Emancipatory Federalism and Juridical Pluralism: The Multinational European Context

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I. Introduction

Adrás Jakab, in his impressive *European Constitutional Language* (2016), has identified what he sees as the key concepts of European constitutional law. These concepts are common to all constitutional cultures of the EU, they have a date of origin and a *telos* – i.e., a purpose to which they are meant to respond, a type of social challenge they are meant to address. Jakab also provides normative guidance or advice for the use of the concepts in today's constitutional discourse in Europe. The list of concepts, further developed in the book, comes in a useful table (pp. 88–9). The key concepts are "sovereifgnty," "the rule of law," "constitution," "democracy," and "nation." "Sustainability" is a concept *in statu nascendi* but not yet in the list.

There are two striking omissions, two key concepts of national constitutional laws – "republic" and "federalism" – that Jakab omits on the grounds that some of the constitutional cultures of the EU explicitly reject them. This argument seems flawed; for it may be that national constitutional cultures reject federalism as a key concept internally or nationally, but it remains a key concept in the external, supranational context of the EU. Likewise, the key concept of republic (or, in similar ways, of monarchy) might be rejected in one country but be considered crucial to refer to another. As regards federalism, it is revealing that Jakab has instead selected "nation," defined as a homogenous political community of equal members, giving it a telos that reflects similar concerns as those underlying the concept of federalism – especially the question of how to accommodate ethnic diversity. Jakab's advice is to use the concept of "the European Nation" to refer to citizens of the EU. This approach implies a rejection of difference, of diversity, of asymmetries. The question of whether several nations could integrate or federate into a larger political community, while preserving their own, is apparently excluded. Moreover, a nation would require homogeneity, a requirement which multicultural societies might not satisfy. Separatism is a threat to the nation. But so would be communitarianism, and even some versions of pluralism.

It was in a similar vein that, in the autumn of 2019, President Macron responded to a question on *Réunion la 1ère* and *Antenne Réunion* about whether the wearing of the full veil was desirable in the public sphere. He said: "Le port du voile dans l'espace public n'est pas mon affaire. C'est ça la laïcité. Le port du voile dans les services publics, à l'école, quand on éduque nos enfants, c'est mon affaire. C'est ça la laïcité." For Macron, the heart of the problem is communitarianism: "il y a aujourd'hui des femmes et des hommes, citoyens français, qui disent : 'de par ma religion je n'adhère plus aux valeurs de la République, je sors mon enfant de l'école pour le mettre peut-être à la maison; je refuse qu'il aille se baigner avec d'autres, apprendre la musique… Et j'ai un projet de vie et de société qui n'est plus d'être ensemble dans la République mais, au nom de ma religion, de porter un autre projet politique. Ça, c'est un problème pour moi. Ça, c'est un communautarisme. Et dans ce cas-là, j'ai un problème avec l'utilisation, la revendication, en quelque sorte, qui devient politique, de ce séparatisme. Si on confond les

sujets, à ce moment-là on se met en situation de ne pas pouvoir véritablement régler le cœur du problème qu'a la République française, qui est le communautarisme."[1]

I do not intend to enter into a debate with Jakab as to whether federalism should or should not be a key concept of European constitutional law. What I find interesting is how a concept may be ingrained in a constitutional or political culture at one level, but not at another. Federalism is arguably a key concept of Basque constitutional culture, but not of Spanish culture; and yet again, it may be considered essential to the EU – much more so than the concept of the "nation."

It is indeed telling that the concept of "federalism" should be excluded in Jakab's list, but we should not resort to nominalism as the yardstick to identify a concept. Just because some constitutional cultures avoid the concept does not mean that they also avoid dealing with the issues addressed by that concept. Just because a culture lacks the term "law" does not mean that there is no law in its society (Tamanaha, 2017). Even when a term is in use, that is no reliable guide to what concept is behind it. There is a law of excluded middle, a law of thermodynamics, a law of the strongest, and the law of the land. The "law" in lex and the law in "ius" are distinguishable synchronically and diachronically. This also seems to be the case for the term *nation*.[2]

The concept of a nation as "dealing with diversity," as opposed to the concept of a nation as reflecting a common origin (natio-native as the place of birth or origin), takes us to the contrast between pluralism and union. This paper uses the term multinational, a term which can also connote different concepts. One "multinational" is a type of company that operates and has principals and subsidiaries in different states. Closer to the topic at hand, *multinational* can connote the coexistence of nations in a common entity or polity, or the make-up of an organization comprising people of different nationalities. As concerns federalism, the misleading effects of nominalism become clear when we enter into the details, distinguishing symmetric from asymmetric federalism, cooperative from competitive federalism, fiscal from compensatory federalism, or even federation from confederation. An important qualification of federalism for many that advocate it is that it be *emancipatory*. A key requirement for this is pluralism. This is clear in the European context. Emancipatory federalism can be distinguished from those federalisms that are oppressive or *bound*. We will also need to problematize the other key concepts of our enquiry: pluralism and European. In the way the term is employed in this paper, federalism is based upon the constitutional recognition of difference and diversity (pluralism) and upon the concept of territorially divided, limited and shared government.

Part I of this article addresses the main features of European integration as a common project for unity in diversity, a telos spelled out as the "ever closer union amongst the peoples of Europe." These words are included in the preambles of European treaties since 1957 and retain a place of honour in Article 1 of the Maastricht Treaty of European Union (TEU). This telos raises questions around multinational polities, the peoples of Europe making up a plural *demos*. Respecting this plurality, this diversity, while aiming at a common and shared legal, political, economic and social constitution, is really the essence of federalism.

In Part II, we deal with the question of pluralism in law and in constitutionalism, since we argue that there is a link between diversity – pluralism – and federalism. When federalism does not purport to dissolve or overcome diversity, but rather tries to make sure this diversity is duly represented in federal governance, it can be said to

emancipate the diverse and plural component entities. Otherwise, union will risk reverting to uniformity. The EU is an important case as regards the relationship between the Member States and the Union. But diversity also exists within the nation-states: territorially through regions, and culturally through the plurality of cultures. In order to accommodate such pluralism, Member States could show a series of attitudes and outlooks, i.e. an *ethos*, along with legal and constitutional instruments: subsidiarity, pragmatism, flexibility, asymmetry, calculated ambiguity. These accommodations are balanced by *ethos* and instruments for the coming and living together of diverse peoples or *demoi* and their sharing a complex polity: citizenship, multiple identities, republicanism, and federalism.

From this link between federalism and pluralism, we move, in part III, to the essence of federalism as an attempt to reconcile pluralism and union – plural identities, rights and entitlements, power-sharing federal bargains, distribution of competencies, collective decision-making in the common institutions – and then consider different versions of federalism to characterize the EU. We conclude that the version of federalism that makes best normative and analytical sense of the EU is *asymmetric emancipatory federalism*. An emancipatory federalism is necessarily one that respects pluralism, but also one that accommodates self-determination – the free will of its component entities to govern themselves on some matters and share sovereign powers on other matters.

II. The EU and its Member States' federal project of integration: United in diversity and ever closer union

1. Introduction: First, there were the States?

The EU is composed of Member States and citizens. It is the creation of states by means of constitutive treaties. This new creation turns *states* into *Member States*. *Member State* is thus the special new status of the states that make up the EU. Before becoming Member States, they were "states" tout court. This transformation is now a main theme in the general theory of state. Constitutional and European law scholars have focused on state institutions and their supranational dimension, occasionally pondering the doctrine of primacy and direct effect, but seldom studying the place and role of the Member States in the new, structured, European Union system. In the 1970s, an interest in the contribution of the Member States to Community law-making and law application caught on among European and international law scholars, but not so much among national scholars of public law, who were still rather inward-looking, inside the national box or the Kelsenian pyramid. This began to change in the 1990s, with the creation of the EU, the ECJ case law on state liability for breaches of EU law and on citizenship, and the realization of the single market (1992–1993). More constitutional lawyers then ventured into the field. Certain national constitutions then started to mention or acknowledge the existence of the EU. While most Member State constitutions have in the meantime accommodated the phenomenon of European integration and acknowledged the normative existence of the EU, they have done so in diverse ways, stopping short of recognizing the principle of the primacy of EU law. The growing interest by constitutional and public law scholars in the status of Member State is thus leading to a European General Theory of (Member) State.[3]

Statehood – or state status – always implies a combination of rights and duties, which are normative positions. Some of these normative positions, such as legal personality and sovereignty, flow directly from statehood in international law. Other normative positions of the state in the EU are linked to the notion of membership in the EU and are related to what the EU ultimately is, to its federal telos. Member Statehood is a status bringing together a bundle of rights and duties – for the benefit of the new EU political constellation, of an institutional unity with its own legal personality, and of each of the Member States, which retain the core of formal sovereignty. Member States are indeed autonomous, but they are no longer *free* (Abderemane, in Potvin-Solis, 2018: p. 209). They are subject to a number of obligations flowing from Membership and these impose limitations on their *exercise* of sovereignty.

2. Main features of Member Statehood and the status of an "integrated" state

The Member State and its components, i.e. its institutions, its population, and its territory, are now integrated into a greater public and political space, that of the EU, with its own institutions, territory, and population. The state's responsibility is projected onto that larger space, almost as the sequel to its loyal cooperation and integration. This spatial and territorial re-scaling feeds into the concept of European *integration*, understood as the "integration" of all of the Member States' institutions, populations, and territories. The counterpart of the Member States' duty of loyal cooperation is the Union's, as well as Member States' mutual duty of respect for each other's nations and peoples (the principle of constitutional identity); for each other's institutions (the principle of institutional autonomy); and for each other's territory (the principle of territorial integrity).

The traditional theory of state thus requires adjustment in the light of a project of integration aiming to federate states, relying on the primacy of the common norms and on solidarity and loyal cooperation between the Member States – as well as between these and the EU. There is practically no area of international relations left which is totally outside the Union's competence. Even in the field of foreign and security policy, Member States can no longer act entirely alone: they must try to reach a common position (Art. 32 TEU, Dubouis, in Potvin-Solis, 2018: p. 620). Member States remain the formal masters of the treaties, however, participating directly in the institutional functions of the EU and reaffirming their fundamental rights as states. There is thus agreement on the duty of the Union to respect their national identity, territorial integrity, equality, and institutional autonomy.

Member States as constituent powers, law-givers, and executive power

Member States have a predominant role in the revision and alteration of the Treaties and in the making of EU legislation. Member States are the Masters of the Treaties and the constituent power. Ratification of any Treaty change is required from all of them, and the change will not be adopted if even one Member State does not ratify it. Even Article 48(5) TEU, which refers to the European Council where one or more (but less than one fifth of the) Member State(s) have difficulties ratifying, is incapable of circumventing this centrality of the Member State: ratification by each according to their constitutional procedures and unanimity in the European Council. This constituent centrality is also present as regards the *passerelles* (Art. 48(7) TEU), which shift select decisions from unanimity to qualified majority voting (QMV). Any national parliament can object and prevent this happening. Other *passerelles* and Treaty provisions provided for in the Treaty on the Functioning of the European Union (TFEU) allow for further specification or development by the European Council (Dony, in Potvin-Solis, 2018: pp. 287– 90); they also require a unanimous vote of the Council or the European Council. Some Member States have adopted legislation to require an act of Parliament to allow Government to agree on a *passerelle*. In the case of the European Union Act (2011) in the UK, a referendum is required for *passerelles*, an extra requirement that goes against the principle of loyal cooperation and frustrates the telos of the Treaty, namely to facilitate QMV in principle.

Member States are also at the heart of the law-making function and the legislative power of the EU; their representatives deliberate and vote all the legal norms of the EU legal system in the Council or the European Council, and Member States still keep a strong hand in the making of executive or regulatory acts through the examination procedure in the appeal committee (comitology). Nonetheless, they need a qualified majority, as the infelicitous case of re-licensing glyphosate shows. Member States retain unanimity for all sovereignty-sensitive matters, and as a matter of fact many of the QMV decisions are adopted by consensus or after having been carefully debated, with minority positions heard and taken into account as far as possible. National parliaments have also acquired some powers regarding EU legislative scrutiny, especially as regards subsidiarity. In spite of the broad diversity of legislative procedures and non-legislative acts, whenever there is an area sensitive enough for the Member States, the Council or the European Council is the central, if not exclusive, institution. All delegation to the Commission is the result of a legislative act where the Council will have been involved.

This centrality of Member States in the making of EU law is then carried forward to its implementation, once adopted as law. The administration and execution of EU law relies almost entirely on existing national administrations. Member States implement the norms of EU law because they are part of their own state legal systems. EU regulations apply directly and cannot be changed by the Member States; the effectiveness of directives may not be jeopardized – even untransposed, they may still produce direct effect. The equivalence principle ensures that Member States use the same administrative procedures for applying EU law as they do for their own internal national law. This means that the national administrations of the Member States *are* the EU Administration. The same goes for the judiciary: national judges *are* simultaneously European judges. There is no parallel federal administration nor judiciary at the EU, as there is in the USA, for instance.

3. The EU as a federation of legal, not political systems: Member Statehood as sociological, political, and legal status

Article 2 TEU is at once foundational and aspirational: "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." The second sentence, in its defective syntax, depicts Member States as sharing those values in "a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." The reference to "a society" is open to interpretation: Is there a European society? Are there any national societies? Are there only national societies? Society could be multiple, diverse, and plural in each Member State, or even locally, or it could be integrated at a European level. In any case, if all Member States really share the values of Article 2 TEU, it should no longer matter whether

society is one or many, on a *vertical* scale, since it would always be *horizontally* pluralist and diverse. But how is one to ensure that Member States come to terms with this value-aspiration? What if Member States, once in the Union, no longer respect the accession criteria such as democracy, rule of law, market economy, and respect for human rights? Concerns come to mind in relation to immigration, refugees, or asylum, as the refusal by some Member States to take in any of the allotted quotas of asylum seekers agreed by the Council illustrates. When a Member State goes it alone and fails to display solidarity toward the rest, it adds a heavy load to the responsibilities of the others and fails to demonstrate that it shares the common values. As regards the rule of law and the values related to judicial independence, not all Member States share the same concepts, as the recent crises in Poland and Hungary show. Loyal cooperation degenerates into betrayal of the values and the very concept of integration.

Unity and diversity

The tensions between unity and diversity that are typical of European integration also have a bearing on the status of Member Statehood. Whereas multiple differentiation or variable geometry calls into question the equal, shared status of the Member States, citizenship in the Union enhances the unity of the EU. The EU also proclaims the value of diversity in important fields like language, culture, religion, local and regional autonomy, and territorial cohesion. *United in diversity* is more than a motto or mark of the EU, it is the essence of the idea of integration: loyal cooperation works for both unity and diversity. A Member State's right to be respected in its distinctiveness and autonomy is the corollary of its duty to integrate through all shared federal norms and to make integration possible. It is also the normative expectation that the remaining Member States will be loyal to the Union, preserving unity and being respectful of diversity. The federal rationale of the EU does not seek uniformity as it cherishes diversity. And yet EU law is to be applied uniformly throughout the Union, so that all individuals enjoy the same rights and share the same obligations. While this can be considered a kind of uniformity, it really concerns non-discrimination on the basis of nationality, i.e. the *equal* legal status of individuals under EU law; it does not concern the procedures and institutional arrangements existing in the Member States, where the principles of procedural, institutional, and constitutional autonomy apply. The EU seeks unity in all areas of common concern, uniformity in EU legal rights and obligations, and loyalty to the Union generally, even in areas of reserved Member State competence, but this is compatible with diversity and plurality of forms and procedures in each of the domestic legal systems in a genuinely federal project. Uniformity of individual rights is compatible with non-uniformity of forms of state, forms of government, federal or central states, and the existence of one or more legal systems within one Member State.

Federalism

Federal organizations are structured around three principles: superposition of the federal and federated legal orders, autonomy of the federated entities, and participation of the federated entities in the federal entity (Godiveau, in Potvin-Solis, 2018). Legal orders are superposed and coordinated through the principle of distribution of competencies, primacy, and subsidiarity. Cooperative federalism is the best possible interpretation of this relationship. Autonomy of the federated entities is reflected in the exclusive competencies of the Member States, the principle of procedural and

institutional autonomy, respect for national constitutional identity, and, again, subsidiarity. Participation of the States in the Union is ensured in the Council and the European Council, as explained above, and even more in the principle of unanimity applying to the constitutive treaties and to legislation in key matters of national interest.

Socio-politically and economically, this status of Member Statehood in the EU is that of relative interdependence between the States themselves, and also between the States and the EU. Legally and constitutionally, this interdependence translates into an intertwining of all the legal orders involved. This is the legal version of federal integration. The constitutional pluralism debates will be explored in Part III. They can be seen as interactions between claims to validity and supremacy in the articulation of legal systems according to certain principles, such as attribution of powers, primacy, direct effect, and direct applicability of EU law in the legal orders of the Member States, all bound by the principles of mutual trust and loyal cooperation. A federal outlook is the key to understanding these relations: a Union based on the rule of law, composed of Member States, each subject to its rule of law. This intertwining of legal orders and rules-of-law extends to all the judiciaries throughout the EU, engaged in a cross-fertilizing dialogue. Constitutional pluralism in the federal polity accounts for the fact that these dialogues are not always smooth or consensual.

The federal relations between the EU and the Member States are complemented by the dimension of citizenship of the Union, necessarily understood as intertwining – integrating – the Member States and the EU, but also as a supranational, transnational, and plurinational citizenship. The Charter recalls in its Preamble that the Union "places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice." The citizens are re-introduced into the federal relationship directly engaged in the EU, as the ECJ already stated in *van Gend en Loos,* as regards individuals, and in *Ruiz Zambrano,* as regards citizens The status is also complemented by the dual system for the protection of fundamental rights: "at first, EU fundamental rights were applicable only to EU institutions, but since the end of the 1980s they have been progressively addressed to state action by the CJEU. One of the main differences with the US Bill of Rights is that incorporation of EU fundamental rights remains limited by the federal principle, in the sense that enforcement of EU fundamental rights is only binding upon the Member States when state action falls 'within the field of application of EU law,' ...[and] the approach to the scope of application of the Charter from the federal perspective is coming under stress by the claims for protection from EU citizens differently situated with regard to EU law" (Pérez, 2018: p. 1082).

Limited federalism: Brexit and differentiation

The intertwining of legal orders is, however, even more complex. It takes place in a polycentric world: the proliferation of international agreements gives rise to a branching out of new legal orders, calling into question the unilateral nature of Member States' agreements. As a result, a new polycentric contractual relationship emerges (Abderemane). This is exemplified by Brexit, where a plurality of sources – European, constitutional, and international – define the status of the Member State and also the intensity of the duties that bind Member States to each other. For example, all 26 Member States show solidarity with Ireland, rather than the UK, and supported the possibility of binding the UK to the Union (through the proposals for a backstop or

through the special nature of the customs arrangement benefiting Northern Ireland). Even within the UK, there are sub-State effects of that plurality of sources defining the status of Member States, and the obligations of faithfulness or loyalty can eventually cut across the Member State. This may well arise in connection with Northern Ireland or Scotland, if and when another referendum is held following the withdrawal of the UK.

Brexit and differentiation challenge the very principle of equality between the Member States, so central to federalism. But they do not undermine the principle of equality because it is not to be understood as uniformity of institutional, territorial, and constitutional arrangements. According to van Raepenbusch, withdrawal and differentiation are the consequence of pragmatism and realism (in Potvin-Solis, 2018: pp. 574–5). Both citizens and Member States are concerned by these principles in that differentiation between Member States cannot lead to discrimination between citizens (Corre-Dumoulin, in Potvin-Solis, 2018: p. 563). This is one of the major threats from the intergovernmental agreement reached between David Cameron and the Member States meeting in the Council of 23 February 2016, with a view to securing a "remain" vote in the Brexit referendum, and so calling into question the very essence of European integration and free movement. In effect, it is a deadly blow to equality between Member States; it also amounts to a constitutional mutation (Poinsignon, in Potvin-Solis, 2018: p. 582). Brexit opens a new era of uncertainty for all parties and for the very process of European integration. Loyal and faithful cooperation is the guiding principle throughout the process of the Brexit negotiation within a Union based on values.

Flexibility is understood as being necessary to ensure unity of structure, although managing diversity has a cost in coherence. As a result, European federalism is profoundly asymmetric, taking account of derogations and exceptions acknowledged for some Member States, above all the UK, but also for Denmark, Ireland, and Sweden; even France or Spain. The ECJ has already established that the principle of unity is not thereby jeopardized. In other words, again, constitutionally, unity does not require uniformity. There is, moreover, an enhanced differentiation outside the Treaties, as in the case of the Treaty on Stability, Coordination and Governance.

Supremacy versus the primacy of EU law

Primacy is a feature of EU law that seems to weaken and confront the Member States' formal claim to sovereignty, understood as supremacy. Sovereignty is to supremacy what primacy is to functionalism. According to the classic state sovereignty doctrine, the state legal system will not yield to other laws, unless explicitly incorporated as domestic law; but this precedence is precisely what primacy requires. Primacy is based on a functional rationale: the common, federal norm applies and the contrary domestic rules are set aside, dis-applied but not derogated. They are not deleted or annulled, only set aside for the particular situation where a federal norm governs the case. The domestic norm could still hold in a purely internal situation. No supreme court in Europe has really come to terms with this prevalence – primacy – of EU norms over Member States' constitutional norms. Yet primacy does not imply a breach of sovereignty. Rather, it is a functional manifestation of comity and federalism. Many, but not all, supreme or constitutional courts of Member States find this difficult to assume, and they rely on the need to control to what extent the European legal system respects fundamental rights (the *Solange* logic). Nevertheless, practically all of them, with the possible exception of the Czech Constitutional Court, have tried to avoid direct confrontation through

dialogue, comity, deference, and loyal cooperation. Equivalent devices to prevent conflict and enhance dialogue between national courts and the two supranational European Courts – the Court of Justice of the EU and the European Court of Human Rights – include the notion of equivalent protection (*Bosphorus*), the national margin of appreciation, the *ne bis in idem* principle (e.g. in *Grande Stevens* v. *Italy*), and the *ultima ratio* principle of necessity.

Avoiding sovereignty clashes

The question of sovereignty is complicated. If sovereignty is understood as supremacy, it would need to be distinguished from primacy, as described above. EU law claims primacy but not outright supremacy over national laws of the Member States. Supremacy is a matter of hierarchy within the legal system. But the EU legal system and the domestic legal systems are not in a relation of hierarchy, but rather in a federal relation of division of competencies: for some matters, the EU is the competent legal system, and for other matters, domestic Member State systems are competent. A clash between norms of EU law and of domestic law will normally take place in areas of mixed competence, but the principles of subsidiarity, proportionality, conform interpretation, and primacy will avoid serious clashes. The legal version of supremacy, understood as hierarchical superiority, is thus vertically solved internally, within each system.

The political version of sovereignty is more complex since it raises the issue of legitimacy, the exercise of power, and coercion. Here the source of sovereignty is no longer the state but the citizens. The holder of sovereignty is the people, the demos, the nation. The demos organizes in a community, it institutionalizes itself in such community creating a polity. This polity is the basic expression of sovereign powers. The holder of the powers is the demos, the people; and it decides how to organize itself, how to govern itself (self-government), and how to exercise those powers. Some of those powers are to be exercised exclusively at the domestic level, and they are thus reserved, but other powers can be exercised jointly with other polities, in the context of a federation, like the EU. Some powers are pooled into, attributed to, shared in, and exercised within the federation. The federation is thus the platform for the exercise of those powers that the states have decided not to exercise on their own, but jointly. Formally, the states remain the holders of the powers, but functionally, they cannot exercise those powers other than through the federal platform they have created. If a state regrets having relinquished the exercise of its powers to the federation, it can always decide to withdraw. Exit or secession is always a sovereign option. The original holder of the sovereignty, the domestic demos, has not dissolved nor disappeared. The EU is not, formally, the holder of the titles or the powers. It is the platform where they are exercised jointly. But the Member States cannot exercise those powers on their own. The EU is not a state in international law, but a platform of states. This is the current constitutional predicament of the EU. The federal state in a community of states is the formal locus of sovereignty according to constitutional theory and public international law. The current EU does not go beyond the state in the recognition of the sovereign original power, because the EU is the creation of the Member States.

Thus the state is responsible, as a single legal entity, for any breach, and is considered as a single entity before the EU and non-EU states. This unity and exclusivity of the state has two important corollaries when it comes to its projection into the external sphere: the executive syndrome, where the government tends to represent

the state; and the centre syndrome, where the federal level tends to represent the state to the detriment of the federated entities (Platon, in Potvin-Solis, 2018: p. 484). In some constitutional systems more clearly than others, parliaments or legislative chambers tend to be disempowered *de facto* or relegated to the status of mere checking institutions; regulations and decrees are preferred, acts and statutes are less frequent. The EU can then even become an excuse to recover delegated or devolved powers (Rideau, in Potvin-Solis, 2018). However, the EU does recognize national constitutional identity and therefore does not preclude an understanding of a federal Member State as comprising sovereign polities getting together in such a state. The *Azores* line of case law of the ECJ tends to confirm this growing sensitivity of the EU towards the internal regional autonomy of the Member States.[4]

Deference and comity

The case law of the ECJ has gradually evolved from the initial negative harmonization case law (supranational constitutionalism) towards a friendly cosmopolitan republicanism (Bailleux, in Potvin-Solis, 2018). The Court is more prudent, more aware of Member State preoccupations, more sensitive to their diversity, autonomy, and status, and more obliging towards the European legislature. The risk is that in displaying such comity towards national concerns, the EU citizenship dimension might be devalued. Member States need to be called upon to honour their free movement obligations under the Treaties.

Comity also relates to the principle of consistent or conform interpretation, an expression of the principle of loyal cooperation, limited only by the impossibility of interpreting *contra legem*.[5] This is based on cooperation and a certain margin of appreciation accorded to the national court. The special status of the Member State puts courts in a position of autonomy at the centre of the European jurisdiction, as European courts (Neframi, in Potvin-Solis, 2018). Member States have a duty to provide effective remedies, compatible with the principle of procedural autonomy, and they must ensure access to the "natural judge," allowing them to cooperate through the preliminary procedure.

Faithful submission

Loyalty, faithful cooperation, fidelity, *Bundestreue*, federally-minded conduct, good faith, deference, comity: they are all expressions of the federal spirit. Fidelity is related to loyalty and solidarity, and linked to contractual or agreed obligations and to their founding principles *pacta sunt servanda* and *fides est servanda*; *bona fide*; *foedus*; and shared destiny, i.e. the commitment to share a common destiny. This is, in essence, the telos of the EU, the "ever closer union": this is the point of the EU. Solidarity builds community, the idea of sharing a destiny and integrating, which is related to the principle of reciprocity at a higher level. Member States may have omitted direct reference to this telos in their Constitutions, they may well have avoided federalism politically; but their integration into the EU (negotiation of the Treaties, creation of the EU, accession to the EU, ratification of the Treaties establishing the EU and of the treaties of accession of each new Member State) implies acceptance of integration, community, and union, i.e. the philosophy of loyalty. There is integrity in integration, there is gravitas. They are accepting the federation of their legal systems. This family of terms turning around loyalty is easily compatible with the Member States' submission to the jurisdiction and authority of the Court of Justice: it is an accepted submission, the exercise of a sovereign will to integrate;

thus, it cannot possibly be serfdom or subordination (Godiveau, in Potvin-Solis, 2018). According to Article 344 TFEU, Member States undertake not to *submit* a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein. This is the meaning of submission to the Court.

The ECJ's unfaithful Opinion 2/13, ECHR Accession

The Court got it wrong as regards the EU accession to the European Convention on Human Rights and its Strasburg Court when it declared that the proposed accession treaty was incompatible with the Lisbon Treaties. Part of the problem was that the Court of Justice would have had to submit to the authority of the European Court of Human Rights as the Member States submit to its own jurisdiction. This is not subordination. The Court was wrong to see a threat to the autonomy and the main features of the Union legal system because the Treaty had explicitly accepted and provided for such submission to the Strasburg Court. This is where the Court failed to honour the Treaty engagement to enter the ECHR. Contrary to the Opinion of the AG. An example of comity, what the Court of Justice could have done, can be found in *Roquette Frères*[6] with its exceptionally long *dispositif*, an attempt by the Court to avoid a constitutional clash with the French Constitution and to impose institutional cooperation and dialogue. In spite of those careful judgments, the federal features of Member Statehood are so strong that European law has infused national law, leading the Court of Justice to step in and interpret national law in the context of preliminary references in order to ensure consistent interpretation and prevent incoherence. When the Court goes so far as to interpret EU norms so that they can fit and cohere with domestic law, avoiding unnecessary clashes, it is showing comity (cases *Akerberg Fransson*, *Dzodzi, Leur-Bloem, Giloy*).

4. Back to the state as a Member State: Respect for national identity and territorial integrity

Respect for national constitutional identity is one of the principles that reaffirm the status of Member States, a return to their centrality in the process of integration; but at the same time, it is also a symptom of the federalization of the Union (Mouton, in Potvin-Solis, 2018). It consolidates the right of the Member States to political preservation of their systems of governance (monarchy or republic as the form of state, parliamentary versus republican forms of government, federal versus unitary territorial organization of the state) as well as their political and constitutional principles, including their cultural identity, which may, in some circumstances, justify restrictions or exceptions to free movement.[7]

Art. 4 TEU proclaims their territorial integrity, safeguarding the competence of the sovereign state to defend such integrity. It does not really refer to the well-established principle of non-intervention in public international law – respect of states' borders, *uti possidetis*, and prohibition of the use of force. The principle of

territorial integrity is not meant to address the claim to independence by a part of a Member State. It is rather public international law, and the principle of status quo, that applies, together with the constitutional law of the Member State concerned (Moine, in Potvin-Solis, 2018: p. 514). Accordingly, from the EU constitutional perspective, the EU and its Member States ought to display a restrained silence towards secessionist movements and not interfere either way, as they are part of the Member State's constitutional self-government and internal self-determination. The EU and its Member States will only have to react if secession is successful, in order to decide how to readjust the status of the continuing Member State and to negotiate the status/accession of the new state. New treaties will be necessary to integrate new members, even though the new member was already part of the EU and perfectly in line with it. And, again, public international law will be the guide: the successor state is favoured in order to ensure continuity and stability, unless there is full dissolution. Even a hypothetical armed conflict between two Member States would be governed by international law, not EU law (515), and if there is an external aggression, the NATO Treaty (as an expression of Art. 51 of the UN Charter) would apply to the Member States that are also NATO members, the solidarity clauses of EU law notwithstanding (i.e. Article 42 TEU and Article 222 TFEU for the case of terrorist attacks).

Respect for institutional and procedural autonomy

The Court recognizes the principle of *procedural and institutional* autonomy of the Member State. Institutional autonomy is more of a political and constitutional principle than a general legal principle. Institutional autonomy is related to the principle of internal self-determination or self-organization, i.e., how a Member State arranges its own public institutions and its own sovereignty internally, the territorial structure and separation of powers. Procedural autonomy is more related to, and therefore limited by, the principles of primacy, efficacy or effectiveness, and equivalence of rights. The EU can have an impact on the institutional autonomy principle, however, if it can be shown that the internal institutional arrangement of a Member State is such as to frustrate the very principle of loyal cooperation and hinder the elaboration or execution of EU law. The case concerning the independence of the judiciary in Poland illustrates this point:[8] Polish judges are also judges of EU law, and if their independence and impartiality are put in jeopardy by political interference from the executive, then the application of EU law will also automatically be in danger. Thus, in infringement proceedings, the responsibility of the Member State as a whole is engaged, regardless of how that State is internally organized institutionally. Institutional autonomy is also a principle safeguarding a Member State's self-organization, something to which the EU cannot really object unless it hinders the uniform application of EU law.

Sometimes, however, the EU might require the setting up of specific regulatory agencies or institutions for the purpose of the implementation of EU law. The classic example is in the field of structured markets in the Common Agricultural Policy. But modern instances abound, as in the case of liberalized public services, special sectors, and markets (for example, in the regulation of telecommunications, postal services, data protection, electricity and energy, and most notably, competition). In such cases, EU intrusion into the self-organization of the Member State is paramount, because sometimes governments are prevented from becoming regulatory agencies themselves (Platon, in Potvin-Solis, 2018: p. 481). The degree of autonomy varies from one case to another. In the light of such intrusions, it makes sense to speak of the "integration" of the Member State into the EU (p. 484). The internal self-determination of the Member State is not absolute, even if its sovereignty is formally intact.

Procedural autonomy is a major principle of the judicial self-government of the Member States. As was mentioned above, Member States have freely submitted to the jurisdiction of the Court of Justice. In return they have secured for themselves a special and privileged jurisdictional status in the EU, as litigant or applicant and as intervener. The privileged status recognized by the Treaties is also reflected in the language regime of the Court of Justice, where Member States can always intervene in any of their official languages. This privileged position in no way contradicts the independence of the members of the European Courts – judges of the General Court and advocates general and judges of the Court of Justice – who avoid all sorts of influence from Member State agents. The new mechanisms for judicial appointments foreseen in Article 255 TFEU (screening) have certainly added a Union or federal dimension to the former system, in which national governments had close to full discretion in the nomination of the members they had been assigned in the Statute of the Court. In this sense, too, there is a federal asymmetry in the system of appointment, since larger Member States can always nominate an Advocate General for appointment. But the most notable federal dimension is found in the interactions of the Court of Justice with all domestic courts, regardless of their rank in the judicial organization, through the preliminary reference procedure, and with the highest courts of the Member States through informal judicial networks and regular meetings. However, the high degree of independence of the members of the Court should go along with an enhanced communicative attitude and willingness to listen (Gervasoni, in Potvin-Solis, 2018: p. 507). The communicative hermetism of the Court has occasionally led to heterodox and untoward situations where an individual judge spreads "his or her" Member State's government's messages with the rest of the judges (p. 507). More than a federal question, this firm attitude has to do with respecting the separation of powers and judicial independence, where the legal cultures differ significantly within the EU.

International action of the Member States through the EU

The EU operates on the international scene as an actor, on its own or together with the other Member States, whose competencies are shared and mixed. The EU, as an actor in its own right, cannot be ignored, even though its presence does not rule out international action by the Member States. When a Member State acts internationally, it will do so not as a Member State of the EU but as a sovereign state. Member States cannot rely on the EU in order to escape an international obligation that falls on the state. When France decided not to deliver Mistral ships to the Russian Federation in 2014, contrary to the terms of the agreement between these two states, it acted for its own sake and engaged its own responsibility, although it was conforming to the Council decision 2014/512/CFSP adopting restrictive measures towards Russia because of its involvement in the Ukrainian crisis. Member Statehood does not produce legal effects on third countries, nor can it be assimilated *de facto* to any organ or institution of the EU.[9] If a third state agrees a Treaty with the EU, this does not engage the international responsibility of EU Member States (Tardieu, in Potvin-Solis, 2018).

Problems may appear when the subject matter of the international agreement is a mixed or shared competence. This calls for cooperation or coordination in the sense of Article 34 TEU, so that Member States do not hinder the action of the EU.[10] Indeed, it is important to ensure both the coherence of EU action and the international representation of the EU. Problems are enhanced when

the EU is acting under the Common Foreign and Security Policy (CFSP), which is not listed as a shared competence but where Member States do retain their competence; in fact, it cannot be ruled out that the CFSP is a shared competence. Yet this does not necessarily imply that action by the EU pre-empts Member State action. They are cumulative. Certainly, the duty of loyal cooperation also applies in this area, and acts adopted under the CFSP require Member States to adopt the necessary measures to fulfil their obligations.[11] However, control by the ECJ is limited, "carved out" first and then "clawed back" as regards restrictive measures adopted towards specific persons, in the light of Articles 24 TEU and 40 and 275 TFEU (Lickova, in Potvin-Solis, 2018). The ECJ cannot be prevented from ruling on the delimitation of competencies in order to decide whether a matter falls within the CFSP.[12]

5. Towards a federal framework of Member Statehood in Europe

The state is an idea, a collective fiction, an institutional fact that exists by virtue of a shared widespread belief in its existence, and which institutionalizes itself through norms of law, institutions, and administrative action. As a collective normative fiction, the state constitutes its own existence through law. The modern state in Europe, not just in the EU, is undergoing important political, economic, social, and cultural transformations; and this reflectiveness – that the state is an institution that constitutes the law but is also constituted by the law – is projected onto the Union in a complex manner. The Member State becomes a collective fiction within the EU, but the EU itself also becomes a collective fiction, constituted through the sovereign decision of the Member States, and yet reconstituting those States as Member States and thus somehow transforming their status. Also, crucially, the EU interacts directly with the citizens of the Union, who develop between the Union and themselves a federal bond. This is best understood when put in jeopardy, as with Brexit.

The EU Member States undergo additional transformations related to the constitutional challenge of creating, belonging to, and belonging in a very special international organization that aspires to be a central standard-setting actor in the world, and which may actually be federating to such a degree that the centre of gravity of sovereignty eventually and inadvertently tilts toward the Union. Perhaps this is what integration in an ever-closer union ultimately means. Constitutional scholars in some Member States have developed legal and constitutional theories of state and law, or nation-state and state-law – *Allgemeine (Rechts) Staatslehre, la théorie de l'État (de droit), Teoria dello Stato (di diritto), Teoría general del Estado (de derecho), teoria geral do estado (de direito)* – which explain, ground – constitute – and legitimize the state. They have been reluctantly adjusting to the challenge of European integration, sticking to a core notion of "national" sovereignty that allows its adherents to maintain the impression that the Member States retain their original sovereignty, always culminating in the Kelsenian

pyramid of law and the state constitution. Some Member States feel that the EU is imposing too much integrity on them standards that go well beyond their initial expectations and beyond the scope and intensity of their conferral of competencies on the Union, the centre. Federal dynamics are always in tension.

The EU, furthermore, is sometimes accused of imposing on Member States a neoliberal ideology in the economic sphere as well as political liberalism. The EU has a liberal agenda on fundamental rights, which some Member States occasionally reject. In some Member States political forces that have openly embraced "illiberal democracy" as well as political movements and parties opposing the imposition of austerity measures are a constant reminder of the "liberal" agenda that is often attached to the "federal" project of Economic and Monetary Union, which imposes reduced public spending, and budgetary rigour. The intergovernmental treaties adopted by some of the Member States outside the EU framework on stability, coordination, and governance are a sign of this development, which has seriously transformed the political landscape in Europe.

Article 50 TEU, allowing withdrawal of a Member State from the EU, is probably the ultimate pointer to Member State sovereignty. The rejection of a right to secession is what finally turned the USA into a federal nation. The EU has not formally taken this step, but the difficulties the UK has been experiencing regarding withdrawal show how formalistic and futile these approaches to sovereignty have become. In the case of the UK, the absence, or weakness, of a constitutional state has made such realization especially radical. The most important challenges to Member Statehood have originated precisely in the UK, with the Good Friday Agreement, the Scottish independence referendum, and Brexit.[13] Even the clashes between executive and legislative powers (prorogation) and executive and judicial powers (the two *Miller* cases) in the UK show how disruptive and divisive, long and winding, the road is from Member Statehood back to full statehood. On the most critical readings, the principle of democracy has been sacrificed to the principle of executive fiat representing (law and) state unity and sovereignty. On more benevolent readings, the constitutional system has been unable to accommodate significant changes of status.

The EU needs to renew itself by, amongst other things, better defining its federal relations with its Member States and tightening its bonds with the citizens, who reinforce the feeling of belonging to a shared culture and a shared political system. This would involve articulating the political relations between three levels. On the first, we find the people, i.e., the citizens of the Union creating a new *agora*, and a new demos. On the second, the Member States, who hold popular sovereignty formally, create new areas of cooperation and reinforce existing ones. On the third, EU institutions bring the Member States' institutions, citizens, and other actors – like regions, cities, trade unions, employers' and professional associations, and organized civil society – together under common norms and shared values. Indeed the status of Member State also depends on how we generally approach the state and its relationship to its citizens, its institutions, and its territory – from a purely domestic understanding to a networked transnational and supranational understanding. The traditional view in the theory of state is that the state determines the law and thus all the legal relationships within its jurisdiction: citizens, institutions, and territory. This is nuanced with the status of Member State: equal treatment, equal recognition, uniform interpretation.

There are strong limits to what a Member State, however sovereign formally, can do. An alternative, more

democratic analysis is to see the state as a creation of the law, as a result of the people, the citizens, and norm-users, arranging their own institutions in a bottom-up process that leads to the modern complex state and to the Member State under the rule of law. This is the meaning of democratic self-government: sovereignty is with the people first before national sovereignty. Indeed the people, or rather the peoples coming together in an ever-closer union, can make this national sovereignty evolve into a federal or supranational entity and decide to turn the EU into a Federation, investing their sovereignty in it. Most constitutional courts having problems with the doctrine of primacy/supremacy fall prey to this national sovereignty bias: the state can enter into international treaties with other states but remains free. Other analyses tend to emphasize the dimension of membership: this international treaty, the EU Treaty, is very special because it changes the nature and status of the state, autonomous but no longer free, not fully sovereign. Many European federalists felt a deep disappointment with Opinion 2/13, on Accession to the ECHR, precisely because the Court of Justice adopted a similar defensive attitude toward the question of who has the last word on fundamental rights in decisions that the constitutional courts of the Member States had adopted towards EU law. Not only that, the Court had disregarded the telos of the Lisbon Treaty, which aimed at integration and at allowing the ECHR to have the last word. Most importantly, this is a dynamic process involving and fueled by the citizens, who can bring actions against their states before the Strasburg Court.

This takes us to the second stage of the analysis of the status of Member States, where the citizens decide that the state is to engage in a federalizing process to create a more integrated area of citizens-territories and institutions of government and law-making – or otherwise decides to go it alone. Citizens may wish to start integrating markets with the free movement of goods, people, services, and capital, and with their concomitant policies; and later spread, spill over, or expand into other areas. But they may also decide to withdraw from such integration. The difficult question here is how to define the demos, the citizen body that decides. As we see with Northern Ireland and Scotland, the issue is not easy.

Citizens can thus decide that their state should integrate into none, one, several, or all of the different layers, each with its own status: **(1)** the layer of the classical status of the "sovereign" state in international law (its relation to its subjects, to third-state nationals, and to other states, once the state is projected outwards beyond its jurisdiction); **(2)** the layer of the status of the state as member of intern tional organizations (Council of Europe, NATO) and of special treaties (WTO); **(3)** the common layer of all the Member States of the EU, which deeply changes the status in layers 1 and 2, and itself enters into international treaties of enormous impact like the Paris Treaty to combat climate change; **(4)** the layer of the differentiated levels of integration within the EU (especially the Eurozone and its future development); **(5)** the layer of the international treaties adopted in relation to the EU but outside its legal remit, such as the new Treaties on Governance and Stability Mechanisms following the crisis, adopted by the Governments of the Member States meeting in the Council; **(6)** the layer of international agreements adopted by the EU Member States and other states creating special areas of integration as the European Economic Area, the Schengen Agreement, and the Erasmus agreements; and **(7)** the layer of cosmopolitanism, where the EU itself becomes a building block of a reformed United Nations. The sovereign and democratic decision of the citizens, acting as the demos, would then transform the idea of state and Member State.

At this point, we could move to a third stage of the analysis and ask how we can rethink the status of (Member) State in the light of these possible developments. Rethinking Member Statehood involves three dimensions: the formal sovereignty dimension, the governance dimension, and the symbolic "identity" dimension. Formal sovereignty is state personality in international law, related to independence, territorial integrity, and external self-determination. Here the formal or legal challenge posed by status of Member States in the current constitutional make-up of the EU is minimal. The principle of attributed powers, the veto power of the Member States, and Article 50 tilt the formal sovereignty scale toward the Member State, which remains a classical state for the few remaining non-EU matters.

Governance is the dimension where integration into the EU has had a huge impact on statehood. This is the domain of internal self-determination. The legal and constitutional systems are transformed: supremacy is a huge challenge, but primacy, direct effect, direct applicability, conform interpretation, procedural and institutional autonomy, liability for breaches, and Member State responsibility are important features of Member Statehood. Legal complexity, unity in diversity, and constitutional pluralism are possible dialectical syntheses to the perceived challenges. But the administrations and even reserved policies are also affected. Multilevel governance, regional policy, structural funds, common agricultural and common fisheries policies, smart regulation, budgetary discipline, and deficit control are examples of these changes. The impact is enormous and the classic "state" has morphed for good.

Finally, the symbolic, cultural dimension of statehood is the most difficult one to analyze and to manage; but, in my view, important transformations are taking place. In essence, the question is how the "national" dimension of identity is negotiated. This can be done following pluralistic, post-national liberal models, open to overlapping identities: e.g. thinking and feeling and acting as local, regional, national, complex European persons, embracing multilingualism, and opening to difference and tolerance. The alternative is to emphasize national identity, with the risk of reverting to populism and xenophobia and rejecting multicultural societies. The strong identification of nation-state and national identity was one possible symbolic expression of the state, but not the only one. Complex and pluralist polities have existed in Europe in the past – the Austro-Hungarian Monarchy, the Ottoman Empire, the British Empire – and they have been experiments in federation *avant la lettre,* before European integration was launched, involving a new understanding of the state.

III. Pluralism in law and the multinational nature of Europe (inside the EU and inside the Member States)

There are three types or expressions of pluralism in Europe: **(1)** cultural pluralism, usually portrayed as multiculturalism; **(2)** legal pluralism or normative diversity; and **(3)** constitutional pluralism. Multiculturalism in Europe, traditionally linked to national minorities, regionalisms, and nationalisms, to sociologically complex societies with an increasing number of subcultures, or to ethnic and/or religious diversity is now increasingly the result of immigration and religious diversity in globalized European societies. This rich plurality brings with it not only a diversity of lifestyles, beliefs, mores, languages, looks, fashion, attire, gastronomy, and the like, but also social (religious or moral) norms concerning aspects like family relations, marriage forms and rights and duties of spouses, divorce, and many other matters that can be considered as forms of law. The result of this cultural diversity, in the normative domain, is something close to what legal sociologists, anthropologists, and comparative scholars call "legal pluralism." In debates around it, the state, and its official reaction to such diversity, occupies a prominent role.

However, the transformations of the state in the European Union into a Member State, and new transnational and global legal phenomena, give rise to new forms of pluralism that need to be accounted for. It is worth analyzing the way in which such diversity of social and legal norms is integrated into a new European system protecting fundamental rights and claiming to have a final say on the many, ever-growing areas of European legal concern. Member States and their constitutional courts remain central actors, but they are no longer the sole and perhaps no longer the ultimate custodians; and this new *polyarchy* gives rise to discussions labelled under the term constitutional pluralism. How are these three forms of pluralism connected, if indeed they are? Here is a fine question for social scientists and methodologists interested in the law, but it also encompasses issues of normative and constitutional prognosis. One is whether a European People, a constituent demos, will eventually conform, giving rise to a new discussion of pluralism and monism which it might be interesting to compare and contrast with the federal constitutional foundation of the USA, or with the plurinational and federal redefinition of Canada. The current context of European crises, where these different forms of pluralism are interacting, makes it necessary for scholars and citizens to understand diversity within Europe, to analyze cultural plurality and the legal claims and challenges that it generates. These affect the legal system and institutions at all levels – vertically, at the local, regional, state, and supranational levels; and horizontally, throughout all spheres of social life – to see how the different responses at these levels themselves create a new pluralistic picture.

1. Pluralism in Europe

Rights and obligations in Europe are assigned to individuals. In a very important sense, as Stanford professor Lawrence Friedman argues, *the Human Rights Culture* is individualistic. But clearly, individuals are not *noumenal* or atomistic units and many of their rights and obligations become meaningless without the social, community, or group dimension. Clearly, rights have a social and collective dimension,[14] but the concept of "group rights" is hotly debated. The point is not that rights are vested in groups; the suggestion is rather that (some) individuals conceive of and lead more valuable lives through their membership of groups ("rights through a group"), rather than being left on their own to devise their vision of the good. Other individuals are perfectly happy with Margaret Thatcher's provocative line: "there is no such thing as society." We can be normatively individualist but cognitively social or communitarian, and some individuals and cultures prefer community orientation in moral issues. European legal culture tends to be individualistic in a normative sense, but Europe is characterized by diversity, plurality, and complexity in a cultural and social sense.

There are over thirty widely used languages in the EU, not all of them official, and fifty more in Europe altogether; a handful of major world religions together with a plethora of non-religious and anti-religious beliefs; and a rich collection of traditions and histories associated with ethnic and national minorities. Some of the national minorities in the EU happen to be majorities in other territories, territorially separated from the state of their national identity. This is the case, for instance, of Hungary and the Magyar in Romania, or of Serbian Kosovars and Muslim Serbians in Kosovo and Serbia, a thorny reminder of the complex linguistic, ethnic, national, and religious mosaic in the Balkans. Others are non-territorial minorities (the Roma or "gypsies"), and, scattered mostly in the major metropolitan areas, there are communities of immigrants and, and urban subcultures. Cultural diversity in Europe therefore springs from a diversity of sources:

- National, cultural, or linguistic minorities (e.g. Serbians in Kosovo after independence in 2008, Kosovars in Serbia before 2008, Catalans in Spain, Kanaks in France);
- Immigrant groups with organized religious claims (e.g. Muslims in Europe);
- Non-territorial ethnic minorities with a special way of life and distinct culture (e.g. the Roma in Europe);
- Other heterogeneous groups: sub-urban minority groups and sub-cultures, rights-groups claiming accommodation and recognition of their difference (based on gender, sexual orientation, disabilities, lifestyles, diet, ideologies, age);
- Other cases that are hard to classify (e.g. Gibraltarians in the UK resisting Spanish sovereignty claims and maintaining privileges under the Commonwealth and the Crown, or Russians in Latvia).

This is a pan-European classification. The classification may differ in each of the European Member States. It will be different in Portugal, in the UK and within the UK, from England to Scotland, from Wales to Northern

Ireland; and it will be different in Finland, in Slovakia, in Latvia, in Austria or in Greece, to name but a few. In other parts of the world, multicultural studies focus on other major sources. In the USA's melting pot, indigenous peoples, immigrant communities, and racial and religious minorities get more attention than national minorities. In Canada, national and linguistic minorities are more often brought to the fore. In India, religious, cultural, and national minorities, along with their class stratification, are commonly highlighted. One of the key distinctions regarding the study of pluralism, cultural and legal, is the distinction between the descriptive-interpretative aspect of pluralism and the normative or practical-reason discourse. In the former, pluralism, a social fact, is better referred to as plurality or diversity, and its counterpart would be uniformity. In the latter, the term pluralism or multiculturalism is apt to convey the idea that such diversity is to be accommodated and advanced within a given social space, and its antonym would be monism or simply assimilation.

Multiculturalism calls for political accommodation by the state and/or a dominant group of all minority cultures and coexistence between groups, whether by reference to race, ethnicity, religion, language, nationality, or aboriginality. Studies of cultural diversity or plurality and normative proposals of multiculturalism draw from each of these different groups. Some methodological risks that follow from confusing the two dimensions when analyzing the social space include **(1)** confusing the two types of discourse, descriptive and normative; **(2)** prioritizing one type of minority over the others; **(3)** ignoring the presence of other minority groups; and or **(4)** forgetting to bring other minorities into the light and into practical discourse when advancing claims of one particular group. Meer and Modood, two sophisticated and methodologically aware scholars, prioritize immigration (and thus religion) over sub-state nations in the West: "[D]espite Kymlicka's attempt to conceptualize multiculturalism as multinationalism, the dominant meaning of multiculturalism in politics relates to the claims of post-immigration groups" (Meer and Modood, 2011, p. 7). From a practical-reason perspective, these groups all make social, political, and legal claims on rights and policies in various ways. They all claim (official) recognition of their difference, non-discrimination, and resistance to assimilation; they all aim at participation in social and political life of the polity (the wider organized society) and call for a nuanced understanding of the principle of equality as non-discrimination and awareness to difference – treating like cases alike and not treating unlike cases alike.

Depending on their identities, and on their perceived needs and interests, each of the identified categories of groups make specific claims. For example:

- National minorities make territorial, cultural, or linguistic claims, demands for devolution and self-government, and for official recognition and constitutional accommodation;

- Religious groups claim respect, tolerance, and freedom to pursue and practice their own, distinct view of the good;

- Ethnic minorities claim non-discrimination, equality, and special measures of inclusion or positive discrimination (indigenous people have special claims related to their territories and local knowledge and way of life, whereas non territorial ethnic minorities have cultural and recognition claims);

- Other groups claim non-discrimination, respect, and support for their special social or cultural needs.

It is the role of a sociologically-minded legal theory and political science to study and explain such claims or demands; and it is the role of the philosophy of practical reason to study and critically assess them. This is the most difficult but a quite credible approach to "pluralism": it tries to study and understand the types of claims and the responses – legal and political strategies, reasons and techniques – to those claims, and defers the evaluation of these debates to a latter stage.

Claims for access, power, empowerment, recognition, tolerance, respect, and equality are made before different institutions: legislatures, policy-makers, jurisdictions, and public administrations. They are also made before non-public organizations (e.g. mass media, cultural industry, telecommunications, educational sector, labour environment, political parties, trade unions, NGOs). Public institutions, organizations, agencies, and bodies with an authority to make general norms and determine public policies or to apply those general rules and generate individual norms, respond to these "supply-side" claims in different ways:

- Containing demands for the recognition of difference against minority claims;
- Reinforcing equality as "uniformity" or assimilation, denying the relevance of difference;
- Reconstructing equality as non-discrimination, recognizing a claimed difference;
- Granting special rights of representation for collectivities (often seen as special privileges);
- Recognizing and accommodating differences (from reasonable accommodation to full-blown pluralism and programs for inclusion);
- Mainstreaming the differences and encouraging a normative and communicative relationship between majority and minority positions, either through legislative measures or judicial recourse to equity and exceptions.

These responses take place at different levels, with different institutions or legal strategies (e.g. the adoption of general, universal norms or dispute resolution through litigation or alternative methods); and they vary according to territorial-institutional perspectives. They have a lot to do with access to power and power-sharing. Constitutional theory, administrative law, and sociologically-informed legal theory, amongst other academic disciplines, ought to analyze such responses in an interdisciplinary and comparative way.

Depending on the powers or competencies assumed by each institutional arrangement, and on the types of demands and the types of norms and decisions adopted, the reactions vary greatly across institutional levels, including the

- Local level, e.g. where permits are issued for the building or opening of a new mosque, where family counselling services are provided, and where accommodation or rejection usually takes the form of administrative decisions;
- Regional level: where housing and social benefits are often determined, along with health, tax, education, cultural, and infrastructure policy, and where policy can take the form of legally recognized and enforceable rights or administrative decisions;
- Member State level: where immigration, labour laws, justice, and Human Rights constitutional controls are determined with reference to universal norms,

social and cultural policies, and judicial decisions at the highest courts;

- Supra-state, European level (with its very complex governance): here is attempted the harmonization of laws, the facilitation of free movement, internal markets, non-discrimination directives, 15 promotion measures and programs, and the implementation of judicial decisions.

Multiculturalism can be seen as a comprehensive normative theory guiding public policy and decision-making in different domains. Different responses are then also controlled, overseen, or supervised by European supranational institutions with reference to commonly shared European values and standards as recognized by and interpreted through Human Rights instruments. These range from those set by the Council of Europe to those set by the United Nations.

Interesting tensions and dynamics obtain as to the descriptive-interpretative question of who sets the standards. As mentioned above, to the extent that a "European" consensus may have emerged, the local versus federal margin of appreciation will decrease; and to the extent that the challenges at stake need to be and actually are tackled effectively at a wider regional European scale, the scope for subsidiarity and proximity of decision-making to the citizens will diminish. The focus on pluralism in Europe will clarify who is ultimately interpreting the standards on issues like the headscarf prohibition in public spaces or certain institutions; the display of the crucifix in Italian public schools; Roma access to sites for camping; etc. It is also interesting to note the Human Rights review of UN Security Council decisions that is reinforced at the EU and Member State levels.

The challenges might be less controversial within a homogeneous society or in a seemingly consensual society where divergent voices did not garner media attention – according to the principle that national authorities know better and thus need a margin of appreciation – but they will be much more controversial in a plural and multicultural society, and they will be closely examined from a wider European perspective where the notion of societal consensus is on important issues regarded with scepticism.

We engage in the evaluation of these normative questions from the standpoint of critical discourse theory, and of a new understanding of law and its legitimacy. The result of this situation of multiple forums or public spaces of debate where multiple (sovereign) authorities are trying to find their way in a complex institutional patchwork is a diversity of normative claims. It is not only a question of who gets to interpret and decide the extent of competencies (or powers), but also a question of where ultimate authority lies. In other words, what is the foundation of sovereignty itself and whose normative standards are going to be followed: is it, as the state-nationalists claim, on the side of the Member States or is it, as the European federalists claim, on the side of the EU? Looking at the cases where European supranational courts have reviewed UN Security Council resolutions on the basis of Human Rights, or at the cases where the ECHR has controlled EU Member States' normative standards and practices or their wrongful implementation of EU policies, the question is who is the legitimate interpreter, who is master. This raises the challenge of locating powers in a federal system.

2. Federalism and constitutional pluralism

The first, state-nationalist, solution rests on the fact that the Member States willingly confer, vest or invest some of their sovereignty in the Union in order to exercise it in this new forum; they relinquish the *exercise* of that sovereignty but not the title itself. The federalists in contrast claim that Member States have relinquished or conferred state powers onto the Union with the result that they can only jointly exercise those powers in the context of the EU decision-making. If they wish to exercise those powers on their own they have to leave the Union. Both positions tend to embrace monism and shy away from dualism or pluralism. Challenges in this area have sparked off the discourse about "constitutional pluralism" in Europe.

This discourse, which can be understood as constitutional "dualism" in an EU framework, was first theorized by Neil MacCormick. It was elaborated by Julio Baquero, Marco Goldoni, Jan Komarek, Nico Kirsch, Mattias Kumm, Miguel Poiares Maduro, Agustin Menendez, Daniel Sarmiento, Alec Stone Sweet, Kaarlo Tuori, Neil Walker and Aida Torres, incorporating the perspective of the ECHR. The main idea of the "constitutional pluralists" is that there is no, nor should there be, any final authority or sovereignty; there is no clear European demos that could self-proclaim its identity or constitute itself by an illocutionary act. On the other hand, there are no longer sovereign nation-states of the old, one-dimensional Westphalian Europe, but rather European Member States. Statehood in Europe has become Member Statehood, and the different demoi of those Member States are at the same time the citizenry of the Union: pluralism and heterarchy prevail. Yet as Avbelj and Komarek concede (2012: p. 4), "the world pervaded by plurality also requires a minimum degree of coherence and, more importantly, it calls for a meta-language through which the actors situated at different (epistemic) sites could reflexively engage with each other by recognising their differences with a simultaneous commitment to a certain shared framework of co-existence." In other words, although *descriptively* pluralists many of these scholars become *normatively* more nuanced.

There are good cognitive and normative reasons for giving up the nation-state claim to sovereignty. It is true that we find in the EU at least 27 ultimate authorities, each claiming legitimacy and supremacy; it is nevertheless the case that each of them are part of a wider Union where they share their sovereignty and their constitutional values, and also part of the European Convention of Human Rights to whom they are jointly accountable: each of them abide by the supranational decisions of its Court, based in Strasbourg, and, following the Treaty of Lisbon (Article 6), so should the EU formally and legally submit, as it now does as a matter of general principle. Perhaps, then, where the highest domestic jurisdictions see heterarchical relations; and non-conflictual, constitutionalist scholars see bridled pluralism; the European courts, especially the Court of Justice, see an understandable national reluctance to digest the "systemic necessity" of supranational primacy, a foot-dragging to be cured with patience, modesty and well-grounded pedagogic judgments. Cormac MacAmhlaigh points that with regard to the ECHR, domestic courts can claim that they are upholding the values of the Convention while disagreeing with the Strasbourg Court's interpretation thereof, but that with regard to EU normative conflicts, domestic courts must uphold the rule of EU law, which will not always be easy and may lead to occasional insti-

tutional disobedience. This can be viewed as the normal development and evolution of any (hierarchical) constitutional system.

The constitutional pluralism devised by public lawyers can also be seen as a new "ideology" in the sense of the term given by Clifford Geertz, provoked by the difficulty of providing an adequate image of the political process according to traditional models, like that of the sovereign nation-state. In *The Interpretation of Cultures* (1973), Geertz considers ideology as a response to the cultural, social, and psychological strain provoked by a loss of orientation derived from an inability to comprehend – for lack of models – the universe of civic rights and responsibilities in which one finds oneself: "The development of a differentiated polity may and commonly does bring with it severe social dislocation and psychological tension. But it also brings with it conceptual confusion, as the established images of political order fade into irrelevance" (p. 219). I believe this is what has happened to nation-state constitutionalists vis-à-vis European constitutionalism: constitutional pluralism and meta-constitutionalism are ideological adaptations to avoid both the traditional and dated position of state nationalism and the promised supranationalism and cosmopolitanism to come. If we add to this picture the gradual development of a forum or agora which becomes the instance where the decisions required to face the economic and financial crisis can become effective, and where the social solidarity necessary for inclusive strategies to manage cultural diversity inspires harmonizing measures, then gradually we will see the waning of the nation-state as the only or even the main forum of sovereignty, deliberation, and decision-making on issues of practical reason.

If pluralism were limited to the constitutional topos – the (nations or peoples constituted through the) Member-States versus the Union – it would still be normatively and institutionally relevant under the subsidiarity principle and federal, globalizing dynamics, but it would fail to capture the cultural and legal diversity and plurality that characterises Europe. We need not only a vertical, federal dimension of distribution of powers but a perspectival and aspectival (kaleidoscopic) approach (James Tully). We know that the most important aspect of pluralism is not this constitutional "exceptionalism" of contested but coordinated supremacies but the diversity of institutional *normative orders* that may obtain in any given social field at multiple levels involving multiple regulators. These can be analyzed following the methods developed by cultural anthropology, even if, as legal theorists or philosophers, we consider it desirable to strive for some form of "coherence" and meta-systematicity. Let me develop this.

3. The theoretical framework for legal pluralism

MacCormick saw law as "institutional normative order." This concept suits all forms of pluralism, with different norms interacting discursively, directing socially meaningful action. Thus, under a single theory, I move towards conclusion by addressing two dimensions of pluralism, descriptive and normative: the existing plurality of normative (and legal) orders and a principled strategy for integrating, recognizing, and accommodating this plurality.

(I) The diversity of institutional normative orders: Rethinking and recapturing normative diversity in Europe.

People guide their social behaviour with reference to norms and to that extent order and normality obtain. When conflict arises, norms develop to deal with it and sometimes the norms according to which people guide their behaviour get modified as a result. Norms are at the same time action-guiding and action-justifying factors and the domain of the normative ranges from moral norms (mores) to the highly institutionalised legal norms of modern state administrations and supra-national organisations; from the relatively few precepts following from a given religious domain of social life to the comprehensive and extensive domain of contemporary state legal orders covering practically all areas of social life. Where lines should be fixed between social, moral, aesthetic, ethical, economic, political, religious, and legal norms is not always clear. It can be a matter of degree rather than category.

All of these norms have social sources – action-guiding, justificatory and critical dimensions – and at given times they can clash. To the extent that norms become institutionalized they tend to juridify. Rather than legal pluralism, such situations are better described or captured under the concept of normative pluralism.

State (official) positive law appears historically as the most complex and highly institutionalized of all normative orders, with refined, all-encompassing (comprehensive) and commonly shared rules of recognition; with a system of legislatures and of distribution of legislative powers to adapt the normative order to changing environmental and institutional circumstances; and with a network of administrative authorities to implement such general and universal norms into more concrete policies and individual acts. A system of courts can in turn authoritatively adjudicate upon possible disputes between citizens and/or administrations and there exists a stable monopoly on the (authorized) use of power to enforce such decisions.

But this is a gradual scale rather than an absolute category of state law. It might be the case that a less complex normative order manages to regulate certain spheres of social life and operates within the confines of the state with its latent consent or even without the state officials acknowledging its existence. If actors guide their action and solve their disputes according to those orders, they can be considered forms of law. On top of these "normative orders" we observe that there are other regulators or standard-setters alongside state administrations and legislatures, and we also observe that there are other forums or instances of dispute resolution besides state courts. These regulators and dispute resolvers operate within and outside of state institutions, from the local level to the transnational one, and they are the subject of new legal pluralism studies and new forms of governance.

It might also be the case that above the legal order of the state we are witnessing the development of an even more sophisticated, multi-level, and multi-actor system of governance and regulation. State law purports to be the centralized regulator, the "chief enabler," the hub of all forms of legal recognition. For the moment it seems that this is (still) a plausible claim; however, the types of regulatory challenges we have seen in area of cultural and legal pluralism, and the challenges posed by constitutional pluralism, could lead us to nuance this statement. In the EU context, this is obvious despite and indeed as a result of the crises.

(II) Pluralist claims to validity and the search for cosmopolitan frameworks

Attention to the diversity of normative orders can capture an important aspect of law as an institutional action-guiding and action-justifying order, but the law adds an important dimension, which is the claim to legitimacy or validity: normative orders make a claim to their correctness, legitimacy, or validity, and it would be pragmatically self-contradictory and self-defeating for a normative order not to make such a claim. A normative order that does not make any claim to legitimacy would be considered as incomplete or purely technical. In contrast, the internally binding character of the law is based on its claim to acceptability, and to relative validity within a given community.

In making such a claim, the law enters the broader and deeper domain of practical reason, where, in ideal discursive conditions, it can be contrasted with other co-existing normative orders making equally forceful claims to validity. We now face a new dimension of the issue of plurality of validity claims, not only of constitutional systems, but also of all normative domains of practical reason – ethical theories, moral systems, religious codes, political moralities and ideologies, different law-like orders within the same social space or transnationally.

Again, if each claim is anchored in appeals to legitimacy, and some of the normative systems – e.g. major world religions – make an additional claim to universal validity, we might asks whether there could be meta-normative or transcendental practical criteria to deal with contrasting appeals to legitimacy. Are there and can we find any common, shared criteria, independent of the internal logic of these claims, with which can evaluate their premises? If we answer in the negative, then we are drawn into incommensurability and ethical relativism, a position sometimes wrongly identified with multiculturalism. If we answer in the affirmative, we need to substantiate our position with credible criteria and theories for a cross-system evaluation: theories and normative proposals like liberalism or versions of it (Ackerman, Dworkin, Rawls), communitarianism or versions of it (MacIntyre, Sandel, Selznik, Taylor, Walzer), libertarianism or versions of it (Hayek, Nozik, Oakeshot), social-welfarism, or different conceptions of the common good, in debates stretching back to Aristotle.

We could also envisage procedural criteria that focus on the discursive conditions for making and testing validity claims: for example, Rawls's veil of ignorance and reflective equilibrium, Kant's golden mean and categorical imperative, Habermas's ideal discourse, or MacCormick's Smithian Categorical Imperative. We could alternatively envisage substantive criteria like Dworkin's rights thesis or MacCormick's and Alexy's fundamental rights. Perhaps the Human Rights Culture is the hermeneutical synthesis.

In doing so, we also reintroduce popular mobilizations and claims for Human Rights, for participation and deliberative democracy, but also the supervision and control by the key European supranational institutions, the European Court of Justice and the European Court of Human Rights; and these are important aspects of the Cosmopolitan vision of Europe. As regards Human Rights standards, social inclusiveness and solidarity, this seems to be the way to recapture the inspirational combined sovereignty of the abandoned constitutional treaty.

Member States and Autonomous Constitutional Regions could be accorded a margin of appreciation and subsidiarity based on local standards, but there could be Europe-wide supervision and control on the basis of agreed standards and the pursuit of consensus.

4. Federalism and cosmopolitanism

This fine balance could be carried through to issues of cultural pluralism and accommodation and to the coupling of economic and social constitutions. But Europe as a project covers other important domains, many of them related to global risks, including in the areas of security policy and the environment. As regards other domains where competition and relocation are easier, like economic cooperation, the EU still has to take the lead, that is, coordinate. Many economic policy areas like welfare, monetary policy, regional cohesion, and fiscal solidarity are crucial areas for cooperation, coordination, and harmonization if Europe is to find the balance between the social constitution (now largely under Member State control) and the economic or monetary constitution (now under EU control).

Strategic decisions need to be made in order to face the risks and the crises threatening Europe. The euro is falling prey to internal and external predators because, according to those who are making the key decisions, there are no mechanisms to react other than austerity and structural reform. Populism – a mix of nationalism, Euro-scepticism, and xenophobia – and anti-cosmopolitan feelings are in the air and the worst strategy is to play into them. Brexit has set off all the alarms. The alternative is federal solidarity, economic, monetary, social, and cultural solidarity, a reflective equilibrium between the economic and the social constitutions, and pluralistic federal dialogue between European citizens and European peoples inspired by the cosmopolitan legal order and human rights.

IV. Conclusion: Emancipatory federalism

All federations are susceptible to endemic and relentless stresses, strains, and tensions, since it is in their very nature to be constructed along established cleavages that have political salience. The principle of accommodation implied in federalism is the formal recognition of the legitimacy of the demands of minorities that are a majority within delineated territories. The same principle applies towards minorities in a stricter sense. As Ronald Watts notes, "federations fundamentally involve *territorial* distributions of authority" and are thus "better suited to accommodate minorities that are territorially concentrated in regional units rather than where they are geographically dispersed, since in the former situation the interests of the minority can be expressed through being a majority within a self-governing regional unit." If federalism addresses the territorial tensions, liberalism and republicanism address the recognition and participation of diverse groups and communities within the territory. Internal plurality and territorial plurality are part of a coherent framework that maximizes individual autonomy (freedom) within the group, recognizes distinctive communities, enhances their self-determination in the polity, and at the same time fosterers shared values. Portraying communitarianism as a threat to the polity, as President Macron has, undermines the normative aspiration of pluralistic federal thinking: namely, emancipatory federalism. Heterogeneity and diversity are structural features of the EU. In order to capture the full "diversity of pluralism" in Europe, five steps would need to hermeneutically combine the descriptive and the normative approaches, i.e. the fact of plurality and the desirability of a maximum degree of accommodation, tolerance, and recognition.

(I) To begin with, and remaining at the institutional level, we need to accommodate the wealth of pluralities on a vertical territorial axis, from the local to the global. This is the identification of multi-level governance.

(II) Next, we need to examine the inclusiveness claims at each of these levels – from the local through the European – and ask ourselves whether important communities or groups might be excluded from each of the pluralistic mosaic of "communities." For instance, is this EU only a club of nation-states? Are nation-regions or national minorities forced into the straight-jackets of their Member-States, like Quebec in Canada, Scotland in the UK, or the Basque Country in Spain and in France? This is the challenge of participation of the territorial entities in the higher levels.

(III) We would also need to be aware of the fact that these territorial jurisdictions, at each level, are implicitly contested or challenged by legal pluralism at the level of norms or even normative orders that are competing if not as global regulators, then at least in specific areas of social regulation (typically family law, but also commercial law) and at local, regional, national, state, transnational, supranational, and international levels. This raises, again, the classical issue of legal pluralism, or the coexistence of normative orders that could be called minority legal orders. There is not only a plurality of norms, there are also alternative forums and methods of dispute resolution at each of these levels. "Where the practices of communities or individuals do not conform to State law requirements, or where communities turn to their own legal regimes or tribunals, the reasons behind these developments need to be understood."

(IV) Then, we could continue on a horizontal axis of inclusiveness to study if there might be groups or collectives that are not territorially based but are neglected or ignored since they are under the sovereignty of institutional bodies that do get formal representation in the polity. It might be that in new forms of governance the same type of stakeholders (repeat players) get to set the standards, because they are better mobilized, or consulted more regularly, or are more powerful. We can find inspiration in theories of multiculturalism or inter-culturalism, and even in more group-oriented communitarian theories, to favour inclusiveness and participation.

(V) Finally, "the wind of freedom blows" within minorities as well; this inclusiveness has to be carried deeper, as an ideal normative framework, to each of the communities claiming recognition of difference, through inquiry into how each of these groups is itself handling internal endogenous claims of difference and of individual autonomy or personal self-determination (internal minorities). This is where we reintroduce important values of liberalism and individualism as enshrined in most of our Human Rights instruments. Here, obviously, we are ideologically inspired by values of liberty and autonomy. Only in this sense can we ever ensure the emancipation of the individual. Not only communities or peoples need recognition. People within those communities need their individual freedom to choose their forms of life. Emancipation should also be from forced belonging or imposed identities. Emancipation as self-determination for communities, even when they are not territorially-circumscribed, encompasses cultural self-government, accommodation, and participation in the polis. Federal self-government for distinct communities that are territorially defined ensures self-government and participation in the larger polity – in the federation.

1 https://www.lefigaro.fr/politique/macron-le-port-du-voile-dans-l-espace-public-n-est-pas-mon-affaire-20191024

2 Although the EU is not a federal state, as a polity it can be seen through the lenses of federal principles. See Koen Lenaerts, "Constitutionalism and the Many Faces of Federalism," *American Journal of Comparative Law* 38 (1990): pp. 205–263; Daniel Halberstam, "Comparative Federalism and the Role of the Judiciary," in Keith Whittington, Daniel Kelemen, and Gregory Caldeira, eds, *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008): pp. 142–165.

3 The most recent and comprehensive analysis can be found in Laurence Potvin-Solis, ed., *Le Statut d'État membre de l'Union européenne* (Brussels: Bruylant, 2018).

4 See Case C-88/03, *Portugal v. Commission*, EU:C:2006:511, and especially the Basque taxation systems judgment, Joined cases C-428/06 to C-434/06, *UGT de la Rioja*, EU:C:2008:488.

5 Case C-441/14, *Dansk Industri*, EU:C:2016:278; Case C-282/10, *Dominguez*, EU:C:2012:33.

6 Case C-94/00, *Roquette Frères*, EU:C:2002:603.

7 Case C-391/09, *Runevic-Vardyn and Wardyn*, EU:C:2011:291.

8 C-619/18, *Commission v Poland*, Judgment of 24 June 2019.

9 Bosphorus, ECtHR judgment of 30 June 2005.

10 Case C-246/07, *Commission v. Sweden*, EU:C:2010:203.

11 Case C-355/04 P, *Segi*, EU:C:2007:116.

12 Cf. Case C-72/15, *Rosneft*, EU:C:2017:236.

13 Also, and much more tragically in Spain, with the criminalization of the Catalan secession movement, where the criminal justice system is mobilized to deter any temptation to question State sovereignty.

14 Jürgen Habermas, *Between Facts and Norms* (Cambridge: Polity, 1996), p. 88: "At a conceptual level, rights do not immediately refer to atomistic and estranged individuals who are possessively set against one another."

15 The EU anti-discrimination directives do not provide an equal level of protection: (Race) Directive 2000/43/EC prohibits discrimination on the ground of race in the areas of employment, education, social protection, social advantages and access to goods and services, but (Framework Employment) Directive 2000/78/EC forbids discrimination on the ground of religion only in the area of employment. The general anti-discrimination directive proposed by the Commission in 2008 and covering sexual orientation, age, disability and religion or belief in the areas of access to goods and services, education, social protection and social advantages, is still blocked in the Council.

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LES GRANDES CONFÉRENCES DU CAPCF

Les **Grandes conférences du Centre d'analyse politique : constitution et fédéralisme** se tiennent deux fois l'an et bénéficient du soutien financier du Programme d'appui à la recherche instauré par le Secrétariat québécois aux relations canadiennes (SQRC) du Gouvernement du Québec.

Ces conférences souhaitent exposer à la fois la communauté scientifique et le grand public aux débats actuels autour des enjeux sociétaux, culturels et politiques les plus à même d'améliorer les relations intercommunautaires et de réimaginer les relations intergouvernementales sur une base plus égalitaire. Pour ce faire, cette nouvelle série de conférences donne la parole à des chercheurs et des professeurs établis dont les travaux ont ouvert de nouvelles pistes de réflexion et remis en question les cadres conceptuels et normatifs dominants.

Le Québec en tant que société distincte, en tant que région-État, nation, membre de la fédération canadienne et en tant que sujet politique sera naturellement au cœur des travaux des chercheurs mobilisés dans le cadre du présent projet scientifique.

The **Major Conferences of the Centre for Political Analysis: Constitution and Federalism** are held twice a year and receive financial support from the Secrétariat québécois aux relations canadiennes (SQRC) of the Government of Quebec's Canadian Relations Support Program.

These conferences aim to expose both the scientific community and the general public to current debates pertaining to societal, cultural and political issues with a view to improving inter-community relations and re-imagining intergovernmental relations on a more egalitarian basis. To this end, this new series of conferences gives a voice to established researchers and professors whose work has opened up new vistas for reflection and challenged the prevailing conceptual and normative frameworks.

Quebec as a distinct society, as a region-state, as a nation, as a member of the Canadian federation and as a political subject will naturally be at the heart of the work of the researchers involved in this scientific project.

Alain-G. Gagnon, Directeur

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