CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

VOLUME 8

ISSUE 3
2016

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

VOL. 8, ISSUE 3, 2016
TABLE OF CONTENTS

EDITORIAL

ESSAYS

NOTES

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

The failure of intergovernmentalism in tackling the EU crisis and the European Parliament's initiative

by

Roberto Castaldi*

Perspectives on Federalism, Vol. 8, issue 3, 2016

Abstract

The EU is facing a multi-faceted, existential, crisis; it is an economic and social crisis in some countries, a political and cultural crisis all over the EU and a geopolitical crisis at the international level. National governments have taken the lead in the crisis management of the EU: the European Council has become the dominant institution and the intergovernmental method has come back into fashion. But intergovernmentalism has failed: since 2008 the crisis keeps getting worse. Intergovernmentalism is leading towards the EU's disintegration. Among many voices to save the EU, it is interesting that the supranational institutions, and particularly the Parliament, are taking on themselves the responsibility to take the initiative and indicate a possible way forward for the Union.

Key-words

EU crisis, intergovernmentalism, European Parliament

1. The multi-faceted crisis of the EU

For almost sixty years European integration had been considered a great success and had enjoyed huge popular consensus. This "permissive consensus" could have allowed political leaders to push integration forward, but it actually made it possible for them to postpone difficult decisions to a more favourable time, in the expectation that the popular consensus will always be there. Since 2008 all this has changed. An accumulation of challenges over the last 8 years has created a multi-faceted crisis that may turn out to be an existential threat for the EU as such.

The financial crisis started in the US, but had its most severe effects on the EU, and especially the Eurozone. The European Monetary Union cannot survive in the long term as it stands. This was known from the very beginning: the MacDougall Report suggested that a monetary union required a budget of at least 5-6% of GDP to address asymmetric shocks and foster convergence.[I] When the monetary union was created without such a budget, most experts thought this could not work, and that the monetary union was just a step along the road towards political union.[II] However, the start of the Euro proved an amazing success, silencing all critical voices, except for a few federalists who kept denouncing the limits of the Maastricht Treaty and the lack of sustainability of a monetary union decoupled from an economic and political union, even before the start of the 2008 crisis.[III] Nowadays this opinion is shared by several Nobel Prize winners[IV] and by the European institutions themselves! The Four Presidents Report of 2012 and the Five Presidents Report of 2015 stress the need to create a "genuine" economic and monetary union. But they have essentially remained on paper due to the lack of political will by national governments

During the crisis the European Council became the dominant institution in crisis-management. This also produced a wide debate over the new intergovernmental turn of European integration.[V] But intergovernmentalism failed:[VI] since 2008 the crisis kept getting worse. The failure of EMU and its possible collapse are widely debated. Political parties opposing the single currency have appeared. The EU's mishandling of the Greek crisis was lacking in both solidarity and effectiveness, and dramatically reduced its legitimacy.[VII] The intergovernmental crisis-management failed and turned the EU from a success story to a

perceived failure. Eventually this made Brexit possible. Intergovernmentalism is leading towards the EU's disintegration.

The rise of China has shifted the competition for global hegemony to the Pacific; US strategic focus has structurally shifted accordingly. Shale gas and America's new energy autonomy has also contributed to the decrease in the strategic value of the Middle East. Eventually this produced a significant power vacuum which made possible the Arab Spring and the collapse of several authoritarian pro-West regimes in Africa and the Middle East, the civil wars, with different levels of intensity, in Syria and Libya, the rise of Daesh or Islamic state, the Russian annexation of Crimea and destabilization of Ukraine, the authoritarian turn in Turkey. All these events have produced significant fluxes of migrants and refugees, a part of which have tried to reach the EU. Since World War II the Europeans have entrusted their defence on the US. With the shift in American strategic focus and the new Trump presidency, requiring allies to carry a greater share of defence costs, Europeans now needs to ensure their own defence, and so far are incapable of doing it. The EU as such spends 0€ on defence. The EU Member States together make up the second highest military expenditure in the world, almost half that of the US, and more than China or Russia. But this money is dispersed among 28 different armies, thus producing very little effective capability. Overall Europeans spend 1.2% of GDP for defence – against a NATO request of 2% - as compared to the whole EU budget which is just 0.9% of GDP.

At the same time, several terrorist attacks within the EU have occurred. The inability of the EU to ensure that Member States exchange information effectively and in real time, and cooperate effectively is evident, yet still very little progress has been made on this. The violent death of so many European citizens was not enough to push national governments to pool their resources at European level. Security concerns, and also islamophobia, are thus on the raise.

All this has weakened the consensus on the EU, but surveys also show that the consensus for national and local government is often even weaker. The whole democratic multi-level system of government in which Europeans live is experiencing a deep legitimacy crisis; Nationalism cloaked in a populist disguise has made its comeback. More political leadership and capital is thus required from heads of state and government to make the decisions needed to address the crisis. But political leadership is conspicuously

lacking. The national governments response to the crisis has been more intergovernmentalism, and the pursuit of the Maastricht logic: more constraints to economic and fiscal national policies, without an effective European economic policy. European decision-making continues to be hostage of national politics, where crucial decisions are postponed in view of a national or local election. Alternatively, fundamental decisions on Europe are forced by party interests, like Cameron's promise to hold a referendum on the British membership of the EU if he won the election, made to keep the Tories united in view of an election he didn't think he could win. But he did, and Brexit may turn out to be the start of the EU's – and possibly the UK's - disintegration, and not just the end of Cameron's political career.

In this context the main attempts to change course came from European supranational institutions. The Juncker Commission introduced more flexibility in the interpretation of the European constraints on national fiscal policies. It boosted investments through the 'Juncker Plan' - essentially EU debt under the form of Euro-project bonds disguised by the management of the European Bank of Investments. Its success brought its further strengthening and increase in funds, doubling its original amount. And a new European External Investment Plan (Juncker Plan II) has just been launched as a tool to help stabilize the Neighbourhood within the European foreign and security policy. Recently President Juncker observed that the success of the Plan has produced a change in its name. Initially nobody believed it would work, and everybody called it 'the Juncker Plan', ready to blame the Commission for the failure. Now that in one year it has disbursed over 17bn. euro into the economy - of the 30bn. already approved from the 163bn. available – the media and national governments have reverted to calling it with its official name, the European Fund for Strategic Investment, so that its success does not strengthen Juncker and the Commission.[VIII]

The Juncker Commission also tried to push forward completion of EMU, by re-launching the debate on the Four Presidents Report of 2012 through a new Five Presidents Report in 2015, but stumbled when opposed by strong resistance by most Member States.[IX] The Commission also prepared a new "EU global strategy", made pushes towards more defence cooperation, and possibly the use of Permanent Structured Cooperation. With regards to migrant and refugee fluxes the Commission set up a redistribution system for refugees, which Member States approved, but are not implementing. The Commission

proposed and managed to create a European Coastal and Border Guard, but Members States limited their powers significantly. Even before the results of the Brexit referendum national governments showed they had no plan – just like the British government! Only the European institutions seemed to have planned for the worst outcome – which is the duty of any government. The European Central Bank had consulted with the Bank of England to prepare emergency plan to cope with potentially negative market reactions. The Commission immediately suggested that citizens' votes needed to be respected, that Brexit should take place as quick as possible to reduce uncertainty, and that the EU should focus on its own reform to address citizens' needs and expectation. Also, the Parliament held an ad hoc plenary and approved by a vast majority a resolution on the same line asking the EU to move forward.

In spite of the limitations in the results obtained, it is clear that the Commission tried to move the EU forward with regards to all the main challenges it is facing. It is now time to turn to the European Parliament, which now seems ready to take the initiative to bring that agenda forward.

2. The European Parliament's role

The European Parliament (EP) is often considered a relatively weak institution, at least by the media; and thus by public opinion. This is mainly due to the fact that even at the time of the first direct elections in 1979 it had very few powers. Nonetheless, its strong democratic legitimacy, as the only directly elected institution of the EU, allowed the Parliament to acquire more and more powers at each Treaty reform, from the Single European Act, to the Maastricht, Amsterdam, Nice and Lisbon Treaties.[X]

Today, compared for example with the French or Italian parliaments, the EP stands out as a strong institution from several perspectives. It has a much stronger legislative role that cannot be curtailed by any means by the executive – as it happens in France where the government can legislate in place of the Parliament, and recently did on labour law for example. The EP cannot be coerced through a request of a vote of confidence by the Commission, as the Italian government does on all most significant pieces of legislation. Nor can the Commission or the Council legislate through decrees.

The EP has gained significant powers with regards to the appointment of the European commissioners, and has established a regular procedure through its hearings and "grilling" of the candidates. Many national parliaments can only vote for the whole government, without the possibility of just setting aside one or a few proposed ministers not suited for their proposed posts. If, for example, the same powers and procedures were available to the Italian Parliament it is doubtful that all of the Ministers of several recent governments would have been appointed to those ministries or at all.

With the Lisbon Treaty the EP also gained the power to elect the Commission President from nominations by the European Council, decided by qualified majority voting, which must take into account the results of the European election. This procedure is very similar to traditional parliamentary democracies, with the European Council in the role of the head of state. The 'Spitzenkandidaten' process, the presentation of a Commission President candidate by each of the main European parties at the 2014 European election, was the first test of this procedure. Most people did not believe the process would work, and the European Council would not nominate any of the parties' candidates; consequently, the media did not pay much attention to the candidates and their debates. But democracy is strong, and the European Council eventually had to nominate Juncker, as the candidate of the party with the most seats in the Parliament. This process could be strengthened in different ways, for example through primaries of the European parties to select their candidates, and by establishing a clear procedure for the European Council to consult the Parliament party groups in order to select the nominees for Commission President. But the democratic linkage between the European citizens and the Commission – as the European executive – through the election of the Parliament has been established.

EU transparency rules allow us to monitor lobbyists' activity, and these have taken notice of the increase in the EP's power. While they used to focus mainly on the Commission, they now devote a great deal of resources to the Parliament.[XI]

This new situation and powers are triggering new political dynamics. On the one hand working practices in the EP have shown a tendency for the groups that voted in favour of Juncker as Commission President – EPP, S&D, and ALDE - to cooperate more closely, as if they were a political majority. With regards to all the main legislative acts and reports there are informal consultations among the rapporteur and the shadow rapporteurs of

those groups, and the compromise amendments are drafted taking mainly into account those groups views. On the other hand, we have seen an end of the traditional arrangement between the two main party groups to elect together the president of the Parliament for half a legislature so that each party holds the presidency over the term of a legislature. The S&D is rejecting this arrangement on the basis that the EPP, as the first party group, holds the Commission Presidency with Juncker - and currently also the European Council Presidency, with Tusk.

At the same time the Parliament is also sensing its new responsibilities. The intergovernmental method of governing the EU has failed dramatically in dealing firstly with the financial and economic crisis, and then with the increasingly dangerous geopolitical challenges around the EU, which contribute to the migrant and refugee crisis. The collapse of the EMU was only averted by the resolute action of the European Central Bank, yet ECB calls for the completion of EMU itself fell on deaf ears in national governments. The 2012 Four Presidents Report, and the 2015 Five President Reports have remained so far an example of what Giddens calls "paper Europe" (Giddens 2014: 7). The crisis eroded trust among national governments, which have shown their lack of political will to tackle the EU's and EMU's structural problems. The Lisbon Treaty for the first time conferred on the Parliament the power to start Treaty reform processes. This was precisely the power the Parliament lacked during its first attempt to reform the then European Economic Community by approving the Draft Treaty on European Union in 1984, known as the 'Spinelli project'. The Parliament proposal was not taken as the basis of the negotiations which led to the Single European Act, even if most of its contents has ultimately found its way into the EU treaties through various revisions.[XII]

3. The Parliament's initiative to tackle the crisis

Against this background the Parliament is trying to take the initiative. The Constitutional Affairs Committee concomitant approval of the Reports on "Improving the functioning of the European Union building on the potential of the Lisbon Treaty" – rapporteurs Mercedes Bresso (S&D) and Elmar Brok (EPP) – and on "Possible evolutions of and adjustments to the current institutional set-up of the European Union" – rapporteur Guy Verhofstadt (ALDE) – provides the EP's view of what can be achieved within the

current treaties, and on what else need to be done through Treaty reforms. The Economic and Monetary Affairs Committee is working on Reports on "The Banking Union" – rapporteur Danuta Hübner (EPP) – and together with the Budget Committee on a Report on "A budgetary capacity for the Eurozone" – rapporteurs Pervenche Berès (S&D) and Reimer Böge (EPP). The final vote of the plenary is likely to take place before the Rome Treaties celebrations next March, when the European Council is supposed to deliver a road map for the relaunch of the Union. Together these four reports constitute the Parliament's attempt at keeping the integration process going, with particular respect to the completion of the EMU, but also taking into account the changing geopolitical environment, and needs. In this last respect it is also interesting to note the start of joint work by the Foreign Affairs and Constitutional Affairs Committees on a Report on "Constitutional, legal and institutional implications of a common security and defence policy: possibilities offered by the Lisbon Treaty" – rapporteurs Michael Gahler (EPP) and Esteban González Pons (EPP).

While national governments do not seem ready to take major decisions, the Parliament is working on a comprehensive set of proposals, that essentially set out ways to implement the Four and Five Presidents Reports. In this endeavour the Parliament can act as a vanguard, counting on the support of those governments keenest in pushing integration forwards. Significantly, the then Prime Minister Renzi praised the EP's work on the reports in his speech to the Italian Parliament on the European Council meeting of last October.[XIII] It is rather uncommon to hear a PM praise and support the EP, and to offer it as an example of the capacity to work in a bipartisan manner, to put forward constructive proposals.

These documents can be considered as attempts by the Parliament to influence the debate in view of the road map to be launched by the European Council in Rome next March 2017. It would also be possible to dismiss the Parliament reports as just more "paper Europe". The Four and Five Presidents reports remained mostly on paper, so why should the Parliament's reports have a different fate? The reason is in the history of the Parliament. These documents may well turn out to be the preparatory works needed to set the common ground among the main party groups to prepare and formally put forward a comprehensive Treaty reform proposal by the end of the legislature, thus using the newly acquired power to initiate the Treaty reform process. This would be coherent with the

Parliament's historical record of struggling to get new powers, and always using them once they have been acquired. The 'Spitzenkandidaten' process is just the last example of this. Therefore, it is interesting to analyse the main proposals of these Reports.

The Bresso-Brok report explores what can be done to strengthen the EU within the current Treaties. It offers several suggestions for improvements and simplifications and shows that integration can be significantly deepened through the tools provided by the Lisbon Treaty. It articulates a few clear messages in a legally detailed and sophisticated manner, pointing out for each proposal the existing legal basis and means. Therefore, it is at the same time a critique of the lack of political will and courage by Member States, who are not exploiting the Lisbon Treaty to the full.

The report criticizes the intergovernmental method and the European Council's dominance and defends the Community method and the role of the Union's supranational institutions. To this end it proposes a reduction in the Council's configuration and the creation of a legislative Council acting as a second chamber and working in public. It also seeks to strengthen and formalise the consultation procedure of the Parliament by the European Council in the process to nominate the Commission President. It suggests that the Member states designate 3 candidates as commissioners (to include both genders) from whom the Commission President can choose, thus increasing its powers and independence. It proposes the adoption of qualified majority voting for the approval of the Multi-Annual Financial Framework and its reduction from 7 to 5 years, to bring it into alignment with the Parliament mandate.

The report emphasises the potential of differentiated integration and stresses that this does not necessarily imply intergovernmental governance. Therefore, it commits the Parliament to refusing its consent to any new enhanced cooperation unless the related passerelle clause (art. 333 TFEU) is also activated – which provides for the application of the ordinary legislative procedure with full co-decision by the Parliament and qualified majority voting in the Council .

The report stresses the need for the completion of EMU. It suggests the merger of the Euro Group President and the Commissioner for economic and financial affairs into an EU Finance Minister as Commission Vice-President in charge of a fiscal capacity. It also proposes a European Monetary Fund to be established in view of the creation of a European Treasury. To this end it proposes to communitarise the European Stability

Mechanism, to set up a real system of own resources for the EU budget, and possibly for a Eurozone additional one, within the EU framework and under the democratic scrutiny of the Parliament. The report rejects the need to create other specific institutions, stressing that the Euro is the currency of the EU, just as the EP is its parliament. It also asks for a single external representation of the Eurozone in the International Monetary Fund, the World Bank and other international financial organizations. It suggests the creation of a framework for an orderly sovereign default procedure, but at the same time demands the strengthening of the Union investment capacity and the creation of a convergence code including social criteria, within a new European social pact.

Finally, the report emphasises that the geopolitical situation requires an EU foreign and defence policy, and that the current treaties allow this to be pursued. It asks for a common defence policy and a Council of Defence Ministers to be chaired by the High Representative/Vice President. It demands the use of Permanent Structured Cooperation, as well as greater involvement of the Parliament on foreign and security policy. It proposed the creation of a permanent civilian and military headquarters with planning and management capability. On internal security it demands mandatory exchanges of information to be established, eventually through enhanced cooperation. It asks for the revision of the Dublin regulation on asylum-seekers and the establishment of a Common EU asylum policy and system. It calls for the use of the passerelle clause to move the justice and home affairs policies to the ordinary legislative procedure. It demands the establishment of a European Public Prosecutor Office.

The Verhofstadt Report builds on the previous one, also addressing the various aspects of the EU crisis, and pointing out what other measures are necessary to strengthen integration but require a Treaty reform as they cannot be reached with existing legal instruments.

The report stresses the goal of ever-closer union and the legitimacy of the Convention as the tool for the reform of the Treaties. It denounces the use of differentiated integration for single pieces of legislation and the creation of a complex Europe "à la carte", rather than being a tool to deepen integration. It asks for a Treaty reform curtailing opt-outs at primary law level, and overcoming all exceptions to the ordinary legislative procedure. It criticised the intergovernmental method reinforced through crisis-management mechanisms. It opposes the creation of different sub-sets of Member states trying to lead

the debate. It also proposes to set up a partnership to accommodate countries outside the EU but with a strong relationship with the EU, that could include the UK, Switzerland, Norway, Turkey, Ukraine, and possibly others.

It also suggests that the next Treaty revision should bring into the Treaties the European Stability Mechanism, the Single Resolution Fund and the Fiscal Compact, ensuring democratic decision-making and Parliamentary control. It should create a European Treasury with a fiscal capacity based on own resources and the ability to borrow. A European Finance Minister within the Commission - under the control of the Parliament and Council - would be in charge of the Treasury and represent the Eurozone in international financial organizations, with the ESM – under the oversight of the ECB – to act as first lender of last resort. It asks for the completion of the banking, capital market, and energy union, and for some form of tax harmonization or coordination, overcoming the unanimity requirement.

The report calls for a European migration system, the strengthening of the Border and Coastal Guard, and of Europol and Eurojust, to also include a European intelligence capacity to cope with the terrorist threat. It also proposes a defence union; the transformation of the high representative into a Foreign minister, also in charge of a unified EU representation in international organizations including the UN; and the creation of a European Intelligence Office within the common foreign and security policy.

It proposes the strengthening of the Commission's power to protect the rule of law and fundamental rights, and the access by citizens to ECJ with regards to those issues. It demands the transformation of the Charter of Fundamental Rights into a Bill of rights, abolishing the limits provided in its art. 51.

Finally, it asks for the Commission to evolve into a fully-fledged European executive, for the reduction of the number of members and Vice-presidents, who should be the Finance Minister and the Foreign Minister. To this end it also calls for the strengthening of the 'Spitzenkandidaten' process, proposes the creation of a legislative Council, and reiterates the call for a single seat of the European Parliament. It proposes to change the ratification procedure of Treaty changes, to take place preferably through a European referendum, or otherwise through a 4/5 majority of national ratifications. It proposes to start a period of reflection aimed at bringing about a Treaty reform on the occasion of the sixtieth anniversary of the Treaties of Rome.

The work on the Hübner Report on "The Banking Union" and on the Berès – Böge Report on "A budgetary capacity for the Eurozone" is still going on, and there has not been a formal vote yet, even within the relevant Committees. Therefore, I will not analyse them in detail; it is enough to note that they delve into two crucial issues regarding the completion of the EMU, providing articulated and specific proposals on the way forward.

4. Clear implications of legitimate discriminatory disenfranchisement

The idea that the EU is at a crossroads is a recurrent one, and the fact that the EU is facing a multi-faceted existential challenge suggests that it may well be again. However, it is unlikely that the EU as such will take crucial decisions in 2017, due to the many important national elections scheduled, most prominently the French Presidential and the German parliamentary elections. Possibly Italy may hold early elections too, while Spain finally got a government. This means that in the four largest Eurozone countries there may be a few years without elections. This opens a window of opportunity for crucial decisions to be taken before the end of the current European legislature, in 2019. An obstacle may be the Brexit negotiations and the fact that the UK would still formally be part of the EU and may try to exploit this to get concessions on the Brexit terms.

A first important moment that may set the path for the next couple of years will be the extraordinary European Council meeting in Rome on March 25, which will start work on a road map for the EU relaunch on the occasion of the 60th anniversary of the Rome Treaties. On that occasion pro-European citizens will rally in Rome to show that citizens still understand that the EU can be part of the solution rather than the problem. It will be an important event that can spell a new alliance between pro-European NGOs, businesses, trade unions, local governments, the European Parliament and pro-EU political leaderships. It can contribute to halting the momentum of nationalist forces, and to provide some political courage to pro-EU ones. The Parliament's initiative can provide the focal point for the Rome mobilization, which can further strengthen the Parliament's will to exploit its powers to the full, preparing and presenting a comprehensive treaty reform proposal.

---

* Lecturer in EU Law, Faculty of Law, CEU San Pablo University, Madrid.

[1] The MacDougall Report is available at

http://ec.europa.eu/archives/emu_history/documentation/chapter8/19770401en73macdougallrepvol1.pdf.

[II] It should be noted that this view was shared by those in favour and those against the monetary union. In a series of debates organised in London by the Institute of Economic Affairs in the years after the Maastricht Treaty Issing (1996) recognised the limits of the EMU, but still supported it, as a step towards political union, while Portillo (1998) recognised that the single currency was ultimately necessary for the single market to work, but he was still against, because it would eventually lead to political union.

[III] An overview of the articles published by *The Federalist* – the main federalist journal – since the Maastricht Treaty to the 2008 crisis is telling on this issue: see Padoa Schioppa A. 1993, 1995, 1998; Rossolillo 1995; Lamers 1995; Pistone 1996; Montani 1997, 1998, 2005; Padoa Schioppa T. 2002; Trumellini 2003; Draetta 2005.

[IV] Some anti-euro scholars have tried to suggest that the Nobel Prizes critique of the EMU indicates that it should be dismantled. However, several Nobel Prizes explicitly answered that they rather want the EMU to be completed: see http://www.huffingtonpost.com/2014/04/11/amartya-sen-joe-stiglitz-populism_n_5134487.html. Only recently Stiglitz occasionally seem to have lost hope on this.

[V] See Bickerton, Hodson, Puetter 2015. For a rather different view see Schimmelfennig 2015, Bauer and Becker 2014.

[VI] On this issue see Fabbrini 2013.

[VII] On this issue see Balibar 2016.

[VIII] See Juncker speech in Berlin on November 10th at the Konrad Adenauer Foundation, available at http://europa.eu/rapid/press-release_SPEECH-16-3654_en.htm.

[IX] Eventually the Commission published the documents presented by Member states in the consultation process that led to the Report. They are available at http://ec.europa.eu/priorities/five-presidents-report_en.

[10]All the Treaties can be consulted at http://europa.eu/european-union/law/treaties_en.

[XI] An overview can be found athttp://ec.europa.eu/transparencyregister/public/homePage.do?redir=false&locale=en and https://lobbyfacts.eu/charts-graphs.

[XII] On this issue see Ponzano 2010: 3-10.

[XIII] The speech and debate is available at http://documenti.camera.it/leg17/resoconti/assemblea/html/sed0691/stenografico.pdf. The reference to the European Parliament is at page 5..

References

- Balibar Etienne, 2016, *Europe, crise et fin ?*, Le Bord de l'eau, Paris.
- Bauer Michael W. & Becker Stefan, 2014, 'The Unexpected Winner of the Crisis: The European Commission's Strengthened Role in Economic Governance', *Journal of European Integration*, XXXVI(3): 213-229.
- Bickerton Christopher J., Hodson Dermot, Puetter Uwe, 2015, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era', *Journal of Common Market Studies*, LIII(4): 703-722.
- Draetta Ugo, 2005, 'After the Constitutional Treaty. The Question of a Political Europe', *The Federalist*, XLVII(1): 18-30
- Fabbrini Sergio, 2013, 'Intergovernmentalism and Its Limits: Assessing the European Union's Answer to the Euro Crisis', *Comparative Political Studies*, XLVI(9): 1003-1029.
- Giddens Anthony, 2014, *Turbulent and Mighty Continent - What Future for Europe?*, Polity Press, Cambridge UK.
- Issing Otmar, 1996, *Europe: Political Union through Common Money?*, Institute of Economic Affairs, London.
- Lamers Karl, 1995, 'A Federal Core for the Unification of Europe', *The Federalist*, XXXVII(2): 94-105.
- Lamers Karl, 1998, 'The New Challenges for Europe After the Monetary Union', *The Federalist*, XL(3): 190-200.

- Majocchi Alberto, 2004, 'Economic Policy in the European Constitution', *The Federalist*, XLVI(2): 68-90.
- Montani Guido, 1997, 'The European Government of the Economy', *The Federalist*, XXXIX(3): 126-176.
- Montani Guido, 1998, 'Towards the Monetary Union: A Comparison of Two Methods', *The Federalist,* XL(3): 201-213.
- Montani Guido, 2005, 'The Role of the European Budget in European Economic Policy', *The Federalist*, XLVII(3): 136-168.
- Padoa Schioppa Antonio, 1993, 'Which Constitution for Europe?', *The Federalist*, XXXV(3): 177-190.
- Padoa Schioppa Antonio, 1995, 'Towards a European Constitution', *The Federalist*, XXXVII(1): 8-25.
- Padoa Schioppa Antonio, 1998, 'The Institutional Reforms of the Amsterdam Treaty', *The Federalist*, XL(1): 8-25.
- Padoa Schioppa Tommaso, 2002, 'A European Economic Constitution', *The Federalist*, LIV(3): 190-202.
- Pistone, Sergio, 1996, 'The Club of Florence and the Intergovernmental Conference for the Revision of the Maastricht Treaty', *The Federalist*, XXXVIII(2): 76-95.
- Ponzano Paolo, 2010, 'The "Spinelli Treaty" of February 1984: The Start of the Process of Constitutionalizing the EU', in Glencross Andrew e Trechsel Alexander H. (eds), *EU Federalism and Constitutionalism: The Legacy of Altiero Spinelli*, Lexington Books, Lanham MD.
- Portillo Michael, 1998, *Democratic Values and the Currency*, Institute of Economic Affairs, London.
- Rossolillo, Francesco, 1995, 'Considerations on the 1996 Intergovernmental Conference and the Passage to the Third Phase of Monetary Union', *The Federalist*, XXXVII(1): 62-74.
- Schimmelfennig Frank, 2015, 'What's the News in "New Intergovernmentalism"? A Critique of Bickerton, Hodson and Puetter', *Journal of Common Market Studies*, LIII(4): 723-730.
- Trumellini Luisa, 2003, 'The Division of the European Union', *The Federalist*, XL(3): 177-184

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

The Establishment of Metropolitan Cities in Italy: An Advance or a Setback for Italian Regionalism?

by

Giovanni Boggero*

Perspectives on Federalism, Vol. 8, issue 3, 2016

Abstract

This paper aims to provide a brief assessment of the legal framework of the newly established metropolitan cities in the Italian domestic legal order. After an historical overview of previous attempts to set up metropolitan cities in Italy (1), it summarizes the main statutory provisions of the Delrio Law (No. 56/2014) through which metropolitan cities finally came into operation (2) and it provides an analysis of its implementation, thereby attempting to make clear whether increased institutional pluralism and differentiation in the local government system will strengthen or weaken Italian regionalism (3). The conclusion will argue that, while the enactment of local government reforms combined with the entering into force of a significant constitutional amendment will increasingly diminish the role of the Regions, metropolitan cities, due to their ambivalent nature, still lack any propulsive thrust and face the risk of being marginalized until a consistent legal framework for their proper funding is laid down (4).

Key-words

Metropolitan areas, Italian local government system, Italian regionalism, institutional pluralism, constitutional amendment

1. Metropolitan Cities as Territorial Autonomous Entities: Just Law on Paper (1990-2014)

The idea of establishing new institutional frameworks for governing metropolitan areas in Italy has become a significant political issue, since at least the 1980s, when the first legislative proposals were submitted to the Italian Parliament[I]. Yet, through the 1950s, and, increasingly, in the '60s and '70s, scholars from different disciplines, especially town planners, pointed out that several policies related to urban agglomerations, such as commuting, congestion and pollution could be better addressed through new administrative entities that would integrate large urban centers and satellite towns into new units, rather than sticking with a poor and fragmented system through inter-municipal co-operation[II]. However, after their establishment in the 1970s, the Italian Regions with Ordinary Statutes of Autonomy had to cope with the structural inadequacy of the tools and organisational schemes provided by administrative law at that time; the delegation of functions to municipalities and provinces occurred without any real chance of taking into account territorial, economic and social differences at their core (former Article 118 IC). For a long time, therefore, inter-municipal co-operation rather than the creation of new local government units was the only tool for addressing metropolitan problems[III].

A first legislative reference to metropolitan cities as new territorial entities can be traced back to State Law No. 142/1990, which marked a relevant step towards the recognition of the principle of differentiation in structuring the Italian local government system. Until that time decentralised administrative authorities were structured following the principle of uniformity, whereby they ought to be charged with the same administrative tasks and endowed with the same organizational rules across the whole country (former Article 128 IC)[IV]. Homogeneity and uniformity, rooted in the Napoleonic model of public administration, were progressively abandoned in favor of differentiation, thereby enabling the establishment of *different* kinds of local authorities carrying out *different* tasks according to *different* rules in *different* areas of the territory of the Republic. As such, the principle of differentiation was conceived as a decisive means for fostering institutional pluralism and therefore also to promote local autonomy, as required by Article 5 IC.

Thus, one has to place the recognition of metropolitan cities by Italian legislation within this theoretical background. However, despite their formal legal recognition, metropolitan cities were not immediately brought into being because of the complicated procedure set out by State Law No. 142/1990 for their establishment, where Article 17 stipulated that ordinary Regions could demarcate the boundaries of the metropolitan areas upon consultation with municipalities and provinces. The exact definition of the areas, which was not binding but discretionary, had to occur '*with reference to the municipalities of Turin, Milan, Venice, Genoa, Bologna, Florence, Rome, Bari and Naples and all other municipalities enjoying a high degree of connection and integration with the latter in terms of economic development, delivery of public services and territorial conformation*'. Because of Regions' failure to comply with this procedure, metropolitan cities could not be established at that time. A further attempt, with the enactment of State Law No. 265/1999, failed once again. This time a definition of the metropolitan areas was made binding, but their territorial demarcation was more flexible, since it did not necessarily imply the creation of a new unit, but allowed for a bottom-up establishment of co-operational arrangements of a supra-municipal nature between the main urban center and a restricted area of municipalities[V].

With the 2001 constitutional amendment metropolitan cities were entrenched into the Constitution and became, together with municipalities, Provinces, Regions and the State constitutive entities of the Italian Republic (Article 114, para. 1 IC). Even after this recognition by constitutional guarantee of metropolitan cities, no agreement could be reached as to their establishment. The constitutional legal framework was not as clear as it could have been since Article 114 IC did not provide any definition and/or demarcation of metropolitan cities, although Article 117, para. 2 lett. p) IC did set out the State's requirement to act, and in particular to set out their electoral system, the governing bodies and their fundamental functions. These provisions notwithstanding, no clarity existed as to whether the State or the Regions enjoyed the ultimate power to formally establish them or whether municipalities should have played a proactive role in this process. The new self-governing entities were enumerated again by Articles 23 and 24 of State Law No. 42/2009 on 'fiscal federalism' and Reggio Calabria was added to the list. Therein, a first vague list of fundamental functions was sketched out and a bottom-up procedure for their establishment was provided by the law to ensure a quick implementation of the new legal framework governing fiscal relations among subnational entities. Yet, again, no

establishment of metropolitan cities followed. A last unsuccessful effort to set them up was made by the government of Mario Monti with the enactment of Law Decree No. 95/2012, which was eventually struck down by the Italian Constitutional Court on formal grounds[VI].

As a consequence of the legislature's repeated failure to implement the Constitution, metropolitan cities thus remained for almost fourteen years the only '*constitutive entity of the Republic*' existing only on paper (Article 114, para. 1 IC). One of the main reasons for this striking failure was the cross-fire of vetoes on the part of the Provinces and of the Regions, fearing their marginalization, and the vetoes of the municipalities within the metropolitan areas, afraid of becoming mere subjects of the needs of the main urban center, or their amalgamation by the corresponding Region (Mantini 1996: 23 and ff.). Another issue was uncertainty as to the very concept of 'metropolitan area', so that the metropolitan city model was often conceived as a uniform and rigid one which had to fit in for all the different urban agglomerations in Italy without any clear scheme as to how relationships with other entities at the grassroots, in particular municipalities and Regions, should work.

2. The 2014 Local Government Reform (*Delrio Law*): Metropolitan Cities as New Provinces 'with Reinforced Powers'?

With the enactment of Law No. 56/2014, the 'Delrio Law'[VII], metropolitan cities were finally established according to a relatively clear-cut and centralistic procedure (Article 1, § 5 and 6), thereby ensuring not only geographical contiguity but also that the new authorities could start operating with no delay. Here, Regions were kept out of this procedure; it was an ordinary State Law which set metropolitan cities up[VIII].

The Law listed once again their names (Turin, Milan, Venice, Genoa, Bologna, Florence, Rome, Bari, Naples and Reggio Calabria)[IX] and mandated they would automatically supersede the corresponding provinces by January 1, 2015, therefore coexisting with all municipalities within their jurisdiction. In other words, municipalities would have not been pooled together into a big metropolitan city. Yet, they could have decided to opt out and be attached to one of the already existing Provinces nearby. Similarly, municipalities outside the jurisdiction of the old Provinces could have opted in and become part to the new metropolitan city. Since a final decision in this respect was in the State's purview, the boundaries of metropolitan areas were not changed at all[X].

In its Judgment No. 50 (2015), the Italian Constitutional Court declared the aforementioned provisions as compatible with the Italian Constitution, by virtue of the nature of the matter: the establishment of a constitutive entity of the Republic can only reside within the State and not within the Region. No violation of the constitutional rule governing the procedure for changing the provincial boundaries could be found either, since the legislature effectively passed, so to say, a structural local government reform, whereas the constitutional provision providing for a bottom-up and proactive role of municipalities and provinces (Article 133, para. 1 IC) applies only when single boundary modifications are concerned [§ 3.4.1 and § 3.4.2]. These principles were eventually embodied in one of the constitutional amendments (Article 40, para. 4) of the constitutional reform awaiting confirmation by popular referendum next December[XI].

The scope of powers and functions of metropolitan cities was roughly designed by the legislature drawing upon the example of the Provinces they had de jure superseded. Yet, metropolitan cities were also given additional responsibilities, in order to tackle problems typical of conurbations, including increasing commuting and immigration flows, pollution, economic development, social exclusion and misallocation of resources. In fact, according to Article 1, §§ 44 of the Delrio Law, they have been granted all the administrative functions already conferred to the Provinces as well as other basic responsibilities ranging from general spatial and strategic planning (thereby replacing or at least competing with the corresponding municipal and regional administrative competences), promotion of socio-economic development, informatization and digitalization of the metropolitan area, road network and traffic regulation and organisation and management of services of general interest. Further tasks have been conferred by the Regions within the scope of their legislative competence. Notwithstanding the fact that metropolitan cities were expected to be charged with these additional tasks their personnel has been reduced by 30 percent by means of the very same local government reform, similarly to what happened to the Provinces.

A residual, but not less important role, is played by administrative functions supportive of municipal activities (e.g. the: collection and analysis of data and technical and administrative assistance to local authorities). In this respect, municipalities and consortia of municipalities within the metropolitan jurisdiction are also explicitly allowed to both delegate tasks to the city, or to have functions delegated by it according to the subsidiarity

principle (Article 1, § 11, lett. b) Delrio Law). In particular, metropolitan cities are endowed with a very broad statutory autonomy enabling them (Article 1, § 57 Delrio Law) to discharge administrative functions on a more flexible basis (Article 1, § 57 Delrio Law). On these grounds, metropolitan cities can establish various 'homogenous areas' (*zone omogenee)* for carrying out given administrative functions due to specific territorial conformation specificities (e.g. for mountainous areas). These areas are not new local authorities, but rather geographical subdivisions in which tasks could be fulfilled in a more efficient and effective way by aggregations of municipalities or consortia of municipalities. For this purpose, specific bodies coordinating with the bodies of the metropolitan city will be set up following a possible agreement with the corresponding Region (Article 1, § 11, lett. c) Delrio Law), which therefore retains a role, though albeit marginal, in the organization of the territory within the metropolitan area. These 'homogenous areas' should thus serve as a means to disentangle possible overlaps of responsibilities or interferences between the city and municipalities. Pursuant to the Delrio Law, in fact, municipalities are expected to become the pivotal authorities of the Italian local government system, that is to say the only territorial authorities acting according to the general competence principle. They ought therefore to be set up in such a position as to organize provision of public services according to a bottom-up and flexible approach, and possibly continuing to rely on effective co-operational schemes they used before the establishment of the metropolitan city, such as public-private law agreements and conventions (*convenzioni e accordi di programma*). In contrast, the metropolitan city will no longer enjoy universal jurisdiction, but will only act according to the scope of its powers and functions as set out by law. As a newly established governing body, the metropolitan conference, an assembly of all mayors of municipalities within the metropolitan area (Article 1, § 7 and 8 Delrio Law), is aimed at further strengthening coordination between municipal and metropolitan activities. The marginal role of the Regions in this respect is confirmed by the pending constitutional amendment, which does not empower them with an exclusive legislative competence for regulating the general structure and organization of municipalities, but on the contrary upholds a restriction of their power to lay down general principles of inter-municipal co-operation (new Article 70, para. 1 combined with new Article 117, para. 2, lett. p) IC), as developed over the past years by the case-law of the Constitutional Court[XII].

Finally, metropolitan cities are expected to inherit the tax revenues through which the superseded Provinces were funded; however it is still not clear whether additional taxing powers will be conferred upon to them by the legislature which, until now, has only committed the government to adopting new legislative decrees on funding for Provinces and metropolitan cities (Article 1, § 97 Delrio Law)[XIII]. The precise amount of resources available has, however, not yet been decided and as such the government has continued to finance Provinces and metropolitan cities on the basis of annual ad-hoc contributions[XIV]. Since 2015, the State has limited funding to what it is needed for the discharge of fundamental functions, with the Regions being liable for the remaining amount (State Law No. 190/2014). In this respect, financial autonomy appears to be an issue of the utmost importance, given that metropolitan cities, as the Italian Constitutional Court puts it, are '*entities also enjoying a supranational relevance when it comes to access EU funds*' [§ 3.4.1]. In this respect, the National Operational Programme (NOP) allocated approximately € 900 million euros (two thirds of which were committed under the EU structural and development funds) to finance projects in all metropolitan cities until 2020, including those in Regions with Special Statutes of Autonomy. Other projects are due to be funded through Regional Operational Programmes (ROP). Yet, the absence of a clear strategy as to how '*an EU Urban Agenda should help cities to implement European priorities*'[XV] makes clear that metropolitan cities cannot rely merely on direct European (co)-funding, but on the contrary that they also deserve adequate financial support also by from the State, as Article 119, para. 4 IC mandates[XVI]. However, at present only two out of ten metropolitan cities have budget surpluses, whereas the majority presents huge financial losses which could bring about sanctions by the central government on the grounds of a violation of the domestic stability pact (Trovati 2016)[XVII]. A recent, albeit totally insufficient, *una tantum* support by the central government, consisted in the 2 billion euros special funding of projects developed by metropolitan cities so as to regenerate their suburban communities[XVIII].

In essence, metropolitan cities are territorial authorities with their own powers and functions, distinct from those of the municipalities, by which whom they can however be delegated single tasks, which are likely to be funded not only via State or regional transfers but also by means of local taxes and charges[XIX], but in any case not by compulsory contributions of municipalities as it happens in other jurisdictions for second-tier local authorities (in Germany, for instance). On grounds of their territorial nature, one would

expect at least their main governing bodies, the metropolitan council and the mayor, to be elected by direct and universal suffrage. This, however, is not the case. Both bodies are in fact indirectly legitimized so as to avoid, insofar as possible, conflicting political views between municipal bodies and intermediate local authorities' bodies. Furthermore, for the sake of saving public money, political bodies of metropolitan cities will not receive any remuneration or reimbursement of expenses.

Article 1, § 25 of the Delrio Law, in fact, stipulates that the metropolitan council is elected by mayors and municipal councilors of the municipalities within the jurisdiction of the metropolitan city and not by the citizens living within the jurisdiction of the metropolitan city. Similarly, Article 1, § 19 provides that the metropolitan mayor is by default the mayor of the main urban center (*comune capoluogo*) and, since he is neither assisted by any executive body, nor he has to submit its acts for the council to approve, he enjoys even more power than the previous president of the Province. The Law provides for the direct election of the mayor and the council only as an exception (Article 1, § 22). However, the residual choice for direct election, which is devolved to the metropolitan city itself, but eventually requires the approval of a new electoral law by the Parliament, is subject to the fulfillment of two alternative conditions: the main urban center within the jurisdiction of the metropolitan city should be divided up into several municipalities or, alternatively, metropolitan cities having more than three millions inhabitants (i.e. Rome, Milan and Naples, for the time being) will have to establish 'homogenous areas' within their jurisdiction.

The very purpose of these provisions was probably to soften the strong monocentric features of the metropolitan city model which appears aimed at strengthening the main urban center as a propulsive thrust, to the detriment of the other municipalities. This phenomenon is particularly striking in the metropolitan city of Turin, in which there is the highest number of municipalities (316) and where the metropolitan area extends well beyond the 'narrow' urban agglomeration up to the mountains at the borders with France, being therefore more of a 'city-region' than a metropolitan city. Therefore, it was for cases like this that the Delrio Law provided metropolitan cities with tools for disaggregating and ensuring more pluralism and democratic participation. Notwithstanding the corresponding provisions already set out in the metropolitan Statutes of Autonomy of Bologna and Genoa, the actual chances to bringing about such a shift towards a different metropolitan

city model are very few at the moment, since the whole procedure is dependent upon the agreement of the most populated municipality or main urban center, which only very unlikely would accept such a break up. Only in the case of Milan, Rome and Naples it appears more likely that such a shift succeeds. A modest, yet significant attempt to enhance democratic tools wherever possible is to be found in numerous metropolitan Statutes of Autonomy envisaging prior citizens' participation and consultation at early stages for developing strategic, spatial and mobility plans, with participation drawn also at lower levels than the metropolitan one. However, given the basis of the electoral system designed by the aforementioned statutory provisions, which hardly can be deemed in conformity with Article 3, para. 2 of the European Charter of Local Self-Government[XX], there is a strong argument that the metropolitan city model is based on a structurally weak form of local democracy in which peripheral entities have little representation whereas the main urban center is the dominant and pivotal actor.

To conclude, metropolitan cities have finally been established after almost fifteen years of non-implementation of the Constitution. The drive for their quick activation outweighed the necessity of complying with a strict bottom-up procedure, involving local communities in their establishment. Yet, by doing so, metropolitan areas ended up being designed not as 'narrow areas' (*aree ristrette*), but as territorial authorities 'over large areas' (*aree vaste*), that is to say also stretching to rural and mountain areas[XXI], with little consideration for the underlying socio-economic structure and in particular for standards such as the overall population, commuting flows and territorial features. The new metropolitan cities are structured as provinces with 'reinforced powers'. In spite of their strategic importance for urban development, they do not enjoy legislative powers and are not democratically legitimized by direct popular election, and thus find themselves at an intersection between, on the one hand, territorial authorities with their own powers and functions distinct from municipal ones, and inter-municipal bodies, on the other hand[XXII]. Their unclear institutional nature is confirmed by the fact that metropolitan cities have abandoned the Union of Italian Provinces (UPI) as their umbrella organisation and have joined the Association of Italian Municipalities (ANCI), even if they are not, strictly speaking, 'municipalities' but rather coordinate municipalities tasks. The re-allocation of devolved sources of funding, combined with the establishment of a clearer framework on allocation of responsibilities between metropolitan cities and Regions, will tell whether the

former can act as new thriving forces of the local government system, as equals or possibly even as competitors of the Regions.

3. Reform Implementation and Constitutional Amendment: Metropolitan Cities vs. Regions?

The actual impact of metropolitan cities on the Italian local government system firstly depends upon the full implementation of the Delrio Law and in particular on how Regions have been, and will be dealing with the allocation of administrative functions originally assigned to the old Provinces. It is, secondly, dependent on the entering into force of the constitutional amendment by means of which the Italian government cuts out the provincial layer of government as one of the constitutive layers of the Republic and upholds the guarantee of local autonomy for metropolitan cities only.

The two reforms, in fact, go hand in hand. The Delrio Law was conceived as a local government reform anticipating insofar as possible the constitutional amendment passed this year and that will enter into force after the aforementioned popular referendum. As a result, the Provinces were hollowed-out by means of ordinary law, whereas the structure of metropolitan cities was minimally sketched out, on the basis of the provincial model, thus leaving it up to the Regions and to metropolitan cities themselves the task as how to outline their governance model. In this article it will be brought to view that, whereas the Provinces might very well be amalgamated into new bigger entities by Regions, but will not be fully repealed, metropolitan cities will either be involved in co-operative frameworks of local governance with the corresponding Regions or turned into passive recipients of decisions issued at regional level. At present, metropolitan cities have been conferred powers and functions overlapping with regional ones, yet at the same time they are still partly subordinate to the regional government and mostly dependent upon it for funding. This will be made clear by surveying the different Regional Laws enacted by regional councils and the metropolitan Statutes of Autonomy approved so far by the mayors of the metropolitan areas sitting in the so-called 'metropolitan conference'[XXIII].

First of all, it has to be clarified that as of 2016, only the metropolitan cities of Turin, Milan, Rome, Naples, Florence, Venice, Bologna, Genoa and Bari started operating on time after the corresponding local elections took place in autumn 2014. Reggio Calabria

has, by contrast, not yet been constituted and will be operating as soon as of January 2017. The Regional Laws passed in 2015, by which the Regions reallocated administrative functions, and decided whether some of them had to be carried out together by different levels of government upon agreement, are grounded in the State-Regions Settlement dating back to September 11, 2014. Here, the Regions committed to involve local authorities in the procedure as well as to take into account the corresponding financial needs necessary to fulfill their administrative tasks.

In the Piedmont Region, the legislative assembly passed a Law (Regional Law No. 23, October 29 2015) by means of which it set out the role of the metropolitan city of Turin as a territorial entity, both coordinating the initiatives of municipalities, and fulfilling old and new tasks of a supra-municipal nature. The same was done by the Liguria Region (Regional Law No. 15, 10 April 2015) and by the Tuscany Region (Regional Law No. 22, March 3, 2015), which stressed the double and therefore ambiguous nature of the city as both a territorial authority with autonomous powers and as a functional entity for coordinating municipal activities. In contrast, the Statute of Autonomy of Genoa underlined that the metropolitan city represents the territory, the communities and the entities of which it is composed. The terms employed by the Statutes of Autonomy of the metropolitan cities of Milan, Rome, Venice and Florence are quite similar. In Rome, the Statute also mentions the special constitutional status of the Italian capital city and its significant role in making sure that constitutional organs and international institutions that have their seat within its boundaries can properly operate. A specific issue is how will the relationship between the metropolitan city of Rome and the capital city will be settled; in fact, while the municipality of Rome will have a special constitutional regime, the metropolitan city is already endowed with the same functions as the other metropolitan cities. In Campania, Regional Law No. 66, November 10 2015 merely quoted the term used by legislation, whereby the metropolitan city is a 'territorial authority over a large area' (*ente territoriale di area vasta*). Very similar is also the definition provided by the Puglia Region with its Law No. 31, October 30 2015. In Emilia-Romagna, Regional Law No. 30 July 2015 defines it as an authority for governing the metropolitan territory in a unitary manner, whereas the Preamble to the Statute of Autonomy of Bologna stressed its role as a 'federative entity' of territories and communities. In the Lombardy Region the ambivalent nature of the metropolitan city is emphasized by Article 1, para. 1 of the Regional Law No. 32, 22 October 2015, whereby it

is defined as an entity aimed at developing the welfare of both the territory as a whole and that of the municipalities. Only the Statute of Autonomy of Bari, by contrast, goes so far as to portrait the existence of a single local metropolitan community. Finally, it needs to be said that all Regional Laws make reference to the need for enhancing and strengthening the role of the metropolitan city as part of the regional local government system, whereas all Statutes of Autonomy highlight the need for preserving the different local identities existing within the metropolitan area, thereby constituting 'homogenous areas' as administrative subdivisions for delivering public services more efficiently and strengthening democratic participatory tools.

As to the scope of powers and responsibilities, one has to consider, on the one hand, the additional administrative functions conferred upon to metropolitan cities by Regional Laws and, on the other hand, how metropolitan cities themselves structured their governance model.

As to the former aspect, one has to further distinguish between the city's own powers and functions, and mechanisms of co-ordination of municipal activities. As mentioned, most provincial functions have been reassigned to metropolitan cities by Regions. But, moreover, also additional powers and functions have been assigned to them. In this respect, in Piedmont the Law is pretty poor, since the Region conferred upon to the metropolitan city of Turin such minor additional tasks as: consultative powers, when decisions on ancient collective rights to use natural resources in private properties or collective rights over lands (better known as *usi civici*) are at stake, the powers to adopt the forestry and pastures plan (*piano forestale*), the organisation and management of the professional education and training system, the management of certain environmentally protected areas and previous provincial functions on public transportation. However, in the case of Liguria, the corresponding Law of Liguria was even poorer, since it retained many former provincial functions at regional level and conferred few additional functions to the metropolitan city, so as that the latter merely retains a consultative role on organisation of professional education and training. In the case of Bologna, the Emilia-Romagna Region deferred to further laws the adaptation of the legislative framework to the role of the metropolitan city. Nonetheless, the Regional Law does stipulate that, for instance, the regional plan of the metropolitan rail service should be passed in agreement with the metropolitan city of Bologna. By contrast, the Law of the Lombardy Region

provides for a detailed specification of fundamental metropolitan fundamental functions on spatial planning, but also on water supply and on the unified management of parks. In Lazio, spatial planning extends to waste disposal and mobility issues for the whole metropolitan city of Rome. In Puglia the regional legislative assembly confirmed the attribution of functions on 'active policies towards employment', whereas it deferred to a further piece of legislation a survey concerning the division of responsibilities on public transportation between the Region and the metropolitan city. No significant innovation can be found in Veneto for the former province and new metropolitan city of Venice, whereas in Tuscany the Region endowed the metropolitan city of Florence with consultative powers within the regional competence of landscape planning concerning its territory. It further allowed the metropolitan city to replace municipalities and pass the structural spatial plan (*piano strutturale*) and give instructions to them as to how implement it (*piano operativo*). Yet, the corresponding Statute of Autonomy is very moderate in this respect and did not implement the legislative provision. By contrast, in the metropolitan cities of Rome, Bari, Milan and Bologna the spatial plan is intended to work as a binding reference framework for municipalities within the metropolitan area and could apply specific constraints on the spatial plans issued by municipalities. The Statutes of Autonomy of Bari, Naples and Genoa, in particular, endorse the expansion of the scope of responsibilities of the metropolitan cities, since they aim towards the enactment of one single building by-law or code for the whole metropolitan area, or at least one for each 'homogenous area'. Finally, the Piedmont Region recognized and committed to the promotion of the role of 'homogenous areas' as relevant subdivisions for avoiding fragmentation of public services delivery within the metropolitan city, and in which the strategic and spatial plans could be further detailed. These areas should be designed in accordance with the Region, but, as set out in the Statute of Autonomy, when there is a given majority within the metropolitan conference 'homogenous areas' could also be designed also without its consent. In this respect yet, it ought to be remembered that Regions retain the competence of defining the areas for optimal delivery of public services (*ambiti territoriali ottimali*) and thus conflicts with metropolitan cities might arise.

As to the governance model, unlike the Regional Law concerning the metropolitan city of Genoa, in those matters in which the Piedmont Region retains legislative competence (promotion of social and economic development, in particular when it comes to

mountainous areas), the metropolitan city and the Region are required to conclude ad hoc agreements (*intese*). In other words, the Piedmont Region favors a cautious and cooperative rather than a confrontational approach with the metropolitan city[XXIV]. If these agreements concern also actions and projects involving municipalities and consortia of municipalities the latter should also be able to sign the agreement. The role of coordination to be played by the metropolitan city in this respect appears therefore diminished, and bound to the ultimate will of the Region. Furthermore, a generic widespread collaboration is required where informatization and digitalization of the whole metropolitan area are concerned. The same applies to Tuscany and to the metropolitan city of Florence. In Bologna, cross-level agreement is required for measures related to the implementation of the strategic plan and is grounded in a Framework Agreement between the Region, the Provinces and the metropolitan city which was signed in January 2016. Co-operation is institutionalized from the outset also in the Regional Laws of both Tuscany and Lombardy, which foresee the establishment of a 'Conference Region-Metropolitan City'. Whereas the Statute of Autonomy of Florence is overwhelmingly silent about the relations of the city with the Region, the Statute of Autonomy of Milan stipulates that agreements with the Region ought to be concluded by the metropolitan city for any kind of action planned on its territory, including building of new infrastructures. Moreover, in Lombardy, the regional government stressed its role of overseeing the relations between the metropolitan city and municipalities located outside the metropolitan area. In general, according to the same Regional Law, relationships between municipalities within the metropolitan area, the metropolitan city of Milan and the Region are under a very detailed co-operative framework. In Campania, the Region has not set out any co-operative framework, but it apparently aims neither to delegate functions to the metropolitan city of Naples, nor to endow it with a sufficient degree of autonomy with reference to the oversight of inter-municipal co-operation within the metropolitan area. The same applies to the metropolitan cities of Bari and Venice. In Campania and Veneto, the Statutes of Autonomy of Naples and Venice only generally endorse the activation of co-operative pathways with the regional government in order to define the corresponding competences, but without providing further details.

Metropolitan cities are further subordinate to the regional administrations in the sense that they depend upon them for funding. In fact, at present they are not endowed with

significant taxing powers and the Regions have been funding them using different schemes. Another important feature of the role to be played by metropolitan cities is their possible representation in the Senate, as modified by the pending constitutional reform. In fact, the new Senate is expected to represent various territorial entities, including possibly also metropolitan cities. Therefore, it might be argued that metropolitan cities will increase their political power not only towards the corresponding Region but also towards the State, insofar as metropolitan mayors or councilors will also be sitting in the new Senate together with seventy-four regional councilors; though, this depends on the final wording of the Law regulating the election of the new members of the House. At present, the constitutional amendment mandates that, out of one hundred new members, twenty-one mayors will be appointed by the regional councils of the corresponding Italian Regions with both Ordinary and Special Statutes of Autonomy. The Law, which will be adopted as soon as the amendment enters into force, could for instance foresee a specific quota for mayors of those big municipalities in which the mayor is *ex lege* also the mayor of the metropolitan city[XXV].

4. Concluding Remarks

More than twenty-five years after their first recognition by an ordinary State Law (Law No. 142/1990), metropolitan cities have finally been established, therefore aligning the Italian legal framework to that of other major European member States, and thereby re-orienting its institutional system towards the development of robust urban clusters aimed at solving connectivity problems[XXVI].

Metropolitan cities are hybrid administrative entities within the Italian local government system, representing both a metropolitan community, coinciding with the old provincial one, and also the various municipalities located within the boundary of the metropolitan area. The legal order of metropolitan cities is grounded on the principle of differentiation, thus enabling each entity by means of its Statute of Autonomy to extend or restrict powers and functions, as briefly sketched out by State and Regional Laws. Yet, the principle of differentiation does not go as far as to allow for the establishment of completely different institutional frameworks, one for each metropolitan area (as it is the case in other EU countries such as France, Germany or Spain), nor is regional legislation

allowed to transform provinces into new metropolitan cities, even if similar problems exist in other areas of the Republic, for instance around mid-sized cities such as Bergamo, Brescia and Verona. Here, only inter-municipal or, more appropriately, inter-provincial co-operation schemes might help in addressing connectivity issues. Therefore, one could claim that the ten metropolitan cities established by means of law by the Italian Parliament in 2014 enjoy the same institutional features, the most prominent of which is the dominant influence of the main urban center and the rather limited scope of powers and functions which matches to a large extent with that of the Provinces. As it is the case for the Provinces, the funding of metropolitan cities by State and Regions is also precarious so that its overall inadequacy, as ascertained, limited to Piedmont, by the Italian Constitutional Court [Judgments No. 188 (2015) and No. 10 (2016)], has until now unlawfully prevented the full coverage of costs for carrying out properly their administrative functions[XXVII].

At the same time, however, metropolitan cities are conceived as entities in charge of spatial, mobility and strategic planning. All three powers are expected to be used coherently and consistently with each other. Yet, whereas metropolitan spatial planning might sooner or later result in a competence of groundbreaking importance, mobility and strategic planning may have a softer impact on municipalities, being more of reference frameworks than binding legal acts. In particular, it appears that three years are is too short of a period of time for a 'strategic' plan to be in force[XXVIII]. Overall, metropolitan cities appear to enjoy in the first place powers aimed at avoiding fragmentation and bringing about harmonisation and simplification among different municipal rules and procedures as well as carrying out mergers and suppressions of a number of local utilities or other administrative structures (e.g. the reduction to one out of two water supply and/or sanitation public utilities within the metropolitan area of Milan or the merger of the ICT departments into one technical body within the metropolitan area of Turin or, furthermore, the appointment of one municipal secretary for both the metropolitan city and the municipality of Bologna). In a nutshell, they are more of planners of public policies than actors fulfilling specific tasks or public services for a given territorial community (Pizzetti 2015). Yet, Regions have been attempting, by means of legislation, to retain their role of coordination and direction: an overlapping of responsibilities appears therefore more than likely. In particular, at present, harmonisation and simplification of rules within metropolitan areas still await concrete implementation. While metropolitan cities, that is to say municipalities of the

metropolitan area, appear partly reluctant to take over the role of pivotal spatial and strategic planning actors, regional governments can play an important role in making this happen. However, together with the State, they can also make it fail. Thus far, in fact, they have been slowing down the process of empowerment of metropolitan cities (as well as of the new Provinces), by delaying the reallocation of the former provincial personnel and by denying or reducing adequate funding.

Upon confirmation of the constitutional amendment by means of popular referendum next December, the progressive 'regionalization' of the Italian local government system might be stopped and even reversed. Regions with Ordinary Statutes of Autonomy will probably enjoy less power than today when it comes to setting up and arranging their own local government systems (Gardini 2015; Sterpa 2016), even if they will still enjoy the power to confer administrative functions to the Provinces within their - albeit more limited! - scope of legislative competence. In addition, they might be endowed by the State with the new power to pool together the existing Provinces (current Article 133, para. 1 IC will be in fact repealed), thereby being able to more consistently coerce them into co-operation in order to fulfill certain tasks and achieve economies of scale (as set out already by State Law No. 78/2015). Yet, on the other side, the State will be conferred with the legislative competence to set out provisions concerning the general structure and organisation of 'entities governing larger areas' (*enti di area vasta*), i.e. the no longer constitutionalized Provinces (Article 40, para. 4) and, as mentioned, Regions will be prevented from passing legislative provisions setting out principles for the organization of inter-municipal co-operation. In this respect too, also the new Senate will have only a weak say, i.e. it will be able to provide the Chamber of Deputies with modifications proposals, but it will not enjoy any veto power (new Article 70, para. 2 IC). Furthermore, whilst still endowed with the power to establish new municipalities by means of Regional Law, Regions will not enjoy the corresponding legislative power to determine the differential organizations and structures of municipalities located under their jurisdiction and, more in generally, will not be able to depart from the legal framework designed by the Delrio Law by creating new local authorities, unless State legislation stipulates so.

Moreover, metropolitan cities will continuously enjoy a constitutional guarantee of autonomy and will be much more dependent upon the State than upon the Regions as to the regulation of their general structure and organization (even if the new Senate is fully

involved in the legislative procedure accrding to new Article 70, para. 1 IC), as to how each function should be carried out and to the demarcation of their borders, as well as also being dependent upon the European Union for direct funding. In their own jurisdictions, metropolitan cities might therefore increasingly replace Regions insofar as specific responsibilities in matters of planning and inter-municipal co-operation are concerned, yet the latter will probably continue resisting this trend of hollowing-out, for instance by requiring the conclusion of specific agreements on certain issues, by giving instructions or by exercising some sort of oversight on given acts which should be coherent with those issued by the Region.

To conclude, one might argue that two years after the enactment of the Delrio Law, the practice shows that, one the one hand, institutional pluralism at local level has been strengthened through top-down measures reinforcing the principle of differentiation, thereby making co-operative mechanisms between Regions and local authorities even more necessary. On the other hand, Italian regionalism as conceived by Italian constitutional reform in 2001 might be in crisis, not only on the grounds of the growing competition with metropolitan cities but most notably on the grounds of the constitutional amendment which is to enter into force as early as next year, if the referendum goes through. Over the past fifteen years Regions have not been able to stand out and gain appreciation and respect, neither for their innovative pieces of legislation, nor for the public policies they pursued, but they have evolved into decentralised entities of the State either delegating administrative functions to local authorities or carrying out administrative functions in their own name, therefore also competing rather than co-operating with Provinces and municipalities.

The Delrio Law and the pending constitutional amendment uphold this general trend of regional 'administrativization' (Gianfrancesco 2014, Ferrara 2014 and Morrone 2016), thus formally reframing Regions from being territorial entities conceived as legislators and managers of local public services into public authorities carrying out or delegating administrative functions to lower local authorities or, at most, exercising the power to direct, guide, coordinate and orientate local authorities and the conduct of their financial relations. In this respect, therefore, unlike what has been emphasized by the different Regional Laws so far, competition rather than fruitful co-operation between Regions and metropolitan cities appears all but unlikely, both being designed as major 'governance

bodies' with structurally overlapping responsibilities.

---

* Giovanni Boggero is currently a Postdoctoral Research Fellow in Constitutional Law at the Faculty of Law, Political, Economic and Social Sciences (DIGSPES) of Università del Piemonte Orientale "Amedeo Avogadro".

I For pointed comments on some reform proposals of that time see Crosetti 1989.

II See for instance Aquarone 1961 and Trimarchi 1972.

III In this respect, it is no chance if even the Explanatory Memorandum to the Council of Europe Draft European Charter of Local Self-Government (1981) regarded inter-municipal co-operation as the current European '*solution to the problem of relations between an urban agglomeration and suburban communities*'. See: CPL (16) 6 - Explanatory Report to the Draft Charter (so-called *Harmegnies Report*), Article 9, 29. Over the years, however, the Council of Europe developed a more appropriate attitude towards the urban phenomenon. See in particular: the European Urban Charter (1992), the European Urban Charter II - Manifesto for a New Urbanity (2008) and Congress of Local and Regional Authorities Recommendation No. 188 (2006) on good governance in European metropolitan areas.

IV Except for Regions with special Statutes of Autonomy in which local government systems could be structured along different lines. See *inter alia*: Italian Constitutional Court, Judgments No. 61 (1958), No. 9 (1961), No. 52 (1969), No. 164 (1972), No. 62 (1973). So also Staderini 1989: 52 and ff.

V On the various past efforts to establish metropolitan cities in the Italian legal order see Brancasi and Caretti 2010.

VI Italian Constitutional Court, Judgment No. 220 (2013), in which the Court considered that a 'structural reform' involving the reorganization of the local government system as a whole cannot be passed by government by means of a Law Decree pursuant to Article 77 of the Italian Constitution, which is suited only for passing measures under extraordinary conditions of necessity and emergence. On this judgment see Boggero 2014.

VII Named after the then Minister responsible for Local and Regional Government, Graziano Delrio.

VIII As for Regions with Special Statute of Autonomy, they are empowered to establish and regulate themselves metropolitan cities. In particular, Sicily set up the metropolitan cities of Palermo, Catania and Messina (Regional Law 4 August 2015, No. 15), whereas Sardinia the metropolitan city of Cagliari (Regional Law 4 February 2016, No. 2). See: Di Maria 2016 and Riviezzo 2016. By contrast, the Friuli-Venezia Giulia Region aims at establishing the metropolitan city of Trieste after amendment of its Statute of Autonomy, which however requires a constitutional law to be passed by the Italian Parliament.

IX In this respect, it ought to be born in mind that the metropolitan city has not to be confused with the municipality of the main urban center which will continue existing. So, for instance, the municipality of Turin continues existing along with the metropolitan city of Turin.

X Critical towards this inflexible demarcation of the metropolitan areas were many constitutional lawyers including Spadaro 2015 and Lucarelli 2014.

XI On this judgment see *inter alia*: Patroni Griffi 2016 and Longo and Mobilio 2016: 15-18.

XII With enactment of the Law Decrees No. 78/2010 (Article 14) and No. 95/2012 (Article 19) the Italian legislature mandated that, for municipalities with a population under 5000 inhabitants, all basic administrative functions ought to be carried out by consortia of municipalities (*unioni di comuni*). The Italian Constitutional Court found that the legislative power of the Regions to regulate the subject matter 'inter-municipal co-operation' was not curtailed by State legislation [(Judgments No. 22 and 44 (2014)]. On the first judgment see the comment by Cortese 2014.

XIII In the past see already Article 15 of State Law No. 42 (2009) which delegated the central government to set out the framework for funding metropolitan cities by conferring them new taxing powers.

XIV Since 2012 for the Provinces and as of 2015 for the corresponding metropolitan cities the central government has dramatically cut transfers, thereby compromising their everyday operations. See e.g. Agnoletti, Ferretti and Lattarulo 2015.

XV Commission Staff Working Document – Results of the Public Consultation on the Key Figures of an EU Urban Agenda, SWD (2015) 109 final/2. As quoted by Pasqui 2016: 153-160.

XVI A proposal on how to finance metropolitan tasks was made by Bordignon and Ferri 2015.

XVII Most recently, a piece of legislation was passed by the government (Law Decree No. 113/2016), whereby financial sanctions were - at least temporarily - cancelled.

XVIII D.P.C.M. (Decree of the President of the Council of Ministers) 25 May 2016 – '*Programma straordinario di intervento per la riqualificazione urbana e la sicurezza delle periferie'*, (GU Serie Generale n. 127 del 1-6-2016),

available at: http://www.gazzettaufficiale.it/eli/id/2016/06/01/16A04166/sg.

[XIX] Cf. Unione delle Province italiane (UPI), *L'attuazione della legge n. 56/2014: il riordino delle funzioni delle Province e delle Città metropolitane e l'accordo in Conferenza unificata*, available at: www.upinet.it, 3 July 2014.

[XX] See most recently: Congress of Local and Regional Authorities, Resolution No. 407 (2016) *on good governance in metropolitan areas,* CG31(2016)17final, 21 October 2016, § 16, lett. d) and also Recommendation No. 392 (2016) *on good governance in metropolitan areas*, CG31(2016)17final, 21 October 2016, § 11.

[XXI] On the notion of 'area vasta' see the contribution by Luther 2014: 7 and ff., who claims that the term 'area vasta' evokes a functional rather than a political conception of local governance, whereby large spaces ought to be governed by administrative law, in particular through organs charged with planning and programming powers.

[XXII] See in this respect also Tubertini 2015.

[XXIII] In this respect see already: Lucarelli, Fabrizzi and Mone (eds) 2015, and the supplement published in 2014 by the Italian law journal *Istituzioni del federalismo* (AA.VV. 2014).

[XXIV] See in this respect also: Orlando 2016: 5.

[XXV] A similar request was made by the Association of the Italian Municipalities (ANCI) while heard in the Italian Parliament on the merits of the constitutional reform back in 2014. See ANCI, *Riequilibrare composizione Senato con Sindaci Città metropolitane e capoluoghi*, available at www.anci.it, 21 October 2014. No such a provision can however be found in the draft law submitted to the Senate in January 2016. See Senato della Repubblica, XVII Legislatura, Disegno di Legge – Norme per l'elezione del Senato della Repubblica (presentato dal sen. Fornaro et altri), available at: www.senato.it.

[XXVI] On the European experience see most recently Carrer and Rossi 2014.

[XXVII] On the first of these two judgments by the Italian Constitutional Court see Boggero 2015.

[XXVIII] This is the reason why some scholars suggested that the strategic plan should be a 'work-in-process' and the three years time just a deadline after which the metropolitan city has to give a formal feedback and check whether the plan is still up to date and to what extent can be amended. So: Orioli and Martinelli 2016: 116-117 and 134-135.

References

- AA.VV., 2014, *Gli Statuti delle Città metropolitane. Modelli a confronto*, *Istituzioni del Federalismo*, XXXV (special issue).
- Agnoletti Chiara, Ferretti Claudia and Lattarulo Patrizia, 2015, 'Città metropolitane: dove trovare le risorse', available at: www.lavoce.info, 24 July 2015.
- Aquarone Alberto, 1961, *Grandi città e aree metropolitane in Italia*, Zanichelli, Bologna.
- Boggero Giovanni, 2014, 'I limiti costituzionali al riordino complessivo delle Province nella sentenza n. 220/2013', *Astrid Rassegna*, no. 4/2014.
- Boggero Giovanni, 2015, 'Una sentenza manipolativa di bilancio: la Corte costituzionale 'soccorre' le Province piemontesi', *Giurisprudenza costituzionale*, LX(4): 1461-1469.
- Bordignon Massimo and Ferri Vittorio, 2015, 'Per una nuova finanza delle Città metropolitane', Urb@n.it Background Papers, October 2015.
- Brancasi Antonio and Caretti Paolo, 2010, 'Il sistema dell'autonomia locale tra esigenze di riforma e spinte conservatrici: il caso della Città metropolitana', *Le Regioni*, XXXVIII(4): 727-752.
- Carrer Matteo and Rossi Stefano, 2014, *Le città metropolitane in Europa*, IFEL-Fondazione ANCI, Roma.
- Cortese Fulvio, 2014, 'La Corte conferma che le ragioni del coordinamento finanziario possono fungere da legittima misura dell'autonomia locale', *Le Regioni*, XLII(4): 792-801.
- Crosetti Alessandro, 1989, 'Sul governo delle aree metropolitane', *Amministrare*, XX(1): 149-159.
- Di Maria Roberto, 2016, 'La Citta metropolitana nelle leggi siciliane 15/2015 e 5/2016, e nella legge statale 56/2014: un breve excursus fra attuali esigenze di uniformità ordinamentale e persistenti rivendicazioni di autonomia speciale', *Le Regioni*, XLIV(2): 307-340.
- Ferrara Antonio, 2014, 'Osservazioni a prima lettura sul ddl costituzionale Renzi-Boschi', *federalismi.it*, XII(8), available at www.federalismi.it.

- Gardini Gianluca, 2015, 'Crisi e nuove forme di governo territoriale', *Istituzioni del Federalismo*, XXXVI(3): 533-567.
- Gianfrancesco Eduardo, 2014, 'Torniamo a Zanobini (?!)', *Rivista AIC*, IV(2), available at www.rivistaaic.it.
- Longo Erik and Mobilio Giuseppe, 2016, 'Territorial government reforms at the time of the financial crisis: the dawn of metropolitan cities in Italy', *Regional and Federal Studies* (forthcoming).
- Lucarelli Alberto, 2014, 'Ripensare la forma di Stato e il ruolo di regioni ed enti locali: il modello a piramide rovesciata', *federalismi.it*, XII(13), available at: www.federalismi.it.
- Lucarelli Alberto, Fabrizzi Federica and Mone Daniela (eds.), 2015, *Gli Statuti delle Città metropolitane*, Editoriale Scientifica, Napoli.
- Luther Jörg, 2014, 'La vastità delle aree e quella dei problemi della loro sistemazione', in: POLIS Working Papers n. 213 April 2014 – OPAL (Osservatorio per le autonomie locali) n. 4/2014 (Andrea Patané et al.), available at www.polis.unipmn.it,
- Mantini Pierluigi, 1996, 'La riqualificazione delle aree metropolitane: profili giuridici', in *La riqualificazione delle aree metropolitane: quale futuro?. Atti del XXXVI Incontro di Studio*, Milano.
- Morrone Andrea, 2016, 'Lo Stato regionale: l'attuazione dopo la riforma costituzionale', *Rivista AIC*, VI(2), available at www.rivistaaic.it.
- Orioli Valentina and Martinelli Nicola, 2016, 'Innovazioni. La riforma del governo locale', in Urb@n.it, *Rapporto sulle città - Metropoli attraverso la crisi*, Il Mulino, Bologna.
- Orlando Marco, 2016, 'La Città metropolitana di Torino verso il secondo mandato', available at www.federalismi.it, 28 September 2016.
- Pasqui Gabriele, 2016, 'Risorse. Fondi comunitari per le città metropolitane', in Urb@n.it , *Rapporto sulle città – Metropoli attraverso la crisi*, Il Mulino, Bologna.
- Patroni Griffi Andrea, 2016, 'Le città metropolitane nel guado costituzionale', *federalismi.it*, XIV(14), available at www.federalismit.it.
- Pizzetti Franco, 2015, 'Le città metropolitane per lo sviluppo strategico del territorio: tra livello locale e livello sopranazionale', *federalismi.it*, XIII(12), available at www.federalismi.it.
- Riviezzo Antonio, 2016, 'Il riordino degli enti locali in Sardegna e la tormentata istituzione della Città metropolitana di Cagliari', available at www.forumcostituzionale.it, 12 March 2016.
- Spadaro Antonino, 2015 'Le città metropolitane, tra utopia e realtà', *federalismi.it*, XIII(1), available at www.federalismi.it.
- Staderini Francesco, 1989, *Diritto degli enti locali*, Cedam, Padova.
- Sterpa Alessandro, 2016, 'I poteri delle Regioni sugli enti locali nella riforma costituzionale', *federalismi.it*, XIV(12), available at www.federalismi.it.
- Trimarchi Francesco, 1972, 'Problemi dell'amministrazione nelle aree metropolitane', *Amministrare*, III(1): 33 ff.
- Trovati Giorgio, 2016, 'I bilanci delle Città metropolitane: prima grana per i futuri sindaci', available at www.sole24ore.it, 8 June 2016.
- Tubertini Claudia, 2015, 'La Città metropolitana tra Regione, Comuni e Unioni. Analisi delle relazioni istituzionali', *Rivista online di Urban@it*, I(1).

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Constitutional Politics in East Germany and the Grand Coalition State

by

Werner Reutter*

Perspectives on Federalism, Vol. 8, issue 3, 2016

Abstract

Constitutional politics seemingly corroborate the assumption that Germany is a Grand Coalition state. In this perspective German cooperative federalism and the supermajority required for any amendment to the constitution privilege bargaining and intertwined policy-making as modes of conflict resolution and thus support grand coalitions. In this paper I will explore whether this theory can explain constitutional politics in the German *Länder*. Firstly, I examine how far sub-national constitutional politics match the functioning of cooperative federalism that is a defining feature of the Grand Coalition state. Secondly, I examine sub-national constitutional politics in the five new *Länder* and bring the role parties played in this policy field to the fore. Overall, I conclude that cooperative federalism did not impact on constitutional politics in East Germany and that the features of consensus democracy are only partly able to explain law-making in this sector.

Key-words

Land constitutions, German federalism, Grand Coalition state, consensus democracy, majoritarian democracy

Apparently, constitutional politics corroborate the hypothesis that Germany is a Grand Coalition state or a 'state which embodies high "'dispersal of power"' and thus privileges bargaining and compromise as modes of conflict resolution (Schmidt 2008: 79; cf. also Katzenstein 1987; Schmidt 1987). In this perspective decisions that require a two-thirds majority cannot but strengthen 'the consensus democracy component and the Grand Coalition component in Germany's polity' (Schmidt 2008: 72; cf. also: Reutter 2010; Lijphart 1999). Such decisions leave governments only few options: If they want to change the constitution, they have to cooperate with parties whose greatest ambition is to unsettle that very government. As far as constitutional politics is concerned Germany seems nothing but a consensus democracy or a Grand Coalition state[I] 'that is, a government Goliath tied down by powerful formal or informal checks and balances and co-governing institutions' (Schmidt 2008: 79).

It bears noting, though, that Manfred G. Schmidt who coined the term Grand Coalition state only referred to the national level. At the national level we find divided governments and co-governing institutions establishing the structural set-up for consensual policy-making in Germany. However, what about the *Länder*? Obviously, they can hardly be tied down by the same 'formal or informal checks and balances' as the national Goliath. In the *Länder* there are neither second chambers like the federal council nor constitutional courts enjoying the same or similar competencies as the federal constitutional court at the national level (Reutter 2017). What does this mean for constitutional politics in the *Länder*? In this article, I will try to find answers to these questions and examine how far constitutional politics in the East German *Länder* confirm the assumption that Germany is a Grand Coalition state and whether consensus democracy has effectively operated at this level and in this policy-field, as well. In methodological terms constitutional politics of the five new *Länder* seem to be ideal to tackle the questions at hand and to examine whether policy-making in this sector shares features complying with functional principles of German consensus democracy. East German *Länder* and their constitutions shared similar initial conditions as far as this policy sector were concerned. After joining the FRG they all had to establish a new system and adopt a new constitution (Lorenz 2013). Hence, my study tries to shed some light on the assumption that the functioning principles of the

German Grand coalition state not only shapes policy-making at the national level but also works in a sector that is supposed to notably represent the autonomy of the *Länder*.

In order to address issues linked to the theory of the Grand Coalition state I will analyse two crucial elements of German consensus democracy as far as these pertain to sub-national constitutional politics. I will firstly explore how the federal system or the vertical division of tasks between the national and the sub-national level impacts on this policy sector. As far as the Grand-Coalition-state hypothesis is concerned this is a crucial dimension because policy-making has been shaped by the functional principles of cooperative federalism in many sectors (Schmidt 2008: 79 ff.). I will explore how far these principles also apply with regard to sub-national constitutional politics. In a second step, I examine if and in what respect constitutional politics in eastern Germany fit with the aforementioned logic of consensus democracy. As any amendment to an East German constitution requires a two-thirds majority in parliament it might plausibly be assumed that they also strengthen the Grand Coalition component at the *Länder* level.

German political scientists have only recently begun to examine sub-national constitutional politics (Reutter 2008; Lorenz/Reutter 2012; Flick 2008a; Hölscheidt 1995; Reutter/Lorenz 2015). Yet, none of these studies explores constitutional politics in the five new *Länder* in an encompassing way and in the perspective laid out above (Jesse et al. 2014: 51-68; Gunlicks 2003: 141-62; Lorenz 2011). In addition, the prevailing research mainly focuses on the question of whether and how far constitutional rigidity affected the number of amendments to German Land constitutions (Flick 2008a). However, in order to capture constitutional politics I do not only have to include adopted amendments into the analysis but all drafted bills that aimed at changing East German constitutions.[II]

1. Cooperative federalism, sub-national constitutional politics and the Grand Coalition state

German federalism splits sovereignty between the federation and the *Länder* in a specific fashion. Most importantly, the division of competencies between the federation and the *Länder* makes cooperation and intertwined policy-making obligatory. The separation of tasks therefore causes a 'network-like system of interlocking politics' in which each participant enjoys 'veto power of considerable strength' (Schmidt 2008: 80 and 81).

These structures seemingly privilege co-operation among Land executives and bargaining as a major mode of conflict resolution as well as privilege unitarian and homogeneous policies. In a nutshell this is the textbook interpretation of German federalism and a core element of the Grand Coalition state (Kropp 2010; Laufer/Münch 2010).

Seemingly, sub-national constitutional politics fits perfectly with this understanding for two reasons: On the one hand, the people in the *Länder* are not sovereign and sub-national constitutions are not merely an expression of decisions made by the *demoi* of the *Länder*. They are part of a federal state and thus have to comply with provisions laid down in the federal constitution. In order to make sure that the sub-national constitutions are in line with the federal order the Basic Law circumscribes the *Länder's* competencies in this area (Lorenz/Reutter 2012; Gunlicks 2012). Art. 28 par. 1 of the German Basic Law (BL) requires Land constitutions to conform to the principles of a republican, democratic and social state governed by the rule of law within the meaning of the Basic Law. Due to this 'homogeneity clause' many scholars see *Land* constitutions 'overshadowed by the Basic Law' (Möstl 2005). In this dominating perspective the BL allots constitutional space to the *Länder*, enclose *Land* constitutions and overrules regulations contradicting the BL (like the existing death penalty in the constitution of Hesse). On the other hand, ideas seem to travel easily between the German *Länder*. C. Pestalozza (2014a) for example claims that there is a tendency towards standardised sub-national constitutions in Germany sometimes based on consultation, sometimes on imitation. Many scholars see sub-national constitutions, therefore, not only shaped by the national level but also by processes of adaptation and homogenisation which could eventually even jeopardise a crucial precondition of federalism: diversity (Pestalozza 2014a; Dombert 2012; Stiens 1997). Table 1 confirms these assumptions. It brings to the fore that all East German Land constitutions address similar issues and embrace similar principles.

Table 1: East German constitutions: structure (number of articles, as of 12/2015)

	[a)]Bbg	[a)]MW	[a)]SA	[a)]SAA	[a)]TH	All
	abs.	abs.	abs.	abs.	abs.	Mean
Principle of the Polity	*56*	*22*	*51*	*41*	*48*	*45.8*
- Preamble	1	1	1	1	1	0.9
- Foundation of State	4	4	13	2	4	5.7
- Basic rights, public goals, communal life	51	17	37	38	43	41.8
State Organs	*34*	*32*	*31*	*33*	*31*	*34.1*
- Parliament	20	21	20	23	22	22.1
- Government	14	11	11	10	9	12.0
State Functions	*25*	*26*	*31*	*26*	*25*	*29.6*
- Legislation	7	6	7	6	5	7.6
- Executive incl. local government	5	7	11	6	8	8.0
- Financial system	7	8	8	8	6	6.9
- Judiciary	6	5	5	6	6	7.1
Final clauses	4	4	10	2	3	6.6
All	*119*	*84*	*123*	*102*	*107*	*116.1*

a) Bbg = Brandenburg; MW = Mecklenburg-West Pomerania; SA = Saxony; SAA = Saxony-Anhalt; TH = Thuringia.

Sources: My compilation based on: Pestalozza 2014b; Flick 2008b: 225.

Based on this understanding, sub-national constitutions should be rather homogeneous. Furthermore, sub-national constitutional politics should be of little

relevance in the *Länder* and be shaped by intertwined decision-making. However, a closer analysis of the content of the East German constitutions and of constitutional politics in the five new *Länder* questions these assumptions and leads to a more differentiated picture. Three findings are crucial:

Firstly, the 'shadow hypothesis' indicates that all East German Land constitutions comply with the principles of the homogeneity clause. As a matter of fact, structure and basic principles of the constitutions of the five new *Länder* are very similar (table 1). They all include chapters on basic rights, state organs and state functions (Flick 2008a; Lorenz 2013). All East German Land constitutions establish a parliamentary system which is complemented by elements of direct democracy, the latter playing only a minor role so far, though (Flick 2008b: 170-85; Reutter 2008: 193-204; Eder/Magin 2008). The final chapters of the constitutions include provisions on varying topics.[III] In summary it can be stated that East German constitutions comply perfectly well with the homogeneity clause. Basic principles and structures of the constitutions match the stipulations of Art. 28 par 1 of the Basic Law. Insofar the 'shadow hypothesis' can be corroborated. Yet, a closer look brings some striking differences between the constitutions and constitutional politics of the *Länder* to the fore.

Table 2: East German constitutional politics compared

	Brandenburg	Mecklenburg-West Pomerania	Saxony	Saxony-Anhalt	Thuringia
Date of effect	20.08.1992	23.05.1993	27.05.1992	16.06.1992	25.10.1993
Referendum	Yes	Yes	No	No	Yes
Number of articles (1992/3)	118	81	123	102	107
• Principles of the polity (incl. basic rights)	55	20	51	41	48
• State organisation	34	32	31	33	31
• State functions	25	26	31	26	25
• Others	4	3	10	2	3
Number of articles (09/2014)	119	84	124	102	108
Number of words (09/2014)	8,706	6,528	8,678	7,724	7,443
Number of proposed amendments (until 09/2014)	21	11	30	5	33
Amendments passed	8	4	1	1	4
Amendment per year	0.36	0.19	0.04	0.04	0.19

Source: My compilation; websites of Land parliaments.

Table 2 provides some important information on the differences between the constitutions and constitutional politics in the five new *Länder* which, once again, enacted their constitutions at a similar time (1992/93) and under very similar circumstances. Yet, already the length of constitutions varies significantly. It ranged between 84 (Mecklenburg-West Pomerania) and 124 articles (Saxony) and between 6,528 (Mecklenburg-West Pomerania) and 8,706 words (Brandenburg).[IV] In addition, Arthur B. Gunlicks has pointed out, that East German constitutions have special signatures due to their provisions on 'modern' social rights and state goals, i.e. in those parts that might be instrumental in

fostering regional identity (Gunlicks 2003: 154-157; Pestalozza 2014a: XXIX f.). But these signatures vary, as well. The constitutions of Brandenburg, Saxony, Saxony-Anhalt and Thuringia include more than twice as many articles dealing with the polity in principle than Mecklenburg-West Pomerania. Insofar the East German Land constitutions can hardly be regarded as uniform or homogeneous. They are rather manifestations of territorially defined values, interests and 'identities' (Dombert 2012; Jesse/Schubert/Thieme 2014: 53-55; Lorenz 2013). Hans Vorländer even believes in an 'East German Constitutionalism'. He sees the eastern German Land constitutions as complimentary to the Basic Law and ascribes them the capacity to develop regional identities and integrate the people into the political and social order (Vorländer 2011; Lorenz 2011). Overall we might deduce from these features that East German Land constitutions have to comply with principles of the Basic Law and to reflect regional needs and interests. Only if they meet both requirements they might contribute to integrating the people into the political order and to fitting the subnational constitution into German cooperative federalism. Thus, sub-national constitutions have to embrace the same principles as the national Basic Law and they have to be autonomous decisions made by the *Länder*.

Table 3: Adopted amendments to East German constitutions (as of 31 Dec. 2015)

	Brandenburg	Mecklenburg-West Pomerania	Saxony	Saxony-Anhalt	Thuringia	All
Number of Amendments	8	4	1	2	4	18
Principle of the Polity	*8*	*5*	–	*2*	–	*15*
- Preamble	1	–	–	–	–	1
- Foundation of State	–	–	–	2	–	2
- Basic rights, state goals, communal life	7	5	–	–	–	12
State Organs	*6*	*1*	–	*7*	*2*	*16*
- Parliament	4	1	–	7	1	13
- Government	2	–	–	–	1	3
State Functions	*11*	*5*	*3*	*4*	*5*	*28*
- Legislation	5	1	–	3	2	11
- Executive incl. local government	2	1	1	–	–	4
- Financial system	4	2	2	1	2	11
- Judiciary	–	1	–	–	1	2
Final clauses	2	1	–	1	1	5
Number of changed articles[a)]	*27*	*12*	*3*	*14*	*8*	*64*

a) Some articles have been altered several times.
Source: My compilation; websites of the Land parliaments.

Finally, in the *Länder* constitutional politics seem to be far more important than many take for granted. Tables 3 and 4 show that this policy sector is relevant and important in the *Länder*. At least parties address constitutional issues regularly and frequently. For example, between 1992 and 2014 the parliaments of the five new *Länder* had to deal with 100 proposed constitutional amendments and adopted 18 of these proposals. This means that on average each elected parliament had to deal with a proposal to amend a constitution almost once a year.[V] In addition, in more than every second term an East

German Land parliament adopted a constitutional amendment. Furthermore, 64 articles in these constitutions were changed (table 3). Or: some 10 percent of all articles of the five East German constitutions were affected by amendments in one way or another. Even though these findings do not tell us anything about the content of the amendments they still prove constitutional politics to be an important topic for parties in the *Länder*. Parties and parliaments deal with constitutional issues on a regular and permanent basis at the sub-national level.

In addition, after 1992/3 constitutional politics took on different shapes in the East German *Länder*. Two dimensions are important in this respect: the number of adopted amendments and the number of all bills introduced into the five Land parliaments. As shown in table 3, between 1992 and the end of the year 2015 the number of adopted amendments varied between eight (Brandenburg) and one (Saxony). Both Mecklenburg-West Pomerania and Thuringia changed their constitutions four times since these had come into effect. The eighteen amendments adopted in the five new Länder since 1992/3 changed or added sixty-four articles. Once again, there are great variations among the *Länder*: In Brandenburg twenty-seven articles were changed, in Saxony only three. It bears noting, though, that the passed amendments address different issues. While Saxony just added a debt brake to its constitution, Brandenburg changed its constitutional preamble and some state goals (including a clause on anti-racism, which has also been added to the constitution of Mecklenburg-West Pomerania) and adjusted also regulations on state organs and state functions.

Table 4: Proposed amendments to East German parliaments: number of articles addressed (as of 31 Dec. 2014)

	Brandenburg	Mecklenburg-West Pomerania	Saxony	Saxony-Anhalt	Thuringia	*All*
Principle of the Polity	*14*	*9*	*39*	*2*	*15*	*79*
- Preamble	1	0	0	0	0	1
- Foundation of State	1	0	23	0	1	25
- Basic rights, public goals, communal life	12	9	16	2	14	53
State Organs	*9*	*8*	*8*	*4*	*24*	*53*
- Parliament	5	5	4	4	19	37
- Government	4	3	4	0	5	16
State Functions	*25*	*8*	*14*	*4*	*30*	*81*
- Legislation	14	4	5	2	6	31
- Executive incl. local government	4	2	3	0	5	14
- Financial system	3	2	4	1	12	22
- Judiciary	4	0	2	1	7	14
Final clauses	3	1	10	0	10	24
All	*51*	*26*	*71*	*10*	*79*	*237*
Number of proposed amendments (until 31 Dec. 2014)	*21*	*11*	*30*	*5*	*33*	*100*

Source: My compilation based on the data retrieved from the websites of the Land parliaments.

There are similar patterns with regard to the number of bills submitted to the East German parliaments as shown in table 4. While the *Landtage* of Brandenburg, Saxony and Thuringia, had to deal with twenty-one, thirty and thirty-three respective bills since 1992/3, the parliament of Mecklenburg-West Pomerania discussed eleven bills and Saxony-Anhalt

only five (tables 2 and 4). The number of articles to be changed by these bills varies significantly, as well (table 4). While in Saxony-Anhalt the parliamentary parties wanted to have ten articles changed, in Thuringia and Saxony seventy-nine respectively seventy-one articles were to be altered. In addition, while in Saxony the bills mostly addressed issues concerning principles of the polity, bills in Brandenburg and Thuringia focused on state functions. These differences were mostly caused by the Left Party (*Die Linke,* the former PDS). All in all, the Left Party submitted fifty-one bills into the East German parliaments, yet endorsed only five in Brandenburg, four in Mecklenburg-West Pomerania and two in Saxony-Anhalt. In contrast, I counted twenty-two attempts of this party in Thuringia and eighteen in Saxony. In summary, I can say that as far as the number of bills is concerned we find significant differences: between the *Länder* as well as between the parties. Even the same party pursued specific goals in different *Länder*. At least, the Left Party seemingly possessed neither a common strategy for all *Länder,* nor did the party coordinate their politics in this sector across the *Länder*.[VI] The same seems true for the other parties as well. Mostly, parties supported different strategies and took a different stance on the same issue in different *Länder*. For example, the CDU endorsed to have a debt brake in the constitution in Brandenburg, Mecklenburg-West Pomerania and in Saxony but opposed similar proposals in Saxony-Anhalt and in Thuringia. The SPD embraced the idea of having a debt brake in the constitution in Mecklenburg-West Pomerania and in Saxony, but rejected it in the other three *Länder*. At the same time the Left Party opposed and the FDP endorsed such a policy in all *Länder*. Overall, these examples prove once again, that constitutional politics are shaped by regional interests and constellations.

As an intermediate result we can, thus, note: Firstly and not surprisingly at all: with regard to East German constitutions the most crucial point is not that they share the same principles but that they differ in important respects (Lorenz 2013). The *Länder* do not only enforce federal constitution stipulations but they autonomously invoke the prerogative to adopt and change their constitutions. Only under this premise can they contribute to what Vorländer has coined 'East German Constitutionalism'. Secondly, due to the separation of tasks in this policy field there is no starting point for intertwined policy-making or intergovernmental coordination. On the contrary, it would jeopardise the very essence of constitutional politics if there were a network of institutions trying to coordinate the constitutional politics of the *Länder*. Thirdly, constitutional politics in the *Länder* are

important, permanent and salient. Or: sub-national constitutional politics matter for parties in the *Länder*.

Overall, we can conclude that the federal system works in a specific way with regard to sub-national constitutional politics. In this policy-sector German federalism seems dual rather than cooperative in character and neither based on cooperation nor on intertwined policy-making. This provides the institutional premise for heterogeneous policies and independent politics in the *Länder* and in this domain. In this respect the functioning principles of the Grand Coalition state can, hence, hardly impact on sub-national constitutional politics. In short: With regard to constitutional politics, the functioning principles of the Grand Coalition State did not effectively operate in the five new *Länder*. They did not shape policy-making in this area. However, there is still the second argument to be tackled with, and that is that two-thirds majorities strengthen the Grand Coalition state.

2. Constitutional politics, the Grand Coalition state and the parliamentary form of government

As pointed out, many assume constitutional politics to be different from 'normal' law-making. Obviously, this is due to the fact that in this policy sector ruling parties and parties in opposition have to find a consensus to muster the supermajority required for an amendment.[VII] In other words the parliamentary form of government is supposed to be suspended and replaced by policy-making based on consensus and compromise. My analysis will partly confirm this view, but I will also challenge the assumption that constitutional politics can only be understood as a manifestation of the German Grand Coalition state or consensus democracy for two reasons. On the one hand consensus democracy focuses on adopted amendments, i.e., on that 'face of power' that led to formal change.[VIII] However, I find such a perspective too narrow and biased to fully capture sub-national constitutional politics. I, therefore, also include bills rejected by parliaments. On the other hand, I will argue that constitutional politics in the new *Länder* partly comply with the logic of the parliamentary form of government and majoritarian democracy.

In order to compare normal law-making with law-making pertaining to constitutional change I construct two ideal types. Theoretically, in a parliamentary democracy the

executive branch is legitimised and eventually held to account by a majority in parliament. If need be, in all East German *Länder* such a majority can bring down any government by a constructive vote of no-confidence. At the same time ruling parliamentary parties depend on the government. This interdependency between government and parliamentary majority also shapes law-making. Ideal-typically, 'normal' – i.e. majoritarian – law-making shows four features: It is dominated by the executive, governments and ruling parties are successful with their bills, parties in opposition are not successful and thus submit only few bills, and there are only few bills jointly introduced by parties from both sides of the aisle. These features have been corroborated in studies on the Bundestag and Land parliaments.[IX] Table 5 summarises these features taking Michael Mezey's concept as a template:[X] As tables 5 and 6 reveal there are similarities, but also some differences between consensual and majoritarian law-making.

Table 5: Majoritarian and consensual types of law-making

	'normal' law-making (majoritarian)	'constitutional' law-making (consensual)
Majority	Simple majority	Two-thirds majority
Government	Active / successful	Passive / successful
Ruling parliamentary parties	Passive / successful	Passive / unsuccessful
Parties in opposition	Passive / unsuccessful	Active / unsuccessful
Coalition parties and parties in opposition (cooperation)	Passive / successful	Passive / successful

Reutter 2015a: 220.

First of all, in constitutional law-making most bills are introduced by parliamentary parties not by governments as in majoritarian law-making (Reutter 2008: 230-248; Ismayr 2012: 219-224). Since 1992/3 East German governments have proposed just four amendments of which[XI] three have been passed. Only the CDU government of Thuringia

(2004-2009) failed to have a debt brake included into the *Land* constitution. This governmental passiveness sets constitutional politics apart from 'normal' law-making. It fits with this finding that parliamentary parties supporting a government introduced even fewer bills than the governments. Ruling parties only submitted two bills on their own i.e. without parties in opposition supporting the initiative from the beginning. Both bills have been enacted, though. In these cases, the consensus was formed during the legislative process.[XII] This finding supports the aforementioned view that constitutional politics are not based on intertwined policy-making. Perhaps even more importantly, this policy sector seems to rank rather low on the agenda of Land governments. Ruling parties and governments rarely took the initiative in the German *Länder* and submitted only few bills in this policy sector.

TABLE 6: INTRODUCED BILLS AND AMENDMENTS IN EAST GERMAN PARLIAMENTS (IN %)

	All Bills[a)]			Proposed Amendments				
	Bbg	SA	TH	Bbg	MW	SA	SAA	TH
Period	1990-2014	1990-2014	1990-2014	1990-2013	1990-2013	1990-2013	1990-2013	1990-2013
Absolute Number of bills / amendments	1,003	1,027	1,065	21	11	30	5	33
Introduced by (in %)								
• Government	70.9	56.8	60.1	14.3	0.0	0.0	0.0	6,1
• Ruling parties	4.3	9.1	5.7	0.0	9.1	0.0	0.0	3,0
• Parties in opposition	20.1	31.8	29.4	71.4	81.8	93.1	80.0	81.8
• Ruling parties and parties in opposition	2.6	2.1	4.9	4.8	8.1	3.4	20.0	6,1
• Others	3.4	0.2	0.2	9.5	0.0	3.4	0.0	3,0
• One party	19.3	35.7	[b)]20.7	66.7	90.9	93.3	80.0	78.8

Abbreviations: Bbg = Brandenburg; MW = Mecklenburg-West Pomerania; SA = Saxony, SAA = Saxony-Anhalt; TH = Thuringia

a) Proposed amendments included, b) based on the period 1990-2009.

Source: My compilation; websites of the Landtage, Landtag Brandenburg, Statistische Angaben zum Landtag, Drs. 1/3243, 2/6618, 3/7923, Stand: 20.06.2014; Patzelt 2012: 540.

Secondly, constitutional politics seem to be more important for parties in opposition than for ruling parties. Parties in oppositions introduced most bills regardless of the fact that almost none of these bills were passed. Out of one hundred proposed amendments introduced until 31 December 2013 to the parliaments of the five new *Länder* eighty-two originated from parties in opposition. In Brandenburg two proposals from minority parties even led to amendments.[XIII] Nonetheless, parties in opposition do not aim at effectively altering a constitution when they propose amendments, but pursue other goals. They try to influence the political agenda, present themselves as the better alternative to the incumbent government and might prepare a future participation in government. But that is exactly the task of any party in opposition also with regard to normal law-making. Hence, in this respect constitutional politics in the five new *Länder* fit perfectly well with the functional principles of the parliamentary form of government. This policy sector is, hence, an essential element of party competition in the *Länder*.

Finally, with regard to constitutional politics parliamentary parties rarely cooperate. This statement applies to parties in opposition as well as to ruling parties. In all five *Länder* only ten out of a hundred bills were introduced by more than one party. Of these ten bills parties in opposition jointly introduced two proposals,[XIV] ruling parties submitted two, as well[XV] and six bills were introduced by parties in power and in opposition.[XVI] We find the same pattern in 'normal' law-making, where only few proposals were mutually submitted by more than one party in parliament. At least in Brandenburg, Saxony, and Thuringia between 80 and 90 % of all bills were submitted by one party or the governments (table 6). As far as constitutional politics are concerned, amendments submitted jointly by parties in power and in oppositions were all enacted.

3. Constitutional politics in the East German Länder – Some Tentative Conclusions

Is Germany a Grand Coalition state also in the *Länder?* And does sub-national constitutional politics strengthen consensus democracy as they do at the national level? These were the questions I have tried to provide answers to. I should emphasise, though, that I did not strive to falsify the theory of Germany as a Grand Coalition state or a

consensus democracy in general. I focused on the sub-national level which is not included in the concepts in question. Hence, I can hardly falsify or verify hypotheses that theories never claimed to make in the first place. Yet, by examining constitutional politics in the five new *Länder* I still tried to shed some light on a few blind spots these theories never took into account and thus to better understand how majoritarian and consensus democracy are linked to each other at least in the policy sector in question. One of my major conclusions is that these concepts are not at all mutually exclusive. On the contrary, as far as constitutional politics are concerned both components operate in the same policy sector. Thus the 'unique combination of majoritarian and consensus democracy' (Schmidt 2008: 87) typical for the German Grand Coalition state shaped a policy sector that many take as a prime example for consensus democracy.

Furthermore, I could bring to the fore that many features usually associated with German cooperative federalism and the Grand Coalition state seemingly cannot explain politics and policies in this domain. Even though it goes without saying that German federalism and the national constitution impacted on constitutional politics in the German *Länder* there was no indication whatsoever on intertwined policy-making or on executive networks providing governments further leverage in this field. On the contrary, in constitutional politics I found a federal system in place in which decisions are made autonomously at the *Länder* level. I could find no evidence that would support the assumption that joint decision-making, cooperation among *Länder* executives or multi-level strategies of parties had any impact in this sector. In essence, parties made different proposals in different *Länder*, did not coordinate the strategies across *Länder*, and defined their roles in the parliaments according to regional needs. My findings rather support Arthur Benz's assumption that federalism is a dynamic and flexible system that works differently in different policy sectors (Benz 1985; Jeffer et al. 2014). In other words, we still have to find a way how to causally link the impact of a multilevel system with subnational politics in different policy areas (Reutter 2014).

Finally, if the institutional set-up for cooperation cannot be referred to in the same way as at the national level to explain consensus and compromise in the *Länder*, we have to look for other factors. Our analysis indicates that if we take both 'faces of power' into consideration – that is not only the adopted amendments but also those rejected by parliaments – we might find constitutional politics closer to 'normal' politics than many

assume (Busch 2006). In spite of the supermajority required for any amendment it seems that constitutional politics are instrumental for party competition in the *Länder* and based on the willingness of the parties to cooperate.

---

* Lecturer in Politics at the University of Leipzig and at Humboldt Universtiy of Berlin. Contact email: *werner.reutter@rz.hu-berlin.de*. The research is funded by the Deutsche Forschungsgemeinschaft (grant no. GZ: LO 1424/3-1; AOBJ: 604048).

I I use the terms Grand Coalition State and consensus democracy interchangeably.

II If not otherwise indicated I retrieved the information on introduced bills and adopted amendments from the websites of the *Land* parliaments. Even though the access to these websites differ in detail, I proceeded in principle as follows: I searched the respective websites by looking for 'bills' *(Dokumenttyp: Gesetzentwurf)* on the subject *'Landesverfassung'*. Then I checked all entries for relevance and for the data we needed.

III In its final part the constitution of Brandenburg addresses issues such as: the constitutional court (Art. 114), how a new constitution is to be adopted (Art. 115), a possible amalgamation of the Land with another Land, and when the constitution comes into effect (Art. 117). The respective articles in the constitution of Mecklenburg-West Pomerania (Art. 78-80) rule: that each pupil will get a copy of the constitution on the first day at school, that texts in official documents will include both the male and the female form, that from 2012 onwards the budget has to be set up in such a way that in 2020 the debt brake will come into effect, and the day when the constitution comes into effect.

IV I compare constitutional policies by using formal characteristics like the number of articles or bills. Comparing constitutions in such a way runs into a number of problems, though. For example, the content of provisions can vary even if these have the same number of articles or words. Furthermore, stipulations addressing the same issue might figure in different chapters of a constitution. For instance, in the constitution of Saxony the parts on the 'Foundation of the State' (Grundlagen des Staates) include provisions on social rights, state goals (Staatsziele), or on communal life (Gemeinschaftsleben). In contrast, Brandenburg's constitution includes a separate chapter on these issues. Or: Chapters on the judiciary not only include provisions on this state function but also on state organs. In order to avoid such problems of assignment we subsumed all articles of a constitution under four headings (table 1).

V Between 1992 and 2014 each elected parliament of the five new *Länder* existed some 22 years, i.e. in sum 110 years. In this period 100 amendments had been submitted to the five parliaments, thus on average 0.9 bills had to be dealt with per year. Furthermore, until the end of 2014 28 parliamentary elections had been taken place, which means that on average each elected parliament passed 0.6 constitutional amendments.

VI We find similar patterns with regard to the question of whether the debt brake should be included in Land constitutions. In some *Länder* the CDU, SPD and the Green Party supported such a policy while they opposed it in other *Länder*; see: Sturm 2011.

VII So far four coalitions could rely on a two-thirds majority in East German parliaments: there were three coalitions including the SPD and the CDU in Brandenburg (1999-2004), Mecklenburg-West Pomerania (1994-1998) and Thuringia (1994-1999); in addition one coalition composed of SPD and PDS (1994-1998) had a majority in parliament of 66.2 percent.

VIII I gleaned this concept from Bachrach/Baratz 1962.

IX As far as law-making in general is concerned we have respective data for only three East German *Länder*. For overviews on Land parliaments and law-making see Reutter 2013: 63-71; Ismayr 2008: 383-429; Reutter 2008: 230-256.

X It should be noted, though, that Michael Mezey asks a different question and compares legislatures, hence, not different types of legislative decision-making; Mezey 1979.

XI Landtag Thüringen, Drs. 3/2237 (28.02.2002) and Drs. 4/4969 (12.03.2009); Landtag Brandenburg, Drs. 2/678 (27.04.1995), and Drs. 3/7444 (28.04.2004).

XII These amendments had the debt brake included in the constitution of Mecklenburg-West Pomerania and reorganised the remuneration for parliamentarians in Thuringia; Landtag Mecklenburg-Vorpommern, Drs. 5/4192 (2.3.2011); Landtag Thüringen, Drs. 2/2381 (6.11.1997).

XIII Landtag Brandenburg, Drs. 2/3657 (16.01.1997), 2/3658 (16.011997), and 5/1880 (25.08.2010).

XIV Landtag Brandenburg Drs. 5/2045 (23.09.2010), Landtag Thüringen Drs. 3/1911 (24.10.2001).

XV Landtag Thüringen Drs. 2381 (6.11.1997), Landtag Mecklenburg-Vorpommern Drs. 5/4192 (2.3.2011).

[XVI] Landtag Brandenburg, Drs. 5/7321 (21.05.2013); Landtag Mecklenburg-Westpomerania, Drs. 4/2118 (neu) (6.3.2006), Landtag Sachsen, Drs. 5/11838 (30.04.2013), Landtag Saxony-Anhalt, Drs. 4/1634 (16.06.2004), Landtag Thuringia, Drs. 3/3651 (9.10.2003), Drs. 4/211 (30.09.2004).

References

- Bachrach Peter and Baratz Morton S., 1962, 'Two Faces of Power', *American Political Science Review*, LVI(4): 947-952.
- Benz Arthur, 1985, *Föderalismus als dynamisches System*, Westdeutscher Verlag, Opladen
- Busch Andreas, 2006, 'Verfassungspolitik: Stabilität und permanentes Austarieren', in Schmidt Manfred G. and Zohlnhöfer Reimut (eds), *Regieren in der Bundesrepublik Deutschland*, VS Verlag für Sozialwissenschaften, Wiesbaden, 33-56.
- Dombert Matthias, 2012, '§27 Landesverfassungen und Landesverfassungsgerichte in ihrer Bedeutung für den Föderalismus', in Härtel Ines (ed), *Handbuch Föderalismus – Föderalismus als demokratische Rechtsordnung und Rechtskultur in Deutschland Europa und der Welt*, Springer, Berlin, 19-38.
- Eder Christina and Magin Raphael, 2008, 'Direkte Demokratie', in Freitag Markus and Vatter Adrian (eds), *Die Demokratien der deutschen Bundesländer*, Barbara Budrich, Leverkusen/ Opladen, 257-308.
- Flick Martina, 2008a, 'Landesverfassungen und ihre Veränderbarkeit', in Freitag Markus and Vatter Adrian (eds), *Die Demokratien der deutschen Bundesländer. Politische Institutionen im Vergleich*, Verlag Barbara Budrich, Opladen, 221-236.
- Flick Martina, 2008b, 'Parlamente und ihre Beziehungen zu den Regierungen', in Freitag Markus and Vatter Adrian (eds), *Die Demokratien der deutschen Bundesländer. Politische Institutionen im Vergleich*, Verlag Barbara Budrich, Opladen, 161-194.
- Gunlicks Arthur B., 1996, 'The new constitutions of east Germany', *German Politics*, V(2): 262-275.
- Gunlicks Arthur B., 2003, *The* Länder *and German Federalism*, Manchester University Press, Manchester.
- Gunlicks Arthur B., 2012, 'Legislative Competences, Budgetary Constraints, and the Reform of Federalism in Germany from the Top Down and the Bottom Up', in Burgess Michael and Tarr G. Alan (eds), *Constitutional Dynamics in Federal Systems,* McGill Queen's University Press, Montreal etc., 61-87.
- Hölscheidt Sven, 1995, 'Die Praxis der Verfassungsverabschiedung und der Verfassungsänderung in der Bundesrepublik', *Zeitschrift für Parlamentsfragen*, XXVI(1): 58-84.
- Ismayr Wolfgang, 2008, 'Gesetzgebung im politischen System Deutschlands', in Ismayr Wolfgang (ed), *Gesetzgebung in Westeuropa. EU-Staaten und Europäische Union,* VS Verlag für Sozialwissenschaften, Wiesbaden, 383-429
- Ismayr Wolfgang, 2012, *Der Deutsche Bundestag*, 3rd edition, Springer VS, Wiesbaden.
- Jeffery Charlie, Pamphilis Niccole M., Rowe Carolyn and Turner Ed, 2014, 'Regional policy variation in Germany: the diversity of living conditions in a "unitary federal state"', *Journal of European Public Policy*, XXI(9): 1350-1366.
- Jesse Eckart, Schubert Thomas and Thieme Tom, 2014, *Politik in Sachsen,* Springer VS, Wiesbaden.
- Katzenstein Peter J., 1987, *Policy and Politics in West Germany. The Growth of a Semisovereign State,* Temple University Press, Philadelphia, PA.
- Kropp Sabine, 2010, *Kooperativer Föderalismus und Politikverflechtung* VS Verlag für Sozialwissenschaften, Wiesbaden.
- Landtag Brandenburg, ELVIS Parlamentsdokumentation. https://www.parlamentsdokumentation.brandenburg.de/
- Landtag Mecklenburg West-Pomerania. Parlamentsdokumentation. http://www.dokumentation.landtag-mv.de/Parldok/
- Landtag Saxony, Parlamentsdokumente (EDAS). http://edas.landtag.sachsen.de/
- Landtag Saxony-Anhalt. Parlamentsdokumentation PADOKA. http://padoka.landtag.sachsen-anhalt.de/starweb/PADOKA/index.htm
- Landtag Thuringia. Parlamentsdokumentation. http://www.parldok.thueringen.de/parldok

- Laufer Heinz and Münch Ursula, 2010, *Das föderale System der Bundesrepublik Deutschland*, 8th edition, Bayerische Landeszentrale für politische Bildungsarbeit, Munich.
- Lijphart Arend, 1999, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries*, Yale University Press, New Haven.
- Lorenz Astrid, 2011, 'Die ostdeutschen Landesverfassungen als dynamische Integrationsstifter', in Lorenz Astrid (ed), *Ostdeutschland und die Sozialwissenschaften. Bilanz und Perspektiven 20 Jahre nach der Wiedervereinigung,* Verlag Barbara Budrich, Leverkusen, 75-98.
- Lorenz Astrid, 2013, *Demokratisierung in Ostdeutschland. Verfassungspolitische Weichenstellungen in den neuen Ländern und Berlin,* Springer VS, Wiesbaden.
- Lorenz Astrid and Reutter Werner, 2012, 'Subconstitutionalism in a Multilayered System. A Comparative Analysis of Constitutional Politics in the German Länder', *Perspectives on Federalism*, IV(2): 141-170, available at http://www.on-federalism.eu/attachments/141_download.pdf (accessed 3 January 2014).
- Mezey Michael, 1979, *Comparative Legislatures*: Duke University Press, Durham, NC.
- Möstl Markus, 2005, 'Landesverfassungsrecht – zum Schattendasein verurteilt? Eine Positionsbestimmung im bundesstaatlichen und supranationalen Verfassungsverbund', *Archiv des öffentlichen Rechts*, CXXX: 350-391.
- Patzelt Werner J., 2014, 'Landesparlamentarismus in Deutschland: Sachsen', in Mielke Siegfried and Reutter Werner (eds), *Landesparlamentarismus. Geschichte – Struktur – Funktionen.* Mielke, 2nd edition, VS Verlag, Wiesbaden, 509-548.
- Pestalozza Christian, 2014a, 'Einführung', in Pestalozza Christian (ed), *Verfassungen der deutschen Bundesländer mit dem Grundgesetz. Textausgabe mit einer Einführung von Christian Pestalozza*, 10th edition, C.H. Beck, Munich, XVII-CXLVII.
- Pestalozza Christian (ed), 2014b, '*Verfassungen der deutschen Bundesländer mit dem Grundgesetz. Textausgabe mit einer Einführung von Christian Pestalozza*, 10th edition, C.H. Beck, Munich.
- Reutter Werner, 2006, 'The Transfer of Power Hypothesis and the German Länder. In Need of Modification', *Publius. The Journal of Federalism*, XXXVI(2): 277-301.
- Reutter Werner, 2008, *Föderalismus, Parlamentarismus und Demokratie. Landesparlamente im Bundesstaat*, Verlag Barbara Budrich (utb), Opladen.
- Reutter Werner, 2010, '"Grand Coalition State", Große Koalition und Föderalismusreform', in Bukow Sebastian and Seemann Wenke (eds), *Die Große Koalition,* VS Verlag für Sozialwissenschaften, Wiesbaden, 85-101.
- Reutter Werner, 2013, *Die Zukunft des Landesparlamentarismus. Der Landtag Nordrhein-Westfalen im Bundesländervergleich*, Springer VS, Wiesbaden.
- Reutter Werner, 2014a, 'Sächsische Verfassungspolitik', in *Jahrbuch des Föderalismus 2014,* Nomos, Baden-Baden, 255-268.
- Reutter Werner, 2014b, 'Multilevel Systems and Sub-National Constitutional Politics in Germany: a Qualitative Comparative Analysis', *Perspectives on Federalism*, VI(2), 215-243, available at: http://www.on-federalism.eu/attachments/186_download.pdf (accessed: 1 October 2016).
- Reutter Werner, 2015a, 'Bayerische Verfassungspolitik', in *Jahrbuch des Föderalismus 2015,* Nomos, Baden-Baden, 215-227.
- Reutter Werner, 2015b, 'Verfassungsgesetzgebung in Brandenburg', *Zeitschrift für Parlamentsfragen*, XLVI(1): 116-135.
- Reutter Werner, 2016, 'Verfassungspolitik in Baden-Württemberg: Ergebnis konsensdemokratischer Zwänge oder "normale Politik mit anderen Mitteln"?', *Zeitschrift für Politikwissenschaft*, XXVI(2): 131-151. DOI: 10.1007/s41358-016-0030-7.
- Reutter Werner, 2017, 'Landesverfassungsgerichte in der Bundesrepublik Deutschland — eine politikwissenschaftliche Bestandsaufnahme', in Reutter Werner (ed), *Landesverfassungsgerichte in der Bundesrepublik Deutschland*, VS Springer, Wiesbaden, 21-48 (in print).
- Reutter Werner and Lorenz Astrid, 2015, 'Explaining the Frequency of Constitutional Change in the German Länder: Institutional and Party Factors', *Publius: The Journal of Federalism*, XLVI(1): 103-127. Doi: 10.1093/publius/pjv041.
- Schmidt Manfred G., 1987, 'West Germany: The Politics of the Middle Way', *Journal of Public Policy*, VII: 139-77.

- Schmidt Manfred G., 1996, 'When parties matter: A review of possibilities and limits of partisan influence on public policy', *European Journal of Political Research*, XXX(2): 155-183.
- Schmidt Manfred G., 2008, 'Germany. The Grand Coalition State', in Colomer Josep M. (ed), *Comparative European Politics,* 3rd edition, Routledge, London etc., 58-92.
- Stiens Andrea, 1997, *Chancen und Grenzen der Landesverfassungen im deutschen Bundesstaat der Gegenwart,* Duncker & Humblot, Berlin.
- Sturm Roland, 2011, 'Verfassungsrechtliche Schuldenbremsen im Föderalismus', *Zeitschrift für Parlamentsfragen*, XLVI(3): 648-662.
- Vorländer Hans, 2011, 'Verfassungstheorie und demokratischer Transitionsprozess. Der (ost-) deutsche Konstitutionalismus', in Lorenz Astrid (ed), *Ostdeutschland und die Sozialwissenschaften. Bilanz und Perspektiven 20 Jahre nach der Wiedervereinigung*, Verlag Barbara Budrich, Leverkusen, 245-260.

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Implication of Federalism in 'Federal' Related Political Institutions: A Conceptual Analysis

by

John O. Kalu and Dov Bing*

Perspectives on Federalism, Vol. 8, issue 3, 2016

Abstract

While most students of federalism feel satisfied with defining it as involving self-rule and shared rule, there is an inherent laxity in that definition because several institutional forms have dual components of self-rule and shared rule. It is therefore necessary to find out if federalism is an equivalent of all self-rule – shared rule systems of government or not. This requires an effort to locate the implication of federalism in federal related political institutions, by exploring the conceptual distinctions between related terms such as federalism, federation, federal government, federal political systems, confederation, and decentralized union. Hence, this article aims at distinguishing these concepts, as well as identifying the interlinkage and relationship that exists between them. The goal is to reduce the level of uncertainty associated with the meaning of federalism in the contemporary political culture, and also, to make it less contested and distinct from other federal kindred terms.

Key-words

Federalism, concept, distinction, process, federal political institutions

1. Introduction

Over the years, federalism has received substantial scholarly attention as governments tend to enlarge against the tides of regional fragmentations in modern societies. The concern has been on exploring and identifying what system of government would best address this problem of enlarging government and the counteracting pressure for autonomous local governance. The recurring themes of possibilities in the literature include concepts such as federalism, federation, confederation, decentralized unitary systems, and their hybrids. What these systems have in common is that each permits a combination of centralization and sort of decentralization of powers operating simultaneously; thus, they have been generally refered to as federal arrangements, federal political systems or federal institutional forms (Elazar 1987: 6; Watts 2008: 8; Stein 1968). Central to their discussions is the concept of federalism which appears, to some scholars, as the only system of governance that is poised to solve the problem in question.

However, analysis of relevant literature reveals a looming difficulty in differentiating federalism from each of the arrangements or systems mentioned above. Depending on what a particular writer aims at, federalism can be equated or associated with any of those institutional structures, and this has led some scholars to contemplate whether federalism is not meaningless.[I] More so, while the term 'federal political systems' has been proposed by Watts (2008) to represent a broad genus of political systems comprising confederations, federations, and decentralized unions, other writers restrict it to federations, federal states, and federal governments. With these contradictions, this paper arises to differentiate federalism and political institutional structures and also to establish the implication of the former in the latter, in order to reduce ambiguities that surrounds federalism and the federal concepts. As Elazar (1987: 14) argues, the choice of terminology strongly influences the direction and even the outcome of any inquiry. Therefore, distinguishing the federal kindred terms as clear as possible would help to reduce the level of uncertainty associated with the meaning of federalism in the contemporary political culture; making it less contested.

This paper makes an extensive exploration of the concept of federalism from an historical perspective in order to understand its root and how this contributes to the ambiguities in the federal concepts. Specifically, in each section of the work we focus on a particular issue of controversy or a form of ambiguity with respect to the concepts. As we progress into latter sections, we analyse the similarities and differences that exist between the concepts and also attempt to distinguish each from another. The implication of federalism in each of the relevant institutional structures are discussed, aided with a table and some illustrative diagrams, in the last section before the conclusion. In the end, this study makes a significant contribution through simplifying what federalism is all about; as informed by historical and contemporary events in both the most notable and the debatable federal political societies. There is no doubt, this would eliminate perceived ambiguity, as well as make it less contested. Thus, it is expected that the article strengthens the taxonomies of the federal concepts, by re-examining the interconnections between the key political arrangements that are often included in the genus of federal political systems by scholars, and attempting to reconstruct them.

2. Conceptualizing Federalism: Between a Process and an Institutional Structure of Government

A question like 'what is federalism' attracts variety of opinions from different angles, as its process purports to achieve contradicting or opposing goals; including centralization and decentralization, unification and diversity, and combining self-rule and shared rule. Therefore, some scholars tend to associate federalism more with one aspect of the demands than the other; meanwhile, the pursuit of one aspect of the opposing goals over another differentiates the tenets of various institutional structures. For instance, scholars agree that federation is a system where there is equality between the desire for self-rule and shared rule, while confederation represents a system where the pursuit of self-rule trumps the desire for shared rule.

However, more problematic is the fact that earlier writers on the subject were not specific in the use of the term—federalism—to represent either the ideology that directs political actions towards achieving the specific goal, or the institutional structure established to attain it. For example, K.C Wheare focused on 'federal government' as the

established system or institutional structure. Note his observation: most of those who use it [federal government] agree in this, that they have in mind an association of states, which has been formed for certain common purposes, [to be achieved through a central government], but in which the member states retain a large measure of their original independence, [through maintenance of their constituent governments] (Wheare 1963: 1-2). He went further to invoke the 'federal principle' as the idea that guides the relationships and interactions between central and constituent governments. This federal principle indoctrinates the method of dividing powers [in a federal constitution] so that the general and regional governments are each within a sphere co-ordinate and independent of one another (Wheare 1963: 10, 15).

To a large extent, Wheare's definition of the 'federal principle' conceptualizes what scholars came to understand and referred to as 'federalism'; even though he seldom used the term in the masterpiece—federal government. However, he saw this principle, first, as a core requirement only in a federation, federal government, or federal system; all of which he used synonymously. Secondly, he took this principle as an ideology that not only ends in guiding the design of a federal constitution, but also is reinforced in the day-to-day practice of the government. In his opinion, "if we are looking for an example of a federal government, it is not sufficient to look at the constitution alone, what matters just as much is the practice of government" (Wheare 1963: 20). To buttress, he adds that "the Nigerian constitution of 1960 purports to establish a federation and it clearly bears many characteristics of a federal system … but it is too soon yet to judge whether, in practice, Nigeria will provide an example of a federal government or not".[II]

Subsequent scholars after Wheare began to analyse his work and reinterpreted, especially, his 'federal principle', as federalism; while using the terms – federal government, federal system, federal constitution, and federation synonymously as corollaries of federalism. To illustrate this, Livingston (1956: 1) in critiquing Wheare, noted that every discussion of federal government begins with the assumption that the problem concerned is one of legal formalism and formal jurisprudence, whereas … legal answers are of values to legal problems, federalism is concerned with many other problems than those of legal nature. In addition, he added that federalism, like most institutional forms, is a solution of, or an attempt to solve a certain kind of problem of political organization.[III] This inconsistent use of the terms is further evidenced in Riker (1964: 1) who posited that "well

over half the landmass of the world was ruled by governments that with some justifications, however slight, described themselves as federalisms". One would think that Riker would mention federations instead of federalisms. Along the line, however, Riker wrote of unsuccessful federations and argued that "the moral of those failures is that federalism must be based upon some deeper emotions than mere geographic contiguity with cultural diversity" (Riker 1964: 33).

Carl Friedrich (1968) appeared to have noted the problem with the way federalism was confusedly being used to represent the process and also the structure of government with regard to division of powers, as he attempted to elaborate. He viewed federalism as an institutionalized process that has a constitutional protection as it is intended to reinforce the federal system. Hence, he argued that it is possible to define federalism and federal relation in dynamic terms. This leads him to conclude that federalism should not be seen only as a static pattern or design, characterized by a particular and precisely fixed division of powers between governmental levels (Friedrich 1968: 7). Federalism is also, and perhaps primarily, the process of federalizing a political community, that is to say, the process by which a number of separate political communities enter into arrangements for working out solutions, adopting joint policies, and making joint decisions on joint problems, and conversely, also, process by which a unitary political community becomes differentiated into a federally organized whole (ibid.). No doubt, Friedrich successfully exposed the problem but did little to resolve it, with his concession that federalism can be both a structure and a process at the same time.

Nevertheless, it was King (1982) that made the first bold attempt to confront the problem conceptually by analysing the terms in order to separate or distinguish federalism from federation. King relates the two terms analogously to a given political philosophy and the concrete plans set-up to achieve it. He views federalism as the political philosophy of diversity in unity, and federation as the established institutional structure to attain or promote this form of unity.[IV] The connection between the two is not hard to establish and King points out that federation is governed by purpose; acting upon federalism and helping to shape and reshape both its expression and its goals (King 1982: 14). This position is adopted by Burgess (2006: 2) who takes federalism to mean the recommendation and (sometimes) the active promotion of support for federation—a particular kind of state and a distinctive organisational form or institutional fact. In his opinion, both federalism and

federation have the main purpose of accommodating the constituent units of a union in the decision-making procedure of the central government by means of constitutional entrenchment; hence, federalism informs federation and *vice versa.*

Clearly, Elazar (1987) concurs to federalism being used in terms of a political philosophy to promote a particular type of unity among different political communities, but argues that federation is not the only institutional form that reinforces it. In his opinion, "using federal principle (or federalism) does not necessarily mean establishing a federal system or federation, in the conventional sense of a modern federal state" (Elazar 1987: 11). He argues further that "the essence of federalism is not to be found in a particular set of institutions but in the institutionalization of particular relationships among the participants in political life".[V] This assertion further compounds the problem beyond a 'process or ideology' (federalism) and an institutional form (federation, or federal state/government) by introducing the possibility of this same ideology being advanced through many other institutional forms.

3. Federal Political Systems as Federations or inclusive of other arrangements?

The notion that federal ideology can be pursued through several other arrangements other than federations raises a controversy over whether those other systems can be viewed as federal systems or not. In this vein, Watts (1998: 117) introduced the term 'federal political systems' to accommodate the other possible institutional forms, and further attempts to distinguish three terms: federalism, federal political systems and federation. He views federalism as a normative principle which aims at perpetuating both union and non-centralization at the same time; this is an endorsement of King's and Burgess' propositions. He posits federal political systems as a descriptive term referring to a broad genus of federal arrangements or political systems in which, by contrast to the single central source of political and legal authority in unitary systems, there are two (or more) levels of government combining elements of shared rule through a common government and regional self-rule for the governments of the constituent units. And he presents federation also as a descriptive term referring to particular species within that genus of federal political systems, which include other institutional forms such as unions, confederations,

constitutionally decentralized unions, leagues, associated statehood, federacies, and condominiums (Watts 1998: 117; Watts 2008: 8).

Watts' description of federal political systems is particularly interesting as it shows that certain similarities do exist in various institutional forms which, to a large extent, aim at reinforcing diversities in unity just as federations. However, christening this broad genus of political organizations as federal political systems complicates rather than simplifying the problem it purports to ease. It makes it difficult to define what a federal government or federal state should mean—whether it should be used when referring to a federation or any other species within the broad genus. As Burgess (2013: 51) rightly puts it, the notion of federal political systems, in the context which Watts postulated it, is a deceptively complex term which lacks conceptual precision. Furthermore, this distinction tends to subordinate federation to a mere species of a genus that remains somewhat ambiguous, whereas, federation (as a federal state) is something that, by virtue of its very statehood, sits uncomfortably in the mixed company of those other forms in the broad genus (Burgess 2006: 48).

Stein (1968) provides a contrasting view of a federal political system, which tends to support its restriction to federations just like Burgess argues above. In his view, "a federal political system is that form of political system (of a nation-state) in which the institutions, values, attitudes, and patterns of political action operate to give autonomous expression both to the national political system and political culture and to regional political subsystems and subcultures (defined primarily by ethnic-linguistic factors)" (Stein 1968: 731). He added that the autonomy of each of these systems and subsystems is counterbalanced by a mutual interdependence, such that the balance maintains the overall union. The enunciated features represent those of a federation and not of the several other species. No wonder Burgess (2013: 54) vehemently posits that "just like every state has a political system … we would expect to find a federal political system in a federal state, federal government, or federation'—all of which are synonyms.

Notwithstanding, what is clear from the foregoing, however, is that there is a strong reason that has prompted Watts to cast the net of federal political systems so wide to capture other species of political arrangements, in addition to federations that supposedly are the natural embodiments. It would be totally unfair to disregard the merit in his classifications; instead, investigating the interconnections between the key political

arrangements he included in the genus of federal political systems will be instructive. This task is tackled below.

4. The 'Foedus' Connection

Against the controversies over federalism and the federal arrangements, the interconnection is found in the consensus that the root word 'federal' stems from the Latin word *foedus*, which means 'treaty', 'compact' or 'contract' of alliance between political entities. Many students of federalism have written consistently about how 'foedus' was used when referring to treaties between independent entities, united by a sense of common needs like war, especially in the medieval Roman Empire.[VI] Elazar (1987) veers deeper into the etymology of federalism beyond the Latin *foedus* by tracing further the root of foedus to the Hebrew term 'b'rit', which means covenant. He therefore posited that, "federal arrangement is one of partnership, established and regulated by covenant, whose internal relationships reflect the special kind of sharing that must prevail among the partners, based on mutual recognition of the integrity of each partner and the attempt to foster a special unity among them" Elazar (1987: 5).

Due to the connection of federalism to the Hebrew *b'rit* and Latin *foedus*, many scholars believe that the practice of federalism predates civilization; existing from about 1000 B.C.E, in the ancient Israel and Greece, to the medieval period that saw the rise of the modern nation-states.[VII] This would be fallacious to many others who believe that federalism is, concretely, 'American invention'.[VIII] Whichever camp a scholar inclines to regarding the origin of federalism influences what the scholar views federalism to mean. Meanwhile, implicit concessions can be deduced from each of the camps. For instance, the first argues federalism had been prior to the American alleged invention; yet, do observe a great difference that might be called a departure from the earlier models, in the form that the American founding fathers introduced.[IX] In that vein, Elazar and some others in that category would refer to the American style as the 'modern federalism'. The second group on the other hand, concedes that something similar to the American style had existed in the pre-American societies.[X]

These two ways of viewing federalism—pre-modern and modern—created the foundation for ambiguity over the subject, as the structure identified in each instance is

equated with federalism. The result is the conclusion by some scholars that there are different shades, representing different structures, of what qualifies as federalism (Livingston 1956: 4; Riker 1964: 6; Elazar 1987: 6; Watts 2008: 8-9). Of course, hardly would a particular society escape from being classified as modelled along the so-called 'pre-modern' medieval European federalism or 'modern' American styled federalism. The variation in the structure each society presents, even though modelled along a particular tradition, further creates another shade. Nevertheless, the debates in relation to the design of the American Constitution by the founding fathers provide sufficient insights to the understanding of federalism in the two traditions, and the issues that confound contemporary federal institutional structures.

5. Issues in differentiating 'Federal' related Institutional Forms

The American founding fathers are largely credited as the inventors of 'federalism' by drafting the US Constitution, which established a novel system of government that has come to be regarded as the premier 'federal government', 'federation', or 'federal state'. This design resulted as a by-product of their pursuit to consolidate independence from their imperial master—the British. While federalism or 'foedus' based system of political organization was a consensus choice, pursuant to creating an egalitarian society, fighting the war of independence however exposed to them the weaknesses inherent in the kind of foedus associations they had known—the supposed medieval federal models. This led to the emergence of opposing views of federalism, supported by different kinds of federalists during the debates at the Philadelphia Constitutional Convention of 1787. At one time, the debates linked federalism to centralization and at another time, they referred it to strong constituent units.[XI] This ambiguity was a source of confusion, affecting how the future American leaders were going to operate the governing tool they had been bequeathed. Other emerging federations that adopted the American style equally inherited similar problematic.

Against the ambiguity around understanding the kind of federalism established in the American Constitution, Diamond (1963) offers a valuable suggestion towards resolving this. In his opinion, objective bases to understanding the framers are perceptible through a number of events and documents which includes: the Declaration of Independence; the

Article of Confederation; the proceedings of the federal convention; the Constitution's ratification—the various federalist essays (Diamond 1963: 24). He explains further that the Declaration document is the primeval statement of the American political principles; the Article of Confederation was the constitution that was rejected; the proceedings are the extraordinary record of the way the constitution came about; the federalist essays are the brilliant and authoritative exposition of the meaning and intention of the constitution; and the arguable anti-federalist essays are the thoughtful defence of the political tradition the constitution was displacing. However, if one follows Diamond's suggestions, to examine the mentioned documents and incidents, ambiguity in the manner the founding fathers used the term 'federal' still persists.

6. Confederation or Federation?

As noted by several scholars, the authors of 'the federalist' applied the term 'federal' (foederal) to both the government under the Articles of Confederation and the one proposed in the new Constitution (Wheare 1963: 10-11; Forsyth 1981: 107; Friedrich 1968: 18-20; Ostrom 1991: 70). The terms 'confederation' and 'federal' were used essentially as synonyms and for different referents; any difference in meaning to be ascribed to the new concept depended upon context.[XII] However, what was obvious is that the two terms were used interchangeably as opposite to a national or unitary government, which was seen as one extreme of political organization, where only one single political entity exists and, thus, power is concentrated in one general government.

Confederation, from earlier systems that were properly named so including the Swiss confoederatio (1291) and the US Articles of Confederation (1781-1789), basically means there are two or more associated entities which bind themselves in 'foedus' or treaty to 'federalize' by forming a common government for certain purposes. It can be called a treaty government. As such, the defining characteristic of a confederacy is that the associated states retain all the sovereign power, with the central body entirely dependent legally upon their will (Diamond 1963: 26). However, a close scrutiny of the new system established in the US constitution reveals a marked departure from that characteristic. For example, in reference to this new system, Alexis de Tocqueville posited that "this is no longer a 'federal' government, but an incomplete national government, which is neither

exactly national nor exactly 'federal', but the new word which ought to express this novel thing does not yet exist" (Cited in Bradley 1945: 159). Observe that 'federal' in this assertion refers to confederation, which was the only known alternative form of government to counteract imperial powers as at then. It is undoubtedly confusing but the analysis below illuminates the ensuing distinctions.

7. National/Unitary Government, Confederation, and Federation/Federal Government

It is clear that the US constitution framers were battling between two extremes of political organization, which were national/unitary government and confederation. The former represents the kind of centralized federal government proposed by Alexander Hamilton, while the latter represents the kind of decentralized federal governance desired by those that opposed Hamilton's view. This second group was eventually labelled 'anti-federalist' as Hamilton had been parading his views as the 'federalist'. In the end the delegates rejected the extreme degree to which Hamilton's initial plan concentrated power at the national level, but they understood that giving more power to the central government was necessary for the nation's survival—a point Hamilton had succeeded to establish. Therefore, the emerging constitution was a compromise of the two opposing views of federalism at the convention. The federalist decisive statement confirms this: "the proposed constitution, therefore, is, in strictness, neither a national nor a federal[XIII] constitution, but a composition of both" (Diamond 1963: 26).

In the contemporary, the term 'federal' is ascribed to the new system, which the framers regarded as possessing both federal (hitherto, confederal) and national features—the same system that Tocqueville had noted as requiring a new name to differentiate. This leaves 'confederation' to stand entirely as the opposite of 'national' (unitary state) while the new 'federal' becomes the middle system which modifies the two by combining their best characteristics (Diamond 1963: 26). Therefore, as the opposite of a confederation, a unitary state or national government is a political organization where the society is treated as one single political entity; thus, power is concentrated in one level of government. Instrumentalities are not created to recognize the differences between distinct groups or to address their yearnings in the polity. It can be seen as a system where groups come to bind

themselves in 'foedus' by establishing a general government that is empowered to possess every power hitherto held by each group. Hence, the defining characteristic of a unitary system is that the constituent units are entirely dependent on the will of the general government, which retains all the sovereign power. In the event that political communities within the unitary state start to agitate and a minimal level of instrumentalities are created to cater for the needs of these different entities, another shade of federal arrangement emerges in the form of a 'decentralized union'.

8. Federalism as a Complement of Federation

Diamond's exposition,[XIV] when he observed that the emergence of the United States Constitution was as a result of the need to change the principles in the Articles of Confederation which allowed for subordination of the central government by the sovereign constituent states, reinforces Wheare's conceptualization; thus: "it justifies us in describing the new principle, which distinguishes the US constitution so markedly and so significantly, as the 'federal' principle" (Wheare 1963: 10). Wheare seemed very correct in the sense that the embattled constitution supposedly had 'confederation principles' as suggested by its name—Articles of Confederation. Hence, the new one, having been presented as not being a 'national/unitary' constitution, and, also, not being the same as the replaced 'confederation' constitution, could only logically be described as a 'federal' constitution. This was how Wheare concluded that the federal principle should be the yardstick to distinguish a federal system; meaning that neither level of government would entirely depend upon the will of the other as in a confederation or national union.

Resulting from the above, it could be argued that federalism is not a *sine qua non* for any other system of government other than a federation. This seems to be a well-known fact as the writings of many scholars indicate. Particularly, Riker (1964: xii) makes it clear that he set out to develop the study of federalism with the aim of generating hypotheses that could be tested in the US system, from which the artefacts of federalism has been derived, and other federations. He did not hope to test federalism in any other system within the so-called broad genus of federal political institutions. The attempt to link federalism to those other systems as proposed by Watts requires further qualifications; because federalism outside a federation may happen as a departure from the tenets of the particular system in

question towards metamorphosing into a federation. As King (1982: 76) argues, there may be federalism without federation, as can be seen in some other systems of government; however, this is not intended at the outset but only results because the system in question is decentralizing and moving towards a federal republic. Therefore, the argument would be that, those other transitional systems where federalism is perceived should be viewed as different kinds of federation, and not totally in terms of their original forms as separate species such as confederation, or decentralized unitary among others. But, regardless of how they are being looked at, the reality is that federalism is evident in those societies and may just be a matter of time before they upgrade to a full federation; as is currently the situation with the European Union.

9. Discussion: Implication of Federalism in 'Federal' Political Institutions

A re-consideration of the conceptual debates shows that federalism has rarely been defined concisely without describing its essence. Meanwhile, when a description is employed, what is presented is the picture of a federation, which explains why there has been an interchanging use of federalism and federation by some writers.[XV] While attempts have been made to separate or at least distinguish the two, especially in the mainstream Anglo-American literature, it does not appear to raise any concern in the European literature; i.e. the French school of integral federalism and their Italian counterpart. Influenced by the philosophies of Immanuel Kant (1724-1804), Pierre-Joseph Proudhon (1809-1865), and, to a lesser extent, Carlo Cattaneo (1801-1869), scholars in this tradition view federalism as an ideology, which goes through a given process in order to attain its targeted values.[XVI] Rather than stressing the institutional aspect through which the 'federalism-federation' controversy would arise, they pay more attention to determining what characterizes a federal society, what the core values of federalism are, and the various levels of political organization where federalism is plausible.

We take a particular note of Albertini's assertion that federalism cannot be limited to the conception of a type of a state, because this would constitute only a small part of its general meaning (2000 [1963]: 88). Concretely, he argues that limiting federalism to a federal state takes no account of the fact that a state always rests on a social base which

conditions its existence, and the nature and working of its institutions are determined by particular types of political behaviour (Albertini 2000 [1963]: 88). Meanwhile, Proudhon relied on Althusius' emphasis on contract to identify federalism from the level of coming together of heads of families, the communes, the cantons, the provinces, and to the state, in order to guarantee a harmonious living together and reduce the prospect of clashes in the society (Friedrich 1968: 26). Kant on his own part had the idea of a worldwide federation of republics as a prerequisite to forestall inter-state conflict (Friedrich 1968: 24). But one common denominator in the thoughts is that, in each instance and level, federalism consisted of a continuous interaction between a certain kind of an inclusive community and component communities.

Undeniably, there is usually the possibility for the individual interests of the component communities to clash against each other and that of the inclusive community; nevertheless, that is what federalism lives to regulate. Therefore, it is not surprising that the pursuit for 'peace' has been identified as the core value of federalism; a finding that has deservedly gained wide acceptance especially among the European federalist scholars (See: Albertini 2000 [1963]: 90; Castaldi 2007: 3; De Rougemont 1947: 25; Dosenrode 2010: 10-11; Levi 2008: 53; Marc 1961; Rossolillo 1989: 31). But, would it be possible to focus on a value of an ideology in the absence of an institution through which the value could be realized? As rightly observed by Albertini (2000: 89) conceptualizing federalism from an ideological point of view alone is not in touch with reality, as it cannot identify precise forms of behaviour or definite realities. He further suggested that alongside the ideological perspective, federalism should also be approached from the institutional lens, as it definitely has a structural aspect (the federal institution), a socio-historical aspect (the complex historical and social conditions that divide a society into groups, classes, and nations), and a value aspect (attainment of peace by overcoming or managing those socio-historical divisions in a society) (Albertini 2000 [1963]: 90-110; see also, Castaldi 2007: 3).

From Albertini's tripartite aspect of federalism, we see the socio-historical aspect as the nucleus of what conditions the emergence of a federal process/behaviour. When we understand the place of socio-historical factor, then it will even be easier to recognize the institutional structure that can foster realization of the core value of federalism—peace. To explain in simple terms, socio-historical basis refers to the primordial loyalty of a people, their psychology and overall disposition towards others in a society, arising from prior

separate settlements in distant territories which made it difficult to be in regular contact with, if ever aware of the existence of, the others until a particular event happened which began to bring them together. Such event could relate to war, as in the case of the United States of America, or colonialism, as in the case of Nigeria. In any case, the hitherto separate groups have been made to come together (socio-historical aspect), and a common union is formed (institutional structural aspect), with a task to secure the peace of all, without attempting to subjugate each other, which brews conflict (value aspect); even though that is not always an easy task.

Now, how does the above exploration contribute towards determining the implication of federalism in various [federal] political institutions? The answer is simple; having established federalism as an ideology that has a structure, and a specific value towards overcoming or managing socio-historical based bipolarization, it is therefore logical to see federalism as the operational attempts to safeguard balance and equilibrium (i.e., as proposed in Wheare's federal principle) between a central and regional governments as aimed at in a federation (Kalu 2016: 353). It should be noted that other [federal] institutional forms might reflect certain glimpses of the federal principle, like each level of government having some areas of independent spheres. But certainly, they do not aim at ensuring equilibrium between the levels of government, as their structure is designed such that one level (either the central government, or regional government) predominates the other in a given instance. Hence, any practice or process of governance that does not strictly aim at reinforcing equilibrium, or non-subordination, of levels of government in a federation or within any other [federal] institutional form, can hardly realize the core value of federalism. Such could be viewed as 'not federalism' or *dis-federalism*[XVII] instead.

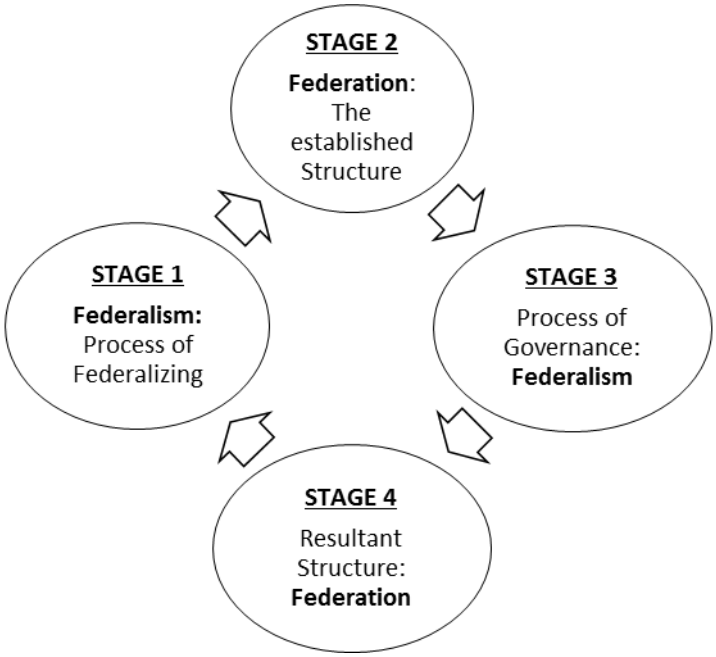
With this understanding, one may argue that among all the arrangements regarded as federal institutional forms (including: federation, confederation, and decentralized union), federalism, in its truest sense, is a prerequisite only in a federation, where there is a need to achieve a balance between unity and diversity; not in any other one. The inter-relationship is further explained: firstly, federalism, when viewed as a process of federalizing, aims at ultimately setting up a federation; and in practice, federalism also reinforces a federation after it is set up. Secondly, while federation sets the rules for federalism, it is the federal operation that safeguards the structure of the federation. This is fully illustrated in table 1 below.

Table 1. Inter-relationship between federalism & Institutional forms

INSTITUTIONAL SET-UP AT THE OUTSET	PROCESS OF GOVERNANCE	RESULTANT STRUCTURE OVER A PERIOD OF TIME
FEDERATION	Federalism	FEDERATION
CONFEDERATION	Federalism	FEDERATION
DECENTRALIZED UNION	Federalism	FEDERATION
FEDERATION	Dis-federalism	DECENTRALIZED UNION OR CONFEDERATION
CONFEDERATION	Dis-federalism	CONFEDERATION
DECENTRALIZED UNION	Dis-federalism	DECENTRALIZED UNION

Table 1 above shows how federalism relates with the major 'foedus' inspired institutional forms; i.e., institutions marked by the presence of two levels of government that have varying degrees of autonomy in relation with each other. These include federation, confederation, and decentralized union. From the table, it can be seen that apart from a federation, no other form of government should aim at practicing federalism if it desires to remain intact and unadulterated, otherwise, a consistent practice of federalism would change any institutional form to a federation over a period of time.[XVIII] Similarly, federations should adhere strictly to the practice of federalism, otherwise, it will seize to being a federation and might evolve into a confederation or decentralized union; depending on which level of government becomes more powerful against the prior equality. The information presented in the table can be re-interpreted with basic circles to show the process that describes federalism, as well as distinguishes it from federation; while also demonstrating the relationship between federalism and the various institutional forms as shown in Figure 1 below.

Figure 1. Federalism process - without distortion

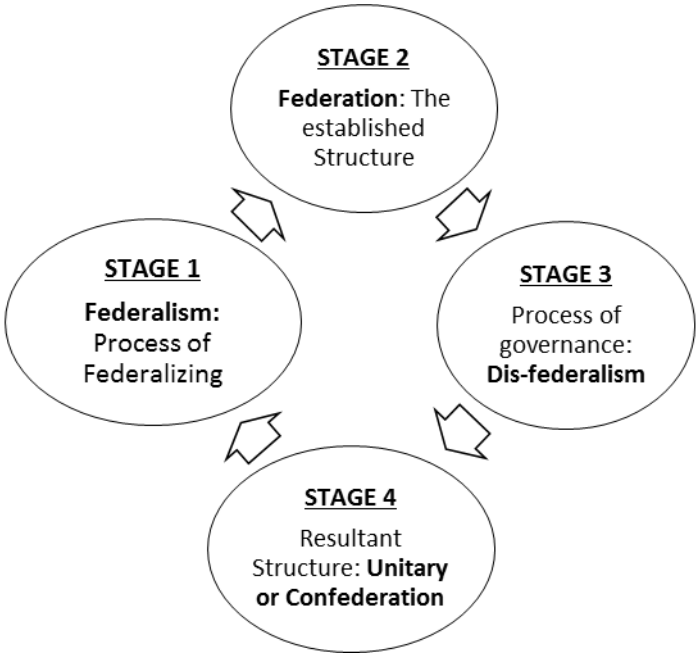


From Figure 1, we see federalism, first and foremost, as a process of federalizing by which a number of separate political communities enter into arrangements for working out solutions, adopting joint policies, and making joint decisions on joint problems (see stage 1). Then, the structural arrangement that is set-up to bring about the desired solutions to their joint problems is a federation as depicted in stage 2. Furthermore, we see federalism as the process of governance in the federation to maintain the designed structure as pointed on stage 3. Lastly, we see federation remaining intact as the structure of government for the society in stage 4. The whole process illustrates the process of federalism in relation to the governance in a federation as the complementary institutional structure.

Nonetheless, if after setting up a federation through federalizing process (see stages 1 & 2), and the operation or process of governance (see stage 3) undermines adherence to the federal principle or federalism, then, the resultant structure over a period of time cannot reflect a federation anymore, as stage 4 in Figure 2 below shows. Depending on which level of government that becomes more powerful, the resultant structure could change to confederation or decentralized unitary. Should there be further need to correct the structure to federation, the constituent units have to federalize again, through

constitutional making in order to restructure, and the process continues. This is illustrated in Figure 2.

Figure 2. Federalism process – when distorted



10. Conclusion

Locating the implication of federalism in federal related political institutions, as this article focuses on, has exposed the need for conceptual distinction of the related concepts. In this course, it has been found that federalism has confusedly been viewed as a structure, or a process, and/or, as both. In addition, confederation, federation, and decentralized union are related structures that have been found to be associated with federalism in one way or the other. Furthermore, federal system and federal government are terms that represent a specific system of government where federalism is practiced. The main challenge of this article has been to distinguish these concepts as clear as possible, and also to identify the interlinkage and relationship that exists between them. This is to ensure that we contribute to reducing the level of uncertainty associated with the meaning of federalism in the contemporary political culture, and also, to make it less contested and distinct from other federal kindred terms. Therefore, after the entire analysis in this work, the following conclusions are drawn with regard to the concepts:

a) Federalism

Federalism is the practice or style of governance (an institutionalized process) that aims towards the unification of entities and the reinforcement of a corresponding level of independence among territorial entities in a given political space. Let us understand that this task is not always that simple to achieve, as the pull for unification is constantly in opposition to the desire for independence and vice versa, but once the aim remains constant, then a level of federalism is in process. Consequently, the degree of conquest of unification over independence, or the other way round, results in a variety of federal institutional forms. However, when this goal for unification and maintenance of independence is constitutionally entrenched, as in a federation, and strictly adhered to by the various governments in practice, without the attempt by any to suppress each of the demands, then federalism would have achieved its ultimate value of equalizing unity and diversity—the attainment of peace.

b) Federation

A federation is a conscious legal institutional structure which comprises a territorial division of government into two levels—the central and constituent governments—which firstly, is purposed to reinforce the quest for union and desire for diversity; secondly, where each government is independent in its own sphere as established in the constitution and also cooperates in the general sphere; thirdly, where none is superior or subordinate to the other; and finally, where no government can overrun or pull out of the partnership, unless mutually agreed. It is important to re-emphasize that federation is synonymous with federal government and federal state.

c) Federal System or Federal Political System

A federal system refers to a political system that is, first and foremost, structured as a federation, and then relies on federalism as the means for its governance.[XIX] While there are scholars who want the term 'federal political system' to apply to any system where there are two or more levels of government within a society including a decentralizing unitary state and a centralizing confederation, many problems result with such a broad classification. First, it leads to a confusion as a country should not be classified, for instance, as a federal political system, while at the same time operating a unitary constitution. Secondly, most of those systems included in that classification do not portray any significant systemic expression of the federal principle, as subordination of each level by another is

overwhelmingly evident. Thirdly, a system should include basic structure, the entire linkages of activities, operations and interactions within the political system to qualify as a system. Hence, a federal political system should be restricted to a federation, which operates a federal constitution and also remains reliant on federalism as the means of governance. Other terms for this includes federal government or federal state.

d) Federal Institutional Forms

Federal institutional forms include all institutional arrangements where there are two or more levels of government in a society, each having a separate areas of autonomous activity, regardless of whether this independent jurisdiction is constitutionally entrenched or it can be dissolved and quashed at the will of the central government. They include 'federation', 'confederation', and 'decentralized union'.

One may question why apply the adjective 'federal' to institutions that historical experience and contemporary knowledge has thought us to distinguish as confederal and/or decentralized union, instead of leaving 'federal' institutional form to federations only. While it potentially appears valid, a number of factors make it difficult to exclude those other structures as forms of 'federal' institutional structures. For instance, it is a well-known fact that the term 'federal' originates from the Latin word 'foedus' (meaning: covenant). Therefore, any arrangement that is based on 'foedus' or its derivative 'covenant' should logically qualify as a form of federal arrangement. The reason is that, at the foundation of each remains the commitment to the 'foedus' principle of safeguarding a level of self-rule for each of the territorial groups and a shared-rule for all. In addition, there is usually some kinds of treaty documents that warrant the protection of each group's distinct identities, regardless of how much valuable the quest for unification becomes. Even so, to qualify as a federal system/federal state the nature of the covenantal relationship, as seen from the constitution of the system in question and its practice, has to be such that the levels of government operate as partners and not as master-servant.[xx]

To conclude, in terms of the implication of federalism in each of the federal institutional forms, it can be deduced that federalism, in its truest sense, is a prerequisite for, and in, a federation alone, where there is a need to achieve a balance between unity and diversity; not in any other institutional form. Nevertheless, there is a caveat. It is possible (and even highly evident) to see federalism developing in each of the other institutional forms, where there are provisions to recognize, protect and nurture the diversity of the

people,[XXI] or consolidate an emerging inclusive union,[XXII] by means of government legislations. But the reality is that, if federalism persists overtime, then the structure of that institutional form is bound to change to a federation, when the constituent units and central government become equal partners with full constitutional security, regardless of whether it was a confederation or decentralized unitary state in the past. Similarly, a federation should adhere strictly to the practice of federalism by consolidating equilibrium between subject's two poles of loyalty, otherwise, it will seize to being a federation and might evolve into a confederation or decentralized union; depending on which level of government has become more powerful against the prior equality.

---

* John O. Kalu got a PhD in Political Science and Public Policy from the University of Waikato, New Zealand. He is currently a postdoctoral researcher at the Department of Political Science and Public Policy, University of Waikato. Professor Dov Bing is the graduate students' advisor at the Department of Political Science and Public Policy, University of Waikato.

I See, for instance, Wright 1978; Walker 1981; Davis 1978.

II See, particularly, Wheare 1963: 29).

III Firstly, it can be seen that Livingston has in this instance replaced the federal principle, which Wheare mostly used, with federalism; Secondly, he also referred federalism as an institutional form.

IV See King 1982: 21.

V Elazar 1987: 12.

VI They include: Elazar 1987: xii; Friedrich 1968: 18; Riker 1964: 8; Davis 1978: 18; Lépine 2012: 29.

VII For further observation in addition to citations in note VI above, see Riley 1973: 52; Lépine 2012: 30.

VIII For example: Wheare 1963: 1; Friedrich 1968: 11; Hueglin 1990: 4; Wright 1961: 41; Føllesdal 2014; Hueglin and Fenna 2006.

IX This concession can be seen in the following, Elazar 1994: 123; Riker 1964: 10; Riley 1973: 51; Lépine 2012: 29; Davis 1978: 119.

X Clear evidence can be found in Hueglin 1979: 40; Wright 1961: 42; Friedrich 1968: 18; Wheare 1963: 1.

XI See Diamond 1963: 24-26; Ostrom 1991: 70; Forsyth 1981: 107; Wheare 1963: 11; Friedrich 1968: 18-20.

XII Wheare 1963: 10; Ostrom 1991: 70.

XIII See, Federalist Paper, No. 39; As a matter of fact, 'federal' mentioned here would have been 'confederacy', if the distinction had been employed.

XIV Diamond 1963: 29-32.

XV See, Watts 2008: 8; King 1982; Burgess 2013; Ostrom 1991: 85; Wheare 1963; Riker 1964; Elazar 1987.

XVI See: Spinelli 1967; Albertini 2000 [1963]; Rossolillo 1989; Levi 2008; Marc 1961; De Rougemont 1947; Dosenrode 2010.

XVII The prefix 'dis-', has been introduced by the author because it stands for 'opposite' or a misapplication of something, which perfectly fits the argument advanced here.

XVIII This is well supported even by the European federalist scholars, including Albertini 2000: 97-107 and Dosenrode 2010: 11, both of who confirm that federalism is a process leading or attempting to lead to a state of federation.

XIX See Elazar 1987: 5-6; Wheare 1963: 29.

XX The citations in note XVIII above provide justification for this conclusion; see also: De Rougemont 1947: 25.

XXI The structure of governance in the United Kingdom, the European Union, Spain, Italy, Finland, and to a lesser extent, New Zealand, are all testimonials.

XXII While in most cases the federal problem is about how to adequately empower the constituent units, the case of the European Union however clearly represents the problem of consolidating an emerging new union against the preponderance of its constituent units.

References

- Albertini Mario, 2000 [1963], 'Federalism', in Rossolillo,Francesco (ed), *The Federalist: A Political Review*, XLII(2): 87-112.
- Bradley Phillips (ed), 1945, *Democracy in America by Alexis de Tocqueville*, Vintage Books, New York.
- Burgess Michael, 2006, *Comparative federalism: Theory and practice*, Routledge, New York.
- Burgess Michael, 2013, 'The penumbra of federalism: A conceptual reappraisal of federalism, federation, confederation and federal political systems', in Loughlin John, Kincaid John & Swender Wilfried (eds), *Routledge Handbook of Regionalism and Federalism*, Routledge, New York.
- Castaldi Roberto, 2007, *A federalist framework theory of European integration*, Centro Studi di Federalismo, Moncalieri.
- Davis Solomon Rufus, 1978, *The federal principle: A journey through time in quest of a meaning*, University of California Press, Berkeley, CA.
- De Rougemont Denis, 1947, 'The Federalist Attitude' in Lipgens Walter and Loth Wilfried (eds), *Documents on the History of European Integration*.
- Diamond Martin, 1963, 'What the framers meant by federalism', Goldwin Ronald A. (ed), *A nation of states*, Rand McNally, Chicago.
- Dosenrode Søren, 2010, 'Federalism theory and neo-functionalism: Elements for an analytical framework', *Perspectives on Federalism*, II: 1-28.
- Elazar Daniel Judah, 1987, *Exploring federalism*, University of Alabama Press, Tuscaloosa, AL.
- Elazar Daniel Judah, 1994, 'Federalism and the way to peace', in Relations, Institute of Intergovernmental (ed), *Reflections Paper*, Queen's University, Kingston, Ont.
- Føllesdal Andreas, 2014, 'Federalism', in Zalta Edward N. (ed), *Stanford Encyclopedia of Philosophy*, Spring, 2014 ed. online (http://plato.stanford.edu/archives/sum2016/entries/federalism).
- Forsyth Murray, 1981, *Unions of states: The theory and practice of confederation*, Leicester University Press, New York.
- Friedrich Carl J., 1968, *Trends of federalism in theory and practice*, Pall Mall Press, London.
- Hueglin Thomas, 1979, 'Johannes Althusius: Medieval constitutionalist or modern federalist?', *Publius*, IX: 9-41.
- Hueglin Thomas, 1990, *A political economy of federalism: In search of a new comparative perspective with critical intent throughout*, IIGR, Queen's University, Kingston, Ont.
- Hueglin Thomas O. & Fenna Alan, 2006, *Comparative federalism: A systematic inquiry*, University of Toronto Press, Toronto.
- Kalu John Otisi, 2016, 'True Federalism? Illustrations With The Venn Diagram', *European Scientific Journal*, XII: 344-365.
- King Preston, 1982, *Federalism and federation*, Croom Helm, London.
- Lépine Frédéric, 2012, 'A journey through the history of federalism: Is multilevel governance a form of federalism?', *L'Europe en formation*, nº 363 Printemps**:** 21-62.
- Levi Lucio, 2008, *Federalist thinking*, University Press of Amer., Lanham, MD.
- Livingston William S., 1956, *Federalism and constitutional change*, Oxford University Press, London.
- Marc Alexandre, 1961, *Dialectique du déchaînement: fondements philosophiques du fédéralisme*, La Colombe, Paris.
- Ostrom Vincent, 1991, *The meaning of American federalism: Constituting a self-governing society*, ICS, San Francisco, CA.
- Riker William H., 1964, *Federalism: Origin, operation, significance*, Little Brown, Boston, MA.
- Riley Patrick, 1973, 'The origins of federal theory in international relations ideas', *Polity*, VI: 87-121.
- Rossolillo Francesco, 1989, 'Federalism and the Great Ideologies', *The Federalist: A Political Review*, XXXI(1): 7-34.
- Spinelli Altiero, 1967, 'European Union in the Resistance', *Government and Opposition*, II: 321-329.

- Stein Michael B., 1968, 'Federal political systems and federal societies', *World Politics* XX: 721-747.
- Walker David Bradstreet, 1981, *Toward a functioning federalism*, Winthrop Publishers, Cambridge, MA.
- Watts Ronald L., 1998, 'Federalism, federal political systems, and federations', *Annual Review of Political Science*, I: 117-137.
- Watts Ronald L., 2008, *Comparing federal systems*, McGill-Queen's University Press, Kingston, Ont.
- Wheare Kenneth C., 1963, *Federal government*, Oxford University Press, London.
- Wright Benjamin Fletcher (ed), 1961, *The Federalist by A. Hamilton, James Madison, and John Jay*, Belknap Press of Harvard University Press, Cambridge, MA.
- Wright Deil Spencer, 1978, *Understanding intergovernmental relations*, Brooks-Cole, Pacific Grove, CA.

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

National parliaments fighting back? Institutional engineering as a successful means to become active actors in EU affairs

by

Diane Fromage*

Perspectives on Federalism, Vol. 8, issue 3, 2016

Abstract

The European integration process has long been characterised by the predominance of national executive powers. National parliaments were recognised as European actors after several decades only, in the Maastricht Treaty first and to an even larger extent in the Lisbon Treaty. Parliaments were hence long dependent on national constitutional, legal and administrative arrangements to be able to participate in EU affairs. This paper analyses how national parliaments (and their members) have reacted to the challenge the European integration process has represented for them while it also takes due account of the role other institutions, such as constitutional courts, have played in this field. It is argued that while these arrangements may have been successful in allowing national parliaments to play a greater role in this field, they should remain temporary for they are characterised by uncertainty and instability and make it generally difficult for citizens to follow up on national parliaments' actions and to be fully informed.

Key-words

national parliaments, European Union, institutional engineering

1. Introduction

As is well known, national parliaments were long absent from the European Communities (and then Union) Treaties. Indeed, they were mentioned for the first time in a (non-binding) Declaration annexed to the Treaty of Maastricht[I] (1992) and, although their status was improved in the Treaty of Amsterdam (1997) where they were the object of a legally-binding protocol,[II] it is only in the Treaty of Lisbon (2009) that they were (eventually) granted special importance in the European Treaties. Since then, they are actually one of the two pillars on which democracy within the EU is based (art. 10 Treaty of the European Union (TEU)) and are deemed to 'contribute actively to the good functioning of the Union' (art. 12 TEU). To this end, the Treaties themselves confer numerous rights of information and participation to national parliaments, most of which are contained in the same article 12 TEU.

On the other hand, this absence of any mention of national parliaments in the original European Communities (EC) Treaties can be explained by the general conception of them as 'classical' Treaties of international law which explains why it was logical that the Member States, i.e. their governments, alone were the addressees of it. Additionally, the European parliamentary assembly (later: European Parliament) was composed of representatives of national parliaments until 1979 when the first European direct elections took place so that *de facto* national parliaments were not totally absent of the European integration institutional game.

Moreover, this does not mean that national parliaments were not involved at all in EU affairs until then in their capacities as national institutions: their assent was most commonly required for Treaty ratification and national provisions could grant them rights of information and of influence. In fact, this participation in daily EU matters was possible on different grounds: because statutes recognising certain rights to parliament (or one chamber thereof) were approved or because parliamentary standing orders granted them certain capacities. The reason for approving these measures and their initiators differ(ed) too: they can (could) be the fruit of government's initiative, of parliamentary amendments

introduced during the course of the approval of the ratification or implementation laws or an informal practice, among others.

Against this background, this paper seeks to analyse why and how national parliaments have empowered themselves through institutional engineering over time. To this end, institutional engineering is understood as the way in which parliaments have made use of the means they had at their disposal to improve their own position in EU matters until their importance in this framework was actually formally recognised at EU level and in their respective constitutions, in legal norms or in their parliamentary standing orders.[III]

In order to study these different dynamics and their evolution, four Member States have been chosen on the basis of their different forms of adaptation to this need for 'self-empowerment': France, Germany, Italy and Spain. These case studies shall first serve to show the factors that led to a need for 'self-empowerment' for national parliaments (2) and, second, to observe how these four national parliaments did empower themselves – or not (3).

2. Reasons for this need of self-empowerment of national parliaments

This second section shall analyse the reasons that led some national parliaments to be obliged to empower themselves whereas other national parliaments were not confronted to the same challenges. This is mainly linked to the absence of reform of the constitution and of the legal norms defining the role of parliament in EU affairs, and to the dispositions of the parliamentary standing orders themselves. National parliaments' need to make an extensive use of all the instruments they had at their disposal can be mainly traced back to institutional features of the Member States (2.1) and to the existence of judicial protection regarding parliamentary prerogatives in EU affairs or the absence thereof (2.2).

2.1. National parliaments constrained to use 'institutional engineering' because of Member States' institutional features

A first reason that explains why all national parliaments were not, originally, granted means of participation in EU affairs – and here reference is made to the Founding States – is that the impact the European process would have, and the importance it would take, simply could not be grasped when the Founding Treaties were adopted. As already

mentioned in the introduction, at the time, the EC were conceived in the form of an ordinary treaty of international law and there was no particular reason why Member States' parliaments should have been granted any active right of participation at all in this domain; informing them was sufficient.[IV]

A second explanation for this state of facts lies in the general pro-European attitude of Member States and their MPs: during several decades, in the Member States analysed here at least, whatever was decided at EU level was not called into question (on Germany (Mangold 2011: 332); on Italy and Spain (Fasone and Fromage 2016)). The output (economic growth, wealth and peace) was sufficient to legitimate the actions pursued in the framework of the European integration process (output legitimacy) (on input, output, throughput legitimacy: Schmidt 2013). Additionally, originally and up until 1979, the European parliamentary assembly was composed of delegates from Member States' national parliaments so that national parliaments were indeed participatory to this process in a certain manner, although at the time the parliamentary assembly had almost exclusively advisory powers. This relates to the question of the actual interest of MPs for EU affairs: This was especially the case in Italy and in Spain where, on the whole, EU matters were the *domaine réservé* of groups of 'happy few' interested by these questions, though in France and in Germany the situation was only slightly better.[V]

Finally, another factor that influenced, and still influences, the role of a particular parliament in EU affairs is its position in the national institutional system. The French and Spanish parliaments for example are weak in any case, also in internal affairs. In France, this is mostly due to the role left to Parliament in the Vth Republic: after the instability experienced during the IVth Republic (1946-1958), the French parliament was marginalised and disempowered in the constitution of the Vth Republic (Chantebout 2012: 400 and Gicquel and Gicquel 2012: 522). This is visible for example in the fact that, until 2008, the only means of influence or control that parliament had in domestic affairs was the motion of censorship as parliamentary resolutions had been prohibited by the Constitutional Council.[VI] This silence of the assemblies was brought to an end only in 2008 when article 34-1 Constitution was added, although resolutions in EU matters ('European resolution') already existed since 1992. In any case, there was – and still is – no possibility for the French parliament, i.e. for neither of its two Chambers, to mandate the government in its negotiations at EU level.

The French parliament is further affected, in its European prerogatives, by another national weakness of Parliament. The provision of the Constitution regulating the relationship between the President and the Parliament (art. 18) reads as follows: 'The President of the Republic shall communicate with the two Houses of Parliament by messages which he shall cause to be read aloud and which shall not give rise to any debate. He may take the floor before Parliament convened in Congress for this purpose. His statement may give rise, in his absence, to a debate without vote'. That is to say that the President may not enter in any of the parliamentary chambers which, in turn, cannot in any way hold the President directly accountable for the position he/she defended in the European Council. Even the possibility to hold a debate in parliament with the President being present does not exist. Furthermore, the French Parliament can be relatively easily – and is, in fact, relatively often – domesticated by the government that can force it to adopt the law it wishes by engaging its responsibility (art. 49-3 Constitution). This means that where a law is not adopted by Parliament the government is automatically dismissed. The constitutional reform adopted in 2008 nevertheless limited the use of this mechanism which the government can now resort to only twice per year: Once for the finance or Social security bill and a second time for another bill. This governmental power of constraint is more limited than in the past but it is frequently used to pass important and controversial bill, such as the reform of the Labour law in 2016 (Law 1088/2016.) The government additionally also long defined the Assemblies' agendas almost exclusively.[VII]

In Spain, the Parliament is also in a weak position in internal affairs. The Government can, for instance, adopt decree-laws that parliament can then only either approve or reject in their entirety within thirty days as foreseen in article 86-2 Constitution. The party system has also traditionally been particularly strong (Kölling and Molina 2012: 2) which led the Chambers to be, generally, willing to act uncritically in accordance to the government's wishes. The political crisis Spain is currently living may however affect this unity and quasi subordination of Parliament to the Government, in particular since the governing party, *partido popular* (right-wing) does not have an absolute majority. This represents in any event an important change with regard to the situation that has prevailed since Spain regained democracy in 1978.

Yet, this need for national parliaments to empower themselves in EU affairs does not only derive from the institutional features mentioned; it can be also traced back to the absence of judicial protection of national parliaments' prerogative at national level.[VIII]

2.2. A necessity of self-empowerment linked to the absence of judicial protection of national parliaments' prerogatives

The safeguard of national parliaments' prerogatives in EU affairs, or even their having capacities to participate in this domain, can be linked as well to the existence of a strong judicial protection of the parliament's prerogatives or the absence thereof.

For sure, the paradigmatic example in this framework is Germany. The Federal Constitutional Court has been protecting the German parliament's prerogatives in the European integration process since its famous *Maastricht decision*[IX] and it emphasized further the importance of parliamentary sovereignty in its more recent *Lisbon judgment* in which it attributed a 'responsibility for integration' to Parliament.[X]

In contrast to the German situation, in Italy the Constitutional Court has not been particularly protective of the Parliament but this is not due to a lack of willingness. The two possibilities to access the Court are too narrow to allow for this kind of review: only regions or national governments on state-regions conflicts of competences can access the court and it can further be led to examine the constitutionality of a law by means of preliminary reference of constitutionality by any judge. Hence, no *ex ante* control is possible, the constitutionality of laws can only be controlled *ex post*. Additionally, there is neither a *saisine parlementaire* nor an individual right for MPs to challenge the constitutionality of a norm. This lack of involvement of the Constitutional Court may additionally explain why Italy adopted the law that implemented the novelties introduced by the Treaty of Lisbon only in 2012 (Fasone and Lupo forthcoming).

As regards Spain, the Constitutional Court has also been led to pronounce itself on the compatibility of EU Treaties with the Constitution but it is bond to answer to the question it is asked and cannot elaborate any further than that. The individual access to the Court for a breach of a fundamental right (*recurso de amparo*) has been very rarely used in this field contrary to Germany.

Finally, in France on the other hand although the Constitutional Council was required to pronounce itself on the compatibility of the European Treaties with the Constitution in

several occasions, in none of them did it seek to enhance the role of Parliament directly, although it required the constitutionalisation of the powers granted to the French Parliament by the Treaty of Lisbon as it considered them to fall outside of what the constitutional framework in vigour at the time could allow.[XI] That is to say that the Constitutional Court declared in several occasions that the Constitution had to be reformed before France could ratify a European Treaty – Treaty of Maastricht and Treaty of Lisbon for instance – but in none of these occasions has it contemporarily also insisted on Parliament's role or attributed a 'responsibility for integration' to it as it happened in Germany.

It can thus be concluded that of the four Member States analysed here only in Germany Parliament has benefitted from the Constitutional Court's activism in its favour. In the other three States, it is rather the absence of such protection that has contributed to national parliaments being forced to resort to 'institutional engineering' – and hence self-empowerment – to be able to participate in the EU integration process. As stated however, this situation may be linked to organic constraints in the courts' capacities and is not necessarily automatically attributable to courts' unwillingness to protect national parliaments or anything similar to this.

Having seen some of the factors that contributed to the existence of a need for these parliaments to empower themselves (or not, as in the case of Germany), in the third part we will observe how national parliaments have then actually proceeded to their 'self-empowerment'.

3. How national parliaments empowered themselves

As mentioned in the introduction, national parliaments did not remain indifferent to their status and have made use of a variety of means at their disposal to actually empower themselves so as to be able to participate in EU affairs even at times when this was not foreseen neither by the European Treaties nor by their constitutions, their legal norms or their standing orders. Interestingly, and as could arguably be expected since the institutional cultures and traditions vary from one parliament to the other, not all of the national parliaments have used the same instruments in this context. The French parliament has for instance used its capacities as a legislator (3.1) whereas the German and

the Italian parliaments used their parliamentary autonomy (3.2). Besides, many of these arrangements simply took place on an informal basis (3.3).

3.1. Use of the capacities as legislator: the French example

As underlined above, whereas the German parliament saw its prerogatives reinforced as a consequence of the decisions of the Federal Constitutional Court and, hence, did not need to fight for its prerogatives – at least after the *Maastricht decision* –, the same does not hold true of the French parliament. As a matter of fact, the French parliament was particularly weak in EU affairs until 1992[XII] when it made good use for itself of the fact that the Constitutional Court had declared that a constitutional revision was required before the Treaty of Maastricht could be ratified (Nuttens 2001: 26f)[XIII] In 1992 indeed, France's participation in the European integration process was (finally) constitutionalised with the introduction of Title XIV (today Title XV). As regards Parliament, the most powerful instrument was the possibility it had from then onwards to approve 'European resolutions' (art. 88-4 Constitution). As highlighted above, this change was all the more remarkable as the French parliamentary chambers did not otherwise have the possibility to approve any resolution addressed to the Government. The impact of this innovation should not of course be overestimated: these resolutions were – and still are – non binding beyond their possible political consequences if the Government does not follow Parliament's indications. Additionally, the material scope of these resolutions was particularly limited for they could only concern European legislative proposals affecting the French *domaine de la loi,* that is the area within which Parliament may legislate by contrast with the *domaine réglementaire* in whose framework the Government has to intervene. Only the Community legislative proposals were transmitted to Parliament which, consequently, could not adopt any resolution on proposals affecting the Second and the Third Pillars. In these areas, like had been the case until 1992, the *Delegations* for the EC, that preceded the EU Affairs Committees created in 2008, could only adopt conclusions. When Parliament had another opportunity to empower itself as the law defining the status of its Delegations for the EC was reformed, it did not take it (Fuchs-Cessot 2004: 247-248). A later reform performed in 1994 aimed at opening up the *Delegations* for the EC's domain of competence to the II and III Pillars by changing their name from Delegations for the EC to Delegations for the EU. At that point however, the empowerment of the French parliament was also linked to the

introduction of a legally-binding protocol on national parliaments in the Treaties which guaranteed all national parliaments would have a minimum period of six weeks to scrutinise European legislative proposals as they could not be examined by the Council before this period had elapsed.[XIV]

In sum, even if this is more true of 1992 than of 1997, it appears clearly that the French chambers have known to use the necessary reforms required by the Constitutional Court when the Treaties of Maastricht and of Amsterdam were approved to reinforce their prerogatives in EU affairs at the same time.

3.2. Use of their parliamentary autonomy

Another means of 'self-empowerment' for national parliaments has consisted in their use of their parliamentary autonomy, visible in their individual capacity to create committees for instance, as illustrated by the German and the Italian examples.

As is well-known and as has been reminded, the German parliament is strongly protected by the Federal Constitutional Court at present. Yet, this has not always been the case and, actually, the *Bundestag* made use of its parliamentary autonomy in order to become a participant in the EU integration process before the 'Article Europe' (art. 23 Basic Law) was introduced in the German Basic Law (Constitution) in 1992.[XV] Indeed, in Germany more than in other Member States the question of the termination of the organic relationship between the European and the national legislatures that existed until MEPs started to be directly elected in 1979 was subject to concern. The question as to how the relationship between the European Parliament (EP) and the *Bundestag* could be maintained was an object of debate (Schoof 1982) and consequently a 'Commission Europe', that had the status of an enquiry committee, was created in 1983. It remained in place during three years only (Sturm and Pehle 2005: 66), it was never institutionalised as a committee – despite its attempt in this sense – (Janowski 2004: 75) and had only a limited role as it was dependent on the permanent committees that had to adopt its conclusions or its recommendations for them to have any effect at all (Fuchs 2003). As a result, it was never able to attract the other MPs' attention onto EU matters (Weber-Panariello 1995: 259). A second committee was subsequently created in 1987, the sub-Committee of the external affairs committee for the question of the European Community, but this attempt failed as well as it depended on the External affairs committee to receive EC documents – and not

all of them were transmitted to it – (Sturm and Pehle 2005: 67) and it had no right to vote or to make proposals. A third initiative was taken in 1991 in the form of the EC-Committee and, although it did represent an improvement of the *Bundestag*'s scrutiny of EU affairs, (Fuchs 2003: 6) it could never fulfil the expectations its creation had awaken (ibid).

It is thus considered that the *Bundestag* 'left itself time until the 1990s to react properly to the changes to the framework of its legislative prerogatives provoked by the European integration' (Mangold 2011: 69). However, even if it were never successful, the *Bundestag* did use the margin of action it had internally to try and enhance its capacity of scrutiny of EU affairs even in the absence of any reform of the constitutional and legal frameworks. By contrast, the *Bundesrat* was more successful. It introduced an Internal market and free trade area Committee as early as 1957 but it could not participate in EU affairs efficiently during the period that preceded the adoption of the Single European Act (1986) (Grünhage 2007: 188). This is why it made use of its power and conditioned its assent to the law authorising the ratification of the Single European Act to larger possibilities of participation in EU affairs.

In Italy too, the use of its autonomy by the parliament was instrumental in its participation in EC affairs as until the approval of the Law Fabbri in 1987, no legal provision existed to this end. Despite this, the Italian Senate created its Committee for European Community affairs as early as 1968,[XVI] although its information in this domain was not guaranteed until 1987.

These examples from the German and the Italian parliaments show that parliaments in several occasions adapted their internal structures to the European integration process faster than the general legal framework for Member States participation was reformed. This illustrates parliamentary activism, and perhaps even a visionary attitude in the case of the Italian Senate and the German *Bundesrat*, and if these early attempts of parliaments to become more involved in the European integration process failed during several decades, it is at least partially due to the absence of adaptation of the overall framework that led for instance to the absence of transmission of EU documents or to decisions being taken at European level before parliaments were even finished with their scrutiny.

3.3. Informal arrangements

Finally, it should be noted that in addition to these formal arrangements, the informal adaptation of national parliaments has played an instrumental role in allowing them to be involved in the European integration process, in particular during its first decades but this is, to a certain extent, still true up until today. In numerous cases indeed, informal arrangements are made that allow parliaments to perform a certain function without any formal modification of their prerogatives at any level. This may, for example, be due to the need to obtain a super majority to reform parliamentary standing orders as informal arrangements also allows for more flexibility. It is also a means to test new procedures before they are formally anchored in standing orders or other legal documents. Interestingly, there is not always a will to formalise these procedures afterwards as they either are considered to function properly – this is the case in the Italian parliament with the subsidiarity check procedure since the Lisbon Treaty as detailed below – and/or because it is considered best to retain certain flexibility.

Such informal arrangements have for instance been used in order for parliaments to be able to control their governments: in Spain, until this practice was formalised in 1994, it was only according to a custom that a representative of the government came before the Congress of deputies to inform about the decisions taken during the previous meeting of the European Council, and that a debate was organised (Cienfuegos Mateo 1996: 90). In 1994, however, this practice was formalised in the Law regulating the functioning of the Joint Committee on EU affairs (Law 8/1994) and it is to the advantage of parliament as, until today, it does not simply depend on the government's will to come before it or on an agreement by the board of Chamber and on the Council of spokespersons for such a hearing to be organised; it can rely directly on Law 8/1994. Additionally, if debates before European Council meetings are possible today it is thanks to an informal practice according to which the Secretary of State for the European Union usually informs the Joint Committee on EU affairs (Fromage 2014: 157).

In France too, informal practice has been instrumental in allowing parliamentary control over representatives of the government when they sit in the European Council and in the Council of the EU as there is no legal basis for this. The latter is a very recent practice put into place during the Autumn 2014 according to which a representative of the government appears before the EU affairs Committee of the National Assembly before the

Council meetings take place. Yet, this practice is, until today, limited to the National Assembly only even if the Senate is considering introducing a similar one. As regards the control over European Council meetings, following the failure of the Constitutional Treaty, a practice has been established according to which a control by both Chambers is permitted *ex ante* and *ex post* (Wessels and Rozenberg 2013: 36).

In Italy, none of the Chambers has reformed its standing order in the view of their participation in the Early Warning System for the control of the respect of the principle of subsidiarity until today. Arguably, a legal basis for this control exists now in the law 234/2012 for the participation of Italy to the definition and the implementation of the norms and the policies of the European Union but these provisions have not been implemented accordingly in the Chambers' standing order. In the Chamber of deputies, the procedure is arguably defined in a quasi regulatory source as it is the Committee on the standing order that defined it in an opinion of 6 October 2009. This procedure was further refined and precised in a second opinion of the same Committee that had the task to review the first informal procedures and propose changes, which it did in an opinion of 14 July 2010. This assessment took place because, in this occasion as had already been the case in previous cases, it was decided that it would be best to try out the procedure on an informal basis before it is formalised (Esposito 2009: 1162). But this second step was never taken. In the Senate, a similar situation exists as the basis for this Chamber's participation in the Early Warning System lies in two letters of its President – that are, additionally, not even publicly available.

Although these informal arrangements in place in these three national parliaments may be particularly effective, they present several risks. Indeed, they can be volatile, especially where there is no written agreement between parliament and government and, perhaps more importantly, there exists a real lack of transparency towards the citizenry which is particularly problematic as the European integration process is already recurrently accused of being undemocratic and as national parliaments are supposed to ensure the democratic legitimacy of the EU as established by article 10 TEU. Hence, even if these arrangements have been instrumental in the speedy adaptation of national parliaments to the novelties introduced by the Treaty of Lisbon in particular, it remains that especially the informal arrangements raise the issue of the government's will: Without any formal protection of their prerogatives, parliaments remain at the mercy of their governments. This is not to say

that this is not the case when formal arrangements exist – at least when the Treaty of Lisbon first entered into force, it was not uncommon for the Spanish government not to transmit the subsidiarity assessments requested by the Joint Committee on EU affairs and this possibility is anchored in Law 24/2009 for example. But there is no doubt that the parliamentary prerogatives are even less protected if no formal recognition exist.

4. Conclusion

The preceding analysis has shown first that the need for parliaments to resort to institutional engineering often derives from particular features of each national institutional system. Besides, it appears that national constitutional courts also play or have played a decisive role in national parliaments' prerogatives being guaranteed or reinforced.

It results that, in several occasions, parliaments indeed had to fight for their prerogatives in EU affairs and, eventually, empower themselves the way they could. Reasons for this may have been Member States institutional constraints and the absence of protection by a Constitutional Court as indicated. National parliaments' response to these shortcomings in turn implied using their influence in the legislative procedure, making use of their parliamentary autonomy and also introducing changes informally.

Although this aspect was not developed at length in the preceding analysis, one additional aspect relates to the fact that all national parliaments had to adapt to the same challenges simultaneously. When this need became most pressing with the introduction of the Political Union in the Treaty of Maastricht, national parliaments were also increasingly cooperating under the auspice of COSAC which most certainly allowed for the exchange of best practices and for cross fertilisation among national parliaments.

On the other hand, the fact that a parliament did not have to fight for its prerogatives – as was largely the case of Germany after 1992 – it actually made use of the powers. Actually, during a very long time, German MPs were very reluctant to do so and a lack of institutional adaptation in order to make the prerogatives attributed to parliament effective was long the rule.[XVII]

The personality of the actors involved appears to be an important factor in this framework, together with the salience of the issues. It is not random that the Bundestag has begun to resort more frequently to its powers since the beginning of the economic and

financial crisis. Perhaps important factors in this regard are the institutional culture and also the political orientation of the MPs involved, i.e. whether they belong to the majority or to the opposition. Indeed, an MP who supports the government is more likely to try and exert influence outside of the formal channels. By contrast, upper chambers who are freer and usually have more time to devote to EU matters may be more vocal and view EU matters as a means to have an influence they lack in domestic affairs, as is arguably the case of the French Senate for example.

All in all, parliamentary engineering in order to empower parliaments in EU affairs appears to have (had) a great potential for it has allowed for an important degree of flexibility and for the compensation of the shortcomings of the national constitutional and legal frameworks. In this sense, it should be praised and may still be considered a useful tool. Nevertheless, a risk of instability exists and is particularly present in this field as governments have generally been – and still are – particularly reluctant to involve national parliaments and give them a say as was illustrated during the peak of the Euro crisis when intergovernmental arena played the most important role and parliaments were only marginally involved. Therefore, parliamentary engineering should rather be a temporary solution useful to adapt swiftly and to test procedures before they are formalised.

---

* Diane Fromage is Assistant Professor in EU Law at Utrecht University, the Netherlands. Previously, she was Max Weber Postdoctoral Fellow in Law at the European University Institute of Florence (2014-2015) and Guest Professor at Pompeu Fabra University (Barcelona, Spain). Her research focuses on national and regional parliaments in the EU as well as on Independent Fiscal Institutions. Email address: d.b.fromage@uu.nl. This paper was presented during the Pademia Conference 'Strengthening Parliaments through Institutional Engineering' held at Sciences Po Paris on 3 and 4 December 2015; I thank all the participants for their useful comments.

[I] Declaration no. 13 on the role of national Parliaments in the European Union.

[II] Protocol on the role of national parliaments in the European Union.

[III] In this sense, a parallel can be drawn to the definition used by Uwe Puetter in his analysis of CFSP in the post-Lisbon era where he states that 'The Lisbon Treaty is therefore understood as an attempt of institutional engineering in the sense that the new provisions are aimed at addressing dysfunctional aspects of the previously existing institutional framework without however changing the general character of the allocation of formal decision-making competences in this policy field.' (Puetter 2012: 21).

[IV] Perhaps an exception can be seen here in the existence of some isolated MPs that did have a visionary outlook and, most importantly, in the German Länder that, for some of them, sought to be implicated in this integration process as early as 1957. On this assimilation of EU affairs to international matters in Germany: (Obrecht 2006: 147); on Italy and the consequent lack of interest on the side of MPs: (Esposito 2009: 1158); on Spain: (Vila Ramos 2010: 299).

[V] Numerous studies show that even when the parliamentary assembly was indeed composed of delegated MPs, the knowledge diffusion and the implication of the rest of MPs were very limited. On Italy for instance: (Guizzi 1980: 144). In France, the French MPs representing the National assembly in the European parliamentary Assembly had to present a yearly report on the most important questions in relation to the European integration process before the Foreign affairs Committee but, in practice, such exchange only happened after 1970. (Saulnier 2002: 283).

This original implication of national parliaments in the parliamentary assembly also explains why some national parliaments at least – among which France, Germany and Italy – did not adapt their institutional structures during the first decades of the integration.

[VI] The original proposal to introduce parliamentary resolutions in the rules of Procedure of the chambers was censored by the Constitutional council as these measures would amount to means of control or influence from the parliament onto the government which went against the Constitution. See Decision 59-3 DC of 25 June 1959.

[VII] Up until the reform of 23 July 2008, article 48 Constitution foresaw that the Government's bills and the parliamentary bills it supported had priority. The only exceptions were the questions to the Government once a week and once a month when the Chambers could define their agenda freely. By contrast, since 2008 article 48 states '…the agenda shall be determined by each House. During two weeks of sittings out of four, priority shall be given, in the order determined by the Government, to the consideration of texts and to debates which it requests to be included on the agenda.' The situation that had prevailed between 1958 and 2008 has now been reversed and Parliament is, by default, in charge of defining its agenda.

[VIII] The European Court of Justice has, in certain instances, empowered national parliaments for example when it entrusted them with the control of the respect of the principle of subsidiarity. (Martinico 2011: 657-658). This also holds true of the Early Warning System in itself as it invites to a political control by parliaments (Goldoni 2014 and Russo 2012).

[IX] The *Bundestag*'s influence and role as an organ of control was reminded in several occasions in this decision, *inter alia* par. 113. BVerfGE 89, 155. The complaint was launched by an individual who claimed that the Treaty infringed a series of fundamental rights enshrined in the Basic Law. On this decision, for instance: (Tomuschat 1993: 489) and (Weiler 1994).

[X] Further on this protection of Parliament by the Court (Kiiver 2010) and on this judgment (Jancic 2010) (Thym 2009) and (Ziller 2010).

[XI] Decision DC-2007-560 DC of 20 December 2007 referring also to Decision DC-2004-505 of 19 November 2004 on the Treaty establishing a Constitution for Europe.

[XII] This does not mean that it was granted strong powers after that but its position was improved indeed.

[XIII] Also: addition by the National Assembly of an article foreseeing parliamentary scrutiny of EC draft legislative proposals during the debate in first lecture that preceded the amendment of the French Constitution. (French Senate 1992:37).

[XIV] Article 3, Protocol on the role of national parliaments in the European Union.

[XV] Arguably, the German Chambers had always had a guarantee in terms of information regarding EC affairs (art. 2 of the law on the ratification of the Treaties of Rome) but they were not guaranteed rights of participation and until 1992 even Treaty changes did not require a qualified majority in both Chambers. Hence, the attempts the Chambers made on their own initiative in order to be heard in this domain are also analysed here.

[XVI] By contrast, in the Italian Chamber of deputies no specific Committee was created until 1990, although a Permanent Committee for the Communitarian problems had been created within the Committee on foreign affairs before that.

[XVII] The EU Affairs Committee was for instance created only in 1994 despite its formal introduction in 1992.

References

- Chantebout Bernard, 2012, *Droit Constitutionnel*, Sirey, Paris.
- Cienfuegos Mateo Manuel, 1996, 'El Control de las Cortes Generales sobre el Gobierno en Asuntos Relativos a las Comunidades Europeas durante la década 1986-1995', *Revista de las Cortes* Generales, 38: 47-100.
- Esposito Antonio, 2009, 'Il Trattato di Lisbona e il Nuovo Ruolo Costituzionale dei Parlamenti Nazionali: Le Prospettive per il Parlamento Italiano' *Ressegna parlamentare*, LI(4): 1119-1173.
- Fasone Cristina & Lupo Nicola, forthcoming (2017), 'Constitutional review and the powers of national parliaments in EU affairs: erosion or protection?', in Jancic Davor (ed), *National parliaments after the Lisbon Treaty and the Euro crisis*, Oxford University Press, Oxford.

- Fasone Cristina and Fromage Diane, 2016, 'Are Parliaments (More) Committed to the Trend of Open Government after the Lisbon Treaty? The Italian and the Spanish Cases', in Bouhadana Irène, Gilles William and Nguyen Duy Iris (eds), *Parliaments in the Open Government Era*, Les éditions IMODEV, Paris, 173-198.
- French Senate, Report by Jacques Larché on the Project of constitutional law adopted by the National Assembly adding a title to the Constitution: 'Of the European Communities and the European Union', Report no. 375 of 27 May 1992.
- Fromage Diane, 2014, 'National Parliaments and Governmental Accountability in the Crisis : Theory and Practice', *Perspectives on Federalism*, VI(3): 149-171.
- Fuchs Michael, 2003, 'Der Ausschuss Für Die Angelegenheiten Der Europäischen Union Des Deutschen Bundestages - Kein Ausschuss Wie Jeder Andere!', *Zeitschrift für Parlamentsfragen*, XXXV(1): 3-24.
- Fuchs-Cessot Alice, 2004, *Le Parlement à L'épreuve de l'Europe et de La Ve République*, LGDJ, Paris.
- Gicquel Jean and Gicquel Jean-Eric, 2012, *Droit constitutionnel et institutions politiques*, Montchrestien, Paris.
- Goldoni Marco, 2014, 'The Early Warning System and the Monti II Regulation : the Case for a Political Interpretation', *European Constitutional Law Review*, X(1): 90-108.
- Grünhage Jan, 2007, *Entscheidungsprozesse in Der Europapolitik Deutschlands. Von Konrad Adenauer bis Gerhard Schröder*, Nomos, Baden-Baden.
- Guizzi Vicenzo, 1980, 'Parlamento Italiano e Attività Comunitaria', paper from a study seminar held in Rome 11-13 December 1979 in *Parlamento, Instituzioni, democrazia*, Giuffrè, Milan.
- Jancic Davor, 2010, 'Caveats from Karlsruhe and Berlin: Whither Democracy after Lisbon?', *Columbia Journal of European Law*, XVI: 337-385.
- Janowski Cordula, 2004, *Die Nationalen Parlamente und ihre Europa-Gremien. Legitimationsgarant der EU?*, Nomos, Baden-Baden.
- Kiiver Philipp, 2010, 'The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU', *European Law Journal*, XVI: 578-588.
- Kölling Mario and Molina Ignacio, 2012, 'OPAL Country Report on the Spanish Parliament', available at: http://www.pademia.eu/wp-content/uploads/2014/02/Country-report_Spain.pdf.
- Mangold Anna Katharina, 2011, *Gemeinschaftsrecht Und Deutsches Recht. Die Europäisierung Der Deutschen Rechtsordnung in Historisch-Empirischer Sicht*, Mohr Siebeck, Tübingen.
- Martinico Giuseppe, 2011, 'Dating Cinderella: On Subsidiarity as a Political Safeguard of Federalism in the European Union', *European Public Law*, XVII(4): 649-660.
- Nuttens Jean-Dominique, 2001, *Le Parlement Français et l'Europe: L'article 88-4 de La Constitution*, LGDJ, Paris.
- Obrecht Marcus, 2006, *Niedergang der Parlamente? Transnationale Politik im deutschen Bundestag und der Assemblée Nationale*, Ergon, Würzburg.
- Puetter Uwe, 2012, 'The Latest Attempt at Institutional Engineering: The Treaty of Lisbon and Deliberative Intergovernmentalism in EU Foreign and Security Policy Coordination', in Cardwell Paul James (ed), *EU External Relations Law and Policy in the Post-Lisbon Era*, ASSER Press, The Hague, 17-34.
- Russo Anna Margherita, 2012, 'Il controllo politico sul principio di sussidiarietà europea: "prove techniche" per un dialogo interparlamentare nello scenario post-Lisbona', *Federalismi.it*, 20: 1-26.
- Saulnier Emmanuelle, 2002, *La Participation des Parlements français et britannique aux Communautés et à l'Union Européenne*, LGDJ, Paris.
- Schmidt Vivien A, 2013, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput", *Political Studies*, LXI(1): 2-22.
- Schoof Eberhard, 1982, 'Bundestag und Europäisches Parlament. Zur Neugestaltung der Beziehungen seit der Direktwahl', *Zeitschrift für Parlamentsfragen*, XIII(2): 199-204.
- Sturm Roland and Pehle Heinrich, 2005, *Das neue deutsche Regierungssystem. Die Europäisierung von Institutionen, Entscheidungsprozessen und Politikfeldern in der Bundesrepublik Deutschland*, Springer, Heidelberg.
- Thym Daniel, 2009, 'In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgement of the German Constitutional Court', *Common Market Law Review*, XLVI(6): 1795-1822.
- Tomuschat Christian, 1993, 'Die Europäische Union unter Aufsicht des Bundesverfassungsgerichts', *Europäische Grundrechte Zeitschrift*: 489-496.

- Villa Ramos Beatriz, 2010, 'El Tratado de Lisboa y las Modificaciones en la Organización Parlamentaria Europea. La implantación del Mecanismo de Alerta Temprana en el complejo Sistema Parlamentario español', *Revista parlamentaria de la Asamblea de Madrid*, 22: 281-312.
- Weber-Panariello Philippe A., 1995, *Nationale Parlamente in der Europäischen Union. Eine Rechtsvergleichende Studie zur Beteiligung Nationaler Parlamente an der innerstaatlichen Willensbildung in Angelegenheiten der Europäischen Union im Vereinigten Königreich, Frankreich und der Bundesrepublik*, Nomos, Baden-Baden.
- Weiler J.H.H., 1994, 'Der Staat "über alles". Demos, Telos und die Maastricht-Entscheidung des Bundesverfassungsgerichts', in *Harvard Jean Monnet working paper series* available at: http://www.jeanmonnetprogram.org/archive/papers/95/9507ind.html.
- Wessels Wolfgang and Rozenberg Olivier, 2013, 'Democratic Control in the Member States of the European Council and the Euro zone summits', study prepared for the Committee on Constitutional Affairs of the European Parliament, Brussels.
- Ziller Jacques, 2010, 'The German Constitutional Court's Friendliness towards European Law. On the Judgement of Bundesverfassungsgericht over the Ratification of the Treaty of Lisbon', *European Public Law*, XVI(1): 53-73.

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

It Is About Control:
Progressivism, FATCA and Global Law

by

Jennifer Grant*

Perspectives on Federalism, Vol. 8, issue 3, 2016

Abstract

Progressive ideology has slowly eroded American principles for over a century, declaring social control its ultimate goal. Social control is not possible while American principles, such as individual freedoms and limited government, thrive. Global control is now the favored progressive tactic to overcome such principles, and no sector of our lives is off limits.

This paper intends to examine the motives behind, and consequences of, U.S. legislation known as the Foreign Account Tax Compliance Act ("FATCA"). Thanks to FATCA, financial institutions around the world have been forced into a sphere of global control. Passed without debate as stealth legislation, FATCA moved us towards global control. FATCA is merely a pit-stop to global control over all financial institutions, transactions, reporting, and a host of other areas. Even worse, the pit-stop is a short one. International organizations are currently working on a global version of FATCA.

Key-words

FATCA, sovereignty, taxation, individual rights, freedom, international, progressivism

1. Introduction

For over a century, Progressive ideology has methodically eroded American principles and freedoms. The roots of Progressivism stem from Socialism and subscribes to the misguided belief that America, her freedoms and Capitalism stand in the way of a utopian secular society.[I] The term "Progressive" is descriptive of the agenda itself; gradual steps towards an end goal which condition the masses for change. Progressivism is slowly eroding our individual freedoms while at the same time bolstering ideas of global government and so-called collective rights.

To ultimately achieve the redistributive goals of Progressivism, global control is a necessary precursor. As such, principles of freedom, specifically those of individual liberties and national sovereignty, must be eroded. This is precisely why Progressives argue the United States Constitution and other founding documents are outdated, "living documents" that can change over time (see Hamburger 2015: Ch. 23, 429 481). This is because those documents lay out that our individual rights do not come from government, are "inalienable," [II] and government's only role is to protect them. Global control is not possible without the erosion of such principles.

While the shift towards global control may be subtle, it has long been in the works with many progressive steps taken along the way (see Swank 2014, citing excepts from Skousen 1963). As Socialist leader Norman Thomas said, "[t]he American people will never knowingly adopt Socialism. But under the name of 'liberalism' they will adopt every fragment of the Socialist program, until one day America will be a Socialist nation, without knowing what happened."[III] Each small step conditions the masses for the next.

The Foreign Account Tax Compliance Act ("FATCA") is a Progressive step towards global economic control. From 2008-2010, Progressives in the United States controlled both Houses of Congress and the White House. Not surprisingly, several highly controversial laws were passed during this time. [IV] One such piece of legislation is FATCA. FATCA's stated goal is to deter tax evasion. That, however, is nothing but a talking point. FATCA is a Progressive step which slowly normalizes ideas of (1) global control, (2) violations of national sovereignty and (3) loss of individual rights, especially privacy.[V]

Although immense power is given to the Internal Revenue Service ("the Service") under the FATCA regime, it will eventually succumb to the weight of global authorities. Once the rest of the world is conditioned to report to a global authority, the United States will find it impossible not to conform.[VI] As it has been predicted, "[o]ver the next 20 to 30 years, we are going to end up with world government. It is inevitable…" (Garrison 1995). FATCA has thrust us toward global, centralized control.

2. The Implementation of FATCA

FATCA has been surrounded by controversy since its inception. In 2010, when Progressives controlled both Houses of Congress, FATCA was slipped into the Hiring Incentives to Restore Employment Act ("HIRE Act") without debate. President Obama then promptly signed the bill into law (Garrison 1995). The HIRE Act was aimed at tax incentives for employers hiring previously unemployed workers - a clearly unrelated issue to tax evasion (Christians and Cockfield 2013: 10).

FATCA itself was never passed as legislation on its own. It is stealth legislation. In theory, all federal laws should be revenue neutral going forward. Therefore, FATCA was included in the bill as an offset to costs in the HIRE Act (Yonge 2014; see also Bean and Wright 2015). Although the strategy of passing stealth legislation without public support or debate is contrary to America's founding principles, it is not shocking considering the political climate at the time. What is shocking, however, is the unprecedented nature of FATCA. Although FATCA was signed into law in 2010, a full implementation was not attempted until 2014 due to difficulties caused by the far-reaching arms of this legislation (Hirschfeld 2013: 688).

2.1. Overview of FATCA

At its core, FATCA is a reporting regime for U.S. taxpayers with assets and interests overseas. "FATCA's stated purpose is to detect and deter offshore tax evasion by requiring all Foreign Financial Institutions ('FFIs'), non-U.S. trusts, and non-U.S. corporations to identify and annually report information to the Internal Revenue Service ('IRS') about their US accountholders" (Shepsman 2013: 1771). All U.S. taxpayers must comply with FATCA reporting by submitting Form 8938, Statement of Specified Foreign Financial Assets, with

their federal tax return (Jaffe & Co. 2014). If the aggregate value of one's foreign accounts exceeds fifty-thousand dollars, or two-hundred thousand dollars for U.S. taxpayers living abroad, the reporting requirements under FATCA are triggered (Karch and Roberts 2015).

What is most disturbing is that under FATCA the Internal Revenue Service unilaterally demands that foreign governments and foreign financial institutions turn over private information with no evidence of wrong-doing. Not only foreign banks, but brokers, investment firms, insurance companies and some non-financial foreign entities are forced to report to the Internal Revenue Service (Jaffe & Co. 2014). National sovereignty and foreign laws are completely disregarded under the FATCA regime.

It seemed unlikely that FATCA's approach would be successful. Congress and the Service, therefore, made it nearly impossible not to comply. "The overseas entities that do not comply with FATCA's provisions face a thirty percent withholding tax on *all* U.S.-sourced withholdable payments […]."[VII] The withholding tax penalty for not complying with FATCA effectively forces either compliance or a divestiture of all U.S. holdings.[VIII] It appears there is no real choice when it comes to FATCA compliance.

FATCA has been called "unprecedented in history, out of step with international practice, and unjustified as a matter of international tax norms" (Christians and Cockfield 2013: 2)[IX]. In addition, it is an "abandonment of the Unites States' previous policy of negotiating with countries" (Shepsman 2013: 1803). The United States, through FATCA, is behaving like a global economic dictator, and even more frightening, a global information gatherer.[X]

2.2. Intergovernmental Agreements Under FATCA

Before FATCA was fully implemented,[XI] privacy concerns arose across the globe. The U.S. federal government, therefore, looked for a way to implement FATCA with a softer approach. What followed was the creation of two model intergovernmental agreements ("IGAs"). Foreign cooperation with the implementation of FATCA is now widely done through the use of the two model IGAs.[XII]

The two models, known as Model 1 and Model 2, differ only by how information from foreign financial institutions ("FFIs") is divulged to the Internal Revenue Service. The United States worked with France, Germany, Italy, Spain and the United Kingdom in order to draft the first model IGA.[XIII] "On July 26, 2012, the U.S. Department of the Treasury

('Treasury') released the Model 1 IGA" (Ferris 2014: 2). Shortly thereafter, on November 14, 2012, Treasury released the Model 2 IGA (Ferris 2014: 2). Under Model 1, foreign financial institutions must divulge private customer account information to their home country, which in turn divulges that information to the Internal Revenue Service. Under Model 2, foreign financial institutions divulge private account information directly to the Service. Regardless, under either model the outcome is the same; the coerced exchange of information between the Service, foreign countries and foreign financial institutions.

The information in the following chart ("Chart A") is derived from the Department of Treasury website and depicts the most updated information regarding countries that currently have a FATCA IGA with the United States, organized by the type of model adopted.[XIV] It is notable that most developed countries currently have a Model 1 IGA in effect.

CHART A

Model 1			Model 2
Algeria	Georgia	New Zealand	Armenia
Angola	Germany	Norway	Austria
Anguilla	Gibraltar	Panama	Bermuda
Antigua and Barbuda	Greece	Peru	Chile
Australia	Greenland	Philippines	Hong Kong
Azerbaijan	Grenada	Poland	Iraq
Bahamas	Guernsey	Portugal	Japan
Bahrain	Guyana	Qatar	Macao
Barbados	Haiti	Romania	Moldova
Belarus	Holy See	Saudi Arabia	Nicaragua
Belgium	Honduras	Serbia	Paraguay
Brazil	Hungary	Seychelles	San Marino
British Virgin Islands	Iceland	Singapore	Switzerland
Bulgaria	India	Slovak Republic	Taiwan
Cabo Verde	Indonesia	St. Kitts and Nevis	
Cambodia	Ireland	St. Lucia	
Canada	Isle of Man	St. Vincent and the Grenadines	
Cayman Islands	Israel	Sweden	
China	Italy	Thailand	
Colombia	Kuwait	Trinidad and Tobago	
Costa Rica	Latvia	Tunisia	
Croatia	Liechtenstein	Turkey	
Curaçao	Lithuania	Turkmenistan	

Cyprus	Luxembourg	Turks and Caicos Islands	
Czech Republic	Malaysia	Ukraine	
Denmark	Malta	United Arab Emirates	
Dominica	Mauritius	United Kingdom	
Dominican Republic	Mexico	Uzbekistan	
Estonia	Montenegro		
Finland	Montserrat		

It is more difficult to gather information regarding countries that do not have an IGA with the United States (see Alciere 2016). The following chart ("Chart B") depicts information regarding the countries that do not currently have an IGA with the United States, organized by geographical region.[xv]

CHART B							
Caribbean	Cuba						
Pacific Islands/Oceania	Fiji	Kiribati	Marshall Islands	Micronesia	Nauru	Palau	Papua New Guinea
	Samoa	Solomon Islands	Tonga	Tuvalu	Vanuatu		
South/East Asia	Bangladesh	Bhutan	Brunei Darussalam	Laos	Maldives	Mongolia	Myanmar
	Nepal	Sri Lanka	Timor-Leste	Viet Nam			
Central/South America	Argentina	Belize	Bolivia	Ecuador	El Salvador	Guatemala	Suriname
	Uruguay	Venezuela					
Europe	Andorra	Monaco					
Eastern Europe	Albania	Bosnia and Herzegovina	Russia	Macedonia			
Middle East	Afghanistan	Iran	Jordan	Kyrgystan	Lebanon	Oman	Pakistan
	Syria	Tajikistan	Lebanon				
Africa	Benin	Botswana	Burkina Faso	Burundi	Cameroon	Central African Republic	Chad
	Congo	Cote D'Ivoire	Egypt	Equatorial Guinea	Eritrea	Ethiopia	Gabon

	Gambia	Ghana	Guinea	Guinea Bissau	Kenya	Lesotho	Liberia
	Libya	Madagascar	Malawi	Mali	Mauritania	Morocco	Mozambique
	Namibia	Niger	Nigeria	Rwanda	Sao Tome e Principe	Senegal	Sierra Leone
	Somalia	South Sudan	Sudan	Swaziland	Tanzania	Togo	Uganda
	Yemen	Zambia	Zimbabwe				

2.3. FATCA's Duplicative Nature

The United States already possesses the ability to collect information needed to fight tax evasion, but not surprisingly, does not fully utilize its ability to do so (Christians and Cockfield 2013). In fact, FATCA is duplicative in many respects when compared to current laws and treaties. Where FATCA is not duplicative, on the other hand, is in (1) its vast expansion of data collection, (2) lack of negotiation and, (3) usurpation of sovereign laws. These are clues as to the underlying motives behind FATCA's enactment.

The Service already has a reporting regime in place for U.S. taxpayers with overseas assets known as the Foreign Bank and Financial Accounts Report ("FBAR"), also designed to deter tax evasion (Harvey 2013: 339—40).[XVI] The requirements of FATCA and FBAR reporting have much overlap. FATCA reporting differs from FBAR, however, by significantly increasing the amount of information the Service collects and, more shockingly, by forcing foreign financial institutions and foreign nations to divulge private information without evidence of wrongdoing, even if contrary to the sovereign laws of the foreign nation (Christians and Cockfield 2013: 10).

Further, FATCA has a far greater reach than FBAR. FATCA requires disclosure of additional financial assets not held in foreign accounts (Jaffe & Co. 2014). "This means not only currency and assets held in foreign bank/custodial accounts, but also assets such as shares and bonds not held in custodial accounts (e.g., share certificates)" (Jaffe & Co. 2014). Although there is much overlap with current law, as a result of FATCA there is a vast expansion of data collection by the Service.

Current tax treaties exemplify the duplicative nature of FATCA as well.[XVII] The United States has previously conducted its international tax affairs using the bilateral approach of tax treaties. Under that method, there has been robust sharing of information without the

violation of either's tax system or sovereignty (Christians and Cockfield 2013: 7). "All of the goals the United States' seek to achieve in FATCA are achievable within this rubric" (Christians and Cockfield 2013: 8). Despite this, FATCA was forced onto the global scene. Under FATCA, the United States is now behaving like a global authority, paving the way for global control.

So the question remains, why the need for FATCA? Never before has a foreign jurisdiction unilaterally forced foreign governments and foreign financial institutions to divulge private information without evidence of wrongdoing.

3. FATCA Conditions the World for Global Government

Progressives are well versed in human behavior and techniques for controlling the masses (see Grant 2010). Therefore, the same techniques and talking points are routinely used in Progressive circles. FATCA takes several steps towards the total erosion of national sovereignty and individual rights. Progressive fingerprints are all over FATCA.

3.1. The Erosion of National Sovereignty

An erosion of national sovereignty is necessary for global control to take root. The power of taxation is a necessary component to a nation's claim of national sovereignty and autonomy (Christians 2009: 104). Enter FATCA - a well-crafted, Progressive step used to normalize losses of national sovereignty. Although the Internal Revenue Service is not a global agency, nations around the globe are nevertheless being conditioned to report to a foreign authority. FATCA is simply a pit stop to prepare the masses for global control.

The importance of sovereignty is laid out in the founding documents of the very country forcing FATCA onto the world. Respect for the sovereignty of the independent United States is required by her Constitution.[XVIII] To quote the 10th Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[XIX] Each State is its own testing ground with unique needs, policies and laws. Therefore, the people can choose which laws work best and government is close to home. Sovereignty goes hand-in-hand with ideals of freedom and local control. Because of this, principles of national sovereignty, especially over issues like taxation, should be respected globally.

From the League of Nations to the United Nations, however, for nearly a century countries have been convinced to give up their sovereignty and submit to the global community, often in the name of world peace and cooperation.[XX] Such countries are easier converts than more autonomous nations like America.[XXI] That does not mean, however, that countries like America are immune to the effects. Once nations are conditioned to function in this manner it will be nearly impossible for the United States, and all other nations, not to come onboard.

There is no doubt that national sovereignty is under attack. The principle that nations have sovereignty over taxation inside their borders is falling by the wayside (Christians 2009: 100). It is slowly being replaced by international community efforts which are redefining international tax norms (Christians 2009: 100). FATCA is part of that effort. FATCA implementation not only impedes with, but overrides laws of sovereign nations. FATCA treats national sovereignty as a mere suggestion.

Canada is an important example of the negative impacts of FATCA due to the amount of U.S. taxpayers living there.[XXII] A recommendation submitted to the Canadian government concluded that the FATCA intergovernmental agreement ("IGA") "impede[s] Canada's efforts to enforce its own tax laws" (Christians and Cockfield 2013: 2). This is illustrated by new legislation enacted to comply with FATCA requirements. The Canadian government was forced to enact the Implementation Act due to conflicts between Canadian law and FATCA requirements.[XXIII] Section 4 of the Implementation Act declares that rules under the FATCA IGA are superior to all Canadian law except her tax code.[XXIV] Important privacy laws, among others, are completely ignored under FATCA, and Canada is not the exception.

Where is the push-back from free nations over FATCA's violations of sovereignty? Many developed nations, like members of the G20, support implementation because it provides them with more data and, therefore, more opportunity to tax their residents.[XXV] The will of the people has been replaced by the will of the Progressive global elites.

3.2. The Erosion of Individual Rights

Another necessary component to the establishment of global control is the erosion of individual rights. A hallmark of Progressive ideology is the denial of our individual rights in

favor of so-called collective rights. The erosion of individual rights is quite often coupled with Progressive cries of security or emergency (see Hamburger 2015: Ch. 23 at 419—39).

Privacy rights are especially vulnerable under FATCA, if not completely disregarded. No evidence of wrongdoing is required for violations of privacy that occur under FATCA. Congress may need a reminder that general warrants are forbidden by the U.S. Constitution.[XXVI] Government must have cause to violate the privacy rights of an individual. Despite this, violations of privacy regularly occur under FATCA, providing the Service with a vast network of information. The United States, via the Service, now has the power to go on "fishing expeditions" for information by receiving "bulk tax information" (Christians and Cockfield 2013: 23—24). Gone are the days where the Service must have a legitimate reason to request information. As it has been noted, it "certainly provide[s] the IRS with a treasure trove of information" (Shepsman 2013: 1811). Just as Alexis de Tocqueville predicted, the American people have been lulled into giving up individual freedoms.[XXVII]

Even worse, "U.S. legislators have already advocated treating FATCA-related information as non-tax return information."[XXVIII] This means the data are not subject to privacy laws in the United States, but are instead easily accessible to all departments of the government combating crimes other than tax evasion (Christians and Cockfield 2013: 24). Given the retaliatory nature of the Internal Revenue Service and other executive agencies, as most recently exposed under the Obama administration, this is a troubling trend.[XXIX]

FATCA violates the privacy rights of not only U.S. residents, but individuals around the globe. As a Canadian report described,

> […] FATCA and the IGA unduly harm the privacy interests and rights of Canadians in part because detailed financial information concerning hundreds of thousands of Canadians would be transferred to a foreign government for the first time. Canada is getting nothing in return for this privacy giveaway other than the relief of the threatened economic sanctions. (Cockfield 2014)

The report highlights not only the erosion of privacy rights stemming from FATCA, but also the economic bullying tactics now used by the global community.

To add insult to injury, violations of privacy under FATCA do not likely increase the Service's ability to catch tax evaders. "American tax policy observers and lawmakers have

already noted that even the expansive surveillance set up under FATCA will be insufficient to catch tax evaders."[XXX] This is likely because "FATCA is designed to secure information about taxpayers," and not to catch tax evaders (Christians and Cockfield 2013: 23). As we all know, with information comes power.

4. The Rise of Global Authorities

Because the shift towards global control has been gradual, the concept of global authorities is nothing new.[XXXI] A poignant example of their ascent and, more importantly, the power with which they have is the Organization for Economic Cooperation and Development ("OECD"). It, like other global authorities, has slowly gained influence and power which is supplanting national sovereignty around the globe.

The OECD is currently a global organization consisting of thirty-four member countries.[XXXII] "For the most part, these OECD members control the bulk of the world's capital, and have similar interests as mature industrialized nations with service and technology-oriented economics" (Cockfield 2006). As for the OECD's mission, it is rather unclear. Since its inception, the OECD has continued to change its directives and focus (Van Kerckhoven and Wouters 2011: 348—51). "The mission of the OECD has always been one of the least well-defined among international economic institutions" (Van Kerckhoven and Wouters 2011: 349). Perhaps this is part of the secret to its longevity and influence.

Although the OECD has no official authority to dictate global law, its influence is powerful and has a global reach.[XXXIII] The OECD has power in the form of "soft law" by which it attempts to influence nations through economic or political persuasion and pressure (Christians 2009: 119). For example, the OECD sets the standards for international tax treaties and multi-national corporate transactions. Countries are forced to adhere to these standards due to global pressure. The ability to gain influence through political pressure is concerning because policy is usually driven by political factors instead of the needs and rights of each independent nation.

The OECD, as is the norm for today's global authorities, has all of the hallmark traits of Progressivism. For example, the OECD has made it clear that it disfavors national sovereignty and instead supports control at a global level. The OECD has articulated that it

"prioritizes responsibility to the international community over the individual autonomy of nations" (Christians 2009: 100). In addition, the OECD's efforts are "endorsing economic coercion rather than encouraging voluntary association" (Christians 2009: 100).

Violations of sovereignty can further be seen in the OECD's work to reduce what it calls "harmful tax competition" (Christians 2009: 101), or as the rest of us call it, free-market competition.

> The essential tension in the OECD's work to curb harmful tax competition arises from the intersection of the idea that nations are entitled to self-determination in most regulatory matters, including taxation, with the reality of a global marketplace. By articulating standards for appropriate tax competition, the OECD is signaling a major conceptual shift away from the conventional view that equates sovereignty with complete state autonomy over tax matters. […] Recognizing ourselves as parties to a global social contract would require a fundamental reassessment of the conventional standards of tax policy design. Instead of focusing on national tax policy as appropriately reflecting only or even primarily the needs and wants of national constituents, a global social contract would require national policy to reflect outward as well, to consider the needs and wants of the worldwide community. (Christians 2009: 101-102)

The policies of the OECD fall in line with Progressive ideology. "Whether intentionally or not, a group of people within the OECD is advancing the dialogue and the debate by implicitly proposing a theory of sovereignty that does not support absolute autonomy in taxation" (Christians 2009: 148).

The OECD is currently working to push global law onto the world's economies in several areas. The OECD has already had success influencing corporate tax law under what it calls the Base Erosion and Profit Shifting ("BEPS") Project. Under BEPS, the OECD released a set of 15 Action Plans set out to curb companies from using favorable tax laws in certain jurisdictions.[XXXIV] Countries with favorable tax rates have been villainized and targeted. The international community, for example, successfully forced Ireland, a sovereign country with favorable corporate tax rates and structures, to change and even eliminate some its more favorable structures. Instead of attempting to emulate Ireland and attract foreign investment through competitive policy, OECD member nations have pushed Progressive tactics and ideology onto sovereign nations. Sovereignty and ingenuity are being erased with sweeping strokes.

4.1. Global FATCA

For those quick to think this is all dramatics or over-exaggeration, global FATCA is quickly becoming a reality. As I write this article, the OECD is working on a global form of FATCA.

In 2014, at the request of the G20, the OECD released two model documents in order to help facilitate a global reporting standard for information sharing (Ernst & Young 2014). The OECD released a model Competent Authority Agreement ("CAA") and a Common Reporting Standard ("CRS"), which were based on the FATCA Model 1 IGA (Ernst & Young 2014). The CRS focuses on procedure and must be implemented into local law, whereas the CAA is aimed at effective information sharing standards (Bean and Wright 2015: 32). The work is aimed at creating global standards for the exchange of information (Jarvis-Blees 2014). "[The CRS] is already being referred to in some quarters as 'GATCA,' ushering in a global standard for the exchange of financial information" (Jarvis-Blees 2014). Over 50 significant jurisdictions have already signed on to implement the CRS by 2017 (Macdonald 2015).

The fingerprints of Progressivism are all over these model documents. For example, the OECD Background Information Brief addressed problems with the CAA and CRS by stating that "the standard will be a 'living system' and so may need to 'evolve over time'" (Ernst & Young 2014). Sound familiar? Further, the CRS will need to be implemented into local law in every jurisdiction and will impact more accounts than FATCA (Ernst & Young 2014). As predicted, a global authority is now violating individual rights and sovereignty around the world. The shift to global control is nearly complete.

5. Conclusion

FATCA is not the first Progressive step taken towards global economic control. It is only one of many steps taken in the Progressive march. The desire for control is not inclusive of taxation either. The step towards global control is currently underway in all areas of our lives.[XXXV] As for the financial world, "[T]he 'Age of FATCA' is upon us, changing the international banking scene for good" (Bean and Wright 2015: 26, citing Whitaker 2013). Until we open our eyes and realize the course we are on, we will never be able uphold principles of freedom. Of course, we could get rid of all of this bureaucracy by

simply abolishing the Internal Revenue Service and restoring what our founders envisioned, but we will leave that conversation for another day.[XXXVI] Those who do not learn history are bound to repeat it, and those who do not understand the aims of the ideologies at work in the world are bound to fall victim to them.

---

* Jennifer Grant is an associate at Lozano Smith LLP in Sacramento, California. She has presented this article as a law school guest speaker in the United States. The content of this document is the sole responsibility of the author and represents a personal opinion.

I Big government progressives are currently a problem in both major American political parties; for a deeper discussion of Progressive ideology see D'Souza 2016.

II The Declaration of Independence para.2, 2nd Continental Congress (U.S., July 4, 1776).

III Norman Thomas, U.S. Presidential candidate for the Socialist Party of America (1948), http://www.goodreads.com/quotes/548340-the-american-people-will-never-knowingly-adopt-socialism-but-under [last viewed Jan. 25, 2016]. Progressives have been more successful than even they predicted. Look at the rise of Senator Bernie Sanders. He is a proud Socialist and gained much support in the 2016 primaries. No longer do Marxists & Socialists have to hide under the cover of terms like 'liberal' or 'progressive.' We are so divorced from our principles that Americans now willingly accept these departures from freedom and individual rights.

IV Recall, it was also around this time that the Senate pushed through the highly unpopular Affordable Care Act, also known as Obamacare, in the dead of night on Christmas Eve 2009. The House passed it several months later. It was shortly thereafter that the American people voted out the Democrats and they lost control of the House. It is also worth mentioning that the American people were fed up with Progressive Republicans as well.

V In addition, FATCA makes it less desirable to be considered a U.S. person and devalues the dollar. The Progressive agenda to downgrade America is accomplished on many fronts, *see* Bean and Wright 2015.

VI Once the world is used to operating within a system of reporting to a foreign centralized agency, that system will be implemented against the United States.

VII 26 U.S.C. §§1471–72 (2012), *see also* Shepsman 2013: 1771 [emphasis added].

VIII Behrens 2013: 208—09 (wherein he talks about the effects and likely responses of FFIs to the implementation of FATCA); and at 213—14 (wherein he states, "The primary factor encouraging foreign entities to comply is avoidance of withholding").

IX S*ee also* Cockfield 2014: 10.

X This is another "fundamental change" to use progressive speak. Although progressives love to characterize the United States as an evil dictator, there is little truth to most of their revisionist history. With the passage of FATCA, however, the United States is dictating its law to the rest of the world, forcing institutions to violate the laws of their home country and foreign countries to write new domestic laws to allow for FATCA compliance. Progressive policy is a source of tyrannical control.

XI Although FATCA was passed into law in 2010 it was not fully implemented until 2014, and even then certain requirements have been continuously pushed out to future dates; *see* Hirschfeld 2013.

XII *See* U.S. Department of Treasury (*online at*: https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx).

XIII OECD Newsroom, Tax, *OECD Welcomes Multilateral Efforts to Improve International Tax Compliance and Transparency,* July 26, 2012 (*online at*: www.oecd.org/newsroom/taxoecdwelcomes multilateraleffortstoimproveinternationaltaxcomplianceandtransparency.htm).

XIV *See* https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.

XV Although this list is not complete, it is the most updated information that is currently available, *see* http://non-fatca-banks.com/ [last viewed March 11, 2016], the information on Lebanon is derived from Bean and Wright 2015. The majority of countries without IGAs are undeveloped or economically unstable, however, a few, such as those in Europe and Oceania, appear to be tax havens.

XVI (Wherein he describes the overlap of information between the FBAR and FATCA's new reporting form, Form 8938).

XVII *See* Christians & Cockfield 2013. *See also* Behrens 2013: 224-25 (wherein he discusses the impact on existing tax treaties and foreign laws).

[xviii] Many top American law schools do not teach the 10th Amendment in Constitutional law courses. That also goes for the 2nd Amendment, the Contracts Clause, and most other parts of the Constitution that demand limited government. The focus is usually on areas such as the Commerce Clause, which has been used by the federal government to overreach its power in significant ways.
[xix] U.S. Const., Amend. X (1791).
[xx] This is not exclusive of territorial sovereignty over taxation. For instance, the Euro is an example of a voluntary loss of sovereignty over the coining of money.
[xxi] Citizens of nations like those in the European Union have already been conditioned to accept losses of sovereignty. It is much easier to impose a regime like FATCA on citizens of those countries then on a citizenry like that of the United States.
[xxii] Bean and Wright 2015: 23-24 (discussing how several Canadians are suing the Canadian Government due to the violations occurring under the FATCA IGA).
[xxiii] The Statutes of Canada, S.C. 2014, C. 20, S.99 (June 19, 2014), *see also* Cockfield 2014: 10
[xxiv] Ibid.
[xxv] *See* Bean and Wright 2015: 19, *citing* Newman 2014.
[xxvi] U.S. Const. amend IV (Dec. 15, 1791); for a discussion on general warrants and freedom *see* Hamburger 2015.
[xxvii] Hamburger 2015: 413—16, *citing* de Tocqueville 1969 (1835): 691—93, II.iv.6.
[xxviii] Christians and Cockfield 2013: 24, *citing* Levin 2012.
[xxix] Recall the IRS scandal where, under the Obama Administration, Conservative non-profit organizations were targeted by the IRS and several other executive agencies simply due to differences in political opinions; a move straight out of the Marxist playbook.
[xxx] Christians and Cockfield 2013: 23*, citing* United States Senate Permanent Subcommittee on Investigations, *Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts (Majority and Minority Staff Report)* (26 Feb 2014) at 6; *see also* Cockfield 2014: 13.
[xxxi] Because the shift to global control and the take down of American freedoms has been a long, subtle process, the mere existence of global authorities with major influence around the world is evidence as to how successful the conditioning process has been and how long it has been in place.
[xxxii] *See* www.oecd.org/about/membersandpartners/; *see also* Van Kerckhoven and Wouters 2011: 350.
[xxxiii] For further discussion on "soft absolutism," *see* Hamburger 2015: 412.
[xxxiv] This project is aimed at closing down tax havens and favorable tax structures using global control and pressure, *see* OECD BEPS Project (*online at:* http://www.oecd.org/ctp/beps.htm).
[xxxv] Take the climate change issue. This is simply another way to create a 'need' for global control. This is why progressives have gone so far as to get caught falsifying scientific evidence to 'prove' their case. It is also why progressives had to switch their nomenclature from global warming to climate change. This is about control, plain and simple.
[xxxvi] Recall that it was not until 1916, when the United States Constitution was amended to include the 16th Amendment, that the income tax was integrated as a permanent part of our country. Our founders did not find an income tax to be conducive with principles of freedom.

References

- Alciere Tom, 2016, 'U.N. Member Countries and Their FATCA IGA Status,' (online at: http://non-fatca-banks.com/) [last viewed Mar. 11, 2016].
- Bean Bruce W. and Wright Abbey L., 25 Feb. 2015, 'The U.S. Foreign Account Tax Compliance Act: American Legal Imperialism?', *ILSA Journal of International & Comparative Law*, XXI(2): 333-368.
- Behrense Frederic, 2013, 'Using a Sledgehammer To Crack A Nut: Why FATCA Will Not Stand,' *Wisconsin Law Review*, Vol. 2013(1): 205-236.
- Christians Allison, 2009, 'Sovereignty, Taxation and Social Contract,' *Minnesota Journal of International Law*, XVIII(1): 99-153.
- Christians Allison and Cockfield Arthur, 2013, Submission To Finance Department on Implementation of FATCA in Canada: Submission on Legislative Proposals Relating to the Canada-United

States Enhanced Tax Information Exchange Agreement (online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407264) [last viewed Dec. 15, 2015].

- Cockfield Arthur J., April 2014, 'FATCA and the Erosion of Canadian Taxpayer Privacy,' A Report Prepared for the Office of the Privacy Commission of Canada (online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2433198) [last viewed Feb. 3, 2015].
- Cockfield Arthur, 2006, 'The Rise of the OECD as Informal 'World Tax Organization' Through National Responses to E-Commerce Tax Challenges', *Yale Journal of Law & Technology*, VIII(1): 136-187.
- D'Souza Dinesh, 2012, 2016: Obama's America, Lions Gate Pictures, (online at: www.dineshdsouza.com).
- de Tocqueville Alexis, 1969 (1835), *Democracy in America*, ed. J. P. Mayer, trans. George Lawrence, Anchor Books, Garden City.
- Ernst & Young, LLP, 19 Feb 2014, 'OECD Common Reporting Standard: A Global FATCA-Like Regime, Tax Alert,' (online at http://www.ey.com/Publication/vwLUAssets/EY_-_OECD_Common_Reporting_Standard:_A_global_FATCA-like_regime/$FILE/EY-Client-alert-OECD-Common-Reporting-Standard.pdf) [last viewed Mar. 13, 2016].
- Ferris Tara, 2014, Announcement 2014-38, Office of Associate Chief Counsel (International), Internal Revenue Service (online at: http://www.irs.gov/pub/irs-drop/a-14-38.pdf) [last viewed Feb. 2, 2015].
- Garrison Jim, 31 May 1995, 'One World Under Gorby,' *San Francisco Weekly*, (online at: www.forcingchange.wordpress.com/2013/04/20/communism-socialism-and-world-change-40-quotes-to-make-you-think/) [last viewed Dec. 15, 2015].
- Grant Jennifer, 2010, 'Exposing The Goal Behind Behavioralist Legal Theory: The Connection Between Behavioral Law and Far-Left Political Ideology,' (online at: http://www.mediafire.com/file/hm6b436a1egayea/Jennifer%20Sellards%2C%20Exposing%20the%20Truth%20Behind%20Behavioral%20Legal%20Theory%20The%20Connection%20Between%20Behavioral%20Law%20and%20Far-Left%20Political%20Ideology-Final%20Draft.docx).
- Hamburger Philip, 2015, *Is Administrative Law Unlawful?*, The University of Chicago Press, Chicago & London.
- Harvey, J. Richard, Jr., 2013, 'Worldwide Taxation of United States Citizens Living Abroad-Impact of FATCA and Two Proposals,' *George Mason Journal of International Commercial Law*, IV(3): 319-358(summer issue).
- Hirschfeld Philip R., 8 Nov 2013, 'FATCA Update: Navigating The Electronic Registration Portal,' *Tax Management International Journal*, Bloomberg BNA, XLII(11): 687.
- Internal Revenue Service, Small Business and Self-Employed Tax Center Online, https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/.
- Jaffe & Co., 2014, 'FBAR & FATCA,' (online at: www.jaffeandco.com/fbar--fatca.html) [last viewed Jan. 5, 2016].
- Jarvis-Blees Wietske, 25 June 2014, 'Financial Institutions Urged to Act on New Zealand's FATCA IGA, FATCA,' Thomson Reuters, (online at: http://fatca.thomsonreuters.com/wp-content/uploads/2014/07/ASIA-Financial-institutions-urged-to-act-on-New-Zealands-FATCA-IGA.pdf) [last viewed Mar. 13, 2016].
- Karch Jon Frederick and Roberts Trevor K., 26 Aug 2015, 'Understanding FBAR and FATCA: What Anyone With A Foreign Account Should Know,' InsideCounsel Magazine, (online at: www.insidecounsel.com/2015/08/26/understanding-fbar-and-fatca-what-anyone-with-a-f) [last viewed Jan. 5, 2016].
- Levin Carl, 11 Jan 2012, 'Letter to the IRS and the Department of the Treasury on Implementing FATCA,' (online at: http://bsmlegal.com/PDFs/CarlLevin.pdf).
- Macdonald Scott, 17 Sept 2015, 'Structured Finance: FATCA and the OECD Common Reporting Standard,' Maples and Calder, (online at: http://www.mondaq.com/caymanislands/x/427528/securitization+structured+finance/Structured+Finance+FATCA+and+the).
- Newman Nathan, 30 May 2014, 'Explaining The Wormy Morass Of Obama's FATCA Tax Evasion Law,' *Forbes.com* (online at http://www.forbes.com/sites/realspin/2014/05/30/explaining-the-wormy-morass-of-obamas-fatca-tax-evasion-law/) [last viewed Jan. 23, 2015].

- Organization for Economic Cooperation & Development, 2016, (online at: www.oecd.org/about/membersandpartners/) [last viewed Oct. 26, 2014].
- Organization for Economic Cooperation & Development, 2016, Base Erosion and Profit Shifting, BEPS Project, (online at: http://www.oecd.org/ctp/beps.htm).
- Organization for Economic Cooperation & Development, 26 July 2012, 'OECD Welcomes Multilateral Efforts to Improve International Tax Compliance and Transparency,' OECD Newsroom, (online at: www.oecd.org/newsroom/taxoecdwelcomesmultilateraleffortstoimproveinternationaltaxcomplianceandtransparency.htm) [last viewed Oct. 15, 2014].
- Shepsman Marc D., Oct 2013, 'Buying FATCA Compliance: Overcoming Holdout Incentives To Prevent International Tax Arbitrage,' *Fordham International Law Journal*, XXXVI(6): 1767-1813.
- Swank Greg, 2 Jan 2014, Update: The Communist Takeover of America-45 Declared Goals, http://beforeitsnews.com/alternative/2016/05/the-communist-takeover-of-america-3353743.html, citing excerpt from Cleon Skousen, 10 Jan 1963, Communist Goals: The Naked Communist, as found in Congressional Record Appendix, pp. A34-35.
- The Constitution of the United States, 1791, Amendment IV.
- The Constitution of the United States, 1791, Amendment X.
- The Statutes of Canada, 19 June 2014, S.C. 2014, C. 20, S.99.
- Thomas Norman, 1948, U.S. Presidential candidate for the Socialist Party of America.
- United States Code, 2010, Internal Revenue Code, Title 26, Sections 1471–72.
- United States Department of the Treasury, 2016, Resource Center, (online at: https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx) [last viewed Mar. 6, 2016].
- United States Senate Permanent Subcommittee on Investigations, 26 Feb 2014, 'Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts' (Majority and Minority Staff Report).
- Van Kerckhoven Sven and Wouters Jan, 2011, 'The OECD and the G20: An Ever Closer Relationship?,' *The George Washington International Law Review*, XLIII(2): 345-374.
- Whitaker G. Warren, June 2013, 'FATCA and the Future,' *Financier Worldwide* (online at: http://www.financierworldwide.com/fatca-and-the-future/#.VHDgHlbVvBd) [last viewed Jan. 22, 2015].
- Yonge Nancy, 2014, 'FATCA,' Course Lecture, Golden Gate University School of Law, LL.M. Taxation Program, San Francisco.

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Austerity on the loose in Portugal: European judicial restraint in times of crisis

by

Francisco Pereira Coutinho*

Perspectives on Federalism, Vol. 8, issue 3, 2016

Abstract

The international bailout granted to Portugal between 2011 and 2014 was conditional on the adoption by the Portuguese State of austerity measures included in a memorandum of understanding (MoU) signed by the European Commission on behalf of the European Union (EU) and the Member States. The MoU was never published in an official journal or even translated into the Portuguese language. Its implementation caused a significant decrease in the level of protection of social rights.

The compatibility of the MoU with core principles of the rule of law and with the EU´s social Constitution was never tested in court. A systemic failure in the jurisdictional system of the EU immunized the MoU to any judicial challenge. At the apex of the system, the Court of Justice of the EU declined to answer preliminary references submitted by Portuguese lower courts that questioned the compatibility with the Charter of Fundamental Rights of the EU of national budgetary measures that implemented the MoU. At the bottom, Portuguese courts either failed to properly identify the EU law acts that were the source of national austerity measures or disregarded their role as common EU law courts of ordinary jurisdiction when they bypassed the opportunity to refer a question for a preliminary ruling of the Court of Justice challenging the validity of the MoU.

Key-words

Bailouts, Charter of Fundamental Rights of the European Union, Social Constitution of the EU, Financial crisis, Portugal, Memorandum of Understanding

1. Introduction

1.1.

During 2012 and 2013 Portuguese lower courts repeatedly made use of the power given by Article 267 of the Treaty on the Functioning of the European Union (TFUE) to refer questions for a preliminary ruling of the Court of Justice (of the EU) that targeted measures adopted by the Portuguese State to meet loan conditionalities stemming from a three-year €78 billion bailout program agreed with international lenders that included the EU. The program envisioned a strategy of fiscal consolidation that had the objective of reducing the deficit and public debt through the adoption of austerity measures that included tax increases and cuts in State spending coupled with the adoption of structural reforms aimed at fostering economic growth, employment and productivity.

The bailout was negotiated between April and May 2011 by the Portuguese State with a *Troika* composed of the International Monetary Fund (IMF), the European Central Bank (ECB) and the European Commission. Negotiation ended with the draft of three memoranda. Two of them – the Memorandum of Economic and Financial Policies (MEFP) and the Technical Memorandum of Understanding (TMU) – were sent as an attachment to a letter of intent addressed by the Portuguese State to the IMF`s Executive Board that asked for access to the fund´s resources. The other – the Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) between the Portuguese State and the European Commission– was signed in Lisbon on 17 May 2011. The first disbursement of financial assistance loaned by the EU and by Member States followed the entry into force of the MoU. Further instalments were conditional on a Commission´s positive review – enacted in liaison with the ECB – that took place on a trimestral basis during the duration of the programme. The second updated version of the MoU, dated 9 December 2011, made a loan disbursement conditional on the adoption in 2012 of a budgetary law that:

> 'reduce(d) wages for all general government sector employees in 2012 by (i) suspending the 13th and 14th monthly salary payments for those workers with monthly salaries of EUR 1,000 or more, ii) suspending on average and in a progressive way the equivalent of one of those two salaries for those workers with

monthly salaries between wage of EUR 485 and EUR 1,000. Similar measures will apply to all State Owned Enterprises classified inside or outside the perimeter of the government sector, and in any other public entity even if falling outside the perimeter of the government sector.'[I]

The Portuguese Budget Act for 2012 raised the public wages cut threshold to EUR 1,100 for suspending both the 13th and 14th monthly salaries, and to between EUR 600 and EUR 1,100 for implementing the progressive suspension [Article 21 of Law 64-B/2011, of 30 December 2011 (State Budget Act for 2012)]. The amendment was accepted by the Commission and the ECB because the rise in State expenditures was compensated by revenue obtained through an increase in the tax rate applicable to capital gains and investment income (e. g. dividends and interest payments).[II]

In *Fidelidade Mundial* and *Via Directa,* a Portuguese union – the *Sindicato Nacional dos Profissionais de Seguros e Afins* (National Union of Insurance Professionals) – sought the restitution of the collectively agreed holiday and Christmas allowances that were suspended by the State Budget Act for 2012 in State owned insurance enterprises. The referring courts – the *Tribunal do Trabalho de Lisboa* and the *Tribunal do Trabalho do Porto* (Lisbon and Oporto Labour Courts) – questioned the Court of Justice as to whether these measures breached fundamental rights protected by the Charter of Fundamental Rights of the EU (Charter), namely the rights to equality and non-discrimination [Articles 20 and 21 (1)] and to fair and just working conditions [Article 31 (1)].[III]

On 26 June and 21 October 2014, the Court of Justice declared the references inadmissible based on its lack of jurisdiction for reviewing national law *vis-à-vis* the Charter.[IV] The Luxembourg court claimed that the austerity measures included in the State Budget for 2012 were outside its jurisdiction, which solely relates to matters falling within EU competence. The Court recalled an earlier decision from 7 March 2013 in which it had already rejected on the same grounds of inadmissibility a Portuguese preliminary reference that challenged a similar austerity measure included in the State Budget Act for 2011.[V]

In *Sindicato dos Bancários do Norte*, the Court declared that in accordance with its settled case-law, the requirements flowing from the protection of fundamental rights within the EU legal order are only binding on Member States when they are implementing EU law [Article 51 (1) of the Charter]. Moreover, Article 6 (1) of the Treaty of the European Union (TEU) that provides that while the Charter is binding it neither creates new EU

competences nor modifies existing ones. Since the referring Portuguese court (*Tribunal do Trabalho do Porto*) had provided no elements from which it could be considered that the contested national provision was implementing EU law, the Court of Justice found itself without competence to decide on the preliminary reference.[VI]

Notwithstanding the fact that the austerity measures included in the State Budget Act for 2012 were adopted after the bailout and in accordance with the MoU – a fact also neglected in the references submitted by the Portuguese courts in *Fidelidade Mundial* and *Via Directa* –, the Court of Justice declared that the doubts '*share(d) the same nature*'[VII] and the questions submitted were '*analogous*'[VIII] to the ones sent before the bailout in *Sindicato dos Bancários do Norte*. In both cases the questions submitted did not contained any concrete element enabling the view to be taken that the 2011 or the 2012 Budget Law sought to implement EU law.[IX]

1.2.

Bailout instruments such as the MoU have been considered the most important social source in the history of the EU (Kilpatrick 2014: 393). Their implementation in Portugal heralded a dramatic erosion of social rights through the adoption of drastic cuts in a wide range of welfare allowances and in public investment in housing, education and health (Nogueira de Brito 2014: 68-73). How is it then possible that the compatibility of the MoU with the EU´s social Constitution was never tested in court? In this article I argue that a systemic failure in the jurisdictional system of the EU immunized the MoU to any kind of judicial review. At the apex of the system, the Luxembourg court failed when it refused to answer the preliminary references submitted by Portuguese lower courts. The MoU was signed by an EU institution within the framework of EU legislation (section one). That means that it was a binding EU legal act that could be challenged on multiple EU law grounds (section two). By not tracing the genealogy of the austerity measures adopted by the Portuguese government to the MoU, the Court of Justice was simply nowhere to be seen during the bailout (section three). At the bottom of the jurisdictional system of the EU, Portuguese courts failed to properly identify EU legal acts that were the source of national budgetary provisions that foresaw austerity measures; moreover, they disregarded their role as common EU law courts of ordinary jurisdiction when they did not refer

questions for a preliminary ruling of the Court of Justice challenging the validity of the MoU (section four).[X]

2. The EU genealogy of the Portuguese bailout legal instruments

2.1.

On 7 May 2010, on the eve of what was named – in retrospective quite hyperbolically – '*the most dramatic weekend in EU history*' (Ruffert 2011: 1779), the Heads of State or Government of the Eurozone reaffirmed their commitment to explore '*the full range of means available to ensure the stability of the euro area*'. Something had to be done to dam the systemic risk of a domino effect on the solvency of Eurozone Member States following the bailout of Greece agreed just days before the summit (on 2 May 2010). If countries such as Portugal, Italy, Ireland or Spain were to lose access to international debt markets the survival of the Euro could be at peril. The Commission was thus mandated to draft a European stabilization mechanism to preserve financial stability in Europe.[XI]

On 10 May 2010, Ecofin approved the establishment of a European stabilization mechanism based on an EU regulation and a Special Purpose Vehicle adopted by Eurozone Member States pursuant to their national constitutional requirements. Regulation (EU) 407/2010 adopted the next day created the European Financial Stabilisation Mechanism (EFSM). On 7 June 2010, the European Financial Stability Mechanism (EFSF) was incorporated in Luxembourg as a private company. The activation of both bailout mechanisms was limited by the adoption of '*strong conditionality, in the context of a joint EU/IMF support*', and based '*on terms and conditions similar to the IMF*'.[XII]

Conditionality in this context was necessary to comply with the no-bailout clause of Article 125 TFEU.[XIII] The latter only permits the granting of financial assistance by the EU and between Eurozone Member States provided that the conditions attached to such assistance are such as to prompt the beneficiary Member State to implement sound budgetary policies.[XIV]

2.2.

Regulation (EU) 407/2010 is based on Article 122 (2) TFEU that allows financial assistance to be granted, under certain conditions, to a Member State facing difficulties or

seriously threatened by exceptional occurrences beyond its control. Surprisingly, in 2010 the '*exceptional occurrences*' were not identified with systemic problems in the Economic and Monetary Union, but with the '*unprecedented global financial crisis and economic downturn*', which was responsible for a recession that could not be explained as a negative peak of an economic cycle [Recital 3 of Regulation (EU) 407/2010].

The EFSM was deemed transitory and merely instrumental for the stabilization of financial markets in the context of the global banking crises that started with the Lehman Brothers bankruptcy of September 2008. The mechanism allowed an EU bailout of Eurozone Member States for only up to €60 billion through loans and lines of credit in the international capital markets. Member States did not directly undertake any liability, as the EFSM funded itself through loans secured by the EU budget [Articles 2 (1) and 5 of Regulation (EU) 407/2010].

2.3.

Access to the EFSM mimics IMF´s bailouts.[XV] A Eurozone Member State facing '*exceptional financial occurrences beyond its control*' presents a draft economic and financial adjustment programme to the Commission and to the Economic and Financial Committee of the Council. The draft is based on an assessment of the financial needs of the Member State previously discussed with the Commission and the ECB [Article 3 (1) Regulation (EU) 407/2010]. The draft is afterwards presented to the Council that, acting by a qualified majority on a loan proposal of the Commission, adopts a decision that includes: i) the amount, the average maturity, the pricing formula, the maximum number of instalments, the availability period of the Union financial assistance and other rules; ii) the adjustment programme prepared by the beneficiary Member State; and iii) the general economic policy conditions attached to the Union´s financial assistance. The general economic policy conditions are established by the Commission in liaison with the ECB with a view to re-establishing a sound economic or financial situation in the beneficiary Member State and to restoring its capacity to finance itself on the financial markets [Articles 3 (3) and (4) of Regulation (EU) 407/2010]. The beneficiary Member State and the Commission then enter into negotiation on the financial conditions of the specific economic policy conditions attached to the financial assistance. The negotiation ends with the signature of the MoU [Articles 3 (5) of Regulation (EU) 407/2010].

The first disbursement of financial assistance is released after the signature of the MoU. Further instalments are conditional on a regular review made by the Commission of the economic policies of the Member State and, particularly, the fulfilment of the conditionality included in the MoU (Article 4 of Regulation (EU) 407/2010). Changes in the general economic policy conditionality are negotiated between the Commission and the beneficiary Member State and afterwards included in a revised draft economic and financial adjustment programme prepared by the Member State. The Council, acting by a qualified majority, approves the adjustments to the programme and revises the decision that granted financial support to the Member State in order to incorporate the amendments to the general economic conditions proposed by the Commission. The disbursement of the next instalment of the loan follows the signature by the Commission and the Member State of an updated version of MoU revised in accordance with the amendments introduced in the Council´s decision [Article 3 (6) and (7) of Regulation 407/201].

2.4.

The EFSF was founded through a public deed made in Luxembourg on 7 June 2010 that incorporated a public limited liability company under Luxembourg law (*Société Anonyme*) that had the State of Luxembourg as its sole shareholder.[XVI] Immediately afterwards, the EFSF signed with the Ministers for Finance of the Eurogroup a framework-agreement which is subject to English law. The framework-agreement establishes the institutional framework of the EFSF, the terms and conditions upon which the EFSF may grant financial assistance, issue debt and provide guarantees, as well as the proceedings of access and the conditionality of financial assistance.[XVII]

The option for private law instruments for the creation of the EFSF can be explained with political reasons related to the fear that the internal procedure of approval of an international treaty could be blocked by parliaments or directly rejected by the people in referenda.[XVIII] This foundational path raises, however, legal problems as many of the matters included in the by-laws and in the framework agreement of the EFSF clearly transcend the boundaries of private law (Tuori 2012: 30).

This transcendence seems to the case in the tasks given to the Commission and the ECB to negotiate and monitor the fulfillment of the measures foreseen in the MoU, a necessary condition to the disbursement of financial assistance under the loan agreement

adopted between the EFSM and the Member States seeking assistance.[XIX] Although Article 13 (2) TUE states that EU institutions '*shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them*', in *Pringle* the Court of Justice clarified that Member States are '*entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union*'; these are similar to those given to the Commission and the ECB in the EFSF.[XX] However, as the Luxembourg court declared in *Pringle* and restated in *Ledra*, the tasks conferred on the Commission and the ECB by international treaties that solely bind the Member States '*do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties.*'[XXI]

Another example of the public law nature of the framework-agreement is the submission to the jurisdiction of the Court of Justice of disputes between the Member States and to the jurisdiction of Luxembourg common courts of disputes between the EFSF and Member States [Article 16 (2)].[XXII] The adoption of a dual system implies that the legal relationships established between Member States are inherently different (and have a public legal nature) from the ones that involve the Member States and the EFSF (which have a private legal nature). In this regard, it is also not clear whether the Treaties authorize the transformation of the Court of Justice into an arbitration forum for the resolution of disputes emerging from a contract subjected to English law. Article 273 TFEU states that '*the Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties*'. This provision aims at protecting the uniformity of EU law, which could be at risk by decisions of judicial bodies in matters connected with the Treaties. Article 273 TFUE was introduced in the Rome Treaty to solve disputes emerging from international treaties adopted between Member States using their *ius tractuum* (Piçarra 2013: 51). Its wording does not exclude the argument that the '*special agreement*' (Article 273 TFEU) between Member States could be a provision included in a contract established between Member States and a private company, particularly in a case were the jurisdiction of the Court of Justice concerns disputes that only involve Member States in matters that are clearly related to the subject-matter of the Treaties.[XXIII]

The EFSF was established by sovereign States to rescue other sovereign States with the assistance of EU institutions. It is inherently a public international law legal instrument that

does not lose that *ethos* by the magical will of States. Any other opinion would reduce to a mere formality the distinction between public and private law and, in the case of the Portuguese constitutional legal order, opens the path to a "Constitutional fraud" through the governmental circumvention of the procedure applicable to the approval of international treaties. With the EFSF, the Portuguese State undertook obligations that potentially have an impact in the financial and economic sovereignty of the State that had to be authorized by the Portuguese Parliament. In fact, it is hard to include these in the general policy competence of the Government to '*adopt acts and take steps necessary to the promotion of social and economic development and to the satisfaction of collective needs.*'[XXIV] The use of public international law legal instruments would also require the authorization of the Portuguese President.[XXV] Only the intervention of both the Parliament and the President could have granted the EFSF the democratic legitimacy required by the Constitution to internationally bind the Portuguese State. The EFSF was thus created in violation of the commitment made on 9 May 2010 by the Governments of the Eurozone Member States to provide financial assistance to Eurozone Member States through a Special Purpose Vehicle established '*pursuant to their national constitutional requirements.*'[XXVI]

2.5.

Financial assistance under the EFSF is triggered by a request of a Eurozone Member State. A negotiation follows, in which the Commission, in liaison with the ECB, negotiates a MoU that includes financial and economic measures based on a Council decision adopted in accordance with Article 136 TFEU.[XXVII] The Commission signs the MoU after the approval of the latter by the Eurogroup Working Group. If an EFSM MoU has already been adopted, a separate EFSF MoU is not needed, provided that the former also covers EFSF stability support. Following the approval of the relevant MoU, the Commission, again in liaison with the ECB, proposes to the Eurogroup Working Group the main terms of the loan agreement. The technical details of the loan agreement are afterwards negotiated between the beneficiary Member State and the EFSF [Article 2 (1) of the EFSF Framework-Agreement].

The initial disbursement of financial assistance is released after the signature of the MoU. Further instalments are conditional on a unanimous decision of the Eurozone Member States based on a report presented by the Commission, in liaison with the ECB, in

which it analyses the compliance by the beneficiary Member State with the terms and the conditions set out in the MoU and in the Council Decision relating to it [Article 3 (1) of the EFSF Framework-Agreement].

2.6.

On 6 April 2011 the Portuguese Government requested the Commission for financial assistance. The answer arrived two days later in a joint declaration of the Eurogroup and Ecofin that made EFSM and EFSF support conditional on the adoption of a '*financial and economic adjustment programme*' supported by strict conditionality.[XXVIII] The negotiation that followed ended on 13 May 2011 when the Portuguese Government and Portuguese Central Bank sent to the European Commission, the Eurogroup and the ECB a letter of intent, with a MoU as an attachment, that included the project of an adjustment program.

On 17 May 2011, the Council granted EU/EFSM financial assistance to Portugal through the Implementing Decision 344/2011/EU.[XXIX] On the same day,[XXX] the Portuguese Government and the Commission signed a MoU that foresaw the adjustment program and specified the conditions of the financial support foreseen in the Council Implementing Decision.[XXXI]

The request for EFSF financial assistance was sent on 13 May 2011 by the Portuguese Government to the President of the Eurogroup in an attachment to a letter of intent. The answer arrived four days later (17 May 2011), when the Ministers for Finance of the Eurogroup decided to loan Portugal €26 billion (a third of the bailout) through the EFSF.[XXXII] As a condition for the bailout it was established that the EFSF loan agreement with Portugal had to specify that the disbursements there under had to be subject to compliance with the conditions set forth in the memorandum signed on that same day between the Commission, the Portuguese Government and the Bank of Portugal.[XXXIII] This was the memorandum (the MoU) that detailed the general economic policy conditions as embedded in Council Implementing Decision 2011/344/EU on granting Union financial assistance to Portugal, whose signature conditioned access to the EFSM. Thus, no independent EFSF memorandum was signed in the Portuguese bailout.[XXXIV]

The implementation of the adjustment programme created an economic recessive spiral that inevitably led to the impossibility of accomplishing the budgetary targets included in the MoU. For that reason, after trimestral evaluations of the programme by the

Commission and the ECB, the Council reviewed the general economic policy conditions attached to the financial assistance. The amendments included new measures for the adjustment programme that were afterwards included in nine (!) updated versions of the MoU. Each new update had to be signed by the Commission and the Portuguese authorities to allow further disbursements of loan instalments granted under the EFSM and the EFSF. [XXXV]

3. The legal nature of the MoU

In the first opportunity it had to review the constitutionality of financial austerity measures adopted after the bailout, the Portuguese Constitutional Court had no doubts about the binding legal nature of the memoranda:

> 'The (adjustment) programme determines the adoption of some previous actions by the Portuguese authorities including several legal instruments that were approved, on the one side, by the Portuguese Government and, on the other, by the Executive Council of the IMF, as well as by the Portuguese Government and the European Commission (for the EU) and by the ECB. Thus, the Portuguese Government and the IMF approved the (TMU) and the (MEFP) that establish the conditions of the IMF financial assistance to Portugal. Furthermore, between the Portuguese government and the EU (the MoU) was signed. (The MoU) was adopted according to Council Regulation (UE) 407/2011, of 11 May 2010, that establishes the EFSM, and in particular its article 3 (5) that establishes the general conditions of economic policy included in the Council Implementing Decision 2011/344/UE, on granting Union financial assistance to Portugal.
>
> These memoranda are binding to the Portuguese State because they are based in legal instruments (…) of international law and EU law that are incorporated through Article 8 (2) of the (Portuguese) Constitution. The (MEFP) and the (TMU) are based in Article V, Section 3, of the Agreement of the IMF , and the (MoU) is ultimately based in article 122 (2) TFEU. Such documents impose the adoption by the Portuguese State of the measures contained therein as a condition of the phased fulfilment of the loan agreements (…).
>
> From the wording of the memoranda, as well as from the Council of Ministers Resolution 8/2011, of 5 May 2011 [published in the Diário da República (Official Journal), II Série, from 17 May 2011], is clear that as a consequence of the (bailout program), Portugal must adopt during a three year period several measures and legal acts, some having a structural nature, connected with public finances, financial stability and competitiveness.'[XXXVI]

The MoU was an atypical EU law act (Pereira Coutinho 2013: 116; Kilpatrick 2014: 411): its entry into force and execution conditioned the application of the Council decision that implemented a Regulation based on article 122 (2) TFEU that created the financial mechanism (EFSM) that allowed the EU to bail-out Eurozone Member States.[XXXVII] As it was signed by the Commission on behalf of the EU [article 2 (2) of Decision 2011/344/EU], it could be qualified as '*an act of an institution*' (Article 267 (1) of the TFEU) and submitted to a validity review by the Court of Justice under the preliminary reference procedure.

The MoU created binding legal effects on both of its signatories. For the EU, the fulfilment of the MoU's conditionality obliged the Council to authorize the payment of the scheduled loan instalments to the Portuguese State. A Council decision that denied such a disbursement could be appealed through the annulment procedure (Article 263 TFUE). For the Portuguese State, Council Recommendations taken in the framework of the excessive deficit procedure refer to the obligation to implement the measures as laid down in the Council Implementing Decision 2011/344/EU and further specified in the MoU and its subsequent supplements.[XXXVIII] The failure to comply with the MoU could ultimately determine the adoption by the Council of sanctions foreseen in article 126 (11) TFEU.

The eventual qualification of the MoU as soft law would not exclude the admissibility of a preliminary reference on its validity. In *Grimaldi* the Luxembourg court declared that non-binding EU law acts, such as recommendations, may be submitted to a reference for a preliminary ruling when such acts intend to produce legal effects *vis-à-vis* third parties, namely when they '*they are designated to supplement binding EU law provisions,*'[XXXIX] which in this case were the Council Regulation (UE) 407/2011 and the Council Implementing Decision 2011/344/EU.

4. The MoU, the Charter and the rule of Law

4.1.

If the MoU were an atypical EU law, the national budgetary provisions under review in the preliminary references submitted by Portuguese courts in *Fidelidade Mundial* and *Via Directa* would be '*implementing Union law*' [Article 51 (1) of the Charter]. Those provisions

transposed almost *ipsis verbis* into national law the bailout conditionality foreseen in the Council Implementing Decision 2011/344/EU and in the MoU.

In *Fransson*, the Court clarified that fundamental rights guaranteed by the Charter must be complied with where national legislation '*falls within the scope of European Union*' rather than only when they are '*implementing EU law*'. The application of the Charter is not limited to cases where national law formally transposes EU law. According to the Court of Justice, '*situations cannot exist which are covered (…) by EU law without (…) fundamental rights (protected by the Charter) being applicable. The applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter.*'[XL]

4.2.

The Commission and the ECB were key institutions in the bailout. When negotiating, signing and assessing the conditionality imposed on Portugal, the former had to assure that the Charter and the social *acquis* of the EU was respected. In the role of guardian of the Treaties as resulting from Article 17(1) TEU, the Commission should have refrained from signing and implementing a MoU whose consistency with EU law it had every reason to doubt.[XLI]

The MoU foresaw cuts to health and education, pensions and other social benefits, as well as reductions in the size and pay of the public sector.[XLII] In *Fidelidade Mundial* and *Via Directa*, Portuguese courts questioned the compatibility of pay cuts in the public sector with the workers '*right to working conditions which respect his or her health, safety and dignity*' [Article 31 (1) of the Charter]. But many other legislative acts enacted to comply with the MoU could have also been challenged on their compatibility with the EU social constitution, such as those related to changes introduced in the dismissal law and in the collective bargaining system (Koukiadaki 2014: 28-30). The lack of EU competence to impose social austerity could also be a ground for challenging the MoU and the Council decisions that support it (Costamagna 2012: 15-16; Barnard 2013: 267-268). [XLIII]

When reviewing the validity of the MoU, the Court of Justice would also have been given the opportunity to address breaches of core principles of the rule of law (Kilpatrick 2015: 349), and in particular the breach of the principle of legal certainty and legitimate expectations (Martín Rodríguez 2016: 266-268; 277-278). The latter forms part of the EU legal order and must respected by EU institutions and Member States when implementing

EU law.[XLIV]

In order to meet the requirements of legal certainty, individuals must have the possibility of determining the source of the national measures imposing obligations upon them and, therefore, '*not only must the national legislation be published but also the measure of EU law which obliges the Member States to take measures imposing obligations on individuals*'. [XLV]

The MoU was not published in the Official Journal of the EU and had a single official version in English. Portuguese laypeople affected by unprecedented austerity were unable to access through an official source and read in their mother tongue the legal document that most seriously affected their daily life during the three (very long) years.[XLVI]

The MoU and its updates were not considered sufficiently important to be published in the L (Legislation) Series of the Official Journal of the European Union. The document was eventually published as an annex to an edition of the Directorate-General for Economic and Financial Affairs of the European Commission named *European Economy – Occasional Papers*. Since it was not published in the Official Journal of the European Union, the MoU was unable to produce legal effects.[XLVII]

Publication in the Official Journal would also have avoided the problem caused by the decision to adopt the English language as '*the original and official version*' of the MoU.[XLVIII] This was a clear violation of the principle of linguistic diversity of the EU protected by Article 3 (3) TUE that states that the Union '*shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced*' and by Article 4 (1) according to which the Union '*respects the equality of Member States before the Treaties as well as their national identities*'. Given that article 4 of the EEC Council Regulation 1/1958 establishes the Portuguese language as one of the twenty-four official languages used by EU institutions, and since the MoU specifies a Council decision addressed to the Portuguese Republic (Article 5 of Council Implementing Decision 2011/344/EU), the Commission was obliged to sign the official version of the MoU in the Portuguese language.[XLIX]

4.3.

The *Fidelidade Mundial* and *Via Directa* decisions of inadmissibility displayed a surprising and unwelcome restraint by the Court the Justice. '*Wherever EU goes, fundamental rights must go too*' could be the motto for the Court´s recent case law (Kilpatrick 2015: 352). In the *Kadi*

cases the Court did not refrain from making a fundamental rights review of anti-terrorist decisions of the Council.[L] *Kadi* was tantamount to the idea that the EU is a union based on the rule of law in which all acts of its institutions are submitted to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights.[LI] When asked to rule on measures adopted in a situation of financial and economic emergency, the Court could not have stayed dormant when questioned with possible breaches of fundamental rights based on legislation clearly stemming from EU law sources. It had also the constitutional obligation to check the respect by EU institutions of core values of the rule of law during their involvement in the bailout of Member States.

The Court of Justice intervention was all the more necessary because national courts were prohibited from reviewing the validity of MoUs. Assuming the role of a constitutional court within a concentrated system of constitutional judicial review, the Court of Justice pre-empted all competence to declare that an EU act is invalid; the exclusivity of that jurisdiction having the purpose of guaranteeing legal certainty by ensuring that EU law is applied uniformly.[LII] National courts may consider the validity of an EU law act, but they are not endowed with the power to declare such an act invalid themselves.[LIII] This judicial stance is a paragon of judicial activism (Vilhena de Freitas 2015: 176), as the wording of article 267 (3) TFUE seems to allow national lower courts themselves to trump the application of invalid EU law.

5. Portuguese courts and the MoU

5.1.

One of the essential features of the jurisdictional system of EU is that it is organized according to the principle of subsidiarity (Piçarra and Pereira Coutinho 2012: 74). The Treaty of Rome rejected the creation of a federal system of courts and instead gave the responsibility to apply EU law in the Member States to national courts, which thereby became '*ordinary courts of EU law.*'[LIV]

The inertia of the Court of Justice during the bailout may be partially linked to the behaviour of Portuguese courts. The latter either failed to properly identify the EU legal instruments that were responsible for the national austerity measures, or simply disregarded their role as common EU law courts of ordinary jurisdiction when they did not refer a

question for a preliminary ruling of the Court of Justice regarding the validity of the MoU.

5.2.

In *Fidelidade Mundial* and *Via Directa*, Portuguese lower courts (*Tribunal do Trabalho do Porto e Lisboa*) failed to properly identify the EU law act (the MoU) that was being implemented by the Portuguese Parliament in the State Budget Act for 2012. The questions submitted were declared inadmissible because they referred to the compatibility of national law with the Charter. Article 267 TFEU is based in a clear separation of functions with national courts, according to which the Court of Justice solely has the power to rule on the interpretation or validity of EU law provisions on the basis of the facts which the national court puts before it,[LV] and has no jurisdiction either to apply EU law to a specific case or to decide upon the validity of a provision of domestic law in relation to EU law.[LVI]

The poor drafting of the preliminary references submitted in *Fidelidade Mundial* and *Via Directa* may be explained by the incapacity of Portuguese lower courts to decipher the soft and hard forms of law used by the *Troika* institutions during the bailout.[LVII]

In the blueprint used for the Portuguese bailout – the IMF´s programs – memoranda are documents prepared by States seeking financial support. They essentially show the political commitment that the States seeking financial assistance are willing to repay the loans granted by the Fund [Article 5 (3) of the Articles of Agreement of the IMF]. Contrary to the statement of the Portuguese Constitutional Court quoted above in section two, IMF memoranda are not binding legal documents. The breach of these memoranda by the State seeking assistance does not entail any international State responsibility.

IMF financing is based on a unilateral decision from the Executive Board of the IMF that specifies the terms and conditions of the loan:

> 'A Fund arrangement is a decision of the Executive Board by which a member is assured that it will be able to make purchases or receive disbursements from the Fund in accordance with the terms of the decision during a specified period and up to a specified amount. Fund arrangements are not international agreements and therefore language having a contractual connotation will be avoided in arrangements and in program documents.'[LVIII]

The Fund arrangement is not an approval of the memoranda submitted by the State seeking assistance. The memoranda are substantially broader that the Fund´s arrangement, and include measures that are not conditions of the loan. The distinction between the Fund arrangement and State memoranda creates a great deal of opacity because the IMF does not publically distinguish the measures that are suggested to the States to be included in the memoranda (fund-supported programs) from measures that are a condition for the financial assistance and are mentioned in the Fund´s arrangement (program-related conditions) (Siegel 2002: 581). This legal and political conundrum is frequently used by governments to approve unpopular measures with the argument that they are a condition imposed by the IMF.[LIX]

EU institutions involved in the bailouts followed the IMF *modus operandi* and identified the MoU as national law.[LX] This may explain why the MoU was not published either in Portuguese or in the EU´s official journal.

Tracing the EU origin of the austerity measures included in the State budget Act for 2012 was not a simple task for Portuguese lower courts. However, this statement does not hold true for an institution with the resources of the Court of Justice:

> 'Whilst the Court has consistently held that, in the context of the application of Article (267 TFEU), it has no jurisdiction to decide whether a national provision is compatible with (EU) law, it may, none the less, extract from the wording of the questions formulated by the national court, and having regard to the facts stated by the latter, those elements which concern the interpretation of (EU) law, for the purpose of enabling that court to resolve the legal problems before it.'[LXI]

It was a notorious fact that the *Fidelidade Mundial* and the *Via Directa* preliminary references were made after the bailout. This should have been enough for the Court of Justice to factually distinguish those cases from the preliminary reference submitted in *Sindicato dos Bancários do Norte*. Moreover, the national provision that was mentioned in the preliminary reference submitted by Portuguese courts (Article 21 of the State Budget for 2012) stated that the suspensions of the holiday and Christmas monthly pay were to be implemented '*during the period of application of the Economic and Financial Assistance Programme (PAEF).*'[LXII] Thus, it was simply not accurate to declare that '*the order for reference did not contain(ed) any specific evidence to support the view that (the national provision) was intended to implement*

EU law.'[LXIII]

Advocate General Whal opinion that the Court of Justice´s rulings on its lack of jurisdiction to review bailout instruments were prompt by a failure of individuals and national courts to explain the applicability of the Charter to national austerity measures, is much too deferential to the Court of Justice.[LXIV] The latter should have *ex officio* redrafted the questions submitted by Portuguese courts in *Fidelidade Mundial* and in *Via Directa*. Given the importance of these preliminary references – they addressed measures that seriously affected the lives of millions –, the restrictive approach to admissibility adopted in these cases conflicts with the role of the Luxembourg court as the constitutional guardian of the rule of law and fundamental rights in the EU.

5.3.

The Portuguese Constitutional Court emerged during the financial crisis as a key player in the domestic political system when it had to address the compatibility with the Constitution of legislative acts that established all sorts of austerity measures. After the decision on the State Budget for 2012 (Case 353/2012), the Court was even identified as a sort of "Don Quixote fighting the windmills of austerity" when it rejected the suspension of two months of salary allowances for public servants and pensioners based on the violation of the principle of equality (Article 13 of the Constitution).[LXV]

Such an image is completely at odds with the fact that from the outset of the crisis, the Portuguese Constitutional Court made every effort to internalise the European and international obligations of the Portuguese State. In case 396/2011 (21 September 2011) (State Budget 2011) it declared that the austerity measures were important to enforce the Growth and Stability Pact obligations. In case 353/2012 (5 July 2012) (State Budget 2012)[LXVI] and in case 187/2013 (5 April 2013) (State Budget 2013) it recognised that the memoranda signed by the Portuguese Government with international and European institutions were legally binding to the extent that they were based on international law and EU law instruments. In case 602/2013 (20 September 2013) (Labour Code) and in case 794/2013 (40-Hour work week) it went through a detailed examination on how the provisions under review were a result of a direct transposition of the MoU into national law. In case 862/2013 (19 December 2013) (Pensions convergence) it declared that the permanent cuts in pensions proposed by the government were broader than those inserted

in the original version of the MoU. Finally, in case 575/2014 (14 September 2014) (Special Sustainability Contribution) the Court considered that the objective set forth in recommendations adopted in the context of the excessive deficit procedure was binding and declared that, although Article 4 (2) TUE obliges the EU to respect the supremacy of Member States constitutions, the constitutional principles of equality, proportionality and the protection of legitimate expectations stemmed from the rule of law and '*belonged to an European common legal heritage*' that also binds the EU, thereby ignoring possible conflicts that could emerge from different balancing of those principles by national and European courts.[LXVII] In the decisions that trumped austerity measures there is always an implicit *caveat* that the national provisions that breached the Constitution were not included in the MoU. In other words, they were a direct result of a political option of the Portuguese State and, therefore, had to be reviewed according to the usual constitutional standards of adjudication.[LXVIII]

In the decision on the State Budget for 2012 (5 July 2012) (Case 353/2012), the Portuguese Constitutional Court was able to avoid addressing the constitutionality of austerity measures that stemmed directly from bailout conditionality by declaring – against all evidence – that the MoU, although binding, '*did not foresee any suspension of the holiday and Christmas monthly salary payments or of any other similar measure.*'[LXIX]

A more coherent, though to a large extent still quixotic, approach would have been to question the validity of the MoU by sending a preliminary reference to the Court of Justice – it would have been the first in the history of the Portuguese Constitutional Court.[LXX] Such a reference would immediately acquire enormous resonance and thus be politically much harder to ignore.

6. Conclusion

The MoU specified bailout conditionality included in the Council implementing decision that authorized EU financial assistance to Portugal. It also contained obligations of the Portuguese State that stemmed from the excessive deficit procedure. Being EU law, the MoU was not exempt from judicial review by the Court of Justice. The EU is a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental

rights.[LXXI]

The intervention of the Court of Justice during the bailout was also crucial to preserve some degree of intergovernmentalism in the EU. The economic and financial policies of a debtor Member State were dictated during three years by EU institutions (the ECB and the Commission) that essentially deferred to the interests of creditor Member States expressed in the decisions of an informal institution created at the margin of the EU political system (the Eurogroup). These EU institutions were also used in international financial mechanisms (first the EFSF and afterwards the ESM) that are not sufficiently accountable to the European Parliament or to national parliaments (Fischer-Lescano 2014: 39-40; López Escudero 2015: 425-428). A judicial counterweight was thus crucial to mitigate this increasing legitimacy (and democratic) deficit in European integration.

By signalling in *Ledra* that it will review the compatibility of ESM memoranda with the Charter in order to assess the fulfilment of the obligations of the Commission as the guardian of the Treaties,[LXXII] the Court of Justice took a stance that could had anticipated years before in *Fidelidade Mundial* and *Via Directa*.[LXXIII]

---

* Professor at Faculdade de Direito da Universidade Nova de Lisboa (Lisbon Nova Law School). Member of CEDIS – I & D Research Center for Law and Society. Email: fpereiracoutinho@fd.unl.pt.

I Portugal. Memorandum of Understanding on Specific Economic Policy Conditionality. Second Update – 9 December 2011, para. 1.8., i) (European Commission, 2011: 86-87).

II Portugal. Memorandum of Understanding on Specific Economic Policy Conditionality. Second Update – 9 December 2011, para. 1.8., i), footnote 15 (European Commission, 2011: 86-87).

III ECJ, Case C-264/12, *Fidelidade Mundial*, EU:C:2014:2036, and ECJ, Case C-665/13, *Via Directa*, EU:C:2014:2327. On 5 November 2013, the *Tribunal do Trabalho de Lisboa* sent another request for a preliminary ruling that challenged bailout measures. In Case C-566/13, *Jorge Ítalo Assis dos Santos*, OJ 2014/C 31/2, the Court of Justice was questioned on the compatibility with the prohibition of discrimination laid down in Articles 20 and 21 of the Charter of the suspension of the holiday and Christmas allowances of retired workers of the Portuguese central bank (*Banco de Portugal*) included in Article 77 of the State Budget for 2013 (Law 66-B/2012, of 31 December). The reference also included questions of possible interference by the Government on the central bank´s autonomy and independence (Article 130 TFEU) and on the breach of the prohibition of monetary financing of Member States by central banks (Article 123 TFEU). The case was removed from the docket of the court by an order of the President of the Court of Justice of 25 March 2014 (OJ C 31, 1. 2. 2014.).

IV ECJ, Case C-264/12, *Fidelidade Mundial,* EU:C:2014:2036, at 22, and ECJ, Case C-665/13, *Via Directa*, EU:C:2014:2327, at 16.

V ECJ, Case C-128/12, *Sindicato dos Bancários do Norte*, EU:C:2013:149, at 7.

VI ECJ, Case C-128/12, *Sindicato dos Bancários do Norte*, EU:C:2013:149, at 10-14.

VII ECJ, Case C-264/12, *Fidelidade Mundial,* EU:C:2014:2036, at 20.

VIII ECJ, Case C-264/12, *Fidelidade Mundial,* EU:C:2014:2036, at 20, and ECJ, Case C-665/13, *Via Directa*, EU:C:2014:2327, at 14.

IX ECJ, Case C-128/12, *Sindicato dos Bancários do Norte*, EU:C:2013:149, para. 12, and ECJ, Case C-665/13, *Via Directa*, EU:C:2014:2327, a 13.

X I will only marginally discuss the compatibility of the MoU with the Portuguese Constitution. Article 8 (4) of the Portuguese Constitution recognizes that the legal authority of EU law in the Portuguese legal order

must be established according to the parameters laid out by the EU legal order, but also declares that such a recognition is not unconditional, as it must comply with the fundamental principles of the democratic rule of law. In other words, the Portuguese Constitution recognizes the primacy of EU law as long as both legal systems are compatible in systemic terms. That compatibility can be found in the mutual respect of the fundamental principles of a democratic rule of law, which I will argue were breached with the adoption of the MoU. However, any constitutional review of the MoU is conditioned to a previous assessment of its validity by the Court of Justice in a preliminary reference submitted by Portuguese courts.

[XI] Statement of the Heads of State or Government of the Euro Area, p. 2, available at http://ec.europa.eu/archives/commission_2010-2014/president/news/speeches-statements/pdf/114295.pdf.

[XII] Press release of the Extraordinary Council meeting of the Economic and Financial Affairs 9596/10, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/114324.pdf.

[XIII] That reads that '*the Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.*'

[XIV] ECJ, Case C-370/01, *Pringle*, ECLI:EU:C:2012:756, at 130 and 137. Previously to this decision of the Court of Justice, several commentators questioned the conformity of the financial assistance provided by the EFSF with Article 125 TFEU (Ruffert 2011: 1785; Menendez 2012: 90-91 and footnote 42).

[XV] The Articles of Agreement of the IMF state that access to the Fund´s resources is conditioned by the presentation of '*adequate safeguards*' by the State seeking financial assistance [Article I (v) and Article V (3) (a)]. The safeguards require the drafting and implementation of a program of economic and financial reforms capable of correcting the macroeconomic imbalances that created maladjustments in the balance of payments. The program is negotiated and presented in a letter of intent addressed to the Fund´s Executive Board. In annex to that letter is usually included a memorandum that specifies the structural economic measures to be taken to correct imbalances and the key macroeconomic targets to be reached through the duration of the program. An IMF Executive Board decision named Stand-by Arrangement grants access to the Fund´s general resources during a specified period and up to a certain amount [Article XXX (b)]. That access is conditioned to the accomplishment of certain macroeconomic objectives (quantitative performance criteria) and to the adoption of structural reforms that are crucial to the fulfillment of those objectives (structural benchmarks). Both the quantitative performance criteria and the structural benchmarks are included in the memorandum attached to the letter of intent sent by the State to the Executive Board. The first disbursement of the financial assistance is available immediately after the adoption of the Stanby-arrangement. Further disbursements are conditioned on a positive review by the Executive Board of the fulfillment of the conditionality included in the Stand-by Arrangement. See *IMF Guidelines on Conditionality*, para. 9 (Denters 2006: 196).

[XVI] The By-Laws of the EFSF were published in the *Journal Officiel du Grand-Duché du Luxembourg*, 8 Juin 2010, C, 1189, p. 570026, and are available at http://www.mf.public.lu/publications/divers/efsf_memorial_080610.pdf.

[XVII] The framework-agreement is available at http://www.efsf.europa.eu/about/legal-documents/index.htm.

[XVIII] In the history of European integration episodes abound of treaties that were not ratified after parliamentary decisions (e. g. the Treaty of the European Community of Defense, adopted in 1950, and abandoned two years afterwards with the rejection of its ratification by the French Parliament) or referenda (e. g. the Treaty Establishing a Constitution for Europe, signed in 2004, but rejected in 2005 in referenda held in France and in the Netherlands).

[XIX] The exercise of these tasks was authorized by a decision of the Eurozone Member States taken within the Ecofin meeting of 9 May 2010 ('Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union', published as Note 9614/10 of the General Secretariat of the Council, p. 2, available at http://register.consilium.europa.eu/pdf/en/10/st09/st09614.pt10.pdf). Although adopted within the meeting of an EU institution, this is a decision of Member States´ representatives '*wearing their intergovernamental hats*' (De Witte 2011: 6). In other words, Member States used their *ius tractuum* to allow EU institutions to participate in the EFSF.

[xx] ECJ, Case C-370/01, *Pringle*, ECLI:EU:C:2012:756, at. 158.
[xxi] ECJ, Case C-370/01, *Pringle*, ECLI:EU:C:2012:756, at 162, and ECJ, Cases C-8/15 to C-10/95, *Ledra*, ECLI:EU:C:2016:701, at 56.
[xxii] Luxembourg common courts have also jurisdiction regarding disputes emerging from the loan agreement adopted between the Commission, the Portuguese government and the Bank of Portugal (Article 14, n.º 2, executive version of 24 and 25 May 2012, available at www.efsf.europa.eu/attachments/efsf_portugal_ffa.pdf).
[xxiii] ECJ, Case C-370/01, *Pringle*, ECLI:EU:C:2012:756, at 173-174.
[xxiv] See Article 199 (g) of the Portuguese Constitution. This provision was invoked to justify the competence of the Government to sign both the MoU and the loan agreements with the IMF, the EFSM and the EFSF (see Resolution 8/2011, published in *Diário da República*, II Série, 95, 17 May 2011). It is also mentioned in an opinion of the Portuguese Secretary of State for the Presidency of the Council of Ministers that endorses the constitutionality of both the MoU and the loan agreements (see paras. 13 e 14 of the opinion included in Annex II to the loan agreement signed between the Commission, the Portuguese Government and the Bank of Portugal; executive version of 24 and 25 May 2012, available at www.efsf.europa.eu/attachments/efsf_portugal_ffa.pdf). At least regarding the competence to adopt the loan agreements, the opinion of the Secretary of State is not in accordance with Article 161 (h) of the Constitution that requires the Government to ask for Parliament´s authorization '*to contract and grant loans and engage in other lending operations, apart from floating debt operations, laying down the general terms and conditions governing such loans and lending operations, and setting the upper limit for guarantees to be given by the Government in any given year*'.
[xxv] The Portuguese President ratifies international treaties [Article 135 (b) of the Constitution] and signs resolutions of the Parliament and from the Council of Ministers that approve international agreements [Article 134 (b) of the Constitution].
[xxvi] 'Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union', published as Note 9614/10 of the General Secretariat of the Council, p. 2, available at http://register.consilium.europa.eu/pdf/en/10/st09/st09614.pt10.pdf.
[xxvii] This provision authorizes the Council to adopt specific measures to those Member States whose currency is the Euro with the scope of: i) strengthening the coordination and surveillance of their budgetary discipline; and ii) setting out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.
[xxviii] MEMO/11/227, available at http://europa.eu/rapid/press-release_MEMO-11-227_en.htm. During the 'European Debt Crisis', the Ecofin and the Eurogroup regularly adopted joint declarations and press releases (*e. g.* Ecofin Communication 9614/10, available at http://register.consilium.europa.eu/pdf/en/10/st09614.en10.pdf). This communication technique is questionable *vis-à-vis* the principle of transparency (Article 1 of the TEU), as it joins one institution of the Union (Ecofin) and an informal political body (Eurogroup) that have members that do not coincide [the Ministers for Finance of all Member States (Ecofin) and the Ministers for Finance of Eurozone Member States (Eurogroup)] and are involved in different bailout mechanisms [EFSM (Ecofin) and the EFSF (Eurogoup)]. The Court of Justice recently declared that the Eurogroup is not among the different configurations of the Council and '*cannot be equated with a configuration of the Council or be classified as a body, office or agency of the European Union within the meaning of Article 263 TFEU*' (Joined Cases C-105/15 P to C-109/15 P, *Mallis and others*, ECLI:EU:C:2016:702, at 61).
[xxix] This decision was published in the *OJ* L 159/88 with the date of approval of 30 May, later corrected to 17 May in a corrigendum (see *OJ* L 178, p. 15). No legal consequences stem from this mistake because the Portuguese State is the sole addressee of the Decision (Article 5). According to Article 297 (2) (§3) TFEU the effects of decisions are produced upon notification of the addressee.
[xxx] The swiftness in the signature of the MoU was due to the fact that the first disbursement of the financial assistance was linked to its entry into force [Article 1 (4) Decision 344/2011/EU]. The emergency of the moment probably explains why the Council Implementing Decision is not numbered in the preamble of the MoU.
[xxxi] On 3 May 2011, a slightly modified version of the MoU was signed between the Portuguese Government and the right-wing opposition parties (PPD/PSD and CDS/PP) (English version available at http://aventadores.files.wordpresscom/2011/05/memorando_troika-en.pdf). The bailout request was made just after the resignation of the Portuguese (Socialist) Government following the Parliament´s refusal to adopt further austerity measures included in a fourth version of the Stability and Growth Pact presented to

Parliament on 23 March 2011. The commitment of the main opposition parties to the MoU was a requirement of the EU and the Eurogroup that is clearly underlined in the joint declaration of 8 April 2011, where it is stated that negotiations shall include those parties and calls for all political parties in Portugal to swiftly sign the MoU and confirm a new government in Parliament with the ability to fully adopt and implement the MoU. This declaration was made less than two months before Parliamentary elections in Portugal. Therefore, it may be regarded as an unlawful interference in the domestic affairs of the Portuguese State forbidden both by international law [Article 2 (7) of the United Nations Charter] and EU law [Article 4 (2) TUE].

[XXXII] Ecofin Press release 10231/11, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/Ecofin/122047.pdf, where it is stated that '*The EU will provide loans amounting to EUR 52 billion as part of a EUR 78 billion package of financial assistance, with EUR 26 billion respectively granted under the European Financial Stability Mechanism (EFSM) and the European Financial Stability Facility. The IMF will provide around EUR 26 billion under an Extended Fund Facility*'. This press release is just another example of the lack of transparency of bailout procedures. The Ecofin cannot act (or speak) on behalf of a mechanism of financial assistance that only includes Eurogroup Member States (the EFSF).

[XXXIII] This statement is included in the last part of footnote one of the MoU (http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf).

[XXXIV] A different path was taken in the second bailout to Greece that included financial support by the EFSF based on the conditions included in an autonomous memorandum signed on 1 March 2012 between the Commission and Greece (see http://ec.europa.eu/economy_finance/eu_borrower/mou/2012-03-01-greece-mou_en.pdf).

[XXXV] The original and updated versions of the MoUs are available at http://www.portugal.gov.pt/pt/os-mnisterios/primeiro-ministro/secretarios-de-estado/secretario-de-estado-adjunto-do-primeiro-ministro/documentos-oficiais/memorandos.aspx.

[XXXVI] Case 353/2012 (5 July 2012) (State Budget for 2012). All decisions from the Portuguese Constitutional Court are available in Portuguese at www.tribunalconstitucional.pt.

[XXXVII] See article 1 (4) of Decision 2011/344/EU. This EU-leg of the bailout was missing in some of the Member State´s bailouts during the crisis. In *Ledra*, the Court of Justice rejected the qualification as EU law of the MoU adopted in a bailout requested by Cyprus to the European Stability Mechanism (ESM) (Cases C-8/15 to C-10/95, *Ledra*, ECLI:EU:C:2016:701, at 54). The ESM was identified as an international agreement signed outside the EU legal framework (Advocate-General Whal, Cases C-8/15 to C-10/95, *Ledra*, ECLI:EU:C:2016:701, at 51).

[XXXVIII] See Council Recommendation on the National Reform Programme 2012 of Portugal and delivering a Council opinion on the Stability Programme of Portugal, 2012-2016, of 6 July 2012, 11268/12, available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011268%202012%20INIT, or Council Recommendation (COM) 566/2012, of 2 of October, 14238/12, available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2014238%202012%20INIT.

[XXXIX] ECJ, Case 322/88, *Grimaldi*, EU:C:1989:646, at 18.

[XL] ECJ, Case C-617/10, *Fransson,* EU:C:2013:280, at 21.

[XLI] ECJ, Cases C-8/15 to C-10/95, *Ledra*, ECLI:EU:C:2016:701, at 59.

[XLII] The original version of the MoU included pension cuts of around 445€ million in pensions (1.11) and savings of 195€ million in education (1.8) and 550€ million in the health-care system (1.10).

[XLIII] In the pending Case T-531/14, *Sotiropoulou*, *OJ* C 351, the CFI will decide on a claim of a breach of the principles of conferral and subsidiarity in an action for damages brought against bailout Council decisions addressed to Greece. In 2010, the CFI rejected a similar action based on the applicants´ lack of direct concern within the meaning of the fourth paragraph of Article 263 TFEU. The Court considered, however, that the applicants had the possibility of attacking national implementing measures '*before the national courts and, in the context of that dispute, arguing that the contested (EU law) acts are invalid, thus leading the national court to refer a question for a preliminary ruling to the Court of Justice*' (CFI, Case T-541/10, *ADEDY*, ECLI:EU:T:2012:626, at 87 and 90).

[XLIV] ECJ, Case C-201/08, *Plantanol*, EU:C:2009:539, at 43.

[XLV] ECJ, Case C-146/11*, AS Pimix*, ECLI:EU:C:2012:450, at 36.

[XLVI] Very appropriately, the Portuguese chose the adjective "entroikado" (a new word) as the word-of-the-year for 2012 (see http://www.portoeditora.pt/imprensa/noticia/ver/portugueses-elegem-entroikado-como-a-palavra-do-ano-2012?id=6901). It means to be '*forced to live under the conditions imposed by the Troika (team*

constituted by members of the European Commission, European Central Bank and International Monetary Fund that negotiated the financial bailout conditions in Portugal)' (Dicionário de Português|Inglês, Porto Editora, 2003-2016, available at www.infopedia.pt/dicionarios/portugues-ingles/entroikado).

[XLVII] ECJ, Case 161/06, *Skoma-Lux*, ECLI:EU:C:2007:773, at 33. Article 297 TFEU requires publication as a condition for the taking of effects by legislative or non-legislative EU legal acts, with the exception of directives and decisions that do not specify to whom they are addressed, which take effects with the notification to those to whom they are addressed.

[XLVIII] This is the expression used in the Portuguese translation made by the Portuguese government that also makes the *caveat* that in '*case of divergence between the English and Portuguese version, the English version prevails*'. The translations of the original and updated MoUs are available at http://www.portugal.gov.pt/pt/os-ministerios/primeiro-ministro/secretarios-de-estado/secretario-de-estado-adjunto-do-primeiro-ministro/documentos-oficiais/memorandos.aspx.

[XLIX] The fact that the Portuguese government and the Bank of Portugal used the English language in the letter of intent that included the MoU sent to the Commission on 13 May 2011 is irrelevant. Regarding requests for EFSM and EFSF financial support, the only version of the MoU that matters is the one signed on 17 May 2011.

[L] ECJ, Cases C-584/10 P, C-593-10 P and C-595/10 P, *Kadi*, EU:C:2013:518.

[LI] ECJ, Cases C-584/10 P, C-593-10 P and C-595/10 P, *Kadi*, EU:C:2013:518, at 66; ECJ, Case C-584/10 P, *Inuit*, P, EU:C:2013:625, at 91; ECJ, Case C-274/12 P, *Telefónica*, EU:C:2013:852, at 56; ECJ, Case C-362/14, *Schrems*, EU:C:2015:650, at 60.

[LII] ECJ, Cases C-188/10 and C-189/10, *Melki and Abdeli*, EU:C:2010:363, at 54; ECJ, Case C-533/10, *CIVAD*, EU:C:2012:347, at 40.

[LIII] ECJ, Case 314-85, *Foto-frost*, EU:C:1987:453, at 20; ECJ, Case C-344/04, *IATA*, EU:C:2006:10, at 27.

[LIV] CFI, Case T-219/95, *Marie-Thérèse Danielsson*, ECLI:EU:T:1995:219, at 77.

[LV] ECJ, Case C-30/93, *AC-ATEL*, ECLI:EU:C:1994:224, at 16; ECJ, Case C-235/95, *Dumont e Froment*, ECLI:EU:C:1998:365, at 25; ECJ, Case C-107/98, *Teckal*, ECLI:EU:C:1999:344, at 29.

[LVI] ECJ, Case 6/64, *Costa*, ECLI:EU:C:1964:66, pp. 592 and 593.

[LVII] Legal complexity is mentioned by Kilpatrick (2015: 333-342), as one of the key rule of law challenges presented by the EU bailouts in debtor States.

[LVIII] *IMF Guidelines on Conditionality*, de 25 de setembro de 2002, n.º 9 (Erik Denters 2006: 197).

[LIX] A clear example was the attempt to lower the TSU (*Taxa Social Única*) – the business contribution to social security – in the summer of 2012. The idea was discussed during the negotiation of the adjustment program. On 12 May 2011, the Portuguese Finance Minister confirmed to a Portuguese newspaper (*Público*) that it had sent a letter to the IMF in which it is declared the commitment of the Portuguese Government to reduce the TSU (http://www.publico.pt/economia/noticia/financas-garantem-que-ideia-de-reduzir-a-tsu-nunca-foi-omitida_1493848). In the MoU sent to the IMF on 17 May it is stated that '*A critical goal of our program is to boost competitiveness. This will involve a major reduction in employer's social security contributions. This measure will be fully calibrated by the time of the first review (end-July 2011, structural benchmark)*' (at 39). The issue remained dormant until 8 September 2012 when the Prime-Minister announced its intention to increase the contribution of workers to the Social Security to 18% (an increase of 7%). A few days later, when the social opposition to the announcement created a wave of massive demonstrations and many questioned whether the measure was part of the *Troika* conditionality, the IMF, though its chief of mission in Portugal, came public to declare that the changes introduced to the TSU were not included in the conditionality of the Fund´s financial assistance: '*There were several budgetary measures that were discussed to be included in the State Budget Act for 2013. The TSU was one of them. But no, it was not a condition for anything else. This was an opinion that was put on the table. We thought it was reasonable and support it*' (see http://www.publico.pt/economia/noticia/chefe-de-missao-do-fmi-simplesmente-reduzir-os-salarios-nao-vai-resultar-1562825).

[LX] In the Report by the European Institutions on the role and operations of the *Troika* (ECB, Commission and IMF) with regard to the euro area programme countries [(2013/2277(INI)], available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0149+0+DOC+XML+V0//PT], the Committee on Economic and Monetary Affairs of the European Parliament regretted '*that the (bailout Eurozone countries) programs are not bound by the Charter of Fundamental Rights of the European Union, the European Convention of Human Rights and the European Social Charter, due to the fact that they are not based on Union primary law*'. In their contributions to the European Parliament Report, both the ECB and the Commission rejected the idea that the MoU created any kind of legal obligations by declaring that '*the*

final decision on concrete measures to be taken at national level is adopted by the concerned Member States' (ECB Questionnaire response, p. 3, available at https://polcms.secure.europarl.europa.eu/cmsdata/upload/f13d8652-15b7-4945-beb7-ce52a447c7d7/att_20140114ATT77317-4182200006287211655.pdf) that have to '*ensure that its obligations regarding fundamental rights are respected*' (Commission Questionnaire response, p. 5, available at https://polcms.secure.europarl.europa.eu/cmsdata/upload/db6df1cd-bcdf-437f-aa6e-4f1aaa16f371/att_20140114ATT77315-2012338784114975647.pdf). On this topic, see Kilpatrick (2014: 394-396).

[LXI] ECJ, Case C-346/05, *Monique Chateignier*, ECLI:EU:C:2006:711, at 18. See also ECJ, Case C-17/92, *Teckal*, ECLI:EU:C:1993:172, at 8.

[LXII] ECJ, Case C-264/12, *Fidelidade Mundial*, EU:C:2014:2036, at 4, and ECJ, Case C-665/13, *Via Directa*, EU:C:2014:2327, at 4.

[LXIII] ECJ, Case C-264/12, *Fidelidade Mundial*, EU:C:2014:2036, at 19, and ECJ, Case C-665/13, *Via Directa*, EU:C:2014:2327, at 13.

[LXIV] ECJ, Cases C-8/15 to C-10/95, *Ledra*, ECLI:EU:C:2016:701, at 91.

[LXV] Joerges (2014: 44) identifies in the Portuguese Constitutional Court case law a *'signal'* of judicial opposition against the European crisis management, although it recognizes that it is a rather weak signal since the implementation of austerity measures was objected on the basis of the violation of the principle of proportionality and equality.

[LXVI] In this case, the Portuguese Constitutional Court limited the effects of the declaration of unconstitutionality of the provisions that suspended the holiday and Christmas salaries in the public sector. The Constitutional Court decision had no practical effects because the cuts were allowed to be applied until the end of the tax year (which was the temporal limit for the State Budget Act for 2012). This was the broader application ever adopted of Article 282 (4) of the Constitution. This provision allows the Constitutional Court to restrict the effects of a decision of unconstitutionality based on '*an exceptionally important public interest*'.

[LXVII] A thorough explanation in English of the most relevant decisions of the so-called "austerity case law" of the Portuguese Constitutional Court was made by Canotilho, Violante and Lanceiro (2015: 155-183).

[LXVIII] In case 353/2012 (State Budget Act for 2012), the Portuguese Constitutional Court recognized that the country was '*in a very serious economic and financial situation, in which it (was) important to achieve the public deficit objectives set out in the memoranda of understanding in order to ensure the financial solvability of the State*', but declared that the austerity program had to be applied fairly. The Court did not adopt a 'crisis law' standard of adjudication and refuse to accept the argument of the financial emergency of the State as a blank justification for austerity measures (Urbano 2014: 14-15). Instead, it went through a case-by-case analysis of each measure, accepting some (mostly transitory) and rejecting others, either because they breached the principle of equality, failed the proportionality test or did not meet legitimate expectations. This case law was praised by some commentators [the most notorious being Novais 2014], but criticized by others that accused the Court of inconsistency and of engaging in judicial activism [Almeida Ribeiro and Pereira Coutinho 2014].

[LXIX] See, however, the second update of the MoU – quoted above in Section 1 – that requires the suspension of the holiday and Christmas monthly salary payments in para. 1.8., i).

[LXX] In case 163/90 (23 May 1990), the Portuguese Constitutional Court recognized that it is bound by the duty to refer preliminary questions to the Court of Justice foreseen in Article 267 (3) TFUE. Remarkably, however, more than a quarter of Century later, the Court never had any doubts that required the preliminary intervention of the Court of Justice. Not even when in Case 141/2015 (25 February 2015) declared that the principle of equality (Article 13 of the Constitution) was breached by a provision that conditioned the grant of a social benefit to a one-year minimum legal residence in the Portuguese territory. This decision was taken with dissenting (Maria Lúcia Amaral) and even concurring opinions of judges (João Caupers) that argued that a reference for a preliminary ruling should have been made in order to solve doubts on the scope of the reasoning of the Court of Justice in Case C-333/13, *Dano,* ECLI:EU:C:2014:2358. In Case 283/81, *Cilfit*, ECLI:EU:C:1982:335, at 16, the Court of Justice introduced an exception to the duty to refer when the correct application of EU law is '*so obvious as to leave no scope for any reasonable doubt*'. The existence of doubts regarding the interpretation of EU law in concurring and dissenting opinions is enough to trigger the duty to refer of a national court '*against whose decisions there is no judicial remedy under national law*' [Article 267 (3) TFUE]. This situation differs from the Case C-160/14, *Ferreira da Silva e Brito*, EU:C:2015:565, paras. 41-42, where the Court of Justice devalued the importance of lower national courts adopting contradictory decisions on EU

law, which in itself would not preclude the apex court from finding a particular interpretation of EU law to be beyond reasonable doubt.

[LXXI] ECJ, Case C-362/14, *Schrems*, EU:C:2015:650, at 60.

[LXXII] ECJ, Cases C-8/15 to C-10/95, *Ledra*, ECLI:EU:C:2016:701, at 68.

[LXXIII] In the pending Case C-258/14, *Florescu*, the Court of Justice will have the opportunity to confirm this approach in a preliminary reference that questions the compatibility with the Charter of a memorandum signed in 2009 between the Commission and Romania within the framework of an EU bailout to a non-eurozone Member State (Article 143 TFEU).

References

- Almeida Ribeiro Gonçalo de and Pereira Coutinho Luís (eds), 2014, *O Tribunal Constituticional e a Crise: ensaios críticos*, Almedina, Coimbra.
- Barnard Catherine, 2013, 'The Charter in Time of Crisis: A Case Study of Dismissal', in Nicola Countouris and Mark Freedland (eds), Resocialising Europe in a Time of Crisis, Cambridge University Press, Cambridge, 250-277.
- Canotilho Mariana, Violante Teresa and Lanceiro Rui, 2015, 'Austerity measures under judicial scrutiny: the Portuguese constitutional case-law', *European Constitutional Law Review*, XI(1): 155-183.
- Costamagna Francesco, 2012, 'Saving Europe "Under Strict Conditionality": a threat for EU social dimension?', Working Paper-LPF no. 7, available at http://www.centroeinaudi.it.
- De Witte Bruno, 2011, 'The European Treaty Amendment for the Creation of a Financial Stability Mechanism' in SIEPS European Policy Analysis, available at http://www.eui.eu/Projects/EUDO-Institutions/Documents/SIEPS20116epa.pdf.
- Denters Erik, 2006, *International Monetary Fund (IMF)*, Kluwer, Alphen aan den Rijn.
- European Commission, 2011, 'The Economic Adjustment Programme for Portugal. Second Review – Autumn 2011' in Occasional Papers, 89, available at http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp89_en.pdf.
- Fischer-Lescano Andreas, 2014, 'Human Rights in Times of Austerity Policy - The EU institutions and the conclusion of Memoranda of Understanding', Centre of European Law and Politics (ZERP), Bremen, available at https://www.etuc.org/sites/www.etuc.org/files/press-release/files/legal_opinion_human_rights_in_times_of_austerity_policy_final.pdf.
- Joerges Christian, 2014,'Three Transformations of Europe and the Search for a Way Out of its Crisis', in Christian Joerges and Carola Glinski (eds), The European Crisis and the Transformation of Transnational Governance: authoritarian managerialism vs democratic governance, Hart, Oxford, Chapter one.
- Kilpatrick Claire, 2014, 'Are the Bailouts Immune to EU Social Challenge because They Are Not EU Law', *European Constitutional Law Review*, X(3): 393-421.
- Kilpatrick Claire, 2015, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe´s Bailouts', *Oxford Journal of Legal Studies*, XXXV(2): 325-353.
- Koukiadaki Aristea, 2014, 'Can the Austerity Measures be Challenged in Supranational Courts? The cases of Greece and Portugal', University of Manchester, Manchester, available at https://www.etuc.org/sites/www.etuc.org/files/publication/files/austerity_greeceportugal_en_3.pdf.
- López Escudero Manuel, 2015, 'La Nueva Governanza Económica de la Unión Europea: ¿Una auténtica unión económica en formación?', *Revista de Derecho Comunitario Europeo*, no. 50: 361-433.
- Martín Rodríguez Pablo, 2016, 'A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis', *European Constitutional Law Review*, XII(2): 265-293.
- Menendez Agustín José, 2012, 'La mutación constitutional de la Unión Europea', *Revista Española de Derecho Constitucional*, no. 96: 41-98.
- Miranda Jorge, 2013, 'Sobre o memorando de entendimento entre Portugal e a "Troika"', in Eduardo Paz Ferreira (ed), *Troika Ano II. Uma avaliação de 66 cidadãos*, Edições 70, Lisboa, 315-318.

- Nogueira de Brito Miguel, 2014, 'Putting Social Rights in Brackets? The Portuguese Experience with Welfare Challenges in Times of Crisis', in Claire Kilpatrick and Bruno de Witte (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights*, EUI Working Paper 2014/05, 67-77.
- Reis Novais Jorge, 2014, *Em Defesa do Tribunal Constitucional: resposta aos críticos*, Almedina, Coimbra.
- Pereira Coutinho Francisco, 2013, 'A natureza jurídica dos memorandos da "Troika"', *Themis*, no. 24/25: 147-179.
- Piçarra Nuno, 2013, 'Sobre a repartição de competência do Tribunal de Justiça da União Europeia', *Revista do Ministério Público*, no. 133: 11-74.
- Piçarra Nuno and Francisco Pereira Coutinho, 2012, 'The Europeanization of Portuguese Courts', *Silesian Journal of Legal Studies*, IV: 73-88.
- Ruffert Matthias, 2011, 'The European Debt Crisis and the European Union Law', *Common Market Law Review*, XLVIII(6): 1777-1806.
- Siegel Deborah E., 2002, 'Legal Aspects of the IMF/WTO Relationship: the fund´s articles of agreement and the WTO agreements', *American Journal of International Law*, XCV(3): 561-621.
- Tuori Kaarlo, 2012, 'The European Finantial Crisis – Constitutional Aspects and Institutions', EUI Working Papers Law no. 2012/28, 2012, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171824.
- Urbano Maria Benedita, 2014, 'A Jurisprudência da Crise no Divâ. Diagnóstico: Bipolaridade?', in Gonçalo de Almeida Ribeiro and Luís Pereira Coutinho (eds), *O Tribunal Constituticional e a Crise: ensaios críticos* ("The Constitutional Court and the Crisis: critical essays"), Almedina, Coimbra, 8-48.
- Vilhena de Freitas Lourenço, 2015, 'The Judicial Activism of the European Court of Justice', in Luís Pereira Coutinho, Massimo La Torre and Steven D. Smith (eds), *Judicial Activism: an Interdisciplinary Approach to the American and European Experiences*, Springer, Heidelberg etc., 173-180.

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

The impossible constitutional reconciliation of the BVerfG and the ECJ in the OMT case. A legal analysis of the first preliminary referral of the BVerfG

by

Francesco Pennesi*

Perspectives on Federalism, Vol. 8, issue 3, 2016

Abstract

In *Gauweiler v. ECB*, the German Constitutional Court referred for the first time a case to the European Court of Justice. The BVerfG openly doubted the legality of the OMT program of the European Central Bank, one of the most effective European instruments in counteracting the effects of the Euro-crisis. Despite the apparent willingness of the BVerfG to accept the referring decision of the ECJ, it is clear that the German judges have a different constitutional interpretation of the monetary mandate of the ECB. This article will focus on the different conceptions of European Monetary Union and in particular of the ECB proposed by the two Supreme Courts in their case-law, and will explain why the legality of the ECB's activity will be re-examined in the near future.

Key-words

ECB, OMT Program, Gauweiler, unconventional monetary measures, Eurocrisis, European Court of Justice, Constitutional Federal German Court

1. Introduction

In 2012, in a *press release,*[I] the Governing Council of the European Central Bank (hereinafter: ECB/the Bank) activated the Outright Monetary Transactions program (hereinafter: OMT). Through this the Bank promised to purchase, in the secondary market, a potentially unlimited amount of government bonds of Member States in a macroeconomic adjustment program using the financial assistance received from the European Stability Mechanism (hereinafter: ESM). The OMT was the clearest example of the new expansive and unconventional monetary policy implemented by the ECB, initiated by the pledge of the Bank's President Draghi to do "whatever it takes"[II] to save the Eurozone.

The purchasing program was justified by the necessity of reducing the excessive difference between the yields of government bonds of certain Member States (*spread*), which risked compromising the ECB's transmission mechanism of monetary policy. Indeed, according to the Bank, the bond yields of certain Member States was not completely dependent upon their economic fundamentals, but also incorporated "redenomination risk premia" (Nordvig 2015), consisting of the fear of investors about the possible breakup of the Eurozone and the abandonment of the euro by Member States in financial difficulties.

Since government bonds represent an essential instrument in regulating interest rates, their excessive volatility risked compromising the "singleness of the monetary policy"[III] implemented by the ECB, compelling the Bank to intervene.

Although the mere announcement of the program was sufficient to reduce the *spread,* and the risk of a break-up of the Eurozone, the Bundesverfassungsgericht (hereinafter: BVerfG/Federal Court) decided to refer for the first time a case to the European Court of Justice (hereinafter: ECJ), openly putting into doubt the legality of the OMT. The referral,[IV] in fact, was more a "diktat" (Mayer 2014) than an act of judiciary dialogue, since the German judges clearly deemed the OMT program illegal. According to their view, the promise to purchase Government Bonds under the normative framework created in the

press release was an act of economic policy, therefore outside the monetary mandate of the ECB, as well as a violation of the prohibition of monetary financing ex art. 123 TFEU.

The German judges decided to follow their controversial but well-established theory of the *ultra vires* and *identity* control (Schorkopf 2009, Mahlmann 2010), according to which they reserve for themselves the last word on the legality of the acts enacted by European institutions. Through these judiciary locks, the BVerfG aims to review and eventually strike as illegal every "manifest"[V] violation of the principle of conferral perpetrated by European Institutions, especially every time the latter might put the fundamental prerogatives of the German Parliament in danger.

The ECJ, deciding in plenary session on the questions referred, did not agree with the view of the BVerfG on the nature of the OMT, considering it in keeping with the monetary competences of the ECB. The European Judges also established that the legal framework enshrined in the *press release,* including a certain number of limitations, was sufficient to avoid any violation of art. 123 TFEU.

The last chapter of the *Gauweiler* case was written on 21 June 2016, when the ball was kicked back into the field of the Federal Court, which decided *obtorto collo* to back the ECJ's decision on the program. The case is important for two reasons. Firstly, because it represents another example of the "European case-law" of the BVerfG (Beck 2011), through which the German Court clarifies, and hopefully improves, its difficult relationship with the ECJ. Secondly, it sheds light on the complex role fulfilled by the ECB during the financial crisis, with the transformation of the Bank from a technocratic institution to a policy maker capable of preventing the breakup of the Eurozone with its unconventional monetary measures.

The present contribution will focus on the case law of the two supreme courts in respect of European Monetary Union, and in particular the action of the ECB. In the first section, it will analyze the first preliminary referral of the BVerfG, contextualizing this decision within the famous European jurisprudence of the Federal Court.

In the second, a similar assessment will be provided for the *Gauweiler* judgement of the ECJ, which must be read in conjunction with the *Pringle* case. In the last section, the final decision of the BVerfG will be taken into consideration to demonstrate that irreconcilable interpretations of the extension of the monetary mandate of the ECB are destined to resurface again in the future.

2. The monetary mandate of the ECB according to the BVerfG

As is well known, the treaties lay down a clear distinction between the economic and monetary pillars of European Economic Governance, with Member States' sovereignty in fiscal and economic policies coupled with the exclusive competence of the ECB in the monetary field.

The BVerfG's judgment strongly implied that the OMT program was an act of economic policy, therefore outside the monetary mandate of the ECB, because of 1) its objective , 2) the selectivity of the potential purchases and 3) the parallelism with the ESM and the risk to compromise the functioning of the latter.

For point 1), in the *Pringle*[VI]case, the ECJ had stressed that the institution of the ESM, created for the financial assistance of Member States in economic distress, was an act of economic policy outside the exclusive monetary mandate of the ECB. The Bank, pursuing the same objective of the ESM with the OMT program, would have promised to perform an act which only Member states have the competence to implement .

At point 2) the German judges also stated that the monetary policies of the ECB cannot have a selective approach, or be differentiated according to the economic situation of single Member States. Differences in the yield of government bonds are entirely due to the economic fundamentals of issuing States, and the ECB must accept that in an open market economy there will always be differences in yields based on market assessments.[VII]

Finally, in point 3), the judges stated that the purchases of government bonds implemented by the ECB may compromise the activity of the ESM. The latter is, indeed, provided with limited resources specifically conferred by Member States. The ECB, on the other hand, can issue an unlimited amount of money and therefore it could easily multiply the expenditure envisaged in the aid measure of the ESM. Furthermore, Member States under an adjustment program of the ESM would have no reason to follow the agreement reached with the latter, since they could still count on the better financial assistance provided by the ECB.[VIII]

The BVerfG therefore proposed a particularly intense judicial review of the activity of the ECB; and the German judges were not afraid of analysing the motivation provided by the ECB for the program ("the safeguard of the monetary transmission mechanism") and,

supported by the technical advice of the Bundesbank, considering it "meaningless". The Court did not accept the analysis formulated by the ECB according to which the *spread* of certain Member States would be the result of the "redenomination risk", namely the fear of the markets for a possible breakup of the Eurozone. In the blunt analysis of the financial situation endorsed by the BVerfG, "*spreads* always only result from market participants' expectations and are, regardless of their rationality, essential for market-based pricing".[IX] Trying to level the yields of different government bonds through the OMTs would amount to an illegal intervention in an open-market based economy, which is supposed to self-regulate.

Taking the above into consideration, it is now important to examine why the BVerfG, despite the dissenting opinions of the two most senior judges,[X] decided to refer a question not only capable of exacerbating the already difficult relationship with the ECJ, but also of compromising the effectiveness of the most effective instrument of financial stabilization in the Eurozone's toolkit.

A brief digression is paramount in understanding why the German Court sees, in the new expansionary measures of the ECB, a departure from the Treaties. The legal framework created at Maastricht to bring discipline to the euro was based on a strong "stability paradigm" (Tuori 2012, Borger 2016). In particular, Germany accepted giving up its strong and stable Deutsche Mark only on condition that the new European Economic Governance was a constitutionalized "Community of stability" (*Stabilitätsgemeinschaft*: Tuori 2012, Saitto 2015).

The characteristics of this Community are well known; the euro was put under the protection of an independent central bank, whose exclusive objective was to safeguard price stability (art. 127.1 TFEU). National governments, on the other hand, still retained responsibility for their budgets, and were put under the legal obligation to avoid fiscal profligacy, since excessive deficits may have spill-over effects on price stability. The budgetary freedom of national parliaments was legally constrained through a precise set-up of prohibitions (art. 123-125 TFEU), established in order to subject their economies to the control of financial markets.

The entire system was based on the conviction that Constitutional Law might effectively dictate the course of action of monetary and economic actors. Under this new

constitutional framework, the ECB was supposed to pursue price stability exclusively, while expansionary monetary policies were not only considered ineffective, but also illegal under the prohibition of monetary financing.[XI]

The BVerfG promised to control the future compatibility of the monetary activity of the ECB with the principle of stability in the*Maastricht Urteil,*[XII]where the transfer of functions and powers of the Bundesbank to the ECB was considered compatible with the Basic Law only because the latter was constitutionally committed to the "stability paradigm" of prices and budgets (Tuori 2012, Saitto 2015). In particular, the institution of an independent European Central Bank was acceptable because it was "inspired by Germany's stability philosophy and only as long as this stability pact was actually respected" (Joerges 2014a).

It is easy to see in this referral a follow-up to the *Maastricht Urteil.* In order to counteract the effects of the sovereign debt crisis, the ECB decided to adopt expansionary, unconventional measures, which are incompatible with the original, stability-driven philosophy enshrined in the Maastricht economic rules.

It also constitutes further evidence of the "methodological nationalism" (Joerges 2014,b) continuously exercised by the BVerfG in its "European case-law". The German Court has a distinctive inward-looking mentality (Weiler 2009), according to which the German culture of stability must be imposed at any cost within the German legal system, disregarding any potential spill-over effect on the European one.

During the euro-crisis, in a contested record of decisions,[XIII] the Court defended the budgetary powers of the *Bundestag,* which was always to remain "the place in which autonomous decisions on revenue and expenditure are made, even with regard to international and European commitments."[XIV] Any capital disbursement in bilateral loans to Greece before the crisis, and in rescue mechanisms later, was legitimate only as long as the *Bundestag* was "adequately informed, enabled to deliberate, and prevented from delegating its evaluation" (Everson & Joerges 2013).

But ultimately, the empowerment of the *Bundestag* was also the *judicial empowerment*[XV] of the BVerfG itself. Evaluating the compatibility of European rescue measures with the budgetary powers of the German Parliament was the easiest way for German judges to directly control the process of European integration.

This operation was successful, since the final result of this judicial activism, carried out in the name of democracy (Wendel 2013), was economic governance where the Bundestag could effectively control its own expenditure, while the national parliaments of Member States financially rescued by the Union have lost any control on their own, forced to operate in "zero-choice democracies" (Heplas 2014).

The German judges were not satisfied when they discovered that the ECB was also capable of putting in place rescue mechanisms capable of circumventing the budgetary control of the *Bundestag,* thus outside their direct judicial control (SMP, OMT, QE programmes). The ECB, provided with its own budget, does not require any transfer of resources from the German Parliament, rendering a possible control from the BVerfG theoretically impossible. This led to the decision to carry out a further judicial empowerment, this time in favour of the Bundesbank.

The Bundesbank, despite the obligation to follow the directives of the European System of Central Banks,[XVI] openly opposed[XVII] the decision of the ECB to resort to unconventional monetary measures, considered incompatible with its monetary mandate. This "monetary controversy", that should have remained within the Governing Council of the ECB, suddenly become a constitutional clash of continental proportions when the Federal Court empowered the *Bundesbank* with a "permanent responsibility for integration" (*Integrationsverantwortung*). This comprised the power to prohibit the implementation of EU acts, including the OMT, in cases where the BVerfG found them incompatible with the Basic Law. It is certainly true that the Federal Court also created *motu proprio,*[XVIII]a positive obligation for the Bundestag and the German Government to *actively* deal with manifest transgressions of power produced by EU Institutions (Wendel 2014). However, the entire referral revolves around the Bundesbank, and without the participation of the most important central bank of the continent, the bond-purchasing programme would lose its credibility.

Once again, the judicial empowerment of a German Constitutional actor constituted an opportunity to uphold the German philosophy of stability, this time directly *vis-à-vis* the ECJ, in order to defend the preservation of the *Stabilitätsgemeinschaft.*[XIX]

3. … and according to the ECJ …

The *Pringle* case was also at the basis of the ECJ's analysis,[XX] although paradoxically the European judges used it to oppose the BVerfG's arguments rather than confirm them.

According to the *Pringle* judgment, in order to establish whether an act has a monetary or economic nature is necessary to refer principally to the objectives of the measure and the instruments chosen to attain them.[XXI] Therefore, if we are to apply this case-law to the OMT Program, we may say that the latter seeks to ensure an "appropriate monetary transmission and the singleness of the monetary policy" (objectives) through the purchase of government bonds in the secondary market (implementing instruments).[XXII]

The ECJ states that the monetary policy of the ECB, in order to function properly, must be "single"; therefore, the objective of ensuring an "appropriate monetary transmission" must be considered an objective consistent with the monetary mandate of the ECB.

The European judges also maintain that the Treaties expressly envisage the possibility for the ECB to purchase market instruments in the secondary market, including government bonds (art. 18, ESCB statute), and thus the instrument chosen is also in line with the objectives sought.[XXIII]

The ECJ clearly establishes judicial control centered on an analysis of the objectives pursued which is very different from the one proposed by the BVerfG. The European Court, for instance, accepts without further analysis the objectives announced by the ECB in its press release ("the singleness of the monetary policy") as well as the technical analysis underlying the monetary situation of the Eurozone. While the BVerfG is ready to enter in the substance of the ECB's decisions without taking into consideration the risks involved in such a strong judicial review, the ECJ exercises the widest possible degree of judicial restraint, promising to limit its control only to an eventual (and unlikely) "manifest error of assessment."[XXIV]

Alongside the formal control on the objectives announced by the ECB, the ECJ has also promised to verify the compatibility of the bank's action with the principle of proportionality. But here again, the European Judges confirm that, in reviewing the monetary decisions of the ECB, they need to leave the Governing Council with an

important margin of appreciation; and the more complex the technical features involved in the monetary assessment are, the broader will be the discretion enjoyed by the bank:

> "As regards judicial review of compliance with those conditions, since the ESCB is required when it prepares and implements an open market operations programme of the kind announced in the press release, to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion."[XXV]

The ECJ, further on in its judgment, correctly points out that the mere announcement of the OMT program was sufficient to attain the objective sought, namely the restoration of the monetary transmission mechanism, and therefore the ECB never purchased any government bond under the legal framework established in the *press release*. According to the Court, the total lack of implementation is a clear evidence of the proportionality between the objectives and the instruments used by the ECB.[XXVI]

The decision of the European judges to leave to the Governing Council a broad margin of discretion is also evident in the motivations, generic and almost tautological, used by the Court to dismiss the most important arguments made by the BVerfG.

Firstly, in the view of the ECJ, the fact that the purchases could indirectly support the financial stability of the Eurozone does not make the OMT program incompatible, in any way, with the monetary mandate of the ECB. The Bank has the competence to purchase government bonds in the secondary market (art. 18, ESCB statute) when in its assessment the singleness of its monetary policy is at risk (1).[XXVII]While the BVerfG considers every overlapping effect between monetary and economic policies as an evidence of the violation of the ECB's competences, the ECJ considers it normal given the tight relationship between the two fields.

Secondly, the ECJ states that the treaties do not prohibit the ECB's implementation of monetary policy characterized by selectivity. Although conventional monetary measures are usually directed at the Eurozone as a whole, this does not mean that the bank cannot carry on a program whose effects are directed at selected Member States (2).[XXVIII]

Thirdly, the issue of parallelism with the ESM is resolved by the ECJ once again empowering the ECB with the discretion to take the right monetary decisions according to its technical expertise. The ECJ's judges point out that the involvement of the ESM

constitutes a necessary but not sufficient requisite in the activation of the OMT program. The Directive Council, therefore, will financially support the targeted Member States only as long as the purchases will be necessary to restore the singleness of the ECB's monetary policy. They will also be suspended (always at the ECB discretion!) in case the Member State assisted does not respect the macroeconomic adjustment program stipulated with the ESM (3).[XXIX]

The current scholarship mostly seems to make a positive assessment of the light degree of judicial review applied by the ECJ to the monetary activity of the Bank (Pisaneschi 2016); the judgment has been considered a positive step towards developing legal accountability while respecting the technical expertise and discretion of the Bank (Hofmann 2015). According to this view, a more substantial judicial review would have forced lawyers to take monetary decisions, replacing the technical assessments of central bankers (Pisaneschi 2016, Bast 2014).

Even if a robust dose of judicial self-restraint is necessary when discretionary acts are involved, the judgment seems difficult to reconcile with the historical position of the Court, according to which no European Institution can escape judicial scrutiny.[XXX]

Indeed, the judicial review established by the ECJ of the monetary activity of the Bank is at best residual. Although it is certainly true that during financial crises central banks encounter difficulties in producing uniform monetary effects in the whole area of their competence, it is clear that the "singleness of the monetary policy" is a too broad an objective on which to base a proper judicial review.

Within the Eurozone there will always be differences in the yield of government bonds of different Member States, and such *spread* will always constitute an obstacle to the singleness of the monetary policy of the ECB. As long as the ECJ accepts the objective formally announced by the ECB without engaging in further analysis, also empowering the bank with a broad margin of discretion in the implementation, the judicial review of the bank's activity will always be nothing more than a necessary formalism.

In addition to the light form of judicial review applied, it is also relevant to stress another element of this judgment, namely the absence of any constitutional analysis on the role of the ECB. The ECJ's decision to refrain from broadening the spectrum of its judicial analysis was probably a necessary choice in order to defuel the potentially explosive nature of the referral and avoid an open conflict with the Federal Court. It is possible to see a

similar, recalcitrant attitude in the *Pringle case,*[XXXI] where the decision to legitimize the financial rescue of Member States despite the apparent literal incompatibility with the no-bail out clause constituted a silent "constitutional mutation" (Tuori & Tuori, 2014).

Compared to the European case-law of the BVerfG, finding a common narrative in the ECJ's *Pringle* and *Gauweiler* decisions is more difficult.

According to Ioannidis, the two judgments had a similar impact on European integration to older milestone cases such as *Van Gend en Loos* and *Costa v. Enel,* providing a constitutional shift from "the Maastricht-born, market-based paradigm to that of cross-border transfers and financial assistance" (Ioannidis 2016). Following this theory, the Court, disregarding the textual meaning of the provisions under examination, would have provided a judicially-driven modification of the constitutional charters whose effects would be comparable with a process of treaty revision.

The major result of this transformation would be the abandonment of the "Maastricht price stability paradigm", which had previously constrained the action of the ECB; but if price stability were no longer at center stage, with what principle has it been replaced?

Some may say solidarity,[XXXII] where, in particular, the purchase of government bonds by the ECB would constitute an example of a Union willing to lend a hand to Member States in financial distress (SMP, OMT and QE Programs). Unfortunately, the strict conditionality attached to these monetary operations, similar and even more controversial than those implemented by Member States,[XXXIII]seems to put into doubt the narrative of a Union based on solidarity.

At the center of new Economic Governance, and in particular of the action of the ECB, seems to be financial stability[XXXIV] (Beukers 2014, Tuori & Tuori 2015). The OMT program, transforming the Bank into a lender of last resort,[XXXV]willing to help national governments to refinance themselves despite the contrary opinion of the financial markets, would be the clearest example of this constitutional transformation.

4. The last chapter of the OMT saga

After the referral, the BVerfG had to decide whether follow the ECJ's position on the legality of the program or confirm the incompetence of the ECB regarding the OMT; the answer arrived on 21 June 2016.[XXXVI]

The choice of the Federal Court confirmed its reputation of a supreme court which "barks, but never bites" (Weiler 2009), accepting the ECJ's ruling according to which the OMT Program would be perfectly compatible with EU Primary Law. In particular, the BVerfG declared inadmissible the questions directly concerning the ECB press release, whilst the questions regarding the omission perpetrated by the Bundestag, the German Government and the Bundesbank were deemed admissible, but unfounded.

The Federal Court strongly criticized the reasoning of the ECJ, but *obtorto collo* decided to accept its jurisdiction on the ECB's action. According to the Federal Court, indeed, the judicial control promised by the ECJ would be insufficient to preserve the principle of conferral (art. 5 TEU). Taking the objectives declared by the ECB for granted without further analysis would be a *de facto* authorization to the bank to self-determine its own competence.[XXXVII]

The BVerfG also criticized the decision of the ECJ to accept the objective of the restoration of the monetary mechanism, considered by the Federal Court as a justification of convenience for the action of the Bank.[XXXVIII] In addition, the BVerfG gave its comment on the constitutional role of the ECB, reaffirming its *status* of institution *sui generis*, which constitutes an exception to the fundamental democratic principle protected by the German Constitution.[XXXIX]

According to the BVerfG, the independence of the ECB constitutes an exception to the fundamental principle of democracy, established in the German Constitution (art. 38 and 20 of the *Grundgesetz*). Nevertheless, such an exception is justified because an independent central bank represents the best possible instrument to attain price stability.

The democratic principle, according to which every political decision must derive from the *demos,* represented in Germany by the Bundestag, can be derogated only "as long as" the ECB pursues exclusively the stability of prices. However, the justification underlying the "suspension" of such a principle is no longer considered feasible when the ECB adopts unconventional monetary programs such as the OMT, capable of producing relevant effects on the public budgets of Member States.

As already stated in the order of referral, the judges could not accept that the ECJ empowers so much competence to an institution acting outside the democratic arena, pleading for a stricter judicial review on the monetary activity of the Bank.

After the *pars destruens,* which actually does not present any new element in the analysis

of the monetary mandate of the ECB, the BVerfG explained, in its *pars costruens*, why it decided to establish the legality of the OMT program.

The BVerfG resorted to a judicial technique already used in its complicated relationship with the ECJ,[XL] establishing that the OMT program was compatible with the German constitution "as long as" the program were implemented in adherence to the conditions laid down by the ECJ in its ruling.

The Federal Court has upheld on many occasions such requisites, as if the ECJ had substantially limited the possibility of the ECB to purchase government bonds; although it is quite clear that the ECJ did not establish any concrete limitations, thus giving the ECB the widest possible discretion in the implementation of the OMT program.

The BVerfG emphasized the obligation of the ECB to give a proper motivation for its acts,[XLI] a requisite that, according to the Federal Court, would lead to a stricter judicial review in the implementation of the program. The inconsistency of this reasoning is clear, since the Federal Court first laments the unconditional acceptance of the objective declared by the ECB, then expects a different result from the motivation attached to the implementing acts of the bank. It is, however, evident that if it were necessary to proceed with bond purchasing, the Directive Council would always resort to the objective already accepted by the ECJ, claiming that the singleness of the monetary policy is at risk. This broad and non-judiciable motivation may help the judicial review of the BVerfG, but not the one promoted by the ECJ.

Furthermore, the BVerfG claims with great satisfaction that the ECJ's ruling would have eliminated the most controversial element of the program, namely the possibility of purchasing an unlimited amount of government bonds. According to the Federal judges, indeed, the ECJ would have expressly limited the volume of bonds purchasable. This claim does not seem in keeping with the ruling of the ECJ either, for while it has clearly established that the ECB can only purchase the volume of bonds necessary to attain the objective pursued ("singleness of monetary policy"), it has also left this necessity-test at the discretion of the bank. The responsibility to check whether the objective has been attained, or not, will lie in the hands of the ECB.

Reading this decision it is clear that the BVerfG still considers the OMT program as illegal, but the German judges once again lacked the courage to use their controversial case-law to nullify an EU act and openly defy the ECJ.[XLII] This lack of determination might

ultimately be beneficial to the Union, since it is unclear what effects a different decision could have been produced on the financial stability of the Eurozone.

Unfortunately, though, the decision of the German judges does not appear to be the result of a sincere preoccupation over the future of the Eurozone, but rather seems a natural consequence of the lack of juridical jurisdiction.

Although in fact the BVerfG has judicially created a complex system to evaluate the legality of EU secondary law,[XLIII] it does not have any jurisdiction over EU institutions; the BVerfG has jurisdiction only over German national institutions, such as the Bundestag and the German Government.

The problem of the BVerfG is that these institutional actors do not in turn have any power over the ECB, and therefore the Federal Court does not have any instrument to strike down the monetary behavior of the bank as illegal. The BVerfG mentions the Luxembourg compromise,[XLIV] but it is impossible to understand how this instrument could prevent the implementation of the OMT program. The ECB is completely independent from political actors, including the European Council, and it has a legal obligation to disregard any instruction received from European and National institutions.[XLV]

In addition, the impositions established by the BVerfG over the Bundestag are incompatible with the independence of the ECB. In particular, it is impossible to understand what role the principle of subsidiarity would fulfill, which cannot be applied in monetary policies where the competence of the EU is exclusive, or the obligation to adopt political resolutions or parliamentary interrogations. The only obligation for accountability of the ECB is the "monetary dialogue" towards the European Parliament.[XLVI] The Bank does not have any formal obligation to account to the German Parliament for its activity. In addition, even the strongest and most controversial political resolution from the Bundestag would have zero effects on the monetary activity of the ECB.

The only feasible option for the BVerfG was to empower the Bundesbank with a "responsibility for integration", namely the responsibility to actively prevent any manifest transgression of competences by the ECB. As stated before, such responsibility was actually a judicially created excuse to influence the process of European integration, rendering the participation of the Bundesbank in the OMT program conditional to the respect of the "stability philosophy" of the *Maastricht Urteil*.

Nevertheless, such empowerment failed for two reasons. Firstly, a judicial decision of

the BVerfG, which prohibited the Bundesbank from taking part in the bond-purchasing operations, would be illegal, since national central banks are under the legal obligation of implementing the decisions and guidelines established by the Directive Council of the ECB.[XLVII] And, secondly, although the credibility of the program would be compromised by such a decision, the ECB could still implement the purchases without the participation of the Bundesbank (Zilioli 2016). [XLVIII]

Preliminary rulings should be an instrument to ensure the uniform interpretation of EU Law, not an excuse for supreme courts to fight over constitutional interpretation of the Treaties. Unfortunately, contraposition becomes inevitable when there are irreconcilable differences in the interpretation of the constitutional mandate of an Institution that, like it or not, has become the main institutional actor of the European politics in economic and monetary policies (Peroni 2013).[XLIX] These differences did not disappear during the referral; and probably even worsened, since the German judges decided not only to interpret the treaty provisions, but also the ECJ ruling according to their domestic constitutional view of the ECB.

We can only explain the strong opposition of the BVerfG to the OMT program by taking in consideration the constitutional transformation of the ECB. The Bank, in the first ten years of its activity, was faithful to the "stability philosophy" of the Maastricht Treaty as interpreted in the *Maastricht Urtail.* In particular, it pursued the primary objective of price stability exclusively, while the mere possibility of adopting Keynesian-inspired expansionary monetary policies was considered both illegal and political unfeasible (Howarth & Loedel 2003). During the crisis, on the other hand, the Bank found itself in a constitutional dilemma of unprecedented complexity: how to ensure the survival of the currency, which it was called on to protect, without violating its constitutional mandate, which prevented it, at least textually, from the pursuit of the objective of financial stability. This is a classic "Catch-22" situation: not saving the common currency would have entailed the end of the European project, while saving it would have broken the constitutional pact at the origin of the EMU.

Unsurprisingly, the Bank decided to put the economy before the law. With a series of monetary operations, it supplied liquidity for the banking market, becoming the lender of last resort for banks in financial distress (Steinbach 2016). Furthermore, with the OMT program, it promised to purchase an unlimited amount of government bonds, becoming

the lender of last resort for national governments (De Grauwe 2014).

It is easy to see the dichotomy between the ECB before the crisis, whose actions were exclusively based on price stability, and the ECB after the crisis, focused on financial stability.

As long as the BVerfG does not accept the constitutional mutation of the Bank and the abandonment of the "stability philosophy" of the *Maastricht Urteil,* there will always be constitutional clashes between the German and the European Court.

It is likely that this broad divergence in the interpretation of the monetary mandate of the bank will reappear in the near future, since another expansive and unconventional monetary program of the ECB, the c.d. *Quantitative Easing,*[L] has also been challenged before the BVerfG.

Are supreme courts the best actors to limit the increasing power and decision-making of the ECB? The overwhelming role fulfilled by the bank during the on-going crisis has raised concern among scholars and politicians alike. The Bank has even been considered as the "heir of the ECJ"[LI] in promoting European integration at the expense of more democratic actors.

Although these concerns are well founded, it is necessary to take into consideration two elements. Firstly, the ECB has undoubtedly taken the driving seat in counteracting the effects of the euro-crisis, but its monetary behavior does not seem to present any element of originality if compared to the monetary policies of other major central banks; as the Fed, the Bank of England and the Bank of Japan have also implemented massive acquisitions of government bonds. Through the lens of comparative analysis, the monetary activity of the ECB does not seem so "unconventional" anymore.

Secondly, these analyses focus their attention on the technocratic nature of the monetary mandate of the ECB, without considering the *federal* one. The ECB, whose decision-making processes and executive role require the involvement of national central banks, is the only genuinely *federal* institution in European Economic Governance. If it is true that systemic crises require a common response by the Union, then the ECB was the only Institution correctly equipped to act.

The mismatch between monetary policy, firmly in the hands of President Draghi, and the economic pillar, still scattered and divided among Member States, is an issue that only a modification of the treaties can solve. The judicial dialogue among supreme courts does

not seem to be the right arena for this kind of challenge.

---

*LLM candidate in European Law at the University of Leiden. Research Member of the CDE (European Documentation Center) at the University of Macerata. Email: francesco.pennesi@alice.it.

[I] ECB, *Technical features of the Outright Monetary Transactions,* Press Release, 6 September 2012.

[II] Draghi Mario, speech at the Global Investment Conference in London, 26 July 2012.

[III] Draghi Mario, *La politica monetaria della Banca Centrale Europea e la sua transmissione nell'area euro. I mercati finanziari e le disfunzioni causate alla transmissione della politica monetaria,* inaugural speech of the academic year 2012/2013, Bocconi University, Milan.

[IV] BVerfG, 2 BvR 2728/13, 14 January 2014.

[V] BvfrG, 2661/06, 6 July 2010 (Honeywell Decision).

[VI] ECJ, Case C-370/12, *Thomas Pringle v. Government of Ireland*, 2012.

[VII] BVerfG, 2 BvR 2728/13, 14 January 2014, paragraph 73.

[VIII] *Ibidem,* paragraph 74.

[IX] *Ibidem,* paragraph. 98 (emphasis not present in the original source).

[X] Cfr the dissenting opinions of Judges Gerhardt and Lűbbe-Wolff.

[XI] Cfr Howarth & Loedel 2003, analysing the first ten years of activity of the ECB: "In other words, there can be no short term tradeoffs between a little bit more inflation for a little less unemployment. Keynesian-inspired macroeconomic policy finds little if no supports among the ECB's executive board and, in large part, the national central bank governors".

[XII] BVerfG, 2134/92, 12 October 1993 (Maastricht Urteil).

[XIII] Cfr BVerfG, BvE 4/11, 19 June 2012 (concerning Germany's commitments in EU financial rescues measures), BVerfG, BvR 987/10, BvR 1485/10 – 2 BvR 1099/10, 7 September 2011 (concerning financial aid for Greece), BVerfG, 2 BvR 1390/12 (concerning the fiscal compact), BVerfG, 2 BvR 1390/12, 12 September 2012 (concerning the ESM).

[XIV] BVerfG, 2 BvR 987/10 - 2 BvR 1099/10, 7 September 2011, par. 124.

[XV] The notion was borrowed from the seminal work of Weiler 1991, although it was used in a completely different context.

[XVI] Cfr art. 12 of the ESCB Statute.

[XVII] Weber, the President of the Bundesbank, resigned openly criticizing the new course of the ECB. Weidmann, the current President, openly advocated the illegality of the bond-purchasing programs of the ECB, even pleading in front of the BVerfG against the OMT: "secondary markets purchases in my understanding should, however, not aim at reducing the solvency risk premiums of specific States. For that would risk among other things to knock out the disciplining role of market rates and undermine individual responsibility for financial policy." Translation provided by Borger 2016. See also Wagstyl 2016.

[XVIII] The analysis of the procedural requirements to challenge an EU act deemed *ultra vires* before the BVerfG clearly lies outside the scope of this contribution. An explanation concerning the loosening of the national criteria to challenge EU acts before the German Constitutional Court to the extreme, creating a semi-*actio popularis,* can be found in Garditz 2014.

[XIX] The author is aware of the possible risk of over semplification of the complex doctrine of the *ultra vires* and constitutional review of the BVerfG. Nevertheless, it is difficult to not see in this doctrine (and especially in this referral) the attempt of the BVerfG to control the process of European Integration.

[XX] ECJ, Case C-62/14, *Gauweiler v. European Central Bank*, 2014.

[XXI] *Ibidem* paragraph. 46.

[XXII] *Ibidem* paragraph 47.

[XXIII] *Ibidem* paragraph 54.

[XXIV] *Ibidem* paragraph 74.

[XXV] *Ibidem* paragraph 68.

[XXVI] *Ibidem* paragraph 79.

[XXVII] *Ibidem* paragraph 64.

[XXVIII] *Ibidem* paragraph 89.

[XXIX] *Ibidem* paragraph 112.

[XXX] ECJ, Case 294/83, *Les Verts* v *European Parliament,* 1983.

[XXXI] Cfr Joerges 2014a, who writes: "Nowhere in the Pringle judgment does one find an explanation as to the conceptual or a means-end rationality of the new modes of European Governance. The law delegates such

matters to politics without caring about the democratic legitimacy of political decision-making".
[XXXII] For a legal analysis of solidarity in the euro-crisis see Borger 2013a.
[XXXIII] The ECB has always attached to its rescue monetary measures a strict conditionality, using its unconventional policies to pressure member states in financial distress towards acceptance of structural reforms. For an analysis of the first, implicit conditionality see Beukers 2013. For a study of the second, explicit conditionality expressly attached to the OMT and the QE programs, see Viterbo 2016.
[XXXIV] Defining such broad and complex interdisciplinary principle is an herculean task which will not be attempted here. For the difficulties of defining the exact characteristics of financial stability see Borger 2013b.
[XXXV] For an economic explanation of the role and importance of the lender of last resort in a currency area see De Grauwe 2013. For a legal analysis, see Steinbach 2013, and De Grauwe Paul, Yuemei and Steinbach 2016.
[XXXVI] BVerfG, 2 BvR 2728/13, 21 June 2016
[XXXVII] *Ibidem* paragraph 177.
[XXXVIII] *Ibidem* paragraph 177.
[XXXIX] *Ibidem* paragraph 188.
[XL] The formula "yes, but" was firstly used in the Solange I and II case, the first constitutional clash between the BVerfG and the ECJ. For further analysis, see Martinico and Pollicino 2012.
[XLI] *Ibidem* paragraph 195.
[XLII] Cfr Pace 2016.
[XLIII] Cfr endnote n. XVIII.
[XLIV] *Ibidem* paragraph 171.
[XLV] Cfr art. 130 TFEU.
[XLVI] Cfr art. 284 (4) TFEU.
[XLVII] Cfr art. 14 (3) of the Statute of the ESCB and ECB. Cfr Baroncelli 2016. "The German Central Bank is a member of the Governing Council of the ECB, and it is not only independent from the electorate by definition (in particular from the German Parliament), but it is also an integral part of the ESCB and should act in accordance with the guidelines and instructions of the ECB. It is true that the Bundesbank voted the adoption of the OMT programme within the Governing Council, but once a measure has been adopted on the basis of a majority, the rule of law should apply".
[XLVIII] Cfr Zilioli 2016: "Indeed, in accordance with Article 12(1) of the Statute of the ESCB and the ECB, Eurosystem operations are carried out in a decentralized way, subject to the assessment by the Governing Council of the possibility and appropriateness of decentralization. Part of this assessment concerns the modalities of decentralization: it is not always necessary, nor efficient, to have all NCBs participating in all Eurosystem operations. This is why, for example, in the running of the platforms of Target2 and T2S, in the production of the various cuts of banknotes, in the management of the foreign reserves of the ECB, some NCBs, and not all, carry out these operations on behalf of the whole Eurosystem."
[XLIX] Cfr Peroni 2013, according to which the ECB would have become during the crisis "the new central hub of economic policies".
[L] Decision ECB/2015/10 of 4 March 2015 on a secondary markets public sector asset purchase programme, [2015] OJ L 121/20.
[LI] Scicluna 2013.

References

- Baroncelli Stefania, 2000, *La Banca Centrale Europea: profili giuridici ed istituzionali. Un confronto con il modello americano della Federal Reserve*, European Press Academic Publishing, Fucecchio.
- Baroncelli Stefania, 2016, 'The Gauweiler judgment in view of the case law of the European Court of Justice on European Central Bank Independence. Between Substance and Form', *Maastricht Journal of European and Comparative Law*, XXIII(1): 79-98.
- Beck Gunnar, 2011, 'The German Constitutional Court versus the EU, self assertion in theory and submission in practice- Euro aid and Financial Guarantees. Part. 1, 2, 3', at http://eutopialaw.com.

- Beukers Thomas, 2013, 'The new ECB and its relationship with the Eurozone Member States: between central bank independence and central bank intervention', *Common Market Law Review*, L(6): 1579-1620.
- Borger Vestert, 2013a, 'How the debt crisis exposes the development of solidarity in the Euro Area', *European Constitutional Law Review*, IX(1): 7-36.
- Borger Vestert, 2013b, 'The ESM and the European Court's predicament in Pringle', *German Law Journal*, XIV(1): 113-140.
- Borger Vestert, 2016, 'Outright Monetary Transactions and the stability mandate of the ECB: Gauweiler', *Common Market Law Review*, LIII(1): 139–196.
- Contaldi Gianluca, 2014, 'Politica economica e monetaria (diritto dell'Unione Europea)', in *Enciclopedia del diritto, Annali*.
- De Grauwe Paul, 2011, 'The Governance of a Fragile Eurozone, Economic Policy', CEPS Working Documents, May, 2011.
- De Grauwe Paul, 2013, Design Failures in the Eurozone: Can they be fixed?', Leqs Paper no. 57/2013
- De Grauwe Paul, Ji Yuemei and Steinbach Paul, 2016, 'The EU debt crisis: Testing and revisiting conventional legal doctrine', LEQS Paper No. 108/2016.
- Everson Michelle & Joerges Christian, 'Who is the Guardian for Constitutionalism in Europe after the Financial Crisis?' LEQS Paper No. 63/2013.
- Faraguna Pietro, 2016, 'La sentenza del Bundesverfassungsgericht sul caso OMT/Gauweiler', Diritti Comparati working paper (1) 2016.
- Garditz Klaus Ferdinand, 2014, 'Beyond symbolism: Towards a Constitutional *Actio Popularis* in Eu affairs? A Commentary on the OMT Decision of the Federal Constitutional Court', *German Law Journal*, XV(2): 183-201
- Gros, Alcide & Giovannini, 2012, 'Central Banks in times of crisis: The FED vs. the ECB', CEPS policy brief (thinking ahead for Europe), No.276, 11 July 2012.
- Hofmann Herwig C.H., 2015, 'Gauweiler and OMT: Lessons for EU Public Law and the European Economic and Monetary Union', Working Paper.
- Howarth David & Loedel Peter, 2003, *The European Central Bank – The new European Leviathan?*, Palgrave Macmillan, Basingstoke.
- Ioannidis Michael, 2016, 'Europe's new transformations: how the EU Economic Constitution changed during the Eurozone crisis', *Common Market Law Review*, LIII(5): 1237-1282
- Joerges Christian, 2014a, 'Law and Politics in Europe's Crisis: On the History of the Impact of an Unfortunate Configuration', *Constellations*, XXI(2).
- Joerges Christian, 2014b, 'Brother, can you paradigm?', *International Journal of Constitutional Law*, XII(3): 769-785.
- Lastra Rosa M and Louis Jean-Victor, 'European Economic and Monetary Union: History, Trends and Prospects', Queen Mary University of London, School of Law, Legal Studies Research Paper No. 136/2013.
- Mahlmann Matthias, 2010, 'The politics of constitutional identity and its legal frame- The Ultra Vires Decision of the German Federal Constitutional Court', *German Law Journal*, XI(12): 1407-1419.
- Martinico Giuseppe, 2013, 'The asymmetric turn of the new European economic governance: some remarks on the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union', *Revista catalana de dret públic*, no. 47: 128-139
- Martinico Giuseppe & Pollicino Oreste, 2012, *The interaction between Europe's Legal Systems. Judicial Dialogue and the creation of supranational law*, Edward Edgar Publishing, Cheltenham.
- Mayer Franz C., 2014, 'Rebels without a Cause? A critical analysis of the German Constitutional Court's OMT reference', *German Law Journal*, XV(2): 111-146.
- Napolitano Giulio, 2012, *La crisi del debito sovrano ed il rafforzamento della governance economica europea*, in Giulio Napolitano (ed), *Uscire dalla crisi. Politiche pubbliche e trasformazioni istituzionali*, il Mulino, Bologna, 383-424.
- Nordvig Jens, 2015, 'Legal Risk Premia during the Euro-Crisis: The Role of Credit and Redenomination Risk', Discussion Paper on Business and Economics No. 10/2015.

- Pace F. Lorenzo, 'And indeed it was a (failed) nullification crisis: the OMT judgment of the German Federal Court and the winners and losers of the final showdown of the OMT case', www.sidiblog.org, 1 September 2016.
- Peroni Giulio, 2013, 'The crisis of the euro and the new role of the European Central Bank', in Bruno De Witte, Adrienne Héritier and Alexander Trechsel (eds), *The Euro Crisis and the State of European Democracy*, European University Institute, Florence, 183-192.
- Pisaneschi Andrea, 2015, 'Legittimo secondo la Corte di Giustizia il piano di allentamento monetario (OMT) della BCE. Una decisione importante anche in relazione alla crisi greca'. *federalismi.it*, XIII(15), at www.federalismi.it.
- Saitto Francesco, 2015, *Economia e Stato costituzionale. Contributo allo studio della "Costituzione economica" in Germania,* Giuffrè, Milano.
- Santor Eric and Suchanek Eric, 2016, 'A new era of Central Banking: Unconventional monetary policies', *Bank of Canada Review*, vol. 2016, issue Spring: 29-42.
- Schorkopf Frank, 2009, 'The European Union as an association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon', *German Law Journal*, X(8): 1219-1240.
- Scicluna Nicole, 2013, 'Politicization without democratization: the impact of the Eurozone crisis on EU constitutionalism', Carlo Alberto Notebooks no. 341/2013.
- Smits René, 2015, 'The Crisis Response in Europe's Economic and Monetary Union: overview of legal developments', *Fordham International Law Journal*, XXXVIII(4): 1135-1191.
- Steinbach Armin, 2013, 'The Legality of European Central Bank's Sovereign Bond Purchases', *Yale Journal of International Law*, XXXIX(2): 15-31.
- Steinbach Armin, 2016, 'The lender of Last Resort in the Eurozone', *Common Market Law Review*, LIII(2): 361-383.
- Tuori Kaarlo, 2012, 'The European Financial Crisis- Constitutional Aspects and Implications', EUI Working paper LAW, 2012/28.
- Tuori Karlo & Tuori Klaus, *The Eurozone crisis. A constitutional analysis*, Cambridge University Press, Cambridge, 2013.
- Tuori Klaus, *2013,* 'Enlarged scope and competences of the ECB. Economc constitutional analysis'. Legal Research paper series, Paper no. 25, University of Helsinky, Faculty of Law.
- Viterbo Annamaria, 2016, 'Legal and Accountability issues arising from the ECB's conditionality', *European Papers*, I(2): 501-531.
- Wagstyl Stefan, 2016, 'Weidmann renews attack on ECB's monetary stimulus Bundesbank president appears at Germany's Constitutional Court', *Financial Times*, 16 February 2016.
- Weiler Joseph, 1991, 'The Transformation of Europe', *The Yale Law Journal*, C(8): 2403-2483.
- Weiler Joseph, 2009, 'The "Lisbon Urteil" and the fast food culture', *European Journal of International Law*, XX(3): 505-509
- Wendel Mattias, 2014, 'Exceeding Judicial Competence in the Name of Democracy: the German Federal Constitutional Court's OMT Reference', *European Constitutional Law Review*, X(2): 263-307.
- Zilioli Chiara, 2012, 'The European Central Bank: a fiscal policy-making institution?', EUDO dissemination conference*: The euro crisis and the state of European democracy*, Firenze, 22 November 2012.
- Zilioli Chiara, 2016, 'The ECB's powers and institutional role in the financial crisis. A confirmation from the Court of Justice of the European Union. A Confirmation from the Court of Justice of the European Union', *Maastricht Journal of European and Comparative Law*, XXIII(1): 171-184.

PERSPECTIVES ON FEDERALISM
Centre for Studies on Federalism
Via Real Collegio, 30
10024 Moncalieri - Torino - Italy
Tel. +39 0116705024
Fax +39 0116705081
Mail to: castaldi@csfederalismo.it