



SANT'ANNA LEGAL STUDIES

STALS RESEARCH PAPER N. 7/2010

Julio Pinheiro Faro Homem de Siqueira

What is subnational constitutionalism?

Sant'Anna School of Advanced Studies

Department of Law

<http://stals.ssup.it>

ISSN: 1974-5656

WHAT IS SUBNATIONAL CONSTITUTIONALISM?*

*Julio Pinheiro Faro Homem de Siqueira***

Abstract: This brief essay aims to clarify the notion of subnational constitutionalism, providing a tentative description thereof and some reflections on its relevance. For this purpose, each component of this formula is investigated separately. Some of the features of subnational constitutionalism are then discussed at length, in order to put forward a particular notion of this concept.

Keywords: Subnational constitutionalism; Sovereignty; Decentralisation; Autonomy.

1. Introduction

This paper briefly explains what subnational constitutionalism stands for. To achieve this purpose, it searches the etymological roots of the words *constitutionalism* and *subnational* and adds some general insights based on constitutional theory, without purporting to provide a deep and conclusive analysis of all the issues that might arise from either of these terms (constitution, constitutional, constitutionalism; nation, national, and nationalism). For a start, in Section 2 this paper specifies which meaning of the notion of constitutionalism it adopts. After, in Section 3, it will give an account of the subnational attribute, before turning in Section 4 to the description of certain complementary characteristics of this compound concept. The conclusion, in Section 5, will present the result of this conceptual inquiry.

2. The notion of constitutionalism

The word *constitutionalism* derives from *constitutional*, which has its roots in the Latin term *constitutio* (meaning “enactment”); the plural form *constitutiones* means “a collection of laws.”¹ The essential notion of constitutionalism was first developed by men of the lineage of Socrates, Plato and Aristotle; since then, much water has flowed under the bridge. Part of this

* This paper was produced under the research group coordinated by Prof. Dr. Giuseppe Martinico on *Subnational Constitutionalism*.

** Master in Laws Candidate at Faculdade de Direito de Vitória (FDV); Graduated in Laws, at FDV; General-Secretary of Brazilian Academy of Human Rights (ABDH); Lawyer. The author would be thankful if you contact him to discuss the issues raised here, and for any comments at julio.pfhs@gmail.com. The usual disclaimer applies. All the web-sources were accessed on 13 September 2010.

1 Sartori, Giovanni (1962), “Constitutionalism: a preliminary discussion”, 56(4) *The American Political Science Review* 853.

flowing water has been collected through the years and was used to form the meaning of *constitutionalism* that is currently employed (with some semantic fluctuation) by many people. In its essence, the word indicates limitation of power and supremacy of law.² It consists of a doctrine concerned with the frame of government, the distribution of powers and a system of checks and balances, and rights protection.

Regardless of various tentative definitions which may differ from one another, the core elements of the constitutional element seem to be non-controversial: limitation of power and supremacy of law. Or, to use a very popular and disseminated term, *rule of law*.

More specifically, *constitutionalism* does not necessarily assume the existence of written norms or a codified Constitution, but rather the legitimacy of the exercise of powers by the authorities, the voluntary commitment of all citizens to the established (or yet to be established) system, and a well-structured frame of government. Conversely, the existence of a Constitution does not imply the idea of constitutionalism either: it is possible both to have constitutionalism without a Constitution, and a Constitution without constitutionalism.³ Thus, the very idea of *constitutionalism* is premised on the respect of the rule of law, “in which the government, however it is configured, reflects the basic values and aspirations of the community.”⁴

Unfortunately, this concept is not universal, and historically it never was. There were (and still are) countries in which constitutionalism is a mere formula to which any content can be attached, which means very little in and of itself. This leads to a situation where the Constitution (either written or of consuetudinary nature) theoretically exists, but is not practiced. In another situation, contrary to the tradition of secular constitutionalism, the version of constitutionalism based on religious affairs appears problematic. However, it sometimes represents a solution rather than a problem, in societies with certain traits.

Notwithstanding the huge variety of meanings that are attached to the concept, we adopt here a generic understanding on the word *constitutionalism*: the structure of governmental

2 Barroso, Luís Roberto (2009), *Curso de direito constitucional contemporâneo: os conceitos fundamentais e a construção do novo modelo*. São Paulo: Saraiva, at 5; Tarr, G. Alan (2007), “Subnational constitutional space: an agenda for research”, *World Congress of the International Association of Constitutional Law*, Athens, 2007. Available at: <http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop11/Tarr.pdf>, at 2.

³ Gardner, James A. (2007), “In search of subnational constitutionalism”, *Buffalo Legal Studies Research Paper Series*, paper n. 2007-016, available at: <http://ssrn.com/abstract=1017239>, at 6-7: “That constitutions and constitutionalism are conceptually independent is further demonstrated by the phenomenon of subnational constitutionalism without constitutions, of which Canada presents the clearest example.”

⁴ Stotzky, Irwin P. (2008), “Constitutionalism and democracy: an essay in honor of Stanley N. Katz”, 63 *University of Miami Law Review* 86.

authority, the limitation of power, the protection of rights. This generic understanding, in turn, will help to provide an introductory appraisal of the term *subnational constitutionalism*.

3. The definition of subnational

If conceptualising *constitutionalism* is such a complicated task, the same task with the *subnational* concept does not prove much easier. The prefix *sub-* presents no issues, as it generally means *under* or *below*. The trouble arises when it is connected with another word, especially if this latter has an evanescent meaning. Again, we will employ a generic meaning that makes it easier to advance in the understanding of the concept.

As stated above, *sub-* generally means *under* or *below*, conveying the idea of an inferior position, or an element set below an imaginary or real line. However, its meaning can vary according with the word it is connected with. A first difficulty arises: *subnational* can mean something that is under or below what is “national,” but it can also mean something completely different.

The solution, obviously, lies in the chosen meaning of *national*. This word is derived from *natio*, whose meaning is controversial as well. The Latin word *natio* comes from the verb *nascor* (*natus*, *nasci*): *to be born*. This is certainly enlightening, although it is not sufficient: to be born in a certain place does not necessarily mean one belongs to it. The birthplace sometimes cannot confer nationality to a person. The same goes with people born in a nation that was extinct, or divided: this cannot retroactively affect their birth. Thus, to be born does not mean belonging to a nation, or being a national citizen. The concept of nation (and of national) has diverged from its etymon, and must be looked at somewhere else. This meaning cannot date back too much; as posited by Renan, “it was in fact the Germanic invasions which introduced into the world the principle which, later, was to serve as a basis for the existence of nationalities.”⁵

Some elements are historically related to the concept of nation, including race, territory, language, culture, and others. However, none of them can be considered decisive. Some of these elements and others are at least as difficult to conceptualise as the word *nation*. The concept of race, for example, has plenty of meanings: biological, religious, sociological. Culture is generally used to encompass customs, but even this meaning is not exhaustive, because in a given nation different communities may have different customs. Territory and

5 Renan, Ernst (1882), *What is a nation?* Available at: http://www.cooper.edu/humanities/core/hss3/e_renan.html: While the term existed in Antiquity, its meaning was very different than the general understanding in modern times. During Antiquity, the word citizen (citizenship) was much more common than national (nationality) to define the members of a *polis* or a society.

language⁶ seem to be the characteristics (among the four listed) that can be considered relatively more suitable to identify a generic concept for the concept of *nation* or *national*. Even though some questions might still emerge from their use, they are more suitable than the other two, and for the sake of this short essay, the territorial element will suffice. In terms of territory many criteria come into play, but the most accurate definition possible is the political one. Accordingly, a *nation* is a country located within the pre-defined political boundaries.

Typically, people born inside these boundaries are *nationals* of this *nation*, but this assumption is not necessarily exact. Fortunately, this interesting aspect does not need to be faced here, because the word *national* in *subnational* does not directly refer to the concept of citizenship or nationality. It is rather connected with the political element, and points to entities that are *smaller* than the nation (and not *under* or *below* it), such as regions, provinces, municipalities, member states of a federation, or cantons. Subsequently, they can be grouped according to their language or customs, although the political criterion is certainly more apt to embark on this defining venture.

4. Some characteristics to complete the idea of the concept

A preliminary understanding of the term *subnational constitutionalism* is that it is a doctrine concerned with the form of government, the limitation of power, and the protection of rights at the smaller-than-national level. To put it more concisely, *subnational constitutionalism* is “the application of the principles of constitutionalism at the subnational level.”⁷

However, a concept of *subnational constitutionalism* (even a preliminary one) will not be complete without adding some remarks about its main legal characteristics. Some of these elements (those considered essential) will be shortly described below, in an attempt to further elucidate the concept.

4.1. Sovereignty

One characteristic that the subnational entities usually do not possess is the sovereignty, which is notoriously a very complex term to conceptualise. In general, two definitions are often used: “The first definition applies to supreme public power, which has the right and, in theory, the capacity to impose its authority in the last instance. The second definition refers to

⁶ As obvious, language alone is unable to identify a single nation (nor could a nation correspond necessarily to a single language). See: Renan (1882).

⁷ Gardner (2007: 3).

the holder of legitimate power, who is recognized to have authority.”⁸ Commonly, the first of these notions refers to the international independence of a nation with respect to others (external sovereignty). There is a reciprocal acknowledgement of autonomy in the international community, though this does not account for the differences between sovereignty and autonomy.

In turn, the second definition can apply to domestic frameworks, and to the limits that define the legitimacy of exercising (delegated) powers by those in authority. When the State is a federation, the concept of sovereignty also pertains to central power, representing the nation vis-à-vis its subnational units. This second definition, indeed, is based on the element of popular sovereignty.

In light of the above, it is *prima facie* clear why sovereignty cannot be a prerogative of the subnational units. Both entities that are sovereign and not sovereign may practice autonomy, but autonomy does not correspond to sovereignty.⁹ Subnational entities have no sovereignty except that proportion of popular sovereignty held by those living within the boundaries of a subnational unit. Thus, when one talks about “subnational sovereignty” the exact reference is to the sovereignty of the people, rather than of the subnational entity in and of itself. In other words, the people are the owners of sovereignty, since subnational units have no sovereignty, only autonomy.¹⁰

The existence of a strong union among subnational units, as in federations, is generally facilitated when there is an abdication of the sovereignty of each subnational entity to a central (national) power which will exercise power to their benefit. In exchange, the subnational units receive through the decentralisation process the element of autonomy.

8 De Benoist, Alain (1999), “What is sovereignty?” 116 *Telos* 99.

9 Chessa, Omar (2007), *La resurrezione della sovranità statale nella sentenza n. 365 del 2007*, available at: <http://www.forumcostituzionale.it/site/>, at. 8-9 expresses a similar understanding: “...alle autonomie regionali e locali non corrisponde dialetticamente la sovranità, poiché quelle non son il frutto, sempre revocabile, della'autolimitazione di questa”.

¹⁰ See judgment No. 365/2007 of the Italian Constitutional Court (ICC) at <http://www.cortecostituzionale.it>. It could be inferred from this decision that the Sardinian people have (popular) sovereignty because they are part of the Italian people, and not because they are within the boundaries of the Sardinia Region, which, in and of itself, has no sovereignty. The ICC found Regional Law No. 7 of 23 May 2006 to be unconstitutional, only in the parts referring to regional sovereignty. See Delledonne, Giacomo and Martinico, Giuseppe (2009), “Handle with care! The Regional Charters and Italian constitutionalism’s ‘grey zone’”, 5 *European Constitutional Law Review* 224.

4.2. Decentralisation

Before explaining the characteristic of autonomy, the process of the decentralisation of power is worth explaining. It typically occurs within federal States' regimes,¹¹ when it is not possible for the central government alone to perform all its necessary tasks.

Among the various examples at hand, a very elucidative one is the distribution of competences necessary for the provision of public services, or the possibility for subnational entities to manage certain public goods in accordance with their prevailing interests. For instance, in a federation comprised of three classes of local entities, the division in terms of interests could follow this model: the federal union (which represents the State internationally and which is considered the central entity) is (also) responsible for its national interests. The member states are responsible for regional interests, and the municipalities or provinces, for local ones. This thesis can be better understood with a simple example: when public transport is run at the municipal level, the interest is local; when it is developed between two municipalities (typically, still within a member state or region), the interest is regional; when it is developed between two member states or regions, in turn, the interest is national.

The decentralisation movement is a very interesting factor of reinforcement for subnational entities. The transfer of resources, responsibilities and authority are not only putting subnational governments at the forefront of politics,¹² but also increasing their independence and autonomy, "introducing a new emancipation language of democracy, pluralism and rights."¹³

Scholars are now more interested in this phenomenon than they were in the mid-1980s when it first took place systematically, and they have certainly benefited from the example coming from the integration process of Europe. Indeed, the European Union represents an archetypical model displaying the centralising tension to which localisation represents a counterweight.

European integration has some points in common with the process of federalisation that occurred at the end of the Eighteenth Century in North America. After productive discussions between federalists and anti-federalists¹⁴ the federal model was chosen, in which the states maintained most of their powers and competences, only giving to the central government

¹¹ Gardner (2007: 8).

¹² Falletti, Tulia G. (2005), "A sequential theory of decentralization: Latin American cases in comparative perspective", 99(3) *American Political Science Review* 327.

¹³ Larson, Anne M. and Jesse C. Ribot (2004), "Democratic decentralisation through a natural resource lens: an introduction", 16(1) *European Journal of Development Research* 1.

¹⁴ See Hamilton, Alexander, John Jay and James Madison (2001), *The federalist* (The Gideon Edition), Indianapolis: Liberty Fund; Sheehan, Colleen A. and Gary L. McDowell (eds.) (1998), *Friends of the Constitution: writings of the "other" federalists (1787-1788)*, Indianapolis: Liberty Fund.

what was necessary to maintain national cohesion and protection. Although the EU process is not being called by the same name, it truly resembles a federalisation process, whereby each country transforms into a subnational entity. Despite its undeniable peculiarities it is possible to glimpse a European nation, under certain aspects.

4.3. Autonomy

The dichotomy between centralisation and decentralisation emphasises one important characteristic of subnational entities: autonomy. Decentralization usually aims to ameliorate the management of a nation or a union of local autonomies, by assigning certain tasks and the provision of certain services to peripheral entities when they are likely to do so more efficiently than the central government. Conversely, when subnational units are not equipped to discharge certain duties, those duties are assigned to the central power (centralisation). The existence of subnational entities presumes the functioning of both processes.

Autonomy comes from the Greek word *autonomía* (*autos* + *nomos*), meaning self-government, or something echoing independence. Autonomy can be defined as a power awarded to an entity with no sovereignty for enacting legal norms which are similar to the ones enacted by the sovereign entity.¹⁵ However, the norms passed by autonomous powers cannot prevail over the law of a sovereign authority, in case of conflict. Autonomous entities enjoy authority only within their boundaries, as do the norms enacted by them. Thus, an entity has autonomy when it has control over its own affairs. According to the level of certain subnational entities, the scope of this control may vary. Usually there are three kinds of autonomy that can be held by subnational entities: executive, legislative, and financial/fiscal.

The existence of an institutional frame of government with proper legislative and executive bodies is a minimum structure for the administration of subnational entities. However, the mere existence of a governmental structure is insufficient for the complete autonomy of a subnational entity. Fiscal or financial autonomy is also important, with the power to collect taxes, to manage the entity's budget and to fund its policies. As mentioned above, some entities also possess judiciary autonomy, so they can exercise jurisdiction and enforce their own laws without referring to a subnational or national entity at a higher level.

Generally, subnational entities' autonomy is ensured by constitutional provisions in the federal fundamental law codes.¹⁶ These constitutional protection clauses can have two forms.

¹⁵ Giannini, Massimo Severo (1958), entry "Autonomia", in *Enciclopedia del Diritto*, Milano: Giuffrè, vol. 4, at 357.

¹⁶ Tarr (2007: 19).

First, the federal constitution may establish only national powers and limit their extent through a provision establishing that the powers the constitution does not attribute to the national (central) entity, or that are not therein prohibited, are reserved for its subnational entities.¹⁷ In a second scenario, the federal constitution may list all powers, enumerating those exercised only by the national entity, along with those that must be exercised by subnational entities. The difference between these two methods is that in the first, subnational entities (probably once nations) confer powers to the national entity, whereas in the second the subnational entities (which were probably never nations) receive powers from the national entity. In both situations, autonomy is a characteristic that determines, to a certain extent, the self-determination of an entity.¹⁸

5. Conclusion

In light of the discussion above, we can say that *subnational constitutionalism* is a doctrine concerned with the form of government, the limitation of power, and the protection of rights relating to the different entities which comprise the nation (or the State). *Subnational* entities typically benefit from the results of some decentralising process, although they have neither sovereignty nor complete independence.

Stemming from a decentralisation process, subnational entities gain the possibility of establishing institutions of self-government, of having their own public finance and public servants, and of implementing their own public policies to achieve, theoretically, the best interests of their citizens. In this sense, the existence of subnational entities brings to the nation (or State) an improvement in government efficiency, state organisation, distribution and exercise of power, and effective protection of rights.

¹⁷ An example is the tenth amendment of US Constitution: “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” See the US Constitutional 10th Amendment at <http://www.usconstitution.net/const.html#Am10>.

¹⁸ Cornell, Svante E. (1999), “The devaluation of the concept of autonomy: national minorities in the former Soviet Union”, 18(2) *Central Asian Survey* 186.

Bibliographical References

Barroso, Luís Roberto (2009), *Curso de direito constitucional contemporâneo: os conceitos fundamentais e a construção do novo modelo*. São Paulo: Saraiva.

de Benoist, Alain (1999), “What is sovereignty?” 116 *Telos*.

Chessa, Omar (2007), *La resurrezione della sovranità statale nella sentenza n. 365 del 2007*, available at <http://www.forumcostituzionale.it>.

Cornell, Svante E. (1999), “The devaluation of the concept of autonomy: national minorities in the former Soviet Union”, 18(2) *Central Asian Survey*.

Delledonne, Giacomo and Martinico, Giuseppe (2009), “Handle with care! The Regional Charters and Italian constitutionalism’s ‘grey zone’”, 5 *European Constitutional Law Review*.

Falletti, Tullia G. (2005), “A sequential theory of decentralization: Latin American cases in comparative perspective”, 99 (3) *American Political Science Review*.

Gardner, James A. (2007), “In search of subnational constitutionalism”, *Buffalo Legal Studies Research Paper Series*, paper n. 2007-016, available at: <http://ssrn.com/abstract=1017239>.

Giannini, Massimo Severo (1958), entry “Autonomia”, in *Enciclopedia del Diritto*, Milano: Giuffrè, vol. 4.

Hamilton, Alexander, John Jay and James Madison (2001), *The federalist* (The Gideon Edition), Indianapolis: Liberty Fund.

Larson, Anne M. and Jesse C. Ribot (2004), “Democratic decentralisation through a natural resource lens: an introduction”, 16(1) *European Journal of Development Research*.

Renan, Ernst (1882), *What is a nation?* Available at: http://www.cooper.edu/humanities/core/hss3/e_renan.html.

Sartori, Giovanni (1962), "Constitutionalism: a preliminary discussion", 56(4) *The American Political Science Review*.

Sheehan, Colleen A. and Gary L. McDowell (eds.) (1998), *Friends of the Constitution: writings of the "other" federalists (1787-1788)*, Indianapolis: Liberty Fund.

Stotzky, Irwin P. (2008), "Constitutionalism and democracy: an essay in honor of Stanley N. Katz", 63 *University of Miami Law Review*.

Tarr, G. Alan (2007), "Subnational constitutional space: an agenda for research", *World Congress of the International Association of Constitutional Law*, Athens, 2007. Available at: <http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop11/Tarr.pdf>.