

Principles of Federal Institutions

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FEDERAL INSTITUTIONS tend to vary in the forms they assume. The flexibility of the principle involved is such that each federal union has its own individual aspect because this system seeks to respect individual situations. However, above and beyond these individual situations, certain common characteristics may be discerned which cause some of these unions to resemble each other and which set them apart from the others. To define the federal structure, it is appropriate to concentrate on these common characteristics, even to the point of overemphasis, so as to single out a few general types. This purely scientific classification will enable us to find our way through the labyrinth of positive achievements and to pass reasonable judgments upon them.

Principal Types of Federal Associations

Past and present experience shows us two types of association of States both of which are sometimes loosely called federal in Europe:

A. The *international* association or league, or alliance, sometimes called *Confederation*. Examples: the GERMANIC CONFEDERATION in 1815; the UNITED NATIONS, the ARAB LEAGUE, the COUNCIL OF EUROPE, NATO.

B. The true *federal* association, called a Federal Union, Federation or Federal State. Examples: the UNITED STATES, SWITZERLAND, WEST GERMANY.

The above classification encounters nowadays rather harsh criticisms as artificial and rigid. In support of this criticism, frequent references are made to such specialized communities as the European Coal and Steel Community, the European Economic Community, (Common Market), Euratom, etc., which do not belong either to the group of international associations nor to the group of federal associations, but which represent an intermediate form: the supranational Community.

These criticisms are without foundation: the principle of supranationality already belongs to the past. The Iron, Coal and Steel Community, the only one with power to make decisions, has

used its authority with extreme caution. It has preferred the classic method of negotiation with the delegates of its member governments. The coal crisis of 1958-1959 and the inability of the High Authority to break the resistance of these governments show undeniably that the real power is concentrated in the hands of the member States. The High Authority was not able to impose the necessary measures. As for the European Economic Community and EURATOM, they are a reversion to the classic type of inter-governmental association, for the ministers, as representatives of the States, keep the real power in their own hands.

Indeed, the problem is to know where the real power lies. Experience teaches us that power eventually settles somewhere. The vital distinction between an association of States and a Federal State lies in the different location of the seat of power. Last preliminary remark: It is important, before approaching the



heart of the subject, to make a few general observations which can serve as a guide in the choices to be made.

Component Elements of the Federal Principle

The principle of federalism has been summed up in such succinct formulas as "unity in diversity," or "liberty with order;" this implies a sort of equilibrium between the rights of the Union and

those of its individual members. The autonomy of the associated States is as necessary as the authority of the Federation.

This presupposes a genuine democracy, which implies the active participation of the people in the organization. A bond must be established between the several States and their peoples on the one hand, the Union and the federal population on the other. In simpler terms, each individual must feel a twofold allegiance: on one hand, to the entire Union, on the other, to the smaller collectivity of which he is a member.

The principle of federalism must be accompanied by the supremacy of the Law, by the rule of law, by legal institutions. The tension, which is unavoidable in a federation, may give rise to conflicts. Certainly, a peaceful means of settling disputes must be found; but tensions must be preserved as a source of life and progress. The Law alone is in a position to solve differences of opinion without completely suppressing them.

The differences between a league, alliance or Confederation of states and a Federal State may be observed in the three following respects; as regards—

1. Their basis; 2. Their structure; 3. Their powers.

Let us examine these three in turn.

I. The Basis of the Association

A Confederation of States, league or alliance—hereafter called a "league" for brevity—is based on a *treaty*, a Federal Union on a *constitution*. Each constitutes a new society: a society composed of pre-existing societies. But they do not evolve in the same institutional and juridical framework: a League is under the jurisdiction of international public law; a Federal State is under that of internal or domestic public law.

A League operates within an international framework, or more precisely, an interstate framework. It is a group of States, not a people. The individual never makes a direct appearance. Between him and the association there intervenes the massive bloc of state col-

lectivities. His individual will is hidden behind that of the State to which he belongs. In this way a League is an aristocratic society, perhaps even an oligarchic one; it disregards the principle of democracy.

A League pact is, of course, subject to amendment. Since it is based exclusively on the will of the States, to revise it requires their unanimous consent and the slow procedure in order to conclude international treaties: Negotiation, signature, and above all, ratification. All of which means that a pact worked out by a League is rarely modified and never amended, thereby crystallizing for an indefinite period of political situation and a balance of forces which are basically temporary. A League of States therefore does not take at all into account social dynamics.

That is why it suffers from congenital weakness and cannot create an indissoluble bond between its members. The latter have the right to secede from the association whenever they see fit. It is not necessary that the right of secession be spelled out in the pact: It is tacitly included. Like any permanent treaty or long-range commitment, the league, alliance or confederate pact is accompanied by the famous clause "*rebus sic stantibus*": the commitment cannot outlast the situation which brought it into being.

A League is more responsive to political factor than to the rule of law. The former always involves arbitrariness, instability and struggle for power. The associated States, masters of their own fate, carry on within the association the same struggle in which they were engaged before its creation. To realize this, it is sufficient to take a look at the difficulties within the Arab League, the U.N or NATO.

The situation is quite different within a federal union.

A Federation is placed within a constitutional framework, which is to say an intra-state framework. It is a group made up not only of States, but also of peoples. It is therefore both a society of States and a society of individuals. Its strength comes from these two sources: by appealing to the people, it can dominate the States; by appealing to the latter, it can stem popular pressure. In this way, it stands at the juncture where the collective and individual

will meet; whence come its flexibility and its firmness. It establishes a federal democracy half way between the anarchy of international associations and the authoritarianism of centralized democracies.

This is why a federation does not consider its constitution as unchangeable, nor insist on unanimous agreement of the federated States in order to revise it. Any modification is carried through according to the procedure which it itself defines. This procedure generally involves the agreement of a certain number of States: in the U.S.A., three-fourths of the states, two-thirds of Congress; in Switzerland, a majority of the cantons as well as the approval of a



majority of the citizens by means of a referendum. Thus the constitution, without too many jolts or violent shocks, can follow the evolution of the political situation and of the balance of forces.

For the same reason, a federation creates an indissoluble association safeguarded against the fluctuations of the selfish interests of the States. There is no question of the right to secede nor of the clause "*rebus sic stantibus*."

If by chance, as was the case in the U.S. in 1861, certain states seek to secede, to separate, this is rebellion and not the legitimate exercising of a right.

The fact is that the rule of Law is dominant in the life of a federal union. It follows that the various States, by joining in a federation, thereby renounce the use of force. The guarantee of legal procedure is substituted for arbitrary diplomatic procedures. Internal struggles do not automatically cease, of course, but they occur within a legal framework and are settled by recourse to Pascal's "neutral third party," that is to say, a judge.

II. The Institutions

On the institutional level the differences between a league, confederation or alliance of States and a federal State appear to be just as profound. As an interstate association the former type of association is comprised only of inter-

governmental institutions and diplomatic machinery.

In the first place, the internal organization of the associated states is kept intact. The existence of the league has no effect whatsoever on the internal structure of their component parts. Although the league possesses an organization distinct of that of its members, this organization, however, is very rudimentary.

In the past, the member States were content to endow it with a single agency of government called a Congress or a Diet. As it was made up of their plenipotentiaries, this agency was nothing more than a permanent diplomatic conference.* Modern leagues such as the various European communities possess a more evolved organization: An assembly of the representative type, a council of ministers, an executive and an administration. However, there is no essential difference. In both cases the will of the individual States prevails over the common authority and the personnel of the home governments yield more influence than the representatives in the Community organizations.

League Depends on Diplomacy

No doubt the collective will of the association cannot be reduced to the sum of the individual will of the various States. The principle of unanimity is not strictly applied. Moreover, it is often substantially a compromise agreed to by the States, but this compromise is nearly always established along the line of greatest resistance, in other words, upon the will power of the most unyielding State. Nor should one be deceived by the multiplicity and variety of the common agencies. In all essential aspects, these agencies preserve their representative national character, with power concentrated in the hands of the Council of Ministers whose character is the most exclusively national of them all.

So it is that, in the traditional as well as in the modern structures of a confederation or alliance, its interstate character remains predominant. Such associations have, properly speaking, neither legislative power, nor executive power, nor judicial power. Usually its decisions assume the character of simple recommendations addressed to the member

*This is true of the NATO Council now.—*editor*.

States. In order to breathe life into them and to make sure that they are carried out, the league must resort to diplomatic procedures. Either these deliberations are incorporated in a convention signed and ratified by the States, or, after their adoption by the latter, they are incorporated into internal statutes which each State enacts into law. In any case, except in rare cases, they are never applied directly and immediately to individuals.

The same thing holds true in the settling of disputes which may arise within the association. To deal with them the preferred method is to have recourse to International Law: negotiation, good offices, mediations, conciliation, arbitration. The creation of a Federal Court which would impose its jurisdiction on the allied or confederated States is carefully avoided.

Why Federation is More Effective Than Confederation

As distinct from such associations, a federation is endowed with an infinitely more effective organization.

It comprises two kinds of government institutions: federal and national.¹ The individual States possess their legislative bodies, their administrations and their law courts. Each has a constitution which serves as its base and regulates its affairs. In this way federal union preserves their individuality as States. In its turn, the federal constitution institutes the various governing bodies of the Federation. Some of these are in keeping with the double nature of the federation and guarantee the representation of the States as well as of the people. The same is true in the case of the legislative power which comprises two Houses: the body representing the States (the American Senate, the Swiss Council of States), and the body elected by universal suffrage (House of Representatives in the United States, the Federal Assembly in Switzerland).

It is important to note, however, that although each American State, large or small—New York with around 16,000,000 population and Alaska with 160,000—has two Senators, these Senators represent the people, not the government of their State. Unlike diplomatic representatives, they are elected by its people, hold office for six years, are paid by the Federal Treasury, are not

instructions by nor responsible in any sense to their State government. Often the Senators from a State belong to one party, while the other party controls the State government. Often the Senators are of opposing parties'. Even when they are of the same party they can differ as radically in policy as did the two Republican Senators from Wisconsin in the early 50s—Senators Joseph McCarthy and Senator Alexander Wiley. Thus, in a very real sense, neither the government of a State or even the people (in the sense of a unit) are represented in the U. S. Senate.²

Other Federal organs are purely Federal: this is the case of an Executive including the Administration, and the judicial system, headed by a Federal Supreme Court. The organization of a Federation is thus complete as is that of any of the States composing it.

The superiority of a federation is still more marked from another point of view: Its will is not, as that of a league, reduced to a haphazard combination of the wills of its various members; a federal union's will is entirely its own, and is a result of a meeting of wills between the States and the people. It has no need to seek lame compromises; it can take decisions in the light of the general interest, for the common good, showing as much respect for the rights of the States as for the rights of individuals.

This is why, in order to achieve its purpose, a federation follows institutional methods rather than diplomatic means. In this way its decisions take the form of laws with their ordinary attributes: their compulsory aspect and their enforceable character. It is immaterial whether the laws are enforced by the State administration—a

¹In the U.S.A., federal and states in Switzerland, federal and cantonal.—*Editor*.

²According to Clarence Streit, this does not handicap the Senate in carrying out one of its main purposes in the U.S., namely, to help preserve the division of power between the Union and the State governments which is basic to the federal system. Mr. Streit points out that the fact that the two Senators from a state may have opposing views on any measure, and that each has an equal vote and an equal right to speak for the people of his State (who are always divided in their views, too), gives the people of each State double the opportunity to curb the majority that they would have if both Senators voted as a unit according to the instructions of their State government.

As a representative of the people of a sovereign State, each U. S. Senator (unlike Members of the House) has the right to hold the Floor as long as he can keep speaking. This right—called filibustering when misused—has more than once permitted a single Senator, Mr. Streit notes, to delay or block the whole Congress and Federal Government. "Without the Senate," Mr. Streit writes in *The New Federalist* (p. 54), "there would be little to check the tendency of the central government to encroach on the local government, which can lead to tyranny such as Hitler's. One of his early steps . . . was to abolish state's rights in Germany."

system which takes effect immediately and directly; they will be enforced in any case under the direction and control of the federal government.

The settlement of any conflicts likely to arise within the federation will also find a solution through federal institutions. Whether it is a case of disagreements among states, or between the federation and one of the States, or else between one State and the nationals of another State, these litigations will all have to be submitted to the courts, either national or federal, or both in succession.

"Compacts" Within a Union

In this way, the entire political life of a federation becomes institutionalized; in other words, ordered and peaceful. However, this same institutionalization does not preclude recourse to more flexible methods suited to interstate relations. In fact, the Federation often resorts to persuasive methods, encouraging the States to come to terms with each other and to cooperate in such and such a field. It often happens that, before taking any decision, the Federation consults the individual States unofficially. These methods of cooperation which are ineffective when applied to sovereign States, prove rewarding when they are supported by an institutional apparatus.

This is also true of the many "compacts" that in recent years have been made in the U.S.A. between States in the same region or with a particular joint interest. These compacts are made as directly between the State governments as are treaties between sovereign nations. One such compact between the States of New York and New Jersey established the "Port of New York Authority," which administers the harbor both States share. Other interstate compacts govern fishing waters shared by two or more States, or the control and use of rivers that traverse several States. These compacts can be brought before the Federal Courts for interpretation and enforcement—which has no doubt contributed greatly to the fact that these treaties have not suffered the infractions and violations that are common to those between sovereign States not linked by Federal Union.*

(To be concluded in next issue.)

*For a full discussion of these interstate compacts which provide an obvious solution to the purely regional problems of Western Europe and of North America in an Atlantic Federation, see "Interstate Compacts in the U.S.," by F. L. Zimmermann & M. Wendel, in the December, 1951, *Freedom Union*.