Distinctive Identity Claims in Federal Systems: Judicial Policing of Subnational Variance

Federal systems typically attempt to maintain a sustainable balance between national and subnational power by institutionalizing a kind of permanent struggle in which national and subnational governments strategically claim and exercise competencies in pursuit of their own goals and policy preferences. Federalism therefore generally contemplates and indeed invites intergovernmental contestation not only within the established constitutional framework, but concerning the dimensions of the constitutional framework itself.

In the course of this struggle, subnational governments have at their disposal a wide array of tools with which to influence and, when necessary, to oppose exercises of national power. One of the strongest and generally most controversial tactics in this arsenal is the assertion of claims of distinctive identity or sovereignty (“DIS claims”). DIS claims are claims by subnational units either to a distinctive subnational identity, whether ethnic, linguistic, cultural, or political, or to an enhanced measure of sovereignty within the federation based on such distinctiveness. Most often, DIS claims are made in the course of jockeying for improved position within the federation. The subnational unit may, for example, seek a more generous allocation of constitutional competencies, or it may wish for greater deference from national actors toward exercises of subnational power, and believes that recognition of its distinctiveness by other actors in the federal system will help produce the desired result. At the margins, DIS claims can be made to justify actual or threatened secession.

DIS claims are most often asserted initially in political fora, such as intergovernmental ministerial negotiations or national legislative committees, and addressed to national actors in the executive and legislative branches. When made in these venues, such claims are often received with surprising tolerance, and in at least some circumstances they are capable of producing good results. In judicial forums, however – and in particular national constitutional courts – DIS claims do much worse; indeed, they seem to receive a uniformly hostile reaction.

Pertinent rulings by the constitutional courts of Spain, Italy, the United States, Canada, and France reveal emphatic rejections of subnational DIS claims made in a wide variety of circumstances. Some cases involve a negotiated political settlement in which the national government recognizes and makes significant concessions in response to subnational DIS claims (Spain, France). In others, subnational units unilaterally assert DIS claims in processes that have been nationally approved (Italy), nationally disapproved (United States), or are subjects of ongoing and inconclusive negotiation (Canada).

Regardless of the circumstances, however, national constitutional courts reject subnational DIS claims. The best explanation for this pattern rests on the distinct institutional position of national constitutional courts. Unlike national executives and legislatures, which engage in constant contestation with subnational units, constitutional courts are not repeat players in these kinds of conflicts, and thus may lack a perspective that might encourage greater tolerance of DIS claims as mere moves in an ongoing process of mutual competition. Additionally, as organs of the national government, constitutional courts may not be quite the impartial referees they appear to be when intervening in intergovernmental contests, and there are reasons to believe that they may sometimes have incentives not only to favor the exercise of power at the national level, but to favor assertions of their own power over conflicting assertions of national executive and legislative power. Finally, national constitutional courts may be hostile to informal rearrangements of the constitutional allocation of powers if they understand themselves to have a special role to play in the protection of national minorities, especially those that in a federation are weak on account of being geographically dispersed. For such minorities, political self-protection may be infeasible, leaving judicial protection the only kind available.

James Gardner, SUNY Distinguished Professor, SUNY Buffalo Law School, NY (USA) is the winner of the EURAC Federal Scholar in Residence Programme 2015.
Winter School 2015 – “deep insights into current global and regional democratic developments!” Petra Wlasak, Austria

In 2015, the focus of the sixth edition of our 10-day postgraduate program “Winter School on Federalism and Governance” was put on the relationship between federalism and democratic participation. We received more than 220 applications and invited 31 qualified researchers and practitioners from 21 countries to learn about federalism and to exchange their experiences in Innsbruck and Bolzano/Bozen. The concept of participatory governance receives increasing prominence. During the Winter School 2015, renowned experts and scholars presented recent developments in the field and discussed several methods of democratic participation in multilevel systems. Case studies from Germany, Switzerland, the UK or Canada showed how differently tools of participatory and direct democracy are applied in legal systems around the globe.

Academics, post-docs and practitioners who approach these issues from a comparative point of view are especially encouraged to apply.

The winner and fourth EURAC Federal Scholar is awarded a research stay of up to three weeks at the institute’s facilities located in the Autonomous Province of Bolzano/Bozen, South Tyrol, Italy, in the heart of the Alps. The grant covers travel costs and accommodation and offers the possibility to publish in EURAC’s online series EDAP. Application deadline is 1 July 2015!

Applicants must submit a not yet published manuscript in either English, German, Italian, French or Spanish. They should also be ready to present their research in English during the International Winter School on Federalism and Governance in early February 2016. For more detailed information, please visit: www.eurac.edu/winterschool

The Winter School’s next edition in February 2016 will focus on “conflict and cooperation in federal systems”. During one week at the University of Innsbruck and one week in Bolzano at EURAC, participants will analyze both the effectiveness of federalism as a tool to solve conflicts and which constitutional instruments are necessary to connect different levels of government. More information about the upcoming edition will be available by late summer at: www.eurac.edu/winterschool

EURAC’s Institute for Studies on Federalism and Regionalism has opened a new round of its EURAC Federal Scholar in Residence-program.

The fellowship scheme was established in order to enhance scholarly discussion and exchange about federal, regional and intergovernmental questions that are of academic, administrative and public importance.

Special thanks for their support go to: Autonome Provinz Bozen-Südtirol; Land Tirol – Abteilung Kultur; Stiftung Südtiroler Sparthase; Land Vorarlberg – Abteilung Wissenschaft und Weiterbildung; Italy-Center and Canadian Studies Centre (University of Innsbruck).
Ethnic Federalism and the Right to Political Participation of Regional Minorities in Ethiopia

The Ethiopian model of federalism is constructed on the exclusive and strong link between ethnic identity and territory; markedly identifying itself as an “ethnic federation”. In what is considered a reversal of the old ideology, since 1991, Ethiopia started with the bold adoption of ethnicity in the realm of politics. This federal idea became attractive to many not only for the purpose of accommodating diversity but also as a means of containing inter-ethnic tensions. Irrespective of its ground breaking achievements, the federal arrangement has however brought about increased ethnic antagonism and competing ethnic nationalisms, particularly within the sub-national units. Albeit the recognizable advantages of territorial federalism, especially in cases like Ethiopia, where elements of diversity within a federation do not fall neatly and precisely into geographical units, such an approach runs the risk of undermining, among others, the right to political participation of ethnic minorities. For instance, in the regions of Amhara, Oromia, Afar, Tigray and Somali a single ethnic group constitutes more than 50% of the regional population and controls all the political space leaving other ethnic groups as regional minorities. The creation of new centers of power (particularly the sub-national units) without sufficiently defining how they are to be shared among the various constituent ethnic groups has entrenched the threat of “local tyranny”. In the regional state of Harar for example, a numerical minority is made to occupy key political offices thereby ensuring its dominance over ethnic groups constituting more than half of the total population. This has resulted in the creation of majorities (“dominant minorities”) and marginalized minorities (“oppressed minorities”). Regrettably, despite the existence of such ethnic heterogeneity and population movement, EPDRF has continued with the practice of solitarily empowering groups which are considered “indigenous” to a particular sub national unit. What is worse, the federal Constitution does not explicitly envisage rights for regional minorities and how they can be reconciled with the power of regional majorities. One of the structural limitations of Ethiopia’s ethnic federalism in this regard is therefore its utter failure to provide mechanisms for the protection of regional minorities which are the result of its own construction of the sub-national units. Despite the optimism by many that the federal idea will contain inter-ethnic clashes, the opposite seems to be the case in reality. Ethnic clashes between the regionally dominant and/or majority ethnic group and the regional minorities have gained new momentum after the ethnicization of the country’s politics. Disappointingly, some regional states have endorsed the dichotomization of their residents and confer sovereign power of a regional state exclusively on the dominant ethnic group/s by totally casting out other resident ethnic groups. This has not been dealt with either by the federal Constitution or the sub national constitutions, the exercise of government power in the regional states has been an exclusionary one and such has been further exacerbated by the electoral law’s adoption of the “winner takes all” electoral system. As PhD candidate at the Center for Human Rights at Addis Ababa University, my dissertation will be dedicated to the main question: “What is the current implication of the Ethiopian ethnic federal arrangement on the right to political participation of regional minorities?” The research is expected to be completed in 2016.

Beya Dessalegn, PhD Candidate at the Centre for Human Rights, AAU and guest researcher at the EURAC-Institute for Studies on Federalism and Regionalism in spring 2015

Responses to the Rights of Sub-State Minorities in Federal Ethiopia

Ethiopia has gone through series of hurdles to build an inclusive system of governance and accommodative political culture despite its age-long civilization and rich natural resources. Among the struggles made to ensure fundamental rights of the peoples of Ethiopia, is the effort which led to the overthrow of the feudal system in general and the brutal Military Junta in particular. In the immediate post-1991 era, the transitional government led by the Ethiopian Peoples’ Revolutionary Democratic Front (EPRDF) introduced de facto a multi-national federal system. This became later confirmed de jure by adopting the 1995 Federal Democratic Republic of Ethiopian (FDRE) Constitution. A new picture in all regional states of Ethiopia was created after the recognition of political rights for the people of Ethiopia in the Transitional Charter of 1991 and later in the FDRE Constitution of 1995 with implementation mechanisms, territorial arrangements of regional states, political orientation and practical approaches of such administrative power exercise. This new picture is the emergence of new ethnic minorities in each of the nine regional states and is a currently emerging serious challenge necessitating a further investigation.

These ethnic minorities have in one or another way tied with majority populations of their respective regional states. Both federal and, exception made for Oromia region, most regional state Constitutions guarantee the right of national minorities to self-administration (if they are territorially grouped), and to participate through their representatives in the polity of their respective regional states. In the Oromia region there is a high number of national minorities that are not recognized by the regional constitution which makes them suffer from a severe lack of effective representation and interrelated denial of fundamental rights. Moreover, in both Amhara and Oromia, there are serious problems in relation to accommodating the interests of the minorities as well as to administering their own political affairs.

In this regard, there is no comprehensive study that addresses the fundamental rights of national minorities in Ethiopian regions. As PhD Student at the University of Addis Abeba, I intend to analyze this case study in my dissertation and to make a small contribution in this lack of studies. I will be mainly raising the research question: What is the impact of the legal and practical arrangement of the Ethiopian federal political system on the protection of the rights of national minorities in Amhara and Oromia Regional states? The plan is to complete the study by mid-June 2016.

Sisay Mengistie Addisso, PhD Candidate in Human Rights, AAU and guest researcher at the EURAC-Institute for Studies on Federalism and Regionalism in Bolzano/Bozen in spring 2015
Autonomy of South Tyrol: today – tomorrow?

Throughout the year, the Institute is holding a series of discussions at EURAC on various topics regarding the South Tyrolean Autonomy. These events on current developments are being organized in collaboration with the South Tyrolean Political Science Association “Politika” and are under the patronage of the South Tyrolean Parliament. Interested citizens are invited to discuss, in German and Italian, the specific topic chosen for that evening with experts from local administrations, universities and politicians. The format is simple: a researcher of the institute acts as “moderator” and guides the discussion between the invited expert and the audience. Every event deals with a different topic.

The aim is to create a discussion ground for interested citizens and experts in South Tyrol on what are perceived as important topics at the local level. The focus can be put on a specific issue currently debated in the media, on a policy field or on general aspects of the Autonomy which are expected to become crucial within the upcoming “Convention on South Tyrol” (Konvent für die Überarbeitung des Autonomiestatus für Trentino-Südtirol / Convenzione per la riforma dello Statuto di autonomia del Trentino-Alto Adige).

The discussions of March and April 2015 were dedicated to: the recent developments of the financial autonomy (expert: dott. Eros Magnago, Bolzano/Bozen); the constitutional reform and its effects on South Tyrol (with Prof. Esther Happacher, Innsbruck) and models of participatory democracy (special guest: Prof. Reiner Eichenberger, Fribourg).

The upcoming events in May will focus on the future of the European Region Tyrol-South Tyrol-Trentino (7th May, with the President of the Autonomous Province Bolzano/Bozen, Dr. Arno Kompatscher and Prof. Christian Traweger, Innsbruck) and on a first analysis of the upcoming local elections (14th May, with Prof. Günther Pallaver, expert on party issues). The discussion series will continue in autumn with other current issues!

How does EU-law influence the legislative and administrative powers of the Autonomous province of Bolzano/Bozen?

The University of Innsbruck, the Free University of Bolzano/Bozen and EURAC are about to conclude their two-year project on the influence of EU-law on legislative and administrative powers of the Autonomous Province of Bolzano/Bozen.

On 29th May, the final research results will be presented and linked to current developments in the analyzed policy areas.

The main output of this research project, financed by the Autonomous Province of Bolzano/Bozen, are two volumes in German and Italian (in print): “L’impatto dell’Unione europea sull’autonomia legislativa ed amministrativa della Provincia Autonoma di Bolzano – Alto Adige: casi scelti” (ESI, Napoli) and “EU-Mitgliedschaft und Südtirols Autonomie” (Verlag Österreich, Wien). The editors are: Walter Obwexer, Esther Happacher, Stefania Baroncelli and Francesco Palermo.

Final conference of an Italian national research project

Since February 2013, the Institute for Studies on Federalism and Regionalism has been participating in a project funded by the Italian Ministry for Education, Universities and Research under the call “PRIN 2010-2011”, entitled ‘Language as a Factor of Social and Political Integration’. As part of this project, a conference will take place at the Free University of Bolzano/Bozen on 21-22 May 2015 in order to explore the link between language and the integration of migrants in Italy’s regions with special statutes. At this event, Karl Kössler will give a presentation about language legislation and political participation of migrants in South Tyrol and Val d’Aosta. Jens Woelk will be discussant in a panel on language use between citizens and public administration. Other speakers include Bruno De Witte (University of Maastricht and European University Institute) and Paolo Caretti (University of Florence), the coordinator of the project.

The programme with all discussion topics and dates is available at: www.eurac.edu/research/autonomies/temp/conferences/Pages/default.aspx
Since 2006, the Institute has been a member of the International Association for Centres for Federal Studies (IACFS).

Last 5th-7th November 2014, Francesco Palermo and Elisabeth Alber represented the Institute at the Annual Meeting in Cape Town, South Africa. The conference was hosted by the Community Law Centre and the South African Chair in Multilevel Government, Law and Policy, University of the Western Cape. It dealt with the topic “Concurrent Powers in Federal Systems: Meaning, Making and Managing”.

The Italian case study was part of the discussions, as concurrency is right at the core of the constitutional reform process in Italy. The Italian constitution of 1948 has experienced two main stages with regard to the vertical division of powers between the center (State) and the subnational units (Regions).

In short, following a gradual process of regional emancipation and an increase of legislative and administrative powers, as well as heightened political leverage of the Regions, in 2001, a mayor constitutional reform was adopted, introducing, at least on paper, all main elements of a federal design. In reality, however, the new federal constitutional arrangement did not produce the expected results and federalism remained largely on paper.

Currently, the Parliament is examining an ambitious constitutional reform bill which intends to curtail the legislative powers of the Regions considerably, as the proposed reform aims at eliminating the concurrent legislation which was identified as the main reason for constitutional litigation and legal uncertainty. Accordingly, a dual system should be introduced, with parallel and independent areas of legislative powers of the State and the Regions, whereby most powers would indeed be attributed to the State.

Next 2nd-3rd October Elisabeth Alber and Karl Kössler will be representing the Institute at the 2015 IACFS Conference hosted by the Canada Research Chair in Quebec and Canadian Studies, Université du Québec à Montréal, Montréal, Canada. The conference’s main theme is “Revisiting Unity and Diversity in Federal Countries: Changing Concepts, Reform Proposals and New Institutional Realities.” The Institute will contribute with discussions on regional power-sharing and institutional designs in and for subnational entities from a comparative perspective.
Federalism and Forms of Democracy

The crisis of representative democracy prompts a rethinking of concepts, and the need to include a variety of interests and stakeholders makes federalism, as a tool of institutional pluralism, a key factor to ensure good governance and high public responsiveness to policy.

Defining good governance as an integrated process of decision-making and as a process by which decisions are implemented effectively (or not), requires us to devote more attention to issues such as citizen involvement in decision-making processes. In sum, the main discourse with regard to the interface between federalism and democracy today is about how to complement representative democracy with more citizen involvement in decision-making processes. This is the case because federalism and democracy can be mutually supporting, federalism being a tool of institutional pluralism that ideally gives effect to both a well-functioning representative and direct democracy, and provides spaces for the implementation of new approaches to democratic governance (e.g. deliberative democratic practices).

While traditional instruments of direct democracy are based on the right of the citizens to take part in the final decision itself, new instruments and procedures of citizen participation aim to include citizens in the deliberations on political and administrative decisions. In the end, representative organs still have the final say but they are morally and in some cases also legally bound to clearly spell out the reasons why the specific collective choice or opinion(s) resulting from participatory methods (partially) cannot be taken into account. This is to guarantee that such citizen participation is not just a consultation but becomes an institutionalized right to participation in decision-making that aims at better governance.

While citizen participation in and for the common good or for sectoral interests by means of (organized) civil society is traditionally flourishing in federal democracies and well-functioning compound States, institutionalized citizen participation defined as a complementary tool for representative democracy is a relatively recent phenomenon. In practice, most experiences of citizen participation in this narrow sense have been at local or regional levels, notwithstanding the possible tensions that can arise between local or regional self-determination and central regulation.

These developments in federalism and democracy inspire us to explore citizen participation in multi-level democracies and compound States, not exclusively but especially from the perspective of subnational entities. The latter was the target of three projects with different outputs.

In terms of publications, the results of the project “Federalism, Alternative Forms of Democracy, Better Governance” – realized in cooperation with the German University of Administrative Sciences Speyer and the German Research Institute of Public Administration Speyer – were published in a volume edited by C. Fraenkel-Haeberle, S. Kropp, F. Palermo and K.-P. Sommermann (for details see page 7). Moreover, the results of the Euroregional participatory research project “POP! Paths of Participation” are published in German and Italian, edited by E. Alber and M. Trettel (see page 7).

Its content highlights the diversity of understanding and implementing political participation and participatory democracy within the European Region Tyrol-South Tyrol-Trentino from a trans-disciplinary perspective. Academics, civil servants and young adults present their views and ideas on how democracy could involve citizens in decision-making more effectively. The project was carried out according to the PAR-approach (Participatory Action Research) and highlighted the need of further fostering an efficient dialogue between all stakeholders involved in enhancing subnational democracy within the multilingual European Region Tyrol-South Tyrol-Trentino that comprises one Austrian Land and two Italian Autonomous Provinces.

If and how federal democracies and their subnational entities use their instruments and potential to better involve citizens’ preferences in decision-making processes was also the theme of the sixth edition of the annual Winter School on Federalism and Governance (in cooperation with the Faculty of Law and the School of Political Science and Sociology of the University of Innsbruck, AT).

During the programme, the methods, forms and instruments of democratic participation in multilayered systems were analyzed, both by focusing on specific instruments of direct and participatory democracy and their implementation in selected countries and the European Union, and by revising conceptual foundations. Among other things, thematic workshops focused on the question of how public participation as a tool of federalism can be crucial for some societies, from building a highway in Russia to challenging transnational institutions (see page 2).

Elisabeth Alber, Senior Researcher, EURAC-Institute for Studies on Federalism and Regionalism
Citizen participation in multi-level democracies

Citizen Participation in Multi-level Democracies offers an overview of new forms of participatory democracy in federally and regionally organised multi-level states. Its four sections focus on the conceptual foundations of participation, the implementation and instruments of democracy, examples from federal and regional States, and the emergence of participation on the European level. There is today a growing disaffection amongst the citizens of many states towards the traditional models of representative democracy. This book highlights the various functional and structural problems with which contemporary democracies are confronted and which lie at the root of their peoples’ discontent. Within multi-level systems in particular, the fragmentation of state authority generates feelings of powerlessness among citizens. In this context, citizens’ participation can in many cases be a useful complement to the representative and direct forms of democracy.

Federalism and decision-making: changes in structures, procedures and policies

Accounting for participation, separation of powers and democratic accountability, federalism gains momentum in times when traditional democratic legitimacy of institutional decision-making is challenged. Its ability to include multiple interests makes federalism a means to ensure good governance. Based on a multidisciplinary analysis, the book tackles the question of whether federalism as a pragmatic governance tool provides answers to current challenges and what those answers are. Thirty-three leading experts critically examine to what extent federalism serves this purpose in compound states, looking at different countries and policies. The volume revolves around five sub-themes: ‘federalism, democracy and governance’, ‘participation mechanisms and procedures’, ‘policy areas compared’, ‘institutional innovation and participatory democracy’ and ‘federalism: from theory to governance’.

Comments on and analysis of the first draft of the revision to title V of the Italian Constitution

“Riforma costituzionale e regioni. Riflessioni a prima lettura sul nuovo titolo V della costituzione” is a collection of proceedings and reflections that took place during a conference organized by the Institute for Studies on Federalism and Regionalism on 10 October 2014 in EURAC, namely on the constitutional reform currently under discussion in the Italian Parliament. The aim was to analyze from a constitutional and from an economic point of view the possible consequences which the reform under way was going to have, not only on the so-called “ordinary regions” of Italy, but specifically on the special ones. The volume includes contributions from Trentino-South Tyrol and Valle d’Aosta next to reflections regarding the new Senate and the reform of the distribution of competences between State and Regions provided for in Title V of the Constitution.

Participation and participatory democracy

This volume is the culmination of all the work and research that went into the project “POP! Paths of Participation in the European Region Tyrol-South Tyrol-Trentino” (2014-2015). It summarizes its most important stages and the results of the working groups and conferences from both theoretical and practical perspectives. Part I describes the project basics and fundamental aspects of the topics participation, democracy and participatory democracy. Part II sheds light on the legal parameters of participatory democracy in Austria and Italy while providing selected case studies. Academics, practitioners and experts in the field present their experiences of participatory democracy in part III of the book. Part IV, in turn, comprises the opinions and reflections of several academic experts regarding direct democracy and citizen participation in the European Region Tyrol-South Tyrol-Trentino. Special attention should be paid to the considerations in part V which have been compiled by the young adults who made up the different working groups in Innsbruck, Bolzano/Bozen and Trento. Images and texts represent their results and opinions, as well as suggestions for the development of participatory democracy in the European Region; from a multidisciplinary point of view and looking towards the future.
Autonomy arrangements around the world: a collection of well and lesser known cases

The volume, edited by Prof. Levente Salat (Political Science Department of Babes-Bolyai University), Dr. Sergiu Constantin (EURAC), Dr. Alexander Osipov (ECMI) and Dr. István Gergo Székely (Romanian Institute for Research on National Minorities) compiles the articles presented at the conference on Autonomy Arrangements organized by the European Centre for Minority Rights (ECMI) in Flensburg in September 2012. The conference was organized in collaboration with the Political Science Department of Babes-Bolyai University, Cluj-Napoca, Romania, the European Center for Minority Issues, Flensburg, Germany, and the Romanian Institute for Research on National Minorities, Cluj-Napoca, Romania. The European Academy of Bolzano/Bozen, Italy, joined the partnership at the editing phase of the present volume, contributing in editing and peer review. The initiative aimed to invite scholars, researchers and practitioners to engage in identifying, researching and analyzing as many operational autonomy arrangements as possible in a standard format, with special focus on the lesser-known cases. The full text is available online at www.ecmi.de/uploads/tx_lfpubdb/Autonomy_Arrangements_around_the_World.pdf