Two-and-a-half Ways of Thinking about the European Union

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This article argues that the *sui generis* theory is a 'negative' and 'unhistorical' theory. It lacks explanatory value for it is based on a conceptual tautology (Hay, 1966, 37): the European Union is... what it is; and it is not... what it is not! Second, the *sui generis* theory moreover only views the Union in negative terms – it is neither international organisation nor Federal State – and thus indirectly perpetuates the conceptual foundations of the Westphalian tradition. Is there a better way of thinking about the European Union? This article argues that 'federal' thinking provides a rich key to unlocking the nature of the European Union.

Two-and-a-half Ways of Thinking about the European Union

Cet article fait l'hypothèse que la théorie *sui generis* de l'UE est une théorie « négative » et « antihistorique ». De telles limites explicatives reposent premièrement sur une tautologie conceptuelle de base (Hay, 1966, 37) : l'UE est... ce qu'elle est ; et elle n'est pas... ce qu'elle n'est pas ! Deuxièmement, la théorie *sui generis* ne considère l'UE qu'en termes négatifs – l'UE ne serait donc ni une organisation internationale ni un État fédéral – pérennisant ainsi les fondements conceptuels de la tradition westphalienne. Quel autre type d'approche permettrait de penser de façon plus pertinente l'UE ? Cette contribution cherchera alors à expliquer dans quelle mesure le cadre fédéraliste constitue une grille de lecture pertinente afin d'interroger la nature de l'UE.

Two-and-a-half Ways of Thinking about the European Union[1]

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Sovereignist Thinking: Unions of States

How should we conceptualise Unions of States, and in particular: the European Union? A first way of thinking is to analyse the European Union in the categories of the Westphalian State system. The latter introduced a distinction that still structures our understanding of the legal world: the distinction between national and international law. The former is the sphere of subordination and compulsory law; while the latter constitutes the sphere of coordination and voluntary contract. International law is here not 'real' law – as it cannot be publically enforced. For a 'public law' between sovereigns is a contradiction in terms since it requires an authority above the States; but if sovereignty is the defining characteristic of the modern State, there could be no such higher authority. All relations between States must be voluntary and, as such, 'beyond' any public legal force.[2]

How, then, did 'Westphalian' international law explain Unions of States, like the Swiss Confederacy and the German Empire? In a pluralist system based on the idea of State sovereignty, Unions of States were constitutional oddities. These compound bodies raised serious conceptual problems; and in order to bring federal unions into line with the idea of state sovereignty, they were forced into a conceptual dichotomy: they were either an international organisation or a sovereign State. The *absolute* idea of sovereignty here operates as a prism that ignores all *relative* nuances within mixed or compound legal structures. With regard to union of States, this led a famous

1 This article is a significantly shortened and restructured version of Chapter 2 of my *European Constitutional Law* (Second Edition, Cambridge University Press, 2015). Thanks go to the editors, and especially Giuseppe Martinico for inviting me to contribute to this special issue. Grateful acknowledgment is made to the European Research Council, whose generous support still allows me to reassess the 'federal' dimension behind 'State coordination' in the twenty-first century (EU Framework Programme 2007–13: ERC Grant Agreement No. 312304).

2 In this context, see: the famous opening remarks by Vattel (1883, xiii).

distinction: *either* a Union of States was a 'Confederation of *States' or* it was a 'Federal *State'*.[3] *Tertium non datur:* any third possibility was excluded.

From the very beginning, this traditional way of thinking blocked a proper understanding of the nature of the European Union. The latter was said to have been 'established on the most advanced frontiers of the [international] law of peaceful co-operation'; and its principles of solidarity and integration had even taken it 'to the boundaries of federalism' (Pescatore, 1970, 182). But was the European Union inside those federal boundaries or outside them? Over time, the Union assumed 'statist' features and combined – like a chemical compound – international and national elements. The European Court of Justice thus confirmed the 'non-contractual' nature of European law;[4] and it famously insisted on the direct applicability and supremacy of Union law over national law.[5] But how should one conceptualise this 'middle ground' between international and national law? In the absence of a federal theory beyond the State, European thought invented a new word – supranationalism – and proudly announced the European Union to be *sui generis.*

Sui Generis Thinking: the European Union

Europe's quest for a new word to describe the middle ground between 'international' and 'national' law was – at first – answered by a novel concept: supranationalism. Europe was said to be a *sui generis* legal phenomenon. It was incomparable for 'it cannot be fitted into traditional categories of international or constitutional law' (Mason, 1955, 126). And it was this belief that ushered in the dark ages of European constitutional theory.[6] For the

3 For the great theoretician of sovereignty, J. Bodin, the Swiss League was thus a confederation in which the cantons had retained full sovereignty, while the German Empire was a unitary State governed by an aristocracy of princes. See: J. Bodin (1966), 165-6 and 207.

4 *Cf.* Case 90–91/63, *Commission v. Luxemburg and Belgium*, [1963] ECR 625.

5 *Cf.* Case 26/62, *Van Gend en Loos v Netherlands Inland Revenue Administration*, [1963] ECR 1; Case 6/64, Costa v ENEL, [1964] ECR 614; as well as: Case 11/70, *Internationale Handelsgesellschaft mbHv. Einfuhr- und Vorratsstellefür Getreide und Futtermittel*, [1970] ECR 1125.

6 While the 'classics' of European law had actively searched for comparisons with international and national phenomena (*cf.* Haas, 1968), the legal comparative approach fell, with some exceptions, into a medieval slumber in the course of the 1980s.

sui generis idea is not a theory. It is an *anti*-theory that refuses to search for commonalities; yet, theory must search for what is common among different entities (Popper, 2002).

What are the problems with the *sui generis* argument? First of all, it lacks explanatory value for it is based on a conceptual tautology (Hay, 1966, 37): the European Union is… what it is; and it is not… what it is not! Indeed: the *sui generis* theory 'not only fails to analyse but in fact asserts that no analysis is possible or worthwhile, it is in fact an "unsatisfying shrug"' (Hay, 1966, 44). Second, it only views the Union in *negative* terms – it is *neither* international organisation *nor* Federal State – and thus indirectly perpetuates the conceptual foundations of the Westphalian tradition (for this brilliant point, see Schönberger, 2004, 83). For even if the *sui generis* theory recognizes that the Union does not fit into classic Westphalian categories, it does not question these categories themselves but rather considers the Union as a – unique – exception to the Westphalian category system. Third, in not providing any external standard, the *sui generis* formula cannot detect, let alone measure, the European Union's evolution. Thus, even where the European Community lost some of its 'supranational' features – as occurred in the transition from the ECSC to the E(E)C – *both* would be described as *sui generis.* But worst of all: the *sui generis* 'theory' is historically unfounded. All previously existing Unions of States lay between international and national law (Westerkamp, 1892). Thus: the power to adopt legislative norms binding on individuals – this acclaimed *sui generis* feature of Europe – cannot be the basis of its claim to specificity (Schönberger, 2004, 93); and the same lack of 'uniqueness' holds true for other normative or institutional features of the European Union.[7]

In sum: the *sui generis* theory is a 'negative' and 'unhistorical' theory. The mixture of international and national elements within the European Union is – wrongly – seen as a 'novelty' or 'aberration'. The (early) constitution of the United States of America serves as an excellent illustration here.

7 To give but one more illustration: Europe's supremacy principle is, in its structure, not unique. The Canadian doctrine of 'federal paramountcy' also requires only the 'disapplication' and not the 'invalidation' of conflicting provincial laws.

Federal Thinking I: the United States of America

The view that the American Union was an object with international and national elements is immortalized in *The Federalist,* No. 39 (Hamilton, Madison and Jay, 2003). James Madison here explored the nature of the Union's legal and political order. Refusing to concentrate on the metaphysics of sovereignty, three analytical dimensions are singled out, which – for convenience – may be called: the foundational, the institutional, and the functional dimension. The first relates to the origin and character of the 1787 Constitution; the second concerns the composition of its governmental institutions; the third deals with the scope and nature of the federal government's powers.

As regards the *foundational* dimension, the 1787 Constitution was an *international* act. The American Constitution needed to be ratified 'by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong'. The *'unanimous* assent of the several States' that wished to become parties was required; and the Constitution would thus result 'neither from the decision of a *majority* of the people of the Union, nor from that of a *majority* of the States' (Hamilton, Madison and Jay, 2003, 184). 'Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act.' The 1787 Constitution was therefore 'a [*international*], and not a *national* act' (Hamilton, Madison and Jay, 2003, 185).

In relation to the *institutional* dimension, the following picture emerged. The legislature of the American Union was composed of two branches. The House of Representatives was elected by all the people of America as individuals and therefore was the 'national' branch of the central government. The Senate, on the other hand, would represent the States as 'political and coequal societies':

> 'In this spirit it may be remarked, that the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small States; since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic' (Madison, 2003, 185 and 301).

And in respecting their sovereign equality, the Senate was viewed as a international organ. Every law required the concurrence of a majority of the people and a majority of the States. Overall, the structure of the central government thus had 'a mixed character, presenting at least as many [*international*] as *national* features' (Madison, 2003, 185).

Finally, what about the third dimension of the constitutional order? In terms of substance, the powers of the central government showed both international and national characteristics. In relation to their *scope,* they were surely not national, since the idea of a national government implied competence over all objects of government. Thus, 'the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects' (Madison, 2003, 186). However, the *nature* of the powers of the central government was 'national' in character. For the distinction between an (international) confederacy and a national government was that 'in the former the powers operate on the political bodies composing the Confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities' (Madison, 2003, 185).

In light of these three constitutional dimensions, *The Federalist* famously concluded that the overall constitutional structure of the 1787 Constitution was 'in strictness, neither a national nor a [international] Constitution, *but a composition of both'* (Madison, 2003, 187). The central government was a 'mixed government'.[8] And it is this *mixture* between international and national elements that was the (new) essence of the federal principle. For Tocqueville, the 1787 U.S. Constitution had thus chosen a 'middle course', *'which brought together by force two systems theoretically irreconcilable*' (Tocqueville, 1954, 122-3). 'The sovereignty of the United States is shared between the Union and the States, while in France it is undivided and compact'. 'The Americans have a Federal and the French a national Government' (Tocqueville, 1954, 128). The unique aim of the 1787 Constitution 'was to divide the sovereign authority into two parts': 'In the one they placed the control of all the general interests of the Union, in the other the control of the special interests of its component States' (Tocqueville, 1954, 151).

8 *The Federalist,* No. 40.

Sovereignty – while ultimately residing somewhere – is here seen as delegated and divided between *two* levels of government. Each State had given up part of its sovereignty,[9] while the Union government remained 'incomplete'. And because both governments enjoyed powers that were 'sovereign', the new federalism was identified with the idea that '[t]wo sovereignties are necessarily in presence of each other' (Tocqueville, 1954, 172). Federalism implied *dual* government, *dual* sovereignty, and also *dual* citizenship.

Federal Thinking II: the European Union

Can we 'think' the European Union in 'Madisonian' or 'Tocquevillian' terms?

The European Union was born through an international treaty; yet the European legal order has subsequently insisted that the Treaties *as such* – not international law – are the origin of European law. The European Union is thus based on a 'constitutional treaty' that created an autonomous new legal order that is distinct from the 'old' international legal order. Within that 'new' legal order, neither the Union nor the States are sovereign. Sovereignty is seen as shared or divided and questions over the ultimate locus of 'absolute' sovereignty are here contested and unresolved. The same federal spirit can be found when analysing Europe's 'government'. For not only are there two levels of government: the European Union's ordinary legislative procedure itself strikes a federal balance between 'international' and 'national' elements. And while the scope of the Union's powers is limited, the nature of the Union's powers is predominantly 'national'. Overall, the legal structure of the European Union is therefore 'in strictness, neither a national nor a[n] international Constitution, *but a composition of both'* (Hamilton *et al.*, 2003, 187). It stands – like the early American Union – on federal ground.

What are the advantages of this federal way of thinking over the over *sui generis* thinking of the past? Only *a federal* constitutionalism can explain and give meaning to normative problems that arise in compound systems like

9 *The Federalist,* No. 42 ridiculed the theory according to which the absolute sovereignty had remained in the States: 'the articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain' (Hamilton *et al.*, 2003, 206).

the European Union. And the classic illustration of the distorted normative discourse here is the debate on the European Union's 'democratic deficit'.[10] It is not difficult to find such a deficit if one measures decision-making in the Union against the Westphalian standard of a sovereign (and democratic) State. There, all legislative decisions are theoretically legitimised by one source – 'the' people as represented in the national parliament. But is this – unitary – standard the appropriate yardstick for a *compound* body politic? In a federal polity there are *two* arenas of democracy: the 'State demos' and the 'federal demos'. Both offer independent sources of democratic legitimacy; and a *federal* constitutionalism will need to take account of this *dual* legitimacy.

Once we accept this view, it is mistaken to argue that '[t]rue federalism is fundamentally a non-majoritarian, or even anti-majoritarian, form of government since the component units often owe their autonomous existence to institutional arrangements that prevent the domination of minorities by majorities' (Majone, 1998, 11). While federal systems may have 'a somewhat ambiguous standing in democratic ideas' (Dahl, 1983, 96), federalism is *not* inherently *non*-democratic.[11] It is – if based on the idea of government by the governed – inherently *demoi*-cratic; and in order to arrive at this idea 'one must depart from mainstream constitutional thinking' (Nicolaïdis, 2004, 102). The discussion of the European Union's 'democratic deficit' thus reveals a 'theoretical deficit' in European constitutional law (Beaud, 1995). The description of crisis reflects a crisis of description (Winckler, 1995). For '[t]he question about which standards should be employed to assess the democratic credentials of the EU crucially hinges on how the EU is conceptualized' (Kohler-Koch and Rittberger, 2007, 4). *Sui generis* thinking here represents a dead end. For in refusing to conceptualise and compare, the – still many – advocates of the *sui generis* thesis undermine the very existence of an external standard against which the Union could be measured against. (There thus exists a deep conceptual contradiction in simultaneously subscribing to the *sui generis* and the democratic deficit thesis!)

10 The following discussion focuses on the constitutional aspect of the democratic deficit. It does not claim that there is no democratic deficit at the social level, such as the low degree of electoral participation or the quality of the public debate on Europe. Nor will it claim that the current constitutional structures could not be improved so as to increase democratic governance in the European Union.

11 In this sense also, see: Dahl (1983, 107), '[A]lthough in federal systems no single body of citizens can exercise control over the agenda, federalism is not for this reason less capable than a unitary system of meeting the criteria of the democratic process[.]'

A new European constitutionalism must be based on a historical and comparative approach to the study of European law. Yet importantly: any comparative challenge to the *sui generis* 'theory' of the European Union will not necessarily deny the Union's 'unique' character; yet this uniqueness is – like the uniqueness of every human being – not rooted in a different 'genus'. Thus even if the European Union is a unique species of the federal genus, it forms part of the federal family and thus shares a family resemblance to earlier federal orders. And it is this resemblance that might provide us with conceptual keys to unlock the nature of the European Union. *Sui generis* thinking will, sadly, deprive us of these treasures.

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