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Participation of Sub-national Units in the Foreign Policy of the Federation

(Work Sessions 2 and 14)

1. Introduction

A country's federal structure is an important factor in conditioning its foreign policy. Federalism, traditionally conceived as shaping only the internal functioning of a political system, in fact also determines the foreign policy making of a country. Contrary to the traditional notion of foreign policy, today's political realities do not correspond any longer with the conventional wisdom of a clear division between a domestic and a foreign policy sphere of governance. While the historic nation state is supposed to behave as a unitary actor, the domestic political structure provides sub-national units with competencies to influence the foreign policy of the federation (Jha, 1999, 1). It is evident that the federated entities are only able to keep their political significance according to their constitutionally granted rights if they participate effectively in the federation's governance of foreign affairs.

In federal democratic systems, officials of sub-national governments have always tried to maintain an influence or a significant role in federal foreign policy making. Interdependence, globalisation, and the shift of decision making away from the nation state onto the international level have only intensified this need. These fundamental changes regarding the role of the

nation state and the condition of the international system bring into sway the delicate balance between the different levels of authority. Although many federal constitutions preclude their constituent parts from the making of foreign policy by assigning these powers to the federal government, it is impossible to ignore the interests of the federated entities entirely. Thus, the sub-national units are trying to reinforce their role in foreign policy making in order to compensate for lost autonomies and legislative powers. Their main purpose is to be involved in major decisions before the final decision is reached or an international treaty signed (Duchacek, 1990, 11).

An understanding of the governance of external relations within a particular federal set-up must take constitutional dispositions as a starting point of enquiry. However, anyone interested in the true functioning of a political system has to go beyond formal structures. The political practices and the interplay of the sub-national units with each other, as well as the relationship between the federal and the sub-national level, must be examined (Jha, 1999, 13). In order to gain a better understanding of federal systems, it is thus necessary to study both their constitutional laws and their political processes and practices (Watts, 1999, 14).

The topic under consideration in Work Sessions 2 and 14 – the participation of sub-national units in the foreign policy of the federation – enquired into the different possibilities for participation with regard to determining foreign policy through the federal framework of the state. Three of the numerous models of participation in federal states were discussed more thoroughly in the work sessions. The report therefore begins with a brief analysis of the participatory

rights of sub-national units in foreign policy in the German, Belgian and Swiss federal systems.

The study of the functioning and characteristics of the respective political systems was the first purpose of the work sessions. The second purpose was to enable an exchange of experiences between practitioners and scholars of different countries. At the heart of the work sessions were several key questions. Is it possible for the federated entities to influence the federation's foreign policy effectively? How can the involvement of sub-national units be reconciled with the need for a credible, reliable, and coherent foreign policy? What are the pros and cons of the different models of participation? In view of these questions, the report summarises some of the main findings of the work sessions.

2. Three models of participation: Germany, Belgium, and Switzerland

The following paragraphs provide a brief overview of the participation of sub-national units in the federal systems of Germany, Belgium, and Switzerland.

2.1. Germany

The Federal Republic of Germany is composed of 16 constituent states (the Länder) and designates itself as a democratic and social federal state (Art. 20 Para. 1 Basic Law). The so-called "eternal guarantee clause" (Art. 79 Para. 3 Basic Law) maintains the Länder as centres of political decision making with substantial legislative powers and the right to participate in federal legislation through the Council of States (Bundesrat) (Kokott, 1999, 176-177).

According to Article 30, Basic Law, the exercise of state powers and the fulfilment of state functions is a matter for the Länder, unless the Basic Law provides or admits otherwise. In reality, however, the Basic Law provides for broad areas of exclusive and concurrent powers of the federation, whereas the legislative powers of the Länder are confined to certain policy areas (Kokott, 1999, 176-177).

Foreign policy is a federal competence (Art. 32 Para. 1 Basic Law). The Länder still have the right to be consulted before the conclusion of an international treaty, but only if one or several of them are more affected by a federal policy decision than the others. The federation even has the right to conclude international treaties within the exclusive legislative powers of the Länder, but in this case they participate in the federation's decision-making process according to the so-called "Lindauer Abkommen" (Sturny and Thalmann, 2000, 151-154).

The coordination between the Länder and the federation usually takes place in the Bundesrat, which is at the heart of the German federal system with regard to the governance of external relations. Because most international treaties have to be approved in the form of a federal law, the Bundesrat has the right either to oppose or to veto, depending on the topic of the international treaty (Art. 59 Para. 2 Basic Law and Art. 77 Basic Law) (Sturny and Thalmann, 2000, 155-156). Above all however, the Bundesrat plays a crucial role in the participation of the Länder in matters pertaining to the European Union (EU).

Despite being an organ of the federation, the Bundesrat today serves as the most important device for the Länder in securing their role in the formation of the federation's EU policy. Article 23 Basic Law provides for a complex coordination process through which the Länder participate in all matters of EU policy (for a comprehensive account see Oschatz and Risse, 1995). As to Art. 23 Para. 2 Basic Law, the federal government keeps the Bundesrat informed, comprehensively and at the earliest possible time. Insofar as the interests of the Länder are affected in a matter within the exclusive competence of the federation, the federal government shall take into consideration the position of the Bundesrat. Whenever the legislative powers exclusive to the Länder are affected, to that extent the position of the Bundesrat shall be the decisive factor in determining the federation's position (Art. 23 Para. 5 Basic Law). Furthermore, if exclusive legislative competencies of the Länder are primarily affected, a Land delegate shall represent Germany at EU level, for example in the deliberations of the Council of Ministers (Art. 23 Para. 6 Basic Law). In practice however, the federal government has mostly refused to transfer the conduct of negotiations to the Länder (see Lejeune, Part B).

2.2. Belgium

In Belgium, several constitutional revisions, between 1970 and 2001, ended with the creation of a federal state. Even today, Belgium finds itself in an ongoing process of federalisation. The specific character of the Belgian system lies in the coexistence of two different federated entities: the regions and the communities. The three regions – the Wallonian, the Flemish, and the Brussels-Capital regions – are territorial entities, whereas the three

communities – the French, the Flemish, and the German communities – reflect the cultural diversity of the country.

Each level of authority has a certain set of competencies as stipulated in international treaties and the Belgian constitution, as well as in special and ordinary laws. Two important constitutional features should be mentioned with respect to the topic under consideration. First, apart from the cases of concurrent powers (the exception in Belgium), there is no supremacy of federal law over regional law (Alen, 1995, 35). In general, all legislative powers are exclusive – each level has its own powers that cannot be disputed. Second, this principle of exclusive powers is also valid in the governance of external relations. If the regions or communities have been made competent for certain policy domains internally, then they are also competent for these matters externally. Thus, within their respective competencies, the regions and the communities possess treaty-making power.

In foreign affairs, a specific procedure was developed for the conclusion of so-called “mixed treaties” that deal with matters concerning federal, regional, and community powers simultaneously. The exclusive powers of the regions and the communities prohibit the federal government from concluding these treaties unilaterally. It is not allowed to encroach upon the exclusive jurisdiction of the sub-national entities without their explicit consent (see Lejeune, Part B).

The coordination between the federal level and the federated entities takes place in the Interministerial Conference on Foreign Policy (CIPE), where the

respective representatives meet on equal terms. The Consultation Committee is called on to solve the difficulties that have not been resolved by consensus in the CIPE. Institutionalised coordinating organs along with informal procedures render possible a coherent formation of the federation's policy decisions within the complex Belgian system.

The federated entities have also become increasingly involved in the EU decision-making process. First, at the preparatory stage, a cooperation agreement ensures the equal participation of all federated entities as well as the federal government in coordinating meetings that aim to achieve consensus on the Belgian position in EU matters. If the parties are not able to reach a consensus, additional procedures (CIPE, Consultation Committee) come into force. The minister representing Belgium within the Council of Ministers can only take up positions previously discussed at a preliminary meeting (see Lejeune, Part B).

Second, at the table of the Council, a minister delegated by all the sub-national units represents the country. Following a change to Article 203 ECT, the Council of Ministers is not exclusively formed by members of federal governments. A member of a sub-national government can therefore represent Belgium legally. The level of authority representing Belgium depends on the configuration of the Council, that is, on the matters being discussed (see Lejeune, Part B).

2.3. Switzerland

Switzerland is divided into 26 quite autonomous cantons. The country's extensive federal structure is complemented by almost 2,900 communes, each enjoying considerable autonomy and competencies.

According to Article 3 of the Federal Constitution (FC), the cantons are sovereign insofar as their sovereignty is not limited by the constitution. They exercise all rights that are not expressly transferred to the federal government. Each canton has far-reaching legislative, fiscal and administrative competencies. The constitution also stipulates an obligation of the federation and the cantons to collaborate and to support each other in the fulfilment of their tasks (Art. 44 FC). Mechanisms of negotiation, mediation, information, and consultation all make reference to the change from a dual to a cooperative federalism, in which the different levels of authority recognise each other as equivalent, and take their respective interests into account.

Foreign relations are a federal matter, yet the principle of cooperative federalism requires the federation to take the powers of the cantons into consideration and to protect their interests (Art. 54 Para. 3 FC). The participation of the cantons regarding decisions of foreign policy is laid down in Article 55 FC. The cantons shall participate in matters concerning their powers or their essential interests, and they shall have the right to participate in international negotiations when appropriate. In addition, the federal government has to inform them timely and fully, and to consult them. These provisions have been further elaborated in an ordinary law in 1999 (for a comprehensive account see Pfisterer, 2001, 535-542).

During the negotiations on the European Economic Area at the beginning of the 1990s, the cantons realised their need for a common institutional arrangement in order to coordinate their positions and maintain more sustained contact with the federal government. As a consequence, in 1993 the so-called Conference of Cantonal governments (KdK) was established with its own institutional structure (board of ministers, secretariat). Ever since, most of the coordination between the cantons themselves as well as between the federation and the cantons has occurred in this quite powerful, but rather informal instrument of cantonal governments (on the KdK, see Münger, 1994).

In Switzerland, the need for sub-national units to be involved more directly in foreign policy is primarily a response to the continuing process of European integration. Although not a member state of the EU, Switzerland is influenced to a large extent by the decisions and developments within the Union.

Consequently in political practice, the right of the cantons to participate in foreign policy first and foremost implies the right to participate in the federal policy of European integration.

3. Findings

The following paragraphs highlight important aspects of the topic under consideration, brought up repeatedly during the work sessions.

3.1. Participation and direct activities

To begin with, an important distinction must be made. The participatory rights of federated entities through the federal framework should be clearly set apart from the foreign policy activities which sub-national units undertake at their own discretion (so-called “constituent diplomacy”), for instance the cross-

border regional cooperation or the offices of sub-national units in foreign capitals. Although it might sometimes be difficult, it is important to draw the line unambiguously in order to tackle the different problems in an appropriate way. For instance the Swiss federal constitution expresses this important distinction in a very clear way. Article 55 FC sets the guidelines for the effective participation of the cantons within the federal framework, whereas Article 56 FC deals with the relations that the cantons may undertake with foreign countries on their own. Because Work Sessions 2 and 14 focused on the participation of sub-national units in the foreign policy of the federation, the remarks made on “constituent diplomacy” have not been included in this report.

3.2. Policy coherence

In the traditional international order of the inter-state system, the nation state had to be able to take unified action against the world outside and to “speak with one voice” in order to defend national interests effectively. This requirement was unquestionable even in a federal state. Until today, it has thus been strongly disputed whether the federated entities should have a say in foreign policy making, and how far-reaching their powers should be.

Accordingly, in the work session it was stated by some participants that federalism displays its positive effects first and foremost within the federation, and is not necessarily suited for the domain of foreign policy.

On the other hand, most participants argued that a federation is by definition multi-faceted in character and rarely able to speak strictly with one voice in every situation. It is often quite difficult to find a commonly accepted position among all actors involved, especially if the internal distribution of powers

assigns major competencies to the federated entities. Compared to “constituent diplomacy”, it is less likely that the foreign policy of the federation would be undermined by actions of the federated entities, because all their activities take place within the constitutionally defined federal framework. Nevertheless, every federation needs institutions and mechanisms to coordinate the interests of the different levels of authority.

3.3. Policy coordination

The tension between liberty of action for the sub-national units and the necessity of policy coherence for the federation underlines the need for effective mechanisms of conflict resolution. Through institutionalised consultative and coordinating procedures, problems are anticipated and each other’s legitimate interests accommodated (Jha, 2000, 13).

First, the federated entities need coordination among themselves. In Switzerland for instance, it is essential for the 26 cantons to cooperate and coordinate their actions if they intend to have a real influence on the foreign policy making of the federation. Second, the sub-national units and the federation have to coordinate their positions to the greatest extent possible in order to strengthen the national position in international negotiations, and avoid inconsistent policy declarations that are damaging to the country’s international reputation and credibility, as well as to ensure that the interests of all parties engaged are taken into account. In Belgium for example, the regions, the communities and the federation must pull together in the CIPE when preparing the Belgian position for the EU Council of Ministers. In the absence of any consensus, the Minister representing Belgium must abstain from the vote (see Lejeune, Part B). As well as formalised mechanisms,

informal or semi-formal procedures that may be used in coordinating the respective policies need to be considered. In Germany for example, the federal chancellor meets on a regular basis with the prime ministers of the Länder to discuss common problems and to coordinate positions, which gives the Länder an additional device for influencing the federation's foreign policy.

3.4. Implementation of international law

According to traditional international law, the federation has a duty to ensure the effective implementation of international law, regardless of the internal allocation of responsibility. In practice though, the implementation often occurs not at federal level, but at sub-national level. Thus, whatever the constitutional rules might be, efficient implementation of foreign policy and international treaties requires the willing cooperation of the sub-national units (Jha, 1999, 12). It is therefore advisable or even imperative to include sub-national units in the federal decision making.

New research on the member states of the EU suggests clearly that in federal states where those responsible for implementing agreements are involved in the negotiation process, implementation records are better. Because sub-national governments under a federal system are responsible for much of the implementation of legislation, problems arise during the implementation stage unless the regional governments are integrated into international negotiations early on (Martin, 2000, 184). In Germany for instance, the Länder are not legally obliged to implement international treaties of the federation. The federation is therefore dependent upon the voluntary motivation of the Länder. Obviously this can be encouraged by the effective participation of the

federated entities in the negotiation process (Sturny and Thalmann, 2000, 157-158).

3.5. Foreign policy and EU policy

The relationship between the participation of sub-national units in foreign policy in general and in the context of the federation's policy as regards to matters of the EU, was also addressed in the work sessions. Principally, there was a consensus that European integration has more far-reaching consequences for a country than other forms of participation at the international level. The relation between the member states and the Union is in fact no longer foreign policy in its classical form. It is rather a new form of "European domestic policy" (Europäische Innenpolitik), in which the interactions between the European level and the state level have taken on "domestic dimensions", replacing traditional modes of international cooperation. On the other hand, several participants argued that the effects not only of the EU, but also of other international institutions, regimes, and regulations on the federation should be taken into account.

In many countries the participation of sub-national units in the foreign policy of the federation became a pressing issue in the first place through the all-embracing process of European integration. Undermining of their competencies was beyond any doubt the main reason for sub-national units request for more participatory rights in foreign policy. In Germany for example, the Länder demanded more involvement in government decisions regarding the EU because they realised that the continuing drift of legislative powers to the European level was undermining their own competencies. Conversely, the federation needs the expertise of the Länder and their administrations on the

European level, as they are normally competent regarding policy implementation.

4. Conclusion

The participation of sub-national units has become a major feature of the foreign policy of federations. Traditionally excluded from the governance of external relations, the federated entities are reinforcing their role within the federal framework in order to compensate for loss of powers due to globalisation and internationalisation of law making. The purpose of the participation in the federation's foreign policy is to be involved in decision making before the final decision has been reached or the international treaty signed.

The federal systems of Germany, Belgium and Switzerland illustrate the different opportunities for federal states to shape an appropriate framework for the requests of the federated entities. In the work sessions it became clear that the participation of sub-national units works well in each of the three countries under consideration. They succeed in voicing their interests, and the process does not actually hinder the federal foreign policy. However, coordination procedures between the different levels of governance are indispensable, and have been put into practice in the German, Belgian and Swiss federal systems. As a rule, the participation of the sub-national units is equally crucial for the federal government. The federation needs the willing cooperation of the federated entities in order to implement its foreign policy and international law. Moreover, the federation has to rely on the knowledge of the federated administrations when shaping foreign policy that primarily

affects the sub-national units. This is particularly true in matters concerning the EU. Consequently, participatory rights have been developed primarily as a reaction to the ongoing process of European integration. The German system especially, for instance, is largely adjusted to the participation in the federation's EU policy.

In Germany, Belgium and Switzerland the participation of sub-national units in the foreign policy of the federation has stood the test of time. In order to understand their respective roles, a thorough knowledge of the federation's political system in general is required. In the end however, each federal system has its pros and cons and the design for a specific country is not necessarily suited to or even transferable to a different political context. Instead, the historical, cultural and political realities of a federation always need to be considered in order to create an appropriate set-up.

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