

Article

## Multiheaded Federations: The EU and Canada Compared

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### Abstract

The purpose of this article is to assess the merits of comparing the EU and Canada from a federal perspective. The point of departure is that both are federal-type entities that represent deviations from the standard or mainstream American model of federalism. That has given rise to alternative conceptions, multilevel governance for the EU, and a multinational federation for Canada. The article discusses the limitations of each such notion and instead argues for the merits of seeing both as different versions of multiheaded federation which is a useful analytical device for analyzing contestation over federalism within federal-type entities. This notion directs our attention to those with power and in the position to shape the political system's federal-constitutional nature and design, which normally happens in the realm of constitutional politics. It is the fundamental struggle over sovereignty within a federal-type structure that gives rise to the notion of a multiheaded federation—there are multiple heads because there is no willingness to accept a hierarchical arrangement. The notion of a multiheaded federation is particularly suitable for capturing (de)federalisation processes and dynamics.

### Keywords

Canada; European Union; federalism; multiheaded federation; multilevel governance; multinational federation

### Issue

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### 1. Introduction

The purpose of this article is to assess the merits of comparing the EU and Canada from a federal perspective. The point of departure is that both are federal-type entities that represent deviations from the standard or mainstream American model of federalism (Baier, 2005; Hueglin, 2013; Hueglin & Fenna, 2015). Such deviations have spurred analysts to develop alternative models, which are important to examine in order to clarify similarities and differences between the EU and Canada from a federal perspective. The EU is often depicted as a system of multilevel governance, a mode of political organisation whose relationship to federalism is at best ambiguous. Canadian scholars have long discussed what kind of national community—if any—Canada constitutes (see, for instance, the contributions in Simeon, 1977). Today there is a strong penchant among analysts for depicting Canada as a multinational federation (see, for instance, Gagnon & Iacovino, 2007;

Gagnon & Tully, 2001; Kymlicka, 1995; Norman, 2006). In effect, McRoberts (2001, p. 694) has argued that “(m)ultinationalism has become no less than an important and influential Canadian school of political thought.” In this connection, it is interesting to note that whereas the EU is clearly also multinational, there is little appetite for depicting the EU in federal terms (for an overview of this body of literature, see Fossum & Jachtenfuchs, 2017). Thus, the innovative notion of multinational federalism has found little fertile ground in the EU literature (exceptions are Auer, 2005; Oommen, 2002).

This article argues that the most fruitful way of comparing Canada and the EU from a federal perspective is to see the two as distinct and separate versions of a broader category of “multiheaded” federations. That claim was initially made in a previous article (Fossum, 2017), which was however mainly focused on the EU and did not elaborate on why the notion of multiheaded federation is more apt for depicting Canada than the model of multinational federation. Neither did the previous

article clarify the difference between multiheaded federation and multinational federalism: the former is an attempt to depict where a given political entity is located within a process of federalisation; the latter sees multinational federalism as a model of federalism or federal democracy. Proponents of multinational federalism portray it as a viable alternative to the American model of federalism. My notion of a multiheaded federation has no such pretence. It sees a multiheaded federation as a useful analytical device for analyzing contestation over federalism within federal-type entities. This article (in contrast to the earlier which focused on institutional arrangements) zooms in on those who have power and who are in the position to shape the political system's federal-constitutional nature and design, which normally happens in the realm of constitutional politics.

This article therefore discusses the EU and Canada as different multiheaded federations with specific reference to constitutional politics. The issue is not constitution making as such but what constitutional politics tells us about federalism. The presence of different federal visions spurs intergovernmental interaction and negotiations. This focus on process stems from the fact that there is no agreement on how to institutionally and constitutionally entrench the key federal tenet of shared rule combined with self-rule (Elazar, 1987). The category multiheaded federation depicts dynamic processes and draws inspiration from Friedrich's (1968) notion of federalisation. A hallmark of a multiheaded federation is that there will always be one or several governments that contest the terms of federation and refuse to accept a federal constitutional hierarchy. The lack of agreement on a shared federalism entails that contentious issues of constitutional salience cannot be left to the courts, but have to be discussed by the heads of governments (in Canada the federal PM and the provincial premiers, and in the EU the heads of states and governments) in complex systems of intergovernmental negotiations. Such systems are marked by a clear disjuncture between federalism and federation (this distinction is defined in Section 2). We need to focus on how systems of intergovernmental relations hold such entities together but, at the same time, we also need to keep in mind that such systems operate through a diplomacy-type logic and are unto themselves not well-suited for fostering a federal culture (the federalism aspect). Federal systems that rely on intergovernmental relations for stabilising their constitutional orders are likely to have to live with an element of instability.

In Section 2 I clarify how and in what sense the notion of multilevel governance is inadequate for explicating the EU's federal traits.

## 2. The EU as a System of Multilevel Governance?

Many analysts refer to the EU as a system of multilevel governance. That is hardly surprising given that most political systems operate with more than one level of

governance. Nevertheless, there is also within the EU debate a more specific understanding of multilevel governance. Hooghe and Marks (2003) clarify that by identifying two basic types of multilevel governance. What they label as the first type, or MLG I, refers to the familiar notion of the federal state. The second type, or what they refer to as MLG II, is composed of many flexible and task-specific jurisdictions (Hooghe & Marks, 2003, pp. 236–237). Since the EU is not a state, the debate on the nature of the EU veers towards what Hooghe and Marks (2003) label as MLG II. Such a notion of multilevel governance is distinct from what we find in the state (whose mode of governing is marked by a hierarchically based form of territorial rule). Accordingly, EU-type multilevel governance is seen as marked by less hierarchy, competencies that overlap across governing levels, and interaction not only across levels of governing but also across the public-private divide. Multilevel governance is less clearly territorially defined given that it entails extensive interaction across the national-international divide (Bache & Flinders, 2004; Enderlein et al., 2010; Lépine, 2012; Marks et al., 1996; Piattoni, 2010).

If the EU is understood in this narrower sense as akin to a system of transnational networked governance, then that would not appear to be easy to square with federalism, given that basically all contemporary federations are states. One response to that objection would be to note that federalism is not intrinsically linked to the modern state, given that it clearly predates the development of the modern state. Historically speaking, federalism is not premised on state sovereignty. As Daniel Elazar has noted, "the federal idea and its applications offer a comprehensive alternative to the idea of a reified sovereign state and its applications" (Elazar, 1987, p. 230).

A second response would be to query whether networked governance as a distinct mode of governing is a suitable depiction of the EU as a political system. If we look at the EU, we see that it is a composite of supranational and intergovernmental traits (Fabbrini, 2015). What we may term the Community system is composed of the EU's internal market and flanking areas. Here, there is a hierarchical structure in place, especially regarding the EU's legal system, or what Joseph Weiler as early as 1981 labelled "normative supranationalism" (Weiler, 1981). This he noted stood in clear tension to "decisional supranationalism," or political decision-making, which was less supranational. Over time, EU decision-making has become more supranational but not across all issues/areas. Important elements of so-called "core state powers" pertaining to fiscal, security, and defence policies stand out in being largely determined by intergovernmental arrangements (Genschel & Jachtenfuchs, 2014).

There are several implications of this for federalism. Since the EU's legal structure has not only clear supranational traits but, as Weiler noted in 1981, has clear affinities with federal systems, and the EU has consolidated its decision-making system in a supranational direction, we

cannot dismiss federalism as a relevant notion for depicting the EU (this is forcefully argued by Larsen, 2021).

The argument thus far has shown that the EU has federal traits, even if it falls well short of being a full-fledged federation (for assessments of the EU's federal nature, see for instance: Bednar, 2009; Benz & Broschek, 2013; Burgess, 2006; Elazar, 1987; Fabbrini, 2015; Filippov et al., 2004; Fossum & Jachtenfuchs, 2017; Heidbreder, 2022; Kelemen, 2004; Larsen, 2021; Laursen, 2011; Nicolaidis & Howse, 2001; Verdun, 2015; Weiler, 2001). The EU should induce us to think less in binary federal- non-federal terms and more in terms of whether the EU is moving towards or away from federalism. In this sense, we need to keep in mind that there is an important distinction between federalism and federation. Federalism focuses on constitutive questions pertaining to the nature and justification of the political community, and the terms of federal co-existence, and as King (1982) notes, compels us to check whether the institutional structure (what King would refer to as the federation component) embodies and gives sustenance to the principles, values, and mentalities of the distinct political culture that we associate with federalism. These are issues that very often involve power struggles, such as struggles over the nature and status of the polity, including its territorial basis and boundaries to the external world, as well as questions of what type of community it is and whose community it should be. These are precisely the issues that are at the heart of contentions over the EU, but they are not what multilevel governance is concerned with.

In addressing these issues, we need to pay attention to federalism, not simply in terms of the EU's structural composition but in terms of the type of community, the mode of identity, and the political culture it embodies. Multilevel governance focuses on structure and process but ignores the important questions that *federalism* brings up regarding principles, values, identities, and political culture.

The EU in effect suggests that there is no one-on-one relationship between a federal mindset or mentality on the one hand and a federal-type structure on the other. The two may develop at different paces, and perhaps even in different directions. An important indicator—and determinant—is how those in charge of determining the EU's future, the heads of states and governments depict the EU and whether their words and actions move the EU in a federal or de-federal direction. In order to establish that, we need to establish whether they espouse a federal mindset or mentality, and whether their actions move the EU in the direction of a system based on a federal-type combination of shared-rule and self-rule or not.

The notion of the EU as a multiheaded federal-type structure is given added credence by recent developments during the last decade and a half of “poly-crises” (Zeitlin et al., 2019). Crises and emergency politics are generally “the hour of the executive” and that also

applies to the EU. White (2022) argues that there are several features of the EU that make it particularly vulnerable to the forms of politics of exceptionalism that we see occurring during crises and emergencies. Ironically, the diffusion of power and the low degree of formal codification that multilevel governance sees as defining traits of the EU entail that “there is little to deter executive agents, singly or collectively, should they seek to improvise...[and] the diffusion of power creates an incentive to concentrate it when difficult situations arise” (White, 2022, p. 785). EU emergency politics concentrates power in the hands of executives. Nevertheless, EU crisis handling has a form and shape that gives added credence to EU “multi-headedness.” That is due to the fragmented character of the EU executive (White, 2020). It consists of the European Council, the Commission, and parts of the Council (when acting as an executive in security and defence policy). The European Council which is at the heart of the multiheaded federation account has played a prominent role in the handling of all the crises that the EU has undergone during the last decade and a half. That is because it is composed of the heads of states and governments, those actors that can unleash the necessary power and capacity to deal with crises and emergencies, given the fiscal and other capacity constraints that mark the other institutions at the EU-level. Within the European Council, each head of state or government has veto; hence decisions are often reached after long and protracted negotiations and are often suboptimal compromises, as the notion of “failing forward” suggests (Jones et al., 2016).

From a federal perspective, the implication is not that there is a return of power from the EU to the member states as we should expect from an intergovernmental perspective. Emergency politics as crises generally tend to foster more integration but this takes place through a new interplay between key member state executives and EU-level experts and executives. Thus, there is a need for a different conceptualisation of the EU, one that takes heed of its distinctive supranational legal-institutional traits and at the same time pays sufficient attention to the central role of national executives in giving shape and direction to the EU's development. The best way of making sense of these traits is to understand the EU as a fledgling multi-headed federation.

Thus far we have seen that the notion of multi-level governance is not a very apt category for analysing the challenges that the EU faces. Neither does it help us to zoom in on those in charge of determining the EU's federal nature and direction. The next section discusses the other alternative conception to the dominant American model of federalism, namely multinational federalism. This model has gained strong support among Canadian academics, who depict it as a model of federalism. The analysis will show that the proponents overstate their case. Canada is still a work in progress, so the more realist depiction of Canada as a multiheaded federation still applies.

### 3. Canada as a Multinational Federation?

Canadians have for many decades obsessed over their country's federal nature and vocation and how to square that with multiple nationalities (Russell, 2019). This can be traced back at least to Lord Acton who noted that "the co-existence of several nations under the same State is the test...of its freedom [as well as] one of the chief instruments of civilization" (LaSelva, 1996, p. 46)

In many ways the notion of Canada as a distinct category of multinational federation draws on this conception of Canada as made up of multiple nationalities. It is not obvious that such a label should be very fitting for Canada, if we look at Canada's Constitution, the BNA Act 1867. This was so centralised that some analysts considered it to represent a mere quasi-federal constitution (Wheare, 1946/1963, as cited in Hueglin, 2021, p. 62). Canada's historical development does not correspond with what Wheare argued. Canada today is one of the most decentralised federations in the world (<https://www.constitutionalstudies.ca/2019/07/centralization-and-decentralization>), even if a decentralised federation is not necessarily multinational. We need to take a brief historical look at the conceptions of Canada that have been bandied about in order to get a better sense of how well the notion of a multinational federation captures Canada's defining traits.

The label multinational federation is used to designate a federal entity that contains multiple nationalities, each of which espouses a national community and a national mode of identity. This first of James Tully's list of four components of a multinational *democracy* entails that:

Since the nations of a multinational democracy *are* nations, their members aspire to recognition not only in the larger multinational association of which they are a unit, but also to some degree in international law and other, supranational legal regimes. (Tully, 2001, p. 3)

The second trait is that they contain both federal and confederal traits. The third is that they are constitutional democracies, and the fourth and final is that they are multicultural.

A properly functioning multinational federal state presupposes two sets of congruence: that the underlying nations are similar in nature, structure, and political organisation; and that there is some form of congruence between political structures and nations. One problem is that "while many states are multinational in their composition very few of them actually function as multinational states" (McRoberts, 2001, p. 711). This applies to Canada, which lacks both sets of congruence.

On the first type of congruence, similarity of nations, at first sight, Canada might appear to qualify since it has, historically speaking, been touted as *bi*-national. Institutionally speaking, we will see that this depiction of Canada is empirically inaccurate. Despite that, this conception of Canada has its supporters and can be traced back to the so-called national compact theory,

which sees Canada as made up of two founding nations (Romney, 1999). The theory posits that the French nation has its core in the province of Quebec (with well over 8.5 million inhabitants (Statistics Canada, 2021)). There is a significant English-speaking contingent inside Quebec, as well as a number of French-speakers outside of Quebec, and makes up close to 23% of the population of Canada (the total of which is 36.9 million), whereas the English nation makes up most of the remaining population (even if Canada's composition has become increasingly multicultural). The numbers show that there is a significant numerical asymmetry between English speakers and French speakers in Canada.

The historical veracity and normative justification of the notion of Canada as binational has been challenged by Canada's indigenous or First Nations people. They were not part of the initial federal bargain. They have a range of self-governing arrangements and are seeking to extend these. This is a conception of Canada that clearly does not fit with the national compact theory's conception of Canada as bi-national.

The role of Canada's First Nations is very complex and if it is to be dealt with adequately requires an article of its own. For our purposes, this complex issue is mentioned here to expose some of the problems of depicting Canada as a multinational federation. The first type of congruence listed above pertaining to whether a system functions as a multinational state was that the nations should have the same conditions for membership and should understand nation and community in roughly the same manner. Neither factor is uniform in Canada. Canada's nations operate with different conditions for membership, and they differ in their conceptions of nation. There is also a problem with national duality. English speakers, or the people that make up the majority in linguistic terms, do not normally see themselves as a distinct nation but "understand their own nationality in terms of the central state and will see all of the state as a single nation" (McRoberts, 2001, p. 685).

This point about English speakers understanding their nationality in terms of the central state relates directly to the second type of congruence, between political structures and nations. Such congruence is important because it speaks directly to the power relations and the conditions for a nation to be able to sustain itself over time. Here we see significant differences within Canada. Most of the French speakers are now concentrated in Quebec, which has undergone a process of "province-building" analogous to state formation (Black & Cairns, 1966; Paquet, 2019; for an early overview of the literature and a set of criticisms, see Young et al., 1984). English-speaking Canada forms a clear majority of the population but is institutionally fragmented, in nine provinces and three territories. There is therefore no institutionally unified English-speaking Canadian nation, as the carriers of Englishness are both the federal government (which is officially bi-lingual!) and the other nine provinces (and the three territories). First

Nations are seeking self-government but their situation does not mimic the territorial concentration and institutionalised power that is concentrated in a province. Compared to the French and English speakers, there are 630 First Nations communities in Canada, which make up 50 nations and 50 languages. The number of people who identify as Aboriginal in Canada according to the 2016 census is 1.67 million (Government of Canada, 2022). First Nations are scattered across Canada (for an interactive map that shows their location across Canada's provinces and territories, see: First Nation Profiles Interactive Map, [aadnc-aandc.gc.ca](http://aadnc-aandc.gc.ca)), and far from all live under self-governing arrangements. For First Nations, there is no congruence between political structures and nations, given that First Nations live in institutional arrangements that are located within both provincial and federal jurisdictions across Canada.

The French–English incongruence between political structure and nation in Canada is reflected in the division of Canada into provinces with extensive powers and prerogatives. This notion of Canada is also historically rooted and even predates Confederation (1867), and finds its justification in the provincial compact theory “which saw Canada as a compact among the colonies and their several successors, the provinces, rather than between nations.” (McRoberts, 2001, p. 695; Romney, 1999). If Canada originally was a compact of provinces rather than a compact of two nations, that brings up the question of why Canada should be considered a multinational federation. The answer seems to require somehow combining the national compact and provincial compact theory.

The provincial compact theory presupposes viable provinces, and through that province-building (Black & Cairns, 1966, introduced this notion; see also Paquet, 2019). Province-building paves the way to an institutional account of federalism (Thorlakson, 2000). Such an account would underline the importance of accumulating institutionalised power to protect the national identity of Quebec. A nation such as Quebec that is situated in a Canadian province has through province-building developed a far better ability to sustain itself and assert itself in relation to the other parts of the country than the collective of First Nations that is neither territorially concentrated nor has the levers of power that a province has. Quebec has significant access to and control of those resources that are important for Quebec's vitality and sustenance as a political system. A further element of institutionalised power is control of the key levers of socialisation and national inculcation which ensure the sustenance of the nation over time. Here, Quebec's strict language laws are quite instructive (C-11—Charter of the French language, [gouv.qc.ca](http://gouv.qc.ca)). Control of the popular composition of the nation also matters to its sustenance over time. In this sense, it is interesting to note that Quebec has significant control of international migration and is able to channel that to the province. All of these levers are vital for sustaining

Quebec as a nation and give credence to Quebec's claim for recognition as a distinct nation *over time*. They provide Quebec with the autonomy to sustain itself over time. First Nations understood as a collective does not have even remotely the same resources to assert a unified national stance. Even English-speaking Canada composed as it is of separate governments (nine provinces and three territories) needs to come together to find an agreement. The process of province-building, Quebec's ability to turn this into nation-building and the institutional division of English-speaking Canada are important reasons for considering Canada as multiheaded rather than multinational.

To sum up the analysis thus far, it has become apparent that the notion of Canada as a multinational federation at best only captures a part of the story. The alternative historical conception of Canada as a compact among provinces is not easy to reconcile with Canada as bi-national, which animates the notion of a multinational federation. At the same time, it is difficult to think of Canada as multinational without at the same time recognising the importance of province-building serving Quebec's nation-building aspirations. The rub is that province-building was not confined to Quebec but encompassed all of Canada's provinces. The notion of Canada as a multinational federation presupposes that there has been a process of province-building that enables a minority nation such as Quebec to assert its national identity. But since a multinational federation is about nations it lacks attention to the role of the provincial governments that do not assert a minority national position but still espouse a provincialist position on the Canadian federal compact.

The analysis thus far has pointed to the shortfalls in those accounts of the EU that seek to depict it as a system of transnational multilevel governance. The analysis has also shown that there are problems with the notion of Canada as a multinational federation. This notion relies on institutional presuppositions that do not cohere with the nations in place.

Section 4 will focus on what this article highlights as the basis for comparing Canada and the EU from a federal perspective, which can be labelled the constitutional politics aspect of federalism. The issue is not constitution-making but what ongoing constitutional negotiations tell us about the system's federalism. Both the EU and Canada are marked by a lack of agreement on a viable federalism (what the system is and who it is for). That lack of agreement naturally directs us to those in the position to make authoritative decisions. A key claim of this article is that we cannot determine the nature of such contested political systems' federalisms without paying attention to *who* it is that sets the terms of federation, what leverage they have in doing so, and how explicit their efforts are. The claim is that the structuring of the process of constitution-making/change and the issues that determine this process go a long way towards understanding the system's



federalism. In other words, the process of negotiating constitutional accords is an important source of information on the system's federalism. Such processes can foster federalisation, or they can subvert federalism and produce de-federalisation. The label multiheaded refers to an important EU–Canada parallel: The core actors are the leaders of the governments of the two systems at both main levels of governing.

#### 4. Constitutional Politics as (De)Federalisation in the EU and Canada

There are two important parallels between Canada and the EU in terms of constitutional politics understood in this (de)federalisation sense. These two parallels are as noted relevant for our thinking of these two entities in federal terms.

One important parallel is that both Canada's and the EU's legal-constitutional arrangement is contested. For Canada, that is readily apparent in the province of Quebec's refusal to sign the Constitution Act of 1982. This failure led to two major attempts to get Quebec to sign the Constitution, the Meech Lake Accord in 1987, and the Charlottetown Accord in 1992, both of which failed. With regard to the EU, the Constitutional Treaty was turned down in popular referenda in France and the Netherlands in 2005. In both cases, then, legal-constitutional contestation relates to one or several governments refusing to endorse the constitutional accord that has been negotiated.

This fact is closely associated with the second EU–Canada parallel, namely, that it is the governments of the two political systems that negotiate constitutional accords in intergovernmental formats that have clear parallels to international diplomacy (Hueglin, 2013; Fossum, 2007; Moravcsik, 1991; Simeon, 2006/1972). Such intergovernmental arrangements play a crucial role in the shaping of the two political systems' constitutional essentials. For Canada, historically speaking, the absence of an amending formula in the British North America Act of 1867 effectively meant that the federal and provincial governments negotiated constitutional accords among themselves. Numerous efforts were made to agree to a constitutional amending formula until one was inserted in the Constitution Act, 1982, which combines qualified majority and unanimity (or a historical overview of amending formula discussions (Government of Canada, 1992). The Quebec government failed to ratify this; hence there is no escaping the political logic that all governments need to assent to constitutional changes. In the EU treaty changes must be ratified by all member states in accordance with their national ratification requirements.

European treaty-making is organised in a manner with clear parallels to how Canada conducts its constitutional politics. In both cases, the heads of the two systems' governments are the key actors.

Section 4.1 provides a brief overview of how Canada conducts its constitutional politics through intergovern-

mental means and Section 4.2 displays how the EU relies on intergovernmental means. Both entities have tried to open and democratise these arrangements. Canada is the only one to have partially succeeded. The introduction of the Charter of Rights and Freedoms in conjunction with Canada's patriation of the constitution has altered the relationship between federalism and federation in Canada (this transformation has been examined in Fossum, 2007, although not with explicit reference to the federalism–federation distinction). In Europe, the rejection of the Constitutional Treaty has cemented the intergovernmental approach to constitutional politics.

##### 4.1. Canadian Constitutional Politics

Historically speaking, as was noted above, we find in Canada a struggle over competing conceptions of sovereignty. Nevertheless, for most of its history, Canadian constitutional politics has been an affair for and by governments, federal and provincial. Up until the Statute of Westminster, 1931, the UK (Parliament) had played the role of umpire. After that the governments negotiated constitutional accords among themselves, and the Canadian Supreme Court did not play a significant role. Courts are normally umpires but as Morton and Knopff argue, prior to the so-called Charter revolution (which unfolded after the Canadian Charter of Rights and Freedoms had been inserted in the Constitution Act of 1982) the Canadian Supreme Court was “the quiet court in the unquiet country” (Morton & Knopff, 2000, p. 9)

Their privileged position meant that the governments of the system—the federal government and the ten provincial governments—considered themselves as the main chaperons of the constitution, the BNA Act of 1867. Alan Cairns then also termed this a “governments' constitution” (Cairns, 1991). Constitutional politics unfolded through a system of intergovernmental negotiations that goes under the label of First Ministers' Conference. The First Ministers' Conference consists of the PM and the then Provincial Premiers. This body played the most important role in the numerous efforts to fashion constitutional change in Canada. The Canadian system of First Ministers' Conference, as Simeon (2006/1972) has noted, has injected an element of intergovernmental diplomacy with clear parallels to international diplomacy into the heart of Canadian politics. There are important structural reasons that help account for why this is so. The Canadian federation is a parliamentary federation (Westminster-style parliamentary majoritarian government) at both levels of government. The first-past-the-post electoral system produces governments with powerful executives who hold different—often conflicting—federal visions. In this context, weak parliamentary controls help to concentrate power in the hands of executives who come together in forums with clear parallels to international diplomacy to work out their disagreements. Herman Bakvis notes that:

With power concentrated in the hands of first ministers, intergovernmental relations have been the purview of first ministers and their close associates.... Generally, Canadian executive federalism has been characterized as closed and elite driven. With not one but 11 (14 including the three territories) powerful governments, it is not surprising that they are often at loggerheads, collectively or individually, resulting in stalemate. When there has been collaboration it is often done on a secretive basis, allowing virtually no opportunity for outside interests to participate or be heard. (Bakvis, 2013, p. 211)

The system of intergovernmental relations has had a centrifugal effect on Canadian politics.

The Trudeau government in the early 1980s sought to break with the binational and intergovernmental past by patriating the Constitution from the UK through the Constitution Act of 1982 and introducing the Charter of Rights and Freedoms, which could give citizens a keener sense of ownership of the Constitution. This was done without the province of Quebec's assent. Quebec responded by not signing the Constitution Act of 1982 (and has still not signed it). After the change in federal government in 1983, the new PM Brian Mulroney spoke about the need for a Quebec round to bring the province of Quebec to sign the Constitution Act of 1982 by recognising Quebec as a distinct society and ensuring Quebec a veto on constitutional change. The general Canadian constitutional amendment formula—the so-called 7–50 formula (minimum seven provinces with a minimum 50% of Canada's population)—does not require the consent of all provinces. Only few constitutional changes require provincial unanimity. Nevertheless, “the federal government decided to treat the whole package as subject to a unanimity agreement” (Cairns, 1991, p. 144). The effect was to convert “the Quebec round” into a provincial round of negotiations, where the other provinces also demanded concessions. The process that led to the Meech Lake Accord (1987) was therefore not a matter of bilateral federal government–Quebec negotiations but was instead conducted by the PM and the ten provincial Premiers in a closed-session marathon negotiating round. The lack of aboriginal and civil society participation was roundly criticised and contributed to the failure of the accord (the two provinces Manitoba and Newfoundland rejected the Meech Lake Accord; for assessments, see for instance Behiels, 1989, and Cairns, 1991).

This example shows the resilience of the model of government-to-government negotiations, even under altered constitutional conditions. Even the much more open and consultative Charlottetown Accord did not break with this pattern.

#### 4.2. *European Constitutional Politics*

The EU shares with Canada this government-centred approach to constitution-making/change. EU treaty

changes are, formally speaking, conducted through the Intergovernmental Conference (IGC), which is the special formation that the EU sets up to carry out treaty changes. The European Council, which is composed of the EU's heads of states and governments, played the leading role in the IGCs that made the Single European Act (1986), the Maastricht Treaty (1992), the Amsterdam Treaty (1997), and the Nice Treaty (2000). In all these instances of EU treaty change, the heads of states and governments and their coteries of officials from the member states were the key actors in charge. There was EU-level institutional input (notably the Council secretariat and the European Commission), but each member state government had veto. Ratification would take place in accordance with national ratification rules, whether through parliamentary votes or popular referendums. In the lengthy process of negotiating each instance of treaty change, the heads of states and governments of the EU member states come together at various intervals to negotiate and renegotiate the rules of their co-existence with considerable discretion. The European Council meetings are closed, attendance is strictly limited, and there is no official and publicly available record of what was discussed (only Council conclusions, available here: <https://www.consilium.europa.eu/en/european-council/conclusions>), as the purpose is to allow for frank and open discussion (for incisive analyses of the European Council, see Werts, 2008, and Wessels, 2016). Hence, the IGC process is surrounded by very little transparency until the ratification stage.

As early as 1972, Richard Simeon (2006/1972, p. 300) presciently noted that “the Common Market perhaps comes closest to the Canadian pattern.” Simeon's book was written before the European Council was established. With the European Council in place, the resemblance between the EU and Canada increased, given the similarities between the Canadian First Ministers Conference and the European IGC.

The European Convention which was established on the basis of the Laeken Declaration (European Council, 2001) was an attempt to break with the intergovernmental constitutional negotiations model by establishing a body composed mainly of parliamentarians. Valéry Giscard d'Estaing, the Convention President, in his first speech, underlined the difference between the Convention and the IGC. He noted: “We are not an Intergovernmental Conference because we have not been given a mandate by Governments to negotiate on their behalf the solutions which we propose” (d'Estaing, 2003). Nevertheless, a detailed analysis of the Convention's work has shown that the European Council was key to the outcome (Fossum & Menéndez, 2011). The Lisbon Treaty which built upon the Convention's work but was termed a treaty and not a constitution represented a clear reversal to the intergovernmental negotiations model. The failure of the Constitutional Treaty also brought more uncertainty as to the EU's constitutional character and vocation. In that sense, we

can interpret this as a step in a defederalising direction. Canada's development conversely has brought in a wider repertoire of societal actors in the constitutional process. That will likely make any further major effort at constitutional change unwieldy (and represent a high bar against any new initiative) but may produce a better balance between federalism and democracy.

## 5. Conclusion

The purpose of this article was to assess the merits of comparing the EU and Canada from a federal perspective. The undertaking confronted a challenge: The two systems are not only different entities (Canada is a state and the EU is something in-between state and international organisation), but the labels that are used to depict them—multilevel governance versus multinational federation—carry different federal weight and significance. It was therefore necessary to examine how well these labels depicted, respectively, the EU and Canada. It was found that they offer partial accounts only, accounts that in effect downplay important federal traits of these systems. Nevertheless, the main merit of comparing the two entities, this article has shown, is not through focusing on static structural and ideational features but rather through focusing on the dynamics of federalisation and de-federalisation. That was made possible by the notion of a multiheaded federation—an attempt to take stock of present reality without elevating that to model status (as the notion of multinational federalism). In this connection, the distinction between federalism and federation is useful because it shows that you can have a federal structure without there necessarily being agreement on the terms of federation. Barring such agreement, we need to focus on those in a position to determine the terms of federation. In both the case of Canada and the EU, it is the governments that make up the two systems that have played this role. The label multiheaded federation refers to the fact that the terms of federation are determined by the governments in complex negotiations. That stands in some contrast to the dominant conception of federations as settled legal-constitutional arrangements with courts as federal overseers and a hierarchical pattern of authority.

It is the fundamental struggle over sovereignty within a federal-type structure that gives rise to the notion of a multiheaded federation—there are multiple heads because there is no willingness to accept a hierarchical arrangement. But the fact that the governments' interaction takes place within a federal-type structure also means that the contestation is contained and can foster further integration. Thus, when within a federal-type structure, there is contestation over the locus of authority and unwillingness to yield to a hierarchical order, and the contestants are in a position to function as authority contenders (as can a government in the system but not a private actor) we have a multiheaded federal political construct.

The theoretical implication is that when we encounter contestations over the terms of federation, we need to shift perspective: Rather than discussing whether or the extent to which Canada and the EU are structured and operate as full-fledged federations, we should with Friedrich (1968) consider them as instances of federalisation—as processes towards more or less federalism. There is clearly a mutually reinforcing relationship between the development of a federal structure (the federation component) and the parties' commitment to uphold the federation (the federalism component) and the normative justifications for that. The notion of a multiheaded federation directs us to those in the privileged position to shape the system's federal future. The conundrum facing multiheaded federations is that the intergovernmental systems that play an important role in ensuring their existence are not well-suited for developing a viable federal political culture.

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## Conflict of Interests

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