Round Pegs Into Square Holes? Governance and Non-Territorial Identity.

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Abstract

The paper examines the current hard-bordered concept of the state and its inability to address the needs of non-national identities. The rise of European micro-nationalism in the latter half of the Twentieth Century led many to question the future of the Westphalian state. This paper examines this claim from the perspective of non-national identities and concludes that the essential elements of the model remained intact. In particular the territorial basis of the dominant governance model and the requirement of hard-borders remains the norm. For this reason, non-territorial identities were largely unsuccessful in their demands for constitutional recognition. The needs of such identities demand that such a shift take place, particularly if the spectre of exclusive territorial nationalism is to be exorcised. Yet the difficulties experienced by the few examples that exist in Europe emphasise the fundamental shift in approach that such a move towards soft-borders entails.

Introduction

The politics of identity has become rather unfashionable in recent times. In both popular and academic writings the claims of non-national groups for autonomy are often portrayed as a throwback to a pre-modern era. This brief paper challenges this view. Far from being an issue from our history, identity and its constitutional representation remains at the heart of most governance models. The nation-state in particular remains legitimised by reference to a national identity. Rather than supplanting identity politics, the nation-state merely privileges a particular form of territorial identity over all others (Tivey, 1981).

The problem for the current state model is that human identity is multi-faceted and overlapping. The single hard bordered territory of a nation-state cannot therefore legitimately represent all identities and no arrangement of such borders ever do so. Only by adapting our concept of governance to recognise the multi-level and non-territorial nature of identity can we hope to satisfy the demands of non-national identities. This requires a shift towards a concept of soft-borders, with overlapping structures of governance focussed upon the individual rather than territory.

The continued dominance of the hard-border can be seen in the response of European states to the challenges of micro-nationalism in the latter half of the Twentieth Century. It is noticeable that those micro-national identities which have been the most successful in achieving recognition are those which have been able to mimic the hard-bordered requirements of the nation-state. At its extremes this drives such identities towards the creation of ethnically and religiously "pure" territories capable of calling themselves a "nation" and thus claiming the right to a state. The

tragedy of Bosnia-Herzegovina is only one example of this phenomenon (Malcolm, 1996).

The only solution to this lack of fit between identities and states, is to resort to non-territorial and over-lapping governance structures, capable of recognising different identities within the same territory. However, the few examples where a soft-bordered approach has been implemented have struggled to avoid applying a hard-bordered approach in practice. Although these examples may more accurately reflect the realities of overlapping identities their difficulties show the continued resilience of the dominant model. The requirements of identity may require a soft-bordered approach to the concept of governance but the legacy of the hard-bordered state is such that, although a shift is necessary, it will prove difficult to deliver.

The Concept of the Hard Border

The concept of the hard-border is so fundamental to modern ideas of governance that it often passes without comment. It is based upon the notion that all government can be exercised territorially. According to this approach, jurisdiction is primarily exercised according to the territory upon which an activity takes place. Where identity is part of the concept, it will be related to territory alone. Thus, if an individual is in territory A they will be subject to the laws and governance of the government of territory A, however it is organised. By crossing the hard-border into territory B, the individual becomes subject to the laws and constitutional structures of territory B. The basic elements of the concept can be summarised as follows:

- that governments exercised power over a territorially defined area
- that they claimed a monopoly of public power over the territory and the population within their borders
- that the territory is exclusive. i.e. All public authority is defined by the boundaries of the nation-state

The first element is self-explanatory. In general, the state is responsible for all individuals within its territory. It has control over the land within it and any other territorially definable features. It is a territorially defined entity. The second element, sees the authority of the state as beyond challenge within the territory. Although some element of federalism may exist within the state, the state apparatus remains supreme. Finally, and most importantly for this paper, the state is hard-bordered. Where one jurisdiction ends, another begins.

The development of this model of governance, although intimately connected to the nation-state actually precedes that of the "nation" itself. Although there is some evidence of pre-nationalism the modern concept of "nation" emerged largely as a means of legitimising existing hard-bordered state structures (Orridge, 1981). The widespread acceptance of the hard-bordered approach to

governance is generally dated to the Westphalian compact of 1648. This series of treaties replaced a soft-bordered approach of multiple allegiances and personal loyalty with an embryonic hard-bordered state model. In the years after 1648, a system of overlapping boundaries and inter-woven links of dynastic governance were replaced by a patchwork quilt of single jurisdictional territories. The reality of legal and constitutional unity within each territory was often more apparent than real, but the principle that legal boundaries started and finished at a fixed territorial border was nevertheless established.

This concept of the hard-border remains fundamental to the organisation of all legal structures around the globe. It divides the world into neat packages which define the application of all policy. Even supra-national and international entities will be defined as a collection of such units. These boundaries legally define most aspects of the individual's life and identity. They define the rights we enjoy, the taxes we pay and the economic policy pursued, amongst an almost endless list. Most importantly, they also define who we are, at least in the eyes of the law. On one side of the border we are Poles, on the other we are Czech.

Hard Borders and Identity

The fact that many identities are not reflected in existing territorial governance models should not surprise us. The multi-faceted nature of identity cannot be captured by the single territory approach that is at the heart of the hard-bordered model. For this reason, the hard-bordered state manufactured its own, "imagined community" to match the territory of the border (Anderson, 2006). At the birth of the European hard-bordered model in 1648, states and empires continued to rely upon their previous justifications for their legitimacy. Reference to the demos was unimportant in a pre-democratic era. However, as such pre-democratic systems crumbled, states required a new form of legitimacy to justify their hard-borders. The paucity of existing identities capable of legitimising the post-revolutionary states in the 19th Century led states to create them (Dyson, 1980, p129).

France is the classic example of this process as in the aftermath of the French revolution, the issue of legitimacy became acute. The legitimacy of a republican government over the territory now known as "France" could not be based upon the pre-revolutionary regime. Neither could any cultural or normative identity be realistically be used to justify a single government in Paris. A large minority (and possibly the majority) of the peoples over whom the new government laid claim did not speak French and whether they identified as French is open to serious doubt (Beer, 1980). In any event, they were given no choice. The state represented the French "nation" and the French state apparatus set about ensuring that the population was French. The classic French imposition of

national culture and nation-building was to provide a global blue-print for the practice of nation-building (Gellner, 1983).

As Gellner states, those who did not conform with the nation-state identity promoted by the central authorities had one of two options – to resist or conform (Gellner, 1983). There was no middle way. The most obvious example of this was through the imposition of national languages on the non-national populations. In Europe this saw the near extinction of the various Occitan languages as well as the Celtic languages of the western fringe. In colonial states it saw the oppression of indigenous languages such as Te Reo Maori as well as the wealth of Aboriginal languages. The aim was the same, however. The nation-state brooked no opposition to its privileged culture (Tivey, 1981).

The discrediting of ethnic nationalist legitimation for the current patchwork of nation-state borders has led to alternative legitimation arguments being employed in the post-war era. The most vocal in the democratic world are those of self-identification. This argues that the nation-state represents a self-identified national community which exists within a particular territory. Given what has been said above, this is actually a self-fulfilling prophecy. It also has an underlying weakness. Even assuming that it is possible to assess such self-identification within the state, what happens when significant numbers clearly do not fully identify with it. More complex still are those identities that cannot be classed as national or do not follow territorial boundaries. How can the single territory nation-state claim to represent these non-territorial or non-national identities? The answer is clearly that it cannot.

Governance, Identity and Soft Borders

Until the latter part of the Twentieth Century the key argument in favour of the hard-bordered approach to governance was that although the nation-state model may not in fact enjoy any particular normative legitimacy, by and large it worked. It may be imperfect and suffer from a number of practical problems through its inability to recognise non-national and non-territorial identities but by and large it allows the delivery of the requirements of governance and the "Law Jobs" better than any alternative (Llewlyn, 1940).

This argument may have been convincing in previous era, but in Europe at least the development of alternatives has seen it lose a significant amount of traction (MacCormick, 1999). Most obviously, the "unexpected rebellion" of western Europe's micro-nationalities led directly to a variety of experiments in sub-national and federal governance structures (Beer, 1980). These were, themselves, made possible by protective supra-national structures of the European Union . By the late 20th Century, in Europe at least, the nation-state was no longer the only game in town. These

developments were portrayed in the heady days of the 1980s as part of a new form of multi-level governance (Marks et al, 1996). However, in the cool light of the 21st Century it is noticeable how the concept of the hard-border continues to dominate.

The emergence (or politicisation) of non-national identities in the supposedly stable states of Western Europe clearly presented a significant challenge to those states. In many cases (Portugal, the UK, Spain, Italy) it led directly to a response in the form of new sub-national governance structures (Hopkins, 2002). However, although the emergence of these regional governments led many to argue that they were part of a wider weakening of the nation-state, closer examination reveals that these responses were almost universally traditional and within the limits of the state model (Elazar, 1995). Most notably, it is only those identities that have been able to achieve some form of governance autonomy have been those able to adopt the hard-bordered paradigm of the nation-state model. Those non-national identities which have not done so, or cannot do so, have failed in their attempts to gain constitutional recognition.

Those few examples of soft-bordered governance which have been developed to represent non-territorial identities have struggled to survive in the hard-bordered paradigm. In Belgium, for example, attempts to resolve the complex issues of the three language Communities (French, German and Flemish) led to a complex and carefully crafted dual layered system of soft-bordered Communities and hard-bordered Regions. Over time these institutions have slowly morphed into two "mini-states" in the form of Flanders and Wallonia. Only the awkward issues of the small German minority in the South East of the country and bi-lingual Brussels has demanded the survival of at least some elements the soft-bordered approach. Even amongst these surviving soft-bordered examples the German Community is constantly agitating for further authority to be treated as another hard-bordered mini-state. Only the uniquely complex example of Brussels has the principle of personalised governance been delivered with relatively little controversy in the field of culture and education. It is important to note, however, that in Brussels the soft-bordered, personal, approach to governance continues to functions.

The fate of the Sami of Scandinavia and Roma people of Central and Eastern Europe provide further evidence of the limits of Europe's micro-national revolution. Although the Sami have achieved limited recognition of their identity in the Scandinavian states, this varies on a state by state basis, with Sami issues continuing to be dealt with through national Sami assemblies, despite the obvious fact that the Sami themselves occupy a territory spanning three states (Norway, Sweden and Finland). The situation of the Roma is of course far worse with no recognition and active persecution continuing throughout their homelands. Despite an estimated European population of

nearly 10 million people, their lack of a territorial homeland means they do not fit within the hard-bordered model of the nation-state. That all these identities exist within the European Union further emphasises the limits of current model. Despite the existence of a supra-national entity and the creation of European citizenship, the reality for non-national identities remains little changed. The dominance of the hard-bordered model makes it difficult for non-territorial identities to achieve constitutional recognition.

Conclusion: Hard Borders and Non-Territorial Identities

The limits of Europe's micro-nationalist "rebellion" betrays a deeper problem concerning governance and identity. Those identities that are able to emulate the characteristics of the nation-state, and identify themselves with a territorial identity, appear far more likely to achieve some form of constitutional recognition than those which do not. Territorial micro-nationalities talk the language of the nation-state. This strengthens the hand of such identities as the nation-state finds it very difficult to respond without challenging its own legitimacy. In addition, such responses can usually be tailored to fit the hard-bordered territorial model, through some form of regional or federal arrangement. Such concessions, although accepting some variation within the state, largely remain territorial and do not challenge the external hard border. This is particularly true when an historical territory or state has previously existed (e.g. Scotland, Flanders, Catalonia). Those parts of the historical territory which conflict with an existing state border will often be sacrificed to allow the lesser territorial claim to succeed (e.g. Catalonia).

In contrast, European identities with no such territorial "homeland" have conspicuously failed to gain governance recognition within the existing state structure. Even as it declines, the legacy of the nation-state appears likely to cast a long shadow on the recognition of identity in governance and law. This is not to say that such soft-bordered approaches must fail. Non-national and non-territorial identities, both religious and secular, seem destined to become more conspicuous rather than less, as the mono-cultural national myth of the state comes under pressure from alternative indigenous and immigrant identities. If the dangerous spectre of ethnic nationalism and exclusive territorial rights are to be avoided such calls for the recognition from identities without a strong territorial link need to be answered. To achieve this will require some recognition of the soft-bordered reality of individual identity but how this is to be delivered remains unclear. The long shadow of Westphalia seems destined to dog attempts to resolve questions of governance and identity for many years to come.

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