

Introduction: Federalism's Janus Face

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NATIONALISM IS AN ideology of the past. Our goal is a federal and post-national Europe, a Europe of the citizens.' By using the word 'federal' in its mission statement, the Spinelli Group, a recently-established network of European 'Federalists',¹ quite obviously seeks to convey a message of more, not less, European integration. The Group's avowed aim is to create a federal Europe, where all Member State nationals are equal as Union citizens, where national differences are transcended, and where important decisions in the fields of economics, social security and fiscal policy are adopted at the EU level.²

The concept of 'federalism', however, generally has a different—indeed the opposite—resonance in the domestic political realm. In formerly unitary States like Italy, Spain, Belgium and the United Kingdom (UK), the process of federalisation has implied granting political autonomy to sub-State groups, in order for minorities at the State-wide level to become self-governing majorities within their own territorial subdivision.³ Federalisation is thus seen as an instrument for recognising and accommodating, rather than transcending, national diversity. As a result of such domestic federalisation processes, the legal rights and duties of the nationals of the State in question are no longer identical but vary according to, for example, one's region of residence. Significantly, with the exception of Belgium, the Member States examined in the present volume do not officially classify themselves as federal systems. They prefer, instead, to describe their governance structures in terms that they consider to be less evocative of political

¹ The statement is extracted from the Spinelli Group's manifesto, available at <www.spinelligroup.eu/manifesto/>.

² See especially Conclusions of the Shadow European Council of the Spinelli Group, 22 March 2011, available at <www.spinelligroup.eu/2011/03/22/from-pact-to-act-a-european-action-plan-for-the-future/#more-554>; Conclusions of the European Shadow Council of the Spinelli Group, October 2011, available at <www.spinelligroup.eu/2011/10/20/a-federal-step-forwards-to-end-the-eurocrisis/#more-1175>.

³ See more generally, J McGarry, B O'Leary and R Simeon, 'Integration or Accommodation? The Enduring Debate in Conflict Regulation' in S Choudhry (ed), *Constitutional Design for Divided Societies* (New York, Oxford University Press, 2008) 63–69.

disintegration, such as ‘devolution’ (UK), ‘*Estado de las Autonomías*’ (Spain) and ‘*regionalismo*’ (Italy).

The epithet ‘federal’ thus seems to denote two opposite concepts, depending on the polity to which it is supposed to apply. When used in relation to the EU, federalisation appears to signify more unity, uniformity and (formal) equality throughout the Union, at the expense of the autonomous powers of its territorial subdivisions (ie, the Member States). In the context of multinational Member States, by contrast, federalism refers to increased self-governing powers for sub-State entities (eg, regions, communities) and, accordingly, to more legal diversity and less (formal) equality. What is more, ‘federal’ is a label most politicians, at EU and domestic levels alike, seem to shun, because it suggests a degree of political integration or disintegration, respectively, which they consider to be undesirable.

What does the Janus-faced character of federalism in Europe teach us about the nature of the concept? Can both sides of federalism coexist? And how could ‘federalisation’ feasibly be an appropriate term for describing what has been going on in post-war Europe if it is rejected by so many political stakeholders? It is clear that ‘federalism in the European Union’ remains a matter of great controversy. This volume engages with the two major current debates on the phenomenon of federalism in the context of the EU. The first part of the book addresses the question whether the EU can be defined as a federal system, and whether it can learn from existing federations. In the second part, the attention shifts to federalisation processes *within* EU Member States, more particularly to the impact of these processes on EU law and vice versa.

PART I: FEDERALISM IN THE EU’S CONSTITUTIONAL STRUCTURE

Can the EU be described as a federal system? That question, which has variously aroused both antagonism and enthusiasm, is the focus of the first part of the present volume. It opens with a chapter by Koen Lenaerts, who understands federalism as ‘the balance of power between the search for “unity” and the protection of “diversity”’. Lenaerts explores that balance of power from three different angles. First, he notes that ‘diversity’ may feature not only among the Member States of the Union, but also within a single Member State. His study is therefore not limited to the division of powers between the Union and the Member States; it also covers the impact of EU law on domestic constitutional arrangements accommodating internal diversity. Secondly, Lenaerts examines the balance of power between unity and diversity as reflected in the Union’s political decision-making process. He argues that the question of the appropriate legal basis for an EU measure pertains not only to the balance of power between the distinct EU institutions, but also to the balance of power between the EU and the Member States. Thirdly and lastly, Lenaerts studies to what extent the balance of power between unity and diversity has been affected by the Treaty provisions on Union citizenship. He submits that the recent ECJ case law on the matter has sought to

reconcile the protection of individual rights granted by EU law with the powers of the EU and national legislatures.

A rather different conception of federalism is adopted by Pavlos Eleftheriadis. He argues that the federal model requires a single scheme of jurisdiction based on a coherent set of constitutional principles. Eleftheriadis's account of federalism is premised on the thesis that a single scheme of jurisdiction is needed for institutions to be legitimate. Drawing on the work of Plato, Aristotle and Jeremy Waldron, Eleftheriadis submits that '[a] set of political institutions may be legitimate for a given group of people in a given territory at a given time only if it is the only one in force'. The *plural* character of the EU's scheme of jurisdiction thus leads to the conclusion that federalism cannot be an appropriate constitutional idea for the EU. In Eleftheriadis's view, the international model could offer a more appropriate framework for understanding the EU.

Moving away from the conceptual debate about federalism and focusing directly on the allocation of competences over various tiers of government, Alexia Herwig's chapter examines the role of the principle of subsidiarity in multilevel governance contexts. For Herwig, the subsidiarity principle essentially demands that a decision be made at the level of governance which is best placed to decide on the matter. While recognising the challenges that may come with the implementation of the principle in positive law, Herwig fully endorses the principle shown 'in its best possible light'. The nub of her argument is that, for the law to be legitimate, the subsidiarity principle must be respected. More precisely, the law is legitimate only if it can be demonstrated that (collective) regulation is preferable over individual decision-making. From this general proposition, Herwig derives that the subsidiarity principle should inform the making of WTO law and EU law as well.

Part I subsequently introduces three comparative reflections into the debate. Chapters four to six focus on specific issues with which multi-layered governance systems, including the EU, must grapple: how to resolve disputes regarding the allocation of powers, how to organise the protection of fundamental rights and how to conduct international relations. The respective contributions explore to what extent the solutions prevailing in certain federal states could serve as a model for the EU.

In search of the common features shared by all constitutional courts in federal-type Member States, Monica Claes and Maartje de Visser undertake a comparative study of the role, organisation and operation of these courts. In a next step, the authors examine to what extent the commonalities found are equally exhibited by the ECJ. Claes and de Visser conclude that the ECJ resembles federal constitutional courts in many respects. For instance, one of the most important tasks of the ECJ and federal constitutional courts alike is to adjudicate disputes over the division of powers. Yet Claes and de Visser's research also reveals that significant differences remain. The authority of the ECJ over issues of power allocation and fundamental rights protection, for example, is much more contested than that of the domestic constitutional courts examined.

The subsequent chapter, by Aida Torres Pérez, reflects on whether the EU can learn from the US system of power division as regards the protection of fundamental rights. Torres Pérez centres her research around two particular issues that multi-layered polities must confront in the field of rights protection: (i) to what extent are the polity's territorial subdivisions bound by central rights; and (ii) how should conflicting interpretations of rights (ie, by the central and sub-polity level) be addressed? As far as the first question is concerned, Torres Pérez observes that in the EU, unlike in the US, the central (ie, EU/US) standard of rights protection is not in all circumstances binding on the States. Yet she also notes that the scope of application of EU rights to the Member States has expanded radically over the years. As regards the second question, Torres Pérez reminds us that, even in the US, there is still room for differing rights interpretations among the states, as the federal Constitution merely provides a floor, not a ceiling, of rights protection against state action. Nonetheless, the author does not recommend the blanket introduction of this floor-of-protection rule into the EU system of rights protection, given the challenges such a rule may pose for the efficacy and uniform application of EU law. In her view, the better approach would be to enhance 'dialogue' between the ECJ and the Member State courts with regard to the interpretation of rights.

In the last chapter in Part I, Geert De Baere and Kathleen Gutman explore the approaches taken in the EU and the US for forging a coherent international relations policy for an internally differentiated polity. The primary focus is on analysing the constitutional framework governing international relations in the EU and the US, respectively, evaluating the allocation of competences between the central authority and the component entities in light of the respective 'constitutional' texts (the Treaties and the US Constitution) and relevant case law of the Court of Justice of the EU and the US Supreme Court. The chapter finds that although the EU and the US have different starting points when it comes to the vertical division of competences in international relations, both evidence a subtle shift or accommodation in the opposite direction. In both legal orders, the point of departure is therefore no longer the exclusive competence of either the central level or of the level of the component entities, but rather, how to reconcile the involvement of both levels in the international relations sphere.

PART II: EU LAW AND MEMBER STATE FEDERALISM

In the second part of the volume, the focus turns to the relationship between EU law and the devolution processes that have recently occurred in certain Member States. It may be argued that the EU and the Member States that have granted political autonomy to sub-State national groups essentially share the same quest. The constitutional order of each of these political communities reflects a search for an equilibrium between the unity of the polity as a whole and the autonomy of the polity's territorial subdivisions. In that sense, the political entities in question

may at least be said to pursue the *aim* of federalism, that is, to guarantee unity as well as diversity in a given polity.⁴

The pursuit of the purpose of federalism evidently takes a different form in the EU than in multinational Member States. Whereas the search for the optimal balance between political unity and autonomy has a centrifugal dynamic at the Member State level, it is an integrating force in the Union as a whole. The question as to how both tendencies can coexist is the common theme running through the contributions in Part II of the book. However, another question must be addressed first: *should* those two 'federal' enterprises be allowed to coexist? Why would *both* European integration and the devolution of powers to sub-State entities be worth protecting and enhancing?

A first motive for maintaining both federal-type structures in the EU could be found in the EU Treaty. Article 4(2) TEU, in its post-Lisbon form, proclaims that the Union is to respect the Member States' 'national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.' Hence, EU law itself could be said to require that Member State federalism not be undermined by the European project.⁵

This textual argument may be strengthened by a more instrumental reason: federal-type arrangements in the EU may have beneficial effects. For instance, one may wonder whether the peace we currently enjoy in Europe is not, to a great extent, the result of the *two* 'federalisation' processes: European integration as well as internal devolution of powers. The peaceful coexistence of the national societies living in Europe seems inextricably linked with the continuous search for the appropriate equilibrium between political unity and autonomy, both at Member State and at EU level.⁶

Yet there are also deontological arguments that could be advanced in favour of federalism's Janus-faced appearance in Europe. One is adduced by Helder De Schutter, whose thesis is predominantly justice-based. De Schutter puts forward a pluralistic understanding of national culture in the domestic as well as the supranational domain, or in other words, 'national pluralism'. National pluralism simultaneously embraces the deepening of European unity and the political recognition of multiple national identities, whether they exist at the State or at the

⁴ See, eg AED Howard, 'Does Federalism Secure or Undermine Rights?' in E Katz and GA Tarr (eds), *Federalism and Rights* (Lanham, Rowman & Littlefield Publishers, 1996) 18. See also WS Livingston, 'A Note on the Nature of Federalism' (1952) 67 *Political Science Quarterly* 81, 88.

⁵ In the same way as Art 4(2) TEU requires the Union to respect a Member State's status as a republic, which forms, according to the ECJ, part of a State's national identity. See Case C-208/09 *Sayn-Wittgenstein* (ECJ, 22 December 2010), para 92.

⁶ A very forceful illustration of the link between federalism and peace in multinational States may be found in the Constitution of the Federation of Bosnia and Herzegovina. This Constitution was established as an annex to the Dayton Peace Agreement (1995), which put an end to the war in Bosnia and Herzegovina. It embodies complex power-sharing arrangements between the distinct ethnic groups. See in this regard also *Sejdić and Finci v Bosnia and Herzegovina* Apps no 27996/06 and no 34836/06 (ECHR, 22 December 2009), para 45; Mijović J and Hajiyev J partly concurring and partly dissenting; Bonello J dissenting.

sub-State level. Federalism may offer an adequate structure for implementing the national pluralist programme.

In sum, there may well be good reasons for preserving federalism's Janus-faced character in the EU. The relationship between both federal phenomena, however, is not without problems. Various tensions may arise from their coexistence. If both are to be preserved in the EU, decision-makers would perhaps do well to resolve such tensions by ensuring that both 'federalisation' processes do not undermine one another. Translated into more specific terms, this means that European integration should not prevent the Member States from devolving powers to sub-State entities and, conversely, that devolution should not undercut the European integration process.

The remaining contributions to the volume demonstrate that the institutions of both the EU and the federal Member States have recently taken significant steps in that direction. Whereas the Union has traditionally been portrayed as 'blind' to domestic federal structures, the second part of the book reveals that the Union institutions are willing to lift their blindfold in certain circumstances. Although this move has generally been welcomed by the contributors, a number of authors would like to see the Union institutions go further down this route. They put forward several proposals to make the Union legislature as well as the Union Courts more sensitive to Member State federalism than they (already) are. In addition, Part II reveals that not only the EU itself but also the federal Member States have made efforts to accommodate the other side's federal aim. As the chapters concerning national legal systems show, the (constitutional) legislatures and the constitutional courts of the Member States in question have—each in their own way—sought to reconcile their States' structural arrangements with the requirements of EU law.

Broadly speaking, the tensions generated by federalism's dual appearance come to the fore in two domains: the making of EU legislation, on the one hand, and (Union and domestic) court decisions, on the other hand. These two areas of tension form the backbone of Part II. A first series of essays assesses the role of autonomous sub-State entities in the making of Union legislation in the post-Lisbon era. The changes the Lisbon Treaty has brought about in this respect are discussed by Piet Van Nuffel. While acknowledging that the representation of regional interests in the Council, the European Parliament and the Committee of the Regions has not been significantly improved, Van Nuffel stresses the more prominent role domestic parliaments have achieved under the Lisbon Treaty. Most notably, the Treaty entitles national parliaments, first, to be informed of draft EU legislation and, secondly, to investigate whether those drafts respect the principle of subsidiarity. Although the Treaty itself does not extend these rights to regional legislative bodies, Member States may decide that the information must be passed on to the regions, and that the latter must be involved in the subsidiarity scrutiny process.

Van Nuffel's contribution clearly shows that, even after the Lisbon Treaty's entry into force, the influence of autonomous sub-State entities on the making

of EU legislation remains highly dependent on the goodwill of the Member States. A comprehensive account of these entities' actual impact can, therefore, be given only after consideration of the Member States' legal systems. That study is meticulously undertaken by Nikos Skoutaris. His comparative research covers both nominally federal Member States (ie, Germany, Austria and Belgium) and what he refers to as 'regionalised' States (ie, Italy, Spain and the UK).

Skoutaris's chapter reveals a significant similarity between the States examined as to the participatory rights of their respective autonomous regions. For one thing, the central authorities are generally bound to inform their regional counterparts of European draft legislation. Furthermore, in all States considered, autonomous sub-State entities may be able to influence the position of the central parliament or government as regards EU law through their representation in the federal upper chamber and/or in special interregional and national-regional bodies. Lastly, Skoutaris points out that each Member State allows, under certain conditions, for regional officials to represent it in the Council. The main point of contrast relates to the participation of regions in the domestic subsidiarity scrutiny of European draft legislation. The existing approaches range from mere informal channels of regional influence, to the joint representation of all autonomous regions by the upper chamber, and even to a system where each regional legislative body is permitted to issue a reasoned opinion on the matter.

Taking a more critical stance, Joxerramon Bengoetxea argues that the interests of a certain type of region are still insufficiently protected in the EU law-making process. His particular concern is with 'autonomous constitutional regions', defined as regions that (i) are constitutionally recognised in their Member State, (ii) possess an extensive degree of political autonomy, and (iii) have their own legislatures and executives. Bengoetxea recommends that these regions' special status be recognised under EU law. Such recognition would entail profound institutional change. In this regard, Bengoetxea offers a variety of suggestions, including a greater weight for the opinions of autonomous constitutional regions in the Committee of the Regions, a split of their vote in the Council for those Member States containing such regions, and an extension to these regions of the privileged status enjoyed by the Member States in proceedings before the ECJ.

Not only the EU decision-making process, but also the case law of the Union Courts in relation to Member State federalism has lately undergone major evolutions. In the present volume, particular attention is paid to the ECJ's position on fiscal, social and linguistic policies prevailing in federal Member States. It is especially in those areas that tensions between EU law and domestic federal arrangements are likely to arise (and actually have arisen). This should hardly come as a surprise. Both social solidarity and linguistic interests are strongly intertwined with people's national identity. Various multinational Member States have accommodated this reality by granting political autonomy to sub-State nations in these fields. The autonomous sub-State groups often employ their newly-won powers to establish financial solidarity mechanisms among their own members, and to encourage the use of the regional majority language in their own institutions and

in the region's public life more generally. Union law, however, attempts, in many ways, to sever or overcome the link between national identity and people's fiscal, social and linguistic rights and duties. As a consequence, EU law could severely constrain the discretion of autonomous sub-State entities to exercise their powers in the way they had envisaged. How the Court does and should adjudicate conflicts between EU law and regional fiscal, social and linguistic policies is therefore a question of eminent importance. It is addressed in chapters eleven to fourteen.

Suzanne Kingston's contribution analyses the new interpretation the ECJ has given to the EU norms on State aid in order to accommodate the devolution of *taxation* powers to regions. Kingston embraces the Court's case law on the matter as a 'mature' approach to Member State federalism. She lauds the Court's ruling that fiscal benefits granted by genuinely autonomous regions should not, by definition, be considered instances of 'selective' aid. In so deciding, the ECJ ensured that the prohibition of State aid would not preclude devolution of tax powers.

Herwig Verschueren, however, is more sceptical of the ECJ's interpretation of the fundamental freedoms in the face of regional *social* policies. He disagrees with the Court's decision that, under certain conditions, the treaty provisions on the freedom of movement also apply to situations involving the crossing of a border between two *sub-State* entities that have self-governing powers in the area of social policy. In Verschueren's view, such intra-State cross-border situations should always be governed by domestic constitutional law, even if the person who crosses the interregional border is an 'EU migrant'.

The relationship between internal market law and *language* regulation in multinational federal Member States is explored in a joint contribution by Stefan Sottiaux and Elke Cloots. The authors propose a framework for adjudicating disputes in this field. They advance the thesis that the designation of a Member State's official languages should be excluded from the scope of the EU norms on freedom of movement and nationality discrimination. Yet in Cloots and Sottiaux's view, this mode of adjudication should be extended neither to issues arising in the periphery of the grant of official status to languages, nor to laws regulating the language to be used in communication between private persons, nor to language proficiency conditions attached to welfare benefits. In so far as they hinder cross-border mobility and/or treat persons differently on grounds of nationality, such language requirements are contrary to EU law, unless justified in light of communication concerns or a group's fundamental interests in relation to its language. Furthermore, Cloots and Sottiaux argue that linguistic requirements imposed by private persons too should be subject to the EU norms on freedom of movement and nationality discrimination. Yet, contrary to public authorities, private persons cannot successfully invoke the fundamental linguistic interests of the language group to which they belong as a ground of justification.

A final contribution on ECJ adjudication relating to Member State federalism is by Elke Cloots. She contrasts the Court's case law on this matter with its approach to domestic constitutional rights. Cloots observes that, whereas the ECJ balances fundamental freedoms against constitutional rights, it resorts to a

radically different mode of adjudication in cases involving a conflict between EU law and Member State federalism. Drawing from US constitutional theory, she describes this alternative decision-making method as 'categorical' and 'rule-based'. Although Cloots is convinced that a categorical and rule-based style is the most promising avenue in this type of case, she highlights certain pitfalls the Court may encounter when opting for rules and categories rather than standards and balancing acts.

Obviously, not all disputes between EU law and domestic federal-type arrangements reached the Union Courts. The great majority of them were fought out at Member State level, most notably in the domestic constitutional courts. Hence, the final piece needed to complete the puzzle of European federalism's Janus face is an analysis of the relevant case law of the constitutional courts (if any) of 'federal' multinational Member States. The three ultimate chapters of the volume are therefore devoted to the constitutional courts of Italy, Spain and Belgium, respectively. More particularly, they examine to what extent these courts have allowed EU law to affect their States' structural arrangements. To put the question the other way around, to what extent have the constitutional courts revised those arrangements to ensure the States' compliance with their duties under EU law?

As far as the *Italian* constitutional court is concerned, Giuseppe Martinico notes that the court has generally approved of EU law being used by the central level of government as a tool for re-centralising powers which had been devolved to the regions. More particularly, the court has permitted the central State to intrude in various ways upon the regions' powers, in order to avoid the risk of State liability for non-compliance with EU law. The State legislature is allowed, for instance, to implement EU law in areas of shared competence not only through basic principles (as it normally should), but also through detailed provisions interfering with the regions' powers. The latter provisions remain in force as long as they are not replaced by regional laws.

Maite Zelaia Garagarza's contribution shows that the *Spanish* constitutional court too has served as an arbiter of disputes between the central State and the territorial subdivisions regarding EU law. Similar to in Italy, the relevant cases before the constitutional court mainly revolved around the rights of autonomous sub-State entities to participate in the making and implementation of EU law. Yet the Spanish territorial subdivisions seem to have been more successful before the court than their Italian counterparts. Most notably, the Spanish court has sanctioned several attempts by Autonomous Communities to compensate their loss of autonomy due to European integration. The court approved, for example, of the establishment of a Basque Office in Brussels. It also cleared the way for Statutes of Autonomy claiming regional power to implement EU law and stipulating that the internal distribution of powers as established by Spanish constitutional law cannot be modified by EU law.

Unlike what seems to be the case in Italy and Spain, the *Belgian* judgments that have recently sparked a fierce debate deal with power struggles between the sub-State entities *themselves* rather than between the federal and sub-State levels

of government. As Stef Feyen's contribution makes clear, a major issue in Belgian constitutional law is whether the scope *ratione personae* of social and fiscal benefits conferred by sub-State entities (ie, in practice, the Flemish entity) should be defined along the same lines in inter-State and internal situations, that is, the lines set out by EU free movement law. The question, in other words, is whether the Belgian internal free movement standards should be interpreted in the same way as the corresponding EU norms governing inter-State situations. If this question were to be answered in the affirmative, the practical effect would be that the (relatively generous) Flemish benefits could in principle no longer be refused on grounds that are 'suspicious' under EU law, such as residence, not even as regards purely internal situations. Feyen demonstrates, however, that the constitutional court's recent case law is not entirely clear on the matter, and recommends a more coherent approach.

The three chapters on constitutional adjudication invariably confirm that EU law has influenced the governmental structure of the Member States under examination, often with the complicity or help—depending on the viewpoint—of the respective constitutional courts. Significantly, the paradigm case discussed in these contributions did not involve a Member State—as a whole—defending its constitutional order against intrusion from EU law. Rather, what was essentially at issue was a dispute between distinct domestic political entities, whereby at least one party resorted to EU law in an attempt to evade constitutional norms concerning the State's 'federal' structure, or to have those norms modified by the court. In sum, in all three legal systems, EU law has been invoked—rightly or wrongly—as a weapon in internal power struggles. The extent to which constitutional courts have been receptive to such arguments, however, seems to vary across States, and even across time within the same State.