

The political and constitutional dimensions of the European Union

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Abstract

In this article we explore the risk of arresting the radical, structural changes in the EU's evolution after the negative pronouncement by the people of France and the Netherlands about the so-called "Constitution". Consequently to the big push eastwards, the EU has the chance to become a supranational laboratory for an extraordinary democratic experiment tending, in the long term, to build something more stable and inclusive than a thin "liberal community" characterized by a certain amount of civic concern, and shaping a *Weltinnenpolitik* outside the horizon of a post-national constellation forced into national cages, even if pushed to the forefront of academic debate with a federal asset.

Key Words: European Union; constitution; enlargement; federalism; identity

1. Introduction

By voting "no" in their referendums last year, the people of France and the Netherlands rejected the so-called "European Constitution" (better: the Treaty establishing a Constitution for Europe, signed on 29 October 2004 in Rome by the heads of State or Government of the Member-States). A period of reflection, explanation and discussion is currently under way in all countries, whether or not they have ratified the Constitution, but we are observing the risk – and the perception of it – of arresting the radical, structural changes in the EU's evolution, particularly on the eve of the next scheduled rounds of enlargement, that would bring Romania and Bulgaria, Croatia and Turkey into the fold.

We suggest exploring three main dimensions of the problems:

- a) we argue that, facing the challenge of a dynamic multi-level constitutionalism (Pernice), the EU could become the supranational laboratory for an extraordinary democratic experiment tending, in the long term, to build something more stable and inclusive than a thin "liberal community" characterized by a certain amount of civic concern, and shaping a *Weltinnenpolitik* outside the horizon of a post-national constellation forced into national cages, even if pushed to the forefront of academic debate with a federal asset;
- b) we lay great stress on the problematic of overspacing the challenge of the enlarged EU-25, connecting it with the aim of becoming coincident with the "auld continent" on a geo-political sphere. Refashioning the identities of the centralised nation-States implies the definition of the parameters to share power and authority not only under a domestic point of view, but also with the aim to provide a better trade-off between equity and decentralisation on a global-scale. When these processes are considered carefully, the thing they all show is the urgency to dominate the logic of the clashing identities in the flexible community of historical and cultural narrations as Europe can be considered. The evolution of the process of modernization calls the institutional order into question and the EU must turn into its distinguishing feature this plurality, the principle of a self-critical appropriation of traditions mixed *per differentiam* (Chabod);
- c) in order to recognize and make sufficient sense of the phenomena of all these meta-changes, a few general conclusions can be drawn refreshing Schmitt's theoretical contributions, investigating if Europe, as a multiverse, can stand in a world-universe, defending an effective multilateralism, promoting something more than a tolerant multiculturalism.

2. A new constitutionalism for the European Union ?

After five rounds of enlargement, the European Union has expanded from a six-member entity into the world's largest trading bloc with 25 affiliates and a population of 455 million. The step towards a cohesive, truly European confederation was not taken until the '70s, but today it is still not a shared perspective to build something more than a broader nationalism. "Widening" the club's membership has gone hand in hand with "deepening" integration too, even if, from a constitutional outline, pushed to the forefront of a prolific debate among scholars with a nation-state federal asset.

It is surely true that such an integration process deeply alters the constitutionally determined balance of powers inside each state, and that the repeatedly denounced constitutional deficit in the integration process represents the lack of formal guarantees in the theoretical dimensions of democratization, in Robert Dahl's poliarchy theory represented by "public contestation" and "inclusiveness" (right to participate).

With the present contribution we intend to explore the relationship between Europeanization and what has been named "multi-level governance", because more and more states exhibit acute signs of weakness and/or the likelihood of outright failure.

On the one hand, we are not interested in elaborating a taxonomy including a certain number of categories of nation-state, to check in a following stage where the EU's Members should be collocated. We simply assume that the global economy renders the traditional nation-state obsolete, threatening its domestic democratic life, but, on the other hand, offering to it new forms of expression to be turned into reality on a supranational scale, focusing the general attention on the status of fundamental rights, one of the great sources of cultural identity all around Europe. Proposing rights as a source of cultural identity does not mean the belief that they are "normatively uncontroversial", because though all Members States do "take rights seriously"; they adhere to the European Convention of Human Rights; they have a domestic Bill of Rights, in the very end the evaluation of these rights frequently diverge. Minimizing the divergence of law and cultural kinds is a process, a stage in a long-time game for an archipelagic constitutional democracy.

Considering the European constitution-making process in the light of a perspective of legitimacy may lead to a worrying conclusion: the EU members are not able to reject, on their own, the rhythm of globalization and their stability is undermined by the financial market ruled by corporations, banks, but they hesitate to cede a relevant part of their prerogatives to build not only a democratic entity, but an entity that becomes larger as well, aggregating asymmetrical state units and communities of interest, in a perspective shaping a *Weltinnenpolitik* outside the horizon of a post-national constellation forced into the classic single nation-state cages.

A Polity without a State cannot be seen only as the defeat of the evolution of the rule of law, of the rigid coincidence between State and Constitution. Under many respects, the European Union could be associated to a liberal community sharing a fragmented constitution since the '60s of the last century, when a part of the academic legal world and the judges of higher European and national courts began to refer to the Treaties *as if* they were a canonic, supreme Chart. Today, most of the legislation of all member states, including those refusing to adopt the common currency, stems from the legal bodies of the Union.

Since the Treaty of Amsterdam and the Chart of Nice, there has been a European unity of civic rights, of budget, of political action, of organizations, an internal and external personality, an order of legal steps, and, as a consequence, the European Court of Justice (ECJ) claims the *Kompetenz-Kompetenz* for its judgements. It is possible to reply that only from a severe functionalist point of view the EU has a constitution, a modern constitution, built on the structural coupling of the legal and the political system (as Luhmann noticed) and

that the works of the “conventionnels” headed by Giscard d’Estaing were conceived to transform into an organic body the fragmented rules.

According to the *evolutionary* idea of constitution, there exists nothing in the world which has so functional an equivalent, but following the tradition of a rule of law regime that limits political power and domination, Europe has a *normative* constitution. Referring to organicistic theories, even when conjugated with progressive intentions (Dieter Grimm), a constitution is defined basically as a *legalization of state power*. Such a constitution is a *foundation of political power*. This surely is a revolutionary idea of a constitution (perhaps provoking some contrast in International Law), but it is not concerning the present situation of the Union.

Currently, the European constitution is in permanent, deliberative change: a *Wandelverfassung* (a *constitution-in-the-making*).

We must turn from a *negative integration* – which means to stay completely backed by the intergovernmental consensus of the Treaties, obscuring the transparency of decision-making, lengthening the chain of legitimacy, silencing every request by the single citizen – to a *positive integration* through social welfare politics, distributive justice, etc. However, it does need a system of domestic resources based on individual European taxes, implying a transfer of sovereignty from the states to the EU.

This is one of the political challenges explored by Jürgen Habermas, when he thinks about a *postnational constellation*, a refashioning of the geopolitical balances, adapting the European Union to the *post-hobbesian order*, beyond the leviathanic dimension of the States, inserting the democratic reflection (at least as a symbolic European characteristic) in an international agenda of priorities¹.

Those who reject the idea of a *Constitution without a State*, considering it synonymous with *Constitution not encapsulating sovereign powers*, are confusing what has been called *democratic deficit* with the lack of a strong power, as if an absolute power was the real basis of a democracy.

Yves Mény underlined more and more times that we all should shun a dangerous illusion: the *constitutional panacea*. Deeply rooted in the federalist circles, it is elevated to an excuse to neglect that there is no Constitution, once adopted, to win the crystallized problems of a country². The EU, without sliding over a wrong *benchmarking*, must vindicate the authorship of the *sui generis* traits of its constitutional legacy.

The defining task facing the EU is to craft a new social contract for the first half of the twenty-first century. A contract for the future should be animated by the ideal of guaranteeing opportunities and security for all, not just a few. Globalization has not corroded the argument for collective provision of public services through social and civil agencies. The sovereignty of Europe’s institutions should be a countervailing force against the chaotic global market, even if the post-war social democratic model as the guarantor of high employment and decent public provision in Eric Hobsbawm’s “Golden Age” is, in many continental regions, at risk of imminent collapse and cannot be extended to the institutional frames of the Community, founding a supranational State unable to sustain a basic premise: public services ought to be universal, fighting against rising intra-state inequalities and against those concerning the East-West and the North-South polarisation.

Radically refashioning the centralised state does imply the definition of the parameters to share power and authority not only on a domestic terrain, but with the aim to provide a better trade-off between equity and decentralisation joining networks of civic associations.

Agreeing to Weiler’s opinion, Mannoni and Fioravanti assert that in Europe a constitutionalization process, non understandable adopting abused categories of public law, is taking place, and the Constitutional Treaty does not modify the situation. The multilevel

¹ Habermas, Jürgen, *La costellazione postnazionale. Mercato globale, nazioni e democrazia* (Milano: Feltrinelli, 1999).

² Mény, Yves, *Conclusioni. Una Costituzione per l’Europa ?*, in Fabbrini, Sergio (ed.), *L’Unione Europea. Le istituzioni e gli attori di un sistema sovranazionale* (Roma-Bari: Laterza, 2002, 298-310).

governance traces a path toward a polycentric reality representing a goal for Europe, an instrument to get rid of the ghosts sometimes coming back from the past, without being tempted by mimetic experiments³.

Really interesting is the Ingolf Pernice's proposal. It consists in unifying the national-state constitutions and the EU's primary law, considering them as the components of an integrated, *multilevel constitutional system*, of a *Verfassungsverbund* (constitutional federation)⁴, of a European constitution in permanent development, to be always unfinished⁵. The scope is to suggest a constitutional settlement that would assist, giving its precious help, the passage from the idea of a *Constitution without a State* to the adaptative category of a *Constitution with a lot of States*, raising this plurality to the more authentic *Grundnorm* of the new concept of Constitution.

Multilevel Governance presents the European Union as a system in which public power is divided into layers of government, where each layer retains autonomous power and none can claim ultimate power over the others.

The EU can be regarded as the product of the need for cross-border common action over a wide range of economic and social issues in the context of the absence of a conscious and willing continental *demos*. We cannot be satisfied with a purely intergovernmental understanding of the EU (and it is to be marked that in the Constitution we can record not a perfect but a definite departure from dark systems) just as much as against a purely supranational one. Scholars are in general agreement that the EU is an innovative kind of entity that continues to resist any known constitutional model, in spite of the relevant position assumed by the worldwide famous scientist of politics Sergio Fabbrini.

In his opinion the EU is a *compound democracy*, organized around a multiple separation of powers (vertical as well as horizontal) and functioning without a canonic government. If this model of democracy has no equivalent in contemporary Europe, however, it was elaborated and pursued on the other shore of the Atlantic, namely in the United States of America. That is why the EU is far from being considered an exceptional system but a species, not yet fully developed, of a federalistic agency⁶. But in Fabbrini's approach emerges a comparativistic perspective, where many analytic elements are superimposed one upon another.

3. The cosmopolitan identity after the big push eastwards

For a long time, Europe was almost solely a cultural and historical construct. After the big push eastward, the European Union is called to ponder its borders, to evaluate if and when the horizon of a common market, of a common foreign policy, will lead towards the coincidence with the whole continent, not bypassing a lively debate about the nature of the Russian federation. That is to say: does the greater and richer survivor of the USSR constitute a vital limb of the European organism, or in a world policy of balancing state powers does it fuel an Asiatic ambition?

The process of enlargement is far from over, but after the opening of its confines eastwards in 2004 the EU assumed a political form that could represent a model for the rest of the world. Obviously, Europe as a political form embodies a peculiar narration of religion, art, not easily to be moved somewhere else on Earth.

³ Fioravanti, Maurizio / Mannoni, Stefano, *Il «modello costituzionale» europeo: tradizioni e prospettive*, in Bonacchi, Gabriella (ed.), *Una Costituzione senza Stato* (Bologna: Il Mulino, 2001, 23-70).

⁴ Pernice, Ingolf, *Multilevel constitutionalism in the European Union*, "European law review", Vol. 27, No. 5, 2002, 511-519.

⁵ Manzella, Andrea, *Dalla Convenzione alla Costituzione*, "Il Mulino", Vol. LII, No. 5, 2003, 913-923.

⁶ Fabbrini, Sergio, *L'Unione Europea come democrazia composita ?*, "Rivista Italiana di Scienza Politica", Vol. XXXIV, No. 1, 2004, 13-42.

Besides, it has immediately come to evidence that the larger the Community grows, the greater the diversification becomes. This is inevitable. Different countries will move towards the same goals at different speeds. It is the penalty to be paid after forty years of forced separation (the cold war), and the result of the incomplete transformation into stabilised democratic regimes of Poland, Hungary, Slovakia, etc. after the fall of the Berlin Wall. Nevertheless, this is not a crucial problem, because the EU-15 area itself is, concerning the Euro, a two-speed system already in existence.

Necessary, as stressed by Vaclav Havel, is the effort by the West side of the “auld continent” to stabilise the East, because otherwise it will be the East to destabilise the West, humiliating a project of peace in a battlefield where the societal impact of immigration will be turned into the pretext to transform Europe in a *fortress* inside which each specific culture is defended by any external influence and consequently where the integration process comes to a sharp end.

The national context has not been eliminated and perhaps it will not do in brief, because specific ways of life and identities are located within their beloved and partially *mythical* national frames, embracing a perspective that sometimes fails to recognize the *difference* as an opportunity and not as an individual or a systemic threat. A threat menacing the inner process of elaborating identity and undermining the way in which the cumulative intermeshing of the rationalization of the world with the functional differentiation of social subsystems is stabilized.

Jürgen Habermas is surely right affirming a turn to be considered radical only when the application of modern principles transforms these principles themselves, but he also recognizes a certain degree of discontinuity, an accelerated mobilization of social change that seems to characterize contemporary societies.

European integration has to be analyzed in terms that address the self-understanding of the present modernity. Many authors have summarized divergent positions, struggling each other about the topic.

Such European self-understanding is entirely indistinct from the general self-understanding of the West. The same commitment to human rights and liberal democracy would be a solid proof. Within the European Union the East Members would suffer from the willing to feel associated to the US, by contrast with France or Germany, more interested in vindicating the Union’s autonomy from Washington.

From a highly problematic standpoint, the European self-understanding is laid on stiff, overly “thick” presuppositions, which are untenable against the background of the continental cultural diversity and evoke illiberal political traditions, already visible referring to nazi-fascist parties and movements.

An abstract, universalistic commitment to democratic regimes is not at all sufficient for a satisfactory decodification of western polities in this evolving world, in the liquid and slippery modernity described by Zygmunt Bauman⁷.

The need today is to challenge the closures of nationalism and Huntington’s *civilizopolism* with a more *rhizomatic conception of political culture*. The plan is not to delegitimize concentric identification as such, for everyone needs to participate in the family that nourishes him and in the state that governs him. It is to appreciate how concentric circles of political culture are complicated and compromised by numerous crosscutting allegiances, models of collaboration. Even more, is to take advantage of the possibilities created by the compression of distance (through *dromology*, the science of *speed*, as emphasized by Paul Virilio) to enact a more vibrant plurality of connections exceeding a concentric model, identified by the State at its core⁸.

Speed is not the only solvent of thick universals. It will be possible to oppose ourselves to the Kantian postulate of a world intelligible in the last instance (even if humans are incapable of

⁷ Bauman, Zygmunt, *Liquid Modernity* (Cambridge: Polity Press, 2000).

⁸ Virilio, Paul, *Speed and Politics* (New York: Semiotexte, 1986); Id., *Negative Horizon: An Essay in Dromoscopy* (London: Continuum, 2005).

grasping that instance), but it would be indispensable to think about a *new matrix of cosmopolitanism* unsusceptible to resolution by one country, one philosophy. This is the cultivation of agonistic respect among parties who proceed from diverse, overlapping sources, posing a threshold not to be trespassed: the human life.

Where all talk of attention to difference, hybridizing identities, we should reply that the language of culture itself cannot always be reduced to a grammar of the Good. Cultures are ruses of power, designed to exclude some while protecting the privileges of others. Most contemporary defences of difference, whether ethnic or national, have less to do, except at the margins, with the defence of a distinct lifestyle, a distinct set of social practices, but more to do with valorising markers of difference. This could seem the claim of the European Union, whose motto is *united in diversity*, an invitation to look upon *unity* as a fact, to be historicised calling back the tragedy of the two world wars, elaborating a (*negative*) *common memory*, a cohesive instrument for a sacred promise: the horror of war, of million people dead, must never more be replied.

No doubt that the EU, in exercising its responsibilities in balancing the world power, will be requested to speak more often with a single voice. In order for the EU to make a credible case for change at global level, a successful governance reform at home is needed, otherwise the international promotion of principles not fully adhered to in the continent, will weaken the legitimacy of the EU, primarily what is contained in the Chart of Fundamental Rights proclaimed at the Nice Summit in December 2000.

Improving European governance means a great number of objectives and in particular more focused institutions with clearer responsibilities, together with the improvement of the bottom-up (States-Commission) involvement in EU policy shaping and implementation, without confusing these ends with organicistic conceptions of a unique European People, a *metaphysic Volk* as in Grimm's theory (derived from Herder). The plurality of the subjects composing Europe, from cities to the organized civil society, is the supreme value of a noble narration, a self-critical appropriation of traditions mixed *per differentiam*, as conceived by the Italian historian Federico Chabod⁹.

There is broad recognition that the principles of wise governance should not be equated to democratic government, as better governance cannot be the answer to a democratic deficit. Undoubtedly, one of the key issues is the democratic legitimacy, which presupposes decisions arrived at through representative deliberation. The inclusion of more players in the policy process, while necessary, does not by itself favour an increased democratic legitimacy of policies or institutions. In this respect, it is probably true that governance mechanisms seeking to enhance the effectiveness and efficiency of the decision-making system and ensure better involvement of a larger number of players will make the institutions more open, leading to increased responsiveness and accountability of institutions, but what is still to be done is to improve the communication, the dialogue between the top and the basement of the pyramid.

The cosmopolitan Europe described by Ulrich Beck frescos delightful horizons, abandoning the strokes of Utopia, presenting itself as Reality. Contrasting a cosmopolitan outlook sharpened by awareness of the transformative and trasgressive impacts of globalization with the national outlook neurotically fixated on the familiar reference-points of a world of nation-states borders, sovereignty, exclusive identities, Beck shows how even opponents of globalization and cosmopolitanism are trapped by the logic of *reflexive modernization* into promoting the very process they are opposing.

Beck's attempt consists in recovering an authentically European tradition of cosmopolitan openness to otherness and tolerance of difference. He suggests that what Europe needs is the courage to unite forms of life which have grown out of language, skin colour, nationality or religion with the awareness that, in a *world risk society* (the globalized *Risikogesellschaft* theorized twenty years ago), in an insecure world, all are equal and everyone is different¹⁰.

⁹ Chabod, Federico, *Storia dell'idea d'Europa* (Roma-Bari: Laterza, 2001⁴).

¹⁰ Beck, Ulrich, *World Risk Society* (Cambridge: Polity Press, 1999).

The suggestion is to reinvent politics, rethinking modernity in the global social order, rejecting the idea that western societies at the beginning of the twenty-first century move from the modern to the post-modern. The meta-change of modern society does not imply a clear break with the main principles of modernity, but rather a transformation of basic institution of modernity in the intimate/private sphere (the nuclear family) as well as in the public sphere (the nation-State).

There has been no movement beyond the realm of the modern to its opposite, that is why we are witnessing a *second* modernity, letting the adjective “second” assume a special connotation in a territorial sense or, with greater precision, in an ultra-territorial sense, being the real theoretical and political challenge of the second modernity the fact that society must respond to supranational phenomena as globalization, gender revolution, underemployment, *simultaneously*. And considering these processes carefully, they all are unforeseen consequences not of the crisis but of the victory of the first, simple, linear, industrial modernization based on the nation-state, the classical target of sociological studies. The unforeseen consequences of functional differentiation can no longer be controlled by further functional differentiation conceived on a single state-nation map¹¹.

The sociology of the first modernity is based on a system of dualisms and boundary demarcations that are self-stabilizing and self-reproducing. As in Carl Schmitt’s political studies, these assumptions show a theoretically decisionistic and therefore quasi-ontological binarism, developing the *either/or* logic and excluding every form of *both/and* reality that can be observed (another question would be *if* and *how much* constantly) inside all the levels of the social and political spheres¹².

The emergence of transnational ways of life, homogenized by the mass media, should not be confused with theories that project the national-international antinomy exclusively onto the global level, even if a world problem requires a world response, defending an effective multilateralism. The EU may become the progressive instrument for changing and influencing in the world, without which we would be powerless in the face of a liberistic globalization and without which citizenship would remain a list of expectations.

The recent expansion in the use of *soft modes of governance*, tracing a horizontal scheme to exercise power in favour of peoples’ rights, not against them, poses important questions about democracy and the rule of law in the young supranational political system (in search of a more detailed definition).

On the one hand, these new modes might be problematic since they bypass parliamentary procedures, lack judicial scrutiny.

On the other hand, the potential participatory nature of soft modes of governance and their partially voluntary character can be seen as a precious source of democratic renewal since they constitute, at least hypothetically, alternative methods for inputting legitimacy into the EU system. In a similar vein, the soft instruments should complement rather than replace all the traditional legal instruments, becoming an unproblematic factor of evolution with respect to the rule of law principle, but far away from the equivalence between Democracy and State.

4. Conclusion

In order to recognize and make sufficient sense of the phenomena of all these meta-changes, we conclude that the European Union, as a *multiverse*, which means a hypothetical set of multiple universes that comprise all of a physical, geographical reality, can stand in a world-universe, promoting within its nowhere running borders a more inclusive strategy than a mere multiculturalism, fighting every temptation to describe such a plurality in terms of a sum of

¹¹ Beck, Ulrich / Lau, Christoph, *Second modernity as a research agenda: theoretical and empirical explorations in the “meta-change” of modern society*, “The British Journal of Sociology”, Vol. 56, No. 4, 2005, 525-557.

¹² Beck, Ulrich, *The Cosmopolitan Vision* (Cambridge: Polity Press, 2005).

völkisch demoi, but at the same time outrunning the proposal of a federalistic institutional asset linked to the aim of helping European citizens to protect their *Lebensform*.

A Constitution is not the necessary premise to a State, and a State can survive without a Constitution conceived as the fruit of a fundamental decision taken in observance to a *Freund/Feind dichotomy*¹³, comparing each conflict to an apocalyptical clash of civilizations that can be allayed having recourse to the (il)logic of pre-emptive war¹⁴.

In this fast-paced world, the West is not self-sustaining, and practicing an effective solidarity should be not simply a moral duty but also an utilitaristic strategy against marginalization, poverty, to assure a future reversing the adage *si vis pacem, para bellum*, into *si non vis bellum, para pacem*.

The desire to hold on to the nation-state, the family, class or an ordinary biography may spring from a wide range of motivations, but it will be an unforgivable mistake to deal with them as if they were signals of the “end of history”, of the empirical supremacy of a law, political and economic system witnessing to be exported by the *last Man*. The mentioned ambiguity invalidates the very concept of crisis, because it imposes the triumph of the West as the unquestioningly frame of reference for the rest of the planet. On the contrary, a cosmopolitan perspective expects the *after cold war* to be bracketed off, erasing all the alibis adopted by those who over-emphasize some dark sides of the past to reproduce false oppositions, handling the human research to freedom as it did not concern the “Third World”. The future is a fully human destiny to be moulded without imperialistic inclinations.

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¹³ Schmitt, Carl, *Le categorie del “politico”* (Bologna: Il Mulino, 1972).

¹⁴ Huntington, Samuel P., *The Clash of Civilizations and the Remaking of World Order* (New York: Simon and Schuster, 1996).

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