the role of those Assemblies.

Italy, Spain and the UK followed different approaches on this point. Italian Regional Councils are forbidden to proclaim themselves as “Parliaments”. After the constitutional reform in 1999, but before the adoption of the new Statute in 2005, the Regional Council of Liguria passed a motion stating that, in the subsequent documents approved by the Assembly, the name Regional Council would have been placed side by side with that of ‘Parliament of Liguria’. The State challenged that motion of the Regional Council before the Constitutional Court (Lupo 2002: 1209-1224),<sup>xxvii</sup> arguing that the only institution exercising sovereign powers, the national Parliament, can be called ‘Parliament’. The Court declared that motion in contrast with the Constitution, but rejected the argument proposed by the State. It affirmed that the name ‘Parliament’ does not derive exclusively from the exercise of sovereignty of behalf of the people: there is no identity relationship between sovereignty and national Parliament.

By contrast the decision of the Court was based on the textual interpretation of the Constitution which attributes the name ‘Parliament’ in Art. 55 to the constitutional body composed of two Chambers and entitled to guarantee the political representation at national level, while it assigns the name ‘Regional Councils’ in Art. 122 to the regional legislative Assemblies. Thus regional Councils cannot depart from the name fixed in the Constitution: Regions do not have the faculty to decide the name of their institutions already provided by the constitutional text (regional Councils, the Regional Executive, the President and the Council of local authorities).

Neither in the UK are devolved authorities free to chose the names of the regional bodies: they are fixed in the Devolution Acts. What is particularly interesting is that regional Assemblies have been named differently. Only *Holyrood* is literally a ‘Parliament’



(Part I of the Scotland Act 1998), while the others devolved legislatures are the ‘Northern Ireland Assembly’ (Northern Ireland Act 2006) and the ‘National Assembly for Wales’ (Government of Wales Act 2006). According to Mitchell, *Holyrood* is a Parliament for two orders of reasons: the first is sociological and deals with its capacity to conform to the ‘public and elite conceptions of what a real Parliament looked like’, showing the ‘familiar hallmarks of Westminster’ (Mitchell 2010: 108),<sup>xxviii</sup> the second refers to its legislative powers (Rawlings 2001: 54 et seq.). Therefore, the Welsh Assembly could not be called ‘Parliament’ so far, because it was not entitled to pass legislation until 2011.<sup>xxix</sup>

On the other hand, the choice to not call the Northern Ireland Assembly ‘Parliament’ is probably more political and symbolic. Indeed the ‘Parliament of Northern Ireland’ was the home rule legislature for this Region from 1920 (Government of Ireland Act 1920) to 1972, when it was suspended and abolished by the Ireland Constitution Act 1973. This Parliament was at the very centre of the home rule system of government, being composed of two Chambers, the House of Commons and the Senate, and expressing the Executive (the Prime Minister was the leader of the majority party in the House). Establishing a ‘New Parliament of Northern Ireland’ in 1999, recalling the home rule experience, would have probably exacerbated the already patent and visible tensions between the main and conflicting regional political parties (the Democratic Unionist Party and *Sinn Fein*).

In contrast with the Italian and the UK experiences, the Spanish Autonomous Communities can define substantially on their own the name of the regional institutions. According to Art. 147, para. 2, let. c), Sp. Const., the Statutes of Autonomy have to identify ‘The name, organization and seat of its own autonomous institutions’. Even though Statutes are state organic laws, conflicts have never arisen about the name given by Autonomous Communities to their regional legislative Assemblies: thus a variety of names have been chosen (Parliament, Assembly, *Cortes*, *Junta General*), sometimes depending on the history of the Community. Most Communities (9 out of 17) preferred the term ‘Parliament’, and amongst them the historical Communities, those having a strong ‘national’ identity, such as País Vasco, Catalonia y Navarra; only three Communities opted for the uncontroversial term ‘Assembly’ (Extremadura, Madrid and Murcia); four Communities (Aragón, Castilla-La Mancha, Castilla y Leon, Comunidad Valenciana) chose the term ‘*Cortes*’, which is also the official name of the Spanish national Parliament, recalling the Assemblies summoned, sometimes frequently and others only occasionally, on



the present Spanish territory from the XI century; finally only one regional legislative Assembly, that of Asturias, has the unusual name (for a legislature) of '*Junta General*', as a tribute to the self-governing body of the Principality established in 1388.

#### 4.2. The electoral systems

The electoral systems for the regional legislative Assemblies decisively influence the balance between legislature and executive at regional level. In this matter the trend towards homogeneity underlined above is definitely confirmed.

In the UK the three regional legislatures are elected by basically the proportional systems defined in the Devolution Acts. Thus the option for enhancing proportional representation was taken, with the agreement of the regional political parties, by the Westminster Parliament, departing from its own system of election (which is now in a "minority position", considering that also British MEPs are elected by a proportional system). This aimed to counterbalance, at least a subnational level, the distorting effects produced at national level by the first-past-the post system.

Both the Scottish Parliament and the Assembly for Wales are elected through the Additional Member System, a mixed system, which combined the first-past-the post in individual constituencies with the proportional system based on party lists and multi-seats regional districts (the same used for the election of the British MEPs in Scotland).<sup>xxx</sup> Instead the Northern Ireland Assembly is elected through the Single Transferable Vote System that assures the most faithful representation in the legislature of the options expressed by voters on the candidates.

Of course the consequence of the adoption of proportional-oriented electoral systems is also the increasing number of the political parties represented within the devolved legislatures, leading to the exclusion *de facto* of majority party government, which until recently has been the rule at Westminster, and to the appointment of coalition or minority governments.<sup>xxxi</sup> This is a first important element to take into account for understanding the role of devolved Assemblies: the more likely coalitions or minority governments are, the more crucial the role of legislature becomes as a place of the compromise between the Executive and 'the others'.



In Spain, on the contrary, the convergence of Autonomous Communities towards the electoral proportional system for regional Parliaments was to a large extent the result of the constraints introduced by constitutional jurisprudence, of the ‘pervading’ provisions of the state organic law no. 5/1985 and of the regional choice to not try different solutions.

Starting from the first aspect, Art. 152, para 1, Sp. Const. formally fixes a certain institutional settlement only for those Communities established according to the burdensome procedure of Art. 151, thus for País Vasco, Catalonia, Navarra and Andalucía. The adoption of a proportional system of election for the regional legislatures to be set up in those Communities is required. Instead, nothing is provided for the other thirteen Communities, those of Art. 143 Const. In theory, they should have not been prevented from adopting a majority system. However the Constitutional Court in decision no. 225/1998 generalized the use of a proportional system as mandatory upon all Autonomous Communities that complied with this jurisprudence.<sup>xxxii</sup>

Considering the second aspect, the organic law provided in art. 81 Sp. Const. on the general electoral regime, organic law no. 5/1985, in principle is not automatically applicable to Autonomous Communities in its chapters concerning the electoral formula (see decisions of the Spanish Constitutional Court no. 40/1981, 38/1983, 72/1984): according to the Constitutional Court regional elections are regulated by each Community (Álvarez Conde 2007: 6). Nonetheless those provisions of the organic law no. 5/1985 (LOREG) concerning the right to vote and to be elected, the electoral procedure and the electoral crimes or the use of media for the electoral campaign and their financing are mandatory also upon Autonomous Communities. Indeed the competence to legislate on the basic conditions for the exercise of constitutional rights is reserved to the State, according to art. 149, para. 1, Sp. Const. (see decision no. 37/1987 of the Constitutional Court), and on this basis the LOREG is enabled to limit the regional autonomy.<sup>xxxiii</sup> Some 116 articles of the LOREG are applied to Autonomous Communities, too (Álvarez Conde 2007: 18).

On the third aspect, also the attitude of the Autonomous Communities in regulating their electoral system has been passive. Most Statutes ‘of the first generations’ were very laconic when they came to the election of the regional legislatures, referring to *leyes de desarrollo básico* (a sort of regional organic law) for the detailed regulation of the matter. The inconvenience was that these kinds of regional laws have to be approved and amended by a qualified majority, thus they are not easy to modify – they have a high level of rigidity – and



in one case, Catalonia, its adoption has proved to be impossible. In this autonomous Community, the provisions of the LOREG on national elections are applied *mutatis mutandis* to the election of the Catalan Parliament.

The tendency, in terms of relationship between the Statutes and the regional law on the electoral system, has changed with the Statutes ‘of second generations’, but the rigidity of the norm has not reduced and may have even become worse. The new Statutes are the source of law (even more difficult to modify than the *leyes de desarrollo básico*) that now provide in detail how the regional electoral system works, thus leaving small space to regional legislation.

The substance has not changed in practice anyway (Presno Linera 2007: 101-146). The electoral system of the Communities remains the national electoral system with minimal adaptations: proportional system, in small provincial districts (except for Asturias and Murcia) with the same or a higher electoral threshold as that provided in the LOREG (3% in each province).

The effect of the system, as at the national level, is to contain the political fragmentation and to produce mainly bipolar or two-party systems (Torres del Moral 2009: 205-256), even though especially in the historical Autonomous Communities the party system is more varied than in other Communities, because of the nationalist parties (Jover 2009: 186-187; Oñate-Delgado 2006: 135-174).

In Italy the transformation of the regional forms of government before const. law no. 1/1999, started by the reform of the law for the regional elections. Law no. 43/1995, drawing inspiration from Law no. 81/1993 on local elections, moved in the direction of reinforcing the position of the Head of the Executive, the President of the Region.<sup>xxxiv</sup>

Afterwards, because of the shift of the competence in regional electoral matters from those reserved to the State to those shared between State and Regions following const. law no. 1/1999 (Art. 122 Const.), State law no. 165/2004 was approved as framework law fixing fundamental principles to be respected by the Regions when regulating the details of their electoral systems. In this regard, the strict relation between Art. 122 and Art. 123 of It. Const. can be immediately seen. Indeed, by setting the general framework of the regional electoral systems, and especially prescribing the direct election of the President of the Regions, where not otherwise provided for in the Statutes, Art. 122 directly conditions



the regional forms of government, to be defined in each Statute, according to Art. 123 It. Const (Catalano 2010: 43-107).

Amongst the principles fixed by Law no. 165/2004, there are two which are particularly important: the first requires the contextual election of the regional Councils and of the Presidents of the Region – now directly elected by people (see further para. 5); the second demands that the regional electoral systems assure the formation of stable majority in the Council as well as guaranteeing the adequate representation of minorities (Art. 4, para. 1, let. a) law n. 165/2004) (Clementi 2005: 115-141). Therefore, on the one hand, a divided government and the risk of dealing with opposite majorities, in the Council and for the President, is minimized; on the other hand, the President can count on a certain and reliable majority to govern, even though the duty to protect minorities impedes the adoption of pure majority electoral systems.

However, the adoption of the new Statutes, most of which containing provisions on the new electoral law (preferably approved by qualified majorities), has not varied significantly the outlook. The rate of innovation in this regard has been low<sup>xxxv</sup> and most ordinary Regions have not adopted their own electoral law, opting for two solutions: either completing the content of the national framework law no. 165/2004 for certain limited aspects (such as incompatibility) or applying, as allowed by const. law no. 1/1999, law no. 108/1968 as modified by law no. 43/1995 (mentioned above).<sup>xxxvi</sup>

Law no. 43/1995 provides a mixed electoral system: four-fifths of the Regional Council's members are elected on the basis of a proportional formula amongst competing provincial lists (in provincial electoral districts); one-fifth of the seats, instead, is allocated using the majority formula to the most voted regional list (called *listino*) associated to the candidate to the Presidency of the Region. As a general rule, the front-runner of the most voted regional list becomes the President of the Regions and all the candidates in that list, which is a blocked list, obtain a seat the Council. In any event, a majority bonus is assigned up to 55% or 60% of the seats in the Council to the most voted regional *listino* and to the provincial list associated with it.<sup>xxxvii</sup> As is immediately evident, this electoral system usually secures to the President a stable majority in the regional Council, contrary to what happened before 1995 and particularly 1999, when the regional Executive was unable to control a highly fragmented Council.<sup>xxxviii</sup>



Amongst the few cases of brand new regional electoral laws, that of Tuscany seems to be particularly interesting or, at least, has tried to vary the State model of law no. 43/1995. The Regional Council of Tuscany is elected by a proportional system on the basis of provincial lists and possibly assigning a majority bonus equal to 60% of the seats.<sup>xxxix</sup> But also a sort of ‘minority bonus’ is provided too, since no less than 35% of seats have to be granted to the lists not associated to the winning candidate for the Presidency (Viceconte 2010: 228). This provision aims at complying with the principle settled in the state framework Law no. 165/2004, requiring the adequate representation of minorities in the Council.

Moreover the controversial mechanism of the ‘regional *listino*’ was abolished and replaced by ‘regional candidates’ (Tarli Barbieri 2004: 199-218), aiming at decreasing the political fragmentation in the Council. Both these candidates and the candidates in the provincial lists can be selected previously through primary elections (thus balancing the elimination of the preferential vote) (Rossi-Gori 2009: 626-630).

The overview of the regional electoral systems in Italy, Spain and the UK shows the existence of elements of rigidity and inertia. On the one hand, in the UK, devolved authorities cannot intervene to regulate their own elections; on the other hand, in Spain and Italy, the room left to the Regions and particularly to regional Assemblies on this matter by the Constitution has been ‘occupied’ by national legislation and has seen Regions substantially passive in accepting solutions already provided by the State, without accommodating them to the peculiarities of the subnational communities.

As for the effect produced by electoral laws on regional Assemblies, they favour multipartitism and the creation of minority or coalition governments in the three UK devolved regions, in contrast with the Westminster model, whereas in Spain the national electoral system is substantially replicated at subnational level, thus producing an artificial simplification of the party system in most Autonomous Parliaments. In Italy the same objective as in Spain has been pursued, aiming at favouring more stable regional Executives than in the past, not submitted to the changing orientation of the Council. Nonetheless such a goal could have not been achieved without the fundamental overturn of the regional form of government.



### 4.3. The organization of the Assemblies: An outline

All the regional legislative Assemblies in the three countries are unicameral and this counts in terms of the definition of the decision-making process, which is definitely more rapid and involves no problems of coordination between two legislative branches, as often occurred in bicameral legislatures.

By contrast, the lack of a Chamber of Second Thought – in addition to speeding up the procedures and making them probably less weighted – usually forces the members of the unicameral Parliament to follow a tighter schedule or to deal with overload problems, because an essential element of division of labour in parliamentary institutions is missed. Indeed the number of components of these regional legislatures ranges from 30 in the Italian regional Councils of Basilicata and Molise to 135 of the Parliament of Catalonia.<sup>XI</sup> What is interesting is that legislatures having quite different sizes are required to perform essentially the same tasks within each State.

In this regard, Regional legislatures are autonomous in arranging their internal organization, providing that the same basic principles – such as the participation of the minorities in parliamentary activity –, fixed in the Constitutions or in the Devolution Acts, are respected. However, regional Assemblies usually do not enjoy the same level of protection from external interferences which used to be recognized, for instance, in the UK and in Italy to the national Parliaments (Barber 2011: 144-154).<sup>XII</sup> In this perspective, the decision of the Spanish Constitutional Court no. 31/2010, on the new Statute of Catalonia runs in the direction of strengthening the Assembly's autonomy. Indeed, amongst the many provisions of the Catalan Statute which were declared inconsistent with the Constitution, there was also that entitling the *Consejo de Garantías Estatutarias* – the advisory and quasi-judicial body that controlled compliance with the Statute – to issue a binding opinion to the regional Parliament on bills dealing with the rights recognized by the Statute, pending the legislative process. The Constitutional Court found that this provision limited parliamentary autonomy and unreasonably affected regional law making.

The basic organizational units of all regional Assemblies are political groups. Even though the party system at regional level is usually 'richer' than a national level, because of nationalist or regional parties, the electoral laws (see above para. 4.2.) help in simplifying the framework. The main problems for the internal stability of the Autonomous



Parliaments (and the same happened before the introduction of the *simul-simul* mechanism in Italy) is the very frequent passage of members from one group to another. The new rules of procedure of the Parliament of Catalonia in 2005 tried to countervail the problem by creating the position of ‘non-attached members’ (Art. 26), which does not exist in the national Parliament. Indeed, the abandonment (or the expulsion) by a member from his own group, forbids him from becoming attached to another group (he could only move back to the original group) for the entire term, but allows him to enjoy all the individual rights as a member of the Parliament. There, this provision, prejudging non-attached members compared to those in groups, strongly discouraged the so-called *transfuguismo*.

The opposite situation has developed within the Italian Regional Councils since 1999. Most new Regional Statutes do not fix any threshold for the establishment of political groups in the Councils, leaving the floor to the rules of procedure. The very low thresholds provided and the explicit guarantee in two Statutes (Tuscany and Emilia-Romagna) for the creation of ‘mono-personal groups’ have led to the ‘explosion’ of groups and to an increasing political fragmentation. Here, contrary to Catalonia, the member of the Regional Council who decides to ‘become a group’ enjoys the same *status* as any other group, thus he is stimulated to leave his original group. The negative side of the story is how to reconcile this fragmentation with the carrying out of the Council’s procedures (Rubechi 2010: 101-117). Neither a special position is guaranteed by most Statutes nor Council’s rules of procedure to the Opposition, the largest group from the minority side, in order to establish a sort of ranking amongst groups (Perniciaro 2010: 87-99).

Indeed, the recognition of the role of the Opposition (regarding the time, the oversight etc.), different from the other minorities, has proved to be effective in the Scottish Parliament and in the Welsh Assembly for putting some order into the varied landscape of the party groups in the regional Assembly. Where, like in the Northern Ireland Assembly, such a position cannot be created in order to preserve the consociational nature of the form of government parliamentary procedures have proved to be longer and more burdensome.<sup>XLII</sup>

Finally, another cross-national feature of regional legislative Assemblies in Italy, Spain and the UK is that their members work most of the time in standing committees, organized by subject-matter more or less mirroring the Executive’s departments (see further, para. 5.3.), and this seems in contrast with the general trend at national level, where



the Floors of the Houses have become the very centre of parliamentary activity (Costa et al. 2004).

## 5. The relationship with the Executive

This section analyses the relationship between the Regional legislative Assemblies and their Executives looking at the procedure for the appointment of the Executive; at the ordinary coexistence between the regional and executive branches and at how it can be challenged; at the procedures to dissolve the Assembly; and at the oversight powers of the regional legislatures.

However, a first assessment of the regional legislative Assemblies' position *vis-à-vis* the Executive focuses on its composition and the incompatibility regime, considering whether the members of the Executive can act also as members of the legislature.

In this regard, the situation of the regional Assemblies in Italy, Spain and the UK is different.

The three devolved legislatures in the UK follow the Westminster model on this point, requiring as a condition for the appointment of the First Ministers (and the Deputy First Minister in Northern Ireland) as well as of the other Ministers, the *status* of Member of the relevant Regional Assemblies. The loss of this *status* implies the loss of the Ministerial position as well (Trench 2010: 120).<sup>XLIII</sup>

Also in Spain the election to the regional Parliament is a requirement for being appointed as President of the Community. On the basis of the generalization to all the Communities of the prescriptions of Art. 152, para 1, Sp. Const. (decision no. 225/1998 of the Constitutional Court), the President has to be elected by the Autonomous Assembly from its members. However nothing is specified with regards to the other components of the regional Executive, except that they have to be accountable before the regional Assembly. This means that the President of the Community, on whom the power to appoint the member of the regional Government relies, can choose them also from outside the Assembly.

Finally in Italy in the ordinary Regions, both in those having a new Statute and in those subject to the transitional provisions of const. law no. 1/1999, the President of the Region



is directly elected by the people, thus he relies on an autonomous channel of legitimisation rather than the Regional Councils.<sup>XLIV</sup> As for the relationship between the office of member of regional Executive (*Giunta*) and regional councillor, it is up to the Regions to decide. Art. 122 Const., indeed, clarifies that the regional law has to set the regime of incompatibility. So far only one regional electoral law, that of Tuscany, as modified in 2009, makes the office held within the regional Executive not compatible with that of member of the Regional Council (Viceconte 2010: 222-223). However, what could seem at first sight as an attempt to clearly separate the legislature from the executive is actually not that crucial in practice, because the components of the regional Government cannot be removed individually by the Assembly and because the maintenance of the Assembly and Executive's offices at regional level is now indissoluble (see next sections).

### 5.1. The confidence between Assemblies and Executives: A common element, but shaped very differently

The confidence relationship between the regional legislative Assemblies and their Executive is at the basis of the regional forms of government in the UK, Spain and Italy. Nonetheless, there are prominent differences between them as regards the establishment of this relationship, its tenure and its removal.

#### a) *The devolved Assemblies in the UK*

In the UK, The Scottish Parliament and the Welsh Assembly – the latter after the new Devolution Act 2006 – are at the very centre of the procedure for the appointment of the *First Minister*. Firstly, contrary to what happens at national level, where Her Majesty confines herself to appoint as *Prime Minister* the leader of the Majority Party proclaimed by the polls (or selected by the Majority Party itself) without any formal vote of confidence of the House of Commons, in Scotland and in Wales the Queen has to wait for the nomination (by simple majority) of the First Minister by the regional Assembly.<sup>XLV</sup>

Secondly, contrary to the practice in Westminster until the Fixed Term Parliaments Act 2011, where the dissolution of the Parliament did not imply the resignation of the Cabinet, who remained in charged, provided that the majority of the citizens confirmed their support, in Scotland and in Wales the procedure for the appointment of the new First



Minister has to take place after every renewal of the Assembly. The other Ministers (whose number is not fixed in the Scotland Act 1998, whereas Art. 51 of the Government of Wales Act 2006 limits the Ministers to 12) are appointed by the Queen on proposal of the First Minister.

However – and this is particularly important – the Scotland Act 1998, compared to the Welsh Devolution Act, limits the margin of manoeuvre of the First Minister towards the Parliament: The Head of the Government cannot seek the Queen’s approval for appointment without the agreement of the Parliament on the names of the Ministers (Art. 47, para. 2). And this is something which is also completely beyond the prerogative of the House of Commons in the appointment of the national Cabinet.

Both in Wales and Scotland, Ministers are not individually subject to a motion of censure by Parliament and only the First Minister can remove them from Office, unless a motion of no confidence is approved towards the Executive as a whole.

In Northern Ireland the ‘pillars’ of the parliamentary form of government have been adjusted to a peculiar and highly unstable context, in which the institutional architecture was originally based on a power-sharing devolution, particularly between the Legislature and the Executive, directly derived from the Assembly. A constant feature of the Northern Ireland Executive is that it is headed by a diarchy: the First Minister and the Deputy First Minister, in spite of the name of the latter which could suggest a sort of hierarchy between the two Offices, have to agree on any measure to be proposed or taken.<sup>XLVI</sup>

Before 2006, the amendments to the Northern Ireland Act 1998 and the St. Andrews Agreement, the process for the appointment of the First Minister and the Deputy First Minister started after the elections within the Assembly, once the political designations were expressed.<sup>XLVII</sup> The Office of First Minister was assigned to the leader of the largest designation, while the Office of Deputy First Minister was attributed to the leader of the second largest designation. Substantially the two positions have always been split between the Democratic Unionist Party and *Sinn Fein*. But from 1998 to 2007 the nominee to these two positions, in order to be ratified, required also a cross-community vote in the Assembly (Wilford 2010: 146).

Then the two Heads of the Executive determine jointly the number of Ministerial offices and their functions. The allotment of the ministerial positions amongst parties is based on the d’Hondt method, ranking the parties according to the electoral polls. Usually



four parties are involved in the negotiations and two of them, the Democratic Unionist Party and *Sinn Fein*, gain the great majority of the offices.

After the St. Andrew Agreement, however, something changed in the process of appointment. First of all the appointment of the First and of the Deputy First Minister has become a sort of ‘*de facto* referendum’ (Wilford 2010: 146), since their nomination comes directly from the polls and not from the political designations within the Assembly. They are respectively the leader of the largest and the second largest parties at the elections. This new provision weakens the position of the Legislature towards the Executive formation.

Once the Executive is formed, a Minister can be removed only by its nominating officer, who is normally the leader of his/her party (and very often the First or the Deputy First Minister). Of course such Executive, divided by rigid political quotas, can be affected by two main problems. The first is the ‘ministerial unilateralism’, since every Minister tends to be accountable to his party only; and the second concerns the preservation of the consociational functioning of the institution, as its composition requires. Then, the main threat is the political deadlock.

Both the Belfast and the St. Andrews Agreements (1998 and 2006) provide a possible tool for countervailing the block of the institutional activities, the vote of no confidence, supported by a cross-party majority in the Assembly; but it has not proved to be effective so far: the two largest parties in the Assemblies lead the Executive and they are not willing to force the Government to resign.

Notwithstanding this criticism, after the period of direct rule, the Northern Ireland Assembly has been able to complete its first parliamentary term (2007-2011), showing that, though still not perfect, the institutional system of Northern Ireland is certainly more stable now than a decade ago.

#### *b) The Autonomous Parliaments in Spain*

On the basis of the general reference contained in Art. 152, para. 1, Sp. Const., as interpreted by the constitutional jurisprudence, the Government of the Autonomous Communities is composed of: the directly elected Assembly; the President, elected by the



Assembly from its member and entitled i) to direct the regional politics, ii) to represent the Community in inter-institutional relations and iii) to represent the State within his Community; the Council of Government, who exercises executive and administrative functions.

The form of government of the Autonomous Communities has been defined uniformly in the original Statutes of Autonomy, in the subsequent regional institutional laws (such as the electoral laws), the *leyes de desarrollo estatutario*, usually approved by qualified majority – thus requiring a wide consensus – and finally in the Statutes of ‘second generations’, which contained much more detailed provisions on this point and on Parliaments than the previous ones. The institutional arrangements regarding the relationship between the legislative and the executive branches, settled by the Autonomous Communities, have almost never been challenged before the Constitutional Court (Jover 2009: 174-175). Therefore the organization of powers has proved largely stable.

The process for the establishment of the Executive after regional elections is divided in two stages. The first, once the new Parliaments has been summoned, normally sees the President of the Parliament involved in consultation of political groups aiming at proposing a candidate to the Presidency of the Community.<sup>XLVIII</sup> The candidate agreed presents his political program to the Parliament and is elected as President of the Community by the absolute majority of the Parliament’s members at the first voting or by simple majority at the second one. The procedure resembles exactly that provided at national level within the *Congreso de los Diputados*. After the confidence vote, the President is instructed by the King to form the Council of Government.

This second stage marginalizes completely the Regional Assembly, which only in few Communities is informed about the composition of the new Executive. Indeed, the appointment and organization of the Council of Government as well as the removal of one or more members is a decision taken unilaterally by the President. The exclusion of Parliament is likely to reduce its influence also during the activity of the Executive. Even though the general directions of regional politics are defined by the Presidents, the other members of the Executive are responsible for the accomplishment of those objectives in the different subject-matters, thus the decision on who will take those responsibilities is crucial.<sup>XLIX</sup>



As for the Executive tenure, the form of government of the Autonomous Communities relies on the traditional tools of the rationalized parliamentarism, the question of confidence (approved by simple majority) and the vote of no confidence, which, as happens at national level, is a constructive vote of no confidence (to be supported by the absolute majority of the members). Neither instrument has been much used to date (Allué Buiza 2006: 209-252; Porras Nadales 2006), though they have been applied more often than in the *Congreso de los Diputados*. Fifteen constructive motions of no confidence have been tabled since 1978, but only five of them were approved,<sup>I</sup> thus causing the resignation of the President (the removal of his Executive) and his replacement.<sup>II</sup> Moreover, some Statutes of Autonomy limits the use of the question of confidence to issues of great relevance or prohibit it in relation to the budget and electoral or institutional matters.<sup>III</sup>

The cautious use of these two instruments has to be understood jointly with the tendency to strengthen the position of the President throughout the years and most of all to preserve the stability of the Executive: majority governments have been predominant, thus the party cohesion has discouraged the use of both questions of confidence and motions of no confidence. However, this does not mean that Autonomous Parliaments are inactive in their relations with their Executive: progressively there has been a considerable growth in the use of the ordinary oversight tools (compared to the ‘extraordinary’ ones, which can lead to the resignation of the President) (Porras Nadales 2006).

*c) The Regional Councils in Italy*

There was a common and negative evaluation of the performance of the regional forms of government from the Seventies to the Nineties: too unstable Executives, too much conditioned by the changes of political majority in the (legislative) Assemblies (D’Atena 1988). At that time, the President of the Region (as well as the other members of the Executive body), entitled to define the general political directions of the subnational entity, was elected by the Council from its members (as in the Spanish Autonomous Communities). His mandate as President depended on the support of the majority in the Council – an Assembly with limited legislative power, but having the authority to adopt regulations, programs and plans for the Region –, the same majority who voted for him



after the election. However, most regional Governments did not reach the end of the five-year term.

Regional Councils were accused of being responsible for the political deadlock and subsequently the electoral law (no. 108/1968, see above) was changed in 1995, introducing the clause that requires the guarantee of a stable majority in the Councils (Pinelli 2008: 1777-1789). Const. laws no. 1/1999 and 3/2001 should have completed the reform of the regional governments, reinforcing the position of the President of the Region towards the Regional Council and giving to the latter the role of full legislator.

Pending the adoption of the new Regional Statutes, const. law no. 1/1999 immediately provided a new form of government for the ordinary Regions to be implemented during the transitional phase. The linchpins of the reforms were: i) the direct election of the President of the Region as well as of the Council; ii) the power of the President of the Region to appoint and remove the other members of the regional Executive, without any participation of the Council;<sup>LVIII</sup> iii) the power of the Council to force the President to resign; iv) the “joint destiny” of the Regional Council and the President (see further, para 5.2.), which makes definitely unlikely the removal of the President in charge by the Assembly through the withdrawal of confidence.

As soon as the new Statutes were to have been approved, Regions could have chosen either to maintain the standard form of government provided in const. law no. 1/1999 or to adopt a new one (for instance moving back to the election of the President of the Region by the Council),<sup>LIV</sup> if consistent with the Constitution. In fact the transitional model became permanent (with few changes).

This outcome was the consequence of two main factors: on the one hand, the Regions became accustomed to the new form of government introduced in 1999 – also because it assured a double channel of direct legitimisation – and were not willing to come back to the past or to test alternatives (the failure could have meant the sanction of the Constitutional Court and/or subsequent amendments to the Statutes);<sup>LV</sup> on the other hand, the attempt by some Regions, essentially the Councils, who approved the Statutes, to insert variations on the “prepackaged” form of government was obstructed by the Constitutional Court.

For instance, the new Statute of Calabria was probably too ‘brave’ in providing that the Vice-President of the Region would have automatically succeed the elected President (as



the new President of the Region) without affecting the Council, which, on the contrary should be dissolved in this hypothesis (as acknowledged in decision no. 2/2004 on the basis of Art. 126 Const.). Therefore, in case of choosing the standard model, constitutional provisions cannot be substantially derogated.

From the perspective of the Regional Councils, their position in the regional form of government has certainly not been enhanced by the constitutional reform and the new Statutes (Olivetti, 2005; Lippolis, 2010; Carli 2010b; Cavaleri 2010).<sup>LVI</sup> The aim of the reform was acknowledged by the Constitutional Court itself: to simplify the regional political systems – with the aspiration to move from an extreme fragmentation of political groups to a bipolarization – and to make the functioning of the political institutions more stable (decision no. 2/2004). Therefore Regional Councils would have been far less free to determine the destiny of the Executives compared to the past.

According to Art. 126 Const. and to the new Statutes, the Council can challenge the existence of the confidence relationship, basically in two ways: by approving a motion of no confidence by the absolute majority of its members or, where introduced, by rejecting a question of confidence posed by the President. Actually in decision no. 12/2006 the Constitutional Court disputably denied the existence of the confidence relationship between Council and President and affirmed that the relation is based more on ‘political consonance’ (Buratti 2006: 90-101), as the results of two contextual elections confirming the same majority. However, while it is certainly true that a vote of confidence is not required when the new Executive is set up and would probably be inconsistent with the Constitution, nonetheless it is the Constitution itself that calls that relationship, once established, as based on confidence. Otherwise Art. 126, which entitles Regional Councils to adopt ‘a reasoned motion of no confidence against the President of the Executive’ would be misleading.

It is also questionable the position taken by the Constitutional Court when it declared unconstitutional the provision of the Statute of Abruzzo on the individual motion of no confidence to the members of the Regional Executive (decision no. 12/2006). The conclusion is that such a motion can be voted but, if approved, cannot provoke the removal of the person contested from its Office. It seems conceived as a kind of symbolic sanction, limiting the opportunity for the Council to effectively control the action of the Executive.



Four Regions have also introduced the question of confidence to be put by the President in the Council (in Campania, Friuli-Venezia Giulia, Liguria and Calabria, where a previous decision of the Executive as a whole is required). As with the analogous tool provided at national level, it should enable the Head of the Executive to call his majority to order on crucial measures for the governmental political program. For how they are regulated, questions of confidence are very unlikely to be rejected. It will be almost impossible for a President to fail and to be forced to resign. On the one hand, the technique used to regulate the question of confidence led to the opposite effect to the discipline contained in the rules of procedure of the national Parliament. While these rules allow putting a question of confidence on virtually every matter except those strictly forbidden, regional Statutes and legislation list the bills or the measures on which such a motion can be presented. On the other hand, regional norms on the vote of the question of confidence require the absolute majority for its rejection and the simple majority for its approval, which then becomes the rule.

It is relatively easy to see that the basic regulation – the electoral legislation, the formation of the Executive, and the confidence – of the relationship between Regional Councils and Presidents (Executives) of the Regions is not much in favour of the Legislative Assemblies (Buratti 2010: 139-175). However potentially there are many other channels for re-expanding the influence of the Councils on regional governments: the legislative process, which is regulated at regional level as well, the ordinary oversight function, fostering processes of public deliberations etc. (see decisions no. 378 and 379/2004).

## 5.2. The power to dissolve the Assembly

Another fundamental perspective through which the position of regional legislative Assemblies needs to be addressed deals with for what reasons and who can dissolve them before the expiration of the parliamentary term.<sup>LVII</sup>

Here a different degree of autonomy exists amongst regional legislatures amongst the UK, Spain and Italy.

In the UK the only hypothesis of ‘extraordinary’ dissolution of devolved Assemblies envisaged – apart from the physiological term – is a sort of ‘*self-dissolution*’. The Executive is



completely set apart and is devoid of any powers to condition the date of new election, which instead was a decisive prerogative of the national Prime Minister so far (through the Crown).<sup>LVIII</sup> By contrast, the devolved Assemblies are able to force the Executive to have an election, since new elections have to be summoned after every dissolution of the Parliament.

The procedural requirement for the anticipated dissolution is the adoption of a resolution by at least two thirds of the Assembly's members, the highest quorum fixed amongst all the procedures of the devolved legislatures. It is certainly a guarantee of stability of parliamentary activity, which however makes quite unlikely the achievement of the threshold.

As for the reasons behind the '*self-dissolution*', there is a significant difference between Northern Ireland, on the one hand, and Scotland and Wales, on the other hand. In Northern Ireland the initiative to dissolve the Assembly can be taken only when the vacant Offices of First Minister and Deputy First Minister have not be filled within seven days of the first meeting of the Assembly, following elections. In this case two conditions have to be met: the quorum of two-thirds plus the substantive reason why the Executive is lacking. These provisions are, in any case, perfectly coherent with consociational nature of the Northern Ireland government.

On the contrary, in Scotland and Wales to some extent the dissolution of the Assembly could happen more easily (Rawlings 1998: 461-509).<sup>LIX</sup> In fact the self-dissolution takes place either when the qualified majority mentioned passes a resolution for whatever reason *or* when the Assembly fails in filling the Office of Prime Minister in due time (28 days). In this case the two requirements are alternative, whereas for Northern Ireland they are cumulative.

In Spain Autonomous Parliaments enjoy a much lower degree of autonomy in terms of decisions on their dissolution than their UK counterparts: there is nothing equivalent to the '*self-dissolution*'. However it is necessary to clarify that constraints have increased in the last few years.

When the Communities were established, under Art. 143, the situation became somewhat paradoxical. Only the historical Communities and Andalucía could provide the anticipated dissolution of their Assemblies and regulated the matter by legislation. In the ordinary Communities legislatures could not be dissolved in advance. It was forbidden,



exclusively for a technical and organizational reason, to hold contextual elections in all the Communities which could have been prevented by the decision of a President of the Region for the dissolution. Thus, behind this absolute rigidity of the system, which deprived the President of the Community of a certain margin of manoeuvre, there was not the intention to preserve parliamentary autonomy at regional level (Jover 2009: 183).

The prohibition was removed only when the Statutes of ‘second generation’ were approved. Some of the new Statutes (Comunidad valenciana, Balearic Islands, Aragón) expressly provide for the anticipated dissolution of the regional Parliaments, also in a very extensive way (Álavarez Conde 2007: 26).<sup>IX</sup> The power of dissolution is conferred to the Presidents of the Communities, who have started to use it actively, making the aspiration for a common electoral deadline unreal (Pendás García 1988).

Finally, in Italy after the constitutional reform in 1999 and the adoption of the standard model of government (founded on the direct election of the President of the Region) Regional Councils are in a peculiar position. They enjoy the power to self-dissolve, but its meaning is twofold (see Art. 126 Const.). The first hypothesis is that of the *proper self-dissolution* (for no specified reasons), when the majority of the members of the Council decides to resign. The second hypothesis is that of the self-dissolution rightly described as ‘*institutional suicide*’ (Gianfrancesco 2009: 218), where the dissolution is caused by the approval of a motion of no confidence against the President of the Region or the refusal to approve the question of confidence put by the President.<sup>IXI</sup> On these occasions – as the first implementation of the reform demonstrates – Regional Councils are very reluctant to use their prerogatives to sanction the President because the impact on their term of office, too.

Instead, the third hypothesis of dissolution dealing with the regional form of government has nothing to do with self-dissolution, depending on factors external to the Council: the removal (by the President of the Republic in case of acts in contrast with the Constitution or grave violations of the law), permanent inability, death or voluntary resignation of the President of the Executive.

Particularly in this regard (the third hypothesis), one can wonder whether the attempt to rationalize the regional form of government has not gone beyond its scope by creating doubts about the democratic legitimisation of the so-called clause ‘*simul stabunt, simul cadent*’.



If, for any reason, the President is deemed to be permanently unable to stay in office, the Council is forcefully dissolved. Either the two institutions act side by side or they do not.

However, the system of sanctions that penalizes the Council does not operate *vis-à-vis* the President, who, for example, can change the political majority supporting him in the Council without any consequences in terms of institutional balance (Tosi 2001).

### 5.3. Other tools for making the Executive accountable

In addition to the most traditional instruments for making the Government accountable, such as the confidence procedure (see above para. 5.1.), other tools are provided to the regional Assemblies for this purpose in their rules of procedure or standing orders. Written and oral questions, First Minister or President question time, and hearings are used by most regional legislatures far more frequently than motions of censure or questions of confidence, being ordinary oversight tools at Assemblies' disposal.

However, most activities regarding the relationship with the Executive take place at committee level. First of all, committees have become crucial within the regional balance of powers between the legislative and the executive branches, because in all devolved Parliaments, Regional Councils and Autonomous Parliaments, they exercise both the legislative and the oversight functions. The joint functions of standing committees in the UK is something completely new, since Westminster Parliament keeps them separated (see above, para. 3).

These standing committees (or statutory committees in Northern Ireland) participate in the legislative process for the consideration of the bill, amending its content and in a few cases – Piemonte, in Italy (Griglio 2010: 127-128); Catalonia and Andalucía, in Spain – they finally approve legislation on behalf of the House (law making committees) (Vírgala Foruria 1993: 73-95).

In Northern Ireland the existence of these committees is considered so strategic to the proper functioning of the form of government that the Offices of Chairman and Vice-Chairman of the statutory committees are allotted to political groups on the basis of the same procedure applied to the formation of the Executive. The d'Hondt method is followed, provided that the committee Chairman and the mirroring Ministers come from different parties.



But because of the weak position of the regional Assemblies in the decision-making process, though formally being the regional Legislators (see further para. 6), the rules of procedure amended after the adoption of the new Statutes or at the beginning of the devolution have preferably strengthened their position in overseeing the Executive through committees. This is required by the new institutional balance itself, particularly in Italy and Spain, which has reinforced the Executives. Not only standing committees carry out public hearings, inquiries and investigations, or address specific concerns to the Executive by mean of motions or resolutions.<sup>LXII</sup>

Perhaps the most important achievement pursued by the ‘new’ regional Assemblies through their committees is of linking the oversight activity on the Executive to the collection of data and information from the public (Maccabiani 2010: 161-188). These Assemblies have become more and more open and transparent as regards their activities (also thanks to ICT), but are also involved systematically in processes of wide consultation of the population (also regulating the code of conduct of lobbyists), both during the committee stage and on specific issues to be investigated. This trend has been especially emphasized by the Parliament of Catalonia (which seems to be a sort of model amongst the Autonomous Parliaments), by the Scottish Parliament and by the Councils of Tuscany and Emilia-Romagna. The new provisions help move regional Assemblies closer to citizens but, at the same time, assure an invaluable source of guidance in assessing the conduct of the Executive and in orienting it.

## **6. Brief notes on the normative power of the Assemblies...and of the Executives**

The most important feature found in all the Regional Assemblies of Italy, Spain and the UK is their nature of legislature. They have been designated to carry out the legislative functions within the remits of the Regions or devolved entities.

However, although legislative production should be the core of the Regional Assemblies’ activities, they have not been able to exercise their power effectively or ‘delegate’ their exercise to someone else.



For instance, in Italy, not only is the rate of legislative production lower at regional level compared to the central one, but also the quality of regional legislation has been often considered quite poor, sometimes hyper-sectoral and others not at all homogeneous in the content (Carli 2010a: 1-7). The legislative process is usually dominated by the Executive and concerns almost exclusively Executive's bills.

Moreover, after the constitutional reform Regional Councils have lost their monopoly as law making authority at regional level. The adoption of the regulations, originally reserved to the Councils, is now left open by the Constitution with regard to the definition of the competent authority and is usually transferred by the new Statutes from the Councils to the Executive bodies with few exceptions (Abruzzo and partially Marche) (Gianfrancesco 2009: 231; Tarli Barbieri 2009).

However, regional Executives, even after const. law no. 1/1999,<sup>LXIII</sup> are forbidden from adopting acts having force of law. In decision no. 361/2010 the Constitutional Court – actually required to decide on a quite different issue<sup>LXIV</sup> – recognized that all legislative powers at regional level are vested in the Councils and thus the Regional Executive is not entitled to adopt either delegated legislative decrees or decree-laws (Ruggeri 2010).

The opposite solution can be found in the Spanish autonomous Communities. Contrary to Italy, the Spanish Constitution indirectly (Art. 153 and 161) and the organic law on the Constitutional Court directly recognize the existence of acts having force of law at regional level. Therefore the legislative monopoly of the regional Assemblies has been severely challenged.

The possibility for Autonomous Parliaments to delegate the adoption of law to the Executives was provided most of all only in the regional institutional laws (*leyes de desarrollo estatutario*) until the recent reform of the Statutes (Castellà Andreu-Martínez 2009: 47-82),<sup>LXV</sup> when those provisions were incorporated in the basic law of the Communities. In most Statutes, legislative delegation is forbidden on certain matters (e.g. the institutional architecture and the protection of rights) and in the Rules of procedure of the Catalan Parliament the process for the adoption of delegated legislative decrees is strictly regulated (Art. 137), underlining the need to preserve the prerogative of the Assembly as 'ordinary legislator'. Indeed, the Catalan Parliament scrutinizes all draft legislative decrees of the Executive, which can be enacted only if amended consistently with what is required by the Assembly (Castellà Andreu-Martínez 2009: 47-82).



A major change of the Statutes of ‘second generation’ was the introduction of Communities’ decree-laws. The innovation does not consist of the requirements for adopting decree-laws – in case of extraordinary and urgent need –, for their conversion into law – without amendments by the Parliaments – and the substantive limits – i.e. their exclusion in matter of rights and freedoms of citizens, electoral law etc. –, to which Art. 86 Sp. Const. can be directly applied,<sup>LXVI</sup> but affects the institutional balance between the regional Parliaments and Executives.<sup>LXVII</sup> Indeed, the expansion of the regulatory activity of the Executive in the legislative field, traditionally reserved to the most democratically legitimated body, is somewhat disputable where no firm limits are posed. The Executives of the Autonomous Communities where decree-laws are provided seem quite active in their enactment. Moreover, due to the jurisprudence of the Spanish Constitutional Court – which recognizes a wide margin of discretion to the issuing authority of decree-laws in appreciating the occurrence of extraordinary and urgent circumstances (see decision no. 68/2007) –, no really effective balances to the law-making power of the regional Executives seemed to have been introduced. Therefore the increasing use of decree-laws could undermine the position of the Autonomous Parliaments.

In the UK devolved legislatures, on the contrary, the intention to ‘delegate’ legislation is realized more as self-restraint and deference toward Westminster than with the purpose of enlarging the tasks of the devolved Executive authority. Indeed, it is now commonly acknowledged that *Holyrood* and the other regional Assemblies are more than happy to abstain from legislating on devolved matters and to leave the floor to the national Parliament, in order to avoid complex negotiations or, even worse, to see their legislation declared *ultra vires* by the Supreme Court (Leyland 2011). On these occasions, devolved legislatures still have a say in the legislative process before the law is passed at Westminster, but it is something different from the traditional law making process.

However, devolved legislatures seem instead very committed to deeply scrutinising regional Executive regulations (subordinate legislation in Scotland). Standing parliamentary committees have been set up in order to examine draft regulations, which are regularly sent to the Parliament before their enactment (Reid 2003: 187-120).



## 7. Conclusions

The existence of Regional Assemblies provided with legislative powers contributes to the positive democratic performance of all the constitutional systems examined, by directly linking people to the fundamental regulatory function.

However, as the cases of regional legislatures in Italy, Spain and the UK prove, there are many challenges to the enhancement of their position, which was the ultimate aim of the constitutional and institutional reforms from the Nineties to the beginning of the new Century.

The first challenge derives from the nature of the States itself, not being federal States. Regions are bound by several constraints in depicting their form of government and in strengthening the autonomy of their own legislatures that inevitably compete with the national Parliaments. Constitutional Courts, in Italy and Spain, and the Westminster Parliament, in the UK, carefully monitor the activity of the regional Assemblies, often limiting their margin of manoeuvre.

The second challenge, instead, is the Assemblies' inertia. Regional legislatures, particularly in Italy and Spain, have not always been willing to test new institutional solutions, such as the electoral laws, relying on existing models. Within each country a gradual process of homogenization amongst legislatures has taken place, becoming more and more similar to one another in their organization and procedures.

Perhaps the most important common feature when we come to the form of government is the presence of the confidence relationship between the legislative and the executive branches in the Italian Regions, in the Spanish Autonomous Communities and in the UK devolved entities. Nonetheless the way this relationship is shaped varies a lot across countries. In this regard, three elements have proved to be crucial: 1) the degree of autonomy enjoyed by the Assembly *vis-à-vis* its Executive and particularly if and how legislatures can be dissolved, ranking the UK three devolved legislatures at the top, the Spanish regional Parliaments in the middle, and the Italian regional Councils at the bottom; 2) the electoral system, whether proportional or mixed, in the three countries; 3) the party system and its relations with the party groups in the regional Assemblies.



Finally, looking at the legislatures in the accomplishment of their normative and oversight functions, their role appears quite weak in the law making process, even though this should be their “core” activity. Indeed, on the one hand, legislative production in the Region has been inferior to expectations, both from the quantitative and the qualitative points of view; on the other hand, (also) at regional level the normative powers of the Executives have significantly grown in the last few years.

On the contrary, the most interesting and innovative institutional solutions can be found in the carrying out of the oversight function, which should be further enhanced in the future, aiming at countervailing more powerful Executives. All the regional legislatures have centred their activity preferably in the standing committees, establishing their own channels of dialogue with the public (through hearings, investigations, inquiries and wide consultations on internet). The objectives fulfilled by the legislatures are twofold: to revitalize the relationship with the constituents, but also to collect information to be used for the Executive’s oversight.

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\* Ph.D. in Comparative Public Law, University of Siena (Italy); Post-Doc Fellow in Public Law, Department of Political Science, Luiss Guido Carli University, Rome.

<sup>I</sup> Indeed, the Governor, who was appointed by the Legislature, was also the President of one of the legislative branches. However, at the same time, ‘the same legislative branch acts again as executive council of the governor, and with him constitutes the Court of Appeals (*Federalist no. 47*).’

<sup>II</sup> The role and power of subnational legislatures are probably more significant in order to assess the ‘quality’ of the democratic system where, like in the three constitutional orders analysed (and unlike many States in the U.S.) – Italy, Spain and the United Kingdom –, local and regional referenda are not a tool for approving or amending legislation.

<sup>III</sup> On the general relation between federalism and democracy, see Madison James, 1788, *Federalist Paper n. 46*; Elazar Daniel J., 1987, *Exploring federalism*, University of Alabama Press, Tuscaloosa-Alabama, 87-108; Dahl Robert A., 1989 *Democracy and its critics*, Yale University Press, New Heaven-London, 213 et seqq.; Stepan Alfred, 1999, ‘Federalism and Democracy: Beyond the U.S. Model’, in *Journal of Democracy*, 10 (4): 19-34; Bodenhamer David J., 2006, ‘Federalism and Democracy’, in Holdstedt Melissa V. (ed.) *Federalism. History and Current Issues*, New Science, Hauppauge, 49-60; Lecours André-Nootens Geneviève, 2009, ‘Nationalism and Identity in Contemporary Politics. Issues of Democratic Shared and Self-rule’, in Lecours André-Nootens Geneviève (eds) *Dominant Nationalism, Dominant Ethnicity, Identity, Federalism and Democracy*, Peter Lang (International Academic Publishers), Bruxelles, Bern, Berlin, Frankfurt am Main, New York, Oxford, Wien, 2009, 11-31.

<sup>IV</sup> From a terminological point of view, the use of the term ‘Region’ instead of ‘State’ or ‘Member State’ is not



particularly significant (in Canada, for instance, Member States are called 'Provinces'). What is important, however, is the endowment of powers of these subnational units (see next sections).

<sup>V</sup> Normally, in regional States, Regions do not pre-date the constitutional legal order. On the contrary, they are formed afterwards by mean of decentralization. The only exception is represented by the historical Autonomous Communities, such as Catalonia, País Vasco and Navarra. Indeed, the Spanish constitutional Court has affirmed that Autonomous Communities pre-dated the 1978 Constitution (see decisions no. 58/1982, 85/1984 and 76/1988).

<sup>VI</sup> Even though the Spanish Senate is formally the Chamber of territorial representation, since part of its members are appointed by the Parliaments of the Autonomous Communities, it actually fails to act in such a way. So far the Spanish Senate has always reproduced the same political dynamics existing in the *Congreso de los Diputados*, as Chamber dominated by national political parties.

<sup>VII</sup> When the Spanish Autonomous Communities were first established, the process for the adoption of the Statutes was different - depending on the procedure followed, Art. 151.1 Const. for the historical Autonomous Communities and 143 Const. for the others -, originally involving municipalities and provinces willing to create a new regional entity.

<sup>VIII</sup> Olivetti Marco (2003), 71-77, 'catalogues' Statutes on the basis of the procedure for their adoption and on whether the source of law in which they might be embedded (a) derives from an international obligation; b) is contained in a national constitutional Act (like the Italian regions with special Statutes); c) is an ordinary statute of the national Parliament adopted without any *formal* guarantees for the devolved authorities (as for Scotland, Wales and Northern Ireland); d) is adopted on the initiative of the local authorities of the relevant Region as an Act of the national Parliament (as in Spain); e) is approved by the relevant regional Assembly but its entry into force depends on the adoption as a national statute (as for the Italian Region with ordinary Statutes before 1999); f) is adopted as a regional law, having a peculiar status compared to other regional statutes (it is the norm on the law production at regional level and the source of authority).

<sup>IX</sup> However the positions of PP and PSOE were very different. The Statute of Catalonia was approved by 189 votes against 154 in the *Congreso de los Diputados* in 2006. It gained the votes also from MPs of the socialist group, even though many of them remained critical about the outcomes of the negotiations on the Statute. On the contrary, the PP voted against the Statute and expressed its convinced opposition to it by appealing to the Constitutional Court (according to Art. 162 Sp. Const.).

<sup>X</sup> Nonetheless there are important exceptions in which the role of the State counts a lot (depending also on the relationship amongst political parties), like that of the new Statutes of País Vasco in 2005 (*Plan Ibarretxe*) and of the Canarias Islands in 2006 that were vetoed by the national Parliament.

<sup>XI</sup> The argument according to which regional statutes would be devoid of "constitutional nature" because they are not expression of a constituent power, acting without limits, cannot be used to differentiate them by State Constitutions in federal states. Indeed, even State Constitutions are subject to constraints, first of all the need to respect the federal Constitution and the division of legislative competences. Moreover, both in federal and regional states the national Constitution very often fixes additional constitutional requirements upon subnational authorities, such as how the relationship between the state legislative and executive branches is shaped.

<sup>XII</sup> By the decisions of the Italian Constitutional Court on the new Statute of Tuscany (no. 372/2004), on the new Statute of Umbria (no. 378/2004) and on the new Statute of Emilia-Romagna (no. 379/2004); and by the decision of the Spanish Constitutional Court on the new Statute of Comunidad Valenciana (decision no. 247/2007) and that on the new Statute of Catalonia (decision no. 31/2010).

<sup>XIII</sup> As recognized by Balaguer Callejón Francisco (2007), above all before the second generation of Statutes (approved from 2006 and 2007), most aspects of the institutional design for the Autonomous Communities were left to the regional legislative acts by 'expanding' the contents of the Statutes. However, in the new Statutes approved many provisions once contained in these regional acts have now been included.

<sup>XIV</sup> Indeed, the regional Council of Basilicata has not approved a new Statute yet, while the entry into force of the new Statute of Molise, adopted on February 22, 2011 and once passed the review by the Constitutional Court, according to Art. 123, para. 5 It. Const. (decision no 63/2012), has been currently suspended. Instead the new Statute of Veneto finally entered into force on April 18, 2012 (after its final publication on the official Journal of the Region, B.U.R. no. 30, April 17, 2012), when the present article had been already finalised.

<sup>XV</sup> See, for instance, the decision no. 303/2003 of the Italian Constitutional Court.

<sup>XVI</sup> Amongst them, the Statutes of Catalonia, of Comunidad Valenciana, of Andalucía, of Aragón, of Balearic



Islands, of Castilla y León, of Extremadura.

<sup>xvii</sup> The reform of the Statutes involves many other aspects, such as the recognition of rights and the claim of being acknowledged as ‘nations’ within Spain, but they are not considered here not affecting directly Regional Assemblies.

<sup>xviii</sup> At the present the *Devolution in England Referendum Bill 2011* has been introduced in the national Parliament, as a second chance to involve England in the devolution process.

<sup>xix</sup> After all, the inclusion of Northern Ireland, which is constitutive and geographically part of Ireland, in the United Kingdom implicitly assumes the existence of a ‘special community’ in that Region; and Scotland was originally an autonomous Kingdom before the annexation (and even today appears to consider as feasible the perspective of a secession from the United Kingdom: see the Report presented to the Parliament by the Secretary of State for Scotland, *Scotland’s constitutional future. A consultation on facilitating a legal, fair and decisive referendum on whether Scotland should leave the United Kingdom*, January 2012, [http://www.astrid-online.it/Dossier--R3/DEVOLUTION/Documenti/Gov\\_Scotland-constitutional-future\\_paper\\_01\\_2012.pdf](http://www.astrid-online.it/Dossier--R3/DEVOLUTION/Documenti/Gov_Scotland-constitutional-future_paper_01_2012.pdf)).

<sup>xx</sup> See the *Memorandum of Understanding and Supplementary Agreements* Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, March 2010, [http://www.cabinetoffice.gov.uk/sites/default/files/resources/devolution-memorandum-of-understanding\\_0.pdf](http://www.cabinetoffice.gov.uk/sites/default/files/resources/devolution-memorandum-of-understanding_0.pdf), and the dozens of Concordats agreed on specific subject-matters, <http://www.scotland.gov.uk/About/concordats>.

<sup>xxi</sup> Out of the three, the Devolution in Northern Ireland, due to the contingency, has been the most dominated by a top-down approach, although every measure has always been negotiated.

<sup>xxii</sup> The Government of Wales Act 1998 excluded the conferral of legislative competences to the Welsh Assembly.

<sup>xxiii</sup> However, according to Mitchell James (2010), 98 the Scottish Parliament ‘is very much the child of Westminster. It is in its DNA’. What changes is essentially the proportional representation.

<sup>xxiv</sup> Actually at the origins of the Spanish democracy the ‘brand new’ rules of procedure of the Autonomous Parliaments largely relied on the provisions of the rules of procedure of the *Congreso de los Diputados*. Afterwards, following the reform of the rules of procedure of the subnational Parliaments, these rules reached their own peculiar configuration, departing from the original model (and although the Spanish Constitutional Court is used to read these rules of procedure through the lens of the national ones).

<sup>xxv</sup> The situation remains quite unique for Northern Ireland, whose institutional architecture is deliberately intended to avoid increasing political tensions.

<sup>xxvi</sup> This constitutional law opened the floor to regulate the form of government of the special Regions outside the Statute, by approving *ad hoc* laws by the absolute majority of the Regional Council’s members.

<sup>xxvii</sup> The action was brought before the Constitutional Court as a conflict arising from allocation of powers between State and Regions, according to Art. 134 It. Const. and led to decision no. 106/2002. The ‘example’ of Liguria was then followed by Marche, whose new Statute, approved in 2001, provided the new name of ‘Parliament of Marche’ to be put in any official document of the Region together with that of ‘Regional Council of Marche’. This denomination was struck by decision no. 306/2002 of the Constitutional Court.

<sup>xxviii</sup> The Scottish Parliament was not established in 1999. It had existed for centuries until it was adjourned in 1707 following the Act of Union. Significantly the opening session of the new Scottish Parliament in May 1999 began by saying that ‘the Scottish Parliament, which adjourned on 25 March 1707, is hereby reconvened’.

<sup>xxix</sup> ... and it neither had a glorious past such as the Scottish Parliament: the Welsh Assembly was a brand new devolved institution.

<sup>xxx</sup> A slight majority of the Scottish Parliament and Welsh Assembly’s members are elected through the first-past-the post system.

<sup>xxxi</sup> Actually in 2011 the first majority party government ever was appointed in Scotland. From 1999 to 2007 Scotland was led by a coalition government composed of the Labour and the Liberal-Democratic parties, while in 2007 a minority government was appointed following the great success of the Scottish national party, which was able to enlarge consensus in 2011 up to 69 out of 129 seats in *Holyrood*. Sometimes political dynamics and the shift in public opinion’s orientation can reverse the usual expectations originating from a certain electoral system.

<sup>xxxii</sup> In that decision one of the Justices, Pedro Cruz Villalón, in his separated opinion criticized the Court for having misinterpreted the scope of Art. 152, para. 1 Const., unreasonably extending its application.

<sup>xxxiii</sup> For instance, the Constitutional Court struck down a law enacted by the legislature of País Vasco that



tried to regulate the conditions to register before elections aiming at exercising the right to vote (decision no. 154/1998).

XXXIV This law provided that every electoral list declared its candidate to the Presidency of the Region, granting to the candidate of the most voted list the election by the regional Council (indeed, formally the President of the Region had to be elected by the Council); a stable majority in the Council, assigning the majority bonus (in order to reach at least 55% of the seats in the Council) to the most voted list; the dissolution *ex lege* of the Regional Council after the first two years of the term in case of withdrawal of the confidence relationship between the President and the Council.

XXXV Moreover, the entry into force of some regional electoral laws, such as that of Tuscany and of Marche, was suspended pending the adoption of the new Statute, according to the decision no. 196/2003 of the Constitutional Court. Therefore their effects have been postponed.

XXXVI These Regions are Abruzzo, Basilicata, Emilia-Romagna, Liguria, Piemonte and Veneto.

XXXVII The attribution of 55% or 60% of the seats depends on the percentage of votes obtained by the most voted regional list, whether below or above 40%.

XXXVIII The fragmentation in the Council has not disappeared, if not got worse, but it seems to affect more the functioning of the Council itself than the ability of the President of the Region to govern.

XXXIX The conferral of the majority bonus is not automatic, but depends on whether no list or coalition has got at least 60% of votes (provided to have obtained at least 45% of votes). See Regional law of Tuscany no. 25/2004 as modified by law no. 50/2009.

XL The number of the Assembly's components is fixed in the Devolution Acts in the UK; in the regional Statutes in Italy (see decision no. 188/2011 of the Italian Constitutional Court) and in the Statutes – which usually fix only the minimum and the maximum size of the Assembly –, but further clarified in the institutional laws and in the rules of procedures of the regional Assemblies in Spain.

XLI This is particularly evident in the UK, where the myth of 'parliamentary sovereignty' of Westminster has not been abandoned yet, notwithstanding the considerable changes derived from the EU law and the ECHR, whereas the devolved legislatures can always be deprived *ex lege* of their legislative competences by the national Parliament. In Italy, instead, whereas the *autodichia* (domestic jurisdiction) of the two national Chambers persists almost unaltered from the landmark decision no. 154/1985 of the Constitutional Court, since 1964 the Court has denied to the Regional Assembly of Sicily (and thus to the other Regional Councils) the same prerogative because of the different constitutional positions of the two parliamentary institutions in the constitutional architecture (see decision no. 66/1964).

XLII Indeed, the idea of having an official Opposition is embedded in majority system, where the first loser takes this role. But in a system, like that of Northern Ireland, where nobody can be considered as a loser in the election for social and political reasons and everyone, according to the most inclusive logic, has to participate in the decision-making process, 'the majority rule is a non runner' and thus an Opposition is not conceivable.

XLIII See Articles 45-49 of the Scotland Act 1998; Art. 16A of the Northern Ireland Act 1998; and Art. 46.6 of the Government of Wales Act. In the former Government of Wales Act 1998, the 'fusion' between the Assembly and the Executive was complete, since there was not an independent Executive branch. Executive functions were delegated by the Assembly to its executive committee.

XLIV Before 1999, instead, the President of the Regions, like in Spain, was elected by the Council amongst its members.

XLV The nomination is notified to the Queen by the Presiding Officers of the devolved Assemblies.

XLVI For instance, Art. 20 of the Northern Ireland Act 1998, as modified, establishes that the Executive Committee (the Executive) shall be chaired by both, the First Minister and the Deputy First Minister.

XLVII The text of the Northern Ireland Act talks about the choice of the 'political designation' by the members of the Assembly. This means that every member has to sign the Register of the Assembly by labelling himself as 'nationalist' or 'unionist' or something else in order to facilitate cross-party negotiations required for the passage of any bill. The system of designation was actually contested by the Alliance Party, by saying that it institutionalizes divisions.

XLVIII In País Vasco and Asturias political groups directly propose their candidates to the Assembly, without the intervention of the President of the Parliament.

XLIX In Catalonia, the Statute has introduced the new Office of *Consejero Primero* (first Counsellor of the Government), a sort of *primus inter pares* within the Executive, to whom the President delegates certain tasks.

L This kind of motion was approved from the end of the Eighties to the middle of the Nineties, in Galicia,



Rioja, Aragón, Canarias Islands, and only indirectly in Murcia. In this Community, actually, the motion was not approved but the President decided to resign anyway.

<sup>L<sup>I</sup></sup> However, it is worth mentioning that a constructive motion of no confidence has never been approved in the *Congreso de los Diputados*.

<sup>L<sup>II</sup></sup> Like the Statute of Castilla-La Mancha and Valencia.

<sup>L<sup>III</sup></sup> The Constitutional Court confirmed this interpretation of const. law no. 1/1999, recognizing an exclusive power of the President to appoint and remove the members of the Regional Executive (decision no. 12/2006).

<sup>L<sup>IV</sup></sup> The Region of Valle d'Aosta, one of the Regions with special Statutes, used the possibility given by const. law no. 1/2001 to adopt a regional law (no. 21/2007) on the election of the President of Region that turned to the previous model for the ordinary Regions, but introducing also brand new provisions: the President of the Region is elected by the Council, who can approve a constructive motion of no confidence against him and also a motion of no confidence against the other members of the Regional Government.

<sup>L<sup>V</sup></sup> As was mentioned above, the Italian Regional Councils were not particularly willing to try out new electoral laws that could have been a significant element of innovation.

<sup>L<sup>VI</sup></sup> The constitutional reform also had another 'victim', probably even more compromised than the Councils: the Governing bodies of the Regions (*Giunta regionale*), in search for a new role between the powerful Presidents and the Councils. By contrast, the real winner of the constitutional reform is the President of the Region, as also the Constitutional Court has somewhat admitted (decisions no. 372/2004 and 352/2008).

<sup>L<sup>VII</sup></sup> The term lasts four years for the Spanish Autonomous Parliaments and the UK devolved Assemblies and five years for the Italian Regional Council.

<sup>L<sup>VIII</sup></sup> However, things have changed at Westminster, too, because of the above mentioned Fixed Term Parliaments Act 2011.

<sup>L<sup>IX</sup></sup> Before the Government of Wales Act 2006 the legislative Assembly could not be dissolved beforehand. This could be explained by the absence of the traditional institutional separation between the legislative and the executive branches. The Executive Committee was a committee of the Parliament. See Rawlings Richard, 1998, 'The New Model Wales', in *Journal of Law and Society*, 25 (4): 461–509, who stresses the importance of the original understanding of the Welsh devolution as structurally different from the other two (in Scotland and Northern Ireland) aiming to reproduce at regional level the functioning of local institutions.

<sup>L<sup>X</sup></sup> For instance the Statute of the *Comunidad valenciana* does not fix any limitations on the use of this presidential prerogative that could prejudice the balance of power between legislature and executive.

<sup>L<sup>XI</sup></sup> The possibility to use a constructive motion of no confidence to substitute a President with another without election is not admitted (see decision no. 2/2004 of the Italian Constitutional Court).

<sup>L<sup>XII</sup></sup> In the new Rules (2005) of the Parliament of Catalonia a new procedure was introduced, called *ponencia redactora* (Rule 117), that substantially entitles standing committees to initiate legislation.

<sup>L<sup>XIII</sup></sup> The constitutional Court excluded this possibility when the original text of the Constitution was in force (decisions no. 59/1959 and 32/1961), but doubts arose about their admissibility in the constitutional framework after the Nineties.

<sup>L<sup>XIV</sup></sup> The '*petitum*' was related to the infringement by a law adopted by the President of the Calabria Region of the national Government's power to replace Region in case of inertia to act (Art. 120 It. Const.) and of the principle of loyal cooperation (Art. 118 It. Const.) and the decision was issued on the basis of a conflict of competence between Regions and State.

<sup>L<sup>XV</sup></sup> The introduction of a new source of law at regional level outside the domain of the Statute seems to be quite disputable. Indeed, the Statutes of autonomy are (or, better, should be) the only sources on regional law making, when it is not otherwise provided by the Constitution.

<sup>L<sup>XVI</sup></sup> Indeed many Statutes simply refer to the constitutional provisions, occasionally enlarging the lists of matters excluded.

<sup>L<sup>XVII</sup></sup> The power of the Executive to adopt regulations, on the contrary, seems to be well delimited to the matter of organization and falling within the competences of the Community (see decision of the Constitutional Court no. 33/1981 and 18/1982).



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# The legislative power of infra-national entities in The European States

by

Katia Blairon\*

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## Abstract

Regional legislative power carries the same title as national legislative power. However, it is obviously different in nature. If Acts are general and impersonal – characteristics that distinguish them from regulations – regional Acts are general and impersonal in scope and are limited to the territory and the regional population, whereas national law applies to the entire territory and national population, namely, at least in the case of shared competences, to all the territories and populations of the infra-State communities. Within the various different European experiences, it is difficult to identify a commonly shared movement regarding regional legislative powers.

In any case, however, regional legislative power is a fundamental element in the definition of the constitutionalism of the composed State in general and of the infra-state communities in particular.

## Key-words

Subnational constitutionalism, legislative power, legislative competences, territory, legislative assemblies



## 1. Introduction: The constitutional features of the region

Recognising the powers of specific infra-State entities requires rethinking some of the basics of Constitutional law. Therefore, according to the States, it is more or less accepted that these variously named entities (regions, States, *Länder*, autonomous communities...) enjoy broad powers and have some features that have long characterised the States which *contain* them. These features are often the constituent elements of a State and specifically, according to the well-known definition of public international law: a Government, a population and a territory. Regarding the region, the “elements” are generally included in the regional statutes, which define the form of Government, the territory and in the end the population of the region<sup>I</sup>.

### The territorial basis of regional legislative power

Regional jurisdiction is exercised within a framework that is territorially limited: it is the “*principle of territoriality*”<sup>II</sup> or the “*localisation*” of an interest in the regional area<sup>III</sup>. “The territory is nothing more than the area of the territorial validity of the legal order”<sup>IV</sup>. It is the normative framework: “it is therefore only a legal factor”<sup>V</sup>. Like the national territory, this aspect of the region is not generally defined by the Constitution. In Italy, it refers to most national territory<sup>VI</sup> and that of the Republic<sup>VII</sup>. A concurrent regional competence<sup>VIII</sup> is inferred in contrast to the provisions of the Constitution that address the “*development of the territory*” and the “*boundaries of local authorities*”<sup>IX</sup>. It is even implicitly included in the territory of the State or the Republic, undefined by the Constitution, in Article 119.

This raises the question of the territorial demarcation of regional jurisdiction. If the territory is “ground”, its air space undoubtedly remains the domain of the State. However, its maritime areas are more problematic considering the particular geography of Italy. The region is not the main owner of maritime public domain<sup>X</sup>, in which the State can always intervene<sup>XI</sup>. Therefore, the region does not have “*a territorial sea*”<sup>XII</sup>, but it can exercise some of its competences in this area, for example, in sea fisheries<sup>XIII</sup>, the maintenance of ports and the regulation of navigation. These specific competences are attributed to the region as such and are not intended to express ownership of the sea<sup>XIV</sup>: the “extension” of its



competence and “*its effectiveness to the extreme margin of maritime space around the territory, and over which, even in an ancillary role*” the power of the State may be exercised<sup>XV</sup>. The territorial issue is of great importance when it comes to the wealth of the soil and marine subsoil. Sardinia and Sicily have often invoked their jurisdiction over these resources to manage oil at sea. Unlike competences – or even land territories – the territorial sea is not shared between the State and the regions<sup>XVI</sup>.

The regional territory, in general, is defined more specifically by regional statutes<sup>XVII</sup>. As regards the Apulia region, the territory is “*property to protect and promote in each of its environmental, landscape, architectonic, historical, cultural and rural aspects*”<sup>XVIII</sup>. The geographic peculiarities of the region or a “part of its territory” are sometimes included in the statutes: mountains<sup>XIX</sup>, plains<sup>XX</sup>, islands<sup>XXI</sup>, countryside, forests<sup>XXII</sup> or the “*municipalities of lesser importance*”<sup>XXIII</sup>. The regional territory reappears in various forms in connection with recognised regional competences (*infra*), for example, in the fight against territorial inequalities<sup>XXIV</sup>, in “*economic, social and cultural development*”<sup>XXV</sup> by supporting the enterprises and the freedom of entrepreneurship in some specific regions<sup>XXVI</sup> or in the field of environmental protection<sup>XXVII</sup>.

The territory is an “essential element” of the Italian regions, not simply a “physical or geographical domain [or] spatial area” of regional competence, but rather “a point of reference for the community’s interests which have found their location”<sup>XXVIII</sup>. Because of their residence or activity, individuals are the recipients of regional standards.

Unlike the Spanish Constitution, whose Preamble refers to the “*peoples of Spain*”<sup>XXIX</sup>, the Italian Constitution does not refer to “regional peoples”.

### The basis of regional social competence

In addition to its territorial framework, the region is “*an entity representative of the general interests of its community*”<sup>XXX</sup>. The regional community “as seen in its various different social formations [...], is another essential element of the region as a natural bearer of important and legally protected interests”<sup>XXXI</sup>. This helps define “the social basis of the region”<sup>XXXII</sup>. In Spain, the regional community is defined in the Constitution as the “*peoples*” of Spain<sup>XXXIII</sup> or the “*nationalities or regions*”<sup>XXXIV</sup>. The Italian Constitution, by contrast, refers to the “*populations of regions*” in the case of the election of the Senate<sup>XXXV</sup>, the “*interested*



*populations*” of municipalities, provinces or regions in the case of a change in district or territory<sup>xxxvi</sup> and “*popular referendum*” concerning regional statutes<sup>xxxvii</sup>. The search for the “democratic element”<sup>xxxviii</sup> of the region is important because it is the source of the legitimacy of its various powers<sup>xxxix</sup>. The regional statute refers almost systematically to this democratic element, while, in the case of the President of the region, it restates the formula of Article 121 of the Constitution, according to which “*the President of the Regional Executive Council represents the region*”<sup>xl</sup>. In addition, the Articles only specify that the Regional Council also represents the regional community<sup>xli</sup> and that each regional counselor “*represents the whole of the region*”<sup>xlii</sup>. Other regional statutes state that “*the Council, as the representative of Calabrese society, exercises legislative power*”<sup>xliii</sup> and that it “*is the body of regional democratic representation, political direction and control*”<sup>xliiv</sup> and “*the legislative and democratic representation body of the region*”<sup>xliv</sup>. However, this social element is not determined by regional citizenship, as the autonomous Spanish communities well know. In Italy, this status is defined by the State and binds the citizen to the latter. Regions cannot claim for it in the name of a regional “people” since Italian Constitutional law only recognises one people: the Italian people whose sovereignty is enshrined in the Constitution and who, like the Constitution, cannot be divided. At best, it is better expressed in the various interests at stake. The development of regional autonomy and, therefore, the increasing importance of local interests, question this split in the expression of popular sovereignty. However, while taking note of the increase in regionalisation, the Italian Constitutional Court has invoked the unity and the democratic principle of popular sovereignty in its refusal to assign the name “Parliament” to a Regional Council on the basis of popular regional sovereignty<sup>xlvi</sup>. On the other hand, if the region is deprived of this fundamental element of sovereignty in particular, the auto-qualification of the community is a “factor of differentiation”<sup>xlvii</sup>, even for the construction of regional identity. It refers to citizens’ necessity to ensure their status, particularly in the region. Therefore, the Constitution stresses the need to involve citizens in the political, economic and social life of the region<sup>xlviii</sup> and protect the most disadvantaged<sup>xlix</sup>. The residents of the region are the other recipients of the statutes<sup>l</sup> which promote “*self-government*”<sup>li</sup>. Generally, the statutes do not refer to their population but rather to their Community(ies)<sup>lii</sup>, which are local<sup>liii</sup> or “*resident in the [regional] territory*”<sup>liv</sup>, or to their ethnic<sup>lv</sup>, cultural, religious<sup>lvi</sup> or linguistic<sup>lvii</sup> minority.



However, the existence and autonomy of the community cannot be guaranteed on the basis of the territory and people alone. These elements are governed by statutes – or constitutions – albeit within the limits of the provisions of the Constitution. Therefore, it is the national Constitution of the central State that defines the third element of the region, i.e., its “bodies of government” and its ability to determine its own form of government. In other words, this refers to its ability to develop a government authority: the scope of its jurisdiction in order to define its own form of government that will govern its population and its territory. Finally, this might be the constitutional element – otherwise constituent in some cases – of these sub-national entities.

Although these “constituent elements” are acknowledged to sub-national entities, they somewhat disrupt Constitutional law because they suggest the existence of, for example, several territories, peoples and governments as well as several legal orders and even several constitutions. They are expressed through statutes or constitutions – the very name generates debate – although they are usually expressed through less controversial and more accepted instruments and techniques. Instruments recognise a sub-national legislative power and techniques distribute powers between the central Government and sub-national entities. As such, one of the major innovations of some European Constitutions (such as the 1947 Italian Constitution) is “the end of the legislative monopoly and the advent of the polycentric legislative regime”<sup>LVIII</sup>. In other words, other powers are acknowledged which may create the Law or an Act in addition to the national Parliament, whose monopoly has long been recognised and theorised<sup>LIX</sup>. By definition, law is any standard or system of standards of the legal (or extralegal<sup>LX</sup>) order. In the usual legal sense, i.e., the formal sense, an Act is the text voted upon by the Parliament<sup>LXI</sup>. In an organic and formal sense, the law is completely different from a regulation, decree or order as well as the Constitution. Therefore, the law fits into a legal order, and more accurately into a normative hierarchical system. In this sense, laws are the rules that a political regime makes and are either supreme or subject to other standards. Whether they are supreme or subject to, State law refers to any rules of law and any provisions that are general, abstract and permanent in nature. They are traditionally national: the central State enacts laws. We are currently able to identify the existence of several types of laws, according to national experience: constitutional law, ordinary law, law delegated to the Government, even a referendum act. Acts can also be regional and, in this case are the source of a particular legal order.



Therefore, each sub-national entity is characterised by its own legal order, which it develops through its legislative power. This is defined as legislative polycentrism.

## 2. Differentiated Legislative Polycentrism

Therefore, in some States, including regional and federal ones, regional law is recognised along with national legislation and is a concept adopted by several constitutions, such as, regional law in the Italian Constitution, the legislation of the *Länder* in the Austrian Constitution, the “*right to legislate of the Länder*” in the German Basic Law and the legislative decrees of the autonomous regions (recognised as legislative acts) in the Portuguese Constitution. Like national laws, there can be several types of regional laws. In Italy, for example, a regional law can be statutory, ordinary, financial as well as provincial. In Spain, on the contrary, the statute of the autonomous community is not a regional act but rather an organic Act passed by the *Cortes Generales*.

Recognising the statutory power of sub-national entities does cause theoretical and practical problems in some European constitutional experiences. Part of the doctrine (for example in France and Britain) negates the legislative value of regional law in a technical sense. These normative acts only recognise the power of “autonomy” and not sovereignty. This assumes that since sovereignty cannot be shared because it is indivisible, the same applies to the legislative power resulting from it. The unity and indivisibility of sovereignty are the unity and indivisibility of the normative power of the State. Thus, sub-national communities are entitled to have regulatory authority that is authorised by the Parliament. It is not a stand-alone regulatory power (in France: Article 72 para. 3 C since 2003). In France, this idea is reflected in the famous formula: “a territorial entity administers, it does not govern” (Lucaire 2000).

Even if this state of the law is established through the unity and indivisibility of the State or the Republic (for instance, in France and Italy), some constitutions deny the existence of any other legislative power, establishing a single legislature. This is the case of the Irish Constitution (Article 15, paragraph 2) and the Romanian Constitution (Article 58) but this monopoly of the enactment of the Act seems to be reserved for the Parliament over any other power of the State. Although like Ireland, France grants two types of power to



territorial communities: a legitimate regulatory power and a regulatory power to be used on an experimental basis in the national laws and regulations governing their competences (Article 37-1 C). Overseas departments and regions can also benefit from the adaptation of legislation and national regulations (Article 73 al. 2 C). While in principle French law seems to deny any concurrent legislative power of the Parliament, it is distinguished by the limited and measured recognition of the *lois de pays* for New Caledonia in 1999 and Polynesia in 2004. If Article 77 of the French Constitution refers only to “certain categories of acts of the deliberative assembly”, the *lois de pays* are the Congressional deliberations of the deliberative assembly of New Caledonia on the competences already assigned or to be assigned that express the importance and specificity of the statutory autonomy enjoyed by the community. The nature of the *lois de pays* is specified in Article 107 of the 1999 Organic Act and has the force of law in the area defined in Article 99 concerning legislative subjects that were regularly attributed to the Congress of the Community<sup>LXII</sup>. So far, the country’s laws have also established rules relating to the source and collection of taxes and duties of any kind, a matter which falls within the jurisdictional area of the legislature<sup>LXIII</sup> and may not be challenged before the Constitutional Council, at least in the case of New Caledonia. Before the emergence of this difference in statute, another part of French doctrine considered asymmetric federalism<sup>LXIV</sup>.

According to a theory that is prevalent throughout the unitary European States, local authorities have no legislative power. They may not in principle have competences in the area that the Constitution assigns to the law. This theory is based on a particular conception of the Act, i.e., that it is a unilateral standard with a general and impersonal vocation enacted by the bearer of legislative power in the State under the conditions prescribed by the Constitution. This definition originated during the French Revolution and was summarised by Léon Duguit in the following statement: “If the law is a command that emerges from the sovereign power, it cannot be made only by the authority that holds this power”. Here again, we return to the bearer of national sovereignty, which precludes sub-entities from exercising the competences of sovereignty. The debate is the following: contrary to the State, the territorial community cannot simply be the community connected to a particular objective, i.e. a particular action, which determines the lack of sovereignty that characterises it<sup>LXV</sup>. Therefore, it is absolutely impossible for the infra-national to define its own jurisdiction, which is only explicit in the attributed fields as well as under the



conditions precisely defined by law as a State standard. In a unitary State, the territorial community is indeed the instrument of its territorial decentralisation. It is definitely required for the exercise of legislative power. But what happens in other forms of the State?

In federal and regional States, this possibility is more easily accepted, since it is the Constitution itself which organises it. Entities, which are different from the State, are also assigned legislative power through the distribution of competences. However, although legislative *power* is guaranteed, the features of this power, including those *constitutional* in nature, are controversial. This is evidenced by the fact that designating the regional legislative *body* a “Parliament” is often denied. In fact, the regional legislative body which is granted legislative power is referred to by a different name.

### The controversial issue of naming the legislative sub-State bodies

Some constitutions refer to these regional bodies as “legislatures”, for instance, in Spain (Article 152)<sup>LXVI</sup>, Finland (the province of Åland<sup>LXVII</sup>) and Portugal<sup>LXVIII</sup>. In other cases, although regional bodies have the power to act, the term Parliament has been denied to some local assemblies<sup>LXIX</sup>. Therefore, in Italy regions refer to it as “Regional Council”, including those with ordinary statute. The legislative body has been given a different name in only two regions with special statute: the regional Assembly in Sicily and the Council of the Valley in the Aosta Valley. The Marches region has attempted to call its regional Parliament “the Parliament of The Marches” and its councilors “deputies”<sup>LXX</sup>. Based on the provisions of the Constitution, particularly Articles 55 and 121, the Constitutional Court<sup>LXXI</sup> has stated that “*even the regional statutes [...] within the meaning of Article 123, paragraph 1, of the Constitution, are subject to the limit of being in harmony with the Constitution*”, both with its letter and its “*spirit*”<sup>LXXII</sup>. The Court had already denied the region the opportunity to have a “Parliament” and use the term “Parliament” “*within the regional statutes*” not because “*the organ to which it refers holds legislative powers and is representative in nature but [because] the Parliament is the seat of the national political representation (Article 67 of the Constitution) and this characterises its functions*”. In this sense, the “*nomen*” Parliament does not simply have lexical value, but it also has significant value, connoting, through the organ, its exclusive position in the constitutional organisation. It is precisely the connotative force of the word which prevents any use of it aimed to



*circumscribe in territorially smaller areas the national representative function exercised only by the Parliament*<sup>LXXIII</sup>. For the same reason the region cannot call its councilors “deputies”. According to the Court “*only the members of the Sicilian Assembly are referred to as 'deputies' pursuant to constitutional Act No. 2 of February 26, 1948. It is obviously an exceptional provision justified by historical reasons [...] which can be used to infer the faculty to use the title MP at the regional level. In fact, for all regions the “nomen” Councilor, imposed by the Constitution (sect. 122, para. 1 and 4) and the corresponding special statutes standards [...] is not modifiable nor overlaps with that of Member of Parliament, to which various Constitutional provisions (sect. 55, 56, 60, 65, 75 para. 3, 85 para. 2, 86 para. 2, 96 and 126) assign significant importance, identifying it in one of the two houses which compose the Parliament. Hence, the regional councilors are doubly prohibited from using the name Parliament and calling its members ‘Deputies’, which has an evocative force that is no less significant*”<sup>LXXIV</sup>.

In Italy, the phraseology of the Constitution also suggests a unicameral regional legislative power. Although it provides for the institution of the Council of the local autonomies<sup>LXXV</sup>, the latter, as its name indicates, may only have consultative functions. The regions are, however, free to strengthen their prerogative and create a “second Regional Chamber”<sup>LXXVI</sup>, instead of having to discuss it and consult with local authorities.

Conversely, it should be noted that local parliaments were designated as such in federal States and do not have the power to make laws, but rather only to adopt decrees<sup>LXXVII</sup>.

Finally, in some European experiences there are, however, sub-national entities which do have a Parliament. This is the case in Scotland and the German as well as Austrian *Länder*.

Whatever form these sub-national legislative bodies take – houses, parliaments, councils... – one of the major innovations of some Constitutions is that they have put an end to the legislative monopoly of the Parliament, thus allowing “the advent of a polycentric legislative regime”<sup>LXXVIII</sup>. They indeed foresee that, in addition to the State, sub-national entities also have the power to act.

These Constitutions allow for a plurilegislative State or the existence of several legislators, which therefore requires that the areas of intervention of each entity, i.e., their area of jurisdiction or even the distribution of these areas, be organised.



### 3. The Distribution of Competences among Several Legislators

Here again the sovereignty issue emerges. Emphasis is often put on the ability of the State to determine its powers, both within its borders (internal sovereignty) and at the international level (external sovereignty). This *Kompetenz-Kompetenz* is otherwise defined as “a power law (it is not a matter of force but of power in the legal order which it has founded), initial (because it is the source of this legal order), unconditional (because there is no external or prior standard) and Supreme (because there is no higher standard)”<sup>LXXXIX</sup>.

“One and indivisible” sovereignty is, on the other hand, the “power to create and break the law”. Therefore, it would likely be challenged by the existence of several legislators, like in Italy, Spain, Germany, Austria, etc. Part of the related doctrine notes that “the regional phenomenon [...] indicates [...] a *status of divided sovereignty* between the State and the regions and it is irrefutable that they may substitute the former in the exercise of sovereign functions (legislative in particular) *with attributes of identical powers*” and concludes that “the Italian Republic is no longer a “regional” State but a “Federal State”<sup>LXXX</sup>. If normative power is a decisive criterion<sup>LXXXI</sup>, the “sharing” of sovereignty raises a number of issues in this regard. Its “absurdity is, however, an interesting fact: the State terms of basic public law are unable to account for the phenomenon of [...] the *res publica composita*”<sup>LXXXII</sup>. A “relaxation of unit links”<sup>LXXXIII</sup> is particularly evident in its “transfer” to sub-entities – devolution – or a supra-national entity – the European Union<sup>LXXXIV</sup>, although the essence of sovereignty is precisely its ability to consent to its limitations.

Two different sources of “general and impersonal standards” are recognised in several European States: the law of the State and the law of the region. Therefore, both the State and the regions legislate through a number of powers that the Constitution has granted them according to their respective place in the legal order.

Italy has experienced an interesting evolution concerning the distribution of competences between the State and the regions. Article 117 of the Constitution renewed in 2001<sup>LXXXV</sup> no longer refers to “*legislative standards*” that the regions were able to adopt<sup>LXXXVI</sup> but to their “*legislative power*” in relation to their (legislative) functions. Therefore, the so-called “integrative” jurisdiction of application disappears. The system allows for two types of regional competence: concurrent and residual, in all matters not attributed to the State<sup>LXXXVII</sup>. Although listed in Article 117, paragraph 2, of the Constitution, the



competences of the latter remain important. The State exercises its competences in the following areas: the sword, the gown, the money<sup>LXXXVIII</sup>, the “*fixing of essential levels of benefits relating to the civil and social rights which must be guaranteed for the whole national territory*”<sup>LXXXIX</sup> as well as in criminal<sup>XC</sup> and civil law matters, international relations<sup>XCI</sup> and environmental protection<sup>XCII</sup>. Therefore, these are the State’s traditional functions. However, part of the doctrine emphasises the relative brevity of its list of competences compared to foreign federal experiences, which more clearly confer unitary functions on the State<sup>XCIII</sup>. In addition, the region can intervene in some of these areas of competence, such as, for instance, international relations, the European Union and the implementation of “*essential delivery levels*”<sup>XCIV</sup>. This list of State’s competences is not truly exhaustive and benefits others under the Constitution through the effect of the reserved act. The question is whether they only relate to “*the laws of the State*” or also extend to the “*laws of the Republic*”<sup>XCV</sup>, for which it evokes the possible intervention of a regional act<sup>XCVI</sup>. We should consider that the State, through its “*laws*”, also regulates *the Statute of Rome*<sup>XCVII</sup>, agreements and forms of agreements between regions<sup>XCVIII</sup>, the basic principles of the regional properties<sup>XCIX</sup>, the regional electoral system<sup>C</sup> and decides on the dissolution of a regional Council<sup>CI</sup>. The special statutes also recall the exclusive jurisdiction of the State. All of this is essentially justified by unitary reasons that the Constitution reinforces via other provisions: this is the case in the establishment of the Financial Equalisation Fund (Art. 119, para. 3) or substitutive power (s. 120, para. 2). Hence, the State has the jurisdiction to establish the “*basic principles*” of the competing legislation in the matters listed in paragraph 3 of Article 117 of the Constitution. The regions are competent to fix “*the regulation of details*”<sup>CI</sup>. Once again the matters involved are many (twenty) and important: scientific research, education, civil protection, food, development of the territory, transport, ports and civil airports, etc. This list of competences is not even definitive. It could even be altered in favour of the State: some have been transferred to the exclusive jurisdiction of the State (health protection), others are circumscribed to a “*regional*” nature<sup>CI</sup>. The 2011 Constitutional Reform attributed the rest of the competences to the “*legislative power*” of the regions<sup>CI</sup>. This “*residual*” competence has had to become “*exclusive*” since the 2005 constitutional reform, which established, in the renewed Article 117, para. 4, of the Constitution, that “*belongs to the exclusive legislative power to the regions*” matters such as health, education, the



definition of educational programs of “*specific interest of the region*”<sup>CV</sup>, the regional and local administrative police and “*any other matters not expressly reserved for the legislation of the State*”<sup>CVI</sup>.

Other Constitutions provide for assigning legislative power to several different entities. This notion of the plurilegislative State means limiting the scope of the acts of the legislature to some parts of the territory and excluding other in order to take into account local specificities. In some cases, this recognition may be marginal and by exception. This is particularly the case in some unitary States such as France, for example in Alsace-Moselle and Corsica, and should increase the possibility for legislative experimentation. In Portugal, two autonomous regions – the Azores and Madeira – have regional legislatures which legislate under the conditions laid down by the Constitution (Article 227) and act via “regional legislative decrees”, (section 229-4 C) not to be confused with “laws”.

By organising the devolution of legislative functions in the Scottish Assembly, i.e. the Scottish Parliament, the 1998 *Scotland Act* made the acts of the latter subordinated to the Westminster Parliament, which remains the only genuine Parliamentary Assembly and whose acts are considered the only true law. The Scottish “act” is limited in several ways. First, the Queen may, in principle, veto a bill, like the laws passed by Westminster. Then, it only has legislative power over the matters listed in the Scotland Act and cannot encroach on the powers of the British Parliament (the London Parliament will not legislate for the Affairs of Scotland). Finally, the Supreme Court controls the acts of the Scottish Parliament, but not those of the British Parliament.

Finally, in Germany, federalism is conceived as a form of separation of powers, thus guaranteeing liberties. Each of the 15 *Länder* has its own constitutional organisation with a Parliament (generally unicameral), an Executive elected by the Parliament and a constitutional control. The distribution of competences is complex and is organised into three groups: first, those which fall within the jurisdiction of the *Bund* (Foreign Affairs, Defence...); second, those under concurrent jurisdiction (in which the *Bund* and *Länder* can intervene); and finally those that are not included in the two first groups but fall within the exclusive competence of the *Länder*.

The methods used to distribute competences between the State and the regions “influences the characteristics of the form of the State”<sup>CVII</sup>. Each method reveals a characteristic: some are “federally inspired”, i.e., the enumeration of national competences, while others display “limited autonomism”, i.e. the precise definition of regional



matters<sup>CVIII</sup>. In all cases, the distribution of competences affects the inclination to develop the State in one way or another. Every method has its pros and cons. For its part, the list tends to “meet the requirement of legal security and guarantee territorial autonomies: we could not, in fact, talk about autonomy if the borders, i.e., the limits to the central State’s administrative and legislative activity, were not predetermined. However, we should consider that the borderline between the State and regional competences is never fixed at any given time, but rather is mobile”<sup>CIX</sup>. Therefore, the relation between the two legislators must be organised.

#### 4. The Relationship between the Two Legislators: from Cohabitation to Control

It would be illusory to want to strictly separate the respective areas of competence of the State and the region. Their distribution becomes more complex as the regions, which more and more are being called to intervene in areas in addition to the State, become more autonomous. Case law and the Constitution have identified the criteria intended to temper and harmonise the distribution system and make the exercise of powers consistent. This method may not be systematically applied in all matters and is complicated due to the unique relationship between the two legislators.

This relationship is first defined in terms of separation. Regional law intervenes in the jurisdictional area assigned to it by the Constitution. In legal terms, regional law in principle may not be subject to or substituted by State law, even accidentally. State law may not, in principle, repeal or replace regional law and vice versa.

Regional and state legislative powers are separate and distinct in their competences: “their relationship is not resolved through the application of the principle of hierarchy, but through the application of the principle of jurisdiction: it prevails over the act, either State or autonomous, which is competent to govern the given matter, with the incompetent Act being unconstitutional because it ignores the distribution of competences defined by the block of constitutionality” (Pierre Bon).

As is the case for all separated powers, collaboration should be organised. “One aspect of the principle of autonomy is, undoubtedly, the nature of the adopted criteria: to either



distribute powers between the central State and the Member States or regions or ensure the necessary coordination among the different institutional levels”<sup>CX</sup>. If the selected criteria imply mechanisms<sup>CXI</sup> of distributional mobility, they will be decisive for the quality of the relationship between the State and the communities.

The principle of loyal cooperation has been instrumental in the exercise of powers and has led to the emergence of another principle: subsidiarity. Both may be found not only in the various different European experiences, but also at the European level (EU) itself.

Another set of criteria for the distribution of competences is based on the principle of subsidiarity: pursued interest. Its name varies from State to State, in France it is called local interest and purpose<sup>CXII</sup> in Italy, though it still refers to the form of the aim pursued. However, the challenge is to identify the area of interest, especially when it is local: it should be defined and represent hundreds of provincial/departmental interests as well as thousands of municipal interests besides those of the regions and the State. However, the assessment of interest is inherently political and represents the point of view of the communities concerned since it “is necessarily *entrusted to their evaluation*”<sup>CXIII</sup>. It is precisely the competition between all of these interests which sometimes makes the system ineffective, and sometimes makes it dynamic.

However, in Italy, as in many other European countries, interest more than any other criterion has long been used to limit regional jurisdiction or, rather, in the intervention of the State in regional areas, by limiting regional action through “national interest”. In addition, it has served as the basis and justification for broad State control over infra-national communities, either before the Constitutional Court in some countries or before administrative judges in others. Therefore, they are both responsible for settling conflict. The Constitutional Court, in particular, would guarantee respect for the Constitution, though generally speaking it would benefit the State at the expense of others, i.e., the infra-national entities, under the legal and economic unity of the State. Here again, the evolution of regional access to Italian constitutional justice, which has been facilitated since 2001, and to a certain equality of status between the State and the regions<sup>CXIV</sup> is an important sign of the evolution of Italian regionalism and the relationship between the State and the regions.

Spain also wields exclusively judicial<sup>CXV</sup> control over the legislative or administrative acts of the Autonomous Communities.



If arbitration between legislative powers makes legal status appear equally accessible to constitutional justice by the State and the regions, under certain conditions it also leads to imbalance to the benefit of the State, which is authorised to act over other communities in order to protect essential interests and ensure the “unitary (or even uniform) exercise” of competence<sup>CXVI</sup>. This is also referred to as the substitutive or replacement power (Article 120, paragraph 2, of the Italian Constitution) of one authority by another one. This power – or this function – is variously intended to counteract either the possible inaction of a region or its improper performance.

Regional legislative power carries the same title as national legislative power. However, it is obviously different in nature. If Acts are general and impersonal – characteristics that distinguish them from regulations – regional Acts are general and impersonal in scope and are limited to the territory and the regional population, whereas national law applies to the entire territory and national population, namely, at least in the case of shared competences, to all the territories and populations of the infra-State communities. Within the various different European experiences, it is difficult to identify a commonly shared movement regarding regional legislative powers.

In any case, however, regional legislative power is a fundamental element in the definition of the constitutionalism of the composed State in general and of the infra-state communities in particular.

Generally, it questions who the unique bearer of sovereignty is, traditionally the only bearer of the power to make the law. Therefore, it raises the issue of the unique bearer of sovereignty and legislative pluralism, postponing the problem of the demarcation of the power of the central State.

More specifically, defining regional legislative power means defining several constitutional aspects of the region. Therefore, the definition of the various characteristic elements of this legislative power influences the extent of regional constitutional power. Beyond the mere consecration of a field of regional legislative expertise, it is indeed necessary to determine which institution should be in charge of promulgating the said act: should it be the Parliament and can it be referred to in the same way as a national Parliament? Can this Parliament consist of “deputies” or “councilors”?



In addition, it is necessary to define its field of application in the same terms as the national law, thus determining a territory, a population and a relevant public authority at the regional level. Finally, regional constitutionalism becomes more clearly defined, especially since it has recognised an appropriate competence, which defines its own competence (as is the case, for example, in Italian or Spanish regions which can ask for additional conditions of autonomy). Infra-State constitutionalism is almost paradoxically defined by the Constitution of the central State, which gives – or does not give – it a certain amount of latitude. Therefore, one type of constitutionalism (national constitutionalism) creates space for the other (regional constitutionalism), or rather it gives shape to its place.

This is particularly significant for the strengthening of regions, and therefore of their legislative autonomy. However, we must also be aware that even if the State should gradually withdraw from certain areas of competence, its role is fundamental and cannot be withdrawn completely. Economy, health and education are areas that national States have taken over, under the pressure of the international economic and financial crisis, either because of the need to ensure a minimum level of equality – either legal or economic – or because regional action alone is insufficient. Institutions are simply the “product of the free invention of men”<sup>CXVII</sup>. One of them is legislative polycentrism, whose complex nature is a reflection of man.

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\* Senior Lecturer in Public Law, Université de Lorraine.

<sup>I</sup> Cf. sect. 1 of the Statutes of The Marches and of Emilia-Romagna.

<sup>II</sup> Cf. Italian Constitutional Court, Judgement No. 829 of July 27, 1988, punto 2.5.

<sup>III</sup> Italian Constitutional Court, Judgement No. 21 of April 17, 1968, punto 4.

<sup>IV</sup> Kelsen 1997: 260-261.

<sup>V</sup> Darcy 2003: 79.

<sup>VI</sup> Sect. 16 and 117 of the Italian Constitution.

<sup>VII</sup> Sect. 10 and 16 of the Italian Constitution. See also sect. 80 and 120. The regional territory as such is not cited except in sect. 119 and 133 of the Constitution, the latter on the terms of its variation.

<sup>VIII</sup> Sect. 117, para. 3, of the Italian Constitution.

<sup>IX</sup> Sect. 120 of the Italian Constitution.

<sup>X</sup> Italian Constitutional Court, Judgement No. 150, May 9, 2003.

<sup>XI</sup> *Ibid.* Judgement No. 23 of January 26, 1957.

<sup>XII</sup> Italian Constitutional Court, Judgement No. 21/68, punto 4.



- XIII Statute of Sardinia, sect. 3; Statute of Friuli Venezia Giulia., sect. 4, para. 3; Statute of Veneto, sect. 2 letter l); Statute of Sicily, sect. 14, para. 1, letter l); Statute of Trentino Alto Adige, sect. 8, para. 15. Italian Constitutional Court, Judgement No.23/57.
- XIV Cf. Italian Constitutional Court, Judgement No. 21/68.
- XV Italian Constitutional Court, Judgement No. 23/57.
- XVI The Court refuses “to divide the seabed into territorial zone, contiguous zone and the high seas in order to define jurisdiction only concerning the activities which can be exercised in the portion of the seabed and the subsoil below the territorial waters”; in fact, these activities “are varied in nature and intensity” and the State exercises related competences in matters of “defence, navigation police, customs control, etc., while on the seabed powers with equal content and intensity for all that is at the level of the sea until the extreme limit of the continental shelf”: Italian Constitutional Court, Judgement No.21/68.
- XVII Statute of Piedmont, sect. 8.
- XVIII Statute of Apulia, sect. 2, para. 2.
- XIX Statute of Emilia-Romagna, sect. 10, para. 1; Statute of Tuscany, sect. 4, para. 1, letter v); Statute of The Marches sect. 4, para. 7; Statute of Umbria sect. 11, para. 2; Statute of Piedmont, sect. 8.
- XX Statute of Emilia-Romagna, sect. 10, para. 1.
- XXI Statute of Tuscany, sect. 4, para. 1, letter v); Statute of Sardinia, sect. 1. Sicily is defined exclusively by its islands: “Sicily, with its islands Eoles, Egadi, Pelagie, Ustica and Pantelleria, is an autonomous region”: Statute of Sicily, sect. 1. Statute of Umbria, sect. 11, para. 2; Statute of Apulia, sect. 2, para. 2.
- XXII E.g. Statute of Umbria, sect. 11, para. 2 and 5.
- XXIII Statute of Tuscany, sect. 4, para. 1, letter v).
- XXIV Statute of The Marches, sect. 4, para. 7: the region “recognises the specific nature of the mountainous territory and internal areas. It promotes policies of intervention and rebalancing to ensure an equal distribution of services and infrastructure, job opportunities and adequate conditions of life”. Statute of Piedmont, sect. 5, para. 1. Statute of Emilia-Romagna, sect. 10, para. 1. See also the Statute of Piedmont, sect. 2, para. 3 on social solidarity.
- XXV Statute of Calabria, sect. 54, para. 1.
- XXVI Statute of Tuscany, sect. 4, para. 1, letter n). See also Statute of The Marches sect. 4, para. 2.
- XXVII Statute of Calabria, sect. 2, para. 2, letter r). On the environmental “vocation” of the territory: cf. Statute of Piedmont, Preamble. Statute of Emilia-Romagna, sect. 3. See also Statute of The Marches, sect. 5; Statute of Piedmont, sect. 6.
- XXVIII Martines 2000: 633.
- XXIX Cf. Pérez Calvo 2000.
- XXX Italian Constitutional Court, Judgement No. 829/88, punto 2.5; Judgement No. 372, December 2, 2004, punto 2.
- XXXI Martines 2000: 634.
- XXXII Pérez Calvo 2000.
- XXXIII Preamble to the Spanish Constitution.
- XXXIV Sect. 2 of the Spanish Constitution.
- XXXV Sect. 57 of the Constitution before the 2005 reform.
- XXXVI Sect. 132 and 133 of the Constitution.
- XXXVII Sect. 123 of the Constitution.
- XXXVIII Pérez Calvo 2000.
- XXXIX *Ibid.*
- XL Statute of Calabria, sect. 34 1.a); Statute of Latium, sect. 41; Statute of The Marches, sect. 26, para. 1, a); Statute of Umbria, sect. 65, para. 1; Statute of Piedmont, sect. 51, para. 1; Statute of Apulia, sect. 42, para. 1; Statute of Emilia-Romagna, sect. 43, para. 1 a).
- XLI Statute of Emilia-Romagna, sect. 27, para. 2; Statute of Liguria, sect. 15, para. 1; Statute of Apulia, sect. 22, para. 1; Statute of Tuscany, sect. 1, para. 1; sect. 11, para. 1 and 4.
- XLII Statute of Emilia-Romagna, sect. 27, para. 2; Statute of Liguria, sect. 30, para. 1; Statute of Emilia-Romagna, sect. 16, para. 1; Statute of Apulia, sect. 24, para. 1; Statute of Latium, sect. 29; Statute of Umbria, sect. 56, para. 1; Statute of Piedmont, sect. 18, para. 2.
- XLIII Statute of Calabria, sect. 16, para. 1.
- XLIV Statute of Emilia-Romagna, sect. 27, para. 1.
- XLV Statute of The Marches, sect. 11, para. 1.
- XLVI Italian Constitutional Court, Judgement No. 106 of April 12, 2002.



XLVII López Aguilar 1999: 104.

XLVIII Statute of Apulia: sect. 13, para. 1; Statute of Emilia-Romagna, sect. 14 para. 1; Statute of Latium, sect. 3 para. 2; Statute of Liguria, sect. 6, para. 1 and Title II of Chapter II of the Statute: “*Relations with citizens*”; Statute of Piedmont, Preamble and sect. 2, para. 1 and 2.

XLIX Statute of Apulia, sect. 10, para. 1.

L Statute of Emilia-Romagna, sect. 15; Statute of Liguria, sect. 6, para. 1; Statute of Tuscany, sect. 3, para. 4.

LI Statute of Apulia, sect. 1, para. 3.

LII See, however, the meaning attributed to “*the enhancement of popular traditions*”: Statute of Calabria, sect. 2, para. 2 s) and the letter p). Statute of Sardinia, sect. 15, para. 2 (“*the Sardinian people*”). See also sect. 2 of the former status of Veneto: “*the self-government of the Venetian people is exercised in the forms respecting the characteristics and traditions of its history. The region participates in the enhancement of the cultural and linguistic heritage of the individual communities*”. Statute of Calabria, sect. 2, para. 2 s).

LIII Statute of Latium, sect. 3, para. 2.

LIV Statute of Emilia-Romagna, sect. 2, l, c). Statute of Piedmont, sect. 7, par. 4: the Statute protects “*the Piedmont community and Occitan, Franco-Provençale and Walser minority communities*”.

LV Statute of Calabria, sect. 2 para. 2, p). Statute of Piedmont, sect. 7, para. 3.

LVI Statute of Calabria, sect. 2 para. 2, p); Statute of Piedmont, sect. 7, para. 3.

LVII Statute of Calabria, sect. 2 para. 2, p); Statute of Apulia, sect. 4, para. 1.

LVIII D’Atena 1999: 383.

LIX The theory of the monopoly of power, including legislative power, has long derived from exclusive sovereignty, at least in France, in order to establish a central power that is therefore unique. The unity of power was thus established, and with it, in France, its centralisation.

LX In this sense, we refer to natural law and moral law, as opposed to positive law (substantive law).

LXI It can also be the text voted by referendum.

LXII Faberon (ed.) 2000.

LXIII Sect. 34 of the French Constitution.

LXIV Michalon 1982: 625.

LXV Sovereignty is often used as a criterion to distinguish the unitary State from the Federal one (Rolla 1998a: 36 and Beaud 1998: 85). But it has already met with several conceptual limits (Beaud 1998) when studied in the compound States. It is an important evolution (Luchaire 2000) which can be direct – by its “*transfers*” – or indirect by the growing autonomy of internal communities. Determining the sovereign allows for the characterisation of autonomy according to their respective and parallel, sometimes interrelated, developments. The form of the State will then in turn be defined in the light of the relationship that the autonomous entity and the sovereign establish or do not establish (on the relationship between the concept of sovereignty and federalism: Caravita 2002: 4).

LXVI The organisation of autonomous institutions is based on the election of a legislative Assembly via universal suffrage under a system of proportional representation, in addition to the representation of the various areas of the territory; a Council of Government in the Executive and administrative functions; and a President, elected by the Assembly from among its members and appointed by the King.

LXVII Sect. 75 (specific laws of the province of Åland).

LXVIII Cf. sect. 114 of the Constitution.

LXIX Blairon 2005: 437.

LXX Regional Deliberation of September, 25, 2001.

LXXI Italian Constitutional Court, Judgement No. 306 of July 3, 2002.

LXXII Italian Constitutional Court, Judgement No. 306/2002, punto 4.

LXXIII Italian Constitutional Court, Judgement No. 106 of April 12, 2002.

LXXIV Italian Constitutional Court, Judgement No. 106/2002, punto 5. Cf. also Italian Constitutional Court, Judgement No. 306/2002. See sect. 60 of the project of the 1997 Bicameral Commission which refers to the “*Regional Assembly*”. On the project Sperooni and the description of the “*regional Parliament*”: cf. Olivetti 2002: 210.

LXXV Sect. 123, last para., of the Constitution.

LXXVI Cf. Olivetti 2002: 362.

LXXVII For example: sect. 127 of the Belgian Constitution.

LXXVIII D’Atena 1999: 383.

LXXIX Pactet 2002: 44.



LXXX De Fina 1988: 3.

LXXXI Cf. Favoreu 2003: 159.

LXXXII Beaud 1998: 88 ; Pactet 2002: 44.

LXXXIII Rolla 1998a: 37.

LXXXIV Cf. Rubio Lara 2002.

LXXXV Constitutional Law No.3 of October, 18, 2001, Official Gazette of the Italian Republic No.248 of October 24, 2001.

LXXXVI Former sect. 117, para. 1, of the Constitution.

LXXXVII This is a reversal of the criteria of the distribution of competences to the benefit of the region, which was seen as “one of the fundamental points of a project that can be qualified as a strong supportive of federalism” (Vandelli 2002: 83). The doctrine identifies a typical criterion of the Federal States in the technique of the list of State powers (cf. Hertzog 2002: 244; Rolla 1998b: 19; Olivetti 2001: 86; Falcon 2001: 306) or at least a very important innovation (Cavaleri 2003: 132). State and regional legislators are granted “absolute equality” less under the new section 114 of the Constitution than by the same limits to which they are subject in their action (it is a “constitutional equal dignity”: Bassanini 2003: 25). However, this particular rule is not widespread in all federal experiments (Carli and Zaccaria 1998), which have seen several variations in the distribution of competences in the texts (cf. Rolla 1998b: 19 and López Aguilar 1999: 49 concerning Spain in particular and Rolla 1998a: 40 from a more general point of view) – sometimes setting the residual jurisdiction for the State – or in practice (cf. Croisat 1999, Volpi 1995: 99), which may result in a “disruption of competences as the initial balance [...] is broken” (Beaud 1998: 109).

LXXXVIII Sect. 117, para. 2 letters), l) and e), of the Italian Constitution.

LXXXIX Sect. 117, para. 2, m and i), of the Constitution.

XC Sect. 117, para. 2, l), of the Constitution.

XCI Sect. 117, para. 2, a), of the Constitution.

XCII Sect. 117, para. 2, s), of the Constitution.

XCIII Olivetti 2001: 92.

XCIV Sect. 117, para. 2, m), of the Constitution.

XCV Referred to the sect. 122, 125, 126, 132 and 133 of the Constitution.

XCVI Olivetti 2001: 93. The Constitutional Court evokes it implicitly in its Judgement No. 94/1985, punto\_3, about the protection of the landscape contained in sect. 9 of the Constitution: “*without a complete exegesis of the constitutional provision, it is sufficient to notice that, according to it, the pursuit of the objective of the protection of the landscape (and the historical and artistic national heritage) is obligatory for the Republic, i.e. [...], in the framework of their institutional competences, to all subjects*”.

XCVII Sect. 114 last para. of the Constitution.

XCVIII Sect. 117, para. 9. of the Constitution.

XCIX Sect. 119, para. 5. of the Constitution.

C Sect. 122, para. 1. of the Constitution.

CI Sect. 126, para. 1. See also sections 33, 116 last para., 118 para. 1 to 3, 125, 132 and 139 of the Constitution.

CII Italian Constitutional Court, Judgement No. 362 of December 19, 2003, cons. in law n. 5.3.

CIII Sect. 9, g), of the project No. 2544-B. The unitary principle reappears as it is guaranteed by the basic principles set by the State and applied uniformly throughout the territory. It is a limit to the legislative power of the regions and at the same time a point of reference for their field of action which is ensured by the Constitution: on the one hand in the elaboration of the *legge-cornice*, through the participation of regional and local representatives in the bicameral commission for regional issues, which gives its opinion on the bill whose rejection by the commission requires the adoption of the *legge* by a reinforced majority (the absolute majority of each House); on the other hand before the Constitutional Court which guarantees respect for each area of jurisdiction. The Law finally clarifies the terms of definitions of the fundamental principles by the State which may not delegate this task to the Executive as regards the “new” principles but which can only recognise the principles contained in the legislation in force: sect. 1, para. 4 of ActNo. 131/2003. See Bassanini 2003: 35.

CIV Sect. 117, para. 4. of the Constitution.

CV Sect. 117, para. 4 c), of the Constitution.

CVI Sect. 117, para. 4, e), of the Constitution. In this renewed system of distribution it seems that the differentiation between the two types of ordinary and special regions disappears. The reform significantly



increases the number of ordinary regions with the same jurisdictions that have characterised the special regions until that time. This is why Constitutional Act No. 3/2001 added a jurisdictional clause that is more favourable to the special regions and the autonomous provinces. Section 10 establishes that “*regarding the adaptation of the respective statutes, the provisions of this Constitutional Act also apply to the regions with special status and the autonomous provinces of Trento and Bolzano to the parties providing for more forms of autonomy than those already assigned*”. See for example: Italian Constitutional Court, Judgement No. 145 of April 12, 2005. Cf. Art. 11 of Act No. 131/2003. In Spain, the Constitution expressly confers legislative authority on the autonomous communities of first rank, but practice and jurisprudence have extended this power to the communities of second rank. The autonomous communities adopt “normative provisions” (Art. 150-3 of the Constitution). This is an example of the principle of the classical distribution of competences: 32 matters fall under the exclusive jurisdiction of the State (Art. 149-1 of the Constitution) and 22 are devolved to the autonomous communities (Art. 148-1 of the Constitution), but the unusual aspect of the Spanish situation is the condition that the status of each community has provided in the exercise of such jurisdiction (otherwise, it is State law that applies). In matters which are not listed in the Constitution but have been claimed by the status of the community, a residual clause applies (Art. 149-3 of the Constitution): the jurisdiction of the communities is thus presumed. The State may also, in its field of competence, only set the general principles, allowing the communities – or some of them – to enact complementary standards of legislation (Art. 150-1 of the Constitution). It may also decide to transfer or delegate competences (Art. 150-2 of the Constitution) to the communities. Conversely, it may intervene if general interest demands it and sets the necessary principles for the harmonisation of the laws of the communities.

CVII Rolla 2002: 48.

CVIII *Ibid.*, p. 48.

CIX *Ibid.*, pp. 48-49.

CX Rolla 1998b: 18.

CXI Olivetti 2001: 97.

CXII Italian Constitutional Court, Judgement No.7 of June 15, 1956.

CXIII Italian Constitutional Court, Judgement No.140, 141 and 142 of July 24, 1972. The interest of several communities in the same matter has been defined in France as crossed competence, making financing these competences complex and in turn the general system. Proposals regularly aim to remove some local communities, but without success (Blairon 2011).

CXIV However, equality is a goal that still has not quite been reached. Although the Constitutional Court’s procedural requirements for the region have been facilitated, the grounds of the law are still unequal.

CXV LO 7/1999 of April 21, 1999 attributes to the TC jurisdiction to resolve the conflict in defence of local self-government.

CXVI Cf. Italian Constitutional Court, Judgement No. 43/04, punto 3.3.

CXVII Rivero 1980: 213.

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# Comparing the Subnational Constitutional Space of the European Sub-State Entities in the Area of Foreign Affairs

by

Nikos Skoutaris

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## Abstract

Foreign affairs have been traditionally seen as an exclusive competence of central governments. However, over the last 30 years, European paradiplomacy has been progressively developing not least because of the institutional opportunities that the Union composite constitutional order provides for the participation of the regional tier in its decision-making processes. The present paper examines how the European multilevel systems have allowed for the creation of such ‘sub-national constitutional space’ enabling their constituent units to be active in the international arena. It does so by examining 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. Finally, it focuses on their autonomous external representation at the EU level. It argues that, despite conventional wisdom, States do not enjoy a monopoly of competences in the area of foreign affairs.

## Key-words

‘sub-national constitutional space’, ‘constituent diplomacy’, ‘foreign affairs’,  
‘comparative constitutional law’



## 1. Introduction

In his seminal *Federal Government*, KC Wheare ‘asserted that a monopoly of foreign affairs is a “minimum power” of all federal governments’ (Paquin 2010: 163). He pointed to the negative consequences of decentralization over foreign affairs not only for the respective national interests but also for the functioning of the international system. Similarly, Robert Davis noted that issues concerning international relations are at the heart of federal regimes (Davis 1967). Contrary to such conventional wisdom, the sub-state entities across the world have been engaging in international relations and conducting foreign policy parallel to the one of their central governments (Requejo 2010). Especially in Europe, during the last thirty years, sub-state diplomacy<sup>1</sup> has been developing to such an extent that it has been convincingly argued that its differences with classical state diplomacy has narrowed significantly (Criekemans, 2010a, Criekemans, 2010b, Criekemans, 2010c, Criekemans and Duran 2010). Such trend to allow the sub-state level to have competences in the area of foreign affairs is largely a by-product of the growth of the EU ‘which led the constituent governments [...] to demand a direct voice in EU decision-making affecting their constitutionally protected powers’ (Kincaid 2010: 19).

The scope of the present article, however, is not to explain the phenomenon of the rise of the constituent diplomacy in Europe *per se*. Instead, the aim of this contribution is to understand how the different European multilevel constitutional orders have allowed for the creation of such ‘subnational constitutional space’ (Williams and Tarr 2004: 3) that enables the respective component units to be active in the international sphere. To do that, the paper first analyses the relevant constitutional mechanisms that permit sub-state entities not only to conclude and implement ententes and formal international treaties but also to participate in the foreign-policy making of the central government including the EU decision-making processes (Part 2). Second, I examine the possibilities of the sub-state entities with legislative competences to represent their interests beyond the national borders with a special focus at the EU level (Part 3).

Our focus on the channels for sub-state representation at the Union decision-making processes does not negate the fact that, within a number of constitutional orders including the German one, EU law is not considered international law. However, the



significant participatory rights of the sub-state level at the EU multi-tier system together with an increasingly favourable legal framework for a more active presence of the regions beyond the borders of their own State<sup>11</sup> dictate the need to understand the EU level as their real template of discussion about their foreign relations and thus relevant for our analysis. Be that as it may, the present contribution starts ‘from a top-down [...] view to determine the quantity and quality of “subnational constitutional space” permitted by the national constitution’ to the sub-state entities (Williams and Tarr 2004: 13-14; Williams 2011: 1112). At the same time and in order to provide for a more complete picture, reference is made - when appropriate- to the relevant sub-state constitutional documents in order to better understand how and to what extent the relevant component units utilised such ‘subnational constitutional space’ (Williams 2011: 1114). The paper mainly focuses on the constitutional orders of those Member States where the regional tier enjoys a constitutionally grounded claim for participation in the policy-making processes. Those Member States include the federal Austria, Belgium and Germany and the regionalised Italy, Spain and the United Kingdom. The thesis of the paper is that the analysis of those constitutional orders and the practice of the sub-state entities question the traditional idea according to which States enjoy a monopoly of competences in the area of foreign affairs.

## 2. Creating and Implementing International Obligations

Conclusion of international agreements lies at the heart of the conduct of diplomacy. International actors negotiate, conclude and implement treaties virtually on a daily basis in order to achieve their policy goals. So, in this part of our article, we will firstly examine those constitutional provisions that allow the sub-state level of the European States not only to conclude international agreements but also to participate in the treaty-making process of the central governments, which remain the main actors in the international arena. However, given the effect of international and EU law on the constitutionally protected competences of the constituent units we also refer to the implementation phase of the international agreements and EU law within those multilevel orders.



## 2.1 Treaty-making powers of the sub-state level

As I already mentioned, the exercise of foreign policy has been traditionally within the domain of the federal government. However, given the vertical separation of powers, it is hardly surprising that the sub-state entities possess at least some treaty-making competences within those constitutional orders that they enjoy a ‘constitutionally grounded claim to some degree of organizational autonomy and jurisdictional authority.’ (Halberstam 2008: 142) However, as we will notice, such treaty-making powers of the governments of the component units are usually limited in three possible ways. One possible limit is that treaties concluded by the regional tier may be subject to consent, review, or abrogation by their nation-state government. This is the case in Austria, Germany, Belgium and Italy. Second, the treaty-making power is limited to areas that fall within the competences of the sub-state level in every multilevel constitutional order that we analyse (Kincaid 2010, 20). Third, the constituent units may not be able to sign treaties under international law but only cooperation agreements such as the ones signed by the UK devolved administrations. Starting with Austria, the competences of the *Länder* are extremely weak and limited to bordering States and their regions (Blatter et al. 2008: 470; Kiefer 2009: 68). In fact, Article 16(1) of the Austrian Constitution provides that the constituent units ‘can conclude treaties with states, or their constituent states, bordering on Austria’ ‘in matters within their own sphere of competence.’ Indeed, Article 54 of the constitution of the bordering *Land*, Vorarlberg, for example, accepts such geographic limitations by repeating almost *verbatim* the aforementioned provision. In addition, in order to conclude such an international agreement, the *Länder* should inform the central government and obtain its authorization before they sign it.<sup>III</sup> The control of the central government over the paradiplomacy is so extensive that the federal level has a constitutional right to ask a *Land* to revoke any agreement even if it was concluded in accordance with the aforementioned procedure. If a ‘*Land* does not duly comply with this obligation, competence in the matter passes to the Federation.’<sup>IV</sup> Such constitutional ‘straightjacket’ is hardly surprising for a constitutional order that has been described as ‘a federation without federalism.’ (Erk 2004)

In comparison to the Austrian *Länder*, it seems that their German counterparts enjoy stronger constitutional rights to conduct autonomous foreign policy through treaty-making. Article 32(3) of the German Basic Law recognises the right of the *Länder* ‘to



conclude treaties with foreign states with the consent of the Federal Government'. They may even, with the consent of the central government, transfer sovereign powers to trans-border institutions 'insofar as [they] are competent to exercise state powers and to perform state functions'.<sup>V</sup> Such provision is also compatible with the reasoning of Regulation 1082/2006 on a European grouping of territorial co-operation (EGTC). According to this relatively new legislative instrument, sub-state entities from different Member States may also establish an EGTC which enjoys legal personality under EU law.<sup>VI</sup> As such, the EGTC is able to act, 'either for the purpose of implementing territorial cooperation or projects co-financed by the' Union 'notably under the Structural Funds' or 'for the purposes of carrying out actions of territorial cooperation which are at the sole initiative' of Member States or the sub-state entities (Committee of the Regions 2007; Strazzari 2011).<sup>VII</sup>

Overall, it is noted that, although the German Basic Law gives the predominant role in the area of foreign affairs to the Federal Government,<sup>VIII</sup> the aforementioned provisions convincingly prove that the Federation does not monopolise the treaty-making powers (Hrbek 2009: 147). This finding is verified by political practice. For instance, Bavaria, which is traditionally very active in establishing and developing formal relations both with organizations and territories within the European Union as well as with different regions around the world, has concluded 32 bilateral treaties (Criekemans 2011).

Contrary to the Austrian and the German sub-state entities, the Belgian regions and communities do not have their own constitutions (Poppelier 2011). However, they enjoy the most strongly developed constitutional rights to maintain autonomous foreign relations worldwide (Paquin 2003: 627). This is largely a result of the fact that the Belgian constitutional order recognises the principle of parallelism between internal and external powers (Dumont et al. 2006, 44-46; Bursens and Massart-Piérard 2009: 95-97). According to Article 167 of the Constitution, the federal government conducts Belgium's foreign relations

*'notwithstanding the competence of Communities and Regions to regulate international cooperation, including the concluding of treaties, for those matters that fall within their competences in pursuance of or by virtue of the Constitution.'*



Despite this unique feature of Belgian federalism, according to which the Belgian sub-state level is under no form of political tutelage with regard to competences belonging to them, Article 167 is accompanied by a number of mechanisms for information, cooperation and substitution in order to ensure the coherence of Belgium's presence in the international arena (Bursens and Massart-Piérard 2009: 96). According to those mechanisms, the region/community involved in treaty negotiations should inform the Federal Council of Ministers, which in turn must decide within thirty days to suspend the negotiations. In that case, the Interministerial Conference of Foreign Policy<sup>IX</sup> -composed of representatives of the federal governments and the governments of the component units- decides by consensus whether to allow the treaty-making process to continue (Dumont et al. 2006: 45). Given this rather extensive 'subnational constitutional space', the Belgian constituent units have developed a thriving international activity. Flanders has concluded 33 exclusive treaties out of which 6 are multilateral. The Walloon Region has concluded 67 treaties while the French-speaking community 51 (Crickemans 2010a: 20).

Apart from the sub-state level of the three aforementioned federations, constituent diplomacy can be also observed in those EU Member States where there is a regional tier with legislative competences. For instance, in Italy 'regions may enter into agreements with foreign States and local authorities of other States in the cases and according to the forms laid down by State legislation.'<sup>X</sup> However such constitutional right is not unconditional according to Law No. 131/2003. In cases of agreements with sub-state authorities of other States, the prior communication of the Italian central government is a prerequisite. On the other hand, international treaties with other States may only be executed and performed regularly as an international agreement in force. This means that they should be first submitted to the Italian State and can 'be signed by the region only on the basis of granting full powers of signature as the regulation of international treaties provides for'. (Argullol i Murgadas and Velasco Rico 2011: 412) Such conditions have been accepted by the regional tier. For example, Article 71(2) of the *statuto* of *Regione Toscana* that 'in matters of regional responsibility, the Region is empowered to stipulate agreements with States and sub-state territorial bodies within the terms provided by the Italian Constitution and the sources from which it has drawn'.

In Spain, the Statutes of Autonomy, apart from being the basic fundamental norm of the Autonomous Communities,<sup>XI</sup> perform a constitutional function, by indirectly



delimiting the powers of the central government. So, although according to the Spanish Constitution the central government has exclusive competences over international relations,<sup>XII</sup> including treaty-making,<sup>XIII</sup> and the sub-state level lacks powers to sign international agreements or treaties, different Statutes of autonomy have nonetheless included special provisions on the foreign promotion of culture or vernacular languages,<sup>XIV</sup> international contacts with overseas migrant communities<sup>XV</sup> and foreign aid.<sup>XVI</sup> In fact, the Basque government has gone so far as to openly argue ‘for a limited understanding of the concept of international relations that reduces it to formal diplomatic representation, war and peace issues and the signing of treaties.’ (Lecours 2008: 11) It considers most of everything else as domestic activities and thus that it is entitled to be active. More importantly for our purposes, the evolving case law of the Constitutional Court has established what can be called the ‘constitutional framework’ for the international relations of the component units of the Spanish State (Aldegoa and Cornago 2009: 250). According to this,

*‘the autonomous communities are entitled to develop diverse international activities as far as these activities are instrumental for the effective exercise of their own powers that the Constitution assigns exclusively to the national government, and neither affect the national government’s international responsibilities nor create new obligations.’* (Aldegoa and Cornago 2009: 251)

This has been verified in its famous recent judgment on the Catalan Statute of Autonomy.<sup>XVII</sup> Chapters II and III of the new Catalan Statute that came into effect in August 2006 provide for quite an ambitious list of competences of the *Generalitat de Catalunya* in the international sphere. For instance, Article 195 provides that the Catalan administration ‘may sign collaboration agreements in areas falling within its powers.’ In spite of the fact that the majority of the provisions contained in those two chapters were challenged, the judgment did not declare any of them unconstitutional.

Finally and in order to complete the picture of treaty-making powers of the European component units, we note that, according to the UK ‘idiosyncratic constitution’, (Jeffery 2010: 104) the UK government enjoys exclusive competence over international relations.<sup>XVIII</sup> So, none of the three devolved administrations may conclude treaties under international law. However, they may conclude cooperation agreements with regions and



sub-state entities such as the one that Scotland has signed with the Chinese Province of Shandong (Jeffery 2010: 116).

## 2.2 Mechanisms for involving the regional tier in foreign policy-making

I have shown in the previous section that virtually all component units with legislative competences possess some treaty-making powers. However, the sovereign States remain the main actors in the international arena. So, it is of crucial importance to analyse the constitutional mechanisms that allow the sub-state entities to take part in the foreign policy making of the central government. In general, the participation of the sub-state authorities in the formulation of the foreign policy -including that for the EU - of the respective Member State is facilitated by legislative chambers composed of representatives of the regions and inter-governmental bodies whether interregional or joint national-regional ones.

In this part, I mainly focus on two fundamental questions. First, I examine whether the participatory rights of the regions in the foreign policy making process are constitutionally or legally guaranteed or guaranteed by non-legislative means. In the case of the upper chambers, the answer is rather straightforward. In the case of the coordination bodies, the picture is rather mixed. Secondly, I analyse whether the position adopted by the component units through those mechanisms is binding for the respective Member State.

Although, the Austrian *Länder* have only rather limited treaty-making powers, their ability to influence foreign policy making is stronger. Article 10(3) of the Austrian Constitution provides that the Federal Government should allow the sub-state tier an opportunity to present their views before the conclusion of treaties which affect their autonomous sphere of competence. With regard to EU affairs, the threshold is even higher. The Austrian constitution goes so far as to provide a requirement for the government to inform the regional and local authorities both directly<sup>XIX</sup> and indirectly through the *Bundesrat*.<sup>XX</sup> Where the proposed Union legislation should be implemented in accordance with a procedure, which requires the agreement of the *Bundesrat*,<sup>XXI</sup> then the Government is bound by the opinion of the upper chamber during the negotiations that take place in the EU framework. Similarly, if the State receives a 'uniform comment' from



the *Länder* -through either the Conference of Integration (*Integrationskonferenz*) of the Austrian *Länder* (IKL) or the non-institutionalised but very influential Conference of the Presidents of the *Länder* (*Landeshauptmännerkonferenz*)- on some Union legislative proposal within *Land* competence, it is bound to respect that opinion during negotiations and voting at the EU level.<sup>xxii</sup> The Government may only deviate from those unitary positions ‘for compelling foreign and integration policy reasons’.<sup>xxiii</sup> In that case, the reasons should be immediately communicated to the *Länder*. Where the EU subject matter lies outside the legislative powers of the *Länder* but touches on their interests, the federation must take into account the written opinion of the *Länder*. This obligation does not stem from the Constitution but from a constitutional agreement between the Federation and the *Länder* according to Article 23d(4).<sup>xxiv</sup>

In Germany, the Constitution does not clarify whether the *Bund* is authorised to conclude a treaty on matters under *Land* jurisdiction. So, in 1957, the Federal government and the *Länder* concluded the so-called *Lindauer Abkommen* agreement. According to this agreement, when treaties with foreign States are under preparation, the component units should be given the earliest possible opportunity to raise their concerns and demands (Hrbek 2009: 147). In addition, pursuant to Article 59 of the German Basic Law, the explicit assent of the *Bundesrat* is necessary for international treaties dealing with political relations between Germany and foreign states. Both those mechanisms ensure the participation of the *Länder* in exercising the treaty-making power of the federation.

The role of the *Bundesrat* is also pivotal concerning the EU affairs. Article 23 (4)-(5) of the German Basic Law and an *ad hoc* Act of Cooperation in 1993 (European University Institute 2008: 148) regulate the relationship between the Federal Government and the 16 *Bundesländer* that are united in the *Bundesrat*. According to paragraph 4, the Government informs the *Bundesrat* which can participate ‘insofar as it would have been competent to do so in a comparable domestic matter’.<sup>xxv</sup> Each *Land* having a weighted vote, the *Bundesrat* adopts by majority a common position of the *Länder*. The opinion of the *Bundesrat* carries varying degrees of influence depending on what kind of competences the relevant decision concerns. If the relevant decision concerns an exclusive competence of the Federal Government, the opinion of the *Bundesrat* just needs to be taken into account.<sup>xxvi</sup> If the decision affects ‘the legislative powers of the *Länder*, the structure of *Land* authorities, or *Land* administrative procedures [...] the position of the *Bundesrat* shall be given the greatest



possible respect in determining the Federation's position consistent with the responsibility of the Federation for the nation as a whole.<sup>xxvii</sup> In case of disagreement, there is a conciliation procedure (European University Institute 2008: 148). The federal government can override the *Bundesrat* veto in cases where the general political responsibility of the Federation and its financial interests are at stake (European University Institute 2008: 148). To complete the picture concerning the role of the German sub-state entities in foreign policy making we have to note that, by virtue of Article 23(1), the approval by a two-thirds majority of the *Bundesrat* is necessary for the ratification of Treaties that amend the Union structure. Such majority is the same with the one necessary for the constitutional revision of the Basic Law.<sup>xxviii</sup>

While the long-standing cooperative federal cultures of Austria and Germany have dictated those constitutionally enshrined obligations for information and consultation of the regional tier, the conflictual political system of Belgium has led to the establishment of a really inclusive coordination procedure. In order to understand how coordination is achieved in a system where there is no hierarchy of norms between the federation and the federated entities, we will use as an example the EU affairs. The relevant procedure is provided in the 1994 Cooperation Agreement between the federal government and the sub-state entities.<sup>xxix</sup> Generally speaking, it is the Directorate for European Affairs in the Foreign Ministry which has the responsibility to coordinate the Belgian positions within the EU. In order to achieve this, it regularly convenes a Coordination Committee on European Affairs. Every decision on the Belgian position is reached in the Directorate General by representatives of the federal prime minister and deputy prime ministers, of the minister-presidents of the different sub-state entities and of those ministers who are responsible for the subjects on the agenda. It is important to stress that all the decisions have to be reached by consensus, especially those ones that touch on regional or community competences. If consensus is not achieved, the matter can be referred to the Interministerial Conference for Foreign Policy and thence to the Concertation Committee. If agreement is not reached even in that phase, customary practice has been established that the representative of Belgium abstains in the Council. However owing to the Belgian tradition of consensus and to the fact that the Belgian influence in the Council deliberations would otherwise be completely lost, a common Belgian position is regularly reached (European University Institute 2008: 64-66; Sciumbata 2005: 117-118).



Contrary to the inclusive nature of the procedures existing in the three aforementioned federations, the case of Italy is somewhat different. Although the competences of the Italian sub-state entities to maintain foreign relations have been expanded, they still have limited means to influence Italian foreign policy. The main duty of the central government is to guarantee a constant flow of information to the Italian regions concerning any international activity both of the central government and the constituent units (Blatter et al. 2008: 473). With regard to the EU affairs, the Law No. 11/2005, which regulates the regional participation in European policy-making provides in Article 5 that when the relevant EU draft legislation is related to regions and local authorities, it should be transmitted to the competent territorial associations for comment; namely, the Conference of the Regions and the Autonomous Provinces (*Conferenza delle regioni e delle province autonome*, hereafter CRPA) and the Conference of the Presidents of the Assembly of Regional Council and of Autonomous Provinces. Upon reception, the draft legislation is forwarded by those two associations to the presidents of the regional executive committees and of the regional councils. They have twenty days to submit their comments to the government. If the legislation is of particular importance for the regions and the autonomous provinces or if one or more of the regions or the autonomous provinces so requests, the government convenes the Permanent Conference for the Relations between the State, the Region and the Autonomous Communities (*Conferenza permanente per i rapporti tra lo stato, le regioni e le province autonome*) to reach a common position within twenty days. After this period of time lapses or in cases of urgency the government can proceed. If the Permanent Conference so requests, the government puts a 'reservation of examination' (*riserva di esame*) in the Council of the EU.<sup>xxx</sup>

The Spanish Constitution of 1978, as I mentioned before, stipulates that the central government has exclusive power over foreign and defence policy,<sup>xxxI</sup> including treaty making.<sup>xxxII</sup> In addition the Spanish *Senado* cannot be considered as a mechanism for the collegiate representation of regional tier in the same way that the Austrian and the German *Bundesräte* can. However, the majority of the sub-state Statutes provide for the rights of the Autonomous Communities to be informed about international treaties signed by the central government and<sup>xxxIII</sup> to ask the central government to enter into international negotiations on matters affecting their competences,<sup>xxxIV</sup> while a number of them allow for the possibility of participation in international negotiations within the Spanish



delegation.<sup>xxxv</sup> The new Catalan Statute adopted in 2006 includes all such provisions. Thus it is very interesting for the ‘constitutional framework’ of the foreign affairs of the autonomous Communities that the Constitutional Court did not hold any of them unconstitutional.

Be that as it may, the main template for intergovernmental relations in the area of foreign affairs has been the EU. Article 6 of the Law 24/2009 of 22 December 2009, establishes the national parliament's duty to transmit any EU draft legislative act to regional parliaments, without any filtering procedure. However, EU matters within the respective policy fields are handled by the Sectoral Conferences. In 1992, the Sectoral Conference for Union Affairs (CARCE) was set up with top officials from the State and the Autonomous Communities. 5 years later it was formally institutionalised by virtue of Law 2/97. It now acts not only as a forum for the exchange of information and the implementation of Union policies but also for the participation of the Autonomous Communities in the preparation of the Spanish position in European decision-making. More analytically, as regards shared competences the central government tries to reach a common position with the Autonomous Communities although it retains the final say. With regard to exclusive regional powers, if the Autonomous Communities reach a common position, the State has to defend it at the EU level (Bengoetxea 2005: 55; Ross and Crespo 2003: 226).

Finally, in the case of the UK, within the framework of devolution, the relative framework can be found in the Memorandum of Understanding and the Concordats on Co-ordination of European Union Policy Issues between the UK government and the devolved administrations which are non-legislative acts.<sup>xxxvi</sup> Those agreements between the Whitehall and the devolved administrations envisage the full involvement of the devolved regional authorities in the formulation of the UK position in the EU and international relations touching on their responsibilities.<sup>xxxvii</sup> In general, the relevant UK negotiating position is discussed at the relevant Joint Ministerial Committee. Ministers and officials from the three devolved administrations work as part of the UK team, with the UK minister determining the final position and retaining the overall responsibility.<sup>xxxviii</sup>



### 2.3 Participation in the domestic process of implementation

As I have already mentioned, international and especially EU law affect the constitutionally protected powers of the sub-state entities. It is of cardinal importance, then, to understand not only when the sub-state entities may autonomously conclude international agreements and participate in the foreign-policy making of the central government but also their role in the domestic process of implementation of international law including EU law. Our starting point is that, in systems in which sub-state entities are assigned legislative powers that are constitutionally enshrined, responsibility for the implementation of Union legislation is shared between the ‘centre’ and the autonomous authorities (Raccah 2008). In that sense, it is hardly surprising that in federal and regionalised Member States there are special mechanisms on the one hand for the participation of the regional tier and on the other for ensuring compliance with their international obligations. The latter is of critical importance especially with regard to the Union law obligations given that a Member State might be held responsible for non-implementation even if the fault lies at the sub-state level. In fact, the CJEU has repeatedly held that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time limits laid down in a directive.<sup>xxxix</sup> For those reasons, in this part of my article I analyse both the mechanisms for the participation of the sub-state entities to the implementation of international law obligations including the EU ones but also the respective measures against non-compliance. A close look on such subsidiary powers of the central level allow us to appreciate the ‘sub-constitutional space’ of the regional tier in an area that has, arguably, led to a certain re-centralisation of competences (Bengoetxea 2005: 49).

In Austria, it is understood that the principles guiding the internal division of competences between the *Bund* and the *Länder* should be also followed when transposing and implementing international law. Article 16(4) of the Austrian Constitution provides that the *Länder* ‘are bound to take measures which, within their autonomous sphere of competence, become necessary for the implementation of international treaties’. Should a *Land* fail to comply with such international law obligation, competence for such measures passes to the Federation.<sup>xl</sup> An almost identical provision exists with regard to obligations deriving from EU law under Article 23d(5). According to it, if a *Land* fails to meet the



relevant Union obligation in time –and that failure is subsequently established by the CJEU- the competence to take appropriate measures is automatically but temporarily devolved to the Federation. The relevant federal statute or Decree enacted to meet the obligation ceases to be in force as soon as the *Land* has taken the necessary measure itself. Moreover, the law on financial relationship between the Federation and the *Länder* regulates that the *Länder* have also to pay the damage incurred by the Federation because of illegal behaviour that has led to a proceeding against Austria before the CJEU.<sup>XLI</sup>

On the other hand, German constitutional law does not consider EU law to be part of international law. Consequently, the internal division of powers applies also in the implementation of Union law unless otherwise provided for in the Basic Law.<sup>XLII</sup> With regard to international law, although Article 32 of the German Basic Law lacks clarity, it seems that, in accordance with the principle of ‘federal loyalty’ (*Bundestreue*), the *Länder* are bound by federal treaties and have to take all measures necessary for their application (Nagel 2010: 124). So, if a *Land* fails to fulfill an international or EU obligation, the *Bund* may invoke a breach of the constitutional principle of ‘federal loyalty’ (*Bundestreue*). In such cases, it is accepted that the existence of a breach can be established directly by a ruling of a national court (Mabellini 2005:78). Alternatively, Article 37(1) of the Basic Law authorises the German federal government to ‘take the necessary steps’, if a *Land* does not fulfil federal duties (*Bundeszwang*). The provision can also apply in the case of a *Land* not properly implementing international or EU law. A decision of the federal government needs the prior approval of the *Bundesrat* deciding by simple majority. Finally, if the federal government suffers financial damage for being held liable in an international *forum* it has a claim against the *Land* under Art 104a(5).

In Belgium, where the principle *in foro interno, in foro externo* applies, the federal State and the sub-state entities are individually responsible for transposing Union legislation each within its own sphere of competence (Bursens and Massart-Piérard 2009: 99). The problem arises when –more often than not- a given Union act concerns more than one tier of government. In this case, the legislation to be transposed is split into separate parts that correspond to the various authorities that have to implement it (Mabellini 2005: 71). In case a sub-state entity does not implement an international or supranational obligation, the Constitution allows the federal state to use its ‘*droit de substitution*’ in order to ensure fulfilment of the relevant supranational obligation.<sup>XLIII</sup> However the procedural conditions



to be met in order for this to happen are laid down by a special law.<sup>XLIV</sup> According to it, the defaulting sub-state entity should be given the chance to defend itself before the relevant international Court. If the relevant Court, for example the CJEU, has condemned Belgium, the federal level can adopt a law with a special majority which authorises the Parliament or the Government to take the necessary measures to comply with Belgium's international obligations after defaulting, sending the sub-state entity a formal notice to comply within three months (Mabellini 2005: 76).

With regard to Italy, following the constitutional reform of 2001, Article 117 recognises that the regional authorities can implement international and Union law in the fields of their legislative competences. In fact, following this amendment a number of regions introduced new instruments designed to ensure the regular implementation of EU directives (Bilancia et al. 2010: E-138). In case 'the regions [...] fail to comply with international rules and treaties or EU legislation', Article 120(2) provides that the Government may act in substitution. In certain cases, the State is even given the authority to act in a preventive way. However, all those national measures aiming at avoiding non-compliance are temporary measures that can be substituted by regional acts (Bilancia et al. 2010: E-167).

The Spanish Constitution, in strictly legal terms, does not include the implementation of the Treaties within the international relations domain. 'Consequently, it does not establish the power to implement treaties either for the central government or for the autonomous communities.' (Aldecoa and Cornago 2009: 251) In contrast, some Statutes of Autonomy provide for the implementation of international treaties in the areas of their own competence.<sup>XLV</sup> For instance, Article 196(4) of the Catalan Statute of Autonomy provides that the *Generalitat* 'shall adopt the necessary measures to carry out any obligations arising from international treaties and conventions ratified by Spain or binding on the State within the area of its powers.' Following such ambiguity of the Constitution, the Constitutional Court's case law seems to suggest that the most important aspect of 'this issue is not the distribution of powers but the idea that both the central government and the autonomous communities are obliged to comply with international treaties adopted by Spain.' (Aldecoa and Cornago 2009: 251)

With regard to the Union obligations, however, the Court has been more precise by holding that any requirement to transpose EU law into the Spanish legal order should not



give a right to the State to impinge the competences of the regional authorities (Ross and Crespo 2003: 220). However, occasionally, the State government adopts framework laws (*ley de bases*) for the implementation of directives (Bengoetxea 2005). More importantly, the Constitutional Court of Spain has interpreted Article 149(3) of the Constitution (principle of supplementary character) as allowing the Spanish government to pass laws of supplementary application in order to avoid State failure to implement Union law.<sup>XLVI</sup> However, the State cannot use this provision to justify the application of State law in an area that it does not have explicit competence. It can only use the principle of supplementary character for those powers expressly included in the Constitutions and the Statutes of Autonomy.<sup>XLVII</sup> Be that as it may, Article 150(3) provides also for an exceptional and extraordinary instrument for ensuring the compliance with international and Union obligations. This provision stipulates that whenever the general interest so requires, the State may pass 'laws of harmonisation' even in matters within the jurisdiction of the Autonomous Communities. It is for the *Cortes* to decide by an absolute majority in both chambers when such laws are necessary (Ross and Crespo 2003: 220).

Finally, point 21 of the non-legally binding Memorandum of Understanding stipulates that the three UK 'devolved administrations are responsible for observing and implementing international, European Court of Human Rights and European Union obligations which concern devolved matters.' However, it is the responsibility of the lead UK Department to formally notify the administrations of Northern Ireland, Scotland and Wales of any new international commitment or EU obligation concerning devolved matters.<sup>XLVIII</sup> Following that, in bilateral consultation with the relevant UK Departments and the other devolved administrations, they decide 'how the obligation should be implemented and administratively enforced (if appropriate) within the required timescale.'<sup>XLIX</sup> However, although the devolved administrations are responsible for implementation of the UK international obligations within their competences, the UK government reserves by law the right to intervene.<sup>L</sup> In particular, if the UK government were to be fined for the failure or implementation or enforcement of a Union obligation by a devolved administration it would deduct the money from the block grant payable to the devolved administration.<sup>LI</sup>

Lately, the UK government has suggested the introduction of a new section 57A into the Scotland Act to allow UK Ministers, concurrently with Scottish Ministers, to



implement international obligations in relation to matters within devolved competence. The rationale for this clause is to allow UK Ministers to implement international obligations on a UK basis where it would be more convenient to take action on a UK basis, rather than Scotland separately having to implement the obligations. The Scottish executive has been less enthusiastic about such suggestion and it remains to be seen what Westminster will legislate.<sup>111</sup>

### 3. The Representation of sub-state entities beyond the national borders

What I have examined until now, is how the sub-state entities participate in the international arena by concluding ententes and international agreements, taking part in the foreign policy making of the central government and implementing treaties concluded by the State. What remains to be seen is how their *ius legationis* i.e. their right for autonomous external representation is foreseen within those multilevel constitutional orders. Clearly, compared to how their *ius tractandi* is enhanced by the respective national constitutional frameworks, States have been more hesitant to provide for a sub-national constitutional space that would allow effective autonomous external representation of the regional tier. The reason being that most of the sovereign States consider international representation as part of their exclusive domain. In that sense, there are very few European regions as active as Quebec which has international representation in more than twenty-five countries boasting seven “general delegations” (Brussels, London, Paris, Mexico City, Munich, New York City, and Tokyo), five “delegations” (Boston, Chicago, Atlanta, Los Angeles, and Rome), as well as more than a dozen smaller units, including immigration and tourism offices (Lecours 2010:33).

The main European exception to this rule seems to be the Belgian sub-state entities that may even appoint their own ‘diplomatic’ representatives abroad autonomously. However, this right is not unfettered. It is the Belgian federal Minister of Foreign Affairs who places the ‘attachés’ (today upgraded to the higher position of “conseiller”) of the regions and communities on the diplomatic lists of the Belgian embassies (Criekemans 2010: 48). Still, the sub-state entities of Belgium ‘have the option of designating their own representatives abroad, whether as part of, or separately from, the diplomatic and consular



posts of the Belgian State' (Paquin 2010: 176). In fact Flanders has even become an 'associate member' of a multilateral organization, the World Tourism Organisation (Crickemans 2010).

The extensive rights for autonomous representation in the international arena of Belgian sub-state entities are pretty unique within the European constitutional landscape and undoubtedly their Austrian, German, Italian, Spanish and UK counterparts do not enjoy similar ones. This does not mean, of course, that they do not represent themselves in the international arena at all. For instance, there is a total of 130 representations and offices of all German *Länder* abroad (Nagel 2010: 125) while Scotland has representative offices in Brussels, USA and China and a network of nineteen Development International offices in three macro-regions: Asia-Pacific, Middle East and Africa and North America (Jeffery 2010: 115). However, all this thriving activity is not so much a by-product of constitutional structures but rather a result of political initiatives.

Despite that, there is an area of sub-state activities beyond the national borders that is regulated both by supranational and –more importantly for our purposes- national constitutional law: the participation of the sub-national units to the EU decision-making processes. Overall, we can note that despite the complexity of the institutional framework that allows the representation of the regional interests in the EU decision-making processes, the EU affairs have been the main template of discussion about foreign relations (Requejo 2010). In other words, the autonomous external representation of most of the European constituent units takes place within the Union order. For this reason, we will focus on the relevant legal framework for the representation of the sub-state interests at the EU sphere as the prime example of representation beyond national borders.

### 3.1 The Representation of the regional interests at the EU

#### 3.1.1 Council

One of the first steps the EU did to respond to the gradual regionalisation process that many EU Member States were undergoing was the opening-up of the Council of Ministers to representatives from sub-state entities. Indeed, the Maastricht Treaty amended the then Article 146 TEC, dropping the reference to national governments. The new wording allowed Member States to be represented in Council sessions by members of regional authorities. It is difficult to overstate the constitutional significance of this



amendment that has survived all subsequent Treaty modifications. However, it is quite interesting to note that the political science literature is divided on the usefulness of such a provision for regions to represent their Union interests (Tatham 2010: 59). Recently it has been argued that such a tool can allow regions to represent distinctive interests at a crucial stage in the EU policy process (Tatham 2008: 499-502).

Be that as it may, Article 16(2) TEU provides that '[t]he Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.' It is not prescribed to which internal level of the government that representative shall belong. Thus, even Ministers from regional governments are allowed to represent their Member States if the internal constitution so provides. In addition, pursuant to Article 5.3 of the Council's rules of procedure 'officials who assist them' may accompany the members of the Council.<sup>LIII</sup> There is no legal requirement that the official should originate from the same government as the representative. Hence, it is possible to have mixed delegations of federal and regional minister.

However, in the composite Union constitutional order one has to examine the national constitutional framework to appreciate the importance of this provision. Indeed, it seems that only a small number of regional authorities can benefit from this arrangement. The usual suspects comprise the sub-state entities of the three federations, the Italian regions and autonomous provinces of Trento and Bolzano, the Spanish Autonomous Communities and the UK devolved governments.

Starting with Austria, the relevant provisions may be found in Article 23d. According to this provision, if the EU subject matter concerns the legislative powers of the *Länder*, there are two options. The first option entails Austria to be represented in the Council by a federal minister who is bound to the opinion of the *Länder*. In fact s/he 'may deviate therefrom only for compelling foreign and integration policy reasons.'<sup>LIV</sup> Paragraph 3 of the same Article, however, offers the federal government a second option to authorise a representative from the *Länder* to be present in the Council on Austria's behalf. This representative is bound by the common position of the *Länder* as expressed in a decision by the 10 *Länder* Prime Ministers (*Landeshauptleutenkonferenz*). In the Council meeting he has to consult the competent federal minister who sends an associate to the representative into the Council meeting.<sup>LV</sup>



With regard to Germany, representation in the Council depends on the issue at stake. Article 23(6) of the German Basic law provides that if the EU subject matter predominantly lies in the legislative powers of the *Länder* a member appointed by the *Bundesrat* may represent Germany.<sup>LVI</sup> This minister usually has the mandate for a certain time (1-3 years).<sup>LVII</sup> In practice, Germany's representation by a regional minister designated by the *Bundesrat* is exceptional. In fact, under the federal reform of 2006, their exclusive right to speak for Germany is now restricted to education, culture and broadcasting (European University Institute 2008: 148).

The Belgian sub-state entities may also represent the federation in the Council. The framework, however, is more sophisticated and finely tuned than the ones in Germany and Austria. Following the constitutional reforms of the early 1990s, a Cooperation Agreement was drawn up in 8 March 1994 between the federal government and the regions and the communities. The Agreement lays down the representation and the coordination of the Belgian position in the Council and is based on three principles: consensus, mixed delegation and rotation. It was amended in 2003 following the regionalisation of agriculture and fisheries.<sup>LVIII</sup> As far as representation of such commonly agreed positions is concerned, the 1994 Agreement distinguished four categories. Category I concerns all Council topics which relate to the exclusive federal competences. Category II deals with issues the dominant share of which are a federal subject matter while Category III with those the dominant share of which are of interest to the sub-state entities. Category IV includes Council topics that touch exclusively on the competences of the sub-state entities. In Category I, Belgium is represented by the federal government while in Category IV by a representative from the sub-state entities. In the latter case, the sub-state entities decide together who represents them. In Categories II and III, a system of 'assistance' applies. The delegation is headed by a member of the government which has a dominant share, with an assistant being a member of the government which has the non-dominant share. The head of the delegation votes whereas the 'assistant' politically controls his behaviour and has the right to speak. Finally, the 2003 Cooperation Agreement added two more categories. Category V concerns Council configurations that touch upon the competences of one regional government. In fact this Category refers only to the competence of Flanders with regard to fisheries. Unsurprisingly, in that case, the Flemish government represents Belgium. Category VI, finally, refers to exclusive regional competences but with the federal



government taking the lead. This only applies to Agriculture (Sciumbata 2005: 113-115). It is worth mentioning that similar Cooperation Agreements as the ones of 1994 and 2003 have been signed between the federal level and the sub-state entities with regard to the Belgian representation in a number of international organisations (Paquin 2010: 176).

But as we mentioned above, apart from the regional tier of the three federations, the sub-state entities of the three regionalised States namely Italy, Spain and the UK have also benefited from this arrangement. Under Article 5 of Law No. 131/2003, Italian regions can participate in the work of the Council of the EU and its working groups and can work with the Commission and its expert committees in areas of regional legislative competence, following agreement in the *Conferenza Stato-Regioni* (Bilancia et al. 2010: E-142). Moreover, in March 2006 the government and the sub-state entities signed an agreement which provides among else that Italy may be represented by a regional official in the Council. However, this may take place after an agreement is reached within the framework of the *Conferenza Stato-Regioni* (Bilancia et al. 2010: E-142).

In Spain, the culmination of efforts begun in the 1990s resulted in an agreement concluded on 9 December 2004 which allows the participation of the Autonomous Communities in the Council in four configurations: Employment, Social Policy, Health and Consumer Affairs; Agriculture and Fisheries; Environment; and Education, Youth and Culture (D'Atena 2005: 17). According to this Agreement concluded by the CARCE, the relevant sectoral conference designates one Autonomous Community to represent all in the forthcoming period. This Autonomous Community then seeks agreement of the others on the common position and with the delegation of Spain, and attends the Council (European University Institute 2008: 286).

Finally Ministers from the three devolved administrations (Scotland, Wales and Northern Ireland) are allowed to attend the Council by agreement with the UK government.<sup>LIX</sup> It is the lead UK Minister, however, who decides on the composition of the UK team, taking into account that the devolved administrations should have a role to play 'in meetings of the Council of Ministers at which substantive discussion is expected of matters likely to have a significant impact on their' competences.<sup>LX</sup> It is the head of the delegation who, also, has the overall responsibility for the negotiations and agrees to Ministers from the devolved administrations speaking for the UK.<sup>LXI</sup> The Concordat clarifies that 'they would do so with the full weight of the UK behind them' because the



positions to be taken within the Council would have been agreed in advance at the relevant Joint Ministerial Committee.<sup>LXII</sup>

### 3.1.2 The European parliament

Despite its importance for the democratic life of the Union, the academic literature has largely overlooked the role of the European Parliament as a channel for regional representation in the EU political structure. The reason for that might be found in the fact that the constituency to elect MEPs in the vast majority of the Member States is a single State constituency. It is only in Belgium, France, Italy, Ireland and the UK that the MEPs are elected on the basis of regional constituencies. In those cases, however, it could be argued that the regional tier is indirectly represented in the political life of the Union (Tatham 2008: 504-506).

### 3.1.3 The Committee of the Regions

Established in 1994, the Committee of the Regions is an EU advisory body. On a proposal from the Commission, the Council unanimously determines the composition of this political Assembly whose members may not be more 350. However, it is the Member States themselves that decide their representatives in the Committee. The only sufficient and necessary condition that the Treaties provide is that the members of that body should be ‘representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly.’<sup>LXIII</sup> This has allowed the States to adopt very different approaches to the rules concerning their representation. For instance, with regard to the form, while in Austria there is a constitutionally enshrined rule concerning the representation of the Federation to the Committee,<sup>LXIV</sup> in Belgium, Germany and Ireland, the rules consist of legislation, in Italy of regulations and in Spain and Portugal the appointment of the members of the delegation is by means of parliamentary resolutions that are not legislative (D’Atena 2005: 20-21). But also with regard to which level of administration actually represents the Member States, the diversity cannot be overstressed. More specifically, delegations from federal or regionalised States such as the three federations, Spain and Italy are predominantly regional while in



non-regionalised such as the Netherlands, Sweden, Denmark Luxembourg and Ireland the representatives come exclusively from local authorities (D'Atena 2005: 20-21).

Be that as it may, it seems that the Committee of the Regions provides for a *forum* through which the sub-state entities can exert influence in the EU decision-making processes. So, the obvious question to be made is in which policy areas this advisory body consults the European Parliament, the Council and the Commission. The answer seems to be when the Treaties so provide and in all other cases that one of those institutions considers it appropriate.<sup>LXV</sup> Generally speaking, though, the Treaties provide for the consultation of the Committee in the areas of transport,<sup>LXVI</sup> employment policy,<sup>LXVII</sup> social policy,<sup>LXVIII</sup> the European Social Fund,<sup>LXIX</sup> education and youth,<sup>LXX</sup> vocational training,<sup>LXXI</sup> culture,<sup>LXXII</sup> trans-European public health,<sup>LXXIII</sup> infrastructure networks,<sup>LXXIV</sup> economic and social cohesion,<sup>LXXV</sup> the environment<sup>LXXVI</sup> and energy.<sup>LXXVII</sup>

However, the Committee of the Regions can influence the shaping of the EU constitutional order by some other means as well. According to the Lisbon Treaty, it can also bring annulment procedures before the CJEU 'for the purpose of protecting its prerogatives.'<sup>LXXVIII</sup> This right of direct access to the Court is further elaborated in the Subsidiarity Protocol. Article 8 provides that it can bring 'actions against legislative acts for the adoption in which the [TFEU] provides that it be consulted.' It remains to be seen when this institution will exercise such right.

### 3.1.4 The regional representations and liaison offices

To complete the picture of the representation of the regional interests in the EU decision-making processes, we have to briefly refer to the regional representation and liaison offices in Brussels. It is important to mention them because they play a crucial role for disseminating and exchanging information on EU policy issues and they are considered to be a proof of the Europeanisation of regions and the emergence of a third level in the EU arena (Magone 2003: 11).

As a starting point we note that they have mushroomed since the first ones were set up in the mid 1980s. At present there are over 250 such offices (European University Institute 2008: 41). They vary both in terms of the authorities they represent but also with regard to the legal basis in accordance with they are set up (D'Atena 2005: 40-41). As for



the first, while some of them are offices of single regional authorities, others represent an association of regional governments and others represent even cross-border regions (European University Institute 2008: 42). Concerning their legal basis, it suffices to note that some are set up by law, others are governed by public law as public bodies and others are privately run as associations. It seems that the national legal frameworks have progressively become more lenient to their existence. A good example of this point is the fact that the Spanish Government had challenged before the Constitutional Court the right of the Basque country to have a delegation in Brussels ‘alleging that there could be no relation whatsoever between the Basque public institutions and the European institutions.’ (Bengoetxea 2005: 54) However, the Court by its judgment 165/1994 rejected the argument of the government and held that Union law is internal law and affects the competences of the Autonomous Communities (Peres Gonzalez 1994: 94).

#### 4. Conclusion

In this article, I have reviewed the constitutional frameworks that have allowed for the creation of a ‘subnational constitutional space’ that enables the European sub-state entities to be active in the international arena. I did so, by reviewing in the first part the treaty-making competences of the sub-state entities, the mechanisms for their participation in the national foreign policy-making and the provisions concerning the implementation of international obligations within the various constitutional orders. The analysis showed that almost all component units with legislative competences possess some treaty-making powers. Such treaty-making powers might be subject to consent by the State or limited to areas that fall within the competences of the sub-state level or even only allowing them to conclude cooperation agreements. However, such important competences exist and the sub-state entities have been exercising them. In addition, the States have established mechanisms for involving the regional tier in national foreign policy-making either through upper chambers or Interregional and joint national-regional bodies. It is indeed difficult to exactly assess how effective those mechanisms have been in allowing the regional tier to influence the national foreign policy making but they definitely offer such opportunity. Finally, I have shown that within constitutional orders where the sub-state entities enjoy



legislative powers, responsibility for the implementation of international obligations is shared between the ‘centre’ and the autonomous authorities.

In the second part, I focused on how the ‘*ius legationis*’ of the sub-state entities is foreseen in multi-level constitutional orders. Here the picture is more mixed, given that the States have proved more hesitant to provide for an extensive ‘subnational constitutional space’ with the exception of Belgium whose sub-state entities may even appoint their own ‘diplomatic’ representatives abroad autonomously. Despite this, the regional tier is progressively more active in the EU sphere given that it enjoys participatory rights in various EU *fora* including the Council of Ministers. This is largely a by-product of both supranational law and national constitutions. And in that sense, the EU affairs are the real template of discussion about the foreign relations of sub-state entities.

Overall, this comparative exposé of the national constitutional frameworks and the practices of the sub-state entities question this traditional idea that States enjoy a monopoly in the area of foreign affairs. In today’s world, there is space for an active constituent diplomacy and the national constitutional frameworks have to a certain extent responded accordingly.

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<sup>I</sup> In this contribution, we will use interchangeably the terms ‘constituent diplomacy’, ‘paradiplomacy’, ‘sub-state diplomacy’ to refer to the phenomenon of the participation of the sub-state entities to the international affairs.

<sup>II</sup> See for example Regulation (EC) No 1082/2006 of the European Parliament and of The Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC) [2006] OJ L 210/19.

<sup>III</sup> Art 16(2) of the Austrian Constitution.

<sup>IV</sup> Art 16(3) of the Austrian Constitution.

<sup>V</sup> Art 24(1a) of the German Basic Law.

<sup>VI</sup> Art 5 of Regulation 1082/2006.

<sup>VII</sup> Recital (11) of Regulation 1082/2006.

<sup>VIII</sup> See for example Art 32(1) of the German Basic Law.

<sup>IX</sup> *Conférence interministérielle de politique étrangère/Interministeriële Conferentie voor het Buitenlands Beleid*.

<sup>X</sup> Art 117(9) of the Italian Constitution.

<sup>XI</sup> Art 147 of the Spanish Constitution.

<sup>XII</sup> Art 149 of the Spanish Constitution.

<sup>XIII</sup> Arts 93, 94 and 96 of the Spanish Constitution.

<sup>XIV</sup> Art 68 of the Statute of Autonomy of Andalusia; Arts 6, 50 and 127 of the Statute of Autonomy of Catalonia; Art 1 of the Statute of Autonomy of Galicia

<sup>XV</sup> Art 6 of the Statute of Autonomy of Andalusia; Art 8(3) of the Statute of Autonomy of Asturias; Art 13 of the Statute of Autonomy of Catalonia; Art 6(5) of the Statute of Autonomy of the Basque Country; Art 3(3) of the Statute of Autonomy of Extremadura; Art 7 of the Statute of Autonomy of Galicia.

<sup>XVI</sup> Arts 220 and 245 of the Statute of Autonomy of Andalusia; Art 197 of the Statute of Autonomy of



Catalonia; Art 62 of the Statute of Autonomy of Valencia.

<sup>xvii</sup> Spanish Constitutional Court, *sentencia* no. 31/2010.

<sup>xviii</sup> See section 3 of Schedule 2 of the Northern Ireland Act 1998; section 7 of Schedule 5 of the Scotland Act 1998.

<sup>xix</sup> Art 23d<sup>(1)</sup> of the Austrian Constitution.

<sup>xx</sup> Art 23e(1) of the Austrian Constitution.

<sup>xxi</sup> Art 44(2) of the Austrian Constitution.

<sup>xxii</sup> Art 23d(2) of the Austrian Constitution.

<sup>xxiii</sup> Arts 23d(2) and 23e(6) of the Austrian Constitution.

<sup>xxiv</sup> BGBI. 775/1992.

<sup>xxv</sup> Article 23(4) of the German Basic Law.

<sup>xxvi</sup> Article 23(5) of the German Basic Law.

<sup>xxvii</sup> *Ibid.*

<sup>xxviii</sup> Article 79 of the German Basic Law.

<sup>xxix</sup> Samenwerkingsakkoord van 8 maart 1994 tussen de Federale Staat, de Gemeenschappen en de Gewesten en het Verenigd College van de Gemeenschappelijke Gemeenschapscommissie, met betrekking tot de vertegenwoordiging van het Koninkrijk België in de ministerraad van de Europese Unie (Belgisch Staatsblad, 17 november 1994).

<sup>xxx</sup> Art 5(5) of the Law No. 11/2005.

<sup>xxxi</sup> Art 149(1)(3) of the Spanish Constitution.

<sup>xxxii</sup> Arts 93, 94 and 96 of the Spanish Constitution.

<sup>xxxiii</sup> Art 240 of the Statute of Autonomy of Andalusia; Arts 41 and 97 of the Statute of Autonomy of Aragon; Art 34(3) of the Statute of Autonomy of Asturias; Art 102 of the Statute of Autonomy of the Balearic Islands; Art 20(5) the Statute of Autonomy of the Basque country; Art 37(1) the Statute of Autonomy of the Canary Islands; Arts 187 and 191 of the Statute of Autonomy of Catalonia; Art 33(1) of the Statute of Autonomy of Madrid; Art 12(2) of the Statute of Autonomy of Murcia; Art 68 of the Statute of Autonomy of Navarre; and Arts 22 and 62 of the Statute of Autonomy of Valencia.

<sup>xxxiv</sup> Arts 240 to 243 of the Statute of Autonomy of Andalusia; Art 97 of the Statute of Autonomy of Aragon; Art 102 of the Statute of Autonomy of the Balearic Islands; Art 6(5) the Statute of Autonomy of the Basque country; Art 6 of the Statute of Autonomy of Cantabria; Art 7 of the Statute of Autonomy of Castille-La Mancha; Art 6 of the Statute of Autonomy of Castille-Leon; Arts 195 to 197 of the Statute of Autonomy of Catalonia; Art 3(3) of the Statute of Autonomy of Extremadura; Art 7(2) of the Statute of Autonomy of Galicia; and Art 62 of the Statute of Autonomy of Valencia.

<sup>xxxv</sup> Art 102 of the Statute of the Balearic Islands; Arts 185 to 187 of the Statute of Autonomy of Catalonia; and Art 62 of the Statute of Autonomy of Valencia.

<sup>xxxvi</sup> See Points 3, 17-20 of the Memorandum of Understanding and B1.2, B1.4, B2.2, B2.4, B3.2, B3.4, B4.2 and B4.3 of the Concordats on Coordination of European Union Policy Issues (Cm 5240, December 2001, Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee).

<sup>xxxvii</sup> See Points 17-20 of the Memorandum of Understanding and B1.2, B1.4, B2.2, B2.4, B3.2, B3.4, B4.5 to B4.11 of the Concordats on Coordination of European Union Policy Issues (above n 20).

<sup>xxxviii</sup> *Ibid.*

<sup>xxxix</sup> Case C-107/96 *Commission v Spain* [1997] ECR I-3193, para 10; Case C-323/97 *Commission v Belgium* [1998] ECR I-4281, para. 8.

<sup>xl</sup> Art 16(4) of the Austrian Constitution.

<sup>xli</sup> BGBI. I Nr. 3/2001.

<sup>xlii</sup> Arts 30, 70 and 83 of the German Basic Law.

<sup>xliii</sup> Art 169 of the Belgian constitution.

<sup>xliv</sup> Art 16(3) of the Special Law of 8 August 1980 on Institutional Reform, as amended by the Special Law of 5 May 1993 on the International Relations of the Communities and Regions.

<sup>xlv</sup> Arts 240 to 243 of the Statute of Autonomy of Andalusia; Art 97 of the Statute of Autonomy of Aragon; Art 12 of the Statute of Autonomy of Asturias; Art 102 of the Statute of Autonomy of the Balearic Islands; Art 20(3) of the Statute of Autonomy of the Basque country; Art 37(2) of the Statute of Autonomy of the Canary Islands; Art 34 of the Statute of Autonomy of Castille-La Mancha; Art 28(7) of the Statute of



Autonomy of Castille-Leon; Arts 195 and 196 of the Statute of Autonomy of Catalonia; Art 9(1) of the Statute of Autonomy of Extremadura; Art 33(2) of the Statute of Autonomy of Madrid; Art 12(2) of the Statute of Autonomy of Murcia; Art 58(2) of the Statute of Autonomy of Navarre; Art 62 of the Statute of Autonomy of Valencia.

<sup>XLVI</sup> CTR 79/1992

<sup>XLVII</sup> CTR 118/96 and 61/1997.

<sup>XLVIII</sup> D4.8 of the Concordats on International Relations and B4.16 of the Concordats on Coordination of European Union Policy Issues (Cm 5240, December 2001, Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee).

<sup>XLIX</sup> B1.4, B2.4, B3.4 and B4.17 of the Concordats on Coordination of European Union Policy Issues (above n 63).

<sup>L</sup> Point 21 of the Memorandum of Understanding (n 63).

<sup>LI</sup> B4.25 of the Concordat (n 63).

<sup>LII</sup> For an analysis see <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/45321.aspx>

<sup>LIII</sup> Art 5(3) of the Annex of Council Decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU) [2009] OJ L325/35.

<sup>LIV</sup> Art 23d(2) of the Austrian Constitution

<sup>LV</sup> Art 23d(3) of the Austrian Constitution.

<sup>LVI</sup> Art 23(6) of the German Basic Law.

<sup>LVII</sup> Further details can be found in the Law of 12 March 1993 on co-operation of the Federation and the Federated State in EU affairs (BGB1. 1993 I, 313).

<sup>LVIII</sup> Samenwerkingsakkoord van 13 februari 2003 tussen de Federale Staat, de Gemeenschappen en de Gewesten tot wijziging van het samenwerkingsakkoord van 8 maart 1994 tussen de Federale Staat, de Gemeenschappen en de Gewesten met betrekking tot de vertegenwoordiging van het Koninkrijk België in de ministerraad van de Europese Unie (Belgisch Staatsblad, 25 februari 2003).

<sup>LIX</sup> Point B4.14 of the Concordats on Coordination of European Union Policy Issues (n 20).

<sup>LX</sup> *Ibid* B4.13.

<sup>LXI</sup> *Ibid* B4.14.

<sup>LXII</sup> *Ibid*.

<sup>LXIII</sup> Art 300(3) TFEU.

<sup>LXIV</sup> Art 23c(1) of the Austrian Constitution.

<sup>LXV</sup> Art 307(1) TFEU.

<sup>LXVI</sup> Arts 90-100 TFEU.

<sup>LXVII</sup> Arts 145-150 TFEU.

<sup>LXVIII</sup> Arts 151-161 TFEU.

<sup>LXIX</sup> Arts 162-164 TFEU.

<sup>LXX</sup> Art 165 TFEU.

<sup>LXXI</sup> Art 166 TFEU.

<sup>LXXII</sup> Art 167 TFEU.

<sup>LXXIII</sup> Art 168 TFEU.

<sup>LXXIV</sup> Arts 170-172 TFEU.

<sup>LXXV</sup> Arts 174-178 TFEU.

<sup>LXXVI</sup> Arts 191-193 TFEU.

<sup>LXXVII</sup> Art 194 TFEU.

<sup>LXXVIII</sup> Art 263(3) TFEU.

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# The Importance of Consistent Interpretation in Subnational Constitutional Contexts: Old Wine in New Bottles?

by

Giuseppe Martinico\*

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## Abstract

In this paper I will focus on the role of national common judges (“giudici comuni”) in systems that are not characterized by a dual court system (one of the elements identified by Gardner as peculiar to fully fledged federal states) especially looking at the lower courts.

This paper is structured as follows: first, I am going to recall the debate on the consequences- in terms of legal uncertainty- of the proliferation of fundamental charters in non- federal systems; second, I am going to frame this issue within the categories of some fashionable constitutional theories; third, I will try to explain why national (lower) judges may play a fundamental role in solving many of the normative inconsistencies that this scenario creates.

## Key-words

Subnational constitutionalism, consistent interpretation, constitutional openness, national judges



## 1. Goals and structure of the paper

In his seminal piece on subnational constitutionalism Gardner strongly connected the idea of subnational constitutionalism to the concept of federalism by describing the former as an “inherent consequence of federalism”<sup>i</sup>

Indeed, as Ginsburg and Posner pointed out: “Americans understand subconstitutionalism as federalism”,<sup>ii</sup> but the American federalism conceives of two levels of judiciaries and two levels of constitutional interpretations that are not always present in Europe.

There are many risks behind this association. From a methodological point of view, for instance one could question the general concept of “subnational constitutionalism”: is subnational constitutionalism a mere “penumbra” concept, which lies in the shadow of federalism?

In this piece I would like to pay attention to the role of national common judges (“giudici comuni”) in systems that are not characterized by a dual court system<sup>iii</sup> (one of the elements identified by Gardner as peculiar to fully fledged federal states) especially looking at the lower courts.

Deliberately I am going to leave national Constitutional courts out of the picture, trying to emphasize the role of the “every-day judges” in contexts characterized by subnational constitutionalism and constitutional openness.

A second reason for doing this is given by the absence of these actors in many (not only European) contexts.

Another feature of the literature in this field consists in the general focus on the relations between subnational and national law. In this short piece, instead, I will try to emphasize the legal continuity among legal orders and its impact on the role of national lower judges.

My understanding of multilevel constitutionalism in fact does not limit itself to the whole set of relations involving national and supranational law but tries to represent subnational constitutional law (if any) as one of the levels of the multi-layered constitutionalism.

This permits us to “consider” and apply, in this ambit, instruments, theories and doctrines that have been conceived for the solution of the conflicts occurring between national and international/supranational laws.



Among such techniques, consistent interpretation plays an important role and in order to show its potential in this field I am going to develop some considerations discussed elsewhere (Delledonne - Martinico, 2009).

This paper is structured as follows: first, I am going to recall the debate on the consequences- in terms of legal uncertainty- of the proliferation of fundamental charters in non- federal systems; second, I am going to frame this issue within the categories of some fashionable constitutional theories; third, I will try to explain why national (lower) judges may play a fundamental role in solving many of the normative inconsistencies that this scenario creates.

## 2. The issue: how to deal with this “mushrooming” of fundamental charters?

A recent “wave” of subnational constitutionalism is characterizing countries like Italy and Spain.

When it comes to the *Estatutos de Autonomía* of Spanish *Comunidades Autónomas* (CAs) or the *Statuti* of Italian regions, therefore, both the Constitutional courts and dominant scholarship tend to deny that they are subnational Constitutions. There is, however, much political pressure to fill these charters with provisions whose content is typically “constitutional” in the most proper sense. If one considers the whole previous history of subnational constitutionalism, this might appear surprising.

In Italy, the engine of this new wave has been the constitutional reform of 1999 which amended, among others, Art. 123 of the Constitution. This Article looks at the regional fundamental charters (*Statuti*) that are approved by the regional legislatures (called *Consigli regionali*) in order to regulate “the form of government” and that include the “basic principles for the organisation of the Region and the conduct of its business” (Italian Constitution, Article 123, p. 1).

*Statuti* are required to be ‘in compliance with the Constitution’ (Italian Const., Article 123, p. 1).

In 2001, the reform of the Title V of the second part of the Italian Constitution was completed giving, according to many commentators, Regions the opportunity to



provide themselves with “micro” Constitutions, which is why the new approved *Statuti* are so rich in provisions devoted to rights and principles.

Moving to the Spanish case, the new process of reforms there started in 2004 after the election of the first Zapatero government<sup>IV</sup>.

All the *Estatutos* present important novelties<sup>V</sup>, both *substantively* and formally: they are longer than in the past; they present a long list of “regional rights” (above all social ones); they re-write the list of competences of the *Estatutos*; they enlarge the fiscal and financial autonomy of the CA’s; they contain provisions regarding the power of the judiciary; they revise the discipline governing the cooperative relations with the nation-state and the EU; and they contain provisions devoted to the issue of identity.

Almost all the *Estatutos* contain provisions on rights and principles. Scholars began to reflect on the nature of such provisions, reaching conclusions similar to those in the Italian debate.<sup>VI</sup> It is a relatively new question, since the old texts were silent on these points. (Maluenda Verdú, 1999; Ruggiu, 2007; Mastromarino, 2005).

To make a long story short, some of these provisions, in both contexts, were challenged before the respective national Constitutional courts.

As seen elsewhere the national Constitutional courts of these two countries argued that some of the contested provisions were not legal norms at all, but were mere “*cultural statements*”<sup>VII</sup>.

This way both the Constitutional courts achieved a double effect: on the one hand, they saved these contested provisions from the accusation of being unconstitutional but, on the other hand, created a sort of *grey zone of legality*, favoring the emergence of particular cases of antinomies that I elsewhere defined as *complex* (Delledonne - Martinico, 2009).

What are the consequences- in terms of legal certainty- of this on the activity of national lower judges? Why should consistent interpretation be preferable to other approaches in this context?

In order to provide this question with an answer, I am going to contextualize these subnational dynamics in a more general multilevel scenario and recall the importance given to the national common judges (especially lower courts) and the instrument of consistent interpretation in this context.

Finally, I will explain why they can have a similar crucial task with regard to subnational constitutionalism.



### 3. The importance of thinking “multilevel”

In order to understand why consistent interpretation can, in this case, play a role and why constitutional openness matters even when dealing with subnational constitutionalism, I will briefly try to define this subnational legal level as part of a broader multilevel and ‘complex’<sup>viii</sup> constitutional scenario.

According to Pernice it is possible to study and analyze the dynamics of the European Union process from a constitutional point of view. Among the premises of his thought we can recall the following: sovereignty is conceived as integrated while the Constitution is seen as a process rather than as a document. This Constitution is the outcome of the complementarity of the national and supranational legal orders and these two constitutional levels are parts of a unique and composed Constitution.

As Pernice said the national and supranational legal systems are “*closely interwoven and interdependent, on cannot be read and fully understood without regard to the other*”<sup>ix</sup> and, from a dynamic point of view this legal “interlacement”) is well represented by the idea of complexity.

The adopted notion of complexity stems from a comparison of the different meanings of this word as used in several disciplines (law, physics, mathematics, psychology, philosophy) and recovers the etymological sense of this concept (complexity from Latin *complexus* = interlaced). By applying the idea of complexity developed by Morin, I argue that the multilevel legal order is a complex entity that shares some features with complex systems in natural sciences. The *mot-problème*<sup>x</sup> “complexity” is used in several ways. Millard, for instance, recalls at least four different meanings of the word complex (Millard, 2007). Complex, in fact, is often used as a synonym of “complicated” and in this sense an antinomy may be understood as complex given its difficulty in being solved because of the legal “abundance” caused by the coexistence of so many legislators in the EU and of the consequent difficult manageability of the several materials, languages and meanings present in the multilevel system. Secondly, complexity may refer “à la situation d’un objet fragmentée, découpée. L’ensemble social n’est pas simple, au sens d’une théorie des ensembles: il résulte de l’addition ou de l’interaction entre une pluralité d’ensembles



partiels, eux- mêmes sans doute s’entremêles” (Millard, 2007, 143). Thirdly, complex is understood as a non-aprioristic or pragmatic concept; in this respect a reason is complex when it cannot infer choices and decisions from general, clear and abstract principles which were defined aprioristically. Finally, complexity is meant as interdependency of the objects with regard to their relative autonomy: in this paper I focus on the relative autonomy of the legal orders (subnational, national, supranational and international) in the multilevel system.

Complexity well describes the multilevel scenario where the legal orders are not only undistinguishable but also “interlaced”.

Scholars<sup>XI</sup> interested in multilevel constitutionalism have traditionally paid attention to the relation between the national and supranational levels while the subnational level has been usually neglected on the grounds of its presumed homogeneity.

However, looking at the constitutional variety at the subnational level (not only in federal contexts), one could see how it might represent a factor contributing to the complexity of the multi-layered system.

The interplay between levels gives the idea of the how difficult it is to distinguish neatly between the legislative domains belonging to the various players involved.

As a matter of fact, one of the most relevant difficulties in the multilevel legal system is represented by the existence of shared legal sources, which make the attempt at defining legal orders as *self-contained regimes* very difficult. This is consistent with the attempt to provide an integrated and *complex* reading of the various levels, and represents one of the most fascinating challenges for constitutional law scholars. At the same time, as a consequence of the lack of a precise distinction within the domains of legal production, it is sometimes impossible to solve the antinomies between different legal levels on the grounds of the prevalence of a legal order (e.g. the national) over another (e.g. the supranational).

Developing this idea I elsewhere attempted to describe a “complex” legal system as an “entity” characterized by the following features: *non-reducibility*, *unpredictability*, *non-reversibility* and *non determinability*<sup>XII</sup>.

Against this background, the subnational system should be understood as part of a complex multilevel system and probably we can attribute these qualities to the antinomies characterizing the multilevel system, arguing that they present the following features:



- First type of complex antinomy. An antinomy may be defined as complex when it is due to the interlacement described above and by the consequent non distinguishability among the different levels. According to this definition one could say that an antinomy is complex if it cannot be resolved looking at the relations between legal orders (e.g. starting from the assumption of the prevalence of order A over order B we cannot say that norm x always prevails over norm y because x belongs to the order A while norm y succumbs because it belongs to order B. This occurs because, in an integrated and interlaced system x and y could belong to both legal orders, A and B).
- Second type of complex antinomy. An antinomy may be complex because it is not predictable. The unpredictability of the system consists in the difficulty to foretell or foresee its evolution by looking at the starting position. In a deterministic system it is always possible to predict the final state if the initial state is known. In a complex adaptive system it is not possible to predict the final state of its evolution if we know the initial state of the components. Similar antinomies, whose solution is not predictable simply by looking at the starting circumstances of the legal system, are conflicts that concern certain ‘materials’ (i.e. documents lacking binding legal effect, but enjoying a wide social consensus) which are drawn by keen law makers from the grey zones of the law, and which consequently acquire a sort of influence on the legal order (this effect is due to the effort of the legislature, which translates this influence into a legislative text). This is precisely the case of regional cultural statements, which an external observer cannot perceive as a specimen of legal material, especially if he or she has in mind the Constitutional courts’ doctrine (whereby the regional cultural statements cannot attain the *status* of norms)<sup>XIII</sup>.
- Third type of complex antinomy. The absence of univocal norms of collision influences the “reducibility” and the “resolvability” of the constitutional conflict in a multi-layered system. Looking at this scenario, in fact, multilevel constitutionalism suffers from the absence of an unambiguous *primacy* clause<sup>XIV</sup>. These antinomies can be resolved only on a case-by-case basis and not by an unequivocal solution offered by the existence of a precise rule for collision norms, such as a clear and undisputed supremacy clause, because in a context like this a provision which, *prima facie*, seems to belong to the subnational level



could actually be the repetition of another norm existing at international or supranational level.

What are the consequences of this on the role of national judges? A consequence of the impossibility to trace these principles back to the wording of a univocal primacy clause, has underscored their role. My assumption is that this context exalts the case-by-case judicial approach to solving legal conflicts between rules. The impossibility of operating a distinction between legal orders implies the end of interpretative autonomy for these courts. The judicial side thus represents a privileged perspective for studying the relations between interacting legal orders, especially when looking at the multilevel and pluralistic structure of the European constitutional legal order.

Returning to the Italian Regional case, one could say that the main risk of the judgements of Italian Constitutional court is to create complex antinomies in the first two meanings we have recalled: the fundamental principles which have been rescued by the Italian and Spanish Constitutional courts could represent the basis for regional legislation (that is ordinary legislation characterized by indisputably binding effects) which could contrast with the Constitution.

We can identify some possible hypotheses of complex antinomies with regard to the regional case, arguing that the main risk of the Constitutional court's judgments is to create complex antinomies which are both 'non-reducible' and 'unpredictable'.

The antinomies can exist in the meanings I have outlined: the fundamental principles that have been rescued by the Italian and Spanish Constitutional courts as 'cultural statements' could form the basis for regional legislation (this is the ordinary regional legislation which has unmistakably binding effect) which could be in conflict with the Constitution. The fundamental principles of the subnational charters could represent a sort of latent and hidden element, apparently inoffensive, which can be made binding by the ordinary regional legislature. In this sense, they could represent elements that are not identifiable as legal and binding by the observer of the starting condition, but which could become legal and binding due to the regional legislature's voluntary implementation of the cultural principle in binding regional legislation.

Ostensibly, the conflict will involve only the implementing laws and the Constitution, but in reality the implementing laws will embody the already existing principle contained in the regional cultural statement. This reveals how absurd the Constitutional



courts' strategy is. The fact that the regional fundamental charters contain a similar provision to the regional legislation implementing them implies the possible reappearance of the conflict between the regional implementing law and the Constitution, which had seemed earlier to have disappeared by considering the fundamental charters' provision a merely 'cultural' statement and not legally binding.

#### 4. The necessity to distinguish between real and virtual conflicts: the importance of a “unitary” application of the consistent interpretation

Having drawn out the dangerous consequences of the decisions of the national Constitutional courts, it is time to say how consistent interpretation might serve as the main instrument to distinguish the compatible regional principles from the incompatible ones.

When is there a real conflict between provisions on regional principles and the Constitution? In other words, when is there a real antinomy between the Constitution on the one hand and the Regional fundamental charters and regional legislation based thereon on the other, when both are applicable simultaneously?

The scholars of jurisprudence and of general theory of law<sup>xv</sup> usually distinguish between virtual and real antinomies: the former can be resolved through interpretation while the latter represent a real example of irreconcilable normative conflicts. Although probably many cases of conflict between the regional cultural statements of the fundamental subnational charters and the Constitution only embody virtual antinomies, some exceptions could exist.

Today national Constitutions do not provide an exhaustive list of fundamental rights, as a consequence of that constitutional openness described above. For instance, with regard to the Italian case, it was said that the general clause of protection of fundamental rights that is contained in Article 2 Constitution is to be considered an 'open' norm.<sup>xvi</sup> This reading of Article 2 has allowed the Constitutional court to recognise and guarantee the so-called new rights (the right to know, the right of privacy, environmental rights) and to keep the Constitution up-to-date with respect to the need to protect the 'person' (*principio personalista*).



This process of constitutional updating was due to the pressure coming from the international law of human rights, which forced the Italian Constitutional court to deal with issues not considered in 1948, i.e., when the Italian Constitution came into force. Looking at the question from this perspective, it seems that no problem of real inconsistency could ever exist for those regional principles which repeat what forms part of the Italian Constitution or the case-law of the Italian Constitutional court. On the contrary, more problems exist for those regional principles (cultural *statements*, as the Constitutional court classified them) which do not do so.

To me, in this case the interpreter should try to find the possible origin of these regional ‘cultural statements’ at the supranational legal level (European Convention of Human Rights, EU Treaties, European Court of Justice’s case law<sup>XVII</sup>). If the interpreter is able to identify the ‘pattern’ of the regional ‘cultural statement’ at this supranational level, he will attempt to interpret the regional law in the light of the supranational norm, trying to find there a consistency between the regional statement and the Constitution.

On the contrary, if the interpreter were not to be able to find such a supranational or international pattern, it could be necessary to set aside the subnational provision (in a system of diffuse review of legislation) or to raise a question of constitutionality before the Constitutional court which might conclude that the regional instrument was unconstitutional (in a centralized system of review of legislation). Looking at Italy, for instance, the very fact that the *Statuti* refer to provisions of international conventions to which Italy is a party, gives the norms of the *Statuti* a presumption of constitutionality, because of the existence of Article 117 (1) of the Constitution, which reads: “Legislative power belongs to the state and the regions in accordance with the Constitution and within the limits set by European Union law and international obligations”. So both the national legislature and the regional legislatures have to respect international and EU obligations.

This provision does not distinguish between directly or indirectly applicable norms of international law, but simply recalls the international obligations contracted by Italy as being a limit for the regional and national legislature. Thus, the international norms become an interposed standard of review, on the basis of which the constitutionality of domestic law (both regional and national) must be assessed<sup>XVIII</sup>. This seems a possible criterion by means of which we can distinguish between real and virtual antinomies.



“Multilevel constitutionalism” is a descriptive formula which does not say which level will prevail on the others and why. It comes with the price of not having an unambiguous supremacy clause for the rights that cannot be classified as competences of one level or another.

Of course, in this case, if we limit our perspective to the mere relation between national and subnational laws, a supremacy exists and it belongs to the national Constitution but, as said before, before using the *extrema ratio* of the unconstitutionality of the subnational provisions, one should be sure of the impossibility of finding a corresponding norm at international and EU level.

This approach corresponds to a unitary conception of consistent interpretation, although normally scholars distinguish among different forms of consistent interpretation depending on the document to be taken as reference by the interpreter (interpretation consistent to the Constitution; interpretation consistent to public international law; interpretation consistent to EU law, on this tripartition see: Luciani, 2007).

Those who deny this unitary conception of consistent interpretation tend to emphasize the axiological superiority of the Constitution over public international and EU laws and conceives the Constitution as the apex and the moment of closure of the domestic legal system.

According to another construction Constitutions should not be understood as a moment of closure but, rather, as documents (or set of principles) open to those external influences that can enrich the protection of the goods estimated as fundamental (Ruggeri, 2010).

Going beyond a positivistic logic, Constitutions can be influenced by the international documents and doctrines if this can improve for instance the protection of fundamental rights.

According to this scheme, there is no clear border between domestic and supranational/international law, the latter being the engine of a sort of steady process of constitutional update and improvement.

As a consequence, there is no need to break down consistent interpretation in the three forms seen above; in fact, consistent interpretation is arguably a unitary instrument (Ruggeri, 2010).



This seems to me a construction which better responds to the complex (i.e. interlaced) nature of the multilevel system, where a sharp distinction among levels is not always possible.

At the same time, this does not prevent Constitutional courts from defending their fundamental charters: to this end, they can make use of those techniques already used to manage the relation between international/supranational law and domestic law, such as, the counter-limits doctrine<sup>XIX</sup>.

## 5. Constitutional openness and the role of national judges

Having recalled the unitary nature of the instrument of consistent interpretation and its importance in a multilevel and complex system, it is time to clarify why the role of national common (especially lower) judges may be crucial in dealing with complex antinomies due to the emergence of subnational constitutionalism. As we know, national judges play a fundamental role in the multilevel system, being at the same time the guardians of the application of national law (they are the first guardians of the Simmenthal doctrine as for EU law, Claes, 2006) and, at the same time, the first adjudicators of the ECHR in national systems because of the principle of judicial subsidiarity (Carozza, 2003).

EU law is just one of the factors inducing multiple loyalties in the ordinary judges. Similarly these national judges have a crucial role in the application of the European Convention on Human Rights (ECHR), and recently scholars have defined them as the natural judges of international law (Tzanakopoulos, 2011). Against this background, what renders EU law particular is the preliminary ruling mechanism which makes the relationship between national judges and the ECJ even stronger. The preliminary ruling mechanism has indeed had a fundamental role in the evolution of EU law thanks to the lucky alliance between national judges and the Luxembourg Court<sup>XX</sup>.

More generally, this emphasis on national judges is not new in public international law studies. It has however been boosted by the contents of post - World War II Constitutions and this can be regarded as a confirmation of the open nature of these Constitutions, especially in the field of fundamental rights.



In fact, an evident reaction to totalitarian experiences is traceable in the language of domestic Constitutions, particularly in the openness shown by these fundamental charters to international law and in their acknowledgment of peace as a fundamental constitutional principle, not only as a strategic foreign policy option. In Spain<sup>XXI</sup> and Portugal<sup>XXII</sup> there is a preventive check operated by the Constitutional courts on the compatibility between the Constitution and international treaties. In Spain, in case of conflict between an international treaty and the Constitution, the latter has to be amended according to Article 95<sup>XXIII</sup> before the stipulation of the Treaty. In Portugal, on the other hand, the Treaty has to be approved by the Assembly of the Republic with a special majority and then it may be ratified<sup>XXIV</sup>. Even after ratification the Treaties may be object of a control of constitutionality. According to the literature the particular force of the Treaties in the domestic legal order can be inferred from Article 8<sup>XXV</sup> of the Portuguese Constitution and Article 96<sup>XXVI</sup> of the Spanish one, although these two provisions seem to be about the validity of these Treaties rather than on their efficacy (Montanari, 2002, 108).

Nevertheless the most important confirmation of the special ranking reserved to human rights treaties in Spain is given by Article 10.2<sup>XXVII</sup>, relating the so-called “interpretive guide” for reading the constitutional clauses devoted to fundamental rights, although the Spanish Constitutional court has specified that such a technique does not give a constitutional *status* to the human rights treaties<sup>XXVIII</sup>. As for Portugal, the fundamental provision is Article 16 of the Constitution<sup>XXIX</sup> which recognizes international human rights treaties as having a complementary role to the constitutional text, although the second paragraph of the Article, which accords an interpretative role to the Universal Declaration of the Rights of Human Rights alone, seems to exclude an extension to other conventions like the ECHR. Moreover in 1982, a deliberate attempt to insert the ECHR into the text of the Constitution was rejected, but the issue is not yet clear because of the existence of other judgments of the Portuguese Constitutional court, which used the ECHR as an important auxiliary hermeneutic tool for interpreting the Constitution<sup>XXX</sup>. A similar provision is included in Article 20, par. 1 of the Romanian Constitution: “Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to”.



Article 5 of the Bulgarian Constitution<sup>xxxI</sup> seems to recognize a general precedence of international law (including the ECHR and EU law) over national law, and also covers the duty to interpret national law in a manner which is consistent with EU law and the ECHR (and the case law of their respective courts). In 1998, the Bulgarian Constitutional court ruled that:

“The Convention constitutes a set of European common values which is of a significant importance for the legal systems of the Member States and consequently the interpretation of the constitutional provisions relating to the protection of human rights has to be made to the extent possible in accordance with the corresponding clauses of the Convention”.<sup>xxxII</sup>

As we can see, according to all these provisions, national law shall be interpreted in light of the contents of the ECHR (and other treaties devoted to human rights), and in this way a sort of interpretive priority is acknowledged to the ECHR.

Consistent interpretation is a very well known doctrine even in EU law (see the *Von Colson*<sup>xxxIII</sup> and *Marleasing*<sup>xxxIV</sup> judgements). More generally, consistent interpretation is a widespread doctrine in multilevel systems<sup>xxxV</sup> since it guarantees some flexibility in the relationship between laws of different orders and gives the role of gatekeeper to judges (see the *Hermès*<sup>xxxVI</sup> and *Dior*<sup>xxxVII</sup> judgments concerning the relationship between EU and WTO laws). Traditionally the literature conceives the obligation of consistent interpretation as a recognition of “indirect effect” to EU law since it confirms its primacy by giving a sort of interpretive priority to it. This is particularly convenient when the conflict between norms cannot be solved by using the *Simmenthal* doctrine because of the absence of direct effect for the EU law provisions.

This is a well known story which does not need repeating at length. The only thing I would like to point out is the increasing importance of consistent interpretation in the multilevel legal system, as recently stressed by Rodin (Rodin, 2010.): The *Simmenthal* doctrine is a rigid one which leads to a unilateral conclusion in cases of constitutional conflict (i.e., a conflict between constitutional supremacy and the primacy of EU law) while the consistent interpretation makes it possible somewhat to neutralize or soften constitutional conflicts.



The duty to interpret national law in a manner which is consistent with the ECHR provisions is sometimes based on legislative provisions, as is the case of the UK, under the Human Rights Act. In 1998, the ECHR was incorporated in the famous UK Human Rights Act, which actually carried out a sort of selective incorporation of the rights of the ECHR (the so-called “Convention Rights”). Section 3<sup>xxxviii</sup> provides the necessity to interpret domestic law “*so far as is possible*” in a way consistent with the Convention Rights. In sum, national Constitutions recognize themselves as texts open and willing to be complemented by the international Treaties on fundamental rights.

These are just examples of the importance that consistent interpretation might acquire in contexts characterized by constitutional openness.

## 6. Advantages and Risks connected to the proposed approach

In my view, to solve constitutional conflicts peculiar to contexts of subnational constitutionalism, it is necessary to bear in mind that certain rights are protected by more than one provision belonging to different legal sources (at regional, international, national and supranational level). Granted that judges are supposed to acknowledge the superiority of their Constitution, an open reading of the constitutional text could, however, relieve Constitutional courts of the pressure and offer them the possibility to give a legal content to conflicts seemingly affected by political interests.

Elsewhere (Delledonne – Martinico, 2009) I tried to stress how behind these clauses there is quite often the political will to present a given subnational context as “peculiar”, provided with a special nature and Ruggiu (Ruggiu, 2007, 133) has already shown how this choice is based on “strategic motivations” which go beyond genuine cultural aspirations.

Thanks to the use of consistent interpretation for solving conflicts due to subnational constitutionalism the system would be able to carry out a triple selection with regard to constitutional conflicts:

- 1) it would be able to give a legal “tone” to otherwise political/cultural conflicts, trying to reconstruct the “parameter” in a multilevel way;



- 2) it would entrust to national common judges the solution of the virtual antinomies thanks to consistent interpretation and an open reading of the national constitutional texts;
- 3) it would give Constitutional (or Supreme) Courts the last say in case of real conflicts that may not be solved by using the consistent interpretation doctrine. In this case, as well, national common judges would have a crucial role in presenting the question (in case of an *incidenter* proceedings where provided) in the most legally precise way possible (ie. by identifying the possible international and supranational- if any- patterns of the subnational provisions whose constitutionality is put in doubt).

As said at the beginning of this short contribution, the chemistry represented by consistent interpretation and constitutional openness gives a strong power to common judges, even in contexts characterized by the absence of a Constitutional court/tribunal properly understood.

Of course this does not mean that this instrument does not present any inconvenience: on the contrary, scholars have repeatedly recalled how risky could be an abuse of this technique: National common judges would not be “qualified” for performing such a delicate task; quite often they do not have the knowledge and (linguistic) skills to do so (Luciani, 2007 and Ruotolo, 2007)<sup>xxxix</sup>.

However, the benefits of this solution are also clear. This option makes lower courts the “pivot” of the multilevel system and would free Constitutional and Supreme Courts from the obvious political pressures that characterized both the Spanish and Italian cases.

Why? Because Constitutional and Supreme Courts are more exposed and visible, and each question pending before them inevitably acquires a certain degree of political tone (see, for instance, the reactions and newspapers titles after the judgement of the *Tribunal Constitucional* on the Catalan *Esatuto*<sup>xl</sup>).

Notwithstanding the crucial role played by national lower judges within the policy consistent interpretation, this technique can of course be used by national higher courts as well. Higher Courts are, nowadays very open to taking into account the case law of human rights tribunals, as Bjorge recently stressed with regard to the ECtHR (Bjorge, 2011).



To be clear: the use of the consistent interpretation cannot magically solve the problems due to this “constitutional pluralism” (Avbelj- Komárek, 2012) but it can help interpreters to deal with constitutional conflicts, favouring a more stringent control over the legal reasoning of the judges and their motivations in case of departure from a possible consistent interpretation of subnational law.

Higher Courts will be always under siege, especially Constitutional courts when dealing with cases brought before them through direct proceedings (as with the *principaliter* proceedings before many Constitutional courts) but even in these cases they could reinforce their decisions, if the economy of the case will permit this, by relying on the case law or trying to have a dialogue with other courts (for instance, the ECtHR and the CJEU). In other words, consistent interpretation could serve for them, even in this case, both as a resource (in order to understand better the meaning of an international treaty or other supranational provision which could serve as a model for the regional legislator) and as a shield against political attacks.

Of course consistent interpretation may be object of abuse (as the Spanish judgment on the Catalan *Estatut* shows<sup>XLI</sup> (on this see: Ibrido 2011<sup>XLII</sup>) but it would be an error to close the door to this option as the Italian Constitutional court did in 2004<sup>XLIII</sup>).

In conclusion, constitutional conflicts produced by subnational constitutionalism do not seem to represent a major issue, because it is difficult to conceive seriously dangerous antinomies, due to the fact the Regional Charters’ fundamental principles usually codify values and principles which already exist at national, supranational and international level. On the contrary in many cases these subnational provisions might work as a factor of constitutional update in a context of ‘experimental federalism’ (Poirer, 2008) which emphasizes a process of mutual learning between levels of government and which permits an improvement in the guarantees of constitutional rights.<sup>XLIV</sup>

However, it is important to stress the existence of fundamental principles in Regional Charters because it could produce asymmetries in the guarantees of rights, providing the ground for differentiated policies, which in turn could discriminate between citizens because of their belonging to a specific region rather than another.

This might create asymmetries that cannot always be conceived as compatible with that fundamental and homogenous level of protection frequently required in multilevel contexts<sup>XLV</sup> In cases like these we cannot hope to have a complete solution from Courts,



since in this case we would be in presence of a *lacuna* that should be solved by the political actors of the system.

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\* García Pelayo Fellow, Centro de Estudios Políticos y Constitucionales, Madrid; Researcher, Centre for Studies on Federalism, Turin; Lecturer, Scuola Superiore S.Anna, Pisa (on leave).

<sup>I</sup> “It is possible that federalism, properly understood, operates in such a way that the creation of a sub-national constitution in a federal system inherently reflects the presence of sub-national constitutionalism. The absolute minimum function of a sub-national constitution, like any other constitution, is to create and order sub-national power by defining and authorizing it, and establishing constraints on its use. In so doing, a sub-national constitution necessarily establishes a framework for the practice of self-governance by the sub-national population to which it applies”, Gardner, 2007a.

<sup>II</sup> Ginsburg - Posner, 2010, 1588.

<sup>III</sup> “I shall therefore pursue in the balance of the paper the much more modest goal of suggesting some reasons for caution in concluding that the appearance of sub-national constitutions in a federal state implies the appearance of sub-national constitutionalism. In particular, I discuss below five such reasons: (1) the easy availability of national constitutional politics as a vehicle for resolving questions of social and political significance; (2) the practice of resorting to extraconstitutional politics instead of law to resolve fundamental issues of governance and identity in many parts of the world; (3) the rise, especially in Europe, of subsidiarity as the prevailing political theory of sub-national power; (4) the growing emphasis in many parts of the world on supranational and international regimes as primary protectors of human rights; and (5) the lack of dual judicial systems in many federal states. In the United States, subnational constitutionalism is favored by the dual structure of the court system, in which each state and the national government has its own independent judiciary. In this system, each level of government has the final responsibility for interpreting its own constitution. Because state and national authority overlap in the U.S. federal structure, this arrangement has a tendency to put the national and sub-national judicial systems into a kind of dialogue with one another, a dialogue carried on through judicial interpretation of constitutions at each level. A dual court system is by no means essential to the emergence of sub-national constitutionalism, but it is helpful. As a result, throughout most of the world sub-national constitutions do not exist within the structural conditions most conducive to the emergence of a robust state constitutionalism.” Gardner, “In search of Sub-national Constitutionalism” Working Paper version (to be understood as slightly different from Gardner, 2007b).

<sup>IV</sup>For a chronicle of the process, see the special issue of the *Revista general de derecho constitucional*, n 1, 2006. As I wrote elsewhere (Martinico, 2010) the CAs' progressive loss of competences or, better, the progressive transformation of the Spanish system into a system of executive federalism: the autonomía of the CAs has just an administrative character, while the political responsibility of the biggest choices belongs to the State.;

2 The big issues of the means of regional funding and of the system of territorial equalization: this reason applies above all to Catalonia, which contributes tax money to the State more than what it receives from the State in terms of State investments or available resources.

3 The lack or the non-functioning of the mechanisms of cooperation and participation at both the horizontal and the vertical levels;

4 The so-called “identity questions”, related to the acknowledgment of national realities different from that of the Spanish nation.

<sup>V</sup> Currently, eight CAs have approved new Estatutos: Comunidad Valenciana (ley orgánica, 10 April 2006, n. 1), Catalonia (ley orgánica, July 19, 2006, n. 6) , Baleares (ley orgánica, 28 February 2007, n. 1) , Andalucía (ley orgánica, 19 March 2007, n. 2) , Aragón (ley orgánica, 20 April 2007, n. 5), Castilla y León (ley orgánica, 30 November 2007, n. 14), Navarra (ley orgánica 27 October 2010, n. 7), and Extremadura (ley orgánica 28 January 2011, n. 1).

<sup>VI</sup> For a comparison, see: Mastromarino - Castellà Andreu, 2009.

<sup>VII</sup>See, for instance, Corte Costituzionale (Italy) judgments 372-378-379/2004, available at: [www.cortecostituzionale.it/Delledonne](http://www.cortecostituzionale.it/Delledonne). On this see Martinico, 2009 and Delledonne - Martinico, 2011. As for



Spain, see the considerations made on the new Catalan *Estatut* (sentencia no. 31/2010, available at <http://www.tribunalconstitucional.es/en/jurisprudencia/Pages/Sentencia.aspx?cod=9873>) by Delledonne, 2011.

<sup>viii</sup> Morin, 1990, 10. About law and complexity see: Ost - van de Kerchove, and Delmas Marty, 2006; Martinico, 2007.

<sup>ix</sup> Pernice, 2002.

<sup>x</sup> Morin, 1993 and Morin, 1989. On Europe as a complex system see: Morin, 1988.

<sup>xi</sup> See Pernice: 'The European Union is a divided power system in which each level of government - regional (or Länder), national (State) and supranational (European) - reflects one of two or more political identities'. Pernice, 1999. 707. I. Pernice, 2002.

<sup>xii</sup> *Non-reducibility*: the result of the relationship among diversities does not present itself as a mere sum of the latter but it is something different.

*Non-reversibility*: for a complex system non reversibility is the impossibility to return to the *status quo* spontaneously and precisely. Unlike the reversible processes, in fact, where from the final condition it is possible to return to the starting condition, the complex systems are non reversible due to the non linearity of the evolution.

*Unpredictability*: it is difficult to foretell or foresee its evolution by looking at the starting position. In a deterministic system it is always possible to predict the final state if the initial state is known. In a complex adaptive system it is not possible to predict the final state of its evolution if we know the initial state of the components.

*Non-determinability (rectius, non determinism)*: the complex system does not follow necessary and univocal laws according to a linear concept of the evolution based on the dialectic cause/effect.

<sup>xiii</sup> Several possible cases of complex antinomies can be identified with regard to the regional legal order. According to many new Italian Regional fundamental charters a new body of control (usually named Consulta Statutaria or Commissione di garanzia statutaria in the language used in the Statuti) will be charged with the specific task of giving its advice on possible conflicts between regional laws and the Statuti. (See for example Article 57 Statuto of Tuscany and Article 69 of Statuto of Emilia-Romagna) The opinions of such bodies create the obligation for the Regional Legislative Assembly (Consiglio regionale) to review the regional law, which can then be adopted a second time.

Nothing prevents the consultative bodies from looking at the fundamental principles of the Statuti when reviewing the regional laws' consistency with the Statuti. This possibility of reviewing the regional laws and of expressing negative advice on them in the light of 'cultural statements' could signal the latent legal effects of the Statuti general provisions; and could also embody an example of real – although indirect – conflict between the Constitution and the fundamental regional provisions, as they cause a potential obstacle for the legislative function entrusted to the Regional Assemblies by the national Constitution.

Moreover, if the President of a Region were to decide to promulgate a regional law without the Regional Assembly's review – and despite the negative advice of the Commissione di garanzia statutaria – we should be faced with a clear invalidity of the regional law due to its conflict with the Statuto itself, which guarantees the role of the Commissione Statutaria and rules on the legislative procedure. Paradoxically, in this case the promulgated regional law would be unconstitutional, because of the violation of the Statuto to which the Constitution attributes the highest position in the regional legal system (Article 123 Constitution).

Other cases of conflict between the Constitution and the Statuti can be thought of. As we saw, Tuscany's regional Statuto contains a provision devoted to the acknowledgement of forms of cohabitation which are different from those of families founded on marriage, the basis of the natural family according to Article 29 of the Italian Constitution (Article 29: 'The family is recognized by the republic as a natural association founded on marriage. Marriage entails moral and legal equality of the spouses within legally defined limits to protect the unity of the family'). This provision represents one of the first acknowledgements of the necessity to give a legal and official status to the 'other forms of cohabitation' (currently, there is no specific legal regime for the cohabitants' rights and duties).

Some regions, like Puglia, recently decided to extend to these forms of cohabitation the same legal treatment as provided for families founded on marriage with regard to the right of enjoying social services (regional law of Puglia no. 19/2006 c.d. 'Disciplina del sistema integrato dei servizi sociali per la dignità e il benessere delle donne e degli uomini di Puglia', See the text here: [http://www.issirfa.cnr.it/download/File/NAPOLITANO\\_PUGLIA/Puglia%20L%2019\\_06%20PDF.pdf?P\\_HPSESSID=b4e62468a96940ae6ae687d571bbb063](http://www.issirfa.cnr.it/download/File/NAPOLITANO_PUGLIA/Puglia%20L%2019_06%20PDF.pdf?P_HPSESSID=b4e62468a96940ae6ae687d571bbb063)).



If Tuscany were to enact a similar regional law referring to Article 4 of its Statuto, would this law be unconstitutional? Probably not, because the Constitution contains no provisions on extra-marital cohabitation, but can we draw the same conclusion with regard to a regional law which extends the right to vote to the immigrants according to Article 3 of Tuscany's Statuto? This case seems more questionable and more of a problem because Article 48 of the Constitution accords the right to vote only to Italian nationals.

A similar debate took place at the local level when some municipal Statuti had given extra-communitarian immigrants the right to vote in local elections (1. All citizens, men or women, who have attained their majority are entitled to vote.

(2. Voting is personal, equal, free, and secret. Its exercise is a civic duty.

(3. The law defines the conditions under which the citizens residing abroad effectively exercise their electoral right. To this end, a constituency of Italians abroad is established for the election of the Chambers, to which a fixed number of seats is assigned by constitutional law in accordance with criteria determined by law.

(4. The right to vote may not be limited except for incapacity, as a consequence of an irrevocable criminal sentence, or in cases of moral unworthiness established by law.). The Consiglio di Stato (Consiglio di Stato, sez. I, parere of the 16th March 2005 n. 9771/04, <http://www.giustizia-amministrativa.it/> On this see Finocchi Ghersi 2006) – which gave an advisory opinion according to the procedure described in the Article 138 of the 'Code of municipalities' ("Testo Unico degli enti locali", D.lgs. 267/2000) – decided to deny the possibility to extend such a right to vote (The Consiglio di Stato recalled Article 117(2) of the Constitution, under which the national legislator has "an exclusive legislative power" in "the electoral legislation ... of municipalities, provinces and metropolitan cities").

This episode shows the possibility for such a conflict also within regions and confirms the risk of latent antinomies between the Statuti's fundamental principles and the Constitution.

<sup>XIV</sup> Scholars have identified at least four different meanings of primacy/supremacy in ECJ case law. Moreover, the notion of primacy enshrined in Art I-6 of the Constitutional Treaty seems to be different from that used by the ECJ. See eg Claes, 2006) 100–101. In order to find a solution to this ambiguity, some scholars have devised a 'law of laws'. On this see Eijsbouts - Besselink, 2008.

<sup>XV</sup> On the antinomies see for example Bobbio, 1993, 409 ff.

<sup>XVI</sup> Article 2 Constitution: 'The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed.'

<sup>XVII</sup> Where there is no supranational or international model for a regional charter statement, it would indeed be inconsistent with the Constitution. In this case, there is no way to "rescue" the regional provision. A good example would be a regional statement which guarantees a very broad acknowledgement of cultural identities and practices of some ethnic minorities. As a matter of fact, it could pave the way for the admission of practices contrasting with the dignity of the woman or with the integrity of the body. It is to be recalled that, according to Article 32 of the Constitution, health is conceived both as an individual right and a public interest. Regional legislation which would protect a similar right to practices violating the dignity of women should be considered unconstitutional. The case of infibulation (and other forms of female genital mutilation) is partially different because it is considered as a crime according to Law No. 7 of 2006 and it is banned by several international documents.

<sup>XVIII</sup> See, for instance, judgments n. 348 and 349/2007, both available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

<sup>XIX</sup> This formula was introduced in the Italian scholarly debate by Paolo Barile: Barile, 1969.

By counter-limits scholars mean those fundamental principles of the Italian Constitutional that may not be jeopardized by European integration. The identification of these barriers to European integration represents the essence of the counter-limits doctrine (*dottrina dei controlimiti*), devised in case 183/73, the so called *Frontini* judgment (but see also case 170/84, the so called *Granital* judgment) by the Italian Constitutional court. Corte Costituzionale, sentenza 183/73, *Frontini* : [1974] 2 *Common Market Law Review* 372 and Corte Costituzionale, sentenza n. 180/1974. *Granital* : [1984] *CMLRev* 756

<sup>XX</sup> See the reports in Slaughter - Stone Sweet - Weiler, 1997.

<sup>XXI</sup> Art. 95.2 Constitution (Spain) :“(1) The conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional amendment.

(2) The Government or either House may request the Constitutional court to declare whether or not such a contradiction exists”.

<sup>XXII</sup> Art. 278 Constitution (Portugal): “1. The President of the Republic may ask the Constitutional court to conduct a prior review of the constitutionality of any rule laid down by an international treaty that is submitted to him for ratification, by any decree that is sent to him for enactment as a law or executive law, or



- 
- by any international agreement, the decree passing which is sent to him for signature.
2. Representatives of the Republic may also ask the Constitutional court to conduct a prior review of the constitutionality of any rule laid down by a regional legislative decree that is sent to them for signature.
  3. Prior reviews of constitutionality shall be requested within eight days of reception of the document in question.
  4. In addition to the President of the Republic himself, the Prime Minister or one fifth of all the Members of the Assembly of the Republic in full exercise of their office may ask the Constitutional court to conduct a prior review of the constitutionality of any rule laid down by any decree that is sent to the President of the Republic for enactment as an organisational law.
  5. On the date on which he sends any decree to the President of the Republic for enactment as an organisational law, the President of the Assembly of the Republic shall notify the Prime Minister and the parliamentary groups in the Assembly of the Republic thereof.
  6. The prior review of constitutionality provided for in (4) above shall be requested within eight days of the date provided for in (5) above.
  7. Without prejudice to the provisions of (1) above, the President of the Republic shall not enact the decrees referred to in (4) above until eight days have passed after their receipt, or, in the event that the Constitutional court is asked to intervene, until it has pronounced thereon.
  8. The Constitutional court shall pronounce within a period of twenty-five days, which the President of the Republic may reduce in the case of (1) above for reasons of emergency”.
- XXIII Art. 95 Constitution (Spain): “(1) The conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional amendment.  
(2) The Government or either House may request the Constitutional court to declare whether or not such a contradiction exists.”
- XXIV Art. 279.4 Constitution (Portugal): “If the Constitutional court pronounces the unconstitutionality of any rule contained in a treaty, the said treaty shall only be ratified if the Assembly of the Republic passes it by a majority that is at least equal to two thirds of all Members present and greater than an absolute majority of all the Members in full exercise of their office”.
- XXV Art. 8 Constitution (Portugal): “1. The rules and principles of general or common international law shall form an integral part of Portuguese law.  
2. The rules set out in duly ratified or passed international agreements shall come into force in Portuguese internal law once they have been officially published, and shall remain so for as long as they are internationally binding on the Portuguese state.  
3. Rules issued by the competent bodies of international organisations to which Portugal belongs shall come directly into force in Portuguese internal law, on condition that this is laid down in the respective constituent treaties.  
4. The provisions of the treaties that govern the European Union and the rules issued by its institutions in the exercise of their respective responsibilities shall apply in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law”.
- XXVI Art. 96 Constitution (Spain): “(1) Validly concluded international treaties once officially published in Spain shall constitute part of the internal legal order. Their provisions may only be abolished, modified, or suspended in the manner provided for in the treaties themselves or in accordance with general norms of international law.  
(2) To denounce international treaties and agreements, the same procedure established for their approval in Article 94 shall be used”.
- XXVII Art. 10 Constitution (Spain): “(1) The dignity of the person, the inviolable rights which are inherent, the free development of the personality, respect for the law and the rights of others, are the foundation of political order and social peace.  
(2) The norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain”.
- XXVIII Tribunal Constitucional, Judgment 30/1991, available at [www.tribunalconstitucional.es](http://www.tribunalconstitucional.es).
- XXIX Art. 16 Constitution (Portugal): “1. The fundamental rights enshrined in this Constitution shall not exclude such other rights as may be laid down by law and in the applicable rules of international law.  
2. The provisions of this Constitution and of laws concerning fundamental rights shall be interpreted and construed in accordance with the Universal Declaration of Human Rights”.



xxx Portuguese Constitutional court, decision 345/99, available at <http://www.tribunalconstitucional.pt/tc/home.html> The episode is mentioned by Coutinho, 2010. On Portugal: Montanari, 112. See also Cavagna - Monteiro, 1992.

xxxI Article 5.4 Constitution (Bulgaria): “Any international instruments which have been ratified by the constitutionally established procedure, promulgated, and come into force with respect to the Republic of Bulgaria, shall be considered part of the domestic legislation of the country. They shall supersede any domestic legislation stipulating otherwise.”

xxxII See Constitutional court Decision no. 2, of 18 February 1998: Official journal no. 22, 24 February 1998. The cases reported are quoted by Fartunova. 2010

xxxIII Case 14/83, *Von Colson* [1985] ECR 1891

xxxIV Case 106/89, *Marleasing* [1990] ECR I 4345.

xxxV Even in the US: Charming Betsy “canon”, 6 U.S. (2 Cranch) 64 (1804).

xxxVI Case C-53/96, *Hermès International (a partnership limited by shares) v FHT Marketing Choice BV* [1998] ECR I-3603.

xxxVII Case C-300/98 and C-302/98, *Dior and others* [2000] ECR 11307.

xxxVIII Section. 3 “(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section –

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility”.

xxxIX On consistent interpretation see: Sorrenti, 2006 and A.Ciervo, 2011.

xl Tribunal Constitucional, 31/2010

xlI Castellà Andreu, 2010. For an idea of the use conception of consistent interpretation by the Spanish Constitutional court see: Ibrido, 2010.

xlII See, for instance, the lack of consistency between the use of consistent interpretation in this judgment and the previous case law of the Spanish Constitutional court.

xlIII Again, I am referring to judgements n. 372-378-379/2004, available at: [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

xlIV Partially concurring with this conclusion, Vespaziani, 2005.

xlV Even in non-federal contexts: see Art. 117, 123 and Art. 5 of the Italian Constitution, which confirm the need for a homogeneity in the regional system and, in a similar way, Art. 149.1.1 of the Spanish Constitution

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## Subnational Constitutionalism: A Matter of Review

by

Giacomo Delledonne\*

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## Abstract

Which is the meaning of constitutional review for a proper assessment of subnational constitutionalism? The essay tries to answer this question by means of comparative analysis. To do so, it considers both federal systems (the United States and Germany) and regional or autonomic systems (Italy and Spain). The analysis of organs and procedures allows to draw some conclusions: the presence of a system of constitutional review at the subnational level is a crucial element for the development of an autonomous, well-grown subnational constitutional law. However, subnational constitutional courts tend to have a more complicated relation with legislative and executive bodies, as less guarantees of independence or court-overturning amendments show. Finally, subnational constitutional courts tend to develop a quite interesting case law, whose experimental features sometimes anticipate major judicial trends

## Key-words

Subnational constitutionalism, constitutional review, judicial dialogue, federalizing processes



## 1. Introductory Remarks

This contribution tries to analyse the role of constitutional review and constitutional enforcement within subnational legal orders and their significance to the meaning of subnational constitutionalism. In doing so, it will try to look into organs and procedures – and, more broadly, systems of constitutional review – in a comparative perspective<sup>I</sup>.

Why should a comparative analysis of subnational constitutionalism (or *subconstitutionalism*, as it has also been defined<sup>II</sup>) focus on the role of constitutional courts and constitutional review in subnational systems? There are, in my opinion, at least two good reasons for choosing such a topic.

First, the rise of constitutional review – thus meaning enforcement of constitutional provisions by the ordinary judiciary or a specialised constitutional court – has been a fundamental step in the process of legalisation of the Leviathan<sup>III</sup>:

*‘This issue of enforcement came to prominence early on in the establishment of modern constitutions. In the older meaning of the term, “fundamental law” was understood to be a special type of law that bound “morally and politically, not legally” ... The concept of fundamental law in modern constitutional regimes is associated with the emergence of the institution of judicial review’<sup>IV</sup>.*

A fundamental consequence of such development was the positivisation, depoliticisation and legalisation of constitutional documents, and ‘the erosion of belief in the idea of the Constitution as a type of fundamental law (*droit politique*) different in kind to that of the ordinary law’<sup>V</sup>. Furthermore, those events also affected the self-understanding of constitutional law scholarship as a distinct branch of legal scholarship<sup>VI</sup>. To sum up, we have to look into the noun: is subnational *constitutionalism* able to shape, even thanks to the operation of constitutional review, some kind of subnational *constitutional law*?<sup>?</sup>

Second, we have to consider the adjective: which kind of constitutional review is performed at the subnational level of federal or regional polities? According to methodological tools drawn from public choice theory, constitutions might be analysed as devices to control – and hopefully reduce – agency costs. In their survey of the defining



traits of ‘subconstitutionalism’, Ginsburg and Posner hold that a proper assessment of subnational constitutionalism has to consider that agency costs are lower within subnational polities due to their being part of a broader ‘superstate’:

*‘To the extent that agency costs decline when regular states become substates, the value of constitutional restrictions (in the substate) also declines. Thus, in the three areas we examine – government structure, rights, and amendment – the rules should become weaker, that is, easier to change or in other ways less likely to constrain the government. ... Because the public and political agents believe that the superstate will reduce agency costs, they feel less need to conform to constitutional rules at the substate level’<sup>XII</sup>.*

Ginsburg and Posner’s assumptions mainly concern government, fundamental rights, and procedures of constitutional revision. Are they true of constitutional review as well?

These are the two main research questions which this paper will address in order to sketch a profile of subnational constitutional review. The analysis and possible answers will be organised around: (1) the existence of a relation between subnational *constitutionalism* and constitutional review; (2) the significance of Ginsburg and Posner’s *lower-stakes hypothesis* to the subject of this paper; and (3) some interesting features of subnational constitutional *case law*.

## 2. Choosing the Cases: Systems of Constitutional Review and Comparative Analysis

When it comes to pointing out the relevant cases in this area, a preliminary distinction has to be drawn. There is a deep link between federal constitutional arrangements and the rise of constitutional review. On the one hand, German and Austro-Hungarian *Staatsgerichtsbarkeit* was – alongside the United States (US) model – among the leading sources of inspiration for the European model of constitutional review<sup>VIII</sup>. On the other hand, it might be worth recalling the High Court of Justice of Sicily (*Alta corte di giustizia per la Regione siciliana*), a peculiar example of ‘arbitral’ constitutional court in Italy (half of its members were appointed by the State, the other half by Sicily) which was disbanded after the establishment of the (national) Constitutional Court of Italy<sup>IX</sup>. For the purposes of this



paper, however, I shall only consider organs or procedures aiming at enforcing subnational constitutional texts *directly* at the subnational level.

A rapid comparative analysis has to consider two variables: the existence of a specialised constitutional court as distinct from the ordinary judiciary, and the existence of subnational constitutional or ordinary judges. The picture is mixed<sup>X</sup>. Diffuse constitutional review is the typical model in the US, Canada, Australia, or the Latin American Federations<sup>XI</sup>. In turn, there are specialised constitutional courts in Germany, Austria, Belgium, Italy, and Spain. Dual judiciaries are present in the US and Australia. Austria, Belgium, Italy and Spain are all marked by federal (or central-state) monopoly over the establishment of courts. The position of Canada and Germany is somehow intermediate. On the one hand, in the former country there are both federal and provincial courts – but ‘the highest level of provincial judiciary is federally appointed and paid’<sup>XII</sup>. In Germany, on the other hand, the only federal courts are the highest appellate courts, while all German *Länder* have their own constitutional courts. The Swiss case is quite similar to the German one, but it has limited room for constitutional review, and some Cantons have established their own constitutional courts<sup>XIII</sup>. A preliminary hypothesis may be laid down: those systems where there is room for constitutional review organised at the subnational level are the ones where subnational constitutional arrangements have traditionally been thought to be a defining feature of their federal model: this is the case of the US or Germany<sup>XIV</sup>. If you preliminarily take into account the original traits – and the intrinsic limits – of the local model of constitutional review, it is the case of the ‘Swiss laboratory’<sup>XV</sup> of cantonal constitutions as well. Conversely, those systems where there are no subnational courts (e.g. Austria or Belgium) or the most senior courts are federal (e.g. Canada) have been defined by scarce scientific and political consideration of subnational constitutions<sup>XVI</sup>.

The analysis will be organised as follows. It will consider: (1) enforcement of subnational constitutional law in a diffuse system of constitutional review (the US); (2) some marking aspects of a complete system of subnational constitutional courts (Germany); and (3) the problem of constitutional review in ‘autonomic’ legal systems where the central state holds a monopoly over it (Italy and Spain). In the end I will try to answer the two research questions that I pointed out at the beginning of this paper.



### 3. New Judicial Federalism and Majoritarian Difficulties in the US

As Ginsburg and Posner observed, ‘Americans understand subconstitutionalism as federalism’<sup>xvii</sup>, but ‘the American federalism conceives of two levels of judiciaries and two levels of constitutional interpretations that are not always present in Europe’<sup>xviii</sup>.

The US has a dual judicial system, with federal and state courts entrusted, respectively, with enforcing federal and state law. The picture, however, is not as plain as this (rather simplistic) outlook seems to show. The state courts traditionally had a weak tradition of review under state constitutional rights. Besides that, from the 1940s the incorporation of the Bill of Rights as part of the Due Process Clause of the Fourteenth Amendment to the US constitution by the Supreme Court was a fundamental turning point: ‘The presence of a federal floor [i.e. those fundamental rights entrenched in the U.S. Constitution] means that the stakes are lower with state constitutions than with the Federal Constitution. The federal government bears some of the monitoring costs of state governments that would otherwise be borne by citizens’<sup>xix</sup>. In other words, that circumstance might have meant a massive, definitive endpoint of any ‘constitutional’ ambitions of state courts.

In 1977, however, a well-known article by Justice Brennan pleaded for the contrary, symbolically paving the way for the ‘New Judicial Federalism’. The framework of Brennan’s insight was the unprecedented expansion of the regulatory scope of federal law from the Great Depression to the 1970s, which should not have been thought to relieve state courts from their duties of constitutional review, even with regard to those state rights otherwise unavailable under the US Constitution: ‘The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law’<sup>xx</sup>. In fact, that *federalising* trend also had in itself some signs of its decline, with the US Supreme Court eventually ‘adopting the premise that state courts can be trusted to safeguard individual rights’<sup>xxi</sup>. On the one hand, the complex trend known as New Judicial Federalism was to be mainly a reaction to the more minimalist approach of the Burger and Rehnquist Courts towards fundamental rights issues. On the other hand, this trend was favoured – and, to a certain extent, made possible – by a doctrine of self-restraint of the US Supreme Court itself, which affirmed that it would not have reviewed state court decisions resting upon an adequate state ground’<sup>xxii</sup>.



That period has been labelled as a ‘golden age’ of state constitutional law and the starting point of renewed scientific interest in the topic<sup>XXIII</sup>. One of the chief assumptions of the trend was Justice Brennan’s claim that ‘one of the strengths of our federal system is that it provides a *double source of protection* for the rights of our citizens’<sup>XXIV</sup>.

As has been noted, New Judicial Federalism was prompted by the more activist attitude of the Warren Court – whilst prior contributions of the state courts to the development of the protection of fundamental rights were negligible: ‘state supreme courts did not develop a body of civil liberties law prior to the 1930s’. Thus, according to Tarr, the New Judicial Federalism ‘represents not a return to the past but ‘an unprecedented exercise of state judicial power’<sup>XXV</sup>. The activism of the Warren Court might not have been so detrimental to federalism as its critics pretended: ‘the protection of civil liberties should not be viewed as a zero-sum game, in which increased activity by one judiciary necessitates decreased activity by the other. Rather, the relationship between federal and state judiciaries involves a sharing of responsibility and a process of mutual learning’<sup>XXVI</sup>. This explanation may be interpreted as not perfectly coinciding with Ginsburg and Posner’s outlook; indeed, a strengthened constitutional review in the ‘superstate’, as they call it, might be the most important factor for a system of state courts to initiate an intensive work of effective construction and enforcement of their own constitutional laws. Other commentators, in turn, have also tried to argue that the New Judicial Federalism is not really novel but rather a ‘rediscovery’ of state constitutions and state declarations of rights<sup>XXVII</sup>.

Even if the actual achievements of New Judicial Federalism are controversial – most of all for its actual dimensions and its real influence over the evolution of the US legal system as a whole<sup>XXVIII</sup> – this trend seems to have been crucial for a radical re-evaluation of state constitutional law.

Some other data, however, impose a more nuanced analysis of those developments in the US. These affect, first, the intrinsic characters of *state constitutional law* as entrenched in *state constitutions* and, second, the position of the judiciary within state political systems and political processes.

Due to reasons concerning state constitutionalism in the US – which have been carefully scrutinised by Williams<sup>XXIX</sup> – state rights are usually more weakly entrenched than national rights. For the purposes of this paper, this circumstance does entail that legislatures and voters within the states are much more willing to reverse decisions by the



state courts by means of constitutional revision, modifying or even suppressing provisions entrenched in their fundamental charters. Another possible occurrence is the recall of state judges, which perfectly fits weaker separation of powers and an inclination towards direct democracy or populism, which are also supposed to be typical of state constitutionalism<sup>xxx</sup>.

Some other data, however, might contradict or, at least, relativise the picture. As I have just recalled, ‘in one sense, these court-constraining amendments have been an enduring feature of the state constitutional tradition’<sup>xxxI</sup>, and since the 1970s they have been passed most of the time in order to reverse state court decisions concerning civil rights and liberties<sup>xxxII</sup>. A significant point is that the recent wave of court-constraining – or to be more correct, court-overturning amendments – has been severely criticised by scholars, who think ‘that they are improper insofar as they take matters that should be resolved by the judiciary and place them in the political process’<sup>xxxIII</sup>. This kind of criticism is obviously related to the broader debates on the virtues of political constitutionalism or the source of legitimacy of judicial ‘activism’<sup>xxxIV</sup>; however, it also suggests that a more deeply rooted consciousness of the *practical* relevance of state constitutional law has been spreading.

These final remarks might even suggest that New Judicial Federalism and activism of state courts might slowly but inexorably challenge many commonplaces in the perception of state constitutional law. Briefly, they might not only have attracted scholarly and public attention towards the *contents* of state constitutions and their own original bills of rights, they might also have induced a change in the *status* of state constitutional law.

#### 4. Constitutional Review in the German *Länder*

As mentioned before, the German judiciary is traditionally characterised by the presence of a number of specialised branches, among which is a court specifically entrusted with constitutional review (*Verfassungsgerichtsbarkeit*). Accordingly, fifteen out of sixteen *Länder* in Germany decided to establish a constitutional court of their own. The only exception was Schleswig-Holstein which, according to Article 99 of the German Basic Law, handed over



to the Federal Constitutional Court the power to decide over ‘its’ constitutional disputes. In 2008, however, a Constitutional Court of Schleswig-Holstein was established<sup>xxxv</sup>.

According to a well-established view, three ‘waves’ of constitution-making are recognisable throughout the *Länder* of the Federal Republic of Germany: the first phase lasted from 1945 to 1949, the second phase lasted from 1949 to 1990, and the third and current phase started in 1990, with the enactment of the Basic Law and the reunification seen as major turning points<sup>xxxvi</sup>. This chronological classification is mainly focused on the contents of the constitutions of the *Länder*, most of all on the provisions concerning constitutional principles, fundamental rights, and ‘goals of state action’ (*Staatsziele*). It is of the greatest interest to draw a parallel between that story of constitution-making and the establishment of constitutional review in the German *Länder* from the mid-1940s onwards. Seven *Landesverfassungsgerichte* were established between the end of the Second World War and 1949 in Bavaria (1947), Hesse (1947), Bremen (1949), Rhineland-Palatinate (1949), Baden, Württemberg-Baden, and Württemberg-Hohenzollern (the three latter *Länder* were later dissolved into Baden-Württemberg). This first phase was quite diverse in cultural influences, which came both from the old Germanic traditions of *Staatsgerichtsbarkeit* and *Verfassungsgerichtsbarkeit*, and pressures from the Western occupying powers. Constituent assemblies in the *Länder* set out a rich array of procedures of constitutional review, whose best examples might be found out in Bavaria. After 1949 – the *Bundesverfassungsgerichtsgesetz* dates back to 1951, and the Federal Constitutional Court started its activity in the same year – five other *Land* constitutional courts were established in North Rhine-Westphalia (1952), Hamburg (1954), Baden-Württemberg (1955), Lower Saxony (1955), and Saarland (1958). In some cases – for example, Lower Saxony – the *Land* ordinary law establishing the constitutional court just deferred to the correspondent federal law. Most interestingly, none of these courts had full competence (if any) over individual complaints (*Verfassungsbeschwerden*). This might look quite striking in those *Länder* whose constitution contains a bill of rights (indeed, it was not [yet] the case of Hamburg and Lower Saxony). Seven constitutional courts have been established after the reunification in Berlin (1990), Brandenburg (1993), Saxony (1993), Saxony-Anhalt (1993), Mecklenburg-Western Pomerania (1994), Thuringia (1994), and Schleswig-Holstein (2008). The enriched competences of those courts – inclusive of individual complaints – seem to show a new interest ‘to promote the self-understanding of the *Länder* over their constitutional law and



the consciousness of their statehood by means of autonomous and binding interpretation of the Constitution of the *Land*<sup>XXXVII</sup>.

This chronological insight seems to confirm that constitutional review is a crucial element in understanding the significance of a subnational constitutional arrangement. The post-1990 phase of constitutional fervour in the Eastern *Länder* – and, subsequently, in the West as well – could not be limited to constitution-making and the updating of the fundamental rights entrenched in the Basic Law. Constitutional review was an obvious component of that trend.

Nevertheless, some elements seem to confirm Ginsburg and Posner's claim on the lesser significance of stakes at the subnational level, too. First of all, the length of the term of constitutional judges and their possibility of being re-elected should be considered. According to comparative scholarship on constitutional review, those members of constitutional courts who are elected by legislatures or appointed by executive office-holders should normally stay in office during good tenure (as happens in the US) or for a term whose length largely exceeds the duration of the legislature. Re-election is normally excluded in order to avoid possible collusion between the appointees and political office-holders. In Germany, for instance, the judges of the Federal Constitutional Court, the *Bundesverfassungsgericht*, are elected for twelve years (unless they attain the mandatory age of retirement of sixty-eight before) and cannot be re-elected for another term<sup>XXXVIII</sup>. A two-thirds majority of the members of the *Bundesrat* or the Election Committee of the *Bundestag* is required<sup>XXXIX</sup>. As for personal requirements, appointees have to be eligible to become ordinary judges (so-called *Befähigung zum Richteramt*)<sup>XI</sup>. A strict regime of incompatibilities is laid down by the law<sup>XLI</sup>.

If you consider the situation in the *Länder*, a trend towards homogeneity – or a generalised mechanic transposition of the provisions of the Law establishing the Federal Constitutional Court – can hardly be recognised.

All the elected members of the Constitutional Court of Bremen, some of the members of the Constitutional Court of Bavaria and six members of the Constitutional Court of Hesse are elected for five years, i.e. the same as the term of the legislature of the *Land*<sup>XLII</sup>. Judges of the Constitutional Courts of Hamburg, Rhineland-Palatinate, Lower Saxony and Saxony-Anhalt are entitled to re-election for another term. Judges of the Constitutional Courts of Baden-Württemberg, Saxony, Bavaria, Hessen, North Rhine-Westphalia,



Thuringia and Bremen can be re-elected without any time restrictions<sup>XLIII</sup>. Re-election, instead, is not allowed in Berlin, Brandenburg, and Mecklenburg-Western Pomerania. A plurality of members of the *Land* legislature is enough to elect constitutional judges in Baden-Württemberg, Bavaria, Bremen, Hamburg, Hesse, and North Rhine-Westphalia<sup>XLIV</sup>. This circumstance can be duly assessed taking into account that the political systems of subnational polities are more likely to be characterised by a dominant party than their national counterparts – and many German *Länder* are not an exception<sup>XLV</sup>.

Finally, members of constitutional courts in the *Länder* mostly fulfil their duties on a volunteer basis (*ehrenamtlich*) or as a secondary task (*nebenamtlich*): thus, when necessary, they can be replaced by substitutes<sup>XLVI</sup>.

As for procedures, there are both similarities and differences with what the *Bundesverfassungsgerichtsgesetz* prescribes for the Federal Constitutional Court. Perhaps the most original procedure to go before a *Land* constitutional court – and which has no equivalent at the federal level – is Bavarian popular action (*Popularklage*), whereby everybody may challenge the constitutional legitimacy of a piece of *Land* legislation in a typically abstract review, without having to prove a violation of his or her fundamental rights<sup>XLVII</sup>.

Individual complaints – one of the procedural tools for which the Germanic model of constitutional review is best-known – are admitted under different conditions in just ten *Länder*. In many cases, *Landesverfassungsgerichte* are just entitled to review *Land* legislative or regulatory acts, and not judicial decisions – even in order to avoid conflicts with federal appellate courts (e.g. the Federal Court of Justice or the Federal Administrative Court). In some *Länder*, individual complaints can be initiated before their constitutional courts only if a parallel individual complaint before the *Bundesverfassungsgericht* has not been or is not being initiated<sup>XLVIII</sup>. This is a mostly subsidiary form of constitutional review, which has been revitalised since the 1990s even in order to reduce the workload of the *Bundesverfassungsgericht*, thus setting up the conditions for a ‘doubled protections of rights’<sup>XLIX</sup>. This has been the outcome of a proactive attitude of some *Landesverfassungsgerichte*, a skillful work of dialogue of the Federal Constitutional Court, and a passionate debate among constitutional scholars<sup>I</sup>. A favourable framework for such developments was provided by the ‘third wave’ of constitution-making starting in the Eastern *Länder* in the aftermath of the reunification<sup>II</sup>.



The great issue at stake was whether a *Land* constitutional court could review under the provisions of the *Land* constitution a judicial decision of a *Land* court in which the latter had applied federal legislative law. The first plausible (and positive) answer came from the newly established Constitutional Court of Berlin in the so-called Honecker case:

*‘the present individual complaint is not less admissible because the challenged judgements have applied provisions of the Criminal Procedure Ordinance, i.e. federal law. The crucial point is that those are acts of the Land Berlin (Article 49(1) of the Land law on the Constitutional Court). The fundamental rights entrenched in the Constitution of Berlin are binding for the judiciary of the Land Berlin (Article 23(1) of the Constitution of Berlin) and may be taken into account – compatibly with Articles 142<sup>LI</sup> and 31 of the Basic Law – if it [i.e. the Land courts] applies federal law’<sup>LIII</sup>.*

On the other side, scholars noticed ‘an evident trend’ in the case law of the Federal Constitutional Court aiming at strengthening its counterparts in the *Länder*, in order also to reduce its workload<sup>LIV</sup>. Dealing with a reference from the Constitutional Court of Saxony, the *Bundesverfassungsgericht* held that the Basic Law does not prevent a *Land* Constitutional Court from reviewing the application of federal procedure law by a court in the *Land* under fundamental rights and right-equivalent guarantees of the *Land* constitution having the same content as the corresponding right in the Basic Law<sup>LV</sup>. This position of the *Bundesverfassungsgericht* implicitly approved the claims which had been made by some – although not all – *Landesverfassungsgerichte* in the preceding years. This has led some commentators to claim that ‘to speak today of an exclusive or primary responsibility of the Federation for the enforcement of constitutional law appears dubious’<sup>LVI</sup>.

Finally, the case law of constitutional courts in the *Länder* deserves a mention. It has mostly been characterised by a significant dialogue – in the broadest, least technical sense – among *Landesverfassungsgerichte* and with the *Bundesverfassungsgericht*. Two examples are sufficient: the legitimacy of the 5%-threshold, which is a landmark in German election systems at all institutional levels, has been (successfully challenged) before some *Landesverfassungsgerichte* with regard to its application in municipal elections<sup>LVII</sup> – before the Federal Constitutional Court decided to declare its constitutional illegitimacy in municipal elections or in the election of German Members of the European Parliament<sup>LVIII</sup>. Another interesting example does concern the recent balanced-budget amendments which cast



duties on both the *Bund* and the *Länder*: in 2011, the Constitutional Court of North Rhine-Westphalia recognised the budget of the *Land* as unconstitutional for violating the new rules on public indebtedness<sup>LIX</sup>. Without trying to draw general conclusions from insulated cases, what seems to emerge is that *Landesverfassungsgerichte* quite often succeed in anticipating federal judicial trends.

## 5. Dilemmas of the ‘Regional State’

Traditionally, European constitutional scholarship tends to cast a distinction between *federal* and *regional* legal systems. Apart from Belgium, those previously unitary states in Continental Europe which conferred some degree of institutional and legislative autonomy to their territorial units in the 20th century were labelled as ‘regional states’: this is the case of the Spanish Third Republic or the Italian Republic<sup>LX</sup>.

Even if the distinction between federalism and regionalism is fading among constitutional lawyers and political scientists<sup>LXI</sup>, its theoretical foundations are not without effect on present-day assumptions concerning many legal aspects of regional autonomy in both Italy and Spain<sup>LXII</sup>. As the Spanish Constitutional Court has recently stated,

*‘it is self-evident ... that one of the defining traits of the autonomic State, insofar as it is different from the federal State, is that its functional and organic pluralism does not affect the judiciary at all. In the autonomic State, the diversification of the legal system, resulting in more autonomous normative systems, does not take place at the constitutional level – entailing the existence of more constitutions (federal and subnational). Conversely, it only starts at the level of ordinary laws, in presence of one national constitution’<sup>LXIII</sup>.*

Thus even if the practical operation of the Spanish federalising process has gone well beyond a mere autonomic frame, the traditional scholarly distinction between federal systems and autonomous (or regional) ones is still relevant to the self-understanding of the system.

For the purposes of this paper, in particular, it is clear that: (1) (central-state) constitutional courts are quite hostile towards any recognition whatsoever of a subnational



constitutional law<sup>LXIV</sup>; and (2) there can be only one interpreter of the Constitution, i.e. the (national) constitutional court<sup>LXV</sup>.

Due to different reasons, both countries have undergone a process of in-depth revision of subnational fundamental charters (*Statuti* of Italian ordinary regions, *Estatutos* of Spanish autonomous communities) in the last decade. After approving new, more ambitious regional charters, a concern arose: how to ensure the compatibility of legislative and administrative activity of a Region with the provisions of its charter – in other words, how to take this piece of *fundamental law* seriously. In Italy, a law may be declared unconstitutional under Article 123 of the Constitution if it violates a regional *Statuto*. Because, among other reasons, of the procedural difficulty of reviewing legislation under the provisions entrenched in the regional *Statuti*, however, the Italian Constitutional Court has quite rarely used those provisions to review the legitimacy of (regional) ordinary legislation<sup>LXVI</sup>.

Furthermore, another major concern is how to build up a ‘culture’ of legislation and administration at the subnational level in countries that have traditionally had a very centralised organisation. At the national level, this function has traditionally been performed by a very prestigious consultative organ, called the *Council of State* in both countries.

In Spain, for instance, organic law no. 3/1980 on the functions of the *Consejo de Estado* allows it to ‘give advice’ to the autonomous communities as well. Subsequently the Spanish Constitutional Court made it clear that autonomous communities are empowered to establish consultative bodies of their own, ‘equivalent to the *Consejo de Estado*’ in organisational and functional terms<sup>LXVII</sup>. In Italy, the problem might have been even more acute because the *Consiglio di Stato* has traditionally been more interested in developing its judicial case law than its consultative functions – being very careful, meanwhile, of preventing the rise of decentralised consultative organs<sup>LXVIII</sup>.

Both Spanish autonomous communities (since the 1990s) and Italian regions (since the 2000s) have established consultative bodies entrusted with assessing *a priori* the compatibility of regional legislative and administrative business with, respectively, *Estatutos* or *Statuti*<sup>LXIX</sup>. To mention just an example, the *Consulta di garanzia statutaria* of Emilia-Romagna is entrusted with: (1) reviewing those events that have provoked a precocious dissolution of the legislature; (2) expressing opinions on popular legislative propositions or



regional referendums; (3) expressing opinions over the compatibility with the *Statuto* of regional laws and regulations; and (4) solving possible conflicts among regional organs.

Those organs share some features with both the legislative and the judiciary<sup>LXX</sup>. In Italy their functions mainly concern the *methods* of regional legislation and its compliance with *procedural standards* laid down in the regional charters. This appears to be very interesting in an age marked by the perception of an irresistible decline of representative legislatures and the legislative function<sup>LXXI</sup>. They embody a sort of ‘public’ consultative function which faces a radical change in legislation: ‘legislative activity has radically changed in the last few decades: it has become extraordinarily more complex than has happened before, much more limited and constrained’<sup>LXXII</sup>. Besides this, however, those consultative bodies should also play a role of protection of minorities and, most interestingly, of local government authorities, which have generally no standing before national constitutional courts. Furthermore, they are supposed to act in an institutional framework characterised – as it happens in Italy – by the presence of a strong executive and a legislature which is *always* dominated, thanks to the peculiar features of election systems, by the regional president’s coalition<sup>LXXIII</sup>. This is why structural aspects of consultative bodies are carefully laid down, so as to allow political minorities to have a say in the designation of their components.

A good example of the possibilities and the limitations characterising this trend comes from the much-discussed judgement of the Spanish Constitutional Court on the ambitious *Estatut* of the autonomous community of Catalonia<sup>LXXIV</sup>. In particular, the *Estatut* changed the *Consejo Consultivo* into a *Consell de Garanties Estatutàries* (Council for Statutory Guarantees), ‘the institution of the *Generalitat* that ensures that the regulations of the *Generalitat* comply with this *Estatut* and the Constitution’<sup>LXXV</sup>. However, in the light of the aforementioned considerations on the differences between federations and autonomic states, the deliberations of the *Consell de Garanties Estatutàries* (Council for Statutory Guarantees) cannot bind the legislature – the *Consell* cannot aim at becoming a sort of constitutional court of Catalonia: ‘there are substantial and evident conceptual differences between the ... functions typical of consultative bodies and judicial functions which are exclusively exercised by courts, in general, and this Court, in particular, as far as its condition of supreme judicial interpreter of the Constitution is concerned’<sup>LXXVI</sup>. Since the Spanish legal system has just one Constitution, there can be only one Constitutional Court. Consequently, the Court declared the illegitimacy of a provision of the *Estatut* according to



which ‘the judgments of the *Consell de Garanties Estatutàries* in relation to Government bills and Members’ bills in Parliaments that develop or affect the rights recognized in this *Estatut, are binding in nature*<sup>LXXVII</sup>.

## 6. A Possible Conclusion

In my opinion, the comparative analysis that I have tried to sketch in this paper does lend itself to some conclusions which do not necessarily fit into a harmonious and coherent picture. Still, they might provide a faithful representation of the ‘spirit’ of subnational constitutionalism in the legal systems which I have considered.

First, there is a persuasive link between lively subnational constitutional arrangements and the existence of some form of constitutional review at the subnational level. Furthermore, revitalisations of subnational constitutional review tend to attract attention towards subnational constitutional law. This is certainly true of the US. The German case, in turn, might suggest a slightly different explanation: as seen before, efficiency-driven concerns – which an American observer would identify as the defining feature of European federalisms<sup>LXXVIII</sup> – may have had a crucial role in strengthening the role of *Landesverfassungsgerichte*<sup>LXXIX</sup>. The recent developments in Italian regions and Spanish autonomous communities prove how subnational communities are conscious of the necessity of having an independent body overseeing the compliance of regional legislative and administrative business with their fundamental charters, thus supporting their function of fundamental law or, in other words, ‘basic institutional norm’ of a subnational polity<sup>LXXX</sup>.

Second, constitutional review is a good field to check the sustainability of Ginsburg and Posner’s hypothesis. Here again, subnational constitutionalism tends to be understood as ‘subconstitutionalism’ – that is, a kind of constitutionalism whose operation is largely dependent from its inclusion in a larger, comprehensive constitutional order. Thus both organisational and functional aspects (see the German case), on the one side, and the position of constitutional review within the broader subnational polity (think of court-constraining amendments in the US), on the other, show that constitutional law – as a kind of fundamental law – tends to be taken less seriously at the subnational level. Indeed, the



position of constitutional courts – or ordinary courts entrusted with constitutional review – within subnational institutional systems is often dependent on how the national constitutional court decides to interpret their mutual relations and their respective roles in the enforcement of constitutional law (see the attitudes of the US Supreme Court and the *Bundesverfassungsgericht* in sections 3 and 4).

Third, lower constitutional stakes – whose existence cannot be denied – are also an incentive to make experimentations. Constitutional review probably offers a good example of subnational constitutional arrangements as a specification of the view of federalism as an organisational form which allows and actually (hopefully) encourages institutional experimentation. The most famous exposition of this view is Justice Louis D. Brandeis' dissenting opinion in *New State Ice Co. v. Liebmann*: 'It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country'<sup>LXXXI</sup>. This conception is deeply rooted in the American understanding of state constitutionalism as an intrinsic element of federalism, as the Supreme Court more clearly argued in the *Lopez* case: 'In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role of laboratories for experimentation to devise various solutions'<sup>LXXXII</sup>.

I will just recall three examples: as different as they are, they offer a convincing demonstration of this assumption and possibly allow provision of an even more nuanced conclusive picture. The first one is New Judicial Federalism in the US: as said before, some commentators have seen the rise of enforcement of state fundamental rights by state courts as a development prompted by the activist attitude of the Warren Court until the late 1960s; this, however, might also suggest that a stronger role of constitutional review at the federal level (i.e. in the 'superstate') does not necessarily entail a more relaxed attitude on the side of state courts. The second example is popular action in the *Freistaat* Bavaria: the introduction of a procedural tool which is quite rare in most legal systems has allowed the Constitutional Court of Bavaria to elaborate the richest and most significant case law among the German *Land* constitutional courts.

Third, I think it is important to point out again the possibility of regional consultative bodies of reviewing regional legislative procedures in Italy, where the national Constitutional Court has consistently held that the internal proceedings of the Parliament



are more often outside the scope of its reviewing activity<sup>LXXXIII</sup>. In my opinion, this trend might be properly evaluated if a comparison is made with the willingness of German *Land* constitutional courts to review budgetary legislation under the provisions of the *Finanzverfassung* after the ‘Second Reform of Federalism’ in 2009, as has happened in North Rhine-Westphalia. These are meaningful innovations because of the traditional deference of the courts towards political office-holders in what has long been seen as the most vital core of representative democracy – *financial decision-making*. As has been held, those changes have been possible at the subnational level ‘because it may be less tightly committed to the rhetoric of sovereignty’<sup>LXXXIV</sup>.

These are all important demonstrations of how the subnational constitutional space may act as a laboratory not only with regard to higher levels of protection of fundamental rights but also to a more transparent and participative political process. If this assumption is correct – as I think it is – well-known narratives of subnational constitutional systems being pervaded by majoritarian traits and lesser guarantees for political minorities could be partially reconsidered. In other words, ‘lower stakes’ may also mean lesser deference towards the most jealously preserved *domaines réservés* of the legislative and the executive.

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\* Ph.D. candidate in Constitutional Law, Sant’Anna School of Advanced Studies, Pisa (Italy). Email address: [giacomo.delledonne@gmail.com](mailto:giacomo.delledonne@gmail.com). I would like to thank Robert F. Williams, Giuseppe Martinico and the anonymous reviewers for their precious suggestions and comments. Usual disclaimers apply.

<sup>I</sup> As for general comparative analyses of constitutional review, see Favoreu 1996 and Pizzorusso 2007.

<sup>II</sup> Ginsburg and Posner 2010.

<sup>III</sup> This trend, however, has also been criticised: think e.g. of ‘constitutional review positivism’ (*Verfassungsgerichtspositivismus*) and its influence on constitutional law scholarship (Cassese 2010: 396-397).

<sup>IV</sup> Loughlin 2010: 288.

<sup>V</sup> Loughlin 2010: 296.

<sup>VI</sup> See Pizzorusso 2006, Neuborne 2007 and Heuschling 2008 (concerning the French tradition of constitutional law scholarship and the rise of the *école d’Aix-en-Provence* after the establishment of the *Conseil constitutionnel*). The prior situation – well exemplified by Vittorio Emanuele Orlando, one of the leading representatives of traditional public law scholarship in continental Europe – is plainly illustrated in Cassese 2011.

<sup>VII</sup> Ginsburg and Posner 2010: 1596

<sup>VIII</sup> See Pierandrei 1962: 899; Pizzorusso 1981: 21 ff.

<sup>IX</sup> See Constitutional Court of Italy, *sentenze* no. 38/1957 and no. 6/1970: ‘all norms relating to the High Court are incompatible with the Constitution. Indeed, in a unitary state – even though its structure is based on extensive territorial pluralism (Article 5 of the Constitution) – the principle of a unitary judiciary cannot be



limited' (both available at <http://www.cortecostituzionale.it>). According to Article 25 of the regional charter (*Statuto*) of Sicily of 1946, the high court was basically entrusted with reviewing the compatibility of state and regional laws with the *Statuto* and the Italian Constitution, 'for the purposes of their validity within the Region'. Neither am I interested in the review of subnational constitutional texts by national constitutional courts (see Fossas Espadaler 2011: 39-44).

<sup>x</sup> See also comprehensive comparative data collected by Dr. Arne Mavčič, available at <http://www.concourts.net>.

<sup>xi</sup> As for the Argentine case, see Hernández 2010.

<sup>xii</sup> Russell 2009: 267.

<sup>xiii</sup> Martinico 2011: E 68. Meanwhile, Cantons Basel, Jura and Nidwalden have established their own constitutional courts (the administrative court of Canton Basel is a constitutional court, too).

<sup>xiv</sup> See Elazar 1999.

<sup>xv</sup> Häberle 2008: 278.

<sup>xvi</sup> See e.g. Tarr 2009: 768 and Popelier 2012.

<sup>xvii</sup> Ginsburg and Posner 2010: 1588.

<sup>xviii</sup> Delledonne and Martinico 2011: 2.

<sup>xix</sup> Ginsburg and Posner 2010: 1605. See also Brennan 1977: 493-495.

<sup>xx</sup> Brennan 1977: 491. A detailed account is provided by Williams 2009: 113-134.

<sup>xxi</sup> Brennan 1977: 502-503.

<sup>xxii</sup> US Supreme Court, *Michigan v. Long*, 463 US 1032-1402 (1983). See also *Murdock v. City of Memphis* (87 US (20 Wall.) 590 (1875)); more indications in Fercot 2008: 318.

<sup>xxiii</sup> Williams 1998: 764.

<sup>xxiv</sup> Brennan 1977: 503 (emphasis added).

<sup>xxv</sup> Tarr 1994: 69.

<sup>xxvi</sup> Tarr 1994: 73.

<sup>xxvii</sup> See Abrahamson 1985.

<sup>xxviii</sup> See again Tarr 1994: 73-77.

<sup>xxix</sup> See Williams 2009.

<sup>xxx</sup> See Ginsburg and Posner 2010: 1606; Williams 2009: 32-33.

<sup>xxxi</sup> Dinan 2007: 986.

<sup>xxxii</sup> See Dinan 2007: 988-989.

<sup>xxxiii</sup> Dinan 2007: 1020. The author also quotes some occasions on which state courts invoked procedural requirements 'to block court-constraining amendments from taking effect'. See e.g. Supreme Court of California, *Strauss v. Horton*, 46 Cal. 4th 364 (2009).

<sup>xxxiv</sup> See Komesar 1988 and Pierdominici 2011.

<sup>xxxv</sup> Article 44(1) of the Constitution of Schleswig-Holstein underwent an *ad hoc* revision in 2006.

<sup>xxxvi</sup> Maurer 2007: 155 ff.

<sup>xxxvii</sup> See Starck 2008: 321.

<sup>xxxviii</sup> See Article 4 of the Law on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*).

<sup>xxxix</sup> See Article 6 of the *Bundesverfassungsgerichtsgesetz*.

<sup>xl</sup> See Article 3 of the *Bundesverfassungsgerichtsgesetz*.

<sup>xli</sup> Article 3(3)(4) of the *Bundesverfassungsgerichtsgesetz*.

<sup>xlii</sup> See Article 139(3) of the Constitution of Bremen, Article 4(2) of the Bavarian Law on the Constitutional Court of the *Land* (VfGHG, available at <http://by.juris.de>: 'The other members and their substitutes are elected by the new *Landtag* after its inaugural session according to the principles of proportional representation'), and Article 130(2) of the Constitution of Hesse.

<sup>xliiii</sup> See Article 4(3) of the Bavarian VfGHG, Article 130(3) of the Constitution of Hesse, and Article 139(3) of the Constitution of Bremen.

<sup>xliiv</sup> See Article 2 of the Baden-Württemberg Law on the Constitutional Court of the *Land* (StGHG), Article 4 of the Bavarian VfGHG, Article 139(2) of the Constitution of Bremen, Article 4 of the Hamburg Law on the Constitutional Court of the *Land* (VerfGG), and Article 76(1) of the Constitution of North Rhine-Westphalia.

<sup>xliv</sup> Think, for example, of Bavaria, where the Christian Social Union held a majority of seats in the *Landtag* from 1962 until 2008; or Bremen, where the German Social Democratic Party held a majority from 1971 to 1991.



- XLVI See comprehensive comparative analysis by Starck 2008: 329-332. See also Starck and Stern 1983.
- XLVII See Article 98(4) of the Bavarian Constitution and Article 55 of the Bavarian VfGHG: 'Everybody is entitled to challenge the constitutional legitimacy of a legal provision of law of the *Land* Bavaria before the Constitutional Court by means of complaint. He or she has to allege that a fundamental right entrenched in the Constitution is illegitimately limited'.
- XLVIII See Starck 2008: 341-343.
- XLIX See Tietje 1999.
- L See Starck 1993, Rozek 1994, Zierlein 1995.
- LI See Häberle 1993.
- LII 'Notwithstanding Article 31, provisions of *Land* constitutions shall also remain in force insofar as they guarantee basic rights in conformity with Articles 1 to 18 of this Basic Law'.
- LIII *Verfassungsgerichtshof des Landes Berlin*, decision of 23 December 1992 (VerfGH 38/92), available in *Entscheidungen der Verfassungsgerichte der Länder Berlin, Brandenburg, Mecklenburg-Vorpommern, Sachsen-Anhalt, Thüringen*, de Gruyter, Berlin and New York 1996: 44-56, 51.
- LIV Tietje 1999.
- LV *Bundesverfassungsgericht*, decision of the 2nd Senate of 15 October 1997 (in *Neue Juristische Wochenschrift*, 1998: 1296 ff.).
- LVI Tietje 1999: 301-302.
- LVII *Verfassungsgerichtshof für das Land Nordrhein-Westfalen*, judgement of 6 July 1999 (VerfGH NRW OVGE 47, 304); *Thüringer Verfassungsgerichtshof*, judgement of 11 April 2008.
- LVIII *Bundesverfassungsgericht*, judgements of 13 February 2008 (BVerfG, 2BvK 1/07) and 9 November 2011 (BVerfG, 2 BvC 4/10).
- LIX *Verfassungsgerichtshof für das Land Nordrhein-Westfalen*, judgements no. 19/2011 and no. 20/2011, both available at <http://www.vgh.nrw.de/entscheidungen/index.php>.
- LX In Italy, this scholarly distinction dates back to Gaspare Ambrosini, who extensively studies the Spanish Constitution of 1931, was largely responsible for the drafting of the section of the Constitution of 1948 devoted to regional and local government and went on to preside over the Italian constitutional court from 1962 to 1967 (see Ambrosini 1944).
- LXI See e.g. Baldi 2003: XI ff.
- LXII See e.g. Italian Constitutional Court, *sentenza* no. 365/2007, which traces a rigid distinction between sovereignty (in federal states) and autonomy (in regional states) of subnational units.
- LXIII Spanish Constitutional Court, *sentencia* no. 31/2010, par. 42. See also Falcon 2010.
- LXIV See DelleDonne and Martinico 2011: 6-15.
- LXV See Italian Constitutional Court, *sentenza* no. 6/1970 (*supra*, at x), and Spanish Constitutional Court, *sentencia* no. 31/2010.
- LXVI See Romboli 2005: 284. There are, however, some exceptions. See e.g. the *sentenze* no. 188/2011, no. 68/2010, no. 119/2006, no. 993/1988, and no. 48/1983 (all available at <http://www.cortecostituzionale.it>). See also Spanish Constitutional Court, *sentencia* no. 247/2007 (on the legitimacy of the *Estatuto* of the Valencia Community), where the Court has stated that the relation between the Constitution and the *Estatutos de autonomía* of the autonomous communities is one of subordination as well as mutual integration, since the *Estatutos* are also part of the *bloque de constitucionalidad* which the Court uses to assess the legitimacy of a norm. Even in Spain, however, the Court has hardly ever used the *Estatutos* to review the legitimacy of legislation.
- LXVII Spanish Constitutional Court, judgement no. 204/1992 (quoted by Garrido Moyol 2011: 640).
- LXVIII See Lupo 2011: 628.
- LXIX As for Spain, Article 129 of the *Estatuto* of Andalusia (*Consejo Consultivo*), Article 58 of the *Estatuto* of Aragon (*Consejo Consultivo*), Article 76 of the *Estatut* of the Balearic Islands (*Consejo Consultivo*), the autonomic law no. 9/2004 of the Basque Country (*Comisión Jurídica Asesora de Euskadi*), Article 44 of the *Estatuto* of Canary Islands (*Consejo Consultivo*), Article 38 of the *Estatuto* of Cantabria (*Consejo Jurídico Consultivo*), Article 13 of the *Estatuto* of Castile-La Mancha (*Consejo Consultivo*), Article 33 of the *Estatuto* of Castile and León (*Consejo Consultivo*), Article 76 of the *Estatut* of Catalonia (*Consell de Garanties Estatutàries*), Article 45 of the *Estatuto* of Extremadura (*Consejo Consultivo*), the autonomic law no. 9/1995 of Galicia (*Consejo Consultivo*), Article 42 of the *Estatuto* of La Rioja (*Consejo Consultivo*), the autonomic law no. 6/2007 of the Madrid Community (*Consejo Consultivo*), the autonomic law no. 2/1997 of the Murcia Region (*Consejo Jurídico*), the *foral* law no. 8/1999 of Navarra (*Consejo de Navarra*), Article 35 quater of the *Estatuto* of the Principality of Asturias (*Consejo Consultivo*), and Article 43 of the *Estatut* of the Valencia Community (*Consell Juridic Consultiu*). See also Garrido Moyol



2011, Tornos Mas 2010, Vintró Castells 2010, Carillo 2008. As for Italy, see the *Statuti* of Abruzzo (Articles 79 and 80, establishing a *Collegio regionale per le garanzie statutarie*), Calabria (Article 57, establishing a *Consulta statutaria*), Campania (Article 57, establishing a *Consulta di garanzia statutaria*), Emilia-Romagna (Article 69, establishing a *Consulta di garanzia statutaria*, implemented by regional law no. 23/2007), Latium (Article 68, *Comitato di garanzia statutaria*), Liguria (Articles 74 and 75, establishing a *Consulta statutaria*, implemented by regional law no. 19/2006), Lombardy (Articles 59 and 60, establishing a *Commissione garante dello Statuto*), Molise (Article 69, establishing a *Consulta statutaria*), Piedmont (Articles 91 and 92, establishing a *Commissione di garanzia*), Apulia (Articles 47, 48 and 49, establishing a *Consiglio statutario regionale*), Tuscany (Article 57, establishing a *Collegio di garanzia*, implemented by regional law no. 34/2008), Umbria (Articles 81 and 82, *Commissione di garanzia statutaria*), and the draft *Statuto* of Veneto (Article 62, establishing a *Commissione di garanzia statutaria*). See also Lupu 2011, Piperata 2011, Napoli 2008, and Cardone 2006.

<sup>LXX</sup> They have even been likened to a sort of ‘technocratic’ second chamber within the regional legislature – alongside the regional council (Lupu 2011: 634-635).

<sup>LXXI</sup> For a recent analysis of the Italian situation see Zaccaria 2011.

<sup>LXXII</sup> Lupu 2011: 628.

<sup>LXXIII</sup> See Fasone 2012.

<sup>LXXIV</sup> See Delledonne 2011.

<sup>LXXV</sup> Article 76(1) of the *Estatut* of Catalonia.

<sup>LXXVI</sup> Spanish Constitutional Court, *sentencia* no. 31/2010, par. 32.

<sup>LXXVII</sup> Article 76(4) of the *Estatut* of Catalonia prior to *sentencia* no. 31/2010 (emphasis added).

<sup>LXXVIII</sup> See Gardner 2008.

<sup>LXXIX</sup> German scholars, however, have felt it necessary to specify that the reduction of the workload of the federal constitutional court ‘is to be applauded for constitutional law reasons’ (Tietje 1999: 283).

<sup>LXXX</sup> Spanish Constitutional Court, *sentencia* no. 31/2010, par. 4.

<sup>LXXXI</sup> US Supreme Court, *New State Ice Co. v. Liebmann*, 285 US 262, 311 (1932).

<sup>LXXXII</sup> US Supreme Court, *United States v. Lopez*, US (1995), 14. See also *San Antonio School District v. Rodriguez*, 411 US 1, 50 (1973).

<sup>LXXXIII</sup> See Italian Constitutional Court, *sentenza* no. 6/1959.

<sup>LXXXIV</sup> Lupu 2011: 629.

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**PERSPECTIVES ON FEDERALISM**

*Centre for Studies on Federalism*

Via Real Collegio, 30

10024 Moncalieri - Torino - Italy

Tel. +39 0116705024

Fax +39 0116705081

Mail to: [castaldi@csfederalismo.it](mailto:castaldi@csfederalismo.it)

