



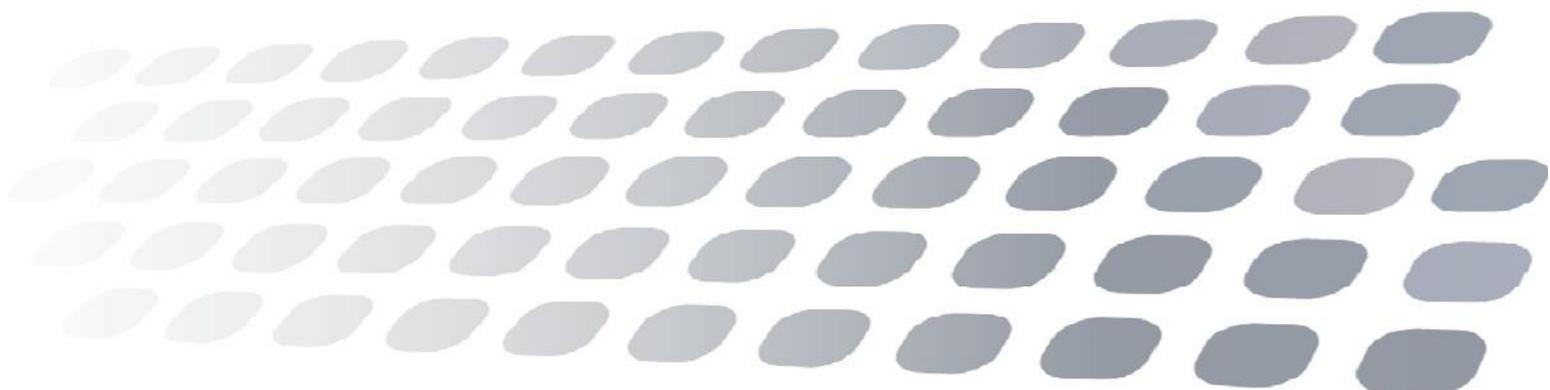
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**Sub-national constitutional politics:  
contesting or complementing, replicating or innovating,  
traditional constitutionalism?**

by

Paul Blokker and Werner Reutter\*

Perspectives on Federalism, Vol. 7, issue 1, 2015





## Abstract

This special issue of *Perspectives on Federalism* collects papers mostly presented at the General Conference of the European Consortium of Political Research in September 2014. The issue contains five papers dealing with the role, the status, the dynamics, and the functions of sub-national constitutional politics and sub-national constitutionalism in a number of member states of the EU as well as in a comparative, non-EU perspective. Even though the papers take different perspectives on the topic at hand, they all engage with the contribution sub-national constitutions can make to democracy and the nation-state within as well as outside of Europe.

## Key-words

Sub-national constitutionalism, comparative constitutional law, comparative federalism, European integration, developing countries



## 1.

This special issue of *Perspectives on Federalism* tackles the question whether and in what respect sub-national constitutional politics and sub-national constitutionalism are linked to self-rule, regional democracy, and multilayered systems. We understand sub-national constitutions in a broad sense. They include constitutional law as well as sub-national legal texts that work and have similar effects as proper constitutions. In addition, we consider the constitutional “space” national constitutions grant to sub-national autonomy as well as bottom-up claims for regional autonomy in centralized states. Evidently, sub-national politics dealing with constitutions and constitutional politics in this broad sense pertains to the aforementioned questions. Yet, it is not always clear in what way and with what effect sub-national constitutions do provide answers, nor what the “right” degree of subsidiarity or sub-national autonomy is from a democratic point of view. Ironically, one might say that sense sub-national constitutionalism and sub-national constitutional politics play a similar role as the number “42” in Douglas Adams’ third book of his science fiction novel “The Hitchhiker’s Guide to the Galaxy”. In this novel Adams has the computer Deep Thought come up with the “Answer to the Ultimate Question of Life, the Universe, and Everything”. As a matter of fact, it took Deep Thought seven and a half million years to compute the answer, which turned out to be: “42” (Adams 2005).<sup>1</sup> The problem was that those who designed and switched on Deep Thought failed to ask the proper question. However, if we do not know “The Ultimate Question of Life, the Universe, and Everything”, the respective “Answer” is of no use at all – which is a pity, indeed. Sub-national constitutionalism seems to share the fate of “42” in Adams’ novel. For many it is an answer, but we do not know to which question. But we can guess. Overall, we see three discourses in which sub-national constitutional politics plays a crucial role.

Firstly, sub-national constitutions challenge the view that undivided sovereignty is a necessary precondition of an integrated nation-state. On the contrary, in the Federalist Papers Alexander Hamilton, James Madison and John Jay (1778/1994) already rejected the notion that sovereignty has to rest in just one institution. Or: Multilevel systems in general and federalism in particular necessarily break up sovereignty. In this perspective, sub-national regions enjoy sovereign prerogatives and can claim to share in statehood. In



federal states “shared rule” and “self-rule” go together (Elazar 1987; Popelier 2014). The demand for regional self-rule can even lead to secession from a nation-state. Such developments seem to be triggered by processes of globalization and European integration. Indeed, in the EU context every state – federal or not – is part of a multi-level constitutional system. “Methodological nationalism” fails to capture recent changes in member states of the European Union. Unitary states have been transformed into federal states (or they are about to do so), federal states have devolved competences to sub-national levels. In other, non-federal EU member states actors at the sub-national level strive for more rights. In some of these cases, sub-national actors got the chance to set up constitutions, establish non-formal statutes, or make over their already existing sub-national constitution. Sub-national constitutions become then a means to sustain some sort of autonomy in a multilevel system. In other cases, no formal or explicit constitutional dimension can (yet) be identified, but claims with constitutional relevance are expressed by regional actors (often grounded in distinct minority identities, as in the case of the Hungarian minority in Romania). In yet other cases, tendencies to sub-national constitutionalization are contrasted by or in tension with simultaneous drives to a recentralization of the state (as is currently the case in the constitutional reform in Italy). In this, it remains open to discussion whether sub-national constitutionalism reinforces or contradicts the functioning of the multilevel system. Or, in other words: when do sub-national constitutions complement, challenge, or undermine a national or the European political order?

Secondly, the link between sub-national constitutional politics and democracy seems to be as ambivalent as the one between sub-national constitutions, the nation state, and multilevel systems. According to Ernst-Wolfgang Böckenförde, constitutions took different shapes and had different effects throughout history. The *Magna Charta Libertatum* of 1215 has been a covenant between the British King and his ranks. The Bavarian constitution of 1818 circumscribed royal powers that derived their legitimacy not from the people but from God. The Constitution of the German Confederation of 1815 was an accord between states that transferred sovereign rights to superior institutions but retained their sovereignty (Böckenförde 1992). All these laws had been constitutions in the sense that they organized and set up some sort of government. Contemporary German *Land* constitutions differ from these historical types for three reasons: They are supposed to be



superior to other legal acts, they are to set up the polity and the rules for the political process, and they are to be manifestations of the will of the people, hence they have to be democratically legitimized. The claim, then, modern constitutions make is broader. Modern constitutions do not only set up some institutions and organs that help to govern. As a consequence, we can argue that constitutional law and constitutionalism are not the same thing. While the first one refers to formal aspects, the second one tries to accommodate ideas about forms and objectives of the polity. Thus, constitutional law is the most fundamental law of a society. It has to be adopted in a specific way and amended in a more difficult procedure than normal law.

Constitutionalism invokes the idea that these features of constitutional law are not just formal distinctions but represent a specific idea of liberal constitutionalism. Or: Constitutional law serves a substantial – in essence liberal – purpose. It rests on two pillars: on the people’s claim for self-governance and on the protection of liberty (Gardner 2007: 2-3). In this view a constitution is a “kind of charter of living”. Accordingly, an “ideology of sub-national constitutionalism (...) conceives of state, provincial, or regional constitutions as charters of self-governance self-consciously adopted by subnational populations for the purpose of achieving a good life by effectively ordering subnational governmental power and by protecting the liberties of subnational citizens” (Gardner 2007: 3). In this view, constitutionalism goes together with democratic self-restraint. The *demos* agrees to limit its sovereign rights in order to protect the liberties of sub-national citizens and guarantee democratic self-rule. However, sub-national constitutions are further circumscribed. In multilevel systems, there is no such thing as constitutional autonomy for sub-national units (Popelier 2014; Lorenz/Reutter 2012). This raises questions about the nature and functions of sub-national constitutions and in what respect these legal texts can set up, improve, and sustain democratic self-rule. At the same time, sub-national or local forms of self-rule might help to re-attach citizens to the democratic process in a context of fragile democratic traditions, the displacement of national sovereignty, and increasing civic adverseness to national politics (Blokker 2012; Lorenz 2013). This relates to a more general trend towards a “democracy of proximity” (Rosanvallon 2011: 171). A democracy of proximity calls for forms of government that are attentive to the needs of citizens, in which an open relationship between the governors and governed exists (accessible and transparent government), and in which the particularity and diversity of context is taken



into account. In some cases, claims for sub-national autonomy also include an emphasis on a more democratic, inclusive form of engagement with constitutionalism (as to some extent in the Scottish case or in current proposals for a “convention” or “constituent assembly” in Alto-Adige).

Thirdly, with the Maastricht Treaty Europe discovered that member states do have sub-national units. From then onwards, European politicians had to learn what subsidiarity means. Very often subsidiarity is regarded as a sort of synonym for local or sub-national democracy. Many see sub-national units as inherently more democratic and more efficient than national or European entities. Sub-national democracy might work as a partial antidote to efficiency (output legitimation) and legitimacy (input legitimation) problems of European democracies. It can trigger legal innovations and help to clarify the status of such innovative features. However, the link between democracy, constitutional law and subsidiarity is not as straightforward as many seem to assume (Benz 2009; Reutter 2010). Historically, subsidiarity has never been a democratic idea. It is rather a normative rule for allocating competencies between levels. In principle it gives preference to the lower level if – and only if – higher levels are not better in providing the service. In other words subsidiarity just constitutes the need for justification to transfer competencies to higher levels if these are better in dealing with the issue at hand. According to Werner Vandendriessche “the commonly shared denominator of the principle of subsidiarity indicates the search for an optimal allocation and exercise of governmental authority in terms of efficiency and legitimacy.” (Vandendriessche 2014: 49).

## 2.

As mentioned above, the special issue collects papers mostly presented at the General Conference of the European Consortium of Political Research in Glasgow 2014. The five papers differ in many respects and address divergent issues. Nonetheless, they all observe a strong tendency towards regionalization that is fueled by sub-national constitutional politics.

W. Elliot Bulmer examines an often overlooked aspect in the Scottish attempt for national independence. Bulmer explores how the Scottish strife for national autonomy is linked to constitutional discussions. He brings the roots and traditions of Scottish



nationalist constitutional thought to the fore. He specifically looks at: (i) selective borrowing from Scandinavian and Commonwealth constitutionalism, whilst simultaneously repudiating, reforming, and replicating, orthodox British constitutional doctrines; (ii) the apparent contrast between radicalism (e.g. the centrality of the idea of popular sovereignty to Scottish nationalist constitutional thought, and the emergence of “ethical constitutionalism”, expressed through commitment to values and principles) and “British incrementalism” in terms of specific institutional proposals. It is interesting to look at how – at least since the 2010 and 2011 elections – the Scottish constitutional conversation has diverged from, but continues to be influenced by, the UK-wide constitutional conversation at Westminster.

Ferdinand Karlhofer takes a different stance on the issue at hand. He explores a – as it seems: obligatory – fallout of federal systems: the discrepancy between the formal constitution and the informal world of effective politics. Some even see Austria as “federation without federalism” (Karlhofer/Pallaver 2013). While Austria's federal structures are taken as weak or almost as nonexistent, there are strong informal forces at work. As a result, Karlhofer points out, the Austrian federal system suffers from an unclear distribution of rights and duties between the national state and sub-national units. In his paper Karlhofer provides an overview on the characteristics and ambiguities of Austria's federal system and analyzes sub-national constitutional politics. Karlhofer wonders whether the constitutional changes and amendments will pave “the way for a sustainable redesign of the federation as a whole”.

Astrid Lorenz addresses the question why sub-national constitutional politics vary with regard to rights of minors. As a matter of fact, it took the EU and Germany a number of years to include the Convention on the Right of the Child 1989 into proper law. It was only in the year 2010 that Germany decided to drop all restriction of any kind and ratify the Convention without qualification. In Germany this triggered some initiatives in the *Länder* which have important competencies in this field even though cooperative federalism is characterized by homogeneity and centralist policies. Maybe even more importantly, parties and party systems in the *Länder* pretty much mimic those at the federal level. Yet, in spite of the legal framework, the functioning of cooperative federalism and “unitarian” tendencies in the parties Lorenz identified different policies in the *Länder*. So, why do parties pursue different strategies in different *Länder*? Astrid Lorenz' paper seeks to solve



this puzzle. Lorenz brings to the fore that sub-national constitutional politics in the Länder do not just follow up on developments at the national or European level. On the contrary, Lorenz argues that sub-national constitutional politics can only be explained if we take sub-national factors into account. Perceptions, negotiations and procedural rules are sub-nationally shaped. As a consequence, we have to take these features into account in order to explain sub-national constitutional politics in Germany. And it is only due to these features that sub-national constitutions can help integrating the people into the overall political order. Sub-national constitutional politics does, hence, not challenge the applicability of the federal constitution but rather helps to stabilize the system as a whole by enabling the political actors to find individual constitutional solutions below the level of federal regulation and thus filling integration gaps at the federal level.

Kriszta Kovács, Zsolt Körtvélyesi, and Alíz Nagy tackle the question of how universal human rights that guarantee non-discrimination fit with claims of national sovereignty. As a rule people are born into their political communities. There is no need to apply for citizenship. At the same time nation states are entitled to define the rules of both birthright and acquired political membership. Yet, the authors argue that human rights principles, first and foremost non-discrimination guarantees, should be given preference over national rules. While the arguments presented by Kriszta Kovács, Zsolt Körtvélyesi, and Alíz Nagy are general by nature, they pay special attention to events that pertain to the case of Hungary. The paper explores in this the complex relation between a nationalist constitutional project (Hungary), external minorities (in e.g. Slovakia and Romania), external ethnic citizenship, and the rights and claims to sub-national self-government of Hungarian minorities in bordering countries.

Zubair Shahid addresses similar issues as the preceding papers but in a very different context. Shahid's paper examines the case of Pakistan and how federalism and sub-national self-rule evolved in this developing country and in fragile political circumstances. His paper challenges the widely held view that the tendency to regionalization and multilevel governance is a purely European matter. On the contrary, countries in different world regions and with different political and cultural traditions equally have to deal with these issues.

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University of Trento, Italy, and associate professor at the Institute of Sociological Studies, Charles University, Prague. Werner Reutter is research fellow at the Department of Political Science (University Leipzig); his research is funded by the Deutsche Forschungsgemeinschaft (grant no. GZ: LO 1424/3-1; AOBJ: 604048).

<sup>1</sup> Cf. also [http://en.wikipedia.org/wiki/Phrases\\_from\\_The\\_Hitchhiker's\\_Guide\\_to\\_the\\_Galaxy](http://en.wikipedia.org/wiki/Phrases_from_The_Hitchhiker's_Guide_to_the_Galaxy).

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**Rights of Minors and Constitutional Politics  
in the German *Länder*. Legal Framework, Party  
Strategies, and Constitutional Amendments**

by

Astrid Lorenz\*

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## Abstract

The article analyses constitutional politics in the German *Länder* in the field of minors' rights. Since this issue seems a purely legal matter dealt with at the federal, European and international level, we should expect similar, almost identically shaped policies at the *Länder* level. However, the analysis brings considerable variations of constitutional activities in this field to the fore: time, frequency, and contents of respective initiatives vary significantly in the period from 1999 to 2014. These variations were due to different party strategies, diverging party platforms and majority constellations in the *Länder*. The analysis also shows that the public arguments brought forward in favour of constitutional amendments refer only weakly and randomly to legal provisions and processes at other levels. The political debate supporting extended children's rights rather refers to general observations, to the specific regional context, and constitutional provisions in other *Länder*. At least with regard to this issue, the multi-level system did not systematically impact on constitutional politics in the *Länder*. It rather can be understood as an opportunity structure providing parties with multiple realms in which they can pursue their goals. Thus the study shows that federal and regional party strategies are key factors in explaining policy diffusion in multi-level systems.

## Key-words

Federalism, subnational constitutionalism, Germany, rights of the child, party politics



## 1. Introduction<sup>I</sup>

In the past decades, constitutional politics have gained increasing scholarly attention. This research was influenced by the neo-institutionalist paradigm. According to this approach, institutions empower actors and at the same time constrain their behaviour. Therefore, actors can be interested in changing them. In consequence, it is crucial to explore the influence of particular institutional contexts on the patterns of politics but also the reasons for changes to the constitutions (Lutz 1994; Lorenz 2005; Roberts 2008; Hayo and Voigt 2013; Robinson and Torvik 2008; Voigt 1997, 1999; Ticchi and Vindigni 2010; Vermeule 2001).

In times of globalisation, Europeanisation and decentralisation, a growing number of studies deal with constitutional mechanisms and rivalries in *multi-level* systems (Gerken 2007; Ginsburg and Posner 2010; Tarr 1998; Reutter and Lorenz 2012; Benz and Broschek 2013; Benz and Colino 2011; Behnke and Benz 2009). They analyse the emergence of a new supranational constitutional law at the European level, the diffusion of constitutional or policy ideas and contents across countries and compliance problems (Elkins and Ginsburg 2013; Weiler 2003; Wiener 2008). These studies have made important contributions to better understand the rationale of constitutional politics and have brought to the fore how political systems with different legal traditions were ruled with and by law. Yet, two crucial questions still remain open: How intensively do actors at the lower levels refer to rules and processes at other levels? And what matters more in multi-level frameworks – the rules or the parties interpreting the rules?

Many studies assume that the legal norms match reality on a sort of one-to-one-basis. Accordingly, processes at a subordinate level should be shaped by rules from above, i.e. a superior level. However, empirical studies on compliance or Europeanisation often indicate that the structure of the norm addressees, their beliefs and preferences influence the effect of institutions (Börzel and Risse 2012; Goetz and Meyer-Sahling 2008; Benz 2004). In fact, we know from comparative parliamentary and policy studies that the legislative output mirrors diverging preferences of leftist and conservative parties. But can this hold true in constitutional politics with its often higher majority hurdles? Institutional and veto player approaches (Tsebelis 2002) would deny this because provisions for qualified majorities give



at least one oppositional party the power to veto any attempt for constitutional change which is not in line with its preferences. Because of this moderating institutional effect, differences in the government composition of lower level parliaments would not necessarily result in diverging constitutional outputs.

As a contribution to a better understanding of the causal mechanisms in multi-level systems, the present article analyses the patterns of constitutional politics concerning minors' rights<sup>11</sup> in Germany and its *Länder*. These cases are 'most likely cases' (Gerring 2007, Eckstein 1975, George and Bennett 2005) for a strong effect of rules at upper levels. At least this is what many scholars of German federalism suggest. It is used to speak about Germany as a 'unitary' federalism and a 'grand coalition state' in which many policy fields at the federal and state level are regulated by the two major parties, the Conservatives and the Social Democrats, in a rather homogenous way (Abromeit 1992; Hesse 1962; Scharpf et al. 1976; Schmidt 2007: 196 ff.; Helms 2007). This interpretation also refers to the state constitutions which are said to be overshadowed by the federal constitution (Cancik 2003; Stiens 1997; Braunschweig 1993). Such a legal determinism of the federal and other upper levels is against the idea of sub-constitutionalism as a kind of autonomy of subordinate states within a loose two-tiered legal framework.

In fact, in a multi-level polity, not all levels of constitutionalism need to address the same issues. In Germany, the federal constitution provides a catalogue of basic rights which, of course, apply to minors, as well. In addition, the Basic Law provides that the federal level is responsible for the foreign policy and the representation of national interests in the European Union. It thus decides on legal affiliations to international or supranational organisations and international agreements that might influence minors' rights in Germany. Hence, the rules and processes at superior levels should have strong effects on the constitutional handling of minors' rights in the *Länder*.

However, if international legal obligations affect *Länder* competencies, then the *Länder* must consent to them before ratification. They enjoy state quality and are entitled to pass laws in their own right. They can establish similar or more protective rights concerning minors in their *Land* and can create own state organisational rules, e.g. in the field of *Land* electoral law. In this way, they can function as laboratories for inventing and testing new constitutional norms (cf. Häberle 1993; Dombert 2012: 21). We know that *Land* parties' aims can differ from those of their federal party organisation (Lehmbruch 2000;



Bräuninger and König 1999; Renzsch 2000). Similar to the well-known multi-level games at superior levels (Putnam 1988; Moravcsik 1997; Wolf 2000; Woll and Jacquot 2010), parties might be interested in influencing the national status quo by also playing such games at a subordinate level.

Accordingly, the German *Länder* are ideal cases to study the impacts of multi-level systems on subnational constitutional politics in the field of minors' rights. The study investigates which initiatives were made concerning the subject, which arguments and references were used by the political actors and how the legal framework and legal activities at the international, European, or federal level were referred to. Such an in-depth analysis makes it necessary to limit the period of investigation and the number of cases. Yet the chosen period of 15 years beginning in 1999 seems long enough to produce robust results. The study covers four states with maximal variation concerning government composition. Exploring two cases per group shall decrease the risk of misinterpretations. Table 1 shows that Bremen and Berlin were mostly run by SPD-led governments, while the CDU headed the governments in Saxony and Thuringia.<sup>III</sup>

Table 1: Party composition of federal and *Land* governments<sup>a)</sup> between 1999 and 2013

Land	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Federal	<b>SPD</b> , Green Party						<b>CDU</b> , CSU, SPD			<b>CDU</b> , CSU, FDP					
Bremen	<b>SPD</b> , CDU								<b>SPD</b> , Green Party						
Berlin	<b>CDU</b> , SPD		b)	<b>SPD</b> , Left Party							<b>SPD</b> , CDU				
Saxony	<b>CDU</b>					<b>CDU</b> , SPD			<b>CDU</b> , FDP						
Thuringia	c)	<b>CDU</b>										<b>CDU</b> , SPD			

CDU = Christian Democratic Union of Germany, CSU = Christian Social Union of Bavaria, FDP = Free Democratic Party, Green Party = Alliance 90 & The Greens, SPD = Social Democratic Party,

a) Parties named first and printed in **bold** letters lead the government; they nominate the chancellor resp. the prime minister; b) between June 2001 and January 2002, the SPD and the Green Party set up a minority cabinet supported by the Left Party; c) a coalition of CDU, SPD was in power until September 1999.

In most other respects, the selected *Länder* share the same side conditions. In all states, constitutional amendments to the *Land* constitution need to be adopted by a two-thirds majority in parliament. In all states, the same parties (CDU and SPD) were able to prevent a constitutional amendment. All four states get huge fiscal transfers from the federal level and other *Länder* as almost all federal states do. Table 1 also shows that the period of investigation covers legislative terms in which the *Land* governments were formed by the



same coalitions as at the federal level. That allows it to study a potential effect of symmetric or diverging party structures at federal and *Land* level.

The first part of the paper gives an overview of the legal setting concerning minors' rights at the federal, international, supranational, and *Land* level. Section two traces all processes (successful as well as failed ones) relevant for the constitutional handling of minors' rights in the four *Länder*. Section three provides a comparative analysis of time, frequency, contents and arguments of constitutional politics concerning the subject and uncovers remarkable variations. Obviously, constitutional politics on minors' rights differ significantly in the German *Länder*. At the same time, the study detects many vertical and horizontal linkages.<sup>IV</sup> The conclusion summarises the findings and makes suggestions for further research.

## 2. The Framework of Law and Legal Activities Concerning Minors' Rights

The German Basic Law (BL) applies to minors in the same way as to anybody else. To respect and protect human dignity and free personal development is the duty of all state authorities (Art. 1 and 2 BL). Yet, there seems to be tension between the duty the state has to fulfil and the rights of the parents because according to article 6, child care and education are the parents' natural right as well as their obligation. The state has to "watch over them in the performance of this duty" (Art. 6 par. 1 BL). In the first decades of jurisdiction, these federal provisions were interpreted in such a way that children rather were understood as objects of parental and state action, not as subjects with own, individual rights. Moreover, parents enjoyed more rights concerning their children than any other social or public institution.

The *Länder* can neither circumvent nor abrogate these federal legal standards but they can provide for the same or more protective rights than the Basic Law in their realm of jurisdiction. At the beginning of the investigation period, all four *Land* constitutions made the protection of families, child care and education the natural right of the parents.<sup>V</sup> The states' provisions were, thus, similar to that of the German Basic Law. Additionally, the Saxon and the Thuringian constitutions which were adopted in 1992 and 1993, took up some specific formulations of the 1990 UN Convention on the Rights of the Child. Article



9 of the Saxon constitution as well as Article 19 of the Thuringian constitution recognised the right of each child to a healthy mental and physical development and the special need to protect the youth against moral, mental, spiritual and physical threats. Moreover, the state has to provide preventive health care for children and young people and an infrastructure for child care. At the beginning of the investigation period, the voting age was fixed at 18 years old, although the Bremen constitution did not include this provision. It was laid down in ordinary law.

The UN Convention on the Rights of the Child (UNCRC) which had been a point of reference for the constitution-makers in Saxony and Thuringia, was signed by Germany in 1992 but with limitations.<sup>VI</sup> The Convention covered a large array of aspects concerning children which partly affected core rules of national sovereignty or deviated from German national standards of protection. About 40 articles of the UNCRC comprised provisions concerning well-being, counter-discrimination measures, cultural rights, privacy, asylum, penal law and many other subjects. Other articles referred to the implementation of the provisions (United Nations 1990). The then incumbent federal government of CDU/CSU and FDP declared that the convention was not directly applicable within Germany and made several objections concerning custody, family and right of inheritance, judicial proceedings, the residence of foreign children in Germany, military service of children. These objections were stated in an attachment to the ratification law. In fact, the UN Convention “does not contain a provision expressly obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law” (Detrick 1999: 27).

In this and the following legislative periods, the parliamentary parties of the socialist PDS, the Social Democrats and the Greens introduced separate initiatives to the federal *Bundestag* to improve and extend children’s rights in the Basic Law.<sup>VII</sup> In addition, the Socialists wanted to lower the voting age to 16 years old. The conservative-liberal majority rejected each of these initiatives and abstained from ratifying the European Convention on the Exercise of Children’s Rights which was adopted in 1996 by the European Council. This convention aimed at establishing similar European provisions for the procedure of implementing the UN Convention on the Rights of the Child.

Although the Social Democrats formed a federal governmental coalition with the Greens in 1998, the majority constellation in the *Bundesrat* did not allow for federal



constitutional changes since these must be passed by two-thirds majorities in the *Bundestag* and in the *Bundesrat*. The red-green government therefore focused on amending ordinary law concerning minors. Conflicts with *Land* governments provoked a further delay of ratifying the aforementioned European Council Convention in Germany until 2001. The conflicts with the *Länder* were also the reason why the red-green federal government had not formally withdrawn the objections to the UN Convention. However, it declared that the objections had only an informal status and were interpreted as no longer being in force. A 2001 bill of the Socialist PDS to include clauses in the Basic Law that children own legal rights and that their well-being and equal treatment is the main task of parents and the state again failed to be adopted.

In 2002, a Special Session on Children of the UN General Assembly consented on an outcome document entitled "A World Fit for Children". This was to encourage the member states to prepare national action plans concerning children's rights. Yet, several non-governmental organisations in Germany used the UN document to lobby for legal and practical improvements for minors. After years of coordination with various representatives of the federal level, the *Länder*, local authorities, non-governmental organisations, scientists and young people, the federal government adopted the "German National Action Plan 2005 to 2010".<sup>viii</sup> This Action Plan included, among other issues, political measures to improve the political participation of minors which had been less in the focus of the federal political actors before. However, it again ignored proposals to amend the federal constitution.

Although the composition of the federal government changed after the 2005 elections, the action plan was realised by the new coalition of Social Democrats and Conservatives. It was during that period, too, that the European Union embraced the idea of promoting children's rights inside and outside Europe (Iusmen 2013: 1). However, the EU policy-making actions in this field lacked coherence and the EU competence to undertake them was contested. Moreover, the actions focused on concrete measures such as a hotline for missing children (Iusmen 2013: 1). Likewise the UN Convention on the Rights of the Child, no similar responses by the EU member states followed but the topic of children's rights remained to form part of the political agenda. In 2007, the oppositional Green Party as well as the Left Party introduced separate bills into the Bundestag to have children's rights included in the Basic Law. While the Greens' initiative was similar to a bill previously



made by the Socialists, the latter now focused on strengthening the participatory rights of minors. Due to the Conservatives' stance on this issue, these initiatives were dead on arrival.

At that point some *Länder* became more active in this policy field. In cooperation with the parliamentary party of the SPD in the Bundestag, the *Länder* governed by Social Democrats wanted to have the *Bundesrat* take the lead in this matter. Since 2007, *Land* governments ruled by the SPD had tried several times to start the respective legislative process via the *Bundesrat*. Yet, the *Land* governments headed by the CDU or the CSU refused to start a *Bundesrat* initiative to include children's rights into the Basic Law.<sup>IX</sup> However, the supporters of the idea were strengthened by the fact that in 2009, the European Union signed the Treaty of Lisbon which in Article 6 incorporated the Charter of Basic Rights of the European Union into the EU quasi-constitutional framework. Taking up ideas of the UN Convention, Article 24 of this charter defined particular rights of the child. According to this article, children shall have the necessary rights to sufficient protection and care. They may express their views freely which shall be taken into consideration on matters which affect them in accordance with their age and maturity and in all actions relating to children, whether taken by public authorities or private institutions. The child's best interests must be a primary consideration.<sup>X</sup>

The continuing demands by the *Bundestag* and the *Bundesrat* as well as the political discourse stimulated by these demands and the EU context probably changed the perception of the Conservative party at least partly. In 2010, the conservative-liberal government withdrew their objections against the UN Convention on the Rights of the Child after *Bundesrat* and the *Bundestag* had consented. The opposition parties were busy in demanding that the federal government should also change the legal provisions concerning minor asylum seekers and do more for children in many aspects. In 2012, each party in opposition, i.e. the SPD, the Green and the Left Party, demanded – separately – to strengthen the role of minors as legal subjects by a constitutional amendment. In addition, the public policies were to give greater attention to the physical and mental well-being and development of children. All initiatives referred to the UN Convention. They differed with regard to the wording and the concrete policy measures. Additionally, Greens and Socialists re-introduced bills to lower the voting age.



### 3. Processes at the *Länder* Level

How did these legal norms and processes at upper levels affect state constitutional politics the field of minors' rights? This section starts with observing parties' legislative behaviour in Bremen and Berlin that were both governed by SPD-led governments. It then proceeds with Thuringia and Saxony, two *Länder* with strong Christian parties. The analysis is mostly based on printed matters and plenary minutes retrieved from the four *Land* parliaments.

#### 3.1. Constitutional Politics and Minors' Rights in *Länder* Governed by SPD-led Coalitions

In Bremen, the SPD headed two coalitions between 1999 and 2013. It coalised with the CDU until 2007 and with the Greens between 2007 and 2013. Under the first government composed of Social Democrats and Christian Democrats, the oppositional Greens demanded in 1999 to realise an electoral reform that also affected constitutional participatory rights of minors. Among others, the voting age should be lowered to 16 years old<sup>XI</sup> to give minors more political influence. The Greens used several arguments to support their proposal: a recent decision of the Constitutional Court of North Rhine-Westphalia, research reports showing that young people are intellectually mature and able to make decisions, a 1996 expert commission of the German *Bundestag* which had supported the idea to lower the voting age, and a petition of a local school. The Christian Democrats refused the arguments. The Social Democrats expressed their general liking for the proposal but declared that this would not solve the youth policy problems. However, the Standing Constitution and Statute Committee of the Land Parliament in Bremen got the mandate, inter alia, to look further into the idea of lowering the voting age.

In 2001, the Bremen Parliament published a report about the simulation project "Youth in Parliament". On this occasion, the Greens demanded again to lower the voting age to 16 years old. All arguments in support of these demands referred to the youth in general or to the particular situation in Bremen. On this occasion, the Greens did not refer to any of the *Bundestag* initiatives for constitutionalising minors' rights. The governing factions CDU and SPD agreed that the participation of young people should be encouraged and asked the government to work out a concept for the promotion and



participation of minors. The plenary discussions mentioned positive experiences in the nearby city of Hamburg and in Baden-Württemberg but the voting age reform was rarely mentioned. Instead, the speakers focused on other issues like right-wing extremism and local developments.

In 2002, in the context of the Special Session on Children of the UN General Assembly, the Green Party demanded to introduce children's rights into the *Land* constitution of Bremen. Representatives of the Green Party argued that the *Länder* were now obliged to implement the UN Convention on the Rights of the Child. The existing constitutional provisions on the right of education, equal treatment, and state protection from neglect were from the Greens' perspective insufficient in making the public aware of children's rights. Especially the independent individual development should get the status of a constitutional right. The Greens also mentioned that ten other *Länder* had already discussed introducing children's rights in their *Land* constitution. In North Rhine-Westphalia, all factions had even unanimously approved a respective modification of the constitution. Interestingly, they did not mention Rhineland-Palatinate where such rights had been adopted even earlier and with the support of the CDU, the SPD and the FDP.

Once again, the Social Democrats sympathized with this initiative but tried to postpone a decision to avoid endangering the incumbent coalition with the CDU. The SPD argued that an enlarged and intense discourse in Bremen on this proposal was necessary. Moreover, it found that the system of basic rights, as established in the Basic Law, could be damaged by particular state constitutional provisions concerning the rights of children. The Christian Democrats and the government stated that the Bremen constitution contained enough provisions for a legal protection of children's rights. The amendment to the constitution, as proposed by the Greens, would only replicate the recent modification of federal ordinary law concerning the rejection of violence in education at the *Land* level. Here we can observe a pattern that is true for all cases. Supporters of the status quo tend to refer to the federal legislative framework and argue that it must be followed by the respective *Land*.

During the legislative process, all societal actors that were officially invited to formulate their position on this topic, were in favour of including children's rights in the *Land* constitution. A synopsis proved that 7 out of 16 *Land* constitutions entailed child-related provisions while 4 contained provisions similar to Bremen and 5 contained neither



children's rights nor youth protection clauses. The debates mirrored diverging perceptions of the legal framework and diverging party positions within and across the state. The actors referred to events at upper levels and horizontal impulses which fitted to their own political preferences and tried to use them as resources to place pressure on the governmental majority. In the end, the Social and Christian Democrats agreed in 2003 to a constitutional amendment. This policy change was due to the hearings, the comparison with other *Länder*, and the impact of the debate on the topic. It has to be noted that the Bremen Conservative Party took a different position than the *Bundestag* Conservatives faction.

In the following legislative term, the Bremen Greens re-introduced a motion to lower the voting age to 16 years old. It was based on the same arguments as in the previous initiatives concerning this issue. The discussion referred nearly exclusively to the Bremen urban context and to general arguments concerning young people's ability to make decisions. Only the Christian Democrats referred to North Rhine-Westphalia. Based on negative experiences with the election age of 16 in local elections, this *Land* had re-increased the voting age to 18 years old. The initiative of the Greens was rejected.

After the 2007 Bremen elections, the Social Democrats formed a coalition with the Greens. They established a parliamentary committee to draft a reform of political participation including lowering the voting age for local and possibly *Land* elections to 16 years old. The arguments included federal legal aspects which, however, were not predominant. They did not focus on minors' rights but more on other elements such as direct democracy. The committee considered legal changes in other German *Länder* as well. Finally, the SPD pointed out that German law contains various age limits that have been changed over time. Yet CDU and FDP refused any change to the voting age. They argued that the electoral law in Bremen should mirror federal law. Hence, it should prescribe that voters must possess German nationality and have the legal age of adulthood which is fixed at 18 years old. To both parties, deviating from federal regulations by establishing a voting age of 16 years old would cause a serious inconsistency in the legal system.

The governmental majority ignored the vetoes and used the fact that the voting age was ruled outside the constitution in ordinary law which could be altered by a simple majority. It lowered the voting age not only for local, but also for *Land* elections. This was justified with the peculiarity of Bremen as a city state where *Land* politics can hardly be separated from local politics. However, the veto of the Christian Democrats made it impossible to



include these provisions into the constitution although the committee also had to check the possibility of constitutional changes.

Only in 2013 do we find an explicit linkage of the Bremen processes to the federal level. At that point, the Bremen parliamentary parties of the SPD and the Greens focused on changes at the federal level. With reference to the 1992 UN Convention on the Rights of the Child, they obliged Bremen to support a motion to the federal upper chamber to add children as legal subjects (not only objects) into article 6 of the German Basic Law or similar motions of other federal states. This initiative was nearly two years after the oppositional Social Democrats and Greens (as well as the Socialists) *Bundestag* factions had introduced a similar motion at the federal level. However, the motion failed to be passed by the *Bundesrat*.

In Berlin, the second *Land* with an SPD-led government between 1999 and 2013, the first legal initiative to change minor-related issues in the constitution was introduced in 2005.<sup>XII</sup> It referred to the local, not the state level. The voting age for the election of local authorities within the *Land* Berlin and local referenda was reduced from 18 to 16 years old. This constitutional amendment was initiated during a left-wing coalition composed of the SPD and the Left Party but it was introduced jointly with the Greens and the FDP. In Berlin, the Green Party had been trying since 1997 to lower the voting age to 14 years old. In order to support their bill, the initiators referred to general reflections about the participation of minors, to recent findings of research on this topic and to the good experience in other *Länder* with a comparable voting age. Federal ruling was only mentioned by Christian Democrats who rejected the amendment. They referred to the linkage between electoral right and the legal age in federal law and thus used quite similar arguments as their party colleagues in Bremen.

Shortly before the end of the legislative term, in 2006, all Berlin parliamentary parties introduced and adopted a constitutional amendment covering several subjects. It also included the provision that citizens aged 16 years old and older have the right to participate in a 'popular initiative'. Successful popular initiatives force the *Land* parliament to deal with a certain political issue. In this way, the constitutional amendment affected state-level politics, not only local affairs. Once again, the CDU in Berlin took a stance diverging from their Bremen sister party faction and the federal party organisation.

In 2007, the oppositional Green Party in parliament introduced a motion to alter article



13 of the Berlin constitution. This motion was probably triggered by developments at the federal level. This motion addressed several issues: each child was to be respected as an independent individual, it was to enjoy special protection by the state and the society; it should have the chance to develop individually, the right to non-violent education, to be heard on issues which affect them and the right to schooling. Young people should be guaranteed vocational training and have the right to exercise the profession. The Greens argued that Germany in general and Berlin in particular performed poorly with regard to children's protection compared to other countries and *Länder*. According to the Green Party, children were not sufficiently respected as independent personalities. On the contrary, children were objects of violence and not taken care of. In addition, they lacked sufficient opportunities for development and participation. The proposed constitutional amendment was to improve this performance by obliging the state and society to assist children. There was no special reference to other levels.

At the same time, the Green Party as well as the SPD and the Left Party introduced many other inquiries and motions concerning the social situation and participatory rights of children and young people. The plenary discussions on the proposed constitutional amendments covered all these initiatives. In fact, the MPs addressed general problems of children and their societal status in their talks rather than the bill proposing a constitutional amendment. Their arguments made little reference to other political systems or levels. Only the government mentioned the federal level. Being a supporter of the status quo, it stated that the constitutional amendment should be postponed until the federal level has made a respective decision on this topic.

Although the motion was not adopted, two years later, in 2009, an inter-factional initiative followed. Now the governmental parties, i.e. the SPD and the Left Party, introduced a bill together with the Christian Democrats and the Green Party. According to that bill, article 13 of the Berlin constitution should guarantee each child the right to personal development and non-violent education. State and society were to protect children against violence, neglect and abuse. The state community should respect, protect and promote the rights of each child and provide living conditions fit for children. The initiative was based on general arguments concerning the rights of children and the role of the state and parents in the spirit of the UN Convention on the Rights of the Child. In the plenary debate, the Greens stressed their will to introduce a provision about children's



rights also in the Basic Law and to lower the voting age. The CDU stated that the amendment was a wrong way but they supported it nevertheless because of the high public pressure to do so. Thus, they changed their position as their Bremen party colleagues had done in 2003. Like the Liberal Democrats, they dealt with the effects of the amendment on the federal legal system. Yet unlike the FDP which rejected the constitutional amendment, they consented to it.

In the same year, 2009, the Green Party of Berlin introduced a constitutional amendment bill to lower the voting age for *Land* elections to 16 years old. The Greens built on positive experiences made at local elections in Berlin. This seemed to be a perfect argument to realise the next reform. Another argument was the inconsistency that 16 year olds were entitled to sign *Land* people's initiatives, but not vote in *Land* level referenda. They also referred to scientific studies concerning young people and to legal norms, reforms and discussions in other *Länder* which supported their goal. Another argument was that one of the most important policy competencies of the *Länder* is education. Evidently, young people are foremost affected by respective-decisions. Young people should therefore be entitled to participate in *Land* elections at an earlier age to have a say on these issues.

All parties supported their view, once again, by referencing general reflections about young people. Some arguments were similar to those used in Bremen but many others diverged. Additional arguments were shaped by the particular Berlin context. The governing SPD, for instance, hesitated to adopt the constitutional amendment before the upcoming *Land* elections. It wanted to include the proposal into their election programme to mobilise social acceptance and legitimacy in the elections. Although the committee set up a hearing with experts who all supported the idea of reducing the voting age, the SPD's refusal of the idea let the bill fail in parliament.

The 2011 elections in Berlin led to a new coalition composed of the SPD and the CDU. One year later, the oppositional Green and Left Party jointly reintroduced the 2009 Greens bill to amend the constitution. The arguments remained the same. They mentioned earlier maturity, particular affectedness of young people by *Land* legislation, good performance in other German *Länder*, the need to take young people seriously, the interest in revitalising the democratic culture and others. On the same day, the new 'Pirates' Party faction introduced a bill to amend the constitution which provided for a lower voting age



of just seven years old and the eligibility to 16 years old. This can be understood as a matter of party competition among the opposition. The Pirates' arguments referred only to general ideas concerning participation and children.

The Berlin SPD parliamentary group held an inconsistent position on this issue. It found that lowering the voting age in other *Länder* had not succeeded because the turnout of voters of 16 and 17 years old there was below average. The SPD concluded that it would not be enough to simply grant adolescents the right to vote. Such a privilege was to be combined with responsibilities to secure reciprocity between state and citizens. However, this linkage to federal law was not explicitly mentioned. The Greens referred to the fact that the SPD of Bremen had supported the idea. The Christian Democrats wanted to have the effects of a lower voting age in local elections better evaluated. Only then would it be possible to discuss the issue, once again. In the end, the bills were voted down.

To sum up the findings: In Berlin, the parties rather considered Bremen developments than impulses from upper levels. The UN Convention was selectively referred to and did not inspire the arguments decisively. Hence, horizontal impulses impacted more on constitutional politics in Berlin than vertical ones. Unlike Bremen, the parties in Berlin did not believe that different voting ages in one federal state are a problem. The federal level was important for the argument that the voting age should be consistent with the age of criminal responsibility which is determined at the federal level and fixed at the age of 18. However, this linkage between federal and *Land* law was called into question by others. The power constellation as well as specific Berlin-related concerns dominated the process. Therefore, the constitutional output differed at the end of the investigation period from the status in Bremen.

### **3.2. Constitutional Politics and Minors' Rights in *Länder* with CDU-led Governments**

In Saxony and Thuringia, the rights of children and young people were of less legislative concern for the parliamentary parties than in Bremen or Berlin. Furthermore, both *Länder* were latecomers in this respect. This may partly be due to the fact that both constitutions were put into effect in the early nineties and already contained certain rights of the child. Nonetheless, during the last years, the topic has gained more attention among the parties in opposition. In addition, there is some evidence about linkages between



parliamentary parties in the *Bundestag* and the parliaments of Saxony and Thuringia. It seems that the Socialist and Greens federal party factions inspired the *Land* factions to engage in constitutional initiatives at their respective level as well as for initiatives aiming to change the federal constitutional framework.

In Saxony, the parliamentary party of the socialist PDS (later The Left Party) was the first one which addressed minors' rights. In 2002, it built on a recent initiative of the PDS *Bundestag* faction which was rejected.<sup>XIII</sup> Its aim was to include children's rights in the Basic Law. The Saxon parliamentary party now demanded that the *Land* parliament obliged the *Land* government to engage in the *Bundesrat* for more protective provisions concerning children's rights in the Basic Law. The role of children as legal subjects, not just as objects of laws, should be strengthened. Like in the other cases, we find here a reference to the UN Convention on the Rights of the Child and to *Land* constitutions that comprised children's rights. But the proposal also referred to rulings of the Federal Constitutional Court. It did not mention the fact that such Court's decisions had the status of federal quasi-constitutional law.

In 2007, the same party demanded to lower the voting age for local elections and referendums to 16 years old and thus followed the discourses described for Bremen and Berlin. But there, these initiatives had been introduced by the Green Party. The Saxon PDS argued that in other federal states a lower voting age worked well. In both motions, a vertical and horizontal impulse was present. The event of the UN Convention was used in the context of the UN Special session on children as an argument chip which however did not decisively shape the debate. The party programme influenced which parts of the UN Convention were referred to.

In 2008 – later than in the other cases of the sample –, the parliamentary party of the Greens in Saxony introduced a draft bill aiming at improving the participation of minors. This bill wanted to decrease the voting age for local elections to 16 and to entitle young people to participate in local planning processes. In addition, it included provisions to implement the right to childcare services. It again referred to the UN Convention on the Rights of the Child. Neither MPs of the Green Party nor from any other parliamentary group made reference to other federal states or the *Bund* level where the topic had been discussed, for instance, in the *Bundesrat*.

In the following legislative period, the Green Party renewed its initiative. Now, it



comprised two possible constitutional amendments. The first one aimed at lowering the voting age in local and Land elections to 16. The eligibility should remain at 18 years old. In order to support this proposal, the Greens argued, inter alia, that this would not contradict the Basic Law and referred to a decision made by the Administrative Court of Hanover (Lower Saxony). With the second motion the Green Party reintroduced the bill on extended participatory rights of young people and for service points assisting in realising these rights with reference to the UN Convention on the Rights of the Child. Here again, we see a loose, instrumental reference to upper-level rulings and a stronger horizontal reference to other *Land* rulings or jurisdictions to strengthen the own policy position.

The Saxon government kept arguing that the existing constitutional provisions were sufficient for the protection of children's rights. In consequence, the ruling parties in parliament rejected the motion to lower the voting age outright. They even refused to discuss the sense of such a reduction. Instead, they argued that the *Land* provided sufficient opportunities for young people to participate as well as assistance.

In Thuringia, as in Saxony, constitutional amendments were only demanded by the oppositional parliamentary parties.<sup>xiv</sup> The opposition mainly referred to other *Länder* whose constitutional developments conformed to their demands. Only in 2008 did the issue get a constitutional status for the first time when the Left Party demanded to include children's rights into the Basic Law. This motion was linked to the described processes at the federal level around some rejected initiatives concerning children's rights. The Socialist Party demanded that the Thuringian government should give reasons for its refusal to a respective motion in the *Bundesrat* and should work towards the inclusion of such rights at the federal level. As a reaction, the CDU parliamentary party asked the government to report on its commitment regarding child and youth rights at the federal and *Land* level and to report on the status of child protection in the constitutions of the German *Länder*.

In 2012 and 2013 – much later than in the other cases and only in the form of small enquiries to the government - the oppositional Left and Green Party put the participation of children and young people back on the agenda. They referred to the UN Convention on the Rights of the Child and criticised that Thuringia had no ordinary law implementing the constitutional right to participate. In its answer, the government listed many concrete forms of participation for young people in Thuringia which were realised irrespectively of the absence of a particular law on youth participation.



Like in Saxony, the Green and the Left Party aimed at lowering the voting age to 16. The Green Party started the process by introducing this request in 2010 but it was limited to local elections and did not comprise a constitutional amendment. The socialist Left Party introduced a similar motion in 2013 and complemented it with a bill to change the constitution to allow for a lower voting age in both local and *Land* elections.

The arguments in support of these proposals mirrored the former ones. They mainly referred to participation in Thuringia and to general social and value changes. Two arguments were crucial in this debate. On the one hand, it was argued that outdated electoral principles caused low political participation. On the other hand, young people were regarded as being more reasonable today and with greater insights at an earlier stage of life. Nowadays, adolescents grow up in an information and media society which creates the precondition to take over responsibility in democratic processes. The supporters, among them the Liberal Democrats, referred to developments in other *Länder* which had changed their laws accordingly. The Green Party referred to Austria and quoted the President of the Constitutional Court of Germany who saw a strong need to modernise electoral laws.

However, the governing party CDU rejected the initiatives referring to (federal) Criminal Law which is based on the perception of a gradual maturation process of people. According to this concept, people up to 21 years old are perceived to lack consciousness for the consequences of their action. Its coalition partner, the Social Democrats, joined in on this position to avoid endangering the coalition. Once again, the international and federal level was addressed selectively and with concurrent interpretations depending on the point of view to be supported in the debate.

#### 4. Comparing the Cases

The comparative study of the cases shows that the parties at the subnational level referred to international, European, or federal norms concerning minors rather randomly. What is more, these references and interpretations of the legal framework were evidently inspired by their respective party position. Based on the analysis, we see two distinct ideological profiles (table 2) that can be linked to two different theoretical understandings of constitutions: The change-oriented position, represented by parties left-of-the-centre,



normally takes the initiative, strives for encompassing regulations, is inclined to change a constitution fairly frequently and ascribes it a high educative value. The status-quo-oriented position, represented by the CDU and the FDP, seeks to change a constitution as little and as rarely as possible and only at a point of time when the constitutional norms are already accepted by the broad society. These programmatic positions were predominant in the discussions.

Table 2: Types of party positions concerning constitutional politics

	Change-oriented	Status-quo-oriented
Aim of constitution	Changing societal views according to the normative good	Mirroring societal majority's views
Content of initiatives	Encompassing	Core rights
Frequency of initiatives	Many initiatives	Few initiatives

However, a second finding seems even more important. Although the same major parties functioned as partisan veto players for constitutional amendments in all four cases, the parties' level of activities and their success rate varied considerably across the cases. Accordingly, the *Länder* show remarkable variation in the constitutional handling of minors' rights. Obviously, the party composition of the *Land* government explains this variation. The mechanisms behind these effects of party constellation are shown in the following.

The effect of the parties materialises in a varying selectivity of issues and in varying interpretations of the legal framework. As a rule, the *Länder* covered only some of the issues included in the UN Convention on the Rights of the Child regardless of the fact that this Convention was often referred to. All initiatives dealt either with the formalisation of children's rights according to article 12 of the UN convention or with a lower voting age, i.e. with issues that were ideologically close to the SPD, Green and Left Party. No other children-related subjects of constitutional change were proposed during the 15 years under



investigation. Moreover, the Charter of Basic Rights of the European Union or other legal documents were completely neglected.

Table 3: Failed and adopted constitutional initiatives concerning minors' rights

Year	Federal government	Land	Land government.	Initiator	Subject	Status
1999		Bremen	SPD, CDU	Green Party	voting age	Failed
2001	SPD,	Bremen	SPD, CDU	Green Party	voting age	Failed
2002	Green party	Saxony	CDU	SPD	rights of child	Failed
2003		Bremen	SPD, CDU	Green Party	rights of child	Adopted
2005	SPD, Green party	Berlin	SPD, Soc	SPD, Left Party, Greens, FDP	voting age	Adopted
2006		Bremen	SPD, CDU	Green Party	voting age	Failed
2006		Berlin	SPD, Soc	SPD, CDU, Left Party, Green Party, FDP	voting age	Adopted
2007	CDU,	Berlin	SPD, Soc	Green Party	rights of child	Failed
2007	CSU,	Saxony	CDU, SPD	Left Party	voting age	Failed
2008	SPD	Saxony	CDU, SPD	Green Party	voting age, rights of child	Failed
2008		Thuringia	CDU	Left Party	rights of child	Failed
2009		Saxony	CDU, Lib	Green Party	voting age, rights of child	Failed
2009		Bremen	SPD, Gr	SPD, Green Party	voting age	Ordinary law
2009		Berlin	SPD, Soc	Green Party	voting age	Failed
2009		Berlin	SPD, Soc	SPD, Left Party, CDU, Green Party	rights of child	Adopted
2010	CDU, CSU,	Thuringia	CDU, SPD	Green Party	voting age	Failed
2012	FDP	Berlin	SPD, CDU	Green Party, Left Party	voting age	Failed
2012		Berlin	SPD, CDU	Pirates	voting age	Failed
2013		Bremen	SPD, Gr	SPD, Green Party	rights of child	Adopted
2013		Thuringia	CDU, SPD	Left Party	voting age	Failed

Source of data: *Bundestag* and *Land* parliaments; my compilation.

In all cases, both issues – children's rights and voting age – were discussed nearly separately from each other although both concern the rights of the same addressees and are linked to the same UN charter which aims at strengthening the well-being and participation of young people. Only two of the 20 initiatives which were covered by the sample included both (Table 3). This separation is also observable for the other German *Länder*. It follows the traditional German judicial separation of basic and social rights on the one hand and state organisational rules on the other that also guided the judicial party politics.

The party families' interpretations of the legal framework were quite consistent across the *Länder*. While all parties referred to processes and rules in other *Länder*, at the federal or international level, their interpretations varied concerning the institutional freedoms and



obligations that were set by the upper levels. In general, the Conservatives found children's rights already effectively protected, a voting age of 18 years old sufficient and participatory rights logically tied to the age of legal adulthood. Conservatives and Liberals argued that *Land* constitutional changes would only damage (in the case of the voting age) or replicate (in the case of children's rights) the existing federal constitutional law. The supporters of changes argued that the *Länder* had to implement the UN charter of rights by constitutional changes and they referred to other *Länder* or countries where the intended changes had been realised. However, the Social Democrats, the Green Party and the Socialists supported different models of constitutional changes.

Concerning voting age, the arguments of the parties were less coherent across the states and levels than concerning children's rights. The Green Party, for instance, introduced varying proposals for a lower voting age and better participation of minors. The position of the Liberals also differed. But the party rationale is apparent inside the states. The parties introduced most of their initiatives separately irrespectively of partly overlapping preferences. Obviously, establishing an own profile was more important to them than cooperating.

The mentioned effect of the government's party composition materialised in a varying frequency and a varying success rate of constitutional initiatives concerning minors' rights in each group of cases. Table 2 indicates that there were far more initiatives in those *Länder* whose governments were led by the Social Democrats. In Bremen, we found 6 initiatives, in Berlin 7, while in Saxony there were only 4 initiatives and in Thuringia 3. The starting points of setting children's rights and the voting age on the agenda also varied with the earliest initiatives in Bremen and Berlin whereas in Saxony and Thuringia which were governed by Conservative Parties, the topic was later and more seldom on the political agenda (except one outlier initiative in 2002).

The varying starting point and frequency of constitutional activism is highly interesting since we generally find the same initiators in all four *Länder*. The Green Party submitted 15 of 20 bills dealing with the rights of children and young people, the Left Party (formerly PDS) eight initiatives. One initiative came from the 'Pirates'. However, it seems that the party organisations focused their energy on *Länder* with a higher chance of realising their aim. Pro-change oppositional parties were much more pro-active under government coalitions that included the left-centrist SPD than in other circumstances. With only one



exception, *joint* initiatives of the Greens and the Socialists or other parties were only introduced when at least one of the initiators was part of a government coalition. These joint initiatives were results of compromises between the parties. It seems that a realistic prospect for adopting an initiative is the only reason for parties to introduce an initiative with others and not alone.

While the Socialists and the Greens were most active in initiating changes, all constitutional amendments were only successful when they got support by the Social Democrats. In the *Länder* with SPD-led governments, half of the initiatives were approved. As Table 3 shows, the constitutional amendments were adopted under SPD-led governmental coalitions with the Christian Democrats (Bremen) and with the socialist PDS or its successor The Left Party (Berlin).

Interestingly, the Christian Democrats changed their position concerning explicit constitutional children's rights in both Bremen and Berlin and argued that public pressure had forced them to do so. That resulted in three constitutional amendments in Berlin (two concerning voting or referendum age, one concerning explicit *Land* constitutional rights of the child) and one constitutional amendment in Bremen where another, quasi-constitutional amendment was realised by an amendment of ordinary law. In the federal states which did not amend their constitutions, the Christian Democrats were the main governing party. Here, they were able to prevent longer parliamentary discussions of the topic. Accordingly, we cannot see whether they changed their view on the issue but we can suspect that due to the absence of frequent public discussions, there is no need for them to legitimise the own position and to think it through.

As a result of these mechanisms, the contents of the constitutional amendments vary, too. The constitutional provisions in all *Länder* under investigation include rights of all citizens in general and of parents in particular as well as measures for the physical well-being of children. However, the *Länder* governed by Social Democrats adopted more encompassing provisions. They wanted children to have a constitutional right to develop their personalities, to be raised without violence; in addition children should enjoy a special protection of the community against violence, neglect, and exploitation. In this way, individual rights of minors were highlighted and constitutionally circumscribed. Moreover, they obliged the state to respect, protect, and promote the rights of children as individual personalities and to ensure that the living conditions are suitable for children. It was not



fixed how the suitability for children would be proven but at least the lower voting and referendum age was a way to provide some of the younger people with procedural rights to communicate their will to political representatives and the public administration.

Obviously, the varying constitutional treatment of minors' rights was also influenced by horizontal and vertical linkages between the party organisations. The pattern of partisan activities seems to be quite strategic. Some time after the pro-change initiatives had failed at the federal level because of the CDU's veto, similar initiatives were introduced in the more prospective *Länder* and after their adoption, initiators in the less prospective *Länder* became active and referred, inter alia, to these examples to support their proposals. In the meantime, the party factions at the federal level use *Land* constitutional reforms to support their own reform proposals at the federal level.

Interestingly, these linkages are rarely made transparent. When we interviewed constitutional experts of the *Land* parties, many of them stated that constitutional politics is mainly influenced by the particular regional settings and not a product of federal developments. Indeed, the concrete decision processes are influenced by the particular majority constellation in a *Land* but the diffusion of ideas and the inner-federal implications of the decisions are influenced by federal party structures. Citizens – and maybe even the negotiation partners at the *Land* level – are unable to understand these inner-federal constitutional dynamics when the *Land* party actors do not refer to activities of their sister party organisations in other *Länder* or at the federal level but mainly to those legislative outputs which are suitable to their aims and to regional affairs.

Even if this pattern of activity was not strategically coordinated by the federal party as a kind of multi-level game but simply arose from individual decisions based on the same political preferences of federal and *Land* party organisations and their embeddedness in a homogenous party discourse, it shows that the effect of institutions is strongly influenced by the preferences and strategies of exactly those parties whose action shall be bound by the rules. That makes the functioning of rules and norms ambiguous.

## 5. Conclusion

The article shows that in the field of constitutional rights of minors, the multi-level system composed by international, EU and German law is a dynamic and flexible structure



with a varying impact on sub-national constitutional politics. That puts the notion of the ‘unitary’ German federalism in perspective. The same legal context was interpreted in different ways across *Länder* and party lines. Impulses to act did not come from the legal framework itself but from certain actors who found it favourable in the context of their party programme to refer to it. The party preferences also resulted in a high selectivity of constitutional issues that were put on the agenda. References to processes and rules in other *Länder*, at the federal or international level were used as instruments to support or reject constitutional initiatives. Insofar the multi-level system is a sort of “opportunity structure” providing the actors with multiple political realms in which they can pursue their goals. In addition, the multi-level system establishes communicative channels through which ideas and policies travel more easily.

Obviously, the federal and *Land* organisations of the parties stayed in contact and so the impulses and arguments passed the levels and state borders. Therefore, the constitutional issues concerning children’s rights were put on the parliamentary agenda in all federal states. But the government structure influenced the level of activism and the constitutional output that differed across the *Länder*. The most pro-active parties were the oppositional Green and the Left Party. Their earliest and most activities took place in *Länder* governed by Social Democrats because the overlapping of preferences made an adoption of the initiatives more promising. While two constitutions were amended under SPD-led coalitions, no constitution was altered under a government led by the Christian Democrats.

Accordingly, the contents of the constitutions concerning minors vary in the observed German *Länder*. The superior levels set basic legal norms but state-level parties used their own shaping power concerning social and participatory rights. In SPD-led states, the voting age was lowered and children obtained an explicit constitutional right to develop their personalities, to be raised without violence, and to the special protection of the community against violence, neglect, and exploitation. Additionally, the state was obliged to respect, protect, and promote the rights of children. In the CDU-led states, the right to vote in elections or referendums remained limited to citizens aged 18 and above and the constitutional protection of children remained primarily a matter of the parents and state action that focused on their physical well-being.



UNICEF emphasises today that the UN Convention on the Rights of the Child “changed the way children are viewed and treated – i.e., as human beings with a distinct set of rights instead of as passive objects of care and charity” (UNICEF 2014). The article shows that it overestimates its effect. In Germany, only article 12 of the Convention received special attention. The selection was clearly influenced by the particular policy preferences of the parties. Such a selective reception is less possible for the constitutional rules in the German Basic Law which must be implemented, but some parties engaged in creating additional, more protective norms at the *Land* level. This variation of constitutional protection for several societal groups questions the binding effect of institutions.

In sum, those perceiving and interpreting the rules seem to be more influential in the interplay between law and politics. At least they take a selective use of rules and create legal provisions according to their preferences and power constellation. But further research is needed concerning the question as to why the level of constitutional activism by *Land* factions of the same parties was so much lower in cases with conservative governments although this constellation would have provided a good opportunity for the opposition to get public attention. It is also still unclear how the federal and *Land* parties form their constitutional preferences. Finally and more generally, it remains open as to why the actors on the one hand take legal provisions seriously as an instrument and on the other hand perceive them and comply with them so selectively.

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<sup>II</sup> It is typical for the German discussion to differentiate between minors as children and adolescents or juveniles (between 16 and 18 years old).

<sup>III</sup> Until now, other parties have not yet been the major party during a whole legislative term.

<sup>IV</sup> Due to limited space, only the most important sources are mentioned. Further information on the debates can be found at the websites of the four *Land* parliaments, i.e. <https://www.bremische-buergerschaft.de/index.php?id=3>, <http://www.parlament-berlin.de/de/Dokumente>, <http://www.landtag.sachsen.de/de/parlamentsdokumente/>, <http://www.parldok.thuringen.de/parldok>.

<sup>V</sup> Art. 12 of the 1995 Berlin constitution, Art. 22 of the Saxon constitution, Art. 17 and 18 of the Thuringian constitution, Art. 23 of the Bremen constitution. The respective *Land* constitutions can be retrieved from <http://bremen.beck.de/default.aspx?bcid=Y-100-G-brverf-name-inh>, <http://www.berlin.de/rbmskzl/regierender-buergermeister/verfassung/>, <http://www.revosax.sachsen.de/Details.do?sid=4341016086322>, <http://www.thueringer-landtag.de/landtag/gremien-und-rechtsgrundlagen/rechtsgrundlagen/landesverfassung/>.

<sup>VI</sup> The UN General Assembly adopted the Convention in 1989; it entered into force on 2 September 1990.

<sup>VII</sup> For the analysis of the developments at the federal level, the following printed matters by *Deutscher Bundestag* were used: 12/6323; 13/2574; 14/5438; 15/1819; 14/7818; 15/4970; 16/817; 16/5005; 16/7110; 17/6920; 17/7187; 17/7644.



<sup>VIII</sup> It set the following policy priorities: Equal opportunities through education, a non-violent upbringing, the promotion of health and healthy environmental conditions, participation of children and youths, development of an adequate standard of living for children, and international commitments for improving children's rights.

<sup>IX</sup> See these plenary minutes by the *Bundesrat*: 840. Sitzung – 20. Dezember 2007; 846. Sitzung – 4. Juli 2008; 856. Sitzung – 6. März 2009; 885. Sitzung – 8. Juli 2011; 890. Sitzung – 25. November 2011; 891. Sitzung – 16. Dezember 2011, available at <http://www.bundesrat.de/DE/service/archiv/pl-protokoll-archiv/pl-protokoll-archiv-node.html>.

<sup>X</sup> Another clause is that every child shall have the right to maintain a personal relationship and direct contact with both his or her parents on a regular basis, unless that is contrary to his or her interests.

<sup>XI</sup> The analysis is based on printed matters and plenary minutes of the *Bremische Bürgerschaft*. For the most important arguments see the following printed matters: Drs. 15/11, 15/37, 15/46, 15/710, 15/717, 15/1150, 15/1340, 15/1411, 16/951, 17/52; 17/53, 17/88, 17/934, 17/934; 18/803, we also retrieved information from the following minutes: 15/3, 15/61; 15/72, 15/75, 15/76, 16/58, 17/8, 18/40.

<sup>XII</sup> The analysis is based on printed matters and plenary minutes of *Abgeordnetenhaus von Berlin*. For the most important arguments see the following printed matters: Drs. 15/4068; 15/5038; 16/0567; 16/2805; 16/2799; 17/0111; 17/0106. We also retrieved information from the following minutes: 15/70, 15/73; 16/13; 16/55; 16/60; 16/55; 16/82; 17/7.

<sup>XIII</sup> The analysis is based on printed matters and plenary minutes of *Sächsischer Landtag*. For the most important arguments see the following printed matters: Drs. 3/6983; 4/8223; 4/11143; 4/12533; 5/7651; 5/5127; 5/13867. Also see the minutes 4/110, and 4/138.

<sup>XIV</sup> See the following printed matters by *Thüringer Landtag*: 4/4460; KA 5/2482; KA 5/3351; 5/6771; 5/478; 5/6075; 5/6121. Also see the plenary minutes 5/12; 5/33; 5/118; 5/121.

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# The Scottish Constitutional Tradition: A Very British Radicalism?

by

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## Abstract

This paper discusses recent developments in Scottish nationalist constitutional thought during the period of 2002 to 2014, showing how the Scottish constitutional conversation has diverged from, but continues to be influenced by, the UK-wide constitutional conversation at Westminster. It presents Scottish nationalist constitutional thought as a ‘very British radicalism’, which is characterised by certain constitutional forms and ideas that are radical in a British context (such as popular sovereignty, proportional representation, a written constitution, and a commitment to covenantal socio-economic and environmental provisions) while at the same time retaining a persistent ‘Britishness’ in terms of specific institutional proposals and ambivalence towards the principles of constitutional government. Finally, I will discuss possible designs of a future constitutional settlement in Scotland and the United Kingdom. Notably, I will explore how far the Scottish constitutional tradition might impact on the constitutional shape of the United Kingdom.

## Key-words

Sub-national constitutionalism, Scotland, UK, Devolution, British constitutionalism



## 1. Introduction

Before the independence referendum in 2014, the Scottish Government committed itself to certain democratic and constitutionalist principles which it envisaged as foundational to the new Scottish state it hoped to create. These included popular, instead of parliamentary, sovereignty and a written constitution with judicially guaranteed human rights (Scottish Government 2013).

This commitment highlights an interesting, if little studied, feature of the Scottish autonomist movement: despite having long been exposed to the constitutional values and assumptions of the British state, Scotland has developed its own distinct constitutional tradition of both thought and practice. The term ‘Scottish constitutional tradition’ does not imply, of course, that such a tradition is universal, either in the academy or in popular usage. It refers mainly to the constitutional ideas and institutions advocated by those who support independence or greater autonomy for Scotland, and it makes no claim regarding the acceptance of such a tradition by the courts as a source of existing constitutional law.

The emergent Scottish tradition, although deeply influenced by British orthodoxies, has also been radically critical of them, and has sought to draw upon indigenous Scottish practices from the pre-Union state, as well as upon European and Commonwealth examples, to forge a new democratic constitutionalism that appears quite at odds with Westminster norms. Its characteristics have been examined in earlier works, in terms of: (i) its origins in Scottish, European and global constitutional history (Bulmer, 2014a) and (ii) the place of constitutionalism in the Scottish independence debate (2014b). The first part of this paper recaps some of that earlier work in a condensed form, in order to demonstrate the existence of a distinctly Scottish constitutional tradition and to examine some of its key principles and features.

These earlier works were written, however, before the publication, in 2014, of the Scottish Government’s draft Interim Constitution for Scotland. That document, while not undermining the general thesis that there is an emergent Scottish tradition of constitutional thought and practice, does require the nature and characteristics of that tradition to be somewhat reassessed. The liberal-constitutionalist principles that the Scottish National Party (SNP) has upheld since the 1970s (Bulmer, 2011a) have been partially – although not



wholly – overshadowed by a new form of communitarian populism. The second part of this paper therefore contrasts the SNP’s 2002 draft Constitution for Scotland with the 2014 draft Interim Constitution and reflects on the causes of the differences between them.

Moreover, this paper is written after the rejection of Scottish independence in the September 2014 referendum. There is a hanging question – of relevance to politicians and policy-makers, as much as to scholars – about what this means for a future constitutional settlement in Scotland and the United Kingdom. The third part of this paper asks how this Scottish constitutional tradition might be expressed in a non-independent but autonomous jurisdiction, and what implications that might have on the future constitutional shape of the United Kingdom.

The three parts of this paper correspond to three time periods. The first covers the period from 1964, when the first draft Constitution for an independent Scotland was written, to 2002 when the SNP’s most elaborate constitutional proposal was published. The second covers the period from 2002 to the publication of the draft interim Constitution in 2014. The third, which is necessarily more speculative, discusses the period from 2014 into the immediate future.

## 2. The Emergence of a Scottish Constitutional Tradition: 1964 to 2002

The United Kingdom is almost unique in having evolved from a seventeenth century monarchy to a modern parliamentary democracy without revolutionary upheaval and without adopting a written, fundamental constitution (Thornhill 2011). The dominant British political tradition has taken pride in this gradual, *ad hoc* evolution, and has generally been highly suspicious of written constitutions, clear ground-rules, abstract principles, and judicially enforceable restrictions on the power of Parliament.

Half a century ago, the idea that there might be a countervailing tradition of ‘Scottish constitutional thought’, less wedded to parliamentary sovereignty and less hostile to abstract constitutional principles, was preposterous to most constitutional scholars. In the orthodox view, north and south of the border, the United Kingdom was a centralized unitary state, divided only by class and never by nationality or geography (Birch 1967; King 2001). Scotland’s indigenous constitutional traditions barely warranted a mention in this account:



'Most of the generalizations that can be made about politics in England and Wales apply with only minor qualifications to Scotland, and for most practical purposes it is reasonable to treat the northern kingdom simply as part of a united political unit called Great Britain.' (Birch 1967: 15)

Since then, much has changed. Those familiar with Scottish political history will be aware of the major milestones. Following the emergence of Scottish nationalism as an electoral threat to the established parties, a Royal Commission on the Constitution (the Kilbrandon Commission) was created 'To examine the present functions of the central legislature and government in relation to the several countries, nations and regions of the United Kingdom' (Jones and Kavanagh 1979: 21). The Commission's report advised a form of 'legislative devolution' for Scotland (Jones and Kavanagh 1979: 22). In 1974 the SNP won 30 percent of the Scottish vote and 11 seats – a result that 'frightened Labour' into supporting devolution (Keating 1998: 223), but the 1979 devolution referendum was defeated because of low turnout. The first attempt to win devolution, having fallen on this hurdle, was indefinitely postponed by the Conservative victory in the 1979 Westminster election (Lynch 2002: 149).

This defeat was a pivotal moment in the emergence of Scottish constitutionalism. From it arose the Campaign for a Scottish Assembly (CSA), formed to 'keep the [devolution] issue alive and mobilise support across the parties and within civil society' (Keating 1998: 223). The CSA evolved into a Constitutional Convention, composed of a broad coalition of interests that could speak with some authority as the voice of Scotland. The refusal of the SNP to participate, once it became clear that there was no room on the agenda for independence, left the Labour Party and the Liberal Democrats in a dominant position, but minor parties such as the Greens were involved, together with the trade unions, the churches, the federation of small businesses and local authorities (Keating 1998: 224).

The opening act of the Convention was to issue a Claim of Right for Scotland, asserting 'the sovereign right of the people to determine for themselves the form of government which best meets their needs' (Dudley-Edwards 1989). This evocation of popular sovereignty was a direct challenge to the British doctrine of parliamentary sovereignty. It reflected not only a desire for the territorial redistribution of power from London to Edinburgh, but also, more radically, a desire to change the source and legitimate



ends of power, and with it to change the way that power was to be exercised in and over Scotland. The Convention's objection was not just to rule from Westminster, but also to the Westminster way of ruling:

'Our direct concern is with Scotland only, but the failure to provide good government for Scotland is a product not merely of faulty British policy in relation to Scotland, but of fundamental flaws in the British constitution.' (Claim of Right, Para. 1.2, cited in Dudley-Edward 1989).

Here the Scottish constitutional tradition diverges most clearly from British orthodoxy. Twentieth century accounts of the British constitution (e.g. Headlam-Morley 1928; Birch 1967) typically attributed its success to three traits. Firstly, its reliance on well-established traditional rights and privileges, embedded in historical compromises and unspoken norms, rather than on principled foundations expressed in written Constitutions. Secondly, a plurality electoral system that reduced factionalism and favoured an adversarial contest between Government and Opposition parties. Thirdly, a dominant executive, armed with the power of dissolution, that could lead and 'discipline' Parliament. Against this, most European models of democracy, characterised by abstract rights, written constitutions, proportional representation, and less dominant executives, were seen as inferior and inherently unstable. Scottish Constitutional Convention reversed traditional interpretations of these three features, presenting them not as the secrets of Britain's strength, but as problematic legacies that were damaging to democracy, morally unsustainable, and alien to the Scottish ethos. It criticized the excessive power of the Prime Minister and party whips (Para. 4.1), the procedural weakness of Parliament and its vulnerability to arbitrary dissolution (Para. 4.4), and the disproportional electoral system (Para. 4.5). It rejected the 'English' doctrine of parliamentary sovereignty as a danger to liberty, since 'every right the citizen has, can be changed by a simple majority of this subordinated Parliament' (Para. 4.3). Mere devolution, without challenging the basic assumptions, traditions and institutions of the British polity, would not provide a satisfactory response to these problems; indeed, it might replicate them in a Scottish context. Scotland needed a Parliament that would be very different from Westminster: a Parliament elected by



proportional representation, with inclusive and transparent procedures, and a more balanced relationship between the executive and legislative branches.

The Scottish Constitutional Convention was not alone in its critique of British orthodoxies and institutions. UK-wide reform groups, such as Charter 88, pointed to a wider sense of dissatisfaction. However, a major difference between the Scottish and the British-English constitutional traditions is this: that whereas voices for reform have remained firmly on the margins of English politics, in Scotland their grievances have been heard, accepted, and used to shape institutional change. The Scotland Act 1998 gives institutional form to nearly all of the Constitutional Convention's desires: the Scottish Parliament is elected by proportional representation for fixed terms, and the executive has no right of arbitrary dissolution. The Scotland Act formed, in relation to the Scottish Parliament, a 'quasi-constitution', which was beyond the powers of the Parliament to change unilaterally. European Convention rights were embedded in the Scotland Act, and a system of judicial review was established by which the 'constitutionality' of laws could be tested. The Consultative Steering Group, created to prepare the Parliament's working practices, made further procedural recommendations, which were broadly accepted, to enhance the role of the opposition and of committees, and to strengthen Parliament as a whole (Bulmer 2014a; Cairney and Johnston 2013).

Since devolution, the practical limitations of these changes, faced with an adversarial party system and a deeply engrained legacy of majoritarian politics, have become apparent (Cairney and Johnston, 2013). Nevertheless, important, and in their own way 'radical', institutional changes have been made. While the UK as a whole voted against even moderate electoral reform in 2010, proportional representation in Scotland is no longer the demand of a handful of reformers; it is a fact. Restrictions have been placed on the prerogative of the Crown, reducing the potential for political influence by the monarch in government formation or the dissolution of Parliament. Constitutional ideas and institutions that were once 'somewhat radical' (MacCormick, 1991; 2000) have now become 'part of the common stock of democratic thought in Scotland today' (MacCormick, 2008).

The divergence between constitutional traditions has deep roots. Since the 1950s some Scottish nationalists have seized on obiter remarks in *McCormick vs Lord Advocate* as justification for the view that parliamentary sovereignty was an 'English' doctrine, alien to



Scottish constitutional law. As early as 1964, the first known draft Constitution for an independent Scotland was published by a group calling itself the Scottish Provisional Constituent Assembly (SCPA) (Moffat, 1993). This included a range of what were then, in a British context, constitutional novelties: a written Constitution, limits on the crown prerogatives, justiciable rights, proportional representation, a unicameral Parliament, constitutional amendment by referendum, a powerful ombudsman (Bulmer 2011a). Four years later, the catalogue of constitutional grievances set out by H. J. Paton in *The Claim of Scotland* (1968) pointed to a distinctly Scottish constitutional tradition, which, if dormant, retained a shadow of life that might one-day be revived. The SNP worked on developing a draft during the 1970s, with its 1977 text (which again provided for popular sovereignty through a written Constitution that only the people, and not Parliament, could amend) forming the basis for subsequent proposals. In those days, however, Scottish autonomists were at best a marginal force in politics, and these views were ignored by the Anglo-centric mainstream of constitutional scholarship.

The SNP's most recent draft of a permanent Constitution for an independent Scotland was published in 2002 (SNP 2002; Bulmer, 2011a). This 2002 draft has been analysed elsewhere (Bulmer, 2011a; 2011b), and it is necessary here only to provide an overview of its main provisions. It opens with a ringing proclamation of popular sovereignty and constitutional supremacy (SNP, 2002: Article I). The ceremonial office of Head of State is vested in the Queen and her successors according to Scots law (SNP 2002: Article II, Section 1). A unicameral Parliament would be elected by proportional representation for four-year terms, and could not be dissolved except in circumstances where a Government cannot be formed. Parliament would have the right to form committees, to determine its own procedures, and to elect its Presiding Officer. The declaration of war and the ratification of treaties would require parliamentary assent (SNP 2002: Article III, Sections 8 and 9). Executive powers would be exercised by, and on the binding advice of, responsible Ministers, with the Prime Minister being elected by Parliament and the other Ministers being nominated by the Prime Minister from amongst the members of Parliament (MacCormick 1991: 165; SNP 2002: Article II). Judicial review of the constitutional validity of laws would be vested in the Court of Session (SNP 2002: Article V). Judges would be nominated by an independent 'Commission on Judicial Appointments'; once appointed, they would enjoy security of tenure, subject only to removal on grounds of misconduct by



a two-thirds majority of Parliament (SNP 2002: Article V). In the absence of a second chamber, the draft Constitution contained a minority veto referendum provision which would enable bills, other than money bills, to be suspended for up to eighteen months by a two-fifths minority of the members of Parliament; the majority would be able to overturn this suspension by appealing to the people in a referendum (Bulmer 2011c). Local Councils, elected by proportional representation, would enjoy autonomy in respect of the powers vested in them by law (SNP 2002: Article IV, Section 1). Suffrage in parliamentary and local elections would be granted from the age of sixteen. Constitutional amendments would need to be approved by a three-fifths majority of Parliament followed by a referendum (SNP 2002: Article 7).

Substantively, the 2002 draft Constitution guaranteed the equality of English, Scots and Gaelic as official languages, but otherwise contained little ‘constitutional nationalism’ (defined by Hayden [1992: 655]) as ‘a constitutional and legal structure that privileges the members of one ethnically defined nation over residents in a particular state’). It specified no national flag or anthem, contained no preamble, had an open approach to citizenship based on residence not ethnicity, and made no mention of church-state relations (Bulmer 2011a). European Convention rights were integrated into the text, including certain protocols such as the abolition of the death penalty. The draft also provided for socio-economic rights, including a right to fair working conditions, housing, education and healthcare.

In many contexts, such proposals would be unremarkable. Written constitutions, guided by principles of higher-law constitutionalism, are the common stuff of which modern democracies are made (Goldsworthy 2006; Law and Versteeg 2012; Miller 2010; Tate and Vallinder 1995; Thornhill 2011). In a British context, however, these constitutional proposals, and the principles that undergird them, are radical. While the constitutional orthodoxies of parliamentary sovereignty and conventional practice prevail at Westminster, many within Scotland have learnt a new language of democratic constitutionalism with popular (rather than parliamentary) sovereignty at its core.



### 3. A 'Very British' Radicalism: Developments 2002-2014

During its minority administration (2007-2011) SNP made few constitutional commitments. Although the party's constitutional policy was never formally changed, the Government's primary focus was on domestic administration. After gaining a majority in 2011, however, important constitutional principles were re-affirmed. In early 2012 the Scottish Government asked the Scottish Parliament to endorse a key clause of the Claim of Right containing the principle of popular sovereignty. This endorsement was granted overwhelmingly, with Labour, Liberal Democrat, Green and independent members, as well as the SNP, all voting in favour; only the Conservatives abstained. By this decision, a principle which had once been a moral claim, external to accepted constitutional principles, was recognized and embraced by Scotland's national legislature.

This was followed, in November 2013 by a White Paper, '*Scotland's Future*', that re-affirmed key aspects of Scottish constitutionalism. It promised that proportional representation, popular sovereignty, and judicially guaranteed human rights, would be entrenched in Scotland's new constitutional order:

Independence will enable Scotland to be a modern, democratic European country with independent government institutions that build on the existing Scottish Parliament, Scottish Government, autonomous legal system and independent judiciary. [...] Central to this will be a written constitution setting out and protecting the rights of the people of Scotland. (Scottish Government 2013: 351)

The Scottish Government also committed itself in the White Paper to a two-stage constitution-building process. Firstly, the Scottish Parliament would create an interim 'Constitutional Platform', establishing the ground-rules and institutional frameworks of a Scottish state from the date of independence. There would then be an inclusive process, during the first post-independence Parliament, to develop an enduring Scottish Constitution:

One of the first and most fundamental tasks of the parliament of an independent Scotland will be to establish the process for preparing Scotland's first written constitution through an open, participative and inclusive constitutional convention. (Scottish Government, 2013: 351).



This two-stage process marked a change from the SNP's previous policy. When the SNP was in opposition (1999-2007), it had envisaged a process similar to that which took place in most former British colonies, whereby a prospective constitution would be agreed and put to the people before the referendum (SNP, 2002; 2005). This tactical change in the chronological order of independence and constitution-making reflected, according to Scottish Government sources, a desire to avoid the politically damaging perception that the Scottish Government would dictate the terms of the future constitution. Yet, in opting for this two-stage process, the Scottish Government distanced itself from the specifics of the SNP's 2002 text (as the details of the future Constitution were now to be worked out after independence, not presented to the people before the vote).

Delaying detailed constitution-drafting until after independence gave the Scottish Government the ability both to promise more, in terms of constitutional rhetoric, and to deliver less, in terms of clear constitutional guarantees, than has been previously envisaged. The 2002 draft reflected a liberal-procedural (Lerner, 2011) approach to constitutionalism. While being strong on human rights, democratic processes, and protections for political minorities, it contained no rhetorical preamble, articulated no grand vision of society, and was silent on matters of national identity, religion and values. Since 2011, however, the SNP's proposals – and public rhetoric – have focused on the prescriptive potential of a Constitution, with less emphasis on procedures and institutional rules, and more emphasis on the constitutional entrenchment of certain principles and policy decisions that are deemed to be foundational to the new Scotland.

The White Paper indicated that a post-independence Constitution could, for example, contain prescriptive provisions on such matters as 'equality of opportunity and entitlement to live free of discrimination and prejudice'; 'entitlement to public services and to a standard of living that, as a minimum, secures dignity and self-respect and provides the opportunity for people to realise their full potential both as individuals and as members of wider society'; 'protection of the environment and the sustainable use of Scotland's natural resources to embed Scotland's commitment to sustainable development and tackling climate change'; 'a ban on nuclear weapons being based in Scotland'; 'controls on the use of military force'; 'rights in relation to healthcare, welfare and pensions'; 'children's rights' and 'rights concerning other social and economic matters, such as the right to education



and a Youth Guarantee on employment, education or training the constitution? (Scottish Government 2013). It also included some brief provisions relating to the status of local government, the independence of the judiciary and the civil service, and the parliamentary ratification of treaties, as well as a commitment in principle to popular sovereignty, human rights and the accountability of the state to the people. Such a Constitution would not only be a Charter of democratic rights and institutions, but a new Covenant amongst the people of Scotland, symbolising a commitment to a more inclusive, communitarian and egalitarian society (Bulmer 2014c).

Despite this professed constitutional radicalism, the draft interim Constitution was a short and rather minimal document. It would have retained the existing institutional structures of the devolved Parliament and Government, adapting them minimally to the needs of an independent state. As such, it contained almost no institutional provisions. There was nothing in the text to regulate how the Parliament of Scotland would be elected, its terms of office, the process of government formation, relations between ministers and the Crown, the mechanism for appointing and removing judges, the procedure for enacting laws, the holding of referendums, or any of the other key procedural institutional elements of that it is the primary task of any written constitution to define. All these matters would have been regulated by an amended Scotland Act as a separate, sub-constitutional, statute.

Moreover, although popular sovereignty was proudly proclaimed, the text of the draft interim Constitution made no provision for the effective entrenchment of the Constitution. The power to amend the Constitution, and the Scotland Act, was to reside in the ordinary parliamentary majority. It contained no clear constitutional supremacy clause and, indeed, the right of the courts to review the constitutionality of laws (which, in any case, would be rendered quite meaningless by the absence of entrenchment) was not explicitly stated. This would, in practice, have transferred sovereignty – understood simply as the power to make changes to fundamental law – to Parliament. In effect, the 2014 text would have established a new form of parliamentary absolutism – a populist parliamentarism, in which power would be popular in its origins, but parliamentarian in its exercise.

The differences between the 2002 and 2014 texts demonstrate a dramatic shift in the SNP's constitutional thinking. On an institutional level, the 2002 draft was committed to a major reform of the Westminster model. Its counter-majoritarian provisions, such as the minority-veto referendum mechanism, the entrenched higher-law status of the constitution,



and a commitment to proportional representation, would have helped to encourage a more consensual model of democracy (in the terms defined by Lijphart 1999). In these respects the 2014 draft is a more majoritarian – and much less constitutionally radical – text.

However, the 2014 draft can also be seen as a product of a new type of constitutionalism that has emerged in parts of Scottish society. In contrast to an institutional, ‘liberal-procedural’ (Lerner 2011) constitutionalism, concerned primarily with the structures of government and fundamental rights, this new constitutionalism is focused on the expression of values and principles. Angus Reid’s ‘Call for a Constitution’ is an example of this tendency; in trying to encapsulate constitutional principles in poetic form, Reid advocates a form of constitutionalism that is based on inspirational ethical principles, not dry laws and institutions (Reid and Davis 2014). Thus the Scottish Government in 2014 offered a brand of populist-communitarian constitutionalism that embraced the principle (if not the reality) of popular sovereignty and progressive socio-economic rights, but which was content with only minor changes to the existing institutional arrangements established by the Scotland Act.

This makes the 2014 draft an example of ‘very British radicalism’. It is radical because it embraces an expansive, transformative, covenantal view of the constitution, and makes a number of progressive policy commitments in seeking to establish a socially just and unified community. Yet it is ‘very British’ in its concentration of powers in the hands of the leader of the parliamentary majority, and its reluctance to place higher-law constitutional limits on the legislative power of that majority.

It is likely that the changing dynamics of party competition had an influence on the SNP’s change of heart between 2002 and 2014. According to Negretto (2013), political parties involved in constitution-making processes have to negotiate between ‘co-operative’ goals (the stake all political actors have in a functioning, legitimate, state) and ‘distributive’ goals (the stake each actor has in maintaining and expanding its own power). The stronger a party is, and the surer it is of maintaining its electoral strength, the more that party will, on the one hand, seek to maximize the power of incumbents (expecting to enjoy incumbency) and, on the other hand, seek to place substantive and policy provisions in the constitution that are favourable to its own ends. The shift in emphasis from the 2002 text to the 2014 text is consistent with what Negretto’s model would predict for a party that has graduated from opposition to office. For example, the minority veto referendum



procedure, which featured so prominently in the SNP's 2002 text, has never been publicly mentioned since the party came to power, and finds no place in the White Paper's proposals or in the 2014 draft interim Constitution. This is exactly what one would expect from a party that anticipates being in government rather than opposition. Conversely, the Scottish Government's constitutional announcements on substantive issues, such as the public funding of university education and a ban on weapons of mass destruction, show signs of wanting to use the constitution to promote the party's policy goals.

The change of emphasis can also be attributed, at least in part, to a clash between the popular constitutional consciousness unleashed by the independence campaign, on the one hand, and the ingrained habits of the British state, on the other. Public demands for a written constitution were voiced by a diverse range of civil society groups on the Yes side of the referendum debate, but the civil service in Scotland, which is steeped in British ways of working, and seemingly hostile or apathetic to the idea of higher-law constitutionalism, struggled to conceive of a constitution in any terms but those described by Eskridge and Ferejohn (2001) as a 'super-statute'. Such a constitution would have little or no more than statutory status in law, even though it might have political salience (McHarg 2014).

The SNP's constitutional radicalism also remained 'very British' in at least two other senses. Firstly, the party was keen to maintain continuity with the British past and with British identities, through the retention of various forms of 'union' between Scotland and the rest of the UK: a common travel area, a currency union, a dynastic union through a shared head of state, a range of cross-border services, and an informal and intangible, but still vital, sense of 'social union' (Scottish Government 2013). Secondly, the SNP's proposals are radical only in a British context, and there is little in them that is new, innovative, or radical in the wider context of modern constitutionalism, as practiced in the democratic states of Europe and the Commonwealth. Indeed, when placed alongside emerging global norms of democratic constitutionalism SNP's proposals appear quite ordinary and even perhaps conservative.

This is not to deny the emergence of a distinctly Scottish constitutionalism (the idea that a Constitution could, in the name of a sovereign people, commit the state to principles such as free university tuition or the prohibition of nuclear weapons would be quite alien to orthodox British constitutional thought); it is merely to note that Scottish constitutionalism does not exist in a vacuum, but in a tussle of party-politics and long term influences.



Moreover, the change in the SNP's constitutional priorities does not negate the existence of a Scottish constitutional tradition that is wider than the SNP. It is worth reiterating that the Claim of Right was asserted as a national claim, not merely a *nationalist* one. Its principles were endorsed by a wide spectrum of the political class and by civic society – from Gordon Brown downwards.<sup>1</sup> These principles were not invented by the Convention, but were derived from a long tradition of distinctly Scottish constitutionalism with roots that can be traced back through the theo-political thought of the Scottish Reformation to the limited and contractual kingship of the Declaration of Arbroath (Bulmer 2014a). Indeed, it could be argued that the 2014 draft interim constitution was itself 'unconstitutional', in that its substitution of parliamentary for popular sovereignty contravened the *grundnorm* of Scotland – which is the sovereignty of 'the whole community of the realm', in their original, plenary, constituent capacity – and the consequent limitation of any parliamentary body.

#### 4. Consequences for Scotland and the UK: From 2014 Onwards

The rejection, for the time being, of independence, does not mean that we can simply go back to the old ways of thinking about the sovereignty of the Westminster Parliament. The referendum can be interpreted as an endorsement and a confirmation, not a denial, of the principle that the people of Scotland are sovereign and so can determine the form of government best suited to their needs. Such sovereign and constituent power does not demand the end of the United Kingdom; merely that, if the United Kingdom is to hold together, it must be based on a new constitutional settlement in which Scotland's place – and the rightful place of the people within Scotland – is properly recognized.

The referendum showed that a majority of the people in Scotland wish to maintain the Union, or at least to give the Union another chance at reinventing itself. The question of *what form* that Union should take, however, remains an open one. Former Prime Minister Gordon Brown, supported by the leaders of the Conservative, Labour and Liberal Democrat parties, intervened in the last days of the campaign with a 'solemn vow' to the effect that a 'No vote' was not a vote for the status quo, but rather an endorsement of an additional transfer of powers to Scotland, resulting in a new constitutional settlement that would amount to 'home rule' or 'as near to federalism as possible' (Campbell 2014).



Former SNP Leader, Alex Salmond, who is contesting the 2015 general election, has stated that his party's priority is to ensure fulfillment of that vow by delivering home rule, interpreted as autonomy over everything except foreign affairs and defence (Knight 2015).

In Scotland, '*We the people*' have chosen to be governed as part of a United Kingdom, sharing powers with United Kingdom-wide institutions as required – but only on such terms as the people agree to, and only for so long as the people wish.

This commitment to the sovereignty of the people rules out any form of devolution as a lasting settlement. Devolution was designed to delegate powers to Scotland whilst retaining parliamentary sovereignty in Westminster. Enhanced devolution would extend the range of devolved powers, but not change the locus of sovereignty or reinforce the status of constitutional guarantees. Under the 'devolution plus' proposals of the Smith Commission (a round table of the political parties hastily convened by Lord Smith at the instigation of Prime Minister David Cameron in the weeks following the referendum), Scotland would continue to be dependent on Westminster's goodwill not only for every power it possesses, but also for the very existence of its democratic institutions.

The Smith Commission's report refers to the Scottish Parliament being made 'permanent' by means of legislation, but it does not say anything about how that legislation is to be protected from or entrenched against hostile majorities in the UK Parliament (Smith Commission 2014). This would be a violation of the Claim of Right. Without popular sovereignty, the people of Scotland might *enjoy* certain privileges and powers by the grace and favour of Parliaments, but will not truly *possess* them by constitutional right. What has been given in devolution, by the benign indulgence of Westminster, might just as easily be taken away by their pique or jealousy. This is not an idle fear: the history of Northern Ireland shows that Westminster is willing to suspend or abolish devolved institutions, by unilateral action, when it sees fit to do so.

The strategic opportunity for the Scottish movement is to set out an intermediate position, between independence and devolution, that would respect the Claim of Right and other advances in Scottish constitutional thinking, while remaining (for as long as a majority of the people of Scotland so wish, and on such terms as the people see fit) part of a United Kingdom. In principle, this could be achieved in two ways: (i) by the creation of a federation of the home nations based on a written federal Constitution for the United Kingdom as a whole, or (ii) through a negotiated bilateral arrangement between Scotland



and Westminster which would guarantee Scotland semi-detached status and substantial 'secure autonomy' in the 'shell' of the United Kingdom.

#### 4.1. A Federal United Kingdom

The defining characteristic of a federation is that there are 'two constitutionally established orders of government with some genuine autonomy from each other' (Anderson 2008: 4). This means that the federal legislature cannot unilaterally change the powers of 'state-level' institutions, whose powers and rights are secured by a written Constitution.<sup>11</sup> Adopting a federal structure, in which the Scottish Parliament would be secured by a written constitutional framework that is beyond the easy reach of any parliamentary majority, would require root and branch transformation of the United Kingdom. The process of negotiating, drafting and adopting a federal Constitution would provide an incentive and ample opportunity to rectify other features of the United Kingdom that are anachronistic and increasingly difficult to defend, such as the absence of effective human rights protections, the disproportional electoral system for the House of Commons, the vague and shadowy extent of Crown prerogatives, religious establishment, and the composition and functioning of the House of Lords.

Replacing devolution with federalism would place the powers of the Scottish Parliament on a more stable and secure constitutional basis, but would not, in itself, enhance the scope of those powers. A draft Constitution produced in 2014 by the House of Commons Political and Constitutional Reform Committee is federal in nature – at least to the extent that the existence and powers of the Scottish, Welsh and Northern Irish institutions would be constitutionally recognized and protected, and that no change concerning these powers could be made to the constitution without a two-thirds majority vote in both Houses of the Westminster Parliament and the consent of two out of three of these Parliaments or Assemblies (Constitutional and Political Reform Committee 2014). However, this text (which is strongly Unionist throughout) would actually reduce the powers of the Scottish Parliament. So we cannot say that federalism – whatever its other benefits might be – would necessarily give Scotland the powers that most Scots appear to want. Indeed, almost all existing federations give to the federal level extensive competence over many aspects of domestic policy – including social security, taxation, and much of



criminal law – that would be unacceptable in a Scottish context, if the aim is to produce a compromise that would make the Union attractive to ‘Yes’ voters.

If a workable and enduring federal solution is to be found for the United Kingdom, it would have to be a very loose federation – or perhaps, more precisely, a ‘confederation’,<sup>III</sup> in which limited powers over certain matters are shared between Scotland and the other nations of the United Kingdom on an equal, mutual, consensual basis, such that: (i) sovereignty resides ultimately with the peoples of the states, who retain a right of secession;<sup>IV</sup> (ii) the powers of the Union are more limited than is usual in most contemporary federations, being restricted to foreign affairs, defence, the monarchy, passports, immigration, the currency, and perhaps – for a transitional period – a few uncontroversial incidentals; (iii) the states contribute to the common treasury from their own funds, rather than being taxed directly; and (iv) the central institutions of the federation are kept relatively small and simple.

Federalism of this sort has many advantages. It would guarantee the long-demanded wish of reformers for ‘home rule all round’ within a loose, consensual Union. It would be highly decentralized both in terms of the extent of powers exercised by each state and in terms of the recognition of the sovereignty of each state. As well as guaranteeing Scotland’s autonomy, it would also provide a means of protecting human rights, deepening democracy, promoting political integrity across the United Kingdom. This would be attractive not only in Scotland, Wales and Northern Ireland, but also to democrats in England; it would ensure ‘English votes for English laws’ in a balanced and coherent way that does not create complications for the rest of the United Kingdom.

One objection to a federal solution is the difficulty of drawing appropriate state boundaries, given the relative size of England, in relation to Scotland, Wales and Northern Ireland. The classic texts on federalism, such as John Stuart Mill’s *On Representative Government*, asserted that there should be a rough equality of size between the states, such that no one can outweigh or outvote the others (Mill 2009/1861). The only prospect for federalism in the United Kingdom, in that case, would be if England were to be divided into regions, such that there would be not four national-states, but perhaps a dozen or so ‘nations-and-regions’. This would lead, however, to other objections: how can Scotland be an equal *nation*, if it is treated on a par with mere *regions* of England? How can England have



a sense of itself, if a thousand year old nation is divided into regions that have little historical, cultural or social relevance?

Yet an alternative perspective, which speaks in favour of a four-nation federation, is to see England's size as an asset; England's counter-poised power could be the key to creating a balanced Union in which the federal institutions do not overshadow the States. In a four-nation federation a Prime Minister of the United Kingdom would have to share power with a First Minister of England – perhaps of a different party – who would have a similar electoral mandate and a broadly equivalent claim to legitimacy. The Parliament and Government of England would demand powers from the United Kingdom, would jealously guard their autonomy, and would ensure that the federal institutions do not over-reach themselves. Mere 'regions' are incapable of that. In the political space between an English Parliament and a Federal UK Parliament there would be room for Scotland, Wales and Northern Ireland to breathe. The fact that English voters would, by virtue of their population, have the largest influence on federal policy need not be problematic provided that the federal government be limited to foreign affairs, defence, and a few other matters.

English predominance could be limited in other ways, too, as part of an overall power-sharing arrangement. The usual way is to give each State equal representation in a federal Senate, while having representation by population in the lower house; this can work, especially if combined with a nuanced legislative process that allows the Senate to veto certain classes of legislation, while not necessarily frustrating clear decision making in other areas. However, given limited powers at the federal level, it might be worth considering other, simpler, alternatives, such as the deliberate over-representation of Scotland, Wales and Northern Ireland in a unicameral Federal Parliament. One way of doing this would be to prescribe a formula for the distribution of seats that awards half the seats on an equal basis (i.e. one-eighth of the total number of seats for each State) and the other half on the basis of population. On current figures, this would give English members a small majority, sufficient to pass ordinary legislation, but not a two-thirds majority necessary for certain key decisions – such as constitutional amendments – over which the representatives of the other three States would have a veto.

Whatever its advantages may be, reaching political agreement on a federal constitution for the United Kingdom will not be easy. The gap between the constitutional conversations north and south of the border, and within Scotland between those seeking greater



autonomy and those wish to put the brakes on the process, is so wide that anything acceptable to an SNP-led Scottish Government is unlikely to be acceptable to opposition parties in Scotland, and even less likely to be acceptable to Westminster.

Much of the difficulty arises from the fact that the English people (whose consent would be essential to the successful creation and operation of a federal system) have no collective say in their own national affairs. Their interests are swallowed up in a United Kingdom from which they cannot clearly distinguish or easily disentangle themselves. At present there is no English Parliament, only a United Kingdom Parliament in which English members have an overwhelming majority. Fundamental restructuring of this type is politically difficult precisely because a federation, in creating a balance of power between the Parliaments and Governments of England, on one side, and of the United Kingdom, on the other, would split the England-UK axis and thereby weaken the power-base of the British elite. Attractive as genuine federalism would be to the people of the four nations, the British establishment would abhor it, and would no doubt resist it with every power they can muster.

Besides, British legal conservatism is probably still too strong to allow the United Kingdom's conventional system to be replaced by a modern, written, federal constitution of this type. It is easier, from an establishment point of view, to find bespoke solutions for Scotland than to challenge the core workings of the British State in ways that could undermine their precious privileges. Indeed, it is arguably less painful for the British establishment to lose control over Scotland, because of independence, than to lose control over England because of a democratic federal constitution.

#### 4.2. Secure Autonomy (Home Rule)

A second line of approach is to pursue autonomy for Scotland by means of a bilateral 'Home Rule' (federacy) settlement between Scotland and the United Kingdom Government. The terms of this settlement would be broadly as follows: the United Kingdom would continue, from the outside, to be one state, with one army, one foreign policy, one head of state, one flag, one passport and the other trappings of statehood. However, this would just be a 'shell'. From the inside, Scotland would be a distinct entity, with its own Constitution, full internal self-government, and full fiscal autonomy – meaning that Scotland would be responsible for raising and spending all of its own



revenues. This autonomy would be enshrined in an overarching constitutional structure which would recognise the ultimate sovereignty of the people of Scotland, freeing us from constitutional dependence on the Westminster Parliament.

Full Home Rule for a sovereign and autonomous Scotland within a 'loosely United' Kingdom could be established in at least two ways. One is by means of a new Treaty of Union, which would replace the old incorporating Union of 1707 with a new non-incorporating Union.<sup>v</sup> There are various historical precedents and current examples of how such an arrangement might work. It could, for example, take inspiration from the Austro-Hungarian Empire under the 'historic compromise' of 1867. The Imperial Government, which had come close to ruin during the 1848 revolutions, and had maintained its power in the 1850s only by means of repression, decided to reconstitute the Empire on a more mutual and inclusive basis. It retained a single external identity in international law for the purposes of foreign affairs and defence. Internally, it was divided into two entities: (i) Austria (including the Czech, Slovak and Polish lands, and other parts of the empire outside of Hungary and Croatia) and (ii) Hungary (including Croatia, Transylvania, and parts of what is now Slovakia). Each of these two entities was fully autonomous over all matters of domestic law, policy and finance. Each had its own Parliament, its own responsible Government, its own constitutional arrangements, and its own civil service. There was a personal union in the monarchy, such that the titles of Emperor of Austria and King of Hungary were combined. There were just three joint ministries: foreign affairs, war, and finance. These ministers were responsible to the Emperor-King (unlike the Austrian and Hungarian Prime Ministers, who were responsible to their respective Parliaments). Besides the three common ministries, there was a Customs Union and common external trade tariff, negotiated between the two Governments, approved by the two Parliaments, and renewed every ten years. There was also a common coinage and a joint national bank, and co-operation on common projects, such as railways and postal services – all of which was negotiated between the two entities on an *ad-hoc* basis and implemented through parallel legislation passed by both Parliaments (Taylor 1976).

This would be possible only if the United Kingdom Government were to recognize the existence of a Scottish entity with whom treaty negotiations could take place. Some argue that a residual, dormant statehood was preserved by the Treaty of Union, and that a future Scottish Government, with the backing of the Parliament and people of Scotland, could



therefore renegotiate new terms of Union on the basis of a claim to continuity with the pre-1707 state. Although this is very much a minority view, and one that many British constitutional lawyers as well as international lawyers would contest, there is nevertheless, on political if not legal grounds, a strong precedent for such an approach in the Anglo-Irish Treaty of 1920 which led to the creation of an Irish Free State. That agreement, concluded between the *de facto* Governments of the United Kingdom and of Ireland approved by both the Westminster and Dublin Parliaments, was never really accepted as a formal treaty by the British Government, which refused to accept the credentials of Irish representatives as plenipotentiaries; yet, in practice, it acted as a treaty, even if, to mollify British legal sensibilities, its provisions had to be re-stated as an Act of Parliament.

Patterning new United Kingdom institutions on those the long-dead and little-loved Austro-Hungarian Empire might seem improbable, but this idea should not be dismissed without careful thought. It would transform the United Kingdom into what many Scots have always claimed it to be in principle, but have long known it not to be in effect: a treaty-based Union, entered into freely, for mutual benefit, on certain limited conditions, by two equal sovereign entities. The concerns of Unionists, in matters such as identity and security, and the aspirations of Nationalists, in matters such as economic and fiscal powers, would both be met on common ground of thinner, more equal and more democratic Union.

Another approach to Home Rule is for Scotland to be given the power, by an Act of the United Kingdom Parliament, to adopt a Home Rule Constitution. This Constitution could be adopted by the people, as an act of sovereignty, following debates and negotiations amongst political and civic actors in Scotland – perhaps through a Constituent Assembly. The Home Rule Constitution would renounce the sovereignty of Westminster over Scotland, while at the same time providing for certain shared powers and institutions (the monarchy, foreign affairs, defence, immigration, passports, the currency, etc). It could also allow for voluntary co-operation in a few other, miscellaneous and uncontroversial areas, where duplication of regulations and administrative personnel would be unnecessary (e.g. meteorological services, or vehicle licensing). Everything else would be Scotland's autonomous responsibility, including the right to raise and spend all of our own money.

For this, inspiration can be drawn from the example of Gibraltar and other overseas territories. Under the Constitution of 2006, Gibraltar has its own Parliament and



Government with full powers over all matters of policy except foreign affairs, defence and security, and with full control over all of its own taxing and spending. The United Kingdom Government is represented by an appointed Governor, who is responsible for external and military matters. Gibraltar has no representation in the United Kingdom Parliament, but is represented on an inter-governmental basis; United Kingdom policies in regard of Gibraltar are determined in consultation with the Gibraltar Government. In other words, Gibraltar, a colony with a few tens of thousands of people, has more autonomy, and a stronger democratic basis for that autonomy, than Scotland would gain if the proposals of the Smith Commission, or any of the other forms of ‘enhanced devolution’ hitherto put forward by the major parties, were implemented.

An even better example of autonomy, for Scotland’s purposes, is provided by the Cook Islands, a chain of Islands in the South Pacific. The Cook Islands remain part of the Realm of New Zealand. The Queen, ‘in right of New Zealand’ is the Head of State, and is represented in the Cook Islands by a ‘Representative’ whose duties are mostly formal and ceremonial. Cook Islanders are New Zealand citizens. Since 1964, however, the Cook Islands have enjoyed full autonomy over almost all matters except for foreign affairs, defence and the issuing of passports, which remain the responsibility of New Zealand. All these provisions are laid down in the Constitution of the Cook Islands, which can be changed only by a two-thirds majority in the Cook Islands Parliament, followed, in the case of major amendments, by a referendum. New Zealand, like the United Kingdom, is one of the few countries that lacks a written, supreme Constitution, yet this has not prevented the establishment of a written Constitution for the Cook Islands. The Cook Islands therefore show that it is possible for Scotland to have a written, supreme Constitution of our own, even while being in a Union, for external purposes, with a country that does not have a written Constitution.

Although the technicalities of the constitutional status would be different, Scotland under a Home Rule Constitution would, in practical terms, be in a position not unlike that of the Channel Islands and the Isle of Man, which also enjoy substantial autonomy while still being reliant on the United Kingdom Government for the purposes of foreign affairs and defence, and while still using the pound. The key difference is that Scotland would be ‘inside’ the United Kingdom, while the Channel Islands and the Isle of Man are ‘Crown dependencies’. Nevertheless, the Channel Islands and the Isle of Man show that the United



Kingdom can be tolerant of substantial autonomy, so long as its military and diplomatic interests are unchallenged, and the degree of autonomy they enjoy could be extended to Scotland – under suitable constitutional arrangements – without great difficulty.

## 5. Conclusion

In a fusion of nationalist and democratic rhetoric, the Scottish national movement has articulated a radical constitutionalist critique of the British system of government that goes beyond a mere ‘centre-periphery’ dispute. It has sought not only to redistribute power from London to Edinburgh, but more fundamentally to constitute a Scottish state in accordance with its own principles, values and institutional preferences. Although the SNP’s constitutional proposals have evolved over time, they have been consistently ‘radical’ in the sense that they have challenged the institutions of the United Kingdom and rejected many of the prevailing constitutional norms, values and assumptions by which those institutions operate.

Yet this radicalism has been shaped by its wider British context and by the partisan interests of the SNP. The two are closely linked: as the party’s electoral fortunes have increased, and as it has enjoyed and come to expect the privileges of office, its critique of the British system has changed, from a complaint against over-centralised executive power, in the period from the 1970s to the early 2000s, to a complaint against the undemocratic origin of power. Reading the 2014 draft interim Constitution, it seems to suggest that executive power, concentrated in a First Minister leading a coherent majority in a single-chamber legislature, without internal checks or external balances, is acceptable – so long as that single chamber is fairly elected by the people of Scotland. The doctrine of popular sovereignty has shifted, in the SNP’s rhetoric and policy proposals, from a defense of the people against Parliaments as asserted in the Claim of Right (since no Parliament could ever act in place of the sovereign people) to a vindication of the unlimited authority of elected Parliaments. In spite of this, however, the SNP felt the need to continue to rely on the notion of Scottish popular sovereignty, as opposed to Westminster parliamentary sovereignty, to make its case. So although the 2014 draft interim Constitution would have resulted in the Scottish Parliament exercising powers of sovereignty (through its ability to unilaterally make and unmake constitutional law, at least during an interim period), that



sovereignty would not, as a point of recognized and asserted constitutional principle, have been inherent in Parliament – it would always be exercised in the name, and on the behalf, of the people. This is a point of principle that Westminster has never formally endorsed, but which in Scotland is now the foundation-stone of an emerging and vibrant constitutional tradition.

This principle has the potential to transform the next stage of the debate, about the place of Scotland within the future constitutional arrangements of the UK. The sovereign people have spoken in the independence referendum, and, while a clear majority of them have chosen to give the Union another chance, it is a chance to deliver *on the terms set by the people of Scotland* – not by Westminster. This means finding a form of autonomy that recognises Scotland's sovereignty, and its equality within the Union, without necessarily demanding independent statehood. Either a loose federal UK or home rule for Scotland (the choice between them is essentially a pragmatic one, dependent upon the will of Westminster and the rest of the UK to embrace radical constitutional change at the centre) if adopted in a spirit of sincerity, would enable Scotland and the rest of the United Kingdom to go forward together in a partnership of equals, sharing certain powers and responsibilities where this is in our mutual interests, while respecting the liberty, autonomy and distinct interests of each country. This would appeal to many supporters of independence, since Scotland would have the ability to pursue different models of economic and social policy, to address the problems of poverty and inequality, and to fund those policies from its own resources, while shaking off the myth of being dependent 'subsidy junkies'. It would also be attractive to moderate unionists, since, despite near total autonomy in internal affairs, the Scots would still be 'British', would still fly the Union flag as well as the saltire, would still carry British passports, could still join the British armed forces, would still be represented abroad by British embassies and consulates, and would still use the British pound.

Finally, if the people are to be sovereign, there should be no change to the constitutional relationship between Scotland and the rest of the UK, or to the rules by which Scottish institutions are structured, or to the rights of Scottish people, except by the consent of the people. This makes a written, supreme Constitution, capable of being amended (at least in its essentials) only by the vote of the people in a referendum, almost a prerequisite for a stable and lasting outcome.



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<sup>I</sup> In 2011-2012, prior to the re-endorsement of the Claim of Right by the Scottish Parliament, the Constitutional Commission, of which the author was then Research Director, undertook to trace the original signatories of the Claim of Right – and we discovered that many senior Labour figures, who were implacably opposed to Scottish independence, had solemnly pledged themselves to defend the sovereign rights of the people of Scotland.

<sup>II</sup> To cite just two well-known illustrative examples: any change to the distribution of powers between the Union Parliament and the States in India requires a constitutional amendment passed by a two-thirds majority in both Houses of the national Parliament and the approval of a majority of the State legislatures; in Canada, most important amendments require the approval of the legislatures of at least seven out of ten Provinces, having between them a majority of the population (the latter provision is designed to ensure that Quebec and Ontario, the two largest provinces, have a mutual veto).

<sup>III</sup> The technical distinction between federalism and confederalism is a fine one that has been much debated by scholars. The Germans differentiate between a ‘*Bundestaat*’ (a federal ‘union-state’, with emphasis on the unity of the whole) and a ‘*Staatenbund*’ (a confederal ‘union of states’, with emphasis on the distinct identity of each state). This expresses the essence of the distinction more neatly than is possible in English.

<sup>IV</sup> There are examples, even within these islands, of the recognition of the right of succession. The Belfast Agreement recognises the right of the people of Northern Ireland to leave the United Kingdom and to be reunified with the rest of Ireland. The Edinburgh Agreement similarly emphasized that Scottish membership of the United Kingdom is based on consent, and can be unilaterally withdrawn.

<sup>V</sup> The distinction between an ‘incorporating Union’ (a single, sovereign state) and a ‘non-incorporating Union’ (two equal entities united by treaty for certain common purposes) is drawn from Andrew Fletcher’s ‘*State of the controversy between United and Separate Parliaments*’ (Edinburgh: Saltire Society, 1982).

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## Sub-national Constitutionalism in Austria: a Historical Institutionalist Perspective

by

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## Abstract

Austria's federal system is determined by an apparent contrast between *formal* and *real* constitution having its roots in foundational defects shaping the system to the present day. As for the formal dimension, Austria has a rather uneven balance with regard to power-sharing. No wonder that, given the structural bias between central state and substates, informal forces are at work in order to make up for the shortcomings of the federal architecture. In this context, sub-national constitutionalism at first sight appears to be marginal. Astoundingly, though, in recent time a lot of constitutional changes and amendments, quite possibly paving the way for a sustainable redesign of the federation as a whole have taken place.

The article starts with a historical outline of the Austrian federation's origins. In chapter 2, the interplay of formal and informal rules and practices is discussed. Chapter 3 deals with scope, contents and dynamics of sub-national constitutionalism under the given framework. The article concludes with assessing the efficacy of subconstitutional politics in relation to the capacities of the federal constitution.

## Key-words

Federalism, Subnational constitutionalism, Austria, Historical institutionalism



Given that federalism is essentially about the distribution of authority between a central government and state governments (Bednar 2011: 270), every two-tiered political system is defined through a “super-constitution” that regulates overlapping control of a single population by a superior state and a group of subordinate states. The latter, as a rule, have their own constitutions, in research referred to under the term “subconstitutionalism” (Ginsburg and Posner 2010: 1).

When dealing with sub-national constitutional politics in Austria, it makes sense to extend the definition by the factor of *informality*, thereby drawing upon Marshfield who defines sub-national constitutionalism “as a series of rules (both formal and informal) that protect and define the authority of sub-national units within a federal system to exercise some degree of independence in structuring and/or limiting the political power reserved to them by the federation” (2011: 1153; cf. also Mueller 2013). Leaving informality out of consideration would inevitably lead to conclusions that cover only part of the story. Quite rightly, due to the absence of strong constitutional veto players, in comparative research Austria mostly is regarded as a borderline case between federalism and unitarism, even, as Erk (2004) put it, “a federation without federalism”. From a merely institutionalist perspective, diagnoses like this are doubtless correct. They fall short, however, by ignoring the fact that the *nominal* constitution is paralleled by a *real* one (*Realverfassung*) with strong informal forces at work. Therefore, what applies to the federal constitution must be taken into consideration with regard to subconstitutions, too.

Being aware of the structural shortcomings, Austria has been in search for a redesigned federal architecture for nearly a quarter-century. Various attempts have been made, most ambitious the so-called *Österreich-Konvent* (“Austria Convention”, 2003-5) which delivered an extensive report with analyses and reform proposals out of which, though, only a small part has been considered so far. Now as before, Austrian federalism suffers from an ill-defined distribution of rights and duties between superstate and substates.

It is noteworthy that the federal constitution leaves little scope of autonomy to the states (*Länder*). Somewhat surprisingly, therefore, it is the *Länder* who, since the late 1970s, have adapted their constitutions in many ways. In many cases the amendments are symbolic only and of little relevance in practice; sometimes, however, they entail far-



reaching substantial changes. As outlined below, sub-national constitutional politics, in contrast to the gridlock at national level, has gained steam and might in the long run play an important role in redesigning the federal systems as a whole.

Bearing in mind that the properties and ambiguities of Austria's federal system have historical roots, the theoretical approach chosen here draws upon the insights of historical institutionalism which allows for assessing the characteristics and the working of institutions with reference to origins and path-dependent developments. In a nutshell, historical institutionalism is

- *historical* in that its proponents employ causal claims stressing timing and sequencing. Past choices, often made under conditions of uncertainty and involving contingent alternatives, are considered to delineate the boundaries within which future choices are made, and it is
- *institutional* in that past legacies manifest themselves most obviously in institutional trajectories. Unveiling the historically constructed “grammar” of institutional configurations can, therefore, illuminate exactly how past events are causally related to future development (Broschek 2011: 541).

In what follows I will first outline the origins of the federal republic, thereby focusing on foundational defects shaping the system down to the present day. Subsequently, the institutional and informal framework determining sub-national constitutionalism will be described and analysed. In the chapter on the practice of subconstitutionalism the focus is put on frequency and substance of changes that have been made so far. The paper concludes with a discussion of the potential impact of present reform initiatives on sub-national constitutionalism and the changing relations between *Länder* and central state in the wider European context.

## 1. The making of the Austrian federation<sup>1</sup>

The roots of Austrian federalism trace back to the ancient Habsburg monarchy which, indeed, had not been a federation in a strict sense. Notwithstanding, though, the multinational composition inevitably implied some federal tradition, particularly in the wake of the *Ausgleich* of 1867 through which the Dual Monarchy with Hungary had been fixed (Burgess 2006: 93), and when the regime increasingly had to cope with centrifugal



forces fed by nationalist upheaval across the whole empire. Unsurprisingly, with the empire in disarray as a result of the lost war, these peoples, with the support of the Entente, promptly founded sovereign states of their own.

In the German-speaking remnants which all together represented no more than a small fraction of the original size of the huge territorial empire, the central authority had left a political vacuum (Burgess 2006: 93) with a prevailing mood of disorientation and a striking lack of prospects. No wonder that scarcely anybody supposed the rump state to be able to survive unless it joined a larger state, namely Germany. Eventually, the 1919 Treaty of St. Germain made clear who had the real power to determine the country's fate. Article 27 ("The frontiers of Austria shall be fixed as follows [...]"), in conjunction with Article 88 forbidding Austria "any act which might directly or indirectly [...] compromise her independence", put an end to any ambitions of pan-German unity.

Under these premises the foundational process of the republic was a tedious process, finalized as late as November 1920 when the constitution of the Republic of Austria came into effect. At the very beginning, federalism had not been on the agenda, on the contrary, the Provisional National Assembly convening in October 1918 had aimed at founding a centralist state. The debate on why and how Austria eventually was structured on a federal basis has been controversial up to the present time.

One school of thoughts claims Austria to have been established in a first step as a centralist unitary state which, in a second step, devolved competences to the *Länder*. In fact, though, the process was more complex, as outlined in a recent historical study emphasizing that the first provisional constitution, adopted in October 1918, merely reconfirmed the imperial *Landesordnungen* (territorial law codes) of 1861 which assigned only rudimentary autonomy to the provinces (Wiederin 2011). However, within a short time the provinces, while accepting the constitution as kind of an indispensable "joint umbrella", started a debate around the question of the republic's state structure. Federalist claims rested upon the so-called *Kronländer* (Crownlands), a quasi-federal Habsburg heritage comprising Vorarlberg, Tyrol, Salzburg, Carinthia, Styria, Upper Austria and Lower Austria, with some of them tracing back as far as the late Middle Ages (Palme 2000). In November 1918, "most Länder declared their 'accession' to the newly created republic in order to demonstrate their original statehood and claim of autonomy".<sup>11</sup> Thus, all Länder constituted themselves as autonomous albeit without claiming sovereignty in the sense of



an independent state, but rather expressing the intent of linking to one another in a common federal state (Brauneder 1998: 202).<sup>III</sup>

In 1945 the situation was quite the same as had been the case after WW I. The Allies had definitely no interest to consider regional interests in their strategic plans. The provisional government in Vienna was formally the only accepted authoritative interlocutor. During the whole occupation period (1945-55) Austria was divided into four “zones” (distributed among USA, UK, France and the Soviet Union), irrespective of the country’s federal division into nine states. Notwithstanding, for the allied authorities in the provinces, the *Land* governors (mostly provisional, since not elected) were welcome with regard to administrative matters. Thus, in the initial post-war time, with the central government not even in a position to communicate its decisions nationwide, the *Länder* accomplished to establish informal political and administrative structures they could build on when, in September 1945, the first *Länderkonferenz* (state conference) could be held in Vienna. Since then, informal rules and practices have been an important factor in Austrian federal affairs.

To sum up, considering its historical development which has been characterized by ruptures and discontinuity, Austrian federalism does not fit into any of the categories of federal state-building as are provided by comparative research. Since, after the Habsburg Empire had fallen apart, virtually all actors, both the *Länder* and the political parties, had assumed the rump state to sooner or later join the German Reich, the outcome was not a *coming-together federation*; by the same reason, it wasn’t a *holding-together federation* either.<sup>IV</sup> And although state-building both in 1918 and 1945 took place under the control of external actors, a factor underlying the definition of *forced together federalism* given by Bermeo (2002: 110), not even this latter category is adequate. It does not apply because the victorious powers, other than in Germany after WW II (cf. Beyme 2010: 368; Swenden 2004: 59), simply did not care whether or not Austria became a federation. Austrian federalism emerged in a more or less chaotic process of putting together what already well before had been under a common roof, albeit now considerably smaller. There was no other option than assembling what had been left over from former hugeness (Wiederin 2011: 371), with a constitutional architecture that has from the outset been subject to conflicting interpretations and claims.



## 2. Institutional and informal framework: properties and ambiguities<sup>V</sup>

In an international perspective Austria ranks among the group of countries which “describe themselves as federations while being so centrally dominated in design and practice as to be little short of unitary states” (Huegelin and Fenna 2006: 34). This is mainly because the inconsistencies of the foundation process have lived on to the present day. The inherent constitutional shortcomings shaping the distribution of power between national and sub-national level are well-documented through single country studies (e.g. Bußjäger 2010b) as well as through comparative historical and political research (e.g. Burgess 2006; Erk 2008), and there is little to add to the current state of knowledge. However, right when the focus is put on sub-national constitutionalism as a political arena closely depending on the scope of *Länder* autonomy, it makes sense to call to mind the relevant key points and findings in order to gain a balanced understanding of origins, actors, and functions.

### 2.1. Federal Council: second chamber with little authority

It is first and foremost the remarkable power asymmetry between the two houses of parliament that creates doubt whether the country is still to be considered a federal or rather a unitary country. The Federal Constitutional Law (*Bundesverfassungsgesetz* – B-VG) provides for supremacy of the National Council (*Nationalrat*) over the Federal Council (*Bundesrat*), markedly expressed in Article 10 assigning the “exclusive federal competence in both legislation and administration” to the former, thus leaving only residual competences to the second chamber (Pernthaler 2010: 112). In the federal legislative process the *Bundesrat* possesses merely a suspensive veto (Article 42 B-VG) that can easily be overruled by the National Council. In the time between 2000 and 2014, there were only 24 suspensive vetoes (all of them overruled by the federal parliament). What is more, in none of the (few) cases where the second chamber enjoys the right of absolute veto – regarding bills affecting legislative or administrative *Länder* competences (Article 44 B-VG) – the Federal Council has vetoed a bill passed by the *Nationalrat* (Gamper 2006: 79). The fact that the second chamber does not even exert its modest constitutional rights in full entirety demands further explanation.

The answer is to be found in the electoral system for the second chamber, and in the party political background framing Austrian federalism. The constitution provides that



*Bundesrat* members are elected by the state legislatures (*Landtage*) in accordance with proportional party representation after every provincial election; candidates need not necessarily be members of the *Landtag*, but must be eligible to be elected to it. As a matter of fact, in the federal parties' hierarchical scale the *Bundesrat* is subordinate and in practice almost insignificant.<sup>VI</sup>

## 2.2. Indirect federal administration

Regarding the division of competencies between federal state and *Länder* the constitution provides four different ways (Art 10-15 B-VG): (1) legislation and implementation exclusively by the federation; (2) legislation by the federation, implementation by the *Länder*; (3) framework legislation by the federation, implementation legislation and execution by the *Länder*; (4) legislation and implementation exclusively by the *Länder*. More precisely the competencies are specified in Art 102 B-VG with the distinction between *direct* and *indirect federal administration* (see Weber 1987). While direct administration provides for federal authorities executing law at all levels, indirect administration means that a “significant proportion of federal administration is carried out by the *Länder* on behalf of the federation”, a provision through which the constitution “compensates the *Länder* for their relative lack of power” (Gamper 2006, 82). What at first sight appears to be hardly more than a regulation reducing the states to mere agents of the central government, is in practice the “organizational core” (Öllinger 2010: 21) of Austrian cooperative federalism. By a couple of reasons, indirect federal administration is not, as one would expect, a hierarchical but rather a complex, in parts even stratarchical negotiating system with the *Länder* controlling the execution of federal law: “[E]ven competences that are allocated entirely to the federation are principally performed by the *Länder*, although they retain their federal character” (Gamper 2006: 83). For any attempt of changing the rules the consent of the *Länder* is required by constitutional law. Given the states being virtually fully autonomous in carrying out indirect federal administration matters, it is no wonder that proposals aiming at a reform of the division of competencies mostly fail to address the issue since this would imply to formally transfer the whole range of tasks from federal to *Länder* level.

Austria's distinct system of indirect administration mirrors a special kind of *executive federalism* with the governors pulling the strings. Formally the central government has the



right to issue instructions directly to a governor – what, however, has been done only once since 1945, and in this unique case was simply ignored by the addressee (Karlhofer 2011: 322). With regard to the control of indirect administration the federal constitution is remarkably restrictive. As a result, “a substantial part of *Land* government activities remains without formal state supervision” (Fallend 2003: 23).

Given these ambiguous properties of the administrative system, the office of a *Land* governor enjoys the special status of a gatekeeper in Austria’s federal setup. First of all, as outlined above, in the broad field of indirect federal administration it is the governor who has the final say. He/she alone is the central government’s counterpart, and thus responsible neither to the *Landtag* nor to his/her cabinet mates in the *Land* government. Since the *Landtag*’s autonomous legislative competencies are limited and with regard to the dominance of the executive headed by the government, the provincial parliament’s scope of influence is narrow, the more so as even its formal right of creating and controlling the government is considerably restricted in practice. Not only is the governor “government head, head of the bureaucracy, responsible agent for [...] indirect federal administration” (Fallend 2011: 182), and last but not least, in all external relations “head of state” (Weber 2004: 78). Moreover, any candidate for governor is usually leader of his respective party and therefore enjoys strong intra-party authority – as a result, *Landtag* elections are primarily governor elections (Weber 2004: 78-80).

### 2.3. “Partyness” of federalism

In a multi-layered system political parties are a kind of integrative agents and, along with interest groups, important vehicles of centralization (Beyme 2010: 373). In Austria, due to their all-encompassing presence at all levels, political parties have represented a pivotal element for cohesion and unification. Being a country with “strong parties in a weak federal polity”, as Obinger (2005) put it, makes it a special case of a “party federal state” (*Parteienbundesstaat*, cf. Decker 2011).

For a long time, the structural architecture of the party federal state left little room for establishing regional parties on a permanent basis with the array of political parties in the provinces aligning itself with that at national level. The congruence of the party systems nationwide can be regarded an indicator of interest coordination and centralization with the parties functioning as intermediary agencies between center and periphery (Beyme



2010: 376).

In the last two or three decades the Austrian party system, along with the international trend, has been changing what has manifested itself, among others, in a decline of the parties' capacity to reconcile conflicting interests (Niedermayer et al. 2006). Until the 1980s, given the two dominant *Lager* parties SPÖ and ÖVP achieving continuously more than 90 percent of the votes, and the third largest party FPÖ ranging between five and seven percent, Austria had a typical two-and-a-half-party system. Thereafter the hitherto frozen party system entered into a stage of rapid change, with the newly emerging Greens on the one side and the FPÖ transforming into a radical right populist party on the other, and both capturing considerable shares of the *Lager* parties' electorates. At states level, however, the party systems have proved considerably resistant, with SPÖ and ÖVP having managed to maintain – except for Carinthia – their supremacy. Now as before, as can be gathered from their share of seats in regional parliaments, they are far ahead of the other competing parties: As of end-2014, SPÖ and ÖVP hold together a total of 302 out of 448 (i.e. 67 percent) *Landtag* seats in the nine provinces, while holding merely 99 out of 183 (54 percent) seats in the National Council.<sup>vii</sup> All things considered, the strength of the parties at state level appears to be the “most remarkable feature of real federalism [in Austria]” (Pelinka 2007: 17). Looked at more closely, though, things are changing there, too, as to be outlined below.

#### 2.4. Double loyalties: regional vs. centralist party interests

For long periods of the Second Republic, the “partyiness of government” (Beyme 2007: 124) with regard to structures and processes in policy-making manifested itself in that *Land* election campaigns frequently were less determined by regional than by national issues, and quite often the outcome was considered as a barometer of public opinion on national politics (Dachs 2006b). With the SPÖ focusing on centralism this has always been beyond dispute; and also the ÖVP, by tradition much more federalist, has emphasized a “dual” party structure, i.e. regional sub-units plus nation-wide “leagues” (*Bünde* along socio-economic lines) in order to avoid or at least to mitigate centrifugal tendencies. Considerable change, though, has taken place since Austria's entry into the European Union in the mid-1990s. Since then, regional elections have tended to be more determined by regional issues than in the past. Inextricably, “vertical integration may become a burden”, and “[r]egional



politicians may tend to dissociate themselves from unpopular ‘party friends’ at the federal level” (Detterbeck 2011: 249). The national government, on its part, tends to emphasize centralism more firmly in order to make up for losses coming along with ongoing Europeanization. With this background, in particular when the need of reallocating competences is at stake, parties tend more and more to oscillate between promoting and blocking changes (Benz 2003).

It is noteworthy in this connection that the intra-party influence of the regional organizations varies strongly with both *Lager* parties: Vienna and Lower Austria have always been the centers of gravity, with regional party leaders being anything but subordinate to their respective national party structures. There has always been some kind of “asymmetry-in-symmetry” in Austria’s federal system – symmetry understood as constitutional equality of the national subunits, while asymmetry mirrors the differences of population and wealth affecting the constitutional units’ political power relations with each other as well as their varying degree of influence on federative institutions (Tarlton 1965: 869; Watts 1998: 123).

### 3. The practice of sub-national constitutionalism

#### 3.1. Types, modes and traditions

With regard to the historical development of sub-national constitutionalism since the founding of the First Republic, Koja (1998: 11f.) distinguishes three phases:

1. adjustment of state constitutions to the national constitution (a temporally uneven process, starting with Styria in 1918, and completed as late as 1930 when Upper Austria adopted its own constitution);
2. refoundation of the republic in 1945, followed by a long period of stagnation in which the *Länder* were essentially confined to replicating federal constitutional law with striking passiveness that did not change until the late 1960s;
3. significantly increased self-confidence of the *Länder* after the release of a constitutionalist’s legal opinion attributing considerably more autonomy to the substates than initially thought.

As for phase three, it started in 1964 with a joint initiative of the *Länder* in which they claimed a strengthening of their competences in return for granting aid to the federation in



a financially precarious situation (Funk 1988: 71). The legal doctrine elaborated in this context, drew on the insight that state constitutions are not simply subordinated to the federal constitution, basically confined to implement federal law. Rather, notwithstanding the rule that state constitutions may in principle not affect the federal constitution<sup>VIII</sup>, there has always been some “relative” constitutional autonomy largely neglected so far (Koja 1988/1967: 19-29). The opinion paved the way for a paradigm shift in constitutional politics encouraging the *Länder* to address the federal government with further demands. The negotiations of the two decades that followed did not really result in substantial changes, albeit did not preclude important settings for times to come. Remarkably, by the way, the negotiations were conducted between federal government and state governors. The parliaments of both levels, though directly concerned when changing the constitutional rules is on the agenda, were excluded from the talks – once again, a prime example of constitutional reality superimposing *formal* federalism (Fallend 2003: 28).

The change in the relations between superstate and substates caused by the new doctrine of a “relative” *Länder* autonomy has persisted down to the present day, naturally circling around the question of how to define scope and limits of relative autonomy. Given that most federal systems provide just an “incomplete” framework leaving more or less “space” for the federal architecture to be filled by sub-national constitutional provisions and arrangements (Tarr 2011: 1133), identifying and analysing scope, activities and substance of subconstitutionalism is both exciting and difficult.

In the case of Austria, though, measuring the space, and to what extent it is filled through *Land* legislation, is particularly complicated in that any claim of accuracy would disregard the fact that there is some ambiguity around the terms *constitution* and *constitutional law*.<sup>IX</sup> What is more, there are not only constitutional amendments and revisions to be considered, but also single laws entailing constitution-related provisions. Stocktaking of subconstitutionalism in Austria therefore has to take into account that there are three rather than two meanings of the term. Distinguishing between

1. state constitutions (of which there are 9),
2. state constitutional laws (70), and
3. single law clauses elevated to constitutional status (roughly 400),

helps understand terminological confusion in connection with constitutionalism. Thus, it is no wonder that constitutional experts, in order to overcome the scattered ensemble of



constitutional provisions, call for recodification in terms of mandatory incorporation of constitutional law in its entirety into the constitutional corpus. However, although there is, aside from content-related changes, urgent need of a structural recodification of *Länder* constitutions, no fundamental change is in sight (Wieser 2008: 177-181). As a consequence, the status quo leaves a lot of room for interpretation, whilst at the same time hampering (but not rendering impossible) structured comparative assessment. Apart from this, however, it is quite revealing to examine how and to what extent the substates make use of the scope preset by the national constitution (Williams 2012: III).

In search of patterns of subconstitutionalism in federal countries Dinan (2008: 841) highlights four crucial institutional features: (1) constitutional amendment and revision procedures, (2) opportunities for direct democratic participation, (3) the choice of a presidential versus a parliamentary system, and (4) the adoption of bicameralism versus unicameralism:

- ad 1: Sub-national constitutions are, as Dinan states, “invariably easier to amend than their national counterparts” (ibid.). As for Austria, the hurdle to be cleared is even lower than in most of the other federal countries: while the national constitution can be amended only by a two-thirds majority in parliament to be followed by an obligatory referendum, changes of a *Land* constitution require only a two-third majority of the *Land* parliament, without popular approval. It is worth bearing in mind, though, that in Austria the scope for sub-national constitutionalism is in general rather narrow (cf. Gardner 2008: 333).
- ad 2: Other than at national level, instruments of direct democracy, as to be outlined below, can be adopted extensively in state constitutions, albeit in practice with some variety. For instance, Vorarlberg has always put emphasis on extending direct democracy (occasionally even at the risk that a law is repealed by the constitutional court) while some other states show themselves remarkably reluctant about this matter.
- ad 3: Strictly speaking, in the case of Austria there is no choice between presidentialism and parliamentarism since the federal constitution allows for the latter option only. Yet, on second sight, there is a kind of a quasi-presidentialism at substate level. As already mentioned, in the federal constitution the office of a *Land* governor is



allotted the role of a “head of state”, and not by chance state parliament elections are frequently regarded as being actually state governor elections.

- ad 4: Given that unicameralism is increasingly the norm in sub-national constitutions (Dinan 2008: 841), Austria is in line with the mainstream. There is a kind of – defect (as outlined above) – parallelism of chambers at the national level while unicameralism at substate level has been an invariable rule stipulated by the national constitution.

Going beyond Dinan’s useful list of features, it is important to regard that subconstitutionalism is to a considerable extent not just a matter of options but also a matter of political culture. In some of the Austrian *Länder* regional identity (note: other than, e.g., in Germany, in Austria there is no difference made between the terms *Land* and region) is strong, underpinned with historical heritage, traditionalism and patriotic sentiments. In others, again, citizens have a more rational view of the *Land* they live in. Comparative studies show that there is a difference between the western and the eastern *Länder*: in Vorarlberg (36%), Tyrol (32%) and Salzburg (39%) emotional attachment to the *Land* is significantly higher than in the national average (25%), while citizens in the eastern states consider themselves to a higher degree as “Austrians” (Plasser and Ulram 2003: 433). Obviously, there is a close correlation between regional identity and the attitude towards federalism: the citizens of Vorarlberg and Tyrol rank highest (75% resp. 74% compared to 59% nation-wide) with requesting a stronger role for the *Länder* in federal politics (Bußjäger et al. 2010: 38).

Given the relevance of historical and cultural aspects, it makes sense to put them into consideration when comparing constitutions. In a recent empirically based thesis, Austria’s nine *Land* constitutions are grouped in three categories (Moser 2010: 69-72):

- Styria and Vienna are states with pronounced *positivistic* constitutions which are decidedly confined to positive law provisions and abstain from inexact norms and promises that cannot be fulfilled, e.g., protecting and fostering marriage and family.
- Burgenland, Carinthia, Lower and Upper Austria have constitutions with a *mix of legal positivism and natural law*, in part including provisions with imprecise norms, e.g., state goals, basic/civil rights and the like.



- Salzburg, Tyrol and Vorarlberg have constitutions that are closely *natural law oriented*, i.e. expressing broad commitment to (vaguely defined) values such as human dignity, freedom, independence etc.

Although not addressing the political-cultural dimension directly, the study provides a valuable classification for comparative analysis drawing on key questions as outlined by Tarr: identifying differences and similarities of substate constitutions and, still more important, explaining the reasons for differences, i.e. “why sub-national units have made more or less use of the constitutional space available to them” (Tarr 2007: 15).<sup>X</sup>

### 3.2. Comparing constitutional profiles

#### 3.2.1. Contents and properties

To say in advance, much of the contents of sub-national constitutions is predetermined in detail by the federal constitution having left little scope for flexible interpretation so far. For instance, with the principle of indirect federal administration the constitution explicitly stipulates national government policy decisions to be implemented by *Land* executive authorities.<sup>XI</sup> In view of that, Gardner (2008: 333) concludes that

[a]lthough the reality [...] may be more complex than the constitutional text alone reveals, there provisions on their face seem to contemplate Land government as agents of the central government in areas of national competence, an arrangement that is largely incompatible with sub-national constitutionalism and overtly antithetical to contestatory federalism.

At least to some extent the verdict needs to be qualified, the more so as it does not take into account recent developments. As a matter of fact, concerning the distribution of competences between central state and substates, virtually all political actors involved have been well aware that reforming the allocation of rights and duties is urgently needed. For a long time, though, Austrian federalism did not develop consistently in a certain direction, neither clearly towards (over-)centralization nor towards decentralization. In a long-term study, Bußjäger (2012: 67) distinguishes four periods:

- 1945-1974: creeping centralization
- 1974-1988: moderate federalization
- as from 1988: uneven development



- since 1995: various attempts of federal reform, including a broadly based convention assigned with the task of elaborating a modern federal convention.

As for the last-mentioned convention, the report submitted to the national parliament is not really stunning, and only a small number of the proposals has been implemented so far, yet it expresses a new stage in constitutional affairs. The same is true for the substates which in the last three decades all have extensively adapted their constitutions in accordance with the above-mentioned new legal doctrine which attributes “relative” autonomy to the *Länder*.

Compared to the national level, sub-national constitutionalism has been characterized by a considerably more dynamic development resulting in a wide range of changes regarding scope and substance, recent studies even identify “contours of distinct Austrian constitutional profiles at member state level” finding expression in “spirited innovations” (Häberle 2006: 381).<sup>XII</sup>

Before dealing in detail with sub-national constitutionalism in Austria, it must be noted that with regard to substance not every constitutional change earns the attribute “spirited innovation”. Some of them fall primarily in the category of symbolic politics; others again lead to far-reaching alterations of single elements of the political system. With good reason, therefore, in this section symbols and general provisions are dealt with briefly while the latter category is examined more broadly, particularly changes of government creation procedures (i.e. proportional vs. majoritarian rule) and patterns of direct democracy.

### 3.2.2. *Preambles, symbols and general provisions*

Preambles to a constitution are widely used as introductory statements without any legal binding. Unsurprisingly, only a single of the *Länder* has one: Tyrol whose preamble affirms, among other things, “trust in God”, “spiritual and cultural unity of the whole *Land* [South Tyrol implied]” and the “well-ordered family as the basic element of people and state” (not entirely coincidental, Tyrol ranks among the group of *Länder* with natural law oriented constitutions). While there is only one constitution with a preamble, all *Länder* have incorporated symbols into their basic laws in order to underline cultural identity and the claim of (regional) autonomy. As a rule, every *Land* has an anthem of its own, a flag, a patron saint celebrated at a feast day, and the like (Häberle 2006: 371 f.)



General constitutional provisions refer to a broad range of principles for specific government action and tasks to be fulfilled. In large part, at substate level it is primarily a matter of replicating federal constitution regulations. Given the narrow limits set by national law, *Land* constitutions tend to focus on (nonbinding, because unenforceable) fundamental rights and “state goals” (*Staatsziele*) as there are, for instance, committing to “family, marriage, equal treatment of housework and gainful employment, Sundays and legal holidays, regional patriotism, and subsidiarity” (Gamper 2012: 70). Notwithstanding, with respect to general provisions, there is increasing heterogeneity among the *Land* constitutions simply because it allows for producing a specific constitutional style (ibid., 84 f.).

### 3.2.3. Government creation: Reluctant farewell to *Proporz* rule

With regard to Austria’s political system, the term “Proporz” has an ambivalent meaning: In an informal sense it is a well-established term inextricably linked with the concept of *consociationalism* as laid down in the seminal works by Lehmbruch and Lijphart defining it as a societal arrangement typically for countries which in their historical development were unable or only insufficiently able to establish a viable, non-destructive system based on the ideal of competitive democracy (Schmidt 2010: 306-335). The Austrian version of *Proporz* democracy is to be traced back to the late 19<sup>th</sup>, early 20<sup>th</sup> century when the Social Democratic Party and the Christian-Social Party organised virtually the whole society in two big “camps” (therefore the term *Lagerparteien*). The First Republic ended with civil war and the abolition of democracy. The Second Republic, then, was founded on the insight that none of the two forces was able to prevail. As a consequence the now renamed parties SPÖ and ÖVP established a system of proportional representation finding its expression in a long series of grand coalitions characterized by comprehensive mutual control and almost excessive clientilism in political, economic, social and cultural affairs.

The informal Post WW-II arrangement of mutual control had had a prelude already at the cradle of the democratic republic to be founded after 1918. After long disputes revolved around the question whether to establish a federation or a central state, a compromise was found in that the outcome was a federation with strong centralist elements. The crucial point was that Vienna and several industrial areas were clear domains



of the Socialist while rural areas were controlled by the Christian-social party. The solution was that all *Land* constitutions, except for Vorarlberg and Vienna, drafted constitutions which provided for the composition of the *Land* government along the parties' vote shares in *Landtag* elections with executive positions to be filled proportionally. Thus, neither of the two *Lager* parties had to fear to be excluded from government permanently.

However, although enshrined in provincial constitutions drafted in the First Republic already, the system of *Proporz* government could fulfil its purpose not before 1945. Only from then on, the two *Lager* parties in office could rely on a balance of power both at national and substate level.

Beginning with the late 1970s, and accelerating with economic crisis in the 1980s, the essentials of Austrian consociationalism based on two-party dualism increasingly eroded. At national level, entering a grand coalition had meanwhile become a risky game, and similar changes took place at *Länder* level as well. And as far as *Proporz* rule was concerned: It seemed, [the Moor had done his duty](#), [the Moor might](#) go. *Proporz* had not only become a burden for central parties, it had also become an ever-growing problem right for those parties that had been used to put majorities in proportionally composed *Land* governments. As long as a predominant party can easily push through its will vis-à-vis its junior partners, all's right with the world. And it can make use of its right that the *Land* bureaucracy is directly and exclusively subordinated to the *Land* governor – a privilege that frequently has caused criticism (Luther 1990: 16).

With shares of votes gradually shrinking and finally falling under the 50 percent mark, though, formerly power-conscious parties have lost ground. As of 2015, there is only one party at provincial level left (the ÖVP in Lower Austria) still holding an absolute majority in parliament. As soon as the early 1990s, the *Land* Salzburg took the lead and started considering a change from proportional to majoritarian rule for government election. After years of fruitless negotiations, though, there was no end in sight (Schausberger 1999: 258). Notwithstanding, in 1998, due to a political scandal – the FPÖ, holding a seat in government, had made public confidential computer data – all the other parties came to an agreement on changing the system at the very earliest. As a result, already in 1999, when provincial elections were to be held, the new government was built on the basis of majority rule. Simultaneously, in Tyrol following the example of Salzburg, the government was elected along the same pattern (ibid.).



For several years, no other *Land* got ready to follow suit and make a move in this direction. Most recently, however, Styria and Burgenland introduced majority rule, Carinthia is supposed to adapt the system by the end of 2015 while in Upper Austria ÖVP and Greens, coalsing informally within the stipulated all-party government, are pronounced proponents of changing the rule but are lacking the required two-thirds majority in parliament.

Concluding this section, it must be noted that in connection with the shift from proportional to majority rule the parliamentary control rights had to be adapted. The reason for that was that in the relationship between government and opposition the logic of action is different. Since 1945, in several *Länder* with *Proporz* system repeatedly, in some of them even for decades, there was virtually no opposition because all parties were in government.<sup>xiii</sup> The dominance of the leading party/parties in government has been secured through high thresholds for the use of parliamentary control instruments, thus inevitably resulting in a lack of accountability. For instance, in four *Länder* with *Proporz* governments (Burgenland, Carinthia, Lower and Upper Austria) a vote of no-confidence against a cabinet member requires either a two-thirds majority either of his own party or of the total of MPs (Fallend 2011: 181). The same had been the case in Salzburg and Tyrol before *Proporz* had been abandoned; now, under majoritarian system, it requires a simple majority only to force a cabinet member to resign (Karlhofer 2013: 17).

#### 3.2.4. *Direct democracy*

In a comparative study evaluating the scope and procedures for direct democracy in Europe, Austria is midfield in a group of countries labelled *The Cautious*, defined as a category in which “the electorate does have practical experience of popular initiatives and/or national referendums. But these procedures are essentially plebiscitary in nature i.e. they are not protected or controlled by the citizens themselves or by the law, but are controlled ‘from above’ by parliament (political parties) or by the executive” (Gross and Kaufmann 2002: 14). As a matter of fact, in Austria pure democracy has been put in second place since the foundation of the republic (Welan 2013: 58f.). More recently, in 2011, a ruling by the constitutional court once again reconfirmed the supremacy of the principle of representational democracy in that it repealed an amendment to the constitution of the *Land* Vorarlberg which had provided for ‘popular legislation’ (Gamper



2014: 30-32). As of recently, though, a sea change seems to be under way: in December 2014, the National Council, in responding to increasing demands, appointed a commission which was entrusted with elaborating proposals for an “enhancement of direct democratic instruments”.<sup>XIV</sup>

Apart from the fact that in Austria direct democracy at national level is relatively underdevelopment, we can draw upon Dinan’s finding that sub-national constitutions generally provide more opportunities for direct democracy (2008: 841) when turning to respective provisions at *Länder* level.

As already pointed out, some of the *Länder* made extensive use of direct democracy instruments as early as the formation phase of the republic, some of them even before their respective sub-national constitution had been drafted. We just need to recall the referendum of 1919 in Vorarlberg (which, by the way, aimed at accession to Switzerland) and the referenda held two years later in Salzburg and Tyrol (both, aiming at Germany, in the same way secessionist). Beyond these spectacular cases, the three Western *Länder* incorporated popular vote provisions into their constitutions soon afterwards. In practice, however, with no single case of initiative reported, direct democracy was quote immaterial in the First Republic (Poier 2010: 32f.). The same applies for the immediate post-war decades where direct democracy was hardly more than dead letter. As late as the 1970s, several *Länder* opened up for revisions of their constitutions in order to enhance civic participation. The new spirit was influenced by two factors: For one thing, the new legal doctrine of relative autonomy fostered in general an understanding of sub-national self-reliance. And for another thing, with the background of societal change policymakers were increasingly faced with civil society activities, such as local initiatives and action groups which more or less explicitly put an enhancement of civic involvement on the agenda. Within a short time, broadening the scope for direct democracy became a nationwide topic, and none of the *Länder* could ignore the demand for more direct democracy. By the end of the 1990s virtually all *Land* constitutions had amended their constitutions in this direction (ibid., 34).



Table 1: Facultative referendum – required number of signatures or resolutions of municipalities

Land	Number of signatures*	Number of municipalities	Exceptions to the rule
Burgenland	12.000 (5%)	–	Bills passed in emergency situations; fixed-time implementation laws; tax laws
Carinthia	–	–	–
Lower Austria	50.000 (4%)	80	Bills passed in emergency situations; fixed-time implementation laws; tax laws
Salzburg	–	–	–
Styria	50.000 (5%)	50	Implementation laws; implementation of Community Law; bills declared urgent
Tyrol	7.500 (1%)	40	Bills passed in emergency situations; implementation laws
Upper Austria	–	–	–
Vorarlberg	10.000 (4%)	10	Bills declared urgent
Vienna	–	–	–

\* In brackets share of electorate

Source: Poier 2010: 37 (updated).

Today, there is both at *Land* and at local level a broad spectrum of provisions for citizen participation. Most frequently to be found are *Volksbefragung* (consultative referendum), *Volksbegehren* (agenda initiative) and *Referendum* (which is either binding or non-binding to policymakers). At a closer look only the referendum can be regarded as being effective in the sense of a policy-decision by the people. Obligatory referenda are stipulated only in Salzburg and Vorarlberg in connection with essential changes of the constitution (in both cases under certain circumstances only). Without exception, though, all *Länder* have constitutionally enshrined provisions for facultative referenda (i.e. veto-referenda) which can be initialized top-down by the *Land* parliaments, and in most of them also through bottom-up initiatives by citizens resp. municipalities concerned – as is the case with Burgenland, Lower Austria, Styria, Tyrol and Vorarlberg. Without exception, though, subject to the vote of the people can only be laws passed by parliament and before coming into effect (Table 1).

When including also municipalities, as the lowest level of a federal system, remarkable differences can be identified: At national level the attribute “cautious” is apposite while at *Land* level, with some variation, direct democracy instruments are slightly broader developed. At local level, by contrast, openness to civic participation is considerably higher.



Given that the legal framework for municipal politics is determined by *Land* legislation (therefore, it is a matter of sub-national constitutionalism), the commitment to granting direct rights to the “sovereign” is more far-reaching: three of the nine *Länder* provide for binding referenda based on initiatives supported by at least 20 (Vorarlberg) resp. 25 (Burgenland, Styria) percent of citizens (Karlhofer 2012: 150).

#### 4. Dynamics and efficiency of subconstitutional politics

As set out above, during 1918 to 1920, along with the tension-filled, contradicting, and to a considerable extent chaotic, formation of the democratic republic, a federal architecture developed whose shortcomings have persisted to the present day. The striking lack of constitutionally entrenched balance of power-sharing, markedly expressed in the insignificance of the *Bundesrat*, has even caused doubt whether Austria is to be seen as a federation or rather a unitary state. However, as has been argued in this article, a comprehensive analysis of Austrian federalism deserves closer attention to informal rules and power relations beyond the institutional framework. Moreover, in the long run, perceptions, interpretations and practice may be subject to change even if institutions remain unaltered.

Drawing on this consideration, the analysis of Austrian sub-national constitutionalism gives a different picture, all the more so as it is anything but static or unidirectional. A flash back to the first post-war decades seems to corroborate the assessment of Austria being a comparably “weak” federation. Leaving aside the distinction between more positivistic and more natural law oriented constitutions (see section 3.1.) what in practice has little relevance, the *Länder* exhibited little individuality. For a long time, sub-national constitutionalism more or less mirrored the logic of national constitutionalism. Not for no reason, the fact that federal law was mostly replicated one-to-one by state legislators was sarcastically labelled as “Rank-Xerox federalism” (Öhlinger 2009: 52).

As from the late 1970s, with the new doctrine of “relative autonomy” unfolding, the culture of subordination to centralist policy-making has increasingly been challenged (Bußjäger 2012). Particularly with government creation rules and direct democracy, both regarded as the most important issues to be tackled, the *Länder* (with varying commitment) have become proactive in adapting their constitutions. It must be noted that the principle



of homogeneity (*Homogenitätsprinzip*)<sup>XV</sup> derived from the federal constitutions still sets limits to overarching ambitions. Notwithstanding, despite restrictions due to homogeneity, one can agree with Tarr stating with regard to Germany and Austria that, although their constitutions “have limited constitutional experimentation in the *Länder*, they have not foreclosed it”, such as generally the system of cooperative federalism “does not necessarily preclude significant use of sub-national constitutional space“ (Tarr 2011: 1139).<sup>XVI</sup>

Indeed, and beyond the two examples outlined more broadly in this article, the Austrian *Länder* have adapted their constitutions in many other aspects, too. In the early 1980s, all of them, except for Vienna, established a *Landesrechnungshof* (audit office); since the mid-1980s, Tyrol and Vorarlberg have a *Landesvolksanwalt* (public ombudsman) who can be consulted by citizens in case they feel unjustly treated by public authorities.

As for EU affairs, Austria’s access in 1995 entailed substantial changes for the *Länder*. The foreseeable loss of influence through integration effects was in part alleviated through state treaties. At the same time, *Land* constitutions were adapted in different ways; while Carinthia, Lower Austria and Vienna abstained from any changes, the others established integration committees and the like on the basis of constitutional law (Moser 2010: 89-102).

Taken as a whole, recent experience has shown that subconstitutionalism has gained steam, and frequently changes in one *Land* serve as a model for others. In at least one case subconstitutionalism has caused a thorough reform at national level: In the 1990s, in several German *Länder* the voting age for local elections had been lowered to 16 years. In Austria, Carinthia and Burgenland made a start by introducing “vote at 16” in 2000, whereby Burgenland extended the reform also to *Landtag* elections. By 2005, five *Länder* had lowered the voting age for local elections and three in addition for *Landtag* elections. Eventually, in 2007, the newly elected federal government (formed by SPÖ and ÖVP) followed suit and lowered the voting age for National Council elections, too. According to a constitutional homogeneity rule providing that at no level the voting age may be higher than for the *Nationalrat*, all election laws – including not only the four remaining *Länder* but also referenda, the election of the Federal President and even elections to the European Parliament – had to be adapted. Since then, Austria has been the only EU member, in a broader sense worldwide the only developed democracy providing for voting at 16 (Karlhofer 2010).



All things considered, apart from the election reform which notabene had started as a bottom-up process gaining national attention only later, Austrian sub-national constitutionalism is inherently a step-by-step story and therefore should not be overestimated (Bußjäger 2010a: 33). On the other hand, right at the substate level there is some potential of change that should not be underestimated. Along with the recalibration of party systems at substate level, coming along with the decline of the formerly predominant catch-all parties SPÖ and ÖVP, the “partyiness” of federalism is withering. Heretofore, the stability of Austria’s cooperative federalism has been seen in close connection with government congruence at national and sub-national level (Bolleyer and Bytzek 2009: 381). Long-term studies, though, suggest qualifying the assessment since congruence is no longer “a function of government formation at the national level” (Jenny 2013: 44). As of early 2015, in six of the nine *Länder* governments there are coalitions formed between SPÖ resp. ÖVP and the Green Party – the latter not really prone to the logics of *Proporz* politics as has been characteristic for the Second Republic. The traditional pattern of government congruence has obviously already begun to disintegrate, thereby inextricably affecting top-down policy implementation and the premise of *Land* authorities being in the role of “agents” of the central government as identified by Gardner (2008). Against this backdrop, gradual constitutional change at sub-national level may eventually turn out to be more effective than the big nationwide federal reform which has not really made progress in the past quarter-century.

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<sup>I</sup> For a more detailed description of the origins of Austrian federalism see Karlhofer 2015.

<sup>II</sup> Joseph Marko: Federalism, Sub-national Constitutionalism, and the Protection of Minorities, undated, p. 1 (<http://camlaw.rutgers.edu/statecon/subpapers/marko.pdf>).

<sup>III</sup> What must be added, though, is that this process was actually orchestrated by chancellor Karl Renner who provided pre-formulated, textually identical declarations of accession to the Land parliaments (Wiederin 2011: 361). Notwithstanding, the states’ commitment to the new republic remained fragile for a while, as demonstrated by several attempts of secession: In 1919, Tyrol, in a hopeless attempt to reunite with its southern part which had been annexed by Italy, declared itself a Free State. In Vorarlberg, a referendum on acceding to Switzerland, held in 1921, was affirmed by 99 percent of the voters. In the same year, referenda in Tyrol and Salzburg on joining Germany were supported by strong majorities of voters. None of these initiatives had a reasonable chance of success (Fiedler 2007: 7-8).

<sup>IV</sup> Cf. the typology introduced by Stepan (1999).

<sup>V</sup> For a more detailed description see Karlhofer and Pallaver 2013.

<sup>VI</sup> The modest prestige of *Bundesrat* office holders is best expressed in the fact that after every national election the government parties, when negotiating the coalition agreement, use to agree upon the voting behaviour not only of the lower house members, but also of their respective members of the upper house – without any consultation with the latter (Weiss 1997: 525).



<sup>VII</sup> Official data by [www.bmi.gv.at/cms/bmi\\_wahlen/](http://www.bmi.gv.at/cms/bmi_wahlen/) [access: 01.02.2015].

<sup>VIII</sup> “The Land Constitution to be enacted by a Land constitutional law can, inasmuch as the Federal Constitution is not affected thereby, be amended by Land constitutional law” (Article 99 (1), Federal Constitutional Law).

<sup>IX</sup> It should be noted that also the name of the national constitution – in full length “Federal Constitutional Law” – is in a sense misleading.

<sup>X</sup> In addition, this paper will also refer to aspects addressed by Tarr in a recent work: elite entrenchment, outsider groups, ordinary politics, constitutional modernization, and external political forces (Tarr 2014).

<sup>XI</sup> “In matters of the indirect Federal administration the Governor is bound by instructions from the Federal Government and individual Federal Ministers (Art. 20) and he is obliged, in order to effect the implementation of such instructions, also to employ the powers available to him in his capacity as a functionary of the Land's autonomous sphere of competence” (Article 103 (1) Federal Constitutional Law).

<sup>XII</sup> Translated from German – FK.

<sup>XIII</sup> In practice, though, frequently two or three of the parties conclude unofficial coalitions with the consequence that important portfolios are distributed among the contract partners while the others are restricted to minor spheres of influence.

<sup>XIV</sup> Cf. Republik Österreich, Parlament, “Enquete-Kommission zur Stärkung der Demokratie” (<http://www.parlament.gv.at/PERK/NRBRBV/NR/PARLENQU/PEKDEMO/index.shtml>).

<sup>XV</sup> Although explicitly entrenched in the federal constitution with regard to *Landtag* elections only (Art 95, para 2, B-VG), the Constitutional Court's ruling tends to interpret homogeneity rather strictly in that “federal supervision is stronger in Austria than in many other federal countries and altogether more typical of regionalized countries” (Gamper 2006: 88, footnotes deleted).

<sup>XVI</sup> Concerning the German case, see the in-depth analyses provided by Lorenz and Reutter (2012) and Reutter (2014).

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**Margins of Nationality.**  
**External Ethnic Citizenship and Non-discrimination**

by

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## Abstract

People are usually born into their political communities, and only a minority of them become member of the given community by naturalisation. Sovereign states enjoy a great margin of appreciation in defining the rules of both birthright and acquired political membership. Most states employ some form of cultural affinity-based criteria relating to ethnic identity that differentiate between applicants that seek to acquire the nationality of the state. Indeed, such distinctions seem to be growing with the revival of ethnic and nationalist aspirations that Europe has witnessed for some years. We argue that human rights principles, first and foremost non-discrimination guarantees, should be taken seriously and effectively applied to these cases of naturalisation, and show what such a scrutiny entails. While the arguments presented here should apply more generally, special attention will be paid to events that primarily triggered the authors' interest, the case of Hungary.

## Key-words

State sovereignty, naturalisation policy, legitimacy, cultural affinity, non-discrimination principle, Hungary



## 1. Introduction

Various forms of citizenship, and its legal counterpart, nationality, define membership in legal and political communities, but also, by this very move, define the boundaries of these communities, making the individual and the collective aspects inseparable. Different levels of governments only make sense with these communities defined. Accordingly, it is a question of primary importance, who has the authority to define these boundaries and what the possible limitations are on this power. With the growing importance of international and supranational human rights guarantees (most importantly the EU and the Council of Europe), various bodies can set limit to national citizenship policies.

Traditionally, international law has seen nationality as belonging to the core of national sovereignty, the *'domaine réservé'* of states, implying an almost complete freedom from external interference. Constraints apply only in cases where a state seeks international (legal) recognition of its relationship to an individual (above all diplomatic and consular protection), and even in such cases, the mere showing of an existing (genuine) connection seems to suffice. This requirement can be seen as a 'positive' element, defining when states *can* recognize someone as a national. It does not say anything about possible 'negative' limitations, where states might be *obliged* to recognize someone as a national, against their will. Here, human rights law presents a potential ground for interference with naturalisation policies.

First, the 'right to nationality' has been codified.<sup>1</sup> Yet, this works less as a practical constraint on state policies (as a clear individual claim obliging a particular state would) and more as a general obligation of states to work towards the elimination of statelessness. Second, the non-discrimination principle should apply to all decisions that concern individual rights and obligations. As a relative principle, the non-discrimination principle can be placed between 'positive' and 'negative' limitations on state power, establishing constraints that potentially cut both ways: when states should refrain from granting citizenship and in cases where they ought to grant recognition. Human rights standards have changed the landscape of national citizenship policies. It used to be a general practice, e.g., to differentiate between men and women, in questions of citizenship, reinforcing the vulnerability of women in case of divorce. States with citizenship policies that discriminate



against women are clear outliers. But to this day, most states continue to apply some form of cultural affinity-based criteria that differentiates between applicants that seek to acquire the nationality of the state, and there seems to be a reluctance to apply non-discrimination rules, with their full force, to such cases.

The present article argues for the general application of the non-discrimination principle to ethnic citizenship policies. It will proceed by first introducing the role of citizenship in defining the political community, the ‘right’ people and, second, by analysing what political goals can serve as legitimate grounds for citizenship policies. We apply a normative, human rights test to this end. While the arguments should apply more generally, special attention will be paid to events that primarily triggered the authors’ interest, the case of Hungary. Recently the Hungarian government offered Hungarian citizenship to ethnic transborder Hungarians without a residency requirement. The extension of voting rights followed this move. The end of this paper examines the implementation of the rules conferring the status of citizenship for those living abroad.

The article builds on arguments from political and legal theory as well as the relevant case law of the human rights international *fora*. It addresses arguments that can be used both for and against the permissibility of external ethnic citizenship, in a way that they could be played out, e.g., in an ECHR case with a claimant challenging the state policy and a respondent government defending its selectivity.<sup>II</sup> In addition to these two layers the paper draws on a recent empirical research, which has shown the effects of the recent Hungarian extension of the citizenry. This is because we believe that only the three aspects combined (theory, standards as applied, empirical insight) can account for the complex processes that sustain naturalisation policies with strong ethnic preference. The paper uses the terms nationality and citizenship interchangeably, if not indicated otherwise. It applies the adopted terminology following Brubaker on the ‘triadic nexus’ of the three players: kin minorities, their home states (where they reside) and their kin-states (the majority/titular nation of which they belong on ethnic, linguistic, religious etc. grounds) (Brubaker 1996). When we write about external ethnic citizenship we understand the granting of nationality to non-resident aliens based on an ethno-cultural criteria. By ethno-cultural, we largely mean the ideal group for traditional European nation-building, still alive today, defined by traces that might include language, religion and some kind of an imagined common ancestry.<sup>III</sup>



## 2. Who are the people?

‘One day Japan grants equal voting rights to the citizen of Norway so that they can elect a small party of Norwegians to the Japanese Diet if they wish. Then the Diet by majority vote levies taxes on Norwegian oil and directs its transfer to Japanese refineries’ (Dworkin 2011: 380). This is the hypothetical example of the book of Ronald Dworkin’s *Justice for Hedgehogs*, which among others deals with the traditional question: Who are the people? As Dworkin emphasizes, people want to be governed by people relatively like themselves, and it has been taken to justify many forms of tribalism and nationalism: of race, religion, language, and kinship. But there is no answer to the question on who the right people are. This is because the ideal of democracy already presupposes a political community. As a default nation-states exist and their boundaries are created and altered by geography, accidents of history, war or politics (Dworkin 2011: 381-382). In most cases we have acquired the political membership by virtue of birthplace or ‘pedigree’, in other cases by naturalisation. But in both cases it is the state, which decides on the boundaries of the given community. States are allocating political membership at birth usually according to parentage (*ius sanguinis*) and territoriality (*ius soli*). Naturalisation is ‘the final step in the process of acquiring citizenship after birth’ (Shachar 2012: 1012). In order to acquire post-birth membership in a desired country, the applicant must first reach its territory and establish lawful permanent residence (Shachar 2012: 1012).

The paper accepts the Rawlsian claim that the nation-states are the primary loci of political legitimacy and the pursuit of justice and that the sovereignty of these states are constrained internally by the moral equality of individuals who are subjects of the given states, that is, who live in the territory of the given states (Rawls 1993: 36). The government must treat all its citizens as equals in the sense that political decisions and arrangements must display equal concern for the fate of all. Becoming a member of a political community is a crucial factor in the determination of life chances. The fate and life of the citizens of a political community are interconnected. The state’s basic political institutions elaborate the rules, which govern their life. Citizens pay taxes to cover the expenses of the political institutions, public services and the redistribution. As citizens we tend to give preference to each other’s interests, and sometimes this ‘preferential treatment’



is justified.<sup>IV</sup> It is the principle of justice, which gives answer to the question whether the preferential treatment is acceptable or not in a given case.

Members of the political community are in different situations both in terms of their abilities and capacities, and their social background and economic conditions. It is the duty of the state to improve the social and economic position of disadvantaged groups so that their opportunities shall be more equal. The state measure does not mean privilege, or giving more rights, but state intervention in order to reduce the social support of negative discrimination and the differences leading to it. The purpose of these measures is the equation of group disadvantages that is helping those who had in an unjust way got into a disadvantageous situation because of their belonging to a social group.

For instance, it is justified to employ preferential treatment if a social group cannot take part equally in the life of the political community, possibly but not necessarily because of structural discrimination, and if the inefficient political power of the group has become steady, because then the group exists separated, isolated from the political community. Accordingly, the term preferential treatment is not the synonym of a justified classification and its goal is never to benefit certain persons. The ultimate purpose of preferential treatment, by definition, is the elimination of inequalities of opportunity in society.

However, in the case of rules conferring the status of citizenship the applicants are not yet stakeholders of the given political community. Following Rainer Bauböck, stakeholders of a country could be those individuals, whose ongoing ties to the polity involve them deeply in its present political life and ‘whose circumstances of life link their future well-being to the flourishing of a particular polity’ (Bauböck 2007: 2422). They can have a claim to membership and to participate in collective decision-making processes.

What kind of standards should govern our relations to individuals applying for admission to our political community? Thomas Nagel offers universal human rights as the source of the constraints on the external exercise of sovereign state power (Nagel 2005: 136). Universal human rights as an important part of international rules and institutions serve as limitations to the dominant sovereignty of separate nation-states. This means that there are principles, which should govern the nation-states’ decision-making when choosing the right kind of demos or extending the citizenry. For instance, a state decision cannot be arbitrary; it should have legitimate reason for offering a membership for those who live outside of the state.



Since Aristotle citizenship has always been associated with political relations (Shachar 2012: 1003). It embodies a connection between the state and the individual, a legal link that should be a reflection of an actual relationship. This follows from the fact that nationality is a key element in defining the boundaries of the political community. Voting and candidacy are usually the privileges of nationals, and as rights they should be exercised by the right people. If political decision-making is seriously detached from stakeholders, this might end up putting the underlying political rights into risk. This is why we need standards to determine whether the extension of citizenry in a given case is morally right or wrong.

This standard could be equality, which has close connections with justice in general. Building upon Rawls' conception of the resource-egalitarian theory of equality, this paper provides normative foundations for its main thesis that common non-discrimination guarantees should be applied to the case of naturalisation and cultural affinity-based preferences. To be able to apply this principle to citizenship policies, to decide what counts as reasonable differentiation in state decisions on nationality, we first should establish what nationality is, and what it isn't. Only in relation to this can we analyse what are the legitimate goals of differentiation, and what can be seen as a proportionate measure to achieve these goals (based on the general test applied in international as well as domestic human rights adjudication). The legitimate goals of nationality are thus linked to the core of nationality: what it means in its essence.

### **3. What is nationality? Non-discrimination and external ethnic citizenship**

#### **3.1. In search of standards**

This chapter applies the non-discrimination test to the case of external ethnic citizenship. This endeavour raises a number of preliminary questions. First, whether the non-discrimination test can be applied to naturalisation, a decision intimately linked to national sovereignty. Second, whether we can define a core meaning of nationality, against which we can then measure what counts as legitimate policy goal and what does not.

Before proceeding further we should clarify what we mean with the term 'discrimination'. One can differentiate between three different types of discrimination. The first of these three dimensions involves ensuring equal treatment of equal situations and



prohibiting the equal treatment of manifestly unequal situations. In order to avoid arbitrariness, governments should determine the criteria for the distribution of the entitlements and benefits with the same degree of consideration of individual interest. If there is a challenge to the validity of the government's policy choices, courts should judge the issue (e.g. tax, financial provisions) applying the reasonableness test. There should be an objective reason of the distinction. In the absence of such a reason, the distinction is arbitrary, since the affected persons were certainly not treated as persons with equal dignity. However, the weaker test of reasonable goal is not applicable for many characteristic cases of racial and ethnic discrimination and for cases that involve fundamental rights. In these cases it is only a test stronger than that of reasonable goal could detect that the classification is in fact discriminatory.

The second dimension of discrimination is the most grievous one. Strict equality is called for in the legal sphere of civil rights and freedoms, since there is no justification for any exception. All citizens of a society must have equal basic rights and fundamental liberties. However, to-be stakeholders are not yet citizens of the political community, and they do not have a fundamental right to gain nationality in a country chosen by them. Thus in ethnic citizenship cases such a right (gaining citizenship) which does not belong to the range of fundamental rights is at stake. Nevertheless, an arbitrary allocation or denial of nationality might in certain cases raise a fundamental rights issue because of the impact on e.g. the private life of the individual.<sup>V</sup>

Citizenship cases include many characteristic features of ethnic and sex discrimination. We call this discrimination based upon bias, while this third type presupposes the illegitimacy of any differentiated treatment due to irrelevant criteria. Since classification based upon ethnicity is a suspect classification, in most jurisdictions heightened scrutiny is required to filter out illegitimate state measures. This standard seems to form a solid basis against which we can measure policies of external ethnic citizenship and it works well in several respects: it applies a general approach and 'forces' governments to justify their policies against a normative framework. This serves the additional goal of pressuring them to come forward with their justifications that are in line with human rights standards.<sup>VI</sup> Most of the literature and the applicable case law on naturalisation and non-discrimination deal with the 'negative' aspect of naturalisation, or exclusion, about denial of citizenship to claimants, whereas we problematize here a 'positive' aspect, i.e. inclusion of groups of



people based on ethno-cultural traits. This can also be interpreted as internal limits (whom states can exclude from the residents) with stricter (international) scrutiny, and external limits (whom states can include from among non-residents) with apparently less (international) scrutiny. Yet, underlining the statement that inclusion and exclusion are only the two sides of the same coin (Joppke 2005: 22–23), an imaginary claimant to a case designed following our arguments here would seek remedy for his or her exclusion for the lack of membership of the said groups. If the gap between the preferential and the non-preferential track is too wide, also considering the basis of the differentiation, it can easily amount to discrimination based upon bias. To be sure, the non-discrimination requirement in itself will not outlaw all kinds of differentiation based on ethnicity, but places a heavy burden on the governments to justify their policies when they apply national or ethnic criteria. On the most general level, nationality can be described as a proxy.<sup>vii</sup> A legislative act defines who is a national, and other acts confer certain rights and duties on these nationals (and not others). It is along these lines that external ethnic citizenship has been defended: after all, states are free to treat citizenship as a symbolic embodiment of ethnic belonging. Indeed, states are largely free to decide what rights and duties are attached to this status. For our purposes, however, the view that maintains the extreme elasticity (or even emptiness) of citizenship would make it hard to define a core meaning of what nationality is about. There are at least two arguments that can save us from this deadlock.

First, as we have seen, nationality is more than one status among many that links a state up to an individual. It is the defining membership for a political community, decisive both for the state (it acts in the name of whom, which people<sup>viii</sup>) and for the individuals (where and how they can exercise their political rights). While many elements have become detached from nationality (non-nationals can vote, can get elected, and can now exercise other rights reserved, earlier, to nationals), there is still a strong connection between nationality and membership in the political community. State practice underlines this view also in the context of external citizenship: many countries that opt for an extension of the citizenry to co-ethnics abroad also allowing them to vote.<sup>ix</sup> This necessarily means that the connection is more than mere symbolism. Second, international and European legal provisions do circumscribe something that seems to be essential elements of nationality. The 1930 Hague Convention, in its Article 1, says that states are bound to recognise other states' sovereign decision on whom their nationals are only insofar as this decision is in line



with international law.<sup>X</sup> This makes it crucial to see what states and other actors on the international scene see as the core meaning of nationality. The International Court of Justice faced this question in its 1955 *Nottebohm* judgement, and concluded that nationality should be ‘real and effective’, adding that ‘naturalisation is not a matter to be taken lightly.’<sup>XI</sup> This established the effective link or genuine connection criteria that have some bearing on what nationality is about, but all this is limited to the scope of international recognition. A state not respecting this principle might argue that it is aware of this limitation, and is willing to accept that it is only valid insofar as it remains strictly a connection between the individual and the state, without international ramifications. A more complete statement on what nationality is, in Europe, can be found in the 1997 European Convention on Nationality.<sup>XII</sup> The very definition of nationality in the Convention maintains that “nationality” means the legal bond between a person and a State and does not indicate the person’s ethnic origin’.<sup>XIII</sup> The Convention, both in its preamble and in Article 5, applies the non-discrimination principle to all questions arising from nationality, including distinctions based on ‘national or ethnic origin’.<sup>XIV</sup> It also repeats some basic principles like national sovereignty on the one hand and conditions for international recognition on the other. As we have seen, states have wide discretion in matters of nationality, of defining the boundaries of the political community. Questions of political philosophy arise about how states can justify their rules of exclusion and inclusion, but in the context of regulating (access to) nationality, this in itself rarely raises constitutional legal problems. One area of law that applies universally and requires such justifications, piercing the veil of national sovereignty, is the principle of non-discrimination that is part of virtually all human rights instruments, on the international, European and national levels. The following section takes this principle seriously and assesses whether granting citizenship to non-residents based on ethnic preference can be justified along established standards, using the rights based test of requiring legitimate objectives (or ‘necessity’) as well as a proportionate relationship between these and the (mode of) interference, that is the applied classification: ‘proportionality’ or, in the parlance of the European Court of Human Rights, that the interference is ‘necessary in a democratic society’.



### 3.2. Applying the non-discrimination test

Regardless of whether we assess impermissible discrimination in a domestic constitutional setting or on the international level, we can largely move along the two-prong test of necessity and proportionality. Reconstructing the test applied by the ECtHR, the steps look as follows:<sup>xv</sup>

- 1) whether there has been a difference in treatment between persons in similar situations;
- 2) whether there is objective and reasonable justification;
  - 2a) whether it pursues a legitimate aim;
  - 2b) whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

In the case of external ethnic citizenship policies, it will not be hard to establish that there is a difference in treatment: it is quite unique for states to grant citizenship to non-resident aliens, especially if this happens in large numbers. Distinctions based on ethnicity will be especially suspect for the Court: ‘Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible’.<sup>xvi</sup> Furthermore, in ECHR case law, rather than looking at mere intent or aim, the effect of the policy is enough to show that there is a difference in treatment (‘indirect discrimination’).<sup>xvii</sup> This will render suspect the seemingly neutral policies that many European states prefer to adopt when furthering the goals of their external ethnic citizenship policies. E.g., Romania and Hungary both apply legal clauses that seek to circumvent earlier border changes, in an indirect way, instead of using a direct ethnic condition. The Romanian clause simply talks about those who lost their nationality ‘for reasons not imputable to them’ or ‘against their will’; the Hungarian law talks about applicants ‘whose ancestor was a Hungarian citizen, or whose Hungarian origin can be presumed’.<sup>xviii</sup> As showing the unequal effect will suffice under ECHR case law, it is enough here to conclude that external ethnic citizenship policies, in their actual application, enforce an ethnic preference, and we do not need to go into the details of the legal wording and interpretation. This is anyway in line with the legislative intent, an ethnic-nationalist vision of the state. The question of what is behind the policies already plays into the justification part of the test.

While ethnic preference triggers a stricter standard of review, the burden on the



responding government might also turn on the continental trends that judges might identify. The ECtHR has maintained that the existence of a European consensus will inform the decision on what counts as acceptable justification.<sup>XIX</sup> These elements are inherently linked to the notion of a ‘margin of appreciation’, a concept that the ECtHR uses to describe the leeway it allows for national governments. Far from imposing uniformity, the Court enforces minimum standards. While the ground of differentiation (ethnic origin -- in most cases, present only indirectly in external citizenship policies) causes the margin to shrink, the policy area, nationality, widens the margin: it is, after all, a ‘*domaine réservé*’, long recognised as belonging to the core of national sovereignty. But regardless of whether the margin of appreciation will be wide or narrow, states will have a large discretion to decide who will become their nationals and who won't. But our question is exactly this: where can we draw the margin, what are the limits that human rights standards do set, in the context of ethnic preferences?

First we need to identify *grounds for differential treatment*. We should only be concerned with grounds that can be deemed legitimate, in line with human rights standards. Yet, in the case of naturalisation policy, this will not be too constraining. Almost anything other than outright racism would most likely suffice. Indeed, states themselves often consider nationality as something as a privilege more than a right.<sup>XX</sup> Let's see, from this aspect, the common explicit (and *prima facie* acceptable) justifications for external ethnic citizenship policies. Governments can use two different types of justifications, either based on arguments why the individual deserves its nationality (individual claim/benefit) or because this is furthering government policies (state goal). As individual rights based arguments are stronger players in the field of human rights scrutiny, let's first look into those.

1) One could argue that individuals sharing the ethnic background of the majority (titular) nation of a country, regardless of whether they reside in the respective state, have a genuine link, an effective connection that ought to be or, at least, can be recognized, if the individuals so desire. Yet, when looking into what genuine link might mean, it remains dubious whether mere ethnic belonging would suffice, rather than being one factor among many that can indicate an adequately deep connection.<sup>XXI</sup> Ethno-cultural proximity might work, if anything, as presumption of a certain type of connection but is not enough in itself.<sup>XXII</sup> But let's be more permissive and imagine for a second that we accept ethno-cultural ties as a basis of effective link and we allow states not only to grant citizenship to



co-ethnics abroad, but also recognise this connection as in line with international law. The major problem with this view is that it would upset the delicate balance of established minority rights standards that maintain the primary responsibility of the home state in securing minority rights, and limit the kin-state's ability to interfere directly.<sup>XXIII</sup> A persistent defender could still object and argue that this might not be that bad, after all. It seems that we give an additional layer of protection for members of a potentially vulnerable group. Yet, if we think of recent examples of Russian interventions that have been defended, among others, on grounds of 'protecting fellow Russians', it is easy to see how the first step of additional protection easily slips into a second one, contributing to an increased securitization of minority rights. This, in turn, is hardly beneficial for minorities who normally seek to fight the perception that they present an inherent danger (because they are potentially disloyal) to the state they live in.<sup>XXIV</sup> Not to mention the issue that external citizenship weakens minority claims for self-governance by increased autonomy (Bauböck 2007). In the Hungarian case, the rights of Hungarians who naturalise from Austria, Slovakia and Ukraine without taking up residency in Hungary actually diminish in important respects. As these countries do not allow applicants to maintain their original nationality, they become nationals of another country, with the additional layer of EU citizenship only available in two of the three cases.

In other words it is, at best, a fallacy to think that it is an external measure, non-resident naturalisation that can address the ills of minority life.<sup>XXV</sup> Getting back to our original question of justification, it remains questionable whether the ethnic link would be enough to defend external citizenship policies from criticism concerning their legal justifications.

2) State governments can apply a somewhat more refined version of the ethnic argument and could argue that granting citizenship is simply a form of recognition that had earlier been denied from co-ethnics residing abroad. They share their 'national identity' with the majority of the kin-state, it should only be permissible to acknowledge that with official documents, that can include a passport, attesting their 'national belonging', having their names printed on their mother tongue ('written as it should be'). Many of these claims are more than legitimate. The primary function of minority rights is exactly to secure that these claims (e.g., right to recognition, right to use one's name) are met – by the home state. The kin-state's ability is, for both legal and technical reasons, limited in this sense.<sup>XXVI</sup>



We have seen earlier that external citizenship as a replacement or additional guarantee for minority rights contradicts some basic tenets of the present system. Furthermore, we have seen that nationality, according to the established legal view, is more than symbolism. While states can adopt policies that counter this, they can hardly use this deviation to justify their policies against external (domestic or international) human rights review.

3) State governments can still point to patterns of oppressive policies, persistent violations in home states, against which they seek to grant protection, remedying existing discrimination. After all, refugee law and, more recently, the concept of the Responsibility to Protect both seem not only to legitimise but also require the protection of third states. Yet, it is easy to see how the grounds of justification diverge in these cases. External protection is legitimate insofar as, in the individual case, it has been established that this is necessary: there has been a violation of human rights. We should not forget that in all of these cases, there is a national sovereignty argument on the other side, too (just like with the external citizenship policy of the kin-state): the home state could argue on similar grounds against external intervention in its relationship with its own resident citizen. Furthermore, diplomatic and consular protection in the case of dual nationals is limited by the principle of effective nationality, which defeats the goal of extending citizenship so as to provide some kind of external protection.

So it seems that while states might be free to adopt policies on general (not individualised) arguments of discrimination by home states, these cannot stretch existing boundaries and go against the sovereignty of home states. Just like we have seen earlier with minority rights based arguments, a contrary position would question the current setup of the international minority rights regime.

4) State governments could point to actual discrimination flowing from past injustices. In the Hungarian and Romanian case, the argument could go, former citizens were denied nationality. Hungary recognises descendants of its nationals as nationals, regardless of the number of generations, the ratio of Hungarian national ascendants, linguistic skills or, most importantly, residence. In contrast, this 'line of inheritance' is broken in the case of former nationals (and their descendants) that lost their Hungarian nationality as a result of the borders moving over their heads. As a direct result undoing this potentially expands the citizenry to 'Greater Hungary' and maybe beyond. Similarly, Romania grants nationality, through 'reacquisition', to former nationals that lived in 'Greater Romania'.<sup>XXVII</sup> ECHR



case law recognizes and might even require the correction of ‘factual inequalities’.<sup>xxviii</sup>

The fallacy in these arguments follows that in earlier justifications: governments try to legitimise their policies by contrasting them with policies that they adopted themselves. Extending the citizenry through an indefinite line of generations, while permissible, hardly seems to be normatively justifiable. States might feel free to adopt such measures, but they can hardly use them as arguments to justify their otherwise questionable policies.

5) As we have indicated, external citizenship policies might be justified based on other basis than individual claims, showing that they serve legitimate state policy goals. Linking co-ethnics might be part of a fully legitimate immigration policy that takes into account demographic and economic reasons as well as an expectation of a certain degree of social integration. Immigration and naturalisation policies can use ethnicity, linguistic skills and other cultural elements as a crude predictor of social integration. A suspect classification can thus become a legitimate part of a policy measuring cultural proximity. The only problem is that this justification as a stated policy goal goes against the policy itself, both in rhetoric and in its actual form. If social integration is the goal and kins migrate, that would frustrate the goal of ‘Greater Hungary/Romania’, emptying the ‘targeted territories’ of co-ethnic population. Furthermore, concerning the prominent omission of the residence requirement, it is hard to explain why states do not use their leverage of the easy access to citizenship to actually attract these people.

6) Finally, governments could argue that, in a post-national phase, seeking to virtualize state borders, their policies are fully in line with what the EU seeks to build: a common space, a truly multicultural universe where national identities are freely recognized. The issue with this argument is that it seeks to slip through the part of the policy that is problematized in the first place by the non-discrimination standard. Rather than a truly European project of virtualizing borders, external ethnic citizenship policies draw new borders based on ethnic belonging. Contrary to the goal of justifying external citizenship policies, this argument is hardly more than a recognition of the goal of discrimination. The government that argues against homogenization in the home states ends up seeking the same type of internal homogeneity among its citizenry.

This will not render, however, all distinctions based on ethnicity (or ‘cultural affinity’) discriminatory. While we can ponder how far liberal constitutional regimes can go in seeking to maintain or establish some sort of internal homogeneity, in a legal assessment



most of the resulting policies will pass the human rights tests commonly applied today, also considering that states will have some margin of appreciation.

Differentiation based on linguistic skills, familial connections, some degree of ‘cultural knowledge set’ (sought to be assessed in naturalisation tests) will most likely favour applicants who are closer, culturally, to the ideal citizen of the policy maker. Asking for a fee to start the procedure and the requirement of adequate resources (means of subsistence, trying to make sure that newly naturalised citizens will not be an undue burden on the welfare system) will disfavour the less wealthy. Yet, in themselves, these will most likely not constitute human rights violations, provided that the non-preferential naturalisation is kept adequately open for applicants who do not qualify for (ethno-cultural) preferential treatment.

Consider a case where the government of the home state is not opposed to the external citizenship of its resident nationals that belong to an ethnic minority group (as is the case with Hungarians living in Romania). Let’s accept for a moment that arguments (justification no. 2 above) based on nationality as an expression of ‘national identity’ and on a view that non-resident kins following the political news of the kin-state, subject to cultural, linguistic and other policies of the kin-state targeting co-ethnics abroad justify the extension of the citizenry. Why would that go against any doctrine established in the name of human rights considerations?

To see why even this scenario is problematic, we need to move beyond the grounds of justification and move to a more demanding element to the test, *proportionality*. Proportionality is a relational term that requires in this case a proportionate relationship between the legitimate policy goal and the means employed, that is, the grounds of classification. In cases when fundamental rights are not at stake and the classification applied is not suspect it is sufficient to apply the weaker test of reasonable goal. However, giving ethnic preference for non-residents, e.g., as a recognition of their ‘national identity’ automatically means a differentiation based upon an immutable characteristic (ethnicity). Heightened scrutiny is appropriate, which requires a necessary relationship between classification and the compelling state goal, there should be no less discriminatory way to achieve the objective. Although to avoid underinclusivity (where all persons with the trait contribute to the harm but others do too) and overinclusivity (where all that contribute to the harm have the trait but some with the trait do not contribute) is important in every type



of differentiation, it is even more crucial in cases of suspect classification. A substantially overinclusive or underinclusive classification tends to undercut the claim of the legislator that the classification serves legitimate political ends (Stone et al. 1996: 751). Regardless of which justification we accept from the list that we have seen earlier, we will see both underinclusivity and overinclusivity. Ethno-cultural proximity will be only a crude predictor both for potential social integration and for how invested someone is in the political community (following the stakeholder concept), leaving people out who should qualify and, at the same time, including people who would not qualify. While governments routinely apply such loose standards, in the case of ethnic preference, such laxity might prove to be fatal, regarding the non-discrimination test. This, in turn, will also depend on what is at stake: what difference does it make to be in or out of the preferential group?

A substantial view should then consider not only the external citizenship policy, taken in isolation, but also its relationship to the non-preferential track of naturalisation. This is why it matters how 'open' non-preferential naturalisation is. If the ground for differentiation (ethno-cultural proximity, through legislative assumptions and the way it is assessed in practice) cannot justify the distance between the preferential and the non-preferential track, the policy will fail the proportionality test and should be seen as discriminatory.<sup>xxix</sup> In the Hungarian case, the non-preferential track includes a 3+8-year residency requirement (considering the registration of settlement in addition to the number of years required by the law directly applicable to naturalisations), while the ethnic preference gives full exemption from the condition of residency, allowing applicants to naturalise without having visited the country. Applicants relying on the ethnic preference have additional benefits like not being required to prove the means of subsistence and housing or to take the naturalisation test.

We argued that it is justified to take the non-discrimination principle seriously and apply the test to naturalisation policies, including external ethnic citizenship policies. Our analysis now concludes that once we take this route, it is hard to stop short of declaring such ethnic preference in violation of the non-discrimination principle, especially if access to citizenship for residents otherwise remains highly restrictive.

So far we have examined justifications that are the most likely to succeed on a non-discrimination test. As these considerations show, however, what is really working in the background is a nation-building project that seeks to revisit history, to the extent possible



(ie., without directly questioning existing state borders), and ('re-') establish a desired past through the means of citizenship policies. As the Hungarian case shows, these goals can go hand-in-hand with more direct political aims benefiting certain parties that seek to secure a loyal voting base with the extension of those eligible to vote, in which case justification under any human rights test is hardly an option.

## 4. Case study of Hungary

### 4.1. Legislative history

Our aim in this chapter is to have a deeper understanding of how direct political aims play into policy decisions and reasoning, an insight that should inform our judgment on the legitimacy of naturalisation norms.

The case study focuses on Transylvania, the region where most of those concerned by the new policy live. It is a part of Romania, with a Hungarian minority population of approximately 1.2 million. Two-thirds of all applications for preferential naturalisation and three-fifths of the applications for registration as a voter in the 2014 general elections came from here.<sup>xxx</sup> In addition, Romania recognises dual citizenship policy and it has large minorities in its neighbouring countries which gives us the possibility to compare the two countries' attitudes towards its minorities. After World War I as a result of the Trianon Peace Treaty Hungary lost nearly 75 per cent of its territory and around 33 per cent of ethnic Hungarians found that they no longer lived in Hungary. This trauma was followed by the revisionist interwar era and the years of socialism. In the bipolar world the rigidities of the global order made the question of the minorities became taboos. In the Central and Eastern European region only bilateral agreements ensured the rights of minorities including a weak guarantee of 'classic' core rights (Venice Commission 2002: Chapter B). The implementation of these agreements depended on the given government. Later on the newly adopted democratic constitutions incorporated the relevant international human rights principles. In addition to these guarantees and the role of the home state, emphasized by the international standards, the kin-state, Hungary has also tried to play an active role. For instance, with the 1989 amendment of the Constitution of Hungary the so-called 'responsibility clause' was built in, expressing its responsibility for the fate of ethnic kin in neighbouring countries – itself a trend in the Central and Eastern European



region.<sup>xxxI</sup> After stormy political debates Hungary adopted the Act LXII of 2001 on Hungarians Living in Neighbouring Countries (Status Law) with an overwhelming parliamentary majority (Halász and Majtényi 2002; Küpper 2004: 313.). The goal of the Law, with reference to the responsibility clause, was to create direct links to transborder ethnic Hungarians. It aimed ‘to promote and preserve’ transborder Hungarians’ ‘well-being and awareness of national identity within their home country’ and to ‘ensure undisturbed cultural, economic and family relations’.<sup>xxxII</sup> The Status Law issued a certificate, called a ‘Certificate of Hungarian Nationality’ for ethnic Hungarians living in Slovakia, Slovenia, Croatia, Montenegro, Serbia, Romania and Ukraine providing certain benefits on an individual basis in Hungary. Several religious and civil organizations as well as the offices of the RMDSZ (Democratic Alliance of Hungarians in Romania)<sup>xxxIII</sup> took part in implementing the Status Law. The Status Law caused widespread uproar amongst neighbouring countries. Although Romania had its own Status Law, the country felt, with 6.6 per cent of Hungarians, that its territorial integrity was threatened, and it considered the Law to be an interference with its national, internal affairs.

International bodies like the Council of Europe Venice Commission, the European Parliament and the Organisation for Security and Co-operation in Europe have criticized the Status Law. As for the principle of territorial sovereignty, the Venice Commission was of the opinion that in fields not covered by international treaties or customs, the consent of the home State should be explicit to the kin-State measures on the preferential treatment of its kin-minorities (Venice Commission 2002: Chapter D). In the given case, Romania had not been consulted prior to the adoption of the measure, although the Status Law affected its internal affairs. In addition, the Venice Commission found that part of the Status Law, which authorised semi-official organisations (such as the local representatives of the World Federation of Hungarians, WFH)<sup>xxxIV</sup> of the kin-state to implement its regulations in the home state particularly troublesome.<sup>xxxV</sup> Moreover, the ethnic targeting of the Status Law was held discriminatory. According to the Status Law the mere declaration of being Hungarian sufficed.<sup>xxxVI</sup> The Commission found problematic that it appeared that the organisations representing the Hungarian national community in the neighbouring countries had to investigate the applicant’s national background before issuing – or refusing – the relevant recommendation. However, it was not specified in the law what criteria they should apply (Venice Commission 2002: Chapter D/a/ii). The European



Parliament also criticised the Law. Eric Jürgens, rapporteur of the EP concluded that the Law was ‘discriminatory and has extraterritorial implications, and recommended that Hungary should rescind the Law.’<sup>xxxvii</sup> On behalf of the OSCE Rolf Ekeus High Commissioner for National Minorities highlighted the concern according to which the state can only act within its jurisdiction, meaning its territory and citizenry.<sup>xxxviii</sup> The Hungarian Parliament had to amend the Status Law in order to be in compliance with the above international standards. And although the Romanian government gave its consent to the amended Status Law, the institutions of foreign Hungarians, first and foremost the WFH, were dissatisfied. Other organisations in the neighbouring countries also expressed the need for dual citizenship. For instance, the RMDSZ in Romania and the Democratic Party of Vojvodina Hungarians in Serbia collected signatures and negotiated with the Hungarian Government about the possibility of having Hungarian nationality. However, at that time no Hungarian parliamentary party was supportive of the idea, the officials of the right-wing Fidesz government argued that the Status Law was introduced instead of extending citizenship, which would be ‘almost impossible’ (Gál 2002: 114).

On 1 May 2004 Hungary – together with some of the neighbouring countries – joined the European Union, but Romania was expected to become a member only at a later stage. Fearing that a different kind of ‘Iron Curtain’ (Waterbury 2010: 10) would cut off Hungarians in Romania from the homeland, a discussion has started on the possibility of external citizenship.

In 2003 the World Federation of Hungarians came up with the initiative of a referendum, and on 5 December 2004 a referendum was held to grant citizenship to transborder ethnic Hungarians.<sup>xxxix</sup> The WFH collected signatures for the referendum, which indicates that at the beginning it was not backed by political parties. It took some time for the right-wing party Fidesz – which previously initiated to adopt the Status Law – to support the referendum. Fidesz’s answer to the investigation of the Council of Europe can explain this. Two years earlier Fidesz committed itself not to extend citizenship rights to the Status Law.<sup>xl</sup> The then ruling majority, the socialist-liberal coalition was against the referendum all along. The left-wing parties emphasized mainly the possible cost of the country’s welfare reform and the probable instability in the region. The possible appearance of new members in the Hungarian political community and its political influence could have been also feared (Kovács 2005: 55-60). After months of negative



campaigning the result was an invalid referendum. 33 per cent of eligible voters appeared, 51.57 per cent voted in favour of the question (Tóth and Kovács 2007: 144). The referendum failed, which was an unforgivable disappointment for the transborder ethnic Hungarians. In 2010 the right-wing Fidesz party won the parliamentary elections and shortly afterwards it started to promote strongly, in the words of Prime Minister Viktor Orbán, the ‘reunification of the Hungarian nation which was torn apart by the Trianon Peace Treaty’.<sup>XLI</sup> It was symbolic that the Act XLV of 2010 on the Testimony for National Cohesion and the amendment of Act LV of 1993 on Hungarian Nationality were the first steps taken by the newly elected government. The Act on National Cohesion declared that all members and communities of the Hungarian nation, subjected to the jurisdiction of other states, belong to the single Hungarian nation.<sup>XLII</sup> The amendment of the Act on Hungarian Nationality sought to target ethnic Hungarians living outside Hungary, amending an already existing preferential naturalisation clause and removing the residency requirement. The preferential track allows applicants to naturalise if they demonstrate that their ancestor was a Hungarian national, or their origin from Hungary can be presumed and further provide proof of a sufficient knowledge of the Hungarian language.<sup>XLIII</sup> In 2011 a new Constitution, called the Fundamental Law was adopted, including a revised responsibility clause. The responsibility clause appeared in the very first sentence of the preamble and has been expanded in Article D authorising the Hungarian authorities to take action abroad in favour of transborder ethnic Hungarians.<sup>XLIV</sup> Shortly afterwards Hungary provided voting rights to its transborder citizens.<sup>XLV</sup> As a result suffrage is no more subject to registered residence in Hungary. Thereby voters who have never lived in the country could influence general elections.<sup>XLVI</sup>

Basically we are witnessing a linear development from 2010 till nowadays. The two-third parliamentary majority changed the concept of the nation (Körtvélyesi 2012: 111), indicating a change in the country’s relation to the ethnic transborder Hungarians. The use of the concept of ethnic nation in the Fundamental Law, together with the amendment of the Citizenship Act and the General Elections Act could be understood as part of a resurgence of ethno-cultural nationalism. As Deputy Prime Minister responsible for the policy towards ethnic Hungarians Zsolt Semjén phrased it, the extension of the citizenry and voting rights to ethnic Hungarians without a residency requirement, meant ‘the reunification of the nation through the legal system’.<sup>XLVII</sup> In a statement made before the



general elections of 2006 the then vice president of Fidesz, István Mikola revealed that the extension of the citizenry and voting rights could have cemented the governance of Fidesz (Mikola 2006). Accordingly, the expressed goal of enfranchising Hungarian minorities was to ensure the survival of the 'one single Hungarian nation' (Fundamental Law) consisting of ethnic Hungarians living anywhere in the region and to secure its own power for twenty years.

#### 4.2. Implementing the new external citizenship policy

In what follows we seek to go deeper into the goals that the legislation actually serves with the extension of citizenship and voting rights. As justification constitutes an essential part of the non-discrimination test, here we provide some empirical insights into the functioning of the new policy, as it can be perceived by the target population. First, we evaluate the implementation of the measures concerning the extension of citizenship. Second, we focus on the execution of measures concerning the extension of voting rights.

The 2010 measures concerning the extension of citizenship have simplified the administrative process, resulting in a short, three-month routine procedure, that requires filling some forms and the collection of (birth, marriage and death) certifications proving connection to an ascendant with links to Hungary, as required by the Act, and a handwritten CV in Hungarian (a standardized language test is not part of the process). Applications can be submitted within the country to the regional representatives of the Office of Immigration and Nationality; registrars; and to the government agencies. Outside of Hungary the consul as the direct representative of Hungary is the person in charge of the process. Should the consul accept the application, it goes to the Minister of Justice, who submits it to the President of the Republic. The President is responsible to issue the certificate of naturalisation. The naturalised person acquires Hungarian citizenship on the day of the oath or pledge of allegiance.<sup>XLVIII</sup> In order to implement the measures on preferential naturalisation a complete network was set up in Transylvania. The Hungarian Ministry of Justice and the Hungarian National Council of Transylvania (National Council), a civic organisation supporting the Hungarian minority agreed to lay down the framework.

Back in 2009 the main aim of the National Council was to achieve autonomy and to preserve the integrity of the Hungarians in Transylvania. With this goal in mind, the Council offered its support to the Hungarian minorities in Transylvania regardless of their



political views. The National Council wished to take the special role as a conciliator between the Transylvanian Hungarian politics and the main public figures. This situation changed substantially after the right-wing Fidesz government came into power in 2010 in Hungary. The National Council set up the new network, called 'Democracy Centres' and established a new party under Romanian law, the Hungarian People's Party of Transylvania (People's Party).<sup>XLIX</sup> The Democracy Centres were established in order to facilitate 'the reunification process'; they sought to change what they saw as the failed politics of the last 20 years in Romania.<sup>L</sup> Since the 1989 democratic transition RMDSZ has represented the Hungarian minority in Romania's political life, sanctioned by votes from the Hungarian minority living in Romania. The National Council and later the People's Party were founded to be the political rivals of RMDSZ, with active support from the Hungarian right-wing government. The truly close relationship between the Hungarian Government and the newly established Transylvanian actors caused significant deficiencies in the operation of the National Council and the Democracy Centres. In order to sketch this fairly knotty situation we chose to conduct interviews with the employees of the People's Party, the National Council and the Democracy Centres in Cluj. Eleven interviews were conducted in 2011 at the National Council, in its regional offices, in the offices of the Democracy Centres and People's Party in Cluj. We talked to the Executive Director responsible for financial and organisational matters of the National Council as well as administrators in regional offices of the National Council. Employees of the Democracy Centres responsible for implementing the naturalisation process were also interviewed, as well as the Head of Secretariat of the People's Party who talked about his experience in connection with the preferential naturalisation.

The interviews shed light on confusion of duties, responsibilities, facilities and budgets of the different organisations. The Head of the Secretariat of the People's Party was responsible both for managing the People's Party office, and for the hotline of the Democracy Centre.<sup>LI</sup> Employees of the National Council are formally hired by the offices of the Democracy Centres; yet, they were at the same time in charge of the duties of the People's Party. The Executive Director responsible for the financial and organisational matters of the National Council's office admitted that their job focused primarily on National Council cases, but in their spare time they also dealt with People's Party related issues.<sup>LII</sup> As per the financial support concerns, the Executive Director made it clear that



neither Hungarian nor Romanian organisations financed the People's Party directly. The People's Party itself did not even have any employee. The Director also confirmed that it was the National Council which received financial support from the Hungarian State.

These interviews lead us to the conclusion, however, that due to the intense relationship between the National Council and the People's Party, financing a civic organisation (the National Council) meant a Hungarian governmental support to a Romanian Party.

The amalgamation of the three organisations frustrated the goals of the National Council to support everyone regardless of their political views. The Democracy Centres failed to comply with their duties other than providing support connected to the naturalisation. They were meant to assist the applicants in submitting a naturalisation request, however, in practice, employees were filling out the complete application forms and book appointments at the Consulate, and sometimes they also helped to complete the handwritten CVs. This meant that the same employees had full control over the process, also being able to filter applicants. The official explanation was that the organisations representing Hungary beyond the borders were in position of investigating the applicant's Hungarian knowledge before submitting the application package to the Consulate. In reality, the process seems to be used to gain support for a political party in two respects. First, by showing that the implementation of the law is in the hands of people connected to the People's Party that is close to the Hungarian ruling party but not supported by the majority of the Hungarian voters in Romania. Even if we accept that these employees can act in the name of the Hungarian state in such a way, the confusion of duties that we encountered puts into question the neutrality of the process that one could expect from a state procedure to accept new nationals. Second, by providing funds which in part were used for political campaigns in the Romanian elections. The network of the three organisations exercised state power extraterritorially and they worked under political influence coming from the Hungarian ruling party. All this seems to frustrate the goal of genuine reunification, and looks more like exporting political divisions from Hungary.

Last but not least we sketch out what role the discussed organisations played in connection with the extension of voting rights. The strong relationship between the Hungarian Government and the People's Party can hardly pass unnoticed.<sup>LIII</sup> The People's Party campaigned for a year to get transborder Hungarians register and it offered help



during the elections as well. On the day of the 2014 general elections the number of the transborder registered voters was 193,793, out of which 66.42 per cent participated in the elections. 128,429 voting slips proved to be valid, and 122,638 voted for Fidesz.<sup>LIV</sup> It was with the help of these votes that the right-wing Fidesz gained again the constitution-amending two-thirds majority of the seats in the Hungarian Parliament. The People's Party together with the National Council helped to deliver two-thirds of the registrations and almost two-thirds of the Transylvanian votes.

As we have seen earlier by extending the citizenry one of the main aims of the Hungarian ruling party was exactly this: to cement its own power for a longer period. The idea to extend the citizenry beyond the state borders is not a new one; it actually marks a regional trend, a model that was certainly known before the Hungarian decision-makers. The ruling parties of Hungary's neighbouring countries have also counted on the external votes, e.g., in 2007 in Croatia, 10 per cent of the voters participated in the general elections were transborder citizens. Or, in the 2009 Romanian presidential elections, the external votes came from transborder citizens living in Moldova and Ukraine helped Traian Basescu to be elected as president (Pogonyi et al. 2010: 14-15). However the move was used to provide support not only to one civic organisation (the National Council) but also to a political party established and operated under Romanian law. This was holding the People's Party up, which in exchange launched a major political campaign benefiting Fidesz. However, the consequences are disturbing. The governmental aim of uniting the Hungarian nation certainly failed as a result of the recently launched preferential naturalisation process. We would not be able to count on one hand how many different groups of Hungarians can now be identified in Transylvania, from the perspective of Hungarian law adopted by the various Fidesz governments. There are ethnic Hungarians who live in Transylvania as Romanian citizens, there are Status Hungarians, the ones with dual (Hungarian-Romanian) nationality; those who registered to vote, those who voted, and those who did not. Indeed, one explanation to the high number of votes going to Fidesz in 2014, in addition to gratitude for the extension of citizenship, is that the road to Hungarian elections is multi-layered. Not all ethnic Hungarians are interested in getting non-resident nationality, even less consider that they should participate in the elections of a neighbouring country, the Hungarian kin-state, so not all of them register for voting, and



even less actually cast a vote.<sup>Lv</sup> This works as a filter that can easily be biased towards those who are anyway motivated by the nationalist rhetoric of Fidesz.

As a result, the Hungarian Government exported the Hungarian political divisiveness beyond the borders and it managed to organise and support a well-structured system for this in Romania. In addition, the Hungarian Government, by trying to earn support for itself and for the newly established People's Party, did not take the will of the ethnic Hungarians in Transylvania seriously, as it used the naturalisation process to provide support for a particular political party in Romania. This is in itself problematic, but also questions the sincerity of the Hungarian Government in demanding territorial autonomy for the Hungarian minority group in Transylvania.<sup>Lvi</sup>

According to László Kövér, Speaker of the Parliament of Hungary, from 2014, the Parliament is more than a national assembly, since it is the first one that represents the whole nation.<sup>Lvii</sup> This sounds like a break with the notion that the notion of the cultural nation ('the whole nation' here) applies to all regardless of citizenship, and this understanding certainly contravenes the goal of reunification. The majority of ethnic Hungarians living in neighbouring countries did not apply for Hungarian citizenship and/or did not register for voting. The quoted statement seems to push these people outside of the national community described as 'the whole nation'.

## 5. Conclusions

In this paper we argued that the general non-discrimination test should be applied to naturalisation policies, including external ethnic citizenship policies. Since classification based upon ethnicity is a suspect one, heightened scrutiny is required to filter out discriminative state measures. The relevant normative, human rights test examines whether the ethnic classification applied is proportionate to the legitimate aim. Therefore, the paper looked into possible goals (ethno-cultural ties as genuine link, nationality as an expression of 'national identity', oppressive policies of the home state, remedying discrimination flowing from the past, social integration, virtualising borders) the state can legitimately seek to achieve by implementing external ethnic citizenship policies. These are the possible justifications that are the most likely to succeed on a non-discrimination test. However, in addition to these *prima facie* acceptable justifications for external ethnic citizenship policies,



illegitimate policy goals can be identified, which are not relevant for the non-discrimination test, as they would immediately fail the scrutiny. Often what is really working in the background is a nation-building project that seeks to revisit history, to the extent possible, and (re-) establish a desired past through the means of citizenship policies. One of the main goals of the recent extension of citizenry and voting rights in Hungary was the 'reunification of the Hungarian nation'. However, Hungary's external citizenship regulation and its implementation did not help to create unity rather it caused divisiveness. The majority of transborder ethnic Hungarians did not apply for Hungarian citizenship and/or did not register for voting. The applied policy and the implementation process seem to push these people outside of the national community described as the whole nation. All this seems to frustrate the goal of genuine reunification, and looks more like exporting political divisions from Hungary and seeking to secure a loyal voting base.

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<sup>I</sup> See Article 15 of the Universal Declaration of Human Rights.

<sup>II</sup> The EU law will not be addressed here directly. We try to build on principles that apply generally, outside the quite specific case of the EU. Many countries applying similar policies are not EU Member States.

<sup>III</sup> Dumbrava writes most recently, along the same lines, about 'public relatives' (Dumbrava 2014: 47).

<sup>IV</sup> Many constitutional courts apply the term *positive discrimination*, in the European Union it is *positive action*, in Canadian legal literature *positive policy*, and in the United States it is called *affirmative action*, *preferential treatment* or *reverse discrimination*. In the present article we are using the term preferential treatment. With this term we mean those measures that give an advantage to individuals on the basis of their belonging to certain national or ethnic minorities or a social group in a special, disadvantageous situation.

<sup>V</sup> See, e.g. *Karashev v. Finland*, no. 31414/96, ECHR 1999-II.

<sup>VI</sup> This is already a huge achievement in the case of the secrecy and non-contestability of naturalisation decisions, as is the case with Hungary.

<sup>VII</sup> See the legal dimension of citizenship in Carens 2000: 162, cited in Dumbrava 2014: 6: 'a formal status that links individuals to particular states and *preconditions a set of rights and duties*' (emphasis added).

<sup>VIII</sup> See Lincoln's Gettysburg Address: 'of the people, by the people, for the people'.

<sup>IX</sup> For instance, Hungary and Romania allow external naturalisation combined with non-resident voting rights, Croatia has a sizeable non-resident voting kin population as well as Italy, applying a separate regime for voting external citizens. Furthermore, it is not exceptional that external votes turn out to be decisive. For a broader overview, see Pogonyi et al. 2010.

<sup>X</sup> 'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.' Art. 1., Convention On Certain Questions Relating to the Conflict of Nationality Laws, The Hague, 12 April 1930.

<sup>XI</sup> *Nottebohm (Liechtenstein v. Guatemala)* ICJ, No. 18 General List (1955), p. 24.

<sup>XII</sup> European Convention on Nationality, Council of Europe, No. 166, Strasbourg, 6 November 1997.

<sup>XIII</sup> Art. 2.a, European Convention on Nationality, Council of Europe, No. 166, Strasbourg, 6 November 1997. Note that this, in itself, does not mean that the person's ethnic origin cannot be taken into consideration either.



- XIV 'The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.' Art. 5.1, European Convention on Nationality, Council of Europe, No. 166, Strasbourg, 6 November 1997.
- XV See, e.g. Kuric and Others v. Slovenia [GC], no. 26828/06, § 386, ECHR 2012.
- XVI See Kuric and Others v. Slovenia [GC], no. 26828/06, § 386, ECHR 2012, citing Oršuš and Others v. Croatia [GC], no. 15766/03, § 156, ECHR 2010.
- XVII See D.H. and Others v. the Czech Republic [GC], no. 57325/00, § 175, ECHR 2007.
- XVIII Art. 11(1), Act No. 21/1991 on Romanian Nationality as republished, with amendments, on 10 February 2010, for an English version, see <http://eudo-citizenship.eu/NationalDB/docs/ROM%20Citizenship%20Law%201991%20%28English%20consolidated%20version%2017%20June%202010%29.pdf>; Art. 4(3), Act LV of 1993 on Hungarian Nationality, as amended by Act XLIV of 2010, for a bilingual version, see <http://eudo-citizenship.eu/NationalDB/docs/HUN%20Act%20LV%20of%201993%20%28as%20of%20Jan%202009,%20English%29.pdf>.
- XIX See, e.g. Kuric and Others v. Slovenia [GC], no. 26828/06, § 387, ECHR 2012, citing Ünal Tekeli v. Turkey, no. 29865/96, § 54, ECHR 2004-X.
- XX For some European examples see Dumbrava 2014: 40-41. Sejdić and Finci v. Bosnia and Herzegovina [GC], no. 27996/06, 34836/06, ECHR 2009, for the relevant statement on necessity and proportionality, see § 46.
- XXI See the list based on the considerations of the International Court of Justice in the Nottebohm decision: 'a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'. Nottebohm, ICJ Reports 1955, p. 23, cited in the Explanatory Report of the European Convention on Nationality, para. 22. 'At the time of his naturalization does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State?', Nottebohm, p. 24.
- XXII See the 'social integration' arguments under 5 below.
- XXIII For accounts driven by similar concerns, see Bolzano Recommendations 2008 and Venice Commission 2002.
- XXIV For an elaborate discussion on the problem of securitization, with examples from the region we are discussing here, see Kymlicka 2007: 182-195, concluding that whenever the 'security card' is played, it trumps minority rights.
- XXV See e.g. Bárdi 2004, talking about external citizenship as an illusion, the 'blue bird of hope'.
- XXVI For an overview of what kin-states can do, see Venice Commission 2002.
- XXVII For more details on these policies, see, respectively, Tóth and Kovács 2013; Iordachi 2013; Barbulescu 2013. ECHR case law recognizes and might even require the correction of 'factual inequalities'. See the principled invoked in the context of nationality in Kuric and Others v. Slovenia, [GC], no. 26828/06, § 388, ECHR 2012.
- XXVIII See the principled invoked in the context of nationality in Kuric and Others v. Slovenia, [GC], no. 26828/06, § 388, ECHR 2012.
- XXIX It is a separate question whether this violation is remedied through levelling down, easing the rules for non-preferential applicants, or by levelling up, hardening the requirements for the preferential track, or else by doing a bit of both.
- XXX 330,970 out of 500,097 applications for preferential naturalisation [http://www.allampolgarsag.gov.hu/index.php?option=com\\_content&view=article&id=274:hirek130909&catid=1:friss-hirek&Itemid=50](http://www.allampolgarsag.gov.hu/index.php?option=com_content&view=article&id=274:hirek130909&catid=1:friss-hirek&Itemid=50) and 99,628 out of 128,712 applications for registration as a voter came from Romania. [http://www.valasztas.hu/hu/ogyv2014/766/766\\_5\\_1.html](http://www.valasztas.hu/hu/ogyv2014/766/766_5_1.html).
- XXXI Art. 6(3) 'The Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary.' For a list of 'national responsibility clauses', see Pogonyi et al. 2010: 3; Halász and Majtényi 2002: 135-144. Most of these countries introduced so-called 'status laws' for external kin minorities, see Bauböck 2007: 2396.
- XXXII Act LXII of 2001 on Hungarians living in neighbouring countries, Chapter II Article 4.
- XXXIII RMDSZ is a Hungarian Party in Romania with the largest number of supporters; several times a governing party in Romania from 1996.



XXXIV The WFH is a specific, marginalized organization without strong internal support, and not very well integrated into domestic Hungarian policies. Its ambition is to join all the Hungarians in the World, preserve and promote their culture.

XXXV 'The grant by a State of administrative, quasi-official functions to non-governmental associations registered in another country constitutes an indirect form of state power: as such, it is not permissible unless specifically allowed.' Venice Commission 2002: Chapter D a/ii.

XXXVI Art. 1(1) 'This Act shall apply to persons declaring themselves to be of Hungarian nationality who are not Hungarian citizens and who have their residence in the Republic of Croatia, the Federal Republic of Yugoslavia, Romania, the Republic of Slovenia, the Slovak Republic or the Ukraine...'

XXXVII Doc. 9744 rev. 13 May 2003, Preferential treatment of national minorities by the kin-state: the case of the Hungarian law of 19 June 2001 on Hungarians living in neighbouring countries <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=10094&Language=EN>.

XXXVIII 'Sovereignty, Responsibility, and National Minorities,' Statement by Rolf Ekeus, OSCE High Commissioner on National Minorities, in The Hague, 26 October 2001. <http://www.osce.org/hcnm/53936>

XXXIX 'Do you think that Parliament should pass a law allowing Hungarian citizenship with preferential naturalization to be granted to those, at their request, who claim to have Hungarian nationality, do not live in Hungary and are not Hungarian citizens and who prove their Hungarian nationality by means of a 'Certificate of Hungarian Nationality' issued pursuant to Article 19 of Act LXII of 2001 or in another way to be determined by the law which is to be passed?' [www.election.hu](http://www.election.hu) cited by Tóth, Kovács 2007: 143.

XL Opinion 168/2001, Strasbourg, Paper Containing the Position of the Hungarian Government in Relation to the Act on Hungarians Living in Neighbouring Countries <http://www.venice.coe.int/webforms/documents/?pdf=CDL%282001%29080-e>.

XLI Excerpt from the speech of Viktor Orbán in the Hungarian Public Radio on 25 April 2004. See the website of the chronology of the dual citizenship <http://www.kettosallampolgarsag.mtaki.hu/kronologia.html>

XLII Art. 3 of the Act XLV of 2010 on the Testimony for National Cohesion. <http://www.vajma.info/docs/Nemzeti-osszetartozas-torveny.pdf>.

XLIII Art. 4(3) 'A non-Hungarian citizen who resides in Hungary and declares himself or herself to be of Hungarian nationality and whose ascendant was a Hungarian citizen may be naturalized on preferential terms upon his or her application in case the conditions defined in Subsection (1) paras b) to e) are satisfied.'

XLIV Art. D 'Bearing in mind that there is one single Hungarian nation that belongs together, Hungary shall bear responsibility for the fate of Hungarians living beyond its borders, and shall facilitate the survival and development of their communities; it shall support their efforts to preserve their Hungarian identity, the assertion of their individual and collective rights, the establishment of their community self-governments, and their prosperity in their native lands, and shall promote their cooperation with each other and with Hungary.'

XLV Article 7(3) of the Act CCIII of 2011 on the Elections of Members of Parliament allows voters without residence in Hungary to vote for one party list.

XLVI Itself a regional trend, see examples from Croatia, Italy and Romania. Dumbrava 2014.

XLVII See Szalay Tamás Lajos, 320,000 ethnic Hungarians in neighbouring countries got Hungarian citizenship with voting rights in two years, Budapest Telegraph based on Népszabadság, [http://www.budapesttelegraph.com/news/285/320\\_000\\_ethnic\\_hungarians\\_in\\_neighboring\\_countries\\_got\\_hungarian\\_citizenship\\_with\\_voting\\_rights\\_in\\_two\\_years](http://www.budapesttelegraph.com/news/285/320_000_ethnic_hungarians_in_neighboring_countries_got_hungarian_citizenship_with_voting_rights_in_two_years).

XLVIII See Articles 13-18 of the Act LV of 1993 on Hungarian Citizenship.

XLIX Offices of the Democracy Centres [http://www.emnt.org/demokracia\\_kozpontok.html](http://www.emnt.org/demokracia_kozpontok.html); Decision on establishing the Hungarian People's Party in Transylvania, [http://www.emnt.org/admin/data/file/20130318/emnp\\_határozat\\_emnt.pdf](http://www.emnt.org/admin/data/file/20130318/emnp_határozat_emnt.pdf).

L The Political Framework Programme of the Hungarian People's Party of Transylvania <http://www.neppart.eu/admin/data/file/20120222/keretprogramweb.pdf>.

LI Interview in Cluj with the Head of Secretariat of the office of the People's Party in August 2011 (on file with the authors).

LII Interview in Cluj with the Executive Director responsible for the financial and organisational matters of the National Council in August 2011 (on file with the authors).

LIII The People's Party congratulates to the victory of Fidesz and happily undertakes its contribution to it. <http://www.neppart.eu/az-erdelyi-magyar-neppart-gratulal-a-fidesz-kdnp-valasztasi-gyozelmehez.html>



<sup>LIV</sup> See National Election Office, Information on counting the votes delivered by postal ballot for lists, Parliamentary Elections, 6 April 2014, [http://www.valasztas.hu/dyn/pv14/szavossz/en/levijkv\\_e.html](http://www.valasztas.hu/dyn/pv14/szavossz/en/levijkv_e.html). This includes external nationals voting from other countries, not only Romania. No data is available on a country basis.

<sup>LIV</sup> See numbers work out as follows. There are several millions of ethnic Hungarians living in the countries neighbouring Hungary. Around half a million people applied for Hungarian nationality (note that this was less at the time of the 2014 elections), 195,338 registered to vote, and 128,429 cast a valid vote. For the number on registration, not cited earlier, see National Election Office, Number of registered non-resident voters, Parliamentary Elections, 6 April 2014, [http://valasztas.hu//hu/ogv2014/766/766\\_5\\_2.html](http://valasztas.hu//hu/ogv2014/766/766_5_2.html).

<sup>LVI</sup> See [http://sznt.sic.hu/en/index.php?option=com\\_content&view=article&id=214%3Ahungarian-government-supports-szekler-county-autonomy&catid=18%3Acikkek-tanulmányok&Itemid=24&lang=en](http://sznt.sic.hu/en/index.php?option=com_content&view=article&id=214%3Ahungarian-government-supports-szekler-county-autonomy&catid=18%3Acikkek-tanulmányok&Itemid=24&lang=en).

<sup>LVII</sup> See the opening statement on the official site of the Hungarian Parliament: [parlament.hu](http://parlament.hu): ‘Magyarország történelmében ez az első képviselőház, amelyik az általános, titkos és egyenlő választójog alapján az egész nemzetet képviseli – azaz, több mint Országgyűlés.’

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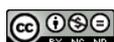
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## Federalism in Pakistan: Of Promises and Perils

by

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## Abstract

This paper presents the case of Pakistan, which is also broadly illustrative of the issues concerning federalism and subnational empowerment in developing countries characterized by unconsolidated political systems and enhanced constitutionalism. In the course of the analysis, this paper examines the dynamics and determinants of federalist/subnational politics in Pakistan, the formal constitutional and ordinance frameworks stipulated in support of federalism and subnational governance. The analysis shall be focused on the Local Governments Ordinance of 2001 and the 18<sup>th</sup> Constitutional Amendment, as these have been the most substantive attempts at subnational constitutionalism that were instituted under opposing political systems, and the extent to which they have enabled greater prospects for a stable federation while also examining the challenges that the radical departure under the 18<sup>th</sup> Constitutional Amendment put forth.

## Key-words

Federalism, Decentralization, Fiscal federalism, Inter-governmental relations, Public finance, Subnational governance, Reform consolidation, State building



## 1. Introduction

Against the backdrop of globalization, increasing supra-national influences, democratization waves, and ever-increasing avenues for ethnic and regional interest articulation, the reconsideration of national governance structure has emerged as an important reform agenda. This is perhaps of a greater salience in the developing contexts where a growing number of countries are increasingly revisiting or rearranging their governance structures in the virtuous pursuit of greater state cohesiveness, nation-building, good governance and democracy. These rearrangements have either involved unitary constitutional structures' transition to federal or confederal structures, or strengthening subnational governance in contexts retaining the unitary structure of governance. The challenges of diversity that the modern polity confronts can be best addressed by following the old dictum of '*e pluribus unum*' in the (re)structuring of the state, whilst ensuring that the perils of greater subnational autonomy do not dominate the oft-highlighted promises. This potential paradox was identified by Alexander Hamilton in 1787 while making a statement before the New York Ratifying Commission:

“The probable evil is that the general government will be too dependent on the state legislatures, too much governed by their prejudices, and too obsequious to their humours; that the states, with every power in their hands, will make encroachments on the national authority, till the union is weakened and dissolved.” – Hamilton (1787)

The virtues of federalism and subnational empowerment have surfaced recurrently in political as well as economic theories from the times of Madison & Hamilton to Musgrave (1961) to Oates (2006) and Weingast (2009). The common denominator remains that in ethnically and socially heterogeneous contexts, state policy is most conducive to the preferences of its constituents when a multi-tiered governance structure exists, with each level having a distinct mandate. Higher levels of government (at the central level) are more suited for the provision of nationwide public goods (such as defence) to retain the benefits of homogeneity in standards, non-excludability and scale effects, while the lower levels of the government (regional/provincial or local/municipal) are better suited in the provision



of locally responsive public goods (waste management, local infrastructure, water and sanitation, amongst others). Distinct mandates, clearly defined functions, and adherence to the stipulated parameters by each tier of the government also enable a greater degree of targeted accountability by the citizen. As compared to a high concentration of power in a potentially exploitative centre, federalism enables diluted power among multiple tiers of government, which may also be mutually competitive horizontally and dependent vertically. From a purely political standpoint, such a dilution in the concentration of power illustrates a path to peace, order and stability especially in contexts marred by deep socio-political cleavages. From a purely economic point of view, the decentralized federal systems enable a higher responsiveness of the government to constituents rooted in greater preference revelation and access to information, as well as the benefits arising as a consequence of intergovernmental competition.

The potential perils of federalism have received relatively lesser mileage in the ongoing discourse, despite being highly influential in substantially reversing the course of the intended reforms. Federalism transcends mere administrative rearrangements, and involves substantive political rearrangement that results in limiting central autonomy in policy design, implementation and enforcement. Building upon the Hamiltonian paradox, while limited central autonomy augurs well for subnational empowerment and federalism, it also results in limiting the strategic control of the centre. This could be a detrimental feature, as decentralized entities may face higher costs of coordination as well as provision owing to scale constraints. Furthermore, if the federalism is not properly structured and the relevant interests in the decentralized scheme are averse to renegotiation on a circumstantial basis, decentralized federalism may instead result in hampering efficiency, accountability and exacerbating instability of the federation itself. This may be a consequence of greater incentives by individual subnational governance structures to expand their expenditures beyond their contribution and externalize the costs to the others or the superior governmental level(s), resulting in an overgrazing of the common fiscal resources which could have significant macroeconomic implications.

With this in context, this paper examines the experience of federalism in Pakistan, which has been characterized by potholes, detours and prospects alike. The Hamiltonian paradox discussed earlier has also been a recurrent observation in Pakistan, given a consistent divergence of the *de-facto* and *de-jure* in governance – run predominantly as a



unitary state despite being formally a federal state. The 18<sup>th</sup> Constitutional Amendment in 2009/10 has been a key development in substantive federalism in Pakistan, diluting the influence of a traditionally powerful centre in the favor of the provincial or subnational governments. The following sections present an evaluation of the prospects and challenges of federalism and subnational empowerment in Pakistan, especially in the aftermath of the 18<sup>th</sup> Constitutional Amendment.

## 2. Contextual overview

The state of Pakistan was envisaged as a federal state at the time of its inception. This was partly attributable to the fact that prior to independence, the founding party continued to articulate demands for increased provincial autonomy under the British rule. In addition, the modalities employed under the Partition Plan (1946) required that the Muslim majority provinces and the Muslim members of provincial legislatures were to choose whether to remain within the Indian federation after decolonization or come together to form a federation of Pakistan. The need for federal system was also an imperative, given that the nation was essentially created on an ideological basis and not ethnic, linguistic or social basis. While being a strong point of articulation, it was important for the state to focus on addressing the heterogeneity of ethnicities, customs, language and social norms, to assure the stability of the newly created polity. Following its independence, the Government of India Act 1935 was adopted as the interim constitutional order with minor changes, while a Constituent Assembly was tasked with creating a new constitution. It must be noted that the Government of India Act 1935, as a colonial instrument, created a federal system but the distribution of authority and powers was skewed towards the centre which was held by the British. The Republic of India was also established at the same time as Pakistan in 1947, but its constitutional experience was on a different trajectory right at the outset – instead of provisionally invoking the Government of India Act 1935, the Indian Independence Act 1947 was instituted as a provisional constitution that took all conducive provisions from the various Indian Councils Acts (1858, 1861, 1892, 1909) and the Government of India Acts (1919, 1935). While the first constitution for India was promulgated in 1950, Pakistan saw its first constitution coming out in 1956. A main reason for this was the political instability post 1952 which saw four governments changing in a 4



year period hampering the consistency required for the constitutional process to get truly off the ground. The first Constitution was promulgated in 1956, which explicitly declared Pakistan as a federal state; however the centripetal impulses of power distribution persisted. Owing to the political crises that ensued in its aftermath, this constitution was abrogated in 1958 and a martial law was imposed.

This marked the beginning of the political instability that has marred the establishment of a stable political culture in Pakistan, as military governments have since ruled the country for an aggregate period of more than three decades. The first military takeover of the government occurred in 1958 with the imposition of martial law by General Ayub Khan. Under his regime, the promulgation of the second constitution took place in 1962 which was prepared by a non-representative bureaucratic body. In the aftermath of its promulgation, a legislative assembly was established and presidential elections were held in which General Ayub Khan retained his position. Following his resignation in 1969 and an intermittent transition under another military dictator, a democratically elected government took office under Zulfikar Ali Bhutto as the Prime Minister in 1971. This period of democratic rule lasted until 1977 when it was overthrown by another military chief Gen. Zia-ul-Haq, however the most important event in this democratic phase was the promulgation and ratification of a new constitution by a representative government in 1973. The Zia regime lasted from 1977 until 1988, whereby political parties were barred from actively participating in the political space until 1986 and a legislative assembly based on non-partisan elections assumed office in 1985. Democratic rule returned to the fore after 1988 until 1999, during which time the PPP and the Pakistan Muslim League (PML) alternated in incumbency for short periods. None of these two parties were able to complete their terms in both rounds of their incumbency. A military coup in October 1999 dislodged the government of PML and the government was headed by the then military chief, General Pervez Musharraf as the Chief Executive. Upon assuming the government, the Musharraf regime held the 1973 constitution in abeyance, and in its stead, introduced the Provisional Constitutional Order as the governing framework of the state. The objective of imposing the PCO was to create an institutional environment conducive for the new incumbents to pursue deep structural and political reforms, as stated in the Article 4 (1) and (2) of the PCO:

*Article 4*

1. *No Court, Tribunal or other authority shall call or permit to be called in question the proclamation of Emergency of 14th day of October, 1999 or any Order made in pursuance thereof.*
2. *No judgment, decree, writ, order or process whatsoever shall be made or issued by any court or tribunal against the Chief Executive or any authority designated by the Chief Executive*

(Excerpt from the Provisional Constitutional Order, 2001)

Holding the constitution in abeyance was not directed at the abrogation of the constitution, and hence the military regime had to receive a nod of ‘*legitimacy*’ from the Supreme Court. The Supreme Court declared the coup d’etat as legitimate and necessary and gave General Musharraf a period of three years to transfer the government back under democratic civilian rule. In 2002, in line with the Supreme Court’s ruling, Musharraf conducted a referendum for Presidency in which he was the sole contender which enabled him to earn an additional 5 years constitutionally mandated term as President. Soon after his referendum, President Musharraf called for general elections to elect the national and provincial legislatures, in October 2002. Prior to the elections, the Musharraf regime also instituted a Legal Framework Order (LFO, 2001) as an addendum to the PCO that ensured that the power would lie with the Presidency, regardless of the outcome of the elections for the provincial and national legislatures. The LFO also expanded the *adult suffrage* by lowering the voting age to 18 years as compared to a prior 22 years, which was subsequently also ratified after the 1973 constitution was put into effect in the aftermath of the elections. In 2008, as a result of fresh elections at the national and provincial levels, the government was assumed again by the civilian democratic parties, with the PPP emerging as the victor and Musharraf still retained the presidency until August 2008, when he resigned owing to the threats of impeachment. The PPP government that assumed office in 2008 was the first ever civilian government to complete its constitutionally mandated tenure of 5 years in 2013 in the country’s 66 year history.

Before narrowing on to the subnational constitutionalism and substantive attempts at federalism under the LGO 2001 and the 18<sup>th</sup> Amendment in 2010, a brief overview of similar provisions in the 1956, 1962, and the 1973 Constitutions follows<sup>1</sup>.



The 1956 Constitution in its Article I, reaffirmed the federal structure of the state, and a uni-cameral legislature under Article 43 – a Parliament including the President, the Prime Minister and a National Assembly. The number of the National Assembly members was fixed at 300, with the membership equally divided between the Eastern<sup>II</sup> and Western wings of Pakistan. Article 61 under the 1956 Constitution stipulated that all revenue collection, loan acquisition and the money mobilized for their settlement by the Federal Government would be accumulated in a *Federal Consolidated Fund*. All other public finance resources received by or for the federal government were to be accumulated under the *Federal Public Account*. Articles 77 and 78 dealt stipulated unicameral legislatures at the subnational/ provincial level whereby the provincial legislature would comprise of a Governor (Nominated Federal Representative), a Chief Minister (elected from the Provincial Assembly), and a Provincial Assembly comprising of 300 members. The *unitary spirit* of the 1956 Constitution could be seen in the Article 92, whereby no bill or amendment making provisions for any matters specified in a money bill, or what could involve expenditures from the Provincial Revenue pools, could be introduced without the assent and approval of the Governor. From a fiscal point of view, Article 116 stipulated that the provinces could borrow finances to the extent allowed by the provincial legislature and with the Provincial Consolidated Fund. However, the article further stipulated that the Federal Government can impose conditionalities or provide guarantees upon loans acquired by a province as it deems fit, but the provinces cannot have access to foreign sources of finance without the approval of the federal government.

The 1956 Constitution, had one important contribution that was retained in the subsequent constitutional frameworks until today – the National Finance Commission. The NFC, stipulated under Article 118, designates the President to define the parameters and modalities of distributing financial resources between the Federation and the Provinces. Subsequently, Article 119 stipulated the limits of the provincial governments to pass legislations or laws concerning inter-provincial trade, taxation, or tolls on goods manufactured or produced in their jurisdictions. This implied that the revenue generation at the subnational level was not allowed and the subnational inflows had to primarily depend on central transfers. This constitutional framework also put forth mechanisms of dispute resolution to settle central-provincial and inter-provincial disputes under Article 129. The idea was to establish consensual deliberative bodies or enabling the disputes to be



referred to the Supreme Court or if they do not fall in the established jurisdiction of the Supreme Court, then the matter may be referred to a Special Tribunal established by the Chief Justice of the Supreme Court. In addition to this, one of the key contributions of this constitution, retained (albeit with revisions) in the subsequent constitutional frameworks was the establishment of the National Economic Council. As per the Article 199, the National Economic Council was to consist of four Federal Ministers and three Ministers from each province. Furthermore, the President had the authority to appoint a board for each province comprising of both the federal and provincial representatives to advise the Federal government on matters related to the provinces. The tenure for central and provincial assemblies under this constitution was set as three years, within which time fresh general elections had to be called.

Following its abrogation in 1958, the Ayub regime established a new constitutional body tasked with framing a new constitution. Upon its promulgation, the first departure it took from the previous order was discarding the terms '*Federal*' and '*Islamic*' from the national name, however the latter was reinstated in the First Amendment in 1963. While it retained the unicameral legislature in the same form as the preceding constitutional order, the number of members in the national legislature was limited to 156, equally divided amongst the provinces. The provincial legislatures were also retained in the same form as stipulated in 1956, with the exception being that the elected provincial assembly seats were limited to 155 (subsequently increased to 218) and instead of the Chief Minister, the Governor was the head of the provincial government with the Provincial Assembly being a legislative body only. Article 74 of the 1962 Constitution also limited the autonomy of the provincial assembly. Under this article, any conflict between the Governor (a federal representative) and the Provincial Assembly, if ruled in favor of the Governor by the National Assembly, could enable the Governor to dissolve the assemblies (contingent upon the approval of the President). This particular provision assumed the status akin to the *Sword of Damocles*, which enhanced the central government's influence and authority over the provincial government. This constitutional framework was more unitary in spirit and perhaps implicitly, in form too. For instance, under the Article 131, the Central Legislature had the authority to make laws or sanction actions for some parts or the whole country, as deemed necessary for matters enumerated in the Third Schedule of the Constitution (this included national security, financial stability, and planning or coordination). In terms of the



institutional dominance of the centre, the National Economic Council was also stipulated to comprise of presidentially nominated individuals – with no provision made for mandatory provincial representation. Finally, a stark departure from the preceding framework, was the establishment of institutions of *indirect democracy*. Under the Article 155, an electoral college was to be formed, whereby each province was to be divided into at least 40,000 electoral units, each of which shall serve as constituencies for the Provincial and central legislatures. These electoral units were akin to local governance structures, albeit with little functional or fiscal privileges, and were called Basic Democracies.

Following the resignation of President Ayub in 1969, a Provisional Constitutional Order was instituted along with a Legal Framework Order, until 1973 when a new constitutional framework of the country was promulgated by a popularly-elected legislature. This constitutional framework is the one still in force, and subject to 22 Amendments as of 2015. The 1973 Constitution stipulated a federal and parliamentary democracy, with three government tiers – central, provincial and local<sup>III</sup>. The central legislature was changed from unicameral to bi-cameral, with the Senate (Upper House) and National Assembly (Lower House). The Senate was to provide an equal representation to all federating regions without any link to population, economic wealth or size, and elected by the Lower House including a few reserve seats for which nominations would come from the political parties and the executive. The Lower House/ National Assembly was to consist of elected representatives elected to represent the population as a whole, with each assembly seat representing a distinct constituency. This Constitutional framework instituted a Westminster style parliamentary democracy, albeit with a few modifications, and had three main legislative lists; the Federal Legislative List, Concurrent Legislative List, and the Provincial Legislative List. These are discussed in a greater detail in the section on the 18<sup>th</sup> Amendment.

### 3. Paradox of subnational democracy in Pakistan

While the evolution of federalism from the constitutional/legal point of view has been briefly reviewed, it is also important to observe any structural reforms in governance that enhanced subnational influence/participation. Interestingly, the political history of Pakistan shows a paradoxically countercyclical pattern for subnational (especially, local) democracy



(Cheema, Khan & Myerson 2013). Thrice in the history of Pakistan, electoral democracy has been introduced at the local (Municipal) levels (1962, 1985, and 2001), which have either been rolled back or “replaced with unelected administrators” (Cheema, Khan & Myerson 2013) once the civilian governments return. The most recent establishment of democratic local governments under the LGO 2001 during the Musharraf regime were, and predictably so, rolled back by the revived civilian democratic government at the central and provincial levels. As a result, a complete civilian tenure in government (2008-2013) elapsed without the establishment of local democratic governments, and was instead characterized by a re-bureaucratization at the local levels. With this in context, it is advantageous to examine why decentralized political governance at the local levels has been a cause championed by the military regimes and less so by the civilian democratic actors.

A popular assertion, which this research also concedes to, is that the elected local governments are established to dilute the political strength of the established political parties and to lend greater legitimacy and a consolidated alternative political base to the incumbent military regime. Elected local governments could offer a non-representative central government a vital political connection to the constituencies throughout the nation, whereby the local incumbents have a direct articulation channel with the centre which in its own interests of consolidation has an incentive to be of a greater responsiveness (Cheema et al. 2006, Myerson 2009). An illustration of this can be found in the 2001 reforms, where the non-representative centre confronted a strong entrenchment of party politics in the broader political space, especially at the central and provincial levels. The incentives of the centre were thus truly reflected in the award of progressively greater authority to local governments vis-à-vis the provincial governments. The devolution of authority under the LGO took the form of greater devolution from the provinces to the local governments, with the central scope of authority very negligibly changed.

Across all of the local governance reforms thus far in the history of Pakistan, a common feature has been the non-partisanship of the local elections. This remained the case with the 2001 LGO as well, where the partisan interests exhibited a considerable degree of resilience in their presence (even though covert), their degree of leverage over the centre or the local governments was considerably reduced. The rules against the partisan local elections, as a general idea, are an influential bargaining and incentive-maximization strategy for a non-representative centre, as it enables a selective enforcement of the rules.



This feature of the local governance structures established under the military regimes offers some explanation of the civilian democratic governments' aversion to allow the local governance structures to exist. Rather intuitive, the mainstream political parties in Pakistan (PML and PPP) saw the local governments established under the LGO 2001 as representative of the *'dictatorial'* interests and according to their perceptions, the local governments represented a class of *'collaborative politicians'* detrimental to their political interests.

In democratizing contexts (apt in the case of Pakistan, but also selectively applicable in other contexts) the *rational* incentives of the established political interests at the provincial and central level of governments are skewed against the establishment of democratic local governments, as they are seen as a competition for power and patronage (Cheema, 2006). Illustrative of this assertion, is the conduct of the elected representatives of the political parties at the central and provincial legislatures in Pakistan, who have committed (with doubtful credibility) to the reform local democratic governments and even passed legislations in this regard but the implementation continues to be deferred on different pretexts. For instance, since 2008 there have been 6 bills presented in the provincial assemblies of Punjab (main political base of the PML-N) and Sindh (main political base of the PPP) for establishing local governments and subsequently ratified into legislations, but the implementation continues to be delayed on the pretexts of developing the institutional, legal and fiscal modalities of local governments and inter-governmental models before allowing the structural existence of the local governments. Some political parties, like the MQM (*Muttahida Quomi Movement / National Allied Movement*) who have a regionally and ethnically concentrated political base in the urban regions of the Sindh province (of vital economic significance to Pakistan), to persist with their demands for local governments as it would enable a stronger bargaining position for them to seek *'political rents'* in the form of ministerial incumbencies at the central level. The temporal pattern of MQM's articulation substantiates the assertion of *'political rent-seeking behavior'* as it always brings up the Local Government debate (often through street agitations and even violent actions) whenever politically expedient or whenever their narrow political interests are challenged by the Provincial Government led by the PPP (with a predominantly rural political base, but with desires of gaining greater political and fiscal influence in the urban areas). Given these factors, the aversion of the civilian dispensations to elected local governments can be



can also be understood as their perception of local governments as a *'bargaining-power'* tool rather than their more substantive implications of democratization, accountability and responsiveness.

Much of this resistance to electoral democracy at the local levels also finds its roots in the *'limited access'/elitist* structure and organization of the established political parties in the Pakistani political space. The political parties in Pakistan are, in their organization and functioning, "highly centralized and their national and provincial leadership exercises substantial control on all legislative nominations and strategic decision-making" (Cheema, Khan & Myerson 2013). Built mainly on the basis of elite coalitions and patron-client dynamics, the organizational structure of these political parties does not extend down to the grass-roots level, and where it does the structures act as reinforcements or executors of the agendas of the higher levels of the party. A cross-country Democratic Accountability Survey conducted under the auspices of Duke University posits that the Pakistani political parties are characterized by high levels of organizational centralization and average levels of organizational extensiveness (Kitschelt and Palmer 2010; Cheema, Khan & Myerson 2013). The survey observations further reaffirmed the similarity of these dimensions across the 5 main political parties in the country (PPP, PML-N, JUI, JI, MQM). The barriers to entry in the federal and provincial political space, are also reinforced because of the absence of local democratic politics which is both a result of, and support to the high dynastic dominance in the political parties in particular and political space in general.

The introduction of local democratic politics and local governance based on genuine participation and democratic norms would not only help in democratic consolidation but also reduce the barriers of entry in the political space at the national and provincial levels. This consolidation could also be a deterrent to any future attempts at non-democratic attempts at gaining incumbency, as historically the political vacuum at the local level has been the main source for the political legitimacy of the military regimes.

#### 4. Local Governance Ordinance 2001

Upon assuming the government through a military coup in 1999, General Musharraf stipulated a 7-point agenda as a basis for the structural overhaul of the political and economic landscape of Pakistan. The seven point reform agenda included<sup>IV</sup>:



- i. Reinvigoration of national confidence and morale through socio-economic reforms;
- ii. Strengthen the Federation, remove inter-provincial harmony and restore national cohesion;
- iii. Devolution of power to the grassroots level;
- iv. Revive Economy and restore investor confidence;
- v. Ensure equal access to law, order and speedy dispensation of justice;
- vi. Depoliticize state institutions to curtail rampant corruption and nepotism;
- vii. Ensure swift, transparent and across the board accountability.

Given the stipulation of a reform vision at the outset of his tenure, a National Reconstruction Bureau (NRB) was established with the explicit mandate of creating a decentralization framework for the devolving fiscal and administrative authorities to the grass-root levels. The local governance reform was initiated in August 2001 under the Local Government Ordinance (2001), which had a legal status of a Presidential directive under the Provisional Constitutional Order (PCO), was not safeguarded in the national constitution of 1973. This also turned out to be a fundamental weakness of the reform process right at its outset. The reforms envisaged under the LGO were more comprehensive and ambitious than those instituted under the Ayub and Zia regimes. However, they faced stiff opposition from the major political parties and the civil society organizations on account of being detrimental to federalism arising as a consequence of reduced provincial autonomy. This was also made a basis for rolling back the LGO in 2008 once the civilian democratically elected government gained incumbency, with the formally provided justification that it undermined the mandate and capacity of the provincial governments to implement its policies.

As a federation divided into four provinces (Punjab, Sindh, Balochistan, Khyber Pakhtunkhwa), a Federally Administered Tribal Area (on the Afghan Border) and a capital territory (Islamabad), the establishment of the local governments was the creation of a *third layer* of the governance structure. This third layer was further disaggregated into three levels; districts, tehsil (municipality), and the lowest tier was Union Council. The Union Council consists of proximate villages or towns (in urban contexts) in the Tehsil. Each administrative tier at the local level had its own council and was headed by a mayor (*Nazim, in local terms*) and a deputy mayor (*Naib-nazim*). All three levels were to be governed by



officials coming through a process of elections. In terms of administration, as many as 10 formerly provincial departments were transferred functionally to the district and municipality level. The new arrangement had the district mayor (Nazim) assume the status of the 'executive head of the district', with a District Coordination Officer (a member of the bureaucracy) appointed by the provincial government reporting to it (Bureau 2001). Owing to the reporting structure, the district mayor was also made responsible for the performance management and stipulating the job modalities. Furthermore, the LGO also enabled the local councils to over-rule executive decisions, and empowered them to make independent decisions on all matters, with the exception of budget approvals. In the case of budget approvals, the local/district executive held considerable power over the local council, whereby it could establish standing committees to have an oversight over the activities of the local executive (Aslam and Yilmaz 2011). The local council also had the discretion to establish standing committees for monitoring of the executive's activities. The monitoring committee had an authority to suggest remedial courses of action to the local government, including the local executive (District Mayor) (Aslam and Yilmaz 2011). The functional assignment to the local government (administrative decentralization), was perhaps the main feature of the local governance systems emerging under the LGO with those existing prior to them<sup>V</sup>. As compared to the preceding institutional framework in the subnational space, the provincial government performed a majority of the state functions, but under the LGO the elected local government and the provincial government were integrated at the district and municipality level, and the provincial administration or bureaucratic accountability division was abolished, with the locally serving bureaucracy accountable to the elected local government.

While the scope of the functional responsibilities of the local governments greatly increased post the LGO Devolution, along with the discretion over the allocation of expenditures and establishment of priorities, the degree of financial decentralization was largely limited. This was because districts governments were not given any revenue generation privileges and had to depend on provincial (and by extrapolation central transfers) through the provincial finance commission mechanism. Most of the district expenditure contribution was attributable to 'establishment costs' which included staff remuneration and overheads, which were under the fiscal obligation of the district governments despite them not have any control over their alteration (in terms of personnel



recruitment or firing, cost-cutting adjustments). Furthermore, most of the devolution of power under the LGO was from the provincial to the district level amidst no transfer of powers (administrative, fiscal or political) from the central government to the subnational governments (districts and provinces included).

Prior to the Local Governance Ordinance, there was no significant inter-governmental linkage (i.e. between the Central/Provincial Governments and Local Governments), the inter-governmental conflict possibilities were minimal. However, in the aftermath of the LGO, the elected local governments had an expanded set of functional responsibilities that were previously provincial responsibilities, as well as a greater degree of control over the provincial bureaucracy (Cheema, Khwaja & Qadir 2006). Since this devolution was instituted in the absence of any elected provincial governments as well as the non-partisan basis of local elections, no integrative efforts either structurally or mediatory were made to enhance provincial-local coordination, which had operational implications for both.

In addition, the indirect election of the district *nazim* created distortions in the incentive structures, especially since the district mayor under the LGO was most powerful actor in the local government system as the head of the executive as well as the legislative branch of the local government. Local governments in Pakistan enjoyed under the LGO enjoyed considerable discretion in the regulation of local matters, expenditure allocation for local goods, and procurement processes (Niaz (2010)). However, most of this authority was concentrated in the hands of the *Nazim (Mayor)*. In the case of budget approval, for example, the *nazim* had the authority to propose the budget liable for consideration by the Local Council. This provision significantly restricted the discretion of the local council in relation to the non-elected bureaucracy and, especially, the *nazim*.

The incentive compatibility mechanism implicit in this arrangement was that the reelection of the mayor would be contingent upon the satisfaction of the union councils: a factor that would allow the Union Councilors to exert a greater influence over the mayor. However, in a political landscape that is dominated by individuals who control the entry into political competition and the intermediation between the state and the citizen as mentioned in the prior section, indirect election of the head of the local government unit opens up the possibility of capture of these offices by the local elite.

Given the dearth of local revenue sources, most of the local fiscal pool was financed through the fiscal transfers from the provincial and central governments under the



Provincial Finance Commission as discussed earlier. While the horizontal distribution of these funds across local governments was formula-based (primarily based on population), the vertical distribution that determines the retained and allocable amounts was largely at the discretion of the province. The local governments also had the platforms of central transfers delivered in ear-marked forms. A pitfall of such an arrangement is that the discretionary transfers provide an incentive to the local government to respond to the preferences of the center in order to get access to funds, rather than to their constituency (Yelmaz 2010). As a result, the central governments/political actors have a greater scope for patronage and clientilistic conduct by linking transfers to political considerations. This ends up reinforcing and perpetuating existing, sub-optimal power structures and strengthens the patronage relationships, and can become an effective channel of rent distribution.

Finally, the main structural flaw with the decentralization under the LGO was that it was developed and instituted in a context when the Constitutional framework was held in abeyance. Despite the new governance structure instituted under the LGO (2001) and its subsequent ratification by the 17<sup>th</sup> Constitutional Amendment in 2003, Pakistan continued to constitutionally be a “two-level federal state i.e. the local governments are not recognized as an established third tier of government by the 1973 Constitution” (Shah, 2012). While the 17<sup>th</sup> Amendment was initially aimed at constitutionally ratifying and sustaining the establishment of a third tier of the state at the local levels, it ended up allowing their establishment for a 6 year period. During this 6 year period, the provincial governments could make any changes to the legislations regarding Local Governments with the approval of the President (Bureau 2001; Shah 2012). The implicit feature of this was that at the end of the 6 year period, the provincial governments were to decide whether or not the local governance structures were to be retained, and if so, what revisions to the legislation were to be introduced. This was, in fact, the main provision employed by the subsequent civilian government to roll-back the Local Governance frameworks under the 17<sup>th</sup> Amendment.



## 5. The 18<sup>th</sup> constitutional amendment

Given the political dynamics of Pakistan, any political decentralization to the local levels in the current structural context does not seem probable or even possess prospects of sustainability. With the civil-military oscillations in the control of the state, there has been a renewed engagement in the national political narrative in the aftermath of the 2008 elections with Constitutionalism. Agreed upon by all political parties, the new narrative extols the execution of all functions of the state, transitions and distributions of the powers, government transitions and inter-governmental dynamics to be governed and conducted under the stipulated constitutional framework. Where inadequate, revisions to the constitutions can be made following a 2/3<sup>rd</sup> majority support across all provincial and national legislative bodies. Decentralization, in the backdrop of this narrative, has assumed administrative and fiscal forms predominantly with the political decentralization only occurring at the centre-provincial level. Nevertheless, as a reform in progress and amid increasing articulations of democratic local governance returning into the national political narrative post 2013 general elections, there exists a possibility of democracy re-appearing in the local space.

The first constitution of Pakistan promulgated in 1956, envisaged Pakistan as a “decentralized federation with significant fiscal and administrative responsibilities being assumed by the lower levels of government” (Shah 2012). The central government, on the contrary, was given a greater discretion over developing its revenue base requisite for direct federal expenditures and transfers to ensure standardization of public service delivery and redistribution to ensure inter-regional equity. The current constitutional framework when first instituted in 1973, enhanced the centralization tendencies in public spending responsibilities, and also stipulated service delivery responsibilities across the two tiers of the government under *Federal Legislative List* and the *Concurrent Legislative List* (Joint responsibility of centre and province). Table 1 provides an overview of the fiscal and functional responsibilities of the federal and subnational governments as stipulated in the 1973 Constitution prior to the 18<sup>th</sup> Amendment. The objective behind the establishment of these lists was to delineate responsibilities as well as enable an interim period whereby with the central equalization efforts, the provincial governments build their fiscal and administrative capacities to assume these responsibilities fully (Shah, 2006). Nevertheless,



the centre continued to encroach on the responsibilities and privileges of the provinces, the provinces in turn on the local governments, and hence the division of responsibilities and the fiscal endowments requisite to deliver on those responsibilities emerged as a main issue of contention in Pakistan, owing to which an institutional mechanism of National Finance Commission was rolled into action.

The first deliberated and consensually agreed National Finance Commission (NFC) Award in 1991 geared towards granting an “unconditional access” to a greater pool of the federal divisible pool (Pasha and Shah 1996; Shah 2012). Important facet of this award was the initiation of the process of *expenditure realignment* aimed at granting provinces a greater discretion over the ‘concurrent’ responsibilities, but this occurred without any discretion over additional or new revenue stream. This resulted in further increasing the reliance of the provinces on the central transfers. As per this 1991 award, which continued to be the revenue distribution formula till 2001, the federal transfers to the provinces financed a greater portion of the provincial operating expenditures and in the case of Balochistan the transfer financing amounted to 99% of the provincial expenditure (Shah, 2007). This process was reversed under the LGO and the PCO discussed earlier, where the centre’s pursuit of diluting established political support devolved both resource endowments as well as functional responsibilities from the provincial to the local governments. While the reforms under the LGO did result in service delivery improvements at the local levels, they were considered incomplete in the sense that they did not rationalize the federal and provincial powers, and in effect led the centre to encroach on both federal and provincial responsibilities (and hence resources) as stipulated in the 1973 constitutional framework.

**Table 1: 1973 Constitution Legislative and Functional Responsibilities of Public Service Goods**

Legislative Responsibility	Services	Actual Allocation of Functions
<b>Federal Government<sup>1</sup></b>	Defense, External Affairs, Posts and Telegraphs, Telephones, Radio and T.V., Currency, Foreign Exchange, Foreign Aid, Institutes for Research, Nuclear Energy, Ports and Aerodromes, Shipping, Air Service, Stock Exchange, National Highway, Geological Surveys, Meteorological Surveys, Censuses, Railways, Mineral Oil & Natural Gas Industries	Federal Government
<b>Federal/ Provincial Governments<sup>2</sup></b>	Population Planning, Curriculum Development, Syllabus Planning, Centers of Excellence, Tourism, Social Welfare, Vocational/Technical Training, Employment Exchange	Federal/Provincial Governments
<b>Provincial Government</b>	Historical Sites and Monuments, Law and Order, Justice, Tertiary Health Care and Hospitals, Highways, Urban Transport, Secondary and Higher Education, Agricultural Extension, Fertilizer and seed distribution, Irrigation, Land Reclamation	Provincial Governments
<b>Local Governments<sup>3</sup></b>	Primary Education, Curative Health, Preventive Health, Water Supply Drainage and Sewage, Farm-to-Market Roads, Land Development,	Primarily Provincial with Minor Local Government Involvement
	Rural Developments, Link Roads, Intra-Urban Roads, Street Lighting, Garbage Collection, Fire Fighting, Parks and Playgrounds	Local Governments

1. According to Federal Legislative List

2. According to Concurrent Legislative List

3. According Provincial Legislation

Source: Shah(2009) Constitution of the Islamic Republic of Pakistan 1973 (Sch. Including 17<sup>th</sup> Amendment)

With the transition back to civilian democratic government in 2008, the consensual narrative across the political space was to ‘*uphold democratic norms*’ by re-strengthening the provinces and rolling back the governance reforms under the LGO. The outcome of this consensual commitment to also led to the 7<sup>th</sup> National Finance Commission Award in 2009 (for the period 2010-2015), whereby the smaller provinces were given a greater share to the resource pools in a bid to build inter-provincial harmony and also meet the equalization requisites. Under the 7<sup>th</sup> NFC, an enhanced allocation was given to the smaller provinces. Indicators such as population density, poverty levels, and domestic fiscal effort were incorporated as determinants of the fiscal revenue sharing formula.

**Table 2: Finance Decentralization under the 7<sup>th</sup> NFC Award**

<b>Total Pool</b>	<b>56%-57.5% of the following sources of federal revenues:</b> Personal and corporate income taxes, wealth tax, sales tax, excise duties on tea, tobacco, sugar, and other excises. Amount FY 2010-11: PKR 865.8 billion (US\$ 9.62 billion)
<b>Formula for provincial allocation</b>	Population – 62% weight Poverty – 10.3% weight Provincial tax effort – 5% Inverse of Provincial Population density – 2.7% weight
<b>Provincial shares</b> In Population Punjab: 57.4% Sindh: 23.7% KPK: 13.8% Baluchistan: 5.1%	<b>Provincial shares in NFC Allocation</b>  Punjab: 51.7% Sindh: 24.6 KPK: 14.6% Baluchistan: 9.1%

Source: Institute of Public Policy (IPP), 2011, Shah (2011)

In terms of its institutional dimensions, the 18<sup>th</sup> Amendment substantially reformed the institutions established as intergovernmental coordination mechanisms, i.e. the Council of Common Interests (CCI) and the National Economic Council (NEC). The CCI is a coordination and deliberative body headed by the Prime Minister (or a designate), the Chief Ministers of all provinces and federal government representatives. While its prior jurisdiction was nominal in terms of providing solicited provincial input in federal matters, the 18<sup>th</sup> Amendment enhanced its potency by making it responsible for all matters related to the federation<sup>VI</sup>. The NEC, also a constitutionally mandated body for oversight over national economic policies, previously composed of the Prime Minister, and Presidentially nominated members (with the constraint holding that at least one representative of each province must be nominated). In the aftermath of the 18<sup>th</sup> Amendment, the composition was altered to enable a greater influence of the provincial governments such that two provincial members in addition to the provincial Chief Minister and four federal government representatives nominated by the Prime Minister would now compose the NEC. This has enabled a greater deliberative scope for the provincial interest articulation in the national policy making, to avert any scope for centralized high-handed policy stipulations.



Furthermore, this Constitutional amendment also enabled substantive changes in the division and devolution of powers between the federal and provincial levels of the government whereby the previously entrenched ‘*Concurrent List*’ was disposed off altogether, and a functional reassignment to the Federal Government was done contingent upon the directions of the CCI, with all other functions devolved to the provinces.

**Table 3: Functional Responsibilities under the 18<sup>th</sup> Amendment**

<b>Federation/CCI (Joint Federal-Provincial) Tasks—Federal Legislative List Part II</b>	
Electricity	Provincial police operations beyond provincial boundaries
Minerals, oil and natural gas	Industrial policy
Railways	National Planning and National Economic Coordination
Major Ports	Coordination of Scientific and Technological Research
Census	All regulatory authorities under a federal law
Public Debt	Standards in higher education and Research, scientific and technical institutions
Federal corporate entities including Water and Power Development Authority and Pakistan Industrial Development Corporation	Interprovincial matters and coordination
Legal, medical and other professions	
<b>Federal Functions—Federal Legislative List Part I</b>	
Defense	International and inter-provincial trade
External Affairs and international treaties	Nuclear Energy
Immigration and citizenship	Airports, aircraft, air navigation, air and sea travel and shipment, lighthouses
Post and Telecommunications	Patents, trademarks, copyrights
Central banking, Currency, Foreign Exchange,	Stock exchanges and futures markets
Corporate regulation including banking and insurance	National highways and strategic roads
Fishing beyond territorial waters	Federal geological surveys and meteorological organizations
Standards of weights and measures	Local government in cantonment areas
<b>Provincial Responsibilities</b>	
All residual functions	
<b>Local Government Responsibilities:</b> By provincial government determination	

Source: Constitution of the Islamic Republic of Pakistan, Shah 2011, Schedule IV (Post 18<sup>th</sup> Amendment)



Notwithstanding the functional reassignments and devolution, there has been very limited reassignment of taxation responsibilities to the provincial governments. The taxation powers remain predominantly with the central government, which were further reaffirmed by the provincial governments owing to the scale advantage argument (Yelmaz 2010). Under the current framework, the federal government continues to impose taxation on sale and purchase of goods, on capital gains, and financial assets. However, the central government had to relinquish revenue generation privileges from immovable property, estate and bequest taxation, VAT on services (still not in effect though multilateral negotiations on tax reforms are ensuing), and *zakat* and *ushr* (religious taxes on income and land holdings) (FBR, 2011).

In terms of the provincial exposure to capital mobilization avenues, the 18<sup>th</sup> Amendment also enables the subnational governments to access domestic and international sources for credit and finance, albeit within the parameters defined by the NEC. These limits continue to be revised circumstantially and are not mandated at fixed rates in a legal framework as observed in the '80-20 rule' as practiced in Bolivia. In addition to enhanced avenues of credit finance, under this amendment the provincial governments were also equipped with a relatively more dynamic and buoyant tax base in the form of sales tax on services. In 2013, the fiscal proceeds from this tax base alone generated around 0.5% of the GDP in fiscal revenues (IPP, 2013 and Government of Pakistan, 2013). Other avenues of provincial fiscal inflows through taxation include agricultural income taxes. However, these have been of a limited yield historically due to evasion, non-compliance and inadequate enforcement often due to the strong political influence that this sector commands (IMF, 2013). For instance, the provincial governments have been empowered to collect agricultural taxes since 1997, whereby the presumptive tax rate applied was a static real amount of PKR 150-250 per acre, or US\$ 1.5-2.5 per acre/annum (depending on the land quality) and the penalty for non-compliance also at a miniscule level of Rs. 1000 (US\$ 10 in 2014 rates). As per IPP (2013) estimates, generating sufficient revenues for the provincial fiscal pools requires that at least 20% of the income from large farm (more than 25 acres) must be established as the effective tax rate, along with a tangible and credible punitive action against non-compliance. However, the historically preferential treatment to the agricultural income tax still persists and the current constitutional framework even in the aftermath of the 18<sup>th</sup> Amendment does little to reverse it.



Enabling the provinces to raise additional revenues through capital value taxation on properties, puts forth an under-exploited revenue base and this has not been a result of the provinces not having the requisite resources for indigenous revenue mobilization but more a consequence of the lack of adequate incentives given the dependence on the NFC transfers (Shah, 2012). The current system also established 2015 as a milestone for transforming the governance structures such that the power concentration at the central level is replaced by concentration at the subnational level. Under this milestone, all major economic and social functions shall be performed and designed by the provinces. This is exhibited in the shifting trends in the financial and functional pools of the provincial governments as illustrated in Tables 4 and 5.

**Table 4: Summary of Fiscal Decentralization under the 18<sup>th</sup> Amendment**

Fiscal Year	Indicator	Federal Share	Provincial-Local Share
FY 2009-10	Revenue collection	94%	6%
	Revenues retained	65%	35%
	Expenditure share	66%	34%
	Residual Fiscal Gap after transfers	-1%	+1%
FY 2011-12	Revenue Collection	90%	10%
	Revenues retained	61%	39%
	Expenditure share	64%	36%
	Residual Vertical Fiscal Gap after transfers	-3%	+3%
FY 2014-15	Revenue collection	85%	15%
	Revenues retained	45%	55%
	Expenditure share	45%	55%
	Residual Vertical Fiscal Gap after transfers	0%	0%

Source: economic Survey of Pakistan 2011, Shah 2011/2012, IMF Government Finance Statistics Module

Amongst this functional devolution, there has also been a dispensing away of viable central roles like fostering a mutually beneficial economic union, protecting minorities and disadvantaged groups, disaster response and risk mitigation, and framing an overall strategic developmental orientation. Particularly, in the context of political and economic cohesion, it is imperative that natural resource endowments are viewed as national subjects instead of being made into provincial realms such that the rents from these resources can be invested at a higher scale of effect and equity at the central level. The current framework makes it into a provincial subject, which has potential for divisive pressures between the provinces and hence expose the federation to risk. This argument finds its roots in the inter-provincial conflict over Hydel resource distribution and the Kalabagh Dam



construction, as well as the distribution of gas and extractive revenues across the provinces. Especially considering the latter, the divisiveness is particularly pronounced in Baluchistan which is host to a substantial mineral and extractives base yet deriving the least benefit. A decentralized system works best if there are potent platforms for interest articulation by the citizenry (through effective political decentralization), and a finance-functional harmony. Particularly important is to ensure that expenditure decentralization must also be accompanied by the taxation/revenue generation decentralization such that reliance on higher level transfers is reduced and also create greater incentives for fiscal transparency and accountability.

**Table 5: Changes in the Direct Expenditure Obligations as a result of 18<sup>th</sup> Amendment**

Expenditure Function	Fiscal Year 2009-10				Fiscal Year 2014-15			
	Federal	Provincial	Local	Total	Federal	Provincial	Local	Total
General Administration	74%	25%	1%	100%	20%	75%	5%	100%
Defense	100%	0%	0%	100%	100%	0%	0%	100%
Debt servicing	85%	15%	0%	100%	85%	15%	0%	100%
Public Order and Safety	30%	70%	0%	100%	30%	70%	0%	100%
Economic Services	26%	50%	24%	100%	10%	66%	24%	100%
Environmental Protection	3%	40%	57%	100%	1%	42%	57%	100%
Housing and Community services	0%	84%	16%	100%	0%	84%	16%	100%
Recreation, Culture and Religion	53%	32%	15%	100%	5%	80%	15%	100%
Education	14%	23%	63%	100%	5%	33%	63%	100%
Health	9%	51%	40%	100%	5%	55%	40%	100%
Social Protection	12%	27%	61%	100%	2%	37%	61%	100%
<b>All</b>	<b>66%</b>	<b>25%</b>	<b>9%</b>	<b>100%</b>	<b>45%</b>	<b>55%</b>	<b>10%</b>	<b>100%</b>

Source: World Bank Reports, Shah 2012



Furthermore, the current constitutional framework post the 18<sup>th</sup> Amendment does not revisit the mechanisms in place for central fiscal transfers to provincial governments under the NFC award. These NFC awards are guided, as mentioned earlier, by the objectives of fiscal equalization horizontally and vertical gap reduction. However, with the functional devolution of the social service provision and infrastructural development to the provincial levels, the role of the federal government in finance provision and establishment of minimum standards is important. Yet, there is no instrument available under the current framework that enables the federal government to influence the absorption of its fiscal allocations in pursuit of the broader national developmental objectives.

## 6. Conclusion and outlook

The LGO and the 18<sup>th</sup> Constitutional Amendment have both been substantive attempts at subnational empowerment; with the former less than the latter by virtue of the absence of the constitutional cover and its autocratic sponsors. Despite having its merits, LGO has little formal relevance in the current scheme of decentralization and federalism discourse in Pakistan. The 18<sup>th</sup> Amendment, thus emerges as the most recent and comparably expansive decentralization reform that has fostered an environment conducive for federalism. Perhaps the greatest merit of this round of reform has been the underlying political consensus and its constitutional embeddedness. Whether or not the current decentralization from the centre to the provincial levels also leads to provincial to local decentralization in the subsequent rounds remains to be seen, but in terms of fostering a greater national cohesion and deepening democracy it does exhibit potential. In addition, a clearer delineation of the functionalities has reduced the scope for arbitrary unwarranted federal intervention in provincial subjects, thus reducing the centre-provincial frictions. The institutional reinvigoration of the CCI, for example, is another important outcome of this amendment, as it creates inter-governmental deliberative platforms that can be used for grievance redressal. Furthermore, it also fosters subnational interest articulation that was previously inhibited by federal unilateralism. The key shift in the current constitutional framework puts the provinces at the core of both policy formulation and its implementation, which not only makes the governance structure more proximate to the citizenry but also clarifies which levels must be held accountable for any suboptimalities in



service delivery. The greater proximity of the government to the citizenry enabled by the 18<sup>th</sup> Amendment may also lead to a relatively higher level of citizen participation in the public policy frameworks while also creating greater pressures for accountability and responsiveness by the governments to the citizens which would be further enhanced if local levels also came to the fore.

The amendment's predominant engagement with the devolution of functionalities and linking the fiscal endowments at the expense of any rationalization of central and provincial functions, discussion on local governance structures or division of the provinces into smaller administrative units. The extent to which the increased authorities at the provincial levels have led to a corresponding improvement in the public service delivery or even grappling with the challenges to the state in terms of rule and order, is suboptimal. Instead of a disparately powerful centre, under the 18<sup>th</sup> Amendment it is a disparately powerful province, and unless there is a further devolution to the local levels genuine subnational empowerment would be limited.

On the whole, federalism in Pakistan may have taken the most substantive of its leaps with the 18<sup>th</sup> Amendment, there are some downside risks that can prove highly detrimental if not dealt with caution. The overall focus of all political actors, the central and provincial governments has to foster greater inter-regional harmony to ensure state stability and cohesion. The recent general elections in 2013 have resulted in a dynamic and pluralized political landscape in Pakistan, which is a welcome sign. However, with the enhanced provincial autonomy and opposing political parties holding office in three of the four main regions, there exist divisive risks too. The 18<sup>th</sup> Amendment stands well on the grounds of democratic consolidation but it cannot be considered a panacea for the governance constraints of Pakistan as it is at best an incomplete process – completion of which would deem imperative more fundamental reforms that ensure greater public responsiveness but also a stable political and economic union due to greater efficiencies and accountability mechanisms.

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<sup>I</sup> The provisions and details have been derived for analysis from the Constitutional Archives and Schedules available at [www.na.gov.pk](http://www.na.gov.pk) and Constitution of Pakistan published schedules.

<sup>II</sup> Present day Bangladesh.

<sup>III</sup> As of IV Schedule.

<sup>IV</sup> Taken from Presidential Address to the Nation 17<sup>th</sup> October 1999. (Archive video).



<sup>V</sup> The local governments established during the 1980s under the Zia regime were mostly suspended during the 1990s so in fact prior to the current devolution there were no elected representatives at the local level and their powers were exercised by provincial bureaucrats as local government administrators.

<sup>VI</sup> The composition remained the same as before (Prime Minister, all Chief Ministers and three nominated Federal Government Representatives), but the scope of responsibility was expanded to include decision making, monitoring, supervision, and control responsibilities over the Federal Legislative List Part II, which includes the following: railways; minerals, oil, and natural gas; hazardous materials; industrial policy; electricity; major ports; federal regulatory authorities; national planning and economic coordination; supervision and management of public debt; censuses; provincial police powers beyond provincial boundaries; legal matters; regulation of the legal, medical, and other professions; standards in education and research; interprovincial coordination; and conflict resolution (IPP, 2011).

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