

MODERN STUDIES IN EUROPEAN LAW

FEDERALISM IN THE EUROPEAN UNION

EDITED BY
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Preface

We are in the middle of a severe recession and a continuing crisis with the single currency. Switch on the television or the radio and you will find pundits pontificating—the more Euro-sceptic amongst them with an almost palpable, savage glee. Will Greece leave the Euro? Will other ‘vulnerable’ Member States be picked off, one by one, as the ratings agencies (those mysterious and apparently all powerful gods) downgrade the sovereign debt of one Member State after another? Is Spain (Portugal? Italy? Ireland? whoever is next: pick your chosen target) too big to fail but too big to save? Can another (better) rescue plan be cobbled together and succeed in satisfying the markets? Can the Germans really be expected to go on showing ‘solidarity’ and writing cheque after cheque—and, if *Bundeskanzlerin* Merkel is willing to contemplate trying, will the *Bundesverfassungsgericht* be prepared to wear it? Is the whole idealistic post-war ‘European project’ doomed?

Against that background, a compilation of essays that tries to examine where we have got to within the European Union on federalism and decentralisation, and where we may be going, may seem to some like the ultimate exercise in the futile or indeed the surreal. If the end of the Euro-world is nigh, does it really matter whether one conceptualises the European Union as a crypto-federal structure or maintains that it is merely a particular form of international organisation (or whether the truth is somewhere between the two)?

The short answer is ‘yes, it matters a very great deal’.

If we look back to 1992 and the Treaty of Maastricht, it is abundantly clear that, whilst there was a lot of enthusiasm for the single currency as an overt symbol of Euro unity, there was no parallel political will (as the necessary concomitant of creating such a single currency) to place fiscal policy under common control.¹ Whatever the external trappings, the practical sovereignty that mattered—such as our freedom to determine our own market philosophy, reflecting the political choices made by our electorate—would remain vested in the central governments of the Member States. And so it continued for the next twenty years. In the meantime, within individual Member States, regions that were experiencing difficulties could hope to be helped out by wealthier regions through transfer mechanisms operated by central government. The better off may grumble, of course; but within a single State where there are wage differentials between richer and poorer regions, there is always quite a lot of central control over what the poorer regions are spending and (crucially) there is also a sufficient sense of solidarity, of ‘we’re

¹ Hindsight is of course a wonderful thing. However, there were a few unpopular economists who pointed this out at the time: see, for example, M Friedman, ‘Why the euro is wrong for Europe’ (1997) 14 *New Perspectives Quarterly* 23–24.

all in this together' (even if it is a bit grudging at times) to keep the national show on the road.

We are in the painful process of finding out that establishing a single currency without fiscal union in 1992 was a step that was both too far and not far enough. But the single currency is no longer a new-fangled toy that can be unmade by waving a magic wand over the experiment. Twenty years on, the single market is much more interlaced and interdependent than it was when the Treaty of Maastricht was signed; and the overall European project is much, much more than the mere single market. At the time of writing, the tide is running quite strongly in favour of the idea that—now that we really have our backs against the financial wall—what is needed is 'more Europe', not less. A closer degree of coordination of fiscal policy and more action by central banking is seen as crucial to rescue the Euro. The inevitable corollary, without touching a single Member State boundary on a map, is the creation of more European unity (even if the dreaded f-word is kept discretely in the closet). Member States who are not part of the Euro-zone are nevertheless still so deeply involved in the economics of the European project that—in their own interests—they cannot realistically remain aloof and uninterested in the precise details of how those at the centre of the storm set about weathering it.

Thus, the exigencies of finding a technical solution to the present 'crisis in the Euro-zone' leads ineluctably to much bigger and deeper questions about the sort of European Union that our present half-way house may need to evolve into. What are the appropriate bases for the unity and solidarity that is so obviously required?

In national terms, unity and solidarity link naturally to shared constitutional values. Citizens own their nation state through the democratic process. They expect their courts (even if the thought is seldom clearly articulated) to ensure that their governments respect fundamental rights and constitutional values and that the executive does not encroach upon the proper sphere of the legislator. Where the nation state has a federal structure, the courts patrol the proper separation of powers between the *Bund* and the *Länder* (or the central authority and the regions) and the citizen identifies both with his region and with his nation. The rule of law is woven deeply into the fabric of the civilised, democratic society of which each citizen is a part; and the jurisprudence of the constitutional court (or the supreme court, where a separate constitutional court does not exist) plays an important part in consolidating that society.

Citizens do not usually, however, love their nation in the abstract. They grew up with it and identify with it. They know roughly where they stand and what they can expect and are suitably cynical about both, without ever seriously thinking of 'leaving' their nation and trying out a different one. They accept that they have duties as well as rights. They value what they identify as the good things about their nation, be that a tranquil life and good quality environment or sporting prowess and cool culture. They make wry faces about what is less good. But they do not (usually) regard those less desirable qualities as reasons for disowning the nation itself.

Viewed in that light, the ‘European project’ (in the guise first of the ECSC, then the EEC and the EC, and now the European Union (leaving EURATOM to one side for a moment)) has been immensely successful in offering to those living within its remit decade after decade of undisturbed peace and relative prosperity—and the gift has been ‘banked’ invisibly. More publicity is given to the (mythical) directive on straight bananas than to twenty measures that improve consumer protection or facilitate free movement. The nationals of the Member States have become citizens of the Union almost by sleight of hand; and certainly without much open recognition of what that new citizenship might entail.

Against that background, is this book not all about angels dancing on the head of a pin? Given the state the European Union is in, should one’s reaction not be that, ‘frankly we’ve rather more urgent problems at hand’? Quite the opposite. By addressing the two distinct but interwoven questions of whether the European Union itself is a federal system, and whether the European Union allows for federalization within the Member States, this book arguably points to the possible way out of both the EU’s crisis of legitimacy and its economic crisis. Bear with me in both respects.

On the one hand, resolving the economic and budgetary crisis would (as scores of economists never cease to remind us) require setting straight the ‘design flaw’ committed at Maastricht and establishing coordinated regulation of banking and financial markets and strengthened controls over Member States’ budgets. The crisis of legitimacy, on the other hand, would require such reforms to be accompanied by a clear reinforcement of the democratic character of decision-making at the European Union level. In other words, both operations would tend to entail a further step in the construction of a ‘federal’ European Union. However, that endeavour will be entirely impossible unless the Union makes it perfectly clear that it continues to respect the constitutional autonomy and identity of its constituent Member States, including their federal and otherwise devolved constitutional structures, which in turn guarantee that decisions are taken as closely as possible to the citizens of the European Union.

Federalism, then, could be the answer to the European Union’s quandaries. It is, of course, not an EU invention. As the comparative chapters in this collection of essays show, one of the more venerable examples can be found across the Atlantic. Naturally, the United States too continues to face fraught questions. According to the Supreme Court of the United States, which was recently confronted with the problem of how to ensure affordable health care for individual citizens without infringing on their personal liberty, ‘federalism secures to citizens the liberties that derive from the diffusion of sovereign power’, and by ‘denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power’.² The Supreme Court also recalled

² *National Federation of Independent Business v Sebelius*, 567 U.S. ____ (2012) (slip op, at 4).

that the federal system rests on 'what might at first seem a counterintuitive insight, that freedom is enhanced by the creation of two governments, not one'.³

For the European Union, Article 4 TEU would appear to provide an excellent programme for such a conception of federalism. It provides for the typical federal rule (compare, for example, the tenth amendment to the US Constitution) that competences *not* conferred upon the Union in the Treaties remain with the Member States.⁴ The Union is also under an obligation to respect the equality of Member States before the Treaties 'as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. More specifically, the Union is to respect 'their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State'.⁵ The Court of Justice has made it clear that it takes seriously respecting the national identities of the Member States.⁶ However, Article 4 TEU also provides the 'glue' to keep the federal construction together, in the form of the principle of sincere cooperation. Pursuant to that principle, the Union and the Member States are to assist each other, in full mutual respect, in carrying out tasks which flow from the Treaties. In particular, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States are likewise required to facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.⁷

Conceptually, the European Union's particular brand of federalism is therefore an instrument both for recognising and accommodating national diversity and for transcending it, when and where required. The book's two-part structure reflects 'federalism's Janus face'. It offers a wide-ranging discussion of federalism in the European Union, addressing issues that are pertinent not only to suggesting a way out of the current impasse but also to getting the citizenry of Europe engaged with, committed to and, perhaps, even fond of, the EU. It could not have come at a more appropriate time.

Eleanor Sharpston
Advocate General at the Court of Justice of the EU

³ *Ibid* 47.

⁴ Art 4(1) TEU.

⁵ Art 4(2) TEU.

⁶ Case C-208/09 *Sayn-Wittgenstein* (ECJ, 22 December 2010), paras 92–94.

⁷ Art 4(3) TEU.

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