

Work Session Proceedings: Reports

William John Hopkins

Foreign Relations of Sub-national Units

(Work Sessions 1 and 13)

1. Introduction

The past 50 years has seen two phenomena occur in global governance. The unprecedented growth in international trade and cooperation, particularly in Europe and North America, has been accompanied by a renewed interest in the federal idea to the extent that around a third of the world's population now lives in a federal state. One result of these developments is the increasingly blurred distinction between the international and the domestic, a fact that is emphasised by an increasing tendency of sub-national units to engage in activities beyond the borders of the nation state. The work sessions upon which this paper is based explored this phenomenon through examining cross-border agreements and sub-national diplomacy in Western Europe and North America. The examples discussed exposed the pragmatic focus of these developments and their limitations. They also raised questions about the future both of the traditional nation state and of federal systems in an increasingly globalised world.

2. Cross-border agreements

As an entirely land-locked state at the geographic centre of Europe it comes as no surprise that cross-border relations are a feature of the Swiss federal state. Perhaps the most documented of these examples is that established around the shores of Lake Constance. The regions that surround the lake have a long history of autonomy and cooperation although the Agreement itself was only established in 1972. Based upon an inter-regional agreement it was established with the specific aim of regulating lake use in the wake of fears over its long-term future. The nature of the agreement limits the formal powers of the International Conference of Lake Constance. It cannot engage in regulation. Instead it operates on the basis of consensus and voluntary agreement.

Cooperation between the lakeside regions is far more today intense than in 1972, and the subjects discussed at the International Conference of Lake Constance now include transportation, development and education. Issues such as these require regulation at a cross-border level, which cannot be achieved under the current agreement. Those involved with the conference noted that when proposals require regulation at the federal level, such as for higher education cooperation, they soon become bogged down. In turn this encourages the regional tier to adopt less formal responses such as the “virtual university” now under discussion. This would not require federal approval and is thus deliverable under the current inter-regional regime.

The International Conference of Lake Constance represents only one of a myriad of organisations that operate across the Swiss border. Others include

the Alpine State Commission and the Upper-Rhine Regional Conference.

Unlike the Lake Constance example, this conference is based upon formal inter-governmental agreement (those involved in this organisation pointed to the involvement of unitary France as a reason for this) and has a far broader remit perhaps reflecting its more recent genesis.

Although European experience with formal cross-border agreements between sub-national governments has a long pedigree they are by no means the only examples one finds in the federal world. Another well documented example is the Great Lakes Charter of 1985, which introduced a United States-Canadian framework to aid management of these impressive geographical features. The Great Lakes Charter like the Lake Constance example is not a formal treaty. As such it operates on a voluntary basis through a procedure of consultation and collective action in relation to research and policy development. The latter led in 1995 to the signing of the Great Lakes Charter Annex, which bars significant water removal from the lakes.

Lacking the institutional ability to introduce the regulations contained in the Annex and other agreements reached, the charter leaves it to each state or province to incorporate the policies agreed into regional legislation. As part of this process other actors will be consulted on the proposals in a way that is not part of the Lake Constance example. Another notable difference is that the Great Lakes Charter remains strictly focussed on ensuring the ecological health of the Great Lakes, and the policies associated with it reflect only this aim.

2.1. Do cross-border institutions require formal recognition?

A feature of most if not all cross-border regional agreements is the lack of formal legal capacity enjoyed by the institutions created. Even when established under a formal inter-governmental agreement such as in the Upper-Rhine example, “sovereign” rights have not been transferred. This can have significant repercussions on the effectiveness of these institutions. Those involved with the Upper-Rhine Regional Conference noted that attempts to develop a single waste-disposal facility for the region have foundered on the issue of how to charge fees. Such fees would need to be introduced in law, something that cannot be achieved without the agreement of the relevant national levels through a formal inter-governmental agreement.

Although it was noted that both the Bavarian and United States courts have been willing to make reference to the decisions of the International Conference of Lake Constance and the Great Lakes Charter as a form of “soft law” (e.g. *Little Traverse Bay Bands Of Odawa Indians and others v. Great Spring Waters Of America* 2002, 203 F. Supp. 2d 853), the legal position of these cross-border institutions is extremely confusing. Their powers and structures are based on a combination of informal agreement, international law and private law and they are in effect a sui generis form of organisation unrecognised by international law. Some participants in both organisations felt that as long as these organisations continue to exist in a legal limbo, they will lack the necessary powers to significantly improve cross-border development.

Not all viewed this lack of formal powers as crucial. Some suggested that these institutions work best as cooperative structures requiring unanimity to develop decision making. Assigning of specific powers to cross-border

institutions in their own right is politically difficult and potentially dangerous for smaller regions, which could find their interests overridden. For the time being at least, these arguments remain theoretical, as cross-border regional cooperation will continue to rely upon regional solidarity and financial autonomy rather than formal powers of regulation.

2.2. What makes cross-border agreements succeed?

The plethora of apparently successful Swiss cross-border organisations raises an interesting question. Why do they flourish in Switzerland when Switzerland's position outside the European Union (EU) might be expected to make their success problematic? One reason advanced by Swiss and German representatives was culture. Although the Swiss border remains economically significant, for much of its length it does not mark a cultural divide. Languages and regional dialects do not follow the national borders in this part of Europe. Is this what holds these informal structures together?

Although cultural and linguistic similarities must clearly be an asset in such organisations, those with experience of North America did not believe they were enough to achieve success. Students from the United States and Canada pointed out that the relationship between Canadian provinces and US states has often been poor despite the strong cultural and linguistic ties. The Great Lakes Charter, on the other hand is an example of a successful cross-border venture, which begs the question why has it succeeded where others have failed? The answer may lie in the realm of politics rather than culture. Several participants in such organisations recognised that when the subject matter of cross-border agreements covers areas where the interests of the participant regions are similar, these operate as effective conduits for cross-

border decision making. However, when these informal institutions are asked to resolve conflicts they will soon be found wanting.

A further reason for the success of these organisations may be federalism itself. It is noticeable that these cross-border institutions rarely exist outside federal states. Where unitary states are involved they are far less able to engage in cross-border activities. Participants from the Upper-Rhine example noted the difficulties in dealing with the centrally appointed Prefect who represents the French region. This person was far less able to negotiate than the regional ministers from Switzerland and Germany, which limits the effectiveness of the institution. This situation may improve as regional decentralisation makes a re-appearance on the French political agenda.

Significant regional and local autonomy is therefore a further pre-requisite for effective cross-border relationships. Although doubts may remain as to the effectiveness of such agreements, they clearly perform a useful pragmatic role even at the informal level. Without the domestic autonomy of the regional unit, this advantage is impossible to deliver.

3. Sub-national international relations

The globalisation of governance and the accompanying penetration of state boundaries have extended the role of sub-national units beyond merely cross-border arrangements. The constituent units of many federal states are now engaged in activities far beyond their territorial boundaries. This is not a new phenomenon. Older federations such as Switzerland (Wildhaber, 1974) and Germany (Engel, 1992) have long engaged in limited international activities, while the new Belgian regions and communities have been quick to enter the

international arena (van Ginderachter, 1993). The United States by contrast has, at least formally, barred any such activities by the unequivocal words of Article 10 of the United States constitution: “No state shall, without the consent of Congress ... enter into any agreement or compact with another state, or with a foreign power”

The United States participants all agreed that such a simplistic analysis of the United States situation belies the constant tension between the constituent states and the federation over the states’ autonomous role beyond the borders of the federation.

3.1. Sub-national legislation and international law: the United States experience

US states and even local governments have a history of using domestic regulation to influence the policy of foreign governments. Swiss participants recalled that 26 states and 200 cities had introduced sanctions against Swiss companies and products to force a resolution of the “dormant account” scandal in Switzerland.¹ Several United States commentators pointed out that this example was by no means alone. A number of local governments have consistently engaged in sanctions (e.g. San Francisco, Berkley and Burlington), and both California and New York State have introduced sanctions against particular states as a result of their treatment of Armenians and Jews respectively. Examples unrelated to the issue of sanctions include states introducing anti-trust legislation that discriminates against foreign firms, and California’s unitary taxation scheme, which ensures that multinational corporations pay tax related to their global income not that accrued in the state. Although one could question the wisdom or the motives behind these

policies, it was emphasised by the United States constitutional lawyers that such actions are decisions taken by democratically accountable institutions acting within their domestic jurisdictions. The problem only occurs when these legitimate actions interfere with international law. Should the courts intervene to restrict the activities of the states that have repercussions beyond their borders?

The response of the Supreme Court to this question has not been without controversy. Although in the examples given above the Court has not struck out the actions of the states there are instances where it has intervened. In the case of *Crosby* (*Crosby v. National Foreign Trade Council* 530 U.S. 363), discussed more fully in the paper of Justice Scalia, a number of states (in this case Massachusetts) had introduced laws restricting the granting of state contracts to businesses with links to Burma (Myanmar). The state law was struck out on the basis that it was pre-empted (Article 6, clause 2 of the United States constitution) by an act passed by Congress (110 Stat 3009-166) to prohibit new investment in Burma. In fact Congress did not explicitly pre-empt state laws in relation to sanctions on Burma, and the Supreme Court appears to have endorsed a type of implied pre-emption in foreign affairs similar to that developed in domestic matters.

The Supreme Court had gone further in the much earlier case of *Zschernig v. Miller* (389 U.S. 429) where it struck out a state law purely on the grounds that it trespassed into the federal level's international responsibilities. This development of a "negative foreign commerce clause" implies that the actions of the states will be restrained when they are felt to be too great a burden upon the action of foreign trade or the federal government in its pursuit of

international relations. Although these decisions clearly do represent some limitations on the autonomy of the states, significant leeway appears to remain for them to introduce domestic legislation that has international impact.

3.2. Sub-national diplomacy

The fact that Article 10 of the United States constitution bars states from indulging in international agreements without the consent of Congress means that such activities must be informal. Participants from several United States jurisdictions confirmed that the extent to which states develop such a role varies considerably. Some states see their international role as purely cultural, while others have clearly developed an informal institutional capacity to engage in sub-national diplomacy. Utah, for example, retains 24 representatives around the globe. Where states do engage in activities beyond their borders the focus is economic, primarily the encouragement of trade and tourism, although even this can lead to controversy particularly in the use of incentive schemes to attract investment.

The development of the global market has meant that even local governments now demand that their voices be heard on a number of international matters particularly as they become more aware that their autonomy is being restricted by the growth of international trade agreements. Until recently these efforts were hampered by the rather uncoordinated nature of such activities as a result of extensive rivalries between cities and regions. United States representatives from local government reported a noticeable reduction in these actions in the aftermath of September 2001.

It was suggested that the expansion of state foreign affairs activities in the United States was a direct result of the expansion of federal policy. The analogy was drawn with the development of United States federalism in the 1930s. Until the New Deal of 1934, federal affairs in the United States were seen as distinct and distant from the affairs of the state. This occurred to the extent that state governors rarely travelled to the capital. In the years since this shift, visits by state governors to Washington have become commonplace. The same is true of international affairs.

United States practitioners and commentators both emphasised that foreign affairs were still a low priority for most US states. As foreign matters enter into the states' field of vision they are dealt with on a pragmatic basis. This will be achieved formally if the Supreme Court is involved, informally if it is not, and increasingly through private or semi-private institutions. This semi-formal diplomacy is not always visible.

It was suggested by both academics and practitioners that this emerging sub-national diplomacy operated on a far more informal and pragmatic basis than its national cousin. A distinction was drawn between foreign affairs and foreign relations with state action falling into the former definition, focusing as it does on semi-private issues such as trade and development. Nevertheless, although regional relations may be less formal they are not less active. Länder representatives noted the wide range of agreements entered into by the German regional tier including around 46 with their Russian counterparts. In Germany, such agreements must gain the approval of the Bund. In practice approval is the norm although the Foreign Office attempts to avoid the regions engaging in binding agreements. Such a process is entirely lacking in the

United States example where the states rarely even inform the federation. States appear to indulge in such activities to the extent that they feel appropriate. If the federation feels a state is going too far, the onus is on the federal level to intervene.

Extreme varieties of sub-national diplomacy were also discussed, with the micro-nationalist regions of Quebec and Belgium being raised as examples. Since the Umbrella Treaty of 1968, which allowed a formal relationship between the Quebec government and the French government, a number of offices and links have been established by the Quebecois. Quebec is not the only Canadian province to engage in these activities. Some are associate members of US state organisations (e.g. the Council of States and the Western States Association) while most also regularly lobby the United States Congress, although they have recently closed their offices in the United States capital at Ottawa's request. Quebec, as one might expect, has continued to operate an office in both Washington and New York, although its focus is on tourism. The difference in the Quebec (and New Brunswick) examples is that their activities have a cultural and political context rather being centred only on economic development and trade.

The extensive competencies of the Belgian regions and communities include foreign policy in their areas of domestic autonomy. Flanders also maintains nearly 100 economic officers around the globe as well as nine "ambassadors" who are not subject to the Belgian authorities. Again these activities have a significant political and cultural element as the Flemish in particular strive to create a distinct identity at the international table.

3.3. The regional level and international organisations

The development of supra-national organisations across the globe is a phenomenon that has had a huge impact upon the operation of federal states (Hopkins, 2002). As matters that had previously been regarded as domestic are increasingly handled at the inter-governmental level, the regional tier is increasingly finding its autonomy proscribed. Nowhere is this more evident than in the EU.

The major issue that faces European regional governments at the present time is the internal relationship between sub-national, national and supra-national levels in European matters (Bursens, 2002). The recognition of this threat to regional autonomy has resulted in the Declaration of Flanders receiving the signatures of 45 regions. This demands that European legislative regions in particular be given a far greater role in European decision making. For all European regions, representation in Brussels is far more important than traditional international relations.

Similar developments have also been evident in the United States as a result of the North American Free Trade Agreement (NAFTA). One example raised by United States local government representatives was the threat to local living wage laws. The trend towards limiting sub-national autonomy when it interferes with the international commitments of the federation was confirmed in the relationship between the states and World Trade Organisation (WTO) regulations. Under United States domestic legislation the president may strike down a state law should it be felt to impinge the requirements of the WTO. Observers of the United States system noted that the states would much rather have seen Congress take such a decision.

4. Conclusions

The increased interaction between domestic and international affairs has had a significant impact upon the practice of federalism in the countries examined. At one level national borders are a hindrance to the successful delivery of policies and, as a result, sub-national units have increasingly developed cross-border relationships, with or without the involvement of the federal level. The “permeability” of these borders and the internationalisation of trade have also had the effect that domestic legislation increasingly has a potential impact far beyond the borders of the particular sub-national territory. In turn the internationalisation of trade and the impact of decisions taken in other nation states upon the economy of a region has led many to indulge in informal sub-national diplomacy to promote trade and tourism. Beyond these actions of the regions on the international stage, regional autonomy is increasingly threatened by the development of supra-national institutions, which increasingly take decisions previously regarded as domestic. For all these reasons, the traditional division of domestic and international policy is no longer sustainable. This presents a number of serious challenges to the federal or regional state.

One of the key challenges this raises is the question of accountability. The principle of federalism is predicated upon democratic decision making and subsidiarity, but the internationalisation of decision making undermines this crucial aspect of the federal ideal. Decisions taken at the inter-governmental, cross-border or supra-national level are by their very nature inter-executive decisions taken without the involvement of the relevant legislatures. In fact such decisions operate in a political space detached from the mechanisms of

accountability. There is no parliament or council where such decisions can be scrutinised. Should such institutions be granted “sovereign rights” to make and enforce decisions in their own right, the issue of accountability will be thrust to the fore.

The Upper-Rhine Regional Conference experience was raised in the work session as a rare example of such a body both recognising and attempting to address the accountability deficit created by increased internationalisation of decision making. The Upper-Rhine Regional Council comprising regional and national parliamentarians/councillors has been created to shadow the conference itself although its discussions may cover much wider subjects.

In tandem with the accountability issue, the development of sub-national foreign affairs and cross-border relationships raises questions about the future of the nation state itself. The discussion of the various types of sub-national involvement in international affairs presented above is clear evidence of the permeability of national borders today, and it would appear that the “hard border” of the traditional nation state is under considerable strain as it softens under practical pressures (Hopkins, 2002a). The ease with which cross-border issues can be resolved in cases where the state operates a decentralised system of government cannot be lost on local and regional politicians in unitary states involved in such bodies.

One should not be too hasty in predicting the demise of the state itself however. There is still a role for the national level, and even those micro-nationalist regions that wish to leave their parent state see it being replaced by another state, not disappearing entirely. The importance of the nation state

to the operation of the regional tier is most clearly shown in the predicament in which the Kurdish administration finds itself. Denied access to the national level by a hostile Iraqi government, the Kurdish administration is not given the privileges of statehood on the international stage. Surrounded by hostile states with Kurdish minorities of their own, which they refuse to recognise, the Kurdish administration is only given the status of a political party in their contacts with these states. This makes the development of cross-border and international relationships difficult, even though they are clearly rational for all concerned. In a world of nation states, regional autonomy can be ignored.

The process of regional involvement in international affairs appears set to continue, but it is not an even or predictable path. All regions are not created equal, and those that have the power to force their way onto the international stage will undoubtedly do so. Those that cannot will be left behind. This “creative destruction” as described in the work session will have a serious impact on the development of federal governance and the nation state in the global era. The evidence presented above suggests that there will be an enlargement and proliferation of sub-national international relations in various guises but the future of sub-national international relations may belong to those regions with the power, both economic and constitutional, to seize the opportunity.

References

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¹ Swiss banks and the government were accused of acting unethically in relation to accounts of holocaust victims that had lain dormant in the years following the Second World War.