

GUEST EDITORIAL

Federalism: The wrong debate

The debate on federalism in Europe is hopelessly confused, as nobody cares to define its subject and purpose. As a result, politicians and journalists feel free to tell us that federalism is synonymous with “centralized bureaucracy”, although every beginning student of federalism knows that the very aim of federal systems is to avoid centralization.

The confusion is, however, not exclusively due to ignorance or bad faith; it probably found its origin in the indiscriminate use of the concept of federalism when the discussion on the future of Europe started in the fifties. For the supporters of European integration, recent history had shown that Europe had suffered, to the point of perishing, by continuous conflicts between the traditional nation-states; these States should, therefore, be gradually dismantled in order to make room for a European construction which was to exercise, in the future, the main state powers. As the United States of America formed the obvious model for such a construction, federalism soon became the rallying cry for those who favoured European unity; but federalism, in this context, referred not only to a union of States where powers are divided between the States and the union without any subordination – it also implied the gradual demise of the States as States or, to put it in Marxist terms, the “vanishing of the State”. And it is curious to see that the opponents of European integration adopted the same stand: they condemned federalism for the very reason that it tried to abolish the States. There were actually two quite different views among the opponents. Some of them, the French president De Gaulle among them, wanted to reinforce the nation-state rather than to weaken it; others, like the British government of the day, were convinced that the entire European enterprise was

heading for failure. The latter view remained fashionable for a long period; when the European Economic Community was established, its opponents simply thought that it could not develop into anything more than an embellished trade agreement (the Dutch opponents added: and with the wrong partners).

None of these early assumptions has been born out by the course of events in the last forty years. The facts actually tell a completely different story. On the one hand, it has become clear that the EEC performs tasks and exercises activities which go far beyond the scope of traditional trade arrangements, and that it is the pivot of an ongoing integration process. On the other hand, it is also obvious that national States show little inclination to vanish but seem, on the contrary, to be in a stronger position than ever before. The States strengthened their hold on the population, by maintaining powerful armies and police forces, and by introducing welfare state machineries for the jobless, the homeless and the helpless. At the same time, the operation of the Community itself compelled the States to expand their activities, as most of the Community's work can only be done properly if national administrations, national courts and national legislatures translate general rules into concrete action. The common agricultural policy, with its odd mixture of Community and national decisions, exemplifies this development. There is, in a more general way, no correspondence between an increase of the Community's powers and a possible decrease of the States' strength.

This lack of correspondence could have led federalists and non-federalists alike to reconsider their basic assumptions, but that did not occur. Debates above a certain age tend to continue in the same terms, whatever happens to their initial object. Intellectual laziness may help to explain such a situation; in the present case, something more is probably involved, as it is easier to abandon the old assumptions than to find new ones. In particular, it is difficult – intellectually as well as psychologically – to dissociate the concept of federalism from the idea that, somehow, the old nation-state is disappearing. However, it is better to acknowledge the difficulty than to overlook it.

If it is true that we have to look for a new model, we should probably try to simplify things by going back to the essentials. We might come to such a result by dropping the old habits of thought and by constructing a new conceptual framework. When one looks at the old debate on

federalism in hindsight, it is interesting to note how much everybody has been clinging to the notion of the State; the European union or the national State is said ultimately to dispose of such a quantity of state powers that it could effectively be called a real "state". This approach is probably not very fruitful, as it mobilizes notions of the past in order to explain developments in the future, without any effort to justify why these notions might still be appropriate. It is not unthinkable that the concept of the State is not a good key for understanding future developments; it could then be more rewarding to look first at the different levels of government activities, without any preconceived idea as to the place where the sovereign State is, or should be, embodied.

At this point, two very simple thoughts spring to one's mind; they are perhaps too simple to have ever been seriously considered. The first is that the European Community as it has been actually working is, before anything else, a mechanism aimed at peacefully solving conflicts of interests. Claims by Bavarian peasants, Spanish fishermen and London-based insurance companies are settled by discussion and by endless negotiation, sometimes followed by litigation and court decisions. In the same way, global interests of agricultural or industrial activities in Europe are set off against competing claims by American wheat growers or Japanese electronic industry. It is a complicated and an expensive method; but it is cheaper and more civilized than boycott, retaliation or armed intervention. The second thought is situated in the same perspective as the first: the Community method was initially hailed as highly original, in the scope, the depth and the institutionalized form of its economic cooperation; but as time passed, its experience appeared to spread to other forms of international collaboration. GATT is increasingly submitting international trade conflicts to forms of arbitration; the United Nations rediscover their peace-keeping role; States are stopped from imposing their will on other States by force. It may be true that dangerous forms of old-fashioned nationalism sometimes resurge, and that warlike situations keep reappearing, but mankind is nevertheless slowly moving towards peaceful ways of settling conflicts, by way of discussions, negotiations and even court or arbitral decisions. The European experience may have helped to pave the way for this evolution.

There is also a different manner in which the European experience foreshadowed ulterior developments on a world scale: European law

has been necessary because European economic systems were growing together and could not be hindered in this movement by the diversity of applicable laws and competent authorities; what we are now witnessing is the birth of a world economy. A world market exists not only for motor cars and for arms, but also for capital. No State, no company, no large organization can escape from its dependence on a world economic system, except perhaps temporarily. If the European Community invented a costly but civilized way of settling conflicts between States, governments and professional groups, it may have shown a way to be further explored for use on a wider scale.

It is time that the debate on federalism begins to take account of these realities. For the future of peace in the world, the important thing is probably not to abolish States or to replace old States by new States, but to devise levels of coordinate government. For various important problems, the final word cannot be left to national governments or national parliaments: sometimes, the only adequate solution exceeds the national powers, and sometimes, national decisions can only work when they are brought in harmony with national decisions of other States. Some new problems, like the environment, concern the entire world community; we shall have to invent new methods in order to come to the rescue of the great globe itself. In this view, federalism is not only constitutional theory; it is theory on levels of government activity generally. It should, therefore, be dissociated from the notion of the State.

Legal developments of the last twenty or thirty years support such a theory of federalism. Their most conspicuous characteristic was indeed the growth of legal pluralism. Every practising lawyer knows that law is no longer a single system of rules issued by a sovereign power (whether a King, a parliament or a military junta). It consists of principles as well as rules; in Europe these principles, although expressed and made operational by the courts, find their origin in legal traditions, which sometimes go back to the Middle Ages. Besides, law now has so many different sources, not only because of the importance of legal provisions issued by European Community institutions, but also because of the influence of the European Human Rights Convention on the evolution of national case law; from this point of view, the Netherlands provides very eloquent examples. The legal situation is, therefore, much more diffuse than it was thought to be when the debate on federalism

started. Often, new legal situations arise which demand new solutions not, or not yet, found by Parliament or government; as the courts cannot deny justice, they have to stretch their imagination in order to discover principles of law which can give a first orientation. The case law of the Court of Justice shows many of these instances, for example when it ruled on confidentiality of contacts between lawyer and client.

As a consequence, the State, although quietly surviving and showing no signs of withering away, is no longer the unique source of law. On the one hand, the rediscovery of general principles of law to be applied by the courts, emancipated legal evolution from the constraints of the State and its institutions. On the other hand, the State itself is embedded in a plurality of European and international structures which contribute, in their own different ways, to making the law evolve. For those who cannot conceive of a legal system without any reference to the will of a sovereign power to create and uphold such a system, it will be more and more difficult to locate this sovereign power. We are moving towards a law without a State.

Federalism provides one of the few theories which make the actual developments understandable; by putting these developments in a federal perspective, events seem to follow a course which is not without its own logic. Jacobinical or Austinian ideas based on the assumption that all public powers proceed from the State fail to take legal pluralism into account; they may have their merits as political mottoes, but they have no explanatory force. Personally, I also have strong doubts about the political wisdom of trying to steer a course back to the times when the nation-state was in full bloom; but that is a matter of political assessment.

As a political creed, federalism has some disadvantages as well. It implies different levels of government without hierarchical relations: by definition, the various powers work in a coordinate way, each being autonomous in its own sphere of action. However, the concept of federalism itself gives no key to the way in which powers are distributed or to the importance of the powers to be exercised at the different levels. Students of the United States Constitution often emphasize that it enumerates union competences and leaves all residual powers to the states, thus providing a shield against centralizing tendencies; but the Canadian constitution, based on the British North America Act, 1867, does the opposite by enumerating provincial powers; nevertheless, there

can be little doubt that centralization in the U.S. has gone much farther than in Canada, in particular in matters of social and economic policy. Besides, the mere fact that a constitutional system is federal gives no clue as to the extent or the nature of the powers retained by or attributed to the union or the states. It is, of course, necessary that some real and effective powers will be in the hands of the component states as well as in those of the union, since it is the interplay between the exercise of powers at the different levels which characterizes federal systems. There is little more, however, that can be confidently said about it.

Summarizing the argument,¹ I maintain that the debate on the future of Europe makes a wrong use of the notion of federalism: first, by linking it to the idea of the withering away of the national State, and secondly, by implying that federalism somehow makes a stand for accumulation of power at the union level. However, I feel that the notion of federalism can help to explain the evolution that European integration seems to experience as an institutionalized form of intense but peaceful collaboration between States. That may be exactly the reason why federalism has a great future in the field of international relations; it is flexible enough to allow Europe, and eventually the world at large, to continue its development towards a situation where different centres of power exist and where, to quote Montesquieu's famous maxim on good constitutions, "par la disposition des choses, le pouvoir arrête le pouvoir".

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1. Here follows a list of some relevant case law and literature: Case 155/79, A.M. & S. Europe, [1982] ECR 1575 and 1616; *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374. *Hoge Raad* 22 Feb. 1985, Nederl. Jurispr. 1986 no. 3. Pierre Bouretz, "Souveraineté", in Duhamel and Mény, *Dictionnaire constitutionnel* (Paris, 1992); A.W. Bradley, "The sovereignty of Parliament – in perpetuity?", in Jowell and Oliver (Eds.), *The Changing Constitution* (Oxford, 1985), p. 23; Michael Charlton, "How (and why) Britain lost the leadership of Europe", *57 Encounter* (1981) No. 2–3; Laurent Cohen-Tanugi, *Le droit sans l'état*, 3rd ed., (Paris, 1987); Carl J. Friedrich, *The impact of American constitutionalism abroad* (Boston 1967), ch. III, "Federalism"; Thymen Koopmans, *The future of legal systems, Hume Occasional Papers No. 13* (Edinburgh, 1990); shortened version in *Juridisch Stippelwerk* (Deventer, 1991), p. 114; Jürgen Schwarze, "Das Recht als Integrationsinstrument", in *Du droit international au droit de l'intégration: Liber Amicorum Pierre Pescatore* (1987) p. 637.

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