SANT'ANNA LEGAL STUDIES

STALS RESEARCH PAPER N. 2/2014

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http://stals.sssup.it

ISSN: 1974-5656

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Abstract

What is the legacy of 1992 program of Transforming Europe? The chapter starts with a brief analysis of the Joseph Weiler's essay announcing in 1991 (Yale Law Journal) an innovative approach to the law and politics of the European Communities. Then, it suggests three domains, namely, public law, rights and governance, as the fundamental challenges to be faced for the EU to flourish in the next decades. In these domains novelties have emerged in the last 20 years that disclose hurdles and potentials, and have changed the ways through which the foundational ideals must be, accordingly, conceived and pursued.

Key-words

European Union, European public law, governance, rights

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Prologue.- I. Three traits.- II. Three domains.- 1. The European Public.- 2. Rights.- 3. Governance.-III. Conclusions: back to the future.

Prologue

Twenty years after *The Transformation of Europe*[1], Europeans face a deep economic nightmare and are called to strengthen unity again, to escape a return to the past. Once left aside the word *finalité*[2], intergovernmentalism is the driving force and *functionalism* is back into action, one that focuses economic disease demanding further institutional measures. But ironically, it is more conservative in nature than the harshly criticized Monnetist predecessor. The latter was well sitting on the normative dimension, on shared ideals- peace and freedom, economic prosperity, solidarity. 'Consequential' integration proved even effective in affording "simple answers to the question: what does Europe stand for?"[3]. It was clearly future-oriented, a justificatory fulcrum of innovation. Contrariwise, today new functionalism works in the backward-looking spirit, on how to safeguard the present *acquis*. It reminds me of the most famous sentence pronounced (in *Il Gattopardo)*, by the child of Sicilian aristocracy under the destructive wind of 1860 unification[4]: "If we want things to remain, then things will have to change".

Whether economic, fiscal, redistributive, new authoritative functions are to prevent monetary union from dissolution, but far from the horizon of "messianism"[5] and also

[1] J.H.H. Weiler, "The Transformation of Europe", *Yale Law Journal*, 100, 8, 1991.
[2] J. Fischer, "From Confederacy to Federation: Thoughts on the Finality of European Integration", in C. Joerges, Y. Meny e J.H.H. Weiler (eds), *What Kind of Constitution for what Kind of Polity? Responses to Joschka Fischer*, Robert Schuman Center, Firenze 2000.
[3] "The coal and steel Community stood for peace and freedom, the common market for economic prosperity, and so did the single market in the 1980s." (R. Dehousse, *Rediscovering Functionalism*, Jean Monnet WP, 7/00, 2000). Also cf. M. Cahill, "The constitutional success of ratification failure", *German Law Journal*, vol. 7, 11, 2006, 947-66. stressing how functionalism was all but directionless, and criticizing the *finalité* perspective as inadequate.
[4] *Il Gattopardo* is a novel by Filippo Tomasi di Lampedusa.
[5] Cf. Weiler's "Editorial", *EJIL* (2011) 22, 2, 306.

of the foundational 'progressive' ideals. And maybe, Europe has recently "reached its lowest point'[6].

European evolution appears to be still, as the *iter* in-between one functionalism and another. 'Transformation' is delicate an assessment, involving both internal and external perspectives; it depends on frames of reference. In the last two decades the *relative* movement within the European Union boat has been intense, although sometimes, as today, the *absolute* movement seems to have been altogether too slow[7]. How do we understand this all? Where has Europe gone? *Quo isti Europa*?

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I. Three traits.

1. Parameters for such enquiries were famously fixed in *The Transformation of Europe.* It also gave the insight that both Europe's *Gestalt* and its evolutionary steps were matter for *legal* analysis, provided that it becomes aware of fundamental questions about community values, institutional balance and the 'politics of European law': that in fact were masterly addressed *together*.

The first feature of that article is its self-defined legal 'purism', pointing to the autonomy of law, its distinctive service and dynamics. Law- however- not meant as a Kelsenian disembodied skeleton of norms, but the life of a system of institutions, in interplay with external environment and with politics itself. Accordingly, the actual tension between supranationalism and intergovernmentalism can be studied from the legal (integration) point of view. The *approach* bore a further virtue: the re-elaboration of political categories (like Hirschman's *Exit* and *Voice*) in terms of legal structures and guarantees. In sum, irreducible to sheer political instrumentalism, law is capable of response in autonomous terms, as a peer. Not as a mechanical servant, law responded, to the crisis of political allegiance in the '60s: it answered in 'federal' terms to a "disintegrating confederal *political* development"[8]. Such a step, *hardening law* (and closing the path to 'selective Exit') forced, thereafter, dialectical interactions: States had to rebalance by increasing *their* Voice and 'hardening lawmaking'.

European *law* creativity cannot be explained as the causal product of 'external'

[6] Id., Festival of Europe, Florence, 2011, at http://www.euractiv.com/fr/avenir-europe/lue-son-plus-bas-niveau-news-504676

[7] I am metaphorically referring to Galileian 'relative motion', and similar records depending on the previous definition of the system of observation.

[8] *Supra* note 1, at 2425.

politics. The rule of law faces with its own commitments the rule of power. But it does coexist with it: "Had no veto power existed, had intergovernmentalism not become the order of the day", Member States would have hardly "accepted with such equanimity what the European Court of Justice was doing"[9].

(Un)Balance provides the interpretive key to subsequent phases as well. In the completion of the internal market, the institution of majority vote, the enlargement and finally the legal expansion of competences, Member States face "binding norms adopted wholly or partially against their will, with direct effect in their national orders"[10]. In the new setting- once abandoned the internationalist consensus model- the novelty is the loss of equilibrium between constitutional legitimacy and institutional dynamics.

2. A second trait follows: the interpretation of the 'democracy deficit', that is, the absence of democratic process in the European enterprise led by international civil servants (the Commission) and the Council of national Executives (Council of Ministers), all of them legislating without parliamentary scrutiny (either European or national). Despite the common belief that democracy can be brought about by increasing the powers of the European Parliament, the approach of *The Transformation of Europe* places lighter accent on the sheer procedural vehicles of 'democracy': however refined, they would not *per se* make up for the *loss of direct influence* that integration generates *due to the larger boundaries* of Europe. The long-run auspice is that a supportive European political culture possibly amends the loss of *reflexivity*, actually perceived when *peoples* are asked to obey decisions whose authority does not derive from *their* autonomy but from the will of a large number of 'others'. It is likely that more democratized procedures are established and that still they do not overcome the lack of democracy, legitimacy, and 'political' involvement. So the matter shifts from democracy to *social legitimacy.*

Needless to say, 20 years after, even Lisbon Treaty's empowering of majoritarianism and of the European Parliament shall fail to trigger the awaited political mobilization.

3. The third trait that I wish to suggest is two-folded. *On the one hand*: the

[9] Ibidem, 2429.
[10] Ibidem, 2462.

observation that the rhetoric of 'ideological neutrality' had been a feature of European practice and culture, and that in 1992 prospects such a sign of political immaturity was less acceptable than ever. It was expected to fade due to the single market strategy, to the consequences of the monetary Union, to the new ambitions toward a vague *political* unity. Commitment to the market- so went the note- has in fact more than a technocratic (favoring undistorted competition) nature, it presupposes "philosophy", choice, "pressure in shaping the political culture of the Community"[11]. *On the other hand*: what is the Community like? How is it a "promised land"? The *1992* program's weakness was just a resurgent idea of unity, rather than of 'community' (in the peculiar definition that the *Transformation of Europe* provides of it). The *unity* ethos should *not* be the mobilizing force, because in conjunction with the rhetoric of the single market, Weiler wrote, it would corrode the 'community' values, that is, those values treasuring the *diversity* of States and Peoples (instead of a super-State), equally allowing transnational human intercourses, unencumbered with the barriers of nationalities.

4. Among other things, the first trait, the institutional approach *through law*, and the third, the peculiar idea of *community*, are both necessary to understand the later-on developed proposal of 'constitutional tolerance'[12]: one that is hardly comprehensible on a sheer legalistic plane (whether Kelsenian or otherwise). Coexistence and harmony can only originate by avoiding formalistic, state-centered hierarchies and *substantively* recognizing the common choice for Europe, as a pluralities' equilibrium.[13]

On a further plane, the contention that legitimacy does not always come from *process (*and also that *outputs* might poorly serve democratic improvements) remains today a lighthouse possibly pointing to the hollowness of deracinated forms of juridification. What Weiler calls today the *alienation* of Europe from its founding values is itself in line with the stress on the categorical difference between social legitimacy and democratic procedures, and with the caveat that their relation might be deceptive. As I would resume the argument, the two terms were suspected to engender in the future a vicious circle. In fact, the present corrosion of the founding values originates from

[11] Ibidem, 2478.
[12] Weiler, *Federalism and Constitutionalism. Europe's Sonderweg,* Harvard Jean Monnet WP, 10/00, 2001.
[13] "Neither Kelsen nor Schmitt", Weiler writes, in his *Federalism and Constitutionalism* (*supra* 11).

institutional self-understanding and behaviors, choices and interpretive practices that are preventing European actors/peoples from developing the necessary *virtues* for those founding values to be pursued[14].

Indeed changing European realities show the continuity of many 'fundamentals' illuminated at that start of the '90s. Despite the huge progress in the famous "deepening and widening", some knots are unsolved, as if no motion took place. As in Alexandre Dumas's *Twenty years after*: the first page does not even engage in bridging the gap, it simply goes as from the day before[15].

II. Three domains

1. The European Public

I wish to suggest now three among the *domains* from which '20 years after' realities can better be seen, namely, the European 'Public' (law), Rights, new Governance. On them all, the *traits* in the foregoing should be made to bear, because these domains provide for the key questions in appraising persistence, failures, promises.

The narrative established by the *Transformation of Europe* deeply relates, albeit implicitly, with the European public legality domain.

Despite exceeding the *statist* mindset, Weiler's concern for the 'public' did not square either with a horizontal civil ('economic') society or with the vertical Federal State. It did not match either a (ultra)Kantian cosmopolitanism of politically dis-embedded individuals or the problem-solving regulatory State. Not even a thin Europe as transnational arbiter of fairness (justice), among interdependent polities [16]. Nonetheless, I believe, it has to do with the values of a resilient idea of public law that belongs in the constitutional traditions[17] of the Europeans.

Such an idea, I believe, embodies a dual core, the tension between two different streams, political and legal: on one side, public (law) as the pre-positive

[14] J.H.H. Weiler, "On the Distinction beteween Values and Virtues in the Process of European Integration," available on http://www.iilj.org/courses/documents/2010Colloquium.Weiler.pdf. Cf. also Id., "The Political and Legal Culture of European Integration: An Exploratory Essay", *International Journal of Constitutional Law*, 9, 3-4, 2011, 678-694.

[15] A. Dumas *Twenty Years After*, David Coward ed, OUP, Oxford 2008.

[16] J. Neyer, "Justice, Not Democracy: Legitimacy in the European Union", *Journal of Common Market Studies*, Vol. 48, 4, 2010, 903-921.

[17] Maastricht Treaty upheld Member States' constitutional traditions (art.6/2); the ECJ treated them as community general source "of inspiration". See the interesting elaboration in W. Sadurski, "European Constitutional Identity?", *Sydney Law School Research Paper No. 06/37* (2006).

material/spiritual determinants generating the political form of governmental power[18]; on the other, the modern *legal* nature of authority: for it the birth of law posits the condition for any possible 'public' [19] (not viceversa) enabling coexistence and coordination.

The first strand resonates in the demos(cratic)-centered State constitutionalism, and resists its ultra-State extension[20]. The second strand- in the Enlightenment tradition- takes the *form of law* as constitutive, contrasts unlimited power and its claim of omnipotence and fidelity to the deep soul of the People. European history has experienced divergence between the two strands, and some more reliable convergence in postWW constitutional traditions.

If something in the 'public law' of the European community is constantly *under construction* it is the duality of its core. In the contemporary *supranational* endeavors, the two components of public law are split on different organizational levels (respectively on the national and community level, or global orders) [21] . The performative- Treaty or judicial- construction of the legal order, the famous *integration through law* are moments belonging to the *public through law* component.

As I understand its spirit, the *Transformation of Europe* took issue with something much closer to rescuing the *dual* core of the public, than to (the false friend of) *constitutionalizing* the Union. It provides no basis for the cyclic appeal to the thaumaturgy of a Constitution: a culture of shared, legitimate government for a common fate hardly stems from legal bootstraps and inflationary *reconstituting of*

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[18] This tradition- visible through Bodin, Rousseau, Hegel- identifies fully public law as political law, *droit politique*, as described by M. Loughlin's, *Foundations of Public Law*, Oxford, OUP, 2010. For the elaboration of public law as endowed with a *dual* core, that includes a 'public through law' as its second stream, G. Palombella, *The (re-)Constitution of the Public*, in A. McCormack, C. Michelon, N. Walker (eds.), *After Public Law?* OUP, Oxford 2013.

[19] It is the 'public' instituted as a third standpoint, beyond private judgments and disagreements, as with Bentham; it is the imperative of 'public law' that with Kant overcomes a state (of nature) where injustice is *unobjectionable.* See J. Bentham, *Of Laws in General*, J. H. Burns and H.LA. Hart (eds), London, The Athlone Press, 1970,192. In Kant's view. unless man "wants to renounce any concepts of Right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined by law" ("Metaphysical First Principles of the Doctrine of Right", *The Metaphysics of Morals* [1797] Mary Gregor trans., Cambridge, CUP, 1996 (repr. 2003) 33, § 44, 90.

[20] For ex., D. Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' and on the contrary, U. K. Preuss, 'Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?', both in M. Loughlin, P. Dobner (eds.), *The Twilight of Constitutionalism?*, OUP, Oxford 2010.

[21] See my *The (re-)Constitution of the Public, supra* note 18.

constitutions. The issues of legitimacy[22] and political faith are thought of as inherent in the threads of trust and action, in the mentioned path of 'constitutional tolerance', the Community *Sonderweg:* one that shall build on existing 'legalities', without deleting either previous constitutional commitments or their substantive interplay. That is consistent with the latent concern for what I would call the importance of *recoupling* (in a fashion appropriate to the multilayered European dimension) the dual core of the public[23].

20 years bring new complexity, however: the enlargements necessarily question the fabric of the European public and the recurrent questionnaire turns even less easy: what is the social and political Eros genuinely allocated on the supranational plane; does EU work towards a thick overriding common *good* or is its rationale sheer prevention of arbitrary interference[24]; what is the content of the 'European public' like? Such a frame-domain of the public deserves renovated attention, even more so after the constitutional failure and the growing doubts on EU economic authority.

2. Rights

Two protagonists of the European public, namely, *rights* and *governance*, can be seen as children of a further Transformation, whose direction is controversial (whether fostering the political Europe, compensating for its lack, or even preventing its realization).

In Euro-continental traditions often rights had to partake in the structure of public law, not to play an anti-institutional role: once comprised of the common weal, they cannot fit unencumbered individualist autonomy. Their 'public' nature discloses 'duties' as irreducible to side effects on *others* of one individual's right. [25]

[22] "it is largely since the Maastricht process that the debate on the European Union has been in terms of a 'crisis' of legitimacy" (G. De Búrca, 'The Quest for Legitimacy in the European Union', *Modern Law Review*, LIX, 3, 349).

[23] Preserving a two prongs allegiance: i) political and legal components of the public, ii) national/supranational levels. I framed the issue at length in *The (re-) Constitution of the Public*, *supra* note 18.

[24] The root of this trend is in the approach to comitology by C. Joerges, J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology', *European Law Journal*(1997) Vol. 3, 3, 273-99.

[25] Cf. my *Politics and Rights in European Perspective,* «Ratio Juris», 18, 3, 2005, 400-409. And also the chapter "Diritti " in U. Pomarici (ed.), *Filosofia del diritto. Concetti fondamentali*, Torino, Giappichelli, 2007.

The known drive towards *European* rights is of course detached from that older background. The rise of postwar constitutional liberalism, the civilizing pressure toward *human* rights, in their deontological momentum, the enhancement of *economic* freedoms at the core of European enterprise can broadly explain.

Now, beyond the older roots, but given their (national, evolving) constitutional persistence, oscillation between the European and the Member States' constitutional views on rights should always be expected. European action has been so often described as offering universalized 'rights' and soulless technocracy. Thus, rights are less common goals, requiring a solidarity context of mutual social commitments, than individual trumps contrasting the resilience of States' protectionist action: a line, that makes Europe the realm of universalization of the 'private'.

This fundamental question is what I would take as the general background to the disappointed note that recently Joseph Weiler wrote: rights have become a means for furthering the "tendency of Citizen-as-Consumer (of political outcomes), and a consumer who is subtly conditioned to make his choices not on the basis of principle, but self–interest". Accordingly, while legal system "places the individual in the center" on the other hand it "renders him a self-centered individual – in strong tension with the spiritual ideal of human integration". [26]

On different detail, and the same orientation, further dissatisfaction has been lamented in the context that generically refers to *human rights* in Europe. Grainne De Burca[27] stressed the weakness of rights' scene in Europe: chronicle lack of provisions mandating monitoring of rights, intervention and review (despite the FRA); separation *vis à vis* the institutional autonomy of the ECHR; a *double standard* asking external interlocutors for commitments scarcely taken as inward-looking obligations. Together with the risk of a Human Rights isolationism of the EU, it is maintained that even the judgment and reasoning of the ECJ in the famous *Kadi*[28] case concurred in the picture, by showing closure *vis à vis* international law obligations, and an American style *exceptionalism*,[29] contradicting the original attitudes in the '50s[30].

[26] Weiler, *On the distinction… supra* note 14, at 24.
[27] G. de Búrca, "The Road Not Taken: The EU as a Global Human Rights Actor", in *American Journal of International Law*, 105, 2011, 649 ff.
[28] ECJ, Joined Cases C-402/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council & Commission, 2005 E.C.R. II-3649, Judgment 3 September 2008.
[29] G. de Búrca, "The European Court of Justice and the International Legal Order After Kadi", *Harvard International Law Journal*, 51, 1, 2010, 1-49.
[30] Id., "The Road Not Taken". *supra* note 27. See also Weiler, *The Distinction*, cit. *supra* note 14, at 38. And: "Much of the human rights story, and its abuse, takes place far from the august halls of courts.

Eventually, one can even think that the legal force gained by the Charter of Nice, is itself a rather cheap obligation, given the high level of protection granted in the constitutional traditions of the advanced countries of the European union: so that Lisbon deception might seem to have given us what we had already got[31].

However, my sense is that the domain of rights is today open to a less stringent fate and to being recast on a richer register than the economic liberties and the 'self-centered individual'. Prospects are theoretically better seen through the lens of the *fundamental* rights of the Charter (after Lisbon), while being less perspicuous through the scrutiny of *human* rights compliance. Let me recall, then, some countervailing points. Again, the new situation has to account for the perspective of a 28 countries' Europe, and it is also on this plane that the *substantive* role of Nice Charter must be appreciated, a plane on which rights (think of minorities, the non discrimination principle, social protection, and even civil and political rights, or the environment, together with the need of economic liberties in the Eastern countries, etc.) are triggering constant re-elaboration, bear a daily shifting extent and content, and are a challenge even within old European Member states.

In many ways, the Charter's reference to 'Fundamental' rights certainly brings a ticker and larger series of contents/commitments than those that the 'Human' Rights deontology in the ECHR should normatively allow. The *fundamental* rights wider domain includes more than those rights basically meant to a universalisable and essential measure of respect for humanity. It involves more advanced, demanding and complex contents, requiring higher institutional and social commitments, and on going confrontation of assessments between ethical and political cultures. To this extent, the *human* rights generic reference is as necessary as insufficient of itself to let us know about the place of rights in Europe, through the import of *fundamental* rights in the Charter. Conversely, the commitments of the latter are a higher challenge for the prospects of European *identity*. Here lies the issue as to turning rights into a vehicle of 'human integration'.

Most of those whose rights are violated have neither knowledge or means to seek judicial vindication. The Union does not need more rights on its lists, or more lists of rights. What is mostly needed are programs and agencies to make rights real, not simply negative interdictions which courts can enforce" (at 39).

[31] J. Baquero, "What's Left of the Charter ?, Reflections on Law and Political Mythology", *Maastricht Journal of European and Comparative Law*, 15, 1, 2008, at 74. F. Rubio Llorente, "A Charter of Dubious Utility", *International Journal of Constitutional Law*, I, 3, 2003, 405-426.

Lamented Europe's lukewarmness for human rights should not be underestimated, but seen in the long-run, and a bit beyond some formal provisos (that is what the 'Transformation of Europe' would have taught).

Even if we were (hypothetically) to agree that the reasoning of the ECJ in *Kadi* was self-referential and thus betraying true internationalism (like the US in *Medellin*[32] and elsewhere), still we could not make this to square with (or contribute a basis for) the warning about Europe's sensitivity on human rights: all conceded, the criticised self-referentiality, if any, was making the protection of *fundamental* rights, once more, the bedrock in the European order.

Moreover, even the lamented institutional separation from the ECHR, might have less impact in practice. The Charter makes the ECHR part of its own meaning, and in so far as this holds, the Charter itself has to be interpreted also through the lens of the ECHR. It seems rather difficult to prevent a kind of indirect-*direct effect* of the Convention as a consequence. It is said that such a situation can possibly empower the national judge. In countries like Italy, it is expectable a potential blurring of the line between *i)* the Charter and the Convention, that is, *ii)* between the *diffuse* scrutiny (disapplication) of the norms infringing the Charter, and the centralised judgment *(review)* of (un-) constitutionality[33] based instead on the Convention.

Certainly, there are predictions stressing the limitations of the legal import of the Charter in the post-Lisbon scenario. But countervailing observations might apply. A limitation like art. 52(5) that affords direct effect to rules, not principles, can have a controversial life, up to judicial definitions. On some matters of more diffuse relevance, this can bring to re-opening supranational/national discussion; and the very issue of social rights is likely to get to the forefront. Similarly, the general limitation of the Charter's binding nature only in case of "implementing Union law"[34], yes, child of a cautious protectionism, might be weakened under the self-expanding arguments (although explicitly excluded) of 'incorporation'.[35] And in this same vein, it is of relevance that horizontal effect can be granted to general principles (as at the time of cases like *Mangold* and *Kücükdeveci* [36] with non-discrimination), despite that

[32] Medellín v. Texas, 552 U.S. 491 (2008)

[33] For the Italian Constitutional Court (decisions nn. 348 e 349 of 2007) direct effect can only be granted to the Charter. In the case of ECHR, for overcoming contrary domestic ordinary rules, referral to the Constitutional Court is needed.

[34] Art. 51(1).

[35] When something 'outside' EU competences is affecting their effectiveness.

[36] Mangold, C-144/04, 22 nov. 2005; Kücükdeveci, C-555/07, 19 jan. 2010.

technically no contradiction takes place *vis à vis* the declaration of the exclusively vertical effect of the Charter (art. 51), as a matter of 'rules'.

Finally, due to the potential role of the national judge in managing the Charter's direct effect on fundamental rights (and in arbitrating its consistency with Constitutional provisions) one cannot exclude that some judicial activism might practically develop by Europeanising constitutional interpretation (and sooner or later re-expand the dialogue with the ECJ through preliminary references, art. 267 TFEU). One possible scenario that has been foreseen features a sort of concurrence of national cultures in mastering the Charter, a kind of bottom up harmonization, better treasuring the primacy of the Charter and at the same time the art. 53 and 52/4 limits from national Constitutions and constitutional traditions. Some known questions might have a chance of new answers: how domestic re-elaboration of rights in the light of the Charter can expand into a transnational dialogue, how can they offer new modes of balancing between life worlds, social contexts and European market priorities, other than those that triggered disagreement (for ex. in Germany or Italy), in the famous ECJ trilogy of Laval, Viking, Rueffert cases[37]. Despite the absence of a full-heartedly endorsed '*finalité*', the chance is that greater density of European reflection be engendered, and that discussion upon rights shall turn into vehicle to re-expanding their *political or ethical import*, involving national theatres' contribution to shaping a less technocratic/individualistic European culture.

So one of the questions for two decades ahead is how a course about rights might frame a 'public Europe', closer to the auspices of its 20 years ago Transformation, re-locating national and supranational, legal discretion and political deliberation, and reversing the turn that led from positing 'the rights of the individual at the centre' to centring Europe upon an individualistic interpretation of rights.

3. **Governance**.

While the prospects of '92 Europe were focusing on the institutional *governmental* structures, their tuning and their accountability credentials, today and significantly, those credentials are recurrently asked of *governance* structures. The public law of Europe was – and is- seen as *politically* unsaturated, but in the last two decades,

[37] ECJ, Case C-341/05, Laval un Partneri Ltd, ECR 2007, I-11767, Case C-438/05, Viking, ECR 2007, I-10779, Case C-346/06, Rüffert, ECR 2008, I-1989.

governance increasingly came to the forefront as escaping standard *legal* control, as well as lacking social and political allegiance. Europe's 'ideological neutrality' (inspired mainly by the *super partes* profile of the Commission), the third among the traits of the *Transformation of Europe*, is relevant here. Such a 'neutrality' flourished most- rather than in the *governmental* dimension- through allocation of overwhelming decision-making to regulatory process, to a variety of implementing, monitoring, advisory bodies, and due to the shift to technocratic register, allegedly exempt of choice disputability, in traditional political terms.

In the known story, as a first structure of governance, comitology[38] apparatus became the core of what later on Weiler called a *mesolevel*, a dimension of *infranationalism*[39], flanking the current supranationalism and intergovernamentalism, but emptying the political dynamics and avoiding the constitutional frame. European governance grew up, especially with two more "structures", now institutionalized, Agencies and the Open Method of Coordination. In truth, Europe has not become the sheer regulatory State, advocated by Majone[40], nonetheless it can hardly be imagined without the core of governance. While cyclically in a 20 years' stalemate, intergovernmentalism follows phases of enhanced supranationalism, governance (infranationalism) flourished anew. Interestingly, even immunized against the charge of 'ideological neutrality': far from naked efficiency or technical hybris, it claims the pursuit of substantive accountability (part of the *process* and/or *output* legitimacy discourse). Governance was propounded by the Commission itself as a promise of participation and distance-shortening between the citizens and the European fairyland[41]. And enhanced 'deliberative' nature is considered to qualify structures of Comitology[42]; the Open Method of Coordination appears an advanced experiment of alternative poliarchy-democracy[43], and Majone's praise of regulatory Agencies *vis à vis* decisional failures of traditional politics is, of its own right, still holding.

All that has become, to the eyes of political scientists, no longer a side effect of

[38] Decision of the Council n. 87/ 373 as amended by Council 1999/468, June 8, 1999.
[39] In an essay now included in *The Constitution of Europe* CUP, Cambridge 1999, 96 ff as an *Afterword* to *The Transformation of Europe*: *Infranationalism*.
[40] G. Majone, "The Rise of the Regulatory State in Europe", *West European Politics*», 14, 3, 1994, 77-101. Id, *Regulation and its Modes*, in Id. (ed.), *Regulating Europe*, London, Routledge, 1996.
[41] *White Paper on Governance*, COM(2001) 428, july 2001, at http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf
[42] Ch. Joerges, J. Neyer, "From Intergovernamental Bargaining to Deliberative Political Process: The Constitutionalisation of Comitology", *European Law Journal*, 3, 1997, 273 ff.
[43] C.F. Sabel, J. Zeitlin (eds.), *Experimentalist Governance in the European Union; Towards a New Architecture*, OUP, Oxford 2010.

Europe's political immaturity, but an asset, the skeleton that makes it to work. European governance mode is often praised as a 'successful pattern', despite it had poor roots in the traditional idea of the 'public' within the Member States' horizon.

However, that comes from supervening novelties: governance is involved in a wider global transformation that it has anticipated, one that originates from the increased weight of *knowledge* and *learning* in decisional choices, from the need of fragmenting high complexity issues into sectors and specialized domains, from the functional interconnections being more relevant than territorial separations, and the like. All that shifted the analytic focus from one opposition--*ie* intergovernmental vs. community (supranational) methods- toward another- the governance-government divide. The novelty, of course, cannot be sidelined.

The functional orientation of governance offers practical gains and pursues effectively behavior-guiding objectives, pretending to decentralize the overall political deficit and as far as possible the law type control through the template of pre-fixed-rules. The underworld of governance[44] has grown up and the ghost of 'ideological neutrality' of course appears repeatedly. But it is argued that the price for a knowledge-society, exposed to complexity and risk, is that one cannot define once for ever the contours and contents of the public interest in a fixed way. European governance develops by defining *goods*, rather than a politically debated notion of the *good*. It also stems from the Commission's hard work in stating the benchmarks and targets: thus mirroring precisely what is often complained about, that is, the shift of the EU from politics to policies. Politics is replaced by creating 'levels of criticism' and a practice of re-appraisals, solving concrete questions. It also purports to manage the anxiety arising from uncertain risk regulations: a claim that is founded "partly on the authority of expertise" but also on the limits of scientific knowledge[45]. As aptly said, that is a European *Eudaimonia*[46] based on *inter*dependence in the *lack* of a solidarity granted by kinship and sameness.[47]

Now, the many facets of EU working lines are today highly interwoven. Even intergovernmentalism that resurfaced vigorously after Lisbon is sometimes seen as a blessing (especially in times of crisis), in so far as it can stir autonomous new

[44] Weiler, "In der Unterwelt der Ausschuesse", *Die Zei*t (22 october 1998)
[45] D. Chalmers, 'Gauging the Cumbersomeness of EUI Law', *LSE WP* 2/2009, 31.
[46] Ibidem, 18 ff.
[47] Chalmers (ibidem,19) recalls Emile Durkheim's distinction between organic and mechanical solidarity. He stresses rightly this point as connected to EU governance.

legislative decisions[48]. The point lies in the import of governance structures in the interplay between intergovernmentalism, supranationalism, constitutionalism. What is the role of the *underworld* of governance in the project of an *ever closer union*? If there can be a further relation between the *meso* and the *higher* level, it would mean that a "movement toward hybridization of governance" can bring the "ability for the governing dimension to provide an overall framing of the Governance Structures with hierarchical governing mechanisms" and this can be tantamount to fostering "framework laws which retain legal ground in the form of legislative procedures and access to juridical review at the same time as safeguarding the flexibility of the Governance Structures"[49].

Summing up, European sui generic governance character is perhaps still amenable to institutional embedding and some legal-political reconciliation. Instead of an instrumental tool of global governance viability, a transmission belt, it might still live up to an equilibrium between infranationalism and supranationalism, recalling some form of political responsibility and social responsiveness that its regional width might allow. The challenge is coping with the ambiguity of governance, whether the new legalized- proceduralised track, the alternative democratic path, or still the opaque escape from political control, the apotheosis of technocratic hybris in uncharted territories. Making a more mature sense of governance internally, can be of help in preventing it from sheer assimilation to *global* governance determinism: in other words, from becoming a regional instance of a self driven new governance 'naturalism', a rule making, in administrative mode, thriving on lack of interlocutors and on detachment from any polities whatsoever.

III. Conclusions: back to the future.

The question of the European public is certainly about the legal and political determinants and the need for their reconnection. Future developments shall deal with fundamental rights' elaboration, dialogue among cultures, judicial interactions. Eventually, the further issue is no longer about the emergence of the underworld, but its political taming and optimization as a powerful component of integration.

[48] G. Amato, 'Editoriale. Quale governo per l'economia europea?' at http://www.italianieuropei.it/it/italianieuropei-5-2011/item/2141-editoriale-quale-governo-per-l-economia-europea.html

[49] P. Kjaer, *Between Governing and Governance*, Hart, Oxford, 2010, 161. Kjaer has gone through extensive considerations of the evolution of Comitology, OMC, and Agencies, and presents the virtues and limits of the distinctive theories sustaining each of them.

Against this background, Europe's legitimacy question resurfaces. The structures of Europe are a regional intermediation that both contributes to global control of complex issues and posits Europe as a *barycenter*, one that should prepare to a major role in the future. The service of preventing European Peoples from falling prey to a globalized universe of economic determinism and un-scrutinized *managerialism* can be valuable: instead of national States, a credible regional player, daring interlocution with regulatory regimes and the like.

As a barycenter of its own, Europe can work in reminding the non coincidence between *globalization* and *universality*, that is, between a factual global rule making and the *normative* conditions for its universalization. It can ask for testing claims of global technocracy rule by the *ought* of justification and universalizability. The EU is a privileged space to this end as well, if it preserves its culture of rights, peace, solidarity, democracy, justice, still overcoming nationalist closures of XX century statism, but rethinking universality, ethos, and diversity *vis-à-vis*, say, the excesses of *global* governance. So far, this is a '20 years after' concern, the relocation of Europe in the post-national (and allegedly post-governmental) constellation, and launching new internal solutions[50].

In the three domains sketched *supra*, the constitution of the public law, the transforming area of rights and the realm of governance, one can see how relevant are the traits of the *Transformation of Europe* I have pointed out in the opening. The *legal* appraisal of institutions/politics interplay, the legitimacy problem, the ideological neutrality and the unity/community alternative, define the coordinates of our progress as well. What is at stake, though, is how to reconnect the potential that rights and governance bear *vis à vis* the complex political future of Europe, that is, within the path to refining Europe's public law dimension. This last question partly exceeds the frames-and visibility- of two decades ago, but can be rescued in conjunction with their fundamental notions.

Undeniably the demand of a responsible and empowered *European* politics is on the forefront. The complex interplay between States and the Union has to be re-written also *vis à vis* the European citizens, through a democratic redetermination of the

[50] For the latter, of not functionalist nature, Miguel Maduro, "The Euro's Democratic Deficit" (Project Syndicate at http://www.project-syndicate.org/commentary/maduro1/English) suggests to solve the knot of democracy while furthering economic governance: "If the way that the EU raises money is made more democratic, deciding how to spend that money would become more democratic, too. This is crucial to ensure the legitimacy of the eurozone's economic governance".

balance between rights and *duties*. As Weiler himself has pointed out[51], there is no way to make European ideals work unless a vicious circle can be broken: one where European institutions seem to work in such a way as to prevent European citizens from cultivating the proper virtues that are necessary to pursue the foundational ideals. Possibly, the fresh view of a recent Report on the path of European transformation, can contribute in cutting that circle: the question of democracy- precisely in connection with a sound control of economic problems- has been understandably evoked. In introducing that report Miguel Maduro aptly stresses that both "political empowerment and civic solidarity" are needed "for the Union to be able to develop a possibly legitimate form of economic and political governance"[52] what requires that the absence of a European politics be overcome, by freeing the Union from being hostage of national politics and also providing it with autonomous resources, especially those generated from the internal market. The accent falls thereby on choices, politics and citizens. Basing upon the solid consistence of the *Transformation of Europe*, we can rescue the spirit of qualitatively new 'transformations'.

[51] Cf. *supra*, note 14.

[52] "Democracy and Justice: the formula for a new EU and Euro governance", at 1, available at http://network.globalgovernanceprogramme.eu/democracy-and-justice/ and see the *Report* at http://network.globalgovernanceprogramme.eu/wp-content/uploads/2012/10/report.pdf