

---

## Perils of Unity, Promise of Union

KALYPSO NICOLAÏDIS

Once again at a time of transformation against the real or perceived threat of disintegration, the EU hovers dangerously between the perils of unity and the promise of union. The stakes may seem starker than two and a half decades ago, when Joseph Weiler published his path-breaking work, *The Transformation of Europe*<sup>1</sup> but he helped define then the terms of today's debate.

That is because his framework pioneered a way of thinking about the EU, not only by weaving into a single narrative the legal and political dimensions of this ever transforming polity, but most importantly by providing a normative imperative against which the unfolding European reality could be assessed, praised, or despaired of. With the project of completing the Single Market in full swing, Weiler offered a new analysis whereby legal supranationalism was neither a mere epiphenomenon mirroring state interests nor an autonomous phenomenon overriding them. Instead, the relationship between law and politics was constantly co-constitutive yet contested. A kind of dance between (law-related) exit and (political) voice allowed for both intergovernmental (and specifically executive) control and weak political centralisation. And this in turn had been both a precondition and a consequence of strong legal authority and enforcement – that is, the progressive foreclosing of what Weiler calls selective exit (e.g., the practice of the Member States of retaining membership but seeking to avoid their obligations under the Treaty).

Under these conditions, it was possible to say that both pessimistic political scientists, who emphasised the obstacles to political bargaining, and optimistic legal theorists, who emphasised legal integration, were right in their description of bits of the elephant. And as an added bonus, the integration project could presumably strengthen both the

<sup>1</sup> J. H. H. Weiler, 'The Transformation of Europe', *Yale Law Journal*, 100, 8 (1991).

Community and the member states. But, and this is a crucial but, such dual strengthening constituted a normative imperative as well as empirical observation. Without understanding the former, the latter could be lost. Indeed, it is such an imperative that EU elites are in danger of losing sight of today.

And that is why, at a time when we are starting to envisage disintegration in Europe, we must critically engage with a theory of equilibrium Weiler developed for a previous phase of European integration.

Each scholar of course has his or her own way of appropriating, appraising, or dismissing *The Transformation of Europe* (and the broader Weiler corpus). And for sure, the passage of time, like William James' pragmatism, tends to unstiffen all our theories, including this one. On my part, I argue that our task according to *The Transformation* is not just to ask how or to what extent the EU has failed to uphold the *original* equilibrium, but rather to assess the EU's transformative potential while remaining faithful to a certain idea of what it is about. In other words, to state it rather grandly, can scholarship move from a special theory to a *general* theory of EU equilibrium? And in doing so, both generalise the initial analysis and point to its lacunae? If so, I would like to suggest what I see as three building blocks for such a strategy.

## 1 The Transformative Compass

It would have been radical enough for *The Transformation* to offer as it did a new analytical lens bringing into focus the fundamental pattern of European politics as a dance between law and politics, judges and politicians, respectively and reflexively engaged in shaping 'exit' and 'voice' in the EC, thus progressively forging a constitutionalised arrangement between states with increasing legal bite but a bite of their own making: letting go and asserting control as the *yin* and *yang* of European politics.

### *The Virtue of 'Community'*

In my view, however, the truly inspired nature of the essay comes in the next two steps. First with *judgment*: that if European integration rests on a dynamic but fragile equilibrium between normative centralisation and political assertion of autonomy, such foundational equilibrium is precious and must be preserved albeit in different guise with changing circumstances; that we should worry about dismantling that which 'helps explain the uniqueness and stability of the Community for much of its

life'; and that if we do worry, then we need to know how to read the signs on the wall, the conditions that underpin the equilibrium. Weiler identifies some, but of course with time their relative importance may change and new ones may become more prominent.

But why is such preservation so important? And so we come to Weiler's third move, his conclusion for *Transformation*, that is the offering of an explicit *normative benchmark* for European developments, the eminently *critical* and political in his vision. The point of the story is not only to ask whether and how the EU manages to move from one version of the equilibrium to the next – after all, the status quo can be stable but undesirable. But crucially, that this is not any old equilibrium. There is something at stake in *this* equilibrium – a vision, an 'ideal type' which Weiler refers to as 'community' as opposed to a 'unity' paradigm. The normative benchmark on the horizon may or not be *intended* by European actors, or it may even be the common vector of various criss-crossing intentions, but somehow until now it has been preserved by the equilibrium.

So the ultimate message of *Transformation* I take to be this: if we are not careful, the promised land of 'community' may become our Paradise Lost. This vision constitutes Joseph Weiler's normative benchmark for, in the end, the European equilibrium is not only of instrumental but also of intrinsic value.

Hence my suggestion that we read *Transformation* backwards – starting with the Community vision – and that we systematically think through the link between its analytical and its normative stance. Some have been tempted to treat the later as a footnote, a kind of ex-post *desiderata* which does not affect the analytical framework per se. In contrast, I view Weiler's demarche through a specific method – which I call *normative inductivism* – namely, extracting the norm we use to assess a phenomenon from the phenomenon itself without falling into the trap of circularity. This methodological point relates to broad debates in legal and political theory which I cannot enter here. Suffice to say that normative inductivism has much affinity with Dworkin's interpretivism – e.g., an understanding of the political practices of a community through a scheme of principles that provide the best justification of these practices, sensitive both to the facts of the practices and to the values that the practices serve. That the interpreter's hypothesis amounts to attributing a *rationale* to the relevant practices does not guarantee that such a rationale is intended, but merely that the interpreter must look for it. Akin also to Adorno's 'immanent critique', we can identify how *existing*

practices can be either a source of actual or *imagined* transformations or a subversion of our interpretations.

*From Community to Union of Peoples*

Before we consider the test of time, it is worth reflecting on the potential and limit of the ‘community paradigm’ which Weiler himself has refined ever since.<sup>2</sup>

For one, although Weiler presented ‘Community’ in binary opposition to ‘Unity’, I believe that it is in fact more productive to present it as a ‘third way’ equally opposed to ‘the classical model of international law’ and to ‘Unity’. In my view, this allows us to make the Community model more than simply an ‘in between’ given that both alternatives – e.g., sovereignty/national statism and unity/EU statism – are closer to each other than they are to the ideal of community. As Weiler argues, ‘with its political process set up to counter the excesses of statism ended up coming round full circle and transforming itself into a (super) state.’<sup>3</sup> As opposed to such mimetism, the third way which we care about is ‘transformative’ and needs to be analysed as a new political form requiring new concepts and insights. In a parallel register, this is what I have sought to convey with the label of ‘Europe democracy’ (see Part III).

Which leads me in turn to prefer the idea of ‘Union’ to that of ‘Community’ for a host of good and bad reasons: the communitarian and organic connotations that have tainted the term ‘Community’ (much abused by the likes of Petain) – even if we would like to believe that terms and ideas should not be held hostage to their contingent misuse; the use of ‘Union’ in the federal context and the useful contrast between federal *Union* and federal *State*.<sup>4</sup> And of course the requisite to yield to prevailing practices – that is if we consider that the move from European *Community*

<sup>2</sup> J. H. H. Weiler, *The Constitution of Europe: ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999); J. H. H. Weiler, ‘Federalism and Constitutionalism: Europe’s Sonderweg’, in K. Nicolaïdis and R. Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford: Oxford University Press, 2001); J. H. H. Weiler, ‘Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay’, in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford: Oxford University Press, 2012).

<sup>3</sup> Weiler, ‘The Transformation of Europe’, 2481.

<sup>4</sup> See A. Cohen, *De Vichy à la Communauté européenne* (Paris: Presses Universitaire de France, 2012).

to *Union* with the Maastricht Treaty has managed to retain the ‘community spirit’. But perhaps most importantly, the (subjective) sense that ‘Union’ connotes a coming together while staying other, the continued autonomy and agency of the parts not only in spite of the togetherness but perhaps most importantly as a precondition for sustainable togetherness.

Crucially, this understanding of Union (or, for Weiler, Community) depends on stripping it from its teleological connotation – the idea that a Union needs to have a *telos*, an end that is radically different from its beginning, and what else than the move from separate *demoi* to the merger into oneness? Beings that have lost and yearned for ‘oneness’, at one point simultaneously male and female, have stirred the human imagination and peopled our myths and religions since our beginnings. After the original sin, *Adam*, the first hermaphrodite and a self-sufficient being like his creator, is divided into two imperfect sexes incapable of reproducing on their own. As told to us by Plato, each half of the primitive *androgyn*, split into two by Zeus, will forever be looking for his or her other half to become one again. How not to see our human unions and accompanying vows (‘if anything but death parts me from you’) as imperfect second bests, pale approximations of the original unity? And yet, Union short of Unity is the human condition, the source of its creativity as well as pathos.

So the idea of ‘ever closer union’ can be read as an asymptotic notion which relies on never stating – and even less attaining – some ultimate, fixed political construct. In this light, Weiler’s recent warning against the kind of political messianism which has inspired European political elites from the origins comes into full relief. Today’s great danger is that this messianic drive, which early on delivered a mode of integration compatible with both *Union* and *Unity*, has now come to embrace ‘Unity by stealth’, an end which justifies overlooking obstacles in the way, including the immense wave of resistance emanating from European publics. And yet the difficulty is this: public discourse seems to require teleological language, statements on ‘what this is all about’. The question for us is whether this can be done by simply extolling purpose and explaining that there is no other horizon than a democratically sustainable process of togetherness without some new grand and shining political construct in sight. How do you explain that a polity can have a compass without a destination?

Crucially in the contemporary twist to this story, the idea of Union implies that of choice. Unity and secession are incompatible. Community is ambiguous – one is usually born in a Community but joins a Union.

Of course, one could argue that European states had no choice but to be born rubbing against each other at the tip of Asia. But they were free to create or join a Union and are, or should be, free to leave it, if an individual *demos* so decides in a democratic fashion.<sup>5</sup> For Weiler, the spiritual meaning of Europe's *Sonderweg* as 'constitutional tolerance' is to make integration an autonomous and endlessly renewed voluntary act of subordination to the European other.<sup>6</sup> Internalising mutual constraint is thus an act of emancipation if it be understood as a version of what federal language calls 'federal liberty' or indeed the choice for mutual recognition.<sup>7</sup> Arguably, such a right to leave can be considered all the more precious if the option is not to be exercised. In prosperous democracies at least, an overwhelming majority of citizens, however unhappy, do not choose to vote with their feet and leave their country even if they are unhappy with their current government. But they can. Similarly, most Europeans would not choose for their state of origin to leave the EU even when a majority might be unhappy about its policies. Under such conditions – which may change – the theoretical right of exit which is part of the constitutional matrix of the EU contributes to its strength, not its weakness as proponents of *Unity* would have it. Which is also why the EU needs to make up for the relatively perfunctory nature of the freedom of exit through opt-outs and differentiated integration.

One may argue that choice is not always a good thing. 'This nothing good or bad, but thinking makes it so,' said the Bard. Indeed, most citizens of affluent states seem to suffer from the pathologies of choice, a state of permanent unhappiness brought about by the sense that some other option might have been better than the one chosen. And among peoples, it could also be argued that commitment may become more profound, humility more warranted, within a no-alternative irreversible Union. Perhaps. But at what price?

## 2 Meanings of Transformation

If *The Transformation of Europe* is constructed around the notion of 'equilibrium', it ends with doubts about its sustainability. So unsurprisingly, most commentaries seek to assess whether this projection has come to

<sup>5</sup> Editor's note: This chapter was written before the 2016 Brexit referendum.

<sup>6</sup> Weiler, 'Federalism and Constitutionalism', 54–72.

<sup>7</sup> K. Nicolaïdis and R. Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford: Oxford University Press, 2001).

pass and on what grounds would we know that it has. This task is complicated by the fact that the concept of equilibrium can be understood in different ways. As with the term itself – ἰσορροπία which implies the leaning on both sides to the same extent but not necessarily at the same time – the notion of equilibrium always involves some oscillation from one side to the other. The dynamic character of all federal polity is an old story, poised as all federations are between federal safeguards –for states – and federal overstretch –by the Union.<sup>8</sup> Indeed, history does not generally offer stable federal bargains. The equilibrium is forever elusive and the oscillating pattern is one of lively awareness of what is wrong with the status quo.

But in the story of *this* equilibrium, the question is not whether the polity survives, e.g., the durability of the EU per se, but whether it survives in the form that we value normatively because we believe it is the best warrant for its long-term sustainability. If, in the end (and recalling the expansive analysis in Weiler's first collaborative EUI 1986 project, *Integration through Law*) a non-state *Community* or *Union* is always about sustaining the balance between the One and the Many, the polity cannot swing too far before that balance is deemed broken. Yet while such an equilibrium is certainly inherently unstable, Weiler may have underestimated the durability of this particular union that is the EU.

### 'Transformation'

In my view, the argument ought to start around the dual nature of 'transformation' in the EU as both incremental ('evolution') and radical ('revolution'). The latter obtains when we use a democratic theory lens, and stems from the innovative character of the polity in the making rather than the degree of change imposed on each familiar category (e.g., 'sovereignty transfers' or 'delegation'). To the extent that transformation continues to eschew a mimetic logic from the state to supra-state, or from international law to domestic law writ-large, then a 'transformational logic'<sup>9</sup> constitutes a radical departure. Much of EU legal theory inspired by *The Transformation of Europe* has been about the ways in which the EU's legal order calls for a transformation of reigning legal paradigms rather than mere conceptual

<sup>8</sup> R. D. Kelemen, 'Built to Last? The Durability of EU Federalism', in S. Meunier and K. R. McNamara (eds.), *Making History: European Integration and Institutional Change at Fifty* (Oxford: Oxford University Press, 2007), 51.

<sup>9</sup> R. A. Dahl, *Democracy and Its Critics* (New Haven, CT, and London: Yale University Press, 1989).

tweaking, as with the constellation of variants on the idea of constitutional pluralism.<sup>10</sup> Nevertheless, we can doubt whether the EU can ultimately be faithful to the spirit of Dahl's third 'transformation of democracy', one that would also revolutionise the EU's social order rather than only relying on its already revolutionary institutional foundations.<sup>11</sup>

But if we turn to an international relations frame and to the prehistory of Weiler's historical exploration, claims about transformation are grounded on a different ontology, a departure point that is the non-state-like, non-hierarchical structure that is the international system. In this reading, the EC third way was born from the belief held by moderate federalists that power politics could be *transformed* in Europe without *transcending* the state system itself – in contrast with federalist schemes like EDC and even ECSC. Albeit necessary to tame nationalism, supranationalism would be instrumental and regulative, not ontological. Behind Monnet, administrative planers united across Europe to seek administrative economies of scale *within*<sup>12</sup> and colonial economies of scale *without*.<sup>13</sup> So, from an international relations view point, we can argue that it is indeed incrementalism which set in motion Europe's transformation: that is the institutionalisation of balance of power through the Community method as a far cry from the 'radical federal' projects floating around in the postwar era. But this in turn opened a space within which a most radical legal, institutional, and political transformation could take place.

The virtue of a conversation about the meanings of transformation is that it is first to free us from arguments from original intent including originalist obfuscation based on the myth-making function of much of the writings by and about the 'founding fathers'. Instead, the story of the equilibrium thus set in motion has much to do with unintended consequences following from a collective purpose to fine-tune the vague peace ideal into specific forms of political 'togetherness'. If what followed was a series of experimental steps which only gradually revealed a compass<sup>14</sup> then the very nature of the project is *ateleological*: 'doing

<sup>10</sup> G. de Búrca and J. H. H. Weiler (eds.), *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2012).

<sup>11</sup> Dahl, *Democracy and Its Critics*; J. Bohman, *Democracy across Borders: From Demos to Demoi* (Cambridge, MA: MIT Press, 2007); K. Nicolaidis, 'European Democracy and Its Crisis', *Journal of Common Market Studies*, 51, 2 (2013).

<sup>12</sup> P. L. Lindseth, *Power and Legitimacy* (Oxford: Oxford University Press, 2010)

<sup>13</sup> K. Nicolaidis, B. Sèbe, and G. Maas (eds.), *Echoes of Empire, Memory, Identity and Colonial Legacies* (London: IB Tauris, 2015).

<sup>14</sup> See introduction of Weiler, *The Constitution of Europe*.



before being' in the vein of continental existentialist philosophers. The 'community' spirit may have been plagued by the taken-for-grantedness of its original purpose of 'peace and prosperity' calling, in Weiler's view, for grounding the project in political values sustained by individual virtues. But I would submit that the transformative challenge is in a way more ambitious as it relies on a kind of pluralist bet: that the complex and deep social structure underpinning integration in Europe is progressively creating a space where conflict about the implications of 'togetherness' can take place not only through deliberation, but also through contestation and even ultimately peaceful self-exclusion. Isn't this the spirit of constitutional tolerance? The bet can be won if our political imagination enables us to recover the open-ended and transnational nature of *transformation*.<sup>15</sup>

In sum, a combination of incremental and radical transformation holds the key, I believe, to the meaning of 'equilibrium': the initial *incremental* transformation of the state system on the European continent, the subsequent transformation of the legal-political order thus created through the transformation of European nation-states into EU member states, and the *radical* but incomplete transformation of their democracies in the process.

### 'Equilibrium'

In line with Weiler's 1999 call to explore the empirical variations on and threats to the foundational equilibrium,<sup>16</sup> some scholars believe that the original historic diagnosis, is just that, a function of its times, superseded *inter alia* by what they see as a more expansive transformative logic through the power of legalism (Kelemen and Lindseth, this volume). Others emphasise the continued resilience of the equilibrium, the conservative nature of transformation.<sup>17</sup> The very fact that each side can make a plausible case may be telling us something important, namely, that two logics that used to be mutually balancing come into tension, risking stretching the pendulum too far.

<sup>15</sup> J. Lacroix and K. Nicolaïdis (eds.), *European Stories: Intellectual Debates on Europe in National Contexts* (Oxford: Oxford University Press, 2010).

<sup>16</sup> Weiler, *The Constitution of Europe*.

<sup>17</sup> A. Moravcsik and K. Nicolaïdis, 'Keynote Article: Federal Ideals vs Constitutional Realities in the Amsterdam Treaty', *Journal of Common Market Studies*, 36, Annual Review (1998), 13-38.

With the first camp, we can ascertain the various ways in which the EU has indeed superseded the foundational equilibrium through QMV in particular, but without creating the kind of disruption Weiler feared. In spite of the partial loss of state ‘voice’, the EU remained remarkably stable throughout the 1990s and most of the 2000s thanks to the entrenchment of its constitutional order through the ‘Europeanisation’ of domestic legal and regulatory systems. Such entrenchment was also the result of the priority granted to market integration combined with a fragmented institutional structure which generated political incentives to issue detailed and judicially enforceable rules framed as ‘rights’ backed with the threat of publicly and privately enforced litigation.<sup>18</sup> At least until the financial crisis, core constituencies within the member states were sufficiently powerful to define the ‘national’ position in ways congruent with the kind of supranational legalism that was originally conditioned on the kind of political control of the legalisation process Weiler analysed in *Transformation*. Legal functionalism seemed self-sustaining, acting as a solvent for constitutional boundaries insofar as politicians and their ideologies remained complicit in this game.

It is precisely this legalisation dynamic which Weiler denounces of late as a ‘formalist self-referential concept of the rule of law’.<sup>19</sup> The ‘immense power of self-governance’ afforded by the combined doctrines of direct effect and supremacy has allowed a process of expansion of rules precisely framed as ‘individual rights’ to obfuscate the fundamentally skewed impact that such rights may have on the distribution of the costs and benefits of integration among European citizens. It may be that supranational law was always bound to create disruptive effects, putting the interests of ‘nomads’ before those of ‘settlers’ and that this was a good thing, indeed the Union’s very purpose of intertwining. But the more what is thus served are perceived as ‘private’ *interests* opposed to ‘public’ *good*, the more socially unsustainable they become. When rules-as-rights come to supersede deeply seated social rationalities, as Joerges would put it, the large sways of populations who find themselves outside the benign value-creating impact of market integration are prone to reject all ‘movers’ and indeed sacrifices incurred in the name of integration.<sup>20</sup> In this sense, the

<sup>18</sup> R. D. Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Cambridge, MA: Harvard University Press, 2010).

<sup>19</sup> Weiler, ‘Deciphering the Political and Legal DNA of European Integration’, 137–58.

<sup>20</sup> C. Joerges, ‘Integration Through Law and the Crisis of Law in Europe’s Emergency’, in D. Chalmers, M. Jachtenfuchs and C. Joerges (eds.), *The End of the Eurocrat’s Dream* (Cambridge: Cambridge University Press, 2016).

socialising of private risks during the sovereign debt crisis is an extension of the same logic.

On what grounds, then, should we believe in the capacity of the Union to adapt, indeed, reinvent some version of the equilibrium along the way? Arguably, (re)balancing need not depend on some providential ‘loyalty’ *a la* Hirschman’s but rather on a kind of meta-equilibrium whereby both law and politics come to better internalise the balancing constraint of the other side: law correcting its own penchant for uniformity, states correcting their own penchant for ignoring externalities. This in turn implies considering the political agency of the social, outside classic aggregative political structures. If so, the triangle between law, politics, *and* society remains under-theorised.

Much of the legal scholarship (including Weiler’s) has shown that the original constitutional compromise between EU competence and member states’ autonomy could be sustained through a subtle interaction between EU law making and CJEU jurisprudence sensitive to ‘the perils of Unity’ brought about by unreflexive legalism. Arguably for instance, much of the internal market jurisprudence has avoided addressing regulatory burdens to free movement by reducing regulatory diversity, seeking instead the same result by changing the baseline in conflict of laws to the country-of-origin jurisdiction, and then, crucially, retreating from the extreme version of such a choice, on a case-by-case, sector-by-sector basis, grounded on the constructive ambiguity of words like ‘legitimate’ or ‘proportional’ regulations.<sup>21</sup> Flirtation with the Unity paradigm in secondary law-making and enforcement may thus be subject to difficult interpretation as to what constitutes the ‘writing on the wall’, hints or decisive moves. In my view, the six-pack legislation of 2012 aimed at enforcing EMU rules on national economies has crossed the fine line between financial crisis management and the engineering of convergence for its own sake.

When it comes to the Treaty-making realm, whether the decade-long attempt at formal constitutionalisation (adopting an actual Constitution) was indeed an attempt to cross the line between the promise of *Union* and the perils of *Unity* is mute, at least for the time being. The question that remains is whether the conceptual apparatus offered by the scholarship on constitutional pluralism and the praxis it is meant to capture succeeds

<sup>21</sup> K. Nicolaïdis, ‘Trusting the Poles, Mark 2: Towards a Regulatory Peace Theory in a World of Mutual Recognition’, in I. Lianos and O. Odudu (eds.), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (Cambridge: Cambridge University Press, 2012).

in fully operationalising the constraining virtues of Weiler's constitutional tolerance.<sup>22</sup> A powerful pluralist argument can be made that the constitutional paradigm, however amended to embrace the non-hierarchical nature of the EU polity, simply cannot accommodate the kind of deep diversity characterising the social-political realities of our the current era.<sup>23</sup> Any form of formal constitutionalism, in this view, comes to adopt overarching norms, like subsidiarity, meant to direct the solution of conflicts or the contribution of each level, to the coherence of the overall order. In contrast, systemic pluralism calls for the decentralised management of diversity all the way down, mutual accommodation without guidance except for perhaps from the self-limiting virtue which comes from the permanent possibility of contestation and the impossibility to freeze deals imposed by the powers of the day.<sup>24</sup> Such pluralist arguments go a long way in grounding normatively the case against *Unity* in the EU. But they may not entirely serve the *Union* paradigm insofar as they rely overwhelmingly on the social third leg of the triangle, overlooking the question of the political per se. If, on the contrary, the *Community* or *Union* is one of peoples whose self-determination is channelled primarily through their own liberal democratic states as well as secondarily through their myriads of modes of citizenship allegiance to the Union, then systemic pluralists echo constitutionalists, by painting a politically impoverished world where 'movements', 'forces', and 'networks' have replaced *la place publique* of territorially constituted peoples. To ascertain the fate of Weiler's equilibrium in today's EU, we need to come back to the transformation of the member states and the way they manage their democratic interdependence.<sup>25</sup>

Can there be much doubt that, even when veto-less, the member states have continued to direct the EU show over the past twenty-five years? And that this matters to citizens? There are clearly many ways in which 'voice proxies' have served to maintain some version of Weiler's equilibrium. Institutionally, the collective reassertion of state power alongside supra-national legality over the past decade has been remarkable, including in the

<sup>22</sup> Weiler, 'Federalism and Constitutionalism, *op cit.*

<sup>23</sup> R. Howse and K. Nicolaidis, 'Legitimacy through "Higher Law?" Why Constitutionalizing the WTO Is a Step Too Far,' in T. Cottier, P. C. Mavroidis, and P. Blatter (eds.), *The Role of the Judge: Lessons for the WTO* (Bern: The World Trade Forum, 2002), Volume 4.

<sup>24</sup> N. Krisch, *Beyond Constitutionalism: the Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010).

<sup>25</sup> C. J. Bickerton, *European integration: From nation-states to member states.* (Oxford: Oxford University Press, 2012).

crowning of the European Council as the institutional apex of the EU in a constitutional convention presumably dominated by parliamentarians.<sup>26</sup> Moreover, enlargement has not meant an abandonment of ‘consensus democracy’ suggesting that the equilibrium can cope with the pressures from scale;<sup>27</sup> and the (now headless) rotating presidency remains a tool of small state balancing. Moreover, the EU machinery increasingly balances an *inter-governmental* with an *inter-state* logic. Arguably, that states *qua* states sustain their structural involvement in supranational institutions through informal modes of governance and national fiefdoms can constitute a more effective voice than voting mechanisms.<sup>28</sup> The real concern with the kind of transnational interventionism brought about by the financial crisis is less with the reassertion of state power – which in truth had never disappeared – than with the incapacity of governments to involve in their horizontal dealings political and crucially *social* forces beyond temporary majorities, as well as the disregard of legal supranationalism for the fundamental value of state autonomy.

To be sure, when proxies for voice have been found wanting, member states have perfected the recourse to ‘negotiated’ partial exit as long as they find it in their collective interest to let each other do so – as illustrated most spectacularly in the context of EMU. Paradoxically, that differentiated integration has become so prevalent of late may be less a sign of fragmentation than of a commitment to legality. This may mean in turn that we will need to analyse more systematically the sustainability of another sort of meta-equilibrium between different version of the voice-exit continuum, operationalised by different groupings of states. Ultimately, we may still question the *de facto* feasibility of the highly symbolic ‘exit clause’ introduced by the Lisbon Treaty, but the very fact that the exercise of this option has now become part of mainstream electoral templates may mean that bargaining ‘in the shadow of exit’ will serve as a voice proxy in the EU political landscape.

In the end, the more profound problem in the EU today is not that of disenfranchised governments in Brussels, but that of discredited governments at home. The currency of power inside the EU is no longer between

<sup>26</sup> P. Maignette and K. Nicolaidis, ‘The European Convention: Bargaining in the Shadow of Rhetoric’, *West European Politics* (April 2004).

<sup>27</sup> R. Dehousse, F. Deloche-Gaudez, and O. Duhamel, *Elargissement – Comment l’Europe s’adapte* (Paris: Presses de Sciences Po, 2006).

<sup>28</sup> M. Kleine, *Informal Governance in the European Union: How Governments Make International Organizations Work* (Ithaca, NY: Cornell University Press, 2013).

big and small countries or even creditor and debtors, but between the haves and have nots of self-ascribed political virtues like openness, a divide which in turn threatens the kind of political mutual recognition which underpins the *Community* or *Union* paradigm. The euro crisis has stretched the potential for EU transformation *within* its parameters to its limits. But we must refrain from wholly inferring from emergency management the shape of things to come.

### 3 Transformation as Democratic Mutation

The question of the democratic anchoring of the EU has become both the deepest source of Europe's current malaise and the potential source of its most transformative promise yet. Weiler's express preoccupation twenty-five years ago with the lack of democratic foundation for the EU was prescient and the key to grounding the promise of *Union* against the perils of *Unity*. If the development of majoritarian legislative authority combined with the granting of competences to bodies with limited capacity to deliver on the expectations created by such competences was the root of the problem then, this gap has been dramatically amplified by the management of the euro crisis. And Weiler's argument at the time that such gap would not be bridged by further empowering a body like the European Parliament or adopting democratic recipes borrowed from statehood is certainly more relevant than ever, although the EP is now entrenched in the Union's democratic landscape. But alternative albeit partial solutions are at hand which did not present themselves twenty-five years ago. This is where the transformative promise lies.<sup>29</sup>

For one, whether or not fears of EU pre-emption of national autonomy and democratic self-government will turn out to be warranted in the long run, we have started to witness a 'democratisation of national vetoes' through referenda, parliamentary action, and, ultimately, national electoral processes. But it will take more than a respect for such democratic vetoes to sell the EU's democratic credential to increasingly sceptical publics. The idea of European democracy is meant to translate the regulative principles of constitutional tolerance and mutual recognition at the heart of *Community* into the language of democracy.<sup>30</sup> It is meant to provide a

<sup>29</sup> K. Nicolaïdis and R. Youngs, 'Europe's Democratic Trilemma', *International Affairs* (November 2014).

<sup>30</sup> K. Nicolaïdis, 'We the Peoples of Europe', *Foreign Affairs*, 83, 6 (2004); K. Nicolaïdis, 'The Idea of European Democracy', in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford: Oxford University Press, 2012); Nicolaïdis, 'European Democracy and Its Crisis'.

normative benchmark both to defend the EU-as-is against a statist reading that would pin EU democracy to the mast of classic legislative-executive designs and to criticise the EU for its lack of democratic ambition. In this light, the EU's transformation has created the legal-institutional foundation for the EU as a democracy, but the latter depends and builds on a fragile yet sustained equilibrium. While the imperative was and still is not to cross the Rubicon and change the EU's political nature from voluntary to coercive association, this leaves us with quite a margin of manoeuvre. This Rubicon is a large river and its shores – the political orders of 'unity' and 'anarchy' on either side – are not clear lines in the sand. As an open-ended process of transformation, Europe's democracy in the making may yet be saved from continued elite capture by the horizontal and fluid nature of the new 'crowd-sourced' politics of the twenty-first century.

This is in my view the paradigm that should inspire democratic renewal in the EU today consistent with *Union* rather than *Unity*: a democratic system, focused on a) the European respect for as well as rescue of national democratic processes, avoiding the drift from technocratic recommendations to supranational democratic pre-emption; b) a supranational consensus democracy resting on the equal ownership of EU decisions by states and citizens; c) and above all a true transnational ambition towards the progressive maturing of European citizens inspired by the virtues of transnational mutuality and capacity to own others' plights and democratic traditions.

If we are to get there, however, Europeans need to call the bluff of those politicians and pundits whose messianism continues to reflect a long-standing elite continental tradition of conceiving democratic politics as a means to a particular end, rather than embracing the 'untidiness' of pluralist political liberalism as an ethos in and of itself. Hopefully, European citizens will thus reinvent a new kind of European idealism affirming that *convergence, homogeneity, and Unity* by stealth has now run its course. Hopefully, they will instil existing EU institutions with such an ethos. If not, the fallout from the crisis will be to shatter the social and political contract at the heart of the late twentieth-century European project of *Community* or *Union*.