

EUROPEAN UNION LAW

THE FUTURE OF EUROPEAN FEDERALISM

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Abstract

The topic of european federalism remains actual, mainly if we are considering the european political background.

There are identity barriers to be defeated, a long way ahead until national identities will stop to be obstacles to deeper integration, in order to consider the European Union to be desirable and profitable (economically, socially and culturally).

This goal can be reached if the peoples of Europe understand it.

The problem of federalism must take in consideration the fact that the european social organization is characterised by the dichotomy of sovereignty versus autonomy, and the european federalist ideas developed in opposition to sovereignty.

Keywords: *European Union , european federalism, models of federalism, political theory*

1. General aspects

Federal structures have the advantage in their ability to resolve conflict between the benefits of unity and the legitimate demands of diversity. in which people continue to identify primarily with their nations.

The EU can be considered as a system of multi-level governance, where the sovereignty rights are divided between supranational, national, and subnational institutions. The constitutional language of federalism is more helpful in analyzing and discussing the ways in which the division of power is organized among the different levels of government in the EU.

Federalism means a spatial or territorial division of power between two (or more) levels of government in a given political system. Both levels must have some autonomous decision-making powers which they can exercise independently of each other. The federal units are represented in central decision-making processes.

2. The structure of european federalism

Altiero Spinelli proposed three political strategies in the field of european federalism¹:

- the democratisation of the co-decision procedure between the European Parliament and the Council;
- the enlargement of the fields of supranational cooperation, in order to transfer more fields from the national level to the supranational level by using the principle of subsidiarity;
- a clear division of competences between the union and the member states.

Jacques Delors vision on the federation of nation states was based on the basic principles of federalism, the personal principle and the principle of autonomy (subsidiarity).

In his opinion, federalism represented two essential rules²:

- the rule of autonomy (subsidiarity), which preserves the identity of each member state and removes any temptation to pursue unification regardless; and
- the rule of participation, which does not allow one entity to be subordinated to another, but on the contrary, promotes cooperation and synergy, on the basis of the clear and well-defined provisions contained in the Treaty.

For Delors, subsidiarity can be applied in two different situations: „on the one hand, as the dividing line between the private sphere and that of the State, in the broad meaning of the term; on the other hand, as the repartition of tasks between the different levels of political power³”.

He believed that subsidiarity as federal principle contained two aspects: „the right of each to exercise his responsibilities there where he can perform them best, and the obligation of the public authorities to give to each the means to reach his full capacity”.

Delors emphasised that subsidiarity is an organizational principle of a federal state.

EU has become more than an international organization or confederation of states, without having become a federal entity, however. Few expect the EU transformation into a fullfledged federation in the sense of a federal state.

In fact, it now shares most features of what is usually defined as a federal system.

We can put into evidence some aspects of federalism⁴:

- the EU is a system of governance based on at least two orders of government, each existing under its own competences and acting directly on its citizens.

¹ See E. Boka *Rethinking the role of the federalist ideas in the construction of Europe (A historical survey)*, p. 12.

² See E. Boka, *op. cit.*, p. 13.

³ See E. Boka, *op. cit.*, p. 13.

⁴ See T. Borzel *What Can Federalism Teach Us About the European Union? The German Experience*, Royal Institute of International Affairs „Paper prepared for the Conference „Governing together in the New Europe”, Robinson College, Cambridge, p. 3.

- The European Treaties are giving jurisdiction and resources to these two main orders of government (levels below the state are increasingly also gaining leverage and institutional representation),
 - there are provisions for 'shared government' in areas where the jurisdictions of the EU and the member states overlap.
 - community law has supremacy over national law.
 - european legislation is made on the basis of majority decisions, forcing individual states to accept decisions against their own priorities.
 - the composition and procedures of EU institutions are based not only on principles of majoritarian representation, but allow for the representation of 'minority' views, as smaller EU states tend to be over-represented in both the EP and the Council of the EU (despite recent adaptations agreed upon in the framework of the Treaty of Nice).
 - the european treaties are not amendable by one government alone, but require the endorsement by national governments and either the national parliaments or the peoples by referenda.
 - the European Court of Justice (ECJ) adjudicates conflicts between the European institutions and EU member states, as well as between citizens and their domestic governments.

3. Theoretical aspects

There are two ideal type models of Montesquieu's ideas about organizing political power as *séparation des pouvoirs* and *distribution des pouvoirs*⁵.

Séparation des pouvoirs, or dual federalism, is the model of the United States⁶.

It emphasizes the institutional autonomy of different levels of government, aiming at a clear vertical separation of powers. Each government level has an autonomous area of responsibilities. Competences are allocated according to policy sectors rather than policy functions. For each sector, one level of government holds in the same time legislative and executive powers. As an effect, the entire government structure is duplicated, as each level manages its own affairs autonomously. The sectoral or dual allocation of policy competences is complemented by a rather weak representation of the federal units at the central level of government. The second chamber of the federal legislature is organized according to the 'senate principle': the federal units are represented by an equal number of directly elected senators, irrespective of the size of the geographical unit they represent⁷.

The senate does not reflect the territorially defined interests as represented by the executives of the federal units, but the functional preferences of the electorate

⁵ See T. Borzel, *op. cit.*, p. 4.

⁶ See T. Borzel, *op. cit.*, p. 4.

⁷ See T. Borzel, *op. cit.*, p. 5.

or the political parties within the federal units. The federal units are coordinating their interests through voluntary co-ordination and co-operation with the central government (the federal level), usually in the framework of intergovernmental conferences. Institutional autonomy of each government level, is, supposing a fiscal system granting federal units sufficient resources in order to exercise their competencies without financial interventions of the central level. They usually enjoy comprehensive fiscal autonomy allowing them to levy their own taxes and hence, to have independent sources of revenue.

Distribution des Pouvoirs or cooperative federalism, is the german model⁸.

It is based on a functional division of powers among different levels of government. The central level makes the laws and the federal units are responsible for implementing them. The vast majority of competences are 'concurrent' or 'shared'. This functional division of labour requires a strong representation of the interests of the federal units at the central level, not only in order to ensure an efficient implementation of federal policies, but also in order to prevent federal units from being reduced to mere administrative agents' of the federal government. Their reduced capacity of self-determination has as compensation the strong participatory rights in the process of federal decisionmaking (mainly in the framework of the second chamber of the national legislature).

The chamber of territorial representation is the *Bundesrat* (Federal Council) principle, where federal units are represented by their governments, and in relation to their population size, but smaller states usually enjoy overrepresentation.

4. The comparison between the german model and the american model

The dominance of territorially interests in the EU is even more pronounced than in established systems of cooperative federalism⁹.

In Germany, the *Länder* have strong representation in central level decisionmaking through the *Bundesrat*, the second chamber of the federal legislation.

The federation represented by the directly elected *Bundestag* (first chamber) and the federal government provide powerful counterweights to this, based not least on the political identity and legitimacy the federation generates, its dominance in the legislature, and its spending power.

The European Commission and the EP are not able to counterbalance the dominance of the Council. Political interest representation in Germany is based on a well-established system of vertical party integration in both chambers of the federal legislature. Neo-corporatist forms of interest intermediation grant German

⁸ See T. Borzel, *op. cit.*, p. 5.

⁹ See T. Borzel, *op. cit.*, p. 6.

economic interests privileged access to the policy process. The EU, by comparison, lacks an effective system of vertical party integration.

The EU lacks three significant elements of a federation, however¹⁰.

First, EU member states are still the „masters“ of the treaties, in terms of holding the exclusive power to amend or change the constitutive treaties of the EU on the basis of unanimity.

Second, the EU has no real „tax and spending“ capacity.

Third, it lacks an essential element of democratic control: the EU's executive is not yet determined by the EU's citizens.

The current distribution of policy competencies in the EU is more closed to the model of cooperative than to „dual“ federalism¹¹.

The EU does not have an sphere of competencies in the sense of holding both legislative and executive responsibilities on its central level. Even in the area of „exclusive competencies“, the EU cannot legislate without the consent of the member states (as represented in the Council of the EU). There is no area in which the member states have completely ceded sovereignty to the EU's central level, to the extent of excluding their direct participation in decision-making. This is true for the area of trade policy and in the field of agriculture¹².

More than that, nor direct income taxes nor corporation taxes are levied on the EU level. The EU holds a few independent sources of revenue. EU income is mainly derived from customs duties and levies charged on imports of third countries, a percentage of VAT collected by the member states, and financial contributions based on a fraction of EU states' GNP.

The EU budget is rather small and similar to the one of the individual member states.

EU expenses are high in the domain of agriculture¹³

Responsibilities for redistribution and stabilization measures mainly rest with the individual EU states.

Swiss federalism has a different group of remedies for counterbalancing territorial interests in central policy-making. The *Ständerat*, the Swiss chamber of territorial representation, is directly elected, as a result of which its members tend to act as representatives of the electorate rather than as defenders of cantonal interests.

The Swiss cantons, not like the German *Länder*, have no strong influence on federal policy-making.

¹⁰ See T. Borzel, *op. cit.*, p. 9.

¹¹ See T. Borzel, M.O. Hosli,) *Brussels between Bern and Berlin: Comparative Federalism meets the European Union*, Webpapers on Constitutionalism & Governance beyond the StateYear 2002/No 2, p. 9.

¹² See T. Borzel, M.O. Hosli, *op. cit.*, p. 9.

¹³ See T. Borzel, M.O. Hosli, *op. cit.*, p. 10.

Even in such a situation, they have significant financial and legislative autonomy vis-à-vis the federal government, compensating their weak representation at the federal level¹⁴.

The EU has in the same time elements of Swiss and German federalism by granting the member states an even stronger role in the legislation and implementation of central policies than the German *Länder* play while leaving the member states more financial and legislative autonomy than the Swiss cantons have¹⁵.

This combination has favored the dominance of member state governments in EU policy-making, which is not effectively counterweighed through the effective representation of functional interests.

Dual federalism means for the member states more fiscal and regulatory autonomy, but the weak representation of the member states at the EU level through a directly elected Senate would render the harmonization of national (tax) regulations¹⁶.

The idea of a second chamber of the EP, in which each member state would be represented by an equal number of directly elected representatives, has little support among the member states.

The national governments can not favor the idea of a Senate model, which would largely deprive them of their current political influence in the EU legislation process. Nor do the member states seem to be able to agree on a clear delimitation of policy competencies, which would help to disentangle EU and national responsibilities and might give each level more autonomy in exercising these functions.

The EU is likely to maintain its gradual move towards cooperative federalism. The logic of market integration, paralleled by a strong preference for preserving the welfare state, favors increasing centralization of national policy competencies at the EU level.

In order to compensate for their losses in sovereign decision making powers, EU member states retain strong co-decision powers in European policymaking, exercised by their governments.

It is a sentiment of skepticism that 700 deputies could be able to effectively represent the interest of some 500 million citizens in an enlarged Union. It remains to be seen, however, whether the EP might in fact play such a significant role, and possibly take over a function similar to the one currently performed by the U.S. Congress¹⁷.

¹⁴ See T. Borzel, M.O. Hosli, *op. cit.*, p. 13.

¹⁵ See T. Borzel, M.O. Hosli, *op. cit.*, p. 13.

¹⁶ See T. Borzel, M.O. Hosli, *op. cit.*, p. 16.

¹⁷ See T. Borzel, M.O. Hosli, *op. cit.*, p. 16.

5. The swiss model

There are three institutional actors in Swiss federalism, the federation, the cantons and the communes¹⁸.

All of them levels of government have specific constitutional tasks though their nature and extent naturally vary and it is very important to include the communes because they play an essential role in Switzerland.

The cantons are still the central actors. They are representing the crucial middle level between the federation and the communes.

The federation is a very important factor. In some aspects, the federal constitution implies that the 'Confederation' means with the whole Swiss political system, including cantons and communes¹⁹.

The division of competences between the three levels of government is mainly regulated by constitutional rules (federal norms regulate the relationship between the federation and the cantons, and cantonal norms regulate the relationship between canton and communes).

The presence of constitutional rules at both federal and cantonal level means that each of the three levels has legal constraints and has to respect the autonomy and prerogatives of the other levels and to cooperate with them. Cantonal acts are subject to judicial review by the Federal Tribunal and federal acts are not and can only be challenged through referendum.

The division of competences is not very clear and it is not fully specified and it operates through several categories, fully cantonal, mixed, and fully federal.

The three levels are working together in a cooperative manner by a variety of ways²⁰.

Cantons have collective veto power over any shift of competences to the federal level because all amendments to the federal constitution are subject to approval by a majority of cantons, as well as of the people, in a mandatory referendum. It happens that popular and cantonal majorities do not coincide and thus that amendments are not passed.

Political representation takes place via the Council of States, which, has equal power with the National Council. Members are now elected on party lines and owe greater loyalty to their party than to their canton.

Cantons also serve as constituencies²¹.

The role of representation of the cantons is made by the intergovernmental conferences of cantonal ministers and cantonal presidents, which are the collective

¹⁸ See C. Church, P. Dardanelli, *The Dynamics of Confederalism and Federalism: Comparing Switzerland and the EU*, Regional and Federal Studies, Vol. 15, No. 2, 163-185, Centre for Swiss Politics, Department of Politics and IR, University of Kent, p. 172.

¹⁹ See C. Church, P. Dardanelli, *op. cit.*, p. 173.

²⁰ See C. Church, P. Dardanelli, *op. cit.*, p. 173.

²¹ See C. Church, P. Dardanelli, *op. cit.*, p. 174.

voice of the cantons. There is no cantonal representation as such in the seven-member Federal Council (the federal executive).

Cantons share in this via the Council of States, their constitutionally guaranteed role in the process of pre-parliamentary consultation, by representation in federal bodies such as the Integration Bureau and via federal-cantonal conferences.

Cantons are involved in the three key phases of federal law-making in Switzerland (pre-parliamentary, parliamentary and post-parliamentary)²².

Cantons and communes undertake most of the financing and implementation of federal laws and policies: there is no local federal administration such as that which exists in the US. There is also a great deal of inter-cantonal cooperation, through conferences of ministers and signing of 'treaties', known as concordats, on a range of matters that cantons want to retain as their exclusive competence but on which some degree of harmonization is also deemed desirable.

Cantonal courts provide the lower level of the judicial system. Legal codes have now been harmonized at the federal level although the organization of the judicial system is still left to the cantons, with significant differences existing between them. Apart from the Federal Tribunal and its specialist sections, there is no overall federal judicial system. The Federal Tribunal ensures uniform application of federal law and compliance of cantonal acts with it.

The 'guaranteeing' of cantonal constitutions' conformity with the federal constitution is performed by the Federal Parliament not by the Tribunal²³.

4. Conclusion

Even there were achieved big steps forward in the process of federalization of Europe, we must accept that today, European Union is a weak federation.

The main aspects of weakness are the small financial resources, small bureaucracy, lack of coercitive force and the democratic deficit (in some aspects).

For the future, we must take into consideration three aspects.

First is that European Union is not a superstate.

Secondly it must exist a balance between democracy and representation.

Finally it must be resolved the problem of constitutional control.

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