FEDERALISM AND NATIONAL MINORITIES

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Abstract

In many parts of the world, globalisation creates a phenomenon which integrates states into federal-like structures, even if they are not necessarily of the known, classical type, like the European Union, for instance. The international doctrine and practise also credit federal states with a higher potential for economic growth compared to unitary states. Starting from the undeniable fact that the economy and politics are closely linked together, some authors are trying to stretch the benefits of the federal system beyond what it can actually offer and argue that federalism may be the solution to other categories of political issues that the unitary states face. Minority population is one such category. This study aims at showing that the state structure is irrelevant to solving the problems arising from the status of belonging to a national minority. This article is the first part of the study, dedicated to the analysis of the object of regulation, represented by the rights of national minorities.

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1. Overview

Subjects of international law, sovereign and independent states enjoy the freedom of choosing an internal system of government of their own and regulate, without any foreign intervention how to organise political, economic, social and cultural lives. Consequently, national authorities are entitled to decide on the type of government that serves the national interest best. The current international community has preserved two main forms of political and administrative state structures, i.e. the unitary state and the federal state.[2]

The unitary state is mainly characterised by the centralisation of the administrative power. The government controls all local authorities, irrespective of the layer of decentralisation, and can legitimately intervene in their activities. Unlike unitary states, federal states allow for shared competencies among the central government and the local authorities, while the central power can intervene in the exercise of the competencies given to the component states only within the scope and the means necessarily safeguarded in the federal constitution.

Given all that, it means that federalism primarily depends on the domestic law of each state, it is not a matter of international law but rather one attached to internal legislation, part of its upper tier, always provided for in the text of the fundamental law of a state. As for the type of federative organisation, it exclusively depends on the constitutional law of the states[3] adopting this form of political and administrative structure and reflects the structure of power and the way power is exerted on the whole sovereign territory of the states concerned.

Some authors admit that federations emerged from the historical developments taking place on certain territories where *a historical* or *territorial identity* was shaped, beyond differences in culture, language or religion. This type of identity[4] is deemed to prevail on the evolution of the respective communities, where a specific situation sparked the adoption of a federative solution for a certain territory, given the coexistence of group minorities.[5]

Other authors claim that particularly in Western Europe we are witnessing a process of confrontation among states and their regional authorities that would claim the right to establish their own regional parliaments, a situation defined as "a typical state of civil war of the post-modern (post-

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[2] J. Dinstein, *The degree of self-rule of minorities in Unitarian and Federal States*, in Catherine Brolmann, Rene Lefeber, Marjoleine Zieck (eds.), *Peoples and Minorities in International law*, Martinus Nijhoff Publishers, 1993, pp. 221ff.

[3] I. Diaconu, *Minorităţile în mileniul al treilea*, Romanian Association for Democratic Education Publishing House, 1999, pp. 237ff.

[4] G. Molnar, *The Transylvanian Question,* „Hungarian Quarterly", vol. 39, no. 149, 1998, p. 56.

[5] Ibid, p. 61.

national state) age"[6]. Starting from this interpretation, some authors consider that the resulting situation would generate a pluralism of territories that, through a process of secession, devolution, would turn into subjects of the state, i.e. component states.[7]

Based on this interpretation, rooted in the well-known model launched by Samuel Huntington in his *Clash of Civilizations,* they argue, for instance, that Transylvania would be part of another culture but the other historical Romanian provinces, consequently meaning that it is rightly entitled to choose another future, politically speaking. This thesis, and the whole theory regarding devolution together with it, is however countered with political and legal arguments by authors specialising in matters of human and national minority rights.[8]

Another interpretation, yet disproved by historical developments, presents the European Union as an edifice inevitably leading to an European constitutional structure based on three tiers, namely, the regions, the national states that would only serve as a formal community framework and the federal state, whose main task would consist in organising the economic life of the union and safeguarding internal security, as well as defending the territory against any outer enemy attacks. Another theory has also claimed that states and the federal-associated forces should be replaced by a federal centre and federal peripheries, an architecture deemed decisive in building a new Europe.

Though this idyllic architecture of the European edifice was planned to complete in the first decades of the 21st century, reality has totally disproved such assumptions. The European Union is now counting 27 Member States and it is yet far from becoming a federal state. Failure to ratify the Treaty establishing a Constitution for Europe has shown that European states, through the free will peoples expressed in referenda, stay at the core of the European edifice.

Consequently, the Treaty of Lisbon translates into practice this popular signal, emphasising the Union's concern for respecting the Member States' identities and diversity, by pointing out that it does not aim to eliminate or marginalise them. The same treaty does not regulate or even hint at all at any means of unifying the political entities of the component states in a unique political-legal structure.

The Treaty underlines such an approach by setting out concrete ways to increase the role of the national parliaments within the community institutional mechanism, but only as core democratic bodies representing the people of the Member States and not as territorial units making the Union. Consequently, the EU is consistent with its initial objective of respecting the national and regional diversity of its Member States, as well as their cultural diversity, and appreciates that only with everyone's contribution can there a model be created of multicultural coexistence on the European continent.

Also, the Treaty of Lisbon also makes it explicit that the European Union aims at preserving and respecting the Member States' national identity, inherent to their fundamental political and constitutional structures. The same spirit translates in the development of the Charter of Fundamental Rights of the EU that provides for the respect of the people's diversity of language, culture and religion.

In conclusion, the European edifice does not ignore the existence of diversity under all its aspects, neither does it ignore the differences of language, religion and culture, which are key to the existence of national minorities, apart from the one they have in a nation. This does not mean that they are given any role with regard to the future of the Member States, in the organisation of their structure or a place in the Union's further development. Seen in this light, federalisation has never been and will never be a recognised or accepted way to solve the problems arising from ethnicity or those of individuals coming from minority groups.

2. The place of national minorities in the structure of the federal state

The majority of experts in the field of international relationships believe that most of the

[6] J. Newhouse, *Europe's Rising Regionalism,* „Foreign Affairs", vol. 76, no. 1/1997.
[7] Idem.
[8] G. Andreescu, *De la „problema transilvană" la „problema europeană",* „Altera" no. 8/1998, pp. 67ff.

federal states were born out of the specific historical developments of those particular countries, which, for different reasons did not end up in the foundation of unitary states. Some of the reasons involve the relatively parallel development on rather large geographical areas for several hundreds of years, as it is the case of Australia and the United States of America, for instance.

Other states made the very decision to form themselves a federation based on arrangements specific to this type of state organisation, while preserving the entities and identities concluding the arrangements and safeguarding a wide or narrow field of competencies, such as the case of Switzerland.

Also, another formula to create a federal state is to conclude a transaction between two founding linguistic and cultural groups, close in numbers, in the absence of which the political and legal entity could not function as one state, a situation apparent in Belgium and Canada. There are other federal states born from the local self-sufficiency and self-rule tradition strongly rooted in medieval times and replicated in modern times, despite some periods of inexistence, such as the situation of Austria and Germany.

In some of the cases the union or the federation was formed around a ruling dynasty, where the component parts of the political-legal state entity kept strong elements of self-rule and were never really unified, such as Australia, Austria and Germany in modern times, whereas in other cases the federal arrangement was sparked by the need to protect the state entities thus grouped together or to keep them independent from neighbouring countries, such as the case of Switzerland and to a certain extent Canada.

What results from the previous facts is that **none of the federal structures was founded to solve minority issues.** Most of the times, the federated states do not correspond to the ethnic distribution of the population. Neither were they founded on such a basis.

In Switzerland, for instance, there are several French-speaking and German-speaking cantons that were never formed based on linguistic or ethnic criteria, but on the territorial criterion. They became parts of a federation later, at different times and under different historical circumstances. Another example is Canada, where there are several individually developing provinces, made of English-speaking population, which never considered their union based on their common language and culture.

The states making the USA were formed on the territorial criterion and not the ethnic criterion at all, similar to the German, Austrian and Australian states. The only exception to the rule is the Canadian province of Quebec whose political and legal architecture corresponds to the ethnic and cultural criteria, similar to the communities and the regions in Belgium.

3. The legal relationship among the federal state and its component states

The way competencies are shared among the centre and the states making up a federation is laid down in the federal constitution and special legislation. In most federal structures, constitutive rules explicitly provide for the competencies of the Federation, wide or narrow, and leave it to the making states authorities to put in place the remaining competencies.

In some cases, competencies may overlap and they rest both with the federation and the component states, which is known as competing competencies. In other cases, such as Germany, the role of the component state is limited only to setting out the general legislative principles, whereas the competence to adopt the specific legislation to be enforced lays with the member states.

The rule according to which a federal state is built aims at including in the federal competencies those elements of power that underpin the functioning of such an entity such as, national security, foreign affairs, the defence, the currency and monetary system, border control and immigration, the customs regime, the treatment of trademarks, brands and patents, as well as the systems to measure space and weight, animal welfare and plant protection, the regulation of air and railway transport, the issues related to nuclear energy.

Most of the times, the competencies of the federal state include the conclusion of agreements with other countries as well as matters of international trade. There follows that component states are

given regulating competencies in fields such as culture, education, health and social welfare, domestic fiscal matters and environmental protection.

Irrespective of how wide or narrow federal competencies in the field of legislation might be, they prevail on those of the component states, whereas in the case of conflicting competing competencies, the federal norm would apply.

Regarding state structures, we can see that both the federal state and the component states have their own legislative, executive and often judiciary bodies. That is why, in most federations, the Upper Legislative Chamber is made up of the representatives of the component states, elected by those states, most often equal in number for each of the federated state. Also, the component state authorities must necessarily adopt the laws passed at the federal level to render them applicable on the territory of their states, thus making it possible to somehow share legislative power by enabling the component states to participate in the exercise of the legislative role of the federal state.

There are other situations when the main federal laws must be adopted not only by the federal parliament or the majority of the population, but also by the majority of the component states, as it is the case in Switzerland.

This form of shared legislative competencies entails the existence of some arbitration institutions meant to solve potential conflict, both between the federal state and any of the component states and any two component states.

Globalisation as a phenomenon as well as the major crises that the world economy suffered recently have led to an emerging general trend to increase the centralisation of federal competencies at the expense of those attributed to the member states. Even if such a trend does not reflect in the corresponding amendments brought to constitutions. This is felt through the demands of the global economy, regulations and the uniform conditions required by the fast movement of goods, capital, values and information, and the ever more visible process of economic integration as well.

Given all that, it means that the way competencies are shared among the federation and the component states, either with regard to the attributes explicitly resting with the federation and the remaining competencies of the state, or with regard to the explicit attributes resting with the member states, **has nothing to do with national minority issues** and **is not founded on cultural or ethnic criteria** either.

The same logic applies when we deal with competing competencies, wide or narrow, shared by the federation and the member states, where the latter all hold the same competencies and are related to the federal centre in the same way, irrespective of the linguistic, ethic and cultural identity of the populations that make them up.

4. Conclusions

State structures, both at the federal level as well as those attached to the component states, are equally **independent from the ethnic or linguistic fabric of the population** living in different regions. This matter concerns legislative, executive and often judiciary bodies as well as the ways in which the component states participate in the exercise of the executive, legislative and judiciary attributes, and the arbitration bodies, too. The competencies of the concerned bodies are the same in all member states, whereas possible differences are insignificant. There are some exceptions, too. There may be significant differences in the USA, for instance, but they **do not link back to the different ethnic origins of the population.**

The centralising trends of the federal structures, which consist in an increase of the central competences at the expense of those resting with the component states, bear no connection to either the ethnic or linguistic structure of the populations living on their territories. *Per a contrario,* the varied ethical mix in the populations of the states making a federation would rather justify a trend to increase local competencies at the expense of the federal ones, a phenomenon that is not present at all in the current context of the global economy developments at least.

On the other hand, it is noteworthy that within federal states, even if there is a local political and administrative life that acts as a catalyst of natural solidarity, **we have not seen yet the creation**

of a provincial identity that would annihilate or render ethical, cultural or linguistic identities less important. Despite that, there have been discussions regarding federalisation as a solution to interethnic disputes, which is deemed at least in theory a way to achieve the legitimate objectives of the peoples or minorities that used to be part of multi-nation empires.

To illustrate, take for example the theory Aurel C. Popovici developed in several of his works about the concept of federalisation, in late 19th century. To avoid any confusion, we need to emphasise that the Romanian scholar, an expert in politics and sociology, had in mind the whole territory subject to the Hungarian Crown, in a context where his theory aimed at sparking the creation of fifteen **national states** placed under the rule of the Austrian Crown. It was deemed the only the solution that could allow for the survival of the population of Romanian extraction, under the circumstances of an offensive legislative and institutional attack against national identity orchestrated from Budapest, aiming at the assimilation of all the nationalities then found within the borders of Austro-Hungarian Empire, including the Romanians from Transylvania.

In spite of that, the solution Popovici put forward was accepted neither by the government in Budapest not the Romanian political circles in Transylvania, whereas in Austria it had a limited echo.

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