European federalism: Pitfalls and possibilities

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Abstract

The purpose of this article is to show that federalism provides a better understanding of what the EU is, the nature of the challenges facing it, and the realm of possible solutions than do alternative conceptions such as multilevel governance. First, some important distortions about the EU and federalism in the EU studies literature need to be cleared up, before developing a new federal conception of the EU, that of a ‘poly-cephalous’ or multi-headed federation. A poly-cephalous federation is not only deeply contested; it is a highly unstable system, in particular when facing the types of challenges that the EU has faced since the global economic crisis of 2008. In the final section, the article looks at a full-fledged pluralistic federation with poly-cephalous traits, namely Canada that, since the 1980s, has greatly modified its poly-cephalous features with democratic effects. The article identifies a set of lessons for the EU from Canada’s experience.

1 | INTRODUCTION

There is a curious paradox in the political and academic debate on the European Union (EU). Whereas it is widely recognised that the complex EU has federal features, the general tendency has been to analyse, reconstruct and assess the EU with reference to theoretical frameworks that are more attuned to centralisation than federalisation, and consequently, to frameworks that deflect attention from the key constitutive challenges facing the EU, pertaining to issues of political order, basis of legitimacy, sphere of competence and mode of community.

This article aims at bringing the debate on the EU back to the federal terrain. I start (in Section 2) by pointing to some of the important distortions that have thus far shaped theorising on the relationship between the supranational centre and the Member States (including the insufficient attention being paid to the differences between federalisation and integration), and showing why the main ‘pluralistic’ theoretical frameworks of European integration (multilevel governance, multinational federation) fall well short of providing a viable analytical framework for the analysis, reconstruction and assessment of the EU, and the challenges facing it. This leads me (in Section 3) to outline the key elements of a new and different federal conception of the EU. My claim is that

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the EU, as it stands, is a deeply contested and quite unstable type of federation, which is centralising without proper and meaningful democratic controls. In this sense, I suggest that we characterise the EU as a (fledgling) ‘poly-cephalous’ or multi-headed federation.¹ The post-2007 set of crises have not only rendered instability apparent (so much so that the continued existence of the Union is seriously threatened), but the EU is also veering off the federal path. The article closes by considering (in Section 4) what the EU can learn from other federations such as Canada, with a long historical experience as a poly-cephalous federation. Canada transformed its federal system in the 1980s, greatly modifying its poly-cephalous traits, resulting after a lengthy period of contestation in improved stability and democratic legitimacy.

2 | EU STUDIES: THE CENTRALISING BIAS

This section starts by pointing to some of the distortions that mar much of the EU studies literature; proceeds to reasons for the insufficient attention paid to federalism; and thereafter points to the shortcomings of multilevel governance and multinational federalism.

2.1 | The centralising bias in EU studies

2.1.1 | Taking centralisation largely as a given

Up until the manifold and overlapping crises struck the EU from 2007, EU studies tended to focus on developments at the supranational (that is, EU) level as key drivers of the process of integration. This was largely due to the fact that the actual theoretical ‘engine’ of European integration was either taken from ‘state’ legal-dogmatic constitutional theory (the post-New Deal United States in the case of the makers of EU law as an autonomous discipline) or from classical ‘international relations’ theories, in the form of neo-functionalism and intergovernmentalism.²

The debate centred on whether the EU was integrating or not. Both the pioneering EU law and neo-functionalism were imbued with a strong

¹ Some of the relevant features and developments are well captured by the ‘new intergovernmentalism’. See C. Bickerton, J.D. Hodson and U. Puetter (eds.), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (Oxford University Press, 2015). The problem is that the authors do not add up the important empirical observations in a convincing conceptualisation of the EU. All federal systems contain intergovernmental features; hence the observations by Bickerton et al. can be made sense of under a federal heading.

² See J.E. Fossum and M. Jachtenfuchs, ‘Federal challenges and challenges to federalism: Insights from the EU and federal states’, (2017) 24 *Journal of European Public Policy*, 467–485.

centralisation bias, to the extent that they focused on centre formation and consolidation. Intergovernmentalism, on the other hand, was devised as a theory of state resistance to integration, or to put it more precisely, centralisation of power: intergovernmentalism posited that integration proceeded as far (and as quickly) as states permitted it.³ The envisaged process dynamics were different from those of federalisation/de-federalisation.

Finally, we could detect a general ‘integration-cum-centralisation bias’ in EU studies, with the bias helping to produce a distorted notion of federalisation, because it was subsumed under integration.⁴ That implied a downplaying of the important difference between integration as centre formation/consolidation, on the one hand, and federalisation as striking a balance between unity and diversity in substantive terms, and between shared rule and self-rule in communal and procedural terms, on the other.

2.2 | Reasons for the failure to develop a distinct federal theory: No obvious federal template for the EU

One reason why mainstream theorising on European integration did not ‘go federal’ was that there was no obvious suitable federal template for the study of

³ This position has its roots in the realist tradition of international relations. A classic statement with direct bearings on the EU is found in S. Hoffmann, ‘Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe’, (1966) 95 *Daedalus*, 862–915. For the standard reference to the neo-realist position, see K. Waltz, *Theory of International Politics* (Addison-Wesley, 1979). For a sophisticated empirical assessment, see A.S. Milward, *The European Rescue of the Nation-state* (Routledge, 1992). For a modified and nuanced version, see Andrew Moravcsik’s *The Choice for Europe* (UCL Press, 1998).

⁴ Note that this bias is mainly found in those portions of EU studies that did *not* work from a federal perspective. Federal scholars have been sensitive to EU pluralism and diversity and have made important contributions to our understanding of the EU. The problem is that they make up a small minority, only. For an overview of federal scholarship on the EU, see Fossum and Jachtenfuchs, above, n. 2. Just to cite two of the contributors that have been particularly sensitive to EU diversity, consider for instance how Joseph Weiler with his notion of constitutional tolerance has underlined that the EU has constantly sought to reconcile a multitude of political orders and constitutional arrangements. He did not however develop these important insights into a theory of federalism that could render explicit what kind of federation the EU constituted. See J.H.H. Weiler, *The Constitution of Europe, ‘Do the New Clothes Have an Emperor?’ and other Essays on European Integration* (Cambridge University Press, 1999); J.H.H. Weiler, ‘European Democracy and the Principle of Toleration: The Soul of Europe’, in F. Cerutti and E. Rudolph, *A Soul for Europe*, Vol. 1 (Leuven, 33–54). Neil MacCormick has made a major contribution to our understanding of the tangled nature of sovereignty in Europe, which paved the way for a federal understanding. That he developed with explicit reference to the notion of subsidiarity whose intellectual lineage is closely related to that of federalism. See N. MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999).

the EU. Mainstream federalism focused less on contorted processes of federalisation and more on established state-based federations.⁵ The latter were steeped in federal constitutions in which the spheres, principles and norms of shared-rule and self-rule, and the interplay between them, were already spelled out.⁶

Quite obviously, that has not been the case in the EU, which lacks not only a written constitution, but also a constitution in a normative, democratic sense.⁷ The EU has some federal features, but clearly lacks anything coming vaguely close to a federal constitution.⁸ The federal challenge of establishing the terms of shared rule and self-rule remains unsettled in the European case. Two immediate challenges emerge: (1) *How* to ensure a viable federal balancing of shared rule and self-rule in the absence of a constitutional settlement worthy of its name? (2) *Who* is to ensure the federal balance, especially in a gradual, step-wise, and quite contorted process of coming together?⁹

Instead of a formally agreed-upon balance, we can observe ad hoc, highly skewed and unsustainable forms of balance (as documented, for example, in the ‘constitutional pluralist’ literature, including the so-called ‘judicial dialogues’).¹⁰ The absence of an overarching design leaves balancing to the caprice of individual institutions and their interactions. The power balance is skewed in favour of centralisation by stealth. The core institutions, notably the Commission, the Court of Justice of the European Union, the European

⁵ For important exceptions, see C. Friedrich, *Trends of Federalism in Theory and Practice* (Pall Mall Press, 1968), and A. Benz and J. Broschek, *Federal Dynamics – Continuity, Change, & the Varieties of Federalism* (Oxford University Press), 2013.

⁶ That implies first that the actors agree to live under a system of shared rule combined with self-rule (and actively embrace this, which is referred to as the federal spirit or federal comity). Second, the institutional make-up of the federation embodies the federal principle, in other words that the system’s institutional make-up operates in accordance with shared rule combined with self-rule. Third, there is an overarching shared federal society; in addition, each sub-unit governs its distinct society.

⁷ See J.E. Fossum and A.J. Menéndez, *The Constitution’s Gift – A Constitutional Theory for a Democratic European Union* (Rowman and Littlefield, 2011).

⁸ There have been numerous instances where federal intentions have been expressed; they have never been accepted by all relevant stakeholders. Some Member States reject that the EU is involved in a process of federalisation.

⁹ The third problem, which will not be addressed here, is that of how much sub-unit diversity federalism can accommodate. The EU’s Member States are highly diverse, and some of that diversity is affecting the integration process through opt-outs, derogations, special status, etc. What distinguishes all federations (even asymmetrical ones) from the EU is their basic structural-institutional similarity at the sub-unit level, and across levels.

¹⁰ M. Avbelj and J. Komarek, *Constitutional Pluralism in the European Union* (Hart Publishers, 2010).

Parliament and the European Central Bank are hard-wired in favour of integration. In addition, intergovernmental institutions, the European Council and the Council of Ministers formations, foster interstate cooperation in areas formally reserved for self-rule. Thus, even if the present unusual federal design could be considered sustainable,¹¹ it would nevertheless be based on very hazy bounds of self-rule.

The EU lacks mechanisms or procedures capable of ensuring the actual preservation of self-rule, which raises questions as to whether the ongoing process of integration is compatible with federalism's core precepts.

The muddled federalist design has had an effect on the way in which the European Union is theorised. In particular, neither in terms of practical design nor in terms of theory has the difference between integration and federalisation been spelled out sufficiently.¹² EU studies has tended to associate integration with centre-formation and consolidation, whereas federalisation would focus on *whether centre-formation unfolds in such a manner as to ensure that there is a system of shared rule at the federal level*, and further that that system *is compatible with and does not undermine sub-unit or Member State self-rule*.

By the same token, European studies has tended to ignore the possibility that the system could be moving away from federalism, in other words, de-federalising (whether because of the Union centralising or disintegrating); or that the in-built bias towards centralisation may result not only in de-federalisation, but also in de-democratisation.¹³

2.3 | False theoretical steps

2.3.1 | The EU as a system of multilevel governance

Analysis, reconstruction and assessment of the EU through the lenses of multilevel governance became quite fashionable in the late 1990s and early

¹¹ Compared to all other federations, the EU appears as a kind of upside-down federation with deep economic integration, but without a truly common defence. See Weiler, *The Constitution of Europe*, above, n. 4.

¹² Federalisation refers on the one hand to the *intention* to establish a federation, and on the other, to the *process* whereby the federation is established. Federalisation thus covers the process from federal intention to federal result. For different accounts of federalisation, see C. Friedrich, above, n. 5; J.E. Fossum 'Democratic federalisation and the interconnectedness—consent conundrum', (2017) 24 *Journal of European Public Policy*, 486–498.

¹³ De-federalisation hardly figures at all in the federalist literature. See the overview in Fossum and Jachtenfuchs, above, n. 2.

2000s. In effect, the European Union is usually considered to be a paradigmatic case of ‘multilevel’ governance.¹⁴

Systems of governing characterised as ‘multilevel governance’ are marked by three main features, which analysts hold out as distinctive. First is the existence of several levels of governing with overlapping competences. Second is intense interaction across levels of governing, including not only political interaction, but public–private, and private–private interaction. Third is a specific mode of governing, characterised by reliance on (formally) horizontal forms of interaction operating through innovative practices in what is claimed to be a networked fashion.¹⁵ In negative terms, multilevel governance is distinguished from the state-based and territorial form of rule, on account of its horizontality (which contrasts with the hierarchical character of the latter).¹⁶ Moreover, the more or less explicitly articulated assumption that runs through this body of thought is that federalism applies to established state-based federations, whereas governance applies to international and transnational governing arrangements, such as the EU.

However, there are good reasons to consider that multilevel governance, understood as a theoretical framework, falls short of making sense of the EU. There are three main reasons for that: the distorted characterisation of the *actually existing* EU; the lack of attention to power and territory, essential determinants of the exercise of power; and the incapacity to tackle basic constitutional questions, including those relating to the very nature of the polity.

First, hierarchical relations are an intrinsic part of the way in which government proceeds in Europe, including the relationships between the

¹⁴ G. Marks, F.W. Scharpf, P.W. Schmitter, and W. Streeck, *Governance in the European Union* (Sage, 1996); S. Piattoni, *The Theory of Multilevel Governance* (Oxford University Press, 2010). Other complementary labels are: transnational governance and experimentalist governance. On the former, see, e.g., J. Bohman, *Democracy across Borders: From Dêmos to Dêmoi* (MIT Press, 2007); on the latter, see C.F. Sabel and J. Zeitlin (eds.), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press, 2010).

¹⁵ There is a large body of literature on multilevel governance. For overviews, see for instance I. Bache and M. Flinders, *Multilevel Governance* (Oxford University Press, 2004); H. Enderlein, S. Wälti and M. Zürn, *Handbook on Multi-level Governance* (Edward Elgar, 2010); F. Lépine ‘A Journey through the History of Federalism – Is Multilevel Governance a Form of Federalism?’, (2012) 363 *L’Europe en formation*, 21–62. See also n. 14 above.

¹⁶ Lisbet Hooghe and Gary Marks distinguish between two forms, with the first type (MLG I) referring to the standard model of federal government as a hierarchical system of rule based on a limited number of general-purpose jurisdictions, and the second type (MLG II) referring to a large number of task-specific and flexible jurisdictions. L. Hooghe, and G. Marks, ‘Unraveling the Central State, but How? Types of Multi-level Governance’, (2003) 97 *American Political Science Review*, 233–243.

Member States and the EU. Even if the EU poses as encouraging networked governance, there has never been a complete transition from hierarchy to networked governance; indeed, it could be argued that in many cases hierarchy is simply clothed as networked governance (something that increases, not decreases, the risk of arbitrariness). The state, far from withering away as an organisational form, has been transformed (and with it state power based on coercion). On the one hand, the coercive imposition of EU law is most of the time not in the hands of supranational institutions, but proceeds through the agency of what formally speaking are national institutions – that in actual practice are interwoven with the EU. In this sense, it could be said that states *lend* their stateness and statehood to the EU.¹⁷ On the other hand, the EU has over time acquired powers that are defining of the state (including the power over the financial life and death of states and financial systems, and very recently, policing powers over European external borders).¹⁸

Second, multilevel governance fails to consider the sources and influence of power, be it economic, physical or social, in European politics. As Michael Keating has pointed out, scholarship on multilevel governance has tended to focus overly strongly on the decision-making process, while failing to consider who wins, who loses, how, and why. This implies that multilevel governance provides us with an unsatisfactory theoretical framework for political analysis. In short, theories of governance run a serious risk of not only ignoring power, but also of cloaking it.¹⁹ Moreover, as Keating also notes, multilevel governance theories, even if dealing with the overlap of power in a given territory, pay little or no attention to territory itself, to how it affects the exercise of power. So much so that ‘the concept of level seems to be used in a very imprecise way.’²⁰

Third, multilevel governance focuses on policy-making and governance processes, but is not well placed to address such core questions as the nature and status of the polity, which refers to the core constitutive issues of the polity. With that is meant the polity’s basic constitutive principles; the principles that inform and underpin the polity’s institutional make-up; and the nature of society (identity, sense of community and belonging). Multilevel governance therefore tends to downplay normative issues pertaining to representation (who represents

¹⁷ On the notion of stateness, see J.P. Nettl, ‘The State as a Conceptual Variable’, (1968) 20 *World Politics*, 559–592.

¹⁸ P. Genschel and M. Jachtenfuchs, *Beyond the Regulatory Polity?: The European Integration of Core State Powers* (Oxford University Press, 2013).

¹⁹ See M. Keating, ‘Europe as a multilevel federation’, (2017) 24 *Journal of European Public Policy*, 615, 621–622.

²⁰ *Ibid.*

whom, how, and in accordance with whose authorisation?); accountability (who is responsible to whom and in accordance with what principles and along the lines of which constituencies?); recognition (who is recognised as a citizen, and as a member of the community and who is not?); and (re)distribution (what are the principles guiding who gets what and how, and how are they justified?).

In sum, multilevel governance's depiction of the EU provides a distorted view of the EU *qua polity*. The distortion pertains to the *federation* aspect, in other words the system's institutional make-up. In addition, multilevel governance largely ignores the *federalism* aspect, or the basic principles and the 'federal spirit'²¹ that animate the federal system.²² Federalism requires that we pay explicit attention to the nature and status of the polity, territory and boundaries, as well as questions of community, identity, consent and stability. In politics, such as the EU, these are the main issues that are at stake. Multilevel governance systematically downplays these issues, and therefore detracts attention from the main challenges facing the EU.

To sum up thus far, multilevel governance provides us with a distorted rendition of the EU, not least because it is inattentive to power and domination. It is also not attuned to constitutive issues pertaining to the nature and shape of the polity and its attendant society, including normative issues of democracy, legitimacy and accountability. These and other features make it quite unsuitable for capturing the many fundamental challenges facing the deeply contested EU.

2.3.2 | Multinational federation—a treacherous path

Among federally oriented scholars, we find analytical approaches to the EU that serve to detract attention from the core issues facing the EU. Multinational federalism scholars recognise the EU's federal features, and they are attentive to the fact that there is conflict, but they nevertheless lead us down a treacherous path in terms of depicting the core features of the EU and the challenges it faces.

A multinational federation is a federation of peoples, whose national identity is different from their identity as citizens of the federation.²³ Sub-unit or

²¹ See M. Burgess, *In Search of the Federal Spirit – New Theoretical and Empirical Perspectives in Comparative Federalism* (Oxford University Press, 2012), 22.

²² Preston King introduced the important distinction between federalism as a repository of values and principles or a political ideology on the one hand, and federation as a form of political organisation on the other. See P. King, *Federalism and Federation* (Johns Hopkins University Press, 1982).

²³ W. Kymlicka, 'Multinational Federalism in Canada – Rethinking the Partnership', in R. Gibbins and G. LaForest (eds.), *Beyond the Impasse – Towards Reconciliation* (Institute for Research on Public Policy, 1998). See also A.G. Gagnon and M. Seymour (eds.), *Multinational Federalism – Problems and Prospects* (Palgrave, 2012).

EU Member State national identity is recognised and accommodated, because each nation enjoys considerable autonomy.²⁴ Sub-unit nations vary considerably; hence, multinational federations are typically quite asymmetrical in structure.

How well does this notion fit the EU? The EU explicitly recognises sub-unit or Member State national identity. Consider Article 4.2 TEU:

The Union shall 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.

This brings up the question of whether equality of Member States puts a damper on national specificity. The short answer is that this has not been so in linguistic terms, whereas we do see it in terms of socio-economic models. Particularly pronounced in the crisis but with roots back to the 1970s, we see the imposition of what may be described, for lack of more precise words, as a neoliberal socio-economic model that violates Member State equality, has profoundly negative redistributive effects, and likely has culturally homogenising effects.²⁵

A multinational federation presupposes that all citizens are federal citizens with the right to co-determine the nature and development of the federation. EU citizenship falls well short of doing so, its substantive content revolving around apolitical faculties (the right to free movement, very especially when connected, in origin or destination, with the exercise of the rights to private property, entrepreneurial freedom or engagement in salaried work).²⁶ The EU is then also not a full-fledged federation. The central EU-level lacks sovereign territorial control and taxing powers; its continued existence is ultimately dependent on the continued support of the core Member States. Thus, while the EU may be said to have some of the traits proper and characteristic of a multinational federation, it

²⁴‘Since the nations of a multinational democracy *are* nations, their members aspire to recognition not only in the larger multinational association of which they are a unit, but also to some degree in international law and other, supranational legal regimes.’ J. Tully, ‘Introduction’, in A.G. Gagnon and J. Tully (eds.), *Multinational Democracies* (Cambridge University Press 2001), 1–33, at 3.

²⁵ While the CJEU regards constitutional identity as a matter of idiosyncratic ‘cultural’ factors, national constitutional courts interpret it as pertaining to core constitutional questions; the CJEU’s selective interpretation suggests that the EU is not taking constitutional identity sufficiently seriously.

²⁶ For an overview of the different categories of citizens in Europe, see R. Bauböck, ‘Why European Citizenship? Normative Approaches to Supranational Union’, (2007) 8 *Theoretical Inquiries in Law*, 452–488.

is also clear that the EU does not qualify as a full-fledged multinational federation.

The critical issue is whether the notion of multinational federation captures the challenges facing the EU. It is quite revealing that the notion of multinational federation is most frequently discussed in relation to established federal states, notably Canada and Belgium. The core issues that multinational federalism scholars focus on reflect these origins. A core notion is that each sub-unit nation in these entities is entitled to sustain its difference and distinctness. The main focus is then on *recognition*, or whether the federation and the other sub-units recognise each other's national distinctness, and the overall system's national diversity. That brings up two issues. One is what holds the system together, and the other is what this entitlement implies. With regard to what holds the system together, nationalism highlights the Us-Them distinction and is based on exclusion. What, then, is it that holds a system made up of multiple nations together? Federalism's answer is that federal systems harbour inclusive mentalities and mind-sets. There is a distinctive federal way of life, where citizens feel attachment to multiple communities, at different levels of aggregation.²⁷ The problem with multinational federalism is that the focus on accommodating national difference and diversity deflects attention from those features that federalists focus on, namely the conditions that enable people to accept a system that combines shared rule with self-rule.

Multinational federations highlight national identity as designative of the community, and as qualifying as giving the right to self-determination as a democratic people (or democratic demos). The critical issue that multinational federalism skirts around is: *what* qualifies a collective as worthy of recognition as a self-governing people? In what respects can and should they govern themselves? This question figures centrally on the European agenda today. It is about the status of Member States within the EU, as well as the status of regions with distinct national minorities (Scotland, Catalunya, Flanders and Wallonia are cases in point).

One reason why multinational federalism skirts around this question is because it pays insufficient attention to *power*. The history of state formation shows us that most instances of contemporary states have emerged through less

²⁷ Nationalists appeal to the value of fraternity but confine it to one group, or culture or language community, whereas federalists *expand* it: 'the idea of fraternity looks two ways. It looks to those who share a way of life; it also looks to those who have adopted alternative ways of life.' S.V. LaSelva, *The Moral Foundations of Canadian Federalism* (McGill-Queen's University Press, 1996).

than democratic means.²⁸ Power has played a central role in the forging of nation-states.²⁹ With this in mind, it is difficult to ignore the fact that the question of what qualifies a collective as worthy of recognition as a self-governing people has a lot to do with the power relations involved. This becomes readily apparent when we keep in mind how the literature depicts state formation and nation-building, as a process where the political system—political and legal institutions—plays a central role in forging and sustaining identities and communities.

Historical experience shows that an important factor in ensuring that a national collective holds the right to self-government today has been its access to institutional and other sources of power, notably access to those institutional means that enable it to credibly assert its status as a people. Those defining elements are precisely the objects of political struggle, which nation-builders seek to assert control over: immigration, inculcation, socialisation; all those levers that enable the officials of the community to regulate entry and exit to/from the community, to set the terms under which these processes take place, and how people are incorporated in the political community(ies). Those are precisely the levers that help to define a community as a people.

Insofar as students of federalism apply the multinational federalism research agenda to the EU, they end up focusing on the wrong questions. The main concern of multinational federalism scholars is that of how to accommodate national diversity. The normative problem is that it reifies national power and national control of community, to the detriment of those obligations that national communities have made to each other in the EU setting. Thus, in the EU the focus would be on those socio-cultural factors that pull it apart, not those holding it together. Ironically, it would also deflect attention from the important redistributive challenges presently tearing the EU apart. In the EU setting, issues of recognition are profoundly linked with redistribution. The upshot is to ignore the main challenge facing the EU, namely to develop a federalism capable of sustaining the EU as a system based on a viable combination of shared rule and self-rule.

²⁸ As Ian Shapiro has noted: ‘social orders come to be what they are in morally arbitrary ways.’ See I. Shapiro, *Democracy’s Place* (Cornell University Press, 1996), 225.

²⁹ S. Rokkan, ‘Dimensions of State Formation and Nation Building: A Possible Paradigm for Research on Variations Within Europe’, in C. Tilly (ed.), *The Formation of National States in Western Europe* (Princeton University Press, 1975). See also C. Tilly, *Coercion, Capital and European States, A.D. 990–1992* (Wiley-Blackwell, 1992).

3 | AN ALTERNATIVE CONCEPTION: THE EU AS A POLY-CEPHALOUS FEDERATION

In this section, I will first provide a brief summary statement of the core features of federalism. These were hinted at above, but not coherently summarised. That is necessary for the next step, which is to flesh out the distinctive features of the EU in federal terms, and in order to show that the most suitable way of depicting the EU is that of a poly-cephalous or multi-headed federation. A clear understanding of what the EU is, and the challenges it faces, is a prerequisite for considering scenarios for transforming the Union.

3.1 | Unpacking federalism

First is that two terms that need to be kept separate are often conflated, namely federalism and federation. Strictly speaking, federalism refers to the values, principles and structuring ideas or underlying political ideology, whereas federation refers to the concrete form of political-legal organisation. The former—federalism—therefore refers to the federal principle or spirit as a regulatory ideal, whereas the latter—federation—refers to the structural form that the polity takes.

Nevertheless, the argument that is developed here presupposes that ‘mature’ federations, as well as federal-type systems that lack agreement, but are actively searching for a viable federalism to justify the features in place, should be included under the federal label.³⁰ That is the only way in which we can usefully deal with ongoing processes—of federalisation and de-federalisation.

Second is that the core principle underpinning federalism is the combination of shared rule and self-rule, and the need to strike a viable balance between the two. What is generally referred to as the ‘federal spirit’ consists in a range of principles that are directed at building support for this combination of shared rule and self-rule. The principles are: autonomy, partnership, self-determination, comity, loyalty, unity in diversity, contractual entrenchment and reciprocity.³¹ These principles give support to the co-existence of multiple communities and systems of governing organised at different levels, coupled with an ongoing balancing between them in order to hold centripetal and centrifugal forces in check.³²

³⁰ But there are those that argue that you cannot have a federation without an agreed-upon federalism. Cf. King, above, n. 22.

³¹ Burgess, above, n. 21, at 22.

³² There are many other merits associated with this division, such as, for instance, economies of scale, experimentation and non-domination. Jenna Bednar has made an important

Third is that all federations have specific institutions/arrangements for ensuring this balancing. In established federations, the Constitution spells out the division of competences across levels of governing, and the courts play a central role in the ongoing balancing by ensuring that the governments respect the jurisdictional bounds as these are set out in the Constitution.

Fourth is that federalism's combination of shared rule and self-rule represents a means of protecting difference and diversity, which in turn means that federalism presupposes two sets of borders and bordering: to the external world and within the federation.³³ Note that this is a complex political process, because as noted in the discussion of multinational federalism, political and legal institutions play a central role in fashioning community.³⁴ In other words, border setting, border maintenance and border change is an eminently political process in federations, because it is where actors' different communal ambitions are exposed and fought for/fought over.

3.2 | The EU as a poly-cephalous federation—core characteristics

3.2.1 | The lack of an agreed-upon federalism

The EU has federal features that support its characterisation as a federation. However, there is no agreement on a viable form of federalism that can underpin, ground and stabilise the 'emerging' evolutionary federation.

In fact, constitutional disagreement runs high in the EU (and post 2007 may well be said to be running higher). We find competing visions of polity and community. There is no agreement on how many communities there are, what the community is for, and who the community is for (states or citizens, or both).³⁵

contribution to this debate by spelling out a set of principles of federal design. See J. Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press, 2009).

³³ The vertical division of powers between levels is one source of bordering in the sense that it specifies what each community—federal and Member State—is responsible for. There is also a horizontal bordering in the sense that each Member State upholds borders in order to sustain a measure of self-rule. Demarcation lines will vary: they are high through exclusive competence and lower when there is shared competence.

³⁴ Executives, organizational arrangements and structures are vitally important in shaping communities, and the very terms of federal interaction. A.C. Cairns, *Constitution, Government, and Society in Canada* (McClelland and Stewart, 1988).

³⁵ There is no scarcity of blueprints for transforming the Union, but there is no easy way of ensuring the political support that is necessary for the Union's constitutional transformation. The poisoned political climate resulting from the cumulative effect of the lopsided design of the Single Market and of Economic and Monetary Union, and the inter-personal and intra-European redistributive effects of the specific decisions taken during the crises, may make it very difficult to reform the Union. Even if a democratic majority could be forged at the

3.2.2 | The imbalance of shared rule and self-rule

The balancing between shared rule and self-rule, between unity and diversity, is both quite skewed and lopsided in the European Union as it stands at present.

The first source of the EU's current problems stems from the fact that the structure of shared rule and self-rule is quite peculiar. There is what, paraphrasing the early writings of Weiler, could be labelled as a form of dualism. This is so because while, formally speaking, competences seem to be largely in the hands of Member States, which are institutionally wired into the EU decision-making process, the Single Market and EMU have led to a hollowing out of public power at all levels of government, while the least representative supranational institutions gain increasing amounts of 'disciplinary' and 'regulatory' power.

The EU stands out for a highly asymmetric division of power between the supranational and the national levels of governments, the extent of which becomes clear when we consider not only relations across levels of governing but also between public and private sector (market) actors. On the one hand, we have a deep economic integration based on the emasculation of public power, with a strong onus on rights to private property and entrepreneurial freedom, but with very limited supranational regulatory and even less so redistributive capacities. On the other hand, we have no truly common foreign policy or defence policy, and only embryonic security and police powers.³⁶ Indeed, the different Euro-crises exhibit clearly that the Union is highly lopsided. The

European and national levels, it is unclear whether the said proposals could render the Union sustainable. In particular, it is unclear whether the *existing* reform proposals envisage the types of relationships between not only the Union and the Member States, but in relation to other political and economic actors, that will be compatible with the further development and consolidation of the Union in a federal direction.

If we look at the literature, we find broadly speaking, three sets of qualitatively different conceptions of the EU. The first sees the EU as a creature of the Member States and that mainly serves the Member States. See, e.g., Milward, above, n. 3. This argument has been updated and adapted to the present situation of a far more integrated EU by the proponents of the EU as a democracy. See F. Chevenal and F. Schimmelfennig, 'The Case for Democracy in the European Union', (2013) 51 *Journal of Common Market Studies*, 334–350. The second position sees the EU as a distinct system of transnational governance, where communities are typically tightly interwoven. See, e.g., Bohman, above, n. 14. The third position sees the EU as a state in the making. See, e.g., G. Morgan, *The Idea of a European Superstate* (Princeton University Press, 2005). For an overview and assessment of the main positions in the debate, see E.O. Eriksen, and J.E. Fossum (eds.), *Rethinking Democracy and the European Union* (Routledge, 2013).

³⁶ Weiler, above, n. 4.

massive creation of diffused risks resulting from the Single Market and from economic and monetary union has not resulted in the creation of mechanisms for controlling, even less establishing mechanisms of common insurance against such risks. In particular, economic and monetary union did not come hand in hand with any form of banking or fiscal union. The Euro was literally a currency without a state. This has resulted in a strong substantive bias in favour of the right to private property and entrepreneurial freedom, to the detriment of socio-economic rights and collective goods.³⁷

At the same time, Member State officials are very visibly present in EU-level institutions, and far more so than in any other federal-type system.³⁸ More than representation, we may indeed speak of *presence* of Member States. This may give the impression that Member States exercise inordinately strong control of the realm of shared rule in the EU. But the reality is more complex than that. The strong Member State presence is intrinsic to a distinctive *fusion of levels*³⁹ in the EU supranational Community. Given the division of labour between decision-making processes at the supranational level and the heterogeneity of national interests, supranational decision-making is highly biased in substantive terms. The strong Member State presence in the EU institutions contributes to lock in Member States. It is a matter of structural co-optation with policy-unifying ramifications extending far into the realm of Member State self-rule. Moreover, many of the areas we would normally associate with Member State self-rule have been increasingly Europeanised, including policing, security and the administration of justice.⁴⁰ To that should be added the centralisation resulting from the responses to the Eurozone crises, and a system of fiscal coordination through what Mark Dawson labels the Coordinative Method.⁴¹

³⁷ F. Scharpf, 'The Asymmetry of European Integration, or why the EU cannot be a "Social Market Economy"', (2010) 8 *Socio-Economic Review*, 211–250.

³⁸ That applies directly to the intergovernmental bodies such as the European Council and the Council formations; Member State imprint is also clearly visible on the Commission and the Court of Justice.

³⁹ Fusion is defined as: 'merging public resources at several state levels, leading to increasing complexities, a lack of transparency and difficulties in reversing the development.' See W. Wessels, 'An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes', (1997) 35 *Journal of Common Market Studies*, 267–299, at 267.

⁴⁰ Europeanisation has been less deep as far as foreign policy and defence are concerned; that is partially reflected in the resilience of the Maastricht pillar structure in these matters; in actual, substantive terms, not only national political resistance, but the geostrategic subordination to NATO go a long way to explain this specificity.

⁴¹ 'EU economic decision-making is coordinative in that it is formed as a policy cycle based on a constant "back and forth" between the EU and national levels ... decision-making never

Secondly, and related, the system of balancing between self-rule and shared rule has developed in a piecemeal manner and in the absence of agreement on the overarching terms. Given the present dynamics, it is very likely that the EU will continue to be haunted by constitutive issues pertaining to how to configure a viable system of shared and self-rule. There are clear signs that the issue has the potential to constantly condition the interaction among the institutions at the EU level, across levels of governing, and among the Member States.⁴² At the root of this is the fact that Member States have refused to attribute final constitutional authority to the overarching structure (of which they are a part). They insist on the need to see themselves as co-responsive issuers of authoritative constitutional commands. The system is, accordingly, marked by lack of agreement on the holding of the final competence power, the power to define who is competent for doing what (usually referred to in the European debate by the German term ‘Kompetenz-Kompetenz’). That shapes a core feature of the EU as a poly-cephalous federation, namely the distinct manner in which efforts at balancing occurs, and no less importantly, who does the balancing.

Precisely because a poly-cephalous federation is a deeply contested entity, a core feature of this system is the need for working out the terms of federal balancing as part of doing the balancing. It is an ongoing matter of combining the need for handling conflicts over contending visions of polity and community, combined with operating the system in a day-to-day manner. Issues of polity, politics, and policy are inter-imbricated, which means that minor policy or political conflicts can turn into fundamental skirmishes over the fundamentals of the polity, and that routine institutional processes can continue moving along whilst concealing or downplaying unresolved political issues.

3.2.3 | Unsettled authority to balance shared rule and self-rule

A distinctive feature of the EU as a poly-cephalous federation is the central role that for lack of a better term the ‘collective executive’ plays in balancing shared rule and self-rule. The more or less institutionalised forms of the collective executive correspond to the European Council (hereafter EC), its restricted

crystallises into a “once and for all” agreement but is ongoing and revisable with the possibility of norms being adapted to changed factual circumstances.’ M. Dawson, ‘The Euro Crisis and Its Transformation of EU Law and Politics’, in *The Governance Report 2015* (Oxford University Press, 2015), 41–68, at 53; see also M. Dawson, ‘The Legal and Political Accountability Structure of “Post-Crisis” EU Economic Governance’, (2015) 53 *Journal of Common Market Studies*, 976–993.

⁴² We can trace this imprint even to specific policy processes, whenever they get politicised.

formation as the European Council of the Eurozone (the so-called Summit), the Council of Ministers, and, regarding again the Eurozone, the Euro-group.

We may identify three forms wherein the collective executive affects the balancing between shared rule and self-rule.

- The first refers to the central role of the EC in Treaty changes and in setting down the main parameters for the EU's nature and scope of operations (*constitutive role*).⁴³ In the EC, the heads of the Member States as the EU's constituent units can negotiate and renegotiate the rules of co-existence with considerable discretion. While the process of Treaty reform was becoming more constitutional in a normatively speaking sense before 2007, from then onwards the trend has been reversed. The European Council and the Euro Summit have taken momentous decisions with massive constitutional implications, notably in terms of the way in which power is organised in the European Union, which has been deeply transformed through 'quasi amendment Treaties' (e.g. the Fiscal Compact) and constitutional 'conventions' (regarding, for example, the way in which the mandate of the ECB is to be understood when it comes to the constitutionality of 'non-conventional' monetary policies).
- The second aspect of balancing pertains to the EC's many roles and its institutional flexibility in the interstices between driver of supranational integration and protector of national sovereignty (*mediating role*).⁴⁴

⁴³ The EC's main role in the EU is, according to the TEU (Article 15.1), that: 'The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.' The EC has interpreted this mandate very widely.

⁴⁴ One is flexibility in issue definition; the European Council has great leverage in terms of deciding whether issues should be considered as constitutional or not. This makes it easier for it to operate, including performing a central balancing role between the EU level and the Member States, as well as across the diverging concerns of Member States; it also makes it notoriously unaccountable in constitutional terms. Another aspect of the European Council's flexibility is that it occupies a range of different roles directed to different constituencies. It works as a strategic driver of the integration process directed at the European constituency; it serves as a national champion because each head of government is elected by and responsible to its respective national constituency; and it acts as a second-order constitutional agent, because it is the key body in charge of constitution-making. The many roles that the Council and the European Council are supposed to fulfil in relation to their various contexts leave considerable scope for shape-shifting by representatives. We may term the European Council an 'institutionalised shape-shift organisation'. See J.E. Fossum, 'The Structure of EU Representation and the Crisis', in S. Kröger (ed.), *Political Representation in the European Union – Still Democratic in Times of Crisis?* (Routledge, 2014), 52–68; with reference to

Wolfgang Wessels has shown how we should associate the EC with three quite distinct institutional roles: as a guardian of the sovereign nation-state (the Presidency model); as a reluctant federator (the Council model), and as a fusion engine (the Fusion model).⁴⁵ These different roles show that it straddles across the spectre of shared rule and self-rule in the roles it occupies.

- The third aspect of balancing refers to the European Council's intervention in policy processes (*policy-making role*). It engages in policy processes; it breaks log-jams; and it signals to the other institutions what actions need to be taken.⁴⁶ Even if these are interventions in policy processes, their cumulative effects have ramifications for the relationship between shared rule and self-rule. For instance, whatever decision bias there is in the European Council (in favour of Member States or supranational institutions or market actors) translates into the balance between shared and self-rule in the EU.

We may consider whether the EC's pronounced role in crisis handling—in the Eurocrisis, in the refugee crisis, and in the ongoing Brexit negotiations—represents a distinct fourth element of balancing. In the EC's crisis handling, all three aspects of balancing have been activated. In addition, it is apparent that the current situation is generating a number of pathologies. The European Council, the Euro Summit and the Euro-group played a central role in the crisis handling. That included fashioning intergovernmental treaties and arrangements (cf. Treaty on Stability, Coordination and Governance in the Economic and Monetary Union), and informal intergovernmental bargains (notably between Germany and France). That form of 'authoritarian managerialism'⁴⁷ has introduced a distinctly Schmittian⁴⁸ moment in Europe's crisis response.⁴⁹ The

shape-shifting representation, see M. Saward, 'Shape-Shifting Representation', (2014) 108 *American Political Science Review*, 723–736. Shape-shifting refers to representatives adopting distinct representative roles that they strategically adjust to the particular settings that they are addressing or relating to.

⁴⁵ W. Wessels, *The European Council* (Palgrave, 2016).

⁴⁶ J. Werts, *The European Council* (John Harper Publishing, 2008). Means of steering include various forms and types of signals such as statements in European Council Conclusions. We can also not ignore the role of anticipated reaction among the other EU institutions.

⁴⁷ C. Joerges and M. Weimer, 'A Crisis of Executive Managerialism in the EU: No Alternative?', in G. de Búrca, C. Kilpatrick and J. Scott (eds.), *Critical Legal Perspectives on Global Governance: Liber Amicorum David M. Trubek* (Hart Publishing 2014), 295–322.

⁴⁸ The decision precedes the norm. C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. G. Schwab (University of Chicago Press, 2005). Actors operate

effect is a certain de-constitutionalisation associated with this shift in decision locus. But rather than a straightforward change to intergovernmentalism, we see a significant, albeit highly selective, strengthening of certain EU supranational institutions, to be precise, the non-representative by design, or the least representative ones, first and foremost the ECB. What appears to be taking place, then, is that the supranational (Community) structure is increasingly transgovernmentalised, in the sense that it is programmed and put to the service of certain key actors within the European Council, often without respect for the Treaties.⁵⁰ This renders the entire EU structure much more readily accessible to certain core governments, to carry out their particular conceptions of how the crisis is to be dealt with, which further weakens supranational integrity.⁵¹

These observations underline that the EU's crises cut to the heart of its existential justification. In addition, in the manner in which the EU has handled the crises, the system of working out the terms of balancing as part of doing the balancing has gotten out of whack. A new dimension of balancing has emerged, namely that of establishing what normality might be in an experimental setting, which is not equipped with clear demarcations between normal and emergency politics.⁵² This signifies that the core challenge is not simply to restore the situation to a pre-crisis normality; the issue is what constitutes normality and what that implies for our thinking about balancing.

3.2.4 | Boundaries and boundary transcendence

The general assumption with regard to boundaries in a poly-cephalous federation is that the Member States as core constitutional chaperons play a central role in boundary determination. That is to a considerable extent borne

not only as representatives of sovereign entities; their actions and decisions are understood as manifestations of sovereign state actions.

⁴⁹ M. Everson and C. Joerges, 'Who is the Guardian for Constitutionalism in Europe after the Financial Crisis?' in Kröger (ed.), above, n. 44, 197–211.

⁵⁰ Consider the European Stability Mechanism (ESM) which was established through an international treaty that assigns supporting roles to EU institutions (Commission, ECB and CJEU). The European Council in its decision of 25 March 2011 paved the way for the ESM through an amendment of TFEU 136. This amendment had not yet been ratified by all Member States when the ESM Treaty went into effect in October 2012. See B. De Witte, 'Using International Law in the Euro Crisis: Causes and Consequences', ARENA Working Paper 04/2013.

⁵¹ Note how the Commission's proposal for a common deposit insurance scheme as a critical component of a common banking union was shot down through German resistance (<http://www.ft.com/intl/cms/s/0/e2dd12ec-fdbe-11e1-9901-00144feabdc0.html#axzz26QknjcVv>).

⁵² J. White, 'Emergency Europe', (2015) 63 *Political Studies*, 300–18; J. White, 'Authority after Emergency Rule', (2015) 78 *Modern Law Review*, 585–610.

out in the EU context, and more so through the increased role of the European Council during the crises.

We may distinguish between EU-external and EU-internal boundaries. EU's external borders are deeply affected by the EU's functional differentiation: different policy areas are associated with different geographical borders and different forms of border maintenance. The relationship between the Schengen Agreement, the Dublin I, II and III Agreements and the Eurozone are cases in point. In both the Schengen, Dublin and the EU's refugee agreement with Turkey (signed on 18 March 2016) (and the support provided by NATO), EU boundary maintenance includes third parties or non-EU members. There is therefore no clear contiguity between EU external boundaries and EU membership. From a federal perspective, the critical issue is whether boundaries are compatible with a viable combination of shared rule and self-rule. In the EU, the short answer is that the current system is not. The problem is less the lack of contiguity as such since in the Schengen and Dublin I, II and III cases, EU norms apply on both sides of the EU membership divide, so-to-speak. The European Economic Area (EEA) countries have submitted to EU rules and norms.⁵³

More important are asymmetries pertaining to how some states have been burdened with tasks that concern all of the EU, but are left to shoulder most of the burdens on their own, as is the case in the refugee crisis with Greece and Italy as frontline states. Another asymmetry manifests itself in how policy issues, such as, for instance, asylum policy is organised. Consider the recent regulation establishing the European Border and Coast Guard Agency, which:

presupposes to a large extent a policy shift along the lines of a marked centralisation of asylum policy ... but with the explicit purpose of keeping fully exclusive national responsibility for asylum seekers and refugees ... by means of most powers shifted to the supranational level placed in the hands of two 'new' independent agencies.⁵⁴

Internal (between Member States) boundaries and jurisdictional bounds are ways of ensuring Member State self-rule, which in turn determine the scope for cultural and socio-economic distinctness, as well as democratic self-rule. During the crisis, patterns of horizontal domination emerged, when some creditor state parliaments (notably Germany's) de facto determined many of the

⁵³ E.O. Eriksen and J.E. Fossum (eds.), *The European Union's Non-Members: Independence Under Hegemony?* (Routledge, 2015).

⁵⁴ A.J. Menéndez, 'The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration', (2016) 22 *European Law Journal*, 388–416, at 403.

operating conditions of debtor state parliaments (notably Greece, Portugal and Ireland).⁵⁵ Another aspect of boundary transcendence pertains to the emergence of hegemonic socio-economic logics or what Marija Bartl refers to as a distinct ‘internal market rationality’.⁵⁶ An important aspect of this stems from the manner in which the EU’s four freedoms have taken on a boundary transcending character. A case in point is the manner in which the principle of mutual recognition was over time transformed to a form of horizontally (functionally) unbounded marketisation. A critical turning-point was when ‘a ban on any product that was legally sold in any other Member State of the communities would, *prima facie*, constitute a disproportionate infringement on the constitutional principle of free movement of goods.’⁵⁷ Raising this principle to a standard of European constitutional law unleashed a significant process of integration largely driven by private-sector actors and the interplay between private market actors and courts, notably the Court of Justice of the European Union (CJEU). That altered the equation for states, which now needed to get exemptions from the EU by going to the EU rather than simply erecting national borders to the outside world. A dynamic of politically unaccountable integration through horizontal market harmonisation thus developed. The problem with this logic is that there is no political process that can determine where this principle is to apply and how extensive it is supposed to be. In that sense, it is a direct affront to any meaningful division of competences along the federal precepts of shared rule and self-rule.

Before concluding, we will briefly look at how another full-fledged polycephalous federation, namely Canada, sought to address the inherent instability that such a structure engenders.

4 | ALTERNATIVE PATHS: LEARNING FROM CANADA

⁵⁵ A. Benz, ‘An Asymmetric Two-level Game. Parliaments in the Euro Crisis’, in B. Crum and J.E. Fossum (eds.), *Practices of Inter-Parliamentary Coordination* (ECPR Press, 2013).

⁵⁶ Marija Bartl describes it as: ‘a specific pattern of political action in the field of internal market, which has emerged gradually due to the confluence of three main factors: first, the EU’s functional institutional design; second, the processes of post-national juridification; and third, a more contingent influence of ideas. In the interplay of those three factors, the interpretation of internal market has become overdetermined, restricting thereby the space of (democratic) politics in its regulation.’ M. Bartl, ‘Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political’, (2015) 21 *European Law Journal*, 572–598, at 572.

⁵⁷ A.J. Menéndez, ‘The Existential Crisis of the European Union’, (2013) 14 *German Law Journal*, 453–526, at 479.

Thus far, I have shown that while federalism provides the most apt normative framework for understanding what the EU claims to be and what it aspires to be, the actual unfolding of European integration has (especially since 2007) pushed the Union in a de-federalising direction (centralisation without proper constitutional and democratic controls can be de-federalising and generates its own fragilities). Indeed, what was argued in the previous section on the EU may be construed as entailing that poly-cephalous federal-type entities are inherently unstable and cannot develop into mature democratic and social states.

In this section, I show why drawing such a conclusion may be premature. Canada provides evidence to the effect that pluralistic federal entities may be stabilised, and in a form that is conducive to the flourishing, not the progressive demise, of democratic self-government. As will be shown, Canada has in the last four decades reformed its constitutional system and toned down its poly-cephalous features; hence it has arguably developed a more stable federation, even if there is still not agreement on the type of federalism it should embrace. Thus, Canada's experience is interesting in terms of the prospects it might offer of reversing the EU's present predicament of de-federalisation coupled with de-democratisation.

4.1 | Why it makes sense to compare Canada and the EU

There are important structural similarities between the EU and Canada.

(1) Canada is constitutionally speaking a contested federation, without agreement on a shared federalism.⁵⁸ Canadians 'all thirty-five million of them, have not agreed that they belong to a single "people" whose majority expresses the sovereign will of their nation.'⁵⁹ There are several qualitatively different visions of the type of political system Canada should be, and these are deeply entrenched in its institutional and constitutional make-up.⁶⁰ At the same time,

⁵⁸ Constitutionally speaking, Canada 'was not constituted by a single act of will or by a set of founding fathers acting in a privileged "constitutional moment". The Canadian constitution has been a work in progress.' J. Webber, *The Constitution of Canada. A Contextual Analysis* (Hart Publishing, 2015), at 1. The initial constitution, the British North America (BNA) Act 1867 has been aptly termed a 'governments' constitution.' See A.C. Cairns, *Disruptions: Constitutional Struggles from the Charter to Meech Lake* (McClelland & Stewart, 1991).

⁵⁹ P. Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (University of Toronto Press, 2017), at 3.

⁶⁰ One prominent vision depicts Canada as a dualistic polity and is steeped in the *national compact theory*. It sees the federation as a compact between two cultural groups, divided along linguistic lines. This vision has been particularly forcefully espoused by the province of Quebec; with reference to the Quebec Act 1774, cf. A.G. Gagnon and R. Iacovino, *Federalism, Citizenship, and Quebec: Debating Multinationalism* (University of Toronto Press, 2006). The second vision refers to the notion that the constitution was a compact

Canada is a full-fledged parliamentary federation with parliamentary government at the main levels, the federal and provincial (and territorial).

(2) Canada is not only deeply contested; it has been on the verge of disintegration, under the threat of Quebec separation and other centrifugal pressures.⁶¹

(3) Canada, like the EU, is marked by executive officials playing a central role in seeking to work out the terms of federal balancing as part of doing the balancing. In Canada, governments (the federal government and the provincial and territorial governments) have traditionally had significant leverage in relation to their respective legislatures and prior to the 1982 patriation of the Constitution also in relation to courts.⁶² This central executive presence is reflected in the fact that heads of governments and their support staffs have been the key actors in constitutional negotiations and have historically speaking negotiated constitutional accords among themselves in considerable secrecy.⁶³

(4) Canada has a mature welfare state based on a significant public presence, and therefore far more extensive than in the US. It combines liberal-type income security programmes with a more social democratic form of health care, in a system that is organised in a complex manner across levels of

among the provinces, embedded in the *provincial compact theory*, and has given rise to the insistence on provincial veto and equal representation in all constitutional (and other) negotiations. See P. Romney, *Getting it Wrong – How Canadians Forgot Their Past and Imperilled Confederation* (University of Toronto Press, 1999). The third vision is that of aboriginal self-government, espoused by Canada's First Nations peoples.

⁶¹ The province of Quebec had long sought separation from Canada and in a popular referendum in 1995 came within a hair's breadth from separating (the 'no' side won with a mere 50.58 per cent of the vote). In connection with this process, the Canadian federal government's lack of a Plan B—in a case of a Quebec 'yes'—made analysts worry that Quebec secession could lead to the unravelling of Canada. See A.C. Cairns, *Looking into the Abyss: The Need for a Plan C* (C.D. Howe Institute, 1997).

⁶² Prior to the Charter revolution in the 1980s, the Canadian Supreme Court was 'the quiet court in the unquiet country'. See F.L. Morton and R. Knopff, *The Charter Revolution and the Court Party* (Broadview Press, 2000), at 9.

⁶³ At the core of this system is the First Ministers' Conferences, a rather informal arrangement of bi- and multilateral meetings among the heads of governments and their support staffs. It sits on top of a comprehensive system of intergovernmental relations that cuts across and coordinates the activities of the governments in the federation. Again, in direct parallel to the EU, the governments of the Canadian federation have long relied on a mode of interaction akin to international diplomacy to iron out and contain conflicts. As early as 1972, Richard Simeon in his *Federal Provincial Diplomacy: The Making of Recent Policy in Canada* (University of Toronto Press) 1972, at 300 presciently noted that "(t)he Common Market perhaps comes closest to the Canadian pattern." See also T. Hueglin 'Treaty federalism as a model of policy making: Comparing Canada and the European Union' (2013) 56, *Canadian Public Administration*, 185-20; and T. Hueglin and A. Fenna, *Comparative Federalism – A Systematic Inquiry*, (Broadview Press), 2006.

government (federal and provincial). These arrangements have been important for reasons of state capacity and legitimacy: ‘In Canadian experience ... both levels of government have seen social policy not only as an instrument of social justice but also of statecraft, to be deployed in competitive and sometimes conflictual processes of nation-building [notably by the federal government and by the province of Quebec].’⁶⁴

These are the features that I here draw on in the search for lessons. Note that with lessons I do not believe that Canada provides the EU with a ready-made template; or for that matter, that the features of the Canadian system I will be emphasising can be easily transferred from Canada to the EU. There is at a minimum a need for translation and adaptation, because the systems differ and so do the specifics of their challenges. In some cases, there might well be historical, institutional, economic or even geo-strategic reasons for why what works in Canada may not work in the EU. Even then, the search for lessons may also be said to serve a ‘diagnostic’ purpose: to assist us in rendering explicit what the challenges that the EU is facing are, and consequently, in developing appropriate means for addressing them.

4.2 | Canadian lessons for the European Union

4.2.1 | Instability and boundary problems

Systems of intergovernmental relations are very precarious means of ensuring federal balancing, as is apparent in several similar ways in the EU and Canada.

First is the difficulty in reaching viable agreement in large-scale and convoluted intergovernmental negotiations. Thus, instruments that are relied on to foster agreement can as easily produce disagreement and generate negative trust spirals, as political power plays generate negative centrifugal or centripetal dynamics.

Second is that intergovernmental negotiations de facto devalue the constitutional currency of the issues that they are addressing. These negotiations are structured so as to mix up different types and kinds of issues, ranging from fundamental constitutional issues to quite minute policy issues. That reduces the dignity of constitutional decision-making, and thus increases the likelihood of constitutional issues being treated as ordinary questions, and decided according to the same kind of bargaining logics.

⁶⁴ K. Banting, ‘Canada: Nation-building in a Federal Welfare State’, ZeS Working paper no. 6/2004. For the development of this system, see K. Banting, *The Welfare State and Canadian Federalism* (McGill-Queen's University Press, 2nd edn, 1987).

Third is a major problem of accountability. In the EU, heads of governments, especially in the European Council, have a double mandate: European and national, and can manipulate these roles with relative ease; thus rendering accountability very difficult. As the case of Canada shows, this problem does not go away through direct central level involvement; it has to do with the relations among the institutions involved, especially how executives, legislatures and courts operate and cooperate.

The upshot is that the critical issue for stability is not only the internal dynamics of the intergovernmental negotiations, whether they produce agreements, or not⁶⁵; it is a matter of the nature of the broader institutional and political cultural context under which these negotiations take place.

As we see in today's EU, the more isolated and less in touch with national democratic debates and politics the heads of governments are (or are forced to be) when they play high-stakes constitutional games, the greater the likelihood that the negotiations will produce results that will fail to address the underlying issues or meet with massive resistance. The EU's (overly) strong reliance on the European Council in its Eurozone crisis handling is a case in point.⁶⁶

4.2.2 | Centralising power is not a panacea

Another lesson from Canada is that centralising power as such offers little assurance of stabilising a contested federal polity. Even a strong political centre, which Canada has, will not necessarily stabilise the federation and prevent centrifugal dynamics. Federal stability critically depends on striking the right balance between shared rule and self-rule. Federal polities are about *unity* and *diversity*, and there is a need for institutional structures, decision-making processes and substantive contents of the law ensuring both.

Firstly, a 'centre' or central government with sufficient capacity to carry out the tasks assigned to it is necessary. Obviously, the greater the range of tasks that the centre gets saddled with, the greater the need for capacity and the more

⁶⁵ There are two sources of instability. One stems from the failure to reach an agreement, and the other to the type of agreement that is reached. Canada has historically suffered from the former, in the sense that major constitutional accords have failed to reach the necessary thresholds of agreement (notably the Meech Lake Accord 1987 and the Charlottetown Accord 1991). The European Union suffers more from the latter, in that it has reached agreements that have failed to solve the underlying problems, and that have arguably rendered it even more susceptible to external forces and shocks. Consider the many built-in weaknesses in Monetary Union that amplified the effects of the financial crisis.

⁶⁶ For an overview of the EC's role in handling the EU crises, see European Parliament, 'The European Council and Crisis Management – In-Depth Analysis', European Parliament Research Service, PE 573.283, February 2016.

likely it is to run rough-shod over the diverse concerns of the members. There are therefore practical and legitimacy limits to centralisation. The central level cannot overcome contestation by further centralisation of power without seriously endangering the very existence of the federal union.

Secondly, the sub-units need sufficient power and competence to ensure that they are capable of undertaking those tasks that are considered essential to self-rule (which is also an assurance of federal diversity).

In Canada, provincial governments have not only insisted on their right to govern themselves in accordance with their interests and concerns, but were historically speaking greatly aided by the manner in which the UK Judicial Committee of the Privy Council (JCPC) systematically expanded the realm of provincial activity through its rulings. In the post-war period, most of the provinces have embarked on ambitious programmes of ‘province-building’ akin to state-building.⁶⁷ The absence of agreement on a constitutional amendment formula effectively meant that each province could insist on a veto on constitutional change. That has reinforced the provinces’ claim to the need for respecting provincial equality.

These structural features in Canada infused intergovernmental relations with a strong competitive logic, which despite strong governments at both levels, had a strong centrifugal effect.⁶⁸ The other problem was that it was only really those aspects of social diversity that governments brought to the negotiating table that were addressed in the intergovernmental bargaining rounds. Canada through mass immigration was rapidly becoming a far more diverse and pluralistic society, with pressing concerns that were not well represented in the realm of intergovernmental relations.

4.2.3 | Purposive reform is possible ...

⁶⁷ Cairns, above, n. 34.

⁶⁸ In Canada the province of Quebec declined to sign the patriated Constitution Act in 1982. When a new effort was made to bring the province of Quebec onboard, the amending formula required that the other nine provinces should be part of the constitutional negotiations. Even if not all amendments required provincial unanimity, ‘the federal government decided to treat the whole package as subject to a unanimity agreement.’ Cairns, above, n. 58, at 144. That turned ‘the Quebec round’ into a provincial round, where Quebec’s demands had to be accepted not only by the federal government but also by the 10 provincial Premiers. The upshot was that the effort to reach a constitutional settlement with Quebec, the Meech Lake Accord (1987), which was accepted by Ottawa and Quebec, was nevertheless rejected because it failed to get ratified in the two provinces of Manitoba and Newfoundland.

Canada is instructive in that it shows that a poly-cephalous federal system can indeed be reformed, and through such reform be made more democratically accountable, even amidst major political conflict and turmoil.

Canada was deeply reformed in the early 1980s. The country gave itself a new constitution, albeit through a procedure and through legal acts that were far from the ones usually associated with the exercise of the *pouvoir constituant*: the Canada Act, 1982, through which the British Parliament renounced its sovereignty over Canada and approved a new fundamental law, and the Charter of Rights and Freedoms, which in replacing the anaemic federal Canadian Bill of Rights amplified the constitutional significance of fundamental rights, were formally (but not substantially) Acts of the British Parliament.⁶⁹

It is important to note that a strong motivation of both reforms was to break the hold of Quebec separatism. By highlighting that Canadians were fully self-governing (and no longer, even in the weakest of senses, a dominion) and by uplifting rights (including group-based rights bent on gender equality and bent on improving the rights of minorities),⁷⁰ it was expected by the key architects, notably Prime Minister Pierre Trudeau, that a stronger collective national identity would be fostered. The governments of Quebec—of all stripes—have been deeply critical and some even hostile to these two processes.⁷¹ In effect, the government of Quebec has not yet signed the Constitution Act, 1982. Nevertheless, both reforms have contributed to the forging of a more pluralistic constitutional practice and constitutional culture.

Some analysts associate the Charter Revolution with ‘the Court Party’⁷² because of the manner in which the strong social mobilisation and the tight links

⁶⁹ <http://www.legislation.gov.uk/ukpga/1982/11/contents>

⁷⁰ A.C. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (McGill-Queen's University Press, 1992).

⁷¹ For a damning verdict of Trudeau's ambitions, see G. LaForest, *Trudeau and the End of a Canadian Dream* (McGill-Queen's University Press, 1995).

⁷² With ‘Court Party’, Morton and Knopff, who are very critical of this practice, refer to the links between rights-advocacy organisations and the courts, with this interaction being greatly facilitated by government and foundation funding, and a host of lawyers. ‘Encouraged by the judiciary's more active policymaking role, interest groups—many funded by the very governments whose laws they challenge—have increasingly turned to the courts to advance their policy objectives. As a result, policymakers are ever watchful for what a justice department lawyer describes as judicial “bombshells” which “shock ... the system.” In addition to making the courtroom a new arena for the pursuit of interest-group politics, in other words, Charter litigation—or its threat—also casts its shadow over the more traditional areas of electoral, legislative and administrative politics. Not only are judges now influencing public policy to a previously unheard-of degree, but lawyers and legal arguments are increasingly shaping political discourse and policy formation.’ Morton and Knopff, above, n. 62, at 13.

between rights advocacy groups, lawyers and courts activated parliaments and reshaped their agendas. A critical aspect of the Charter Revolution was that it democratised access to the courts.⁷³ That, in turn, deeply affected the style and substance of intergovernmental negotiations. Governments could no longer negotiate among themselves in relative isolation from the citizenry, but had to take into consideration commitments to bilingualism, multiculturalism, gender equality and aboriginal rights.

The Charter Revolution reconfigured the triangular relationship among executives, legislatures and courts. In doing so, it also provided new and flexible mechanisms for working this relationship. Key here is the Charter's notwithstanding clause,⁷⁴ which enabled governments (the federal and provincial governments) to opt out of some of the provisions of the Charter (but not the controversial language provisions). The relevant legislature's use of the opt-out was limited to five years, and had to be actively renewed. The provision was considered a safety valve, and a political defence mechanism against over-juridification by subjecting most aspects of the Charter to the possibility of legislative review.⁷⁵ From a European perspective, what matters are not the specific provisions of the Charter that trigger the review but the fact that it provides a means of engaging courts and legislatures in a dialogue over the nature and reach of rights.⁷⁶ Such provisions, if crafted and operated well, can improve the likelihood of competent and legitimate decisions.

4.2.4 | ... But much depends on the development of a constitutional culture

Issues of identity are not only very difficult to resolve, but can easily spiral into violence and system breakdown, as we see in so many places around the globe. An important buffer in Canada was the presence of a federal political culture that was highly attentive to difference and diversity.⁷⁷ Such a culture emerges under certain specific conditions of power: a certain combination of successful

⁷³ See C.R. Epp, *The Rights Revolution. Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998).

⁷⁴ Section 33 of the Charter of Rights and Freedoms. See <https://lop.parl.ca/content/lop/researchpublications/bp194-e.htm>. See, also, P.J. Monahan, *Constitutional Law* (Irwin Law, 3rd edn, 2006).

⁷⁵ J.L. Hiebert, 'Interpreting a Bill of Rights: The Importance of Legislative Rights Review', (2005) 35 *British Journal of Political Science*, 235–255.

⁷⁶ This Canadian provision has then also given rise to the so-called 'dialogue theory'. See P.W. Hogg, and A.A. Bushell, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)', (1997) 35 *Osgoode Hall Law Journal*, 75–124.

⁷⁷ S.V. LaSelva, *The Moral Foundations of Canadian Federalism* (McGill-Queen's University Press, 1996).

exercise of power, which rests on effective public institutions, elective and non-elective, capable of producing viable results, and exercising due restraint.

4.2.5 | Capacity to control the socio-economic environment

Obviously, an important reason why Canada was able to undergo its difficult constitutional transition was because it had institutions that could contain conflicts. Like any well-developed state, it had the requisite policy levers including fiscal clout, and strong tax and fiscal powers at both main levels of government, as well as a well-functioning public bureaucracy. It has sovereign control of monetary and fiscal policy, and a system of banking and bank regulation that proved very capable of weathering crises, including the financial crisis.⁷⁸

Such policy levers relate to the basic institutions of maintaining control of socio-economic factors, modified by its NAFTA obligations, but not to the extent of undermining state capacity to underwrite social and economic risks.

Thus, whereas the Canadian Charter did not include social rights, often considered an important defect,⁷⁹ Canada nevertheless did possess vital components of the social glue that keeps diverse societies together. Canada has a public health service, a welfare state and a system of regional redistribution. These features figure as important components of the Canadian identity (and enable Canadians to see themselves as different from Americans). It is well documented that these arrangements have enabled Canada to largely escape the so-called ‘progressive’s dilemma’, namely that there is a necessary trade-off between cultural diversity and redistribution.⁸⁰

5 | CONCLUSIONS

The main purpose of this article was to substantiate the claim that federalism offers a more compelling analytical framework for the analysis of the nature of the EU than the main alternatives such as multilevel governance. Analysing the EU from a federal perspective provides a better understanding of what the EU is,

⁷⁸ The Canadian system of banking regulation and organisation proved able to deal with the financial crisis in a relatively straightforward manner and far more easily than the US. See M.D. Bordo, A. Redish and H. Rockoff, ‘Why Didn’t Canada have a Banking Crisis in 2008 (or in 1930, or 1907, or ...)?’ NBER Working Paper 17312 (National Bureau of Economic Research, 2011).

⁷⁹ J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto University Press, 1997).

⁸⁰ K. Banting, ‘Is There a Progressive’s Dilemma in Canada? Immigration, Multiculturalism and the Welfare State’, (2010) 43 *Canadian Journal of Political Science*, 797–820.

the nature of the challenges currently facing it, and what possible solutions there might be.

The assessment of the EU from a federal perspective had to clear up some important distortions about the EU and federalism that mark discussions of the EU. Of particular importance was to underline that federalisation is about establishing a system that combines shared rule with self-rule. Any federal system will therefore place constraints on centralisation, because the essence of federalism is to strike a viable *balance* between shared rule and self-rule.

The article showed that the best way of overcoming the distortions was to introduce a new federal conception of the EU, that of ‘poly-cephalous’ federation. Poly-cephalous federation renders clear how the tension between federalism and federation shapes the EU. It does not pretend that the EU has been configured in accordance with federalism, or federal ideology. It shows that the EU has federal features, but, by the same token, that the EU lacks a proper federal ideology. Further, a poly-cephalous federation is not only deeply contested; it is also a highly unstable system, in particular when facing the types of challenges that the EU has faced since the global economic crisis.

The crises-driven distortions manifest themselves in patterns of de-federalisation moving in two directions at the same time: on the one hand towards an overly strong centralisation in the Community system, which is becoming increasingly technocratic, and on the other towards an unstable bargaining/negotiation system under the auspices of the European Council. These two developments represent particularly thorny challenges and underline that the issue is not one of centralisation or decentralisation but one of restoring federal balance. In this context, the European Council as the key balancer is as much a part of the problem as it is a part of the solution.

In the final section, the article briefly referred to a full-fledged federation with poly-cephalous traits, namely Canada, and showed how Canada has modified its poly-cephalous features since the 1980s. An important aspect of this process of rights-based politicisation was the fact that Canada was a welfare state and as such had a significant social buffer to prevent a toxic mixture of recognition and redistribution. The EU’s austerity policy and the significant social cutbacks have done precisely the opposite: reduced social buffers and therefore laid the EU bare to challenges along the lines of identity (cultural dimension) and redistribution (socio-economic dimension).