

30th SESSION
Strasbourg, 22-24 March 2016

CPR30(2016)02-final
24 March 2016

Autonomy and borders in an evolving Europe

Principles, frameworks and procedures for protecting and modifying status, competences and borders of sub-national entities within domestic law

Governance Committee

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Resolution.398(2016).....	3
Recommendation 385(2016).....	5
Explanatory memorandum	7

Summary

The balance of opposing principles of State unity and sub-national autonomy needs continuous adaptation. More profound adaptation may provoke changes in the distribution of competencies, or even regarding the legal/constitutional status of sub-national entities. Frequently, controversy and conflict between national government and subnational entity is the inevitable consequence.

Based on the comparative method, this report examines normative guarantees and procedures provided by various European domestic laws for modifying subnational constitutions, competencies and financial resources of subnational entities, boundaries and territorial status as well as principles governing conflict prevention and resolution. The comparative evaluation identifies good practice and links it to the Reference Framework on Regional Democracy. The aim is to draw out principles, frameworks and procedures for protecting and modifying status, competences and borders of sub-national entities within domestic law.

In its resolution, the Congress invites the local and regional authorities of member States to favour court proceedings to ensure compliance with the principles of regional self-government, if enshrined in domestic law; as well as to develop and improve, in conflict prevention and resolution, procedures that entail effective

1 L: Chamber of Local Authorities / R: Chamber of Regions
EPP/CCE: European People's Party Group in the Congress
SOC: Socialist Group
ILDG: Independent Liberal and Democratic Group
ECR: European Conservatives and Reformists Group
NR: Not registered

and transparent dialogue with central government. It calls upon the member States of the Council of Europe to continue to reaffirm and promote peaceful and constitutional solutions to disputes about territory and to refrain from changing the boundaries and territorial status of subnational entities without prior consultation of the population.

RESOLUTION 398(2016)²

1. Throughout the history of Europe there have been constant changes to States' territorial boundaries. From the Second World War until the fall of the Berlin Wall, however, Europe experienced an unprecedented period of territorial stability.
2. Since 1989, the fall of the Berlin Wall and the disintegration of the Soviet bloc, Europe has resumed its "multiplication" of borders and the pace of change shows no sign of slowing. Borders continue to be redrawn, sometimes against the wishes of the populations concerned.
3. Respect for the rule of law, the national sovereignty of States and good neighbourly relations have been the basic principles underpinning all European intergovernmental cooperation since 1945. These principles are a prerequisite for any changes to boundaries and autonomy statutes sought by member States.
4. When territorial re-organisation proves to be necessary, the Council of Europe, which has substantially developed its standard-setting competences in the field of human rights and the rule of law, is well-placed to promote appropriate democratic methods as a means of resolving tensions between its increasingly diverse populations.
5. A pluralist democracy must not only respect the ethnic, cultural, linguistic and religious identity of individuals and groups but must also create appropriate conditions to allow them to express, preserve and develop those identities.
6. The procedures applicable to the modification of territorial boundaries and statutes of autonomy in member States must be part of a stable, recognised and legally established framework. Any changes must be made in a transparent manner, with due process and by means of a sustainable political dialogue between central government, the regional authorities and all parties concerned.
7. The Congress of Local and Regional Authorities, having regard to:
 - a. the preamble and Article 1 of the Statute of the Council of Europe;
 - b. the Council of Europe Reference Framework for Regional Democracy;
 - c. the Council of Europe Framework Convention for the Protection of National Minorities (ETS No.157) ;
 - d. the Vienna Declaration of the Heads of State and Government of Member States of the Council of Europe (1993) ;
 - e. Congress Recommendation 346 (2013) on regions and territories with special status in Europe;
 - f. Recommendation Rec (2004) 12 of the Committee of Ministers to Member States on the processes of reform of boundaries and/or structure of local and regional authorities;
 - g. Recommendation No. R (96) 2 of the Committee of Ministers to Member States on referendums and popular initiatives at local level.
8. Mindful that the relationship between regional authorities and central government must be based on the principle of mutual loyalty with all due respect for the unity, sovereignty and territorial integrity of the state.
9. Concerned at the disregard for international standards and the resort to undemocratic means for redrawing boundaries and changing the territorial organisation of member States.
10. Invites the local and regional authorities of member States of the Council of Europe to:
 - a. have recourse, where necessary, to judicial bodies to ensure compliance with the principles of regional self-government, if enshrined in domestic law;
 - b. ensure that any demand for internal secession or separation takes place within an institutional, if not constitutional, framework, and that the corresponding procedure entails the consultation of all the populations concerned;
 - c. develop and improve, in conflict prevention and resolution, procedures that entail effective, transparent and representative institutional dialogue with central government so as to ensure that the solutions envisaged are as legitimate as possible.

² Debated and approved by the Chamber of Regions on 23 March 2016 and adopted by the Congress on 24 March 2016, 3rd sitting (see document CPR30(2016)02-final, explanatory memorandum), rapporteur: Karl-Heinz LAMBERTZ, Belgium (R, SOC).

11. Invites its Governance Committee to:

- a. hold a high-level international conference on the theme “Autonomy and borders in an evolving Europe” in 2017;
- b. further develop its work on the principles, frameworks and procedures for protecting and modifying the status, competences and borders of regional entities within domestic law;
- c. continue the discussions on the potential of regional bodies and institutions for easing regional conflicts.

RECOMMENDATION 385(2016)³

1. Changes of borders have been a recurring phenomenon in Europe throughout its history. Most such changes have occurred as a result of wars, whether through conquest or as a result of international conferences. From the Second World War until the fall of the Berlin Wall, however, Europe experienced an unprecedented period of territorial stability.
2. Since 1989, there have been substantial changes to the territorial organisation of Europe and the pace of change shows no sign of slowing. National and subnational boundaries continue to be redrawn, often with scant regard to the wishes of the populations concerned. Despite this year's celebrations of "70 years of peace in Europe", the threat of violent conflict in the European area, threats of re-centralisation and financial cuts in the wake of the economic and financial crisis are endangering meaningful sub-national autonomous governance.
3. Respect for the rule of law, the territorial integrity and national sovereignty of States and good neighbourly relations are the basic principles underpinning all European intergovernmental co-operation. These principles are a prerequisite for any changes to boundaries and autonomy statutes that are sought by member States.
4. While the Council of Europe has made great progress in developing its normative and standard-setting power in the field of human rights and the rule of law, it has had less success in promoting democratic and participatory or inclusive methods of territorial reorganisation as a means of resolving tensions between its increasingly diverse populations.
5. A pluralist democracy should not only respect the ethnic, cultural, linguistic and religious identity of individuals and groups, but also create appropriate conditions enabling them to express, preserve and develop these identities;
6. The manner in which changes of status, competencies and boundaries can be introduced and negotiated needs to be entrenched in legal and constitutional guarantees. Any changes must be introduced transparently, with due process, free from unconstitutional and undemocratic pressures, through sustained political dialogue between central governments, subnational authorities and all those concerned.
7. The Congress therefore, bearing in mind:
 - a. the preamble and Article 1 of the Statute of the Council of Europe;
 - b. the Council of Europe Reference Framework for Regional Democracy;
 - c. the Vienna Declaration of the Heads of State and Government of the member States of the Council of Europe (1993);
 - d. Recommendation No. R (96) 2 of the Committee of Ministers to Member States on Referendums and popular initiatives.
8. Concerned at the increasing resort to violent, undemocratic and sometimes military means for redrawing boundaries and changing the territorial organisation of member States.
9. Calls upon the member States of the Council of Europe to:
 - a. continue to reaffirm and promote peaceful and constitutional solutions to disputes about territory;
 - b. ensure that any changes to the competencies and financial resources of sub-national entities are introduced following pre-established procedures and guarantees;
 - c. refrain from changing the boundaries and territorial status of sub-national entities without prior consultation of the population;

³ See footnote 2.

d. encourage member States to ensure that regular procedures of dialogue between central governments and sub-national entities are fully developed, in order to maximise political accountability and avoid unnecessary recourse to judicial means to solve territorial disputes.

10. Calls on the Committee of Ministers to:

a. reaffirm its support for the principles of the Council of Europe Reference Framework for Regional Democracy, in particular the principle of mutual loyalty and equal dignity, and for other Council of Europe instruments relevant for providing guidance to member States on issues of sub-national autonomy;

b. encourage debate and discussion on these subjects within its midst, underlining its availability to participate in such discussions should this be considered appropriate;

c. continue to promote the peaceful settlement of such disputes among its members;

d. continue to support the work of the Venice Commission and the Congress in their work to promote appropriate legal and constitutional solutions for sub-national territorial issues.

EXPLANATORY MEMORANDUM⁴**Table of contents**

A. Introduction: looking for common principles	8
B. Principles, frameworks and procedures for protecting and modifying status, competences and borders of sub-national entities within domestic law	9
1. Normative guarantees	9
2. Procedures for the change of normative guarantees	11
3. Procedures regarding the transfer of competences.....	12
5. Procedures for changing boundaries	19
6. Procedures for the resolution of controversies	21
7. Territorial integrity vs. secession.....	24
8. Sub-national treaty-making power and participation in international organisations.....	27
C. Concluding comparative remarks	28
D. Bibliography.....	30

⁴ This explanatory memorandum was prepared by the Institute for Studies on Federalism and Regionalism of the European Academy of Bolzano/Bozen (EURAC): Francesco Palermo and Jens Woelk, members of the Group of Independent Experts on the European Charter of Local Self-Government, as well as Greta Klotz, Karl Kössler, Sara Parolari, and Martina Trettel.

A. Introduction: looking for common principles

1. The legal and territorial status of regional sub-national entities⁵ within domestic law, especially of those with legislative power and constitutional autonomy, varies considerably between the Member States of the Council of Europe. Due to dynamic change, induced from outside (e.g. globalisation, financial and economic constraints, EU integration) or inside (regional parties, economic disparities), the balance of opposing principles of State unity and sub-national autonomy needs continuous adaptation.
2. More profound adaptation may provoke changes in the distribution of competencies or even regarding the legal/constitutional status of sub-national entities. Frequently, controversy and *conflict* between national government and sub-national entity is the inevitable consequence. It can be resolved either politically, in institutions, through formal or informal procedures, or by Courts.
3. In a number of States, there have been recent reforms, either granting more autonomy or re-centralising powers. Some have also affected the territorial design of the State (e.g. Regions in France) or of some entities (e.g. Vojvodina in Serbia). The movements for independence in Scotland and Catalonia are emblematic of the quest for territorial reconfiguration from the bottom-up.
4. Overall, a balance is required between guarantees of autonomy and legal certainty, on one hand, and the necessity of dynamic change for adaptation, on the other. The Committee of Ministers Recommendation Rec(2004)12 to Member States on the processes of reform of boundaries and/or structure of local and regional authorities already set out numerous pointers for setting up or reforming such entities, particularly the need for consultation between authorities.
5. The respect for the rule of law (in procedures and institutions) as well as dignity and mutual respect (as complementary principles) are necessary in all horizontal and vertical relations between levels of government. A general attitude in favour of compromise can only be created through – reciprocal – loyalty and solidarity (among the parts of a bigger whole) thus allowing for the necessary adaptation of balances requested as reaction to change of the situation within a State and of the external context. The Council of Europe's Reference Framework on Regional Democracy MCL-16(2009)11 (hereafter: Reference Framework) provides precious indications in this regard.⁶ They are intended to serve "as a reference point for any government wishing to begin a process of regionalisation or reform of its local and regional structures, without placing its sources in any order of priority". The Reference Framework gathers important principles and "rules for living". Their specific combination within a given State set-up constitutes the essence of the principles of democracy and autonomy. However, these are tested when important change affects the territory, status or powers of sub-national entities.
6. Against this background, this study shall collect and compare legal information on how status, powers, resources and borders of sub-national entities can be changed according to domestic law of a number of selected Member States. Based on the comparative method, a set of research questions have been examined for a number of countries presenting different cases of sub-national entities. The selection of countries reflects the variety of patterns to be found in Europe, in particular regarding the symmetry or asymmetry of legal arrangements and the ways of resolving controversies. The comparative evaluation shall identify good practice and link it to the Reference Framework on Regional Democracy. The final objective is to provide comparative ground for policy recommendations in the Council of Europe-framework.
7. The countries selected for comparison are: Austria, Belgium, Bosnia and Herzegovina, France, Germany, Italy, Moldova, Nordic Autonomies, Serbia, Spain, Switzerland, Ukraine and United Kingdom. Already a brief comparative overview shows a high degree of differentiation between the institutional and territorial arrangements among the cases selected.
8. The federal systems of Austria, Germany, and Switzerland combine strong constituent units and a strong federal government, each entitled with powers delegated to it by the people through a constitution, and each empowered to deal directly with the citizens in the exercise of its legislative, administrative and taxing powers. In other federal countries such as Belgium and even more Bosnia and Herzegovina, the powers of the central government are comparatively less developed. Spain, Italy, and the United Kingdom are unitary States in form, meaning that the ultimate authority rests with the central government, but they incorporate

5 According to the functional definition in the Reference Framework on Regional Democracy, "*Regional* authorities are territorial authorities between the central government and local authorities." (emphasis ours). In this report, the distinct concept of "sub-national entities" or "units" is used as an umbrella term for cantons, Länder, (autonomous) regions, communities or provinces, or similar entities endowed with legislative powers.

6 E.g. 1.4.3 - para.25: "The relationship between regional authorities and central government shall be based on the principle of mutual loyalty and equal dignity and shall entail respect for the unity, sovereignty and territorial integrity of the state".

constitutionally protected sub-national units vested with significant legislative, administrative and/or financial autonomy.

9. The Nordic autonomies, with the examples of the Faroer and Åland Islands and the territory of Greenland, are often referred to as examples for “federacies”, i.e. a political arrangement in which a smaller unit is linked to a broader polity, but retains considerable autonomy. The smaller units have a minor role in the central government and the relationship with the central state can be dissolved by a mutual agreement. France, Moldova, Serbia and Ukraine present decentralization arrangements which can be interpreted as expression of a transition from a centralistic tradition towards an asymmetrical compound state: for France, reference here is in particular to Corsica and the recent regionalisation reforms, for Moldova to Gagauzia, and for Serbia to Vojvodina. The situation in Ukraine is in a flux as the country is currently in a process of constitutional reform including a re-definition of its system of territorial government (in which decentralisation and autonomy may play a greater role than before);⁷ it is not further referred to in this study.

10. Focusing on a number of essential questions, which characterize the horizontal relations between sub-national units and the vertical relations between sub-national units and the central government, the following issues have been selected in order to identify common trends and principles as well as to single out exceptional cases: Normative guarantees and procedures for modifying subnational constitutions or their functional equivalents of autonomy or regional statutes (A., B); Guarantees and procedures for modifying competencies and financial resources (C., D.); Guarantees and procedures for modifying boundaries and territorial status (E.); Conflict prevention and resolution (F.); Rules on possible *secession* of parts of the national territory (G.); International activities and relations of sub-national entities (H.). The main findings of the analysis will be summarized in brief Concluding Comparative Remarks (III.)

B. Principles, frameworks and procedures for protecting and modifying status, competences and borders of sub-national entities within domestic law

1. Normative guarantees

On the constitutional recognition and/or protection of sub-national entities and on the legal position of the rules and procedures for their status, powers and borders in the domestic legal system.

11. Each territorially compound system of whatever nature is composed of two or more orders of government, operating within a framework consisting of the national constitution and, as is often the case, sub-national constitutions. According to principle 2 of the Reference Framework, “Where regional authorities exist, the principle of regional self-government shall be recognized in domestic legislation and/or by the constitution, as appropriate”. The extent to which national constitutions recognize or regulate sub-national units varies greatly. As the latter entities are not (entirely) sovereign themselves, their own constitutional autonomy is, where it exists, limited to a greater or lesser extent by the national constitution. Normative guarantees may be included in various sources of domestic law and/or international law and they may vary considerably regarding their degree of protection.

12. It does not come as a surprise that the entrenchment of the status, boundaries and powers of sub-national entities is in general particularly strong in classical federal systems. In Austria, Germany, and Switzerland, the formal entrenchment of the Länder and Cantons in constitutional law and a long history of federalism leads to considering them as (constituent) “States”. Sub-national entities all enjoy a largely equal constitutional status, notwithstanding the six “half-cantons” (Art. 142(4) of the Swiss Constitution). In all three cases, this status is reflected in the power of these entities to adopt their own constitutions; in the German case these are even enforced by own Länder constitutional courts.

13. Significantly, this constitutional autonomy also encompasses the power of institutional and procedural self-organisation including such crucial issues as their electoral system, the legislative procedure, the relations between the sub-national legislature and executive or additional fundamental rights. This power has entailed considerable variation regarding some of the aforementioned issues. Yet, it is of course always limited by homogeneity clauses included in the respective national constitutions. In Germany, such a clause ensures the conformity of the sub-national constitutions with “the principles of Republican, democratic, and social government, based on the rule of law” and with the fundamental rights guaranteed by the Basic Law (Art. 28). In Switzerland, a similar provision safeguards the democratic character of the cantonal constitutions and, more generally, their compatibility with federal law (Art. 51), while in Austria the Länder constitutions are not allowed to “affect” the national constitution (Art. 99(1)). Similar to these classical federal States, normative guarantees regarding the two entities of Bosnia and Herzegovina, i.e. the Republika

⁷ See Venice Commission preliminary opinion on proposed decentralisation in Ukraine, CDL-PN(2015)006.

Srpska and the Federation of Bosnia and Herzegovina, are included in both the State constitution and in the two fully-fledged sub-national constitutions.

14. Entrenchment of autonomy is in several other cases characterized by considerable de-constitutionalization, i.e. the relegation of a significant part of regulations regarding the powers of sub-national entities to extra-constitutional sources of law. In relation to the autonomous communities of Spain and the special regions of Italy, the basic framework for the distribution of powers is laid down in the respective national constitution, while its specification is left to bilaterally negotiated autonomy statutes.⁸ In the Spanish case, the constitution enumerates the exclusive jurisdictions of the state, but only offers in principle certain subject matters to the autonomous communities, which later needed to be determined like the boundaries individually in each single statute (Art. 147). Disagreement about sub-national competences at the time of the adoption of the national constitution in 1978 was the reason for this partial postponement and de-constitutionalisation of the distribution of powers. Asymmetry was, at least initially, its result.

15. Similar to Spain and Italy, the competences of Belgium's sub-national entities, i.e. the communities and regions, are not regulated exhaustively in the federal constitution. However, unlike in the first two cases, specification does not rely upon bilaterally negotiated statutes, but upon special laws adopted by the federal parliament. In both houses such laws require two-thirds majorities plus majorities within both the Dutch and French linguistic groups with a majority of the members of these groups being present (Art. 4(3) of the Constitution). As a result, the federal constitution effectively shares the "competence-competence" with this special legislation, guaranteeing a veto power to both groups of members of parliament, Dutch-speakers and French-speakers.

16. In Nordic countries as well as in Central and Eastern Europe, there are several cases of constitutionally protected autonomy of single sub-national entities within otherwise unitary and often highly centralized States. This contrasts starkly with the above-mentioned Western European cases of general decentralization. A special status of autonomy is entrenched, for instance, for Gagauzia (Art. 111 of the Moldovan Constitution), Vojvodina (Art. 182-183 of the Serbian Constitution) and Crimea (Art. 134-139 of the Ukrainian Constitution), even though the latter Autonomous Republic is no longer under Ukrainian control. In all these cases the scope and content of autonomy is further specified in sub-constitutional law. Regarding the Åland Islands, for instance, normative guarantees are partly included in constitutional law (Art. 120 of the Finnish constitution) and otherwise found in the Act on the Autonomy of the Åland Islands.

17. In still other cases, there is a complete lack of constitutional protection of sub-national entities. In the United Kingdom, for example, the devolution process initiated in 1998 is based, in default of a codified U.K. Constitution, exclusively on ordinary statutes approved by Westminster (Scotland Act, Government of Wales Act and Northern Ireland Act). Similarly, the status of Corsica within France lacks constitutional entrenchment. Some degree of autonomy was instead introduced by an ordinary law of 1982 (amended in 1991), which granted the island the status of a territorial collectivity (*collectivité territoriale*) and established the Corsican Assembly.

18. Apart from normative guarantees through domestic law, sub-national entities are in a number of cases additionally protected by international agreements providing an external foundation and/or guarantee for their autonomous status. Besides the Åland Settlement of 1921, also the autonomy of South Tyrol goes back to an international accord, i.e. the 1946 Gruber-De Gasperi Agreement between Austria and Italy. This agreement ensures that the infringement of essential elements of autonomy may be challenged in international forums, including the International Court of Justice. The constitution of Bosnia and Herzegovina, and thus the legal protection of its two entities, even forms itself part of an international agreement, as Annex IV to the Dayton Peace Agreement of 1995.

Conclusions

19. In conclusion, sub-national entities are commonly recognized and protected by entrenchment in the national constitution, albeit to a greater or lesser degree. Corsica within France and devolution in the United Kingdom are in this regard clear outliers. The normative guarantees provided by national constitutional law are supplemented by quite diverse other legal sources, ranging from fully-fledged sub-national constitutions (Germany, Austria, Switzerland as well as Bosnia and Herzegovina), bilaterally negotiated and centrally approved statutes (Spain and Italy) and special legislation requiring the consent of different linguistic groups (Belgium) to acts adopted by the national parliament with regard to single sub-national entities (Nordic countries and several countries in Central and Eastern Europe). In certain cases of autonomy being implemented as a tool of conflict management or minority-protection, domestic legal guarantees are also based on safeguards stemming from international law. The Åland Islands and South Tyrol as well as, more recently, Northern Ireland and Bosnia and Herzegovina are cases in point.

⁸ Any change to the competences of Italy's ordinary regions is subject to the normal procedure of constitutional amendment.

20. Even if the autonomy of an entity is strongly entrenched, for example in a sub-national constitution, it always finds its limits in homogeneity clauses, which are enshrined in the national constitution for the sake of ensuring the legal coherence needed for the functioning of the whole system. A characteristic feature of (constitutional) autonomy of sub-national entities is its negotiated character, the form of which depends on the single historical and systemic situation of the cases examined. In federal countries formed by aggregation of previously sovereign entities, negotiation is the expression of the parity of members and at the very core of the federal compact. In other countries, where autonomy of sub-national entities is the result of a devolutionary process, the element of negotiation is reflected in the bilateral approach to elaborating autonomous statutes or in procedures of special legislation requiring inter-group collaboration.

2. Procedures for the change of normative guarantees

On the procedures for amendment of the constitutional and legal sources relevant to sub-national autonomy and the mode and degree for the participation of the sub-national entities therein.

21. As demonstrated in the previous section, normative guarantees for sub-national entities may be included in a number of different legal sources. In order to protect these entities against unilateral, precipitous or ill-considered change, they are often involved in the amendment procedure of the source guaranteeing (elements of) their autonomy. Their participation may thereby range from mere consultation to approval or effective veto rights. As the entrenchment of autonomy is frequently based on the interplay between different legal sources, its effective long-term protection requires the involvement of sub-national entities in different amendment procedures.

22. In Germany and Switzerland, a strong role of the Länder and cantons is constitutionally guaranteed regarding both the national and subnational constitutions. In Switzerland, the cantons themselves individually determine the procedures for changing their constitutions and both total and partial revisions of the federal constitution require a double majority. This means that approval is needed from a majority of the people throughout the country as well as a majority of the people of a majority of the cantons (Art. 192-195 and 142 of the Constitution). In Germany, by contrast, the amendment procedure of the federal constitution does not foresee elements of direct democracy, but still ensures effective participation of the Länder. As a two-thirds majority is necessary not only in the Bundestag, but also in the Bundesrat (Art. 79(1-2) of the Basic Law), even a substantial minority of the Länder may veto a constitutional amendment. Moreover, “the division of the Federation into Länder” and “their participation on principle in the legislative process” may not be amended at all by virtue of the so-called eternity clause (Art. 79(3)).

23. Also in Austria, the principle of federalism itself belongs to a particularly protected constitutional core of fundamental principles. But by contrast with Germany, where any amendment affecting this core is prohibited, change to this core in Austria “merely” requires a special procedure including a positive country-wide referendum (Art. 44(3) of the Constitution). The Länder are only involved, albeit indirectly, in case of amendments restricting their competences because these require the approval of the Bundesrat (Art. 44(2)). However, unlike the German institution with the same name, the Austrian second chamber, composed by representatives elected by the respective sub-national parliaments, functions much more along political party lines and is thus ill-equipped to safeguard the interests of the Länder. Even though the Länder legislatures are responsible for amending their own constitution, the specific amendment procedure is determined by Art. 99 (2) of the federal constitution.

24. By contrast with Switzerland, it therefore does not fall within the scope of sub-national constitutionalism. What Belgium has in common with Austria, is the lack of formal involvement of the sub-national entities in the amendment of the federal constitution. This tedious process rests entirely with the Belgian parliament and thus depends in practice on the collaboration of members of the Dutch and French linguistic groups (Art. 195 of the Constitution). All changes regarding crucial issues for the Belgian sub-national entities, among them boundaries and powers, may only be effected via the above-mentioned special legislation procedure and thus require majorities within the Dutch and French linguistic groups in both houses giving them effective veto power.

25. Quite evidently, the autonomous communities of Spain and the special regions of Italy, whose autonomy is to a large extent regulated by an interplay between the national constitution and the autonomy statutes, have a vital interest in being involved in both amendment procedures. However, sub-national entities are not involved, neither directly nor indirectly through an effective second chamber, in changes to the respective national constitution. The opposite is true for a *change of the statutes*. In this regard, all Spanish autonomous communities play, irrespective of certain procedural variations established in each statute, a key role in the bilaterally negotiated amendment process. At the end of this process, the amended statute always requires the approval of the Spanish parliament as an organic law (Art. 147(3) of the Constitution), like the original statute.

26. Only for the few autonomous communities established by a special procedure, i.e. Catalonia, the Basque Country, Galicia and Andalusia, the national constitution foresees a mandatory referendum (Art. 152(2)). Whereas the statutes of Italy's ordinary regions are amended by a regional law following a special procedure, changing those of the special regions requires a bilateral process and final approval by the national parliament, similar to the procedure in Spain, albeit in this case as a constitutional law.

27. Where autonomy is granted in an asymmetrical manner only to single sub-national units, amendments usually require the consent of the entity concerned. A case in point are the Åland Islands, whose special status may only be changed, as far as it is regulated in the Act on Autonomy, by concurrent action of the Finnish parliament and the Åland legislature (Art. 75 of the Finnish Constitution in conjunction with Sec. 69 of the Act on Autonomy).

28. By contrast with all above-mentioned cases the special status of Corsica within France as well as of Scotland, Wales and Northern Ireland within the United Kingdom is only guaranteed by sub-constitutional law making the amendment procedures of these legal sources crucially important.

29. As far as U.K. devolution is concerned, the Westminster parliament retains its supremacy in conformity with the principle of parliamentary sovereignty and may therefore amend the devolution acts, as has happened several times already, or even repeal them. The latter option is, however, rather a legal than a political possibility. It remains controversial whether changes of the devolution acts require, without a formal obligation, approval by a referendum. Although the original acts of 1998 have been based upon referendums in all three cases, the recent adoption of the Scotland Act 2012 did not involve direct popular consent.

Conclusions

30. From a comparative perspective, a close interrelation exists between the normative guarantees for autonomy of sub-national entities in national or federal constitutions and the procedures for protecting it against unilateral change. In classical federations, sub-national units are authorized to amend their own constitutions within the limits of federal homogeneity clauses and they participate, in most cases, in amendments of the federal constitution. In Switzerland, this involvement is directly based on the will of the (cantonal) population as expressed in a referendum and indirect in Germany, through approval by the Bundesrat. In these cases, an amendment may only be blocked by collective action of sub-national entities, as none of the Länder or cantons has an individual veto.

31. The dynamics are therefore different in the cases of Spain and Italy. On the one hand, the autonomous communities and special regions are not involved in changing the national constitutions. On the other hand, they are, at least to some degree, compensated by a strong role in the bilateral processes of amending their autonomy statutes. Still closer to the lower end of the spectrum of sub-national participation is the United Kingdom, which does not grant the devolved entities any formal role. The thesis of "necessary popular consent" through a referendum remains highly disputed and does not seem to be supported by coherent practice.

32. Indeed, from a comparative point of view, referendums play a role in some cases, but are on the whole of rather minor importance. This holds true notwithstanding the necessary approval of national constitutional amendments by majorities in a majority of the Swiss cantons and the mandatory referendums on statute reforms in four autonomous communities of Spain. As most countries refrain from requiring direct popular consent, it cannot be considered as a general element of constitutional change affecting sub-national autonomy.

3. Procedures regarding the transfer of competences

On the transfer of competences from the centre to the periphery and vice-versa: procedures and criteria.

33. According to the Reference Framework (para. 4): "Regional competences shall be defined by the constitution, the statutes of the region or by national law. Regional authorities shall, within the limits of the law and/or the constitution, have full discretion to exercise their initiative with regard to any matter, which is not excluded from their competence nor assigned to any other authority. Regulation or limitations of regional competences shall be based on the constitution and/or law".

34. Normally the distribution of powers between the levels of government is set out in the constitution, and in most compound States the distribution of powers is based on two connected principles: 1) the principle of enumeration of legislative powers and 2) the residual clause. The former means that legislative powers of the federation/central State (or the sub-national entities) are only those expressly listed in the constitution. According to the residual clause, in most federal systems, all legislative (but, in principle, also related administrative and, in some cases, judicial) powers that are not explicitly reserved to the federal/national

level are vested with the sub-national units. To this extent, the Swiss constitution explicitly States that the Confederation can only exercise the powers which are explicitly enumerated in the constitution itself (art. 42), thus leaving residual powers to the cantons. By consequence, a newly emerging power or subject matter is automatically assigned to the cantons.

35. The Confederation undertakes all tasks that the cantons are unable to perform or which require uniform regulation at federal level (art. 43a); this specific clause incorporates and complements the more general subsidiarity clause (art. 5a). Besides the residual clause, some important cantonal powers are listed, such as education (art. 62), relation between church and state (art. 72), protection of natural and cultural heritage of the Cantons (art. 78). The Swiss constitution foresees that any change to the existing division of powers requires a constitutional amendment, i.e. to be accepted by the majority of the cantons and the population.

36. In Italy, the Constitution lists legislative exclusive competences of the State, shared competences between the State and the regions, and attributes the residual competence to the regions (article 117); any amendment and therefore any new transfer of competences from centre to periphery or vice-versa can be achieved by means of a constitutional reform. The same goes for Austria, where the transfer of competences can only happen with a reform of the Constitution. Federal legislation is, as a rule, executed by the Länder on behalf of the federal government (so-called “indirect federal administration”, Art. 102.1 Constitution). Article 102.2 of the Constitution contains a long list of federal competences that could be directly executed by the federation if it so chose; however, in these matters executive power may also be delegated to the Governors of the Länder (Art. 102.3 Constitution). Actually this is the most common option; for competences other than those listed in Art. 102.2 B-VG, the approval of the Länder would be required were the federation to execute them directly.

37. Within the system of “indirect federal administration”, the Länder governors are principally responsible for execution. In this very special context only, they are subject to federal instructions. The division of powers laid down in the Constitution can however be derogated when public authorities act by means of private rather than public law (Art. 17 Constitution).

38. Additionally, in some compound States concurrent/shared competences are foreseen in the constitutions. These are subject matters in which the legislative powers are *shared* between the state and the subnational units. There are different methods of sharing competences. In Germany, the Basic Law distinguishes four types of legislative powers: (a) exclusive powers of the Federation (listed in article 73); (b) framework legislation permitting the federal legislator to set a frame of principles which the Länder could fill in with their legislation on details (article 75 – abolished in 2006); (c) concurrent powers (articles 72 and 74); and (d) exclusive legislative powers of the Länder; all residual powers, such as in particular cultural and educational matters, the organization of their administration and of local government as well as police and public order, are vested with the Länder (article 70 GG).

39. In the past, the Federation has expanded its legislative powers by the extensive use of the so-called “concurrent powers” (Art. 72 GG), in the name of unitary requirements, thus emptying the sphere of differentiated Länder legislation. The concurrent powers are exercised either by the Länder or by the Federation; the latter has to justify their exercise, in particular on the basis of the need for a regulation covering the whole federal territory. This was not too difficult, although the Länder participated in the legislative process via the Bundesrat. The Federal Constitutional Court (BVerfG) had declined its competence to judge, considering such controversies as political questions. Thus, the Federation could, in practice, bind a major part of the Länder legislation very efficiently, by means of adopting federal law, which takes precedence over the law of the Länder, and it has increasingly done so. The evolution towards a federal system with strong unitary tendencies reflected a general expectation of German citizens corresponding to the logic of the welfare-state (in line with the constitutional principle of the “social state” in article 20 Basic Law) and creating an overriding imperative of homogeneity of living conditions throughout the entire federal territory.

40. Considering the increased disparities in economic and social terms after re-unification, the Länder had used the minimal constitutional amendments of 1994 in an attempt to contain this centralising mechanism, mainly by imposing different preconditions for federal legislation and by obliging the Federal Constitutional Court to deal with disputes arising from the use of these powers: article 93.1 no 2a GG now expressly comprises the obligation of the BVerfG to monitor the exercise of the concurrent powers in case of claims stating the non-existence of the preconditions for federal legislation. This amendment stands for a tendency to underline the importance of (more) competition in the future development of German federalism.

41. In the following years, limits to the exercise of concurrent and framework legislative powers by the Federation were confirmed in a series of judgments in favour of the Länder in which, according to the new formula in article 72.2 Basic Law, federal intervention has been declared unconstitutional. In addition to the “concurrent” legislative power, the federal framework legislation – abolished with the federalism reform 2006

– influenced the administrative sphere of the Länder and the judicial system (which is organized by the Länder with the exception of supreme federal courts and federal legislation on procedure).

42. Flexibility *clauses* may exist in order to allow for a change in the allocation of powers between the levels of governments by specific procedures for the transfer of powers, with or without participation of sub-national entities. For example, the Belgian constitution contains three provisions, which allow for a flexible and asymmetrical distribution of powers. First, it permits special majority legislation in order to “absorb” powers between communities and regions (Art. 137). In other words, the institutions of the (French or Flemish-speaking) communities could come to exercise the powers of the (Walloon and Flemish) regions, respectively. This occurred immediately after the second state reform of 1980 between the Flemish region and the Flemish-speaking community, while the Walloon region and the French-speaking community remained distinct in their respective powers.

43. Secondly, the French-speaking community may by virtue of Art. 138 transfer the exercise of powers to the Walloon region (with regard to its powers in the monolingual French language region) and to the French-speaking community commission (with regard to its powers in Brussels). Such transfers do not require special legislation according to Art. 4.3, but concurrent laws with still certain qualifications. Thirdly, the Walloon region may transfer certain regional responsibilities to the German-speaking community for the exercise in the German-speaking area of Belgium (Art. 139); such transfers have taken place, too, for example regarding tourism and the protection of monuments, employment and local authorities.

44. Even the Spanish constitution foresees flexible mechanisms when it comes to allocation of powers, providing for three possibilities of competence-transfers. First, the Spanish Parliament may allow all or certain Autonomous Communities (ACs) to legislate on issues of state jurisdiction within limits established by organic law (Art 150.1). Secondly, the ACs may be entrusted with State powers, which “by their very nature lend themselves to transfer or delegation”, again by means of an organic law including the provision of financial means (Art. 150.2). While supervision is to be exercised, in the first case, by the Spanish parliament, the much more often invoked second provision equally allows for supervision by the central government (Art. 153b).

45. The third possibility pertains to a competence transfer allowing for centralization under certain conditions. Even if a subject matter falls within the jurisdiction of an AC, national legislation may, if “necessary in the general interest”, still establish “principles necessary for harmonizing the rule-making provisions of the Autonomous Communities” (Art. 150.3). Altogether, the three mechanisms allow for more flexibility, partly compensating for the rigidity of the constitutional amendment procedure in terms of modifying the distribution of powers.

46. Also the Nordic Autonomies combine formal constitutional guarantees with a more flexible option for the transfer of further powers. The legislative and administrative competences of the Åland Islands (section 18) as well as the exclusive competences of the State (section 29) are enumerated in the Act on Autonomy. Therefore, any amendment and/or transfer of competences between these two lists requires an amendment of the Autonomy Act itself, i.e. a qualified majority in Åland’s legislative assembly and the procedure for constitutional reform in the parliament of Finland.

47. However, a more flexible transfer to Åland is possible for “further legislative competences of the State” listed in section 29 of the Act on Autonomy: these can be transferred through an ordinary act of the parliament of Finland. The Takeover Act 2005 grants the Faroe islands the right to take over all fields of affairs with the exception of those linked to sovereignty (i.e. “citizenship”, “constitution”, “defense and security”, “Supreme Court”, “foreign policy” as well as “exchange rate and monetary policy” (section 1). The authorities of the Faroe Islands decide when these new responsibilities shall be taken over. Until then, the state remains vested with the legislative competence. In some specific cases, the takeover of new responsibilities shall occur after “negotiation with the Danish public authorities”. The same provisions apply to Greenland (section 2, Act on Self-Government).

48. A particular case of flexible competence-transfer procedure regards Bosnia and Herzegovina. As according to the original design of the Dayton Peace Accord (DPA) the powers of State are rather modest (art. III.1.), further functions and powers can be transferred to the State by agreement between the subnational Entities (art. III.5.), which are vested with the residual powers (art. III.3.a Const.). Due to the structural weakness of the common State and the control of its institutions by the Entities, the federal system could not develop its integrative function which led the International Community to active intervention in order to guarantee the implementation of the DPA and Bosnia and Herzegovina’s continuity as a State (most notably through the exercise of the Bonn Powers by the High Representative).

49. This process has been controversial and partly contested by the Entities, especially the Republika Srpska. In particular, State framework legislation has been recognized by the Constitutional Court in some subject matters which, according to the text of the Constitution, were exclusive competencies of the Entities.

For the Constitutional Court, the particular importance of some matters for the (economic) integration of the whole system as well as the necessity of strengthening the powers of the State institutions in order to avoid separation and guarantee the minimum base for the functioning as a State, require a joint and shared responsibility of all levels of government. Going beyond the limited catalogue of State powers (art. III) and based on systematic arguments, the Court interpreted the constitutional competence lists as “open”, in particular for guaranteeing equal levels of human rights protection throughout the country (e.g. by determining minimum standards) and a functioning economic integration in order to effectively realize and guarantee the fundamental economic freedoms in the Constitution of the State.

50. One more key aspect related to the division of competences in compound States is the symmetric or asymmetric distribution of powers between the subnational units. In some countries, the competences are equally distributed among subnational entities while in others they are divided differently between territorial entities. For example in Switzerland, all legislative and administrative powers are symmetrically distributed between the Cantons. The same goes for Austria and Germany, in which the division of competences foreseen by the federal constitution apply equally to all subnational units, even if the German Länder enjoy to right to derogate (*Abweichungsrecht*), in some very limited fields, from federal legislative intervention exercised on the basis of concurrent powers. The latter is seen as a symbolic turn away from a strictly symmetrical design in the exercise of the legislative powers allowing for experimentation and a certain degree of competition between the Länder; however, the areas are few and not very important, e.g. legislation on restaurants and on shop closing hours (article 72.3 GG as amended in 2006).

51. On the contrary, Italy is a very interesting case when it comes to asymmetries, in fact the distribution of competences foreseen by the Constitution does not apply to all 20 regions. In fact, art. 116 Const. refers to the five special autonomous Regions which have their legislative and administrative competences listed in their own special statutes (which have constitutional rank); therefore, they are guaranteed against amendments, as those require the complex procedure for constitutional change. In practice, a series of competences, not foreseen in the special statutes, have been transferred from the Italian State to – especially - one of these special regions, Trentino-South Tyrol (and to a lesser extent to other special regions), by means of enactments decrees to the Autonomy Statute.

52. Such decrees enjoy a specific, protected position within the Italian legal system due to their negotiated character: although technically adopted by the Government in the form of Presidential Decrees, the enactment decrees are drafted by a joint commission with representatives of State and Province/Region, where consensus on the regulation has to be reached. This transfer has been extensively used over the last 20 years considerably adding to the autonomous Provinces’ powers (inter alia State roads, teachers, university, personnel, etc.). In a similar manner, since 2001, Art. 116.3 of the Constitution provides for the transfer of further powers in a special procedure between single (ordinary) Regions and the Italian parliament. However, this has never been used so far.

Conclusions

53. From the comparative analysis, it results that federal countries predominantly rely on a detailed division of powers between the federation and the constituent units, which is enshrined in their federal constitutions together with a supremacy clause in favour of federal law and residual powers for sub-national entities. This permits sufficient guarantees, where the latter jointly (and effectively) participate in federal legislation and constitutional amendment through the second Chamber. By contrast, autonomy regimes targeting specific territories usually rely on a more articulated, multilevel legal framework, which includes the national constitution, sub-national constitutions, special laws and negotiated procedures. Bilateral negotiation is very often used as a flexible way for transferring further powers to the sub-national level. The need to achieve a certain degree of flexibility in adapting the division of powers according to the needs is common to both systems.

4. Guarantee of financial resources

On financial arrangements, including fiscal and taxation powers, distribution of resources, specific guarantees and fiscal equalization mechanisms and the change of all these.

54. Arrangements regarding the raising, sharing and spending of resources are critically important, both politically and economically, for the functioning of the overall system. In addition, the way in which financial powers are assigned can significantly influence the allocation and exercise of legislative and administrative powers. Thus, guarantees of adequate financial resources and distribution mechanisms, fiscal and monetary powers as well as equalization and solidarity funds are important both economically and for the concrete functioning of the two levels of government, as they may create or prevent intergovernmental conflicts.

These guarantees are consequently emphasised in the Reference Framework (para. 44-52), with a particular focus on pre-established rules based upon objective criteria and linked to regional competences.

55. While constitutional and legislative guarantees are fundamental for legal certainty (and economic management), there is also a need for flexible adaptation to changes in the economic and financial context; again, fundamental is the predetermined and objective character of the procedures for flexibility. More recently, the overall responsibility of the State vis-à-vis the sub-national entities has been emphasized due to financial and fiscal conditionality, in particular for those States that are members of the Eurozone. With limited exceptions (such as the UK where there is no written constitution and most of the fiscal regulations are laid down in instruments of soft law) in all compound countries financial relations are provided in constitutional documents. Nonetheless, within this common pattern there are wide discrepancies.

56. On the one side, some States have very detailed “financial constitutions” (for example, Germany and Switzerland) which specify the revenue-raising powers of the different levels of government. On the other side, “financial constitutions” of other States (for example, Belgium, Italy and Spain) are more “open” mentioning only the general principles of financial relations (principle of autonomy, joint responsibilities, principle of solidarity, duty of balanced budget), and leaving detailed regulation to ordinary laws (for example, law 42/2009 in Italy), or special national legislation (for example, the Belgian special law on financial resources and the Spanish LOFCA – Ley Orgánica de Financiación de las Comunidades Autónomas), to the autonomy statutes and, in some cases, to intergovernmental agreements (Italy and Spain). The provisions on financial powers and resources may therefore be found either in the constitution or in ordinary or special legislation.

57. A common tendency in the allocation and distribution of fiscal and taxation powers is that the assignment of major revenue sources rests with the national governments. This means that tax pressure is uniform within the country and own taxes are the exception. On the contrary, spending powers have increasingly moved from the national to the subnational and/or local level of government in most European countries in the belief they can be better administered on a regional basis in order to match better territorial peculiarities and needs. However, it is worth noting that the national level often makes use of a general spending power to pursue its own objectives in areas of subnational jurisdiction and by this way widening the scope of influence.

58. This results in a vertical fiscal gap that can be read as the index of non-accountability of the system (the sphere of government which decides on spending is not the same that decides upon revenue) and that is covered mainly through tax revenue sharing and/or financial transfers from the centre.

59. Against this background, compound systems have opted for different financial arrangements. Some countries (characterized by a varying degree of political decentralization) are very centralized from a fiscal point of view, such as Germany, UK, Belgium and Italy. Financial autonomy and consequent separation of the spheres of Federation and Länder in sustaining the costs of their relative functions are the basic principles established in the German Basic Law (articles 104a and 104b). In practice, however, the Länder regularly implement federal legislation; thus they also have to care for the relative costs and can only defend themselves (and their budgets) via their approval of federal legislation through the Länder, as a majority of them can exercise a veto-right. Legislative powers on taxation are concentrated with the Federation through ample use of concurrent powers in order to guarantee a high degree of fiscal unity throughout the federal territory (art. 105.2 GG). The Länder retain some legislative powers on local taxation of consumption and luxury goods, but only in so far as these are not equivalent to federal taxes. In terms of financial resources, federal and Länder levels are interconnected as revenue from the main taxes is shared.

60. Similarly, in the United Kingdom taxation is in practical terms applied in a uniform manner across the country under legislation passed by Westminster and collected by UK tax authorities. Notwithstanding the criticism, the so-called “Barnett Formula” (the conventional rule, which regulates the financial transfers) is still in force. According to this rule, the main part of the expenditure by the devolved administrations (leaving aside local authority finance) derives from a block grant provided from Westminster and calculated according to a formula based on population numbers rather than on a needs assessment. Devolved administrations retain the power to spend this block grant autonomously. So far, Scotland has the right to increase or decrease the rate of (personal) income tax by up to 3% (so called Tartan tax). Up to now, this power has not been used as the amount, which could be generated, was not enough to make the exercise worthwhile. This situation will partially change in 2016 with the entry into force of the Scotland Act (2012): the Scottish Parliament has received the power to set – on an annual basis – the Scottish rate of income tax and further minor tax powers have been devolved to Scotland. Furthermore, a bill is under discussion at Westminster, which will devolve – if passed – even more fiscal powers to “Scotland”.

61. Belgium is characterized by a low level of fiscal autonomy, in particular for the communities. Although the latter are allowed levying taxes, in practice they can do so only in cooperation with each other. This means that they are essentially dependent on federal funds, mainly on financial transfers of VAT and personal-

income-tax. While the regions likewise receive personal-income-tax transfers, their financial resources are based to a larger extent on own taxation, especially in the Flemish case. They have introduced a number of own taxes. Excessive interregional fiscal competition is, however, prevented by a limitation of reductions and increases to no more than 6.75 percent of the total tax amount collected in each region.

62. Also in Italy, the tax system remains mostly centralized. However, the financial resources of the five special regions are guaranteed through a share of state taxes generated on the regional territory. Percentage and types of shared taxes differ from one special region to the other as specifically provided by each autonomy statute ranging from a minimum percentage of 25% to a maximum of about 90% in the autonomous Provinces of Bolzano and Trento and even more in Sicily and Aosta Valley, although recent cuts have overall decreased the amount in practice.

63. In Gagauzia, financial relations are not regulated in a satisfactory way creating permanent disagreements between the central and the devolved governments. Article 18.2 of the Law on the special legal status of Gagauzia provides that “the mutual relationships of the budget of Gagauzia and of the State budget shall be established in conformity with the laws of the Republic of Moldova on budgetary system and on the state budget for the corresponding year in the form of fixed payments out of all forms of taxes and payments”.

64. A mixed system can be found in the Faroer Islands specifying that with the takeover of a field of responsibility by the Faroer public authorities, the latter are also responsible for the financing of the respective expenditure. The Danish State transfers an annual subsidy to the Faroer Islands, too (about 6% of Faroese GDP), and the Faroer Government has the right to levy direct and indirect taxes. The Greenlandic Self-Government Act specifies the economic relations between Greenland and the Danish Government in detail. According to the Act, the State shall transfer annually a specific amount of several millions DKK to the territory (in accordance with Danish price and wage index) to be reduced when Greenland receives revenues from its mineral resource activities, which are all due to Greenland (Act on Self-Government, section 7).

65. On the opposite side, there are few examples of fiscally highly decentralized countries, where the sub-national level raises more than 50% of the revenue. This is the case of Switzerland, where the Constitution explicitly requires the Confederation to ensure that the cantons have the necessary fiscal resources to fulfil their tasks and cantons are vested with own tax raising power; however, not in areas that are already taxed by the Confederation or that have been declared tax-free by the Confederation (art. 47). The most important exception to this rule is direct taxation, which also accounts for most cantonal tax revenues (chapter 3, art. 126 ff.).

66. Again, Bosnia and Herzegovina is a very special case, with close-to-full fiscal and financial autonomy of the Entities. Regarding the necessary support of the central government, the State Constitution only contains basic principles providing that 1/3 of resources necessary for the State level have to be borne by the Republika Srpska and 2/3 by the Federation of Bosnia and Herzegovina (Articles III.2.b and VIII Bosnia and Herzegovina Constitution); this rule reflects the total dependence of the State on financial transfers from the Entities. In 2006, self-generated financial resources for the State have been created with the introduction of a value-added tax (VAT).

67. Even fiscally very decentralized countries have progressively mitigated this feature reinforcing solidarity mechanisms in order to ensure equality throughout the territory. This is common to most federal systems, where quite complex systems of fiscal equalisation are established in order to guarantee a compensation for structural disadvantages of weaker members. Due to the re-distribution of resources, these equalisation systems are often very controversial; one way to reduce conflict is to involve sub-national entities in the elaboration of a solution. Negotiation in financial matters can thus be considered as a characteristic feature in compound territorial systems.

68. Equalization can be carried out in different ways. In Switzerland, the Confederation adopts regulations on equitable equalization transfers between the federal level and the cantons and between the cantons themselves (article 135 Constitution). The funds for equalization transfers come from the richer cantons and from the Confederation. Art. 135 Const., adopted in 2004 as a part of a fundamental reform on fiscal federalism and entered into force in 2008, provides guidelines that aim at reducing financial disparities among the cantons. In Germany, a system of different levels of apportionment of the entire tax revenue applies between the different levels of government, mainly between the Federation and the Länder. The total of the Länder portion of tax revenue has to be distributed among them, equalising their different financial capacities.

69. For the same purpose, the financially weaker Länder receive funds from the Federation as supplementary grants. Subsequently, financial equalisation takes place within the various Länder in order to equalise the considerable differences. With regard to horizontal equalisation payments among the Länder, (more) competition in the field of financial relations has been advocated, especially by the financially

stronger Länder, and in some occasions the case has been brought to the Constitutional Court for adjudication. A reform of the federal system is expected to reshape the financial relations between Federation and Länder. However, there have been few incentives for change, so far, due to the long duration of the current Agreement between Federation and Länder on the equalisation system, which will only expire in 2019.

70. The Austrian Fiscal Equalization Law (Finanzausgleichsgesetz, FAG), an ordinary law in force for 4 years that cannot be vetoed by the Länder, regulates tax sharing and intergovernmental transfers. Before the federal government submits the draft of this law to the federal parliament, negotiations take place between the federal minister of finance and representatives of the Länder and municipalities.

71. The first step taken by the FAG is tax sharing. The Federation can legislate on a certain tax, if it is at least partially entitled to the tax revenue. If there is no federal share of revenue, legislation remains with the Länder. The FAG then determines the revenue share for both the Länder and municipalities. This procedure is guided by tax revenue criteria and by demographic criteria. Intergovernmental transfers follow as second step in form of quota allocation funds or as grants to cover special needs or purposes.

72. More asymmetric equalization systems provide not only for a national equalization, but also for a differential system as regards some areas. In Italy, the national system of fiscal equalisation (which is often contested as it severely impacts on some areas, due to the significant differences between the financial capacity of the Regions, especially between the North and the South), does not apply to special regions. According to art. 27 of Act 42/2009 (implementing art. 119 Const.), instead bilaterally agreements with the State shall define the single special Region's contribution to equalization and to the recovery of public finance (including obligations imposed by EU and by the Internal Stability Pact). So far, only some of the special regions (including South Tyrol and Trentino) have signed such a bilateral financial agreement with the State. The consequence is that their single situation considerably differs one from the other.

73. The Act on Autonomy of Åland Islands guarantees a special equalization mechanism and financial guarantees for the territory. Åland "shall every year receive a sum of money from State funds to cover the costs of autonomy", and the Act contains detailed regulations on how to calculate the amount of equalization (Section 46) and on the basis for equalization (sections 46 and 47), extraordinary grants as well as tax retribution (sections 48 and 49). Furthermore, Åland shall be assisted by State funds in case of "prevention substantial economic disorders that affect especially Åland" as well as for covering "costs of natural disaster, nuclear accident (...)" (section 51).

74. In recent years, in particular after the economic and financial crisis, the members of the Eurozone agreed to respect the obligations resulting from the so-called "Fiscal Compact" (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union). The EU recommends amending the constitution or legislation of Member States by introducing debt-brake rules and balanced-budgets provisions, which have to be respected also by sub-national entities. The leading example is Germany, where a constitutional reform (2009) introduced a constitutional obligation to balance budgets on the part of both the Federation and the Länder (known as "debt brake"). In particular, regional expenditure is now bound by a new constitutional structural deficit rule resulting from the Fiscal Compact and introduced in article 109.3 Basic Law, and the Federation will have to limit its revenue from credits.

75. The constitutional amendment binds all governmental authorities, including Länder and municipalities. Thus, all Länder must endeavour to approve balanced budgets, with the smallest possible deficit; no revenue from credits will be admitted from 2020. In addition to the new constitutional rules on budgetary discipline, a so-called cooperative early warning-system has been introduced. In January 2010 a Stability Council has been established for the supervision and annual examination of the budgetary management and situation of Federation and Länder, and in particular for measuring the progress of five Länder receiving consolidation grants. In order to avoid budgetary emergency situations, the Stability Council shall agree recovery programmes with the concerned Länder (article 109a GG). Other countries followed suit, e.g. Italy (art. 81 Const.) and Austria (where, instead of constitutional rules, the Länder have concluded an agreement on the respect of the obligations)⁹.

⁹ See for a detailed overview, H.T. Burret, J. Schnellenbach, Implementation of the Fiscal Compact in Euro Area Member States, Working Paper, November 2013 (at: http://www.sachverstaendigenrat-wirtschaft.de/fileadmin/dateiablage/download/publikationen/arbeitspapier_08_2013_engl.pdf).

Conclusions

76. While federal systems typically offer constitutional guarantees for financial relations, including fiscal and taxation powers, other systems usually only provide for general principles in their constitutions, leaving detailed regulation to specific legislation. Specific constitutional or legislative rules shall guarantee equal chances in development through a certain re-distribution of resources. The more detailed the “financial constitution”, the more the autonomy of sub-national entities is guaranteed, as changes in public finances require constitutional revision. On the contrary, an “open” model means fewer guarantees, but it is more flexible as changes do not require constitutional amendments (with their special procedures and majorities).

77. In any case, all financial arrangements leave (some) room for negotiation and agreement: multilateral (in the case of federal systems) and bilateral (in the cases of single territories with differentiated status). More recently, constitutional or legislative rules and limits resulting from EU obligations (Stability Pact and Fiscal Compact) add complexity to the overall picture reducing sub-national autonomy.

78. The special status of some territories often has the consequence of differentiated fiscal arrangements as well as special treatment in the equalisation procedures or the exemption from these.

5. Procedures for changing boundaries

On territorial change: procedures, limits and referendum requirement for changing the boundaries of sub-national entities.

79. Constitutional and legal procedures regarding the definition or change of boundaries are an essential indicator for the kind and degree of autonomy characterizing sub-national entities. Often specific guarantees for the territory of existing sub-national entities are an obstacle for a re-definition of their boundaries. Re-organisation has sometimes happened in exceptional periods of crisis or as a consequence of war, but also financial and efficiency-related considerations may give rise to territorial re-organisation. Unitary States, which decide to regionalize or federalize, may do so following historic boundaries or by developing new criteria for the boundaries of (new) entities. Often, in democratic States, the population of constituent units concerned by a boundary change must agree on that change through a referendum. Special amendment procedures for the creation of new constituent units may require, in different ways, approval of already existing sub-national entities. Thus, the Reference Framework provides that “Regional boundaries shall not be altered without prior consultation of the region(s) concerned. Prior consultation may include a referendum.” (para. 31).

80. Territorial re-organization is sometimes invoked for efficiency reasons, in particular for creating economically more homogenous territories, which would avoid complex equalisation procedures. However, after decades of existence, also sub-national entities in many cases seem to develop their own identities and cannot be easily replaced by new entities (to be) created according to economic and efficiency criteria. This is illustrated by the German case, where periodically the debate about a “more rational” territorial design of the Länder taking into account economic and efficiency criteria comes up, in general, i.e. referred to the entire federal territory, or related to specific parts of it (e.g. between Berlin and Brandenburg). Similar debates are known in Italy, where a merger of the 20 regions into a smaller number of “macroregions” is discussed from time to time. It is still too early for an evaluation of the results of the recent regional reform in France, where the number of regions will shrink from 22 to 13 as of 2016. Seven of the new regions will result from mergers.

81. Constitutional guarantees through specific procedures for changing boundaries are frequent and often involve the federal level besides the entity concerned. This is the case of Austria, where changes of sub-national boundaries necessitate concurrent constitutional laws of the federal level and the respective Land (Art. 3.2 B-VG). Also in Belgium territorial reorganization requires special legislation: any change of boundaries of the State, the provinces or the municipalities, may only be effected by a law (Art. 7 Const); territorial changes regarding the provinces require a special law (Art. 5.2). Also changes to the boundaries of the four linguistic regions require a special law passed by a majority of the votes cast in each linguistic group in each House and a two-thirds majority of the total votes cast (Art. 4.3).

82. Similarly, also in Spain the procedure for changing boundaries is complex. As the boundaries of the Spanish Autonomous Communities are defined in their respective statutes (Art. 147.2b), territorial changes have to follow the procedure of statute reform (Art. 147.3). Moreover, the national constitution explicitly prohibits the “federation” of ACs, i.e. mergers (Art. 145.1); however, a special provision permits the integration of Navarra with the Basque Country (Interim Provision No. 4.1).

83. Other cases of change regarding the territorial structure of ACs are not authorized (STC 99/1986). One instrument for protection against unilateral change of boundaries is the requirement of a *referendum* of the

concerned population as expression of democratic participation. This principle protects sub-national entities, but may also apply to municipalities and their belonging to one or another sub-national entity, especially where they are situated on or close to the boundaries.

84. An interesting, very stable territorial system is Switzerland. Democratic and finally peaceful internal secession procedures were the model for a provision in the Constitution of 1999 regarding territorial changes or secession. In neither case, can there be a unilateral decision. According to article 53, any modification of the number of the cantons or of their status is subject to the assent of the concerned population, of the concerned cantons, and, at federal level, of the Swiss people and of the cantons at large.

85. Thus, the procedure seems to take both minority interests and majority interests into account. Internal secession instead was a hot topic in the context of one important territorial change: in 1979 the separatist movement in the Jura canton achieved the creation of a new canton, e.g. the French-speaking catholic part of the mostly German speaking and protestant canton of Berne. Creating this canton required serious and difficult negotiations between the relevant parties, followed by a series of three popular referenda at different levels, including the municipal one, and by final ratification by the entire electorate of Switzerland. The Confederation was able to resolve this contentious issue peacefully. In 1999, Article 53 established a simplified procedure for internal changes of cantonal boundaries. In the case of the Canton Jura, as specific federal rules for the consequences of the internal secession were lacking, important questions were settled by reference to customary international law under the laws of State succession.

86. Also in Germany, the specific procedure established for territorial change includes a referendum (article 29 GG). However, despite continuous debate on the size of the Länder and the re-organisation of federal territory, in particular about resolving demographic and economic discrepancies, this general procedure for territorial re-design has never been applied in practice. All major territorial changes have been based on special provisions: the creation of the "South-Western State" of Baden-Württemberg in 1952 (article 118 GG), the accession of Saarland to the Federal Republic on 1 January 1957, democratically legitimated by the referendum held on 23 October 1955, and even reunification in 1990, which took the form of accession of the five re-constituted Länder in Eastern Germany.

87. In the case of Gagauzia, the law does not establish the boundaries of the autonomous territorial unit but rather the procedure for defining them. Article 5 of the law on the special legal status provides that the territory of Gagauzia is determined by local referendums in localities where persons belonging to the Gagauz minority are settled. In villages in which the Gagauz constitute more than fifty percent of the population, inclusion in the special territorial unit is decided if more than fifty percent voted in favour in the local referendum. Villages where the minority constitutes less than fifty percent may be included on the basis of the freely expressed will of one third of the electorate in a local referendum.

88. In a different way, also the Italian Constitution combines guarantees with democratic participation. Regional boundaries may be changed through a constitutional law. A merger between existing regions or the creation of new regions having a minimum of one million inhabitants may be agreed, after consultation of the regional councils, when such request has been made by a number of municipal councils representing not less than one-third of the populations involved, and the request has been approved by referendum by a majority of said populations (art. 132.1 Const.). However, not unlike Germany, the only time when a new Region was established (Molise, in 1963), this happened by means of a special procedure for this specific case. Regional boundaries may also be changed in order to allow to "move" municipalities from one region to another.

89. With regard to ordinary regions in Italy, art. 132.2 Const. requires approval by the absolute majority of residents in a local referendum and an act of Parliament after consultation of the regional assemblies involved (these do not have a veto right, however). Regarding the special regions, the Constitutional Court has decided (judgment no. 66/2007) that the same procedure is to be followed, without a (constitutional) amendment of the autonomy statute; this is still controversial as the territory of each special region is identified in the autonomy statute, and therefore any change of the boundaries would require also its amendment.

90. Regarding South Tyrol, also the international agreement at the base of autonomy has to be considered in identifying its territory. In practice, a compromise combines both procedures: art. 132.2. Const. and the amendment of the autonomy statute. In order to allow the detachment of the municipality (after approval in a referendum) a constitutional law has to be adopted.

91. By contrast with the mentioned systems where changes of boundaries are regulated either through a defensive attitude or through an open approach, no special procedures exist for the Åland Islands, for Greenland or the Faroe islands. This can be explained with geographical reasons (islands distant from mainland) as well as with their asymmetrical situation and the different perspectives for the future, which may even include the option of independence. A further special case is the United Kingdom, due to the lack

of a written Constitution. However, the historical borders of Scotland (as resulting from treaties such as the Treaty of York in 1237) have been formalized in legal acts (schedule 1 of the Scotland Act 1998 identifies Scottish regions and constituencies). Therefore, any change of the boundaries between the devolved territories requires a modification of these treaties by a new act of Westminster. Since (original) devolution acts were adopted by means of a referendum in the devolved areas, their change would require the same procedure, although formally there is no obligation to do so; this view is controversial, however (e.g. the Scotland Act 2012 has not been confirmed by referendum).

92. Procedurally even more peculiar is the case of Bosnia and Herzegovina. After the end of the war in 1995, a rigid territorial division between its two Entities was introduced (dividing the state territory 49%-51%), marked by the IEBL (inter-entity boundary line), the former cease-fire line. However, the strategically important city of Brčko was the only element in the Dayton Peace Agreement, which had not been fully finalized. An arbitration procedure ended in March 1999 with the establishment of an internationally administered “district”. Finally, in March 2009, the Parliamentary Assembly of Bosnia and Herzegovina adopted an amendment to the constitution establishing the Brčko District as a unit of local self-governance thus ending international supervision (new article VI(4): Brčko remains under the sovereignty of the State in the areas falling within the competencies of the State institutions, while its territory is a shared property of the Entities).

Conclusions

93. Entrenched procedures for the change of territorial boundaries are the rule essentially everywhere, as even in the countries where this is not explicitly provided (such as the UK, Bosnia and Herzegovina and the Nordic Autonomies), changes of borders are either geographically impossible (islands) or anyway entrenched in different ways (Bosnia and Herzegovina, United Kingdom). The entrenched procedures normally include limits to unilateral action by the central government, such as consultation and, in some cases, a referendum of the concerned population. While still not a mandatory requirement to be found in all cases, the referendum has gained increasing importance conveying stronger legitimacy to these fundamental decisions. Also the Committee of Ministers’ Recommendation Rec(2004)12 to member States on the processes of reform of boundaries and/or structure of local and regional authorities sets out numerous pointers for setting up or changing such entities, particularly the need for consultation between authorities. Any reform process must be based on effective, transparent, responsible and representative institutional dialogue.

94. In some countries, linguistic or other cleavages have led to compromise via the territorial principle, i.e. rigid boundaries, producing a defensive attitude and guarantees that make change extremely difficult (see the example of Belgium and Switzerland). Elsewhere change is made easier in terms of legal procedures (provisions permitting change through open approach and consultation), but often politically difficult to obtain. The result is relative stability in the territorial set-up reminding of the territorial integrity-principle of States themselves.

6. Procedures for the resolution of controversies

On political or judicial procedures for the prevention or resolution of controversies. Formal or informal, multilateral or bilateral settings.

95. Two independent orders of government in a compound state create the need for resolving conflicts over their respective constitutional role and competencies. This can occur politically in Parliament or inter-governmental institutions (e.g. conferences), in formal or informal procedures, bilaterally or multilaterally. If a controversy cannot be prevented by political means, the role of an arbiter is usually assigned to courts (in the UK, a Supreme Court has been established with devolution exactly for this reason). This is also recognized by the Reference Framework: “Regional authorities shall have the right of recourse to a judicial remedy in order to secure the free exercise of their powers and respect for the principles of regional self-government enshrined in domestic law”.

96. Political procedures or institutions may facilitate (negotiation for) compromise thus reducing the need for subsequent recourse to judicial remedies. The most traditional instrument for that purpose is subnational participation in national legislation through federal *second chambers*. However, the composition, role, weight and effectiveness of such second chambers vary considerably. In Germany, the Federal Council (Länder), consisting of representatives of the Länder governments (articles 50-53 Basic Law), is consulted on all federal bills. While its suspensive veto can be overruled by Parliament (the Bundestag), some bills require its explicit consent, with a majority of its votes; in case of the Federal Council’s opposition, the only way to pass the bill is compromise. Mediation is institutionalised in the so-called mediation committee (“Vermittlungsausschuss”, Art. 77.2 Basic Law) equally composed of members of the federal Parliament and the Länder. If compromise cannot be found or is not accepted by either Parliament or Federal Council, the

bill cannot enter into force. With these far reaching rights of approval, the Länder has become the pivotal institution of the whole federal system. The divergence of political majorities in the two Houses offered a strong temptation for opposition leaders to use the veto powers in order to block any significant move of the federal government. However, its peculiar composition (with members representing the Länder governments) most often permits the representation of territorial interests.

97. Federal second chambers per se do not, however, guarantee effectiveness in preventing conflicts. Some are too weak in terms of composition and powers to provide a significant involvement of subnational entities in legislation. For example, the Austrian Länder has no significant powers, as it participates to legislation on equal footing with the National Council only for constitutional amendments, and is composed by members elected by the Länder Parliaments. Other chambers are designed in order to emphasise the veto power rather than the cooperative element. In Bosnia and Herzegovina, the “House of Peoples” is dominated by ethnic interests of the three constituent peoples represented in this institution; each of them can block any decision in the House of Peoples with a declaration that an issue touches upon a “vital interest” of the respective people.¹⁰

98. Less formal institutions of intergovernmental rather than parliamentary cooperation are very frequent. In Switzerland different degrees of non-judicial procedures exist for avoiding or resolving conflicts politically (such as the consultation of the inter-cantonal conferences). Some of them are even explicitly mentioned in the constitution (Art. 147, Art. 44). Conflicts between the cantons and between cantons and the Confederation are rare and the constitution obliges to “solve them as far as possible through negotiation and mediation” (Art. 44.3). For this very reason the role of the Supreme Court in resolving conflicts is not as pivotal as in other countries; also because it does not have the power to review the constitutionality of federal legislation. Also in Belgium collaboration between the various government levels plays an important role, even though the distribution of powers attempts to detail and neatly divide exclusive powers as much as possible thus diminishing the overlap of competences. There is certainly a collaborative political culture between the language groups in the federal government and the Brussels region-government. The primary intergovernmental body is the Coordinating Committee (Comité de concertation/Overlegcomité), which was only established with the third state reform in 1988, alongside with the specialized inter-ministerial committees bringing together the ministers with specific portfolios.

99. The mentioned kinds of institutional concentration of sub-national interests work well in the case of symmetrical powers and status, as efficiency in decision-making is made possible by the general use of the majority-principle.

100. This would not be appropriate in case of strongly differentiated powers and/or special interests to be protected. Asymmetrical regionalism requires differentiated means of individual and thus bilateral representation and participation. A case in point is Italy’s two-track regionalism: while the formal (intergovernmental conferences) and informal (political relations) instruments for ordinary regions to prevent conflicts politically are not very effective in practice, for special regions specific bilateral institutions and procedures are in place. These establish direct channels for cooperation with the central government in order to prevent political conflicts or judicial litigation. Particularly important in this regard are the joint commissions for each Italian special region. These are composed of an equal number of state and regional representatives and tasked with drafting the enactment measures (norme di attuazione) for the respective autonomy statute. These are then submitted to the national government, which adopts them in form of decrees which have a higher position than the laws of parliament.

101. Bilateralism is evidently epitomized by the statutes of the Spanish Autonomous Communities, but also important with regard to the effective exercise of competences. In order to solve disputes about jurisdictions, the Constitutional Court has repeatedly called for the establishment of mixed bilateral commissions. Multilateralism is embodied by the sectorial conferences of ministers with the respective portfolio, which have since the late 1980s become institutionalized for a broader range of subject matters. Whereas some of them are rather informal, others have a formal legal basis (e.g. the Consejo de Política Fiscal y Financiera). A regular intergovernmental conference of the prime ministers of both the State and the Autonomous Communities was set up only in 2004.

102. Also in Finland and Denmark legal mechanisms exist for preventing conflicts between the State and the autonomous territories from the beginning: bills of the State which may affect the autonomous territory have to be submitted to the subnational governments first. In all three Nordic Autonomies joint organs as well as parliamentary committees for the political resolution or prevention of conflict play an important role. With regard to Åland, these are the Åland Delegation and the Autonomy Committee of the Åland Parliament. An important role for cooperation between Åland and the Finnish State is played by the so-called Åland Delegation. The joint organ consists of the Governor of Åland (who is appointed by the President of Finland),

10 A majority within the three groups of present members is required (art. IV.3e). This means that for a veto on legislation, an ethnic group of Delegates constituting only 20% of the House of Peoples is sufficient.

two members elected by the Council of State and two elected by the Parliament of Åland (furthermore, both institutions must elect two deputy members).

103. The tasks of the Delegation consists of the formulation of opinions for the Council of State, the State ministries, the Government of Åland and the Courts if requested (Section 55-57, Act on Autonomy). For example, they shall decide on matters referred to State land and State buildings as well as financial procedures. Moreover, every “Act of Åland” is accompanied by an opinion of the Åland Delegation. According to the Act on Self-Government of Greenland and the Homeland Act of Faroe disputes between the subnational authorities and the State are resolved by some kind of a joint committee. In both cases this committee is composed of two members nominated by the Danish Government, two members by the Government of Greenland or respectively by the Government of Faroe as well as three judges of the Danish Supreme Court. Both acts stipulate that in case the four government nominees are not able to resolve a dispute, the decision shall be taken by the three judges.

104. Since devolution started to operate in the United Kingdom in 1999, priority was given to *informal* bilateral relations and dispute resolution mechanisms. Intergovernmental relations are mainly based on a series of informal agreements (bilateral or quadrilateral) termed concordats. General terms and conditions of inter-administration policy co-operation and coordination applicable to all concordats are incorporated in a “super-concordat” called Memorandum of Understanding. There are a number of procedural mechanisms to ensure that legislation considered at the Scottish Parliament is within competence – the Presiding Officer has to certify legislation to that effect, and any governmental legislation has to be similarly certified by the minister introducing it. Moreover, following Parliament approval, but before royal assent is given, there is a delay to allow the Scottish law officers, if they consider it necessary, to send a bill to the Supreme Court to determine whether the proposal is *intra vires*. Another dimension to consider relates to the Sewel convention, which was deliberately formed to recognize the respective legislative competencies of the Scottish Parliament and Westminster.

105. Historically, controversies between federal and sub-national governments have been among the reasons leading to the establishment and development of constitutional adjudication. Thus, the judicial resolution of conflict is standard in most systems and makes guarantees of sub-national status and powers enforceable. The Austrian Constitutional Court plays an important role regarding both horizontal and vertical competences disputes. The subject matters enumerated in the constitutional distribution of powers consist of single terms or short phrases which strengthened the Constitutional Court’s responsibility to construe subject-matters and to develop a methodology for their interpretation. The Court may either scrutinise draft laws before their enactment (Art 138.2 Const.) with scrutiny restricted to the question whether the central unit or the Länder are competent to enact such a law. Or it may scrutinise enacted laws whether they are constitutional or not, including the question whether they were enacted by the competent authority (Art 138.1 B-VG).

106. The Constitutional Court of Belgium (until 2007 called Court of Arbitration) has delivered several important judgments with regard to intergovernmental conflicts. It established, for instance, the principle that the subject matters assigned to the regions and communities have to be interpreted extensively because they would enjoy in these areas “la plénitude de compétence”. Overall, the court has over the last decades favoured the political trend towards decentralization by acting with judicial self-restraint when it had to judge delicate political compromises achieved only after long and difficult bargaining. The tendency to solve a number of conflicts within intergovernmental forums or, more informally, among party leaders, has kept the court’s role in defining the allocation of competences rather limited. This of course also results from the fact that powers are defined in detail by the constitution together with special legislation. Moreover, the definition of the scope of the Constitutional Court in Art. 142 sets certain limits. Whereas it grants extensive authority to adjudicate disputes about competences, it restricts its review of both national and subnational pieces of legislation to their compliance with only some provisions rather than the entire constitution.

107. In Italy, the Constitutional Court is entrusted with the adjudication of conflicts regarding competences of state and regions (ordinary as well as special). It contributed significantly to the emancipation of Italian Regions in the 1980’s and 1990’s, developing procedural rights and “cooperative regionalism”. After the reform of the constitution in 2001, the court has hampered its role of conflict manager because of the lack of enactment provisions of fundamental parts of the constitution. Consequently, criticism has arisen as to the role of the Constitutional Court: since 2001, it vests a quasi-legislative function, as its extensive case law tends to replace the ordinary legislation by the parliament. As to South Tyrol, the Court recently played a crucial role in defining the scope of its financial autonomy regime. This has occurred against the backdrop of financial austerity measures, in which the autonomous province is attempting to resist centrally imposed financial restrictions by the State government.

108. Also the Spanish Constitutional Court has contributed significantly to the evolution of the “State of Autonomies”. In its ruling on the LOAPA it mandated a restrictive use of the power to adopt harmonization laws (STC 76/1983). But the case law is also characterized by an extensive interpretation of the national

government's power to establish "basic rules" or enact "basic legislation" (STC 35/1982; STC 32/1983). Finally, the Constitutional Court is the ultimate interpreter of the statutes of the Autonomous Communities: it lately emphatically stressed its general jurisdiction "over the whole Spanish territory" (Art. 161), when declaring opinions of the newly established Catalan "Consell de Garanties Estatutàries" on bills affecting statutory rights (Art. 76.4 of the Statute of Catalonia), which would be binding for the regional legislature, as inconsistent with its own monopoly of constitutional interpretation (STC 31/2010 FJ 32).

109. The resolution of disputes concerning devolution issues (i.e. conflicts of competence, powers of the three devolved governments or laws adopted by the devolved legislatures) is under the jurisdiction of the Supreme Court of the United Kingdom. Since its creation in 2005, the Court – which has started working in 2009 – has however decided few proper devolution cases concerning the division of powers, while there have been plenty of cases concerning the applicability of the European Convention on Human Rights to Scottish criminal prosecutions.

110. An important role in conflict resolution is also played by the Supreme Court of Finland: according to the Autonomy Act of Åland (Section 60) the Supreme Court shall decide on conflicts between Åland officials and State officials with regard to administrative functions obtaining opinions first. Furthermore, the Finnish President can apply his veto on Åland legislation only after having heard the Supreme Court (which collaborates with the Åland Delegation).

Conclusions

111. Political and judicial conflict resolution mechanisms are foreseen everywhere. It appears indispensable to have and to rely on both. The examples for (meaningful) political participation range from institutions, such as Parliament or other (e.g. conferences), to special procedures of consultation. Bilateral relations reflect the procedural answer in case of strong asymmetries in status and powers. Courts complete the picture as arbiters of legitimacy after decisions have been taken. The extent and degree of the availability and use of each of these elements varies in each system depending on political, cultural and historical factors. However, in recent years, the search for a judicial resolution of conflicts between levels of government has become more common and frequent in most systems, especially those where political guarantees are weak.

7. Territorial integrity vs. secession

On the determination of the political status of the sub-national territory, secession and related procedures, in particular referenda.

112. Claims for independence and secession still have followers in Europe, as demonstrated in a number of (even recent) cases. This raises the important question of whether sub-national autonomy fuels or dampens those claims. That States view separatist demands with great suspicion hardly comes as a surprise. After all, they are guided by an inherent interest of self-preservation and protected through the international principle of territorial integrity. The vast majority of constitutions therefore explicitly discourages secession by emphasizing "territorial integrity", "indissoluble unity" or the "indestructible state", thus (at least implicitly) prohibiting any strife for secession. A second category of constitutions remains silent on this issue, but this also means that they do not provide any internal legal basis for separation. In other cases, the constitution recognizes a right to negotiate separation or the territorial status rather than guaranteeing a right to secession itself. Only few constitutions explicitly guarantee a right to secession including a procedure to enforce it.

113. While the Swiss constitution allows the redrawing of internal boundaries (internal secession), it does not grant the cantons a unilateral right to secede from Switzerland. In the absence of any secession claims, a secession right has so far never been vindicated. Neither in Germany nor in Austria constitutional provisions allowing unilateral secession of sub-national entities exist, which is understandable in the light of the historical circumstances: (Western) Germany being only partially sovereign until 1955 and divided until 1990; Austria in 1920, after the dissolution of the Austro-Hungarian Empire. In both cases, the federal constitution only states that the territory of the State is composed of the territory of the Länder, thus excluding further territorial claims, recognizing the international borders (for Germany as defined in the "4 + 2-Treaty" on unification with the GDR, 1990, for Austria as defined in the Treaty of St. Germain and – in relation to Hungary – by in the Venice Protocol of 1921). Also the Belgian Constitution does not include a right to unilateral secession. It merely states that the boundaries of the State may only be changed or corrected by a law (Art. 7) and that the preservation of territorial integrity is a key duty of the King (Art. 91.2).

114. More complex is the situation in countries having specific, asymmetric autonomy regimes designed for areas inhabited in substantial numbers by persons belonging to minority groups or nations. The Constitution of Finland does not allow unilateral secession as “the territory of Finland is indivisible” and “the national borders cannot be altered without the consent of the Parliament” (Section 4). Also the Italian Constitution implicitly prohibits secession: “The Republic is one and indivisible” (art. 5). However, even if independence claims have not taken root, there are some secessionist movements and claims (the Northern League for years campaigned on a secessionist agenda of a hypothetical people “Padania” to be recognized and the Veneto region adopted a law to allow for a referendum on self-determination, which has been declared unlawful by the Constitutional Court, judgment 118/2015). With the formal declaration of conflict-settlement before the UN Secretary General by Austria and Italy, the South Tyrolean claim for self-determination has been (satisfactorily) settled in its internal form of territorial autonomy.¹¹ However, political and economic difficulties as well as budget cuts and constraints have revived the debate on external self-determination in recent years. While the governing South Tyrolean People’s Party, representing the majority of German speakers, fully supports autonomy, some opposition parties claim the right of self-determination of South Tyrolean German and Ladin speakers.

115. Rather than authorizing secession, the Spanish constitution grants a “right to self-government”, but at the same time underlines “the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards” (Art. 2). Another reference to territorial integrity is made in the context of the mission of the armed forces (Art. 8.1). As early as in its judgment on the Basque law 9/2008, which foresaw a popular consultation about a new political status of the Basque Country, the Constitutional Court made two fundamental statements (STC 103/2008): first, the Autonomous Communities do not have the power to regulate such a consultation, any authorization is part of the exclusive competences of the State (Art. 149.1.32).

116. Secondly, the constitution would not rule out the possibility of recognizing another subject of sovereignty, i.e. the Basque people. However, this would require an amendment of the constitutional provision, which vests sovereignty exclusively with “the Spanish people” (Art. 2). For this change to be effected, the onerous procedure of Art. 168 would have to be followed. More recently, a seminal judgment (STC 42/2014) made clear that Catalonia does not have a right under the constitution to call for a referendum or other forms of popular consultation regarding its future status. Political struggles are nevertheless continuing, and included an informal consultation on independence that took place in late 2014, so the issue is far from being settled.

117. As the United Kingdom does not have an entirely written constitution, and the Scotland Act 1998 does not explicitly refer to a right of secession, there are no constitutional indications on this issue. On 15 October 2012 the UK and Scottish Governments signed an Agreement on a Referendum on Independence for Scotland (so-called Edinburgh Agreement). Attached to the Agreement there was a (draft) Order in Council which, after its approval devolved the competence to legislate on a referendum to the Scottish parliament (normally a competence reserved to Westminster). The political agreement contains the main elements of the subsequent referendum for Scottish independence (for example, the nature and design of the referendum question, franchise for referendum, campaign finance). The specific regulation was laid down in the Scottish Independence Referendum Act 2013, as an act of the Scottish Parliament. The referendum held on 16 September 2014 was a consultative one. However, although not legally binding, it was politically binding as the UK Government explicitly promised to respect the result. The majority of votes was against independence (55,3%), but the issue is politically still on the table.

118. Examples for an explicit guarantee of the right to external self-determination are the Faroe Islands and Greenland: for both, the perspective of independence and the right of external self-determination play an important role. Thus, they are expressly mentioned in the respective sub-national legal acts: “In 2005, the Government of the Faroe and the Government of the Kingdom of Denmark agreed on a new negotiated settlement that is composed of two new arrangements, which in concert establish full internal self-government as well as a certain degree of external self-government. This settlement is not seen or understood to be an exercise or replacement of the right of full self-determination.” Nevertheless, the Act on the Home Government of the Faroe provides in Section 1 that the islands are part of the Danish state: “The Faroe are a self-governing nation within the Danish State, in accordance with this Act. With due respect to the state boundaries the People of the Faroes, through its elected representatives, the Parliament (Løgtingið), and an executive established by it, the Government (Landsstýrið), shall assume the powers of Faroese Special Affairs as stated in this Act.”

¹¹ As recently underlined by the Austrian Parliament in a motion voted on 8 July 2015, according to which the right to self-determination of the German-speaking minority in South Tyrol is to be considered satisfactorily fulfilled by the current form of autonomy, which the Austrian Government is encouraged to support and further develop (s. PK-Nr. 806/2015).

119. The Self-Government Act of Greenland recognizes the right of self-determination of the people of Greenland under international law; Chapter 8 (section 21) provides guidelines for the process leading to independence: consultation of the people of Greenland, subsequent negotiations with the Danish Government and a referendum as well as consent of the Danish parliament (Folketing). In 2008, a referendum on greater autonomy has been held in Greenland: 75,5% of voters supported a new arrangement (Takeover Act/Act on Greenland self-government). As to Gagauzia, article 1.4 of the Law on the special legal status of Gagauzia limits the right to external self-determination to the case of loss of independent statehood by Moldova. In a referendum held in 2014, whose validity was contested by the Moldovan authorities, an overwhelming majority of voters of the autonomous territorial unit opted for independence of Gagauzia should Moldova become a member of the European Union.

120. History shows, however, that if, in case of continuous controversy, all negotiations fail and no common ground or constitutional accommodation can be found, separation or secession may be considered as the only option. Reference is made here to the dissolution of Czechoslovakia (“velvet divorce”). Although it may be considered an example of good practice, due to the peaceful character of the division, it should be noted that the separation took part against the will of the population: in a September 1992 poll, only 37% of Slovaks and 36% of Czechs favoured dissolution. For political reasons, other solutions, such as a more developed federal system, had not been given sufficient attention. Actually, the division had been negotiated between the two governments and subsequently ratified by the respective Parliaments – without popular consultation.¹²

121. By contrast, the dissolution of the Socialist Federal Republic of Yugoslavia started and ended with referendums on the independence of the former Republics (which formally had a right to secession, according to art. 1 of the Yugoslav Constitution, 1946, moved to the Preamble in the Constitution of 1974). In the case of Montenegro, a referendum of independence had been expressly foreseen as an option for ending the subsequent State Union with Serbia (art. 60 Constitutional Charter, 2003); in May 2006 it was held under international supervision and ratified the country’s independence. The International Community had insisted on a double threshold regarding turnout and majority in favour, in order to guarantee clarity and legitimacy of the decision. Both had been met and became yardsticks for further referendums on independence in other cases.

122. Referendums have played major roles in Bosnia and Herzegovina. The Republika Srpska had been proclaimed in 1992 as a separate State of Serbs in a clear act of secession through a referendum held after and in response to the referendum on the independence of Bosnia and Herzegovina as a whole, in which practically only Bosnians and Croats had taken part. While the goal of Bosnian Serbs had been independence of “their” self-proclaimed republic for possibly joining Serbia proper, and the Bosnian Croats had hoped to create an autonomous territorial unit of their own in Herzegovina in order to prepare for joining Croatia in future, only the third major group, the Muslim-Bosnians’, shared and supported the International Community’s objective of preserving Bosnia-Herzegovina’s statehood and territorial integrity. In December 1995, the two warring Entities were forced together by the pressure of the International Community in the Dayton Peace Agreement.

123. More than a decade later, Kosovo’s independence led to increased tensions in Bosnia-Herzegovina, where Republika Srpska vetoed recognizing Kosovo as a State threatening to declare its own independence. Periodically, there have been tensions between the International Community and RS, following the official defiance of the OHR’s authority by Republika Srpska,¹³ as well as its threats to call a referendum on the status of the Dayton Peace Agreement or of State judicial institutions established by international decree.¹⁴ Finally, the often invoked case of Kosovo’ is however different as during SFRY it never was entitled to self-determination not being a Republic: after NATO intervention against Serbia, the Autonomous Province was placed under an interim regime of UNMIK (UNSR 1244/1999) leaving the status issue open. However, in a referendum held in 2008, a clear majority of the population expressed itself in favour on the unilateral declaration of independence. Nevertheless, the independent status and statehood are still contested by Serbia and not recognised by, amongst others, five EU member States.

12 On 13 November, the Federal Assembly passed Constitution Act 541, which settled the division of property between the Czech lands and Slovakia. With Constitution Act 542, passed on 25 November, they agreed to the dissolution of Czechoslovakia as of 31 December 1992.

13 Statement by the Ambassadors on the RS Government, Conclusions, 25 September 2009; available at: [www.ohr.int/pic/default.asp?content_id=43990]

14 See e.g. RS Government’s Position of 14 December 2009 and the RS National Assembly Conclusions of 28 December 2009.

* All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

Conclusions

124. In their constitutions, the majority of States, including the federal ones, emphasizes the territorial integrity of the state and does not recognize a right to secession or independence of sub-national entities. However, in recent years there have been a number of cases of separation and secession in Europe as well as of respective political claims and movements. Paradoxically, European integration and a peaceful environment appear to favour these claims. However, in a democratic context, respectful of human and minority rights, the right to secession is difficult to qualify as part (or extreme consequence) of the right to democratic participation.

125. In the cases of the Basque and Catalan independence movements the Spanish state refused to address the question of territorial self-determination politically; legal issues and the Constitutional Court played a major role in affirming the principle of territorial integrity. By contrast, the case of the Scottish referendum on independence shows that this fundamental political question may be answered differently in a different constitutional setting and culture. However, the Scottish example also demonstrates that such a decision cannot be made unilaterally: in case of a positive referendum, negotiation on the details of the way to independence would have followed. This important lesson, together with the need for pre-established rules and clarity in the referendum procedure, has been learned from the terrible consequences of unilateral referendum decisions leading to the dissolution of Yugoslavia and war.¹⁵ Comparative experience shows that while political claims cannot be prevented by explicit or implicit rules denying the right to secession, such claims need to be embedded in a procedural context that cannot but include negotiation and agreement by the parties involved.

8. Sub-national treaty-making power and participation in international organisations

On the recognition of sub-national entities in international law and organizations

126. Membership of the state (including sub-national entities) in international organisations, which affect the competences of sub-national entities with their rules, activities or obligations, may pose problems for sub-national autonomy in general, but in particular for differentiated and asymmetrical autonomy solutions. Due to supremacy and direct effect of EU law, EU membership and integration pose even more risks for sub-national powers or special status. A further question relates to the membership of sub-national entities in international organisations.

127. Most federal and regional countries provide their subnational units with treaty-making power. This allows subnational entities to enter formal agreements with foreign countries or with their subnational units. Subnational treaty-making power is formally recognized by the constitutions of Austria, Belgium, Germany, Italy and Switzerland. A certain degree of foreign power to subnational entities has been recognized by the Spanish constitutional court (inter alia, STC 137/1989) and in the United Kingdom such activity is implicitly considered as part of the devolved powers. Everywhere, however, foreign policy is an exclusive competence of the national level. This implies the power of the national level to prevent or prohibit foreign relations of subnational units, should these be considered incompatible with national foreign policy, as international liability is vested with sovereign States, only. In 2015, the Flemish government decided to set up a fully-fledged ministry of foreign affairs.

128. EU Law has a huge impact on the competences, legislation and administrative structures of sub-national entities. Most sub-national entities are involved in the process of EU decision-making through domestic procedures, which guarantee that their positions on EU proposals regarding their competencies are considered by the national governments representing the Member State in the Council of Ministers.

129. This is often guaranteed through their second Chambers, which even permits participation in the preliminary subsidiarity control-procedure (Länder in Austria and Germany), or through formal (Italy) and informal (Austria) conferences. Only Germany and Belgium formally open the possibility of regularly participating as the representative of the Member State to ministers of sub-national governments (according to art. 16 TEU), while other do it in a less formalized way (Italy); in the past, also ministers of the Scottish government have represented the UK in Brussels. Nowadays, also direct relations including representation offices of sub-national entities in Brussels are recognized practice.

130. An extreme example is the special status accorded to the Åland islands within the European Union, which is recognized in the Finnish accession treaty. According to Protocol 2 (on the Åland Islands), the area of Åland is outside the VAT area and allowed to apply its special concept of "regional citizenship" as well as a peculiar property regime (hembygdsrätt/kotiseutuoikeus). The Åland Islands are also guaranteed a special

15 See also the unlawful referendum that took place in Crimea in 2014. On the issue see the Venice Commission CDL-AD(2014)002-e.

role with regard to EU legislation or international decisions affecting them (section 58, 59 and 59b, Act on Autonomy); this includes direct collaboration of the Åland Islands with the EU Commission. By contrast, Faroer as well as Greenland decided to remain outside the EU in order to preserve their special status. Furthermore, both have the power to conclude international agreements, which relate entirely to subject matters under the jurisdiction of their authority.

131. As to formalized representation in international organizations, the Nordic autonomies are a particularly developed example. They are directly represented in the Nordic Council and in the Nordic Council of Ministers. Both, Denmark and Finland have 20 members in the Nordic Council, an inter-parliamentary body. Among the Finnish members, two are sent from Åland and, in case of Denmark, two from Faroe and two from Greenland. Furthermore, each State sends one representative of the executive to the Nordic Council of Ministers, an inter-governmental body. Again, the three autonomous territories have equal representation and thus a broad possibility to influence decisions. The so-called “Åland Document” (2007) played an important role in strengthening the influence of the autonomous territories within the Nordic cooperation. Conversely, Catalonia represents an interesting example of informal and tolerated foreign policy carried out by a subnational entity. It has developed an extensive network of international relations with permanent delegations to several international organizations, including the EU, as well as to other powerful subnational entities (such as Québec) or even States. It also has over 40 representation offices worldwide, ensuring the representation of specific interests of the Catalan government, especially in areas such as trade and investment, Catalan culture and language support, tourism.

Conclusions

132. Sub-national entities are part of the State, who is the internationally recognized entity and actor under international law. Direct action (treaty-making capacity) and formal recognition and representation of sub-national entities (such as in the Nordic Council) is the exception, although informal means of a limited sub-national “foreign policy” as well as interregional and trans-frontier cooperation are many. The problems resulting from the State’s obligations at international level may be compensated by domestic participation in preparing the State’s decision at international level, and, in some cases, mitigated or resolved through reservations and derogations with regard to the sub-national entities.

C. Concluding comparative remarks

133. The objective of this study is comparison for the purpose of identifying common principles and trends regarding the protection of regional autonomy. Analysing the normative guarantees and procedures for modifying sub-national constitutions or regional statutes, the principles 2 and 29 of the Reference Framework for Regional Democracy – constitutional or legislative recognition of regional government as a principle and of the single entities – are broadly reflected. However, it depends on the importance for and impact on the whole system of territorial government, whether the main *source* of recognition and protection of a sub-national entity is the national Constitution, special legislation or a sub-national statute. Nevertheless, a re-enforced or entrenched status is common standard, in some cases strengthened by an international agreement.

134. Accordingly, manifold guarantees and pre-established procedures for modifying competencies and financial resources can be found, in line with the principles 3 to 7 of the Reference Framework. The single guarantees and procedures are very different in detail. By contrast with detailed catalogues on the division of powers are common in federal States (especially in the older and more established ones), in regional or devolutionary systems usually the powers of sub-national entities are listed in the Constitution (with the exception of Italy) or in the foundational acts or statutes of the entities. The analysed cases show the importance of bilateral negotiation, in particular for the transfer of (additional) competences and in the financial sphere.

135. In practically all analysed cases, the boundaries and territorial status of sub-national entities cannot be changed without prior consultation with the concerned entity. More often than not, this consultation also includes a referendum of the concerned population, in full conformity with principle 31 of the Reference Framework for Regional Democracy.

136. In all systems, sub-national entities can make use of political and judicial instruments for the prevention and resolution of conflicts; this corresponds to principle 30 of the Reference Framework for Regional Democracy. However, in some cases the procedures of dialogue with the central government are not developed sufficiently, which leads to an increase in the use of judicial means placing a considerable burden on courts and reducing political accountability.

137. An express right to independence or *secession* remains a rare exception, while constitutional clauses stressing territorial integrity or silence on this delicate matter prevail. However, over the last 25 years, there have been a number of referendums on separation or secession in Europe. If a referendum is held, procedures and vote as well as required majorities are subject to clarity requirements. Unilateralism is anyway generally discouraged by (international and) domestic legislation in all cases.

138. Sub-national entities are rarely directly recognised in the international context; their representation and participation in international matters affecting them mainly occurs via domestic procedures. For sub-national entities in EU Member States, this is in particular the case regarding EU affairs.

139. The general picture suggests that considerable sub-national autonomy is possible in most analysed States. However, the financial crisis as well as EU membership and the resulting strengthened role of the national governments have recently affected this picture and put considerable strain on sub-national governments. However, as the conditions and context in the single cases are too different, any generalisation is impossible.

140. As the Council of Europe's Reference Framework on Regional Democracy observes in its preamble, it is "through their diversity, (that) local and regional authorities also reflect the fact that the key principles of democracy and public participation in the management of living environments are flourishing". The principles and procedures for modifying status, competences and borders of sub-national entities (shall) express this fact by providing the necessary guarantees for a substantial degree of sub-national autonomy.

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