European Union governance and the place of the regions

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The European Union's governance system recognizes regional autonomy and cultural diversity, but it does so within a framework defined by each member state, a framework which the European Union must accept as a given. In a sense, this is a negative duty for the European institutions: they must respect the choices made by each member state as regards the role of the regions and the protection of cultural diversity in their constitutional system.

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1. Introduction

The 25th anniversary of the entry into force of the Maastricht Treaty was celebrated on 1 November 2018. That Treaty brought important institutional innovations that have shaped the system of European governance until today. The Treaty created European citizenship and listed a number of rights of European citizens. It also created codecision, the legislative decision-making mechanism giving equal influence to the European Parliament and the Council of Ministers when making European laws. It extended European cooperation into new domains of core state powers, namely foreign policy, criminal justice and immigration. It created the rules on Economic and Monetary Union and thereby laid the basis for the single currency. It recognized differentiated integration, that is, the fact that not all the Member States have to participate in all European policies, but that there can be opt-outs of some countries from some policies, or enhanced cooperation between groups of countries in other areas. All these innovations together signified a qualitative jump in the nature and scope of the integration process, but they have also been at the origin of some of the deep-seated problems that the EU has faced in recent years. The creation of Economic and Monetary Union gave us the single currency but it also failed

to prevent the financial crisis of the euro zone, partly because of the unbalanced organisation of EMU under the rules of the Maastricht Treaty. Cooperation in the field of immigration led to the direct involvement of the European Union in the so-called refugee crisis. Differentiated integration, and the habit of allowing opt-outs, may have encouraged the UK to keep its distance from the other countries, and may thereby have fed the appetite for the Brexit choice made in 2016.

In this paper, I would like to evoke three other innovations of the Maastricht Treaty that have proved to have a special importance for the place of the regions in the system of European governance. 25 years later, they are still important for understanding that system. These three notions 'invented' at Maastricht were respect for national identity, respect for subsidiarity and respect for cultural diversity. I repeat the word 'respect' three times and, in the conclusion, I will come back to why this term is important when trying to grasp the place of the regions in the European Union's system of governance.

2. Institutional diversity and national identity

The European Union has always depended on the cooperation of its Member States to ensure the effective application of European policies. Because it needs that cooperation, and in order to allow for its smooth functioning, the Union has avoided interfering with the institutional and constitutional structures of the Member States. The Member States must ensure that those structures allow the country to comply with its European obligations, but they can choose how to do this. Thus, for example, it is for the States to decide which national authorities should transpose directives, at what level and by what legal means, on condition that the content of the directives is correctly applied. The power to implement certain EU policies may, thus, be exercised in part or wholly at the regional level, but this depends on the constitutional arrangements of each country.

With respect to the constitutional orders and constitutional law of the Member States, Europe's position has long been one of 'constitutional blindness', or at least a form of indifference to the internal constitutional choices of the Member States. The founding treaties did not say anything about the basic constitutional features and structures of its Member States; they could be republics or monarchies; they could be unitary, federal, regionalised or decentralised states; they could have a parliamentary or a presidential form of government. Any of these choices were and are acceptable. This principle of constitutional autonomy, while not included with so many words in the Treaties, was implicitly recognised.

The Maastricht Treaty then introduced in the European Treaties a little sentence, namely that 'The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy'[1]. It is unclear why this little sentence was introduced and what its intended meaning was. Several circumstances may explain why the drafters of the Maastricht Treaty thought it useful to include it[2]. One factor was that the newly established European Union started an important new phase in the European integration process. By adding new policy areas, and confirming the transformation of the Union from an economic organisation to a polity covering also cooperation in the areas of foreign and defence policy and justice and home affairs, this Treaty included areas that are at the heart of national sovereignty. In addition, and this would transpire during the ratification process, the mood among the European public had changed and Euro-scepticism was on the rise, with many people worrying that Europe was becoming some kind of superpower, threatening national identity or national interests and cultural diversity. The Treaty also confirmed the overall aim of an 'ever closer union' among the peoples of Europe. It thus seems likely that the drafters of the Maastricht Treaty felt that they had to counterbalance this deepening of the European integration process by inserting this reference to national identity and to the fact that the Union would have to respect it.

It should be stressed however, that right from the beginning in 1992, the reference to the 'national identities' of the Member States was closely linked *to their democratic system of government*. Accordingly, the reference was not to national *cultural* identity, but to a more political form of identity. In addition, the identity was that *of the Member States*, rather than of their peoples, nations or citizens. What seemed to be at stake was the preservation of the Member States as independent states and the confirmation that the Union will not change into a federal United States of Europe absorbing the Member States.

With the Constitutional Treaty, and later the Lisbon Treaty, the notion of identity became more prominent and its formulation became more precise. The new Treaty article (the current Art. 4(2) of the Treaty on European Union) links national identity with a reference to the equality of Member States, and with a commitment to preserve the essential State functions. The notion of national identity of the Member States was, itself, specified as being '*inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government*'. This confirmed the political and structural nature of the concept: national identity is not about the preservation of cultural identity or specificity and not about protecting a shared sense of belonging, but rather about protecting the specific institutional infrastructure of each Member State. The second sentence of Article 4(2) confirms this by stating that the Union respects the essential State functions of the Member States, of which it mentions three: ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.

From the perspective of the regions, there is a double message here. On the one hand, the European Union is required to respect regional self-government, meaning that its policies should be sensitive to the existence of regions and to their particular characteristics, for example the fact that a Spanish Autonomous Community is not the same thing, institutionally speaking, as a French region. We can find some judicial recognition of this, for example in a case dealing with the regulation of games of chance in Germany. The Maltese gaming firm Digibet argued before the European Court of Justice that German legislation was in breach of the EU right to free movement of services because restrictions of gaming varied from one German Land to another. This inconsistent regulation resulted from the fact that the regulating games of chance is a competence of the *Länder* so that they may adopt divergent policies in this area and impose different restrictions on the provision of gaming services by operators of other EU countries. The Court of Justice accepted this state of play and argued that 'the division of competences between the *Länder* cannot be called into question, since it benefits from the protection conferred by Article 4(2) TEU'[3].

On the other hand, what Article 4(2) TEU protects is the regional self-government *as recognised by the constitution of each Member State*, and not regional self-government as such. This distinction explains the very different reaction of the European Union's institutions to the Scottish and Catalan independence projects[4]. As the Scottish independence referendum had been organised with the agreement of the national government in London, the European Union had to accept it and, in the case of a successful referendum, would have had to cooperate loyally with the UK in ensuring that Scotland could become a new Member State of the Union. By contrast, since the Catalan independence referendum was declared unconstitutional by the judicial organs of the Spanish state, the European Union had to abstain from encouraging or supporting the independence process, as it would otherwise have interfered with the Spanish constitutional system of regional government. This does not mean that the secession of part of a Member State is indifferent to the functioning of the Union. Upon a successful secession, the question would naturally arise whether the newly created State could and would become a Member State of the Union[5]. In the absence of continued EU membership, a number of persons (those living in the new State) might lose their status of European citizens and the associated right to free movement, which would be a serious concern from the point of view of EU law.

3. The principle of subsidiarity

The principle of subsidiarity is also an invention of the Maastricht Treaty and has become one of the leitmotifs of European integration. It came as a counterpart to the dramatic expansion of European Union competences caused by that same Maastricht Treaty. Yes, the EU could engage in many new policy domains but it had to show, when launching new projects and new legislative initiatives, that there was a genuine value added by doing this at the European level rather than leaving it to the Member States. The principle of subsidiarity, as currently formulated in the Treaty on European Union, acknowledges the regional dimension. Subsidiarity means that 'the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, *either at central level or at regional and local level*, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'[6].

In the first years after the Maastricht Treaty, this idea remained very abstract, and the principle of subsidiarity did

not have a meaningful impact on EU decision-making. In order to give more 'teeth' to subsidiarity, the Constitutional Treaty, later confirmed by the Lisbon Treaty, created the so-called early warning mechanism giving to the national parliaments a limited power to control respect for the principle of subsidiarity. This mechanism invites national parliaments to scrutinize proposals for European legislation launched by the European Commission from the perspective of subsidiarity. If a national parliament is not convinced of the value added by EU action, it can say so by means of a reasoned opinion, and if one third of all national parliaments express such a critical opinion, the European Commission must explain better why it considers that this EU initiative is useful and needed[7]. Integrating national parliaments into the decision-making process of the European Union and granting them control over EU's 'creeping competence' was supposed to 'kill two birds with one stone' by both strengthening the democratic legitimacy of the European decision-making process and protecting the autonomy of the Member States.

Again, from the point of the view of the regions, subsidiarity plays an ambiguous role. On the one hand, respect for subsidiarity also implies respect for the capacity of the regions to solve problems by themselves without interference by the EU. However, the Lisbon Treaty entrusted to the *national* parliaments the task to control respect for subsidiarity. The Treaty of Lisbon added that each national parliament should consult 'where appropriate' regional parliaments with legislative powers[8]. This is the only place in European Union primary law where the 'regions with legislative powers' are recognised as a special category[9]. Still, this clause leaves it, once again, within the discretion of each State to decide whether and how to involve the regional parliaments in the process. The solutions adopted in Germany, Belgium and Italy are quite diverse[10]. In Spain, the regional parliaments have a short four weeks period in which they can give a critical opinion on a EU legislative project that they can transmit to the Cortes, and that regional opinion would then normally be incorporated in the opinion of the national parliament but only if the parliament decides to send an opinion to Brussels. If, on the contrary, the national parliament considers that a proposal for EU legislation respects subsidiarity, it will not send a negative opinion to Brussels, even though one or more regional parliaments have taken a different view of the question.

4. Cultural diversity

Recent Treaty reforms, in particular the Lisbon Treaty, have given more salience to cultural diversity, by inscribing it among the main objectives of the European Union, in Article 3 TEU, and by including respect for cultural diversity in the (now binding) text of the EU's Charter of Fundamental Rights[11]. This growing salience also affects the European Union's external relations, as is illustrated by the fact that the EU concluded and ratified, alongside its Member States, the Unesco Convention on Cultural Diversity[12]. *Inside* the European Union, both national and regional diversity are recognized by the Court of Justice in in judgments and by the EU's political institutions in their policy documents, and the Union's budget supports projects that favour the mutual exchange of cultural creations between the Member States.

This can be illustrated by the way in which the EU rules on the control of state aid are practiced. From the point of view of EU law, public financial support to specific categories of firms may constitute *state aid* and be prohibited by the Commission if it is considered to have a detrimental effect on the conditions of competition in the internal market. The Commission has adopted a general regulation exempting small amounts of funding, so that the European scrutiny of state subsidies is limited to large sums paid to individual firms, and to subsidy schemes with a large number of small beneficiaries. State subsidies to the cultural sector, or with a cultural aim such as the strengthening of the national or regional language, are in principle covered by the state aid regime. However, here as well the Maastricht Treaty had innovated by introducing a new clause in the relevant Treaty article (this is now Article 107 para. 3(d) TFEU) according to which financial aid to promote culture and heritage conservation will in principle be approved[13]. This 'culture clause' would appear to cover the many cultural subsidy schemes existing in all European countries, but it does not solve all the problems, since the Treaty article still leaves a very wide margin of discretion for the Commission to decide which schemes are compatible with, or contrary to, the 'common interest'. However, it is clear that the Member State governments, when they adopted this clause back in 1992, wanted to convey a signal to the European Commission that it should tread carefully when examining state subsidies in the cultural domain. It seems that the Commission is indeed acting cautiously and that cultural

subsidy regimes in the Member States are normally acceptable for the Commission[14]. A good illustration of this practice is the consistent approval by the Commission of numerous cultural subsidy schemes of the region Euskadi, often directed at promoting cultural expressions in the Basque language[15].

The European Union itself gives some financial support to regional cultures, but these are not large amounts, and they are complementary to the cultural policy choices of the Member States. We see again the same double-edged picture as with national identity and subsidiarity. If a Member State recognizes cultural diversity and allows regions to support their own regional culture, as is the case in Spain, then the EU will not hinder this and will even offer some modest additional support. If, on the contrary, a Member State such as France fails to recognize minority cultures in its own internal policy, the European Union will accept this choice and will not seek to overturn it.

5. Conclusion

The European governance system recognizes regional autonomy and cultural diversity, but it does so within a framework defined by each member state, a framework which the European Union must accept as a given. In a sense, this is a negative duty for the European institutions: it must *respect* the choices made by each State, but respecting does not necessarily mean *protecting*. It also does not mean that regions should have an active role in shaping EU policies. If a legislative region aspires to obtain a more active role in European policy-making, it must effect that change by acting through the national level. If we take the case of Belgium, that country is represented in the EU Council of Ministers by a regional minister when the subject being discussed is one that falls within the competences of the Belgian regions (for instance media, education or regional development); however, this happens because Belgian constitutional law requires it, and not because the European Union has imposed it on Belgium. The radical alternative is, of course, for a region to try to become itself an independent Member State of the EU with all the rights and prerogatives attached to that status, but the European Union is not going to help it to get there.

This current system of multilevel governance of the European Union will not fundamentally change in the years to come. The European Union is facing a number of major challenges such as: how to stabilize the Eurozone, how to ensure an orderly Brexit, how to develop a coherent common migration policy, how to deal with the illiberal democracies in Central Europe, and how to ensure the survival of the ecological system. These challenges may well cause significant reforms of the EU's current system of governance. However, a wholesale transformation of the EU into a true 'Europe of the regions' is simply not one of the priority issues on the EU's agenda, and is therefore not going to happen any time soon.

Notes

1. Article F (1) of the Treaty on European Union, as adopted at Maastricht. That article is no longer part of the Treaty on European Union today.

2. See Elke Cloots, *National identity in EU law* (Oxford University Press, 2015), at 82-83.

3. Court of Justice of the European Union, Case C-156/13, *Digibet Ltd*, ECLI:EU:C:2014:1756, para. 34.

4. See Cristina Fasone, 'Secession and the ambiguous place of regions under EU law', in Carlos Closa (ed.), *Secession from a Member State and withdrawal from the European Union* (Cambridge University Press, 2017) 48, at pp. 62-63.

5. On this question, see Mar Campins Eritja, 'The European Union and the secession of a territory from a EU Member State', *Diritto pubblico comparato ed europeo* (2015) 492.

6. Article 5(3) of the Treaty on European Union.

7. For studies of the functioning of this early warning mechanism, see Katarzyna Granat, *The principle of subsidiarity and its enforcement in the EU legal order: the role of national parliaments in the early warning system* (Hart Publishing, 2018); Anna Jonsson Cornell and Marco Goldoni (eds.), *National and regional parliaments in the EU legislative procedure post Lisbon* (Hart Publishing, 2017).

8. Protocol no. 2 to the European Treaties on the Application of the Principles of Subsidiarity and Proportionality, Article 6.

9. See Gracia Vara Arribas and Anna-Lena. Högenauer, 'Legislative regions after Lisbon: a new role for regional assemblies?, in Claudia Hefftler et al. (eds.), *The Palgrave handbook of national parliaments and the European Union* (Palgrave, 2015) 133.

10. See a comparative assessment by Diane Fromage, 'Regional parliaments and the early warning system: an assessment and some suggestions for reform', in Jonsson Cornell and Goldoni (eds.), *National and regional parliaments in the EU legislative procedure post Lisbon*, cit., at p.117.

11. Art. 3(3) TEU: 'The Union (…) shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.' Art. 22 of the Charter of Fundamental Rights of the European Union: 'The Union shall respect cultural, religious and linguistic diversity.'

12. Convention on the Protection and the Promotion of the Diversity of Cultural expressions, ratified by the EU by means of Council Decision 2006/515, *Official Journal of the European Union* 2006, L 201/15.

13. The relevant part of that Treaty article goes as follows: 'The following may be considered to be compatible with the internal market: (…) (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest.'

14. See Delia Ferri, 'Cultural diversity and state aids to the cultural sector', in Evangelia Psychogiopoulou (ed.), *Cultural governance and the European Union: Protecting and promoting cultural diversity in Europe* (Palgrave Macmillan, 2015) 119.

15. See the following examples: *State Aid N 257/2007 – Spain*, Subsidies for theatre productions in the Basque country, 27 June 2007; *State Aid N 161/2008 – Spain*, Aid to the Basque language, 16 July 2008; *State Aid N 406/2010 – Spain*, Basque film support scheme – budget increase, 21 October 2010; *State Aid 32266 (N 2011) – Spain*, Aid for the promotion of the Basque language at the workplace, 19 April 2011.