

Regional Identities in Europe

Their Manifestations in Constitution- and Policy-Making

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Introduction

For a certain period of time, starting in the early 1980s, the notion of a ‘Europe of the regions’ (Keating 2008: 630) generated a lot of support and even enthusiasm, as it became a political slogan used by ardent promoters of regionalism and, for a while, also the European Commission. Around the turn of the millennium, however, the idea of regions as a genuine ‘third level of government’ within the EU suffered a setback for several reasons, among them the acknowledgement that realising this idea is bedevilled by the enormous diversity of European regions in terms of both legal status and political influence (Weatherill 2005: 15). This chapter is decidedly not about the EU-focused ‘Europe of the regions’ in the above sense. Instead, it explores European regional identities in broader terms and asks how such identities may manifest themselves, especially in case of regions demanding greater autonomy in both constitution- and policy-making. Section 2 provides a working definition of ‘region’ and how it relates to autonomy claims and processes of identity formation. Section 3 then explores how the constitutional entrenchment of regional identities interacts with these processes and how such identities may be reflected in policy-making. Section 4 concludes.

European Regions, Autonomy and Regional Identity

The ‘Region’ as a Contested Term: A Working Definition

As we shall see in this section, the term ‘region’ has rapidly gained importance in recent decades in politics, academia and in the arenas of both international and constitutional law. It does not come as a surprise, therefore, that understandings of this term have proliferated. In such a context, it is evident that a working definition is needed of what this chapter takes ‘region’ to mean.

First, the focus is exclusively on regions in a *legal-political* sense. However, as the etymological origin in the Latin word *regio* merely refers to a boundary line, and to the territory between boundaries, the distinctiveness of this territory may manifest itself in a range of quite different ways (Gamper 2004: 3). Depending on the criteria used to set one area apart from others, we may distinguish, for example, historical, cultural and economic regions, which can make it appear that talk of legal-political regions is nothing more than the bias of lawyers and political scientists. There appears to be an emerging consensus, however, that regions should be considered as social constructions rather than natural entities in any case, irrespective of which criteria are used (Keating 1997: 390).

Secondly, we need to narrow the focus within the wider category of legal-political regions. What this chapter looks at are *subnational* regions defined as ‘an intermediate territorial level, between the state and the locality’ (Keating 1998: 9). This definition does not require, of course, that such intermediate entities are explicitly and literally called regions in constitutional texts, as was the case arguably for the first time with the *regiones* mentioned in Art. 8 of the 1931 Spanish Constitution as autonomous components of the *Estado Integral*. Subnational regions according to this interpretation can be called provinces, cantons, etc. However, the regions addressed in this chapter are certainly not those above the state, i.e. entities bound together by political, economic or military cooperation between states. Until the 1960s, this was arguably the only understanding of ‘region’ that had common currency, and it is still reflected in terms such as ‘macro geo-economic regions’ (Ortino 2005: 282) or APEC or ASEAN. While recent decades have witnessed the beginning of a shift towards a more open conception of regions that also includes subnational entities (Keating 1998: 9), Europe has in the meantime seen the emergence of new understandings of legal-political regions. A case in point are cross-border regions, which have been established through sustained bilateral or multilateral cooperation across international boundaries. These regions, often deliberately termed ‘Euroregions’, which typically follow a functional rationale and/or symbolic rationale of (re-)connecting territories that share some common historical or ethno-cultural identity but are separated by international boundaries, are inherently political in nature. But cross-border regions also have a legal dimension, for instance, under EU law as a consequence of the 2006 EU Regulation on a European Grouping of Territorial Cooperation,¹ in the national law of numerous countries in post-communist Central and Eastern Europe and, importantly in the age of Brexit, under Strand 2 of the 1998 Belfast Agreement. ‘Macro-regions’ within the EU are an even newer form of legal-political region, albeit one with far weaker legal institutionalisation. With a focus mainly on the economy, they have resulted from

1 See Regulation (EC) No. 1082/2006 of the European Parliament and the Council (2006) of 5 July 2006 on a European Grouping of Territorial Cooperation, OJ L210/19, 31 July 2006.

the EU's adoption of macro-regional strategies since 2009 (European Commission 2014). This final kind of region is based on certain common interests and challenges and is itself merely a relatively loose 'network, a *modus operandi* or, rather, a form of joint action' involving actors from various levels of government levels, not least the subnational regions that this chapter focuses on (Committee of the Regions 2012).

Dynamics of Autonomy and Dynamic Autonomy

As far as the establishment and extension of regional autonomy is concerned, one may distinguish between two basic dynamics that I have explained in more detail elsewhere (Palermo/Kössler 2017: 22–25): a top-down approach of granting limited autonomy primarily for the delivery of regional development policies, as in several European countries such as France during the early post-war period, and bottom-up dynamics with regions themselves claiming distinctiveness and arguing on this basis for some autonomous status. The latter dynamics grew strongly in prominence from the 1970s onwards with the advent of what has been aptly called (Western) Europe's 'regional revolution' (Hopkins 2002: 39). Notable reforms or reform attempts during this decade that involved bottom-up dynamics included the start of a process in Belgium that has so far seen six consecutive state reforms (1970–2011); the adoption in Spain in 1978 of the constitutional framework for the establishment of autonomous communities; and, in the United Kingdom, the (at least attempted) devolution projects for Scotland and Wales (Mény 1982).² As this chapter aims to explore the manifestations of regional identities in constitution- and policy-making, it concentrates on cases of autonomy that are characterised by bottom-up dynamics. In other words, it concerns identity-related claims for (more) self-government.

Such demands then typically reflect a dynamic understanding of regional autonomy according to which self-government is a process rather than an outcome. This point relates to a classic controversy on the nature of federalism – a phenomenon that is, despite different views on the exact relationship, closely linked with regional autonomy (Palermo/Kössler 2017: 13–61). After a long period during which Kenneth Wheare's vision of federalism as something inherently static (Wheare 1947: 11) had prevailed, this was challenged in the 1960s, particularly by Carl Friedrich's arguments that federalism should be seen as a dynamic process of federalising

2 Both projects eventually failed after post-legislative referendums in 1979. In Wales, only 20.3% voted for devolution, while 51.6% did so in Scotland. But as the latter figure represented merely 32.9% of the registered Scottish electorate, the required threshold of 40% was not reached.

rather than the final outcome of this process. In short, Friedrich pioneered an understanding of federalism as process (Friedrich 1962: 528). For him, federalism was not a 'a fixed and unalterable plan' or 'a static pattern, as a fixed and precise term of division of powers between central and component authorities' (Burgess 2006: 35). The downside of such an approach is of course the uncertainty about when this federalisation process started and where it will end. This point can be illustrated by the way labels of autonomy have been used in the South Tyrolean political discourse over the last three decades. Once the implementation of the reform package agreed upon in 1969 was completed in 1992, a new vision was needed. This was first labelled 'dynamic autonomy', implying bilateral negotiations for additional competences, and then, after 2011, 'full autonomy'. The latter was vaguely defined in a position paper produced by the ruling party, the South Tyrolean People's Party, as reducing national government powers to only a few matters and achieving comprehensive financial authority. Yet, similar to the above-mentioned process of Belgian state reforms, this process remains open-ended and its outcome unclear. What 'full' means in terms of the scope of autonomy of course lies very much in the eye of the beholder.

Regional Identity

Historically speaking, regional identities have often been regarded with a certain disrespect, not least among liberal political theorists. The following quotation from John Stuart Mill testifies to this: 'Nobody can suppose that it is not more beneficial for a Breton or a Basque of French Navarre to be a member of the French nationality than to sulk on his own rock, the half-savage relic of past times. The same remark applies to the Welshman and the Scottish Highlander.' (Mill 1861: 293) The underlying assumption of such disparaging remarks is the belief of traditional liberalism that a nation state built on a monolithic national identity is a necessary prerequisite for democracy. In order to put this monolithic idea of both the nation and the state into practice, the liberal-democratic nation state in this tradition pursues a project of *producing* ex post the uniform national identity, for instance 'Frenchmen' and 'Italians',³ that its theory of democracy actually *presupposes*. Even though this school of thought has been challenged since its heyday in the 19th century by several movements, especially since the 1990s by the 'liberal nationalism' of Charles Taylor and Will Kymlicka, it continues to exert influence (Norman 2006: 1–3). This is epitomised by the widespread portrayal of national identity formation as something normal and neutral, when it is in actual fact based on a liberal myth

3 Regarding France, see Weber (1977). For Italian identity, see Massimo D'Azeoglio's often-cited *bon mot*: "We have made Italy, now we have to make Italians", quoted in Hobsbawm (1992: 44).

of neutrality (Kymlicka 2002: 343–347) and on the ‘identity fiction’ that constructs such identities from the dominant collective identity ‘based on power relations and/or the magic of the greater number’ (Marko/Constantin 2019: 130). This context is relevant for regional identities in two important ways.

First, the construction of a uniform national identity by ‘extending’ the dominant collective identity makes it (almost) inconceivable for members of the dominant group that identities other than this fused nationalised one may exist. For instance, ‘English Canadians outside Québec largely think of themselves as Canadians-who-happen-to-speak-English, rather than as a distinct national group within Canada’ (Miller 2001: 314). And this inability to imagine multiple identities for oneself often entails that regional identities, let alone claims for regional autonomy that are based on such identities, are considered to be something inherently suspicious. Even if national identities tend to dominate in many countries, multiple group attachments at different levels are of course possible and it is increasingly recognised, for instance, ‘that European identity can be seen as complementing rather than replacing or conflicting with national and regional identities’ (Mendez/Bachtler 2017: 7). Secondly, and something that is often forgotten by movements of regional identity formation, the ‘identity fiction’ of inflating the dominant identity and simultaneously suppressing others is likewise a problem at the regional level. If autonomy is understood as a tool to empower – whether exclusively or at least largely – the dominant group at the regional level and to reinforce its identity as that of the region as a whole, this replicates the dynamics of 19th-century identity formation in the nation state only on a smaller scale, that is in a ‘nation-region’ (Kössler 2018). The schizophrenic attitude of reinforcing a supposedly uniform regional identity vis-à-vis the national identity and simultaneously downplaying other identities *within* the region is just as problematic for a vibrant democracy as exclusive identity formation at the national level. At both levels, these processes must demonstrate some degree of pluralism and openness, as they otherwise go against democracy’s core idea of multiple claims to representation, i.e. against a notion of a (national or regional) political community ‘whose identity will constantly be open to question, whose identity will remain forever latent’ (Lefort 1988: 304).

Regional Identities in Constitution- and Policy-Making

Constitutional Entrenchment of Regional Identity

A constitution is ‘less something we *have* than something we *are*’ (Pitkin 1987: 167) because it is shaped to a significant extent by a distinctive history before the actual process of constitution-making and always inextricably linked with questions of

identity. In countries characterised by the presence of both national and regional identities, the constitutive function of a constitution at the national and (where existent) the regional level, i.e. to forge a political community, is equally important as its regulatory function regarding the exercise of public power.

While numerous issues of constitutional design are relevant and indeed fiercely contested where competing identities exist, with territorial demarcation and power-sharing arrangements being only some examples (Kössler 2016), this chapter focuses on the image of the above-mentioned political community, as reflected in constitutional preambles or other programmatic provisions. Importantly, comparative evidence demonstrates that there is an emerging trend for preambles to be granted greater binding force, either independently, as sources of rights, in connection with other constitutional provisions or as guidelines for constitutional interpretation (Orgad 2010: 715–718). In this context of increasing relevance, it is all the more important to recognise that, rather than static images, preambles are better understood as only setting the initial topography upon which the image of the political community is shaped (Jacobsohn 2010: 12). This is because the distance between the preamble and the people for whom it purports to speak always inevitably tends to grow over time (Tushnet 2010: 671). For instance, the preamble of the 1937 Irish Constitution famously still invokes ‘the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred’, which creates a pronounced dissonance with the reality of an increasingly secular country.

Statements of identity in preambles and other programmatic provisions of national constitutions have been increasingly complemented, during the post-Cold War period, by equivalents at the subnational level. In fact, the processes of shaping the image of the political community at both levels are closely interconnected, sometimes contradictory, and therefore need to be explored in an integrated manner through a multilevel perspective. Regional identities interact with these processes in two ways. First, they often define the creation of a certain image of the political community. Secondly, a constitutional imagination of an identity that had not previously existed may in turn have repercussions on identity formation.

As for the first scenario, pre-existing regional identities were constitutionally entrenched and thus rigidified, for example, in Bosnia and Herzegovina. A good example is the former Article 1 of the 1992 Constitution of the Republika Srpska, which reflected a monistic conception of the identity of this constituent unit in a way that favoured ethnic Serbs over regional minorities. This programmatic article at the very beginning of a constitution adopted on the eve of the Bosnian War (1992–95) defined the Republika Srpska as ‘a State of the Serb people and of all its citizens’. Importantly, that statement did not only reflect a certain exclusive conception of identity, privileging one ethnic group, it also had far-reaching institutional repercussions, as it formed the rationale and justification for eschewing power-sharing

and entrenching instead highly majoritarian decision-making of the legislative and executive branches of government to the benefit of the Serb majority population. Part of Article 1, the wording 'a State of the Serb people and', was in 2000 eventually declared unconstitutional by the Constitutional Court because it violated the constitutional principle of 'collective equality' of Bosnia's three constituent peoples (Bosniaks, Serbs and Croats).⁴ But other legal battles concerning the constitutionalisation of (an exclusive) regional identity have followed. Cases in point are the renaming of municipalities by adding the prefix 'Serbian'⁵ or, very recently, the upholding of a National Day of the Republika Srpska considered discriminatory against non-Serbs.⁶

In the second scenario mentioned above, the constitutionalisation of a certain image of regional identity, which had not existed before, in turn influences identity formation. A case in point in this regard is Article 2 of the 1978 Spanish Constitution, a programmatic and ambiguous provision characterised as 'a veritable synthesis of all the contradictions looming during the constitution-making process' and an 'authentic point of encounter between different conceptions of the Spanish nation'.⁷ This provision balances 'the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards' with the 'right to self-government of the nationalities and regions', thus laying the constitutional basis for what then became known as the state of autonomies (*Estado de las autonomías*) and for the creation of regional identities alongside pre-existing ones such as Catalan and Basque identities. The establishment of the Autonomous Communities (1979-1983) created political spaces for regional parties, which were either newly founded or consolidated under these conditions and proved instrumental in the production and reproduction of regional identities in Spain (Martínez-Herrera 2002). Of course, the regional governments used their new powers in areas such as culture or language to different extents and with varying degrees of success to shape distinctive regional identities. Yet, it can be said that on the whole '[i]rrespective of their relative artificiality or historical depth, all of the autonomous communities embarked on a process of boundary building, which included the invention of symbols as well as the rediscovery and rewriting of regional cultures' (Convers 2000: 130). This process of regional identity-formation eventually again found constitutional expression. Between 2006 and 2011, many Autonomous Communities adopted new statutes, which, despite their subordination to the national constitution, are clas-

4 Constitutional Court of Bosnia and Herzegovina (2000), Partial Decision U5/98 III of 1 July 2000.

5 Constitutional Court of Bosnia and Herzegovina (2004), Partial Decision U 44/01 of 27 February 2004.

6 Constitutional Court of Bosnia and Herzegovina (2015), U3/13 of 26 November 2015.

7 Jordi Solé i Tura, one of the framers of the constitution, quoted in Conversi (2000: 126).

sified as constitutional documents in a material sense.⁸ These included numerous references to historical kingdoms and traditions, to ‘indigenous languages’ of the region or flags, monuments and anthems (Delledonne/Martinico 2012). However, in its seminal ruling of 2010, the Constitutional Court famously placed certain limits to identity affirmation in the case of the Catalan statute. The judges held that the national symbols and historical rights mentioned in this statute must be read as referring to the (Catalan) *nationality* as part of the indivisible Spanish *nation* and that Catalonia may be a national reality ‘in an ideological, historical or cultural sense’ but, unlike Spain, not in legal-constitutional terms.⁹

Regional Identity and Policy-Making

Processes of regional identity formation are reflected in policy-making in a number of areas. But they are arguably intertwined with social welfare policies in a particularly strong way. Apart from redistribution and political legitimation, a third key function of such policies is the creation and/or consolidation of identity(ies) (Palermo/Kössler 2017: 347). While historically ‘the welfare state served to “crystallize” the nation-state’ (Moreno/McEwen 2005: 2) by engendering a feeling of nationhood, competing regional identity formation has led a number of subnational governments to engage in social welfare. Irrespective of the government level that pursues policies in this area, there is a dialectic relationship between welfare-state policies, on the one hand, and identity and solidarity, on the other: ‘Not only does a sense of common identity help sustain the values of mutual help, but the welfare state itself helps foster national [or regional] identity and unity.’ (Keating 2001: 40)

Scotland, Flanders and the Basque Country are good examples of the interplay between regional identities and social welfare policies. In the third case, the regional government introduced a minimum income scheme as part of its 1988 Plan to Fight Poverty. This was a pioneering initiative in Spain and mainly inspired by the French *Revenu minimum d’insertion* (Moreno/Arriba 1999). This programme was the fruit of a marriage between identity politics and social policy, as embodied by the coalition government of the Basque Nationalist Party (PNV) and Basque Socialist Party (PSE). With the minimum income, the coalition deliberately and decidedly aimed at strengthening social identity and cohesion within the Autonomous Community.

In Belgium, the economic rise of Flanders (and parallel demise of Wallonia), as ports, service and foreign investments gradually became more important than the coal and steel industry, was soon accompanied by calls for decentralisation of functions including social policy. After this process began with the first state reform of

8 Spanish Constitutional Court (2010a), STC 31/2010 FJ 3.

9 Spanish Constitutional Court (2010b), STC 31/2010 FJ 12.

1970, 'autonomous' Flemish social welfare policies came to the forefront of the political agenda and were eventually enabled by another state reform in 1980. While the national government remained responsible for the most important social insurance schemes (e.g. old-age pensions and unemployment insurance), 'social assistance' to individuals was to some extent decentralised (Cantillon 2006). This enabled the Flemish Community, for instance, to complement in 1999 the national programme providing assistance for elderly people with the Flemish Care Insurance, which the Court of Arbitration upheld as constitutional.¹⁰ After the decentralisation of family allowances with yet another state reform in 2011, further transfers of powers regarding social security schemes remain at the heart of efforts to strengthen Flemish identity today – for some, this has been so much at the expense of Belgian identity that these transfers are seen as a key step in gaining independence. That is why further decentralisation of social welfare is looked at in the rest of the country with utmost concern (Swenden 2013: 370).

The link between the assertion of a distinct regional identity and striving for social welfare policies 'of one's own' is particularly evident in the case of Scotland. It is important to note that the creation of the UK welfare state occurred in a post-World War II context in which it was supposed to serve as a powerful new manifestation of common British nationhood, replacing the then-declining Empire in this function (Williams 1989: 162). It was therefore natural that relevant institutions were (re)named the Ministry of *National* Insurance or the *National* Health Service. It was only in the 1960s, when the UK-wide welfare state started to lose its unifying force, that this provided a fertile ground for Scottish parties to pursue an agenda of welfare nationalism. This agenda saw Scotland and not the UK as the primary locus of solidarity. Moreover, the portrayal of Scotland as more socially minded, particularly in comparison to England, became a hallmark of identity formation and underpinned both the thrust in the 1990s for devolution (of certain social welfare policies) and opposition in the 2000s to the privatisation and marketisation of public services (Keating 2012: 221). More than in the Basque Country and Flanders, however, Scottish welfare nationalism has been balanced since the start of devolution in 1998 by a strong counter-current of welfare unionism, which emphasises the need for a common policy framework to equity and a broadly common social citizenship across the UK (Hazell/O'Leary 1999: 43).

Conclusions

'It is fair to claim that no clear account of the concept of autonomy is available.' (Wiberg 1998: 43) This often-quoted statement refers to *territorial* autonomy of re-

10 Belgian Court of Arbitration (2001), Judgment No. 33/2001.

regions and not to *non-territorial* autonomy of groups, which is on the whole a much less powerful instrument (Kössler 2010: 265–272). But in addition to ‘autonomy’ the term ‘region’ also lends itself to a myriad of different understandings. While there is indeed a proliferation of such conceptions, this contribution has focused exclusively on the *subnational* region and how identities of such regions in Europe are related to constitution- and policy-making.

Regional identity formation is linked with both these dimensions of autonomy in a dialectic relationship. While such identities inspire constitution- and policy-making, these political processes in turn aim at and often succeed in reinforcing regional identities. A certain image of the regional political community, in the above example of the Republika Srpska an exclusive one, not only found its expression in constitutional preambles and other programmatic provisions, it also influenced the subsequent processes of identity formation and provoked resistance from non-Serbs who successfully challenged several constitutional provisions in court. This case illustrates a critical issue for the development of collective identities, especially in the context of power-sharing arrangements for divided societies, which has recently attracted increasing attention, i.e. the systematic exclusion of smaller groups, often referred to as ‘others’ (Agarin et al. 2018). What has been termed the exclusion-amid-inclusion (EAI) dilemma effectively includes the main groups involved in the previous (but often only frozen) conflict, but at the same time excludes certain ‘others’. Going far beyond institutional exclusion, this also has repercussions on perceptions of collective identities. In Spain, the recognition in Article 2 of the Constitution of both a national identity and regional identities, as well as the opportunity for the Autonomous Communities to legally define the latter in their statutes, enabled the reinforcement and sometimes even the initiation of processes of regional identity formation. These processes culminated in the 2000s with several Autonomous Communities revising their statutes. Similar to the Bosnian case, however, the court interpreted and reinforced the national Constitution, especially in the case of Catalonia, as a clear limit. It thus demonstrated the interconnectedness of identity formation in constitutional terms at the national and subnational levels of government.

Not unlike constitution-making, policy-making is also linked with regional identities formation in a dialectic relationship in several areas. This seems to hold true in particular for social welfare policies, which are facilitated by the solidarity bonus generated through a common identity while fostering such an identity at the same time. Yet looked at in detail, this relationship works differently from case to case and has different underlying rationales in each instance. In Flanders, the early but still ongoing calls for the decentralisation of more and more social welfare policies appear to have been inspired in part by a more general desire to ‘downsize’ the repertoire of powers of the national government. In other words, they seem to some extent instrumental, which is exactly what makes them suspicious to

opponents of decentralisation. In comparison, in the case of Scotland, claims for 'ownership' of social welfare policies are arguably far more intimately linked to a continuous narrative on egalitarianism as part of a Scottish (and particularly not English) identity. But even in this case, welfare nationalism, a political force at least since the 1960s, has been faced with a deliberate counter-reaction towards welfare unionism. This once again demonstrates the limits that regional identity formation is typically confronted with, be they legal or political in nature.

While the focus of this paper has been decidedly on regional identities, many of the considerations above regarding the links between constitution- and policy-making, on the one hand, and the formation of collective identities, on the other, are reminiscent of the cumbersome process of developing a European identity. A case in point is the treatment of identity in the Treaty on European Union (TEU), which is central to the EU's constitutional law. Both the preamble and Article 1 of the TEU refer repeatedly to the 'peoples of Europe' in the plural, even if reference is made to an 'ever closer union' between them. But on the other hand, Article 9 of the TEU regulates common EU citizenship (in addition to member state citizenship), which was agreed upon in Maastricht in 1992 precisely with a view to the creation of a European political community with a distinctive identity (Kostakopoulou 2007). Moreover, the new Article 2 introduced with the 2007 Lisbon Treaty, aims to establish a community based on shared European values as elements of a common identity. However, the real existence of this community and the enforcement of these values through the procedures of Article 7 have become, in relation to the governments of Hungary and Poland, fiercely debated issues (Halmai 2019). These instances of constitution-making are aimed, as are several other fields of EU policy-making (Prutsch 2017: 18–23), at strengthening a common European identity that can eventually complement national, regional and local identities. At the same, of course, it needs to be taken into account that 'increasing re-nationalisation tendencies and growing alienation from the "European project"' (Prutsch, 2017: 39) mean this endeavour is now a far greater challenge than it was a few years ago.

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