What Does The Eu Tell Us About Federalism?

Abstract

The link between federalism and the EU has been widely explored from the perspective of structural, definitional elements. Rather than looking at the impact of federalism on the EU, this paper looks at what the EU tells us about contemporary federalism. It is contended that the most significant contribution of the EU to the theory and practice of federalism is the key role of asymmetry. In the EU, like in other contemporary manifestations of federalism, asymmetry is the backbone of the functioning of the relations between the tiers of government, a structural rather than an accidental element of today's federalism.

Introduction*

Since its inception, the process of European integration was closely associated with the federal idea (Burgess 2000), although always as a sui generis experiment. However, a European federation has not materialised so far, nor is this likely to happen in future. What has developed is rather a 'contrapunctual law' (Poiares Maduro 2006), with the orders of the European Union (EU) and the Member States requiring constant integration and harmonisation with each other.

Such interaction falls short of the essential element of federalism, i.e. the hierarchical relationship between the legal orders of the EU and of the Member States, with the former prevailing over the latter (MacCormick 1999:118). While this would prima facie exclude any linkage between federalism and the European Union, there are no doubt a number of factors that make the association reasonable. Not only the ideological roots of the European project (Burgess 1996), but also the functioning of several key principles of EU law are typically federal. These include the precedence of EU law over any domestic source of law, the direct effect of European law in the domestic legal systems and between citizens, the protection of fundamental rights of individuals (all initially established by the Court of Justice – CJEU), the distribution of powers, the principles of delegated competences, subsidiarity, proportionality (all in Article 5 of the Treaty on the European Union – TEU) and the principle of loyal cooperation (Article 4.3 TEU) (Schütze 2009).

The tightrope walk of the EU between federalism and exceptionalism is mirrored also in terminology. In defining the nature of the EU, ad hoc terminology widely prevails (sui generis, multilevel governance, etc.), although some try to underline the common federal thread by referring to the 'treaty federalism' of the EU as opposed to 'constitutional federalism' typical of federal states (Hueglin and Fenna, 2006:13). At the same time, a consistent part of EU constitutional terminology has been drawn from federalism and terms such as pre-emption, supremacy, exclusive and concurrent powers, residual clause, and the like are common in literature and even in normative texts.

What kind of Federal Traits? Asymmetry as a Structural Element of EU Federalism

Within the limits of a sui generis, non-state, non-hierarchical structure, it is therefore not wrong to link federalism and the European Union. This has however been made by looking at structural elements, using federalism to try to define 'the beast': is the EU a federation, why, and to what extent? The answer to such questions cannot but be subjective, based on the underlying understanding of federalism.

More than looking at the contribution of federalism to the European Union, it is worth looking at the contribution of the European Union to federalism. What does the European Union tell us about federalism, i.e. what traits of federalism emerge as structural when looking at the EU as an important test case for contemporary federalism?

The history of the EU from the visual angle of federalism (Burgess 2000) tells us that the establishment of common rules has always taken place in an asymmetric way and so has always been the nature of EU institutions, policies and procedures.

In some core areas (notably in the fields of exclusive EU jurisdiction – article 3 Treaty on the functioning of the European Union, –TFEU), the EU adopts uniform rules. These are binding for all states, although the exclusive competences are often exercised by means of directives instead of regulations, i.e. by legal acts that bind in the outcome but allow Member States to tailor implementation to their specific situation, thus to make implementation asymmetric. In more and more significant areas of integration, the rule is asymmetry from the start. This means that EU rules do not apply to all, that only some states participate in institutions governing a number of highly significant policies (from the monetary union to asylum, from security to border controls, from education to family law) and that procedures that lead to decisions are specific and applicable to the issues and Member States at stake.

The asymmetric trend within the European Union has increased significantly with every treaty reform from 1992 (Maastricht Treaty) onwards (Treaties of Amsterdam, Nice, Lisbon), in a growing number of areas. Accordingly, the terminology used in the political and academic debate has also produced a wide range of words to indicate this phenomenon: variable geometry, multi-speed integration, Europe à la carte, opt-ins and opt-outs, enhanced cooperation, permanent structured cooperation, intergovernmental cooperation and possibly other (Antoniolli 2019). All these concepts indicate differentiated integration thus, in federal terms, asymmetry. The legal mechanisms to achieve the various forms of asymmetry are however different in nature: some are laid down in the treaties, some in EU legislation, some develop outside the treaties as forms of intergovernmental cooperation (and some are later incorporated in the treaties).

Asymmetry in Action

The privileged asymmetric instrument, provided by the treaties, is the so called enhanced cooperation (Cantore 2011). It was introduced by the Treaty of Amsterdam and extended to common and security policy by the Treaty of Nice and to defence by the Treaty of Lisbon, which made it a general mechanism covering all areas of European integration (article 20 TEU and articles 326-334 TFEU). The Treaty establishes limits and procedures for enhanced cooperation: a minimum of 9 Member States, the right to join at any time for other EU countries, and the limit to not undermine the internal market or economic, social and territorial cohesion, to not constitute a barrier to or discrimination in trade between Member States, to not distort competition and to not extend powers outside EU competences. In just a few years since the Treaty of Lisbon, a powerful asymmetric form of cooperation has been established in the areas of family law (divorce and property regime of international couples), patent law, European public prosecutor and defence. Other proposals are pending, including on a financial transaction tax.

Other instruments regulate the three most relevant policy areas in which asymmetry is most visible in Europe: the Economic and Monetary Union, the free movement of people and the Area of Freedom, Security and Justice.

The Economic and Monetary Union includes 19 Member States having adopted the Euro as their currency (only the UK and Denmark have formally opted out, while the other Member States committed to join when convergence criteria are met). In the aftermath of the economic and financial crisis that hit Europe as of 2008, a number of acts and instruments have been adopted in this area that strongly centralised economic governance and financial surveillance. These include the so called six-pack (2011), two-pack (2013), the Euro Plus Pact (2011), the Open Method of Coordination for economic policies, the European Stability Mechanism (2012), the 'Treaty on Stability, Coordination and Governance' (known as Fiscal compact, 2012), the Banking Union. Each act has different sources, different effect, is regulated by different institutions with different powers.

The second main asymmetric area is the one affecting the free movement of people. The Schengen Agreement on the abolition of internal border controls and common visa was signed in 1985 by just five Member States, and in 1999 it was incorporated into European primary law by the Amsterdam Treaty, with the opting out of the UK and Ireland. While some Member States have not yet joined, the agreement was extended to some non-Eu countries: Norway, Iceland and Switzerland.

The third prime field of asymmetry is the so-called Area of Freedom, Security and Justice, which provides for special arrangements for some member states concerning border checks, asylum and immigration, police and judicial cooperation in civil and criminal matters (UK, Ireland, and Denmark opted out).

Whatever the future developments of the European integration process will be, there is no doubt that the asymmetric features will not be reduced and are likely to be further improved, as stated by the very European Commission in a White Paper on the Future of Europe (European Commission 2017). Asymmetry, different rules, institutions and procedures for different policies and different participating units in order to allow differentiated levels of integration is thus the main legacy of the European Union to the study of contemporary federalism.

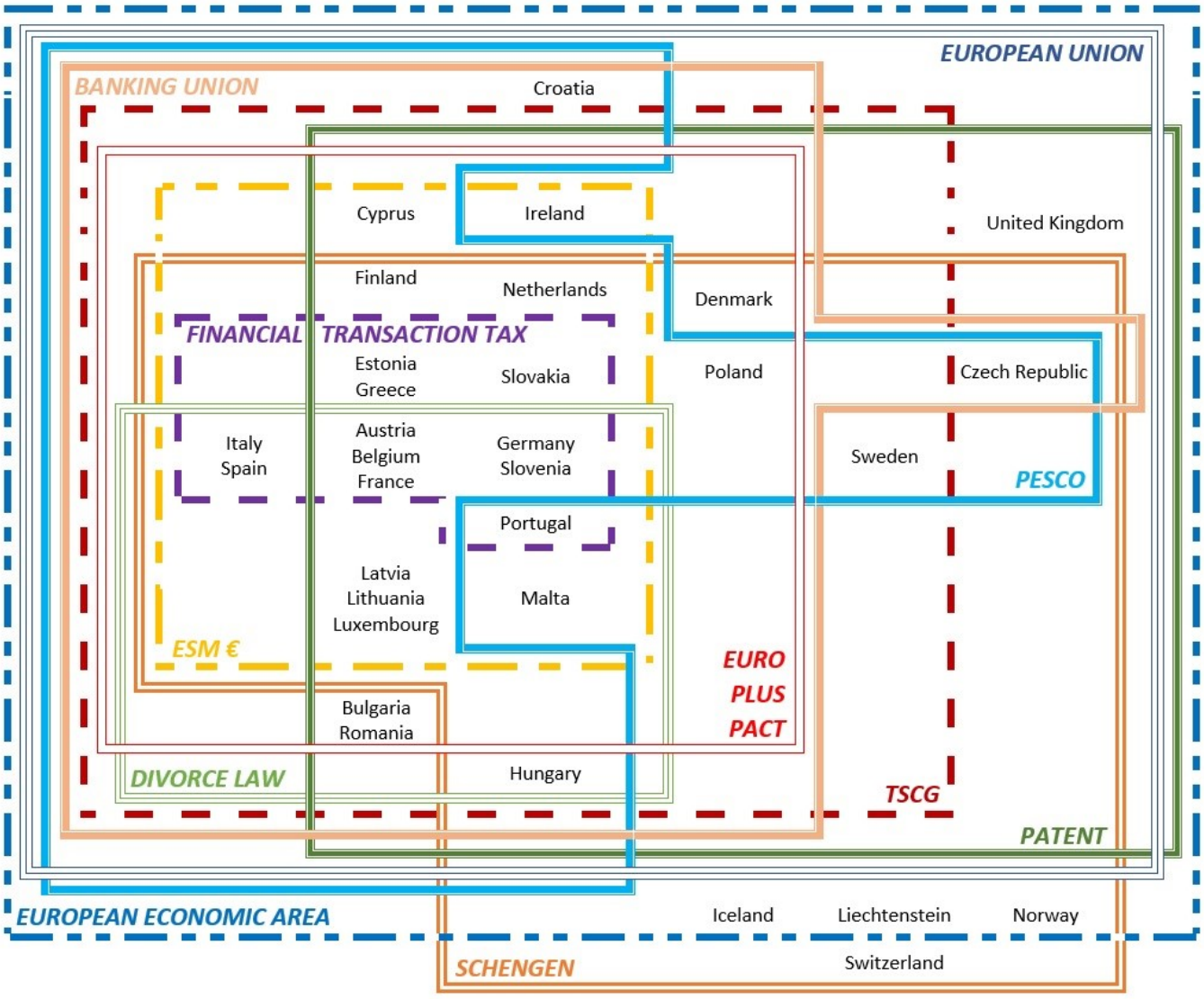


Figure 1 – Differentiated integration, 2018 (own elaboration based on earlier graph by Institute Jacques Delors, 2013)

Conclusion: Research agenda of (asymmetric) federalism and EU

The European Union epitomises the complexity of decision-making in contemporary societies. European decisions are made by an increasing number of actors vested with different legitimacies, often beyond the mere political-electoral one. These actors are arrayed both vertically (levels of government) and horizontally (parliaments, governments, agencies, courts, administrations, interest groups) and interconnected between and among the tiers of government, in a post-sovereign, non-hierarchical bundle of norm suppliers. Thus, in interconnected Europe, jurisdictions tend to overlap as no field can be clearly separated from others, and the legal and administrative regulation of each competence matter results in an entanglement of

norms and procedures produced by several authorities at different levels (Scharpf 1995).

At the same time, there seems to be no alternative to the evolution of governance towards greater complexity and pluralism, not only because societies are simply becoming more intricate, but also because democracy requires that many voices be included in decision-making processes, especially in order to increase social acceptance of norms. One of the most significant contemporary challenges is how to combine pluralism with good and effective governance and the EU, with all its shortcomings, is an extraordinary example of such an attempt. Contemporary constitutionalism requires much more elaborate rules than in the past, as it has to ensure democratic, transparent, inclusive, and effective decision-making, taking into account different claims, different interests, and different legitimacies.

The European Union, as a partial, sui-generis federal phenomenon, calls on looking at precisely this challenge: how to address the growing call for pluralism within legally regulated procedures. Asymmetry is the response it provides more and more frequently. New forms of decision-making are the overall context in which asymmetries operate. Federal studies can provide answers to these challenges and would benefit from a more careful attention paid to asymmetry in decision-making processes.

*A more developed argument can be found in my chapter, "Federalism and the European Union" in John Kincaid, ed., A Research Agenda for Federalism Studies (Cheltenham, UK: Edward Elgar, forthcoming 2019).

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