

INTRODUCTION

The Potential of a Polycentric European Union

JOSEPHINE VAN ZEBEN AND ANA BOBIĆ

Political and academic debates on the European Union's future move along a continuum between a state-centric free trade zone¹ and federal European state.² These debates cumulated in the 2016 Brexit referendum and the anticipated end of the United Kingdom's EU membership on 29 March 2019.³ Brexit is only one of the myriad of challenges, ranging from fiscal crises to humanitarian tragedies, that the EU faces.⁴ The expansion of the Union's mandate and institutional set-up has not been able to prevent, or even reduce, these challenges. The starting point of this Volume is that the solution to these problems does not lie on the well-travelled continuum between renationalisation of powers and a federal Europe. Instead, we take up Vincent Ostrom's challenge to contemplate

¹ See e.g. Y. Tamir, *Liberal Nationalism* (Princeton University Press, 1995) and G. Majone, 'Europe's "Democratic Deficit": The Question of Standards', *European Law Journal* 4 (1998), 5. See also R. Schütze, *European Constitutional Law* (Cambridge University Press, 2012), 54.

² See e.g. J. Habermas, 'Why Europe Needs a Constitution', *New Left Review* 11 (2001), 5; E. Eriksen, J. Fossum, and A. Menéndez (eds.), *Developing a Constitution for Europe* (Routledge, 2004); D. Šidanski, *The Federal Future of Europe: From the European Community to the European Union* English trans. (University of Michigan, 2000); N. Fligstein, *Euroclash: The EU, European Identity, and the Future of Europe* (Oxford University Press, 2008).

³ P. Craig, '"Brexit": A Drama in Six Parts', *European Law Review* 41 (4) (2016), 447 (showing that the causes for the Leave vote were many and its consequences still unclear); see also P. Craig, 'Brexit, A Drama: The Interregnum', *Yearbook of European Law* 36 (2017), 3.

⁴ Each of these challenges has given rise to its own subfield of European scholarship, which in turn feeds back into more general debates regarding competences and subsidiarity. See e.g. G. Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence', *European Law Journal* 21 (1) (2015), 2 (on the interpretation and assigning of EU competence through a study of internal market competences); M. Bartl, 'The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit', *European Law Journal* 21 (1) (2015), 23 (considering the principle of subsidiarity through a case study of European private law) and F. Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy', *European Law Journal* 21 (3) (2015), 384 (on the future of European integration after the financial crisis).

a system of societal relationships not dominated by ‘the state’ or ‘the government’⁵ by exploring the presence of, and potential for, polycentric governance within the EU.

As a descriptive theory of governance, polycentric governance is characterised by the presence of many centres of decision making, which are formally autonomous and may compete and/or collaborate under an overarching shared system of rules.⁶ Normatively, polycentric governance accommodates both representative and deliberative models of democracy by placing intrinsic value on individual self-governance without prescribing specific outcomes from the process of governance.⁷ The institutional set-up of polycentric systems aims to ensure balance between decision-making centres so as to prevent dominance of certain centres and safeguard continued self-governance.⁸ Adopting a polycentric perspective means to conceptualise society as a collection of rule-based interactions between individuals. In this context, self-governance refers to the ability of individuals to determine the rules that underlie these interactions and to set the goals for sustained interactions that result in collective action.

This Volume has a dual ambition: first, and most importantly, by assessing the EU’s potential for polycentric governance, it seeks to offer an alternative theory of governance for the EU, as compared to existing pluricentric EU governance theories – specifically federalism, multilevel governance, constitutional pluralism, and multilevel constitutionalism.⁹

⁵ V. Ostrom, *The Meaning of American Federalism: Constituting a Self-governing Society* (ICS Press, 1994), i. In this Volume, the importance of non-dominance is contextualised by J. van Zeben in Chapter 1, and further explored by F. Cheneval in Chapter 3.

⁶ V. Ostrom, C. Tiebout, and R. Warren, “The Organization of Government in Metropolitan Areas”: A Theoretical Inquiry’, *The American Political Science Review* 55 (1961), 831.

⁷ M. McGinnis and E. Ostrom, ‘Reflections on Vincent Ostrom, Public Administration, and Polycentricity’, *Public Administration Review* 72 (2012), 15.

⁸ P. Aligica and V. Tarko, ‘Polycentricity: From Polanyi to Ostrom, and Beyond’, *Governance: An International Journal of Policy, Administration, and Institutions* 25 (2012), 237, 246.

⁹ Legal scholarship does propose changes to the EU’s constitutional make-up with a view to change its method of governance. However, these legal theories (e.g. constitutional pluralism) must be distinguished from political theories such as multilevel governance. Polycentricity, conversely, acts as a complete theory of governance. For an excellent example of legal writing in this area, see M. Dawson and F. De Witte, ‘From Balance to Conflict: A New Constitution to Europe’, *European Law Journal* 22 (2) (2016), 204. See also N. Walker, ‘Constitutional Pluralism Revisited’, *European Law Journal* 22 (3) (2016), 333; I. Pernice, ‘Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?’, *Common Market Law Review* 36 (1999), 703 and A. Jordan, ‘The European Union : An Evolving System of Multi-level Governance ... or

The descriptive nature of some existing theories limits their ability to engage with the democratic concerns that inform much of the binary debate between centralisation and renationalisation of European competences.¹⁰ The strengthening and expansion of the EU's polycentric features with a view to ensuring individual self-governance creates a model of European governance that accommodates different conceptions of European *demos*,¹¹ as well as the divergent constitutional theories applied to the EU,¹² without having to revert either to a state-centric or federal model of Europe. Moreover, the similarities and overlaps between polycentricity and other EU-related pluricentric theories of governance show that polycentric governance is not foreign to the EU; many of the EU's institutional features already support a polycentricity system. By critically examining which institutional features of polycentricity are missing or incomplete in the current EU framework, targeted suggestions for improvement are possible.

The second aim of this Volume is to expand the scope of application of polycentric theory itself. Developed by Vincent and Elinor Ostrom through the Bloomington School of Institutional Analysis, polycentric theory has thus far primarily been used to explain (local) governance in the United States of America, and natural resource management by local communities worldwide. The application of polycentric theory to the EU has been very limited: Vincent Ostrom commented on the EU several times – going as far as to say that ‘the

Government?’, *Policy & Politics* 29 (2001), 193. For a detailed comparison and discussion of these theories see, in this Volume, Chapter 1 by J. van Zeven.

¹⁰ See e.g. J. Habermas, ‘Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible’, *European Law Journal* 21 (2015), 546; J. Weiler, ‘Democracy without the People: The Crisis of European’ (2012), available at [www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474438/IPOL-AFCO_ET\(2013\)474438_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474438/IPOL-AFCO_ET(2013)474438_EN.pdf) accessed 1 on November 2018; M. Kumm, ‘Democratic Challenges Arising from the Eurocrisis: What Kind of a Constitutional Crisis Is Europe in and What Should Be Done about It?’, in *Challenges of multi-tier governance in the European Union: Effectiveness, efficiency and legitimacy* (Directorate-General on Internal Policies 2013, available at www.lehrstuhl-pernice.de/tl_files/documents/Multi-tier%20governance%20in%20the%20EU.pdf#page=126 accessed on 1 November 2018) (arguing for increased democracy at the European level). Conversely, see G. de Búrca, ‘Europe’s Raison D’Etre’, *New York University Public Law and Legal Theory Working Papers* (2013), 385 (arguing that the EU’s current day added value is its influence on interstate relations *outside* of the European Union, not within the EU).

¹¹ See, in this Volume, Chapter 3 by F. Cheneval.

¹² For an overview, see S. Bredt, ‘Prospects and Limits of Democratic Governance in the EU’, *European Law Journal* 17 (2011), 35.

future development of human civilisation turns critically upon the resolutions that are attained in Europe¹³ – but never developing polycentric theory to fit the EU's particular context.¹⁴ Other authors have used the term polycentricity to describe related, but different, issues of EU governance.¹⁵ Through careful examination of the descriptive and normative implications of polycentricity for the EU, we have been able to expand the theoretical foundations of polycentric theory to better fit large polycentric systems, and to flesh out the shape and form of polycentric institutional features.¹⁶ This will hopefully benefit the work of those who seek to study polycentricity in other supranational settings, such as climate change governance.¹⁷

Structure of the Volume

The foundations of this Volume were laid during van Zeben's year-long research stay at the Ostrom Workshop in Indiana in 2013. The purpose of this visit was to assess the extent to which the EU is already polycentric and, assuming that this would be desirable, which polycentric features of EU governance should be strengthened. However, it quickly became clear that mapping the full polycentric potential of the EU required expert knowledge of many areas of EU law, and would therefore be better achieved through a collaborative effort rather than through a monograph. This Volume is the product of an interdisciplinary collaboration between the contributors, fine-tuned by critical discussions of each other's work through a workshop

¹³ V. Ostrom, *The Political Theory of a Compound Republic* 3rd edn (Lexington Books, 2007), 223.

¹⁴ V. Ostrom, 'Faustian Bargains', *Constitutional Political Economy* 7 (1996), 303. The most complete attempt by other members of the Bloomington School is the unpublished work by McGinnis and Hanisch: M. McGinnis and M. Hanisch 'Analyzing Problems of Polycentric Governance in the Growing EU' (2005) Paper presented at the Transcoop Workshop on Analysing Problems of Polycentric Governance in the Growing, EU Humboldt University Berlin (on file with the author).

¹⁵ See e.g. M. Wind, 'The European Union as a Polycentric Polity: Returning to a Neo-medieval Europe?', in J. Weiler and M. Wind (eds.), *European Constitutionalism beyond the State* (Cambridge University Press, 2003), 103 and R. Dehousse, 'Beyond Representative Democracy: Constitutionalism in a Polycentric Polity', in J. Weiler and M. Wind (eds.), *European Constitutionalism beyond the State* (Cambridge University Press, 2003), 135.

¹⁶ See in detail, in this Volume, Chapters 1 and 2 by J. van Zeben.

¹⁷ D. Cole, 'Advantages of a Polycentric Approach to Climate Change Policy', *Nature Climate Change* 5 (2015), 114; E. Ostrom, 'Polycentric Systems for Coping with Collective Action and Global Environmental Change', *Global Environmental Change* 20 (2010), 550.

in February 2018 and written commentary until the final drafts. This reflective process added greatly to the analysis contained in this Volume and our collective thinking on polycentric theory in the EU. We are hopeful it also cemented opportunities for future collaborative efforts.

The authors in the first part of the Volume set out the theoretical foundations of polycentricity, and the extensions to the existing theory that its application to the EU requires. In the first two chapters, van Zeben positions polycentric theory with respect to other pluricentric theories and proposes an analytical framework through which the polycentricity of governance systems can be identified and assessed (Chapter 1). This general theoretical framework is then tailored to the specifics of the EU (Chapter 2). The remainder of the first part focuses on core concepts of EU integration and their relation to polycentricity: self-governance and *demos* in the EU (Cheneval, Chapter 3); the conceptualisation of the subsidiarity principle in polycentric theory and EU practice (van Zeben and Nicolaïdis, Chapter 4); and the impact of the internal market on polycentricity within the EU (van Zeben and Bobić, Chapter 5).

The second part of this Volume discusses the institutional essentials of polycentric governance and their prerequisites in turn. First, Bobić defines the overarching shared system of rules and considers its enforcement (Chapter 6); van den Brink focuses on the role of EU citizenship and its ability to secure self-governance through free entry and exit within the EU (Chapter 7). Relatedly, Goldner Lang considers the position of third-country nationals in the EU and their potential for self-governance (Chapter 8). Finally, Kukovec examines the possibilities for peaceful contestation of the rules and under the rules (Chapter 9). The three subsequent chapters relate back to the enforcement of the shared system of rules within the EU's polycentric system. Díez Sánchez considers the extent to which access to justice, particularly through the judicial system, is available under the shared system of rules (Chapter 10); and, Abazi and Garben conclude this part of the Volume by setting out the possibilities for access to information, and the ways in which collective and individual capacity to learn is facilitated and/or obstructed in the EU, respectively (Chapters 11 and 12).

This in-depth study of the polycentric features and potential of the EU sets the stage for an alternative model of European governance, which places self-governance at the centre. The concluding chapter will provide

an overview of the limits of EU polycentricity, as discussed in the second part of the Volume. In addition, it provides some suggestions on how to best accommodate two intrinsic challenges of polycentric governance – complexity and the risk of fragmentation¹⁸ – in order to improve the likelihood of polycentric success in the EU.

¹⁸ For a more detailed discussion of these challenges in the EU context see, in this Volume, Chapter 2 (Section III) by J. van Zeben.