CENTRO STUDI SUL FEDERALISMO

PERSPECTIVES ON FEDERALISM

VOLUME 13

ISSUE 1

2021

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

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The Conference on the future of Europe and the reform of the EU

by

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Perspectives on Federalism, Vol. 13, issue 1, 2021

Abstract

The Conference on the future of Europe is underway. It may pave the way to a reform of the EU. Or it may go down in history as a lost opportunity, or even as an initiative which backfired, having created expectations that may not be fulfilled. Its success or failure depends on the behaviour of citizens and institutional actors within the Conference, and on the evolution of the European political landscape after the German and French elections.

Key-words

Conference future EU, reform, political landscape, citizens, institutions

1. The origins of the Conference on the future of Europe

The Conference on the future of Europe was initially proposed by French President Emmanuel Macron. He wrote a letter to all European citizens in view of the 2019 European elections mentioning the Conference as the instrument to involve them in a great participatory experiment to set the way forward for the EU. At that time Macron had a clear plan. The Conference was meant to provide momentum to France's proposal to deepen economic integration by creating a Euro-area budget. Macron's narrative on creating a European sovereignty could favour a strong push towards more integration. That he would use to overcome Germany's resistance with regards to more fiscal integration and risk-sharing at EU level.

Then the pandemic arrived and the Conference was postponed. The pandemic was a crisis that initially Member states tried to tackle alone, and failed. The EU attempts to coordinate the response, at least as far as the common acquisition of vaccines and in some solidarity among Member states eventually succeeded. The EU response to the economic impact of the pandemics was impressive. The EBC launched a massive program of pandemic purchase, even putting aside the old dogma that purchases should be linked to the capital key of each country. This way it could help those in need almost without limits. The Commission suspended the Stability and Growth Pact, relaxed the State aid rules, launched the SURE program and proposed the Next Generation EU, which the European Council eventually approved.

This new massive investment program is financed by EU-issued debt, and the EU was to get new own resources to be able to pay it back. For Macron it was a welcome and unexpected gift: German resistance had fallen, before the Conference even took place. The pandemics had succeeded in what Macron had failed so far. Chancellor Merkel had changed her mind. She once said that Eurobonds will never materialise until she was alive. Now she played a key role in establishing the NextGenEU financed by EU debt, even if not officially called "Eurobonds". The NextGenEU is supposed to be una tantum. But the fight to make it structural has already started. The Parliament, the Commission and the European Central Bank – supported by several countries, including France – clearly see this as an essential step to

complete the Economic and Monetary Union. The pandemics was the crisis that put the proposals of the 2012 Four Presidents Report and the 2019 Five Presidents Report on the establishment of a genuine economic and monetary union had finally into the EU agenda and deliberations.

It looks as if there is a lack of ownership of the Conference, which is formally co-promoted by the Council, the Commission and the Parliament. It was Macron's idea, with the aim to exploit it to get momentum to create a Euro-area budget. But the pandemic brought the NextGenEU, with the EU debt and the prospect of new own resources. Hence, there is no clear aim for what the Conference should bring about. Many countries are afraid it could bring to a Treaty change process. Other hope it will. All are afraid, because nobody knows what could be its outcome, what is it supposed to be, and what is the next step of European integration that could get momentum from the Conference.

2. The difficult start of the Conference

Eventually the Conference officially started in 2021, after a long struggle between the European institutions. The European Parliament was the main drive to get the Conference done, while the Council was less enthusiast about it. But the Conference is especially an extraordinary occasion for citizens and civil society to express their views on the future of Europe.

The European Commission systematically organises consultations on its legislative proposals, and there is a wide debate on everything about the EU in Brussels by NGOs, economic actors and associations organised at European level. Still, the Conference on the future of Europe is one of a kind for several reasons.

For the first time the European Union asks its citizens to express freely their views in an open manner on the future of their Union, and provides an interactive multi-lingual digital platform to do it (www.futureu.eu). Each and every citizen can easily register in the platform and insert her or his ideas, like and comments those of other citizens, as well as insert events on any topic related to the future of Europe. The Conference platform is divided in different

topics, so that users can find what they are looking for, and interact with other citizens interested in a specific issue. The thematic areas are: Climate change and the environment; Health; A stronger economy, social justice and jobs; EU in the world; Values and rights, rule of law, security; Digital transformation; European democracy; Migration; Education, culture, youth and sport; and Other ideas. Citizens can thus propose their ideas on the EU division of competences, decision-making process, institutions' powers as well as any specific topic and European policy.

The Conference is also a hybrid experiment in participatory and stochastic democracy, because it includes Panels of European Citizens selected randomly, but in order to represent the diversity of European society. These Panels' works are then presented to the Plenary session. The Plenary includes some of the citizens involved in the Panels, together with Members of the European and national Parliaments, members of the Commission and the national governments, as well as of regional and local governments and civil society.

The governance of the Conference is rather complex, with the co-participation of the European Parliament, Commission and Council in all bodies and decisions. The fact that it is unclear if the Council position on anything needs to be unanimous or not makes the management of the Conference a difficult task.

President von der Leyen in her state of the Union speech invited all citizens, and especially young people to participate. But what is lacking is a clear communication strategy. The Committee of the regions and the Economic and Social Committee have fought to be involved in the Conference plenary, but it is unclear if they are effective in mobilizing regional and local governments and economic and social actors to participate. It would not be difficult for local and regional governments to organise open Council meetings to be inserted in the Conference platform, or to insert in their websites an invitation for citizens to participate with a link to the platform. Just as ministries of education could invite schools to devote some time of their civic education to organise debates among students on the future of Europe. Nothing of this is happening, and the media are not reporting on the Conference works, nor are they contributing significantly to raise a debate on the future od Europe.

It seems national governments accepted to implement the Conference – an idea initially put forward by Macron and then supported especially by the European Parliament – but worry that the citizens may come forward with proposals for an ambitious reform, that many of them are afraid to undertake. At the same time, it will be difficult for them to ignore completely the results of the Conference. Especially if many citizens will participate in its works through the digital platform and if many events will be organised locally, in a bottom-up fashion around Europe.

3. The context of the Conference

In politics timing is everything. Concomitancy can have a deep impact on event or process apparently or logically unrelated. The Conference is supposed to finish in spring 2022, during the French presidency of the Council of Ministers. Thus, it suffers from the widespread belief that nothing will be decided while there is not the new German government and before the French presidential and parliamentary elections taking place between April and June 2022.

That may be true. But after the French elections, the time for important decisions may come. And the Conference may provide both the agenda and the momentum needed. To this end it is important that citizens participate in the digital platform of the Conference: https://futureu.europa.eu/. The national governments are afraid that citizens may set the agenda. And the ideas on the digital platform as well as the work of the Panels of European citizens show that there is a request for the EU to do more in different fields: from health to climate change, from foreign and security policy to migration, from the economic to the social realm. It looks like the Conference is providing the occasion for European citizens to express their desires. And apparently this implies more European public goods provided through European policies. It seems many Europeans do not grasp that the EU still lacks a number of competences and powers needed to act in certain areas. Still, they ask for the EU to act in those domains as well. This is challenge that may arise from the Conference: a push for more sharing and pooling of sovereignty, that is a strengthening of EU competences and of the powers of the EU supranational institutions, as well as the reduction of the use of unanimity in

the decision-making process, or the transformation of the new NGEU tools into structural EU instruments and powers.

It is impossible to know if the Conference will bring to a Treaty reform, a constitutional momentum, or if it will fail. But it is clear that its potential impact rest on a massive citizens' participation and on the evolution of the political context.

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PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

The Role of the European Union in Secessionist Conflicts

by

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Perspectives on Federalism, Vol. 13, issue 1, 2021

Abstract

Secession in a EU context analysed from a multilevel governance unravels that there is in fact room EU interference in secessionist conflicts. Nevertheless, a balance should be struck between such commitment and restraint in respect of Member State autonomy. Through creative and pragmatic conflict-resolution the EU can and should conjure the political courage to find the limits of potential commitment. To better accommodate such a role, the TEU ought to be adapted

Key-words

Secession, EU accession, EU Membership, multilevel governance, independence

1. Introduction

In the tangled secession debate it is easy to lose sight of the forest through the trees. The conflict arising from a territory aspiring to separate from a EU Member State brings rise to bulks of questions, each in their turn generating even more – often contradictory – answers. The issue of secession in a European context is dominated by gridlocks between state and people, territorial integrity and self-determination, international law and EU law, Article 48 and Article 49 TEU, … in favour or in opposition of secession.

Yet, this essay unravels a clear view: through a frame of multilevel governance it is argued that the EU faces the challenging charge of finding an equilibrium between remaining in the margins and committing in secessionist conflicts. While this essay attempts to maintain a neutral stance in the secession debate, the current status quo results in a state-reinforcing bias. Contrary to popular belief, however, nothing in international or EU law prevents secession or subsequent Membership of the EU. Nevertheless, secession can only occur lawfully provided it occurs through sound consented agreement between seceding and predecessor state and is in complete concordance with the domestic constitution and the rule of law. In such event, it is consequently argued that the EU should exert its influence through creative and pragmatic conflict-resolution. Such a role for the Union gives answers to some of the paradigm issues in secession. For instance, considering both alleged routes to post-secession Membership to the EU in the current political and legal landscape (Article 48 and 49 TEU), this essay establishes that whatever procedure ultimately is deemed the accurate one, both have room for EU commitment – albeit that Article 48 TEU enjoys preference. Nevertheless, politics and emotion still blur the secession debate and constitute a veritable ball and chain for EU action. The EU should conjure the necessary political courage to find the limits of its commitment, without overstepping its predominantly restrained role in internal matters of secession.

In order to better accommodate this EU role, it is argued that the TEU should be adapted. A new provision should be installed including the requirements for lawful secession, the general procedural requirements therefor and a framework for more EU engagement. A final sceptical note is not out of order. In a European context where any consensus for treaty

reform is difficult to negotiate, it is highly unlikely that the Masters of the Treaties will codify anything threatening their sovereignty.

2. EU multilevel governance: reframing the debate

The main questions of this essay is to determine what role the EU can and should play in secessionist conflicts within its Member States. By adopting a multilevel governance frame of reference to answer this question, this article aims to take a step back from the classic gridlocks and stalemates in the secession debate in order to provide a fresh view on the issue. Before tackling the question of the EU's role, the following paragraphs first delineate how the Union fits within the concept of multilevel governance.

The EU is a union of independent states. It consists of a national and a supranational level. Through the EU integration narrative, Member States have increasingly transferred parts of their sovereignty to the supranational tier, thus creating a veritable echelon of power above them and their citizens (Panara 2015: 11). Both tiers are regulated constitutionally. The Member States have their domestic constitutions and the EU is regulated through the constitutional treaties.[I] Still, Member States remain assertive regarding their sovereignty and constitutional identity – *Brexit* being the extreme expression thereof. From an early stage on, however, the ECJ has established that the EU is a new and autonomous legal order in which the Member States have limited their sovereignty for the sake of the Union.[II] In this sense the EU is a constitutional composite, consisting of both a national and supranational constitutional dimension (Panara 2015: 12).

For a long time the EU wore blinkers, only focussing on the constitutional Member States '*monoliths*' (Fasone 2017, 48). The notion of '*regional blindness*' is part of a larger metaphor used to indicate the EU's visual impairment towards regions, neglecting the subnational dimension of Member States. The metaphor is used to analyse the EU's position towards subnational regions and has gradually evolved from regional blindness to 'regional myopia' and finally 'regional visibility' (Bengoetxea 2012: 230-238), now identifying a veritable third level in the EU construct. One might even say that the EU has sent ambiguous signals to subnational

entities – be it intentional or not (Fasone 2017, 51-60). Over the years the EU has significantly reinforced the role of subnational entities – and especially those with legislative powers – in EU governance through *inter alia* the establishment of the Committee of Regions, granting subnational ministerial representation in the Council and the codification of the principle of subsidiarity (Fasone 2017, 51-60). In the context of secession, this could be perceived as seconding the aspirations of seceding entities, who are picturing an independent future along with a safe Member State status within the EU.

The devil's advocate could equally argue that this is the EU's way to keep independence-seeking regions at bay, by way of compromise. Personally, I am of the opinion that the developments attributing more powers to subnational regions are (to a large extent) unrelated to the secession debate. Rather, these empowerments of regions are an answer to larger issues like the alleged democratic deficit in the EU. I also believe it is a question of realism. When it becomes apparent that over 70% of EU law is implemented by subnational entities[III], consistency requires EU governance to correspond to reality, being that subnational entities have significant impact on EU governance and it is therefore rational to operate in close coordination. Legally, too, empowering the regions is an adequate translation of the principle of subsidiarity, consolidated in Article 5 TEU. Finally, justified empowerment of various sublevels is a logical and rational policy choice, when seen from a multilevel governance perspective.

The foregoing indicates that there is more to EU governance than *prima facie* appears, and the latter ferries me seamlessly to the notion of multilevel governance.

Multilevel governance is a notion that is generally linked to the EU, describing it as a '*system of continuous negotiation among nested governments at several territorial tiers—supranational, national, regional and local*' (Hooghe and Marks 2003: 234). According to the Committee of Regions Whitepaper on Multilevel Governance, multilevel governance means '*coordinated action by the European Union, the Member States and local and regional authorities, based on partnership and aimed at drawing up and implementing EU policies.*'[IV]

The EU is a hybrid multilevel governance polity. On the one hand it primarily embodies a rigid structure with a durable institutional design in its constitutional Treaties, which is

reinforced by an exclusive and closed club of EU Membership (Popelier 2019: 38). On the other hand, the EU also features more flexible tendencies within this stable organisation with its vast number of different actors on the different tiers of government (Popelier 2019: 38). While indeed the EU is a union of independent states who form the EU's first point of contact, the Union itself is an entity with far reaching powers, legal personality and has been recognised from an early stage on as an autonomous legal order.

The EU, as a system of multilevel governance, is an intricate interconnected network of different actors, which inevitably means that a secession on a domestic level of the Member States will have repercussions on the supranational level for the EU, the other Member States and their citizens. The EU can therefore not be indifferent in these matters. If it wishes to legitimise itself as a valid player in multilevel governance, the EU ought to minimise the potential socio-economic and political cross-border disruption caused by secession within the EU (Haljan 2014: 15).

At the same time, the EU consists of independent Member States that are rather keen on their sovereignty and constitutional identity. The EU therefore awaits the difficult task to find an equilibrium between respecting state sovereignty as regards the legality of secession ('restraint') and dealing with the supranational and macro consequences of secession ('commitment') (Popelier 2019: 39). After a brief categorisation of pertinent types of secessionism in a EU context, this balancing act will be analysed throughout the following sections. First as regards the position towards secession within a Member State and secondly the EU position when dealing with seceded states aspiring to access the Union.

3. Categorising different types of secession

A territory seceding from a EU Member State and simultaneously acceding to the EU is, while much debated, unprecedented. In the cases of *inter alia* Croatia and Slovenia the secession happened before applying for EU membership. The case of Greenland and Denmark is clearly different since it involved an exit from the EU. The foregoing aims to demonstrate the unknown path down which the secession debate leads us and the (legal)

uncertainty it entails. By categorising secessions into different types, we can establish way-showers in this uncharted territory. The importance of differentiation in types of relevant secessions for the European Union lies in the different manner each secession interacts with the confronted hurdles in the strive for secession.

Based on the differentiations of consent and withdrawal Closa identifies a typology of 4 scenarios within the EU, to which he matches contemporary examples (Closa 2017a: 518):

1. Unconsented secession without withdrawal of the predecessor state (e.g. Catalonia);

From its origin up till now, the Catalan separatist movement has been refuted, fended off and even been declared unconstitutional by the Spanish government. The Catalan secession would without a doubt be a unilateral one – that is, so long as Madrid does not change its mind. Furthermore, Spain has never contemplated an '*Españope'* – by which I mean an equivalent term for *Brexit* for a Spanish withdrawal from the EU.

2. Consented secession without withdrawal of the predecessor state (e.g. Scotland *ante* 2016);

As demonstrated in an example above, the Scottish independence would have occurred lawfully and consensual through the Edinburgh Agreement (2014). The *Brexit* referendum was held only two years later in 2016. So while the *Brexit* might have already been sprouting in 2014, the official volition of withdrawal was not yet expressed.

3. Consented secession with withdrawal of the predecessor State (e.g. Scotland *post* 2021 if it were still within the EU); and 4. Unconsented secession with withdrawal of the predecessor State (e.g. Scotland *post* 2016 until 2021).

Closa initially illustrated the two remaining types with the same example in different hypothesises, varying on the (un)consent of the UK. When this contribution was written in 2016 it was uncertain whether the UK would allow for a renewal of the Edinburgh Agreement. Therefore a new Scottish independence could occur either consensually or unilaterally. Today, however, the deck has been reshuffled. First and foremost, since Brexit, neither the UK nor Scotland are Members of the EU – making the case for Scottish independence significantly less relevant for this essay as it analyses the role of the EU in internal secessionist conflicts.

Moreover, the nature of the Scottish secession has received ambiguous signals since 2016. For the sake of the example, and ignoring the occurrence of Brexit, the categorisation of the Scottish secession would be as followed. In 2020 the prospect of a consented secession was grim after a letter from PM Johnson to Nicola Sturgeon[V] declaring the referendum "a once in a generation vote", making any secession effort unilateral and thus fall within the fourth type. Today, after Secretary for Scotland Alister Jack declared that another independence referendum could be on the table if 60% of the Scottish people votes in favour thereof for "a reasonably long period" we know that, for the time being, prospects of Scottish independence could be consensual and thus fall within the ambit of the third type.

4. The role of the European Union as a system of multilevel governance

4.1. A EU role in secession within a Member State

The first and thorny issue for the EU rising with a territory seceding from a EU Member State is the role the Union should adopt when dealing – or not dealing – with these matters as a system of multilevel governance. Separatist politicians and parties and proponents of secession inventively look for European backing in their endeavours. Member States on the contrary, insist on their sovereignty in this sphere. As the following subsection will demonstrate, the EU's actual position in this context is predominantly restrained, resulting in a state protective orientation.

To deduct the desirable EU position, it should first be determined whether the Treaties prohibit secession or not. Coincidently, the Treaties do not mention secession (neither unilateral, nor consented), let alone a pathway to achieving it. To what extent is this Treaty silence a coincidence? After all the Member States are the *Masters of the Treaties*. Coherently, it is only logical that the Member States want to safeguard their territorial integrity and sovereignty in the Treaties by on the one hand enshrining the protection of territorial integrity (Article 4(2) TEU) and on the other hand refraining from acknowledging secession in the Treaties (Closa 2016: 246). It seems unconceivable that Member States would lay out a "user manual" to achieve secession in the Treaties (Piris 2017a: 79). In line with this reasoning, the Member

States would not deem it necessary to explicitly prohibit secession in the Treaties, since such prohibition is implied through Articles 2, 3 and 4 of the TEU (Closa 2016: 246).

Proponents of secession interpret this Treaty silence as EU neutrality towards how secession is achieved. (Piris 2017a: 79). Treaty silence could accordingly be interpreted as non-prohibition of secession. This alleged Treaty neutrality is in any case not absolute. A great deal depends on how the secession has been achieved, *i.e.* whether the secession occurred unilaterally or consensually.

4.1.1. Predominantly restrained

Regardless of the potential repercussions that secession causes to the outside world, it primarily remains an internal development within a Member State (Popelier 2019: 39). Consequently, there are some factors the EU should take into account when determining its position and role to play. These relevant factors amount to a position and role that is predominated by restraint, yet that has limited room for commitment as well. The following paragraphs shall shed light on which specific legal factors a multilevel EU ought to take in mind when dealing – or not dealing – with internal conflicts of secession.

First of all it goes without saying that any EU position on internal secession ought to be in conformity with the Treaties. In particular, three provisions are relevant for determining a EU position: respect for the rule of law (Article 2 TEU), respect for the territorial integrity of Member States (Article 4(2) TEU) and the respect for the principle of sincere cooperation (Article 4(3) TEU).

Article 2 TEU plays a key role in determining the EU position. It contains the most fundamental values on which the EU is built, amongst which the rule of law and democracy stand out in this context (Kochenov and van den Brink 2016: 13). The rule of law is to be respected by the EU and by the entirety of its Member States, including the levels potentially seeking independence. Adherence to the rule of law requires any credible secessionist movement aspiring a future within the EU to proceed in conformity with the domestic constitutional requirements. According to Kochenov and van den Brink this does not apply if said constitutional requirements are unreasonable and prohibit any chance at successful

secession – an opinion that not so subtly winks at the Spanish government.[VI] Such reasoning may become the mainstay for political idealism and rhetoric, but it does not seem commendable for the EU. The EU as system of multilevel governance, or as a polity even, cannot directly ignore the constitutional requirements of one of its Member States. It would not only disrupt its intricate system of multilevel governance, but would moreover emit an undesirably biased signal to both existing and future candidate Member States.

Adherence to democracy and the rule of law does, however, require a restrained role of the Union in both consensual and unilateral scenarios. Proponents of secession, even of the unilateral variant, proclaim that democracy trumps the need for a legal basis (Closa 2017a: 518). In their view a plebiscitary vote through majority justifies secession, if needed according to some even unilaterally. Notwithstanding the excruciatingly downplayed notion of democracy in that reasoning, the rule of law and democracy require the Union to dismiss, or at least not acknowledge, any secession that has not or does not respect(ed) the constitution of its (predecessor) state. If, on the other hand, a seceded state acquires independence through a process of consent with it its predecessor state and in compliance with its constitution, the EU has no choice but to acknowledge that secession within the multilevel system (Popelier 2019: 44). This does not mean that the EU should feel bound by its effects (Closa 2017a: 524).

More importantly, any position adopted by the EU should take Article 4(2) TEU into account, which reads:

> '2. 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**. It shall respect their essential state functions, including **ensuring the territorial integrity of the state**, maintaining law and order and safeguarding national security.' (emphasis added)

In respect of this Article, the EU cannot interfere with the national identities of the Member States, including regional and self-government. The same goes for territorial integrity (Fasone 2017: 51-52), which is exactly what internal secession threatens. Does this, however, mean that all hazards to territorial integrity of a Member State are to be managed exclusively by the Member State in question?

From a legal point of view there is no doubt that territorial integrity is not conferred upon the Union, and therefore *a priori* excluded from its competence.[VII] The mention of territorial integrity in Article 4(2) TEU does not, however, in strict legal terms constitute a reservation of competence to the Member States. Article 4(2) is not a limitation on the *existence* of competence, it is rather a limitation on the *exercise* of EU competence (Garben and Govaere 2017: 4-5). Meaning that the EU is bound to respect the core areas of national identity – including territorial integrity – when undertaking EU action.

The question remains whether Article 4(2) TEU harbours an implicit exclusive competence for Member States regarding territorial integrity or not. After all, the enigmatic Article 4(2) does not explicitly reserve this competence for the Member States (De Witte 2017: 70) While granted, *prima facie* this existence of said exclusive competence is debatable, the Committee on Constitutional Affairs of the European Parliament was very clear on the matter when the predecessor provision of Article 4(2) was drafted stating that

> 'internal territorial organisation and the division of competences within each Member State to be matters to be decided upon by the Member States alone' and 'It is important that there should be no ambiguity about the fact that each Member State is entirely and exclusively competent to define the level, geographical scope, powers and status of its regional and local authorities.'.[VIII]

There is thus no doubt that territorial integrity, including regional self-government, is a matter to be managed and regulated exclusively by the Member States (Fasone 2017: 248). Moreover, the EU should respect the territorial integrity of its Member States in any undertaken action and in general refrain from interpreting, let alone arbitrate internal secessionist conflicts (Closa 2016: 249). It therefore goes without saying that Article 4(2) TEU significantly suggests the EU remains on the side-lines in conflicts of internal secession, which constitutes the second indicator for a restrained EU role, even as a multilevel governance actor.

The operational effect of Article 4(2) TEU is significantly different depending on the (un)consensual character of the secession. In the scenario of a unilateral secession, Article 4(2) TEU requires the EU to respect the reigning state-oriented bias (Popelier 2019: 44). The EU

ought not to recognise the seceded state, since the secession occurred in contravention of Article 4(2) TEU. If, however, the secession occurred consensually the situation is different. According to Tierney and Boyle respect for territorial integrity would no longer be at issue if the secession occurred consensually, provided the EU wants to cooperate with the seceding territory (Closa 2016: 249). Granted, the EU ought to acknowledge the secession in respect of Article 2 TEU, but from the moment that a Member State consents to a change in its territory there is no way for the EU to violate the territorial integrity of the predecessor state – at least as regards the secessionist conflict in question.

Article 4(3) TEU harbours the principle of sincere cooperation. In this specific context, Article 4(3) TEU functions as an enforcer of Article 4(2) TEU in favour of the (potential) predecessor state. By invoking the principle of sincere cooperation the Member State in question can essentially force both the Member States and the EU to follow its stance. This is particularly relevant for unilateral secessions, that violate the principle of territorial integrity from Article 4(2) TEU. Pursuant to the principle of sincere coordination, the Member State at hand can force the arm of other Member States and the EU to essentially "have its back". Thus, other Member States and the EU would not be able to recognise, let alone support any unilateral secession that runs counter to the constitutional structure of another Member State (Piris 2017b: 90). As was the case for Article 2 and Article 4(2) TEU, the principle of sincere cooperation is less an issue in the case of consensual secession. In fact, it would even be out of the question. In no case could a Member State deploy sincere cooperation on other Member States or the EU with the aim to force recognition of the newly seceded state – even though that seems an unlikely occurrence.

So far the EU has to a large extent upheld that restraint regarding the centrifugal secessionist forces threatening certain Member States. Whether that corollary means that the EU has thus far upheld a neutral or agnostic position in the secession debate and in particular in regard to seceding territories is questionable at best. High-ranking EU officials have indeed shown reluctance to interfere through their Statements by remarking it '*is not their place*' to determine the (legality or) fate of a seceded territory.[IX] Up to this point this corresponds with the restrained approach that is expected of the EU. Paradoxically both the then-President of

the Council of the EU H. Van Rompuy and the then-President of the Commission M.J. Barroso proceeded with gloomy statements on continuing EU membership as universally worshipped by secessionist territories, blowing secessionist dreams of independence out of the water in several succinct sentences. That being said, separatist politicians and activists tend to be relentless and perseverant in sticking to their nationalist ideals and this is mainly an issue for the next subsection.

In the present political and legal landscape of multilevel governance *per contra*, this "neutral" position results in a state-protective orientation, indirectly weighing in favour of the Member States. Can the Treaties' silence on secessionism and the Union's (debatably) agnostic stance regarding secession be labelled as categorical neutrality? It is to some extent to be understood as '*conservative neutrality'*, the product of political cowardice and complacency, resulting from deflected responsibility (Walker 2017: 40), as part of a larger trend of honouring internal constitutional structures as if they were monoliths.

Perhaps there is some wisdom in conservative neutrality from the EU as regards secession considering its salient, delicate and emotional character. Furthermore everything examined above *does* indicate that the preferable EU position within the multilevel governance system would be characterised by restraint. In that sense one could argue that, rather than conservative neutrality, the EU upholds '*considered neutrality'* (Walker 2017: 41) towards internal secessionist conflicts. Walker recognises considered naturality to entail situations in which it would be unwarranted for the EU to take a categorical stance one way or another. Given the delicacy and salience mentioned above in conjunction with the earlier legal analysis of Articles 2, 4(2) and (3) TEU, there is certainly an argument to be made that the EU *should* not intervene in matters of secession, resulting in restrained neutrality. Yet, considered neutrality does not necessarily entail an absence of any influence.

It was demonstrated earlier that the EU is increasingly engaging in cooperation with subnational entities for EU governance. This is a logical consequence of its multilevel character. Still, matters of internal secession are a matter to be dealt with by the Member State in question, pushing the EU to the side-lines. It seems unwarranted for the EU to engage in an internal secessionist conflict. This is true for a direct interference, but also for apparently

neutral accommodation. If by example the EU would try to mediate as a negotiator without favouring one party over the other, that could be perceived as legitimising the secessionist movement or applying unsolicited pressure on either party (Haljan 2014: 14). The EU should therefore adopt a position dominated by restraint. If, however, the Member State in question is able to bring up the political maturity for working out a consensual process of secession, there is more room for the Union than *prima facie* appears. Once a secession process is occurring democratically, with adherence to the rule of law (and thus the domestic constitutional requirements) and with consent of the soon-to-be predecessor state, the indicators of restraint lose their binding effect. The EU *can* then engage in different areas of a secession, but the most important one is without a doubt the potential EU Membership of the seceding or already seceded state. Moreover, the EU *should* then engage in said areas to prevent negative spill-over effects, as befits its status of a multilevel governance actor.

4.2. A EU role in post-secession Membership

All the aspiring secessionist territories from EU Member States as we know them today unequivocally picture their independence within the EU as prospective Member States – be it automatic or through procedure. The occurrence thereof would be unprecedented, and just as the seceding territories, the EU finds itself in uncharted territory when deciding on how to deal with applications from within. The Membership question has been raging for close to a decade now, with no categorical answer in the foreseeable future. The debate has mainly been held on a procedural level, causing a clash between Article 48 and Article 49 TEU.

This section aims to show that whichever procedure is eventually deemed the adequate one, there is room for EU engagement in either of them. Nevertheless, it is argued here that Article 48 TEU is the desirable route under the current political and legal system, considering the EU multilevel structure. Before tackling the Membership question from a EU frame of reference, the following subsection first examines succession from an international point of view.

4.2.1. An international sidestep to state succession

When it comes to state succession there simply is no categorial answer (in either EU or) international law (de Waele 2014: 34). In this sense international law, just as EU law, seems to be neutral towards how secession is achieved, which is mainly a domestic issue (Conolly 2013: 67). The consequences of secession, on the contrary, is a topic that has caused a lot of ink and words to flow on the international scene. International law scholarship seems to acknowledge that in the event of secession the predecessor state takes up the role of the 'continuator state' and the seceded state goes *tabula rasa* as the 'successor state' (Crawford and Boyle 2017: 71). Concretely this means that through a strong presumption of continuity[X] the predecessor state will retain the legal personality of the former state, despite the changes in its territory and population. The seceded state, on the other hand, goes *tabula rasa*, which in practice results in the disapplication of the treaties and all other obligations (or perks for that matter) – unless negotiated otherwise.[XI]

This reasoning makes twofold sense. Firstly, if we are to accept that indeed the self-determining unit does all the self-determination (and thus the remainder of the country is allowed no say in it), it seems only logical that the independence of the seceding territory cannot have pejorative consequences for the predecessor state. If that would not be the case, a consented secession would be even more unlikely than it already is. It is one thing to conjure the political maturity to accept a territory separating from a nation's territory, but if that separation has negative repercussions on the remainder of that territory it requires something closer to political altruism. Secondly, the newly seceded state was not party to the treaty in question and therefore cannot be bound by it, at the same time other treaty partners cannot be forced into accepting the newly seceded state's participation (Athanassiou and Shaelou 2014: 361).

In some cases this presumed continuity may still encounter practical problems. Take for instance the secessionist trend in Flanders. If Flanders were to secede from Belgium, the Walloon region would continue as Belgium in all its obligations, notwithstanding that Belgium has just lost over half of its GDP and population. In practice it would not be possible for Wallonia to uphold all treaty obligations on its own, possibly resulting in a dissolution of

Belgium – this is notwithstanding that it would be highly unlikely for such a secession to occur consensually.

In any case, dual secession seems to be out of the question (Piris 2017b: 92). Dual secession is the scenario in which a country divides into two states, who both retain their treaty obligations. Within a EU context this reasoning neglects important issues to be negotiated such as opt-outs, European Parliament seats and Council votes which are inherently matters of accession rather than succession (Piris 2017b: 92). If the result is a dissolution and dual secession it is highly unlikely that the predecessor state would have given its consent in the first place (Armstrong 2017: 117).

In international law, however, continuity precedes succession (Crawford and Boyle 2013: 72), which means that revision of the predecessor state is unnecessary. This might be a theoretically sound notion, but in practice it lacks realism and pragmatism. Which is why problems of succession are often dealt with through tailor made agreements.

Still there are those who say that answers should not be searched in international law, but in the law of the autonomous legal order that constitutes the EU. Yet, answers may be searched there, but will not always be found there – at least not in the current legal and political framework. Public international law therefore remains an important frame of reference. In any case, secession and succession are often resolved through intensely political and tailor-made agreements, thereby overshadowing rules and custom (de Waele 2014: 35). Once again parties in a secessionist conflict are confronted with a great deal of uncertainty. For seceding territories it is consequently in their best interest to try to engage in the necessary negotiations towards a solution for instance through a 'devolution compact'. It is argued below that the EU can and should play an important role as tailor of such pragmatic solutions.

4.2.2. The EU exists

> 'Feeding this frenzy for secession and independence in Europe is the premise that all these new States will somehow find a safe haven as Member States of the EU. Absent that assumption, appetite for independence would be significantly muted, the rough seas of "going it alone" far more threatening.' (Weiler 2012: 212).

This quote of Weiler concisely and accurately describes the problem at hand. The EU's very existence alters the stakes of separatism and opens the way to secession just by providing a (potential) safe haven for seceded territories (Walker 2017: 45). The EU is – at least partly and probably involuntarily – responsible for the resurgence of separatist trends in Europe merely by existing and indirectly offering the possible prospect of Membership (Piris 2017a: 76). Whether the EU should take blame for that is a different matter. Personally, I find it questionable to point fingers or blame the EU for merely existing and for being a possible – yet contested – safety net for seceding territories. That is a harsh oversimplification of the situation. As Kochenov and van den Brink say "blaming the EU for making secessions from the Member States premised upon joining the Union easier, would be an absurd move" as challenging sovereignty and the *status quo* is inherent to the EU's very nature (Kochenov and van den Brink 2016: 20). Still, objectively there is no going around the EU being one of the causes of the secessionism resurgence and an important new factor in the calculus of independence seeking regions within EU Member States (Closa 2016: 242). That being said, for secessionist spirits the cause is usually premised on a different *Leitmotiv*, ranging from historical, economical, linguistic to political motives, the existence of the EU is surely not all-decisive (Piris 2017a: 78).

The EU has – or at least could have – great influence over secessionist conflicts, even more so as concerns the Membership question. It is argued here that the EU should exert that influence in a way that befits its multilevel structure. The EU cannot legitimise itself as a multilevel supranational organisation if it keeps ignoring the political reality that secessionist conflicts have repercussions outside of the Member State in question (Popelier 2019: 45). Traditionally speaking secession is deemed to run counter to the very idea of European integration, therefore subsequent Membership ought to be off the table. Seen from a multilevel perspective, however, the interaction and flexibility of different tiers is considered inherently trivial to EU governance. There is no apparent reason why the EU should not accept a newly seceded state into its order, especially those that result from a consented secession. '*The 'carrot' of current EU membership, […] , should be its own incentive, without the 'stick' represented by the raw threat of future exclusion*' (Walker 2017: 46). In any case a clear EU position is overdue, ideally a more

proactive role in secessionist conflicts is adopted instead of the *ad hoc* deflecting statements it has conjured up till now (Haljan 2014: 15). There *is* room for EU commitment in consensual processes of secession, the question remains on how to occupy it.

4.2.3. Room for commitment

Internal secessions have non-negligible influence on the outside world, ranging from indirect encouragement of other secessionist movements to direct effect on the structure of the EU. Besides that the Membership application of a seceded state also has an effect on the institutional composition, decision-making and policies of the EU. This is often mistakenly dismissed as a mere mechanical modification of EU structure, but entails difficult matters such as adoption of the Euro, redistribution of seats in Parliament and votes in Council, adjustment to the Commission composition just to name a few (Closa 2017a: 524).

Furthermore, even though proponents' arguments in this context lack convincingness, it could be argued that the EU ought to prevent or appease the (temporal) disapplication of EU law and citizenship. To be sure, more store ought to be set to the fact that these applicants have been former constituents of a Member State, but more importantly of European integration. Whether it is through negotiations prior to independence, securing access to certain policies or other pragmatic solutions, there is room for commitment – to the extent that it is not hindered by politics.

This subsection aims to demonstrate that, irrespective of which procedure is ultimately deemed the appropriate one for accession of consensually seceded states, there is room for EU commitment. It is further argued here that the EU should make use of that room, be(ne)fitting its multilevel structure.

Internal enlargement and accession from within

'Internal enlargement', 'enlargement from within' or 'accession from within', while perhaps slightly different in nuance, in scholarship all refer to the scenario in which a seceded state from a EU Membership retains or acquires EU Membership (Athanassiou and Shaelou 2014: 336). Retained Membership would occur through negotiations prior to independence to

provide a seamless transition of Membership upon the moment of independence. The traditional modem for that is found in Article 48 TEU. A doctrinal majority, however, prefers a route of reacquiring Membership through Article 49 TEU. Before discussing the potential routes, one scenario ought to be excluded from further consideration, namely any scenario of an automatic right to Membership, which seems unfeasible.

Initially separatist politicians presented continued EU Membership as automatic, it was a question of a right to remaining a EU Member (Piris 2017a: 77). Over time secessionists had no choice but to concede that some form of procedure is impossible to bypass.

When we study continued Membership through the lens of international law, Article 34 Vienna Convention on Succession of States in Respect of Treaties stipulates a presumption of continuity. Based on Article 34 alone, one could presume that a newly seceded state would at least inherit some of its previous international obligations (Chamon and Van der Loo 2014: 618). In the EU context however, Article 4 of that same Convention puts a stop to this by laying down that

> 'the present Convention applies to the effects of a succession of states in respect of: a) any treaty which is the constituent instrument of an international organization **without prejudice to the rules concerning acquisition of membership** and without prejudice to any other rules of organization;' (emphasis added).

Consequently, there exists no right to automatic EU accession, some form of negotiation or procedure has to be complied with before acceding (Kenealy and MacLennan 2014: 599). There is no legal impediment for seceded territories to join the EU. EU accession is, however, premised on some form of examination of how the independence came to be and whether that process complies with the values of the Union on the one hand (Armstrong 2017: 121-122), but on the other hand the EU should also examine whether the applicant ticks off the requirements of Article 49 TEU – not necessarily through that procedure.

Whatever the sentiment granted to continued Membership for reasons of previous enjoyment of EU law or citizenship, automatic continued Membership is not possible. Just as in international law, the EU position as regards predecessor state is clear: the predecessor state is the continuator state (Athanassiou and Shaelou 2014: 342). As regards the seceded state, the

– debatably – legitimate expectation of seceded states and their citizens could nevertheless in theory take form through negotiations (Closa 2017a: 524). Which procedure ought to be seen through and what forum is used for negotiations remains open for debate, that classically revolves around Article 48 and 49 TEU.

The '48-49 debate' has been raging for the better part of a decade now, without a conclusive answer. At least not in regard of consented secessions. For a unilaterally seceded state, there is no doubt that the only route to accession would be Article 49 TEU. A long route, considering the obligations on the EU and other Member States from Article 4(2) and (3) TEU (Popelier 2019: 46). Nevertheless, in the long run all parties may decide to make peace with the political reality by recognising the seceded state. In that scenario, the only route is the official accession procedure enshrined in Article 49 TEU. In a scenario of consensual secession, however, there is no clear pathway to accession, albeit that in doctrine Article 49 TEU seems to have preference over Article 48 TEU.

While doctrine may favour Article 49, much is left to the way of timing and terms of negotiation (de Waele 2016: 7). In both procedures, there is a risk of a temporal vacuum between independence and Membership (Dermine 2014: 46). This will be demonstrated in the subsequent respective subsections on Article 49 and 48 TEU, but it is important to already denote that such a temporal void – of disapplication of EU law and citizenship – is a valid reason for the EU to be more engaged in the accession procedure of seceding states and accompanying negotiations, irrespective of which procedure is ultimately deemed the appropriate one.

"All roads lead to Article 49 TEU"

Similar to the well-known proverb "*all roads lead to Rome*", the majority opinion for the road to EU accession for seceded states seems to point towards the accession procedure enshrined in Article 49 TEU. It is after all, the obvious route.

Proponents of the Article 49 TEU route to accession dismiss the argument based on the fact that the applying seceded state was formerly a constituent of the EU. They do so by arguing that may well be the case, but that former constituency does not exempt seceded

territories from the requirements in Article 49 TEU. For some seceded territories indeed, it may accelerate the procedure, but that does not mean that any seceded region would automatically comply with the stringent conditions of Article 49 TEU (Piris 2017a: 83). Moreover it is not a question of fact, it is rather a question of principle.

In order to qualify for accession in the first place, an aspiring accessor must comply with two general requirements. Not only does the accessor have to be a 'European' state (the so-called 'political criterion'), furthermore it is mandatory that the country in question respects and is willing to promote the European values enshrined in Article 2 TEU ('general policy criterion') (de Waele 2017: 157). The fact that Article 49 TEU requires aspiring accessors to be a European *state*, for me has two implications: firstly that indeed only lawful, *consensually* seceded states can join the EU. Without the consent of the predecessor state, Member States might not be inclined or even allowed to recognise the seceded territory as a state. In that case the seceded territory will not be eligible for accession. Secondly, the aspiring accessor would not be a state until after the fact of a successful secession. In one way, an application for EU membership would constitute an important and powerful signal to the outside world from a newly independent state in its own right (Armstrong 2017: 123). The other side – and downside – of the coin, however, entails that there would be a temporal void or vacuum between the moment of independence and EU accession (Athanassiou and Shaelou 2014: 349), considering that Article 49 TEU is a lengthy procedure, this is not ideal. Some have nevertheless argued that the negotiations required under Article 49 TEU could already be initiated in advance of official independence, albeit informally (Armstrong 2017: 124; Athanassiou and Shaelou 2014: 350). How that would translate into practice is a more complex matter and furthermore the Turkish have taught us that negotiations too, can be long-lasting. Nothing prevents the newly seceded state to uphold EU law *proprio motu*, but how commendable that attitude may be, it will not grant access to the rights and obligations of EU law which is only guaranteed through official Membership.

The political and general policy criteria have been further detailed and developed in the 'Copenhagen Criteria'.[XII] Which, in summary, require an aspiring accessor to provide the necessary institutions able to protect democracy and fundamental rights (political criterion), to

dispose of a functioning market economy that is able to cope with the market forces of the Union (economic criterion), and finally the capability of taking on the various obligations that come with EU Membership (administrative criterion). Furthermore the aspiring accessor must create conditions for its integration through adjustment of its administration[XIII], guarantee effective implementation of EU law and maintain 'good neighbourliness' with its neighbouring countries.[XIV] The latter essentially requires accessors to solve any outstanding disputes with bordering countries. Seeing as how the predecessor state would be a neighbouring country after a secession this might be delicate, but there should not be any conflict if the secession occurred lawfully and consensually.

Needless to say, no seceded territory by definition complies with the conditions set out above, which reinforces the earlier statement that there is no automatic right to continued Membership.

Expedition and simplification: festina lente*?*

Article 49 TEU is notoriously known to be a somewhat lengthy and extensive procedure. Which is only logical. After all, the EU cannot afford to just allow any state join the EU without any form of control. EU Membership comes with many benefits, but with great benefits…, comes great responsibility. Therefore, the EU has to diligently ensure that certain criteria are met. The following paragraphs aim to demonstrate that certain aspects of the procedure in Article 49 TEU can be simplified or expedited for territories aspiring to join the EU after a secession from a Member State. Expedition or simplification in this procedure is not merely a consideration of emotion or morality, it is foremost a consideration of fact (Athanassiou and Shaelou 2014: 344). The aspiring accessor in this case has already been part of the EU and is therefore familiar with EU integration. Evidently, some aspects of the accession procedure will progress more smoothly than it would for third countries. On top of that factual expedition, it is argued here that even more store might be set for seceded territories through more flexibility in the accession procedure – that is of course, if the EU deems this to be the adequate procedure.

Once the first criterion of the Copenhagen Criteria (the political criterion) is met, the aspiring accessor is granted the official candidate status. This might seem a rather symbolic milestone, but it also gives the greenlight to the Commission to engage in preliminary screenings to determine the adequate moment for opening negotiations (de Waele 2017: 159). Custom dictates that the Commission will issue its positive advice on this transition once the economic criterion has been fulfilled. Considering that seceding territories are often economically superior regions (*e.g.* Catalonia, Scotland, Flanders and Veneto) (Piris 2017a: 78), there *would be* room for the Commission to speed things up in this part of the procedure if that is the case – whether it would be willing to is another question (which I will tackle later on). It seems that what by opponents of secession is usually labelled as 'regional egoism' (Piris 2017a: 78), might for once play to the advantage of secessionists.

The Commission *would be* able to speed things up, but in practice the Commission awaits the Council's request for the opinion. Concretely this means that any Member State can delay or downright veto the initiation of the procedure, since the Council votes by unanimity in the accession procedure. In case of a consensual, lawful secession I would think that all the institutions and Member States would be on the same level concerning the lawfulness of the secession. Whether they would be willing to accept a new Member State is another matter – some Member States might veto in fear of motivating centrifugal forces in their own territory.

Once the Council has decided (by unanimity) to open negotiations, the accession procedure can proceed. The negotiations play a vital role in the accession procedure. They ensure smooth integration into the EU and serve as a barrier to protect both the accessor and the Union from negative consequences of enlargement. Simply put the negotiations aim to verify the Europeanisation (Athanassiou and Shaelou 2014: 344) and compliance with the *acquis communautaire* of the accessor state by ticking off the different chapter in which the *acquis* has been divided. It is undeniable that certain aspects of future Membership must be negotiated. Nevertheless, the familiarity with the EU acquired by seceded territories from EU Member States can provide for a more expedient progress in some chapters of the *acquis* (Chamon and Van der Loo 2014: 623). This is *a fortiori* true for subnational regions that have

participated in the EU subnational representation and governance and those regions with legislative powers (*e.g.* Flanders) (Fasone 2017: 134).

Once all requirements are met, the negotiations are closed when the Commission grants its blessing through an opinion. Subsequently, it is finally time for the accession agreement. This might feel like a relief for the mainstream accessor, but in the case of a seceded territory this is an additional hurdle to surpass – well actually it would have to sit by, wait and cross its fingers. The required Parliamentary consent for the adoption of the agreement is overshadowed through the fact that the agreement has to be ratified in all Member States, once again granting the Member States the possibility to veto the accession in its entirety.

Praising Article 49 TEU as the only adequate procedure for accession, does not mean that pragmatism is out of the question. Athanassiou and Shaelou argue that because of that same familiarity with the EU that is set out above, the 49 TEU process could be 'simplified' and that 'special arrangements' could be possible provided that it enjoys unanimous support of the Member States and that any adjustment to the accession procedure fits 'within the fabric of Article 49 TEU' (Athanassiou and Shaelou 2014: 245). According to Article 49 TEU, 'the conditions of eligibility agreed upon by the European Council *shall be taken into account'* (emphasis added the authors). In their view, this European Council adjustment of the accession procedure could even translate into a '*bilaterally negotiated process leading to accession*' – so long as it complies with unanimous Member State support and remains within the fabric of Article 49 TEU. Others too have argued that even though Article 49 TEU must be seen through, the EU must strive for pragmatic solutions such as initiating accession negotiations prior to independence to ensure a ready-to-sign accession upon independence and installing continuity mechanisms in case of a temporal problem between independence and accession, especially in regard of the Single Market and EU citizenship (Armstrong 2017: 124; Schmitt 2014: 25). In practice such measures could result in a seamless transition of EU Membership, yet a lot depends on politics and timing – once again the Turkish never-ending example comes to mind.

In a recent proposal the Commission advocates a more credible, more dynamic and more predictable accession procedure with a stronger political steer.[XV] Although the proposal

primarily aims to facilitate Balkan EU enlargement, there are some interesting intentions to be deducted. The proposal pursues more credibility for the accession procedure of Article 49 TEU by focussing on the necessary fundamental reforms of the applicant, which *nota bene* would not (or at least to a lesser extent) be necessary for applying seceding territories. More importantly, the proposal endeavours to render the accession procedure more dynamic through grouping the negotiation chapters in 6 thematic chapters.

This newly pursued flexibility for EU enlargement makes me wonder whether the EU would extend a similar flexibility towards seceding states aspiring to join the EU family. If grouping the thematic chapters is an option for the Balkans, it is conceivable that a similar approach can be adopted for seceded territories aspiring to accede. A distinction could than by example be made between those chapters wherewith the accessor is (presumably) familiar because of earlier constituency of EU integration, and those chapters that would require more negotiation. Such dynamic and flexibility could provide for momentum, expediting the entire process. Once again it is obvious that the EU would only be prepared – or even allowed – to assign such flexibility if the secession occurred lawfully. Finally the Commission proposal will particularly focus on predictability, which if you ask me is a welcome addition since EU enlargement is '*unhelpfully obscure*' (de Waele 2017: 162) on which countries might one day have the honour to join our ranks, this is *a fortiori* true for seceding territories who are all the more manoeuvring in uncharted territory.

If Article 49 TEU is ultimately deemed the appropriate procedure for accession of consensually seceded states, I have one advice for EU policy makers and negotiators: *festina lente*. Make haste, slowly. The accession procedure is a delicate one, especially considering the double-veto possibility allowing any Member State to torpedo the entire procedure at its initiation and conclusion. Even in consensually occurred secessions, Member States might have an incentive to veto accession of a seceded state to avoid legitimation of their own domestic secessionist movements. Notably Spain is often singled out, especially since its refusal to recognize Kosovo (van den Driest 2014: 31). But a Spanish '*no*' is certainly not the only threat to a successful accession of a seceded state.

Nevertheless, there is reason for the EU to be more engaged in the Article 49 TEU procedure. There is no going around the fact that seceded states from within are in a different position than third countries. Their familiarity with EU integration *will* speed up the procedure as matter of fact. Moreover, the impact of such a difficult and contested accession procedure on the seceding territory, its inhabitants and the EU multilevel structure itself puts a moral (and debatably legal) obligation on the EU to be more committed in the process (Closa 2017a: 523). Nothing prevents the EU to engage itself from the moment a secession occurs consensually and democratically. In that light the EU should endeavour a seamless transition be it through pre-independence negotiations for accession, interim measures to avoid temporal and legal vacuum or a combination thereof. Pragmatism does not, however, equal negligence. It is important to underline that expedition and simplification are advised, yet it should not be prioritised at the expense of diligence, substance and the fabric of Article 49 TEU. In reiteration: EU, *festina lente.*

Article 48 TEU, too easily dismissed?

Article 48 TEU embodies the treaty amendment clause. Proponents of secession see in this provision the potential prospect of a seamless transition of EU Membership. To which they would have a right, seeing as how they find themselves in a different situation than third countries applying for EU Membership, *i.e.* they were already a constituent of a EU Member State. From a multilevel governance view, they were moreover a constituent of EU integration.

Negotiation and prevention of abrupt dislocation is according to some integrated in the fabric of the EU constitutional order, since even the most extreme separation, Article 50 TEU containing the possibility to withdraw from the Union, stipulates that '*the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal*' (Kenealy and MacLennan 2014: 600). On first sight, this argument might look abstract and it might appear to be a forced outcome of *Vangendeology* (Armstrong 2017: 116) to resort to speech based on "the spirit" of Article 50 TEU (de Waele 2014: 37). That may well be the case, but nowadays *Brexit* has shown the vital role of negotiations in the withdrawal process. Moreover is it that unusual in policy or law making to find inspiration in existing provisions? The real question is

whether the EU has an equal incentive to negotiate in a post-secession scenario as it has for a withdrawal. As is true for withdrawal of an entire Member Sate, the partition of even a part of a Member State from the EU potentially entails far-stretching consequences for the EU as a whole, this is *a fortiori* the case for economically strong regions that moreover have played a role in EU governance and implementation of EU law – not to mention the difficult case of Flanders and Brussels (Popelier 2019: 49). Thus, from a multilevel governance perspective not only ought the seceded state be able to secure transition through negotiation, *vice versa* the EU ought to have a say in its partition as well, if only to prevent negative repercussions on its structure.

Critics of Article 48 TEU have raised a number of concerns with its application for a seceded state accession procedure. First of all, the right to initiative of Article 48 TEU is reserved to Member States, which the seceded is not (Piris 2017a: 81) – that is obviously the problem in the first place. This would require the rump state to initiate negotiations, which in turn requires a significant amount of good will – in addition to the good will granted for a consensual secession. This creates '*a multilevel political structure for negotiations*' (Armstrong 2017: 125). The solution for this intricate multilevel structure is according to secessionists to be found within the principle of sincere cooperation from which they would derive a right to negotiate with the EU (Kenealy and MacLennan 2014: 599). What has not been taken into account is that the EU might want to have a say as well and that the Parliament and the Commission equally have a right to initiate the procedure for treaty amendment. While a multilevel political structure for negotiations is labelled as a bad thing, it is actually an accurate representation the EU's multilevel structure. Granted, a proposal coming from a EU institution for the accession of a seceding state through treaty amendment is not very impartial, but let us not forget that if a secession occurs consensually, nothing prevents the Union of interfering. Furthermore, impartiality *de facto* results in a state-protective orientation. Then again, EU involvement to that extent might go down the wrong way with certain Member States – notably and recurrently Spain comes to mind.

What could give rise to problems, however, is that nothing obliges the other Members States to participate in these negotiations, resulting in a veto for any state. Which means that,

similar to the double veto in Article 49 TEU, the procedure can be blocked by any Member State.

Furthermore, Article 48 TEU would not be convincingly faster than proponents have us believe. The technicalities and formalities of Article 48 TEU require an Inter-Governmental Conference to be convened that is presumably preceded by a Convention before the Treaties can be amended (Piris 2017a: 80). Presumably, because it is unlikely that the European Parliament would consent to bypass a Convention on an issue with such gravitas. The Scottish *anno* 2014 envisaged an independent Scotland as part of the EU within a timeframe of 18 months through Article 48 TEU. Indeed that might be a tad optimistic, but seeing as how the average accession procedure takes about a decade[XVI] I would argue that Article 48 TEU has some margin for being more expedient than Article 49 TEU.

Two risks also come to mind when evaluating Article 48 TEU as an accession route for seceded states. First of all seeing as how the initiative for proposals in Article 48 TEU lies with several actors, engaging it could open Pandora's Box for creeping treaty amendment attempts forwarded by the Member States, Commission or Parliament (Piris 2017a: 81). Secondly the EU has already been accused of double-heartedness as regards accession in the past (de Waele 2017: 160), consequently the EU should be extra mindful when being more flexible towards internal enlargement through Article 48 TEU.

For its highlighted defaults and while the Article 48 TEU route does not necessarily provide more – or less for that matter – prospect of success than Article 49 TEU[XVII], it at least acknowledges the differences between an applicant that has already been part of European integration and secondly shows more promise for closing the temporal gap between independence and accession. Finally, as was the case for commitment in Article 49 TEU through expedition or simplification, using Article 48 TEU as the appropriate pathway to accession must not go at the expense of diligence and scrutiny.

In conclusion of this section I would like to point out that both procedures have defaults as regards accession from within. Article 49 TEU, and *a fortiori* Article 48 TEU were not designed to deal with such an occurrence, which is abundantly reflected in the debate. Yet, both procedures can be modified, simplified and accelerated to accommodate an internal

enlargement and that should be what you derive from this section. Moreover, the EU has room to do so and should use that room to commit to the accession or non-accession of a seceded territory. Whatever the outcome, the EU cannot permit itself to remain on the side-lines in an event that drastically impacts its entire multilevel structure. Instead, the EU should face the political reality at hand and cooperate with all parties involved to find pragmatic solutions to these very real problems. In the current legal framework I personally find Article 48 TEU to be the adequate procedure to accommodate the role of the EU within its system of multilevel governance, as it acknowledges the very real difference between internal and external accessors and to my mind has more potential and room to close the temporal gap between secession and accession. In the end it is up to the EU to decide which procedure is the better fit: Article 48 or Article 49 TEU. Or should there be a new provision altogether?

5. An institutional framework on secession

5.1. Necessity of a (European?) framework

All the foregoing has demonstrated how much (legal) uncertainty and unclarity rains in the uncharted waters of secession. Unclarity *an sich* would be a sufficient argument to advocate clear rules on secession, yet there are plenty arguments to substantiate a (European) framework on secession. Research shows that an implicit prohibition of secession or silence thereon, as is the case within the EU and a lot of its Member States, results in a diminished chance on actual secession, that can count on less popular support, but causes secessionist movements to be more prone to violence (Ginsburg and Versteeg 2019: 259). In contrast, a right to secession makes actual secession more likely, yet reduces the chance of violence. Although secession within EU Member States has remained – more or less[XVIII] – peaceful up till now, it is always better to prevent than to cure.

Of course we cannot expect the EU to regulate a manual or pathway to secession that would lead to its fragmentation, and would run counter the very first provision of its Treaty of creating an ever closer Union. Nevertheless, a clear set of rules on how lawful secession can occur and relevant procedural requirements are not inconceivable. Be advised that legal clarity

and legal certainty are two different notions. While legal clarity may provide for a clear set of rules on secession, this does not mean that the outcome of following those rules will always achieve the desired result (Walker 2017: 35).

If one acknowledges the need for a framework, the question remains on what level such a framework should take form. The international level? The EU level? The domestic level? It is argued here that the EU is (one of) the adequate level(s) to establish a framework on secession, keeping in mind the multilevel governance system that it constitutes. This evidently does not necessarily preclude regulation on the domestic or even international tier. On the contrary, the regulation of secession in terms of legality on the domestic (constitutional) level could play a pivotal role in matters of secession.[XIX] The unclarity on secession and the fact that for a significant part of reasoning scholars and parties are forced to defer to international law, however, '*surely is a harrowing abdication, flying right in the face of the celebrated Van Gend & Loos judgment and its progeny*' (de Waele 2014: 35).

Another reason to regulate a framework on the EU level is that this thesis has shown that EU resources (Articles 48 and 49 TEU) seem to be more susceptible to seamless transition of Membership than the resources of public international law (rules on state succession) (Walker 2017: 118).

Finally finding and regulating a common stance within the EU will already prove to be a Herculean task, I sincerely doubt finding a universally agreed stance on the international level will prove to be any easier.

As said above, there are various arguments for a codification of a EU stance on secession besides legal clarity and prevention of violence. Firstly all contemporary secessionist movements in the EU include the Union and prospects of Membership in their calculus on whether to strive for secession or not (Closa 2016: 242). More importantly, and as largely covered above, internal secessionist conflicts have a significant spill-over effect on the outside world and in particular the EU. As a system of multilevel governance the EU cannot stand idly by when secession has (negative) repercussions on the EU and or the Member States. Finally, another sometimes overlooked party potentially affected by secession and in particular subsequent Membership is the third states currently engaged in an ongoing accession

procedure (Closa 2016: 242). We have seen that opponents of secession already invoke an argument on the structural overload of the EU. One could indeed wonder where the limits of the absorption-capacity of the EU lie. Remarkably enough, the Juncker-Commission stated in 2014 that no new accessions would take place under its steer, yet this would not have applied to Scotland.[xx] Closa argues that a normative framework is thus necessary to prevent unequal treatment as regards state accession (Closa 2016: 242). I , however, partly disagree. Similar scenarios indeed ought to be treated equally, whereas on the contrary, different scenario's – which is the case for internal applicants – warrant different treatment. As pointed out earlier, internal accessors have been part of European integration and are consequently *de facto* different from external applicants which in turn justifies differential treatment. Nevertheless, that does not mean that there is no longer need for an institutional framework.

Of course, not everyone agrees with the need for a legal framework. Haljan for instance prefers a '*wait-and-see*' attitude over '*damn the torpedoes and full speed ahead*' (Haljan 2014: 17). Given the political salience and delicacy of secession he argues there might be wisdom in patience, since time and trial-and-error might exactly be what all parties need to grasp the gravity of the situation. If uncertainty and conflict are the price to pay for a long-term solution, so be it. Still, I am of the opinion that a clear view on the EU position is overdue and that ideally it takes shape through an institutional framework. In summary and to put it bluntly in the words of de Waele:

> 'in light of the contemporary EU's sheer incapability to offer parameters for determining the veracity of many opinions expressed, in political as well as academic circles, its legal order seems hardly worthy of the autonomous epithet it was so happily endowed with over fifty years ago.' (de Waele 2014: 39),

a statement made seven years ago, but still painfully accurate today.

5.2. Adapting the TEU

The question remains whether a new Treaty provision is the adequate way to stipulate a clear EU multilevel role in matters of secession. After all, this thesis has shown that under both current available routes to accession there is already room for EU commitment. Moreover,

amending the Treaties to explicitly acknowledge secession may not be able to count on the desired and more importantly required support from all Member States. In a context where consensus on *any* Treaty reform is difficult to find, it seems highly unlikely that the Masters of the Treaties will regulate anything that (in)directly threatens their national sovereignty and constitutional traditions. To add to the injury, the success of a framework on secession is dependent on politics, veto possibilities and the nationalism of the states that already enjoy a strong biased position in matters of secession.

Reward sweetens labour. Adapting the TEU for a (procedural) framework on secession would not be a self-sailing enterprise. Yet, the benefits of such a framework are considerable. First of all, it would put an end to the inconsistent, unofficial whispers of secession in the coulisses of the EU and vague unpromising statements lacking official status.[XXI] Furthermore, a provision on secession would constitute an adequate arbiter for differentiation between secessions and subsequent accessions. The principle of equality requires internal and external accession to be treated differently, but we can extend this consideration within internal enlargement as well. Not all internal secessions are alike. A general procedural entrenchment in the TEU could make a distinction between for instance unilateral and consensual secession and provide an *ad hoc* basis for different situations of internal disruption of territory (Fasone 2017: 61) (*e.g.* the difficult situation of Flanders). Lastly, a general provision could allow the EU to impose procedural requirements that reflect its role in matters of secession. Drawing inspiration from Article 50 TEU, Walker for instance points out that a timeframe for accession procedures is not uncalled for (Walker 2017: 44). Nevertheless, for all the potential benefits a general (procedural) provision might conceive, the anchorage of politics and self-interest of Member States still bears heavy weight.

Even though agreeing on and adopting regulation in the EU Treaties is without a doubt a difficult task, Fasone points out that a set of common principles for lawful secession can already be deducted within the EU Member States (Fasone 2017: 51). This is in concordance with the observations made throughout this essay. A secession can be lawful, to the extent that it occurs on a consensual basis with a sound agreement between seceding and predecessor state, it respects democracy and adherence to the rule of law and finally it be in accordance

with the domestic constitutional provisions. The latter of course poses a problem for certain secessionist movements, such as Catalonia and Veneto, considering there is no way for them to secede in a constitutionally sound way – and there do not seem to be significant change in that respect on the horizon. Nevertheless, this article has shown that these matters are to be dealt with internally by the Member States and the EU should adopt a restrained position on the side-lines.

Notwithstanding the Member States' competence and based on these shared principles, Fasone has worked out a proposal for an *ad hoc* provision on secession (Fasone 2017: 66). She stipulates two requirements by which the EU could not only ensure respect of its core values, but also provide a solution for the temporal vacuum between independence and accession. First of all, any secession within the EU ought to occur in correspondence with the common constitutional traditions of the Member States, meaning that unilateral secession is out of the question. Secondly, a procedure should be installed (and of course respected) which requires Member States and seceded states in conflict to submit all relevant intel to the European Council, but moreover to wait a predetermined number of years before gaining independence. The latter would grant enough time for EU commitment – whatever the chosen procedure – to prevent a legal limbo between independence and accession. The combination of these requirements would to her mind constitute a valuable EU contribution towards cooperation in matters of secession and to some extent even repress groundless attempts of secession.

This is a provocative proposal with valid insights and solutions. Yet, Popelier adds other key concerns that should not be omitted in the regulation of a (European) framework: the event that a seceded state does not wish to join the EU, a reassessment of the predecessor state and the scenario in which negotiations remain inconclusive in the given timeframe (Popelier 2019: 50).

There is an apparent need for clarity in matters of secession within the European Union. If the EU wants to be worthy of titles as a structure of multilevel governance or an autonomous legal order, such legal limbo cannot fly. Ideally the EU fills this void by adapting a new provision in the TEU that gives pragmatic answers to problems such as *inter alia* the ambiguity on lawful secession, the temporal paradox and the adequate accession route. In particular the

provision should be able to better accommodate a more engaged EU role. Nevertheless, the political context of secession will cause change to be time and effort consuming.

6. Conclusion

The aim of this essay was to research what role the European Union should play when dealing – or not dealing – with secessionist conflicts. Adopting a multilevel frame of reference enabled this thesis to step aside from the traditional gridlocks and assert that the political reality of internal secessions entails a non-negligible spill-over effect on the outside world, and more importantly the EU. The EU should thus without question deal with secessionist conflicts. It is true that internal secessions are in principle to be managed and regulated by the Member States, and that consequently the EU should largely remain on the margins by adopting a restrained role. Yet, it was equally established that once a secession progresses to a consensual process, room is created for the EU to commit.

Where there is room, the EU can and should commit by finding pragmatic solutions to traditional paradigm issues such as negotiation, a temporal vacuum and EU accession irrespective of the chosen route – albeit that under the current legal and political landscape it was established that Article 48 TEU is the way to go as it acknowledges the difference between internal and external accessors and shows more promise of closing the temporal gap. To better accommodate such EU commitment, the TEU should be adapted or complemented by a new provision. A provision that acknowledges Member State competence, but also recognises EU engagement in order to cooperate with all parties towards a smooth secession and accession, provided it is in accordance with all the necessary requirements of lawful secession, as enshrined in this brand new provision.

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[1] ECJ Case C-294/83, *Les Verts*, 1986 ECR-1339.

[II] ECJ Case C-26/62, *Van Gend & Loos*, 1963 ECR-1.
[III] Committee of Regions, *Opinion on Guidelines for the application and monitoring of the subsidiarity and proportionality principles*, 2006/C 115/08, C 115/35, 2.17.
[IV] Committee of Regions Opinion, *White Paper on Multilevel Governance*, 2009, C-211/1, 1.
[V] Letter from PM Boris Johnson to Scottish First Minister Nicola Sturgeon: 14 January 2020.
[VI] An argument reminding me of Waters' warning as to any regulation prefiguring all possible outcomes (Waters 2016: 18-19).
[VII] According the principle of conferral enshrined in Articles 4(1) and 5(2) TEU.
[VIII] Report of the Committee on Constitutional Affairs of the European Parliament on the division of competences between the European Union and the Member States, A5-0133/2002 final, 24 April 2002, §34 and 4.3.2.
[IX] Herman van Rompuy: Council of the EU, '*Remarks by the President of the European Council on Catalonia*', 12 December 2013, EUCO/267/12, PRESS 576.; Romano Prodi, President of the Commission, 1 March 2004, OJ C84 E/422, 3 April 2004.; José Manuel Barroso, President of the Commission, OJ C208, 3 July 2014 ; Jean-Claude Juncker E-011776/2015 .; (Viviane Reding, Vice-President of the Commission, 4 October 2012, in a letter to the Spanish Secretary of State for European Affairs (in Spanish) .
[X] UN General Assembly, *Vienna Convention on Succession of States in respect of Treaties*, 6 November 1996, Article 34.; This is, however, not an universally accepted codification (De Waele 2014: 35).
[XI] Vienna Convention, Article 2(1), b).
[XII] *Presidency Conclusions, Copenhagen European Council*, 21-22 June 1993, paragraph 7.
[XIII] *Presidency Conclusions, Madrid European Council*, 15-16 December 1995, III-A.
[XIV] *Presidency Conclusions, Helsinki European Council*, 10-11 December 1999.
[XV] Commission Proposal on Enhancing the accession process – A credible EU perspective for the Western Balkans, 5 February 2020.
[XVI] Some states have enjoyed speedier accession, *e.g.* Sweden, Finland and Austria.
[XVII] Both procedures rely on unanimous consent of all the Member States.
[XVIII] Not taking into account for instance the violent repression by police forces in Barcelona during pro Catalan independence manifestations.
[XIX] For interesting contributions thereon see: Weill 2018; Ginsburg and Versteeg 2019.
[XX] J.-C. Juncker, *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change Political guidelines for the next European Commission* Opening Statement in the European Parliament Plenary Session Strasbourg, 22 October 2014; Candidate for President of the European Commission Strasbourg, 15 July 2014.
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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Subnational Courts of Last Resort in Germany and the USA

by

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Perspectives on Federalism, Vol. 13, issue 1, 2021

Abstract

In this article I explore the judicial dimension of federal systems from a subnational perspective. The findings show that regardles of the type of federalism subnational courts of last resort underscore plurality and diversity and thus inject federal ideas into the two systems. Federalism is, hence, not only an overall structure that shapes the judicial system but an intrisic part of judcial review. If we discuss constitutional adjudication and high courts in federal systems, we must take the subnational level into account. Without giving this level its due credit, we are unable to understand neither federalism in general nor judicial federalism in particular.

Key-words

Constitutional adjudication, federalism, subnational courts of last resort, comparative rule of law

1. Introduction

Comparative studies on federalism mostly ignore the judicial dimension. Similarly, comparative research on judicial review is 'national-centric' (Williams 2006: 68). These might be reasons why there is much disagreement about the role that courts of last resort – such as supreme or constitutional courts – might play in federal systems. While Daniel Halberstam (2009: 18) believes that the judiciary can be 'useful' in 'sustaining the federal system' and national courts 'are not irredeemably biased in favor of the center', others argue that the central judiciary in general and national courts of last resort in particular can hardly be independent umpires of federalism (Bzdera 1993; Aroney and Kincaid 2017a). Although case studies show 'that there is a great deal of variation among federal countries in the importance of judicial review in settling constitutional disputes about federalism' (Russell 2017: 8), many scholars share Dicey's (1915: 100) assumption that federalism 'lastly means legalism', which in turn can give reason to the 'predominance of the judiciary in the constitution'. From this perspective, national high courts are crucial for the functioning of federal systems. They shape the balance between centralization and decentralization 'directly by ruling on the constitutional distribution of powers and indirectly by ruling on social issues, individual rights, economic affairs, and other matters' (Aroney and Kincaid 2017b: 3). Consequently, many take it for granted that high courts and the central judiciary in federal countries mostly show a 'centralist bias' (Russell 2017: VIII) and are a 'natural ally of the central government in the control of the states' (Halberstam 2009: 6). Put simply, federal systems seem prone to turn into 'unitarian juristocracies' because national judges make crucial decisions and favor the national government.[1]

In this paper, I follow up on this debate on the judicial dimension in federations or on judicial federalism. Nonetheless, I will provide a new and fresh look at the issues at hand in three respects. First, I shed light on institutions that are mostly ignored in this debate, namely subnational courts of last resort. Thus, in contrast to the main strand of research (Aroney and Kincaid 2017a, 2017b; Benz 2017; Somin 2017, Kramer 2009) I will explore the judicial dimension of federations from a subnational perspective and focus on subnational courts of

last resort. Second, according to Peter H. Russell, the 'judicial dimension of federations is one of the least studied aspects of comparative federal governance' (Russell 2017: VIII). Moreover, most scholars in this field analyze how the judiciary shapes federalism. By contrast, I examine whether and how subnational courts of last resort inject federal ideas into the judicial system. Thus, instead of exploring the judicial dimension in federal systems like in most other studies, I highlight the federal dimension in judicial systems. Third, according to Daniel Halberstam, the 'role of the judiciary as federal umpire has taken place within two separate disciplinary compartments: comparative politics and law' (Halberstam 2009: 3). In this paper, I will bridge this gap and adopt a comparative perspective to explore the role of subnational courts of last resort in the American and German federal system. The findings show that regardles of the federal system subnational courts of last resort underscore plurality and diversity and thus inject federal ideas into the two systems. Accordingly, if we discuss constitutional adjudication and high courts in federal systems, we must take the subnational level into account. Without giving this level its due credit, we are unable to understand neither federalism in general nor judicial federalism in particular.

Comparing constitutional courts across nations is methodologically tricky. As it turns out comparing subnational courts of last resort across nations is even trickier because case selection is limited. There are not many countries with subnational constitutional courts (e.g. FRG, USA, AUS, Brazil). This choice with limited options left me with two cases: the USA and Germany. My research design has to accommodate this methodological bottleneck. Luckily, with my case selection I can still verify the hypothesis that subnational constitutional review reinforces federalist ideas and is a check on unitarian tendencies in the judicial system.

In order to answer the research question at hand I use a most different systems design (Przworski and Teune 1970) and follow Aroney and Kincaid (2017b: 18), who highlight that 'explaining the behaviour of courts across diverse federal systems must necessarily be multidimensional.' They list seven 'key explanatory factors' (ibid.) such as historical, cultural, political, and institutional dimensions that might affect the power of national high courts in federalist systems. However, I limit my analysis to two subnatinal courts of last resort, namely the New York Court of Appeals (NYCoA) and the Berlin Constitutional Court (BCC). Both

courts engage in judicial review and are thus 'countermajoritarian' institutions in that both 'force the majority (either the parliamentary or the popular majority) to revisit an issue it had tried to settle' (Ferejohn and Pascuale 2010: 353 and 354; see also Bickel 1962: 16-32). Furthermore I will focus the analysis on four dimensions, namely the overall constitutional framework, the selection of judges, institutional factors, and rulings. Finally, I will draw some tentative conclusions.

2. Federalism, Constitutional Adjudication, and Subnational Courts of Last Resort in Germany and the USA

A federal system separates public powers vertically. It divides sovereign authority among the constitutionally-defined levels of government and consequently allows 'self-rule' and 'shared rule' (Elazar 1987; Bednar et al. 2001: 224). This also applies to American and German states. All 50 American states and all 16 German Länder have their own executive, legislative and judicial branch of government. At the same time, in these federal democracies the judiciaries are not only juxtaposed horizontally to the executive and the legislature at the national and subnational level, but they are also vertically separated. Nonetheless, this general classification does not tell us much about the structure and functioning of judicial federalism and the role that subnational courts of last resort might play in these systems. Moreover, subnational courts of last resort are part of a regime of constitutional adjudication because they make their decisions 'within the broader legal and political system' (Clayton and May 1999: 233f.). Three basic principles govern this regime of constitutional adjudication at the subnational level and define the role of subnational courts of last resort in Germany and the USA: the legal tradition, the type of federalism, and the structure of the judicial system (table 1).

Table 1 Subnational courts of last resort and regimes of constitutional adjudication

	USA	FRG
Legal tradition	Common law (single cases, inductive)	Civil law (systemic, deductive/syllogistic)
Type of federal democracy	Dualist and decentral (horizontal)	Cooperative and unitarian (vertical)
Subnational courts of last resort	Court of appeals; nonspecialized, autonomy and supremacy	Constitutional court, specialized; autonomy and supremacy
Regime of constitutional adjudication	'Horizontal stratarchy'	'Vertical stratarchy'

Sources: my compilation.

Legal tradition: In American state supreme courts, the common law tradition is prevalent, while German constitutional adjudication is shaped by the civil law tradition. 'Common law adjudication is understood as an inductive, and empirical process [...] This stands in stark contrast to the paradigmatic model of adjudication issuing from the civil law tradition, which conceives of the judicial task as a deductive one involving the syllogistic application of a general rule – embodied in a code – to a set of particular facts' (Rosenfeld 2006: 628). In a common law tradition, precedence and stare decisis are crucial factors shaping the judgments of courts. By contrast, the civil law tradition favors courts speaking with one institutional voice while in a system with common law tradition courts very often speak with a 'multiplicity of individual voices' (Rosenfeld 2006: 635). For this paper, it is even more important that the common law tradition allows state supreme courts to shape policy areas independently of the legislature (Tarr 2010: 321-333). At the same time, the two courts represent different types of judicial review (Kelsen 1942). Like the other state constitutional courts in Germany, the BCC is a specialized court on constitutional issues. It has the exclusive power to invalidate statutory laws passed by the parliament of this German Land. Depending on the proceeding, it can be a court of last resort as well as a court of first instance. By contrast, the NYCoA is a non-

specialized appellate court that has the prerogative to refuse to apply a statute that it has declared unconstitutional. Hence, like other state supreme courts, the NYCoA can engage in 'constitutional policymaking in the realm of civil liberties' (Williams 2006: 70).

Type of federalism: textbooks teach us that American and German federalism radically differ from each other. For example, Daniel Halberstam (2009) labels the American model as 'horizontal' because the two levels of government are independent of each other. By contrast, the German model is called 'vertical', giving the 'federation the primary prerogative of enacting legislation and the Länder the prerogative of executing such legislation' (Halberstam and Hills 2001: 175). Although these interpretations are somehow 'misleading' (Halberstam and Hills 2001: 175), they bring an important difference to the fore as the two systems balance centralizing and decentralizing tendencies in different ways (Benz 2017: 195-200; Somin 2017: 441-446). The German system has a strong unitarian tendency because all major legislation is passed at the federal level. Furthermore, the Basic Law provides a long list of human rights that give the federation an overriding influence in shaping public policies for the whole country. By contrast, American states enjoy the 'ability to formulate, execute and adjudicate [their] own policies' (Halberstam 2009: 4) and American state constitutions are longer and more detailed than their German counterparts. Some American state constitutions even include provisions on public policies and provide a bill of rights (Tarr 2000; Dinan 2006; Dinan 2012). This paved the way for a New Judicial Federalism in which state supreme courts became increasingly important for developing and expanding state civil liberties (Tarr 1999; Fino 1987; Williams 2003).

Judicial federalism/system of constitutional courts: both the German and American states possess state autonomy, which entails the privilege of installing and sustaining constitutional courts (Germany) or state supreme courts (USA). In this regard, both judicial federalisms are dualistic with two levels that in most cases operate autonomously and independently of each other (Tarr 2009; Kramer 2009). The national courts of last resort are supposed to refer to the national constitution and interpret national law without interfering in the legal and territorial jurisdiction of subnational units. Similarly, the subnational courts of last resort simply say 'what the law' is at the subnational level to use the famous expression from Marbury vs. Madison. In

fact, all 16 German Länder and all 50 American states have used this prerogative to establish a high court or a court of last resort. Subnational courts of last resort use subnational constitutions as their legal benchmark for adjudicating political or legal issues. Put differently, the constitutional courts in the German Länder and the state supreme courts in the USA are manifestations of self-rule in subnational units. They apply and interpret laws and their constitutions autonomously, as long as they can refer to 'adequate and independent state grounds' to use the proper American expression (Tarr 2015).

Nonetheless, it would be misleading to assume that judicial federalism is exclusively based on 'self-rule'. By contrast, according to the Supremacy Clause of the U.S. Constitution (Art. VI, Clause 2), American state supreme courts must comply with rulings of the U.S. Supreme Court and statutory laws promulgated at the national level. Similarly, Art. 31 of the German Basic Law gives federal law precedence over Land Law, which includes the notion that subnational courts of last resort are bound by rulings of the Federal Constitutional Court. Even more, national courts of last resort can invalidate subnational law if the latter is in conflict with national law. For example, G. Alan Tarr (2010, 258) reports that between 1791 and 2007 the U.S. Supreme Court invalidated almost 1,000 state laws (or 4.4 per year). Similarly, between 1951 and 2018 the German Federal Constitutional Court declared 273 statutes of the Länder as unconstitutional (4.1 per year) (Tarr 2010: 258; Federal Constitutional Court 2018). In sum, we not only find 'self-rule' or autonomy of the two levels in the judicial system but also 'shared rule', supremacy, and interdependence.

Although German and American judicial federalism provide subnational courts of last resort with a similar status defined by self-rule and shared rule, the legal and political environment create two different regimes of constitutional adjudication. The American type can be coined as 'horizontal stratarchy', indicating that there is a system in which we find multiple institutions with the power to invalidate laws and engage in judicial review. It is horizontal because the two levels of government can act independently from each other (Halberstam 2009). The German regime of constitutional adjudication also includes various courts that have the mandate for constitutional adjudication. Nonetheless, it is vertical rather than horizontal because the legal tradition and the system of federalism underpin unitarian, integrative tendencies and leave little room for policy-making by subnational courts of last resort.

3. Appointment of Justices and Composition of the Courts

The participation of subnational courts of last resort in a democratic regime of constitutional adjudication presupposes that the appointment of justices and the composition of the courts comply with two basic principles: the rule of law and democratic legitimacy (Tarr 2010: 198). In the two cases examined in this paper, we find that the 'balance between judicial independence and judicial accountability' (Tarr 2010: 198) has taken varying forms. In addition, in most studies on high courts in federal countries, the selection of judges counts as a key factor for explaining unitarian tendencies of national courts of last resort (Aroney and Kincaid 2017b; 2017a: 519-523; Halberstam 2009: 18; Bzdera 1993: 27). Moreover, we even find the notion that national 'courts should in some sense be representative of the various political and regional identities within the country' (Aroney and Kincaid 2017a: 523). Applying the same reasoning to subnational courts of last resort, we come to other conclusions. Judicial independence, accountability, and representativeness not only differ between the two courts but also compared with their national counterparts. Consequently, subnational courts of last resort inject diversity and plurality into judicial federalism and thus constitutional adjudication.

The NYCoA is composed of seven judges, i.e. the chief judge (CJ) and six associate judges (AJ). Following an amendment to the constitution in 1974, these judges are appointed to a fourteen-year term based on the so-called Missouri Plan (Art. 6 § 2a Constitution of New York State). The Governor selects a candidate from a list made by the Commission on Judicial Nomination, which evaluates 'the qualifications of candidates for appointment to the court of appeals' and recommends to the Governor 'those persons who by their character, temperament, professional aptitude and experience are well qualified to hold such judicial office' (Art. 6 § 2c Constitution of New York State). The State Senate must confirm the nominee. This type of appointment is supposed to ensure that judges have the necessary qualification and that the pitfalls and downsides of popular elections or legislative appointments can be avoided (Tarr 2010: 59-61). When a judge steps down prior to the end of his/her term in office or when an incumbent judge reaches the age of 70, the Governor can appoint a new judge, who is once again subject to confirmation by the State Senate. The judges

are tenured full-time officers of the court. In 2018, their salary ranged between 215,700 USD per year (= 193,852 Euro) for associate judges and 222,500 USD (=199,861 Euro) for the Chief Justice (Perkins 2018). Judges of the court of appeals enjoy independence. They can only be removed 'for cause' and 'by concurrent resolution of both houses of the legislature, if two-thirds of all the members elected to each house concur therein' (Art. VI § 23a Constitution of New York).

Table 2: Composition of the BCC and the NYCoA according to legal stipulations

	Berlin Constitutional Court	**New York Court of Appeals (since 1974)**
Established	1992	1847
Number of judges	9	7
Number of appointed judges (1992-2018)	37	29
Length of term (since 1974)	7 years	14 years
Minimum age	35	None
Appointment (since 1974)	Election by Land parliament	Missouri Plan
Status of the judges	Part-time (non-tenured)	Full-time (tenured)
Expense allowance / salary (2018)	No salary (expense allowance [up to 12,000 Euro])	222,500 USD (CJ) 215,700 USD (AJ)
Gender quota	At least three men and three women	—
Judges without law degree	Possible	Not possible

Sources: my compilation; based on Gesetz über den Berliner Verfassungsgerichtshof (Act on the Berlin Constitutional Court); the Constitution of New York; Perkins 2018.

By contrast, the BCC comprises nine judges who serve a seven-year term at the court. They cannot be reappointed. While in New York State representatives of all three branches of government are involved in the selection and appointment of judges, in Berlin the election of judges to the constitutional court rests exclusively with the regional parliament. Only parliamentary parties enjoy the privilege to propose candidates to the parliament for election.

The House of Representatives of Berlin elects judges to the BCC with a two-thirds majority of the votes cast. The executive or the judiciary have no say whatsoever in the appointment process. There is no hearing before the election of a judge takes place in a secret ballot in parliament. Judges cannot be recalled or ousted from office by the parliament or the government. Only the court itself can depose a judge from office. Any judge can submit a request to be relieved from office at any time. In addition, there is a minimum age of 35 years. Most importantly, the judges work only part-time at the BCC. In Berlin, constitutional adjudication is a sort of moonlight job or honorary office. The judges of the BCC make their living as professor at a university, as a judge in another court, or as an attorney in a law firm. As judge at the BCC, they only receive an expense allowance between 400 and 1,000 Euro per month depending on the caseload. In their main profession, three of the nine judges of the BCC must be judges at a specialized court, while three others have to have a law degree. Consequently, three judges of the BCC could have no law degree, an option that has not been put into practice thus far. All 37 judges elected between 1992 and 2018 have studied law and passed the first and second state bar examination. Finally, there is a gender quota at the BCC, whereby at least three men and three women must serve.[II]

Notwithstanding these legal differences, the composition of the two courts is surprisingly similar in some respects. Between 1992 and 2018, the House of Representatives of Berlin elected 37 judges, while the Senate of New York State confirmed 29 nominees of the Governor. On average, in the two courts judges were already in their fifties when appointed to the court. Accordingly, becoming a judge in a court of last resort seems to be the climax in a legal career and not simply a stepping stone towards future ambitions, notwithstanding the fact that a number of judges of the NYCoA later became judges at the U.S. Supreme Court (Bierman 1995: 1412). When appointed, judges of the NYCoA are on average six years older than their colleagues from Berlin. Furthermore, judges of the NYCoA stayed in office for 1.7 years longer than their colleagues in Berlin, which is not much considering that in Berlin judges are elected for 7 years and in New York State for 14 years. In addition, between 1992 and 2018 only nine female judges out of 29 served at the NYCoA (31%), while in Berlin the parliament elected 15 female judges out of 37 (40.5%). Nevertheless, at the NYCoA the nine female

judges together spent 79.1 years in office (out of a total of 186.5 years), while their female colleagues of Berlin covered 94.1 years (=44.0%). Finally, the political composition is also similar: in Berlin, 21 out of 37 judges have been nominated by parties of the left (SPD; Greens, Pirates, PDS) while in New York State Governors of the Democratic Party nominated 21 out of 29 judges. Consequently, in Berlin left-leaning judges – at least according to the nominating party – covered 56.7 percent of all of the time that judges spent at the court of last resort in this German Land. In New York State, the same group of judges covered 66.4 percent at the Court of Appeals.

The findings prompt two conclusions. On the one hand, for judges at subnational courts of last resort, judicial accountability seems more important than for their colleagues at the national level. This does not mean that judicial independence is somehow limited. Nonetheless, in most dimensions of the appointment processes, the balance between judicial independence and judicial accountability is struck in favor of the latter: the tenures are shorter, and the representativeness of the courts is greater. In all of these dimensions, the appointment process of judges to subnational courts of last resort significantly differs from their national counterparts. These differences between the national and subnational level underscore the notion that subnational high courts inject federal ideas such as pluralism and diversity into the judicial system. On the other hand, the appointment of judges and the composition of the two courts fit perfectly well into the two regimes of constitutional adjudication: legal tradition, the type of federalism and the court system seem to require tenured judges in American state supreme courts, while the narrow jurisdiction of Land constitutional courts would hardly justify full-time judges.

4. Institutional Preconditions and Modes of Operation

Institutionalists believe in organizations because organizations privilege actions that follow established patterns and routines. Consequently, the institutional design of the two courts in question should affect the role that these courts might play in a regime of constitutional adjudication. Surprisingly enough, upon first glance American and German courts of last resort

seem to be similar institutions. They are constitutionally mandated and can manage their internal affairs and their budgets autonomously. Nonetheless, the comparison ends here, given that the institutional structure and mode of operation of the two courts could hardly be more different.

Table 3: New York Court of Appeals (NYCoA) and Berlin Constitutional Court (BCC): Institutional Features

	Berlin Constitutional Court	**New York Court of Appeals**
Resources	0.7 Mio. € (2019); staff: 6 (without judges)	17.7 Mio $; (2019); staff: 129 (without judges)
Organizational culture	Discontinuous court; weak organizational structure	Permanent court, strong organizational structure
Mode of decision-making	Few hearings; ex ante (rapporteur judge); collective body	Permanent court, ex post (opinion-writer), single judge
Composition	9 honorary, part-time judges	7 tenured full-time judges
Competencies	To ensure that the constitution of Berlin is effectively enforced	'to unify, clarify, and pronounce the law of New York State'
Matters/Motions	179 per year (1992-2018)	4,035 per year (1997-2018)

Sources: Senatsverwaltung für Finanzen von Berlin 2017: 9; Reutter 2017: 94f.; NYCoA 1998-2018; New York State 2019: 13.

According to the Annual Report of the Clerk to the Judges of 2018, the NYCoA employed 129 non-judicial staff. By contrast, in the same year the BCC's staff comprised six employees, who mostly worked on cases and prepared decisions of the court. In other words, the BCC's administrative infrastructure is minimal. In addition, the BCC is organizationally 'embedded'. It is affiliated to the Higher Regional Court of Berlin (Kammergericht), to whose services the court can refer, if necessary. Finally, compared with the NYCoA, the budget of the BCC is negligible, at well below one million Euro per year. In fact, adding up all budgets since 1992, Berlin's taxpayers had to spend less on the BCC than the taxpayers of New York State for the NYCoA in one year alone. In 27 years of its existence, the BCC could dispose of 13.9 Mio.

Euro, while the NYCoA's budget for the 2019-2020 fiscal year alone exceeded 15.8 Mio. Euro (= 17.7 Mio. USD).

It goes without saying that the organizational differences laid out above also reflect on the mode of operation of the two courts. Legally, the BCC comprises the president, the plenary meeting of all judges, members of the research staff, and the administration. The president chairs the plenary meetings, manages the general administration, and represents the constitutional body externally. According to the rules of procedure, the plenary deals with basic questions and decides on cases by majority. A judge prepares the final ruling as a rapporteur. The court is entitled to come to a decision if at least six judges are present, although this minimum number can be further reduced if a judge reports a conflict of interest. Abstention from voting is not an option. On average, the judges meet once per month for one day. If we take reports of former presidents and vice presidents as a reliable source, we should find teamwork, expertise, and collegiality reigning among the judges (Reutter 2017: 89-92). The part-time basis of the call presents a challenge as the judges must acquire the necessary expertise on constitutional law on top of their ordinary professional duties. These preconditions make deliberation an exception and privilege decision-making. Moreover, they are a hurdle for submitting dissenting votes. Put simply, the BCC comes close to what M. Cohen (2014) has coined an 'ex-ante model' of deliberation in which a rapporteur prepares the decision for the whole court and in which deliberation among the judges precedes the oral argument.

The NYCoA works in a sort of reversed fashion and represents the ex-post model in which the deliberative part of judicial decision-making takes place after the case has been orally argued (Cohen 2014; NYCoA 2018: 3-7). Following the self-description in the Annual Reports, the judges can rely on a large number of staff who provide administrative and judicial support. The Clerk of the Court and its staff are responsible for case management, whereby they prepare reports on civil motions and selected appeals in criminal cases. In addition, while the BCC only knows decisions made by the whole plenary (apart from dissenting votes), the NYCoA grants single judges much more discretion. A decision needs the vote of four judges, while five judges constitute a quorum. All judges of the NYCoA must decide collectively on

appeals, motions, certified questions, and issues concerning the State Commission on Judicial Conduct. However, single judges decide individually on applications for leave to appeal in criminal cases and 'emergency show case orders' (NYCoA 2018: 2). In contrast to the BCC, the judges of the NYCoA individually sign or concur with opinions, while dissenting opinions are published, of course. Appealed decisions by lower courts can be affirmed, reversed, modified, dismissed or dealt with in other ways. The judges of the NYCoA 'commute' between in-court and in-chambers sessions. In-court sessions take place on a monthly basis (except in July) for two weeks in Albany at the Court of Appeals Hall. The judges spend the time between the in-court sessions in their Home Chambers to prepare pending cases, write opinions and attend to other businesses related to their professional responsibilities. These so-called in-chambers sessions generally last three weeks. During in-court sessions, the judges meet every day 'in conference' to discuss cases and reach decisions. Public hearings or oral arguments take place on a regular basis during in-court sessions (Tuesday to Thursday). The court is known to be 'a hot bench'. Hearings are question-and-answer sessions in which the lawyers have to quickly respond to very specific and sometimes painstaking questions raised by the judges. According to the Annual Report (NYCoA 2018: 3), in most cases each judge receives copies of the briefs well in advance of the oral argument. Consequently, each judge is familiar with the cases and can thus use the oral argument to address issues and raise questions triggered by the briefs. Each appeal is assigned randomly to one of the judges for reporting. The ensuing conference of the judges follows strict rules. In this model, deliberation among judges takes place before a decision has been proposed. Decisions are made by simple majority (NYCoA 2017: 8-9).

In addition, both courts use oral arguments and dissenting votes on a mirror-inverted basis (table 4). From a legal perspective, an oral argument should take place before the BCC hands down its decision. This rule is laid down in the Act on the Berlin Constitutional Court. Nonetheless, the parties involved or the court can forgo this procedural step. In effect, the legal exception has turned into a practical rule. Between 1992 and 2018, the BCC only scheduled 39 oral arguments or hearings, i.e. two per year. Out of 4,824 incoming cases, more than 99 percent did not entail an oral hearing at the BCC. Almost 97 percent of all decisions

on the merits (1,157 out of 1,196) were issued as a 'court order', i.e. as a 'Beschluss' or a decision without prior hearing. At the NYCoA, the 'fast track' is the exception. This track of *Sua Sponte Merits* (SSM) allows the NYCoA to decide appeals without oral argument, 'saving the litigants and the court the time and expense associated with the filing of bound briefs and oral argument' (NYCoA 2018: 4). Such an alternative track may be granted if the parties have requested SSM review and 'if, for example, it involves narrow issues of law or issues decided by a recent appeal' (NYCoA 2018: 4). Since 2005, only 460 appellants have been granted such a fast track, i.e. 35 per year. Based on the very small number of oral arguments, the BCC can hardly be understood as a court that extensively deliberates on cases. It not only corresponds to the ex-ante model that M. Cohen (2014) has described but also the public part of deliberation is minimal, in most cases non-existent. By contrast, in most cases the NYCoA grants a public venue in which the appellant can clarify issues and defend the case.

Similarly, there is a significant discrepancy regarding the number of dissenting votes. In both courts, a dissenting vote is possible, although in Berlin dissenting votes are extremely rare. Between 1992 and 2018, we find only 38 dissenting votes in which a judge publicly disagreed with the opinion of the court's ruling (Reutter 2017b). This reflects only 3.7 percent of all 753 decisions included in the dataset of the BCC, whereby 64 judges have either signed or concurred with a dissenting vote. The NYCoA provides a reversed image in this respect. Although Luke Bierman (1995: 1410) states that the NYCoA showed strong traditions 'concerning congeniality among its members and its decision-making', dissenting votes became frequent and a sort of routine. Between 2005 and 2018, overall 831 dissenting votes were handed down (63.9 per year), while from 2012 and 2014 less than half of the appeals found the support of all judges.

Obviously, the institutional preconditions and the mode of operation of the two courts significantly differ. The NYCoA enjoys a fully-established organizational infrastructure and full-time judges. By contrast, the BCC's institutional resources are minimal. Having hardly any staff, limited organizational resources, and part-time judges who convene only a dozen times per year provide no indication that the BCC could be as powerful as the NYCoA. Put differently, without 'resources, principally time and expertise, opportunities for activism may

escape or simply go unrecognized' (Wenzel et al. 1997: 369). At the same time, the institutional layout of the two courts fits with the two regimes of constitutional adjudication outlined above.

Table 4: Input, throughput, and output: caseload, type of proceeding, oral arguments and dissenting votes

	Berlin Constitutional Court		**New York Court of Appeals**	
Period	1992-2018		2005-2018	
Caseload (Input)	Abs.	Per year	Abs.	Per year
• Incoming cases per 100,000 population (2018)[a)]	—	6.1	—	19.8
• Docket[b)]	4,824	179	54,497	3,892
Throughput				
• Number of oral arguments	39	1.4	2,464	190
• Without oral argument / SSM	4,553	169	460	35
• Number of dissenting votes	38	1.5	831	63.9
Type of Proceeding (Output)				
• Constitutional Complaint / Appeals[b)]	4,609	171	4,312	308
• Disputes between State Organ	79	2.9	—	—
• Judicial Review / Constitutional Question	15	0.6	93	6.6
• Others	120	4.5	363	28

a) BCC: cases 230, population 3.75 Mio; NYCoA: 3,875 filings; population 19.54 Mio; b) BCC: all registered cases; NYCoA: appeals plus orders granting leave to appeal plus motions plus criminal leave application filings.
Sources: NYCoA 2005-2018; Verfassungsgerichtshof Berlin 2012-2018.

5. Comparing Constitutional Adjudication of Subnational Courts of Last Resort

Numerous studies have aimed to capture the effects of constitutional adjudication and judicial review (Hagan 1998; Kmiec 2004). For Arend Lijphart (1999: 225), for example, the 'impact of judicial review depends […] vitally on the vigor and the frequency of its use by the courts, especially supreme and constitutional courts.' According to Lijphart (1999: 225f.), Germany and the USA possess 'strong judicial' review, although the author did not mention subnational courts of last resort. I will complete Lijphart's approach and try to explore the impact of subnational constitutional courts by assuming that the accessibility, caseload, and type of proceedings shape the role that a court might play in a federal democracy. Unsurprisingly, the two courts significantly differ once again (table 4).

According to Art. VI § 3 of the Constitution of New York State, the jurisdiction of the Court of Appeals is in most cases 'limited to the review of law'. Its main task is to 'unify, clarify, and pronounce the law of New York State' (NYCoA 2018: 2). Only in few and exceptional cases might the court also decide on facts. Like the other state supreme courts in the USA, the NYCoA is the final appellate tribunal for civil and criminal appeals. Appeals as of right (e.g. constitutional question, certified question, death penalty, appellate division order) are possible but do not happen too often. Some 95 percent of the incoming appeals must obtain permission by either the court, a single judge of the NYCoA (in criminal cases) or an Appellate Division. Notwithstanding this qualification, between 2005 and 2018 the NYCoA registered on average 3,892 new filings per year, i.e. appeals plus orders granting leave to appeal plus motions plus criminal leave application filings. Per 100,000 members of the total population, this was some 19.8 incoming cases in 2018. However, ultimately fewer than 10 percent of the incoming cases were appeals that received permission by the court. Consequently, each year some 308 appeals, 6.6 constitutional questions, and 28 other cases were eventually accepted.

By contrast, the BCC does not work as a proper court of appeals. The BCC's major task is to enforce the constitution and apply constitutional stipulations to political or legal issues. Thus, we find various applicants that can bring a case to the court. For example, an individual can lodge a constitutional complaint, or a parliamentary party, the incumbent government or a

lower court can ask the court to review a statute or decide on conflicts between state organs. Compared with the NYCoA, the number of cases registered at the BCC is much lower. Since 1992, each year some 179 motions were submitted to the BCC on average. Constitutional complaints always accounted for the vast majority, representing more than 95 percent of all incoming cases. In principle, all filings registered at the court are 'motions as of right'. The court must deal with each of them if the applicant insists. Nonetheless, it can do so in different ways so that only a minority of the cases brought before the court are honored with final a decision on the merits. Most constitutional complaints are rejected for formal reasons.

Between 1992 and 2018, the BCC registered a total of 4,824 incoming cases. The court found 2,261 petitions inadmissible or obviously unsubstantiated, while 833 motions were withdrawn and another 302 were dealt with in other ways not specified in the statistics of the BCC. Ultimately, there were only 1,196 cases that triggered a decision on the merits (= 24.8 percent) The discrepancy between incoming cases and appeals honored by a disposition of the court is even greater at the NYCoA: between 2005 and 2018, the NYCoA registered almost 55,000 incoming matters, i.e. 3.892 per year. This is more than 20 times the caseload of the BCC. Nonetheless, in this period only 4,312 appeals, 93 constitutional questions and 363 other matters were granted a final disposition of the court.

Once again, we find similarities and differences. Most importantly, both courts have the privilege to invalidate laws and can thus contribute to answer constitutional issues. At the same time, the jurisdiction, type of proceedings, and accessibility create institutions that do not share much in common. The BCC speaks as an integrated institution that is rarely called upon. Oral arguments and dissenting votes only happen in exceptional cases. By contrast, the NYCoA is institutionally strong, its decisions are individualized and these make differences among the judges a matter of routine. In addition, it is frequently called upon. Put simply, caseload, throughput, and output represent different court types.

6. Subnational Courts of Last Resort and 'Unitarian Juristocracy': Some Tentative Conclusions

Most studies on the judicial dimension in federations are national-centric. They overwhelmingly focus on the national level and explore the impact of the judiciary on federalism. This paper has applied a different approach. Empirically, I address a dimension that has hitherto been overlooked in the debate on judicial federalism. Methodologically, I apply a most different systems design to the study of subnational constitutional adjudication, and theoretically I try to describe and capture whether and how far subnational courts of last resort inject federalist impulses into the judicial system. Moreover, I assume that subnational courts of last resort are part of a regime of constitutional adjudication. They act in a legal, constitutional and political environment, which shapes their role and defines their impact on federalism and democracy. The findings lead to three conclusions.

First, it is not possible to make general statements about causal links between constitutional adjudication and federalism. The two cases examined in this paper differ in almost all respects. They share the right to invalidate laws. Nonetheless, the appointment of judges, the composition of the court, the mode of operation, and the role these two courts play in their respective polity vary not only in degree but also substance. While these might seem to be trivial findings, it rules out arguments like the notion that federalism means legalism that causes a strong judiciary that in turn will lead to juristocracy. Moreover, we also cannot say that judicial review will always strengthen unitarism. In fact, we might even say that the NYCoA privileges the judiciary only because it works as a decentralizing institution. At the same time, by comparison the BCC looks less powerful and it combines a weak(er) judiciary with vertical integration and thus unitarian tendencies.

Second, in both countries constitutional adjudication is not monopolized in a single court. In both regimes, it rather manifests itself as stratarchical structure. This pluralistic power structure not only injects plurality and diversity into judicial federalism but also makes varying rulings on the same issue feasible. For example, with its ruling Goodrigde v. Department of Public Health (2003) the Massachusetts Supreme Judicial Court allowed same-sex marriage in

this state, while the NYCoA refused to legalize same-sex marriage in Hernandez v. Roblez (2006). Similarly, there are diverging rulings of German Land constitutional courts on religious issues (Henkes and Kneip 2009). Once again, this favors a pluralistic understanding of constitutional law and underscores federal principles.

Third, if we discuss constitutional adjudication and court of last resort in federal systems, we must take the subnational level into account (Williams 2006; 2003; Tarr 2009). Without giving this level its due credit, we are unable to explain neither federalism in general nor judicial federalism in particular. G. Alan Tarr has rightfully highlighted that American state supreme courts are not simply legal institutions; instead, they 'actively participate in governing and they are the target of political action designed to influence their decisions and their membership' (Tarr 2009: 204). Arguably, German Land constitutional courts have not acquired such a status. Nonetheless, they also rule on controversial issues, safeguard the subnational constitution and protect civil liberties. In this sense, both courts contribute to the development and functioning of federalism.

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[I] I borrow the term 'juristocracy" from Ran Hirschl (2004 and 2007).

[II] See Reutter 2020; 2018; 2017. My compilation based on: Abgeordnetenhaus Berlin, 'Parlamentsdokumentation'. Available at: https://www.parlament-berlin.de/de/Dokumente/Parlamentsdokumentation; NYCoA 1998-2018; 'List of associate judges of the New York Court of Appeals' (Wikipedia) https://en.wikipedia.org/wiki/List_of_Associate_Judges_of_the_New_York_Court_of_Appeals; Historical Society of New York Courts, 'Biographies' http://www.courts.state.ny.us/history/legal-history-new-york/history-legal-bench-court-appeals.html accessed 31 July 2019. To make comparisons possible, the time period begins with the election of the first judges to the BCC (03/26/1992) and ends on 12/31/2018, which covers a period of 26.8 years. Consequently, at the BCC the judges served 241.1 years in office (=26.8 years x 9 judges) and at the NYCoA seven judges stayed 186.5 years in office (26.8 years x 7 judges).

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

The EU-Member State Relationship as a Principal-Agent Problem

by

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Perspectives on Federalism, Vol. 13, issue 1, 2021

Abstract

Ever since the European Union came into existence many theories have addressed the state of European integration. This paper tries to offer a further interpretation building on the principal-agent concept. The basic idea is expressed by the dilemma whether the EU should exclusively be seen as an agent of the Member States, or the situation is much more complex. The paper is going to detect three types of agency relationships within the European Union, and presents legal and political solutions of the founding treaties which aim to tackle the agency issues. Furthermore, the study analyzes two fundamental causes for the complexity of the European Union – Member State relationship. One of them are the shortcomings of the EU bureaucracy; the other cause – postulating the European Union as a value community – seems to have its current engine in Central Europe, namely in Hungary and Poland.

Key-words

European integration, value community, interest community, principal-agent problem

1. Introduction

Many theories of integration (see Azoulai and Dehousse 2012: 354) have been developed in order to describe the structure and the evolution of the European Union[I] and many of them focus on the federal aspect of the European Union's structure (Burgess 2006: 226; Schütze 2009: 346; Millet 2012: 53). The roots of the issue have a long history. The measure of the integration on a virtual scale, having two extremes (intergovernmentalism *versus* federalism), has been debated for quite some time (e.g. Bickerton 2012; Van Middelaar 2013: 181). Lately, new centripetal forces such as the Brexit or the emergence of populist politics (Corrias 2016: 6. Müller 2016) keep the debate on the agenda.

It has been an evergreen topic and it can be recognized either as a competence debate (Craig 2004: 323) among the different levels of the integration, or as the question of power balance among various European institutions. Accordingly, it has an essential relevance which institution becomes the dominant player in different periods of the integration, such as the European Parliament having a federalist character, or the inter-governmentalist European Council. In this regard it is important that institutions of the European Union should not be treated as a whole. While the Council and the European Council can be evaluated as the playground of the inter-governmental debates, the Commission and the Parliament play an important role in the relationship structure concerning the EU and Member States. In this regard, the Court of Justice of the European Union [CJEU] has to be taken totally apart as it plays the arbiter role in between the Member States, between the institutions and between the Member States and other EU institutions in both directions, too.

In the background of the *sui generis* nature of the EU there is a relevant pair of concepts which might be interpreted as two different visions or paradigms:[II] the European Union as an *interest community* and its perception as a *value community* (Bogdandy 2019). Can one say that the EU is on the way from the former to the latter? Or, is it already in the latter phase? Or, is this only an artificial binary code as the values and the interests are interrelated from the very beginning? The aim of this paper is to keep analytically apart the two concepts in order to illustrate a paradigmatic shift in the EU-Member State relationship. Therefore, the paper

operates first with the concept of interest community presupposing the dominance of the Member States; and later, with the introduction of the value community concept, it outlines the complex nature of the EU-Member State relationship arising from the so-called *sui generis* structure of the European Union (Schütze 2018: 263).

In order to illustrate the complexity of the relationship, the article is going to use the principal-agent problem as an analytical tool. This will be presented in Section B. Building on this law and economics perspective, section C aims to identify three different agency relations within the European Union: between Member States and EU institutions and *vice versa*, and among the Member States themselves. Furthermore, section D aims at analysing the founding treaties currently in force, in order to trace the disciplining strategies attempting to mitigate the agency issues. Section E on the one hand argues – through a case study concerning Hungary – that legal mechanisms prevail over governance strategies, and on the other hand – through a case study focusing mainly on Poland – it presents the value community of the EU in action. Section F concludes the paper emphasising the special role of the CJEU as an arbiter in all three agency relations within the EU.

2. The Principal-Agent Problem

The concept of the principal-agent problem comes from microeconomics, and, as many concepts of similar origin, it might be fruitfully applied in legal affairs (Cooter and Ulen 2004: 15). In order to enlighten the issues arising from the agency relationship, one must take a glance at the idea of perfect competition which presupposes a special information structure of the market, where buyers and sellers have perfect knowledge about prices and quality, implying that prices reflect the quality of the goods. Therefore, poor quality goes with low prices, while high quality induces high prices. In contrast, in reality one of the parties knows more than the other and this leads to so-called *asymmetric information*. In order to overcome this problem, buyers might apply different forms of signalling such as warranty (Pindyck & Rubinfeld 2008: 617).

The situation is similar in the case of a principal-agent relationship where the agent is an individual employed by a principal to achieve the principal's objective (Armour et al. 2009: 35). The problem of asymmetric information appears already when principals hire their agents and they have to rely on different quality signalling characteristics such as their education level. In addition, principals (e.g. owners) cannot always completely monitor their agents (e.g. employees) and the acting employees are also better informed than their principals. In such a situation it might happen that agents have an incentive to pursue their own goals, rather than the goals of the principal.

A similar feature appears in private enterprises having a diversified ownership structure, but the firm itself is actually controlled by the management and the managers' goals may deviate from those of the owners (Armour et al. 2009: 36). Since monitoring the management is costly (the oversight is difficult), there is a need for an incentive structure that rewards the outcome set by the principals and thus mitigates the principal-agent problem.[III]

The basic idea of asymmetric information and conflict of interests illustrated above applies practically to all principal-agent relationships. The theory was already fruitfully used to examine the role of direct democracy in order to reduce the potential risks of representative democracies where citizens are to be considered the principals of the governments (Matsusaka 2005: 185). And now, the underlying idea of this study is to take a look at the EU as a huge, multinational enterprise and to apply the principal-agent theory in order to assess its composition and structure.[IV]

3. Three Agency Problems

3.1. The EU as a Contract

As a starting point, the founding treaties of the European Union can be evaluated as a functional constitution creating a multilevel governance structure by allocating different competencies between the supranational level and the Member States (Isiksel 2016: 19.; Bogdandy 2010: 1). Translating this to a law and economics approach, the founding treaties can be conceptualized as contracts signed by contracting parties (Voigt 2012: 13). As a trace of

this interpretation, the first article of the Treaty on the European Union (TEU) declares that '[b]y this Treaty, the *HIGH CONTRACTING PARTIES* establish among themselves a EUROPEAN UNION, hereinafter called "the Union", on which the Member States confer competences to attain objectives they have in common.'[V] Accordingly, from the point of view of the Member States, the European Union can be described as a contract signed by more partners, and as a constructed representative along the lines of an agency relationship. Consequently, the EU means both a relationship structure among the Member States and also a set of actors (institutions) established by the treaties.

However, if one perceives the institutions of the EU as an agent constructed in order to represent the interests of the Member States, then, similarly to its 'enterprise' counterparts,[VI] the EU also carries an implied moral hazard: the agency problem. The question might arise therefore whether the institutions of the EU counteract the interests of Member States, its principals in the given framework.

3.2. Relationship among the Contracting Parties

Contrary to the basic model where there are only one principal and one agent, the situation becomes more complicated with a multiplicity of principals. The multiple and diverging interests of the many contracting parties go together with high coordination costs that might lead to the simplification of the decision-making rules. In such a situation it can be questionable whether pursuant the action of the agent none of the principals can be worse off (*Pareto criteria*), or it is enough if the gains of an action for some principals outweigh the loss for the rest of the principals (*Kaldor-Hicks criteria*) (Cooter & Ulen 2004: 58).

As it can be seen in the case of the EU, the strictly intergovernmental areas apply the Pareto criteria as all the principals have veto rights.[VII] However, the so-called ordinary legislative procedure which can be considered as being the typical decision-making procedure within the European Union follows the Kaldor-Hicks criteria. The reason why it has become typical might be in close connection with the heterogeneous preferences of the many participants, resulting in huge coordination costs. This might be an explanation why there is a correlation between the widening and the deepening of the European Union: as the number of

the Member States grew, the criteria of unanimity was more and more difficult to maintain since the many veto rights could paralyse the functioning of the institutions (Orbán 2014: 111). The shift toward a decision-making procedure based on Kaldor-Hicks criteria, however, opens up a second type of principal-agent problem: the issue of the relationship among the Member States that can be interpreted as a sort of a majority-minority relationship reflected by the weight of the Member States having different size populations (Bunse and Nicolaidis 2012: 249). [VIII]

3.3. Janus-Faced Actors

Up to now two agency relationships have been identified: the first between the Member States as principals *vis-á-vis* the institutions of the European Union as agents, and the second among the Member States having diverging interests. However, in the case of the European Union there is a third type of principal-agent problem that blurs the whole relationship structure.

The third type of agency relationship questions the clear principal role of the Member States and the pure agent status of the EU institutions as at the end of the day the relationship between the EU and the Member States has seemed to alter along the functioning of the Union. One can name this phenomenon *'the paradox of integration'*, retraceable to two fundamental causes: indirect bureaucracy and the postulation of the EU as a value community.

A. Indirect Bureaucracy

In order to indicate the first fundamental cause, one might think about a couple of examples. For instance, if one examines issues of regional policy, or the area of freedom, security and justice, it can be seen that the administration of the Member States plays a major role at the implementation phase of the policies. At EU level, besides the outstanding role of the European Commission as the 'guardian of the treaties', there are only a few coordinating and controlling mechanisms such as OLAF or FRONTEX. For example, article 17 TEU states that the Commission shall ensure the application of the Treaties and of measures adopted by the institutions pursuant to them; it shall execute the budget and manage programmes; it shall

exercise coordinating, executive and management functions, as laid down in the Treaties. There are a few other exceptions as well[IX] but direct administration is still exceptional within the EU and the general rule is the indirect (or subsidiary[X]) administration carried out by the administrative bodies of the Member States.

This sort of mechanism is supported by article 1 TEU, declaring that EU decisions are taken as openly as possible and as closely as possible to the citizens. Paragraph 3 of Article 4 TEU states that the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. As a consequence, the Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives. Regarding administrative cooperation, Article 197 TFEU explicitly declares that effective implementation of Union law by the Member States shall be regarded as a matter of common interest. Therefore, Article 291 TFEU emphasizes that Member States shall adopt all measures of national law necessary to implement legally binding Union acts.

In addition, a similar mechanism holds for the judiciary. The European Union itself is a legal system[XI] enforced by a network of courts, culminating in a body based in Luxembourg. From this perspective, the courts of each Member State act as Union courts[XII] when they apply EU law under the guidance of the CJEU.[XIII] And accordingly, Article 19 TEU – which plays a very crucial role concerning the development of European legal order these days[XIV] – states that 'Member States shall provide the remedies necessary to ensure effective legal protection in the areas covered by Union law'.

When it comes to assessment, one might observe that it is logic that the functioning of the EU relies on the administration and the judiciary of the Member States. This mechanism seems to be indispensable as many times policy implementation and jurisdiction could not be carried out effectively through the EU institutions. However, all this means that in these spheres of action when the EU can solely rely on the Member States, the EU becomes a sort of principal who builds up monitoring-coordinating mechanisms to oversee the actions of the Member States.

B. The EU as a Value Community

The second fundamental cause why it seems that the EU has gained the role of a principal goes back to its nature. Namely, postulating the EU as a value community makes it a common reference point as holder of specific values. In this regard, it is fair to say that interpreting Article 2 TEU is the 'Gordian knot' of the European constitutional law and accordingly scholars have already pointed out that this very Article is the core of the European multilevel constitutionalism (Kelemen and Pech 2019).

On the one hand, EU values are oriented towards candidate countries as Article 49 TEU states (Kochenov and Dimitrovs 2021). Thus, for example, the operation of EU law has hitherto been based on the basic hypothesis that the legal systems of the Member States ensure the independent functioning of the courts of the Member States (Lenaerts 2020: 29) and this institutional setting has been examined in the context of the accession conditions, too. On the other hand, Member States have to comply continuously with the common 'rules of the game' (Lenaerts 2020: 29) and based on that EU institutions might formulate normative expectations *vis-á-vis* the Member States. This is why the institutions of the EU started to hold Member States responsible for infringing the principle of the rule of law and other common values. To this viewpoint significant contributions have been added by Central Europe. Important steps toward this development have been the Tavares and the Sargentini Reports adopted with an eye to Hungary[XV] or the rule of law procedure carried out against Poland.[XVI] In these cases EU institutions clearly behaved as principals who attempt to discipline their agents and have been trying to find an answer to the so-called 'Copenhagen dilemma' (Müller 2015: 141).

The issues concerning the EU values (Jakab and Kochenov 2016) and the current debates on the justiciability of Article 2 TEU[XVII] have created a need to rethink some core elements of constitutionalism: the concept of the European Legal Space (Harding 2000: 129-130) requires a minimum 'Europeanization' of the basic constitutional principles as the General Affairs Council Conclusions noted in 2014. Parallelly, the comparative work of the European Commission for Democracy through Law (Venice Commission) thrives to identify common European standards and the Rule of Law Checklist[XVIII] is an important example of that. In addition, there are other tools and academic reflexions as well e.g. the EU Justice Scoreboard,

the new emphasis of CJEU on Article 19 TEU,[XIX] the further development of the notion of EU citizenship which has evolved from the right of workers to free movement to an EU level fundamental political right[XX] or the idea of the so-called 'biting intergovernmentalism' which is based on the second type of agency relationship (Kochenov 2015).

To sum it up, at this stage of the integration the construction of the EU as a whole has reached a particular junction: the roles are 'doubled'; both the Member States and the institutions of the EU are principals and agents of each other, and here lies the paradox of integration. This observation might be in connection with to double sovereignty thesis of Habermas (2012: 1-11) who deduced his theory from the interpretation of EU citizenship, which provides the citizens a dual capacity to act as EU citizens and Member State nationals at the same time.[XXI]

4. Disciplining Strategies of the Two-Way Agency Relationship

Nevertheless, the case of the European Union is unique and very complex. The *sui generis* character of the EU makes it possible to use the 'federal' *adjective* as a structural attribute even if one cannot describe it with the *noun* of federation (Riker 1964: 11; Lenaerts 1997: 747-749; Oeter 2010: 59-62). The most significant challenge upon such a composition is that both participating layers might feel strong incentives to undermine the functioning of the whole system (Kelemen 2007: 53). The supranational level might tend to overstep the competences conferred on the EU,[XXII] while the Member States might abandon their cooperative attitude in order to shirk their obligations. In addition, as one could see above, at the end of the day both the Member States and EU institutions might behave as principals in different situations. These potential phenomena highlight the importance of the different procedures of conflict resolution and the principles guaranteeing the EU's structural integrity. Therefore, the question arises: how is this complex relationship structure manageable with the help of different contractual safeguards?

The principal-agent link generates risks. For neutralising them relevant solutions have to be applied in order to minimise the vulnerability of the principal. Therefore, contracts normally

use different strategies which target either the strengthening of the position of the principal or the limitation of the agent. In the following section I am going to build on the classification of John Armour, Henry Hansmann and Reinier Kraakman, and I am going to analyse and detect the different solutions applied in the founding treaties.

There are two different groups of strategies which aim to address the issues.[XXIII] The *regulatory strategies* are prescriptions of behaviour with an authority (e.g. a court) who is authorised to determine a non-compliance behaviour. The second group is that of the *governance strategies* which aim to facilitatate the principal's control over the agent's behaviour. In the latter case the principal determines the non-compliance behaviour.

	Regulatory	Regulatory	Governance	Governance	Governance
	Agent constraints	Affiliation terms	Appointment rights	Decision rights	Agent incentives
Ex ante	Rules	Entry	Selection	Initiation	Trusteeship
Ex post	Standards	Exit	Removal	Veto	Reward

Table 1: 'Strategies for Protecting Principals' (see Armour et al. 2009: 39)

4.1. Regulatory Strategies

A. Agent Constraints

The most obvious behaviour regulating tools are the rules and standards. Rules require or prohibit a specific behaviour of the agent *ex ante* while standards leave the determination of compliance to an adjudicator (Kaplow 1992: 586).

Among the regulatory strategies the different procedures before the Court of Justice of the European Union (CJEU) have to be outlined. The founding treaties contain effective solutions for both cases when the EU institutions or the Member States are the agents. In the first case the review of legality or annulment procedure,[XXIV] and the action for a wrongful failure to act[XXV] have to be mentioned. In addition, to some extent also the preliminary reference

procedure has a judicial review function (Weatherill 2012: 213) but it primarily reveals the agent role of the Member States as regards the enforcement of EU law.

Furthermore, as for the Member States being the agents of the EU one must highlight the importance of the infringement procedures.[XXVI] These can be initiated by the Member States against each other as well, which is a legal strategy to accommodate the second type of agency relationship within the EU (Kochenov 2015). What is more, Article 260 TFEU gives weight to the judicial procedures: if a Member State fails to comply with a judgement of the CJEU, it is open to the Commission acting as the guardian of the treaties to take another action against that Member State which may result in huge penalty payments. This secondary legal procedure operates as a negative incentivizing mechanism that not only aims to reach the correction of the noncompliant behaviour of a Member State but also serves as a guarantee for the other Member States that their contracting partner will respect the rules of the game at the end of the day.

B. Affiliation Terms

The rights to enter and exit are both legal tools and they regulate the terms on which principals affiliate with agents.

As regards the entry rule, both the EU and the Member States are principals. Article 49 TEU firstly declares that the applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament which shall act by a majority of its members. Then it provides also that the agreement shall be submitted for ratification by all the already contracting States in accordance with their respective constitutional requirements.

The entry rule demonstrates that not only the already existing Member States but also the European Union as an entity has a principal role. Not any country is accepted to become a Member State, only those who are willing and are able to fulfil the accession criteria. In order to meet the conditions, any applicant has an extensive information disclosure duty. In addition, the procedure generates a second type agency problem as well: all the earlier contracting parties have to accept the new contracting partner. Once a country becomes a Member State, it has

the same principal rights as the other members but it also becomes an agent of the EU as it has to carry out its policies and to enforce EU law.

Contrary to this, the right to exit is a clear sign of the principal position of each of the Member States as neither the institutions of the EU nor the Member States, acting collectively, have the right to exclude any country who is already within the club. Article 50 TEU states that any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. As a result, the right to exit can be evaluated as an *ultima ratio* sovereign right[XXVII] of the Member States aiming to try to constrain the agent behaviour of EU institutions and also the other contracting partners who may neglect its interests (de Búrca 2016: 537).

4.2. Governance Strategies

A. Appointment Rights

Among the governance strategies the appointment rights have outstanding importance. This strategy affects mainly EU institutions as agents and it is reflected by the procedures aiming at electing the leaders of the institutions. It can be evaluated as a typical *ex ante* attempt to determine the future action of the agents. However, the rules concerning the election of the president of the EU and that of the European Commission reveals again the existence of a second type of agency problem: the election does not require unanimity among the principals, therefore some of them might have less influence on future activities.[XXVIII]

The *ex post* pair of selecting the agents is the possibility of their removal. In this regard Member States have much less influence. While in the case of the President of the EU the qualified majority of the European Council can relieve him or her from position,[XXIX] the treaties do not accord such a disciplining right for the Member States in the case of the Commission. According to Article 17 TEU the selection and removal rules regarding the Commission are asymmetrical: while its President is nominated by the European Council to the Parliament, later the Commission is responsible as a body only to the European Parliament.

In the reverse manner, taking the Member States as agents, no appointment rights can be found.

B. Decision Rights

As regards the decision rights *ex ante* one should consider the initiating rights, while *ex post* the option of the veto.

Concerning the *ex ante* mechanism, Member States as principals have almost no influence on the functioning of the EU. Earlier, the Commission had monopoly right to initiate a law-making procedure. Later, the Lisbon Treaty has introduced some nuances and put the Member States into a better position accentuating their principal role. According to Article 76 TFEU the acts referred to in the chapters concerning the judicial cooperation in criminal matters and police cooperation together with the measures referred to in Article 74 that ensure administrative cooperation in the areas covered by area of freedom, security and justice shall be adopted either on a proposal from the Commission or on the initiative of a quarter of the Member States. The new feature can be interpreted as a compensation for the deepening of the European integration as after the entry into force of the Lisbon Treaty almost all elements of the area of freedom, security and justice are decided in ordinary legislative procedure.

In this regard, another element of the Lisbon Treaty can be assessed as a compensation for the further integration: the so-called subsidiarity procedure. As a federal principle, subsidiarity has already been introduced at the birth of the EU as a sort of counterbalance of the integration aiming to protect the sovereignty of the Member States (Estella 2003: 179). In addition, the new procedure described in Protocol No 2 allows the national parliaments to signal if they consider a 'draft legislative act' to be beyond the scope of competencies of the EU institutions (Jancic 2015: 940). This can be evaluated as a sort of *ex post* veto mechanism even if its effectiveness is questionable.[xxx] On the one hand, in the political sphere, the horizontal communication among the national parliaments seems to be slow and they have never reached a so-called 'orange mark' since the introduction of the subsidiarity mechanism in 2009. On the other hand, subsidiarity could function as a legal strategy as well but court litigation has not achieved spectacular successes either. It soon became clear that the CJEU

was following a restrictive interpretation, and without further analysis, came to the conclusion, in the context of a directive, that due account was taken by the EU legislator of the principle of subsidiarity. In addition, in carrying out the tests provided for in Article 5 (3) TEU, the CJEU did not undertake any quantitative or qualitative analysis.[xxxi]

In the reverse manner, taking the Member States as agents, no decision rights can be found.

C. Agent Incentives

The situation is quite different regarding agent incentives. In this case one cannot detect incentivising mechanisms *vis-á-vis* the EU as an agent. Regarding the Member States, however, the picture is more complex.

First of all, the *ex ante* trusteeship status in the case of the EU-Member State relationship cannot be conventionally interpreted. A reason for this might be that normally trusteeship would presume alternativity, the possibility to choose from among the agents but this is not the case here.

As regards the *ex post* incentives, they either motivate the Member States to fulfil effectively the policies of the EU or de-motivate them from acting opportunistically. Concerning the founding treaties, two mechanisms have to be emphasised here. The first is the excessive deficit procedure which might lead to self-disciplining measures by the Member States in order to avoid potential financial sanctions, the coercive means of remedying excessive deficits.[xxxii]

The second mechanism is the Article 7 procedure which aims to protect the fundamental values of the Union listed in Article 2 TEU. In connection with the mechanism the CJEU has jurisdiction to decide on the legality of the acts adopted but only in respect of the procedural requirements. Therefore, despite its legal formulation, the procedure can be evaluated as a rather political tool (Fekete and Czina 2015).

In this procedure the EU is postulated clearly as a value community and as a principal it becomes a reference point detached from the Member States. In addition, the procedure can be initiated not only by EU institutions but also by one third of the Member States, while the main decision under paragraph (1) – stating the 'clear risk of serious breach' of EU values –

should be brought by the Council and under paragraph (2) – finding the 'serious and persistent breach' of EU values – by the European Council. These elements point to the presence of the second type of agency relationship. Nevertheless, the whole procedure has never been fully applied, so its disciplining power can be contested.

Furthermore, it is worth to mention a third incentivising instrument, the so-called pay-for-performance strategy which is not used at treaty level but it could be found in the rules concerning the structural funds during the multiannual financial framework of 2014-2020.[XXXIII] The reason for mentioning it is a recent debate on the newest multiannual financial framework that aimed to create a connection between the respect of EU values and the reception of future EU funds. In this regard, due to the ineffectiveness of the Article 7 procedure, the European Commission has drawn up a proposal for the current financial cycle to make the granting of financial assistance subject to the rule of law. The legal basis for this is Article 322 (1) (a) TFEU, and it can be considered as a new governance strategy as not the CJEU but other EU institution shall constrain the noncompliant Member State: it is the Council that should act by qualified majority upon the proposal of the Commission.[XXXIV]

As it could be seen above, similarly to regular contracts the founding treaties do also contain many safeguards and use many strategies to mitigate the principal-agent problem in both directions. The resulting analysis demonstrates that in many cases both the Member States and the EU have their spheres of action and their tools as principals. In this regard, a key question is the efficient functioning of the mechanism. For example, governance strategies seem to strengthen more or less the Member States, but the efficiency of the tools can be questioned (e.g. subsidiarity control). Parallel with that, there is one important exception, the incentive structure, where EU institutions seem to have stronger tools that may have financial consequences, but the efficiency of those tools is questionable as well (e.g. the so-called Article 7 procedure).

In contrast, legal strategies seem to function way more efficiently which is in connection with the legal character of the European integration (de Witte 2012: 19). Regarding the legal strategies, the central role of the Court of Justice of the European Union has to be emphasised as its mission is to balance the agency problem in both directions.[XXXV] Besides the clear

functioning of the different procedures in front of the CJEU, the possibility to impose pecuniary penalties on the Member States in the context of infringement procedures under Article 260(2) and (3) TFEU provides a further strong incentivising mechanism that strengthens the efficiency of legal strategies.

5. Case Studies

The following section is going to focus on the third agency relationship, and it will present first – through the case of Hungary – the special importance of the legal strategies in comparison with other strategies and then – through the series of judgements relating to judicial independence – the value community nature of the European Union.

5.1. The 5th Amendment of the Fundamental Law of Hungary

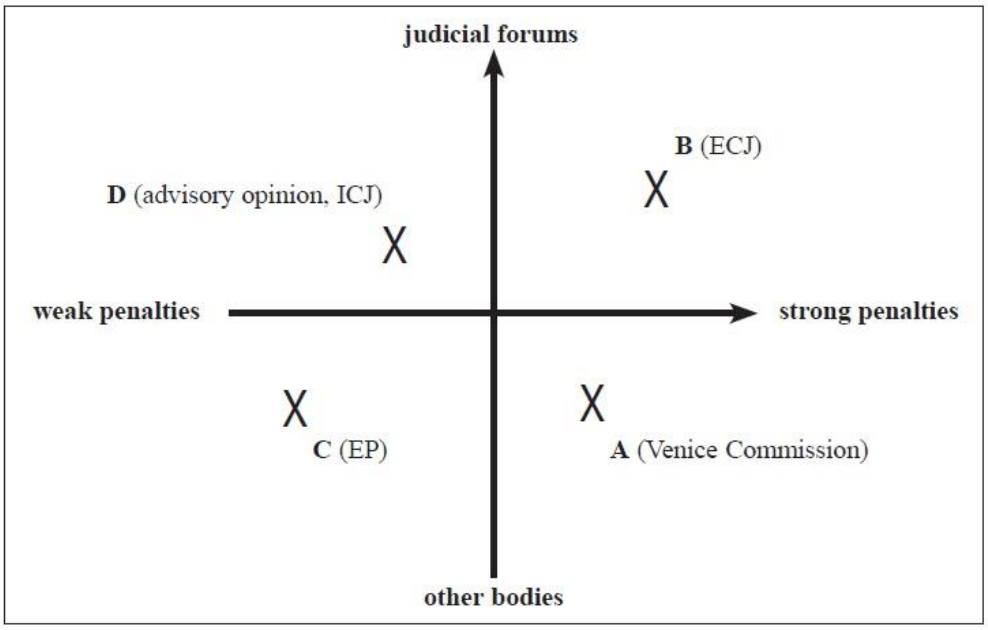
In order to evaluate the efficiency of the disciplining tools, one might turn to the theory of Andrew T. Guzman as a starting point. He calls reciprocity, retaliation and reputation as 'the three Rs of compliance' and underlines the repeated nature of international interactions between the states which makes them interested in a coordinated behaviour even without an enforcement mechanism carried out by a third party (Guzman 2008: 33-45). Whilst he also distinguishes between treaties and other soft law agreements, in his opinion the 'the three Rs of compliance' make both treaties and soft law effective' (Guzman 2008: 180). Therefore, international tribunals can be effective without an enforcement mechanism because their primary role is informational: if a state does not comply with international law, it will be considered as an unreliable partner (Guzman 2008: 34, 51-54).

However, the above presented bilateral situation might change when multilateralism comes into the focus and we take into account the creation of international organisations and their dispute resolution mechanisms. To model the latter, one might turn to the deterrence theory of law and economics literature (Cooter & Ulen 2004: 492-497): a criminal will commit a crime as long as $Uc > p * Up$, where Uc is the expected utility [(u)tility] from the perpetration of the crime [(c)rime], p is the probability of successful investigation [(p)robability] and Up is the

decrease in utility in accordance with the degree of the punishment [(p)unishment]. Consequently, if 10 out of 10 irregular activities are duly punished by the authorities, then even the most risk-loving criminals will reconsider their actions regardless of the degree of punishment. On the contrary, if the probability of the imposition of a fine is close to zero, then however high the amount of the fine may be, nobody will take it seriously, since as *lex imperfecta*, it will never bear an actual legal consequence.

While the above formula is evidently a simplified model to depict the mechanisms of criminal actions, it can shed a new light on the international commitments, compliance or non-compliance of the states. In order to enlighten the deterrence formula presented above, there has to be a body which takes a position in cases of compliance with international and European commitments and standards. Without such a body present, the right side of the deterrence formula would be undefinable, and we would only be able to talk about unilateral commitments of states where the 'three Rs' give incentives for the states by self-interest.

The right side of the formula is composed of two elements: the probability of holding the state accountable for its failure to comply with the commitments, and the prospective legal consequences. It seems to be plausible that if the arbiter is a judicial forum with concrete discretion, the probability of uncovering the infringements and imposing sanctions is higher than in a case when a political body is empowered to adopt a simple political declaration or recommendation. There is a great institutional variety between these two extremes. For instance, the model can be further supplemented by the prestige of the international institution adopting a resolution, which can potentially be detrimental to the reputation of the state in question, and therefore it can have a stronger effect than the opinion of a not-so-reputed advisory body. Consequently, international arbiters can be represented along two imaginary coordinates, one of which represents the nature of the institutions, while the other depicts the strength of the applicable sanctions.



To give an example: the Venice Commission can only issue opinions, however, by virtue of its expertise and prestige, this apparently weak discretionary power can involve relatively important prestige-related consequences and that is the reason why it appears in the lower right corner of the figure. The CJEU has strong influences thanks to the infringement and other procedures, thus it is placed in the upper half of the figure. For that matter, we could also place in that corner the European Court of Human Rights, as even though its decisions are of *inter partes* effect, they serve as minimal standards for national constitutional courts[XXXVI] and also for the European human rights law.[XXXVII] At the same time, a decision about complying with an international commitment can be shaped by many other factors such as the balance between the reachable benefit and the expected sanction of non-compliance or the level of wealth of a country (Shavell 2004: 479-482). In this regard there might be a huge difference between the sanctioning powers of the ECtHR and the CJEU, as the latter can impose huge a lump sum or a penalty payment on the Member State.[XXXVIII]

The functioning of the above depicted applied theory is perfectly manifest in the case of the Fundamental Law of Hungary and its fifth amendment in 2013. Shortly after the fourth modification of the Fundamental Law, three international organizations reacted immediately:

the Venice Commission, which issued an opinion on the new constitutional framework,[XXXIX] and two other EU institutions, the European Commission and the European Parliament. The story that followed is well-known: the European Parliament accepted the so-called Tavares Report while from the part of the European Commission, Commissioner Reding held a speech in which she outlined three areas of the Fundamental Law that were considered problematic from the perspective of European standards.[XL] Unsurprisingly, the fifth modification corrected all three problems raised by the European Commission. However, the content of the Tavares Report and the opinion of the Venice Commission were taken into consideration to a lesser extent (Vörös 2014: 1).

For this result the application of the above described deterrence theory seems to provide a plausible explanation: the possible severe legal consequences had a deterrent and thus constitution modifying effect in contrast with the possible governance strategy following the Tavares Report. Although the Commission alone cannot impose sanctions on the Member States for the Treaty opposing behaviour, being the 'guardian of the Treaties' it is a Commission competence to investigate these issues and launch an infringement proceeding which might lead to severe financial sanctions. In contrast, the European Parliament can only initiate the so-called 'nuclear bomb' procedure where the p component of the above presented equation converges to zero as the essence of the process can be interpreted along the second agency relationship which makes it similar to the prisoners' dilemma game with multiple actors. This means that taking into account the collective action, the so-called free-rider problem gives incentives to each Member State to exit the common retaliatory action: Member States should cooperate in order to regulate their rule-breaker partner; however, only one Member State is enough to jeopardize the procedure.[XLI] What remains after all is the reputational sanction carried out by the report of the European Parliament where the weight or effect depends on the credibility and the authority of the issuer organ.[XLII]

5.2. Defending the value community: the case of judicial independence

As presented, Hungary successfully prevented the infringement procedures in 2013. In contrast, the next case study focuses mainly on the judicial reforms of Poland which landed

before the CJEU in several rounds. The heart of these cases is the principle of judicial independence which is rooted in the common constitutional traditions of the Member States and which constitutes an essential guarantee of the rule of law. Here the focus must be put not only on the vertical dimension, according to which Member States must ensure a judicial system that guarantees the enforcement of EU law, but also on the horizontal one.[XLIII] Namely, the principle of mutual recognition[XLIV] developed in the context of the internal market and then successfully applied in the area of freedom, justice and security, makes mutual trust the driving force behind the functioning of the European Union (Lenaerts 2017: 805). If this mutual trust is lost, the whole EU legal system will become inoperable, as it might happen that the courts of some Member States question the validity of judicial decisions of a partner Member State.

As Member States are committed to EU values, there is a presumption in the European Union that Member States will ensure the independence of the judiciary (Lenaerts 2020: 31). Recently, however, Polish judicial reforms have brought many cases before the CJEU in which these fundamentals have been called into question. In addition, Polish reforms have been monitored by other relevant international actors as well: the Venice Commission has published two opinions,[XLV] and the European Commission initiated the Article 7 procedure.[XLVI]

The Polish cases were preceded by a Portuguese case[XLVII] which gave the CJEU an opportunity to set out important points of principle. Accordingly, in order to assess whether a body has the characteristics of a 'court', it must be taken into account among other conditions that it is independent.[XLVIII] As the CJEU stated, preserving the independence of the judiciary is essential given the second paragraph of Article 47 of the Charter of Fundamental Rights, and preliminary ruling mechanism provided for in Article 267 TFEU can only be initiated by a body that fulfils the condition of independence.

This case can be assessed as the prologue of the so-called Polish cases. Without presenting all the cases in detail,[XLIX] it is worth mentioning the act aiming at lowering of the retirement age for judges of the Supreme Court of Poland which affected nearly a third of the current members of the Supreme Court, including the president, whose constitutionally mandated six-year-long term would have been shortened.[L] Under the new Polish law, the retirement age for

judges of the Supreme Court has been reduced to 65 years. It was possible to extend the active judicial service beyond the age of 65 but this would have required the submission of an application and a health certificate. The extension should have been authorized by the President of the Republic of Poland.

The case was brought before the CJEU as an infringement proceeding. First, in order to prevent the possible and irreversible damages, the CJEU ordered the immediate suspension of the operation of the contested Polish legislation before a final decision was taken.[LI] Later, the provisions proved to be contrary to EU law as they violated the principle of the immovability of judges and the principle of judicial independence. The CJEU recalled in its judgement that EU law is based on the fundamental presumption that all Member States share the values referred to in Article 2 TEU with all other Member States. Although the organization of the judiciary in the Member States falls within the competence of the Member States themselves, in exercising that competence they must comply with their obligations under EU law. In the context of the case the CJEU has stated that the principle of immovability requires, *inter alia*, that judges remain in office until they reach the mandatory retirement age or until the end of their term of office, if this is for a fixed term. Exceptions to this principle can only be made if they are justified by legitimate and compelling reasons, respecting the principle of proportionality. However, in the present case, the CJEU considered that there were serious concerns about the real objectives of the reform and that any extension upon request was at the discretion of the President. On this basis, the CJEU concluded that the power of the President raises reasonable doubts as to the immunity of the judges concerned from external factors and the neutrality of the conflicting interests, thus violating Poland's obligations under the second subparagraph of Article 19 (1) TEU.[LII]

Another case to be highlighted concerns the newly established Disciplinary Board within the Polish Supreme Court.[LIII] The referring court was faced with a procedural problem, as the disputes before it concerning the retirement of Supreme Court judges fell within the exclusive jurisdiction of the newly established Disciplinary Board within the Supreme Court. The question arose as to whether, because of the latter's doubts as to its independence, it was required to disapply the national rules on the division of jurisdiction and, if so, to rule on the

substance of the dispute. The CJEU held that it was contrary to the right to an effective judicial remedy that disputes concerning the application of EU law could fall within the exclusive jurisdiction of a forum which did not constitute an independent and impartial tribunal. Based on this judgement, subsequently, the referring court held that the Disciplinary Board cannot be regarded as a tribunal for the purposes of either EU law or Polish law, but the Disciplinary Board continued to work. As a consequence, the Commission requested the CJEU, in proceedings seeking interim relief, to order Poland to adopt interim measures who decided on 8 April 2020 that Poland must immediately suspend the national provisions on the powers concerning the Disciplinary Board with regard to disciplinary cases concerning judges.[LIV] On 15 July 2021, this was confirmed by the judgement of the CJEU concluding that the disciplinary regime for judges in Poland is not compatible with EU law,[LV] and following a few months of debate, the Polish Government has finally declared that it will comply with the judgement and it will terminate the chamber of the Supreme Court devoted to disciplining judges (Sadurski 2021).

Last but not least, a recent Malta-related judgement[LVI] has to be highlighted. The subject of this case was the scrutiny of the constitutional rules on the appointment of Maltese judges, as amended in 2016. According to the constitutional provisions in force since 1964, the Prime Minister submits the candidates to the President of the Republic for appointment, which, according to the claimant, raises doubts regarding the independence of the judges so appointed. The only element changed in 2016 was the setup of a committee that was entrusted with the task of evaluating and commenting the applications.

The case provided an opportunity to apply Article 49 TEU as the CJEU had to examine the Maltese constitutional rules that had already received green light at the time of accession together with its amendment. The CJEU emphasized in its decision that, under Article 49 TEU, the Union brings together States which have freely and voluntarily acceded to the common values referred to in Article 2 TEU. As a result, the CJEU emphasized that

> 'compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State

> cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law (…) the Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary.'[LVII]

As a consequence, one must see that this is a further argumentative step regarding the protection of the European Union as a value community as the judgement connected Article 2 and 19 TEU and Article 47 of the Charter of the Fundamental Rights to Article 49 TEU dealing with the accession to the European Union. As Dimitry Vladimirovich Kochenov and Aleksejs Dimitrovs formulated, the new judgement has introduced the 'non-regression' principle in EU law as a possible solution of the Copenhagen dilemma (Kochenov and Dimitrovs 2021).

6. Concluding Remarks

The paper addressed the current structure of the European Union along the principal-agent concept. It has revealed three agency relationships. For the first one, the EU has been established as an agent of the Member States but the multiple and diverging interests of the many contracting parties went together with high coordination costs that has led to the simplification of the decision-making rules. This has created a second type of agency problem among the Member States. In addition, the relationship between the EU institutions and the Member States seems to be even more complicated as along its functioning the EU relies on its Member States as being its agents who are meant to carry out its policies and to enforce EU law. For this third type of agency relationship the paper detected two fundamental causes. One of them is a practical reason, the shortcomings of the European bureaucracy and the second one is the postulation of the EU as a value community. Yet, one might even claim that here lies the possible federal moment of the European Union as this postulation perceives the EU as an entity detached from the Member States which can formulate normative expectations *vis-á-vis* the Member States.[LVIII]

As a final evaluation, a few comments have to be added here. First of all, it has to be acknowledged that while the Member States perceive the EU institutions as their agents they argue along the classical sovereignty paradigm (as illustrated by Bodin 1993: 74-87). In contrast, the *sui generis* nature of the European Union means that both the legal and the political reality is built upon the pooled sovereignty paradigm (Keohane 2002: 748. Weiler 1991: 2479). This might explain the existence of an invisible paradigmatic shift between the two visions of Europe labelled as an interest community and a value community.

Secondly, the institutions of the European Union should not be treated as a whole. While the Council and the European Council can be evaluated as the playground of the second type of agency relationship, the Commission and the Parliament play an important role in the first and in the third agency relationship. In addition, the Court of Justice of the European Union has to be taken totally apart as it plays the arbiter role in between the Member States and between the Member States and other EU institutions in both directions, too.

Last but not least, the novelty of the integration process has to be outlined which is the many self-reflective decisions of the CJEU concerning the rule of law, a basic value of the European Union. Based on the Portuguese, Maltese and mainly the Polish cases presented, it can be seen that the CJEU has effectively protected the independency of the Polish judiciary through the interim measure and its judgments until now. As a result, one could provocatively state that today the engine of the European constitutionalism are those Member States who are *unwilling* to comply with the core elements of EU values[LIX] as they direct the Court of Justice of the European Union towards interpreting the axiological foundations of the EU, that is to say the values affirmed in Article 2 TEU.

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The author is grateful to the anonymous reviewers of *Perspectives on Federalism* for the constructive critics and is thankful to Eva Maria Belser for supporting the writing of this paper and to András Jakab for his valuable comments.

I See *Part I: Perspectives*, in Jones et al. 2012: 3-77.
II On the usage of 'paradigm' see Kuhn 1962: 130.
III In addition, there is also a market for managers who maximise profit and bulid up their reputation.
IV For other applications see Kassim 2003: 121; Egeberg 2014: 240.
V Accordingly many constitutional courts name the Member States as the lords of the treaties, see: 'Herren der Verträge' in BVerfGE 89, 155 (190) Maastricht decision and also the Constitutional Court of the Czech Republic in Pl.ÚS 19/08 ze dne 26.11.2008, 106.

[VI] E.g. huge companies or interest unions, see: Armour et al. 2009: 36.
[VII] Such an example is the multiannual financial framework but only with the restriction that the net contributor countries are compensated elsewhere. Orbán 2014: 132.
[VIII] In addition, this approach enables the grouping of the Member States not only as big *versus* small, but also as more and less developed ones or old *versus* new Member States. See Schelkle 2012: 278; Lequesne 2012: 267.
[IX] Articles 244-250 Treaty on the Functioning of the European Union [hereinafter TFEU] (COM), Article 317 TFEU (Implementation of the Budget), Articles 101-106 TFEU (Rules on Competition) and one must note the phenomena of the so-called 'agencification' as well. Szegedi 2014: 298.
[X] The original philosophical meaning of subsidiarity concentrates on the protection and the strengthening of the autonomy of lower levels and communities. Minnerath 2008: 52.
[XI] 'As the Court of Justice has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals (see, in particular, judgments in van Gend & Loos, 26/62, EU:C:1963:1, p. 12, and Costa, 6/64, EU:C:1964:66, p. 593, and Opinion 1/09, EU:C:2011:123, paragraph 65).' ECJ, Opinion 2/13 of the Court, ECLI:EU:C:2014:2454, para 157.
[XII] Or common law courts of the EU as Koen Lenaerts names. Lenaerts 2020: 30.
[XIII] Article 267 TFEU.
[XIV] See the series of judgements on judicial independece starting with ECJ, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117.
[XV] European Parliament, *Report on the situation of fundamental rights: standards and practices in Hungary.* (2012/2130(INI)) (2013), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0229+0+DOC+XML+V0//en; Lili Bayer & Maïa De La Baume, *European Parliament report calls for sanctions procedure against Hungary,* https://www.politico.eu/article/viktor-orban-european-parliament-report-judith-sargentini-calls-for-sanctions-procedure-against-hungary/.
[XVI] European Commsission, *A new EU Framework to strengthen the Rule of Law*. COM(2014) 158 final.
[XVII] European Commission, *Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based.* COM(2003) 606 final; 6. Scheppele 2016: 105.
[XVIII] Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007. In effect, the European Commission in its Communication from April 2019 explicitly refers to the Checklist as a possible source of the European understanding of the rule of law. European Commsission, *Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union.* COM/2019/163 final. III.
[XIX] E.g. ECJ, Case C-619/18, *European Commission v. Poland,* ECLI:EU:C:2019:924.
[XX] Opinion of the Advocate General Maduro, ECJ, Case C-380/05, *Centro Europa*, 2007 ECR I-349, para 14. Bogdandy et al. 2012: 489.
[XXI] For a critique of Habermas, see Grimm 2017: 51.
[XXII] In this regards national constitutional courts have developed different constitutional reservations (human rights, *ultra vires* and constitutional identity based reservations) which – as extra-contractual tools – intend to show that in spite of the conferred powers, sovereignty and *Kompetenz-Kompetenz* remain at Member State level. See: Claes & Reestman 2015: 917. Konstadinides 2011: 195.
[XXIII] Armour et al. 2009: 39-45.
[XXIV] Article 263 TFEU.
[XXV] Article 265 TFEU. Craig & de Búrca 1996: 452-455, 483-487.
[XXVI] Article 258 TFEU. Schäfer 2014: 82-94.
[XXVII] ECJ, Case C-621/18, *Wightman*, ECLI:EU:C:2018:999.
[XXVIII] See for example the election of Jean-Claude Juncker.
[XXIX] Article 15 paragraph (5) TEU.
[XXX] There were only three yellow signals. Monti II on a draft regulation, the second on the establishment of a European Public Prosecutor's Office and the third on the Posting of Workers Directive.

[xxxi] ECJ, Case C-84/94, *United Kingdom v. Council,* ECLI:EU:C:1996:431; ECJ, Case C-491/01, *R v. Secretary of State for Health, ex parte Imperial Tobacco*, ECLI:EU:C:2002:741.177–185.
[xxxii] Article 126 paragraph (9) and (11) TFEU.
[xxxiii] European Parliament and the Council, *Regulation No 1303/2013 of 17 December 2013*.
[xxxiv] European Parliament and the Council, *Regulation No 2020/2092 of 16 December 2020, on the General regime of conditionality for the protection of the Union budget*. For the recent legal debate concerning the entry into force of the mechanism see: Alemanno & Chamon 2020.
[xxxv] The CJEU can be assessed as a special constitutional court within the EU, see: Tridimas 1996: 206.
[xxxvi] E.g. Decision no 61/2011 (VII. 13.) of the Constitutional Court of Hungary.
[xxxvii] Article 53 of the EU Charter of Fundamental Rights.
[xxxviii] Article 260 TFEU.
[xxxix] Venice Commission, *Opinion On The Fourth Amendment To The Fundamental Law Of Hungary*, CDL-AD(2013)012.
[xl] Viviane Reding, *Hungary and the Rule of Law - Statement of the European Commission in the Plenary Debate of the European Parliament*, https://ec.europa.eu/commission/presscorner/detail/ro/SPEECH_13_324. The three areas were: the introduction of an ad-hoc tax on Hungarian citizens after CJEU judgements; the power of the President of the National Office for the Judiciary to transfer cases from one court to another; and the restrictions on the publication of political advertisements during election campaigns.
[xli] Similar events can be seen also nowadays as Member States are reluctant to carry on with the Article 7 procedure even after the adoption of the Sargentini Report.
[xlii] Similar efficiency problems arise in connection with the Sargentini report which has triggered the Article 7 procedure without any result. In contrast, the so-called value related CJEU proceedings have reached more spectacular results. See the 'information on values-related infringement proceedings': https://www.asktheeu.org/en/request/6115/response/19716/attach/html/6/st14022.en18.pdf.html.
[xliii] For example when Polish courts had issued three European Arrest Warrants in order to prosecute LM, a Polish national, for illicit drug trafficking, the Irish High Court was awaiting an answer as to what information and guarantees, if any, it should obtain from the issuing judicial authority in order to rule out the post-transfer risks in the context of the Article 7 procedure launched against Poland. ECJ, Case C-216/18, *PPU Minister for Justice and Equality v. LM,* ECLI:EU:C:2018:586. Sonnevend 2018.
[xliv] ECJ, Case C-120/78, *Rewe-Zentral*, ECLI:EU:C:1979:42.
[xlv] Venice Commission, *Opinion on the Draft Act Amending the Act on the National Council of the Judiciary, on the Draft Act Amending the Act on The Supreme Court, Proposed by the President Of Poland, and on the Act on The Organisation of Ordinary Courts*, CDL-AD(2017)031-e; Venice Commission, *Urgent Joint Opinion on the Amendments to the Law on Organisation on the Common Courts, the Law on the Supreme Court and other Laws*, CDL-PI(2020)002-e.
[xlvi]Eureopean Commission, *Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland,* COM(2017) 835 final.
[xlvii] ECJ, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117.
[xlviii] *Id.* at para 44.
[xlix] For an overview see: Madarasi & György 2021: 92-94.
[l] ECJ, Case C-619/18, *Commission v. Poland,* ECLI:EU:C:2019:924.
[li] ECJ, Case C-619/18R, *Commission v. Poland,* ECLI:EU:C:2018:852 and ECLI:EU:C:2018:1021.
[lii] Another infringement case concerned the Polish law of 12 July 2017 which reduced the retirement age for judges of ordinary courts and prosecutors to 60 for women and 65 for men, and the early retirement age limit for judges of the Supreme Court. See: ECJ, Case C-192/18, *Commission v. Poland,* ECLI:EU:C:2019:924.
[liii] ECJ, Case C-585/18, *A.K.*, ECLI:EU:C:2019:982.
[liv] ECJ, Case C-791/19R, *Commission v. Poland,* ECLI:EU:C:2020:277.
[lv] ECJ, Case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596.
[lvi] ECJ, Case C-896/19, *Reppublika*, ECLI:EU:C:2021:311.
[lvii] *Id.* at 63-64.
[lviii] 'A European *Marbury v. Madison* is yet to come.' Jakab 2013.
[lix] For a further Hungarian example see: Vadász 2019.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Federalism, political culture and the Question of Remaking Nigeria

by

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Perspectives on Federalism, Vol. 13, issue 1, 2021

Abstract

The practice of federalism in Nigeria had undergone different stages of structuring to resolve salient political issues. However, despite each change to the structure, the clamour for further change has not abated. Thus, bringing to the fore the question, are the issues affecting the practice of federalism rooted in the structural arrangement or with the attitude of the citizens towards the principles of federalism? This article, an exploratory study, interrogated the latter part of the question by examining the concept of federal political culture and its effect on the practice of federalism in the country. It analysed salient issues like Herders/farmers conflict and insecurity and complemented with a survey of 220 respondents. Preliminary evidence indicates the presence of a federal political culture among the citizens and concludes that remaking Nigeria lies in evolving policies that enhance this culture.

Key-words

Political Culture, Federalism, Restructuring, Diversity

1. Introduction

The practise of federalism in Nigeria has evolved from a three regional arrangement to 36 states. The evolution has come with its challenges as operators of the system constantly struggle with demands from various country sections that would guarantee a stable federal structure. Each attempt has thrown up new challenges or complicated the existing federal arrangements. This raises concern about the suitable institutional design that will balance and mitigate existing tensions among the country's various ethnic and religious groups. The literature on federalism in Nigeria is rich with narratives on institutional design, fiscal matters, judicial review, intergovernmental relations and constitutional matters (Adedeji and Ezeabasili, 2017, Arowolo, 2011, Ewetan, 2012, Olowu, 1991). The country operates a presidential system patterned after the American presidential system. The legislative arm is bi-cameral with an upper chamber called the Senate and a lower chamber called the House of Representatives. The federation is divided into 36 states with federal capital and 774 local governments. The 1999 constitution divides powers between the federal and state governments, with the latter has full rights to the exclusive list and both sharing competencies over the concurrent list. Though bequeath by the military government on the country's return to democratic rule in 1999, the constitution has arguably been the centre of most debate on restructuring of the federation. The legal document centralises legislative and fiscal powers at the centre, thereby creating super-subordinate relations between the federal and state governments (Omitola, 2005, Adefulu, 2005). The solution recommended from various studies has been to readjust the existing structures through constitutional amendment or convening a sovereign national conference to negotiate a new federal arrangement. These solutions certain scholars argue would address contemporary challenges of insecurity, inter-ethnic and religious conflict, and rising poverty levels.

Awofeso and Obah-Akpowoghaha (2017) in their discourse on the practice of federalism in Nigeria, observed that the advent of military rule, monolithic economy occasioned by dependency on oil, the civil war, ethnic and religious conflict and non-viability of states as the factors that have inhibited the practice of federalism in the country. The

authors recommend a review of the constitution to alter the power imbalance between the federal and state government. This was the same argument Oni, and Faluyi (2018) proffered in addressing the clamour for restructuring in the country. They advocated for the convening of a national conference that would culminate in reducing federal powers and addressing perceived horizontal group inequalities in the country. Lenshie and Yenda (2015) differ in their prescription to the challenges of federalism in Nigeria. The authors believe that the entrenchment of democratic values would assuage ethnic rivalry and end repeated calls for 'true federalism in the country. Orji (2010) examined the 'ethnicised' public sphere within the context of inter-ethnic conflict and concluded on devolution of powers as the preferred solution to Nigeria's federal system despite certain inherent tendencies. The synopsis extracted from these narratives on the diagnosis of federalism in Nigeria is that the political concept would function better with a redesign of the structure. The prescription mainly centres on de-concentration powers at the centre and re-concentration of same at the sub-national level. In addition, democratic principles must guide the exercise of governmental powers.

Suberu (2018) examined the role of the Supreme Court in the practice of federalism in Nigeria. The Supreme Court is the last Court of appeal for cases emanating from lower courts and adjudicating disputes between the national and sub-national governments. The author examined litigations between the Federal and State governments on issues bothering on revenue allocation, the status of local governments and authoritarianism of the Federal executive and ruling political party. Numerous cases were analysed to extrapolate the dimension of federal jurisprudence in Nigeria. The author concluded that, based on the issues studied, the Supreme Court had played an essential arbitrative role in federalism in Nigeria. However, the Court is seen as being: 'an interpreter and enforcer of Nigeria's centrist constitution rather than as a transformational agent for the country's democratic decentralisation after years of hyper-centralising, extra-judicial military rule (Suberu, 2018:326).'

Thus, the Supreme Court upholds the provisions of the 1999 constitution, a legal document arguably perceived as entrenching a unitary than a federal political system.

Maiz (2013), however, thought that federalism could not be reduced to only institutional design without understanding the ideas and emotions behind them. The author's

argument is premised on the proposition that political actions are motivated by certain cultural beliefs, values and sentiments. The actions of political actors are not always based on rationality or calculated attempts at achieving their interests. Consequently, an understanding of these beliefs and values would provide a better interpretation of political actions. Thus, Maiz proposed that "federalism requires a self-sustainable and robust institutional design (a federation), a complex, decentralised party system and a set of attitudes and values; a shared political understanding that provides civic support for the system". The import of this statement is that apart from having a suitable federal arrangement that appropriate powers to the various levels with defined limits, there is also the need to have a common political across the federation. Duchacek (1987:341) referred to this as a federal political culture and defined it as " a set of orientations towards the federal political system and attitudes toward the role of self.....in the system". It is the presence of a shared federal political culture among the citizens that could guarantee the maintenance and stability of the federal system (Elazar, 1987). The essence of a shared federal political culture is to ensure that the various groups have a strong belief and commitment to the federal arrangement. A lack of it may lead to instability and secession threats. This perspective of a shared federal political culture offers an alternative insight into issues confronting the Nigerian Federation. While the extensive study on the practice of federalism in Nigeria had focused extensively on institutional design, little is known of a shared federal political culture and its effect. This paper seeks to offer insight into issues affecting the practice of federalism in Nigeria from the perspective of a shared federal political culture and a more effective path for restructuring in the country. The next section of the paper examines the federal political culture and practice of federalism in the United States, Canada and Australia.

2. Conceptual clarification

The concept of federal political culture, like every other concept in political science, is plagued with the dilemma of definition. In their operationalisation of the concept, Cole et al. (2004) observed that scholars tend to view it from a different perspective. This has hindered

the appropriate measurement of the concept. For instance, the authors observed that Duchacek, one of the few scholars to adopt the concept in interrogating the workings of federal systems, emphasised citizens' views and values towards the governmental arrangement. Thus, the people's orientations towards the federal system in terms of support for local initiative and responsibility presents evidence of a federal political culture. Other scholars like Elazar (1987), Wildavsky (1998) and Livingston (1968) have a different perspective on the concept. They believe that a federal political culture could be conceived of in terms of inter-ethnic relations and the degree of acceptance or rejection of diversity in the society. Therefore, federalism emerges in response to the various values politically salient in society.

The above perspectives on the concept of federal political culture complicate the attempt at having a precise definition. However, for clarity, this article adopted the meaning given by Brown (2013:298) that a federal political culture is "the extent to which the political attitudes and beliefs of a population reflect attachment to key values associated with federalism". This definition's key element is attitudes that could manifest as support for or rejection of federal principles, policies or structures. On this premise, this article investigates the concept within the context of the clamour for restructuring in Nigeria.

3. Federal political culture and practice of federalism in United States, Canada and Australia

Cole et al. (2004), in their study of the concept in the United States, Canada and Mexico, using a sample survey, designed three questions for respondents to ascertain if a pro-federal culture is in the majority or not in these countries. Based on the responses received on these questions and other variables, the authors hypothesise that Canada would tilt more towards a pro-federal culture. At the same time, the United States would fall between a most and least pro-federal culture. Their findings were in tandem with their hypothesis. Over half of the respondents in Canada and the United States preferred a federal government to any other kind of government. In the same vein, responses to the second question showed a large percentage of respondents in disagreement. However, answers to the third question were at variance with

the presumptions of a federal political culture. Most of the respondents were in agreement with the preference of a strong leader. This may be connected with citizens' appreciation for prompt response to issues affecting their daily lives than delays arising from consultations with various interest groups.

Notwithstanding, the authors concluded that while there is no direct correlation between a country's federal structure and federal political culture, "there appears to be an interactive or reciprocal relationship between the two" (Cole et al., 2004:220). Worthy of note from these findings is that Canada, which had the most pro-federal culture, also has the most negligible centralised federal structure (Watts, 2002). Thus, bringing to the fore the question that more decentralisation of the federal system would lead to a pro-federal political culture? In a similar study carried out by Kincaid and Cole (2011), the results from a survey conducted in 2009 showed that Canada and United States still maintained a high level of pro-federal political culture. However, a slight difference was observed in the United States as the percentage recorded in 2004 had moved upward in 2009. This is despite the centralisation of power at the national level. This outcome raises doubt on whether decentralisation in a federation will enhance a pro-federal political culture. Again, the authors concluded that there appears to be a corresponding relationship between the country's federal structure and cultural patterns. They advocated for more in-depth research of other federal and non-federal countries to confirm or disconfirm their exploratory findings.

Dardanelli et al. (2018), in their study of De/Centralisation in federations, concluded that in terms of public attitudes towards federalism, the United States still has a high percentage of citizens who support the federal system. Likewise, the gravitation towards centralisation has not diminished in the country. The authors observed that "High economic integration and strong identification with the federation tend to foster centralisation" (Dardanelli et al., 2018:209). In contrast, Canada, which also has a strong identification with federalism, has a more decentralised federal system. Notwithstanding, their findings confirm earlier observations made by Kincaid and Cole (2011).

Brown (2012) and (2013) examined the concept of federal political culture in Australia. This was with the intent of ascertaining "the extent to which the political attitudes and beliefs

of the general population reflect attachment to key values associated with federalism" (Brown, 2012:311-312). The author used a sample survey containing questions that categorise respondents into a six-point cultural spectrum: strong federalist, clear federalist, conflicted federalist, conflicted non-federalist, clear non-federalist, and strong non-federalists. The classification of respondents into these categories was informed by the same rationale used by Cole et al. (2004) and Kincaid and Cole (2011). However, there was a slight modification to test which structural or institutional aspects of a multi-level system were desirable or undesirable. Thus, Brown went further to examine respondents' preferences for specific federal features. For instance, a solid federalist is an individual who finds the four attributes of the division of power, legislative diversity, political diversity and arguments between levels as desirable.

Clear federalists desire two of the attributes and consider either or both the remaining two undesirables. Conflicted federalists prefer division of power but consider other attributes as undesirable. This follows the reverse trend with the conflicted non-federalist and clear non-federalist. The strong non-federalist considers all four attributes as undesirable. The results from the survey indicate that the predominant political culture in Australia support federalism. The distinction, however, lies with the various features of a federal system. Respondents favouring a federal system all support a division of power but differ on legislative diversity, political diversity and arguments between levels. The data shows that Australia, like the United States and Canada, has a higher percentage of citizens who value a federal arrangement than those who do not. Likewise, it aligns with arguments on centralisation as the federation has been transformed "by a persistent and pervasive expansion in the role of the Commonwealth" (Fenna, 2018:48).

One factor that has facilitated a relatively stable federation is the support received from a large percentage of the citizens. This does not suggest that these federations do not have issues with the practice of federalism in their countries. It only indicates that the desirability for continuous practice of federalism may be found in the political culture of the citizens. Furthermore, Cole et al. (2004) and Kincaid and Cole (2011) observed that the attitudes expressed by these citizens might be based on their experiences with their country's federal

structure. Thus, the interface between the citizens and the federal systems may determine the predominant political culture.

4. Federalism and federal political culture in Nigeria: analysis of salient issues

This paper used secondary qualitative and primary quantitative data as used in studies on federal political culture in Canada, the United States, and Australia. The findings from the sample survey, which served as the source of quantitative data, are discussed in the next section. The aim is to explore the relevance of this concept in understanding the operations of federalism and how to chart a better path of restructuring the Nigerian federation. Similarly, it attempts to stimulate further study based on empirical data to validate or invalidate specific assertions of the concept.

Federalism in Nigeria has evolved from a non-centralised federation to a highly centralised federation. Several arguments were used to explain the gradual concentration of power at the centre. Some scholars argue that the military's incursion into the Nigerian political space led to the centralisation of the Federation (Akinsanya, 1999 and Oni and Faluyi, 2018). This centralisation of the federation by the military emanated from their hierarchical nature, which is based on command and control. Other scholars believe that the attempt at secession by the Eastern region and subsequent civil war served as the catalyst for the disaggregation of the constituent units into smaller and less viable states and the centralisation of the Federation (Lenshie and Yanda, 2015). This resulted in the weakening of the capacity of the states to challenge the dominance of the federal government (Adedeji, 2017). Based on these arguments, the prescription for resolving the salient issues of inter-ethnic rivalry and conflict, marginalisation and control over resources is the devolution of more powers to the states (Orji, 2010). While the arguments on the cause and solution to Nigeria's federal arrangement appear valid, there is a need to explore other dimensions of the issue. One of which is the presence of a federal political culture that supports the practice of federalism in the country. This is pertinent as the continued sustenance of the federation hinges on support received

from the majority of the citizens. Centrifugal forces in terms of inter-ethnic and religious conflict precipitate a disintegration of the country. Responses of the federal and state government to these issues have most likely developed a set of attitudes and beliefs towards these levels of government. This set of attitudes and beliefs could either be the pro-federal or anti-federal arrangement.

To analyse the concept of federal political culture in Nigeria, citizen's responses towards the RUGA policy of the federal government was used. The policy was proposed in the wake of the persistent conflict between herders and farmers across the country. This was juxtaposed with the responses from citizens of the southwest region to the security initiative of the state governments of this region codename 'Amotekun'. The initiative came about from the rising cases of insecurity in the area allegedly perpetrated by Fulani herdsmen. Both policy initiatives generated responses from the citizens, and this could serve as a gauge of the presence or absence of a shared federal political culture in the country. Coincidentally, each policy initiative also generated responses from the federal and state governments. For instance, when the federal government proposed the RUGA policy, some state governments opposed it and even initiated a counter policy. Likewise, when the state governors of the southwestern region proposed the security outfit, the federal government voiced some concerns. In each case, the citizen's responses could serve as a measure of support or antagonism to these policies.

The herders/farmers conflict though predating the Buhari administration, took an upward trajectory from 2015. Apart from the lives that were lost, the conflict took an ethnic dimension, with the herders (perpetrators) identified as Fulani nomads and farmers (victims) being minority ethnic groups in Northcentral states (Ekpo and Tobi, 2019 and Ningxin Li, 2018). The media reporting of the conflict and the President being of Fulani extraction further heightened the conflict (Ciboh, 2017, Ekpo and Tobi, 2019). The federal government proposed a cattle settlement policy called 'RUGA' under The National Livestock Transformation Plan (NLTP) to resolve the conflict. The policy intended to have a designated area for herders to rear their cattle with adequate social amenities and grass. Thus, with the herders restricted to a designated location, the likelihood of herders grazing into farmlands

would be eliminated and avenues for conflict reduced. The policy was to commence in selected states in the North-Central, North-West, South-West, South-South and South-East regions.

However, the reactions that trailed the announcement of the policy made the federal government suspend its implementation. To actualise the policy, the federal government needed the support of state governments in allocating land for the scheme. The Governors of some states voiced opposition to this policy with active support from their citizens (The Punch newspaper, 2019). For instance, the Governor of Benue State in the North-Central region vowed that no part of the state would be ceded for RUGA, having previously enacted an anti-grazing law in 2017 (Kwaja and Ademola-Adelehin, 2017:7). This action by the Governor in passing the anti-grazing law may be responsible for the disaffection between him and his political party, the All Progressive Congress. This is the political party controlling the federal government. After intense pressure, the Governor left the political party and joined the opposition party (The Vanguard newspaper, 2018). This response by the Governor towards the policy and the support he received from the state's citizens could probably be seen as a lack of support for federal government solutions to their problems.

The International Crisis Group report (2021) observed that the lack of multi-stakeholder consultations is responsible for the criticism that heralded the announcement of the RUGA initiative. The report noted that highly placed Northerners perceived the RUGA scheme as a covert move to acquire land legally in the South for ominous reasons. With this view held by those in the South and Central regions and a lack of consultations to ensure buy-in, the policy could not take off. Furthermore, the legality of the scheme was challenged in Court. The Benue state government filed a suit at the Federal High Court, Makurdi and sought, among other prayers, the interpretation of the Court on the legality of the scheme within the context of the Land Use Act. The Federal High Court ruled in favour of the State government and issued a perpetual injunction restraining the Federal government and its agencies from implementing the scheme in Benue state (Ibekwe and Onyewuchi, 2020). The Court ruling notwithstanding, the RUGA scheme had suffered enough backlash necessitating its suspension by the Federal Government.

Paradoxically, when the South-West governors collaborated to establish 'Amotekun' a regional security outfit to curtail increasing insecurity in the region, it received massive support from its citizens. This is despite the note of caution expressed by the federal government. Like other regions in the country, the South-West region had come under the persistent attack of kidnappers and bandits. Noting the limited capacity of the Nigerian Police Force to curtail the upsurge, the South-West Governors launched the regional security outfit on the 0f ,2020 (The Punch newspaper, 2020). The security outfit aims to assist the regular police personnel with information and apprehension of criminals in the region. However, through the office of the Attorney General of the Federation, the federal government voiced concern over operating a parallel security outfit without legal backing (The Vanguard newspaper, 2020). Again, there was a wide condemnation of the federal government response and voice support for the actions of the South-West governors from the citizens (The Guardian newspaper, 2020a). The deductions from these instances showed that in the case of the RUGA policy proposed for resolving the Herders/Farmers conflict, the citizens from the states concerned opposed it and supported their governments' responses towards the policy. However, the citizens opposed the federal government's response towards the security outfit while supporting their governors for initiating it. The support that came for the RUGA policy came mainly from the North West and East. These are regions that share an ethnic affinity with the President. In contrast, opposition to the South-West regional security outfit came from the same areas. Citizens of these regions view it as an attempt to subjugate their citizens' interest in the South-West (The Guardian newspaper, 2020b). This brings another dimension to the discourse as Nigerians are more likely to support views and actions of their ethnic groups represented through the state governments than the federal government. Thus, it could be inferred that citizens tend to support their ethnic nationality vis-a-vis the state governments than a federal government that is the distance from them.

Notwithstanding, this does not presuppose the absence of a federal political culture as support for or against the federal government and state government policies differ across each region. Similarly, while support for the Federal government policy came from one region, opposition to it came from another region, likewise with the state government policy.

Arguably, there appears to be the presence of a federal political culture as there exists some support for the federal government policy. The challenge may be the degree of presence which may differ across each state of the federation based on experience of the citizens with the practice of federalism. The next section analyses the data obtained from the sample survey and was used to make further deductions.

5. Analyses of data

All The sample survey used in this study was obtained using an online platform to distribute the questionnaire to purposively selected respondents. The questions were designed as closed-ended to facilitate better responses as most respondents tend to ignore open-ended and lengthy questionnaires. The sample survey intended to juxtapose the responses with the findings from the literature on the presence of a federal political culture in Nigeria. However, there are some limitations observed in the course of administering the questionnaire. Notably is the lack of funding to conduct a more comprehensive sample survey and the reluctance of respondents to fill the questionnaire despite repeated promptings. However, the study aims not to make generalisations applicable to most federal systems and Nigeria. Instead, it seeks to ascertain if there exists the presence of a federal political culture among citizens and how it could facilitate a better working of federalism in the country.

The data obtained from the questionnaire is presented in tabular form using frequency and percentages below.

Table 1: Age group of Respondents

Age	Freq.	Percentage
18-25	148	67%
26-35	39	18%
36-45	23	10%
45 and Above	10	5%
Total	220	100%

Table 1 above, shows that a larger percentage of the respondents fall between the ages 18 and 25. An indication that the experience of the majority of the respondents on the practice of federalism was under the present democratic experiment.

Table 2: Geopolitical Zone of Respondents

Geopolitical Zone	Freq.	Percentage
South-West	130	59%
South-East	11	5%
South-South	24	11%
North-Central	16	7%
North-West	24	11%
North-East	15	7%
Total	220	100

Table 2 shows that a larger percentage of respondents came from the Southwest geopolitical zone when compared with respondents from other zones.

Table 3: Gender of Respondents

Gender	Freq.	Percentage
Female	83	38%
Male	136	62%
Void	1	0.4%
Total	220	100%

Table 3 shows that more males responded to the survey than females

Table 4: Educational Qualifications of Respondents

Educational Qualification	Freq.	Percentage
SSCE	83	38%
Diploma/Degree	74	34%
Postgraduate Diploma/Degree	63	28%
Total	220	100

Table 4 shows that the educational qualification of the respondents appears evenly distributed with the number of those with O/Level qualification slightly higher than others.

Table 5: Employment Status of Respondents

Employment	Freq.	Percentage
Paid Employment	51	23%
Self Employed	169	77%
Total	220	100%

Table 5 shows that a higher percentage of the respondents are self-employed.

Table 6: Which level of government do you feel will provide better services to you if given the power to do so?

Level of Government	Freq	Percentage
Federal	94	43%
State	80	36%
Local	46	21%
Total	220	100%

Table 6 shows that a slightly higher percentage of the respondents hold the opinion that the Federal government will do better if given the power to do so than States and Local governments. The deduction from this question is that there is still some higher level of confidence in the federal government than the State and Local governments in the provision of services.

Table 7: Which Level of Government do you trust more in Nigeria's federal system?

Level of Government	Freq.	Percentage
Federal	80	36%
State	140	64%
Total	220	100%

Table 7 indicates overwhelming support for the State governments than the Federal government. Therefore, the respondents hold more affinity to their State governments than the Federal government. The implication of this is that in terms of support for government decisions and actions, citizens may be skewed in favour of their State governments than the Federal government. This appears in contrast to the question in table 6 as respondents believe more in the capacity of the Federal government than their state governments.

Table 8: Is you State treated fairly in Nigeria's Federal System?

Options	Freq.	Percentage
Yes	106	48%
No	114	52%
Total	220	100%

The question in table 8 was to ascertain the respondents' perception of the status of their state in the federal system. There is marginal difference between those that hold the view of unfair treatment to those of fair treatment. Consequently, the treatment in terms of allocation of infrastructure, financial resources and federal appointments given to each state in the federal system may not have met their expectations; it does not appear to be overtly unfair.

Table 9: Which level of government do you think deserves more powers?

Level of Government	Freq.	Percentage
Federal	77	35%
State	143	65%
Total	220	100%

Table 9 shows a significant margin between those that want more powers for the State government than the Federal government. Thus, confirming the argument made in the literature on federalism in the Nigeria that States need to be given more powers to handle the issues that confront their citizens.

Table 10: Do you prefer a federal system to a unitary system?

Options	Freq.	Percentage
Yes	139	63%
No	81	37%
Total	220	100%

The question in table 10 is one of the questions intended to measure the presence of a federal political culture and from the data obtained, more of the respondents still prefer a federal system to a unitary system.

Table 11: A country in which everyone speaks the same language is preferable?

Options	Freq.	Percentage
Yes	155	70%
No	65	30%
Total	220	100%

The question in table 11 is intended to ascertain the preference for homogeneity which is attributed to unitary systems and heterogeneity, which is attributed to Federal systems. The response contradicts earlier question on federal and unitary systems. However, this could be an indication of the perception of the respondents that the diversity of the country is what breeds conflict and a common lingual Franca could facilitate harmony.

Table 12: Having a strong federal government is better than a weak federal government?

Options	Freq.	Percentage
Yes	200	91%
No	20	9%
Total	220	100%

Table 12 shows that while the federal government is considered more powerful than the State government in the present arrangement, the respondents do not support a weakening of that power. Again indicating a support for a federal system where the national government is strong enough to discharge its functions as against a weak one.

Table 13: When making decisions, government should consider the interest of all ethnic and religious groups?

Options	Freq.	Percentage
Yes	206	94%
No	14	6%
Total	220	100%

This question deals with accommodation of diversity in decision making and from the responses obtained, there is a preference for this attribute. Thus, indicating the perception that citizens prefer decisions that emanate from wider consultation with diverse groups to decisions that excludes them.

The observation from the literature and the sample survey clearly indicates the presence of a federal political culture as opinions expressed by citizens does not indicate a support for disintegration of the federation rather for a better working of the system. This is evident by the support given to both the federal and state governments on certain policy choices and the preference of a federal system to a unitary system. The degree of presence

however varies across each region depending on the experience of their citizens and the salience of the political issues.

6. Conclusion

From the analysis above, the issues appear to be more on practice than the principles of federalism. How it is been operated is more likely to shape the experiences of citizens and determine their support or rejection of the system. This experience in terms of the impact of federal government policies on their social existence has not been meaningful. There exist a gap between what the principles of federalism espouse and the experience of citizens. Notwithstanding, there is evidence of a federal political culture as extant literature establishes a relative level of support for the federal government. This support is a reflection of the citizens' attitude towards the continued existence of the Nigerian Federation. Data from the sample survey also suggest the presence of a federal political culture. However, caution needs to be applied here as this does not suggest a high or low degree of presence. On the contrary, the data shows the acceptance of a federal system over a unitary system. Thus, confirming the presence of a federal political culture.

The question of remaking Nigeria focuses on identifying a more suitable and effective path of restructuring the federation. Advocates of restructuring argue for devolution of powers to the constituent units in order to meet the expectations of their citizens. The argument for devolution gives the impression of a weakening of the federation which could lead to disintegration. This probably explains why there are counter arguments against devolution of powers to federating units. The survey highlighted certain perspectives which appear germane to the debate on restructuring. For instance, more of the respondents believe in the capacity of the federal government to deliver services than the state governments. Likewise, they desired a strong federal government to a weak federal government. On the other hand, respondents expressed more trust for the State governments than the federal government. Devolution of powers to state governments should be done in a way that creates a balance. The state government should have powers and revenue sources that ensure effective discharge of their

responsibilities. The federal government on its part should retain powers that ensure its ability to guarantee stability and cohesion in the federation. Powers to be devolved and retained by the federal government should be done in consultation and negotiation with state governments. The outcome of such negotiations could change the narratives on the practice of federalism and create better experiences for the citizens. This could in the medium and long term reinforce the federal political culture of Nigerians.

In conclusion, attitudes, perceptions and beliefs of citizens expressed in the form of support or rejection for federal structures and policies arguably has the potential to create stability or instability. How these attitudes and beliefs are developed is a function of the interface between the citizens and the government. This analysis is by no means a conclusion on the discourse of the concept of federal political culture. On the contrary, it is to stimulate further interrogation of the concept in Nigeria preferably with empirical data to identify the degree of presence and causal relationship if any with the practice of federalism.

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