

Federalism, federations and the European Union

In his abstract titled “The F-word is back on the agenda”, published in the *Internationale Spectator* (Clingendael Institute, the Hague) in June 2004, Bob Molenaar states quite rightly that Europe can have a federal structure without constituting a state in the classical sense of the word. The author also points out the existence of different sorts of federal states. However I believe he makes a wrong inference when he puts slightly decentralised or regionalised states, such as Great-Britain and Italy, on a par with federal states. More than once I observed that federalism, confederalism and decentralisation are confounded. In this response, I would like to counter this confusion and to amplify the debate on the European constitution by illustrating the concept of federalism as an organising structure, to compare the European Community, the current Union, with that concept and to give my opinion on the draft structure for the European Union.

Federalism as such is a government structure which, by itself, does not need to be corporate, let alone state-based, by nature. The American professor Daniel Elazar, expert on federalism and federations, very properly emphasised that the concept of federalism can be used in every kind of organisation. This federally arranged organisation can be both a national or an inferior governmental institution, and an international institution or even a private organisation. Molenaar pointed out the two ways in which a state federation can start and develop – mostly bottom up, sometimes top down. I confine myself to the most common development process, which is also relevant to the European integration.

The core of the federalism concept only consists of a contract between equal partners in which they agree to form a whole to which a certain amount of power is wielded and for which some institutions will function on behalf of that whole. This contract (in the case of states, usually called the federal constitution) is *completely reciprocal* in the sense that it can *only* be amended by *mutual agreement*, both by the constituting units (i.e. former states, provinces, federated states, to keep to the state example) and by the whole (the union, the federation). Thus, any alteration in the contract can only be carried through by all units and the whole; this applies to both alterations in the units’ relation to one another and between the units and the whole. The same counts for the accession to, and expulsion or secession from the whole. This *over all mutual consent* for institutional reforms of the federation is the essence of federalism. That is why both the whole and the units can call themselves sovereign, for their autonomy cannot be taken unilaterally by any other partner in the federation – *sovereignty in a federation is shared*.

This makes a federation fundamentally different from other organisational forms. In a confederation, the entire sovereignty remains in the hands of the constituting parts. Any decentralisation means that the source of the power, e.g. the national authorities, keeps its sovereignty. As a consequence, a member of a *confederation* can decide to withdraw unilaterally, and in case of decentralisation, the (functional) autonomy can be withdrawn by the sovereign body that granted it. Confederalism and marriage are alike: two to start, one to end the relationship.

Apart from this common core, federations differ in many ways. There are nearly as many federal systems as there are federations. Each federation has its particularity. Nonetheless, one can classify federal systems.

The European Community (EC) is a kind of federation already. The EC indeed bears the essence of federalism, for the treaties contain no termination clause. They can neither be tacitly renounced since the treaty parties have not expressed this meaning, and because the right to renounce cannot be deduced from the nature of the treaties (article 56 of the Vienna Convention on the Law of Treaties, signed 23 May 1969). On the contrary: the goal of the treaties is in fact gradual integration!

This European federation can be distinguished from other federations by criteria, for example 1° institutions, 2° distribution of competences with the member states and 3° means. This federation can therefore be characterised as institutional, competitive, intra-state and dependent. *Institutional*,

because it has institutions which exist similarly at the level of the member states: the three classic state powers are institutionalised on both levels of government into a parliament, a government and a judiciary. *Competitive*, because the EC operates in many domains of policy which are not clearly defined as transferred by the state level (i.e. the technique of the so-called functionalism). *Intra-state*, because the decision-making between the EC and its member states mainly takes place within the framework of the Council of Ministers, a Community institution. *Dependent*, because it can hardly generate own funds to pursue its policy, mainly provided by funds from the member states.

How did the *bill of constitution* change this EC form? First of all, one notes that the constitution provides the unilateral withdrawal of a member state from the Union (art. 59): this termination clause means *a step backwards* in the mutual bond between the member states and the Community, i.e. away from the mutual character of federalism, and towards a confederation. However, this voluntary withdrawal of a member state is tempered by the ratification of an agreement with the EU on the terms of its withdrawal. One could speak of a mixture of federalism and confederalism.

How could the widened EU be characterised as an alliance *sui generis*? I am sticking to the criteria which I used for the EC. The constitution would make the EU partly concur with the EC, and partly it would not. According to the IGC, the EU must remain an institutional organisation with the maintenance of the European institutions and their role, as well as dependent of the funds which are supplied by the member states. Nevertheless, it has to become a so-called exclusively competent organisation for a number of policy domains, as the distribution of competences between the Union and the member states is defined constitutionally – the technique of functionalism is abandoned. Moreover, it would be more organised in an inter-state way for the decision-making at the EU level (e.g. national parliaments are involved in the decision making process), at the cost of the intra-state procedures.

Is this organisation form suitable for the EU? In my attempt to answer this question, I will now leave art. 59 of the bill of constitution out of consideration. In this context, I put forward that *a weak image of a federal superstate* is in the *interest* of the EU as a whole of nation states. Referring to the contribution of Bob Molenaar, I confine myself to the following about the societal environment of the EU, which I compare with the characteristics of the Union.

From a religious, cultural and linguistic point of view, Europe is a mosaic. It hardly counts any culturally homogenous states. It has two thoroughly different law systems, the continental and the British system. Economically and politically, especially the twelve new member states and the candidate states, had a very different history: those countries have lived for decades with a planned economy and most of them functioned politically even longer according to a rule of different sorts of dictatorship. Hence, their lack of experience in market economy and parliamentary functioning.

Because of all these reasons, the widened EU is a major challenge to make it work smoothly and effectively. What are the positive aspects of the constitution? I think that the unilateral withdrawal clause lowers the psychological threshold for certain member states, of which some have never or barely been sovereign and independent and which wish to cherish this new political status. That looks good to me. For the same reason, but also because of the democratic deficit in the first 15 member states – the mistrust of the population with respect to political institutions is a constant in opinion polls – it has been wise of the European Convention and the IGC to make the EU explicitly competent for certain policy fields, hence to define a distribution of competences, as well as to let more decisions be made in an inter-state way. And at the same time, it leaves the EU institutionally intact. My criticism confines itself to the dependence of the EU for means with regard to the member states: the lack of fiscal competence in the first place, unless approved unanimously, cannot help to pursue a resolute policy; so, in the new EU, the guideline remains: ‘representation without taxation’.

Antwerp, September 2004,
Herbert Tombeur, m.a.