Is The EU A Federal State? Essay, Research Paper

The main objectives of this paper is, by looking at other federations to find out what makes a federation and compare the position of the European Union in regard to these concepts. But first, I will start with an introduction on the integration of Europe, in which federalists had an important say.

Federation – the ultimate peace treaty

Proposals for a federalist unification of Europe came already in the 18th century. For Immanuel Kant, the federation was a means of achieving a perpetual peace. He saw the solution to trouble not in treaties but in a federation of peoples. This federation, he argued ‘has no aim to acquire any power like that of a state, but merely to preserve and secure the freedom of each state in itself.’ This belief is, I think, what brought the first efforts towards European Integration in the post-war period. For Winston Churchill, a federation of states would ensure peace, safety and freedom. By 1943 he called for a United States of Europe. The main thought behind Monnet’s and Schuman’s proposals for integration was also based on the principle of collective security and had as their main aim the control of Germany. Like Kant, Schuman in his ‘Declaration’ states that the pooling of coal and steel will lead to the first concrete foundation of a European federation – which, like Kant stressed, is indispensable to the preservation of peace.

There were two different ‘federal’ approaches in the post-War period. On the one hand we have Monnet’s functionalism : a step by step construction of Europe, with successive layers becoming easier to achieve due to the concept of spill-over. On the other hand we have Spinelli’s constitutionalism. He believed that solution was to prepare a constitution and ratifying it. He called upon the Americans to use Marshall Plan dollars to impose an American style federal model on Europe.

This second possibility proved to be impossible in the post-war period. Most of the West European states, who had just regained their status as sovereign nation states after World War II, were unwilling to lose such a significant account of their sovereignty in favour of a federal Europe. The only supranational institution formed was the High Authority. However the pro-federalist had to face a number of distinct politicians who did not believe that a federal Europe was the solution. Two of these were General Charles de Gaulle and Margaret Thathcer. De Gaulle argued that ‘at present there is and can be no Europe other than a Europe of the States’

Thatcher’s arguments revolved around the concept of ‘family of nations’; she promoted co-operation between independent sovereign states and explained that efforts and centralization have been unsuccessful elsewhere, citing the Soviet Union as an example.

Therefore fifty years of European construction have been characterized by this battles. What is Europe today? To analyze how a federal state should be I will consider three federal systems principally, namely the United States, Germany and Switzerland. The European Union’s members are definitely sovereign states very different from the provinces and states which form traditional federation such as the US and Germany. States like Great Britain and France have a long history of independence with a strong role in the world political arena. On the other hand there is no state in the US or Germany with such a history.

To understand whether the EU is federal or not I will look at two principle systems: the political and the judicial systems. I will tackle first the political system.

Federalism and the Political System

According to Douglas V. Verney, federalism proper involves three fundamental principles:

- A constitutional distribution of powers.

- The separation of the executive and legislative branches of governments.

- A division of the legislature into two roughly equal chambers.

It is only in the first of these criteria that the European Union does seem to conform. There is no Constitution of Europe in which the powers are distributed between the Commission and the States but there are different treaties which do have this role.

As regards the separation of the branches, in theory this exists, but not in practice. This system is severely unbalanced with three institutions making up the executive (Commission, Council of Ministers and European Council) and then one much weaker institution representing the legislative branch (European Parliament).

Regarding the third federal principle, there is no division of the legislature. Actually, there is no upper house representing the Member States. True, there is the Council of Ministers, but that is an executive body which meets in private and thus it cannot be compared to a legislative body which engages in public debates. It has what many observers called a “democratic deficit”

In the United States the Senate has always played a very important role as the representative of the states, which are unequal in population. Eight American states which together have a population of about five million elect 16 senators, while California with 31 million has only two, just as the small states. This is elected by the citizens since 1913. This is not the same for all federations. In Germany the larger l?nder return more members to the Bundesrat. This division of the legislature into two roughly equal chambers does not apply yet for the EU.

In the European Union there is already an institution representing the governments of the fifteen Member States.: the Council of Ministers. It is similar to the German Bundesrat as members change depending on the issues being discussed. However unlike the Senate, the Council is an executive body. Therefore from the German, American and Swiss example, for a truly federal system to be present the Council would have to be a legislative body. Tony Blair and the United Kingdom had already proposed a second chamber during the Intergovernmental Conference 2000. However, unlike the proposal made by Britain, there is no need to create a new body. The Council, in a truly federal state, would become the Senate of the European Union, as after all it does represent states, though it is not directly elected. This was already proposed in the Tindemans Report (1976) and in the Draft Treaty on European Union submitted to the EP – the work of Altiero Spinelli and a group of other MEPs (1984).

Neither can one say that the Commission is a real government. For Hartley, a true federal system should include competence on foreign policy, defense, tax, and the Commission has to be fully responsible to the elected representatives of the people (EP). Yet foreign policy and defense are still purely intergovernmental, while tax powers are limited and still under unanimity in Council.

Therefore we can conclude that as regards the political system it is still firmly rooted in the pre-federal stage of intergovernmentalism.

This political set-up that Europe does not preclude a move towards a federal union. This means that the fact that Member States have maintained their role as international actors does not imply that it is not a federation. From an analysis other federations this can be proved. I will start by quoting the Government of the UK who in 1945, during the Reparation for Injuries case, stated that :

‘it is now admitted that [there are] ?entities or organisms such as Federations of the kind where the constituent members themselves retain a measure of international personality side by side with that possessed by the Federation’.

A look at modern European federation indicates that control over foreign affairs is not unique to the European Union. In 1949, Germany adopted a federal Constitution for the third time. Article 32 states that the conduct of external relations belongs to the Bund. However it allows that the Landau may, with the consent of federal government, enter into treaties with foreign states on matters which fall within their own legislative competence.

In Switzerland cantons do have some power too. According to Article 9 of the Constitution, the cantons retain the right to conclude treaties with foreign states with respect to matters of public economy, frontier relations and police. A canton can also conduct official relations with a foreign government, but that has to take place through the intermediary of the Federal Council.

It is clearly evident that while in Germany and Switzerland the Landau or Cantons have some partial control on their foreign policy, this is still nothing when compared to the exclusive control exercised by the Member States of the European Union. Yet it disproves any arguments that state that a federal state cannot exist without exclusive competence on foreign policy.

If the political system of the European Union is based on inter-governmentalism this cannot be said about the judicial system. T.C. Hartley identifies a list of essential features of a federation as far as the courts and the legal system are concerned.

Federalism and the Legal System

1. A Federal Constitution which delimits the respective spheres of the federation and the Member States.

2. There must be a Federal Supreme Court which interprets the Constitution.

3. The federal law should constitute a separate legal system.

4. Community law must be supreme over national law.

5. The Supreme court should have the power to interpret the validity of law.

6. Power to review the constitutionality of sate legislation.

1. a Federal Constitution which delimits the respective spheres of the federation and the states.

As already argued, the treaties can be considered as the Constitution of the Union. Actually the treaties do meet the needs of a Constitution since they establish the legislative, executive and judicial organs of the Community and grant them their powers. However they do not grant powers to the Member States. It is simply assumed that all powers not granted to the Community are in the States’ hands. This is similar to the US Constitution.

2. there must be a Federal Supreme Court which interprets the Constitution.

The European Court of Justice and the Court of First Instance clearly carry this out. The Supreme Court of the US is established by the Constitution while that of Canada is established by a federal act. A Supreme Court is crucial in any federation to settle disputes as to the interpretation of the Constitution and the respective powers of the federation and the states. Like the US and Canadian Supreme Courts the ECJ is the final authority on the interpretation of the Community Constitution and legislation. It is also the final authority of Community legislation.

3. federal law should constitute a separate legal system.

In the European Union no state legislature can amend Community law and therefore it is an independent legal system.

4 community law must be supreme over national law

In the United States and Canada this is ensured by specific clauses in the Constitutions. The Community Treaties contain no such clause and one cannot state that the framers of the treaties intended them to be supreme. However this has been achieved through case law. In the case Costa v Enel the ECJ stated that ‘any provision of Community law whether contained in the treaties or in community legislation, prevails over any provision of the law of the Member States, and also of Constitutions.’

In 1990, in a case involving Spanish fishermen applying for British fishing permits, the ECJ decided that British Courts must have the right to suspend acts of Parliament when the contradict EU Law overturning 500 years of the British legal tradition.

5 The Supreme court should have the power to interpret the validity of law

The ECJ has the right to interpret the validity of law both in cases originating in national courts and in cases originating directly in its courts. However the European Court is in a weaker position when compared to the American Supreme Court due to the fact that there is no right of appeal from a state court to the ECJ. It can only make a reference and this differs

from appealing. The European Court only decided questions of community law. It does not decide the case. The final judgment must always come from the Member State Court. This leads to two problems. The Member State court may refuse to make a reference or it may refuse the judgement by the European Court of Justice. Both these cases have happened: the French Conseil d’Etat (French administrative Court) and the Bundesfinazhof (tax court- Germany) refused to make reference in cases where their principles were against the established case law.

It is also possible for action to be brought by an institution of the Union, a Member State or a citizen for annulment of a Community act. The European Court has exclusive jurisdiction.

6 Power to review the constitutionality of state legislation

According to American Judge O.W. Holmes, the review of state laws are a necessary part of the federal judicial function. He wrote ‘I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think that the Union would be imperiled if we could not make that declaration as to the laws of the several states.

Interestingly, the UE treaties do not directly give the European Court this specific power. However Hartley argues that this is indirectly achieved : ‘the ECJ cannot declare MS legislation invalid?it can ..declare that in enacting ..the measure the MS has failed to fulfill an obligation under the treaty. Eventually, another Member State or institution would bring the case to the Court, and the Court then would declare the act in breach of Community law.

Therefore indirectly or directly all six judicial necessities of a federal state are fulfilled by the European Union. This is largely due to the effort of the ECJ itself which through its case law managed to acquire an important leading position as a federal court.

Therefore we can conclude that judicially, Europe is federal.

Europe’s federalism will be a of a unique form. Even though lots of comparisons are made with the American system, it is evident that certain differences are deep rooted.. The United States was constructed from the efforts of small, economically primitive states to find a stronger framework to resist outside threats. As it is said in the Federalist Papers, “disunited states would be gradually entangled in all the pernicious labyrinths of European politics and wars”. The 18th century American states were not nation states. Secondly there is a clear similarity in the culture, language, religion and tradition of Americans.

Europe is completely different. The EU is formed from long established nation-states who in past centuries dominated the world with immense empires (e.g. France, Spain, Britain). Also the differences between them are evident. Definitely a French differs from a German much more than a Californian does from a Pennsylvanian.

A common concept which relates US and European integration is that power should be distributed at an appropriate balance between states and a central authority: the principle of subsidiarity, a term borrowed from the Catholic Church.

The Treaty on European Union says that :’the Community shall take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Community’

The 10th Amendment of the US Constitution says ‘the powers not delegated to the US by the Constitution are reserved to the states respectively or to the people.’

However the American experience of federalism shows that federalism can be achieved in Monnet’s functional way rather then Spinelli’s method of ratifying a Constitution. After all, American federalism, took decades of Court decisions. tense negotiations over enlargements and a Civil War. Europe has achieved a single currency after less than fifty years while it took over a century for the Americans.

Conclusion

Well, is the EU a federal state? Definitely the EU is unlike any other political institution in the world. Regarding the judicial sector, the EU is federal. But then the political system shows that the EU is still based on intergovernmentalism, more similar to a Confederacy. For M. Burgess, drawing from a number of academics, a proper federation necessitates a ‘central government on some constitutionally entrenched basis’. This does not exist yet. However when comparing Frederick Listers’ list of ‘what makes a confederation’ and Burgess’ list of ‘what makes a federation’ we find that the EU has took from both lists. Therefore this shows that it is not “either federation or confederation” as the realists tend to argue. In conclusion, one definitely (when looking at other federal states) cannot simply say that the EU is a federal state. After all it is not even a state. But a collection of. Burgess calls it a “a confederal-federal union” . Verney describes it as ‘more than a confederacy, but less than a federation’. Such an analysis leads us to predict that the European Union seems to be moving towards a federal union. However it is very difficult to define today’s state of play since as Alexis de Tocqueville said, ‘human beings more easily invent new things than new words to describe them’.

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