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“RETHINKING THE BOUNDARIES OF CONSTITUTIONAL LAW”

Workshop 11: Subnational Constitutions in Federal Constitutional States

Wednesday, June 13, 2007
Athens, Greece

To view pictures from this conference [click here](#).

I. Introduction

The workshop began with Alan Tarr (tarr@camden.rutgers.edu) delivering a paper entitled, “[Subnational Constitutional Space: An Agenda for Research](#).” He indicated that the discipline of comparative subnational constitutional law was a new one, and it encompassed a number of challenging questions such as what actually constitutes a “subnational constitution”; how much “subnational constitutional space” is permitted by the national constitution, and how the limits on that space are policed; the extent to which subnational units actually utilize their constitutional space; as well as a variety of other questions such as whether subnational constitutions are similar to each other within federal states and what the mechanisms for change are in such subnational constitutions.

II. Amendment and Revision of Subnational Constitutions.

Anne Twomey of Australia (anne.twomey@bigpond.com) delivered a paper entitled, “[The Involvement of Sub-national Entities in Direct and Indirect Constitutional Amendment within Federations](#).” She explored the relationship of subnational units to the amendment of national constitutions, which is an area that would be of great importance to such subnational units. She gave a broad survey of federal systems, concluding that the influence of subnational units on national constitutional change tends to be a negative influence, with only rare examples of initiation of national constitutional change by subnational units. She suggested that this might be a role for subnational units that could be strengthened. She also explored the role of political parties at the subnational and national level in these processes.

John Dinan of the United States (dinanji@wfu.edu) presented a paper entitled, “[Patterns of Subnational Constitution-making in Federal Countries](#).” He examined the institutional arrangements in the component units of 12 different federations, analyzing whether such arrangements were similar to (“Parallelism”) those in the national constitution, or, rather, were dissimilar (“Non-parallelism”) to those in the national constitution. He evaluated constitutional amendment and revision procedures, direct democracy, presidentialism v. parliamentarianism, and bicameralism v. unicameralism. He concluded that subnational constitutions make significant use of their constitutional space in all of these categories except presidentialism and parliamentarianism.

Rosario Serra (rosario.serra@uv.es) and Pablo Oñate of Spain (pablo.onate@uv.es) presented a paper entitled, "[The Reform of the Spanish Subnational Constitutions: Rules and Regulations and Political Contexts.](#)" They noted that the autonomy statutes are not really constitutions, but that they include characteristics of constitutions. The question of whether they are really constitutions is controversial in Spain. They indicated that under the new Spanish Constitution the autonomous communities could be recognized, and governed by autonomy statutes. This autonomous status could be achieved through two different processes ("tracks") the faster of which was at the same time more complex. The paper provided a review of the processes of change in these autonomy statutes which require action both at the national and regional level, together with, in certain cases, the involvement of the voters. The paper was based on three case studies of the reform of the autonomy statutes, covering Valencia, Catalonia and Andalusia, from the point of view of the degree of national identity, the depth of concern about reform of the autonomy statute, and the preference for even increased autonomy.

III. New Developments in Subnational Constitutions.

Christina Murray of South Africa (Christina.murray@uct.ac.za) presented a paper, co-authored by Catherine Maywald (Cathie_maywald@yahoo.com.au), entitled "[Constitution-Making in Southern Sudan.](#)" They reviewed the process of achieving a comprehensive peace in the conflict between north and south Sudan, leading to the adoption of a constitution for Southern Sudan that was, to some extent, mandated by the Comprehensive Peace Agreement. After the adoption of 10 state constitutions in Southern Sudan there are actually three levels of constitutionalism: national, regional, and state. The ten state constitutions, drafted by the state parliaments, have to be certified by both the Southern Sudan and national authorities. These state constitutions were based substantially on a model that was prepared, but several of them do include important new rights guarantees.

Brady Williamson of the United States (bwilliam@gklaw.com) presented a paper entitled, "[Does Hope Have Any Foothold in Sudan?](#)" He indicated the importance of Sudan in Africa, and that there was the promise of basic protections for individual rights and liberties in the 3-level constitutional structure in Southern Sudan.

Richard Cornes (rmcornes@essex.ac.uk) of New Zealand presented a paper entitled, "[The Union in 2007: Towards a New Constitutional Bargain for the Union of England, Scotland, Wales and Northern Ireland.](#)" He described the current debate over, and process of, devolution (not federalism) of power in the UK which is not governed by a written, federal, constitution. Such devolution, which is asymmetrical, or even possibly "haphazard," does not include England, which is governed by the Westminster Parliament. He goes on to provide a set of descriptive, or defining, principles or characteristics of devolution in the UK, including territorial definition (people's identity), the type of institutions (locally elected with separation of powers) and powers (the ability to act within the terms of the devolution and with some fiscal autonomy), the methods of establishment (Parliamentary statute after local positive referendum) and control (local democratic process, complimented by judicial review). He then develops a set of prescriptive principles for devolution in the UK.

Shi Shifeng (rocky.s.f.shi@gmail.com) presented a paper entitled, “[Towards Multiple-Constitutionalism: A New Paradigm for Constitutional Reform in China?](#)” He examines the possibility in China of “multiple-constitutionalism” or “multi-layered constitutionalism.” Such a system might have local or regional constitutions, a national constitution, and international “constitution.” These three levels of constitutionalism would interact with each other, primarily through a judicial system. This, of course, has not yet taken place in China.

Paulo Cardinal (paulocardinal@yahoo.com) of Macau, who was unable to attend the workshop, submitted a paper entitled, “[The System of *Non Dual Domains* and the Principle of Exclusivity Allocated to the Subnational Autonomous Units and the Protection of Fundamental Rights: The Case of the Special Administrative Regions of the P.R. of China.](#)” He described the arrangement for limited territorial autonomy in China for Macau and Hong Kong -- the Special Administrative Regions. It is not a true federal system, but this form of asymmetrical territorial autonomy is governed by a Basic Law which has many of the characteristics of a subnational constitution.

Jonathan Marshfield (jonmarsh@camden.rutgers.edu) of the United States, who was unable to attend the workshop, submitted a paper entitled, “[Subnational Constitution Making in Transitional Federal States - South Africa, Democracy, and the KwaZulu-Natal Constitution.](#)” He contends that the availability of subnational constitutional space provides a political opportunity for the dominant national political power to make concessions to opposition parties and interests, on the subnational constitutional level, that it could not make in the context of national constitutional making. In the same way, the opposition can accept such concessions on the subnational level, and use the subnational constitution making process to refine their political and negotiating skills. This form of subnational constitutional bargaining can alleviate conflict and even reduce the possibility of violent confrontation.

IV. Subnational Constitutional Space

Antonio Moreira Maués, of Brazil (amaues@amazon.com.br) presented a paper entitled, “[Constitutional Justice and Subnational Constitutional Space: The Cases of Brazil and Spain.](#)” He analyzed the decisions of the Spanish Constitutional Court and the Brazilian Federal Supreme Court on a variety of questions concerning the competency of the subnational units. The Spanish Constitution did not mandate the creation of Autonomous Communities whereas the Brazilian Constitution defined and widened the competency of the states including autonomy for municipalities.

Antoni Abad i Ninet of Spain (abadininet@hotmail.com) and Adrià Rodés Mateu (adria.rodés@uab.es) presented a paper entitled, “[Asymmetry in the Spanish State's Model of Territorial Organization.](#)” The paper indicated that the Spanish national constitution ??while responding to the tension between forming a unitary Spanish state and recognizing the historic “nationalities,” does not define the composition of the states in terms of a territorial federal structure. The asymmetrical, devolutionary process of recognizing and empowering autonomous communities is still evolving. Autonomy Statutes have been developed according to two, differing procedures established by the national constitution: the “slow” and the “fast” tracks.

Autonomy for regions is not guaranteed by the national constitution, they do not play structural roles in the Senate, and they are not recognized as regions in the European Union institutions. The paper concludes that this model has not achieved its purpose of flexibly accommodating autonomy and self government in multinational regions because of extensive intrusion into the competencies of Autonomous Communities by the national government.

Manuel Gonzalez Oropeza of Mexico (gonzalezoropeza@prodigy.net.mx) delivered a paper entitled, “The Nature of Subnational Constitutions in Mexico.” He indicated that there was potential for the state constitutions in Mexico to emerge from the prior centralizing tendencies of one-party rule, but that a variety of important matters such as human rights and judicial review remained primarily in the domain of the federal constitution. He concluded, however, that there was some available state constitutional space to be utilized and that this was really the current challenge to the states of Mexico.

Ricardo Hermany (hermany@unisc.br) of Brazil delivered a paper entitled, “[\(Re\)discussing the Public Politics in the Local Space: Interconnections among Federalism, Subsidiarity and Social Right in Brazil.](#)” He analyzes the local space (“third level”) within the subnational units in Brazil. The national constitution of 1988 gives municipal districts a form of autonomy, including the assignment of municipal competency. He analyzes the subsidiarity principle in the Brazilian context, including the judicial role in working out competency disputes.

Marko Stankovic of Serbia, who was unable to attend the Workshop, submitted a paper entitled, “[The ‘Spoiled’ Principles of Federation in Belgium.](#)” He contends that the unique Belgian devolutionary federalism, which is not territorial, really does not provide viable subnational constitutional space, and that therefore Belgium does not have any subnational constitutions. He measures the Belgian constitutional structure and concludes that it does not meet the criteria of a federal state.

Alexei Trochev of Canada, who was unable to attend the conference (trocheva@queensu.ca) submitted a paper entitled “[Less Democracy, More Courts: A Puzzle of Judicial Review In Russia.](#)” He described why some Russian subnational units created constitutional courts and others did not. He contends that this decision represents a political choice, made by strong incumbents in office to legitimize their federalism and judicial reforms. This conclusion is contrary to the prior assumption that politicians create strong and independent courts to protect them from the tyranny of election winners in the context of political uncertainty.

V. Subnational Constitutional Rights

Brian Galligan (galligan@unimelb.edu.au) of Australia presented a paper entitled, “Federalism, Subnational Government and Rights Protection.” He points out that, despite the ongoing discussion of whether federalism serves to protect rights, little attention has been devoted to the protection of rights by component units. Subnational constitutions generally, outside the United States, have been neglected. In component units, however, even those without constitutions, rights protections may be provided by political and legislative means, especially for ethnocultural groups. The range of subnational rights protections is analyzed

through three models, traditional, constitutional or territorial federalism; recently articulated multinational federalism, and asymmetric federalism. Asian federalism and quasi-federal arrangements are highlighted, often in the context of multiculturalism. Key elements are the presence or absence of security threats from ethnic groups spanning borders; and deep consensus on liberal democratic values and human rights.

Walter Carnota (wcarnota@fibhotel.com.ar) of Argentina presented a paper entitled, "[National and Sub-national Protection of Fundamental Rights in Connection with International Law.](#)" He indicated that at least one state in Argentina was engaged in an experiment whereby its state constitution incorporated various international human rights norms. This, he concluded, resulted in an interesting multi-level regime of rights protection, where not only could state citizens look to the subnational and national constitutions for rights protections, but could, as a matter of state constitutional law, look to international rights protections. He opined that it was conceivable this would result in a form of "trickle-up" phenomenon of rights protections.

Mark Leeming (mleeming@selbornechambers.com.au) of Australia submitted a paper entitled, "[Common Law Within Three Federations.](#)" He indicated that often rights protections within subnational units in federal states might be provided by subconstitutional mechanisms such as common law adjudication and statutory protections. He analyzed common-law rights protections in Australia, Canada and the United States. Canada and Australia have developed a national common law, which may be modified by state or provincial statute, by contrast to the situation in the United States where common law is developed primarily by states. This allocation of law-making authority will be significant in any federal country which has state courts.

Céline Fercot (celinefercot@yahoo.fr) of France presented a paper entitled, "[The Diversity of State Constitutional Rights: An Essential Feature of Federalism -- A Comparative Analysis of German, American, and Swiss Law.](#)" She described the protection of subnational constitutional rights (which are quite diverse: identical, more protective, and less protective than federal provisions) as an element of the principle of autonomy in federalism. This indicates that the presence of subnational constitutions is a material condition to such subnational constitutional rights. Further required are jurisdictional structures ("institutional condition") and procedural conditions to effectuate such subnational rights. In each of the three states studied federal law has been seen as primary but this is changing and should continue to change.

VI. Conclusion

James Gardner of the United States (jgard@buffalo.edu) presented a concluding paper entitled, "[In Search of Subnational Constitutionalism.](#)" He asks whether the increasing prevalence of subnational constitutions reflects an actual increase in subnational constitutionalism--an ideological commitment to the role of subnational units in shaping the lives and protecting the liberty of people, even possibly against the national government. Although cultural and ethnic protections appearing in subnational constitutions suggest such ideology, other factors raise questions. Such factors include reliance on national constitutional protections, extraconstitutional avenues of rights protections, and the growing availability of supranational human rights protections.