

Is the EU a federal state?

The main objectives of this paper are three: trace out the differences between federalists and intergovernmentalist in the building of the Union; find out, by looking at other federations, what makes a state federal, and then conclude whether the EU is presently, or moving towards to, a federal state.

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. Treaties were meant to be discarded. 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 is, I think what brought the first efforts towards European Integration in the post-war period. For Winston Churchill, the United States of Europe would ensure peace, safety and freedom. The main thought behind Monnet's and Schumann's proposals for integration 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 federation 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 spill-over events. On the other hand we have Spinelli's constitutionalism. He believed in preparing a constitution and ratifying it. This second possibility proved to be impossible in the post-war period. Most of the West European states 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 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 Mrs. Margaret Thatcher. 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 battle. What is Europe today? To analyse 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 federations 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 analyse the two principal systems: the political and the judicial systems.

According to 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 EU 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 it exists, but not in practice. being severely unbalanced with three institutions making up the executive and then one much weaker institution representing the legislative branch.

Regarding the third federal principle, there is no division of the legislature. Infact 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.

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 not the same for all federations. In Germany the larger lander return more members to the Bundersrat. This division of the legislature into two roughly equal chambers does not apply yet for the EU.

The European Union has lots of executive bodies but then it is weak on the legislative side. It has whay many observers called a “democratic deficit” (verney). In the American system of government, there is an upper house (Senate) to represent the people of the various regions. This is elected by the citizens since 1913. In the EU 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. However there is no need to create a new body. The Council, in a truly federal state, would become the Senate of the European union. 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). Foreign policy and defense are still purely intergovernmental.

Therefore we can conclude that as regards the political system this is still firmly rooted in the pre-federal stage of intergovernmentalism. (Hartley). However this cannot be said about the legal and judicial system.

He lists these essential features of a federation as far as the courts and the legal system are concerned.

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.

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 MS. 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

Federal law should constitute a separate legal system which is different from both state and international law. Therefore 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 MS, and also of Constitutions.

The European Court is in a weaker position only due to the fact that there is no right of appeal from a state court to the ECJ. It can only make a reference. This differs from appealing. The European Court only decides questions of Community law. It does not decide the case. The final judgment must always come from the MS court. This leads to 2 problems. The MS court may refuse to make a reference or it may refuse the judgment by the ECJ.