

Transformation of EU Constitutionalism

 verfassungsblog.de/transformation-of-eu-constitutionalism/

Matej Avbelj Mi 22 Jun 2016

The EU constitutionalism has been transformed. For the worse. The causes for that are well known. They are the sum of consecutive, unresolved financial, economic, political, humanitarian and security crises. This post is not interested into causal relationship between the crises. It centers instead on their aggregate negative outcome and the possible way ahead. It asks what exactly the EU constitutionalism, as a dominant narrative of European integration, has (d)evolved into and what can be done to fix its fissures?

Can you still remember the EU constitutionalism's glory days? Those times when the EU, albeit unwritten, legal constitution was taken for granted? The doctrines of primacy, direct effect, pre-emption, human rights protection and the like were claimed by the ECJ and rendered relatively plausible by the national (constitutional) courts. Can you recall the enthusiastic announcement of the ECJ's Advocate General Jacobs: "*Civis Europeus sum*", which was just a few years later turned into a symbolical provision in the Treaty of Maastricht establishing the citizenship of the Union? Destined to become a fundamental status of individuals in the EU, its symbolical nature was defied in the *Baumbast* case, as, again the ECJ, has turned the conditional Treaty provision into a directly effective one. By instituting a general and directly effective prohibition of discrimination on the basis of nationality across the entire material scope of EU law, the grounds were laid for a strong federal de-alienation effect between the citizens of the Member States, bringing them, at least legally if not yet politically and sociologically, closer to the EU as well as to each other. The seeds for supranational solidarity were hence not just sown, they started taking roots.

In the absence of a written constitution, and even after an explicit rejection of the process of documentary constitutionalism, the EU constitutionalism and its supranational philosophical foundations were drawing on the national constitutional traditions and ideas, which were (seen as) migrating in vertical and horizontal directions to make up a holistic and yet internally pluralist EU Constitution. Pluralism, irrespective of its exact character, was the EU's constitutional key. The pluralist normative orientation which simultaneously required a preservation of plurality (different national constitutional traditions *lato sensu*) and a commitment to the common European constitutional whole, served as a normative fiber for keeping the Union united in its diversity, as the cliché goes.

All went well in good times, in the conditions of positive outcome legitimacy. As, in particular, the economic tide started to turn, the EU constitutional honeymoon was over. The migration of constitutional ideas was still, somehow, tolerated, but things have become more complicated. It started to matter, unprecedentedly so, whose constitutional ideas or traditions these are and where they are coming from. Are they coming from the (German) core to be imposed on the periphery? Are they coming from the liberal West, who is trying to erode "our" Central European values? *No pasaran!* The end has come to the supremacist, paternalistic attitudes of the West towards the more autochthonous values of our people (we have heard, at least, from Budapest and Warsaw). However, things have become much worse, indeed nasty, when it was not only different ideas which were travelling, but when people with different ideas got into motion.

First, there were *les plombiers polonais*, who actually turned out in higher numbers as the Polish plumbers in the UK. They and the rest of the (relatively) impoverished East, meanwhile allegedly undermining the Swedish right to a collective action, were soon blamed for social dumping and for welfare tourism, which needs to be put to an imminent halt. *Civis Europeus es*, but either stay at home or without social support until you are settled enough for us, the new slogan, also scribbled in the praised Cameron's Deal, could sound. However, the worst was yet to come with the, admittedly uncontrolled, arrival of refugees and economic migrants from the Middle East and Africa. Since most of them are Muslims, at least Central European states were prompted to defend *un'Europa Cristiana* that was, but never mind, omitted from the preamble to the Constitutional Treaty just a few years ago. In a response to the mass migration of people not just with different ideas, but of altogether different creed, iron fences and barbed wires were erected on the internal borders between the Member States. The bizarre construction of the fortress Europe *inside* its borders, while the Schengen regime simply collapsed, took place

amidst accentuated xenophobic sentiments not just at the political fringes, but also at the political centers across the Union. These political centers have been, admittedly, increasingly decentered, taken over by left and right-wing populists, who have been prospering by blaming the bureaucratic monster in Brussels and, typically, the autocratic, selfish government in Berlin, for their almost entirely home-made crises.

This is how the events in the EU have been taking a nasty turn. The old virtuous, but largely academic, elite cosmopolitan constitutionalism has been replaced with a real-life constitutionalism from the past that could be described as: nationalist, populist and non-constitutionalist constitutionalism. Nationalist, exclusionary constitutionalism, combined with political myopia, has undergirded Cameron's drive towards (a referendum on) Brexit. The same type of constitutionalism has been domiciled across the Rumsfeld's New Europe, which is doing its best to repeat the well-known tragedy of Central Europe. The nationalist constitutionalism is a fertile ground, indeed, a prerequisite for populist constitutionalism, which is reserved for and caters to the needs of "our people". In theory. In practice it serves as a utile smokescreen for the concentration of power, both political and economic, of the new political elite and its loyalists. This phenomenon is spreading like fire, much more than cosmopolitan constitutional ideas before, across the EU from the East to the West, from the North to the South, declaring an end to the liberal democracy, based on the rule of law, replacing it by an illiberal and, perforce, non-democratic authoritarian rule. Finally, the strawman bureaucratic monster Brussels, with a disabled administration and a *de facto*, but not *de iure*, faltering legitimacy has shifted away from constitutional governance, back to the intergovernmental decision-making, handily dubbed executive federalism. This was, indispensable (no matter how highly normative unattractive it is) in the context of the described national political shifts towards nationalist and populist constitutionalism and simultaneous lack of efficient democratic governance prerequisites on the supranational level.

On my modest reading, the praxis of European integration as well as its dominant constitutional narrative have been now for years trapped into a vicious circle. How to break with it? In the time full of paradoxes, let me be also guilty of one. As a supranational constitutional skeptic, I am convinced, as I have already argued [at this blog](#), that a veritable constitutional engagement is the only way out of this unhappy, indeed deeply concerning situation. With or without Brexit, an intense transnational debate cutting across the Member States and the supranational level needs to be launched in the autumn to determine whether and to what an extent the peoples of Europe want to engage constitutionally: to do things together for the holistic common good. Only after arriving at this answer, it will be possible to start crafting more concrete institutional solutions for the EU's functioning in the years and decades to come. In the rich repository of the federal idea, there is a plethora of options for also very flexible and differentiated institutional framings, but none of them can function in the absence of the thinnest constitutional desire to do things together, to conceive of oneself as journeying in the same boat, being part of the same polity. If the EU, its Member States, the officials and private citizens alike have lost this minimalist constitutional sense of belonging, the EU, naturally, cannot be a constitutional, pluralist, democratic polity, based on the rule of law. It will be something else. The constitutional ideas will continue to migrate, but as these will be very different ideas, based in a very different kind of constitutionalism, EU too will be a very different, but certainly a much less appealing place.

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION Avbelj, Matej: *Transformation of EU Constitutionalism*, *VerfBlog*, 2016/6/22, <http://verfassungsblog.de/transformation-of-eu-constitutionalism/>.