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“The European Union as a Federative Association”

The notion of the EU as a ‘federative association’ is not commonplace. I think I owe you an explanation.

First of all, I am drawn to a tradition in classical public international law, where a chapter on States as primordial subjects of international law was sometimes followed by a discussion of ‘associations of States’, notably personal unions, real unions, confederations and federations. Without trying to place the EU in one of these four specific categories, I am somewhat attracted by the general notion of the EU as an ‘association’. It is a voluntary undertaking by States to pool together their powers and their resources, without extinguishing the nature of the founders as independent States.

The far-reaching nature of the association certainly justifies the concept of ‘community’, which of course is more commonplace. But why have I chosen to speak of a 'federative association' rather than of a community?

My source of inspiration for this expression dates back more than 200 years. Let me first introduce the French writer and thinker *Abbé de Saint Pierre*, who died in 1743. Over and above his economic and constitutional writings, he, like some thinkers preceding him, was preoccupied by the idea of an eternal or perpetual peace in Europe. The Abbé drafted several manuscripts in which he advocated a sort of confederation among the European powers, with a central organ largely corresponding to what is today known as the Council (or Council of Ministers) of the EU. There would have been a common defence, and even qualified majority voting on some matters.

*Jean-Jacques Rousseau*, who needs no further introduction, agreed, albeit reluctantly, to edit the rather confusing manuscripts of Abbé de Saint Pierre. I say reluctantly, not because he was not interested in the project or felt no sympathy for the ‘good Abbé’ (as he sometimes referred to him), but because he had doubts about the feasibility of the proposals. It is likely that he was also concerned (with good reasons, as it later turned out) about the reactions of men in power and the difficulties that himself might encounter in this respect. In the eighteenth century, peace was not an uncontroversial subject. Rulers liked the idea of retaining the option to go to war, to settle conflicts and scores, and perhaps to conquer more land and more people.
In any event, Rousseau did edit and publish, in 1761, a shortened version of the Abbé’s thoughts, coupled with his own assessment thereof. Rousseau’s main difficulty was this: rulers wanted to expand, not restrain their powers, through external conquest and internal oppression; why would they agree to confine themselves to what they already had, or less, by entering into a society which restrained their military and other means?

Today, there are few remaining traces of Rousseau’s own concept of international law and international organisation, or indeed of European integration. But it seems obvious that he was a forerunner to *Immanuel Kant* in one crucial aspect: he did not find the idea of perpetual peace realistic, unless more fundamental issues of constitutional order were addressed.

In other, more modern words, those of Article 6 of the Treaty on European Union (TEU) to be precise, Rousseau seems to have thought that only States that were ‘founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law’ could be expected to enter into such a bargain.

In fact, there are indications that Rousseau once or twice referred to a veritable federative association (‘*une bonne association fédérative*’), and one must assume that by that he meant something going *beyond* a confederation. True to his preferences, he seems to have favoured an association composed primarily of small States, but he seemed not to believe that anything like that could be achieved during his lifetime. Indeed, he would have had to wait for 200 or so years.

Perhaps Rousseau would have been disappointed with the Schuman plan, consisting only in the creation of something as mundane as a community for administering the production of coal and steel. However, faced with an explanation of the astute strategy of Jean Monnet, he might have approved. The prospect of eternal peace, in the framework of an association uniting not only States but also peoples, would after all have caught his imagination (albeit that political integration would be achieved only gradually, through what political scientists have called functional integration).

Turning now to our title, in Rousseau’s words, the ‘bonne association fédérative’. I find something rather attractive in an expression which bypasses the idea of a federal State, something which the EU is not, and will not become in the foreseeable future. But the EU is not an intergovernmental organisation either. It is, as is often pointed out, a phenomenon that does not exist, and is not likely to emerge in the years to come, anywhere else in the world. The EU is a process, a bicycle that implies, and perhaps needs, constant pedalling.

So why is it so special, in short, federative? It would be trite to
recall the special institutional framework, with not only a Council (of Ministers) but also a Parliament, a Commission, and a judicial system. To mention the powers of EU institutions to legislate, as a rule by qualified majority, would also be to state the obvious. But for non-lawyers at least, it may be somewhat less obvious, although it is probably more important, to remind ourselves that, in the words of the Court of Justice, a new legal order has emerged. The special institutional framework would have remained a paper tiger without the specific features of the EU legal order as we know it today. The EU is a markedly legal project.

One can also speak of a ‘constitutionalisation’ of the EU, as achieved, at least in part, through the case-law of the Court of Justice. Let me cite four principles developed by the Court in this respect, namely direct effect, supremacy, fundamental rights, and effective remedies. Through these and other principles, a kind of a constitution has evolved. Alas, at least from the perspective of the general public, these developments have been made ‘by stealth’. Indeed, one of the virtues of the draft Treaty establishing a Constitution for Europe is that it would bring into the open the fundamental principles and values binding this strange edifice together.

The fundamental principles that I cited above have one thing in common: they entail EU law reaching out to the citizen, and establish a direct legal channel between the two, sidestepping, as it were, national governments. The citizen can invoke directly some of his or her rights (direct effect), these rights cannot be overruled by national legislation (supremacy), some of the rights are so fundamental that they prevail not only over national law but also over EU secondary legislation (fundamental rights), and remedies must be available, if need be against the national government concerned, if the rights of citizens under EU law are violated (effective remedies, including the Francovich principle).

I see all of this as part of the federative project. And yet, the institutional framework of the EU has to a large extent upheld the dichotomy between EU institutions, on the one hand, and Member States on the other. By and large, the institutional set-up of a given Member State has been seen as its internal affair and not something regulated by EU law. For instance, the founding Treaties cite as EU institutions the European Parliament, the Council, the Commission, the Court of Justice, and so on, but no mention is made of the authorities or institutions of Member States. Member States are seen as something different. They are founders and members of the association, whose 'national identities' have to be respected (to quote Article 6, paragraph 3, of the TEU).

And when, under EU law, questions of responsibility and liability for breaches of EU law arise, it is, apart from the EU institutions themselves, the Member States as single entities
which may be held responsible and liable. Infringement procedures, under Article 226 of the Treaty establishing the European Community (ECT), can be brought by the European Commission (and, under Article 227 ECT, by a Member State) against a Member State, not against individual organs or instrumentalities of that Member State. And when, as is the case in Finland, a regional government (the autonomous Åland Islands) is considered by the central government as a possible source of failures to fulfill EU law, the responsibility of the regional government can only be invoked under domestic Finnish law.

The Francovich principle reaches out to the citizen, but in searching for someone to blame for a breach of EU law, it is the Member State as such which is brought into focus. According to the Francovich principle, as specified most recently in the Köbler judgment, a Member State is responsible and liable for the actions of all of its institutions and organs, including the judiciary. In this respect, Francovich is akin to the classic principle of public international law, according to which a State is responsible for the actions of all of its organs, regardless of their internal status. It is the Member State, period.

Now let us ask ourselves to what extent EU law has moved, and is moving, beyond this institutional dichotomy between the EU, on the one hand, and the Member State, on the other. Such a development would suggest that the idea of a federative association is taking shape.

There is, in my view, an important and long-standing example (although one which is not always viewed in this light): the institution of preliminary rulings, meaning binding opinions given by the European Court of Justice to the national courts and tribunals of Member States. Of course, the very idea that national courts, without the intermediary of national governments, can turn directly to the Court of Justice in Luxembourg was a revolutionary idea when it was introduced. It is important to stress that this right applies not only to the supreme courts of the Member States (which, in some ways, could be said to be part of central government). Article 234 ECT grants this right to ‘any court or tribunal of a Member State’; thus national courts and tribunals of first instance, too, become, as it were, EU courts, with direct and unfettered access to the Court of Justice.

This facet of the EU judicial system is not without exception. According to Article 68 ECT, which concerns what is often called justice and home affairs, Article 234 ECT applies only to cases raised before a national court of last instance. And Article 35 TEU provides for an optional system of preliminary rulings in ‘Third Pillar’ matters of Police and Judicial Cooperation in Criminal Matters but enables a Member State which accepts such a system to limit its effects to courts of last instance. The draft Constitution would, however, abolish these
exceptions and entrench the full jurisdiction of the Court of Justice with respect to preliminary rulings, save matters falling under the 'Second Pillar' common foreign and security policy.

Other than the mechanism of preliminary rulings, one can envisage an even more direct involvement of national courts as EU courts. The Community trade mark system is a case in point. The 1993 Regulation on the Community trade mark contains a number of provisions on 'Community trade mark courts'. These are not EU institutions stricto sensu, but national courts of first and second instance which have been designated by the Member State concerned as Community trade mark courts and which 'shall perform the functions assigned to them by this Regulation' (Article 91). These functions include jurisdiction over infringement and validity of Community trade marks.

The new regulation on the implementation of the rules on competition provides for the identification of competition authorities within the Member States. Under Article 35 of the Regulation, Member States are obliged to designate the competition authority or authorities 'responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with'. These authorities may include national courts. The new Regulation also contains more general provisions about cooperation between the European Commission and national courts and the role of national courts in ensuring the uniform application of Community competition law. The idea behind the new Regulation is decentralisation and a system in which national courts and authorities are increasingly seen as part of an overall EU framework, with important powers of coordination and control retained by the European Commission.

The new Framework Directive on telecommunications (or to be more precise, electronic communications networks and services) provides yet another example of national authorities acting as a sort of European body. According to this Directive, national regulatory authorities (NRAs) charged with the regulatory tasks assigned under the Directive shall be designated by each Member State. These authorities must be independent and exercise their powers impartially and transparently. In addition, provisions relating to an effective appeal mechanism make reference, in this respect, to the role of national courts or tribunals. Once again, the system is decentralised, but the European Commission retains powers to regulate and to monitor national application and implementation.

The Framework Directive on telecommunications has been paralleled by similar solutions in the liberalisation of markets in fields such as postal services and electricity. There is a tendency to emphasise transparency, the independence of NRAs from their own government, and co-operation amongst NRAs
and between them and the Commission.

Indeed, the general trend nowadays seems to be decentralisation, coupled with overall EU coordination, networking, and some specific powers entrusted at EU level notably to the Commission. One could perhaps assert that there is nothing radically new about this, given that the EU has always used national authorities for implementation. The tiny number of EU civil servants (the ‘enormous Brussels bureaucracy’, which, in fact, is much smaller than that of any major European city) would never be able to implement the whole range of EU legislative and administrative acts. And yet, there does seem to be a current trend of explicitly assigning tasks provided for by EU legislation to certain national courts or authorities, bypassing, to some extent, central government (although it may be involved in designating the relevant court or the authority). I would interpret these developments as steps towards a ‘federative association’.

But directly involving the political institutions of a Member State, other than its central government stricto sensu, would probably be a more radical move. In this regard, it should be recalled that the existing EU organs include the Committee of the Regions, ‘consisting of representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly’ (Article 263 ECT). The modest powers of this Committee have discouraged us from seeing it as an element of an emerging federative structure. If the Draft Treaty establishing a Constitution for Europe were to be adopted, the role of the Committee of the Regions would be somewhat enhanced, including a limited right to bring actions before the Court of Justice.16

There are certain other facets of the existing Treaties which could be seen in this light. According to Article 19 ECT, Union citizens residing in Member States of which they are not nationals shall have the right not only to vote but also to stand as candidates in municipal elections in the Member State in which they reside. EU rules can thus have some bearing on the composition of local government bodies. In any case, local government is seen as relevant here from the point of view of the concept of Union citizenship.17

Some of the more substantive rules of the EC Treaty address not only national but also regional matters. Apart from the association of overseas countries and territories, Article 151 ECT may be cited, according to which the Community shall contribute to the flowering of the cultures of the Member States, while respecting not only their national but also their ‘regional diversity’. To cite a more specific example, by the Treaty of Accession of Austria, Finland and Sweden to the EU, the Sami people were recognised in a separate protocol as an indigenous people to which Norway, Sweden and Finland owed
obligations. And the main provision of the draft Constitution for Europe regarding respect for the national identities of the Member States (Article I-5) refers to their fundamental structures, political and constitutional, ‘inclusive of regional and local self-government’.

The principle of subsidiarity is often seen as a federalist (or to use my expression, ‘federative’) principle. However, Article 5 ECT mentions only the Community and the Member States as relevant players. It is not stated explicitly that the Community should refrain from acting if the action can be better achieved, not by national central government, but by regional or local government (although it is true that Article 1 TEU refers generally to the need to take decisions ‘as closely as possible to the citizen’). This is a matter rather left to each Member State to handle. It is in my view therefore symbolically significant that Article I-9 of the draft Constitution would imply a textual change in this respect. The draft provision states explicitly that the Community is competent only if the intended action cannot be sufficiently achieved by the Member States, ‘either at central level or at regional and local level’ (my emphasis).

Involving the national parliaments in EU institutional structures can be seen as an even more far-reaching idea. The national parliament, of course, is generally conceived as the main representative of popular but national sovereignty, the epitome of the nation assembled through its elected representatives. Yet, the constitutional Convention preparing the draft Constitution has proposed involving national parliaments more directly in EU matters. According to Article I-9 of the draft Constitution, national parliaments shall ensure compliance with the principle of subsidiarity. They may, according to a separate draft Protocol, issue reasoned opinions on Commission legislative proposals, and where reasoned opinions represent at least one third of all the votes allocated to the national parliaments (each country would have two votes, as some Member States have a bicameral system), the Commission ‘shall review its proposal’. If there is an alleged infringement of the principle of subsidiarity, an action may be brought before the Court of Justice not only by a Member State, but also notified by it ‘on behalf of’ its national parliament or a chamber thereof.

Moreover, the draft Constitution provides that within the so-called area of freedom, security and justice, national parliaments may participate in evaluation mechanisms and shall be involved in the political monitoring of EUROPOL as well as the evaluation of the activities of EUROJUST (Article I-41).

The draft Constitution, of course, is still just that, a draft. However, if this constitutional endeavour moves forward, I would not expect the draft provisions that I have cited to be substantially altered.

The general trend, in my view, is fairly clear. We are not only
moving away from a purely intergovernmental structure, which was discarded as early as 1951 (albeit for a very limited area),
but are also moving somewhat beyond a ‘tripartite’ structure of
EU – Member State – citizen. The citizen will of course continue to be an important player, and this even more so given the
developing concept of Union citizenship, and the Convention’s proposal to make the Charter on Fundamental Rights part of the Constitution. But in addition, national parliaments, regions and local governments, as well as national courts and national administrative authorities, are taking on an increasingly explicit role as EU institutional ingredients. A pluralist structure, in other words, is taking shape.

Decentralisation and subsidiarity, coupled with more central harmonisation, coordination and control, are the key words. Are we even witnessing the emergence of Rousseau’s ‘bonne association fédérative’? The answer appears to be yes, at least from the point of view of structural and institutional developments.

But is it a good association? The main historical task, eternal peace between its members, seems to be ‘mission accomplished’. Moving towards a more 'federative' structure could only strengthen this conclusion. This accomplishment alone is in my view worth all the effort. But in addition to this basic goal, a more unified Europe without internal borders has, despite all the difficulties, taken significant leaps forward.

But there are, as we know, formidable challenges and problems ahead, relating above all to issues of accountability, legitimacy, and political and cultural identity. We would need a new generation of Rousseaus, to give both structure, content and life to the social contract. But I’d better stop here, waiting for Godot.

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1 For the purposes of this paper, we need only mention the ideas of one of the ministers of the French king Henry IV, Maximilien de Béthune, better known as the Duke of Sully (1560-1641), as well as those of the English Quaker William Penn (1644-1718).
9. At the time of writing (November 2003), such national legislation is, in fact, under preparation.
10. Case C-224/01, judgment of 30 September 2003, nyr.
11. By the Order of 18 March 2004 (not published) in Case C-45/03 Dem’Yanenko, the Court seems for the first time to have had to decline to answer a question posed by a national court not deemed to be a court of last instance within the meaning of Article 68 ECT.
17. EU citizenship includes also the right to vote and stand in European elections in the country of residence but does not extend to national and regional elections (elections of national and regional parliaments), Allan Rosas, ‘Union citizenship and national elections’, in Allan Rosas and Esko Antola (eds), A Citizens’ Europe: In Search of a New Order. London 1995: Sage Publications, pp. 135-155.
19. In this context I find it symbolically significant that Article 1 of the Draft Constitution would provide that the Union shall exercise its competences ‘in the Community way’ (in French: ‘sur le mode communautaire’). This would apply to all competences, thus including the present ‘Second’ (common foreign and security policy) and ‘Third’ (police and judicial cooperation in criminal matters) Pillars.