Chapter 1

The European Union and Federalism: Thinking Outside the Box

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Abstract

This chapter focuses on the European Union, viewed from the angle of the traditional distinction between states, both unitary and federal, and the unions of states. The chapter analyses critically what may be called the 'ascending order' approach to the study of modern polities; that is, an approach based on an increasing order or trend, without reversing direction, as well as on the assumption that the categories employed are intrinsically and necessarily different in some respects. An alternative approach, which is not based on rigid distinctions between the various types of modern polities, is then proposed. In the process of developing such alternative approach, the focus is on general principles.

Keywords: European Union, ascending order, general principles, rule of law, supranational courts.

1. Introduction

This chapter concerns both administrative and constitutional law, which are currently regarded as the twin main pillars of public law. It focuses on the European

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Union from a federal perspective.[1] This topic has been subject to much comment in the legal literature.

The purpose of this chapter is not to provide a general overview of the topic, for my own views on this matter have been set out on an earlier occasion[2] and limits of space would not permit it. It has the more limited purpose to encourage, so to say, thinking outside the box; that is, to explore ideas about regional integration that look unusual because they are not limited by our intellectual tradition. A (perhaps diminishingly important) strand of legal thought has categorically denied that any commonality could exist between public law within and outside of the state. A more sophisticated variant of this strand is constituted by what may be called the "ascending order" approach to the study of modern polities; that is, an approach based on an increasing order or trend, without reversing direction, as well as on the assumption that the theoretical categories that are employed – unitary states, federations, and unions of states - are intrinsically and necessarily different in some respects. It is, by all means, perfectly legitimate to adhere to this point of view. By the same token, it is legitimate to subject it to critical scrutiny, as well as to propose an alternative approach which is not based on rigid distinctions between these types of polities. The chapter thus uses a variety of factual and normative elements. It also uses insights from both legal and political science literature.

The chapter is structured as follows. The starting point is what has just been referred to as the "ascending order" approach. Its main features will be delineated. The next step will be to critically analyse the "ascending order" approach, firstly with regard to the categories that are employed, and secondly because there are several significant divergences between theory and fact. The main elements of an alternative approach will then be delineated. In the process of developing such an alternative approach, I will point out the importance of general principles, which I consider to be one of the most important issues from a public law perspective. It will be argued that the jurisprudence of supra-national courts can help us to understand both why the general principles shared by most, if not all, legal orders are relevant for the public authorities that act beyond the states and why such principles must be taken into account within national systems.[3]

1 Two collective works, in particular, deserve mention: Cappelletti, Seccombe and Weiler, 1986, and Nicolaidis and Howse, 2001; For a retrospective of the evolution of the European construction in its first four decades, see also, Weiler, 1991, p. 2403, and, for its political philosophy, Dickson and Eleftheriadis, 2021.

2 della Cananea, 2003 (arguing that the EU is a mixed polity, and that there have been other types of mixed polities in the past, such as multinational empires). In a similar vein, see Cassese, 2017, p. 78.

3 Supranationalism has been intended in more than one way. For Ernst B. Haas, it meant that political and social forces were building a new type of regional integration: 1967, 2nd edn. For lawyers, it meant that the new institutions exercised powers binding national authorities: see Reuter, 1965; Dehousse, 1969, p. 183; For even more views about supranationalism, Stone Sweet and Brunell, 1998, p. 63 (showing the emergence of the supranational constitution through the rulings of the Court of

2. The "ascending order" approach

To begin with, we need to look more closely at what was initially called the "ascending order" approach. According to a strand of legal and political thought dating back to the Treaty of Westphalia, there is a clear-cut distinction between states and other entities. Samuel Pufendorf argued that the State was a *respublica regularis* (that is, a regular political entity), because sovereignty was concentrated, while empires were irregular forms of government (*respublica irregularis*).[4] It differed, moreover, from systems of states, where the various components renounced the unilateral exercise of some of their sovereign powers in favour of their joint exercise.[5]

Following this line of reasoning, it is held that unitary states, federations and unions of states can be arranged in an increasing order.[6] The various polities are arranged in a sequence such that the next element is always characterised by more diversity and more decentralisation than the previous one. The first type of polity in an ascending sequence has the lowest diversity, while the last one has the greatest diversity. While normative powers are centralised within unitary states, they are increasingly decentralised within federations and confederations and, *a fortiori*, within unions of states such as the EU. Similarly, there is an ascending order concerning heterogeneity, in the sense that unitary States are characterised by homogeneity, while federations and confederations allow for more diversity, and unions of states, *a fortiori*, do so.

There is evidence that, except for ethnically diverse states without aspirations for mono-ethnicity, such as Spain and the United Kingdom, many of the newer European nation-states in the nineteenth century had one crucial defining feature, they strove to be ethnically homogeneous. Germany and Italy provide illuminating examples.[7]

Within nation-states, moreover, the power to legislate on many important issues is centralised. Nineteenth century France exemplified this, and Italy followed its model soon after its political re-unification in 1861. By contrast, federations are characterised by a more or less pronounced heterogeneity. For example, according to Daniel J. Elazar, since the beginning the U.S. was highly differentiated from both an ethnic and religious point of view, and this is the key to understanding its institutional arrangements.[8] Thus, the Constitution conferred legislative powers to both

Justice) and Lindseth, 1999, p. 628. (emphasising the administrative dimension of supranationalism). Intergovernmental theories, can be considered in § 2.

4 Cassese, 1986, p. 120. As regards the vast literature which preceded the last century, it suffices to observe it was only some years after the Treaty of Westphalia that Samuel Pufendorf criticised the irregularity – the 'monstruosity' – of the Empire: see his De iure naturae et gentium, 1672, Book VII in Pufendorf, 1991, p. 144.

5 Pufendorf, 1991, p. 146.

6 See, among others, Wallace, 1985, p. 406.

7 See Hurrelmann et al., 2007, p. 11.

8 Elazar, 1998, p. 122.

levels of government, the Federation and the states. Tocqueville noticed it more than two centuries ago with remarks that fully retain their importance:

> The principle of the division of legislative power thus received its final consecration; henceforth then, the necessity to divide legislative activity among several bodies can be considered a demonstrated truth. This theory, more or less unknown in the ancient republics, introduced into the world almost by chance, like most great truths, misunderstood among several modern peoples, has finally passed as an axiom into the political science of today.[9]

This is by no means an isolated case. For example, in Switzerland, where there were distinct social groups with different languages (French, German, Italian, and Ladin), a federal constitution was adopted in 1848, which was subsequently revised several times, most recently in 2000.[10]

A fortiori, so the argument goes, diversity inevitably characterises the EU. Three aspects can be detected in this respect. Firstly, it is precisely because the EC/EU is a union of states that it is even more heterogeneous than federations. Secondly, its heterogeneity is not simply an element of fact, it is also a necessary element. This is confirmed by a cursory consideration of some fundamental norms. Under Article 4 (2) TEU, the EU 'shall respect ... national identities'. Moreover, by virtue of Article 22 of the Charter of fundamental rights, which now has the same legal value of the treaties, the EU must respect linguistic diversity. Thirdly, the Union's legislative powers are limited by a strict doctrine of conferral. [11] The Union is thus based on attributed powers. It is clear that the issue of competence has a central importance with regard to the relationship between the EU and its Member States.

The view just outlined is however based on some implicit assumptions that are questionable. On the one hand, it would be wrong to infer from the provisions of the treaties that EU institutions are responsible for 'some unwarranted arrogation of power' to the detriment of states' rights.[12] On the contrary, national governments have often widened the scope of application of the competences of the EU. On the other hand, when the Court of Justice has broadly interpreted those competences, the states, being the masters of the treaties, could have redefined them in a restrictive manner, but did not do so. Emphasising the "creeping competences" of the EU is, therefore, an over simplistic approach to an important and interesting issue. Nevertheless, more than its institutional foundation, what matters here is its conceptual foundation. This will be subject to critical scrutiny.

9 Tocqueville, 1821, p. 137.
10 Fleiner, 2002, p. 97 (pointing out that diversity is at the heart of Swiss federalism).
11 See Craig, 2004, p. 323. See also, on previous reform proposals, von Bogdandy and Bast, 2002, p. 227.
12 Craig, 2004, p. 324.

3. The deficiencies of the "ascending order" approach: the categories employed

Whatever its simplicity and apparent appeal, the "ascending scale" approach is flawed for both conceptual and factual reasons. First, it utilises some categories or concepts, such as those of state, federation and unions of states, as if they were fixed and immutable. On the contrary, the phenomena to which those concepts refer to can, and do change, throughout time. Secondly, and as a consequence of the evolution of those entities, whose distinctive traits have been previously considered - namely, the social substratum and the division of lawmaking powers - have changed throughout the years and are still changing. This second aspect will be discussed in the following paragraph.

Meanwhile, it can be observed that the concept of state is legally relevant, but ambiguous. It is legally relevant, because there are some legal consequences that follow from the finding that a certain entity can be qualified as a state. Included within these consequences, there are both powers and duties. There is, for example, a state's power to exercise force within its territory, albeit within the limits established by international custom and treaties. However, the concept of state is ambiguous. This is shown by the fact that it is necessary to distinguish the modern state, that which has been characterised by a professional bureaucracy for collecting taxes in order to pay the army, from previous political bodies.[13] Its ambiguity is confirmed by the advent of the welfare state, which has further developed the vocation of the state to deal with all interests that are socially relevant.

In contrast with nation-states, federations are said to be a mechanism for accommodating diversity and allowing different choices, with respect to the autonomy of their components. There is, again, some truth to this. However, there are, important differences between federations. What matters, for our purposes here, is not so much, to borrow Montesquieu's distinction between republics and empires, that some federations have a vast territory (for instance, Canada), while others have a small territory (Switzerland). Nor is it whether a federal regime is either symmetric or asymmetric. That is, whether it accords a special status to some of its components. Examples include the Basque country in Spain and Kashmir in India, before its special status was withdrawn. What really matters is whether there is any legal foundation or grounds to distinguish federations and confederations. Actually, there is no legal consequence that follows from including a certain polity within federations or confederations.[14] Thus, it cannot be said that as, for instance, Belgium or

13 See Cassese, 1986, p. 120. As regards the vast literature which preceded the last century, it suffices to observe it was only some years after the Treaty of Westphalia that Samuel Pufendorf criticised the irregularity – the "monstruosity" – of the Empire: see his *De iure naturae et gentium,* 1672, Book VII, Pufendorf, 1991, p. 144.

14 Giannini, 1986, p. 112.

Canada are federations, a certain quality or trait necessarily follows from it. It is, likewise, of limited helpfulness to raise the doubt whether Germany is a federation because it assigns legislative powers mainly to the Bund, whereas the Lander are generally responsible for implementation. What matters is the gradual construction of the federal settlement since 1949.[15]

Finally, although unions of states share some features, in that they differ with regard to other features, which are not less important from an institutional and legal perspective. For example, both the United Nations (UN) and the Council of Europe (CoE) are intergovernmental organisations, based on multilateral treaties. However, accession to the UN is open to every state and is subject only to the requirement to keep peaceful relations with other states. It is not fortuitous then, that the UN includes, to use the order of concepts employed by John Rawls[16], not only constitutional liberal democratic or non-liberal but decent governments, but also authoritarian governments and outlaw states, which refuse to comply with reasonable legal precepts aiming at protecting individuals and minorities. By contrast, not only is the accession to the CoE limited to European countries, but it is also subject to more stringent requisites; that is, under Article 8 of the Treaty of London (1949) the respect of democracy, the rule of law, and fundamental rights. Consistently with these demanding requisites, the membership of a state that infringes them may be terminated, as happened recently with Russia, following the invasion of Ukraine. Similarly to the CoE, the European Community has been a regional organisation open to the accession of other nations that belong to the same area.[17] For this purpose, the EU sets out not only procedural rules, but also substantive conditions. That is, the respect of the values upon which the Union is founded, including democracy, liberty, and the respect for the rule of law and fundamental rights (Article 2 TEU).

4. The deficiencies of the "ascending order" view: the divergence between facts and theory

After explaining why the "ascending order" model is conceptually flawed, it must be added that, factually, there is much that is imperfectly understood about modern polities.

Even within traditionally homogeneous and unitary states, such as France, the second half of the twentieth century has seen the creation of territorial bodies entrusted with legislative powers, namely the regions. Together with this institutional change, there has been the recognition of both ethnic and linguistic minorities,

15 For this discussion, see Where, 1963; See also Benz, 1999, p. 55.
16 Rawls, 2001, pp. 3–5.
17 Boulouis, 1990, p. 45.

notably in Corsica and Brittany. There is, therefore, a moderate heterogeneity of social groups, with their own cultures and languages. Such heterogeneity is more evident, and sometimes striking, in other states, such as Italy and Spain. It is precisely for this reason that the legislative powers of sub-national governments have dramatically increased.

The internal transformation of the states is not isolated. Legal scholarship was accustomed to looking to the state as the most important source of political authority. The state was the institution to which demands were addressed and which was charged with considerable responsibilities, including protecting the national interest and the rights of its citizens abroad. After 1945, states have operated in an increasingly complex web of national, trans-national, and supra-national legal processes. This is no mere incremental change.

Between historians, there is debate about the role of the EC/EU. Two interpretations of the events that occurred during the second half of the last century have been proffered. The first suggests that the EC/EU has weakened the legitimacy of the nation state. The other interpretation argues that the EC has been the instrument for the rescue of the nation state.[18]

This is by all means an interesting debate, from which public lawyers and political scientists may learn much. However, from a legal perspective the states that have become members of "regional" organisations such as the EU have agreed either to renounce some of the traditional attributes of sovereignty or, according to another strand of thought, to exercise their powers jointly, not autonomously. Thus, for example, they have renounced to the old privileges concerning the exercise of justice. Historically, within the Holy Roman Empire, the emperor could grant the *privilegium de non appellando* to an imperial estate.[19] As a consequence, there was a limit to the extent to which an appeal could be brought to the imperial supreme courts. There is no such limitation in the supranational legal orders of our epoch, where both the Court of Justice of the EU and the European Court of Human Rights have compulsory jurisdiction and individuals and corporations can lodge complaints against state action or inaction. This confirms that any attempt to use the word "state" as a qualifying concept is susceptible to have only a limited range of applications or usefulness.

Another caveat is applicable as far as federations are concerned. As observed earlier, the "ascending order" vision of political systems asserts that federations are characterised by a more pronounced heterogeneity than unitary states. This is, again, true to some extent. However, federations are not necessarily the product of ethnic and cultural diversity. This is the case with Canada, but not with Australia. Whether Australia has recently taken adequate steps to protect its cultural heterogeneity, with special regard to ethnic minorities, is another question, which requires autonomous treatment.

18 See Milward, 2000.
19 For further analysis, see Bryce, 1907.

A final remark concerns other distinctions between federations and unions of states. As noticed earlier, the EU is characterised by a marked ethnic and linguistic diversity, which must be respected. However, in the Indian federation there is an even greater ethnic and linguistic diversity. In India the languages spoken belong to very different linguistic families, the major ones being the Indo-Aryan language (78% of Indians) and the Dravidian languages (spoken by 19.64%) in Southern India. This is not merely a fact but also has legal consequence. Interestingly, in 1947 the Indian Constitution entered Article 343 into force, affirming that the official language would be Hindi, with the official use of English to continue for a further 15 years. Later, a constitutional amendment allowed for the continuation of English alongside Hindi in the Indian government indefinitely. Arguably, the striking diversity of local languages has induced the rulers to maintain the use of a "foreign" language that could be understood by all.[20]

This line of reasoning may be usefully completed with a further look at the division of legislative powers, or competence, between the EU and its Member States. There are two sides of the same coin, that is, existing Union competence and how it may be widened, if the public interest so requires.

The regulation of the Single European Market may be considered from a particular point of view that, I believe, all public lawyers would regard as practically important; that is, the regulation of government procurements. In the Union whenever a public contract reaches the thresholds established by EU directives (that is, more than 5 million Euros for public works and 143,000 Euros for central government contracts concerning services), all public authorities, including private entities that are under public control in one way or another, can only use the procedures established by directives, including bids. Moreover, no-bid contracts, namely contracts that are awarded to a single vendor without any previous competitive bidding procedure, are allowed only under certain circumstances, including urgency or the existence of a single provider for a certain service. Outside of these situations, such contracts are forbidden. As a result, no-bid contracts are annullable before national courts, as established by the settled case law of the European Court of Justice. In the U.S. no-bid contracts are often criticised on the grounds that they lack transparency and can lead to a waste of taxpayers' money. However, there are no federal rules prohibiting them. It is for national lawmakers to prevent the executive branch from using no-bid contracts. Thus, for example, in California competitive bidding is required unless there is a particular legal basis for bid exemption, while in Iowa lawmakers rejected the Governor's request to fund no-bid contracts.[21]

Finally, although the legislative powers of the EU are based on the principle of conferral, it does not follow from this that there is what judge Koen Lenaerts called 'a constitutionally protected nucleus of sovereignty for the Member States'.[22] This

20 See Tillin, 2007, p. 45.
21 Beeman, 2020. For further analysis, see Bartle and La Course, 2003, p. 192.
22 See Lenaerts, 1990, p. 220.

is a matter of political discretion entrusted by Article 235 to the Council, acting in accordance with the stated procedure, to decide on the necessity of such action. On the other hand, in more than one case, the ECJ has decided to "stretch" Community competence. For the Court, national interests appear to be properly protected by the procedural safeguards inherent in the structure of the institutional framework, namely, decision-making procedures and judicial safeguards.

5. An *excursus* on moral disagreement in the EU and the US

The argument that is being made in this chapter about the divergence between theory and reality can be developed more thoroughly with regard to a perspective that is both interesting and important, namely that of moral disagreement. The structure of the argument within this paragraph should be made apparent at the outset. Firstly, I will illustrate how moral disagreement is examined in the context of federalist regimes in a recent and thought-provoking essay written by Guido Calabresi and Eric Fish. Secondly, it will be argued that their analysis is supported by both historical and contemporary analysis. Thirdly, and more importantly for our purposes here, a brief comparison between the EU and the US will be attempted.

The starting point is the well-known conclusion reached by Isaiah Berlin about the differing visions of the good that follows from diverse moral ideas, thus preventing the achievement of harmony in contemporary societies.[23] The implications, which contrasting visions of the world will have for the shape and content of public law, are considered from a federal vision. Calabresi and Fish discuss two themes. The major theme concerns federalist government. The "minor" theme concerns specifically the U.S.

From the former viewpoint, the authors argue that a federalist government provides an important, though partial, solution to the lack of harmony in contemporary societies. Different social groups may live within the same federation because its structure leaves certain moral questions, for example abortion or capital punishment, to local control. This allows them to keep their 'distinctive moral views, while at the same time coexisting in the larger national polity alongside those with whom they disagree'.[24] Calabresi and Fish also point out that Americans disagree profoundly on a range of important questions of moral principle, such as capital punishment and same-sex marriage. For each of these questions, a policy that is deemed necessary by some appears totally unacceptable to others. As a consequence, it is difficult for the supporters of these contrasting views to coexist in the same nation. If one of these

23 Berlin, 1992.
24 Calabresi and Fish, 2016, p. 1.

factions gains control of government, it may use public powers to adopt decisions that are "abhorrent" to the other one.[25]

This analysis is impeccable and may easily be supported by both historical and contemporary examples. Historically, racial segregation was an element of division, though Tocqueville was not the only writer who expressed some scepticism about it. For him, '[T]he prejudice of race appears to be stronger in the States which have abolished slavery, than in those where it still exists; and nowhere is it so intolerant as in those States where servitude has never been known'.[26] After 1850, such division emerged in two diametrically opposed positions regarding the U.S. Constitution. For some, the Constitution did not prohibit slavery. For others, it gave government the authority to abolish slavery, in particular by using the Commerce Clause and by granting due process rights to protect fugitive slaves. Both strategies found their way in two new constitutional amendments approved by Congress before the Civil War had ended. While the 13th Amendment outlawed slavery, the 14th Amendment ensured the due process of law for all, within the states.[27] However, it did not outlaw methods that could prevent many from voting, hence the significance of the Civil Rights Act (1964).

Another examples is both constitutionally relevant and significant from a comparative perspective. It concerns capital punishment. Although the Constitution's Eight Amendment establishes a ban on cruel and unusual punishment, it does not set out precise rules about when a jury may impose the death penalty and how it must be carried out. As a result, diversity reigns. Twenty-seven of the fifty states currently provide the death penalty for certain crimes, even though some of them have either adopted a moratorium or have "*de facto*" suspended executions since various points in time. However, it remains a prerogative of each state, although the Supreme Court has held that some types of punishment are 'cruel and unusual' and thus violate the Eight Amendment, while others are unconstitutional for the lack of adequate guidelines for judges and juries when deciding whether to impose capital punishment.[28]

The significance of these findings is not limited to U.S. public law in itself. It also concerns a comparison with EU public law. Consider once again, capital punishment. As early as the age of the Enlightenment, thinkers such as Cesare Beccaria argued that civilised nations had to ban capital punishment.[29] More than two centuries later, that wish has become reality. Within the EU, capital punishment is prohibited by the Charter of Fundamental Rights, which under Article 6 (1) TEU has the same legal value as the treaties. Article 2 (1) recognises to everyone the right to life and Article 2 (2) reinforces such protection by establishing that 'no one shall be condemned to

25 Calabresi and Fish, 2016, p. 15; See also Sunstein, 1996.
26 Tocqueville, 1821, p. 533.
27 For further analysis, see Ackerman, 1991 (for the thesis that the abolition of slavery occurred as a disruption of contract).
28 The legislative provisions providing guided discretion have been approved by the US Supreme Court in a line of cases, including *Jurek v. Texas,* 1976.
29 Beccaria, 1764.

the death penalty'. The essence of this fundamental provision corresponds to those of the European Convention of Human Rights. While Article 2 (2) ECHR indicates some cases in which 'deprivation of life shall not be regarded as inflicted in contravention of this article', Article 2 of Protocol No 6 to the ECHR, has a more restrictive content. It provides that

> A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions.

As a result of this, capital punishment is prohibited, too, in the greater area of Europe, i.e.: the CoE that stretches from the Atlantic Ocean to the Carpathian Mountains.[30] Only outside this area is capital punishment allowed, namely in Belarus and Russia (where there is, however, a moratorium). Comparatively, there is a striking difference with regard to the US. The choice of a "harsh justice" in America divides it from Europe, and the key to understanding this divide is, for some commentators, the greater weight that is given in Europe to human dignity.[31]

An important corollary of the vision of moral disagreement in federalist government elaborated by Calabresi and Fish concerns the comparison between unified Europe and the US. In the US, there is an unending conflict over moral issues that divide Americans such as capital punishment, racial segregation and abortion, for which the Supreme Court has recently held that there is no room for federal legislation, thus overturning *Roe v. Wade* after almost fifty years.[32] To talk of an objective good or a shared societal value is therefore vacuous, despite the existence of a strong federal power. On the contrary, notwithstanding the weakness of the "central government" within the EU, a unified Europe has survived for so many decades amidst crises and enlargements. The precise key to understand the underlying reason is moral disagreement, in the sense that 'the value differences are remarkably limited'.[33] Despite different histories and cultures, as well as religious variations, on important moral issues the Member States 'think pretty much alike' or, at least, the differences that exist have not risen to an intensity that would require a strong central authority to intervene, as Supreme Court did in *Brown and Board of Education*.[34]

Two caveats are appropriate to qualify the conclusion just reached. The first is that no irenic vision of public law in Europe is justified. Old differences persist, for example in the treatment of persons imprisoned. New differences emerge, for instance as far as same-sex marriage is concerned. The other caveat regards EU

30 Costa, 2013, p. 81.
31 Whitman, 2005.
32 US Supreme Court, 2022, *Dobbs v. Jackson Women's Health Organization*.
33 Calabresi and Fish, 2016, p. 14.
34 US Supreme Court, 1954, 347 U.S. 483, the landmark decision of the U.S. Supreme Court ruling that the doctrine "separate but equal" could no longer be applied in the field of education. For further analysis, see Balkin, 2001.

institutions. Some recent decisions, for instance about whether and how the Union should support Ukraine, reveal a diversity of views that is unprecedented. Nothing suggests therefore, that the rulers benefit from an atmosphere of Jovian calm in which they would be able to decide what is best for the peoples of Europe. The general point that has been made here operates on a different level. Making a theory asserting the existence of a categorical difference between the US and the EU, in the sense that the former is more homogeneous that the latter on moral grounds, would be empirically weak.

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6. Beyond the "ascending order": a wide spectrum of polities

Thus far we have considered both the normative and descriptive adequacy of the "ascending scale" approach. We have found that, whatever its apparent appeal, this approach does not withstand critical scrutiny. Firstly, methodologically, the idea that nation states, federations and unions of states are fixed and immutable a *priori* categories is flawed and must therefore, be revised. Secondly, a legal theory that takes for granted the existence of neat differences between three categories should be revised. There are obvious differences between the various types of polities. The degree of difference in this respect should not, however, be exaggerated. The real world is much more complex and this should be taken into due account by both public lawyers and political scientists. Thus, for example, we have seen that from the viewpoint of moral disagreement the EU is surely not more divided that the US.

This is all very well, but naturally, once we have explained why the "ascending order" approach has several deficiencies, we have to put something else at its place. In the remaining space, I can only mention, without examining them in detail, some elements of a more adequate theory of modern polities. The first is the concept of polity, which does not designate every organised society, but only the entities that possess some specific attributes of authority. The second element is how these entities should be considered. The third is a practical demonstration of the existence of common attributes. This demonstration, which will be accomplished in the following paragraph, concerns the general principles of law.

The starting point is the concept of polity. A long-standing tradition of legal and political thought focuses on this concept. This old tradition goes back in time to Aristotle's Politics, where two distinct approaches were used. There was a theory of the ideal, or best, state, from a philosophical perspective. There was, additionally, an analysis of actual states, more precisely a comparative analysis, because Aristotle compared the constitutions of Sparta, Crete, Carthage.[35] In both approaches, "polity" was the chief structural concept of societies, and the only environments within which

35 Aristotle, no date, book II, section 1272 b.

men could live.[36] Not all societies, however, could be regarded as polities, but only those which achieved an ordered organisation of power. Interestingly, in the modern era the term "polity" was translated as "state". This was a manifestation of the belief that the term "state" could be viewed as timeless. In the same order of ideas, the general theory of the state elaborated by Austrian and German public lawyers at the end of the 19th century applied the concept of state to a variety of entities. That theory held that the concepts of state and sovereignty, or *imperium*, were closely related, in the sense that sovereignty was a necessary attribute of each state and that its scope of application included both peoples and territory. Interestingly, while most theorists asserted that sovereignty was indivisible, Georg Jellinek observed that, empirically, this was not always the case. For example, although Bosnia was still part of the Othman Empire, state authority on that territory was exercised by Austrian institutions. He thus coined the term "*co-imperium*".[37] His remark was not only a healthy antidote against the belief that the state phenomena may be considered without an adequate awareness of their spatio-temporal mutability, it was also a fertile indication that sovereignty had to be conceived not in an abstract manner, but concretely. Following this line of reasoning, it is easy to observe that in last seven decades the Member States of the EC/EU have shifted from an isolated to a joint exercise of sovereignty concerning both lawmaking and dispute resolution in several areas. With the Treaty of Maastricht, it exercises monetary sovereignty, with a single currency and a central bank. It impinges on other sensitive areas like foreign policy and defence, although the decisions are still in the hands of national governments. The EU can thus be regarded as a polity having its own power and legitimacy.

Secondly, this broad notion of polity can be used to construct an alternative approach, based on a spectrum, namely a broad range of political entities – including federations, confederations, unions – that exist and can be identified between two extreme points, from a completely unitary order, where central government is the main actor that defines and enforces rules while other public authorities have no legislative power at all, to a legal regime where other sites of authority have gained importance in regulating many areas of economic and social life.[38] The metaphor of the spectrum of light seems appropriate, because as this term designates a band of colours, with different degrees of refraction of light, so does a spectrum of public institutions, with each different form at its margins shading into other forms.[39]

36 Aristotle, no date, book II, section 1252 b., 27. In secondary literature, see Bluhm, 1962, p. 743.
37 Jellinek, 1900.
38 For a similar approach, see Elazar, 1987.
39 For this remark, see Watts, 2000, p. 161.

7. General principles: beyond the divide between internal and external public law

As a final step, some implications of the theory just delineated will now be analysed. They concern the general principles of law. Firstly, it will be argued that, in contrast with the school of thought according to which there is a divide between public law that is internal to the state and that which is external, there are some general principles governing the conduct of all public authorities. Second, it will be observed that the rule of law and its corollaries, notably the separation of powers, are in contrast with the traditional way to consider certain institutional issues as mere "internal affairs".

At the beginning of this study, a mention was made of two variants of the same theory that would have been subjected to critical scrutiny. The stronger variant categorically denies that any commonality might exist between public law within and outside the state. The softer variant is constituted by the "ascending order" approach to the study of modern polities. The difference of emphasis between these variants should not conceal the similarities in their approach, that is, to establish rigid boundaries between the various types of polities. Earlier in this study, I explained why the latter variant does not withstand critical scrutiny. It is to the other one that we now turn. As a first step, its intellectual and institutional foundations will be considered. Next, the emergence of general principles common to the legal orders of the Member States will be illustrated. The focus will then shift towards the rule of law and one of its corollaries, namely judicial independence.

The intellectual foundations of the theory under consideration owe much to a well-known German thinker, Hegel. The fact that there are completely different laws within and outside the State was obvious, almost axiomatic, for Hegel. In his Philosophy of Right, he argued that the reality of internal public law changes when the relationship between the States are concerned, that is to say in their external law.[40] While every individual State has its own constitution, its internal law,[41] reflecting the *volksgeist*, another set of legal principles regulates the State in establishing relationships with other States. Such relationships are subject to the State's external law. This line of reasoning permitted Hegel to recognise the existence of two different legal orders, which, due to their different foundations, were not only independent, but reciprocally isolated. This concept of the sovereign power of the State has a variety of consequences for each separate State. Firstly, there is no ground for *ius gentium*. Secondly, transactions between sovereigns can only be based on treaties. As States enjoy full autonomy, this may be exercised above individual treaties,[42] although this does not mean that Hegel did not acknowledge the need to respect the

40 Hegel, 1821.
41 Hegel, 1821, § 259.
42 Hegel, 1821, § 330 and the addendum n. 191.

obligations stemming from treaties. His concept has deeply influenced an important school of thought in international law, in which Hans Triepel and Lassa Oppenheim have been the leading figures.[43] Namely, that international law, from this point of view, is not simply separated from internal public law, but is built on completely different foundations. Still today, many public lawyers reiterate that the state is a central category because it is characterised by a system of authority that is totally distinct from others.

The conceptual and institutional foundations of the divide between the two fields of public law, within and outside the state, are however highly questionable. Conceptually, at the heart of the Hegelian theory there is a sort of "sacralisation" of the State ('man must … venerate the state as a secular Deity'), [44] which might have been appealing in the mid 19th century, but is not so two centuries later. Moreover, the legal environment has profoundly changed in the meantime. At the international level a change occurred with the Statute of the International Court of Justice. Article 38 included within the sources of law, that the ICJ is bound to apply, in order to avoid a *non liquet*, the general principles of law recognised by civilised nations, meaning the general principles that are valid *in foro domestico*.

Since the early years of its jurisprudence, the Court of Justice of the EC referred to general principles in two ways. On the one hand, it applied general principles extrapolated from the Treaties establishing the Communities. On the other hand, especially when the Court had to resolve disputes in relation to issues and matters not expressly covered by the Treaties, it choose to draw on the principles shared in the legal systems of Member States. Initially it referred to those principles without a written norm authorising it to do so. Subsequently, it could avail of both general and sector specific norms established by the Treaties. The general norm was found in the reference that was made by Article 164 of the Treaty of Rome to the Court's mission to ensure the respect of the "law" in the interpretation and application of the Treaty. This particular norm was established by Article 288 (now Article 340 TFEU), according to which

> in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

Even a cursory glance at this provision shows that it does not simply presuppose a vertical relationship between EU law and national laws. Rather, it connects national legal order with that of the EU. It thus requires EU lawyers to study national regimes of the liability of public administrations.

43 Triepel, 1899, p. 82; Oppenheim, 2005, p. 20; only considers the principles of customary and conventional international law.

44 Hegel, 1821, § 328. The critical remark is borrowed from Romano, 1954, p. 419.

When reviewing the legality of the acts adopted by both EC and national institutions, the European Court of Justice (ECJ) has also referred to other general principles of law, such as the principles of proportionality and legal certainty, including those between the general principles of EC law.[45] This process of judicial creation of general principles is of the utmost importance. If a certain principle is considered by the Court as common to all or most national jurisdictions, then it is included between those general principles of which the Court has to ensure an observance. This method, which has permitted the Court to qualify as general principles, amongst others, the right to be heard and proportionality, has been codified by the Treaty establishing the European Union (TEU). Article 6(3) of the TEU, reads as follows

> Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.[46]

The underlying assumption is that there are not only distinctive national traditions, but also common constitutional traditions. Included among these common traditions is, for example, the right to effective judicial protection.

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8. General principles: the rule of law and judicial independence

After delineating the development of general principles, it can be helpful to look more closely at some of them, which have been at the heart of recent academic and institutional debate, that is the rule of law and one of its corollaries, judicial independence.

There exists voluminous literature on the historical origins of the concepts of Rule of Law, *Rechtsstaat* and *Etat de droit*, which will not be described here.[47] The focus is rather on their twofold role in EU law. On the one hand, respect for the rule of law is a requisite for joining the Union. This requisite, which was implicit in the original *foedus* between the founders of the EC, was made explicit by European Council meeting in Copenhagen in 1993, together with stable political institutions, and respect for fundamental rights and other criteria. It is now enshrined into the Treaties and must be respected by the Union's Members. Article 7 TEU establishes the political mechanism for ensuring the respect of EU values. On the other hand,

45 Reuter, 1964, p. 263.
46 Emphasis added. On common traditions, see Pizzorusso, 2002; Cassese, 2021, p. 592.
47 See Craig, 1997, p. 467. See also the Venice Commission, 2007.

the rule of law must be respected by the Union's institutions and agencies, in the discharge of their functions and powers. The strong connection between the two sides of the rule of law was emphasised by Walter Hallstein in the early 1970s, when he argued that, as the Member States of the EC complied with the principle of *Rechtsstaat*, so the EC itself had to be conceived as a *Rechtsgemeinschaft*.[48]

The ECJ has included the rule of law between the principles of which it ensures that respect is given. In particular, in its landmark ruling in *Les Verts* the Court has held that

> the European Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.[49]

More recently, in its opinion n. 2/13 on accession to the EU, the Court held that the set of common values, upon which the Union is founded is the 'premise [that] implies and justifies the existence of mutual trust between the Member States that those values will be recognized' and respected.[50]

In consistensy with this settled interpretation, EU institutions have developed a rule of law "toolbox" with a view to ensuring its respect.[51] Thus, for example, in its first ruling on the "Cooperation and Verification Mechanism" (CVM), the Court of Justice confirmed that this mechanism falls within the scope of Romania's Treaty of Accession and that it must therefore, be regarded as binding.[52] Another example concerns judicial independence. This is simultaneously viewed as the necessary precondition to the vindication of individual rights, including the freedom of thought, and as an existential requisite for its cooperation with national courts. It is for these reasons that, for example, Hungarian legislation authorising the removal of judges by means other than impeachment or imposing their early retirement is regarded as inconsistent with the rule of law.[53]

Two concluding remarks are appropriate. The first is that, although the rule of law may mean different things in different contexts and epochs, including the "thin" conception which may be acceptable even under an authoritarian government, in the

48 Hallstein, 1972.

49 Judgment of the Court of 23 April 1986, Case 294/83, *Parti écologiste "Les Verts" v European Parliament*, § 23.

50 Opinion of 18 December 2014 on the accession of the EU to the European Convention on Human Rights (Opinion 2/13), § 168.

51 European Commission, 2014, COM(2014) 158 final/2.

52 CJEU, Joined Cases C-83/19, C-127/19 and C-195/19, Cases C-291/19, C-355/19 and C-397/19, *Asociaţia 'Forumul Judecătorilor din România*.

53 CJUE, judgment of 6 November 2012, *Commission v. Hungary* (holding that the national scheme of compulsory early retirement was inconsistent with the principle of proportionality). See also ECtHR, judgment of 23 June 2016, *Baka v Hungary*, application n. 20261/12, § 155, recalling the judgment of the Hungarian Constitutional Court no. 166/2011, of 19 December 2011.

European legal area its *noyeau dur* includes both the principle of legality and judicial independence. Secondly, and consequently, for the Member States it is no longer possible to assert that their measures concerning the judiciary fall within their "internal affairs" and are, therefore, governed only by the laws of each state. The internal affairs doctrine is an instrument through which national institutions have jealously guarded the ability to apply their own laws. However, it no longer applies to national institutions in the areas covered by EU law.

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9. Conclusion

A quick attempt to synthetise the basic argument of this study proceeds as follows. Leaving aside the methodological implications to be drawn from this work, the thrust of the conceptual and empirical findings has been to criticise the traditional distinction between unitary States, federations and unions of States. The key issue then becomes one of ascertaining not *ex ante*, but *ex post*, whether there are general principles that are common to all these polities and the consequences that follow from them with regard to the discharge of public functions and powers. In particular, although debate will doubtless continue as to which concepts best capture the meaning and significance of the rule of law, there is no doubt that its corollaries, including judicial independence, apply to both the EU and its Member States.

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