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The EU as a Confederal Union of Sovereign Member Peoples: Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU

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1 THE MODIFIED CONFEDERATION AS A MODEL?

Part I of this thesis has illustrated the value of a confederal understanding of the EU. The EU can be usefully understood as a further evolution of the unfashionable but rich confederal form. Approaching the EU as a modified confederal form provides us with an instructive prism to better understand its nature, functioning and evolution of the EU. It helps to explain, for instance, the relative success and deepening of European integration, the plural nature of the EU legal order, or the increasing gap between the growing federate authority of the EU and its static confederal legitimacy. The modified confederal approach equally fits with the general intuition that the EU is federate in some sense, but not 'really' so, just as a moped with a bigger engine is not really a racing bike. Several more specific findings underlie these general conclusions on the relevance and potential of reconnecting the EU with confederalism.

To begin with the confederal perspective has proven instructive in delineating where the EU does follow the classic confederal model and where it does not. To operationalize the confederal model for this purpose the EU was compared against two concrete examples: the often ignored American Confederation and its evolution into a federal state. A comparison that was structured around sixteen key federate modifications that shaped this evolution. Jointly these modifications created a comparative grid on which the EU could be positioned between the confederal and the federal poles.

A systematic comparison subsequently showed that the EU remains confederal on eight of these federate markers. Crucially, however, these eight include all *foundational modifications* that together provided the constitutional basis for American federation: The EU is not based on a single people, may not use force against its members or impose direct taxes. Equally no amendment by majority is possible, but secession is. Lastly the government of the EU is fully merged and not separate as in the US, has a weak executive and relies on a primarily confederal representational scheme. On all these foundational points the EU remains confederal. These findings, therefore, support the initial intuition that the EU sufficiently shares in the core characteristics of the confederal form to be usefully approached as such. Especially relevant for our comparative purpose, furthermore, is that EU is not based on a single European people, whereas the assumption of one sovereign American people constituted the very core of the federate shift in the US.

At the same time the constitutional system of the EU has incorporated five important federate modifications. To begin with EU law claims, and generally receives, supremacy and direct effect. The EU can also rely on a broad doctrine of competences, as well as on specific competences to regulate commerce internally. The US Confederation sorely lacked these instruments. Lastly, and vitally, a central court was established and given the final say on the interpretation of EU law. Not incidentally these federate elements coincide with several hallmarks of the EU constitutional order: they are the federate all-stars that stand out in the otherwise confederal team. They have proven to be of vital importance for the nature and functioning of the EU, and should be considered crucial modifications to the standard confederal model.

The remaining three federate modifications compared presented a more mixed result. As far as objectives, external powers and the institutional set-up of the legislature were concerned the EU system was either blended, conformed to neither, or equally to both the systems under the American Confederation and the US Federation.

2 AN INVERTED CONFEDERATION WITH A FEDERATE SUPERSTRUCTURE RELYING ON A RULE BY LAW

These comparative findings, and the interesting blend of confederal and federate elements they reveal, help us to better understand the functioning and evolutionary dynamic of the EU. To better serve this purpose these individual comparative findings were aggregated and analytically refined into three more general propositions on the modified confederal system that has evolved in the EU, and that has managed to address several of the existential weaknesses of confederalism.

To begin with, these modifications show how the EU can be understood as an *inverted confederation*. As an 'empire' the EU inverted the traditional external and military focus of confederations to an internal and economic focus. A modification that has had a significant impact on the overall functioning and stability of the EU. Most importantly this internal focus provided a more secure incentive for confederal cooperation. For where traditional confederations often broke down after the external threat disappeared, an internal market provides a more constant spur for cooperation: there are no times of peace in the marketplace. Consequently Member States have a continuous interest in economic cooperation, and face immediate and serious harm if they are excluded. What is more, this incentive to cooperate and overcome other self-interests keeps pace with the level of integration: the more developed the market, the bigger the benefits and the higher the costs of exclusion. This federate modification, therefore, helps to explain the relative stability of the EU, as well as its capacity to spread to ever more sensi-

tive areas and overcome deep crises. The level to which the Member States have so far been willing to go during the EMU crisis is a case in point.

The inverted focus on an internal market also provided an inherent incentive to deepen integration: the market has virtually no limits in itself, and can always be improved. An internal market is also far more likely to spawn a more developed institutional and legal framework. In contrast to external relations a market concerns innumerable interactions between individuals and public authorities in areas covered by national law. As such famous EU doctrines as supremacy and direct effect were also far more likely to develop within an internal market concerned with the proper tariff for urea formaldehyde than in a defensive confederation.

By stimulating such institutional and legal developments the inverted focus of the EU also links to the second proposition developed in part I: how the EU combines a confederal foundation with a federalized superstructure. An image that clearly materializes where one zooms out and combines the results on the sixteen points compared: on all foundational modifications the EU remains confederal, whereas it has incorporated five federate modifications at the structural and institutional level.

These different federate elements in the superstructure of the EU, including supremacy, direct effect and the ECJ, help to explain the remarkable effectiveness and stability the EU has achieved, certainly for a confederal system. Negative integration as developed by the Court of Justice, for instance, provided an essential legal backbone. It limited the effects of political inaction and acted as pacemaker where the political process stalled. Broader competences allowed the EU to act where there was political will. The broad and judicially developed system of EU competences even compensated for the confederal rigidity of the amendment process through what may be termed pseudo-amendment. Together these federate modifications reduced several of the existential weaknesses in the classic confederal model: the superstructure reinforced the basis.

The federalized superstructure these modifications created also enabled the EU to develop a genuinely confederal rule by law, the third general proposition developed in part I. No less than four of the five federate modifications incorporated in the superstructure of the EU concern law and the legal system. Where the legislative and the executive remained largely or wholly confederal, the legal column was federalized to a significant extent. Through these federate legal modifications as supremacy, direct effect and other legal principles developed by the Court of Justice the EU could plug in to the well-developed legal and bureaucratic systems of its Member States. It could subsequently rely on these systems, and the capacity for statal self-control they contain. A mode of governing wholly unavailable to the American Confederation because its members were far too unstable and undeveloped. A mode of governing that also explains the importance of law in the EU as well as the plural nature of its legal order: it allows the EU to

govern relatively effectively without itself acquiring the institutional capacity or normative authority normally deemed necessary to ensure compliance. As such this rule by law partially challenges the conventional linking of law and power and law and state. It thereby forms a further evolution of the federal idea developed in Philadelphia itself, creating an empire of law beyond what even the founding fathers deemed possible.

Though clearly not fail-safe, the rule by law is secured by the fact that Member States have become dependent on their own legal systems as well: they cannot do without courts or bureaucrats. And it is difficult to reduce the rule of law reflexes in these systems, which like a USB standard allow the EU to plug in through the format of law, without undermining their effectiveness altogether.

Jointly these modifications have significantly strengthened the constitutional system of the EU. They have created a modified confederal model which at least softens the most existential weaknesses in the system of the American Confederation. Weaknesses so aptly analyzed by Madison, and which largely inspired the federate Constitution.

The inverted focus and the legal backbone of negative integration, for instance, improve the 'energy' in the centre, spurring it to act. Broadly defined powers allow it to act. An effective rule by law ensures compliance of acts once the centre has acted, without the centre needing to develop the capacity to enforce. Several of the confederal Achilles heels mentioned by Madison are therefore covered, including the lack of authority and capacity to act in the centre, the inability to amend and a lack of compliance due to limited enforcement capacity. All in all not a bad score for the modified confederal model. Certainly not as it belongs to a constitutional sub-species that normally rivals the Panda bear in its seeming desire for extinction.

3 WEAKNESSES AND RISKS OF A MODIFIED CONFEDERAL SYSTEM: A WIDENING GAP...

At the same time many challenges remain, and some serious new ones have been created by these modifications as well. A further use of the confederal perspective is therefore to assist in better identifying and understanding these weak spots in the modified confederal system of the EU.

The self-deepening tendencies of the internal market, for instance, raises the problem of delimitation: are there any boundaries to the internal market? And how to balance a federate and legalized market against other objectives that are organized at a confederal and political level?

The rule by law approach of the EU, furthermore, has several inherent weaknesses as well. It is logically limited to areas governed by law, excluding several important areas of public authority not reducible to legal control. Where an area is nevertheless legalized to allow for EU control the

relation between the members of the *Trias*, and between law and politics more generally, may be unbalanced. Conversely a reliance on law may also reduce the politicization of EU topics; integration is seemingly imposed by courts and bureaucrats and becomes the opposite of politics. This allows national politicians to refrain from taking responsibility for European integration, let alone for developing a political narrative capable of explaining or supporting it.

Most problematic, however, a rule by law seems to depend on several preconditions which might not endure. These include the stability of the Member States and the openness and receptiveness of their legal and bureaucratic systems to an EU rule by law. Where these preconditions are threatened, as they increasingly seem to be, a rule by law may lose its effectiveness, and classic confederal compliance problems resurface.

The most fundamental risk in the modified confederal model, however, stems from the increasing gap between the confederal basis and the federate superstructure of the EU. As was shown the federate elements in the EU system have gradually expanded and deepened over time. The EU, for instance, claims increasing authority on ever more sensitive areas, which strongly increases its legitimacy demands.

On the other hand the confederal basis of the EU cannot match this federate deepening, and is left struggling to meet these increasing legitimacy needs of the federate superstructure. The confederal elements in the EU system are also incapable of stopping their federate counterparts from expanding further, nor can these federate modifications be removed altogether as this would undermine overall stability.

The inevitable clash between these trends is clear, and is exemplified rather dramatically by the EMU crisis. Yet importantly the confederal perspective demonstrates that this legitimacy gap should not be misdiagnosed as a problem of democratic representation. Nor can it be reduced to a 'no-*demos*' argument. It is true that the creation of a single European people would establish a federate basis, and therefore close the gap between basis and superstructure. However, such a European *demos* only forms *one* of the possible solutions. It should not be mistaken for the problem itself, which originates in the increasing gap between a confederal basis and an expanding federate superstructure.

This distinction between the legitimacy gap itself and the potential solution of a European *demos* is particularly important, furthermore, because the creation of a European people seems unlikely, at least for quite some time to come. As chapter 6 showed, several of the key factors that drove the process of US federation are absent in the EU. Some factors are even reversed, and work against federation. One of the most vital differences in this regard concerns the difference in elite structures. The typical post-colonial elite structure of the US promoted federation: several groups of ousted pre-colonial elites hoped to regain political power and influence through federation.

In the EU no such group exists, or in any event does not form a sufficiently critical mass. Both national and European political power derives primarily from the national level. Rather than aiming to empower the European centre, this reality incentivizes current elites to protect their national authority and strongholds from further centralization. Contrary to the US, therefore, the current elite structure in the EU resists rather than supports a federate shift of ultimate authority to the EU. In addition it was shown that the process of US federation should, for an important part, be understood as an attempt to *limit democracy*, and to ensure that democracy was sufficiently tempered by aristocratic elements. Federation as such should, consequently, not be confused with democratization. Federation is neither necessary nor sufficient for democracy: in fact the situation under the American Confederation could be described as more democratic than the system envisioned by the founders at Philadelphia, as they themselves openly acknowledged.

4 CLOSING THE GAP?

Obviously this leaves the question how to strengthen the confederal foundation of the EU. How to do so before it crumbles under the weight of its own federate superstructure, and without leaving the confederal confines imposed by the lack of a European people? A foundation that will have to build on the specific strengths of the confederal model, yet must avoid its many inherent weaknesses.

Although clearly not coming close to a final solution to this fundamental challenge, the next part of this thesis engages precisely this challenge of modifying and strengthening the EU confederal basis.

It does so by exploring another classic concept of constitutional theory, and one which also played a key role in the US: sovereignty. Can a confederal conception of sovereignty be envisioned which can help to construe a foundation strong enough to support the federate superstructure of the EU? For if such a stronger confederal foundation can be established it would allow the EU to retain and develop its modified confederal system. An outcome that is considered normatively desirable because of its ability to actually combine unity and diversity in a reasonable effective manner, and to do so in a way that realigns government and national democratic systems with the global reality that requires governing. As such a reinforced confederal system could even open up an interesting model for international organization more generally.¹

1 Cf. Elazar (2006), 51: 'There are many indications that the European Community with its functional arrangements presages a revival of confederal government in other parts of the world as well.'