

What is a Federation?

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When explaining European construction the Federal model is often alluded to, whether as a point of reference or as an ultimate goal. However we do have to be clear what this model means. For Olivier Beaud, Federation is a special form of political structure that cannot be grasped without detaching itself from the theory of the State.

Reference: Olivier Beaud, *Théorie de la Fédération*, Paris, PUF, 2009, 456 p., 29 euros.

For more than fifteen years, Olivier Beaud has devoted a large part of his thought to questions raised by federalism¹. His *Théorie de la Fédération* (that has just been republished by Presses Universitaires de France) however does not merely compile this previous work². Instead, it is an ambitious treatise that sets out to redefine the analytical categories traditionally used to understand federalism. If these concepts appear unsatisfactory to Olivier Beaud, it is because they are essentially borrowed from the theory of State. The author however seeks to show that a *federation constitutes a political form in its own right*, distinct from statist forms but of equal status. The aim of the book is to offer this political construct its own distinct theory, that is to say a theory free from the categories that structure the theory of the State.

¹ We could quote (this list is non-exhaustive): Olivier Beaud, “La Fédération entre l’État et l’Empire”, in B. Théret (dir.), *L’État, la finance, le social*, Paris, La Découverte, 1995, p. 282-304; Olivier Beaud, “Fédéralisme et fédération en France: histoire d’un concept impensable?”, *Annales de la faculté de droit de l’Université de Strasbourg*, 1999, vol. 3, p. 7-82; Olivier Beaud, “Fédéralisme et souveraineté”, *Revue du droit public*, 1998, n° 1, p. 83-122; Olivier Beaud, “De quelques particularités de la justice constitutionnelle dans un système fédéral”, in C. Grewe, O. Jouanjan, E. Maulin et P. Wachsmann (dir.), *La Notion de “justice constitutionnelle”*, Paris, Dalloz, 2005, p. 49-72.

² Olivier Beaud, *Théorie de la Fédération*, Paris, PUF, 2007, 434 p. for the first edition (and 2009, 456 p. for the second). The text was not modified in the second edition, but a double index (onomastic and thematic) was added. In the pages that follow we cite the work according to the pagination of the first edition.

Remove the concept of Federation from the orbit of the State

The work opens the first of its five parts on a particularly stimulating critical reflection. The author shows the aporia produced when statist categories are applied to a federal entity. According to Olivier Beaud, the concept of Federation is too often tackled through the issue of sovereignty, a State category par excellence. However, from an internal perspective, sovereignty is defined as the unity of power over a specific territory and, and from an external perspective, by the absence of any superior power. Applying such definitions to a *union of States* leads to inevitable aporia, to which Jean Bodin is also prey. Such an approach leads to the following dilemma: either member-States are sovereign, and sovereignty is destroyed because it is divided, or it is the Federation that is sovereign and member-States are no longer “States” because they are submitted to a higher authority.

Judging the concept of sovereignty “inadequate to think through the federal phenomena”, Olivier Beaud confines it to the theory of the State and hence frees up the concept of Federation³. This leads him to relativise the binary—and doctrinally traditional—distinction between the “confederation of States (*Staatenbund*) and “Federal State” (*Bundesstaat*). After demonstrating the blind spots of this dichotomy, the author underlines its implicit state-centrism. The dichotomy relies ultimately on the attribution of sovereignty to member-States or to the federal apparatus. Here we find the logic of “all or nothing” that fails to take into account both the reality of institutions and the continuity of categories required to describe them. Closer to the ideas defended by Sergio Ortino or Christoph Schönberger, Olivier Beaud proposes to build a “general concept [...] that could be shared by all federative forms”⁴. Through reference to Montesquieu, he lays the foundations of a fully-encompassing concept using the idea of a “union of freely consenting States”.

The dual-nature of the federal pact

This idea supposes paying special attention to the founding moment of Federations and their emergence. Olivier Beaud undertakes this exercise using an updated notion of the

³ Olivier Beaud, *Théorie de la Fédération*, Paris, PUF, 2007, p. 56.

⁴ Olivier Beaud, *Théorie de la Fédération*, Paris, PUF, 2007, p. 92. In other words the concept of Federation developed by Olivier Beaud is not (as it has sometimes been said) an intermediary category between the confederation and the Federal State. It is rather designed as a genre of which the confederation and federal State form two specific limits.

“federal pact”, so familiar in German doctrine⁵. The federal pact is a form of birth certificate of a Federation; it is an operation that is both contractual and founding of a new institution. Here resides one of the principle innovations of theory. Indeed, the traditional doctrine considers the confederation of States as a contractual phenomenon, whereas the Federal State is an institution. Recognising the dual-nature of the federal pact, Olivier Beaud introduces a solution of continuity between the two familiar federal forms.

If this “Federal operation” is of a contractual nature it is because it relies on freely consensual exchange between States. In this sense, the Federation is opposed to the Empire; that is to say to the binding together of States through the action of a higher restrictive power. At the same time, the federal pact founds a new *institution*, a moral entity in its own right that transcends member States while prolonging the political project they initiated. This new collective entity – the “Federation” with a capital “F” – resembles both member-States, the pluralist pole of the Federation, and federal organs – or the “federation” with a small “f” – which constitutes the unitarist pole. In the tradition of Gierke and Kelsen, the federal theory of Olivier Beaud is therefore tripartite and based on equal representation, as it places both federal and federated powers on the same level. As should be clear now, this solution is separate to the two symmetrical theories that consist, in the first case, of assimilating the Federation to the sum of member-States, and, in the second, to identifying the Federation with federal organs.

According to Olivier Beaud, the relationships formed between the federation and the member-States are marked both by an *independence* and an *interdependence* the degrees of which vary in each empirical Federation⁶. The principle of independence is present in two types of mechanism: the guarantee of the status of member-States by federal law and the autonomy, which varies in extent, of the federation in relation to the States. The principle of interdependence signifies that the legal orders that compose the Federation are not radically foreign to each other, but that their mutual relations are now regulated by federal pact.

⁵ See: Carl Schmitt, *Théorie de la Constitution*, Paris, PUF, 1993 (1928), p. 507 and following. In particular, p. 512 where Schmitt defines the Federation (*Bund*) as “a durable union based on a free convention, serving the common goal of the political conservation of all the members of the Federation; it modifies the overall political *status* of each member of the federation as a function of this common goal.”

⁶ We have to underline that these two principles only partially cover the two characteristics traditionally applied to member-States of the same Federal state that is to say the autonomy and participation in the elaboration of federal law. Olivier Beaud’s conceptual definitions are broader and can thus be applied to what is traditionally designated as the confederation of States.

The federal space as interspace

This idea is developed in the third part of the work where Olivier Beaud examines the two major consequences of the federal pact: the transformation of “monad-States” into member-States, on the one hand, and the creation of a new institution on the other. As regards the first idea, the transformation of States is above all relational. States remain political entities and continue wielding public power over a territory and a population on this basis⁷. The legal relationship between States changes however: “The Federation ‘internalises’ the relations that were before purely inter-state, or international, relations; these relations do not become “intra-state relations” however.”⁸ What therefore emerges is an intermediate status, a status of “foreign but neighbouring”, one that sits between the status of being identical or radically heterogeneous.

This phenomenon is not a mental construct but covers perfectly tangible legal realities. Thus, for example, the supreme jurisdiction of a member-State necessarily pays special attention to jurisprudences established in other member-States. The question of citizenship offers an even clearer example, for it brings out an intermediate category between the citizen of a member State and the “foreigner”: the “national citizen” of the Federation who is not a citizen of the federal State. Furthermore, the transformation of States does not exhaust the consequences of a federal pact, the founding role of which should be recalled.

By describing the Federation as an institution, Olivier Beaud especially wants to show how it acquires a certain autonomy in relationship with other member States (the degree of this autonomy varies from one Federation to another). In this respect, the most revealing question is that of the admission of new members, for this procedure differs intrinsically from the original federal pact. The desire for membership expressed by a candidate State is no longer submitted to the approval of a group of monad-States, but to an internal act within the Federation that might in some circumstances upset certain member-States. All in all, membership to an already formed Federation is not a contractual act but the result of an institutional procedure that at least partially escapes the will of member-States.

⁷ In accordance with the criticism laid out at the start of the work, Olivier Beaud leaves aside the question of the sovereignty of States (of its lessening or its transfer).

⁸ Olivier Beaud, *Théorie de la Fédération*, Paris, PUF, 2007, p. 231.

The *telos* of the Federation

The particularly enlightening fourth part of the work demonstrates the author's theoretical originality. Making a break with dominant doctrine, Olivier Beaud re-introduces a dimension of purpose to the definition of political form in general, and of the Federation in particular⁹. In his eyes, what characterises the *telos* of the Federation is its *contradictory duality*: at the same time as they attempt to preserve their individual political existences, States adhering to the federal pact create a shared purpose. It should be noted that neither of these goals can be achieved without the other disappearing: "Thus the very existence of a Federation translates not only this balancing act between two conflicting aspirations, but also the *imperfect fulfilment* of them."¹⁰ This is why all Federations show a tension between the centrifugal force brought by the "individualist purpose" of States and the centripetal force that their "common purpose" implies. It is on this foundation that the author proposes to rethink the distinction between the confederation (where the individualist purpose dominates) and the federal State (where the common purpose dominates).

Once more, the demonstration is not purely theoretical. In many cases, legal texts record this duality of purposes and distribute the corresponding competences to the members of the Federation. As far as the common purpose is concerned, it is generally *security* and *prosperity* that are foregrounded. The first cannot be reduced to external defence but also includes the maintenance of domestic order (with the risks that any system of intervention or federal execution has for member-States). The aim of economic prosperity – which tends to limit the protectionism between member-States – is also the subject of frequent tensions. The individualist purpose consists of defending the existence of member-States as political entities. This supposes not only that the federation is not in a position to appropriate the prerogatives of federated States, but also that it actively guarantees them. All in all, the fundamental paradox of any Federation is that its creation should fulfil both conflicting expectations.

Federation and political regimes

In the fifth and final part of his work, Olivier Beaud examines the relationships between federalism (understood as a political form, on the same basis as the State), and the

⁹ In fact, at least since Jellinek and Weber, there has been a habit to define political forms through their specific means (violence) rather than through their purposes. In this respect, the originality of Olivier Beaud's work does not only lie in the discovery of a new political form but also in the approach used to get there.

¹⁰ Olivier Beaud, *Théorie de la Fédération*, Paris, PUF, 2007, p. 280.

forms of government (or political regime) according to our traditional distinctions. By paying attention once more to emerging Federations, the author shows that they create distinctly federative organs that have no functional equivalent in the unitary State. Such is the case with the Federal Diet, the only federal organ in embryonic Federations, which cannot be assimilated to classic parliamentary assemblies. With this asymmetry noted, it is not relevant to apply the typology designed to characterise state governments to a Federation.

Transference of this type is no easier in more complex federal systems. Olivier Beaud examines the examples of Switzerland and America and then looks at “Federations of Republics”. He underlines the very ambivalent character of the federal clauses that guarantee federal States a legal right to a republican regime. While these clauses enable member-States to preserve the form of political existence that they have chosen, they could also become a tool of the federation to limit the constitutional autonomy of member-States or justify questionable federal intervention. Here we find a tension typical of federalism; federal law is both the guarantor of the political identity of States and a potential agent of their involuntary transformation.

In line with Montesquieu, Olivier Beaud also observes that a Federation whose member-States have heterogeneous forms of government is intrinsically more fragile. From here comes the tendency within more enduring Federations (like Switzerland), to a rapprochement among member-States’ political regimes. This movement of homogenisation often reflects back on the federal apparatus itself: through mimesis, political functioning generally ends up approaching the form of the dominant government. In its monarchic form, this tendency seems to be confirmed by the history of the German second *Reich*. Initially intended by Bismarck as a republic of monarchies, the Empire progressively drifted towards an increasingly monarchist form of functioning. This is how the progressive relegation of the *Bundesrat* to the profit of the Emperor and his administrative apparatus should be analysed.

With these details dealt with, Olivier Beaud concludes the work with a reflection that is worth citing. While the State is always defined by the sole criteria of sovereignty, the Federation is characterised by a series of opposing principles: “The principle of federative duality (there are two public powers in a Federation), the principle of federative parity (the federal legal and federated legal orders are equal), the principle of federative plurality (there is a federation but necessarily several member-States). None of these features are to be found in

a State.”¹¹ Thus, by recapitulating his fundamental reasoning, Olivier Beaud demonstrates the operational character of the Federation.

Constitutional law as political law

As we can see, the primary merit of the work is to honour the promise of its title. In these pages we indeed find a new theory of Federation, and a different way of envisaging and understanding the phenomenon. This constitutes the work’s strength but also its difficulties; it is hard to break with established paradigms and reinterpret subjects we already think we know with new-opened eyes. However Olivier Beaud has made things considerably easier for his reader. The theses forming the framework of the work are introduced and summarised at the start and end of each chapter and are always carefully explained and abundantly illustrated. The book had great clarity and is written in a simple strong language that makes the writing legible to non-legal-experts. This formal aspect should not be underestimated as it demonstrates a theoretical project that, while not fully explicit, is still very real: to break the isolation of constitutional law by resuming dialogue with the other social sciences.

The originality of this approach resides above all in the author’s methodological and doctrinal choices. By re-introducing purpose and intention into the definition of political forms, Olivier Beaud inscribes himself in a largely neglected tradition of legal theory: that of institutionalism, of which Maurice Hauriou and Santi Romano were the main upholders. Olivier Beaud stands apart from the jusnaturalism of a Hauriou. To him the federative *telos* is not a supra-positive and eternal essence. It is instead a social and historical project that covers essentially political interests. As a result in a concrete case, the political purpose of an institution can only be grasped at the price of historical, political, and even economic analysis. Hence the reintegration, in the work of Olivier Beaud, of extra-legal data often considered superfluous by many of his colleagues. In a doctrinal landscape dominated by legal dogma (that is to say by the systematic analysis of judicial decisions), one has to praise the profound originality of an approach that sets out to inject an intrinsically political dimension back into constitutional law. The historian, the political scientist and even the philosopher can genuinely delight in this. Not only because their work is liable to find an unexpected echo among legal experts, but also because in return they will benefit from new analytical tools that they will be able to use to describe and explain their own subjects in a more relevant way.

¹¹ Olivier Beaud, *Théorie de la Fédération*, Paris, PUF, 2007, p. 423-424.

While the *Théorie de la Fédération* is indeed the work of a legal theorist, the form and content show that he is not only addressing law studies.

Let us add that the work of Olivier Beaud very consciously operates a “return of theory” that is not at all straightforward in the contemporary context. It stands out from the tendency (apparent in all areas of the social sciences) to insist on the uniqueness of the event, mistrusting conceptual constructions that are too broad and defends in the noble sense of the term the casuistry of the scientific subject. Running against this tendency, Olivier Beaud appears more as the French heir of *allgemeine Staatslehre*, an enterprise that does not renounce the fashioning of concepts and typologies to apprehend the real. This relationship can be read on each page of the work, and the author calls upon the most eminent legal experts of the past centuries in turn. For all that, the doctrine does not stand as oracle or authority. On the contrary Olivier Beaud highlights the disagreements that divide the great public law specialists and on the political and theoretical motives that implicitly or explicitly structure their debates. From this emerges a refreshing image of a too-often disparaged discipline: the history of ideas. Far from discursive embellishment or an instrument of legitimation, it appears as an irreplaceable source of investigation.

Furthermore, and this is an essential feature of his method, Olivier Beaud has a constant eye for testing out his constructions through confrontation with legal and political realities. It is his conviction that the value of a theory can essentially be measured by its ability to adequately describe reality. Hence the multiplicity of historical examples and concrete case studies that are scattered throughout the book. Readers are themselves invited to test the solidity of the reasoning of each of his stages. He moreover discovers reflections and situations full of theoretical issues. In this respect, while the United States and their founding fathers are not forgotten, the book also pays homage to a European heritage (which is both institutional and intellectual) about which too little is known. The significance of Swiss constitutional history in particular, a rich and fascinating case study, is fully elaborated here.

The main reproach that can be made of the book is to not touch on certain questions that the reader is sure to pose. For example, when Olivier Beaud looks at emerging Federations, he deliberately leaves the question of “federative decomposition” open. How can we understand that an originally unitary State can become progressively federal? Similarly, bearing in mind that the formulation of this theory was motivated by the formation of the

European Union, how does the author envisage the application of his theory to Europe? Far from showing the limitations of the work, such questioning rather underlines its strength and potential. For the first instinct of readers' on closing the book is the desire to reinterpret their environment in the light of Beaud's newly acquired paradigm. This reflex will surely guarantee the *Théorie de la Fédération* great posterity in the years to come.

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