CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

The Role of Subnational Constitutions in Accommodating Centrifugal Tendencies within European States: Flanders, Catalonia and Scotland Compared

by

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Perspectives on Federalism, Vol. 6, issue 2, 2014

Abstract

Looking at federalism (Belgium), quasi-federalism (Spain) and devolution (United Kingdom), this paper shows that regional autonomy of Flanders, Catalonia and Scotland may be strengthened through a strong empowerment to establish fully-fledged subnational constitutions and through the active use of that empowerment. The author argues that subnational constitutions, whilst not acting as a panacea, may serve as important focal points for regional identification and be part of suitable autonomy arrangements within the State. They may help accommodate centrifugal tendencies, as long as the empowerment stems from a coherent and transparent central constitutional framework which clearly defines and entrenches the subnational constitutional space and its inherent limitations.

Key-words

Subnational constitutions, federalism, devolution, autonomy, independence

1. Introduction

This paper argues that subnational constitutions[I] may help accommodate centrifugal tendencies within European States without stipulating or inviting secession.[II] Looking at federalism (Belgium), quasi-federalism (Spain) and devolution (United Kingdom)[III], the analysis shows how regional autonomy of Flanders, Catalonia and Scotland may be strengthened through the empowerment to establish fully-fledged subnational constitutions and by subsequent use of that empowerment, as for instance in Germany or Switzerland.[IV] This may contribute to a resolution of existing vertical power conflicts and to a robust subnational autonomy that accommodates the demands of the majority of the regional population.[V] The paper intends to add a fresh perspective to the current constitutional debate which, with regard to Scottish independence, has been mostly focused on a written constitution *outside* the UK framework. In light of the outcome of the referendum on 18 September 2014,[VI] the question has become even more pressing how to accommodate persisting quests for greater autonomy *within* the existing State. Taking a comparative perspective, the paper draws conclusions for Flanders and Catalonia, as well, where the constitutional future appears as uncertain as in Scotland.

2. Subnational Constitutional Power in Flanders

2.1. Overarching Constitutional Framework

The original Belgian Constitution of 1830 was designed in a unitary way. Whilst decentralization commenced in 1970, Belgium only declared itself a fully-fledged federation in 1993, consisting of "the Flemish Community, the French Community, and the German-speaking Community" (Art. 2 of the Constitution[VII]), as well as the "Flemish Region, the Walloon Region, and the Brussels Region" (Art. 3 of the Constitution[VIII]).[IX] Hence, two sets of "overlapping sub-states" with different competences were created.[X] Whilst communities deal with "education, culture, person-related matters and the use of languages", regions mainly have powers on "social-economic and territory bound matters".[XI]

Belgian federalism hence devised a complex system.[XII] Its distinction between regions and communities (as stipulated in Art. 1 of the Constitution[XIII]) makes the Belgium federation unusual.[XIV] It is important to understand that the territories of the communities and the regions are not identical, but merely overlap.[XV] Different powers are attributed to them, even though these may have become more blurred in recent practice.[XVI] The latter has particularly happened in Flanders, where the Community and Region have practically merged.[XVII] The opposite effect has occurred with regard to the South of the country, since the Walloon Region encompasses two linguistic communities (French and German), and the unity of the Walloon Community suffers from the lack of identification by the French speaking population of Brussels.[XVIII] Brussels itself is, due to its lack of a single linguistic or cultural identity, not a community, but a distinct region.[XIX] As a further complication, community powers can be exercised by the regions; in the case of the Walloon Region this means that the resulting acts will only be valid for those parts of the region that correspond with the community that transferred the matter.[XX]

This leads to a complex system of community and regional interaction and of multiple layers of government, which may even lend itself as an example of constitutional pluralism.[XXI] This situation is aggravated by the fact that there is no rule of precedence of federal over regional laws.[XXII] The resulting compromise may have been suitable to appease the various contributors to the Belgian federation initially, but enduring conflict seems to suggest that this model has not been very successful.[XXIII] The delicate balance of powers and representation requires constant negotiation and readjustment and hence does not appear to provide a clear and transparent system of governance. The constitutional structure has not proven to be very successful in easing tensions and accommodating quests for greater autonomy.[XXIV]

In light of that, future constitutional reform could serve to organize the federal system in a more coherent way, by abandoning either the community or the regional structure whilst granting strong minority rights within each of the entities. Hence, suggestions have been made to delete the communities and to have four regions instead of that.[XXV] These could be Wallonia, Flanders, the German-speaking region and Brussels. However, the two main ethnic groups of Flanders and Wallonia are competing over their national influence,

and without strong recognition of both groups effective governance of the country might be impossible.[XXVI] This is particularly difficult in Brussels where the two main ethnic groups "meet (or confront) each other".[XXVII] Reform prospects are further hampered by the high hurdles regarding constitutional amendment set up by Art. 195 of the Constitution, essentially requiring three stages of legislation coupled with a two-third majority of both Houses.[XXVIII] As a consequence, Belgium may well illustrate the limitations of constitutional responses to centrifugal tendencies. However, the recent Sixth State Reform strengthens fiscal autonomy of the regions, cedes further powers in the fields of economic and social policy and hence shows that Belgian federalism is dynamic and not averse to reform.[XXIX]

2.2. Subnational Constitutional Power within that Framework

Subnational constitution-making power in Belgium is merely "embryonic".[XXX] Whilst the Flemish Community as well as the Flemish Region, the French Community and the Walloon Region have a limited degree of quasi-constitutional autonomy, the Brussels-Capital Region and the German Community have lacked that autonomy so far.[XXXI] As *Pas* stresses, "[c]ontrary to the general rule in almost every federal State, the Belgian federated entities have no proper constitutions of their own".[XXXII] One reason for that might be that Belgium is a rare example of a federation that was not built on previously independent States, but which resulted from a process of decentralization within a once unitary framework.[XXXIII]

This has not hampered a certain degree of institutional autonomy, labeled as *constitutive* instead of *constitutional* autonomy.[XXXIV] The latter is confined to the "election of the parliaments and to the composition and functioning of the parliaments and their government".[XXXV] These powers have been conferred upon the regions through the federal parliament, which is an arrangement that resembles devolution rather than federalism.[XXXVI] The Constitution empowers the federal Parliament to specify these matters (Art. 118 (2) and 123 (2) in conjunction with Art. 4, para 3)[XXXVII], which it did according to Art. 35 (3) of the Special Majority Act of 8 August 1980.[XXXVIII] In essence, this means that the degree of constitutional autonomy is legally apportioned in each case and not guaranteed by the federal Constitution.[XXXIX] In addition, the transfer of powers is limited by the Constitution

itself and by the Special Majority Act.[XL] The resulting powers of regional legislation must be "exercised through special majority decrees passed by a two-thirds majority vote in the council concerned".[XLI] This has lead only to minor deviations from the federal set of rules, such as the extension of the election period from four to five years, the non-dissolution of subnational parliaments, or the elimination of the role of the King in the formation of government.[XLII] Hence, even the limited regional constitutional powers have clearly not been fully exhausted.

This rather weak constitutional autonomy is not well-suited to help solve conflicts resulting from quests for greater autonomy, as it fails to provide the regional units with a strong feeling of identity. A way forward might be combining a more stringent and transparent organization of Belgian federalism as suggested above with enhanced regional constitutional autonomy. In addition to its important symbolic function, full subnational constitutional power might allow identifying, defining and addressing regional concerns in a more effective way without having to unravel the federation as such.[XLIII] In this context, the "slippery slope" argument might be tackled by clearly defining the limitations of such power in the Belgian Constitution and by retaining original sovereignty at the central level.

To the extent that demands for greater regional autonomy are driven by economic reasons, this autonomy might include a right to levy additional regional taxes, either exclusively or in conjunction with the federation (as for instance in Switzerland).[XLIV] In addition, the current situation whereby the center retains the residual powers, i.e. those not transferred to the regions, could be reversed.[XLV] Such powers would have to be primarily established by the Belgian Constitution, but might equally be reflected at the regional constitutional level, hence strengthening regional identification. In spite of the high hurdles for constitutional amendment, reform in the direction of stronger subnational constitutional powers does not appear completely unrealistic.[XLVI] There is currently a major movement towards a subnational constitution, in particular in the Flemish parliament, the latest step being a Draft Charter for Flanders as completed in 2010.[XLVII] This might help create the necessary thrust to prompt further constitutional reform.

3. Subnational Constitutional Power in Catalonia

3.1. Overarching Constitutional Framework

The current Spanish Constitution of 1978 retains Spain as a unitary State which distinguishes it from the federal model whilst providing a high degree of autonomy to the regions.[XLVIII] Art. 2 of the Constitution stipulates on the one hand that "[t]he Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards"; on the other hand it "recognizes and guarantees the right to autonomy of the nationalities and regions of which it is composed and the solidarity amongst them all".[XLIX] Whilst "nationalities" and "regions" are mentioned separately, these terms are not defined differently by the law, nor are they listed anywhere in the Constitution.[L] Art. 137 organizes the Spanish State by distinguishing between "municipalities, provinces, and Autonomous Communities that may be constituted".[LI] Further provisions within the same Title VIII of the Constitution lay out procedures regarding "access to autonomy", powers of Autonomous Communities and their essential rules of governance, as well as a central parliamentary approval process.[LII] The latter happens through a so-called organic law according to Art. 81 para 1.[LIII] The autonomy initiative according to Art. 143 et seq. requires drafting and adopting a "Statute of Autonomy" (Art. 146 et seq.)[LIV], which constitutes the "basic institutional document" whilst forming "an integral part of the constitutional legal order".[LV] Pursuant to Art. 147 para 2. d), each Statute needs to lay out, inter alia, "[t]he powers assumed within the framework established by the Constitution and the basic conditions for the transfer of the services corresponding to them".[LVI] Amendments to the Statute shall "conform to the procedure established therein and shall in any case require the approval of the Cortes [i.e. Parliament] through an organic law".[LVII] Art. 148 provides a list of powers that the provinces may assume, whereas Art. 149 retains other powers at the central level. Within the limits defined by these provisions, subsequent expansions of regional powers may be undertaken after five years (Art. 148 para 2), unless a fast-track procedure (Art. 151) is used which provides a higher degree of democratic legitimation, in particular through a referendum.[LVIII]

As the Constitution establishes little more than a blueprint of regional powers[LIX], the actual structure of the Autonomous Communities varies, depending mainly on whether the slow track (Art. 143) or the fast track (Art. 151) was chosen.[LX] The latter can be combined with Art. 2 of the Interim Provisions listed in Title XII of the Constitution. According to this norm, "territories which in the past have, by plebiscite, approved draft Statutes of Autonomy, and which at the time of the promulgation of this Constitution, have provisional autonomous regimes, may proceed immediately in the manner provided in clause 2 of Art. 148, when agreement to do so is reached by an absolute majority of their pre-autonomous higher corporate bodies, and the Government is duly informed".[LXI] There are additional rules stipulating involvement of the federal Parliament, e.g. Art. 144 a) (authorization of Autonomous Communities not exceeding the size of full provinces), Art. 144 b) (autonomy for territories outside provinces) and Art. 150 (2) (transfer of competences).[LXII] Finally, the First Additional Provision of the Constitution provides protection to the former statutory foral regions ("fueros"), whereas the Fifth Interim Provision allows for the "cities of Ceuta and Melilla" to "set themselves up as Autonomous Communities".[LXIII] This structure suggests a form of asymmetric autonomy which facilitates tailor-made subnational constitutional setups.[LXIV] Placing a lot of responsibility in the hands of the regions comes, however, at the price of a high degree of fragmentation and complexity.

3.2. Subnational Constitutional Power within that Framework

This incomplete and complex framework has led to a certain patchwork of subnational powers, with regions achieving autonomy through various combinations of the above-mentioned rules, resulting in 17 Autonomous Regions and 2 Autonomous Cities.[LXV] The patchwork character appears to be owed rather to historical circumstances than to rationality or transparency. The scattered nature of relevant constitutional provisions reveals that the arrangement attempts to square the circle in accepting strong competing claims for integration and autonomy.[LXVI] When the Spanish State was re-launched after the end of the Franco regime, this framework may have been a useful compromise in order to achieve a constitutional settlement in the first place.[LXVII] However, it lacks the necessary detail and clarity to accommodate current regional claims for autonomy in an equitable and transparent manner.[LXVIII] This is aggravated by the fact that the Spanish Constitution

confers powers onto the regions without elevating them to the status of federated entities. Art. 148 and 149 leave substantial scope for regional competences, but the Constitution merely provides statutory instead of full subnational constitution-making power. In subjecting the precise scope of powers to the choice of each province, Spain constitutes a very specific model of asymmetric federalism, not in the sense that it would grant different powers to the regions (with the exception of the Basque country and Navarre)[LXIX], but by setting up an à la carte model which, to a certain extent, invites the regions to make their individual choices.[LXX] This creates a subnational constitutional space which can be cultivated autonomously by the regions in cooperation with the central Parliament through the approval process.

The resulting Statutes can be quite far-reaching in practice.[LXXI] It is therefore important to note that the extent of constitutional autonomy is thoroughly checked by the Spanish Constitutional Court. Through a number of landmark decisions, the Court has defined and limited regional autonomy by stating that this autonomy is of a political and not merely administrative nature, but must not compromise national unity. [LXXII] Constitutional autonomy has been a particularly thorny issue in a recent controversy relating to Catalonia's new Statute of Autonomy passed in 2006, which characterized Catalonia as a nation in the Preamble and contained far-reaching rules on regional autonomy.[LXXIII] In essence, the Constitutional Court rejected 14 and read down 27 out of the 114 articles.[LXXIV] The Court emphasized that "statutes of Autonomy are rules subordinated to the Constitution, as it [*sic!*] corresponds to normative provisions that are not an expression of a sovereign power, but of a devolved autonomy based on the Constitution, and guaranteed by it, for the exercise of legislative powers within the framework of the Constitution itself".[LXXV] Relying on this framework, the Court went on to ascertain several constitutional functions of the Statutes, stipulating that "[t]he first constitutional function of the Statutes of Autonomy lies therefore in the diversification of the Legal System through the creation of devolved regulatory systems, all hierarchically subordinated to the Constitution and organized among them in accordance with the criterion of competence".[LXXVI] Second, "it has the function to attribute powers that define, on the one hand, an internal remit for the regulation and exercise of public powers by the Autonomous Community, and help to outline, on the other hand, the scope of regulation and powers inherent to the State".[LXXVII] In a nutshell,

the Court has thus secured the supremacy of the national Constitution, whilst emphasizing the important constitutional functions of subnational Statutes of Autonomy.[LXXVIII]

As in Belgium, subnational constitutional power of the Spanish regions exists merely in a wider sense. Admittedly, the Statutes of Autonomy come much closer to subnational constitutions than the Belgian Special Majority Act and subsequent decrees.[LXXIX] Furthermore, the Spanish regions have more influence over the actual scope of their subnational constitutional powers than the Belgian regions or communities. But the authorization provided is still weaker than the far-reaching empowerment of regions in Germany or Switzerland that were able to establish fully-fledged constitutions. The quest for independence in Catalonia may be too vigorous to be successfully accommodated by a subnational constitution,[LXXX] and some of the more nationalistic elements of its latest Statute of Autonomy could not be valid parts of such a constitution, either.[LXXXI] Still, authorization of regional constitution-making in a more formal sense might serve as an additional focal point for intra-state identity. As in Flanders, economic motives for further autonomy might be addressed by a subnational constitutional autonomy that includes an enhanced power to levy regional taxes.[LXXXII] Such empowerment might be less suitable to deal with the more emotional side of the argument, although one should not underestimate the potential for national identification with a constitution (including its symbolic value) as an expression of regional self-determination, even if constrained by the overarching national framework.[LXXXIII] However, feasibility of subnational empowerment through required constitutional change at the central level is limited by the fact that amendments would have to be carried out by a three-fifths majority in each legislative chamber (Art. 167), which posits a slightly lower hurdle than the Belgian Constitution - unless a more fundamental constitutional revision is undertaken which even requires a two-thirds majority plus a successful referendum (Art. 168 para 1).[LXXXIV] Since its adoption in 1978, the Spanish Constitution has not been reformed, even though it has been affected by a number of changes at the regional level.[LXXXV] This does not invite a very optimistic assessment of chances for systematic reform.[LXXXVI]

4. Subnational Constitutional Power in Scotland

4.1. Overarching Constitutional Framework

The UK Constitution has grown over the centuries without having ever been laid down in a single inclusive document.[LXXXVII] It represents a cluster of statutes, treaties, common law and constitutional conventions.[LXXXVIII] Due to the lack of comprehensive codification, there is disagreement as to what precisely qualifies as constitutional, i.e. is "important or significant enough to be included".[LXXXIX] This has been clarified by the House of Lords Constitutional Committee according to which the Constitution consists of "the set of laws, rules and practices that create the basic institutions of the State, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual".[XC] This should include rules dealing with the distribution of powers between the UK and the Scottish parliaments and governments. After a long period of being an independent nation, Scotland came to be part of the Kingdom of Great Britain in 1707 through the Articles of Union.[XCI] Through the Act of Union in 1800, the United Kingdom of Great Britain and Ireland (later to be reduced to Northern Ireland) was established.[XCII] Scottish autonomy was increasingly established through devolution as stipulated by Westminster Parliament, in particular through the Scotland Acts 1998 and 2012.[XCIII] With Wales and Northern Ireland having obtained devolved powers, as well, the devolution settlement increasingly resembles a quasi-federalist setting.[XCIV]

Devolution has been strengthened by the *Sewel* Convention according to which Westminster legislation in devolved areas requires the consent of the Scottish Parliament.[XCV] In order to accommodate this in practice, the Scottish Parliament has started passing *Sewel* resolutions which authorize Westminster to legislate "on its behalf".[XCVI] Since constitutional conventions are merely politically binding, the resulting entrenchment of devolved powers does not appear very strong.[XCVII] However, when assessing the quality of devolved powers, one should take into account that conventions are usually adhered to and valued highly,[XCVIII] whereas the tendency towards strict legal entrenchment in other countries is not dominant in the British legal culture.[XCIX] Instead, a strong trust in political arrangements appears to stabilize expectations regarding permanent

devolution in a similar way as legal entrenchment by enumerated constitutional powers and constitutional court supervision does in other legal orders. The effectiveness of entrenchment as a means of conflict resolution does not hinge on its legal quality, but on the perceived level of stability and reliability it generates. This requires a broader conceptualization of law's role in a society, the basic contention being that legal cultures diverge substantially in this regard.[C]

Further entrenchment might result from limitations to parliamentary sovereignty in a legal sense.[CI] Their effectiveness will depend on how intensely they can be scrutinized by the courts.[CII] In that sense, the classical view of *Dicey* has begun to be challenged by several judges, e.g. *Lord Justice Laws* who claimed in *Thoburn* that "constitutional statutes", i.e. statutes on matters of particular importance, would not be subject to implicit, but only to explicit repeal.[CIII] Similarly, in *Jackson*, *Lord Justice Steyn* stated that "[w]e do not in the United Kingdom have an uncontrolled institution", pointing to the EU membership, the Scotland Act and to the Human Rights Act.[CIV] *Lord Justice Hope* even expressed the view that "…Parliamentary sovereignty is, if it ever was, no longer absolute".[CV] Finally, in *H v Lord Advocate* the Supreme Court indicated that the Scotland Act 1998, due to its "fundamental constitutional nature", cannot be impliedly repealed.[CVI] Whilst these statements were only made obiter dicta, *Tierney* sees them as "significant cracks in what has traditionally been a monolithic acceptance by senior judges of Westminster's untrammeled legislative power".[CVII] Referring also to European Union (EU) membership and the Human Rights Act, he views the devolution settlement as having "the potential to become the most stark example of how a devolved territory can use existing powers and the historical legacy of a distinct juridical identity to push for further constitutional space to an extent that the narrative of undivided sovereignty becomes less and less sustainable as an explanation for the nature of divided powers in such a heavily decentralized state".[CVIII]

This assessment is not uncontested.[CIX] Firstly, recent Supreme Court decisions have elsewhere confirmed Westminster's parliamentary sovereignty vis-à-vis the Scottish Parliament.[CX] Secondly, repealing the European Communities Act might violate the treaties (although even that is now doubtful due to the exit option introduced by the Lisbon Treaty[CXI]), but from the domestic perspective it might still be covered by parliamentary

sovereignty.[CXII] Thirdly, the European Convention on Human Rights and Fundamental Freedoms (ECHR) does not even claim to take supremacy over domestic law, and the implementing Human Rights Act does not allow the courts to set aside primary legislation, but limits them to declarations of incompatibility.[CXIII] Finally, any EU or ECHR related limitations of sovereignty would be motivated by international obligations instead of domestic settlements and therefore hardly lend itself for valid conclusions as to the constitutional repercussions of the latter. To conclude, potential inroads into parliamentary sovereignty appear to be either challengeable or ill-suited to prove the existence of a legally entrenched subnational constitutional space.

4.2. Subnational Constitutional Power within that Framework

Elements of a Scottish Constitution have been able to develop during a long period of history.[CXIV] The Union with England did not terminate that process entirely, but gradually superseded it through acts of Westminster Parliament, court decisions and conventions addressing the Union as a whole.[CXV] The House of Lords assumed appellate jurisdiction over civil law cases, and the development of public law was transferred into the hands of the UK Parliament.[CXVI] At the same time, the Union preserved and formalized some elements of Scottish sovereignty, including the "independence of Scottish private law and the judiciary".[CXVII] Whilst the Union did not explicitly recognize Scottish constitution-making powers, such powers can arguably be assumed to predate the Treaty of Union and to have been implicitly recognized by the UK Constitution. In that sense, the Treaty of Union may be read as a constitutional document providing or implicitly recognizing a certain Scottish constitutional space.[CXVIII]

The Scottish Constitution does not take a clearly established form and is far from complete, but was further strengthened through the devolution settlement.[CXIX] The Scotland Act 1998 devolved a number of powers to Scotland, whilst reserving others to Westminster.[CXX] As a consequence, the Scottish Parliament was elected and has passed legislation on a wide range of issues ever since.[CXXI] Its creation shows how Scotland started to occupy the constitutional space.[CXXII] *Murdison* concludes that "the Scottish constitution continues to develop alongside the British constitution, and it has received more room to grow" even though "Westminster continues to control important aspects of

sovereignty".[CXXIII] One should be cautious not to overstate this point, as devolution has been formally effectuated by the UK Parliament, hence by a process that has not been legally controlled by the Scottish constituency (even though it is the consequence of political negotiations between the Scottish and the UK government). However, to the extent that Scotland continued to fill the resulting enlarged space by legislating on essential matters of regional governance, its Constitution continues to develop. This is due to the fact that the understanding of the Constitution is broader than in Belgium or Spain so that even legislation that does not assume a certain formal quality as the Spanish Statutes of Autonomy can qualify as constitutional as long as it carries a substantial weight as stipulated by the House of Lords definition given above. Interestingly, this expands the subnational constitutional space per definition rather than by actual empowerment.[CXXIV]

In line with the binary nature of the referendum process (independence/non-independence), recent drafting efforts have almost been exclusively limited to the design of an independent Scotland's constitution, whereas a written constitution within Scotland has hardly been discussed. This may change now that the independence question has been answered in the negative, at least for the time being.[CXXV] The current avenue of strengthened regional powers points towards greater fiscal autonomy,[CXXVI] which could be reflected in the Scottish Constitution as well as in Scottish statutory legislation. The reinvigorated discussion on a potential federal set-up not only for Scotland, but also for Wales, Northern Ireland and potentially even for parts of England, in combination with the traditional reluctance to codify the UK Constitution, might further spur such entrenchment at the regional level. At the same time, a federal arrangement is hardly conceivable without a more formalized central constitutional framework than what is currently available. [CXXVII]

In spite of the boost that it provided for Scottish autonomy, the Scotland Act 1998 clearly did not provide any answer as to the future of Scotland's Constitution.[CXXVIII] The same applies to the subsequent Scotland Act 2012 which devolved further powers.[CXXIX] Facing the outcome of the independence referendum, nothing in the current UK Constitution prevents the devolution of further competences or a further entrenchment of existing ones.[CXXX] This would not be tantamount to embracing the notion of "devomax"[CXXXI], the precise content of which appears to remain somewhat blurred and

subject to interpretation. The point would be not to achieve a maximum, but rather an optimum which tackles the conflict resulting from competing claims for integration and disintegration by accommodating both as far as possible and by respecting their underlying motives.[CXXXII] To that end, stronger fiscal autonomy would be an important step.[CXXXIII] Powers regarding energy policy, in particular oil and gas, and the accruing revenues could be added to the package,[CXXXIV] although this must not create an imbalance to the detriment of the UK as a whole.[CXXXV] Ultimately, Scotland might proceed to create its own written constitution within the UK constitutional framework.[CXXXVI] Such a basic document might lay down a number of fundamental principles of government, a list of legislative powers, rules on legislative process and fundamental rights.[CXXXVII] Looking at the current elements of the Scottish Constitution, it would stipulate rules on the Scottish Parliament, including elections and legislative powers; the Scottish government as led by the First Minister; the Scottish court system, in particular the Court of Session; and potentially rules on referendums for fundamental questions.[CXXXVIII] It could also encapsulate fiscal powers alongside rules on budgetary self-responsibility and accountability. Even if such a document might initially have little more than a declaratory function (namely to the extent that it merely restates the pre-existing in a more comprehensive fashion), it could nevertheless provide an important reference point for constitutional identity. At the same time, it might serve as a platform for the further development of Scottish (constitutional) autonomy, as currently envisaged through negotiations with the Westminster government.[CXXXIX] Due to the lack of specific hurdles for constitutional amendment in the UK, such changes might even be carried out by simple legislation and remain "entrenched" through the existing constitutional convention, although a referendum and the creation of a single document would strengthen the constitutional character of that process.[CXL] In that sense, the UK might, against many odds, experience a fresh constitutional moment leading to a more formally entrenched constitutional setup both at the national and the regional levels, maybe even with a (quasi-) federal outcome.[CXLI]

It remains to be seen whether these suggestions might help accommodate the continued thrust for greater self-determination. This depends to a large extent on the motives behind this plea. In this regard, *Thomsen* convincingly argues that "[w]hereas nationalist movements are often fuelled by emotional demands for 'natural' self-

determination, … [in the case of Scotland] surrendering independence was a pragmatic or, some would argue necessary response to a critical social and economic situation".[CXLII] Likewise, in light of changed circumstances, the Scottish quest for independence appears to be "an explicit accentuation of concerns about political and socio-economic advantages and disadvantages of political nationalism – that is the stressing of pragmatic reasoning over ethno-cultural affection".[CXLIII] Such pragmatic concerns might be easier to address by a well-designed and entrenched form of devolution including substantial financial autonomy (and corresponding accountability), whereas more emotional motives could be more difficult to tackle.[CXLIV] At the same time, one of the assets of a written subnational constitution would be its high symbolic value which might appeal not only to the minds, but also to the hearts (which seem to play a major role in the Scottish independence debate, as well).

5. Conclusions

This paper has set out to show that formal subnational constitutional power and its use can help accommodate quests for greater autonomy and independence, no matter whether they are fuelled by more rational or more emotional motives. It has suggested that such power can serve as a focal point for national identification and provide a coherent framework for regional self-determination. Subnational constitutional power should be seized and used actively.[CXLV] Where it lacks or is deficient (as in Belgium and, to a lesser extent, in Spain), it should be provided or strengthened within the overall constitutional setup, since it can be part and parcel of a more fine-tuned response to centrifugal tendencies than independence, or at least serve as a compromise where independence is currently not attainable. Provided the central constitution clearly defines the limitations of that empowerment and its exercise and retains original sovereignty, fears regarding a slippery slope towards unilateral secession appear less warranted than the actual risks associated with insufficient accommodation of legitimate quests for self-determination within the State.

At the same time, this shows that anchoring subnational constitutional power at the national level requires a coherent and transparent central constitutional framework. In that

sense, the complex Belgian Constitution and the somewhat fragmented character of the Spanish Constitution might benefit from a substantial reform that, due to the existing thresholds for constitutional amendments, is rather difficult to achieve. This stands in contrast to the UK Constitution which, due to its informal nature, can be changed much more readily. This, of course, comes at the cost of formal entrenchment so that the effectiveness of the future Scottish Constitution in accommodating claims for self-determination will depend on the societal trust in political forms of securing subnational constitutional space. As *Tierney* has aptly put it, "the United Kingdom seems to be a dynamic laboratory to test the role played by sub-state territories in effecting constitutional change in an environment that is neither entirely unitary nor federal".[CXLVI]

One should emphasize that subnational constitutional power cannot operate as a "panacea".[CXLVII] First of all, regional powers do not necessarily need to be reflected in regional constitutions, but may also be expressed through ordinary statutes (sometimes classified as constitutional) or administrative action. Subnational constitutional power as provided by a central constitution can be far-reaching and its effectiveness in accommodating centrifugal tendencies hinges on its specific exercise, although the latter may again be restrained by the central constitution, e.g. by stipulating homogeneity requirements.[CXLVIII] Even where such power has been granted and used in a more complete sense as for instance in Germany or Switzerland[CXLIX], its effectiveness in accommodating centrifugal tendencies may be limited or at least difficult to assess – be it because such tendencies have been minor or because there are many other factors that may equally contribute to the accommodating effect. Furthermore, such federal arrangements usually demand a high level of entrenchment through a written constitution at the national level that delineates the respective regional and central powers. If the United Kingdom opted for a federal solution, creating such a written constitution would be a key challenge. Another one would be how to deal with an asymmetry that may facilitate fine-tuned subnational autonomy, but also enhance complexity and raise issues of fairness.[CL] Finally, where societal gaps have become as apparent as in Spain or Belgium, the accommodating effects of constitutional responses (where they can be attained) may be limited, as illustrated by the quasi-constitutional Catalan Statute of Autonomy.

With all of that in mind, a case for constitutional engineering can still be made.[CLI] Where independence is (currently) unattainable, strong and entrenched subnational constitutional power can be one out of several tools for a suitable constitutional compromise that adequately responds to centrifugal tendencies without inviting secession. Where such quests for internal self-determination are strong enough, they may eventually generate the majorities for constitutional reform, in spite of existing amendment hurdles. Ultimately independence might not be identified as the best option for strong regions within an integrated Europe that recognizes them - whilst being itself evidence of the fact that decisions increasingly require transnational coordination and take effects beyond the domestic realm.

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* Reader, School of Law, University of Aberdeen. Email: dirk.hanschel@abdn.ac.uk. The author wishes to thank his colleagues at Aberdeen law school as well as Eibe Riedel for their comments and suggestions. The paper (for a draft version see https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws2/w2-hanschel.pdf (last accessed on 30 November 2014)) was further refined in light of feedback received at the IXth World Congress of the International Association of Constitutional Law in Oslo in June 2014 and at the Society of Legal Scholars Annual Conference 2014 in September in Nottingham. Final thanks go to the reviewers for their feedback and suggestions.

I By using the term "subnational" this paper relates regional constitutions to those of sovereign states, without disregarding that some regions may in fact consider themselves as nations, as well. For the research context see Tarr et al. 2004, as well as http://www.iacl-aidc.org/en/iacl-research-groups/subnational-constitutions-in-federal-quasi-federal-constitutional-states (last accessed on 30 November 2014); see furthermore Williams 1997; for a broad understanding of constitutional arrangements see Saunders 1999: 23.

II On this approach see, for instance, Williams and Tarr 2004: 15. The paper thus implicitly suggests that responding to quests for greater autonomy can have an accommodating effect at all instead of necessarily fuelling further-reaching demands; on this debate see, with regard to "post-conflict federalism", Choudhry and Hume 2010: 356 et seq.; with regard to devolution as a potential "slippery slope to separation" and the question whether "the demands of the Scots and the Welsh [could] be contained within the traditional parameters of the British constitution", or whether "devolution [would] involved constitutional upheaval on a massive and unpredictable scale" see Bogdanor 2009: 34. He also addresses the problem of the inherent "asymmetrical" nature of devolution, begging the question whether it might "lead to new discontents and prove a springboard for further grievances" (p. 34 et seq.), see furthermore ibid., p. 94 et seq.; for a specific EU perspective on the issues see Closa 2014; for a critical account on secession as a solution in light of centrifugal tendencies see Brown-John 1999: 594 et seq.; conversely on the viability of constitutionalizing secession see Haljan 2014.

III On current centrifugal tendencies within these regions see for instance "Scottish Independence", http://www.theguardian.com/politics/scottish-independence (last accessed on 28 November 2014); "Spanish Parliament Rejects Catalan Independence Vote", http://www.bbc.co.uk/news/world-europe-26949794 (last accessed on 28 November 2014); http://www.flemishrepublic.org (last accessed on 28 November 2014); "Catalonia, Scotland and Flanders Force Separatism Back on the EU Agenda", http://blog.gmfus.org/2012/12/06/catalonia-scotland-and-flanders-force-separatism-back-on-the-eu-agenda (last accessed on 28November 2014); on the value of comparative constitutional analysis in this field as well as on the inherent limitations see Himsworth 2013: 349; for a comparison of federalism and devolution see von Andreae 2005; on the classification of the Spanish constitutional system as "quasi-federal" see Rius-Ulldemolins and Zamorano 2014.

IV On Germany see for instance Stiens 1997; Menzel 2002; on Switzerland see Fleiner 1995: 57; Nuspliger 2000: 66 et seq.; on both countries see furthermore Hanschel 2012: 117 et seq., 478 et seq., for a comparative

analysis of subnational constitutions see for instance Watts 1999.

[V] On the notion of conflict resolution in federations from a comparative perspective see Hanschel 2008 and 2012, including persisting challenges for the German federal system.

[VI] See http://www.bbc.co.uk/news/events/scotland-decides/results (last accessed on 28 November 2014).

[VII] See http://www.const-court.be/en/basic_text/belgian_constitution.pdf (last accessed on 1 December 2014).

[VIII] See http://www.const-court.be/en/basic_text/belgian_constitution.pdf (last accessed on 1 December 2014).

[IX] Popelier 2012: E39; on the series of State reforms leading to this result and beyond see Peeters 2012: 164; see furthermore http://www.belgium.be/en/about_belgium/country/history/belgium_from_1830/formation_federal_state (last accessed on 28 November 2014); on the importance of the Fifth State Reform which transferred a number of powers to the Regions and the Communities see Sinardet 2012: 135 et seq.; on the recent Sixth State Reform see Reuchamps 2013: 375.

[X] Popelier 2012: E39.

[XI] Idem.

[XII] See Pas 2004: p. 161.

[XIII] See http://www.const-court.be/en/basic_text/belgian_constitution.pdf (last accessed on 1 December 2014).

[XIV] Pas 2004: 163.

[XV] Pas 2004: 163; Popelier 2012: E 39.

[XVI] Pas 2004: 163 et seq.

[XVII] Pas 2004: 164; Peeters 2012: 168.

[XVIII] Idem.

[XIX] Pas 2004: 164 et seq.; Peeters 2012: 168, with further details on its complex status.

[XX] Pas 2004: 165; Peeters 2012: 168.

[XXI] Generally on the notion of constitutional pluralism see for instance Walker 2002: 317 et seq.

[XXII] Peeters 2012: 165.

[XXIII] On the powers of the Constitutional Court in solving such conflicts see Art. 141 et seq. of the Belgian Constitution, see http://www.const-court.be/en/basic_text/belgian_constitution.pdf (last accessed on 1 December 2014). On continued political negotiations and crisis see for instance http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/10/01/589-days-with-no-elected-government-what-happened-in-belgium (last accessed on 28 November 2014)

[XXIV] See for instance http://www.flemishrepublic.org (last accessed on 28 November 2014).

[XXV] Peeters 2012: 167.

[XXVI] Peeters 2012: 167 et seq.

[XXVII] Idem.

[XXVIII] Contiades 2013: 39 et seq.; see furthermore Behrendt 2013: 35 et seq.; for Art. 195 see http://www.const-court.be/en/basic_text/belgian_constitution.pdf (last accessed on 1 December 2014). Part of the Sixth State Reform was the insertion of a transitional provision in Art. 195; for a critical account of that provision, which lowers the requirements for amendment, see http://belgianconstitutionallawblog.com/2014/11/17/revision-constitution-sixth-state-reform (last accessed on 30 November 2014).

[XXIX] See Reuchamps 2013; for the text of the agreement see http://www.lachambre.be/kvvcr/pdf_sections/home/FRtexte%20dirrupo.pdf (last accessed on 1 December 2014); see furthermore http://www.flanderstoday.eu/politics/historical-constitution-reforms-will-create-new-belgium (last accessed on 28 November 2014); http://programmedestabilite.be/en/Institutional_reform.htm (last accessed on 30 November 2014); for the resulting changes in the Constitution see http://www.const-court.be/en/basic_text/belgian_constitution.pdf (last accessed on 1 December 2014).

[XXX] Popelier 2012: E39, with further references; see furthermore Peeters 2012: 165, and in more detail at 169 et seq., where he describes constitutive autonomy as "rather limited compared to other federal states and […] not [as] a sufficient legal basis for the communities and regions to adopt their own constitutions" (170). As Popelier 2012: E41, points out this limitation is essentially due to the fear of the "French-speaking parties" that the Flemish might use such a constitution as a tool for a "separatist agenda".

[XXXI] Pas 2004: 165; Popelier 2012: E40. Constitutive autonomy is, however, now being extended to them as a result of the Sixth Belgian State Reform, see Reuchamps 2013: 387.
[XXXII] Pas 2004: 165.
[XXXIII] Peeters 2012: 166 et seq.
[XXXIV] Peeters 2012: 165.
[XXXV] Pas 2004: 165; Peeters 2012: 169.
[XXXVI] On this assessment see Pas 2004: 165; Peeters 2012: 164.
[XXXVII] See http://www.const-court.be/en/basic_text/belgian_constitution.pdf (last accessed on 1 December 2014).
[XXXVIII] Pas 2004: 168; Popelier 2012: E40. The Act (as displayed at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=1980080802) was amended by subsequent legislation, see http://www.gallilex.cfwb.be/fr/leg_res_00.php?ncda=8739&referant=l00&bck_ncda=5108&bck_referant=l00 (last accessed on 28 November 2014).
[XXXIX] Popelier 2012: E40.
[XL] Ibid.
[XLI] Pas 2004: 165.
[XLII] Pas 2004: 169.
[XLIII] For a detailed account of the pros and cons of subnational constitutions for Belgium, albeit with a more cautious result, see Popelier 2012: E 42 et seq.
[XLIV] On the importance on taxation and the complex current system see for instance Peeters 2012: 169; on progress in this direction through the Sixth Belgian State Reform, e.g. in relation to energy tariffs, see http://www.ffw.com/publications/all/articles/belgian-state-sixth-reform.aspx (last accessed on 28 November 2014). This reform shows that fiscal autonomy does not require subnational constitutions, but the latter may help to organize the resulting subnational regulatory space in a way that secures societal identification and unity.
[XLV] See Peeters 2012: 171 et seq., who points to the fact that Art. 35 of the Belgian Constitution already makes provision for that option once a list of enumerated federal powers has been created.
[XLVI] Pas 2004: 169; on the chances for reform see also Peeters 2012: 171 et seq.; on the Sixth State Reform see Reuchamps 2013.
[XLVII] Idem; see furthermore Popelier 2012: E41 et seq.; for the actual text see http://www.vlaanderen.be/int/sites/iv.devlh.vlaanderen.be.int/files/documenten/Charter%20For%20Flanders.pdf (last accessed on 28 November 2014).
[XLVIII] Ruiz Vieytez 2004: 135 et seq.
[XLIX] See http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx (last accessed on 1 December 2014).
[L] Ruiz Vieytez 2004: 136 et seq.
[LI] See http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx (last accessed on 1 December 2014); see furthermore Ruiz Vieytez 2004: 137.
[LII] Ruiz Vieytez 2004: 137.
[LIII] See Cabellos Espiérrez 2009: 56 et seq.
[LIV] See http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx (last accessed on 1 December 2014).
[LV] Ruiz Vieytez 2004: 138; on the proliferation of such statutes in recent years see Martinico 2010.
[LVI] See http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx (last accessed on 1 December 2014).
[LVII] See Art. 147 (3) of the Constitution, http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx (last accessed on 1 December 2014); on the importance of parliamentary approval see Viver 2012: 226 et seq.
[LVIII] As Ruiz Vieytez 2004: 139, states, this operates on a "semi-contractual nature" and allows for "the possibility of attaining a higher degree of competence from the very beginning of the autonomous system"; more generally on the admissibility of referendums under the Spanish Constitution see Martín Núñez 2012. For the relevant constitutional provisions see http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx (last accessed on 1 December 2014).

[LIX] See Colino and Olmeda 2012: 191 et seq.; on the "dispositive principle" as one important, but heavily criticized feature of the Spanish governance system see Viver 2012: 223.
[LX] Ruiz Vieytez 2004: 139.
[LXI] See http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx (last accessed on 1 December 2014).
[LXII] See Ruiz Vieytez 2004: 140 et seq.; see http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx (last accessed on 1 December 2014).
[LXIII] See http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx (last accessed on 1 December 2014); see furthermore Ruiz Vieytez 2004: 140 et seq.
[LXIV] On asymmetric autonomy see for instance Weller and Nobbs 2012.
[LXV] Ruiz Vieytez 2004: 140 et seq., see in particular the Chart on p. 142; see furthermore Colino and Olmeda 2012: 191, who speak of "decentralization *à la carte*"; on recent reforms "related to devolution of competences, redistribution of resources and symbolic issues" see ibid., 192; on the lack of completeness of the constitutional framework and how the regional Statutes have filled the gaps see Vider 2012: 222 et seq.; see furthermore Flores Juberias 2013: 232 et seq., who describes the Spanish Constitution as an "open-ended model".
[LXVI] As Colino and Olmeda 2012: 191, put it: "It is a devolutionary and evolutionary federalism, which has produced at the same time a dynamic entailing both a centrifugal and differentiating tendency and a centripetal and equalizing one."
[LXVII] Hence, it has been "praised and advocated as the best way to accommodate a country perceived by some minorities as multinational", see Colino and Olmeda 2012: 191 et seq., with further references.
[LXVIII] As Viver 2012: 220, points out there is a "failure to complete the constitutionalization of the system of political decentralization, that is, to incorporate into the Spanish Constitution provisions pertaining to the territorial power structure. Whereas in other constitutions such provisions normally appear in the federal constitution, in Spain they are relegated above all to the statutes of autonomy and to legislation."
[LXIX] Viver 2012: 233 et seq.
[LXX] See Colino and Olmeda 2012: 191; see furthermore Viver 2012: 232 et seq., as well as 232 mentioning the heavily criticized "dispositive principle" of the Spanish Constitution; on the powers assumed by the Provinces see the list by Ruiz Vieytez 2004: 144 et seq.
[LXXI] See Viver 2012: 224 et seq.: "it should be stressed that the statutes of autonomy are not limited to assuming powers not reserved by the central government."
[LXXII] See generally Cabellos Espiérrez 2009: 43 et seq.; on the most recent decision against the intended Catalan independence referendum and the reaction of the Spanish Parliament see http://www.theguardian.com/world/2014/apr/08/spain-set-to-reject-catalonia-indpendence-referendum (last accessed on 28 November 2014); on the referendum which was ultimately carried out without permission see http://www.cataloniavotes.eu (last accessed on 28 November 2014); for a critical account regarding the strong emphasis that the Spanish government places on rule of law arguments in this regard and for a plea in favor of a political solution see Casals and Krisch at http://blogs.lse.ac.uk/europpblog/2014/11/04/using-spanish-law-to-block-catalonias-independence-consultation-may-simply-encourage-catalans-to-construct-their-own-alternative-legality (last accessed on 28 November 2014).
[LXXIII] See http://www.parlament.cat/porteso/estatut/estatut_angles_100506.pdf (last accessed on 28 November 2014); generally on the Catalan Autonomy Statutes see Flores Juberias 2013: 235 et seq.
[LXXIV] See Colino and Olmeda 2012: 198 et seq.; for the actual judgment see http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2862010en.aspx (last accessed on 28 November 2014); on the judgment see furthermore Delledonne 2011: N2, who finds it to be "succeeding in not condemning as illegitimate most of its controversial provisions by means of interpretation consistent with the Constitution", whilst contending that precisely this weakening of their legal significance might invite further conflict.
[LXXV] See http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2862010en.aspx (last accessed on 28 November 2014), para. 3, subpara 1. To some extent, this may be contrasted with the Court's decision on the Charter of the Valencian Community, where it had complemented the principle of subordination by referring to Statutes of Autonomy as integral parts of the Constitution, see Tribunal Constitutional Case no. 247/2007, http://hj.tribunalconstitucional.es/docs/BOE/BOE-T-2008-638.pdf (last

accessed on 28 November 2014), p. 18; see furthermore Delledonne 2011: N7.
[LXXVI] See http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2862010en.aspx (last accessed on 28 November 2014), para 4, subpara 3.
[LXXVII] Idem, para 4, subpara 4.
[LXXVIII] Similarly Colino and Olmeda 2012: 198 et seq.
[LXXIX] Hence, the Catalan Statute of Autonomy (2006), both in its contents and its form, shows a certain similarity with subnational constitutions, see http://www.parlament.cat/porteso/estatut/estatut_angles_100506.pdf (last accessed on 28 November 2014). As Tarr et al. 2004: 5, claim, Statutes of Autonomy "do seem to exhibit some of the attributes of constitutions, but that term is studiously avoided in Spain".
[LXXX] See the recent quarrels on the legality of the intended Catalonian referendum on independence, http://www.bbc.co.uk/news/world-europe-29390774 (last accessed on 28 November 2014).
[LXXXI] See again the judgment of the Spanish Constitutional Court at http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2862010en.aspx (last accessed on 28 November 2014)
[LXXXII] Currently, only the Basque Country and Navarre have far-reaching tax autonomy, see Viver 2012: 233 et seq. According to Art. 157 para 1 (a), additional fiscal autonomy can also be conferred by statute, without requiring a change of the Constitution.
[LXXXIII] On identity clauses within the current Statutes of Autonomy, whilst stressing the danger of the slippery slope, see Ruggiu 2012.
[LXXXIV] Barrero Ortega and Sobrino Guijarro 2013: 304 et seq.
[LXXXV] Viver 2012: 218, 219 et seq.; on the vain attempts to reform the Constitution see Viver 2012: 220 et seq.
[LXXXVI] The Spanish Prime Minister recently invited Catalonia to seek constitutional reform, see http://www.reuters.com/article/2014/11/12/us-spain-catalonia-idUSKCN0IW17520141112 (last accessed on 28 November 2014); for a critical account on the prospects of such change see Casals/Krisch at http://blogs.lse.ac.uk/europpblog/2014/11/04/using-spanish-law-to-block-catalonias-independence-consultation-may-simply-encourage-catalans-to-construct-their-own-alternative-legality (last accessed on 28 November 2014).
[LXXXVII] See Blackburn 2013: 359 et seq.
[LXXXVIII] For an overview see, for instance, Himsworth and O'Neill 2009: 15 et seq.; specifically for the potential status of the Treaty of Union as a constitutional document see ibid., p. 110; on the "sources and nature" of the UK Constitution see furthermore Bradley and Ewing 2011: 8 et seq.
[LXXXIX] Himsworth and O'Neill 2009: 15; for further attempts to define constitutions from the British perspective see Bulmer 2011: 31 et seq.
[XC] http://www.publications.parliament.uk/pa/ld200102/ldselect/ldconst/11/1103.htm (last accessed on 28 November 2014).
[XCI] See Himsworth and O'Neill 2009: 38 et seq.; Murdison 2010: 444; Ford 2007: 106 et seq.
[XCII] See Himsworth and O'Neill 2009: 38 et seq.; Bradley and Ewing 2011: 37 et seq.
[XCIII] On the Scotland Act 1998 see http://www.legislation.gov.uk/ukpga/1998/46/contents (last accessed on 28 November 2014); regarding the literature see for instance Mullen (2009), p. 33 et seq.; Himsworth and O'Neill 2009: 54 et seq.; Blackburn 2013: 364 et seq.; more broadly on the historical development of devolution see Tierney 2012: 196 et seq.; Murdison 2010: 444 et seq. The Scotland Act 2012 implemented the recommendations of the Commission on Scottish Devolution (see http://www.commissiononscottishdevolution.org.uk/ (last accessed on 28 November 2014)) and devolved further matters to Scotland, including taxation powers (see http://www.legislation.gov.uk/ukpga/2012/11/contents/enacted (last accessed on 28 November 2014)).
[XCIV] Tierney 2012: 207. Bogdanor 2009: 89, even asserts that devolution "has transformed Britain from a unitary state to a quasi-federal state". On the asymmetric character of devolution in the United Kingdom see Himsworth 2013: 355 et seq.; McGarry 2012: 148 et seq.
[XCV] Mullen 2009: 34; Himsworth 2013: 375 et seq.; http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-02084.pdf (last accessed on 28 November 2014).
[XCVI] Tierney 2012: 212.
[XCVII] On the classification of constitutional conventions see, for instance, Bradley and Ewing 2011: 19 et seq.

[XCVIII] On the general observance of constitutional conventions see ibid., p. 24 et seq.
[XCIX] For a cautious approach regarding legal constitutional entrenchment in the event of a "yes" vote in the September referendum see Tierney, 'Constituting Scotland: Retreat from Politics?', in Constitutional Law Blog, 8 April 2014, http://ukconstitutionallaw.org/blog/ (last accessed on 28 November 2014).
[C] For a rich debate on the role of legal cultures with regard to constitutional transfer see generally Frankenberg (2013), with critical contributions e.g. by Michaels 2013: 56 et seq.
[CI] See Tierney 2012: 203 et seq.; for an account of pertinent statements by judges see also Himsworth and O'Neill 2009: 108 et seq.
[CII] On the reasons for the lack of litigation before the Judicial Committee of the Privy Council see Hazell 2009: 66 et seq., 76 et seq. Jurisdiction has meanwhile been transferred to the Supreme Court, see http://supremecourt.uk/procedures/practice-direction-10.html (last accessed on 28 November 2014). For the first devolution case regarding distribution of powers see http://www.bailii.org/uk/cases/UKSC/2010/10.html (last accessed on 28 November 2014); see furthermore *Imperial Tobacco Limited*, Judgment Given on 12 December 2012, [2012] UKSC 61, as well as *AXA General Insurance Limited and Others*, [2011] UKSC 46, Judgment Given on 12 October 2011, in particular paras. 43 et seq. (on the scope of judicial review).
[CIII] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), para. 63; see furthermore Tierney 2012: 204.
[CIV] *Jackson v Attorney General* [2005] UKHL 56, para. 102; see furthermore Tierney (2012), p. 204.
[CV] *Jackson v Attorney General* [2005} UKHL 56, at para. 104.
[CVI] *H v Attorney-General* [2012] UKSC 24, para. 30.
[CVII] See Tierney 2012: 205.
[CVIII] Idem.
[CIX] See, for instance, Himsworth and O'Neill 2009: 106 et seq.
[CX] See *AXA General Insurance Limited and Others*, [2011] UKSC 46, para. 46: "Sovereignty remains with the United Kingdom Parliament. The Scottish Parliament's power to legislate is not unconstrained. It cannot make or unmake any law it wishes."
[CXI] See Art. 50 TEU.
[CXII] This needs to be distinguished from the question whether primary legislation breaching EU law without explicitly repealing it can be set aside by the House of Lords (now the Supreme Court), as answered in the affirmative in the case of *Factortame*, see Himsworth and O'Neill 2009: 115 et seq.; see furthermore Bogdanor 2009: 28 et seq., who emphasizes the limiting effect of EC membership on parliamentary sovereignty whilst asserting that this effect has never found major acceptance amongst the population.
[CXIII] Section 4 of the Human Rights Act 1998, see http://www.legislation.gov.uk/ukpga/1998/42/contents (last accessed on 28 November 2014); see furthermore Bogdanor 2009: 59 et seq., who points to the fact that the Human Rights Act only limits the parliamentary sovereignty to the extent that Parliament has to be explicit when deviating from it.
[CXIV] On Scottish constitutional history see Murdison 2010: 445 et seq.
[CXV] See Murdison 2010: 451: "It is no surprise that the dominant nation, England, imposed its own legal philosophy on Scotland through acts of Parliament and through judicial decisions…".
[CXVI] Murdison 2010: 456.
[CXVII] Murdison 2010: 456 et seq.; for a detailed historic account on different viewpoints regarding the constitutional quality of certain provisions see Ford 2007: 130 et seq.
[CXVIII] See Himsworth and O'Neill 2009: 110 et seq.; for a more cautious account see Bogdanor 2009: 11, who points out that "[i]n practice…the fundamental characteristics of the state remained unchanged", whilst conceding that "there are certainly those in Scotland who regard the Act of Union as a constitutional document". He stresses the Great Reform Act of 1832 as more as "[p]erhaps…the nearest that Britain has ever come to a constitutional moment".
[CXIX] Murdison 2010: 463 et seq.
[CXX] Murdison 2010: 463; Mullen 2009: 33 et seq.; Himsworth and O'Neill 2009: 101 et seq.; Himsworth 2013: 376 et seq.; for an overview of reserved and devolved matters see Hazell 2009: 69.
[CXXI] Murdison 2010: 453 et seq.
[CXXII] See Tierney 2012: 195 and 201; on the process of creating the Scottish Parliament see, for instance, Himsworth and O'Neill 2009: 58 et seq., and on its powers 121 et seq.; on the role of the Scottish Constitutional Convention in that process see http://www.scotland.gov.uk/About/Factfile/18060/11550 (last accessed on 28 November 2014).

[CXXIII] Murdison 2010: 465; for a list of reserved matters see Mullen 2009: 41 et seq.
[CXXIV] See Fn. XC above.
[CXXV] On the result of the referendum see http://www.bbc.co.uk/news/events/scotland-decides/results (last accessed on 26 November 2014)
[CXXVI] http://www.bbc.co.uk/news/uk-scotland-scotland-politics-25626977 (last accessed on 28 November 2014).
[CXXVII] See for this the LibDem Report "Federalism: The Best Future for Scotland", Report of the Home Rule and Community Rule Commission of the Scottish Liberal Democrats, October 2012; for a rather critical account of such a federal solution (as compared with Germany), see http://www.theguardian.com/commentisfree/2014/sep/22/federalism-germany-britain-federal-system-uk (last accessed on 28 November 2014); for a plea in favor of a national constitutional convention see http://www.theguardian.com/commentisfree/2014/sep/21/not-fear-f-word-federal-britain-confederal-europe (last accessed 28 November 2014), as well as http://ukconstitutionallaw.org/category/constitutional-reform (last accessed on 26 November 2014); for an alternative approach see for instance the project "Constitution UK", as displayed on http://blogs.lse.ac.uk/constitutionuk/introduction (last accessed on 28 November 2014).
[CXXVIII] Mullen 2009: 37.
[CXXIX] http://www.legislation.gov.uk/ukpga/2012/11/contents/enacted (last accessed on 28 November 2014).
[CXXX] Mullen 2009: 41.
[CXXXI] See, for instance, http://www.bbc.co.uk/news/uk-scotland-scotland-politics-26245611 (last accessed on 28 November 2014).
[CXXXII] On the role of Scottish nationalism both in entering and potentially leaving the Union see Thomsen (2010), p. 43, 228; on Scottish identity see more generally Reicher et al. 2009: 17 et seq.
[CXXXIII] See Mullen 2009: 43 et seq. Meanwhile this has been partially granted by Part III of the Scotland Act 2012 (see http://www.legislation.gov.uk/ukpga/2012/11/contents/enacted (last accessed on 28 November 2014)), but could be further expanded.
[CXXXIV] See for instance http://www.scotland.gov.uk/Topics/Business-Industry/Energy/Facts (last accessed on 28 November 2014).
[CXXXV] See, for instance, point 3.117 of the Calman Report 2009, at http://www.commissiononscottishdevolution.org.uk/uploads/2009-06-12-csd-final-report-2009fbookmarked.pdf which talks about a "pooling of risks and resources" (last accessed on 28 November 2014).
[CXXXVI] On recent attempts to devise a constitution, albeit for an independent Scotland, see Himsworth and O'Neill 2009: p. 2 et seq.; Bulmer 2011: 119 et seq.; on recent discussion regarding this model see http://constitutionalcommission.org/blog/?p=319 (last accessed on 28 November 2014). However, the Constitutional Commission does not take a clear stance on independence, but aims "to promote the constitutional and civic-democratic government of Scotland; whether that be in the form of an independent Scottish State or in the form of a revised union is up to the people of Scotland to decide", see http://www.constitutionalcommission.org/about.php (last accessed on 28 November 2014). Rather critically on a detailed and entrenched written Scottish Constitution Tierney, 'Constituting Scotland: Retreat from Politics?', in Constitutional Law Blog, 8 April 2014, http://ukconstitutionallaw.org/blog (last accessed on 28 November 2014). According to Bogdanor 2009: 14, "[t]here is no point in having a constitution unless one is prepared to abandon the principle of sovereignty of Parliament, for a codified constitution is incomplete with this principle." However, this point is not valid for a subnational constitution respecting the sovereignty of the national Parliament, as this is usually expressed by supremacy clauses, e.g. in the federal context.
[CXXXVII] For parallels see the suggestions on a Scottish Constitution outside the UK framework made by Himsworth and O'Neill 2009, and Bulmer 2011.
[CXXXVIII] The recently published Draft Constitution for an Scottish Independence Bill continues these elements, as well, see http://www.scotland.gov.uk/Resource/0045/00452762.pdf (last accessed on 28 November 2014); see furthermore the work of the Constitutional Commission at http://www.constitutionalcommission.org (last accessed on 30 November 2014).
[CXXXIX] On the process within the Smith Commission see https://www.smith-commission.scot (last accessed on 28 November 2014); on the report published on 27 November see http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf (last accessed on 28

November 2014). The report stresses, inter alia, the strengthening of powers of the Scottish Parliament, further devolution of fiscal powers coupled with enhanced budgetary accountability, a statutory basis for the Sewel Convention and the devolution of further legislative and administrative powers; on the possible consequences of this report see for instance http://ukconstitutionallaw.org/2014/11/27/stephen-tierney-is-a-federal-britain-now-inevitable (last accessed on 30 November 2014).

[CXL] Generally on the constitutional amendment process as carried out by ordinary parliamentary legislation see Blackburn 2013: 366; on "[i]nformal methods of constitutional amendment"…"notably judicial decision-making in matters of public law and changes in the constitutional conventions regulating the system of government" see ibid., p. 370 et seq.; on the evolving practice of having referendums for constitutional changes see Tierney 2012: 213 et seq.; see furthermore Bogdanor 2009: 7 who claims that there can be little doubt that the referendum has become an accepted part of the constitution"; on constitutional changes since 1997 see ibid., p. 4 et seq., claiming (p. 6 et seq.) that in a "country with a codified constitution, the framework must be visibly and noticeably altered either by an amendment to the constitution or through a decision by judges which in effect re-interprets the constitution. In Britain, by contrast, the framework can be gradually adapted to create a wholly different constitution almost without anyone noticing"; generally on the issue of a national constitutional convention see above Fn. CXXII, CXXVII.

[CXLI] On this, see for instance, Timothy Garton Ash at http://www.theguardian.com/commentisfree/2014/sep/21/not-fear-f-word-federal-britain-confederal-europe (last accessed on 28 November 2014); on the notion of "constitutional moments" in the US American context see Ackerman 1991.

[CXLII] Thomsen 2010: 42.

[CXLIII] Ibid., p. 228.

[CXLIV] As Bogdanor 2009: 12, observes, constitutional changes have not appeared to be very popular in the UK in the past, unless they are perceived to deliver concrete services to the population.

[CXLV] On the tendency to underutilize subnational constitutional power see Tarr et al. 2004: 14 et seq.

[CXLVI] Tierney 2012: 196.

[CXLVII] Tarr et al. 2004: 16; for a quite critical account regarding the role of subnational constitutional power see Popelier 2012: E43 et seq., with further references.

[CXLVIII] See, for instance, Art. 28 para. 1, cl. 1 of the German Basic Law; on this see furthermore Hanschel 2012: 117 et seq. The Swiss Federation leaves more autonomy in this regard, see Hanschel 2012: 478 et seq.

[CXLIX] See, for instance, Hanschel 2012: 117 et seq., 478 et seq.

[CL] For a rather critical account of asymmetry see Woodman and Ghai 2013: 479 et seq.: "If the national government is inclined to support autonomy, it may have to generalise the conditions for the grant of autonomy." (p. 480); for a more positive view see Palermo (2009), for a mixed account pointing out chances and risks see Weller 2012: 298 et seq.; for a critical reflection on this contribution, in particular with regard to minority issues, see in turn Palermo 2010: 763 et seq.

[CLI] On the notion of constitutional engineering see more broadly Sartori 1997 and Contiades 2013.

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