

European Constitutionalism

Historical and Contemporary Perspectives

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Introduction

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The deep economic crisis Europe has been facing for several years can be seen as both a cause and a consequence of the political indecision in which the European Community/Union has been living for so long now. The end-goal (the *finalité*) of this unique political project has never been clarified. While its objective – to guarantee peace, security, justice and wealth – was certainly explicit from the start and has been repeated in the various treaties founding the Community or Union, the institutional and political means necessary to attain these goals have so far remained undetermined. In these times of turmoil, this indetermination turns out to be the latent defect of the European Union.

If truth be told, the European project has always been caught in a series of paradoxes or antinomies that seem to be inherent to it. How, for example, can we build a political entity if the political subject is not yet identified, if there is no such thing as a ‘European people’? How can we have a people of citizens without a political constitution? And how can we have a political constitution without a European people? These antinomies probably have something to do with the teleological nature of the European project. European integration is a process the end of which is not defined in advance. The founding fathers of the European community were well aware of the processual and regulative dimension of the European idea, and they were at the very least unclear about the institutional form the European Community should take. Jean Monnet looking back in the 1970s at the first decades of the European construction wrote in his *Memoirs* (1976):

I could not say where necessity will take us, what kind of Europe awaits us, for it is impossible to imagine today the decisions that may be taken in tomorrow’s context. The most important thing is to hold on to the few fixed points that have guided us from day one: to create, gradually, between the men and women of Europe the widest common interest possible, managed by common democratic institutions to which sufficient sovereignty is delegated. This dynamic is still at work today. [...] I have never doubted that this process would lead us one day to the United States of Europe, but I do not try to imagine today the political framework we will adopt, so imprecise are

the terms we argue about: confederation, federation. What we are preparing, through the action of the European Community, is unprecedented. This community is itself based on institutions that will have to be reinforced, but the true political authority European democracies will one day designate has yet to be conceived of and realised.¹

It seems that this task (“conceiving a real political authority”) is still ahead of us. Remaining very vague about a possible deadline and the circumstances under which this goal might be achieved, Monnet just mentioned that “Realities themselves will enable us to define the political union. The idea is clear: a political Europe will be created by men and women, when the time comes, based on the realities on the ground”.² We cannot but hope that the crisis we are experiencing is one of these “realities” out of which institutional innovation and political decisions will arise. In any case, there can be only one method to achieve a political union, according to Monnet: it consists of “delegating sovereignty” and “exercising this sovereignty in common”.³ The details of these transfers are of course omitted and in the end the EU remains an unidentified political object. Indeed, most jurists agree today that the EU is a legal construct *sui generis* – which confirms this congenital indetermination and suggests that efforts to define the EU by referring to traditional and proven patterns are probably pointless.

The issue of European constitutionalism paradigmatically illustrates the conceptual, political and legal difficulties we are confronted with when we try to define the EU and to imagine its possible developments and transformations. It emphasizes one of the paradoxes of the European

¹ “Vers quel aboutissement nous conduit cette nécessité, vers quel type d’Europe, je ne saurais le dire, car il n’est pas possible d’imaginer aujourd’hui les décisions qui pourront être prises dans le contexte de demain. L’essentiel est de s’en tenir aux quelques points fixes sur lesquels nous nous sommes guidés depuis le premier jour: créer progressivement entre les hommes d’Europe le plus vaste intérêt commun géré par des institutions communes démocratiques auxquelles est déléguée la souveraineté nécessaire. Telle est la dynamique qui n’a cessé de fonctionner [...]. Je n’ai jamais douté que ce processus nous mène un jour à des Etats-Unis d’Europe, mais je ne cherche pas à en imaginer aujourd’hui le cadre politique, si imprécis sont les mots à propos desquels on se dispute: confédération ou fédération. Ce que nous préparons, à travers l’action de la Communauté, n’a probablement pas de précédent. Cette communauté est fondée elle-même sur des institutions qu’il faut renforcer, tout en sachant que la véritable autorité politique dont se doteront un jour les démocraties européennes reste à concevoir et à réaliser”, Jean Monnet, *Mémoires*, Paris, Fayard, 1976, p. 615-616.

² “Les réalités elles-mêmes permettront de dégager l’union politique. L’idée est claire: l’Europe politique sera créée par les hommes, le moment venu, à partir des réalités”, *ibid.*, p. 505-506.

³ “[...] délégation de souveraineté et exercice en commun de cette souveraineté déléguée”, *ibid.*, p. 506.

project: unable to develop without constitutionalizing the European legal framework but unable to find the appropriate manner in which to do so, or the support of the European peoples. These difficulties have historical, conceptual and legal reasons which must be identified and discussed. This was precisely the objective of the seminar on Social Philosophy held at the Inter-University Centre of Dubrovnik in April 2013. The present volume brings together the most significant contributions to this symposium.

The first four contributions address the legal nature and structure of the European Union. *Violeta Beširević* (Union University Law School of Belgrade) shows that EU has an un-codified, evolutive and antirevolutionary constitution, which helps connect the “Politics of Messianism” (J. Weiler) with democracy and positions the EU in a global world. To this end, she outlines the historical context, showing that the words “state” and “constitution” have more or less always been present on the integration agenda. Since a constitution is usually connected with the existence of a state, she then summarizes the different views on legal conceptualization of the EU. Starting from the premise that a constitution can exist without a state, she identifies the core elements of the EU constitution. She then sheds light on some features of internal and external EU constitutionalism which justify her claim that political Messianism in EU integration has been predominantly directed at making democracy the only legitimate form of governance in the EU public order, without a parallel in transnational or international law. *Nenad Dimitrijević* (Central European University of Budapest) focuses on the issue of constitutional identity and asks several related questions: How does constitutional identity relate to pre-political identities? What are the features of constitutional identity? Why does constitutional identity matter, and more particularly how does it relate to democracy and legitimacy? Who is, or who are, the bearers of this identity? N. Dimitrijević emphasizes an important controversial aspect of EU constitutionalism: the identity-specific relationship between historical particularity and constitutional universalism. *Dragica Vujadinović* (Faculty of Law, University of Belgrade) deals with a very similar issue – the concept of European constitutional patriotism – and she underlines the reasons behind its attractiveness. Constitutional patriotism was initially developed in post-war Germany. However, the concept achieved unexpected popularity in the late 1990s when it started being used as a normative model for understanding European identity building – as the civic basis of identification with a supranational political community. The normative and economic attractiveness of the European polity derives from the fact that it is constitutionally capable of enlargement and of “transnational overflowing” towards countries outside of the EU. The attractiveness of the EU comes also from the openness of its constituent power; there is no one unique *demos*, and European *demoi*

will have always to negotiate and decide upon what they want and what they do not want to share: the Union does not impose any homogeneity. In his contribution, *Tanasije Marinković* (Faculty of Law, University of Belgrade) addresses the legal nature of European Human Rights Law. While it is undisputed that the formal traits of this law place it within the domain of international law – the High Contracting Parties to the European Convention are states which have accepted the limited jurisdiction of the European Court in their mutual disputes and as concerns individuals' complaints – its essential features, among which the praetorian work of the European Court itself, correspond to the concept of the contemporary judicial review of constitutionality. This paper addresses the complexities of European Human Rights Law due to its dual nature, namely, the international law nature of its basis and the constitutional law nature of its content. Having regard to the level of interplay between these two dimensions, one formal and the other essential, the author concludes that European Human Rights Law is of supranational nature, which is furthermore confirmed by considerations of its normativity.

The following four contributions address the topic of European constitutionalism from a political and philosophical point of view. Dealing with Habermasian political thought, *Gérard Raulet* (Paris-Sorbonne University) argues that Habermas' diagnosis of the withdrawal of the nation state has been widely misunderstood. It must not be forgotten, as Habermas himself reminds us, that the beginning of European public spheres coincided with an affirmation of nationality. Whereas the nation-states of the Old Regime were in fact feudal multinationals, in 1789 and then in 1848 nationalities were associated with the awakening of political public opinion. How does this problem look in a globalized world order in which the role of the sovereign national states is undermined by the structural changes brought about by the reproduction of capital? In his paper, Gérard Raulet examines the different answers given by Habermas in his numerous contributions to the debate about the end-goals of European construction, European identity and European citizenship: "constitutional patriotism"; a "post-state constitutionalism"; but also "solidarity", as the way in which the nation state of the 19th century provided an answer to the need for new identifications; and, not least, the formation of a European people sufficiently homogeneous to form a democratic will. G. Raulet compares these answers to the legal and/or (pseudo) constitutional texts on which a European common will is supposed to be grounded and with the opinions of constitutional lawyers. He concludes that we must deal with two different or even contradictory perspectives: a soft liberal (Anglo-Saxon compatible) and a more radical, more "continental" (French-oriented) conception of democracy and

legitimacy. The question is, how does Habermas draw a coherent line between these two distinct approaches, which have influenced his political thinking since its very beginnings in *Strukturwandel der Öffentlichkeit* (1962)? *Alexandre Dupeyrix* (Paris-Sorbonne University) recalls that Kantian cosmopolitanism was for a long time considered the model of supranational citizenship. However historical, social and economic developments that Kant could not foresee oblige us today to rethink his blueprint and to replace it by the concept of “transnational democracy”. This contribution sheds light on the conditions required for such a new order and addresses in particular the issues of identity and sovereignty. One of the difficulties the European project seems confronted with is the lack of any European identity. But what kind of identity are we talking about? Cultural or political identity? And how might these two aspects of identity be matched? As for the concept of sovereignty, it seems to be one of the two pillars (with human rights) of a modern democracy: can the EU be a democratic order if sovereignty within the Union is divided, shared or progressively dissolved? *Patrice Canivez* (University of Lille) deals with the type of multiculturalism that is unique to Europe and analyses the relationship between such multiculturalism and the European political integration process. In so doing, he distinguishes between multiculturalism at the level of the European nation-states and multiculturalism at the level of the European Union envisaged as a whole. The analysis considers the diverse aspects of multiculturalism, especially the role of language, religion, history and the different ways in which the process of secularization has developed in the European member states. The chapter notably discusses 1) the distinction made in Canada between multiculturalism and interculturalism and Charles Taylor’s suggestion that interculturalism is best suited to European nation-states, 2) the transition, in Habermas’ reflections on Europe, from the idea of a post-national European Federation to that of a European transnational democracy. Finally, the chapter relates the question of cultural pluralism in Europe to the much-debated issue of federalism in the European Union. Dealing with the political thought of Jacques Derrida and Jürgen Habermas, *Tonči Valentić* (Zagreb and Ljubljana) claims that Europe is and cannot be anything else but a cosmopolitan project of transnational idea of freedom of citizen and human being in its identity. What is missing today is rather the subject of transnational politics as “metapolitics of advent of freedom of the coming community” (Agamben). Only in this sense can Europe overcome neoliberal technocratic ideology and once again create itself as a project of new power beyond the limitations of nation-states, territorial sovereignty and the limited participation of European citizens in EU politics today.

In the last contribution to this volume, *Maria Găinar* (University of Strasbourg) discusses, in a strictly historical approach, the adoption of the

declaration of European identity in December 1973. She argues that this adoption undoubtedly marked the emergence of Europe as a distinctive political entity in the international arena. It is the result of both internal factors (the reflection on European identity initiated in the 1960s) and contextual factors (European reactions to Henry Kissinger's speech on the "Year of Europe", European success with the CSCE process, European concerns vis-à-vis the American-Soviet entente). The declaration entails two dimensions: the affirmation of an independent attitude with regard to different regions in the world and the distinct position of the Nine, with regard to those of the United States and the Soviet Union. Thus, though only momentarily, the Nine make the choice of the "European Europe" and pave the way for progressively "[defining] their identity in relation to other countries or groups of countries".

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This volume is dedicated to our colleague and friend Heinz Paetzold, Professor of Philosophy at the University of Kassel and course director of the Dubrovnik seminar, prematurely deceased in 2012.