

Daniel Thürer

Federalism and Foreign Relations

“International relations are like a game of billiards”. This is how one observer described the old world of sovereign states. According to the commentator in question, national lawyers were concerned with the internal structure of the billiard balls while international lawyers dealt with their interactions. But when the matter is examined in terms of the interplay between federalism and foreign policy, it is clear that this image does not reflect the modern reality. The purpose of my presentation is to show that we need new philosophies, new theories and new concepts if we are to come to terms with the workings of today’s federalism and shape the federalism of tomorrow.

My presentation consists of three parts. The first part, entitled “A Qualitative Leap”, considers the traditional view of federalism and the challenges now facing it. The second part, entitled “Shortcomings of Escher’s Maxim”, highlights four aspects of modern federalism that do not fit neatly into the old way of thinking. The third part, entitled “Beyond Montesquieu”, considers the question of how, viewed through a foreign policy lens, federalism can and should be understood as an ordering principle and philosophy for contemporary circumstances.

1. A qualitative leap

According to the conventional view of the international order, states lay beside each other like billiard balls, with nothing moving within. They were defined by three elements: a territory marked off from the outside world, a national

people, and sovereignty in the sense of supreme state power. This view has become ingrained in our minds and is still to be found in many textbooks.

There was probably never a time when it was a true reflection of reality and the evidence of our everyday experience is that it does not apply to our contemporary world at the beginning of the twenty-first century.

Two historical developments are causing the international system to change and are seriously eroding the classical model of statehood. The first comprises the “top-down”, so to speak, processes of globalisation. These are trends extending far beyond the economic field and encompassing areas such as culture and communications and ultimately, indeed, our very values and sense of identity. Globalisation is leading to new forms of internationalisation, unification and institutionalisation of traditional social orders: universal markets and human rights belong to the goals and ethos of the global systems which are increasingly overriding, permeating and combining with national legal systems. In a sort of counter-movement, regional forces have been emerging throughout the world at the sub-national level with efforts being made to establish, develop and maintain small and in certain cases trans-national spaces. An example is the Regio Basiliensis, whose institutions cover German, French and Swiss territory. The ethos of inter-state regions is the preservation or recovery of the shared identity of historical communities, many of them divided by national boundaries, the establishment and realisation of democracy and citizenship for the local region, and promoting the efficiency and transparency of political and administrative processes across national borders. Are “pararegional structures” also emerging across national frontiers:

connections and networks between cities, for example between London, New York, Frankfurt etc.?

How does all this relate to federalism? The historical development of the federalist principle began with the federal constitution. The aim of such a constitution is to combine unity and diversity harmoniously in a political system. The characteristic features of the constitution of a federal state are:

- The presence of two or more legal orders which apply directly to citizens of the state;
- A constitutional distribution of power among the different levels in the political structure, with the subsidiarity principle applying where possible and with the constituent states enjoying a substantial sphere of autonomy;
- Involvement of the constituent states in the formulation of federal policy;
- A constitutional basis that cannot be amended without the participation of the constituent states;
- Processes and institutions to facilitate cooperation in matters that fall under the shared responsibility of different players in the federalist system.

The “federal state” was “invented” by the founding fathers of the United States, adopted by Switzerland in 1848 and subsequently by over 20 further countries, most of whom are represented here today in St Gallen. Federal constitutions generally assigned questions of foreign policy to the federation,

particularly to the federal government. The central state was thus given a virtual monopoly over foreign affairs, even in matters over which the cantons had jurisdiction for internal purposes. It was fundamentally a matter for the federation to represent the state as a whole in its international relations and to defend it against any threats to the body politic. Alfred Escher, a powerful Zurich statesman of the nineteenth century, coined a maxim to describe this arrangement: “internal diversity and external unity”.

2. Shortcomings of Escher’s maxim

The representatives of Leading House I – my colleagues Bernhard Ehrenzeller, Giorgio Malinverni, Rudolf Hrbek and I – examined the issues pertaining to “Federalism and Foreign Relations” and, proceeding from the microcosm to the macrocosm, as it were, identified four dimensions:

- The foreign policy of constituent states;
- Participation by constituent states in the foreign policy of the federation;
- Transposition and application of international and supra-national law in the federal state;
- “Federation building” in Europe.

Let us begin with foreign relations of sub-national territorial authorities. One of the characteristic features of the modern federal state is that constituent states and, to some extent, local government authorities, are increasingly becoming active in foreign policy as independent players. Of course this phenomenon is nothing new. It was provided for in the Swiss federal constitution of 1848, for example. Even back then, our old federal state spoke

to the outside world not just with the one voice of the confederation, but with the 26 voices of the confederation and the 25 cantons. Of course, the pursuit of independent external contacts by the constituent states has come to the fore as a defining feature only in more recent times. Border “lines” have become blurred and been subsumed into border “spaces”.

Old, historic contiguous regions are once more emerging as cultural and economic spaces. Consider the Lake Constance area, to take a particularly obvious example. The architecture of ecclesiastical buildings, for example, or the history of families and firms show how close-knit the area was before the establishment of nation states with their precisely defined boundaries. Lake Constance is the only region in the world where three federal states come together. Here, the existing constitutional possibility for regional diversification of the state’s external representation facilitated the emergence of cross-border arrangements between constituent states and local authorities. It goes without saying, of course, that loyalties of this kind cannot be pushed so far as to jeopardise the integrity of the states concerned.

Worldwide, we are also witnessing, for example, constituent states and cities increasingly extending their spheres of activity beyond national borders, whether on a unilateral or multilateral basis and whether through formal or through non-binding agreements. The story that during the Second World War the state of Vermont declared war on Germany before Washington did so, as I heard from one of the Senators for that state when I was in the United States, offers a particularly striking – and also questionable – case in point. But the idea of constituent states and cities undertaking initiatives in the area of human rights, launching or supporting ecological programmes, establishing

cultural links with foreign counterparts, competing abroad on an autonomous basis for investment in their economies, lodging protests or imposing sanctions – all this is now commonplace. Indeed, many sub-national territorial units have set up their own representative offices in foreign capitals and economic centres. What are the circumstances in which constituent states can engage in external activity? Where they have a direct interest as the owners of banks, insurance companies or other commercial companies? Or where they are directly concerned in their role as guarantors of fundamental rights? Are they entitled, as a general rule, to conduct activities across national boundaries in matters falling within the scope of their intra-state jurisdiction? Where are the limits, dictated, for example, by the need for unified action by the state as a whole?

As a general proposition, it may be concluded that the divergence between the inner and outer structure of the federal state is increasingly receding into the background and the “internal diversity” lauded by Escher is being reflected more and more towards the outside as well. Behind the gradual shift to autonomy in foreign policy and the emergence of sub-national territorial units from the grip of the old nation state, are we seeing the birth of a new, flexible, variable federative model, characterised by overlapping spheres of competence, in the shaping of national, trans-national, international and supra-national relations?

Let us turn, secondly, to the internal relationship between constituent states. These states are increasingly involved in the formulation of the foreign policy of the federal state. Various forms of cooperation may be observed. In the Bundesrat (Upper House of Parliament) model of Germany and Austria, for

instance, the governments of the Länder participate in the formulation of federal policy through their own chamber (the upper house) in the federal parliament. In Belgium, the regions and linguistic communities have their own external powers in matters lying within the scope of their internal powers, although they are required to consult the central government before entering into treaties with foreign authorities. In Switzerland, the cantons have joined together in the Conference of Cantonal Governments with a view to bringing their combined influence to bear on the federal government in particular and general policy areas, including foreign policy matters. We are thus witnessing a process in which, while powers are increasingly migrating from constituent states to the federal government and to international forums and institutions as a result of globalisation, the cantons are responding to this by using both formalised and informal procedures so as to exert their own influence on the shaping and formulation of federal policy. In the slipstream of globalisation, the long-running internal trend is continuing whereby the right of self-determination of internal actors has been developing into a process of codetermination at the higher level of the federation. In this process, the constituent states are, of course, not involved in foreign policy as players in their own right, but as hidden partners in foreign policy, as it were, concealed from view to the outside world.

The counterpart to this bottom-up participation in federal affairs – and this is the third dimension I referred to above – is the top-down transposition and application of international and supra-national law. This involves classical issues of the relationship between international law and municipal law. A number of approaches are possible. Complex questions of legislative

technique arise. In these processes, the state may be likened to the custom-house in Hawthorne's novel "The House of the Seven Gables", through which, figuratively speaking, passes the merchandise landed at the state's borders off the high seas. Are the goods reweighed and repackaged upon "import" (dualism) or are they left as they are (monism)? Do they remain at federal level (the "custom-house") or do they continue on to the constituent states (the "subsidiaries"), where the latter have jurisdiction, internally, over the matters in question? How can the federal state ensure that the constituent states comply with their obligation to respect and in any event to implement international or supra-national law? We are therefore asking: in what manner and in what form do internal territorial units form, as it were, the "base" for the transposition and enforcement of international and supra-national law at internal level within the federal state? The implementation of such law within a federal state concerns not only the law of the federation but also the superior legal order which takes precedence over the federal state as such.

We come now, on our journey through the world of federal institutions, to the fourth and perhaps most interesting and innovative stage: the federalist processes unfolding at supra-national, particularly at European level. This takes us back out of the internal domain of the sovereign state and confronts us with the unprecedented phenomenon of the pooling of sovereignty, the transformation of national sovereignty through the institutions that have emerged in the supra-national union of states and nations. The principle of federalism has taken on new and original forms in the area of European integration. A particularly topical aspect is, of course, the ambitious plan adopted at the Laeken European Council to draft a European constitution. I

can hardly imagine, however, that there will emerge from this a substantive new legal order for the European Union (EU). Rather, it will become clear, that the European *pouvoir constituant* continues ultimately to consist not of a single European people but of several different nations. The EU will remain a union of states (or nation states) and is not going to mutate into a European nation state. This is probably axiomatic and a specific feature of the realisation of the federalist principle in the European region. But is that not also a significant federalist finding? Is it not a frequently overlooked, but essential and by no means inevitable effect of European integration that, in their respective fields of activity, government agencies (e.g. immigration authorities, employment offices etc.) as well as commercial enterprises and individuals must treat the “Other” – i.e. the nationals of another EU member state – as fundamentally equal, and that the legislative, executive and judicial branches at all levels of government are bound to keep constantly in mind the legal orders and traditions of which European integration is composed? In this sense, institutions shape our behaviour, and practices are internalised. The saying “form follows substance”, however, does not always apply; reality shows that institutions too shape the conduct and even the thought processes of individuals. This everyday aspect of “federalism in action” is often overlooked.

3. Beyond Montesquieu

Federalism – this much is clear – is an idea, a principle of legitimacy that extends far beyond the federal state, which constitutes just one of its manifestations. Bodin and Hobbes developed the theory of sovereignty, Locke

championed the fundamental and human rights of the individual, Montesquieu conceived the doctrine of the separation of powers, and the Philadelphia founding fathers created the federal state. Our discussion of the relationship between foreign policy and federalism has shown that we are in need of a new philosophy of federalism. This will not be the billiard ball theory but a theory of networks or mediators between political communities. The nodes in the networks are the nation states. The nation states remain the central players in international relations, their constitutional systems remain the most effective safeguards of human rights, the central forums of democracy, the indispensable promoters of social justice. But statehood must be interpreted afresh in the light of new federalist processes: it must open itself up both inwardly and outwardly, but conversely it must also curb centrifugal, polyarchic processes.

Let me conclude with a little story. I found the story in a booklet entitled “How To Be Successful in Business Life” that I bought many years ago at a kiosk somewhere in the United States. The story goes as follows:

“There was once a battleship in heavy seas. It was night. The officer in charge informed the captain that the ship was on a collision course with another ship whose light had been observed in the distance. The captain gave an order to tell the boat: ‘We are on a collision course, change direction by twenty degrees’. The answer came: ‘I advise you to change course by twenty degrees’. The captain replied: ‘We are a battleship, the captain is speaking. Who are you?’ The answer came back: ‘I am a seaman, second class’. The captain: ‘So, I order you to change course immediately’. The answer: ‘You had better change course, sir; I am a lighthouse’.”

The story suggests that even if we who believe in the federal system are weak compared to apologists of centralist power, we are strong under two conditions: if the practical basis on which we stand is solid and if our message is clear and illuminating.

What would be our mission, our philosophy? Let me name four elements.

First, the state no longer finds meaning in itself. It has become a “middle man” or a “mediator” between the inside and outside.

Second, modern constitutional states are not only the true “junctions” in the network of international and sub-national affairs, but also the most effective trustees of the international community’s values. They still are, in the final analysis, the single entity that is best capable of actually guaranteeing human and fundamental rights as well as equality and rule of law, of achieving democracy and of – at least partially – imparting social justice.

Third, a special basic attitude is required for handling a federal system, which Denis de Rougemont referred to as the “love of complexity”. In this sense, the philosophy of federalism corresponds optimally to the spirit of the complex modern information and knowledge society.

Fourth, the legitimation of the federal form lies ultimately in the affirmation of variety as wealth, and in the respect and tolerance of others, who we do not seek to standardise but accept as they are.

We need a new federal philosophy. Pellegrino Rossi once noted that Geneva had produced innovative practitioners and had had the good fortune to have philosophers on hand to explain to the world what was being done there: Calvin as regards the Reformation, Rousseau as regards democracy.

We have joined together here in St Gallen for a unique assembly of practitioners and philosophers. Work sessions on three fascinating themes will take place. The ones on Federalism and Foreign Relations promise to be a good catalyst for a new, richer understanding of an old principle that is in danger of ossifying. I hereby invite you to take part, in order to, as the title of the conference puts it, “learn from each other”.