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Beyond Sui Generis: Comparative Federalism and the European Union*

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I want to start by thanking the editors at *Diritti Comparati* for inviting me to come and speak to you all here at the journal's annual meeting. When I read the description of your journal, I instantly felt completely at home. *Diritti Comparati* exists at the intersection of European law, comparative law, and constitutional law. It aims to understand the challenges and transformations brought about by supranational integration and globalisation more broadly, and to address how these phenomena have given rise to the migration and the transformation of ideas. This is combined with the call for scholars to engage in the historicization and contextualisation of comparative analysis. I could not agree more. This is exactly what I aim to do with my research – and I believe it is profoundly important if we want to understand the current challenges faced by the European Union and its Member States.

In the context of the study of the European Union, the comparative approach has been somewhat neglected. The most significant reason for that, perhaps, is the dominant view in the field that the EU is unique, or *sui generis*. Because the legal and political nature of the EU is assumed to be one of a kind, logically it does not really make sense to systematically compare it with something else and instead indulge in scholarly solipsism. This, I believe, is a fundamental mistake, which we are paying the price for today. It might have been that the sui generis thesis was sufficient in times of relative stability, but with the multiple crisis Europe has faced in the last decades – the Eurozone crisis, the migration crisis, the rise of authoritarianism in Poland and Hungary, Brexit, the Covid-19 pandemic, and the Russian invasion of Ukraine –, it is no longer sufficient to argue that

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the EU is sui generis. In the UK, this became clear the day after the Brexit referendum, when one of the most googled questions were: "What is the European Union?".[2] At one level, it is of course ironic and somewhat depressing that this question was asked in earnest *after* the Brits had voted to leave the EU. But the question nevertheless stands. Now, in the shadow of the war in Ukraine, it is a question we should ask ourselves more than ever.

The crises Europe has faced during the last decades and the extraordinary power and authority exercised in response thereto force us to ask several fundamental questions: *With what right are the citizens and states of Europe governed? What are the foundations of authority in and of the European Union? What is constitutional nature of the European Union?* These are the questions that I try to answer in my recent book, *The Constitutional Theory of the Federation and the European Union*,[3] which I will discuss today. But I want to start by saying something about the questions I ask and the tradition I work within. The question of authority is distinctly *juristic* because law is the language of authority. For that reason, the book is a work of legal scholarship. That being said, the book is fundamentally about "the political",[4] and it is written not just for lawyers but also for scholars and students of IR, comparative politics, political theory and political history and of course EU law and EU studies.

The book is a study in what my former supervisor Martin Loughlin calls "political jurisprudence".[5] In this view, public law, importantly constitutional law, is not a subset of positive law (as distinct from private law), but rather concerned with the establishment and regulation of governing authority. It therefore poses the question of *right* in relation to governmental ordering in the modern world.[6] "Right" is somewhat artificial because the English language does not possess what most other European

[2] B. Fung, *Britons are frantically Googling what the EU is after voting to leave it*, in *Independent* (London, 24 June 2016).

[3] S.R. Larsen, *The Constitutional Theory of the Federation and the European Union*, Oxford, 2021.

[4] For two influential and radically different conceptions of the political and its relationship to constitutional ordering, see H. Arendt, *On Revolution,* New York, 2006; H. Arendt, *The Human Condition*, Chicago, 1998), on the one hand; and C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty,* Chicago, 2010; C Schmitt, *The Concept of the Political*, Chicago, 2007.

[5] M. Loughlin, *Political Jurisprudence,* Oxford, 2017.

[6] ibid 13.

languages have, namely, a clear conceptual separation between "right" and "law": *diritto* versus *legge* in Italian; *droit* versus *loi* in French; *Recht* versus *Gesetz* in German; and *ret* versus *lov* in my first language, Danish – to mention a few. The question of "right" is the question of authority; the exercise of "rightful" governmental power. In the Middle Ages, the question of *right* – the questions of "higher law" – was discussed in terms of natural law and divine authority. But with the birth of the modern world, the "political" came to be understood as an autonomous sphere distinct both from religion and the economy.[7] In the modern world, people are organised into territorial bounded communities, with institutionalised forms of authority; «this is a distinctive way of being and acting in the world, the world of the political».[8] In the modern world, public law, most importantly constitutional law, addresses the justification of power and authority in legal terms in political communities.

The reason I spend some time on this is to differentiate my approach, that I assume at least some of you share, from those of neighbouring fields. I am not trying to understand questions of *legitimacy* neither in a normative-philosophical or a descriptive-sociological sense. What I mean to say is that I am not interested in questions of moral philosophy such as whether or not EU law and government can be justified with reference to a set of normative criteria or whether it could, or should, be reformed in order to do so. Nor am I interested in sociological questions of whether people in Europe believe the EU to be legitimate or not (and why). That is of course not meant as a slight to scholars asking those questions, but I think it is important to showcase what public law, understood in terms of political jurisprudence, can offer to the study of the EU. The fundamental question raised by a political jurist with regard to the EU are: How is authority built up and maintained in the EU – importantly but not exclusively by law? With reference to what principles and ideas can governmental authority be wielded in Europe? This is the distinct approach of the tradition of public law as political jurisprudence that I work within.

That being said, my book is also a significant critique of the dominant position within political jurisprudence because I part way with what we could call the "statist worldview" – or the "Westphalian worldview". In this view, the nation-state is understood as the dominant if not the only form of

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[7] M. Loughlin, *The Idea of Public Law,* Oxford, 2003, 73–79.
[8] Loughlin, *Political Jurisprudence* (n 4) 1.

political association of modernity.[9] In contrast, my argument is that we will get a flawed understanding of the EU if we try to understand it through the eyes of Hobbes or Bodin. We cannot understand the EU based on the model of the state and trying to do so is a source of a lot of confusion in the literature. For example, it is the "statist worldview" which has given rise to the idea that the EU is sui generis. The sui generis thesis takes the sovereign nation-state as the norm and describes the EU as the exception: somehow more than an international organisation yet less than a sovereign state. Something unique and unprecedented.

The mainstream position in the field is that since the EU does not fit the model of the state, it cannot be fully federal.[10] I turn that argument on its head and show that the EU would not have been fully federal if it *did* fit the model of the sovereign state. There is a long but largely forgotten tradition in the history of political thought which grabbles with understanding federal polities, which do not fit the model of the sovereign state. There are also political experiences of federalism we can draw on for understanding our current moment of crisis, however, they have largely been forgotten or even repressed because they do not fit the current national stories. For example, today we tell the story of the American founding as if it was founded as a nation-state and as if the constitutional was born as the "moral" constitution it is today. However, as have been demonstrated by constitutional scholars and historians of the Early American Republic, this is a myth. The United States was not founded as a nation-state but rather as a Union of States, and the US Constitution was not understood as moral document as it is today but rather as a compromise between Northern and Southern States over slavery.[11]

My argument is that the constitutional nature of the EU is neither unique nor unprecedented. I argue that the EU is a federal union of states, or what I simply suggest we call a federation (or *Bund* in German). That is, a political union of states founded on an interstate agreement of a constitutional nature, a federal compact, that does not absorb the Member

[9] M. Loughlin, *The State: Conditio Sine qua Non,* in *International Journal of Constitutional Law*, 16, 2018, 1156; D. Grimm, *The Constitution in the Process of Denationalization*, in *Constellations*, 12, 2005, 447.

[10] For an overview of the literature, see Larsen (n 2) introduction.

[11] For two interesting recent books on this topic, see M.M. Edling, *Perfecting the Union: National and State Authority in the US Constitution*, Oxford, 2020; N. Feldman, *The Broken Constitution: Lincoln, Slavery, and the Refounding of America,* London, 2021.

States into a new state. A federation has a dual source of authority, consisting of the political existence of the Union and the Member States, and it is characterised by the internal absence, contestation or repression of sovereignty. A federation is born when several states under military or economic compulsion find it difficult or impossible to maintain themselves politically and decide to come together to constitute among themselves a federal union. The new union is in this way founded on an interstate agreement between these states, and from a formalistic perspective, therefore, the federation is born out of international law. However, this interstate agreement between the Member States is also a constitution. First, because it gives *birth* to a new political entity, the common union, with a nascent political identity of its own, and with its own institutions and its own political will. Second, because it leads to a fundamental *transformation* of the Member States in a way and to a degree that they no longer meaningfully can be understood as fully autonomous sovereign states. After they have become Member States, the federating states are no longer the same, nor do they relate to one another primarily through international law. Olivier Beaud has expressed this beautifully in his treatment of the theory of the federation: «Once they have come together in a federal union, the Member States are no longer truly sovereign states, nor are they strangers to one another».[12] They are rather members of a common new polity, the common Union. A federal constitution is thus distinct from the constitution of the state because it is not founded on the exercise of sovereign will but rather based on mutual and equal contract.

I argue further that it is the dominance of the statist worldview both in law and more broadly the social sciences, which has obscured the federal nature of the EU. By focusing exclusively on the state, scholars have become blind to the significance of two other main forms of political association: the *empire* and the *federation*. Both of which are composite legal and political entities. The federation, however, is distinct from the empire which is founded on an act of domination by one polity over another. Historically, therefore, federalism has been understood as the alternative to imperialism.[13]

[12] O. Beaud, *Théorie de la fédération* (Presses universitaires de France 2007, 230, my translation).

[13] See, for example, C.J. Friedrich, *Man and His Government: An Empirical Theory of Politics,* London, 1963, 608: «federalism holds out the prospects of organizing the world at large as the alternative to imperial domination». This is discussed in further detail in Larsen (n 2) ch 2.

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At this point you might object that surely the study of the EU, something "post-national" and "post-sovereign", cannot be shaped by the nation-state centric worldview.[14] Well, yes, as it turns out. The meta-narrative taken as the point of departure with EU study goes something like this: for centuries, the European nation-states were in more or less constant war with each other. This culminated in the greatest nationalist war of all times, where atrocities yet unheard of in history where committed. After the war, this led the European nation-states to come together in a great peace project, namely the project of European integration. A new and unique legal order was created that over the years emerged as a rival centre of governmental authority to the nation-states.

Here there is a fork in the road, depending on whether scholars give priority to the European institutions or to the Member States, which more often than not are seen as competitors in a zero-sum game as the "drivers" of European integration. Scholars who prioritise EU institutions tend to look EU with admiration and excitement as a unique project that has finally managed to transcend the horrors of the nation-state, and they have developed theories of (neo)functionalism, cosmopolitanism, and constitutionalism beyond the state as explanatory models for European integration. Other scholars argue that notwithstanding the significance of the project of European integration and globalisation more broadly, the nation-state remains the most important political unit. In their accounts, the EU is better explained by theories of (liberal) intergovernmentalism, realism, and the EU as administrative or international law.

There are therefore significant disagreements within the scholarly community studying European integration and EU law, importantly whether or not the nation-state is withering way, and whether or not this is a development we should celebrate or lament. The underlying account of European history, however, remains the same story in which the nation-state takes centre-stage.

[14] The influential account of the EU as a space of post-sovereignty was set out my in N. MacCormick in his *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth,* Oxford, 1999.

Yet as any transnational or global historian will tell you, this metanarrative is flawed.[15] It is flawed not only because it is based on a naturalisation of the history of a few states in western Europe (most importantly Britain and France) as the model for all political communities in Europe and beyond. It is also based on an ideological and fundamentally flawed account of *their* histories, which ignores their imperial legal, political, and economic entanglements. For most of political modernity, the European states were in one way or another entangled in transnational orders of empires, either in the form of land empires within Europe or in the form of the colonial empires extending out from the imperial metropoles in Europe. The EU was founded by three declining maritime empires – France, the Netherlands and Belgium – and two failed fascist empires, Germany and Italy but this is largely ignored in the literature about European integration and EU law.

From the perspective of global history, the nation-state only became the dominant form of political association sometime in the second half of the twentieth century as a product of the decline and eventual collapse of the European empires. Moreover, as demonstrated by influential historians and IR scholars, that the nation-state would become the dominant form of political association was by no means the predetermined legal and political outcome of decolonisation.[16] On the contrary, political leaders both in the former imperial peripheries and the imperial centres turned towards imperial reform, federation and regional integration when the European empires started to crumble. Some of these federations and regional orders failed within a decade of their foundation, such as the French Union (1946–1958), the African Union (1961–1963), the West Indies Federation (1958–1961), but some of them survived, such as the (British) Commonwealth of Nations (1926/1949–), and the European Economic Community/European Union (1957–). All these regional orders and federations were integral parts of political projects of «worldmaking after empire», borrowing Adom Getachew's words.[17] With the decline of European empires, federations and regional orders – not autonomous and

[15] See, eg, J. Burbank and F. Cooper, *Empires in World History: Power and the Politics of Difference*, Princeton, 2010.

[16] A. Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination,* Princeton, 2020; G. Wilder, *Freedom Time: Negritude, Decolonization, and the Future of the World*, Durham NC, 2015); Burbank and Cooper (n 14); F. Cooper, *Citizenship between Empire and Nation: Remaking France and French Africa, 1945–1960,* Princeton, 2014.

[17] Getachew (n 15).

isolated nation-states – was understood as the most significant tool both for managing and stabilising imperial decline, and for imagining a new world after empires.

A core argument of my broader research agenda is to show that we have to study the project of European integration as a part of the projects of "worldmaking after empires". The argument of the book is that what came about with the Treaty of Rome was a federal union, not a unique or sui generis project. Of course, I am not the first person to advance a federal interpretation of the European Union. This is quite a commonplace argument. But my argument is that, because the federation for the most part is conceived through the prism of the sovereign state, federal theory tends to begin with a very problematic dichotomy – of German origin – between a confederation of states (*Staatenbund*) and a federal state (*Bundesstaat*). Whereas the confederation is understood as a purely international law organization between fully sovereign states, the federal state is understood to be a public law organization with a fully sovereign federal level, where power is merely devolved to the Member States.

Based on this dichotomy, it is argued that the EU fits into neither the category of the confederation nor the category of the federal state, and for that reason it is characterized by a unique brand of federalism – as Joseph Weiler argues.[18] Other scholars would even say that, because the EU is not a state, it can only be "quasi-federal" or an "incomplete federation".[19] In my view, this is a fundamentally flawed approach to the study of federalism and it leads to flawed conception of the EU.

The federation is an ambiguous form of association characterised by legal and political pluralism and the lack of a settled internal hierarchy. My argument is that we should think of the federation a distinct type of polity

[18] J.H.H. Weiler, *Federalism Without Constitutionalism: Europe's Sonderweg* in K. Nicolaïdis and R. Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union,* Oxford, 2001; J.H.H. Weiler, *In Defense of the Status Quo, Europe's Constitutional Sonderweg*, in J.H.H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State*, Cambridge, 2003.

[19] G. Peters, *Federalism and Public Administration: The United States and the European Union*, in A. Menon and M.A. Schain (eds), *Comparative Federalism: The European Union and the United States in Comparative Perspective,* Oxford, 2006; J.E. Fossum and M. Jachtenfuchs, *Federal Challenges and Challenges to Federalism. Insights from the EU and Federal States,* in *Journal of European Public Policy,* 24, 2017, 467.

– a discrete form of political association – and that the EU is a manifestation of that. The federation in general, and the EU in particular, is not a sub-species of the state. For that reason, we should not try to make sense of the European Union based on the theory of the state, and most importantly, through the master concept of the state: sovereignty. If we operate within this commonplace distinction between the confederation and the federal state, we do not get a proper understanding of federal public law in general, nor of EU law in particular.

Let me conclude by saying a few more words of the role of comparative law. If I am right, what should we compare the EU with to understand its constitutional structure and constitutional dynamics? We should compare it, first to young federal polities, such as the early history of the United States, and the German federations of the 19th century. But in order to understand its historical context, we also need to do much more work on how the EU emerged as part of a broader movement of "world-making after empires" and how it interacted with the other unions and polities and reforms that emerged – and failed – in the decades after World War Two, such as the French Union and the African Union. Only then do we stand a chance of understanding how we got to where we are today and what the avenues for action are today in the EU.

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ABSTRACT: This intervention makes the case for a comparative approach to the study of the legal and political order of the European Union (EU). Because of the widespread understanding that the EU is unique or "sui generis", EU scholars have largely engaged in scholarly solipsism assuming the EU to be a sample of one. This is a fundamental mistake, and it has left the EU academic community woefully underprepared to analyse or respond to the recent crises of the Union. The sui generis thesis is a product of the literature's "statist worldview", which assumes the nation-state to be the dominant if not the only form political association of modernity, and therefore concludes that the EU must be unique. It is necessary to break away from the statist worldview and analyse the EU public law based on a comparison with the polities it is actually comparable with, namely, federations and empires.

KEYWORDS: EU public law - political jurisprudence - theory of the federation - constitutional theory - comparative constitutionalism

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