



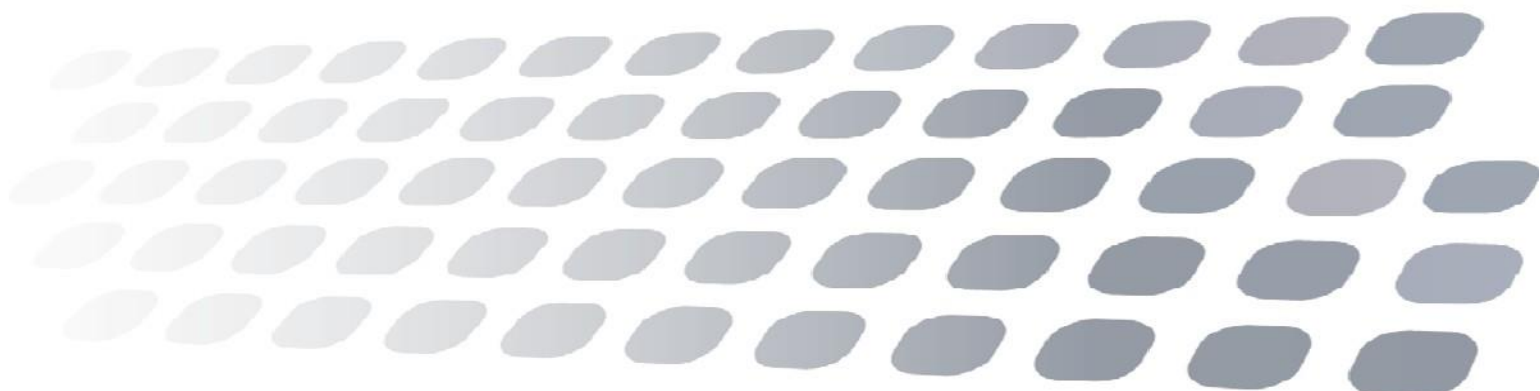
CENTRO STUDI SUL FEDERALISMO

PERSPECTIVES ON FEDERALISM

VOL. 11

ISSUE 1

2019





ISSN: 2036-5438

VOL. 11, ISSUE 1, 2019

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ISSN: 2036-5438

Are You Ready for That? The Next European Elections as a Crucial Moment in the History of the EU

by

Giuseppe Martinico*

Perspectives on Federalism, Vol. 11, issue 1, 2019





Abstract

This issue of Perspectives on Federalism presents a special symposium devoted to the elections of the European Parliament. The EU has frequently been described as a burden, a threat to national sovereignty or a technocratic subject provided with an indirect legitimacy, but this representation does not give justice to its important role in everyday life. Indeed, the EU is also an added value, thanks to EU law we have enjoyed new rights which we can now claim before national judges. In this sense, although it does not benefit from the kind of legitimacy that national democracies normally have, it for sure participates in the function historically played by constitutionalism

Key-words

European Parliament, elections, Brexit, European constitutionalism



The elections of the European Parliament (EP) are approaching. While traditionally these elections have been described as “second order” elections (Reif, Schmitt 1980) when compared to the national ones, this time they seem of primary importance for European integration, as recently emphasized by Emmanuel Macron (Macron 2019). There are many reasons for this. First of all, they might be the first post Brexit elections. I wrote “*might*” as uncertainty and confusion rule in the UK these days. Repelling the tide in order to come back to the original conformation of English law. The curious phenomenon called “Brexit” is inspired by this goal: a titanic challenge against history which aims to achieve what Lord Denning could not even conceive in the seventies, when he defined the impact the Treaty of Rome over the English system as an “incoming tide”. In theory, anything could happen at this point, since the Court of Justice of the EU has ruled in a recent judgment^I that the UK could change its mind, by revoking the notification that triggered the Brexit procedure two years ago. This decision is to a certain extent problematic since it risks adding confusion to an already complicated scenario. This sad situation is, after all, consistent with the historical relationship between the EU and the UK, as recalled by Stephen George in his book published at the end of the nineties, emblematically entitled “An Awkward Partner” (George 1998).

However, the next European elections will also be crucial for another reason, i.e. the massive attacks launched by self-declared populist forces to the idea of European integration as traditionally understood. It is not by coincidence that Salvini, one of the two vice premiers in Italy and leader of the “Lega”, has declared that these elections will be “a referendum between the Europe of the élites, the banks and the finance and the Europe of the people”^{II}. The EU has frequently been described as a burden, a threat to national sovereignty or a technocratic subject provided with an indirect legitimacy (Lord 2017), but this representation does not give justice to its important role in everyday life. Indeed, the EU is also an added value, thanks to EU law we have enjoyed new rights which we can now claim before national judges. In this sense, although it does not benefit from the kind of legitimacy that national democracies normally have, the EU participates in the function historically played by constitutionalism. In this sense, EU constitutional law is not an exhaustive phenomenon, it



does not aim to replace (completely at least) national constitutionalism: on the contrary, EU constitutionalism needs the constitutional materials of the Member States in order to perform its rationalizing function (Mirkin-Guetzévitch 1931) the constitution, in this sense, remains the “shape of the power”). This point has been developed by, among others, the former Advocate General Miguel Poiares Maduro (Poiares Maduro 2012), who radically challenges the argument of those who deny the existence or the possibility of a supranational constitutionalism, by making a distinction between the idea of constitutionalism as such and state constitutionalism, which is understood as a particular historical experience and not as the paradigm of constitutionalism as such. Against this background “European constitutionalism brings us closer to the ideals of constitutionalism. It is not, in itself, a closer representation of constitutionalism than national constitutionalism, but their interplay is. This is what constitutional pluralism argues and therein lays its thicker normative claim, one that relates constitutional pluralism and constitutionalism in general” (Poiares Maduro 2012: 77) In other words, we do not need a European super State to recognize the importance that the EU has in our life. Member States will continue to have a central role but - and this is what populists usually do not mention - the European peoples (plural) will reinforce their position of being capable of dealing with many global phenomena only by cooperating together without being obliged to renounce their diversity. “United in diversity” is not by coincidence the motto of the EU. We have decided to devote a special symposium to the next European elections with three short articles authored by Nicola Lupo, Diane Fromage and Roberto Castaldi, who kindly accepted to analyse this crucial moment from their (different) perspectives.

However, this issue does not limit its attention to the EU only since we have also gathered three long articles dealing with other relevant legal and political experiences. In his piece Matteo Monti explores the tricky relationship between asymmetry in fundamental rights and the principle of non-discrimination in Belgium – focusing on the debate concerning the Charter for Flanders – and Switzerland. In their article Domenico Giannino and Antonio Manzoni deal with some interesting decisions of the Supreme Court of Justice of Colombia and the Inter-American Court of Human Rights and try to identify the core points of a new environmental justice approach. In his essay Rajesh Kumar offers a fascinating analysis of the development of federal financial relations during British rule in India by identifying six phases in its evolution. As always, happy reading.



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¹Court of Justice of the European Union, C-621/18, *Wightman e a.*, ECLI:EU:C:2018:999, www.curia.europa.eu

¹¹“Salvini lancia la "Lega delle Leghe": ‘Sarà un referendum tra noi e le élite europee’”, 01 July 2018, <http://www.ilgiornale.it/news/politica/salvini-guarda-europee-referendum-noi-e-lite-ue-1547278.html>

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**Subnational constitutions between asymmetry in
fundamental rights protection and the principle of non-
discrimination: a comparison between Belgium
(Charter for Flanders) and Switzerland**

by

Matteo Monti*

Perspectives on Federalism, Vol. 11, issue 1, 2019



Abstract

This paper investigates the complex relationship between asymmetry and the principle of non-discrimination from the perspective of subnational *fundamental rights*. The research question of this paper concerns the compatibility of asymmetry in fundamental rights with the equality principle, looking at the so-called Charter for Flanders (*Handvest voor Vlaanderen*, in Flemish) in the light of the Swiss experience.

In the first part (section 2), this paper briefly explores the importance of subnational constitutions in multinational states, highlighting how subnational constitutions could incorporate cultural fundamental rights related to (sub)national identities. The paper analyses how cantonal constitutions in the Swiss Confederation protect cultural fundamental rights and how the project of the Flemish Charter promotes national identity in fundamental rights.

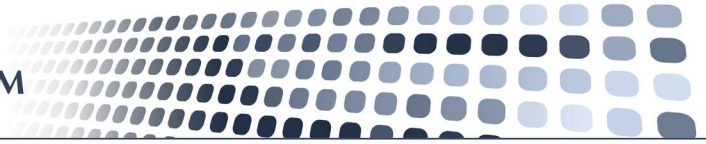
The second part of the paper (section 3) explores the limits, stemming from the equality principle, to the asymmetry of fundamental rights as derived from subnational constitutions in federal systems. While doing so, the paper focuses on the Swiss experience, looking at the relevant case law of the Swiss Federal Supreme Court and the decisions of the Federal Assembly concerning subnational fundamental rights.

Finally, the third part (section 4) of the paper is dedicated to the Belgian scenario. This part analyses how the principles inferred from the Swiss case may be applied to the Belgian scenario and to the Flemish Charter.

In the final remarks (section 5), the paper makes some considerations *de jure condendo* about the Charter for Flanders in Belgium and the asymmetry in fundamental rights in multinational states.

Key-words

federalism, fundamental rights, asymmetry, non-discrimination principle, subnational constitutions, cantonal constitutions, Charter for Flanders, Switzerland, Belgium



1. Introduction: subnational constitutions in federal multinational states

Subnational constitutionalism could be used for different aims, and it is often used as ‘number “42” in Douglas Adams’ *The Hitchhiker’s Guide to the Galaxy*’ (Blokker et al. 2015: III), and thus as the answer to every type of question. However, what is of interest here is the issue of the subnational bill of rights as an instrument of asymmetry in federalism. This paper investigates the complex relationship between asymmetry and the principle of non-discrimination from the perspective of subnational *fundamental rights* (recalling the distinction between fundamental rights and human rights: Palombella 2007). In particular, the paper is about the asymmetry in fundamental rights generated by the subnational constitutions and its compatibility with the equality principle.

This paper does not enter the debate concerning whether federated constitutions should be considered as an essential characteristic of federalism (*ex pluribus* Gamper 2005: 1312, Gardner 2007, Delledonne et al. 2014; cf. Popelier 2012: 43; for an example of a federal state without subnational constitutions, think Belgium or Canada: Tarr 2009). What should be stressed is that, in a complex reading of federalism as a process (cf. Friedrich 1968; Wheare 1947; Watts 1999a; Elazar 1987; Burgess 2006) with many stages, the presence of subnational constitutions is surely an important step, but not a foundation stone. Indeed, if the constituent units have the power to enact subnational constitutions — i.e. they have constitutional autonomy (‘Kompetenz zur Verfassunggebung’, Kelsen 1925: 208) — the federalism to which they belong could be considered an advanced federalism.

In federalisms, the importance of subnational constitutions is due to the presence of provisions that highlight the national/cultural identity of the inhabitants of the constituent units, such as anthems, flags, and festivities (Häberle 2007, 2008), but also, and above all, to the presence of a subnational bill of rights that enshrines cultural fundamental rights. Ethical and cultural differences have played a critical role in the development of subnational constitutions and bills of rights, even in very culturally homogeneous countries such as the United States.¹

Subnational constitutions with bills of rights that contain cultural subnational fundamental rights could be a good instrument of asymmetry to reinforce the unity of federal states. This leads to the existence of a competition between the federal bill of rights and the



federated bill of rights (Weerts 2016: 179) or a ‘charter duel’ (Watts 1999: 958), but, especially, to the creation of asymmetry in the field of fundamental rights relating to the presence of subnational fundamental rights not covered by the Federal Constitution. ‘There is undeniably a potential diversity in the sources of rights and liberties within the federal structures. This is reflected in the large variety of rights secured in state constitutions’ (Fercot 2008: 306).

However, it seems to be the main role of asymmetry in federations to ‘take account of the fact that within a state there are significant cultural or societal differences among the constituent units’ (Tierney 2004:188). Of course, the asymmetry must be limited by conformity with the federal fundamental rights and the Federal Constitution because, as stressed (Auer et al. 2013b: 40; Martenet 1999: 420; Watts 2000: 954), subnational bills of rights may have just a complementary role in the protection of rights, and they must be coherent with the Federal Constitution.

Against this background, subnational constitutions could be particularly important for multinational states^{II} that are trying to accommodate the multi-ethnic character of their constituent units, such as Belgium and Switzerland.^{III} In particular, over the past two decades, the request for a subnational constitution has regularly emerged in Flanders. The research question in this paper concerns the compatibility of asymmetry in fundamental rights with the equality principle, looking at the so-called Flemish Charter (*Handvest voor Vlaanderen*, in Flemish)^{IV} in the light of the Swiss experience. As a consequence, the project of the Flemish Charter will be analysed in the light of the Swiss experience in order to understand how much an asymmetry in fundamental rights would be compatible with the equality principle (i.e. the homogeneity clause/the supremacy clause) and if a potential and future enactment of the Flemish Charter would be coherent with the Belgian constitutions. Although Flanders lacks full constitution-making power, this analysis could be interesting, because Belgium is a legal system that is engaged in a continuing evolution (Arcq et al. 2012: 50 and ff.) and because the Flemish Prime Minister has recently claimed that the process for enacting the Charter must restart.^V In this field, it must be underlined that the absence of a supremacy clause in the Belgian Constitution leads to the lack of a hierarchy between federal law and regional law, relegating the issue of the conflict of laws to a matter of competence. This particular aspect of the Belgian legal system could lead to wide forms of asymmetry, granting a large application of the Flemish fundamental rights with the only

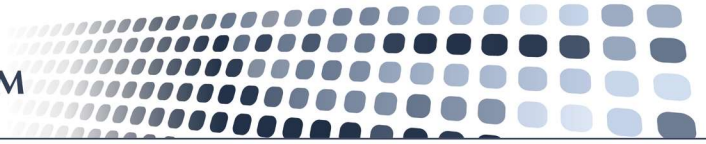


limits of the Belgian Constitution (articles 127(2), 128(2), 129(2), 130(2) and 134(2) of the Belgian Constitution. Cf. Delpérée 1999; Romainville and Verdussen 2015). For this reason, a comparison with the Swiss Confederation could be particularly useful, given the vast asymmetry conceded in the Helvetian legal system.

Methodologically speaking, some Belgian scholars (van der Noot 2014) have suggested that the Swiss experience could be a good comparative model to explore the sustainability of the asymmetry in fundamental rights derived from the project of the Charter for Flanders. Indeed, using the ‘most similar cases logic’ (Hirschl 2014: 245 and ff; cf. Thérét 2005: 107 and ff.), it can be stressed that both legal systems are federal multinational states,^{vi} are trying to accommodate the different *Weltanschauung* or cultures of their constituent units, lack a dual court system (only a few Swiss cantons have their own constitutional courts: Jura, Vaud, Nidwalden, and Graubünden), and have federal governments that are careful to share the governmental roles and powers among different ethnic groups. Moreover, the different ways of developing federalism probably would not affect the matter of subnational constitutions. Belgium and Switzerland have come to be federal states in different ways: the former from a top-down process (devolutionary system), the latter through a traditional federalisation process (aggregative system). As stressed (Tarr 2011: 1135; about the Belgian federalism cf. Verdussen 2005: 175), this could affect the degree of potential space allowed to subnational constitutions, but this trend could not be elevated to a general rule (Palermo and Kössler 2017: 126-127; on the contrary, other authors stress that subnational constitutions would emerge easily in a devolutionary system Cf. Popelier 2012: 45).

In the first part (section 2), this paper briefly explores the importance of subnational constitutions in multinational states, highlighting how subnational constitutions could incorporate cultural fundamental rights related to (sub)national identities. The paper analyses how cantonal constitutions in the Swiss Confederation protect cultural fundamental rights and how the project of the Flemish Charter promotes national identity in fundamental rights.

The second part of the paper (section 3) explores the limits, stemming from the equality principle, to the asymmetry of fundamental rights as derived from subnational constitutions in federal systems. While doing so, the paper focuses on the Swiss experience,



looking at the relevant case law of the Swiss Federal Supreme Court and the decisions of the Federal Assembly concerning subnational fundamental rights.

Finally, the third part (section 4) of the paper is dedicated to the Belgian scenario. This part analyses how the principles inferred from the Swiss case may be applied to the Belgian scenario and to the Flemish Charter.

In the final remarks (section 5), the paper makes some considerations *de jure condendo* about the Charter for Flanders in Belgium and the asymmetry in fundamental rights in multinational states.

2. The legal framework and the cultural fundamental rights in the cantonal constitutions and in the project of the Charter for Flanders

2.1. The Swiss case: the legal framework and the cultural identity of the fundamental rights enshrined in the cantonal constitutions

In Switzerland, there are two levels of ‘constituent power’, *rectius* constitutional autonomy: the federal one and the cantonal one. According to article 51.1 of the Federal Constitution, cantons must have their own written constitutions.

The main role in the protection and guarantee of fundamental rights was originally played by the cantonal constitutions. Switzerland was a typical example of an aggregative federalism. Only in 1999 did the federal state enshrine a complete bill of rights in the Federal Constitution (for a good summary of the evolution in the field of individual rights, see Weerts 2016). Indeed, in the Constitution of 1848 there was no place for individual rights^{VII}; individual rights were guaranteed by cantons.^{VIII} The asymmetry of individual rights was quite evident, but the federation began to ensure some levels of uniformity in the field of individual rights (starting from the equality principle in elections, the freedom of establishment, and religious aspects) by increasing the *a priori* check made by the Federal Assembly (federal warranty) on the cantonal constitutions (cf. Weerts 2016: 187-188). The full revision of 1874 did not include a full bill of rights, but it included other forms of checks on the uniformity of rights through the appeal to federal courts against any act that violates federal rights (i.e. it was an embryonic mechanism of judicial review).

In the 1960s the Federal Supreme Court began to ‘reveal’ the unwritten constitutional rights,^{IX} which gained a binding nature. Finally, in 1999 the full revision of the Swiss



Constitution included a complete bill of rights in the charter, but this did not mean that cantons stopped developing their own bill of rights.^x The recent reforms and revisions of cantonal constitutions have within their goals the development of complete bills of rights and the reaffirmation of cantonal identity (Schmitt 2012:146).

Thus, the cantonal constitutions have their own bill of rights, sometimes recalling international human rights, sometimes including ‘original’ fundamental rights, and sometimes referring to the Federal Constitution. In any case, it is important to highlight the fundamental role that the subnational constitutions of the cantons have played in the development of the Swiss Bill of Rights.

L’attention vouée par les constitutions cantonales aux libertés a été d’abord la cause, puis la conséquence de la subsidiarité de la protection fédérale de celles-ci. Ce sont les premières qui, avant même la création de l’Etat fédéral, garantissaient des droits et des libertés à leurs citoyens. La garantie fédérale s’est peu à peu développée et étendue, mais toujours en fonction des garanties cantonales: d’abord pour en combler les lacunes, puis pour les compléter, enfin pour les supplanter (Auer et al. 2000: 40).

Nowadays, the cantonal constitutions must be coherent with the obligation of the democratic principle of organisation and must be guaranteed (*procédure de garantie fédérale*) by the Federal Assembly (for a deep analysis, see Martenet 1999: 451 and ff). This last issue requires the respect of federal law as claimed by article 51.2 of the Constitution, according to the principle of federal law supremacy. The Federal Assembly must make this *a priori* check (*procédure de garantie fédérale – ex art. 172.2*), in which it controls the coherence of a new cantonal constitution or of any modification of a cantonal constitution (i.e. full revision or partial constitutional amendment) with the Federal Constitution (the Federal Assembly rarely denied the guarantee/warranty. Cf. Auer et al. 2013a: 581; Grisel 1996).

The Federal Assembly decree deliberates on the compatibility of a federated (i.e. cantonal) constitution with the Federal Constitution. This means that, in the field of fundamental rights, it decides about the conformity of cantonal fundamental rights to the federal Bill of Rights. The main role in this procedure is played by the Federal Council, which gives the Assembly a message (*feuille fédérale*) about the issue of conformity (cf. Martenet 1999: 454). The Federal Supreme Court considers the decisions about conformity contained in the decrees as binding, so it cannot dispute the compatibility of the federated rights with the



Federal Constitution until some modifications of the written or unwritten Federal Constitution occur.^{XI}

The Federal Supreme Court (*Tribunal Fédéral*) is the second organ that has to control the compatibility of fundamental cantonal rights with the federal Bill of Rights, according to article 189 of the Constitution (cf. Martenet 1999: 251 and ff.). Thus, cantonal constitutions in the field of fundamental rights must respect the catalogue of federal fundamental rights, the unwritten constitutional rights, and the international human rights (Palermo and Kössler 2017: 328).

Concerning the topic of cantonal fundamental rights and cultural identity, it must be stressed that the existence of cantonal rights is linked to both the issue of sovereignty (art. 47.1 Const.) and the fact that cantons are states with their own cultural tradition and history (Häberle 1997: 112).

In the origin of the Confederation, the role played by the cantonal constitutions was more evident in the defence of cultural fundamental rights (i.e. rights that were recognised and so enshrined in just some constitutions). Of course, this was particularly evident in the early days of the *Republique Helvétique* (1798–1803), when some cantons (for an in-depth analysis, see Monnier 2007) guaranteed religious freedom for Catholics or Protestants (depending on the religion of the majority of the cantonal citizens), the equality principle (the most progressive cantons) or free movement, and economic freedoms (the most industrialised cantons). The cultural asymmetry was particularly evident also in the Napoleonic Era and in the so-called Regeneration (for a more detailed study, see Weerts 2016: 185-190). Most progressive cantons enshrined in their constitution important political rights and civil rights—freedom of expression, property rights, freedom of association, freedom of the press, freedom of trade, freedom of education (Kölz 2006: 358-373; Martenet 1999: 158 and ff.)—linked to their ideas of what the state should be and what their people consider to be individual rights (i.e. their national tradition and culture). Cultural asymmetry of fundamental rights was highly relevant in this phase, especially because the Federal Constitution of 1848 did not contain a catalogue of fundamental rights. Indeed, as already seen, a complete catalogue of fundamental rights was only developed, at the federal level, with the case law of the Federal Supreme Court and with the revision of 1999. In addition, the Bill of Rights of 1999 actually met some difficulties linked to the absence of cultural consensus in Switzerland about considering some rights as fundamental rights. Before the



revision of 1999, some amendments containing primarily social rights, such as the right to housing or the right to education, were rejected by some cantons (Weerts 2016: 194). As a result, these types of rights exist solely in some cantonal constitutions.^{xii} In this domain, it is worth stressing that ‘a general characteristic of positive rights is that they reflect the «constitutional identity» (Verfassungsidentität) of subnational units, even if they «often promise more than they are able to provide»’ (Fercot 2008: 317).

In 1965, the ‘Awakening of Cantonal Constitutions’ (Weerts 2016) began, during which many cantons ‘revised’ their constitutions and bills of rights according to their cultural identities. This is well expressed in the statement contained in the *Message du Conseil fédéral concernant la garantie de la nouvelle constitution du canton d'Unterwald-le-Haut*, according to which the canton Unterwald-le-haut enacted that ‘la nouvelle constitution découle du besoin «de rapprocher derechef le peuple et sa constitution d’adapter les institutions démocratiques aux circonstances de l’époque et de créer les conditions propres au développement de la paix politique et confessionnelle, ainsi qu’au progrès économique et sociaux»’ (*Message du Conseil fédéral à l’Assemblée fédérale concernant la garantie de la nouvelle constitution du canton d’Unterwald-le-Haut* (Du 24 juin 1968), FF 1968 II 49). This statement shows how the people of this canton need rights closer to their culture and tradition. After the ‘awakening’, almost all cantons developed new constitutions with a full-fledged catalogue of rights, and in the 1990s they developed ‘audacious’ bills of rights, which enshrined innovative rights not included in the Federal Constitution, such as the right of access to official documents, the right to demonstrate in public, the right to education, the right to housing, the right of every woman to material security before and after childbirth, *et cetera*, or widened the federal fundamental rights. In addition, it has to be stressed that even if the majority of cantonal constitutions enshrine rights that have an equivalent at the federal level, ‘Elles ont souvent une histoire qui leur est propre et qui peut conférer au droit ou à la liberté en cause un sens particulier, même si leur lettre reprend la formulation fédérale correspondante’ (Auer et al. 2013b: 40). Finally, sometimes there is a process of ‘mutual learning’ between the Federal Constitution and the cantonal constitutions as well as between the different cantonal constitutions (Palermo and Kössler 2017: 330).

In conclusion, many cultural fundamental rights still exist in the cantonal constitutions — fundamental rights not considered by the Federal Constitution because of the lack of consensus within the whole federation and that are deeply linked to the history, tradition,



and culture of a canton—. On the contrary, some federal rights might also not be considered important enough to be included in the cantonal constitutions. However, this would affect the federal equality clause: federal rights must be applied even if they are not culturally compatible with the culture of the cantons, as a consequence of the supremacy clause.

2.2. The Belgian case: the legal framework and the cultural identity of the fundamental rights enshrined in the Flemish Charter

In Belgium, federated constituents have limited constitutional autonomy (Peiffer 2017). Nonetheless, the Flemish Government aims to enact the so-called Charter for Flanders, a sort of ‘proto-subnational Bill of Rights’. Even though the sixth state reform (Goossens and Cannoot 2015; Nihoul and Barcena 2011) did not change much concerning the constitution-making power of the subnational units (i.e. it did not increase their constitutional autonomy), the development of this possible new form of asymmetry in the Belgian legal system is interesting. Indeed, the Charter could be an instrument of asymmetry not only in subnational constitutional rights but also in a larger sense (cf. Nagel and Requejo 2011): in Wallonia, the project of a proto-constitutional text (*Proposition de décret spécial instituant une Constitution wallonne*, Doc. Parl., session 2005-2006, document n°367) was abandoned at an early stage (Peiffer 2017: 56 ; cf. Popelier 2012; Nihoul and Bárcena 2011 : 235).

At the present time, the Charter could not be a real subnational constitution, and some authors have highlighted what limited legal value its provisions could have (Lambrecht 2014: 148; van der Noot 2014: 276)^{xiii} or its possible enactment as a decree and not a simple resolution (Peiffer and Sautois 2013: 105), but what is of interest here is to understand if a potential and future enactment would be coherent with the Belgian Bill of Rights.

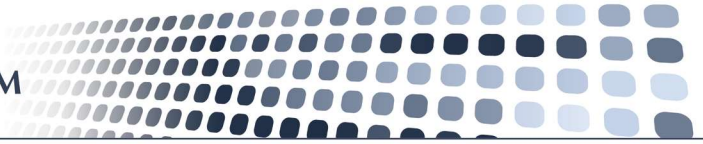
Historically speaking (Lambrecht 2014; van der Noot 2014), this process began in 1996 with the book ‘*Proposition of Constitution for Flanders*’ (*Proeve van Grondwet voor Vlaanderen*, in Flemish) written by Clement et al. (Clement et al. 1996), which anticipated the debate about a Flemish constitution. This book marked a milestone in the debate about the Charter of Flanders; as a matter of fact, the Flemish Government invited the authors to present it, and in the ensuing years, a petition asking for a constitution was signed by 24,000 Flemings and



two texts were developed. In 2010, the Flemish PM Kris Peeteres (CD&V) decided to launch a new phase (van der Noot 2014: footnote XXVII): the Charter was presented by the majority parties (CD&V, N-VA and SP.A) to the press on 23 May 2012, but it was not voted or debated on by the Parliament. Currently, the process seems ready to start again, as claimed by Flemish Prime Minister Geert Bourgeois (N-VA)^{XIV} and his majority (N-VA, CD&V and Open Vld).

The Charter^{XV} has not yet been enacted, but it addresses important issues about the Flemish national identity (for example, art. 4 - arms, flag, national anthem and holiday) and it has a large Bill of Rights. The Preamble of the Charter states: *‘This charter is a timeless text that sets out the background to which the pursuit of an autonomous Flanders, in Belgian and European contexts, is taking place, in accordance with the subsidiarity principle’* (author’s translation from the Flemish). Thus, ‘Even though the text is not a proposal for a subnational constitution, it does constitute according to the drafters an impetus to it: a kind of non-binding version’ (Lambrecht 2014: 147). Finally, it is true that the current text does not have a subnational constitutional value, but some potential consequences could be inferred concerning a legal system that is engaged in a continuing evolution. ‘The improbability and the many problems attached to such a hypothetical paralegal text do not necessarily imply, however, that the establishment, in Belgium, of fully-fledged federated Bills of Rights, or even of «full option» subnational Constitutions, would be deprived per se of any added value from the legal-scientific point of view, be it in terms of fundamental Rights protection or, more broadly, in terms of legal certainty’ (van der Noot 2014: 279). It is also true that the Charter should be considered in a different way from how useful a true and full-fledged subnational constitution could be (Lambrecht 2014: 156), but *de iure condendo*, a reflection about its potentiality could be beneficial.

Regarding the matter of the fundamental rights enshrined in the Charter for Flanders, it must be underlined that from the beginning, the ‘propositions notably insist on fundamental Rights and on the related policy options that Flanders should follow, essentially echoing the relevant European and International legal sources and adapting them to the competences of Flanders as a federated entity. In addition, the last articles of the texts mention elements such as the Flemish coat of arms, flag, anthem and «celebration day» («feestdag»)’ (van der Noot 2014: 275). In this nation-building process, the fundamental rights play an important role, even if they are not as developed as they are in



the Swiss case: *‘The Charter for Flanders is an overview of the main principles of the organization and functioning of the Flemish democratic rule of law. These principles determine what Flanders stands for, which are the rights and freedoms guaranteed in Flemish society’* (Preamble of the Flemish Charter – author’s translation from the Flemish).

The Bill of Rights is deeply influenced by the Charter of the Fundamental Rights of the European Union, the European Convention of Human Rights (ECHR), and the rights enshrined in the Belgian Constitution,^{xvi} but it is also a cultural self-presentation of the Flemish people. Indeed, the Flemish Bill of Rights includes rights that are not completely enshrined in the Belgian Constitution and that clearly belong to the Flemish national culture as developed in the last decades and to which belongs also a strong Europeanism. Included in the Charter for Flanders are some (not all) rights derived from the Charter of Fundamental Rights of the European Union that are a cultural choice and an expression of Flemish culture. In this regard, for example, articles 15 and 16 of the Charter widen the equality principle and include the affirmative actions in the contest of the non-discrimination principle. Particular care is dedicated to the rights linked to the industrialisation of the region, especially the right to work, the right of enterprise, and economic freedoms (on the rights of workers, see articles 31–35; on the rights of enterprises, see articles 42 and 50). In addition, there is the development of rights correlated to the digital society, such as the right of consumers (article 41), the right to data protection (article 21), the constitutionalisation of the right of intellectual property (article 43), and the right of the media (article 24). In the end, there is the reinforcement of some rights, often derived from the EU Charter, such as artistic freedom (article 26) and social rights (articles 36 and 40). Above all, strong attention is paid to the rights of disabled people (article 49) and the elderly (article 48). As already seen, social rights are among the greatest sources of division between legal systems.



3. The balance between asymmetry in fundamental rights deriving from subnational constitutions and the principle of non-discrimination

3.1. Interactions between the federal Bill of Rights and federated ones: the birth of asymmetry in fundamental rights and its consistency with the principle of non-discrimination

There are four possible interactions between federal fundamental rights and federated fundamental rights (cf. Palermo and Kössler 2017: 344): i) the same content; ii) the widening of federal rights; iii) different rights; and iv) the minor extension of the federated rights.

The first category occurs when a *federated* right is the same as enshrined in the *federal* Bill of Rights (i.e. it has equivalent content). This interaction does not involve a form of asymmetry in fundamental rights as long as the federated rights are interpreted in the same way as the federal ones. Conversely, if they are interpreted in a different way — usually in the presence of a dual court system — there is an overlapping with the second or the fourth interaction (it is the so-called *New Judicial Federalism*: Tarr 1994. Cf. Palermo and Kössler 2017: 335).

The second interaction happens when the federated right somewhat widens (i.e. gives more protection) the guarantee provided by the Federal Constitution. This category is called in this paper the ‘widening of federal fundamental rights’, meaning an expansion of the protection of federal rights due to subnational bills of rights. This category could be controversial and complex, because it is important to understand what the untouchable core of a right is, whether it could not be widened or modified.^{xvii} The untouchable core of a right depends on its different frameworks and definitions in the various legal systems. A good example of the impact on the essential core of a right could be found in the topic of same-sex marriage. For example, in some legal systems, such as the Italian one, marriage is a union between a woman and a man (See Constitutional Court decision n. 138/2010), and so a subnational constitution probably could not widen this right without infringing on the core of the right to marriage. On the contrary, for example, in the United States there is no such literal interpretation of the right to marriage as traditionally thought. Thus, as happened in the near past, the state constitutions and the national Supreme Courts widened the notion of the right to marriage, granting this right to gays and lesbians. “This



has occurred when states have sought to occupy constitutional space by creating state constitutional rights broader than what was available under the federal Constitution' (Fercot 2008: 309).^{xviii} Finally, this consensus led to the judgment *Obergefell v. Hodges*, 576 U.S. (2015), which ruled that the federated bans on gay and lesbian marriage are unconstitutional. In order to better understand this point, it could be useful to recall Wellman's theory of rights (Wellman 1985, 1995). According to the American scholar, each right is composed of a *defining core*, which is fundamental and characteristic of the right (in some way, the central core), and some *associated elements*, which are correlated aspects.^{xix} It seems to me that only these latter elements can be subjected to a widening.^{xx} Of course, the definition of the core and of the associated elements of a right can change according to the social conscience, as the US experience of abortion has showed.^{xxi}

This complex second category was clearly enounced in a decision of the US Supreme Court, which stated, 'state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution. They also are free to serve as experimental laboratories, in the sense that Justice Brandeis used that term [...] State courts, in appropriate cases, are not merely free to—they are bound to—interpret the United States Constitution. In doing so, they are *not* free from the final authority of this Court' (*Arizona v. Evans*, 514 U.S. 1 (1995)).^{xxii} A good example of this phenomenon is given from the widening of free speech made by the California Constitution, in respect to which the US Supreme Court 'held that the First Amendment (...) does not *ex proprio vigore* limit a State's authority to exercise its police power or its sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution' (*Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980)).

The third interaction occurs when a federated right is not included in the Federal Constitution.^{xxiii} This last interaction is the most asymmetrical, because it grants some rights as fundamental just to residents in a particular subnational unit. For example, in the United States 'the right to vote for African-Americans, women, and eighteen-year-olds were pioneered in state constitutions before their incorporation into the federal charter. So too were provisions guaranteeing equal protection of the laws, banning poll taxes, and prohibiting the sale or use of alcohol' (Tarr 2011: 1147). This form of asymmetry has to



respect the federal rights, and, as a consequence, the federal rights cannot be contradicted or distorted by fundamental rights contained in the subnational constitutions.

Finally, the fourth interaction is when a subnational constitution does not cover or gives less protection to a federal fundamental right. This is a classic case of antinomy between rules that is resolved by the application of the supremacy clause (and so it does not create an asymmetry).^{XXIV} This fourth interaction cannot exist in a federal state (an exception in this trend is the Canadian Notwithstanding Clause. See Palermo and Kössler 2017: 331); the antinomy is resolved through the application of the Federal Constitution (i.e. of federal fundamental rights).

In conclusion, the first three interactions are able to create an asymmetry in fundamental rights. Two preliminary considerations have to be made: *in primis*, the first interaction is able to create an asymmetry in the case there is an interpretation of the equal right that can lead this interaction to overlap with the second category and thus widening a federal fundamental right (this could happen if there is a dual court system)^{XXV}; *in secundis*, from the practical point of view, it has to be claimed that the subnational rights could have a role in the field of competences of the subnational units.

However, the asymmetry contains a hidden issue of equality and discrimination; as stressed, the presence of different rights ‘could produce asymmetries in the guarantees of rights, providing the ground for differentiated policies, which in turn could discriminate between citizens because of their belonging to one specific region rather than another’ (Delledonne and Martinico 2010: 911). The line between an acceptable and sustainable asymmetry and an intolerable discrimination is thin, and it is remitted to the care of federal organs that must guarantee the equality principle (Palermo and Kössler 2017: 130 and ff). Indeed, it is important to maintain the standards provided by the Federal Constitution: ‘if a state’s protection of individual rights droops too low (...) The federal Bill of Rights is the floor whereas the state bills of rights are the ceiling. The state can reach above the floor but cannot drop below it. The room in between is where it is all worked out’ (Beasley 1995: 695) Thus, it can be said that the equality principle is respected every time *federal rights* are respected. The federal Bill of Rights should indeed be considered as the minimum standard that guarantees the equality principle in the federation (Palermo and Kössler 2017: 341-342): it is the so-called *Mindeststandardlehre* theory in Germany (See BVerfGE 96, 345 [365]; 36, 342 [361]) or the ‘lowest common denominator’, quoting Judge Robert Utter.^{XXVI}



In such cases, however, courts have normally judged that the federal charter of rights, insofar as there is a conflict, must prevail. What provincial charters of rights can do, however, is to supplement or extend the rights available to their own citizens and minorities beyond those set out in the federal constitution (Watts 2000: 985; cf. Henrard 2004).

In this domain, the ECHR has stressed that ‘La diversité des législations internes, propre à un État fédéral, ne peut jamais constituer, en soi, une discrimination, et il n’est pas nécessaire de la justifier. Prétendre le contraire serait méconnaître totalement l’essence même du fédéralisme’ (CEDH, Cour (Plénière), 22 oct. 1981, n° 7525/76. Cedh, Affaire Dudgeon C. Royaume-Uni, 22 octobre 1981, 7525/76).

In this sense, it can be stressed that subnational constitutions finally play the role of promoter of rights not considered as fundamental rights by the major part of the population (or, on the contrary, they would be enshrined in the Federal Constitution). These rights lack ‘common consensus’, using the words of ECHR. They are rights of philosophical, cultural, and political minorities, in a broader sense. This vision seems to be correlated with the idea of subnational constitutions and bills of rights as *laboratories of new rights*, as suggested by Judge Brandeis.^{xxvii} Subnational rights could become cultural rights of the whole federation, and as a consequence be enshrined in the Federal Constitution, or they could not, and remain subnational rights.

The following section presents an analysis of the equilibrium and the balancing process in the Swiss legal system as a prototype case. It is stressed that the lack of a dual court system^{xxviii} could be problematic for the existence of asymmetry; however, the Swiss legal system shows that it is surmountable.

3.2. The Swiss case: how much asymmetry in fundamental rights is tolerable?

As already seen, the asymmetry in fundamental rights was in some way linked to the history of the Swiss Confederation. In the period following the Constitution of 1848, the equal treatment of Swiss citizens was initially developed just in regard to some rights, and then it was progressively increased with the role played by the Federal Assembly and by the Federal Supreme Court (with the development of unwritten rights). The final stage was the Constitution of 1999, with the inclusion in the Swiss Constitutional Charter of the federal



Bill of Rights. As seen in section 2, for a long period the rights of the Swiss people were deeply linked with their residence in cantons, but nowadays the equilibrium reached between the federal and cantonal constitutions retains a degree of asymmetry in the protection of fundamental rights. The cantonal fundamental rights are those ‘qui garantissent des droits individuels aux citoyens et sont, à ce titre, directement applicables’ (ATF 136 I 241, 248.) or ‘réservent au citoyen une sphère de protection contre les interventions étatiques’ (translated from the German. ATF 131 I 366, 368).

Taking the possible interactions between fundamental federal rights and cantonal rights into consideration, the positions of the Federal Assembly (after the proposal of the *Conseil Fédéral*) and of the Federal Supreme Court seem to show a quite clear trend. In the first scenario — the equal protection of a right given by the Federal Constitution and by a cantonal one — the Federal Assembly has highlighted that the cantonal fundamental rights do not have a law-value if they cover the same rights of the Federal Constitution or the unwritten fundamental rights.^{xxix} Thus, the equivalent cantonal rights guaranteed by the Federal Constitution are just ‘monuments’ (Aubert 1967: 632) linked to the past history of the cantons. This issue was confirmed by the Federal Supreme Court, which claimed that if the cantonal rights are not more protective than the corresponding federal rights, they do not have any legal value (ATF 121 I 267, 269; cf. Auer et al 2013b: 38 ; Fercot 2008: footnote 21). This is true until the federal (or international) right remains in effect: if a federal right is abrogated, the cantonal equivalent will re-emerge. As stressed by some authors (van der Noot 2014: 281-282; cf. ATF 121 I 267, 269-272), the Federal Supreme Court often interpreted in a very textual way the cantonal rights as being similar to federal ones so as to try to limit their application. Finally, the first scenario is not problematic because it does not create any asymmetries.

Regarding the second scenario — the major protection of a cantonal right compared to the same right in the Federal Constitution — some authors (Auer et al. 2013a: 38) have highlighted how the Federal Supreme Court has often chosen not to discuss the issue by refusing the petition in case of a lack of motivation^{xxx} or by saying that the cantonal right does not widen the federal one.^{xxxi} In any case, sometimes the Federal Supreme Court also has to recognise the larger protection provided by cantonal constitutions. For instance, this happened in the case of the right to compensation for illegal imprisonment as contained in article 4 of the Canton of Valais (which widens the unwritten federal right to



compensation, granting it for every illegal detention),^{xxxii} in the case of the personal freedom protected in a broader way by article 12 of the Constitution of the Canton of Geneva (which widens the right to personal freedom),^{xxxiii} and in the more protective discipline of the prohibition of retroactivity enshrined in article 5 of the Constitution of the Canton of Nidwalden.^{xxxiv} The larger protection is sometimes recognised also by the Federal Assembly; for example, this occurs in the case of the right of petition included in article 12 of the Constitution of the Canton of Thurgovie.^{xxxv} In this sense, as previously said, it has to be highlighted that the Federal Supreme Court considers the interpretation given by the Federal Assembly as binding. Sometimes, on the other hand, the Federal Assembly limits the possibility to widen some rights, because they would affect the central core of some federal fundamental rights. This was the case of the attempt to grant a married couple similar protection for ‘other forms of cohabitation than marriage or than family in the traditional sense, whilst federal law only recognises the right to marry. This time, the federal government still considered that this type of cantonal provisions may have an autonomous scope on the condition that they go beyond the case law defined by the Federal Court Regarding the choice of other forms of life in common, the federal government directly made it clear that the scope of this provision has to be interpreted in the context of the division of competences. It considered that such an article cannot produce effects on the marriage, but on the exercise of personal rights or in procedural law. Thus, the provision cannot deploy any effect on the relations of civil law and unmarried couples; the effects of marriage cannot be extended to cohabitation’ (Weerts 2016: 199).^{xxxvi} These principles were affirmed in both the ‘*Message concernant la garantie de la constitution de Berne*’^{xxxvii} and the ‘*Message concernant la garantie de la constitution d’Appenzell Rhodes-Extérieures*’.^{xxxviii} The aforementioned cantonal rights affect the core of a federal right in a matter of federal competence; thus, the Federal Assembly censured this type of widening.

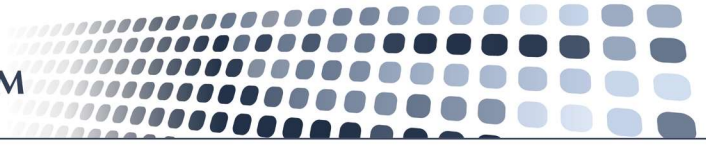
This second scenario leads to a form of asymmetry in fundamental rights. The residents in some cantons can enjoy more extensive fundamental rights protection due to the cantonal constitutions, which offer a broader protection than the corresponding federal rights. This is not just an issue of asymmetry *de facto* but is an asymmetry *de jure* that has great impact on the life of Swiss citizens. The hidden question is about the equality principle: undoubtedly, some citizens inside the federation enjoy a deeper degree of protection of their rights, but,



as we have seen, the Federal Assembly and the Federal Supreme Court consider this asymmetry as legitimate. Indeed, the issue about equality (linked to the supremacy principle) rises only when a federal fundamental right is contradicted or distorted (in its core) by a cantonal one.

The third category concerns the presence of different fundamental rights that are not enshrined in the Federal Constitution. This is the main source of asymmetry, because the second category is deeply linked to a matter of interpretation. In the second scenario, the Federal Supreme Court could limit the application of cantonal rights with a restrictive interpretation of their provisions.

Cantons have developed original rights that are not included in the Federal Constitution and derived from the national culture of the cantons: the freedom of manifestation (art. 8 JU, art. 19 BE, art. 20 NE, art. 21 VD, art. 32 GE - art. 24 FR), the right to family life (art. 9 SO, art. 8 JU), the right to a free choice of a different form of life than marriage (art. 12 NE, art. 14 VD, art. 14 FR, art. 22 GE, art. 13 ZH), the right to housing (art. 22 JU, art. 29 BE, art. 38 GE, art. 13 TI), the right to scholarship and education (art. 10 SG, art. 29 BE), protection of maternity (art. 35 VD, art. 33 FR) and of children (art. 13 TI, art. 13 VD, art. 23 GE), the right to work (art. 19 JU), and the right to a clean environment (art. 19 GE). Of course, these cantonal fundamental rights have a greater impact when they are developed in fields where cantons have exclusive competence.^{xxxix} These cantonal rights were considered coherent with the federal system by the Federal Assembly and by the Federal Council, and/or they were considered not in contrast with the federal fundamental rights by the Federal Tribunal. A good example is the ‘*Protection contre la fumée passive*’ enshrined in article 176 of the *Constitution de la République et canton de Genève*, which creates the protection against passive smoking (then granted also by the federal laws about tobacco^{xi}). According to the Federal Supreme Court, the constitutionalisation of this right ‘fait ainsi partie des dispositions plus strictes que les cantons peuvent adopter, conformément à l’art. 4 de la loi fédérale’ (ATF 136 I 241). This provision was previously controlled by the Supreme Court in the occasion of the popular initiative (*initiative populaire*): the Federal Supreme Court (ATF 133 I 110) considered that the right of protection from passive smoking does not affect the federal labour legislation, the federal protection of the right to life, or the right to personal freedom, and it respects the proportionality test.



Other examples are those regarding the Bern and the Appenzell Ausserrhoden constitutions. The Federal Assembly^{XLI} has accepted the innovative rights included in the Constitution of Bern and in the Constitution of Appenzell Ausserrhoden, such as the right to access public documents, the right to demonstrate in public, and some innovative social rights. Finally, another good example is that of the Neuchatel Constitution, which, considering the jurisprudence of the Federal Supreme Court that did not claim as discriminatory a very different fiscal regime (tax rate) between married and non-married couples (ATF 123 I 241), enshrined in its article 12 a right to choose a form of common life different from marriage. This fundamental right caused a new cantonal legislation providing a 10% reduction of the tax rate (van der Noot 2014: 284). However, sometimes the rights enshrined in the cantonal constitutions would affect the minimum standards guaranteed by the Federal Constitution, and so they are not compatible with the Federal Constitution. In the last analysis, they would impact on the equality principle, breaking the equal treatment of Swiss citizens that is given by the respect of federal fundamental rights. Occasionally, the Federal Assembly^{XLII} has censored the cantonal fundamental rights because they restricted federal fundamental rights, as happened with article 141 of the Geneva Constitution concerning religious freedom and political rights: in the name of the right to have neutral institutions, article 141 of the Constitution of 2006 excluded ecclesiastics from the possibility of becoming a member of the *Court des Comptes*. This was considered against the anti-discrimination principle as stipulated by the Federal Constitution.

Regarding the fourth interaction — the lack or the less protection of rights provided by the cantonal constitutions — it has to be underlined that the cases are rare and *passé*^{XLIII}; a good example is the denial of the right to vote for women in the Canton of Appenzell Innerrhoden. The check on the asymmetry could be made by the Federal Supreme Court after the federal warranty, as in the case of the right to vote denied to women by the Constitution of the Canton of Appenzell Innerrhoden. The Supreme Court stated that the Federal Assembly could not dispute this suppression of the right to vote (or, better, this different idea of the right to vote) because at that time (1971) there was no constitutional disposition, such as article 4.2 of the Federal Constitution (adopted in 1981). So, the Supreme Court can reduce asymmetry in fundamental rights, according to the evolution of



the fundamental federal rights, coherently with the supremacy clause; however, before modification at the federal level, this type of asymmetry was untouchable.^{XLIV}

From all these arguments, it seems clear that the equality principle is respected in Switzerland by the respect of the minimum standard given by the Federal Constitution and its Bill of Rights. Thus, the constituent units may widen the fundamental rights of their people without legally impacting on the equality principle. This seems to be confirmed by the fact that cantonal constitutions could also not recognise some rights included at the federal level (as happened for articles 6–12 Cost. TI) and could remand to the federal Bill of Rights or to an international treaty (as happened for articles 7 and 8 Cost. GR), but the federal rights remain applicable. So a smaller protection of rights than at the federal level is possible, but in the end, the federal right rises and substitutes for the less protective cantonal right.^{XLV}

In conclusion, even if the cantonal constitutions are a secondary and complementary source of fundamental rights, they still create an asymmetry in fundamental rights that impacts on the equality principle. As stressed, ‘le principe d’égalité dans la loi trouve une *limite institutionnelle* dans la structure fédérale des Etats’ (Auer et al. 2013b: 495). This is true for both ordinary legislation and subconstitutional protection of rights. As a consequence, cantonal constitutions must respect the federal Bill of Rights, as disposed by article 35 of the Swiss Constitution (Auer et al. 2013a: 61).

However, this concerns the minimum standard, the core of a right. A right could be widened or changed in some parts with no violation of the equality principle as it is developed in federal states. Thus, it is clear that, as claimed by many scholars (Auer et al. 2013b: 40 ; cf. Martenet 1999: 420), cantonal fundamental rights have just the role of a complementary source in the field of fundamental rights. This complementary source, on the one hand, creates asymmetry, and, on the other hand, it does not break the equality principle given by the minimum standard of the Federal Constitution. ‘In Switzerland the Federal Council (Conseil Fédéral) and the Federal Assembly, like the Federal Tribunal, refuse to recognise the validity of any cantonal provisions that are less protective than the corresponding federal provisions; a solution largely approved by the majority of authors. State constitutions can therefore only guarantee protections that are «at least equal» to the federal Constitutional «requirements»’ (Fercot 2008: 311).^{XLVI}



The Swiss asymmetry in fundamental rights protection was also considered not to be in contrast with the ECHR by the European Court of Human Rights in *Müller e.a. v. Switzerland*. The case was about the freedom of artistic expression, which was guaranteed in a different way in the cantons and was particularly weak in the Canton of Fribourg: ‘The applicants claimed that the exhibition of the pictures had not given rise to any public outcry and indeed that the press on the whole was on their side. It may also be true that Josef Felix Müller has been able to exhibit works in a similar vein in other parts of Switzerland and abroad, both before and after the «Fri-Art 81» exhibition (see paragraph 9 above). It does not, however, follow that the applicants’ conviction in Fribourg did not, in all the circumstances of the case, respond to a genuine social need, as was affirmed in substance by all three of the Swiss courts which dealt with the case’ (ECHR., *Müller e.a. v. Switzerland*, 24 may 1988 (*Application no. 10737/84*))^{XLVII} Thus, the ECHR recognises the possibility of asymmetry in fundamental rights in federal systems.

4. Consideration about the project of the Flemish Charter: a sustainable solution?

This section analyses the project of the Flemish Charter, looking at the Swiss experience and the Belgian Constitutional Court jurisprudence concerning the equality principle, which ‘est l’un des fondements d’un Etat de droit démocratique’ (Belgian Constitutional Court decision n. 17/2009).^{XLVIII} As noted by Lagasse (2017: 2), on the one hand, the Belgian legal system is fighting a battle against discriminations, but on the other, it is engaged in a process that increases differentiation between individuals (i.e. residents in different constituent units) due to federalism. Regarding the principle of equality, the Constitutional Court has claimed that it has to be balanced with the principle of federalism, and, as a consequence, some forms of diversity could be acceptable considering the competence and the respect of the constitutional fundamental rights:

Une différence de traitement dans des matières où les communautés et les régions disposent de compétences propres est la conséquence possible de politiques distinctes permises par l’autonomie qui leur est accordée par la Constitution ou en vertu de celle-ci. Une telle différence ne peut en soi être jugée contraire aux article 10 et 11 de la Constitution. Cette autonomie serait dépourvue de signification si le seul fait qu’il existe des différences de traitement entre les destinataires de règles s’appliquant a une même



matière dans les diverse communautés et régions était jugé contraire aux articles 10 et 11 de la Constitution (Belgian Constitutional Court decision no. 139/2003).^{XLIX}

This idea is particularly clear also in the words of the *Conseil d'Etat*:

Les droits fondamentaux (...) définis par des normes juridiques supérieures ne sont pas des matières en soi, mais des principes qui doivent être respectés par les différentes autorités pour régler les matières qui leur sont attribuées. Lorsque la mise en œuvre d'un droit fondamental de l'espèce requiert une réglementation complémentaire, ou lorsqu'il est estimé nécessaire de concrétiser la portée de pareil droit fondamental concernant une matière déterminée, c'est à l'autorité compétente pour cette matière qu'il appartient d'édicter les règles nécessaires (*Conseil d'Etat* decision no. 28197/1 1999).¹

In order to evaluate the compatibility of the current Flemish project with the Belgian fundamental rights, the four previously mentioned categories are used. First of all, it must be stressed that the Charter does not contain very radical and original solutions (in this sense, see also Popelier 2012: 49), but it widens — most of the time only in the text and not in a substantive way — the rights enshrined in the Federal Constitution, and sometimes it gives 'constitutional' protection to rights that are already protected by federal law, regional law, or EU laws. This last issue does not reduce the importance and the presence of asymmetry in fundamental rights, because a constitutionalisation could grant protection in the case of abrogation of the other sources of the right or could orient the action of the Flemish Government imposing stricter limits compared to the federal ones. Indeed, the Charter could bind the regional government to enact coherent law in the competences given to communities and regions. The lack of a hierarchy among federal law and regional law, and the provision of article 141 of the Belgian Constitution allow to speculate about the great impact that this disposition could have in terms of effective application of this asymmetry of rights.

Thus, by using the aforementioned categories, it can be said that sometimes the Charter 'covers' the same rights as the Federal Constitution; sometimes it widens the federal rights; and other times it 'creates' new fundamental rights. At the same time, it never provides less protection or no protection compared to the Belgian Constitution.

A good example of the first category is article 14 of the Charter. The formal equality of Belgians is claimed in a similar way by article 14 of the project and by article 10 of the



Belgian Constitution. This category can also be observed when the Charter seems to grant a larger protection of rights, such as in the case of the principle of non-discrimination. Indeed, article 15 of the project includes a larger number of cases of banning discrimination (language; religion or belief; political or other ideas; belonging to a national, ideological, or philosophical minority; ability; birth; disability; age; or sexual orientation) compared to the smaller text of article 11 of the Federal Constitution (“To this end, laws and federate laws guarantee among others the rights and freedoms of ideological and philosophical minorities”), yet the project just recalls the Constitutional Court case law without any widening of the principle of non-discrimination.^{LI} Therefore, certain specifications seem to be enacted just to comply with some deep cultural ideas of the Flemish people.

If the interpretative method developed in the Swiss legal system is applied, this category should not be considered problematic; these rights should be interpreted in the same way as federal rights,^{LI} above all because and as long as this interpretation would be made by the Belgian Constitutional Court.

The second category is well represented in the Charter. Many rights are more protective than the federal ones. However, it is important to highlight that most of these widenings follow the Constitutional court’s case law or the European Court of Justice’s or the ECHR’s, as in the case of the equality between women and men included in article 16 of the Charter. Article 16 follows in a broader way (i.e. granting in all areas, including employment, occupation, and reward, the equality between women and men) article 11 of the Belgian Constitution. This specification is important, but its actual larger application is uncertain: the Constitutional Court has yet stressed that a ‘strict scrutiny’ has to be applied in this matter^{LI} and that ‘la Constitution attribue une importance particulière à l’égalité entre hommes et femmes’ (Belgian Constitutional Court decision n. 159/2004). Sometimes, however, the widening is genuine, and it could be useful to understand the possibility of asymmetry in fundamental rights. This is the case of the affirmative actions explicitly provided by article 15^{LI} of the project and in the special issue of gender equality by article 16^{LI} of the project. On the so-called affirmative actions, the Belgian Constitution is silent, except for gender equality in elective and public mandates (Art. 11bis of the Constitution), and the Constitutional Court is quite prudent about that (Renauld and Van Drooghenbroeck 2011: 600; Belgian Constitutional Court decisions n. 9/94, 42/97,



157/2004). These provisions could find application in the regional competences concerning labour policies (job placement, employment programmes, economic migration, *et cetera*, and public employment), the welfare state (social housing, financial support for housing, taxation, *et cetera*), or the regulation of enterprises (agriculture, sea fishing, *et cetera*). Another interesting article is article 54 of the project, which provides stronger protection to free movement (for every citizen of the EU) and that in some way, through this constitutionalisation, widens article 12 (right to personal freedom) of the Belgian Constitution, which does not explicitly enshrine free movement as an autonomous fundamental right but considers it as part of personal freedom (Renson 2011: 751). Other examples of widening are article 43 (right of property), which adds the protection of intellectual property compared to article 16 of the Federal Constitution (right of property)^{LVI}; article 25 of the project (freedom of association - right of assembly), which highlights, seeming to give it a broader protection, the right to associate in trade unions and political parties, in contrast with articles 26 (right of assembly) and 27 (right of association) of the Constitution^{LVII}; or the religion freedoms of article 23 of the project, which widens articles 19–21 of the Belgian Constitution. An interesting example is that of due process. The Flemish Charter is rich with provisions about fair trial (articles 17, 18, 19, 20), inspired by the EU Charter and the ECHR. This is interesting because these provisions reinforce, from a constitutional point of view, some rights not completely enshrined in the Belgian Constitution (articles 12, 13, 14), even if they are enforced by the application of the ECHR and the EU Charter. These articles could impact on, for instance, juvenile law enforcement, first-line legal assistance, or *maisons de justice*. Finally, another interesting widening is linked to economic rights. In the field of the rights of workers and enterprises, the project seems to guarantee in a constitutional way larger rights compared to the Federal Constitution, such as the right to strike or the right to sign collective contracts.^{LVIII} In the field of the right of enterprises (articles 42 and 50 of the project), article 50 also protects enterprises in front of administrative authorities.^{LIX}

All these widenings could have a concrete role only in the case of a) coherency with the supremacy clause (so, no contrast with the Belgian Constitution); b) application in the field of regional competences, where they may influence the regional legislator; or c) gaps in federal legislation in the concurrent competences.^{LX} Thus, hypothetically, the respect of these rights could be demanded from the Flemish Government by the Flemish residents



and could widen the protection given by the Federal Constitution. On the other hand, none of these widenings seem to be in contrast with the current Belgian constitutional rights.

Regarding the third category, some ‘new’ rights can be found in the project. For example, some provisions grant protection to rights such as artistic freedom (article 26),^{LXI} the right to inform and the media system (article 24),^{LXII} the protection of the consumer (article 41), or the right to data protection (article 21),^{LXIII} which are not considered by the Federal Constitution, just the EU Charter. The constitutionalisation of these rights leads to reinforcement of them from a constitutional point of view; if the international, European, or federal right would be abrogated, they could play a role in the protection of individuals. Currently, their actual application would be limited. For example, it would be possible to have some forms of financial aid for arts linked to the competences of the region and of the community, but surely not a broader protection from criminal censorship in the case of morality (the criminal matter belongs to the exclusive federal competence, with some reservations that do not matter in this field). The right to inform is important, but as for the regulation of media, the actual and current competence of the Region of Flanders could not grant a great difference from the current legislation. This is certainly true also for the protection of personal data and the protection of consumers, which could be improved just in the field of competence of the region. However, what could be a herald of deep asymmetry is the issue of social rights. Some new fundamental rights, such as the right of the elderly (article 48) and the right of people with disabilities (article 49), could be a trump card. Indeed, the Charter could affect the budget choices in the field of welfare and management of public spaces (education, transportation, assistance to persons, spatial planning, *et cetera*), which is partially within the competence of the regions,^{LXIV} and in the healthcare sector. Finally, these provisions could just be applied in the field of regional competence, in which they could represent a real instrument of asymmetry granting to Flemish residents ‘regional fundamental rights’ that must be respected by the regional authorities.^{LXV} Of course, this would be possible if an efficient system of judicial review was developed.

Concerning the fourth category, there is no trace of it in the Flemish project. Thus, none of the Flemish fundamental rights seem to be in contrast with the federal constitutional rights or federal law, so an eventual and possible binding nature of the



Charter would not affect the equality principle as expression of the supremacy clause and of the minimum standards.

As claimed:

C'est l'idée que les droits fondamentaux ont vocation à représenter le substrat minimal de toute collectivité qui, au-delà de ses clivages et de ses particularismes, aspire à se perpétuer en tant que communauté viable. Par leur rattachement à l'ordre constitutionnel, ils transcendent ainsi tout à la fois la collectivité fédérale et les collectivités fédérées. La coexistence au sein d'un même Etat de plusieurs groupes, plus ou moins différents, ne saurait occulter la nécessité d'un fond commun de valeurs partagées (Verdussen 2005: 182).

In conclusion, the Charter of Flanders seems to be able to play a role as a complementary source of fundamental rights with a binding value just for the regional lawmaker, but at the same time it is able to recognise and grant more protective rights to the residents in Flanders within the limits of the equality principle. The aforementioned principle of the complementarity is already claimed by article 57 of the Charter, which states, '*No provision of this charter may affect the protection of fundamental rights, as provided for in the federal constitution and in international treaties binding for Flanders*' (author's translation from the Flemish).

The Flemish Region should acquire the full 'constitution-making power' (*rectius* – a full constitutional autonomy)^{LXVI} in order to enact a 'real' subnational constitution, and its actual application would be determined by the development of an efficient system of judicial review.

5. Final remarks

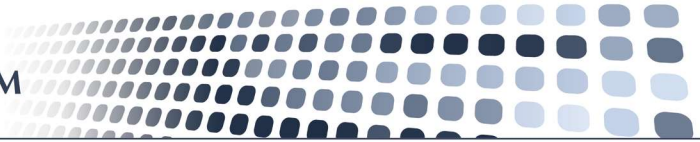
If it is true that the subnational constitutions are not the *number 42* of Douglas Adams's book, it is also true that 'constituent units may provide greater opportunities for groups who are outnumbered nationally to participate in politics, to have their rights recognized, and to advance their common concerns. Contemporary trends point toward expanding recognition and autonomy for groups in multilingual, multicultural, multiethnic and multinational states, sometimes as the only alternative to either political frustration or secession. Sub-national constitutionalism can provide a way to respond to demands for



recognition and self-rule' (Tarr 2011: 1148). Instead of what happens in other European multinational federalisms such as Italy or Spain (Delledonne and Martinico 2010), in Switzerland subnational constitutions provide cultural fundamental rights not enshrined in the Federal Constitution, and so they create a level of asymmetry in the field of fundamental rights. This asymmetry is acceptable and sustainable until it does not affect the principle of equality. In Switzerland, the federal constitutional supremacy was interpreted as limiting cantonal autonomy in the development of their own fundamental rights just when they affect the federal fundamental rights, considered as a minimum standard. This occurs when some federal fundamental rights are contradicted by the federated constitutions or when the core of federal rights is distorted by a cantonal provision. If these principles may be applied to the project of the Charter for Flanders, it should be stressed that the Charter would be compatible with the equality principle, as expression of the minimum standards (of course, the devolvement of a mechanism to apply the supremacy clause and the homogeneity clause would be needed^{LXVII}). The current Charter enshrines some interesting rights that are able to create an asymmetry in fundamental rights, which can bind the regional legislator. These considerations *de jure condendo* are linked to the need for a real 'constituent power' for the regions and an efficient system of judicial review. From a theoretical point of view, the project as currently conceived does not seem to infringe on the equality principle. Finally, it can be suggested that this new form of asymmetry could help the Belgian federalism to work better, accommodate some demands of the Flemish people, and undermine secessionist pushes,^{LXVIII} confirming the 'tailor-made design' (Peeters 2005: 44) of the Belgian federalism. In addition, it could not be excluded that these rights could one day be adopted by the Federal Constitution: 'It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country' (Justice Brandeis, dissenting opinion, *New State Co. v. Liebmann* (1932)).

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¹ 'For example, an ideology of subnational constitutionalism clearly guided the Texas Supreme Court when it claimed in a 1992 case that the Texas Constitution must be understood, unlike the U.S. Constitution, to «reflect Texas' values, customs, and traditions,» and must therefore be interpreted in view of the «experiences and philosophies» of the state's founders'. Gardner (2007: 3). Cf. Elazar (1987: 10); Williams (2009).



^{II} ‘(..) increasingly prevalent ethno cultural justifications for federalism may suggest that subnational constitutions often, or even typically, reflect distinctive values and choices of subnational populations, a situation consistent with the widespread existence of subnational constitutionalism’. Gardner (2007: 8).

^{III} ‘Perhaps the basic political right, particularly for internal nations within multi-national countries, is the right of self-determination--the power to determine the fundamental character, membership, and future course of their political society. This right of self-determination is inevitably limited when nations are constituent members of a larger political entity, but it is not effaced’ Tarr (2009: 185). ‘Some federations such as Switzerland, Nigeria, and Belgium, as well as quasi-federations such as Spain-were designed to recognize and accommodate the multiethnic character of the population and provide space for the expression of diversities’ Tarr (2011: 1137). Cf. Saunders (1999).

^{IV} The more recent version of the Charter is available at <http://www.standaard.be/extra/pdf/Handvest%20voor%20Vlaanderen.pdf>.

^V Flandersnews.be, *Flemish PM wants Flemish constitution*, 07/03/2016, (<http://deredactie.be/cm/vrtnieuws.english/Politics/1.2593534>). There are also more recent statements reported in Peiffer (2017: 56).

^{VI} Cf. Tarr et al. (2004), in which Belgium and Switzerland are considered as *multinational federations*. Some Swiss scholars using the concept of *Willensnation* contest the qualification of the Swiss system as a multinational country: Cf. Frenkel (1993). Anyway, Switzerland seems to have all the characteristics of a multinational country (Kymlicka (2011) and Ipperciel (2007: 48)).

^{VII} ‘Only few rights were included such as ‘Equality before the law (Article 4), the right of establishment (Article 41), freedom of the press (Art. 45), freedom of association (Art. 46) the right of petition (Art. 47), freedom of Christian worship (art. 44), the right to “natural justice” and the prohibition of extraordinary courts (art. 53). A revision of Art. 41 and 48 was adopted in 1866’. Weerts (2016: 186, footnote 43).

^{VIII} See ‘Rapport de la Diète aux vingt-deux cantons suisses sur le projet d’acte fédéral par elle délibéré à Lucerne, Genève, 15 December 1832, p. 44-45’: ‘les cantons conservent leur souveraineté pour ce qui concerne leur system constitutionnel (..) Elles devront garantir au pays les exercice de droits politiques’.

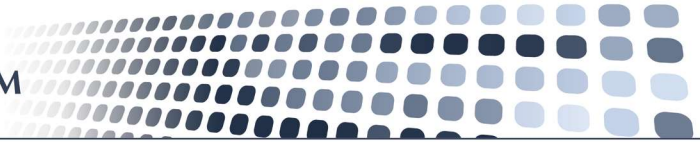
^{IX} The unwritten rights are, as reported by Weerts: ‘Right to property (Federal court, decision Keller, 11 May 1960, ZBI, 1961, p. 69), freedom of expression (Federal court, decision Sphinx-film SA v. Conseil d’Etat du canton de Neuchâtel, 3 May 1961), personal freedom (Federal Court, decision Kind X. v. X. und Zivilgericht des Kantons Basel-Stadt, 20 March 1963), language freedom, (Federal Court, decision Association de l’école française und Mitbeteiligte v. Regierungsrat und Verwaltungsgericht Zürich, 31 March 1965), freedom of assembly (Federal court, decision Nöthiger und Pinkus v. Polizeirichteramt der Stadt Zürich, 24 June 1970), right to the basic requirements (Federal court, decision V. v. Einwohnergemeinde X. 27 October 1995)’. Weerts 2016: 191, footnote 63. For a deep analysis see Rossinelli (1987).

^X Since the adoption of the Constitution in 1999, 11 cantons have adopted new constitutions (nine of them have developed their own bill of rights): ‘cantons and their citizens can undoubtedly continue to express their creativity. The adoption of the federal Bill of Rights in 1999 has not dampened their willingness to enshrine their own fundamental rights in their own fundamental text’. S.Weerts (2016: 205).

^{XI} *Ex pluribus*: ‘Selon la jurisprudence actuelle, le Tribunal fédéral n’examine en principe pas la conformité avec le droit fédéral des dispositions constitutionnelles cantonales auxquelles l’Assemblée fédérale a donné sa garantie. Il est fait exception à ce principe dans les cas où la règle de droit supérieur n’était pas encore en vigueur lors de l’octroi de la garantie (ATF 111 Ia 239 consid. 3 p. 240; cf. ensuite ATF 116 Ia 359 consid. 4b p. 366), ou lorsqu’il s’agit de tenir compte d’une évolution de principes de droit constitutionnel non écrit qui aurait eu lieu dans l’intervalle (ATF 121 I 138 consid. 5c/aa p. 147)’. ATF 131 i 126.

^{XII} ‘In the field of social rights, cantons are innovative. They go further than the first generation of cantonal revisions and the Federal Constitution. The canton of St. Gallen offers protection that allows children to receive assistance as soon as the school attendance causes disadvantages due to the location of their homes, to disability or for some social reasons. St. Gallen’s constitution also guarantees the right of persons, having completed their compulsory education, to receive assistance for their education or their development in accordance with their own financial resources and those of their parents. The constitution of the canton of Vaud grants rights in education and training that exceed the federal guarantee for an adequate education. It guarantees also the right to appropriate emergency housing and the right of every woman to material security before and after childbirth’. Weerts (2016: 202).

^{XIII} Recalling what was written by Lambrecht (2014: 148) and by van der Noot, (2014: 276). About the matter of its enacting as a decree and not a simple resolution cf. Peiffer and Sautois (2013: 105).



XIV Flandersnews.be, *Flemish PM wants Flemish constitution*, 07/03/2016, (<http://deredactie.be/cm/vrtnieuws.english/Politics/1.2593534>). The process will be influenced by the electoral results of the forthcoming elections.

XV The more recent version of the Charter is available at <http://www.standaard.be/extra/pdf/Handvest%20voor%20Vlaanderen.pdf>.

XVI 'In 2010, the Flemish Minister- President handed over to the president of the Flemish Parliament a draft Charter for Flanders, containing a collection of fundamental rights laid down in the federal Constitution and the EU Charter'. Popelier (2012: 42). 'The rights and freedoms contained in this Charter for Flanders are derived from the Charter of Fundamental Rights of the European Union and the Federal Constitution. The Charter for Flanders leaves the Charter of Fundamental Rights of the European Union, as it is the most recent synthesis of the common values of the Member States of the European Union'. Preamble of the Flemish Charter (author's translation from the Flemish).

XVII '(.) in spite of the supremacy clause, state supreme courts can deduce from their constitutions some individual rights that do not exist at the federal level or they can interpret state constitutional rights more «liberally» than their federal counterparts, insofar as such an interpretation would not contradict any right secured at the federal level'. Fercot, (2008: 313).

XVIII See Baker v. State, 744 A.2d 864 (Vermont, 1999); Baehr v. Lewin, 74 Haw. 648, 852 P. 2d 44 (Hawaii, 1993); cf. Williams (2002). This phenomenon could also be observed in the topic of sodomy laws, which were considered as a federated state's dominion until the decision *Lawrence v Texas*, after that decision, sodomy laws must be considered as not coherent with the US Constitution. See. J.A., Gardner, *In Search of Subnational Constitutionalism* (September 19, 2007), Buffalo Legal Studies Research Paper No. 2007-016, 2007, p. 29. Cf. Fercot (2008: 322).

XIX 'A right is complex in that it is constituted by a number of Hohfeldian elements in addition to its defining core. It is a complex because these associated elements belong to the right only by virtue of their essential relation to that core'. Wellman (1985: 91-92).

XX These last aspects can be widened, but never restricted. For example, Wellman identifies the defining core of the freedom of speech as follows: 'The defining core of the constitutional right to free speech is the legal liberty of each individual to publish (.) his or her sentiments, ideas, or opinions (.) The scope of this core liberty is limited by specific exceptions, including speech that is libelous or obscene and speech that creates a clear and present danger of substantive evils' (Wellman 1995: 192). So, if this is the US 'core' right with its limits, the federated constitutions cannot, for example, eliminate the limit of obscenity (the free speech, in this case, would be widened by affecting the defining core of the federal rights). But a widening would be possible concerning the associated elements; for example, '(2) the legal claim of each individual against federal and state governments that they not prevent or hinder the exercise of the core liberty of free speech by any form of previous restraint;' (Wellman 1995: 193), individuated by Wellman as an associated element, could be widened by positive rights: the state could give financial aid to economically weak thoughts (e.g. in the field of the press).

XXI Think about the different space of action of national constitutions conceded before and after the *Roe v. Wade* decision and the different idea of the core of the right to abortion. See, for instance, the decision *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) regarding informed consent, and the judgment *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) concerning state funds, facilities, and employees in the abortion operations. Finally, consider *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and the standard of undue burden; *Gonzales v. Carhart*, 550 U.S. 124 (2007) regarding partial-birth abortion; and *Whole Woman's Health v. Hellerstedt*, 579 U.S. (2016) reinforcing the idea of undue burden.

XXII Cf. *Michigan v Long* 463 US 1032 (1983). Cf. for a theoretical analysis Brennan (1977).

XXIII 'the state constitutional rights revealing the greatest diversity among federal systems are those rights that are «independent» from – different from – federal protection. These more restrictive or more expansive rights show a real diversity which is often ignored and misrepresented'. Fercot (2008: 309).

XXIV 'As for Switzerland, in the field of the equality clause or the prohibition of discrimination, some cantonal constitutions are very succinct, for example the constitutions of Schaffhausen and Fribourg, which affirm solely that «nobody should be discriminated against». Older constitutions often lack clarity: for example, the Valais constitution of 1907 contains a brief provision specifying that «every citizen is equal before the law» (Article 3). Four constitutions are even silent on, or only refer to the equality between men and women. The impact of «more restrictive constitutional rights» is generally limited in the federal context, because insofar as there is a conflict between two norms, it is resolved by Article 31 of the German constitution, Article VI § 2 of the American Constitution or Article 49 of the Swiss constitution'. Fercot (2008: 310).



xxv Tarr (1994). As will be exposed in the Swiss legal system, the lack of a dual court system avoids the widening of cantonal rights that use the same form of the federal rights. In general 'With regard to the contents, a constitution regulates issues that are constitutional in nature, such as the system of government, the composition, election and function of the legislature and the executive, instruments of direct democracy, the organisation of local government and often further elements such as (sub-)national identity, the use of language(s) and fundamental rights, at least in addition to those guaranteed by the national level. To be considered as such, a (subnational) constitution generally needs to differ from (subnational) ordinary legislation in both form and substance and to express a margin of its own authority, not being a mere specification of the national constitution' Palermo and Kössler (2017: 129 and 335).

xxvi 'The fourteenth amendment to the United States Constitution, which applies the federal constitution to the states, only establishes the minimum degree of protection that a state may not abridge'. *Alderwood Assocs. v. Washington Emntl. Council* 96 Wn.2d 230 (1981) (State supreme court of Washington 1981).

xxvii 'It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country'. Justice Brandeis, dissenting opinion, *New State Co. v. Liebmann* (1932).

xxviii Cf. Gardner 2007: 29. 'While a dual judiciary would seem to be the logical corollary of the dual polity inherent in the federal principle as traditionally formulated, a number of federal systems have concluded that a fully dual system of courts is not necessary as long as the independence of the judiciary from the executives and legislatures of both levels of government can be assured'. Watts (2000: 958).

xxix 'Selon la doctrine et la jurisprudence, les droits fondamentaux figurant dans les constitutions cantonales ont une portée autonome pour autant qu'ils offrent une protection qui dépasse celle qui est assurée par le droit fédéral (ATF102 la 469 ss; FF 1989 III 696 et 833). Cela signifie qu'en matière de droits fondamentaux, les cantons peuvent garantir la même protection que la Confédération ou étendre cette protection. Il s'ensuit également que la garantie fédérale ne saurait être accordée lorsque le canton prévoit de manière impérative une protection moins étendue que ne le fait la Confédération par le biais de ses droits fondamentaux écrits ou non écrits'. *Message concernant la garantie des constitutions révisées des cantons de Zoug, de Bâle-Ville, de Schaffhouse, des Grisons, de Thurgovie et de Vaud du 8 avril 1992*.

xxx The aforementioned authors (Auer et al 2013a : 38) reported the following case law in order to support their thesis: ATF 118 ia 427; ATF 115 ia 234, 246.

xxxi The same authors (Auer et al 2013a : 39) cited the following decisions: ATF 121 I 267; ATF 119 ia 53, 55; ATF 112 ia 398, 411; ATF 108 ia 64; ATF 104 ia 480.

xxxii '(..) côté d'une violation de sa liberté personnelle, telle qu'elle est garantie par le droit constitutionnel fédéral non écrit et par l'art. 5 CEDH, le recourant invoque la violation des dispositions du droit cantonal relatives à l'indemnisation du prévenu victime d'une arrestation et d'une détention injustifiées.

a) Aux termes de l'art. 4 al. 3 Cst. cant., l'Etat est tenu d'indemniser équitablement toute personne victime d'une arrestation illégale. Par ailleurs, l'art. 114 ch. 1 CPP val. prévoit que le prévenu mis au bénéfice d'une décision de non-lieu peut recevoir une indemnité «en raison de son arrestation et de sa détention ou pour d'autres motifs». Selon la jurisprudence interprétant ces dispositions, il faut entendre par arrestation illégale la détention préventive injustifiée, par exemple parce qu'il n'y a pas de motif d'arrestation ni de détention. Elle peut aussi se révéler telle après coup. Il peut donc y avoir obligation - et non simple faculté - d'indemniser une personne détenue de façon injustifiée non seulement en cas d'atteinte illicite mais aussi en cas d'atteinte licite à la liberté personnelle'. ATF 113 Ia 177.

xxxiii 'Les dispositions auxquelles il se réfère sont plus précises que les principes découlant directement de la garantie constitutionnelle de la liberté personnelle; le défaut de base légale qu'il invoque doit donc être apprécié en fonction des dispositions constitutionnelles et légales genevoises, ces dernières dispositions s'appliquant concurremment avec les principes découlant de la garantie précitée'. ATF 104 ia 297.

xxxiv 'Die kantonale Verfassungsnorm gewährt dem Berechtigten insofern einen weitergehenden Schutz als das Bundesrecht, als sie nach der Auslegung des Verwaltungsgerichts keine Ausnahme vom Rückwirkungsverbot zuzulassen scheint'. ATF 101 ia 82.

xxxv 'La conception du droit de pétition (§ 12), qui (comme les nouvelles constitutions des cantons d'Argovie, de Baie-Campagne, de Soleure et de Glaris) confère un droit à obtenir une réponse à une pétition, va plus loin que le droit fédéral'. *Message concernant la garantie de la constitution révisée du canton de Thurgovie*, FF 1989, III, 833.

xxxvi Cf. 'Un canton ne peut pas réglementer un domaine qui fait l'objet d'une compétence fédérale exclusive. Il peut toutefois assumer des tâches qui relèvent d'une compétence fédérale concurrente, non limitée, dont la



Confédération ne fait pas entièrement usage. Ces normes constitutionnelles ont alors, par rapport au droit fédéral, une portée plus restreinte que le laisse supposer leur libellé. Toutefois, tant qu'elles couvrent une compétence cantonale qui est susceptible d'une interprétation conforme au droit fédéral, la garantie fédérale doit leur être accordée' *Message concernant la garantie de la Constitution d'Argovie du 15 avril 1981 du 15 avril 1981*, FF 1981 II, p. 254.

xxxvii 'L'article 13, 2e alinéa, de la nouvelle constitution garantit le libre choix d'autres formes de vie en commun que celle du mariage ou de la famille au sens traditionnel du terme. Cependant, dès lors que, selon l'article 64, 2e alinéa, de la constitution fédérale, la législation civile est de la compétence de la Confédération, cette disposition ne peut déployer aucun effet sur les rapports de droit civil de couples non mariés; ainsi, par exemple, les effets du mariage ne sauraient être étendus au concubinat'. *Message concernant la garantie de la constitution de Berne du 6 décembre 1993*, FF 1994 I, p. 403.

xxxviii 'L'article 10 garantit, outre le mariage et la vie de famille, le libre choix d'une autre forme de vie en commun. Or, conformément à l'article 64, 2e alinéa, de la constitution fédérale, la Confédération légifère dans le domaine du droit civil; cette norme cantonale ne peut donc pas déployer d'effets sur les relations de droit civil des couples non mariés et étendre par exemple les effets du mariage à l'état de concubinage. En revanche, elle pourrait avoir des effets par exemple sur l'exercice de droits proches des droits de la personnalité ou dans le cadre du droit procédural'. *Message concernant la garantie de la constitution d'Appenzell Rhodes-Extérieures du 10 janvier 1996*, FF I 1996, p. 967.

xxxix 'Nevertheless, in spite of the fact that there are virtually no longer any areas in which the cantons have exclusive competence, cantonal constitutional rights still have great actual relevance: they can influence the jurisprudence of the cantonal constitutional jurisdictions and of the Federal Tribunal. Furthermore, they are all part of the national «constitutional identity»'. Fercot, 2008: 318.

xl 'A juste titre, les recourants ne se prévalent pas de la loi fédérale du 3 octobre 2008 sur la protection contre le tabagisme passif (RS 818.31), entrée en vigueur le 1^{er} mai 2010'. ATF 136 I 241.

xli *Message concernant la garantie de la constitution de Berne du 6 décembre 1993*, FF 1994; *Message concernant la garantie de la constitution d'Appenzell Rhodes-Extérieures du 10 janvier 1996*, FF I 1996, p. 967. Both messages highlight some problems associated with the widening of federal rights, but, excluding social rights, they do not discuss the new rights, because these new rights do not affect the federal rights and do not contradict them.

xlii 'la distinction effectuée va à l'encontre de la tendance au pluralisme, qui empreint aujourd'hui notre société et se traduit dans la composition des autorités. Elle conduit à disqualifier les ecclésiastiques par rapport aux autres citoyens, à les stigmatiser sans motif valable. La clause de laïcité prévue à l'art. 141, al. 3, de la Constitution genevoise constitue une discrimination au sens de l'art. 8, al. 2, Cst.'. *Message concernant la garantie de la Constitution révisée du canton de Genève*, FF 2006 8337.

xliiii 'At the end of the nineteenth century, rejections of cantonal constitutions were often pronounced, particularly because the cantons disregarded equal political rights'. Biaggini (2004: 220).

xliiv 'Folgerichtig gilt der Grundsatz für das gesamte spätere übergeordnete Recht. Im vorliegenden Fall war der am 14. Juni 1981 angenommene Art. 4 Abs. 2 BV im Zeitpunkt der Gewährleistung von Art. 16 KV durch die eidgenössischen Räte in den Jahren 1971 und 1979 noch nicht in Kraft und konnte daher nicht berücksichtigt werden. Die Frage, ob Art. 16 KV, wie er bisher von der kantonalen Praxis verstanden wurde, mit dem späteren, die Gleichstellung von Mann und Frau ausdrücklich verankernden Verfassungsrecht vereinbar ist, kann und muss daher geprüft werden'. ATF 116 Ia 359.

xliv See ATF 106 Ia 267 [271]. 'Si l'article 5 ne devait pas couvrir tous les aspects de ce droit fondamental protégés par le droit fédéral, la législation et la jurisprudence cantonales devront donc, comme par le passé, se reporter à la jurisprudence du Tribunal fédéral' *Message concernant la garantie de la constitution du canton de Glaris*, FF 1989, III, 706. 'Cela signifie que les cantons peuvent garantir la même chose ou plus que la Confédération, mais également que la garantie ne peut pas être octroyée lorsque le canton, par une prescription expresse et contraignante, accorde une protection moins étendue que la Confédération par ses droits constitutionnels écrits ou non écrits (..) Les limitations des droits fondamentaux (§ 8) doivent tenir compte de l'étendue de la protection accordée par le droit fédéral (..) Le paragraphe 6, chiffre 1, ne s'exprime pas en ce qui concerne le contenu particulier de ce droit fondamental; la législation et la jurisprudence cantonales devront donc comme par le passé suivre à cet égard la jurisprudence du Tribunal fédéral'. *Message concernant la garantie de la constitution révisée du canton de Thurgovie*, FF 1989, III, 833.

xlivi The decisions reported are the following: Cf. FF (Feuilles fédérales), 1987, II, p. 626 at p. 632; FF, 1989, III, p. 706 at p. 711; FF, 1989, III, p. 833, 839-840; FF, 1994, I, p. 401 at p. 407; FF, 1996, I, p. 965 at p. 970-971.



^{XLVII} ECHR., Müller e.a. v. Switzerland, 24 may 1988 (*Application no. 10737/84*). In a more recent case, the Court has indirectly affirmed the possibility of asymmetry in fundamental rights: 'For this reason the management of public billboards in the context of poster campaigns that are not strictly political may vary from one State to another, or even from one region to another within the same State, especially a State that has opted for a federal type of political organisation. In this connection, the Court would point out that certain local authorities may have plausible reasons for choosing not to impose restrictions in such matters (see *Handyside v. the United Kingdom*, 7 December 1976, § 54, Series A no. 24). The Court cannot interfere with the choices of the national and local authorities, which are closer to the realities of their country, for it would thereby lose sight of the subsidiary nature of the Convention system (see *Case «relating to certain aspects of the laws on the use of languages in education in Belgium»* (merits), 23 July 1968, p. 35, § 10, Series A no. 6)'. ECHR., *Mouvement raélien suisse v. Switzerland*, 13 July 2012, (*Application no. 16354/06*).

^{XLVIII} *Contra*: 'There is no need for the recognition of fundamental rights at the level of sub-states. Indeed, the principle of equality and non-discrimination even opposes the recognition of new fundamental rights in sub-national constitutions, based upon the principle of equality and non-discrimination'. Popelier (2012: 55).

^{XLIX} See also Belgian Constitutional Court decision no. 37/1992, no. 33/1995, no. 78/1997, and no. 85/1999. As already seen, the same principle was adopted in the Swiss legal system, where the Federal Supreme Court also affirmed: 'A supposer donc que les causes mentionnées par la recourante présentent de fortes similitudes avec sa situation personnelle, la circonstance, inhérente au fédéralisme, que les mêmes dispositions légales aient été appliquées différemment par des autorités de cantons différents (pour autant qu'elles respectent le cadre légal), n'est constitutive ni d'une violation de l'interdiction de l'arbitraire, ni du principe d'égalité de traitement'. ATF 2C_832/2016.

^L On the matter of the application of fundamental rights made by the subnational units, see Peiffer (2017: 56).

^{LI} 'Le texte constitutionnel ne comporte aucune liste de motifs de discrimination qui seraient interdits, par opposition à d'autres motifs de distinction qui seraient, eux, autorisés. *A priori*, toute la différence de traitement, sur la base de n'importe quel critère, peut constituer une discrimination interdite par la Constitution'. Renauld and Van Drooghenbroeck (2011: 583). The decision reported is the decision number 15/2009. Belgian Constitutional Court decision n. 15/2009.

^{LII} This uniformity in the matter of judicial interpretation occurs already in the field of regional laws: 'En appliquant les normes fédérées, les juridictions les interprètent souvent, en cas de difficulté, à la lumière du prescrit de la norme supérieure – la Constitution fédérale – et tendent des lors à imposer des standards uniformes limitant le marge de manœuvre des collectivités'. Verdussen and Bonbled (2011: 261). It occurs, above all, concerning the application of the ECHR: see Belgian Constitutional Court decision no. 136/2004.

^{LIII} 'Le contrôle de la Cour est plus strict si le principe fondamental de l'égalité des sexes est en cause'. Belgian Constitutional Court decision n. 166/2004.

^{LIV} 'The principle of equal treatment does not prevent Flanders, in order to ensure full equality in practice, maintain or adopt specific measures to address disadvantages related to sex, race, colour, ethnic or social origin, genetic characteristics, language (...)'. Art. 15 of the Charter (author's translation from the Flemish).

^{LV} 'B. The principle of equality does not prevent measures being taken or taken, with specific benefits being put in favor of the under-represented gender'. Article 16 of the Charter (author's translation from the Flemish).

^{LVI} In the Belgian legal system, intellectual property is recognised as a right by federal law. See Paques and Vercheval (2011: 792). Thus, the larger protection is due to the constitutionalisation of this right.

^{LVII} These rights are recognised in Belgian law, but they are not recognised as constitutional rights. Cf. Schaus (2011: 1084). See Belgian Constitutional Court decisions no. 64/2009 and *Conseil d'Etat* decision no. 12521/1967.

^{LVIII} 'Employers and employees or their respective organizations have the right to negotiate collective bargaining at the appropriate levels, collective employment contracts and, in the event of conflicts of interest, collective action to defend their interests, including strike'. Article 32 of the Charter (author's translation from the Flemish).

^{LIX} 'A. Everyone is entitled to his business being treated impartially, equitably and within a reasonable time by the institutions, bodies and agencies of the Flemish government'. Article 50 of the Charter (author's translation from the Flemish).

^{LX} Regarding the 'hidden' concurrent competence Cf. Popelier and Lemmens (2015: 26). Concerning the 'compétence parallèle' in the field of application of fundamental rights, see also Verdussen and Bonbled (2011: 248 and ff).

^{LXI} In the past, the protection of artistic expression was guaranteed by the case law of the *Conseil d'Etat* but only as a *species* of the larger *genus* of free speech and not from a constitutional point of view. See *Conseil d'Etat* decision n. 191.742/2009. 146.226/2005.



LXII Cf. about the freedom to inform and the media system: Belgian Constitutional Court decisions n. 194/2009. See Jongen and Dony, (2011: 848).

LXIII According to some scholars, the right to data protection can be directly reconnected with article 22 of the Constitution. Degreve and Pouillet (2011: 1012, footnote 44). Indeed, the federal law and the same article 22 should be connected with the ECHR's jurisprudence. Id.: 1016.

LXIV Considering also the limits determined by the Belgian Constitutional Court in the field of article 23 Cost. Cf. ex pluribus decision no. 103/2015.

LXV Consider that since 1999 the federal fundamental rights are also protected by constituent units. Verdussen (2005: 188-189).

LXVI The enactment of the Charter could be made possible or by an amendment of the Constitution or by the abrogation of some constitutional provisions and the special law of 8 August 1980, leaving a space of action for the Flemish Parliament. For an in-depth analysis on this point, see Lambrecht (2014: 150-151). Cf. Peiffer (2017: 54).

LXVII As stressed also by the authors of the *Proeve van Grondwet voor Vlaanderen*: 'La Cour constitutionnelle (telle que nous la proposons) peut vérifier si les constitutions des États fédérés sont compatibles avec la Constitution fédérale, et on devrait trouver dans la Constitution fédérale une disposition dite d'homogénéité, contenant des conditions de fond auxquelles doivent satisfaire les constitutions des États fédérés'. Brassinne (1997: 4).

LXVIII Also if 'the French-speaking parties fear that a Flemish constitution stands as a symbol for a separatist agenda rather than expressing sub-national autonomy in a federal structure'. Popelier (2012: 54); Peiffer (2017: 56); Nihoul and Barcena (2011: 234); Lambrecht (2014:152-153). In this field it has to be stressed that in the book *Proeve van Grondwet voor Vlaanderen* 'Les auteurs se défendent d'avoir fait un exercice en vue d'un éventuel séparatisme; bien au contraire, ils situent la Flandre comme une «deelstaat» ou «onderdeel» de l'État fédéral «Belgique» signifiant par-là que la Flandre est une partie de l'État fédéral, ou plus précisément une composante de celui-ci'. (Brassinne 1997: 11). And this only 'federalist will' seems to have inspired the parties that have supported the attempts to enact the Charter (apart for N-VA e Vlaams Belang): Lambrecht (2014:151). Finally, the Charter is clear in declaring 'Flanders as a federated state of Belgium' (Title I) (author's translation from the Flemish).

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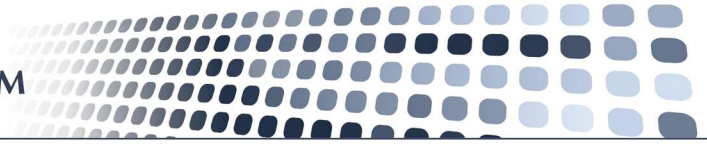
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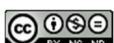
ISSN: 2036-5438

Evolution of Fiscal Federalism in the Colonized India

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Perspectives on Federalism, Vol. 11, issue 1, 2019





Abstract

In order to understand the true essence of the existing federal structure in India, it is very much required that there should be a proper understanding of the events and circumstance which led to its progressive evolution. Thus, while considering this aspect, the present paper is focused on the analysis of evolution of federal financial relations during British rule in India. The paper has been categorised into six phases: the first phase covers the introductory part, the second phase covers the analysis of the cementing of theoretical base for decentralisation (1860-1871), the third phase provides the informal progress to the ongoing process of decentralisation (1871-1920), the fourth phase evaluates the formalisation of decentralisation (1920-1937), the fifth phase analyse the Centre-Provincial relations under the formal Federal structure (1937-1947), and the last phase provides discussion on Federal financial relations in the transition phase (1947-1950).

Key-words

Decentralisation, Devolution, Fiscal Federalism, Colonial Rule, Reforms etc.



1. Introduction

Generally, the de-facto aspect of the federal concept explains that even a huge landmass with large population and with full of diversities (such as social, cultural, geographical, political and economical etc.) can be administered in a peaceful way, provided it contains the mechanism for a balance in Power and resources sharing between federal and regional units of the governments. And this balancing factor is determined by variety of factors such as- the mode of creation of the federal structure and experiences from various phases of ups and downs etc. In Indian context this phenomenon can be understood by observing the developments that took place during the colonial rule in India.

On the evolutionary aspect, it can be said that although federal concept is an age-old concept and it takes its shape as per the prevalent system of the government. And when we look at the existing federal structures, it can be observed that although the modern type (Federalism which is based on a democratic form of government system) of federalism is considered to be originated on the pattern of the United States of America and Canada. But even before this, there are examples in the history of mankind that there have been many instances where the unitary and federal form of government system worked one after the other.

To put it simply, the growth of the concept of federalism or decentralisation can be described as natural consequence of basic state of affairs. The history speaks loudly and explains that whenever there is need to govern a large territory with full of diversities then there is a non-negotiable need for the division of the administration and available resources in some manner so that the proper functioning of the administration can be worked out. Further, in ancient and the medieval times also, there was existence of federal kind of structure, but it was not based on principles as we are experiencing nowadays (i.e. principles of democratic governance). For example, in ancient India the King Ashoka (Belonged to the Mauryan Dynasty and ruled from 269 BC to 232 BC) as well as King Samundra Gupta (Belonged to the Gupta Dynasty and ruled from 336 AD to 380 AD) established a large empire which expanded even beyond the boundaries of today's India. And they administered this vast land by dividing it into various provinces and sub-



provinces on the basis of the requirement of their time. Similarly, in the medieval time during the Akbar (Belonged to the Mughal Dynasty and ruled from 1556 AD to 1605 AD) and his successors reign the Indian subcontinent was ruled by dividing the whole administration into provinces and districts.

Further, when we talk about the modern time especially in Indian context, we usually consider it with the advent of colonial rule. While looking at the historical part of this modern phase we can see that even the colonial power (i.e. Britishers) were no exception to this basic understanding that the vast and diversified territory can only be managed through some sort of decentralisation in administration. And, when these Colonial rulers became the dominant power in India, they began to realise that if they want to rule India then they have to follow the natural consequences of India's diversities (i.e. decentralisation of the administration).

Additionally, during this historic phase, the Britishers being the colonial power made every change which could serve the colonial interest whether it was related to social change, economic reforms, administrative moulding or the political restructuring. Moreover, everything was governed with the sole motive to squeeze India's wealth and in order to serve this prime objective they framed the financial administration in such a way so that it not only ensures the economic efficiency in administration but can also help them to strengthen the hegemony of the colonial government. With all this background the British colonial government in India from time to time kept on changing their policies so that they could maintain and enhance their grip over the Indian subcontinent.

With briefly touching upon the history of the colonial rule in India we can see that in the beginning the British rule in India was based on the philosophy of strict form of centralisation. The legal history of the British colonial rule in India explains itself that the unitary form of government was the principle and that principle got its initial significance from the stream of legislations such as- Regulating Act of 1773; Pits India Act 1784; the Charter Act of 1793; the Charter Act of 1813; and further reinforced by the enactment of the Charter Act of 1833.

Furthermore, building upon the same stream of thoughts and with the analysis of the Charter Act, 1833 it can be observed that the Act was aimed to establish a unitary form of government in India. Further, that Act established a kind of centralised administration in which the Governor General of India and its Council were vested with all the powers of



direction, control and the superintendence of the whole military, civil and revenue administration in India (Mishra 1963: 30). In those circumstances, without the prior sanction of the Governor General-in-Council, the provinces were not having any discretion to spend revenue for the purpose of creating new post, or making arrangement for grant of salaries, allowance or gratuity (Mishra 1963: 30). This all depicts that at that point of time a sort of unitary grip was being practiced.

Additionally, that process of strict centralisation continued even after the crown took over Indian administration (as a consequence of India's freedom revolution of 1857) and finally that culminated into a kind of administration where the mismanagement of the financial affairs became a new norm and consistent headache for the imperial government.

All these above-mentioned circumstances created a sort of compulsion for the imperial government to initiate the process of decentralisation of the financial administration. And that process of decentralisation had no option of returning back to the centralisation and moreover it kept on expanding its sphere until it culminated into a formal fiscal federal structure.

Thus, in order to have a better assessment of the historic evolution of the fiscal federalism during the colonial rule in India, we need to have a critical analysis of this historical process in various phases. Further, each phase of this evolution has covered not only the process of refining the financial relations between the supreme government (Central government) and the provincial governments but also presented the assessment of the role and effect of the prevalent circumstances and the ultimate intention of these colonial rulers.

In short, this paper has tried to cover analysis of the historic evolution of fiscal federalism (in the time span of 90 years i.e. 1860-1950) which can be observed in the following sections:

- Cementing the theoretical base for decentralisation (1860-1871)
- Informal progress of the process of decentralisation (1871-1920)
- Formalisation of the process of decentralisation (1920-1937)
- Centre-Provincial relations under Federal structure (1937-1947)
- Federal financial relations in the transition phase (1947-1950)



2. Cementing the Theoretical Basis for Decentralisation: 1860-1871

This phase continued with the ongoing practice of strict form of centralisation in the financial matters. But additionally, this phase had also witnessed that the prevalent system of centralisation had started showing its negative side i.e. mismanagement of the financial administration. However, on the ideas level a consensus was evolving that there should be decentralisation of certain financial powers and responsibilities which are of local governance level. But, in practice the supreme government was not ready to accept the devolution of financial powers. So, this adamant attitude of the supreme government led to the piling up of the fiscal deficit (Keith 1936: 183-185).

Further, this highly unitary system of finance had provided numerous ways of gross abuses by the provinces. However, the provincial governments were the real administrator of the country, but they were kept without any form of financial responsibility. As a principle it is well known that an efficient working of the economy comes only with the responsibility. But in the prevalent system in that phase of the history the provinces were free from this responsibility aspect. And this separation of responsibility from the finance consequently led to the provincial extravagance. Further, the responsibility to find the new avenues of revenues was with the supreme government and the provinces were free to demand as much as they want. Thus, all this led to the competition among the provinces to give justification for their ever increasing demands for finance. The circumstances were that the provinces were of view that they had a resource from which they can withdraw without any limit. This presumption was developed because they had no experience of the co-relation between the economy and responsibility. By their experiences the provinces found that the less economy they practiced, the more they have chances to prove their urgent requirement of the funds.

Thus, the distribution of the resources to the provinces were not based on any well-defined principle or formulae such as- availability of resources, expenditure requirement or the needs etc. But it was based upon the relative demands, which the provinces could make on the supreme government's revenues. The result in the words of General Strachey, was that 'the distribution of the public income degenerates into something like a scramble, in which the most violent has the advantage, with very little attention to reason' (Mishra 1963: 32).



Further, there was no well-established system of account and audit and due to that the supreme government could not exercise any effective control over the provincial expenditure. The prevalent system can aptly be described in the words of Dr. B. R. Ambedkar, so as the government of India remained without an appropriation budget and a centralized system of audit and account, it continued to be only a titular authority in the matter of financial control, and the provinces, though by law the weakest of authorities in financial matters, were really the masters of the situation (Mishra 1963: 32).

Besides the above-mentioned state of affairs even the new legislative development in the form of India Councils Act, 1861 also could not break the stream of rigid centralisation. Consequently, the deficit and the level of debt of the central government were piling up every year. The financial situation was so grim that even the new initiatives (such as introduction of proper budget system, uniform system of accounts etc.) taken by Mr. James Wilson (Financial member of the Governor General-in-Council) could not bring any improvement in the worsening fiscal condition.

Additionally, although the provincial governments were the main collecting authority of all the revenue, but they were doing so merely as an agent of the central government. Thus, the provinces have no direct interest in the whole proceeds of the collected revenue. Furthermore, the provinces were getting funds on the basis of what they were expending thus they were tempted to ask for more and more funds and tried to spend every pie without considering of any return for that expenditure. Thus, all this was worsening the fiscal condition of the central government (Kumar et al. 1983: 905).

Further, moving towards the reformative stream of thoughts, the initiatives taken by Mr. Samuel Laing who succeeded James Wilson also made some progress by stressing the need for the decentralisation of certain financial powers which includes devolution of taxation powers to the provinces. This all was being suggested only to rationalise the finances of the government of India.

While concluding this phase of moving towards decentralisation, it can be said that although there was no substantial change in the ground realities which can be described as a beginning step towards the devolution of the financial powers. But this phase has made the substantial changes in the thought process, now the central government at least theoretically convinced that they need to move towards the decentralisation. As it is well known that actions follow the ideas, similarly circumstances and events of this phase had



made the changes at the thought process level which provided the conceptual basis for taking the actions in the next phase. Finally, we can say that this phase had provided the ideological cementing to need of incorporating the financial responsibility in the working of the provincial governments by using the tools of decentralisation which we will clearly see in the form of Mayo Resolution in the next phase of fiscal devolution.

3. Informal Progress of the Process of Decentralisation: 1871-1920

The nomenclature of informal progress is given while keeping the circumstances in mind that there was no declared objective of decentralisation in that phase. Further, that phase of informal progress was a result of hit and trial experiments. In this phase the central government took various initiative such as- Mayo Resolution of 1870; Provincial Financial Settlement (1882); Charles Elliot Committee (1887-1888); Quasi-Permanent Settlement (1904); Royal Commission on Decentralisation (1908) and Permanent Settlement (1912) etc. In order to have a deep understanding, we need to have detailed analysis of the changes that took place in that phase.

That phase began with transforming the thought process of the last decade into reality. In 1871 the famous Mayo resolution or scheme was declared. That scheme was aimed to bring in soundness in the Imperial finance which was in the state of chronic deficit (Copland 2001: 17-19). The broad objectives of the Mayo Scheme can be observed from the wordings of Lord Mayo (Mishra 1963: 34), “the more we will give the financial administration in the hands of the local governments the more it will lead to the efficiency and economy in the administration. Further, it will also increase the sense of responsibility in the provinces and ultimately will result in instituting the Empire in various parts of India and finally will lead the more and more association of natives with the administration”.

Further, the Mayo Scheme brought in various changes in the existing financial relations between the Imperial and the Provincial governments. The main features of this Scheme have been provided in the following words (Sury 2008):

- It promoted mainly two causes, firstly providing the relief to the Imperial government from the ever-increasing level of fiscal deficit and secondly, imbibing the sense of financial responsibility among the Provinces.



- It made the provision for the devolution of certain heads of expenditure such as – Police, jails, registration, education, medical services (excluding medical establishments), civil buildings, printings, roads and certain miscellaneous public improvements etc to the Provinces.
- Further, for the purpose of bearing the burden of the above-mentioned heads of expenditure, the Scheme assigned the receipts of the abovementioned corresponding heads to the Provincial governments.
- Besides this in order to fulfil the increased burden of expenditure the existing system of fixed grants from central government to the provinces was also continued.

Besides these Features, the Mayo Scheme when tested on the actual ground it revealed various defects such as- it was lacking the adequate resource arrangement for the Provinces. And moreover, it did not make the arrangements for the progressive administration of the subjects transferred to the Provinces. Additionally, it did not provide for the year on year revision of the fixed grants, as the expenditure was increasing but the base year (i.e. 1870-71) for calculating the grants remained fixed. Further, the scheme did not consider the existing inequality among the Provinces with regard to the expenditure burden and the grants. The allocation of the grants was also not based on the fair principles as the conditions of the Provinces were not equal. All this showed that the real motive behind this scheme was not to devolution of functions and powers to the Provinces but to provide some sort of ease to the imperial finance.

The system provided by the Mayo Scheme although did not provide a complete solution to the financial problem of the Imperial government, but it at least provided a kind of beginning which could not be stopped in the time to come. And the initiation of financial decentralisation given by the Mayo Scheme ultimately culminated into formation of the formal fiscal federalism.

After the Mayo Resolution the next wave of informal financial decentralisation came in the form of widening the scope of Provincial Financial Settlement. In 1877 Lord Lytton with the assistance of his finance member Sir John Strachey made changes in the existing state of affairs and brought into picture a new scheme for informal decentralisation of the financial relations. Under this new scheme some more heads of expenditure such as- law



and justice, land revenue, stamp, excise, general administration and stationary and printing etc. were transferred to the Provinces. But strange thing was that the Provinces were not given the power of taxation upon these transferred heads of expenditure. On the other side the Provinces were given share in the revenue of the Central government. One more significant feature of this arrangement was that the Provinces were not only allowed to keep the revenue from some minor heads of revenue but it also provided that whether there is surplus with the Province or deficit, it would be shared equally with the Central government. Thus, it created an informal beginning of the formal federal financial relations.

Like earlier schemes this scheme was also not free from drawbacks. Some of the major drawbacks of this scheme are as follows: (a) that scheme was lacking any kind of uniform pattern of transfer of subjects, (b) the provinces were kept out of the sharing from the largest source of revenue i.e. land revenue etc. Despite these defects this system brought in a sort of flexibility in the revenues of the provinces.

The Mayo Scheme was having a condition of annual revision but in the year 1882 Lord Ripon with the assistance of his financial member Major Baring made some changes in the existing Provincial Financial Settlement. Under this stream of reform, the annual revision of settlement transformed into a settlement which required revision after every five years i.e. Quinquennial arrangement. Further, under this new scheme the system of shared revenue or the divided heads came into existence. This was the first time the revenue was classified under three main heads i.e. Imperial, Provincial and Divided. The main subjects under these heads are as follows (Jha 1983: 68-69):

I. Imperial

1. Military public works
2. Revenue from opium
3. Custom duties (except in Burma)
4. Telegraphs
5. Gains by way of exchange transactions
6. Tributes
7. Post office receipts
8. Revenue from salt (except in Burma)
9. Railways



II. Provincial

1. Interest on provincial securities
2. Education
3. Provincial rates
4. Receipts from law and justice
5. Medical receipts
6. Stationary and printing
7. Minor departments
8. Police
9. Ordinary public works
10. Provincial railways
11. Miscellaneous items (except gains by exchange premium on bills etc.)

III. Divided (Heads with unequal division)

1. Excise
2. Forests
3. Registration
4. Stamps
5. Land revenue
6. Assessed taxes

Besides this division on the basis of revenue, there was also corresponding division of the heads of expenditure. But this whole distribution was imbalanced, and the provincial governments were facing the situation where the expenditure was much more than the corresponding sources of revenue. The main objective of this Quinquennial arrangement was to create a greater financial stability in the Provinces, but in reality, it increased the imbalance among the Provinces and also created the friction and irritation in relationship among them. Furthermore, another major defect of this system was that on the completion of every five year the balances standing on the credit of the Provinces were taken over by the Government of India.

The Quinquennial arrangement was revised in the year 1887 and 1896. And, again in 1904 the defects of this system became quite visible and Lord Curzon (the then Governor General of India) made some efforts to improve the conditions. Under the new reforms in



1904 the Central Government introduced a scheme which was quasi-permanent in nature. Although, this scheme did not make any change in the classification of the subjects which was introduced by the Quinquennial arrangement, but it modified the share of the Provinces. Under this quasi permanent settlement, the whole revenue from the subjects of national importance (i.e. customs, salt, post, mint, railways and mines etc.) were appropriated by the national government and the share of revenue from the subjects of local nature (i.e. police, education, civil works, medical services etc.) were given to the Provinces. Although, the revenues given to the Provinces were fixed but that could be revised only by the supreme government, provided there are substantial changes in the original circumstances. Due to these arrangements the overall expenditure burden of the Provinces had exceeded their revenue generation capacity. So in order to fill this gap there was provision for the lump sum grants. However, the quasi-permanent settlement did not make any big change but, it strengthened the existing stream of reforms which was initiated by the Mayo Scheme.

Further, in order to improve the financial relation with the provinces, the Supreme government in 1908 appointed the Royal Commission on Decentralisation which presented its report in 1909. The Commission though convinced with the existing financial relations but still emphasized for reorganization of Indian financial system. Some of the major recommendations by the Commission are as follows:

- It suggested that the provisions of divided heads are not good for the provincial development.
- The system of fixed assignment had made the arrangement unduly rigid.
- The definite purpose lump sum grants had provided the unnecessary scope for interference in the Provincial matters.
- These Provincial settlements had discriminated among the provinces.
- As the existing arrangements lacked any power to the provinces for additional taxation or borrowings, thus it excluded the provinces from taking any measure for improving the administration.

As a result of these recommendations Government of India again came with a new kind of financial arrangements in 1911-1912. The new arrangements initiated by Lord Hardinge (the then Governor General of India) were given the nomenclature of Permanent



Settlement. Under this arrangement, the forest revenue and expenditure were completely given to the provinces. The new system was kept rigid and permanent but there were provisions if any contingency arises. Besides this, the provisions for grants to the Provinces were retained. Further, the Government of India was given the authority over the expenditure and the revenue from the following heads: military receipt, mint, tributes from native States, customs, Railways, Opium, telegraph, salt, post office and Home Charges etc. And the other heads were either divided between the Imperial and Provinces or totally given to the Provinces. But, the provisions of the Permanent Settlement did not allow the Provinces to adjust the funds as per their changing needs.

The Permanent Settlement continued till the implementation of the Montague-Chelmsford reforms i.e. 1920. During the period of 1912-1920 the revenue could not satisfy the growing level of expenditure. Further, the self-regulatory kind of system provided by the Permanent Settlement could not sustain for long time in a fast-changing federal adjustment. Although, as it is a very well-known fact that no system can make arrangements for all the times to come. Thus, the Permanent Settlement also proved to be ineffective for the circumstance prevalent in the beginning of 1920s. The next phase (1920-1937) marked a formal beginning of the federal concept in Centre-State financial relations in India. This phase provided the required impetus to the developing fiscal federal relations.

4. Formalisation of the Process of Decentralisation: 1920-1937

The process of formalisation of fiscal federalism got initiation with the implementation of the Government of India Act, 1919 (also known as Montague-Chelmsford reforms). This phase because of administrative and financial changes usually called as the beginning of formalisation of federal financial relations. Further, this phase had also made various kinds of experiments in the Centre-State Financial relations such as: Montague Chelmsford Reforms, Meston Committee, Taxation Enquiry Committee (1924), Indian Statutory Commission (1930), 1st Peel Committee (1931), Percy Committee (1932), White Paper on Constitutional Reforms (1931), 2nd Peel Committee (1932), Joint Parliamentary Committee on Indian Constitutional Reforms (1933-34) etc. And, in order to have clarity as to how the



fiscal federalism get cemented as a part of formal administration, we need to analyse the above-mentioned reform initiatives in a bit detail.

In 1919, the continuous and unstoppable process of decentralisation got a required shot in the arm by the enactment of Government of India Act, 1919. This Act was based on the reforms suggested by the Montague-Chelmsford Committee. That Committee was tasked with the objective to find out the totally separate resources for the Centre and the Provinces. The report opined that the financial autonomy to the Provinces could only be secured by separation of their resources from the Central Government. The main features of these reforms can be perused in the following ways (Jha 1983: 78-79):

- It provided the limited responsible Government at the Provincial level.
- It classified the subject matters into two categories i.e. Central and Provincial.
- The subjects containing the broad spectrum were given to the Centre, such as: Foreign affairs; post and telegraph; Military matters; customs and tariffs; public debts; coinage and currency; railways; commerce and shipping; civil and the criminal laws etc.
- The subjects given to the Provinces were further sub-divided in two categories i.e. Reserved and Transferred. The reserved list contained the subject such as- the Police; Prison; administration of justice; Land revenue; factory regulation and labour affairs etc. And under the transferred category the subjects included were- public health; cooperative societies; public works; agriculture and veterinary questions; sanitation; local self-government; hospital; asylum etc.
- Under this scheme the old system of divided heads of revenue was discontinued.
- Under the new scheme the subjects such as- land revenue; irrigation; excise; forests; and judicial stamps were completely transferred to the Provinces.
- It proposed a kind of mechanism where Provinces were given the autonomy for self-governance with the federal government as protector and arbitrator for inter-Provincial relationship.
- Under these reforms the taxation powers of the Provinces enlarged.
- The Provinces were conferred with the borrowing powers and were made entitled to enter the money market on their own behalf, so this provided the ever-required financial independence to the Provinces.

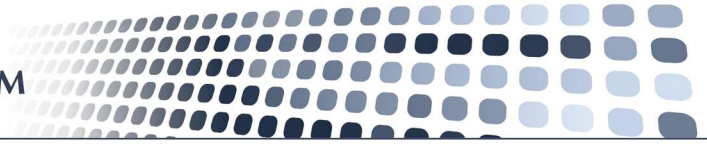


- Further, on the expenditure side, the Central government tasked itself with the responsibility to take care of the cost of defence and the commercial services like-railways; civil works; and the post and telegraph etc.
- And finally, the Provinces were empowered to frame their completely separate budget.

However, with the above mentioned features the Provincial set up was given a formal shape of units in a federation but, in practice it removed the major source of revenue from the central share and consequently it led to a huge deficit in the federal finance. Thus, in order to meet this challenge, the central government appointed a Financial Relations Committee under the chairmanship of Lord Meston. The Meston committee recommended against the division of the income tax with the provinces. It further suggested that general stamps for the administrative and financial standing should be provincialized. It also suggested that the scheme for initial contribution and standard contribution should be limited up to seven years only. And that contribution would be based on the taxable capacity and economic condition of the Provinces. Although, some of these recommendations of that committee were accepted but the suggestion relating to the sharing of income tax was not accepted. The Meston award was the only instance in the history of Indian fiscal devolution, where the Provinces were required to make the contribution to the Central revenues.

Further, in the meantime in order to solve the issue of division of sources of revenue between the Centre and Provinces, the Indian Taxation Enquiry Committee headed by Sir Charles Todhunter was constituted. The Todhunter committee recommended that excise duty on the opium; country made foreign liquor and general stamp should be reassigned to the Centre. It also recommended that the Centre should share a small portion of the corporation tax with the Provinces. Although, none of the above given recommendations of that committee were accepted. Further, the committee was neither in favour of giving the income taxation power to the Provinces nor in favour of imposition of surcharge by the Centre for the benefit of Provinces.

In the series of reform initiative of this phase, next came the report of the Indian Statutory Commission, 1930. This Commission accepted most of the recommendation of its financial assessor Sir Walter Layton. Layton suggested that in order to satisfy the claims



of the industrial Provinces a substantial part of the income tax should be given to these Provinces. He also appreciated the methodology for proposed division, as suggested by the Todhunter Committee. The Commission also suggested that the income tax exemption given to the income from the agriculture should be done away with in a periodic manner and the income from it should be wholly assigned to the Province of origin. Sir Layton also suggested that a special Provincial fund should be formed in which the income from the taxes on commodities such as matches and cigarettes and also duties from the salt etc. would come. Further, the share from this fund among the Provinces would be based on the per capita (Sury 2010: 14-15).

Further, the Centre-State financial relations were also discussed by the Federal Structure Committee of the 2nd and the 3rd roundtable conferences (held in 1931 and 1932 respectively) through its two sub-committees. These two sub committees were presided over by Viscount Peel and known as Peel committee-I and Peel committee-II. In between these two committees another Expert Committee presided over by Lord Percy had presented its reports. The analysis of the findings of these committees has been covered in the following paragraphs.

The 1st Peel Committee recommendations are as follows:

- The proceeds of the income tax should be transferred to the Provinces and its collection and administration should be kept with the Federal government.
- It indirectly suggested that the whole federal tax revenue should be derived from the proceeds of the indirect taxes.
- And if there is any federal deficit then the Provinces should make the contribution to meet any such requirement. Further, this provision would be gradually terminated in 10 to 15 years.
- And if there is any permanent surplus due to this arrangement then that should be distributed as per the wishes of the federal government to the Provinces as an alternative to reduction of taxation.
- It also suggested that the Constitution should lay down the share in the available fund among the provinces on the basis of some criteria whether it is based on revenue or population or some other criteria.



- It also recommended for an expert committee to devise a criteria on which the income tax among the Province should be allocated.

Thus, on the issues raised by the 1st Peel Committee, an expert committee headed by Lord Percy was appointed. The Percy committee on the issue of distribution of the income tax suggested that the allocation should satisfy the following three tests: (a) It should be easy to understand and administratively workable. (b) It should deliver the results that should be fair and acceptable to the Provinces. And (c) it should be compatible with the idea of federation with provincial autonomy.

While keeping the above given requirements the Percy committee suggested the following scheme: (a) the corporation tax which paid by the residents in the federally administered areas and the tax paid by the federal officer from on their salary should be left with the Centre. (b) The remainder of the net proceeds should be transferred to the Provinces with consideration of population as a factor for deciding the share. Further, it was suggested that the scheme should not revised before the completion of five years. And with regards to the provision for grants it is suggested that if it is feasible then it should give to the Provinces on the basis of their population size.

Additionally, the 2nd Peel Committee further suggested that there should be two-fold divisions of the income tax proceeds. Firstly, there should be permanent Constitutional provisions for the share of the Federal government and secondly, similarly there should be Constitutional provisions for the permanent share for the Provinces. Besides these recommendations, there was another reform initiative in the form of White Paper on Indian Constitutional Reforms, 1931. Under that paper it was suggested that a prescribed percentage (i.e. 50% to 75%) from the net proceeds of the income tax revenue should be assigned to the Provinces. Further, the paper suggested two new features. Firstly, it recommended that the Federal legislature should be empowered by law to assign the tax proceeds from certain heads such as excise duties, salt duty etc. to the Provinces. And secondly, in case of certain taxes the power to levy tax would remain with the federal government but their proceeds may be transferred to the Provinces. The proposals suggested by white paper were also accepted by the Joint Parliamentary Committee on Indian Constitutional Reforms, 1934. And furthermore, the Parliamentary committee suggested that the share of the Provinces in the proceeds of the income tax should be decided by an Order-in-Council. It also proposed that the Provincial share should not



exceed 50% of the total income tax proceeds and the Provinces should not be given power to impose any sort of surcharge on the personal income tax (Sury 2010: 18-20).

Although, the major theme of the above given recommendation to devolve more and more financial powers to the Provinces, but in reality, the idea of transferring the proceeds of income tax to the Provinces and later on covering the Federal fiscal deficit from the Provincial contribution was wholly discarded. Further, the major significance of the measures took place in this phase was that it provided the formal shape to the fiscal side of the Indian Federal structure. As, these arrangements were not based on the purely federal principles therefore these were mainly guided by the political exigencies. In broad terms it can be said that the reforms initiated by the Act of 1919 were proved to be another landmark in the long journey of the evolution of the fiscal federalism in the Colonised India. The end of this phase had set the stage for further reforms which later on came in the form of Government of India Act, 1935.

5. Centre-Provincial Relations under Federal Structure: 1937-1947

When the Act of 1919 was implemented it came up with several limitations. Further, the working of the Fiscal federal arrangements was analysed and evaluated by the three roundtable conferences and the Joint Parliamentary Committee on the Indian Constitutional reforms (1933-34) and on the basis of their recommendations the Government of India Act, 1935 was passed. The Act of 1935 made the formal declaration for setting up of a federal structure and made the elaborate provisions for this purpose. That Act also proposed a scheme of categorisation of the functions and the resources in three categories. Under this arrangement the subjects of Central interest were covered under the fold of Federal list which contained 59 entries. Similarly, the matters related to the Provincial interests were categorised under the Provincial Legislative List which contained 94 entries. And lastly, the subject which were touching the common interests of the Centre and the Provinces were maintained in a new list under the name of Concurrent legislative powers and it contained 36 entries. These provisions had made it clear that the structure created by this Act became the foundation for the Fiscal Federalism under the Constitution of India (H.L. Bhatia 1993: 341).



The Act of 1935 was another milestone in the evolution of Fiscal Federalism in the colonised India. The description of this Act was very aptly given by D.D. Basu, “while under all the earlier Acts and reforms the Government of India was in the unitary form but the Act of 1935 for the first time prescribed a federation, taking the Princely States and the Provinces as its units. But the provisions of the Act kept it optional for the Princely States to join the Federation and they did not join it. Consequently, the Federation prescribed by the Act of 1935 never came into existence” (Basu 1987: 9). The arrangements for the allocation of the resources to the Federal and the Provincial Governments, as had been given in the Act of 1935 can be classified into following four categories (Mishra 1963: 110-111):

- Taxes levied, collected and retained by the Federal Government: this category includes the item like- import and export duties; post and telegraphs; corporation tax; receipt from the railways; currency and coinage; and the military receipts etc.
- Taxes levied, collected and retained by the Provincial Governments: it includes land revenue; irrigation; duties on succession to agricultural land; capitation tax; taxes on minerals rights; excise duty of narcotics and non-narcotics drugs; excise duty on opium; alcoholic liquors; on medicinal and toilet preparations manufactured and produced in the Provinces; taxes on trade; profession and other employments; taxes on sale of goods and advertisements; cesses on the entry of goods in local area; duties on passenger and goods transported on inland waterways, tolls etc.; taxes on luxuries, entertainment; gambling and betting; stamps and registration related duties; taxes on animals etc. Thus, all this shows that these entries were of mainly local connection and further it could be better managed through the Provincial administration.
- Taxes levied and collected by the Federal government but assigned and shared with the Provinces: The taxes and duties which were assigned to the Provinces include stamp duty on bill of exchange, promissory notes, cheques, bill of lading, insurance policies, receipts, terminal taxes, and duties on the succession to the property other than the agricultural land. Similarly, taxes which were shared with the Provinces covered under the following entries- salt duties; a percentage of net proceeds of taxes on income excluding the agricultural income; excise duties on the subject



which are not included in the list on which the State excise duties applies such as duties on tobacco, export duty on the jute and jute products which were distributed among the Provinces. The sharing these taxes and duties under the Government of India Act, 1935 although in the beginning would be based on the executive order but later on would be determined by the legislative measure.

- Provisions for Grants-in-aid and borrowings: The gap in the responsibilities and resources of the Provinces would be supplemented by the grant-in-aid by the Federal Government. Further the Provinces were also given the freedom that they could borrow from the open market but for that purpose they were required to have the prior sanction of the Government of India.

The special feature of the Act of 1935 was that for the first time the revenues and the account of the Provincial governments were separated from the Government of India. The Provinces were free to frame their own budgets and responsible for their ways and means. Although, the Act of 1935 provided the structure for a fiscal federalism, but it left many questions to be answered before it can be made functional at the ground level. Thus, in order to solve these problems an enquiry committee headed by Sir Otto Niemeyer was appointed. The Committee was tasked to give recommendation on- (1) the percentage of shared taxes to be given to the Provinces and for evolving the principle on which that would be disbursed to the Provinces, (2) grant-in-aid to the Provinces in order to overcome their debt liabilities. While considering these terms the enquiry committee made the following recommendations (Sury 2010: 24):

- 50% of the net proceeds of the Income tax should be assigned to the Provinces but it does not include the proceeds from the corporation tax.
- Share of the provinces which are growing the jute in the jute export duty should be raised by 12.5% to 62.5% of the net proceeds of the duty.
- The debt which are outstanding to the Centre and contracted before the April 1, 1936 by the provinces namely- North-West Frontier Province, Bengal, Orissa, Assam and Bihar should be cancelled and the similar debt of the Central Province should substantially be reduced.
- Annual grants-in-aids of varying amount should be made for United Province, Orissa, North West Frontier Province and Assam.



The above provided recommendations by Sir Otto Niemeyer were accepted as it is by the Federal government and were incorporated in the Government of India (Distribution of Revenue) order, 1936. While considering the emergent situation during the 2nd world war these recommendations were made subject to change under the above-mentioned Order. Thus, with the above-mentioned changes of this phase it can be concluded that the Act of 1935 provided a kind of ground preparation to adopt the provisions of Fiscal Federalism under the Constitution of India. The major changes in the transition phase of 1947 to 1950 can be analysed in the next phase of evolution.

6. Federal Financial Relations in the Transition Phase: 1947-1950

The Independence brought in many changes in the Centre-State fiscal relationship. Especially the partition of the country compelled the Constitution framers to rethink about the idea of loose federal set up with maximum autonomy to the Units. Although the scheme suggested by Sir Otto Niemeyer was retained. But, as due to partition the Jute industry was affected. So, the Provincial share of the jute export duty was reduced from 62.5% to 20% which was broadly the share of the jute growing area which was transferred to the Pakistan. Further, during the Framing of Indian Constitution the provisions related to the Centre-State Financial Relations were referred to an Expert Committee headed by Nalini Ranjan Sarker. This committee after serious consideration provided a scheme for the financial relations and later after some modification that scheme was incorporated in the present Constitution. Major recommendations of this expert committee are following (Singhvi 1974: 149-150):

- The sharing ratio in the net proceeds of the income tax including corporation tax between the Centre and the Units should be 40:60.
- In order to balance the revenue structure of the Provincial governments, some share of the central excise duties should be given to the Provincial Governments.
- The sharing of the net proceeds of the jute export duty with the Provincial governments should be done away with.
- A Finance Commission should be constituted to handle the matters related to the distribution of revenue between the Centre and States.



Besides this, after the partition of the Country the arrangements related to the allocation of income tax and the jute export duty caused discontent among the States. So, in order to solve that problem, the matter was referred to C.D. Deshmukh. The Deshmukh award (1950) suggested that with regard to the changed percentage, the recommendation of the Niemeyer award can be applied by deducting the share of the areas transferred to the Pakistan. And while considering the issue of jute export duty the Deshmukh Award recommended for varying amount of grant-in-aid to the affected provinces. The Award suggested that following amount (in rupees) of grants-in-aid- West Bengal (105 lakhs), Assam (40 lakhs), Bihar (35 lakhs) and for Orissa (5 lakhs). This Award came into force on April 1, 1950 and remained effective for two years and ended on March 31, 1952.

7. Conclusion

In summing up the analysis on the evolution of Fiscal Federalism, it can be observed that the process of fiscal decentralisation which initiated in the 1860s had gone through various ups and downs and ultimately shaped the administrative structure for the efficient devolution of the financial resources. The whole phase of financial devolution has experienced various experiments for resource sharing models such as: transfer of resources from the Provinces to the Centre (under the Government of India Act, 1919) and again reverting back to the transfer of resources from the federal level to the Provincial level (under the Government of India Act, 1935). Further, the analysis also portrayed that this process of evolution was neither a result of the lone colonial initiatives nor a purely indigenous product but was a consequence of the natural state of affairs. And in that natural state of affairs, the country like India which is full of diversities and spread almost over a subcontinent, could not be ruled or governed by a unitary government system in an economic and efficient manner.

Additionally, in the beginning, all the efforts of the colonial rulers were to anyhow decrease the mounting fiscal deficit of the Imperial Government, but that beginning of decentralisation later on proved to be an unstoppable process which finally culminated into a well-structured Fiscal Federalism. But the structure which evolved during the colonial rule was neither aimed at the development of India nor directed to the welfare of the masses of India (Tomlinson 2008: 1-3). On the other hand, the structure of fiscal sharing

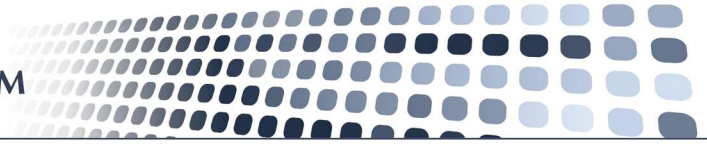


was devoted to extracting as much as possible wealth of India and transfers it to the British government of that time. Moreover, the expenditure of colonial rule in India was confined to the areas and items which were necessary to maintain the peaceful hold of the colonial rule over India and also to keep the subjugation of her people intact. Thus, all these efforts for fiscal devolution were unavoidable compulsion of colonial rule in India and the last major effort i.e. the Act of 1935 became the foundation stone for the provisions of Fiscal Federalism under the present Constitution of India.

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ISSN: 2036-5438

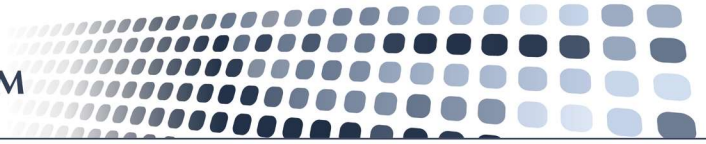
**The commons: an innovative basis for transnational
environmental law in the era of Anthropocene? The
case of Latin America**

by

Domenico Giannino and Antonio Manzoni*

Perspectives on Federalism, Vol. 11, issue 1, 2019





Abstract

The purpose of the present paper is to find a theoretical-legal basis for the recent innovative decisions by the Colombian Supreme Court of Justice and by the Inter-American Court of Human Rights on the issue of environmental justice. In order to pursue this aim, we will proceed as follows.

First of all (Par. 1), we will outline the general framework in which the considered case law are situated. The contemporary environmental degradation of our planet – especially of the so-called (environmental) commons – caused by human activity has led to a new term coined to describe a “human-made” geological era: the Anthropocene. The increasing detrimental conditions of most natural ecosystems has elicited the birth in recent decades of a new category of fundamental human rights – strictly coupled with the natural environment – the so-called “environmental rights”.

In the central part (Par. 2 and 3) we will illustrate and comment on the content of the judicial decisions by the Supreme Court of Colombia (STC 4360-2018) and by the Inter-American Court of Human Rights. Notably, we will try to underline the most innovative shifts that these judgements have brought in the theme of environmental justice.

The following part (Par. 4) will deal with the question: what is the theoretical-legal basis for the innovative case-law set out earlier? We argue that this basis actually already exists, and it can be found in the theory of the environmental commons (henceforth, simply “commons”). To do this, we will first identify five core points characterising the new environmental justice approach of the considered jurisprudence. After this, we will show how these five points are almost completely mirrored by the main features of the commons, so that they can offer – we believe – a valid theoretical-legal basis for this innovative case law. Lastly (Par. 5), we will consider two theoretical objections, that can legitimately arise, and how we propose to overcome them.

Key-words

Colombian Supreme Court of Justice, Inter-American Court of Human Rights, Environmental Commons, Anthropocene, Environmental Justice.



‘What is needed, in effect, is an agreement on systems of governance for the whole range of so-called global commons’ (Encyclical Letter *Laudato Si* of the Holy Father Francis)

1. Anthropocene, the “tragedy of the commons” and the birth of environmental rights

Over fifty years ago, in 1968, the ecologist Garrett Hardin published his famous article “The tragedy of the commons” in *Science*.^I In a nutshell, the author addressed the problem of human overpopulation which, without any regulation, will inevitably lead to the extinction of those limited resources (i.e., the so-called commons, or common pool resources) present on our planet, due to their consumption. As it is widely known, the commons considered by Hardin are those particular goods that economists define as both *non-excludable* and *rival*. This entails that individuals cannot be excluded from their enjoyment (non-excludability) and the use of the goods by one individual reduces its availability for others (rivalry) (e.g. fisheries, timber, etc.).^{II}

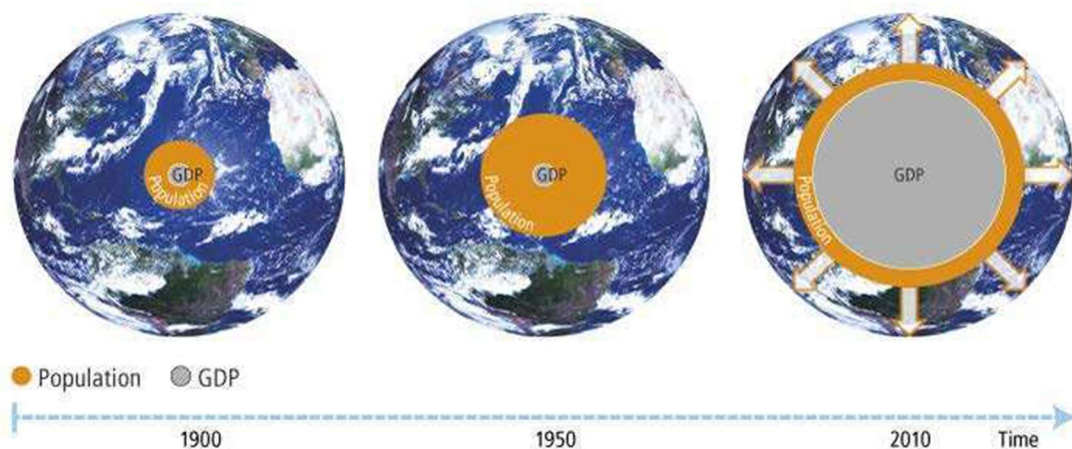
In the subsequent decades, however, the pessimistic outcry sent out by Hardin on the increasingly depleted natural resources of our planet has mostly fallen on deaf ears. These issues include climate change, deforestation, the dramatic situation of glaciers, and the list goes on. In sum, all these environmental issues, which only a few decades ago were considered little more than fantasies, have all become some of the most compelling problems to deal with in today’s global agenda.^{III} In other words, we could surely say, by looking at the contemporary situation of the natural resources of our planet, that the “tragedy of the commons” predicted by Hardin is actually becoming an unpleasant truth.

The rampant processes of exploitation, pollution, depletion and commodification of natural resources^{IV} have been so deep and widespread in the last century that, according to numerous scholars from various disciplines, we have entered into a new “human-made” geological era called ‘Anthropocene’ (Crutzen & Stoermer 2000). What is meant by this term is that human activity has had such a deep impact on the planet that it can be compared to a proper geological era. Indeed,



[a]t some point after 1950, the socioeconomic system coupled strongly with the Earth system – the oceans, atmosphere, ice sheets, soils, cycles and waterways and diversity of life that combine to keep Earth habitable – *becoming* the primary driver of change in the Earth system and this is taking place at an unprecedented magnitude and speed [Figure 1 below] (...). With increasing population and GDP [Gross Domestic Product], the human system is increasingly infringing on Earth's buffering capacity, threatening Earth resilience'. (Nakicenovic et al. 2016: 8; Crutzen & Stoermer 2000; Crutzen 2002; Waters et al. 2016; Rockström et al. 2009; Steffen et al. 2004).

In other words, the Anthropocene is 'thoroughly characterized by change, uncertainty and, probably, considerable instability in the behaviour of the Earth system' (Vidas et al 2015: 2).^V This is a striking fact, if we consider that such conditions are not merely created by natural forces, such as in previous geological eras. To make a comparison, the previous geological era – the so-called Holocene, which lasted 11,700 years – has been characterised by a notable ecosystemic stability and resilience.^{VI}



The figure shows how in the last century increasing population and GDP have been threatening Earth's buffering capacity and resilience (*Figure 1*) (Nakicenovic et al. 2016: 9)

The data emerging from the analysis of the Anthropocene are alarming. Among other effects,

'greenhouse gas levels as high as seen today may not have been seen for at least three million years. Earth is losing biodiversity at mass extinction rates. The chemistry of the oceans is changing faster than at any point in perhaps 300 million years. Our own



technology has had what is arguably the largest and most rapid impact on the nitrogen cycle for some 2.5 billion years' (Nakicenovic et al. 2016: 9; Ceballos et al. 2005; Hönisch et al. 2012; Williams et al. 2015).

Needless to say, most of the effects caused by the geological shift to the Anthropocene are not only damaging the natural environment of our planet, but they are also having a “boomerang effect” on the same agents that mostly contributed towards creating them: humans. Consequently, in recent decades (and, as we will see in the following sections, especially in very recent years), there has been a remarkable flourishing of international treaties, national laws, courts' decisions and civil society movements that focused their attention on environmental issues. The coupling of “environmental protection” and “human rights” has definitely become part of the contemporary legal lexicon,^{VII} representing all those demands on the relation between human life and an environment which, as it seems, cannot be conceived anymore as something “external” to, and irrelevant for, human well-being, as a Cartesian *res extensa* ontologically divided from humans. But, on the contrary, it seems that the increasingly damaged condition of our Earth system entailed by the Anthropocene urgently calls for a redesign of the traditional conception of man in relation to nature, seeing him as an integrated part of the ecological systems of our planet which, as a matter of fact, are an essential pillar for sustaining life.^{VIII}

In sum, we could certainly affirm that the Anthropocene has strengthened the link between fundamental human rights of the individual (and of communities, as we shall see) and the environment, considering these two as interrelated in a biunivocal process. For instance, Yusoff highlights how it is somehow self-evident that ‘we cannot answer biopolitical problems of ecologies with the very same mechanisms that are productive of them’ (Yusoff 2018: 270). Thus, in this sense, the intertwining between fundamental human rights and the environment, as well as the recognition of legal personality to “natural objects”^{IX}, could be feasible attempts to find innovative legal-political solutions to the tragedy of the commons.



2. The landmark judgement STC4360-2018: the rights of the Colombian Amazon rainforest

In the last 50 years, Latin American countries have experienced a long process of ‘accumulation by dispossession’ (Harvey 2003)^x whose environmental consequences are imperilling the already fragile region’s ecosystem equilibrium and the life of the most disadvantaged communities. (Castro Herrera 2018).

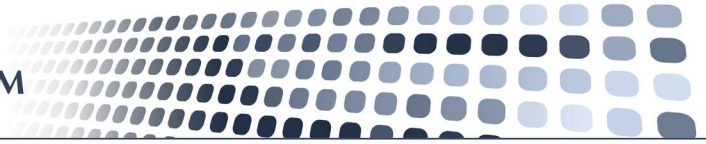
In response to this, several local, national and supranational social movements have developed, creating widespread awareness of the necessity to protect those natural complexes. This diffuse sensitivity is due to the immense richness of natural resources characterising this area and decades of violent struggles for their protection. In fact, in the last 20 years, Latin America has undergone many tensions between the above extractive development models and recognition of the rights of nature. This has been most striking in Ecuador and Bolivia, with conflict over oil drilling in the Yasuní National Park (Ecuador); deforestation in the Isiboro Sécore National Park and in the Indigenous Territory (TIPNIS) in Bolivia; and, finally, the well-known Cochabamba water war (Bolivia).

The national and supranational jurisdictional and political institutions of the region – namely the Inter-American Court of Human Rights^{xⁱ} (San José Court), the national High Courts^{xⁱⁱ} and the constitutional legislators^{xⁱⁱⁱ} – have answered these threats by recognising the environment as having its own legal personality.

In the case of Colombia, the main environmental concerns are related to the deforestation of the Amazon rainforest. Illegal mining, illicit crops, illegal logging, and forest fires are endangering the main ecosystem of the second most biologically diverse country on Earth.^{x^{iv}}

These concerns have been addressed by the Colombian Constitutional Court in several decisions,^{x^v} which have fostered the “ecological imprinting” of the 1991 constitution^{x^{vi}} and recognised the healthy environment as a fundamental and collective right.

Among these rulings, the judgement T-622 of 2016^{x^{vii}} is particularly important because the Court, using a *holistic jurisdictional approach*,^{x^{viii}} granted legal personhood to the Atrato river (Pecharroman 2018). Thus, natural resources – in this specific case the basin of the Atrato River – are protected regardless of the presence of specific threats of damages to



the environment or to the rights of the human beings. In line with the Aristotelic idea that the "whole" is not equal to the mere sum of its individual components,^{xix} the protection and the preservation of the Earth system – in which the human being is a remarkably huge component – cannot be reduced to a narrow concern only for its singular components,^{xx} taken in their individuality. Instead, it must be addressed to the entire system conceived as a whole, made of an interconnected web of relations.^{xxi}

All these important judicial developments have been summarised by the Colombian Supreme Court of Justice in its decision of April 5th, 2018.^{xxii} In this ground-breaking judgement, the Court ruled in favour of the 25 young plaintiffs seeking protection of their rights to life, health, food, and a healthy environment. The legal reasoning of the Court is of major importance not only because it is grounded on an innovative 'de-colonial thinking' (Acosta Alvarado & Rivas-Ramírez 2018), but also for acknowledging that the Amazon rainforest is a subject capable of claiming its own right to protection. In fact, the Court recognises that the Colombian Amazon rainforest has its own legal personality and the Colombian state has the duty to preserve, restore and prevent any damage to this extremely delicate ecological system.^{xxiii}

Furthermore, it is particularly remarkable that the Court, through the massive reference to the different instruments of international environmental law, highlights the existence of a global ecologic order, which serves as guiding criterion for the national legislators.

The legal reasoning of the Court starts with the recognition of the inextricable connection between environmental protection and the rights to life, health, freedom and human dignity. Indeed, the judges highlight that 'the growing degradation of the environment imperils the right to health and the rest of fundamental rights'.^{xxiv}

Besides, the Court establishes a cause-effect relationship between the current anthropocentric and egoistic model of development and the deterioration of the environment. This model – based on uncontrolled population growth, extreme consumerism, exploitation of natural resources – is the main culprit of the ongoing environmental crisis.^{xxv} The way of escape is a profound cultural shift from a *selfish ethics*, whose mainstay is the greedy pursuit of personal gain, to a *holistic ethics*, constructed upon social justice ideals.^{xxvi}



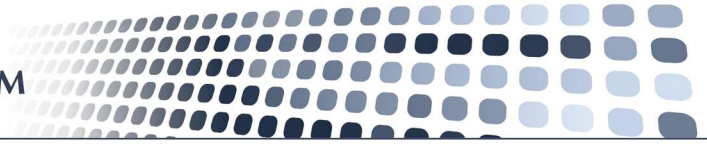
This *holistic jurisdictional approach* brings the Court to acknowledge the environmental rights of the future generations^{xxvii} that have claim-rights on those environmental components essential to the life of every living being on the planet. The above rights imply that the current generation – the bearer of environmental duties and responsibilities – must refrain from all those activities which may endanger the ecological balance.

In its analysis of the case, the Court “invents” an innovative theoretical framework – the above-mentioned *global ecological public order* – whose key-elements are contained in the *corpus* of international environmental law.^{xxviii} Several environmental international treaties are consequently used in the ruling as the legal ground of the Supreme Court’s rationale.^{xxix}

This innovative theoretical approach allows us to notice how international environmental law is adapted in order to be applied at national level. The above adaptation process’s aim is twofold: on the one hand, the implementation of a substantial and procedural body of rights and responsibilities; on the other hand, the creation of an *environmental global rule of law*.

The internationalization of constitutional law is particularly noteworthy in the field of environmental protection. Therefore, it would be useful to apply to this area of law the concept of transnational constitutionalism (Zumbansen 2011). Environmental issues – alongside human rights litigations – offer, in fact, a good example of the ongoing changes in the constitutional landscape. Nowadays a lot of political power centres are appearing beyond the state, dealing with the protection of the environment (Najam et al. 2006) which by definition is a transnational problem. This enables the international system of environmental governance to dictate a common set of rules, whose legitimacy is no longer ‘single acts of constituent power’ but ‘the fluid and multiple forms of authorisation provided by rights’ (Thornhill 2014: 370).

This is increasingly true in light of the above-mentioned strict connection between environmental protection and human rights,^{xxx} whose supranational systems of protection ‘offer sophisticated legal and extra-legal mechanisms necessary to tackle both the severe impact of human activities on the environment and the human rights implications of environmental degradation’ (Hajjar Leib 2011).



The coupling of human rights and environmental law – especially at the regional level – may be able to overcome the issue of the legally non-binding nature of several environmental international treaties.

3. The Inter-American Court of Human Rights Advisory Opinion OC-23/17: an environmental Latin-American *ius commune*?

The American Convention on Human Rights 1969 does not refer explicitly to the protection of the environment. However, both the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights have been increasingly inclined to recognise environmental rights, according to the well-known doctrine of the *greening* of international law (Pamplona & Annoni 2016).

The legal ground of the Inter-American Court rulings concerning the protection of the environment is the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, better known as the Protocol of San Salvador. In its article 11.1 the treaty recognises that ‘everyone shall have the right to live in a healthy environment’.

The protection of the economic, social and cultural rights is assured by the San José Court, as far as possible, establishing a link to the violation of one of the American Convention rights.^{XXXI}

The Court has been able to overcome the formal problem of the non-enforceability of the San Salvador Protocol using a different set of strategies.

Firstly, the majority of the Inter-American human rights system’s cases, concerning environmental issues, are strictly connected to the deterioration of the essential natural resources in the territories of indigenous communities. Protecting the rights of these vulnerable communities means safeguarding the environment they are living in, due to their ancestral, but at the same time extremely innovative, worldview based on the pursuit of happiness through a more communal life, a permanent intercultural dialogue and a deep respect for the environment.

Secondly, Articles 1 (prohibition of discrimination), 3 (right to juridical personality), 4 (right to life), 8.1 (right to a fair trial) and 25 (right to judicial protection), have served in several cases as a *conventional parachute* for the right to a healthy environment.



Thirdly, the indivisibility and interdependence of human rights have been stressed on several occasions not only by the Court (García Muñoz 2017) but also by many prestigious commentators (Cançado Trindade, 1994).

Finally – as discussed below in the analysis of the Advisory Opinion OC-23/17 – the Court has recognised the environment has its own legal personality. This last development may help in all those cases where the environmental damages are not life threatening, since ‘although the right to life has the potential to include protection against serious environmental risks to life, the reliance on such an expansive formulation is limited to incidents of direct threats to life’ (Hajjar Leib 2011).

In the ground-breaking Advisory Opinion OC-23/17, requested by Colombia, the San José Court has once more been the advocate of an original American Convention’s interpretation, aimed at guaranteeing the strongest protection possible to the environmental rights.

Grounding its opinion on the already mentioned Article 11 of the San Salvador Protocol and on Article 26^{xxxii} of the American Convention, the Inter-American Court of Human Rights recognises the right to a healthy environment as a fundamental right to the existence of humankind. In developing its legal reasoning, the Court utilises different human rights approaches to environmental issues.

To begin with, the judges of San José refer to different international instruments,^{xxxiii} highlighting the wide international recognition of the interdependence between environmental protection, sustainable development and human rights. Indeed, the rights to health, life and personal integrity are *greened* in order to include the right to a healthy environment.

Furthermore, following the school of thought known as environmental democracy theory (Mason 1999) – in light of Member States’ obligation to respect the right to a healthy environment as a prerequisite for the protection of the rights to health, life and personal integrity – the Court creates a well-structured procedural framework of State responsibilities in the cases of environmental crisis.

The objective of this procedural framework is to ensure the conveyance of information and participation of the public at every stage of the decision-making process regarding environmental issues.



Last, but not least – because this is, perhaps, the most radical passage of the advisory opinion – the Court has recognised the environment has its own legal personality. Hence, the environmental resources (oceans, glaciers, forests, the air we breathe) are protected by the Inter-American Human Rights system not only because the rights to health, life and personal integrity depend upon human beings’ physical environment, but also for the their *intrinsic* value, regardless of the existence of environmental damage.

This judicial perspective is of primary importance to the Inter-American continent in view of the already mentioned violent struggles for the protection of natural resources. Therefore, in light of the above, it is worthwhile observing the *incipit* of a Latin-American environmental *ius commune* (von Bogdandy et al. 2017). The Court, in fact, highlights the regional trend to acknowledge the legal personality of the environment in recent Latin-American High Court rulings and in the majority of the constitutions of the region.^{xxxiv}

The national and supranational judicial institutions of the region are indeed building a groundwork of common environmental substantial and procedural principles, with the aim to guide the political decision-makers towards a full protection of the fragile equilibrium of the Latin-American ecosystem and of the life of the most disadvantaged communities.

In this scenario, the San José Court – due to its long-standing experience in the creation of transnational rules in the field of human rights protection – may lead the way in the process of recognition of environmental principles as *jus cogens*. A set of peremptory rules that – in consideration of their primary importance for the life of humankind – ‘all States must observe (...) whether or not they have ratified the conventions establishing them, because it is an obligatory principle of the international common law’.^{xxxv}

4. A theoretical basis: the commons

We believe that, due to the innovative concepts endorsed, the judicial decisions discussed above express without any doubt an innovative approach in dealing with environment-related rights and, more generally, with environmental issues.

Therefore, what we would like to argue in this section is that, in order to corroborate and strengthen the core elements emerging from the aforementioned case law, there is the need to ground them on some theoretical-legal basis. We believe that this basis *already exists*,



and it is the theory of the so-called (environmental) commons. To argue this, we will proceed as follows.

First of all, we are going to identify five main elements from the judicial decisions set out above: 1) *Holistic/Systemic approach to the man-nature relationship*; 2) *Community*; 3) *Intergenerational justice*; 4) *Environmental rights*; and 5) *Transnational environmental law*.

Secondly, we will illustrate what the commons are and present their ontological and legal core features. As it will be easily inferable after this explanation, these core features of the commons *almost entirely mirror* the five aspects emerging from the case law outlined above. In this way, we argue, the theory of the commons can offer a valid theoretical basis for the previously analysed environmental judicial decisions.

4.1 Five core features

At this point, from these important judicial decisions we have just outlined, we can identify five core points focusing on environmental justice (we will briefly outline them here, leaving a more in-depth discussion until later):

1 - *Holistic/Systemic approach to the man-nature relationship*. The natural ecosystems and all their components (among which humans are included) are seen as an interconnected web of equal relations where none of them are in a hierarchically superior position in comparison to one another. In a holistic ecological approach, humans and nature are conceived as part of a single unitary system. Notably, among other things, this aspect is also highlighted by the innovative solution of endowing natural environment entities with legal subjectivity performed by the case law set out above. This new approach in dealing with environmental issues, we will argue shortly, is expressive of an overcoming of the anthropocentric-ecocentric dichotomy.^{XXXVI}

2 - *Community*. The importance given by courts' decisions to the rights of indigenous communities in relation to the ecosystem they live in is expressive of a more general approach that stresses the vital link between a community and its natural environment as carrier of fundamental human rights (right to life, right to health, etc.).^{XXXVII}



3 - *Inter-generational justice*. Environmental rights (and environmental justice in general) do not only take into account issues of intra-generational justice (i.e. justice related to present generations), but they are also deeply imbued with concerns of intergenerational justice, i.e. rights of future generations.

4 - *Environmental rights*. The existence of a by-now consolidated category of rights we can define as “environmental rights”^{xxxviii} among the category of fundamental human rights. This *in fieri* catalogue of rights includes the right to health, the right to a healthy environment and the right to water and food, which are all intrinsically connected to the right to life and to the concepts of human freedom and dignity.

5 - *Transnational environmental law?* The above-mentioned case law suggest the direction for the possible creation of a “global constitution for the environment”, or a “global ecological order”. As previously clarified, it seems that the current instruments of international and domestic environmental law are somehow inadequate in dealing with most of the environmental issues of today, which usually manifest themselves in a transnational fashion, creating effects that transcend national borders (see climate change, pollution, depletion of fisheries, and so on).^{xxxix}

4.2 What are the commons?

There is no universal consensus, especially among legal scholars, on the taxonomy of the “commons”. However, despite this fact, we can affirm that there is a widespread agreement on the core features of this category. Indeed, the commons are considered as goods that

‘are neither private nor public. Nor are they understood as a commodity, as an object, or as a portion of the material or immaterial space that an owner, private or public, can put on the market to obtain their so-called exchange value. The commons are recognized as such by a community that engages in their management and care not only in its own interest but also in that of future generations’ (Capra and Mattei 2015: 149).



As we can see, this definition is very broad. Traditionally, scholars include in the commons all the natural resources that are essential for life and that we all share equally: the air, the oceans, rivers, fisheries, lakes, glaciers, forests, etc. We said we define these commons as “environmental” commons (or, in this paper, simply commons) and they constitute our object of interest now.^{XI}

As we hinted at the beginning, the global commons probably represent the category of goods that have been (and are) the most affected by the Anthropocene effects. As a matter of fact, it has been highlighted that

‘[i]n the Anthropocene, Global Commons are an integral part of the Earth system and can no longer be considered to be exogenous to human development and prosperity. The resilience of critical biomes, for example the Amazon rainforest and the Arctic, which are at risk of reduced functionality or changing state within the next few decades, must be protected. This is a fundamentally new perspective. We all depend on a stable and resilient Earth system for our wellbeing, from individual households, communities and cities to nations and regions. This resilience can no longer be taken for granted’ (Nakicenovic et al. 2016: 27).

Now, starting from the definition by Capra and Mattei (2015: 149) given above – that actually comprises almost all the essential elements – we can move on to illustrating the main features that characterise the theory of the commons. But first it is necessary to make a preliminary remark. We are aware that today the commons movements around the world are quantitatively numerous and highly multifaceted. However, as we just hinted above, there are certain features that are somehow always present, i.e. a “common core of the commons” (forgive the wordplay!). And it is exactly the features of this core that we are going to outline now.

First off, the commons postulate a holistic approach to ecology.^{XLI} We partly already know what this means from the previous discussion of the five jurisprudential features. Holism applied to ecology entails that the natural environment and the living beings living within it – including humans – are not seen as separate entities, but conceives instead human and natural elements as interconnected in a web of equal relations.^{XLII} In this way,



holistic ecology deeply opposes a *mechanistic* view of the man-nature interface^{XLIII} which, following the Cartesian and Baconian legacy, conceives nature as an entity which, as a machine, can be understood, composed and fragmented in all of its parts and is seen as a hierarchically inferior entity which must be “dominated” by men.^{XLIV}

According to a holistic view, instead, the natural world is not conceived as a machine, as a *res extensa* ontologically divided from the *res cogitans* (i.e., the human being) but, instead, it is understood as a network of interconnected relations with no hierarchical relationships with each other. Every single component contributes to the whole. The paradigmatic examples are the natural ecosystems (e.g., a forest, a coral reef, etc.) and, at a global level, the so-called biomes (e.g., tundra, tropical rainforest, desert, ocean, etc.; see Figure 2 for a map of the “critical” biomes).^{XLV} The correct functioning of ecosystems is dependent not just on the health of other ecosystems. Their flourishing is also dependent on the aggregate contribution of living and non-living entities residing in it so much that, in case even just one of them is removed or altered, the equilibrium could often be irremediably broken. And, as we already said, the Anthropocene is putting the functioning of these fragile equilibria under great strain.^{XLVI}

An even more patent example of this interconnectedness is given by the so-called “critical biomes”, that ‘play a decisive role in regulating the overall status of the life-support system on Earth, that is, how well Earth can support world development’ (Nakicenovic et al. 2016: 31 - *figure description*). Indeed, they

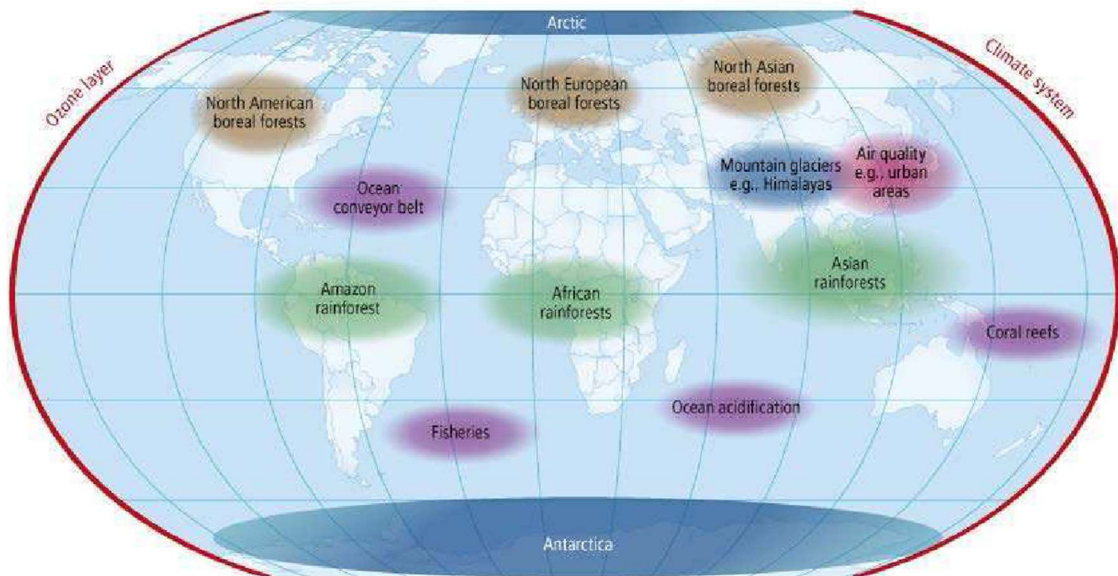
‘[r]egulate regional energy flows, hydrological flows, and carbon, nitrogen and phosphorus cycles and provide stable habitats for living species are under threat. These biomes are *interconnected with each other* – moisture feedback from the Amazon rainforest affects the temperature and function of the tropical monsoon system, which in turn may interact with the global climate system’ (Nakicenovic et al. 2016: 30, emphasis added).

In the era of the Anthropocene,

‘[a]ll Earth’s biomes are influenced by human pressures indeed, more than three quarters of the terrestrial biosphere has been transformed into what might be called anthromes – or anthropogenic biomes. In particular, the world’s grasslands and savannas have been transformed by human pressures, particularly agriculture, with severe impacts on

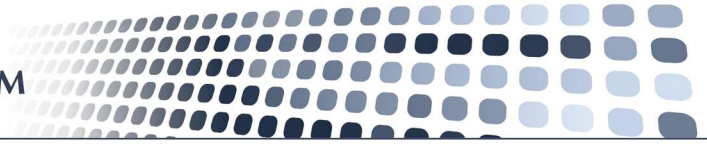


biodiversity and other Earth system functioning’ (Nakicenovic et al. 2016: 30, emphasis added).^{XLVII}



(Figure 2) A map of the critical biomes. Rainforests (green), boreal forests (brown), atmosphere (red), cryosphere (blue), hydrosphere (purple). (Nakicenovic et al. 2016: 31)

In light of these dramatic considerations, the commons theory instead implies adopting a holistic/systemic approach that does not situate human beings “outside” nature but, instead, locates them in an inter-connected relationship with it. We humans *are* nature and do not *own* it: the fact that we are ontologically made of the same texture of the ecosystems surrounding us and giving us life comes inevitably before any social construction on the belonging of these ecosystems to any given person.^{XLVIII} Besides, we must not forget the “boomerang effect” we mentioned at the beginning of this paper, i.e. that the Anthropocene shift is eliciting not only disastrous effects on the natural environment (or, in general, on everything in the planet that is “not human”) but, as a matter of fact, even the human race is experiencing difficult problems due to its own activities (e.g., diseases from excessive pollution of air, migration for climate change, related issues of food security, and others).



Then, there is the element of the community, which also shares the same etymology with the word “common”. The role played by the community in the governance of the commons (seen as goods that are necessary for life of present and future generations) is essential. Indeed, the community can be seen as the main “agent” that acts in defence of the commons.^{XLIX} However, the term “community” needs to be better specified. Are we only considering the indigenous communities, living in symbiosis with the common resource? Or are we identifying the meaning of community with a broader spectrum, thus comprising not only small-scale communities but also larger communities which can possess a trans-national (i.e., that is irrespective of national borders) nature? We believe that the term “community” when dealing with the actors with the duty and responsibility for the protection of the commons should be interpreted in an elastic manner. In what sense? Conceiving the term community as only a relatively small aggregate of individuals living in a relatively small portion of our planet, in our opinion, does not make much sense in our contemporary globalised and hyper-connected world. We believe, instead, that in our contemporary days and for issues such as the environment the term community should be better intended as every aggregate of individuals that cohesively acts through social networks in defence of goods that are essential for life (i.e., the commons), irrespective of their geographical distribution (after all, such an extended interpretation of the term “community” is already present in the definition of commons we gave above quoting Capra and Mattei 2015: 149).^L Consider the classical example of the pollution of our atmosphere: isn’t this an issue that concerns the entire population of our planet? And isn’t the ensemble of all the individuals throughout the world that have an interest in preserving the common “air” a *community*? We believe so, especially, as we just said, in our increasingly globalised world.^{LII} Thus, conceiving the term community in such a way allows us to encompass not only those indigenous groups that are localised in specific geographical areas, but also every individual on the planet that has a stake in protecting our natural environment, as in an “all-affected” legitimacy.^{LII}

Moving on to analysing the next characterising features of the commons (the feature of transnational environmental law has already been discussed earlier, in the comments to the judicial decisions), there is the essential component of intergenerational justice. Without



entering into the immense philosophical debate on the issue,^{LIII} for our purpose it is necessary to highlight how the concern for the environmental rights of future generations is inherent in the definition of the commons. Indeed, the concern for the conditions of natural resources is not solely directed to our contemporary situation (intra-generational justice). The tragedy of the commons predicted by Hardin is certainly happening today exactly because the previous generations had such little care for the preservation of the Earth's natural resources. Thus, one of the first priorities of commons movements around the world is exactly the concern for future generations. Indeed, it is true that the Earth regenerates itself. However, the rate of the depletion and exploitation of natural resources operated by the Anthropocene is so intense that, in many cases, we have reached a point of no return, as the dramatic example of our ecological footprint clearly demonstrates.^{LIV}

5. On the futility of dichotomies: two theoretical challenges.

At this point, it is worth considering two important points in support of our thesis. Firstly, we believe that the endorsement of the commons theoretical framework – thanks to its holistic/systemic perspective on environmental justice – can help to overcome a rather fruitless and obsolete dualism: ecocentrism vs. anthropocentrism. Secondly and finally, we will consider a legitimate objection that usually arises when dealing with the commons and which regards their being a *tertium genus* compared to the traditional public-private dichotomy. We will demonstrate how this objection could be overcome. These two points can be summed up by the following inquiries:

1) What about the ecocentrism vs. anthropocentrism debate? Does the commons' theoretical framework fall under one of these two approaches? Or does it overcome this dichotomy?

2) What about the assertion that the commons are considered neither private nor public? Does this feature constitute an insurmountable barrier to the endorsement of the commons as a foundational basis for the new tendencies in environmental justice set out above?



Let us consider these two points in turn.

1) *What about the ecocentrism vs. anthropocentrism debate? Does the commons' theoretical framework fall under one of these two approaches? Or does it overcome this dichotomy?*

We saw how one of the most innovative points in the judicial decisions considered in this paper is the adoption for the first time of a holistic/systemic approach when dealing with environmental justice. Indeed, while the first formulations of environmental rights have been developed by assuming nature as a mere ancillary entity for human well-being – reflecting an essentially anthropocentric approach^{LV} – the new holistic perspectives considered here assumed a more central role of nature in relation to humans. As in a “copernican revolution”, thus, the focus shifted from an essentially anthropocentric treatment of environmental justice to an evaluation of nature for its *intrinsic* value.^{LVI} The patent demonstration of this new approach lies in the fact that, as we saw, the judges actually *endowed nature with legal subjectivity*.

What we would like to stress here is that the judges are using the same holistic/systemic approach to ecology embraced by the commons doctrine. And this approach, we believe, helps to find an optimal compromise between anthropocentrism and ecocentrism.

But why should this compromise be found? We think that this dualism is fruitless and lacks significance. To be more precise, the distinction between anthropocentrism and ecocentrism cannot be conceived in absolute terms, in the sense that it is *impossible* to have either a “pure” ecocentric approach and/or a “pure” anthropocentric approach when dealing with environmental justice^{LVII}.

How? Why not a “pure” ecocentric approach, i.e. an approach that posits the primacy of non-human nature over humans? We believe that this aim is practically impossible to pursue. Indeed, we cannot overlook that, despite everything, we humans *are part* of the Earth in the same way as animals, trees, rocks and rivers are. Even if, probably, the extinction of the whole human race would avoid the “tragedy of the commons” and would not have brought the Anthropocene, nevertheless it is morally, physically and practically inconceivable to eradicate our presence on Earth. Also, a pure ecocentric stance is not even



possible in philosophical terms: whether we want it or not, it will be always up to *humans* (and humans only) to decide whether to adopt an ecocentric approach or not. Unfortunately, nature cannot “decide for itself” and have a say in judicial courts, if it was not for the human medium (the endowment with legal personality of the Atrato river and of the Colombian Amazon rainforest came from a human decision!).^{LVIII}

On the other hand, especially today, we could not endorse a purely anthropocentric ecological stance anymore. As we said earlier, our current living in the Anthropocene entails that we, as morally responsible agents, could not conceive nature as a mere *means* to achieve human well-being anymore.^{LIX} On the contrary, as scholars from various disciplines argue, we should start adopting solutions that contribute to human welfare without compromising the welfare of the natural world. With a very effective expression, saying that man is the principal cause of the Anthropocene ‘does not mean that humans are the central concern for Anthropocene normativity, for responses to its crises, or primary beneficiaries of any regulatory and/or normative interventions’ (Kotzé 2014: 262).

Conceiving nature as a common, instead, rejects the assumptions lying at the basis of the anthropocentrism vs. ecocentrism debate *in toto*. Indeed, this debate assumes an *oppositional, mutually exclusive* and *hierarchical* dualistic way of thinking, that conceives humans and nature as if they were on two distinct ontological levels. In other words, having in mind only anthropocentrism or ecocentrism as the only two possible ways of dealing with environmental justice is not only reductive of the variegate human-nature relationships, but it also does not constitute a reasonable solution for our age. The commons, instead, by postulating a holistic/systemic approach to ecology in the above-considered terms, help to not see environmental justice in such manichean terms (i.e., black or white, no “grey areas” in the middle). As it can be inferred from our explanation of the features of the commons, a holistic/systemic approach allows us (and, more importantly, the judges who will decide on these matters) to take into account *both* humans *and* nature when deliberating about environmental justice.



2) *What about the assertion that the commons are considered neither private nor public? Does this feature constitute an insurmountable barrier to the endorsement of the commons as a foundational basis for the new tendencies in environmental justice set out above?*

Ecocentrism vs. anthropocentrism is not the only dichotomy that is challenged by the commons. There is another dualism under discussion, far more pervasive, one of the founding pillars of the modern liberal state: the public-private dichotomy.

As we hinted above, although there is no universal consensus on all the types of goods that constitute the category of the commons, there is a widespread agreement on the fact that they cannot be considered neither private nor public (see definition above). With a very effective expression, the Italian legal scholar Ugo Mattei define the commons as a *tertium genus* compared to the traditional public and private categories.^{1X} However, this means that the commons actually challenge the roots of the modern liberal state, because questioning the traditional public-private dichotomy (always considered as exhaustive) means questioning one of the founding pillars of all the contemporary legal systems worldwide, without considering the international legal system.

Thus, at this point, an objection (especially, we suppose, among legal scholars) would legitimately arise: if we have to introduce a new “third category” in addition to the public and private ones, wouldn’t it constitute too big a shift for our legal systems? Wouldn’t abandoning our traditional public-private dichotomy be too big an upset for basically the entirety of our current national and international institutions?

How should this objection be responded to? Actually, the answer is not as hard as many would believe. Indeed, the point is that, accepting the commons as a *tertium genus* and introducing them in our legal systems would not necessarily imply the neglect of the traditional public-private dichotomy.^{1XI} How is it possible? The answer lies in the way we conceive and legally define the commons.

We believe that probably the most effective and innovative formulation of the commons in this sense comes from Italy, and in particular from the work of a reforming Commission chaired by the legal scholar Stefano Rodotà. Rodotà, together with other important co-national legal scholars, was called in 2007 to redact a reform scheme for the Italian civil code (1942), in order to reform its obsolete classification of the goods.



The Commission's final formulation was highly innovative because, if the scheme of reform would have had been approved,^{LXII} Italy would have had one of the most complete legal definitions of the commons at the international level.

The Commission defined the commons as goods that

‘suffer a highly critical situation due to their scarcity, depletion and for absolute lack of legal guarantees [and it defines them as] *things that express utilities that are functional to the exercise of fundamental rights and functional to the free personal development, and they are characterised by the principle of intergenerational safeguard of their utilities*’ (Rodotà Commission 2008: 6, emphasis added, my translation).

But perhaps even more interesting for our current purposes, the Commission defined the commons as those goods that ‘cannot be included *stricto sensu* in the category of public property, because they are under a regime of *diffuse ownership*, since they can belong not only to public legal persons, but also to privates (...)’ (Rodotà Commission 2007: 6, emphasis added, my translation).

As we can see, the main innovation lies in the concept of “diffuse ownership”. Indeed, this formulation directly addresses our objection no. 2) How, as we can read from the text of the Reform Scheme, the commons can be *either in public or private hands*. What is important is that, since these goods are ‘things that express utilities that are functional to the exercise of fundamental rights and functional to the free personal development’ (Rodotà Commission 2007: 6, my translation), their enjoyment must be granted for everyone, *irrespective of their proprietary regime*. Thus, this way of conceiving the commons can overcome our objection no. 2) set out above. Indeed, this innovative way of legally framing the commons is able to succeed in creating a new category *without* actually eliciting a radical transformation of our current legal systems, i.e. without abandoning the classical public-private dichotomy.

Thus, in light of all these considerations, we see how the theory of the commons is not as “anthropocentric” as many would *prima facie* argue. On the contrary, as we said before, we believe that this theory (equipped with the features described above) could actually constitute the flywheel to overcome a dichotomy (“anthropocentrism-vs.-ecocentrism”^{LXIII})



that, in the era of the Anthropocene, has probably become rather obsolete and inadequate, if taken in its absolute terms.^{LXIV} Indeed, if we – and either the considered judicial decisions and the contemporary environmental justice seem to be following this path – are starting to consider the human being as *essentially intertwined and integrated with the natural environment* (in a holistic fashion), a rigid separation between anthropocentrism on one hand and ecocentrism on the other ceases to have so much significance.^{LXV}

Actually, this seems to be the approach of the Universal Covenant affirming a human right to commons and rights-based governance of the Earth's natural wealth and resources. This international agreement endorses the idea of the implementation of a

‘system for using and protecting all the creations of nature and related societal institutions that we inherit jointly and freely, hold in trust for future generations, and manage democratically in keeping with human rights principles grounded in respect for nature as well as human beings, including the right of all people to participate in the governance of wealth and resources important to their basic needs and culture’ (Weston & Bollier 2013: 219).

6. Final Remarks

According to a wide array of scholars coming from various disciplines, we are currently living in a new ‘man-made’ geological era called Anthropocene. However, the choice of the name we would like to label this era it is not the real issue here. The real issue is that, for the first time in history, the human footprint on planet Earth has reached such a great magnitude that its effects can be compared to those of a proper geological era. And these effects are, needless to say, most of the time detrimental. The rates of deforestation, desertification, pollution of air and seas - just to mention a few - have reached levels that are unsustainable for our planet. All these problems, though, are not only affecting “the environment”, conceived as an abstract entity to be taken by itself only. These problems, instead, have actually started to deeply touch even humans, the ‘authors’ of Anthropocene. As it too many times happened in the last century, those who always pay the highest price are the most vulnerable groups of society.



In this article, we focused on the case of Latin America. We believe it is a paradigmatic case to study. Indeed, on the one hand it is one of the richest regions in our planet in terms of biodiversity and of natural resources; on the other, all these incommensurably valuable goods for humanity have been undergoing an enormous process of destruction. And many indigenous communities, which have always been living in a deep symbiosis with its environment, are now under great risk because of the intolerable levels of depletion of those goods that are essential for life: water, food, a healthy environment.

It is exactly because of its immense richness in natural resources that, perhaps, the judicial decisions by Latin American courts have also been a flywheel for the protection of environmental rights of these communities, marking important milestones for future case law on this issue. Notably, we chose to focus on two recent decisions (the STC 4360-2018 by the Colombian Supreme Court and the Advisory Opinion OC-23/17 by the Inter-American Court of Human Rights) which - we believe - incarnate a very remarkable shift towards a new conception of environmental justice. Indeed, for the first time these decisions - together with the one on the Atrato river, T-622 of 2016 - *endowed the natural environment with legal personality*. This means to grant a river, a forest, etc. the *capacity to act* in its own defence before a court of law - of course, with a *fictio juris*: those individuals and communities who see their environmental rights violated can pursue a legal action against the perpetrators. But that was not all. Indeed, these judicial decisions have the great merit of having embraced a new ecological attitude, more in tune with the detrimental environmental conditions of Anthropocene. We tried to identify five core elements characterising this new approach: 1) *Holistic/Systemic approach to the man-nature relationship*; 2) *Community*; 3) *Inter-generational justice*; 4) *Environmental rights*; and 5) *Transnational environmental law*.

At this point, we noticed that all these elements are actually mirrored by a theory that is acquiring more and more relevance in the last decades when dealing with the environment: the theory of the commons. Thus, we argued that the commons could help strengthening the new environmental justice approach embraced by our considered case law by constituting a valid theoretical basis for future pronouncements. The theory of the commons also gives a helping hand, we argued, in overcoming two rather inadequate and obsolete dichotomies for our age.



The first one is the ‘anthropocentrism vs ecocentrism’ debate. These two stances taken in their *absolute* terms cannot fit an environmental justice discourse for our contemporary days.

The second dualism the commons help to overcome is the public vs private debate when considering. Indeed, the theory of the commons stresses that this traditional dichotomy cannot give an adequate esteem of those goods that are essential for life and that we all share equally also caring for future generations. For this reason, commoners postulate a different way to conceive these goods that *does not fall* in neither public nor private property. However, we argued that considering the natural environment as a common *does not* necessarily imply neglecting the traditional proprietary regimes of public/private. Instead, embracing the theory of the commons as a basis for environmental protection would only imply to endorse a ‘special’ regime for certain kinds of goods that are essential for life and that are currently in great danger of being depleted forever due to anthropic activity. Specifically, to ground this claim we looked at what we believe is probably the most innovative legal formulation of the commons: the one given by the Rodotà Commission in 2008.

* Domenico Giannino (Institute of Latin American Studies, School of Advanced Studies University of London) and Antonio Manzoni (Sant’Anna School of Advanced Studies).

^I Cf. Hardin (1968).

^{II} ‘All commons are shared resources in which each stakeholder has an equal interest. Common-pool resources [also called CPR] are resources where one person's use subtracts from another's use and where it is often necessary, but difficult and costly, to exclude other users outside the group from using the resource’. (Nakicenovic et al. 2016: 27). See also Ostrom (1990).

^{III} For example, see United Nations, ‘Global Issues’, available at <<http://www.un.org/en/sections/issues-depth/global-issues-overview/>>, accessed 27 January 2019.

^{IV} See Polanyi (1944); Castree (2003) identifies six main features/consequences that usually characterise commodification of nature: *privatisation, alienability, individuation, abstraction, evaluation, displacement*. Also, an example of commodification of nature from the most recent decades can be found in those practices labelled as ‘market environmentalism’, such as carbon/biodiversity offsets and cap-and-trade pollution schemes. Cf. Center for Climate and Energy Solutions (2011); Bachram (2004); Ives and Bekessy (2015); for a general philosophical criticism of these commodifying practices, cf. Sandel (2013).

^V In the same article, the authors offer an interesting discussion on how the concept of “stability” of the Earth conditions, which has always been taken for granted by international law, is now highly questioned by the effects of Anthropocene.

^{VI} ‘*Stable and resilient Earth system*. The Earth system is dynamic and ever changing but internal regulating processes, such as negative feedback loops, ensure that fluctuations of key processes remain within boundaries so that the system is stable and resilient. However, external pressures, and internal feedback loops driven by, for example, evolution can overwhelm the internal regulating capacity of the system thereby upsetting this dynamic equilibrium’ (Nakicenovic et al. 2016: v). ‘According to the International Commission on Stratigraphy, the geological epoch that began at the end of the last ice age 11,700 years ago and that has



continued until now is named the Holocene. The Holocene has been characterized by a remarkably stable climate' (Nakicenovic et al. 2016: iv).

^{vii} Interestingly, Kotzé (2014: 253) highlights how human rights, especially in the environmental context (i.e., the so-called environmental rights), are currently undergoing an increasing popularity, even though they are legitimately criticized 'for being vague (or 'troublingly indeterminate operationally'), absolute, redundant and undemocratic; for being non-justiciable, which means they are incapable of being settled by law or by the action of a court; for being too anthropocentric due to their promotion of economic and social freedoms, too culturally imperialist, too focused on individuals as a result of their grounding in liberal individualism and for being disingenuous by creating false hope.' In-text references by Kotzé to Weston and Bollier (2013: 117-118); Boyd (2012: 33-34).

^{viii} As various authors increasingly underline, measures to tackle the contemporary environmental issues are by now to be treated as proper emergencies. Cf. for example the recent contribution by Stacey (2018). Cf. also Capra and Mattei (2015); Barnes (2006). The alarming situation of today's environmental situation has been sent out by many scholars from various disciplines. An extremely dramatic issue in this sense is the situation of our *ecological footprint*. This concept has been introduced to measure the impact that human activities have on the ecosystems of our planet. More specifically, it assesses the amount of natural resources that we consume in relation to the capacity of our planet to regenerate them. In the last few years we reached the impressive record of an ecological footprint of 1.5, which means that 'every year we consume an amount of resources that exceeds half of the Earth's regenerative capacity' (Mattei and Quarta 2018: 19, our translation). In other words, every year there is a proportion of 0.5 of our natural resources that will never regenerate anymore, establishing a dramatic trend of consumption that, if maintained, will inevitably lead to the complete depletion of our planet.

^{ix} On the legal rights of natural objects see for example Stone (1972).

^x On the impact of neoliberal policies in Latin America see Grugel (1998); Huber and Solt (2004); Michael Walton (2004).

^{xi} *Medio Ambiente y Derechos Humanos*, Advisory Opinion OC-23/17 Inter-American Court of Human Rights, serie A23 (15 November 2017).

^{xii} STC 4360-2018 Corte Suprema de Justicia Colombia; STC 622-2016 Corte Constitucional de Colombia; Sentencia No. 218-2015 Corte Constitucional del Ecuador.

^{xiii} Ecuadorian Constitution (2008) and Bolivian Constitution (2009).

^{xiv} Colombia is one of seventeen megadiverse countries in the world according to the UN Environment World Conservation Monitoring Centre. More information are available at <<http://www.biodiversitya-z.org/content/megadiverse-countries>>, accessed 16 December 2018.

^{xv} The following decisions of the Colombia Constitutional Court are especially important: T-411/1992, C-431/2000, T-622/2016.

^{xvi} The Colombian *constitutional ecological order* – identified by the Colombian Supreme Court of Justice in its decision of April, 5th 2018 - consists of article 1 (prevalence of national interest); article 8 (state duty to protect Colombian environmental assets); article 49 (state responsibility for environmental protection); article 58 (ecological function of the private property); article 63 (national parks and communal lands of ethnic groups are inalienable, imprescriptible, and not subject to seizure); article 67 (the education system of the State has the duty to train the citizens to the respect of the environment); article 79 (healthy environment is a fundamental right); article 80 (the State will manage the environmental results with the aim of guaranteeing sustainable development, conservation, restoration, or replacement); article 88 (the creation of popular actions as a specific judicial mechanism for the protection of the environment); article 95 (the protection of the environment is a duty of every citizen); article 226 (the duty of the state to promote the internationalization of ecological relations). The entire text of the Colombian constitution is available at <https://www.constituteproject.org/constitution/Colombia_2005.pdf>, accessed 16 December 2018.

^{xvii} Ruling by the Colombian Constitutional Court T622/16 available at <<http://www.corteconstitucional.gov.co/relatoria/2016/T-622-16.htm>>, accessed 16 December 2018.

^{xviii} On the idea of holism in ecology see Smuts (1999).

^{xix} This idea is a simplification of a more philosophically complex concept expressed by Aristotle in the eighth book of *Metaphysics*. "To return to the difficulty which has been stated with respect both to definitions and to number, what is the cause of their unity? In the case of all things which have several parts and in which the totality is not, as it were, a mere heap, but the whole is something besides the parts, there is a cause".



XX The four main components of the Earth system are: hydrosphere, geosphere, atmosphere and biosphere.

XXI This systemic approach is borne out by the most recent scientific development. Indeed, “Quantum theory forces us to see the universe not as a collection of physical objects, but rather as a complicated web of relations between the various parts of a unified whole”. (Capra 1983: 55).

XXII STC4360-2018 available at <https://www.elaw.org/system/files/attachments/publicresource/Colombia%202018%20Sentencia%20Amazonas%20cambio%20climatico.pdf>, accessed 16 December 2018.

XXIII STC4360-2018, para 14

XXIV STC4360-2018, para 2.2.

XXV STC4360-2018, para 2.4.

XXVI STC4360-2018, para 2.5. The Court refers back to the well-known article by Peces-Barba (1997).

XXVII STC4360-2018, para 2.5.3.

XXVIII Acosta Alvarado and Rivas-Ramírez (2018) highlight the similarities between the idea of *global ecological public order* and the environmental public order, contained in Amaya Navas (2016).

XXIX The International Covenant on Economic, Social and Cultural Rights (1966); the Declaration of the United Nations Conference on the Human Environment (1972); the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (1977); the Rio Declaration on Environment and Development (1992); the Paris Agreement on climate change (2015).

XXX STC4360-2018, para 2.2

XXXI Article 19.6 of the Protocol of San Salvador.

XXXII Article 26 of the American Convention states that: “The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires”.

XXXIII The Declaration of the United Nations Conference on the Human Environment (Stockholm,1972), the Rio Declaration on Environment and Development (1992) and the Johannesburg Declaration on Sustainable Development (2002). We must hold in mind that, from the moment it was born, environmental law has always been deeply anthropocentric. As an illustrative example, see the Principle 1 of the Rio Declaration on Environment and Development (1992): ‘Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature’: available at http://www.unesco.org/education/pdf/RIO_E.PDF), accessed 30 January 2019.

XXXIV The right to a healthy environment is recognised in the constitutions of Bolivia, Argentina, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Venezuela.

XXXV *Judicial Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 Inter-American Court of Human Rights, Serie A18 (17 September 2003).

Medio Ambiente y Derechos Humanos, Advisory Opinion OC-23/17 Inter-American Court of Human Rights, Serie A23 (15 November 2017).

XXXVI Ecocentrism in environmental ethics is opposed to anthropocentrism. According to the former, the natural environment is considered for its intrinsic value, i.e. it is valuable for its own sake. According to the latter, instead, nature is valuable for its instrumental value, i.e. for its utility for something else, in our case for human utility. For a more in-depth discussion of these terms, cf. for example Boylan (ed.) (2014); Humphrey (2002); Rolston III (1988).

XXXVII Cf. the reports by the Inter-American Commission on Human Rights <http://cidh.org/countryrep/Indigenous-Lands09/Ancestral-Lands.ENG.pdf> and <http://www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf>

XXXVIII There are different analytical approaches to the study of human rights in the environmental context. Three terms have been used: “environmental rights”, “environmental human rights”, “human rights and the environment”. Kotzé (2014: 255) argues that “[w]hile there is little agreement on the conceptual difference between these terms, it is generally accepted that environmental rights’ relate to the (mostly substantive) right to a clean and healthy environment that is not harmful to health and wellbeing. ‘Environmental human rights’ is a somewhat broader category of reference that could include all human rights that have a bearing on the environment, including procedural and substantive rights (e.g. the rights to human dignity, life, administrative justice, access to information and access to justice). ‘Human rights and the environment’ is the broadest



category of the three because it situates human rights and the environment as two separate yet distinctly interrelated issues⁷.

XXXIX 'The traditional forms of national sovereignty are increasingly challenged by the realities of ecological and economic interdependence. Nowhere is this more true than in shared ecosystems and in 'the global commons' - those parts of the planet that fall outside national jurisdictions' (Brundtland 1987, available at <<http://www.un-documents.net/our-common-future.pdf>>). In international law, the traditional distinction it is usually made between "global" and "local" commons. 'Local commons are, for example fishing grounds, grazing areas, irrigation systems, agriculture and forests. Global commons, for example include the atmosphere and high seas, areas that are recognized as falling beyond national jurisdiction.' (Nakicenovic et al. 2016: 27).

XI However, for the sake of completeness, we must say that some scholars consider commons even goods such as the cultural heritage, immaterial goods such as Internet and even 'everything that is obtained by social production, which is necessary for the social interaction and for the continuation of this production, in the form of knowledge, the languages, the regulations, information, affections, and so on' (Hardt and Negri 2010: 8, our translation).

XLI Cf. Capra and Mattei 2015.

XLII Cf. *Idem*.

XLIII The so-called "reductionism", to find a term for summarizing these aspects. With this term it is meant an approach that attempts to explain things by reducing them to their individual simpler components. Cf. *Idem*.

XLIV On this historical shift, marked by the Scientific Revolution, from a holistic to a mechanistic view of the man-nature interface, see Merchant (1990); Capra and Mattei (2015); Kheel (1985). Similarly, and relating to human rights, according to some 'the liberal notion of human rights that is grounded in Modernity, itself pits humans as masters of nature and entitled recipients against a defenseless environment' Kotzé (2014: 263); in-text reference by Kotzé to Bosselmann (2004).

XLV See Shaw (2018).

XLVI See Nakicenovic et al. (2016).

XLVII In-text references to Barnosky et al. (2012); Williams et al. (2015); Lenton et al., (2007); Lenton and Williams (2013); Ellis (2013).

XLVIII Cf. Mattei (2011); Capra and Mattei (2015).

XLIX Cf. what is probably the main contribution on the community governance of common pool resources, i.e. the work by Elinor Ostrom, *Governing the Commons. The Evolution of Institutions for Collective Action* (1990). In her famous work, Ostrom tried to empirically confute Hardin's pessimistic prophecy - the unavoidable tragedy of the commons - by presenting a wide array of experiences collected from communities all over the world. In particular, she observed how these communities naturally and efficiently organise and auto-govern themselves for the use of collective resources (e.g. water to irrigate, soil to cultivate), performing a regulation of egoistical individualism without the intervention of the private property/market mechanisms and/or the State. In a few words, through a catalogue of examples, Ostrom tried to empirically demonstrate that the "tragedy of the commons" described by Hardin was an illegitimate generalisation, since an efficient and yet generative use of common resources (i.e. the so-called *commoning*) is actually possible.

^L Along these lines, see diffusely Capra and Mattei (2015: 28-29; 131-136; 144-145).

^{LI} Cf. Kotzé and Soyapi (2016: 84) on the relation between globalisation and transnational environmental law.

^{LII} Another interesting aspect characterising the commons movement is their peculiar way of conceiving power relations in their governance. For example, they refute the logic of concentration of power that is present both in public property and private property, while favoring instead a *diffusion* of power over the good among the consociates. Also, the commons postulate cooperation and *participatory inclusion* in the enjoyment of the good and not, as mainly private property instruments do, competition over the resource and exclusion from its enjoyment for whoever is not the owner (see Mattei 2011). On the transnational nature of politics and social movements related to the environmental issues see Doherty and Doyle (2006).

^{LIII} The debate has had a huge philosophical resonance throughout history. Without in any way claiming to be exhaustive - since the authors who wrote about this topic span from Aristotle to Rawls and Parfit -, cf. Gosseries (2008); Gosseries and Meyer (eds.) (2009); Gardiner et al (eds.) (2010).

^{LIV} See footnote 8.

^{LV} According to Gearty (2010: 7-8), '(...) the [anthropocentric] discussion is invariably about the self-fulfilment of the individual, his or her ability to set goals for leading a full life and then being free to go on to achieve those targets. The debate is about what are the necessary building blocks of such a successful life; it is



not about what that life can or ought to do to make the world around it a better place, even for others to live in, much less simply for the planet's sake. Such a formulation thus sees *the environment as a life-sustaining good or entitlement to be added to all other material conditions of human welfare including housing, food and healthcare*. Anthropocentric-oriented rights are *utilitarian* and they focus on the socio-economic context thus seeking to ground, improve access to and expand human claims to resources with a view to ensuring economic development in its widest sense'. In-text reference to Bosselmann (2005). Also, remember the Principle 1 of the Rio Declaration on Environment and Development (1992): '*Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.*' (available at http://www.unesco.org/education/pdf/RIO_E.PDF) (emphasis added).

^{LVI} See above, par. 4.1.

^{LVII} See De Lucia (2015); Grear (2013); Philippopoulos-Mihalopoulos (2013).

^{LVIII} We believe we can identify, on the one hand, a "softer" ecocentric approach and, on the other, a "stronger" one in the formulation of environmental human rights. The former 'sees the environment as a condition to life, thus placing limitations on individual freedoms [and] more inclined towards limitations of human entitlements to resources.' [Conceived this way, environmental rights would] 'recognize the intrinsic and not the functional value of the environment, while simultaneously seeking to preserve ecological integrity'. Kotzé (2014: 258), in-text reference to Bosselmann (2005). The "stronger" ecocentric approach, instead, is well represented by the above-discussed decision by the Colombian Supreme Court (STC 4360-2018). This approach does not simply posit limitations on human freedoms for the sake of environmental integrity. It goes further than this, by *endowing nature with proper rights*. Such an approach is also followed by 'Ecuador and Bolivia's constitutional experiments incorporating a more ecocentric objective into human rights by granting the environment a 'right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution' (article 71 of the Constitution of Ecuador)'. Kotzé (2014: 258-259, emphasis added). For a general overview of the ideas of *buen vivir* (Bolivia's constitution 2009) and derechos de la naturaleza (Ecuador's constitution 2008), see Bariè (2014). A similar "strong" ecocentric approach can be found in the Universal Declaration of Rights of Mother Earth, presented in 2011 to the United Nations by the Bolivian Government. 'The Declaration recognizes that the Earth is a living entity and as a result 'Mother Earth' could lay claim to the full range of fundamental rights normally attributed to humans including, among others: the right to life and to exist; the right to be respected; the right to regenerate its bio-capacity and to continue its vital cycles and processes free from human disruptions; the right to maintain its identity and integrity as a distinct, self-regulating and interrelated being; the right to water as a source of life; the right to clean air; the right to integral health; the right to be free from contamination, pollution and toxic or radioactive waste; the right to not have its genetic structure modified or disrupted in a manner that threatens its integrity or vital and healthy functioning; and the right to full and prompt restoration.' Kotzé (2014: 265, emphasis added), referring to the art. 2 of the Proposed Universal Declaration of the Rights of Mother Earth (2011) <<http://pwccc.wordpress.com/programa/>>.

^{LIX} Cf., among others, Brundtland (1987); Kotzé (2014).

^{LX} See Mattei (2011).

^{LXI} This dichotomy is one of the pillars of the Western political-legal tradition so much that Norberto Bobbio supported the idea of its undeniability. Indeed, he wrote in its *Stato, Governo, Società. Per una teoria generale della Politica* (1985) that the denial of this distinction would have meant the dissolution of the law itself.

However, the contemporary social and legal complexity wriggles out of any tight divide and, therefore, it is necessary to become aware of the hybridization of institutions, models and legal systems. The dichotomy public versus private is *de facto* becoming the object of a dialectical overcoming in the double sense of destruction and conservation (Catania, (2008). Cf. Casini (2014); Ford (2011); Kotzé and Soyapi (2016: 87). Cf. also Piketty (2014: 569, 573): '(...) it is important, I think, to insist that one of the most important issues in coming years will be the development of *new forms of property* and democratic control of capital. The *dividing line between public capital and private capital* is by no means as clear as some have believed since the fall of the Berlin Wall. As noted, there are already many areas, such as education, health, culture, and the media, in which the dominant forms of organization and ownership *have little to do with the polar paradigms of purely private capital* (modeled on the joint- stock company entirely owned by its shareholders) *and purely public capital* (based on a similar top- down logic in which the sovereign government decides on all investments). *There are obviously many intermediate forms of organization* capable of mobilizing the talent of different individuals and the information at their disposal. When it comes to organizing collective decisions, the market and the ballot box are merely two polar extremes. *New forms of participation and governance remain to be invented.* (...) The nation-state is still the right



level at which to modernize any number of social and fiscal policies and to develop *new forms of governance and shared ownership intermediate between public and private ownership*, which is one of the major challenges for the century ahead. But only regional political integration can lead to effective regulation of the globalized patrimonial capitalism of the twenty-first century' (emphasis added). Cf. also Capra and Mattei (2015: 144 ss); Barnes (2006).

^{LXII} Now, after ten years, the project has been re-launched. While we are writing, (Jan. 2019), a campaign for the collection of signatures is going on in order to present a popular initiative law to the Italian parliament for the recognition of the commons in the Italian Civil Code in accordance to the 2007 Commission's formulation.

^{LXIII} Also, we saw how the commons challenge the allegedly exhaustivity of another very important dichotomy: the public-private one.

^{LXIV} Löwbrand et al. (2009: 12) actually propose a formulation of ecocentrism that deeply resemble the salient features of the commons as we described above: 'descriptions of the world as an intrinsically dynamic, interconnected web of relations in which there are no dividing lines between the living and nonliving, or the human and non-human ... resonate well with the Anthropocene imagery'.

^{LXV} To use an effective expression, the Anthropocene needs a shift from the *homo oeconomicus* to an 'an enlightened *homo ecologicus universalis*. This is a being that is much more connected with the environment, who seeks out solidarity instead of competition, and whose freedom is conditional on the foregoing. Individuals thus become planetary citizens (...). Kotzé (2014: 267).

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ISSN: 2036-5438

The 2019 European Parliament elections: Looking back and ahead*

by

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Perspectives on Federalism, Vol. 11, issue 1, 2019





Abstract

At the end of May 2019, European citizens will be called to elect their representatives to the European Parliament. These elections are both uncertain, as the situation in which they intervene is unique, and crucial because the European Union arguably faces one of the most acute legitimacy crises since the beginning of the European integration process. At the same time however, these elections also mark the 40th anniversary of the direct elections to the European Parliament and a balance of this experience appears to be in order. Against this background, this article proposes both a reflection on the evolution over the past forty years, and some thoughts as to the way forward. In particular, it critically considers some of the solutions that have been put forward to improve democratic legitimacy within the European Union.

Key-words

European Parliament - Elections - Spitzenkandidaten - Democracy - European Union



At the end of May of this year, Europeans will be called to elect their representatives to the European Parliament (EP). These elections will mark the 40th anniversary of the direct elections to the EP since, before 1979, Members of the European Parliament (MEPs) were always delegated Members of the national parliaments of the Member States. The conditions of these elections are particularly uncertain: the European integration process has recently gone through several and multiform crises, i.e. economic and migration crises, but also legitimacy crisis as illustrated by the Brexit vote. Populist parties are also on the rise in several European Member States, and far right and anti-establishment parties are expected to win 120 seats, i.e. 16%, in the next elections.^I However, trust in the European Union (EU) is at record-high.^{II} In parallel, ‘lead candidates’ – or *Spitzenkandidaten* – have been designated by (some) political parties in an attempt to inject more democracy in the election process: By voting for a specific political party, citizens now supposedly choose the future President of the European Commission. This procedure, which is similar to the one in place in parliamentary systems whereby the prime minister commonly stems from the parliamentary majority, was introduced for the first time during the last EP elections in 2014 and will be reproduced in 2019.

Those elections are also ‘first time’-elections in five regards.^{III} 1). Provided that Brexit intervenes on 29 March as scheduled – or soon thereafter –, they will be the first European elections ever organised after the exit of a Member State; the influence this may have on voters is difficult to predict, and it could either go in favour or against the EU. 2). These elections appear to be more Europeanised, as they do not only have a national focus as had been the case of previous elections. This may not be true of all Member States, but it is of at least some of the Western ones as is visible in the way in which the media depict these elections. 3). For the first time over the past 25 years, the majority in place, i.e. the Grand coalition, will most likely not be maintained after May of this year. The consequences of this change are hard to predict, although it can be anticipated that a coalition of three groups will be necessary to pass a piece of legislation, which will eventually set the third, smaller party, in a strong position to impose its will. 4). It is also the first time that five of the main European figures will have to be designated at the same time. Indeed, it is not only the President of the Commission that needs to be chosen, but also the President of the EP, the President of the European Council, the High Representative of the Union for Foreign Affairs and Security Policy and the President of the European Central Bank



(whose nomination does not normally intervene simultaneously). 5). Finally, it is also the first time that Germany is a serious candidate to obtain two of these five high-level positions, i.e. the Presidency of the Commission (Manfred Weber) and the Presidency of the European Central Bank (Jens Weidmann). While it is highly unlikely that these two persons will obtain these positions, the fact that no German citizen has ever presided over the European Central Bank and that the last German President of the European Commission was Walter Hallstein points towards difficult political negotiations.

Against this background, a reflection on the EP as an institution and on how it has evolved since its creation appears to be in order (I), as is an analysis of the open questions immediately prior to the upcoming elections (II).

1. From the Parliamentary Assembly to today's EP

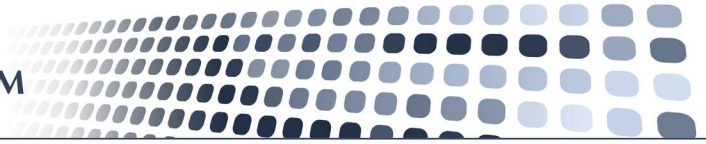
The EP is the result of the evolution of the Parliamentary (or Common) Assembly first created in the Coal and Steel Community Treaty which became the Parliamentary Assembly of the European Economic Community after the Treaty of Rome. As mentioned, its members were MPs delegated from the parliaments of the Member States, even if direct elections had always been envisaged as a possible alternative. An agreement in this sense could finally be reached in 1974 at a time when the intergovernmental aspect of the European integration process was also reinforced by means of the creation of the European Council. Following this decision, the first direct elections were organised in 1979. A dual mandate remained possible until 2002, i.e. a politician could be elected both as an MP and as an MEP, but in practice, the number of MEPs who also held a national parliamentary mandate decreased rapidly. MPs who were also sitting in Strasbourg prior to the introduction of the direct elections largely failed to 'Europeanise' their counterparts as the diffusion of information among MPs related to the European integration process that could have intervened through them generally failed to materialise. In this sense, the introduction of the direct elections arguably did not represent a major change for those MPs that were not also sitting in Strasbourg. This *de facto* isolation of (most) MPs from the European dossiers is also related to the absence of institutional adaptation by national parliamentary chambers with a view to scrutinising European affairs. Some exceptions



existed, but they generally did not have any dedicated structures during the first decades of the integration process, so that even where they received information, no adequate structure allowed them to process it. With the introduction of the direct elections in 1979 however, some parliaments, among which for instance the French one, started to mobilise and to create *ad hoc* structures and procedures. This notwithstanding, these arrangements remained largely imperfect in numerous parliaments until the adoption of the Lisbon Treaty. Differences existed, but overall a strong imbalance in favour of national executives, i.e. governments, could be observed to the detriment of parliaments which were not sufficiently associated to the European decision-making process. In parallel, the Parliamentary Assembly, and later the EP, was progressively reinforced. It ceased to be merely a consultative assembly and became a co-legislator in a growing number of areas. Since the Treaty of Lisbon, the EP is a co-legislator in almost all policy domains, and it has acquired numerous additional rights. Despite the crucial role the EP now plays, fewer and fewer European citizens vote for the European parliamentary elections, although some disparities exist across Member States. This is one of the challenges that urgently needs solving.

2. Contemporary challenges

The EP is not the only parliamentary institution facing important challenges; Some have pointed to an overall tendency towards ‘deparliamentarisation’ (Tapio and Hix 2000: 144f.), and we observe a loss of confidence in public institutions generally.^{IV} Within the EU, citizens’ trust in EU institutions is globally higher than their levels of trust in their own national institutions.^V This notwithstanding, the levels of participation in EP elections has kept decreasing since 1979,^{VI} which points to a certain paradox. In any event, the supposed democratic deficit characterised by a detachment from the European arena and by a lack of trust only represents part of a more complex reality whose components vary, and differ across Member States. Be this at it may, 40 years after the introduction of the direct elections, this change has clearly failed to make citizens identify to this supranational institution (Barrett 2018: 3). They do not feel it as their own even if it is precisely the EP that is supposed to represent citizens directly at Union level (art. 10-2 Treaty of the EU)



and to guarantee the democratic character of the European decision-making process. There is additionally certainly a broader issue of representativity in an ever larger, more diverse and more differentiated EU (Curtin and Fasone 2017). To name only one of the most well-known illustrations of this problem: how is the EP supposed to guarantee the democratic legitimacy of decisions affecting the Eurozone in view of its composition? Is it even in a position to fulfil this role? Should other mechanisms of representation be developed instead? Which form should they take? Any further complexity additionally bears the risk of leading to an ever-greater lack of understanding by citizens. The fact that European elections continue to operate under a national logic adds to this issue of adequate democratic representation in a fragmented EU. Even if the various national political parties are aggregated under broader European political groups, significant differences remain among them thereby leading to heterogeneous groups.^{vii}

To solve these issues, several solutions have been considered, and have even already materialised for some of them.

Indeed, there have been numerous and recurrent calls for the creation of a second (or third) parliamentary chamber composed of delegated MPs at European level. Such a reform would admittedly increase the complexity of the EU institutional system, and could render it even more alien to ordinary citizens. Nevertheless, it has some potential, provided that it is conducted alongside broader reforms of the institutional system in place, to avoid a duplication of functions with the EP or with the Council for instance. A second parliamentary chamber would allow for a better participation of national parliaments in the European decision-making procedures, and it would contribute to make European matters less alien to MPs. By the same token, current issues existing in terms of interparliamentary cooperation between national parliaments, and between them and the EP could be resolved. This would enhance democratic legitimacy in a multi-tier EU.

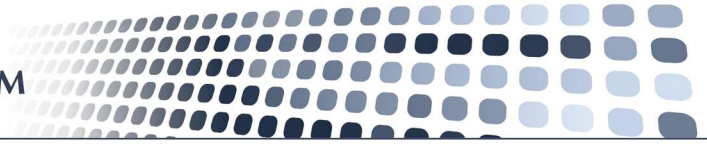
Transnational lists have also been envisaged as a solution to the currently existing problems, even if MEPs themselves rejected this idea. This is with no doubt a proposal worth examining, as it could contribute to the creation of a true European public sphere and to achieving more homogeneity within political groups. However, several issues could hinder those positive consequences: European citizens already feel largely distanced from their MEPs, and it can be anticipated that this distance would grow even further, were they to elect MEPs from a Member State other than that of their nationality. In this sense, the



linguistic issue is also likely to play a key role as those MEPs would need to campaign in several Member States whose languages they presumably do not master. Finally, if only some of the MEPs were to be elected on the basis of those transnational lists, an imbalance between them and the rest of the MEPs would appear, and would require at least some specific safeguards. In sum, transnational lists do not represent a miracle solution to the issues the EP is currently facing but with some specific safeguards, they could bear some potential.

In contrast, the *Spitzenkandidaten* procedure should urgently be abandoned for a series of political and legal reasons. Politically, binding the nomination of the Commission President to the result of the EP elections appears to be particularly risky in a context in which Euroscepticism and extreme parties are on the rise. This is all the more true as this procedure has been used by those same parties to delegitimise the Commission and its actions. Beyond this, the question can be asked as to whether a Commission President representing a group that has obtained only a few additional percentage-points than the next group will truly benefit from an increased democratic legitimacy among citizens. It is indeed unlikely that a clear majority will arise from the upcoming elections. Furthermore, how can a politicised Commission only be headed by a politicised President while Commissioners continue to be designated without taking the majority in the EP into account? The question also arises as to why of all the key figures existing within the EU only the Commission President should be chosen on the basis of the results of the elections, while the others continue to be picked by the Member States. All Commissions so far have admittedly shown an element of politicisation, even if President Juncker was perhaps the most vocal in admitting this fact. Yet, the Commission's function within the EU institutional system is to act as the Guardian of the Treaties. If it is too politicised and is thus perceived as less neutral, it is likely to lose its legitimacy vis-à-vis Member States to bring an action against one of them before the Court of Justice. Such an evolution is more dangerous today than ever before: the EU acutely needs a strong, neutral arbiter who makes sure that its rules and its values are respected.

Last but not least: this procedure did not have the positive impact anticipated in 2014 as turnout further decreased in that year. It could be argued that this might have been due to citizens' not knowing the procedure yet; it remains though that this is not an encouraging sign. Actually, political groups themselves do not seem fully convinced by this



procedure, as not all of them have nominated one lead candidate in 2019. Taking all these factors into consideration, the possibility exists that this procedure will do more harm than good: there is no guarantee that the lead candidate of the parties would eventually be chosen as Commission President, mainly because other positions have to be filled at the same time, and because Member States may not be ready to automatically designate a candidate they do not approve of.

Looking ahead...

Instead of constantly looking for solutions to the perceived democratic deficit in form of institutional reforms, perhaps the EU, and its Member States, should start by improving the way in which information related to the European integration process is communicated to citizens. Citizens' knowledge of the EU should also be improved, for instance by means of dedicated educational programmes in schools and for the general public. MPs and MEPs should also cooperate more and better.

* A large part of these ideas were presented at the workshop 'Les élections européennes : quatre enjeux en perspective' organised at Sciences Po Paris on 5 February 2019 and I take this opportunity to thank the participants for their insightful comments.

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^I Politico, Projected composition of the next EU parliament (18 February 2019), <https://www.politico.eu/2019-european-elections/>.

^{II} European Commission, Press release 'Spring 2018 Standard Eurobarometer: One year ahead of the European elections, trust in the Union and optimism about the future is growing', 14 June 2018, http://europa.eu/rapid/press-release_IP-18-4148_en.htm.

^{III} These features were underlined by Enrico Letta during the workshop 'Les élections européennes : quatre enjeux en perspective' organised at Sciences Po Paris on 5 February 2019.

^{IV} Standard Eurobarometer 89, Spring 2018, 41f.

^V 42% of citizens trust the EU, whereas an average of 34% trusts their national governments and parliaments. Standard Eurobarometer 89, Spring 2018, 12.

^{VI} European Parliament, 'Results of the 2014 elections', <http://www.europarl.europa.eu/elections2014-results/en/turnout.html>.

^{VII} Suffice it to think about the Fidesz party within the European Peoples' Party for instance.

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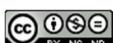
ISSN: 2036-5438

**The 2019 European Parliament elections:
politically crucial, but without clear institutional effects**

by

Nicola Lupo*

Perspectives on Federalism, Vol. 11, issue 1, 2019





Abstract

The elections for the European Parliament that will take place on 23-26 May 2019 will most probably disprove the second-order nature of the European elections and invert the steady decline in voter turnout, for the first time since 1979: not only the pace, but also the direction of the future process of European integration is at stake. However, the legal framework governing the electoral and democratic process in the European Union is far from unified and uncertainties and ambiguities are still existing: especially regarding the constitutional convention on the lead candidates, known as *Spitzenkandidaten*, which still appears far from consolidated and is affected by the ambiguous design of the form of government of the European Union.

Key-words

European Parliament, European Elections, Spitzenkandidaten, Form of Government, Electoral Thresholds, Voter Turnout, Constitutional Convention, Representative Democracy



The elections for the European Parliament have traditionally been considered as second-order elections. This means that both electoral campaigns and voters' motivations have been dominated by the political dynamics existing inside each Member State. The decline of voter turnout, which regularly occurred in elections from 1979 to 2014, also showed the fallacy of the idea that the increase in the powers of the only directly elected EU institution, the European Parliament – an increase that actually took place at every revision of the treaties, from the Single Act until the Treaty of Lisbon – would have solved the democratic problems of the European Union.

Most likely the elections that will take place on 23-26 May 2019 will disprove both the second-order nature of the European elections and the steady decline in voter turnout. For the first time in the political debate at both the European and national levels, the direction and pace of the future process of European integration is at stake. Economic governance, the control of migratory flows, foreign and defence policy are all crucial topics in today's national political debates and will also be pivotal for the European Parliament elections in May. It is easy to foresee that the electoral turnout will for the first time, reverse the trend in terms of voter participation, thus exceeding the percentage of 42.62% reached in 2014 (with very high variations among the member states) (Cfr. Rozenberg 2009: 7; Franklin & Hobolt 2016: 77). This is due, paradoxically, to the conspicuous presence, in almost all the Member States, of Eurosceptic and sovereigntist political parties, as well as – to a lesser extent – to some notable but isolated attempts to give rise to authentic supranational political parties.

Of course, the legal framework governing the electoral and democratic process in the European Union is far from satisfactory and consolidated. Electoral systems, and even the actual days of the week on which voters are called to the polls, are still regulated at the national level, constantly awaiting a 'uniform' European electoral system. Presently, the electoral process must comply with common principles defined in the 'Act concerning the election of the representatives of the Assembly by direct universal suffrage',¹ adopted in 1976 and subsequently amended in 2002 (and again, as explained below, in 2018).

Brexit presented an opportunity to revisit an old idea to seize the UK's 73 seats and attribute all or at least part of them to a single European constituency across transnational lines (Razza 2013; Letta 2017: 137), but this was ultimately rejected. With its resolution of 7

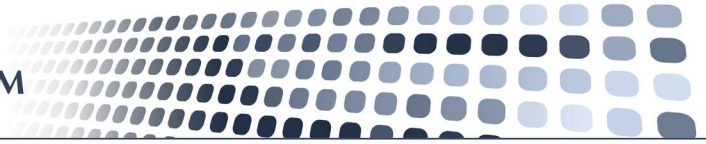


February 2018,ⁱⁱ the European Parliament also rejected the option to not assign any of these 73 seats in the next elections. As often happens in Europe, a compromise was reached: 27 of these seats will be redistributed to the currently under-represented Member States, always according to the principle of digressive proportionalityⁱⁱⁱ (according to which the more populous Member States are represented by a greater number of MEPs, but still in a way that ensures that each MEP from a more populous Member State represents more citizens than each MEP from a less populous Member Stateⁱⁱⁱ); while the remaining 46 will not be assigned for the time being (also in anticipation of future new EU accessions).

The same issue of admissibility of thresholds in the electoral systems for the European Parliament gave rise to very different orientations by the constitutional courts of the Member States: the German Federal Constitutional Tribunal declared thresholds set at 5% and then at 3% unconstitutional, while the Czech Republic's Constitutional Court ruled in the opposite direction (Michel 2016: 133; Smekal & Vyhnánek 2016: 148). Indeed, a hint in favour of keeping these thresholds is now based in judgement no. 239/2018 of the Italian Constitutional Court,^{iv} where the Court rejected the questions raised by the Council of State about the unreasonableness of the 4% threshold set in the Italian legislation. The Court stated that such thresholds are aimed at reducing fragmentation and at 'favouring the formation of a political majority in the Assembly' (Delledonne 2019). Likewise, the adoption, on 13 July 2018, of Council Decision 2018/994/EU, Euratom,^v amending the Act of Brussels of 1976, makes it mandatory for larger Member States with constituencies electing more than 35 MEPs to set thresholds ranging from 2% to 5%. The Decision is currently subject to the approval of the Member States, according to national constitutional requirements, and if ratified it will apply from the 2024 European elections.

Above all, the constitutional convention on the lead candidates, known as *Spitzenkandidaten* that was applied during the 2014 elections, still appears far from consolidated in its fundamental characteristics and is affected by the ambiguous design of the form of government of the European Union (Schuette 2018; Navarro, Sandri & von Nositz 2018).

Indeed, that constitutional convention, laboriously conceived and developed before the 2014 elections (Peñalver Garcia & Priestley 2015) and implemented with the subsequent formation of the Commission headed by Jean-Claude Juncker, over the last few months has been formally confirmed by the main political forces, who have indicated their own



candidates for the leadership: the German Manfred Weber for the EPP (currently chairman of his political group in the EP); the Dutch Frans Timmermans for socialists (currently vice-president of the European Commission); the German Ska Keller and the Dutch Bas Eickhout for the greens (that already in 2014 had proposed a couple of lead candidates); the Czech Jan Zahradil for the conservatives; the Slovenian Violeta Tomić and the Belgian-Spanish Nico Cué for the European Left (while the Greek Yanis Varoufakis would lead another leftist party, called DiEM25). And the picture is still in progress.

Even from a purely institutional point of view, official documents have not been lacking, although they are not legally binding. On the one hand, the European Parliament's decision of 7 February 2018^{VI} - through which the Parliament consented to the review of the framework agreement on relations with the European Commission - established the conditions that must be respected by the European Commissioners who are designated as lead candidates or in any way participate in the European elections. The decision thus recalled the obligations of confidentiality and collegiality and forbidding them to use the Commission's human or material resources, without the need to put themselves on leave. At the same time the decision warned that the European Parliament is 'ready to reject any candidate, in the investiture procedure of the President of the Commission, who has not been appointed *Spitzenkandidat* in view of the European elections'. On the other hand, the European Commission's Recommendation of 14 February 2018 invited every European political party to 'make known the candidate for the function of the President of the European Commission they support', possibly to select him/her 'in an open, inclusive and transparent way' and to announce him/her 'well ahead of the start of the electoral campaign, ideally by the end of 2018'.

However, not all the parties have complied with this invitation and there has been some dissociation. This is particularly relevant because it came from some of the figures that this convention had helped to shape, or at least to put into practice: for instance, Guy Verhofstadt, formerly *Spitzenkandidat* for the liberals in 2014, said that the convention has substantially disappeared (Hersenzhorn 2018) after the recalled rejection of the transnational lists for the European Parliament; and Juncker himself explicitly denied his support (Von Hannelore, Mühlherr & Schiltz 2018) for the prospect of a Commission chaired by Weber, thus keeping his hands free for other possible options, among which is the presidency of Michel Barnier.



The point is that the *Spitzenkandidaten* convention still has a basic ambiguity. It is not clear at all, indeed, whether the convention is analogous to a presidential system, where a sort of popular election of the President of the Commission takes place, and therefore it is necessary to verify which list, and then which lead candidate, has obtained more votes (or more seats in the EP); or whether it is comparable to parliamentary forms of government, where if a lead candidate is able to collect the majority of European Parliament's members in support of a Commission, s/he will chair.

Although the first option is often told, also because it seems to be easier to explain to citizens, the option that appears more likely, and at the same time the most correct from a legal standpoint, is indeed the second one. It is more likely because it is extremely improbable – at least if we stick to the opinion polls – for a single list alone to obtain the majority of seats in the European Parliament. It is the most correct because, as the Italian Constitutional Court recognized (in its already recalled judgment no. 239/2018), in recent years there has been an ‘undoubted transformation into a parliamentary direction of the form of government of the European Union’ (In this sense see also Poptcheva 2019; and more cautiously Shackleton 2017). Additionally, the current electoral legislation for the European Parliament in the Member States is in no way able to outline any kind of “direct” election of the President of the European Commission, which would clearly favour the largest Member States.

It might even be, that the 2019 elections would mark another discontinuity in the traditional European Union arrangements: that is, suggesting European leaders not to promise, as they have sometimes done, what is (at least as for today) impossible, and to show instead that they are more respectful of the ‘composite’ logic underlying the European Union's constitutional system. A logic based on the dynamics of the forms of government in place in the Member States, which in 27 cases out of 28 require a confidence relationship of the Government with at least one branch of the Parliament (Ibrido & Lupu 2018). A logic that relies, also with regards to the form of government of the Union, on the typical mechanisms of parliamentary democracy: being the European Council entrusted with the task of ‘taking into account the elections of the European Parliament’ (Article 17, paragraph 7, TEU) when it identifies the candidate president of the Commission who will then have to be approved by the European Parliament, by a positive vote of the majority of its members (even if the Treaties emphatically speak of ‘election’ by the European Parliament: article 14, paragraph 1, last sentence, and article 17, paragraph 7, TEU).



The democratic problems of the European Union, in order to be properly diagnosed and, hopefully, tackled, require not to promise citizens what the institutional system of the Union cannot deliver, and to clarify as much as possible the political responsibilities of each actor. It is true that the system is indeed complex, but it is not necessarily obscure and incomprehensible. In any case, European citizens will have, in late May, a decisive word. Although it will be neither the only nor the final one, as is natural in a constitutional democracy and in a parliamentary form of government.

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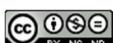
ISSN: 2036-5438

Novelties and paradoxes of the 2019 European elections

by

Roberto Castaldi*

Perspectives on Federalism, Vol. 11, issue 1, 2019





Abstract

The 2019 European elections are characterised by many novelties and paradoxes: for the first time they have acquired a high political salience, also thanks to the cleavage between nationalist and pro-EU parties. And there is a wider public debate than in the past. However, not all political parties are presenting their *Spitzenkandidaten* and few have taken a clear position with regards to the struggle between the Parliament and the European Council on which institution really decides the next Commission President. Pro-European and nationalists are much divided and often some forces in one camp have paradoxical positions on some specific issues.

Key-words

European elections, European Parliament, nationalism, 2019, Spitzenkandidat



There has never been such a wide public debate in view of the European elections. There are some interesting novelties and paradoxes characterising the 2019 European election. The first are among the reasons which have spurred the debate. The second are less recognised, but still very relevant to understand the possible future dynamics of the European unification process.

1. A new political salience, but without clarity

In the past European elections were perceived as second order elections and merely a test for the national governments popularity. Therefore they did not spur a truly European debate or electoral campaign, but mainly national debates and campaigns. Even the symbols of the European parties were usually not present in the ballot papers, where only the national parties symbols appeared. The perception of the Parliament as a weak institution – as it was at the time of the first direct election in 1979 – has not significantly changed, notwithstanding the fact that the Parliament actually increased its powers and competences significantly and is now a powerful actor in the EU institutional and decision-making dynamics.

In 2014 due the financial crisis, the rise of nationalist forces and the Spitzenkandidaten experiment there was for the first time some interest in the European election. This trend has continued and for the first time the European elections are generally perceived as having a significant and European political salience. One of the often forgotten reasons was the success of 2014 experiment of the European parties presenting their candidates to the Commission Presidency. In 2014 few people believed it would work, and thus change the expectations for the future (among others Castaldi 2013 and Corbett 2014). But it did. Therefore the expectations, especially by the media, have changed. However, the fact that the some European parties - such as the Alliance of Liberal Democrats of Europe or the nationalists of the Europe of Freedom and Nations, and of the Europe of freedom and direct democracy (which with Brexit is not sure to get enough MEPs from enough countries to continue to create a Group in the Parliament) - are not presenting a Lead candidate or *Spitzenkandidat* to the presidency of the Commission is weakening this process, which is certainly not a consolidated one.



The Lisbon Treaty provides that the President of the Commission is elected by the Parliament on a proposal by the European Council, which has to take into account the results of the European election and make appropriate consultations (art. 14 and 17 TEU). It looks like a parliamentary form of government, in which the European Council plays the role of a collective head of state. In many (consolidated?) parliamentary democracies, such as the UK for example, there is a tradition for the leader of the main party – even if it does not get a majority - to be given the first chance to form an executive. In other (less consolidated?) parliamentary democracies, such as Italy for example, coalitions are often formed by identifying a suitable head of the government, who is not the leader of any of the parties in the coalition: Giuseppe Conte is just the latest example, and one of the most extraordinary as he was almost completely unknown to the public before being picked as Prime Minister.

Just after the elections the first political struggle will likely be between the Parliament and the European Council on who really gets to decide the next Commission President. We usually divide democratic regimes in presidential (and semi-presidential) or parliamentary forms of government. With the Lisbon Treaty and the 2014 elections the EU started moving towards a parliamentary form of government. To consolidate this trend it is crucial that the Parliament keeps the power to choose the next Commission President. As the EU is a young democracy, still developing its own shared traditions, the Commission President does not necessarily need to be one of the lead candidate, but at least should be expressed by the parliamentary coalition willing to elect her/him. If the European Council will get back the power to nominate the Commission President at its wish, the only way left to build a European democracy would be through a presidential system, with the direct election of a EU President, arising from the fusion of the Commission and European Council Presidencies. Therefore, there is a very important institutional consequence that will arise from this European elections and the ensuing political balance in the Parliament and its ability to preserve the power acquired in 2014.

In view of the 2019 elections, not just traditional European parties have mobilised in advance, identifying their lead candidates and approving their Manifestos. Also attempts at creating new European transnational parties have emerged, such as Volt or Diem25 – beside the Greens, which are already organised as a transnational party. But the growing Europeanization of the political struggle is shown also by the fact that national leaders and parties have started to position and manoeuvre in view of the European election well in



advance. Many national parties in various countries – more than in the past – are inserting references to their European parties, which are trying to set up EU-wide campaign with some common messages built on their Manifestos. Unlike in the past, also nationalists have been trying to forge new and wider alliances before the elections, rather than afterwards. Still, their hope to create a single and powerful group collapsed so far, due to very divergent positions. However, many nationalist leaders of different European parties – from Salvini to Orbán – employ a narrative suggesting that the election will put in motion an overall revolution at EU level, thanks to their own victory, even if the main polls suggest the opposite.

On the other side there is a national leader, French President Emmanuel Macron, who wrote a letter to all EU citizens in all EU languages, to propose a deep EU reform to get into a European Renaissance. Macron made the European relaunch a crucial issue also in his presidential electoral campaign, and has stayed the course ever-since. However, paradoxically, he is not telling voters which European party *En Marche* will join or which candidate for the Commission Presidency will support. So he is campaigning on a pro-EU platform, or for the Europeanization of new important policies, while resisting the Europeanization of the electoral campaign and politics itself.

2. A new political cleavage, but without clear proposals and fronts

Essentially the new political significance of the elections is due to the various crises of/in the EU in the last decade. After decades of huge popular consensus for integration, the “permissive consensus” gave way to a “constraining dissensus” (Hooghe and Marks 2008), even if the Eurobarometer shows a recent increase in the consensus towards the EU. So the cleavage between nationalists and pro-European has become politically relevant, in fact crucial. And this thanks to the nationalists, who have made their anti-EU or anti-Euro position a main feature of their narrative in the last years. The [Ventotene Manifesto](#) envisaged the emergence of this cleavage and dynamics, which eventually was not the result of the pro-Europeans’ actions, but of the nationalists.

The best example is the UK. It was the nationalists who set up the Brexit process, eventually bringing Cameron to promise a referendum to keep the Tories united and not lose votes to the UKIP in case the Tories won the elections. And then losing the Referendum on Brexit. The paradoxical result almost 3 years after the referendum, is that the British political

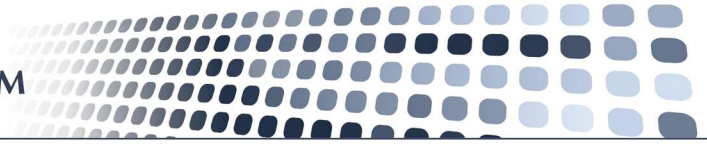


system is melting down and will be dominated by the UK relationship with the EU for years to come. And in the traditionally most euro-sceptic country over 6 million people signed a petition to stay in the EU, and polls suggest a majority of British citizens would like to remain in the EU. The largest pro-European rally ever happened in London, with over 1 million people (10 times more than the 1985 Milan rally supporting the European Parliament Draft Treaty on European Union, which eventually helped convene the first Inter-Governmental Conference to reform the Rome Treaties): just 3 years ago this would have been simply unthinkable of. Brexit turned out to be an economic, political, and cultural nightmare. It risks bringing back violent tensions in Northern Ireland and poses a threat to the United Kingdom unity itself. Many hoped or feared that it would trigger a domino effect. It has shown how relevant the EU is for our lives, even when we don't realise it. To some extent it has turned a highly euro-sceptic public opinion into a highly polarised one, with a strong pro-EU mobilization, that will likely remain relevant whatever the result of the Brexit process. Overall Brexit boosted EU citizens confidence in the EU at new highs after years of declining trust¹.

This new cleavage dominates the nationalist narrative, but not the one of the pro-EU parties. Because this cleavage is new, but is not the only one, as the old right/left cleavage continues to apply. Therefore most pro-EU parties prefer to focus on their specific policies preferences, than on their pro-EU stand. Therefore, while the novelties of the 2019 European elections have much to do with this new cleavage, there are not two clearly identifiable opposing coalition of forces supporting opposite views on how to reform the EU – the need of which is probably the only thing on which most nationalists and pro-European would agree.

This new cleavage is expressed by narratives rather than by articulated proposals. The nationalists depict the EU as the cause of all problems, and the return to national sovereignty as the simple remedy. The main pro-EU parties emphasize the importance and benefits of integration, but then splits between a mere defence of the status quo and the requests for a deep reform to strengthen the EU towards a federal dimension.

Even the national leaders trying to present themselves as the overall leader of the pro-EU and nationalists fronts – Emmanuel Macron on the one hand and Viktor Orbán and Matteo Salvini on the other – did not put forward clear proposals on how to reform the EU. Nationalists have highly contradictory claim. They ask for more EU solidarity where they needs (the Italians on migrations, the Visegrad countries on the economy), but are unwilling



to provide it on the other areas, and to fully respect the letter and the spirit of the EU rules. Their contrasting interests can torn apart the EU, but not provide a coherent plan to reform it.

So far Macron is probably the only pro-European leader who raised to the challenge and decided to exploit rather than suffer the new cleavage. Speaking about a sovereign Europe Macron is exposing the nationalists for what they really are, taking away their disguise as “sovereignists”. The only effective sovereignty on the global stage in the XXI century is the one of continent-wide states. We need a European sovereignty to defend our interests and values in the world. Those who fancy a return to the XIX century national sovereignty are actually working to become a satellite of the US, China or Russia. Therefore Macron set a number of goals in terms of creation of European policies, which now are national policies. But he remains rather vague on the institutional set up to manage these new competences, and seem to point towards an inter-governmental mode of governance, which is one of the main causes of the crisis of the last decade (among others Fabbrini 2015). Paradoxically, he speaks about a united, sovereign and democratic Europe, but then consider undemocratic the *Spitzenkandidaten* system, through which European citizens’ vote contribute to the choice of the Commission President. And to keep open the chance of getting Macron’s *En Marche* in their group the whole ALDE decided not to present a lead candidate, while it was among their main supporters in 2014.

3. A greater interest and public debate, but little understanding of the practical consequences of the vote

The new political salience and cleavage made the 2019 European elections a main issue in public discourse well in advance, while in the past nobody talked about the European election until they were very close. In many Member states for the first time some major media outlets are producing special dossiers on the European elections well in advance. To a large extent the electoral campaign will focus on the cleavage between nationalist and pro-EU parties. However, there are few clear proposals on how to reform the EU on which the citizens can choose. Furthermore, not all political parties are presenting their *Spitzenkandidaten* and few have taken a clear and strong position with regards to the struggle between the Parliament and the European Council on who really decides the next



Commission President. Pro-European and nationalists are much divided and often some forces in one camp have paradoxical positions on some specific issues as already mentioned. Therefore the debate on the policies will probably still dominate the scene.

It is to be seen if this wide debate will help citizens understand the EU institutional dynamics and the relevance of the Parliament. The traditional perception of the weakness of the Parliament is mainly due to three aspects. First, the fact that initially it only had a consultative role, and the increase of its competences and powers happened incrementally and in a piecemeal fashion, that was difficult for the public to perceive. Second, the fact that the Parliament cannot initiate its own legislation, even if it can ask the Commission to present a proposal on a specific issue. However, if we look at the main legislation in many countries, it is mainly proposed by the government, and the number of bills of parliamentary origin approved is very small. For example in France and the UK the government has almost complete control of the Parliament agenda. So much so that the British Parliament had to pass a specific act to be able to discuss and have indicative – not binding - votes on Brexit options alternative to the government proposal, i.e. the Deal negotiated with the EU. Third, because media do not speak about what happens in the Parliament, but in very special occasions - and often with more attention to some colourful side-aspect than to the daily legislative work of the Parliament. Paradoxically, this is also due to the way the Parliament and media work. MEPs are in Brussels or Strasbourg most of the time. Therefore, it is difficult for them to participate to political TV programs in their home countries. Also because media invitations are often at short notice, counting on the fact that politicians are usually eager to participate.

However, from a comparative perspective, the European Parliament is a relatively strong one and has been able to impose significant constitutional praxis to exercise its prerogatives: for example it is more powerful than the Italian Parliament in many respects. The European Parliament has stronger control on the executive formation, as it holds hearings with single aspirant commissioners and is able to prevent any of them from getting the post, while the Italian Parliament is forced to have a confidence vote on the whole government as proposed by the Prime Minister, without the possibility to intervene *ex ante* in the formation of the executive. The praxis of the hearing of aspirant commissioners proved very effective, and some of them were forced out of the Commission: for example the Italian Rocco Buttiglione. The European Parliament is able to exercise its legislative power more effectively, because



while the Parliament can hold a no-confidence vote against the Commission, the latter cannot ask – or at least has never asked - one to the Parliament on a single legislative act. So the European Parliament is really able to amend and intervene thoroughly on all legislation, and is also able to work across parties to reach compromise able to gather a wide consensus. On the contrary all the main pieces of legislation in Italy are approved through a confidence vote required by the government in order to ensure the cohesion of its majority and significantly constraining the use of the Parliament legislative powers – beside the wide (ab)use of decrees and delegated acts (Borghetto 2018).

Also the heterogeneity of some European parties is very broad. For example the European People Party is in theory a pro-EU one, but in the last legislature it was only defending the status quo, blocking or watering down all possible reforms brought forward. This was also due to the presence of Orbán's *Fidesz* party in the EPP. This also prevented a more timely EU intervention to protect the rule of law in Hungary. Only recently *Fidesz* was suspended, not expelled, from the EPP. To a greater or lesser extent this heterogeneity characterises all European parties. Many citizens are disoriented, as they are used to their, more cohesive, national parties. However, in comparative terms, this heterogeneity is rather normal for parties reaching out over such a vast and heterogeneous polity. For example in the US the Democratic and Republican parties are also very heterogeneous, and from many point of view even more than the European parties, which inside the Parliament tend to be quite disciplined. To some extent the US citizens are used to the weakness of their parties, but the different perception is also linked to the fact that the US institutional system is solid and not put into question, while the EU is still being built and this is why the nationalist/pro-EU cleavage is getting so relevant, just as the federalist/anti-federalist cleavage was in the US at the beginning of its history as a federal state.

Notwithstanding the novelties, and also due to the paradoxes, it is still difficult for citizens to grasp the practical consequences of their vote, even if they are more aware of the European political significance and cleavage of the 2019 elections. However, these consequences can be extremely relevant. The political balance of the Parliament will be crucial for all the legislative work of the next legislature, including the possible attempt at drafting a comprehensive Treaty reform. It will also be crucial in determining the ability of the Parliament to stand up to the European Council and preserve the power to choose the Commission president that it managed to obtain in 2014. Even if the pick was not a lead



candidate, but was the result of the Parliament groups negotiations, it would be a significant result for the Parliament, that would leave the way open towards a European parliamentary democracy. On the contrary, if the European Council was to get back that power, the Parliament could try to claim it back only through a Treaty reform assigning that power to the Parliament even more clearly than the Lisbon Treaty. Otherwise, the only viable alternative to create a European democratic form of government would be to pursue a presidential one. All this make the 2019 European election a crucial and decisive moment, with far reaching consequences. Hopefully, this perception is widespread nowadays and may bring an increase in the turnout, which would be a significant boost for the prospects of European democracy.

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¹ See Standard Eurobarometer 89, Spring 2018, 41f.

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