Journal of Comparative Urban Law and Policy

Volume 4
Issue 1 *Festschrift II in Honor of Julian Conrad Juergensmeyer on the Occasion of His Retirement: International Perspectives on Urban Law & Policy*

Article 13

2020

Cities as International Legal Authorities - Remarks on Recent Developments and Possible Future Trends of Research

Helmut Aust
Freie Universität Berlin, helmut.aust@fu-berlin.de

CITIES AS INTERNATIONAL LEGAL AUTHORITIES – REMARKS ON RECENT DEVELOPMENTS AND POSSIBLE FUTURE TRENDS OF RESEARCH

Helmut Philipp Aust*

INTRODUCTION

What is an international legal authority? And what could it mean to include cities in this group? These might be appropriate starting points for the following reflections. Different understandings of international law would give starkly differing answers to the two questions. First of all, international legal authority seems to imply that international law is recognising the authority of a given entity. "Authority for what?" might be asked at the next step.

International law constitutes different kinds of authorities. In mainstream international law doctrine, this question is usually translated into the venerable category of subjectivity.[1] This category defines who has rights and obligations under international law. Under more demanding understandings it might also mean that a given entity – a subject – has some form of law-making powers on the international level. This distinction alerts us to the manifold forms of authority that international law constitutes. States are usually understood to possess plenipotentiary powers. In comparison, international organisations (IOs) usually operate under a doctrine of conferred powers.[2] In more concrete terms: they can only exercise the competences that member states have transferred upon them. Individuals fall into a wholly different set of subjectivity. Individuals certainly belong to the group of subjects of today's legal order. But could they also be understood to be "international legal authorities"?

This comparative point underlines the title that the concept of authority goes beyond mere subjectivity. The concept of authority implies that a given entity has some form of regulatory power. It is evident that states are entitled to legislate for the territory under their jurisdiction and the citizens and other individuals who find themselves within that territory. IOs may enact rules according to their founding treaty. In both cases, it is authority that is constituted or at least recognised by international law. Constituted in the case of IOs – whose existence is owed to an international agreement. Recognised in the case of states – if one presumes that states somehow predate international law and

* Dr. iur., Professor of Law, Freie Universität Berlin.

[1] For a general overview see Roland Portmann, *Legal Personality in International Law*, Cambridge: CUP, 2010.

[2] Jan Klabbers, *International Law*, 2nd edn., Cambridge: CUP, 2017, 108.

that it is not the other way around (as Hans Kelsen would have it with states only being creatures of law).[3]

These rather general remarks set up a roadmap for the following inquiry. We need to ask, accordingly, whether cities are indeed international legal authorities. This requires us to look at the question of whether the rules of international law recognise some form of regulatory power by cities. In a second step, we should ask ourselves on which basis this authority is constituted. I will argue that cities are a most peculiar form of international legal authority as the ground for their authority is hybrid: it follows from both international and domestic law. This has important repercussions for what cities can effectively do on the international level. In particular, I will show that cities and the associations they form on the global level are in a somewhat similar position to IOs. The can only operate on the basis of conferred powers. But these conferred powers do not emanate from an international legal agreement but from a combination of competences under domestic law and a mirroring recognition on the international level that cities are legitimate actors on the international level.

THE TRADITIONAL ABSENCE OF CITIES FROM INTERNATIONAL LAW

But let us first turn to the international level itself. If you consult any standard treatise on public international law, you will find a list of the subjects of international law or its actors (depending on the respective jargon). In virtually all cases, cities and other forms of subnational authorities will be absent from these lists.[4] This is a consequence of the traditional inter-state character of international law. Although international law today knows many other subjects in addition to states, cities are usually not mentioned in these lists. There are specific reasons for this construction of the field of subjects/actors. First of all, subnational authorities count as state organs in the sense of the law of state responsibility.[5] Accordingly, if a local authority violates a norm of international law, this breach is attributed to the state that has to eventually provide for reparation for the commission of wrongful acts. This happens quite frequently in fields as diverse as human rights law or international investment law. Second, also other activities of local emanations of the state are attributed to the state as such. This has a role to play, for instance, with respect to the generation of practice for the development of customary international law.

In my view, this state of affairs is gradually changing. This change is triggered by two movements, one of which is a bottom-up phenomenon, the

[3] See Hans Kelsen, *Reine Rechtslehre*, 2nd edn., Vienna: Deuticke, 1960.

[4] For a notable exception see the reflections in Klabbers (note2), 73.

[5] See Article 4 of the 2001 Articles on State Responsibility, adopted by the UN International Law Commission, annexed to UN Doc. A/RES/56/83 of 12 December 2001.

other a reaction from the top down. If we first look at the bottom-up processes, we see that cities have intensified their presence on the global level. Recent years have seen an exponential rise in international, transboundary or global activities of cities.

BOTTOM-UP PROCESSES: GLOBAL ACTIVITIES OF CITIES

The most prominent emanations of this development is the field of climate change governance.[6] Here, cities have argued with increasing resonance that they are key actors remedying some of the deficits caused by the inaction of laggard states towards to the "super-wicked" problem of climate change. Accordingly, numerous associations such as ICLEI or C40 have been set up, which aspire to network cities across the globe. Usually based on informal structures common to many forms of global governance today, these networks nonetheless have mimicked international organisations. They aspire to develop a presence at international conferences and diplomatic gatherings. They have also established cooperative links with a multitude of other actors such as the World Bank with which C40, for example, has signed a Memorandum of Understanding about cooperation in the fight against climate change.[7]

This development can also be seen in other fields such as security cooperation, health governance or human rights implementation.[8] In these fields, cooperation between cities on the international level is not as entrenched as it is in the climate change context. But also in these fields, it is possible to observe that cities and their associations position themselves as relevant actors, addressing a governance gap created by the allegedly ineffective structures of the traditional system of inter-state diplomacy.

TOP-DOWN PROCESSES: RECOGNITION OF THIS DEVELOPMENT BY STATES

This bottom-up movement is mirrored by a top-down process in which established international legal authorities, i.e. states and IOs, increasingly recognise that cities and subnational authorities are relevant international actors

[6] For a more extensive treatment of developments in this field see Helmut Philipp Aust, 'The Shifting Role of Cities in the Global Climate Change Regime: From Paris to Pittsburgh and back?' *Review of European, Comparative and International Environmental Law* 28 (2019) 57-66.

[7] See further on this Memorandum Michael Riegner, 'International Institutions and the City: Towards a Comparative Law of Glocal Governance' in H.P. Aust and A. du Plessis (eds.), *The Globalisation of Urban Governance – Legal Perspectives on Sustainable Development Goal 11*, New York: Routledge, 2019, 38, 46.

[8] On the latter see especially Barbara Oomen and Moritz Baumgärtel, 'Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law' *European Journal of International Law* 29 (2018) 607-630.

and could thus indeed be understood as international legal authorities. This development rests on three pillars which I would like to briefly sketch here.

First pillar: international law increasingly calls on the local level directly.[9] To some extent it is possible to speak about the "globalisation of urban governance."[10] What do we understand by this term? It refers to the changing normative environment in which local governments operate across the globe today. They are no longer just creatures of domestic law, which only have to take into account the domestic legal framework. Instead, they are increasingly confronted with international normative expectations on what it means to be a well-governed city. The most prominent examples for this move are the almost parallel adoptions of the Sustainable Development Goals by the UN General Assembly in 2015 – with its Goal 11 on safe and resilient, inclusive and sustainable cities – and of the New Urban Agenda by UN-Habitat shortly thereafter.[11] These normative expectations rarely take the form of formally binding international law. But quite often they find themselves incorporated in other documents with some kind of legal force – such as the recent ISO efforts to define standards of what it means to be a "sustainable city."[12]

Second pillar: In various international regimes states have recognised that cities are important for the enforcement of agreed upon international norms. This becomes evident, for example, in the resolutions of Conferences of the Parties in the treaty regimes of the climate change and biodiversity regimes.[13] Accordingly, states recognise that cities are important stakeholders for global concerns. This move is clearly empowering cities which can henceforth point to these decisions to underline that it was the traditional inter-state system itself that grants legitimacy to their cross-boundary efforts.

Third pillar: mostly in Europe, but increasingly in other areas of the world as well, states have set up international agreements regulating

[9] Groundbreaking contributions in this regard have been: Yishai Blank, 'The City and the World' *Columbia Journal of Transnational Law* 44 (2006) 868-931; Gerald Frug and David J. Barron, 'International Local Government Law' *The Urban Lawyer* 38 (2006) 1-62; Janne Nijman, 'The Future of the City and the International Law of the Future' in S. Muller et al (eds.), *The Law of the Future and the Future of Law*, Oslo: Torkel, 2011, 213-229.

[10] See Aust and du Plessis (note 7).

[11] See further Helmut Philipp Aust and Anél du Plessis, 'Good Urban Governance as a Global Aspiration: On the Potential and Limits of Sustainable Development Goal 11' in D. French and L. Kotzé (eds.), *Sustainable Development Goals: Law, Theory and Implementation*, Cheltenham: Edward Elgar, 2018, 201-221.

[12] Cf. https://www.iso.org/committee/656906/x/catalogue/ (last visited 28 August 2019).

[13] For more details see Helmut Philipp Aust, *Das Recht der globalen Stadt – Grenzüberschreitende Dimensionen kommunaler Selbstverwaltung*, Tübingen: Mohr Siebeck, 2017, 166-177.

transboundary cooperation among subnational authorities.[14] The Council of Europe was a frontrunner in this regard, but it has been mimicked recently by the African Union trying to set up similar instruments for the African continent. For our topic the important takeaway of these instruments is that states thereby implicitly recognise that it might be necessary for local authorities to cooperate internationally in order to fulfil their local mandates. In the European context, there has been an interesting move from just facilitating co-operation between border regions to the broader view that in general local governments might need to co-operate with their peers in other states in order to fulfil their tasks.

THE COMPLEMENTARY NATURE OF BOTTOM-UP AND TOP-DOWN PROCESSES: TOWARDS "INTERNATIONAL LEGAL AUTHORITY" FOR CITIES

The bottom-up and top-down processes are complementary and jointly contribute to the shaping of an international legal authority for cities. The substance of this authority will take some time to develop more clearly. In very broad terms, I see this authority to develop in the sense that states increasingly recognise the global aspects of local matters. In other words: they agree that cities can transcend their national boundaries if it is necessary for the achievement of their objectives. This reminds us of implied powers arguments in both U.S. constitutional law and the law of IOs. The forms of global city cooperation are still a far cry away from the formalised instruments that public international law knows otherwise, most importantly in the field of the law of treaties. For the time being, the field of global city cooperation is a laboratory for experimentation. It thrives on its informality and hence also on flexibility. These two notions are assets – but they also underscore that at some point issues of legitimacy, transparency and accountability will arise which might call for a more formal regulation of what cities as international legal authorities can do at the international level.

THE HYBRID NATURE OF THE INTERNATIONAL LEGAL AUTHORITY OF CITIES

I would like to stress that this emerging international legal authority of cities is hybrid in nature. It is derived from the described processes at the international level. But at the same time, it is conditioned by domestic law. States retain the power to control the extent of the international cooperation in which cities wish to engage. This also makes the field of global city cooperation inherently complex. This is also why this field will increasingly call for robust comparative law endeavours in order to understand more fully the framework conditions under which cities can implement their international legal authority.

To give just one example of the differences that flow from the framework conditions of domestic legal systems, I would like to point to the

[14] See further Aust (note 13), 154-166.

very different legal basis on which cities and other subnational actors operate in U.S. and German constitutional law. In German constitutional law, the local level is protected by a provision in the Basic Law, the German Constitution, which prescribes a right for local government to regulate local matters independently and within the limits of the law. Statutory regulation must not infringe on this local domain in a disproportionate manner. With respect to the global aspirations of cities and local governments, the doctrinal debate then turns to the question of whether the notion of "local matters" can encompass also issues of global concern (such as climate change) which, however, take on a local meaning "on the ground." The situation is obviously very different in the United States (and also in Canada).[15] In the North-American context, cities are creatures of the state or, rather the states (or the provinces in Canada).[16] Accordingly, there seems to be no constitutional domain of freedom for local government, which is protected against state intervention. Yet, it is noticeable that many U.S. cities are frontrunners in the field of climate change governance – but also with respect to other global concerns such as women rights, which are the subject of local enforcement measures in a whole host of U.S. cities and towns.[17] This alerts us to the fact the necessary comparative law exercises for unravelling the hybrid authority that cities enjoy on the international level will also require sensitivity for cultural factors underlying the many different legal systems in the world and their operation.

CONCLUSION

For concluding my brief remarks, I would like to stress again that cities are clearly on the rise as international legal authorities. This process follows, on the one hand, from their self-appointment, so to speak. Through global associations such as C40 they drive home the message that global governance today is also a matter in which the subnational level needs to be involved. On the other hand, the inter-state system is cautiously embracing this development through various forms of recognition. Finally, the international legal authority of cities is of a hybrid nature – it flows from both international and domestic legal frameworks.

---

[15] For a thoughtful exploration of the legal situation in Canada see Geneviève Cartier, 'Double-Facing Administrative Law: State Prerogatives, Cities and Foreign Affairs' in J. Bomhoff, D. Dyzenhaus and T. Poole (eds.), *The Double-Facing Constitution*, Cambridge: Cambridge University Press, 2020, 313-344.

[16] For a seminal treatment of these foundations see Gerald Frug, 'The City as a Legal Concept' *Harvard Law Review* 93 (1980) 1057-1154.

[17] See Karen Knop, 'International Law and the Disaggregated Democratic State: Two Case Studies on Women's Human Rights and the United States', *Rapoport Center Human Rights Working Paper Series* 6/2012, available at https://law.utexas.edu/humanrights/projects/international-law-and-the-disaggregated-democratic-state/ (last visited 28 August 2019).

Future work in this area will require joint efforts from international law scholars as well as experts of constitutional law, administrative law and urban law. This will require mutual learning processes and a willingness to engage across intra-disciplinary boundaries. The work of Julian Conrad Juergensmeyer is a shining example of how this might be done: by curiosity for the unknown, a willingness to engage with the law in action and on the ground – all the while being open for the new horizons that require urban lawyers to look beyond the shores of their respective domestic laws. *Ad multos annos!*