

ISSN: 2036-5438

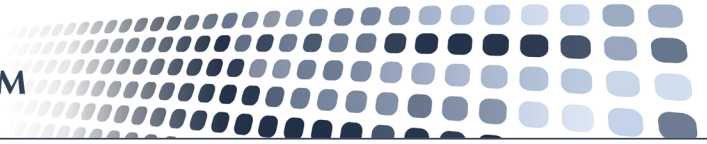
## Towards a Federal Democracy in Europe? \*

by

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Perspectives on Federalism, Vol. 3, issue 3, 2011





## Abstract

The paper endorses a dynamic rather than a static analysis of the EU at super-systemic level of analysis. It sketches a toolkit to analyse the actors and contents of constitutional politics, exploiting the insights of the main grand theories, based on the interpretative scheme of crisis-initiative-leadership, and the distinction between unification, integration and construction. Applying this toolkit, a trend towards an increase of the EU federal features can be discerned. Eventually, to overcome the current crisis more steps in this direction are needed.

## Key-words

European Union, Federal Democracy, Crisis, Federalism



## Introduction

The EU is often considered a *sui generis* polity, and is recognised as a multi-level system of government. The European Parliament defined it a supranational democracy. It can be analysed from different perspectives, but essentially it challenges traditional notions of modern politics associated with the nation-state. In this paper I will argue that it may be reasonable to consider it as the laboratory of a new form of supranational federal democracy.

To argue my case it is necessary to assess what is the EU in comparison with a federation. Such an assessment requires an historical and dynamic perspective, and not a static one, to assess if there are consistent trends in its development. I am inspired by an old academic debate on federal studies about the opportunity to focus on federal institutions from a legal and static perspective, or rather on federalising processes. Wheare's approach, systematised in his seminal work *Federal government*, was criticised for being too static - even if beside the actual design and functioning of federal government, it analysed also the reasons why a federal arrangement would be a suitable choice, and had a pioneering comparative perspective. Friedrich's classic *Federalism in theory and practice* moved the debate to a more dynamic conception of federalising processes. Elazar followed Friedrich's path, trying to propose a federalist paradigm throughout his works, and summarised in *Exploring Federalism*. However, his dynamism brought him too far, jeopardising the very basis of federal studies, as Elazar tended to consider any institutional settings between a unitary state and an international organization within federal arrangements. This way he blurred together the classic distinction between federation and confederation, which had been the basis of federal studies since the creation of the American federation and the publication of *The Federalist Papers*. Albertini's *Il federalismo. Antologia e definizione*, proposed a complex theory of federalism as an active political thought, combining a dynamic vision of federalising processes with a firm classic definition of the federal state institutions.

A similar debate needs to take place with regards to the EU. Far too often after each new Treaty comes into force, a new wave of studies describes the new features of the



EU and often attempts to identify new trends and suggest that whole phases of the integration process are open or closed on the basis of that last step. Unfortunately, such analyses tend to last only until a new Treaty enters into force<sup>I</sup>. Such attempts at drawing long-term conclusions from the analysis of relatively short-term developments are fashionable, because there is always a heated academic and public debate on the EU, but their short life suggests that they are methodologically weak. It is more sensible and fruitful to interpret the short-term developments in the light of a long-term analysis of the process<sup>II</sup>. To do that it is necessary to address the proper level of analysis, and to combine the most fruitful insights of the main integration theories, which I will do in the first section.

I will then summarise the whole development of the European integration process to identify the main institutional trends. Such an analysis will also highlight the relevance of classical categories such as federation and confederation. I will suggest that there is a rather consistent trend towards an expansion of EU competences and towards strengthening supranational decision-making processes. In other words, I claim that while at any time from 1950 until today, a static view of the EU would suggest that it has both federal and confederal features, a dynamic view shows a significant increase of the former over the latter. On this basis I will discuss the current crisis and the possibility that it may trigger new steps forwards, contributing to the establishment of a new kind of supranational federal democracy.

## **1. The theoretical toolkit for a long-term analysis of the EU development**

Peterson (1995) suggests that the EU can be studied at three main levels of analysis: super-systemic, systemic and sub-systemic. History-making decisions, basically corresponding to constitutional politics, are his super-systemic level, on which so-called grand theories have focused. They can be broadly grouped into three families: the intergovernmentalist, the neo-functionalist, and the federalist traditions<sup>III</sup> (cfr. Rosamond 2000). They differ with regards to the identification of the key players in the process; the motives (economic, political, ideological) of their choices; the relationship between



economic integration and the creation of supranational institutions and decision-making procedures; the dynamics of the process and the decision-making mechanisms that determine it; and the possible/desirable ultimate goal of integration. For different reasons and in different ways all have difficulties in explaining - not just foreseeing - the "time" of the various steps of European integration, which is a crucial element of the process. All traditions passed through phases of revision or spread according to the relative congruence with a certain stage of the process. It is not possible to analyse them in any detail here (see Castaldi 2005), but I will consider their different views about the main actors and their agenda setting power with regards to constitutional politics. This will necessarily include an examination of their explanatory capacity regarding the timing of constitutional politics.

### 1.1. Identifying and analysing the actors of European constitutional politics

The intergovernmental - or confederal or internationalist - school of thought identifies national governments as the key players that control the integration process. Constitutional politics revolved mainly around Treaty reforms that result from Intergovernmental Conferences. The dynamics of the intergovernmental bargaining is thus the key element to be analysed. Moravcsik's sophisticated liberal intergovernmentalism (see especially 1991, 1993, 1995 and 1998) also considers the interaction with domestic constituencies and stakeholders as determinants of the national preferences that confront each other within the European intergovernmental bargain. Usually intergovernmentalism essentially discharges European institutions as main players in constitutional politics. However, against the initial assumption that member states would not to give up their sovereignty to supranational bodies<sup>IV</sup> and integration may bring about at most a confederation, intergovernmentalist thought had then to explain the gradual but significant strengthening of the supra-national or federal features of the EU. Moravcsik deals elegantly with this problem suggesting that European institutions are instruments to ensure a correct implementation of the grand bargains that would otherwise not have been applied entirely by some member states because of their relative costs.

The neo-functionalist strand initially interpreted European integration as a gradual dynamic process superseding states' absolute sovereignty. Integration would eventually lead to political union under the leadership of technocratic elites heading supranational



institutions. The political entrepreneurial role of the European Commission as agenda setter, steering the integration process has been traditionally emphasized by neo-functional scholar. However, after the Empty Chair crisis a significant theoretical revision took place, acknowledging the significant role of national governments too. In the second 1968 edition of his classic *The Uniting of Europe*, Haas proposed a profound self-questioning and criticism, acknowledging the central role of states and national governments, the limits of supranational technocratic elites, and especially the possibility that, instead of spill-over, other integrative or disintegrative dynamics could take place. On this basis, an extensive neo-functional literature highlighted the concept of spill-around, build-up, retrench, muddle-about, spill-back, encapsulate, each of which indicated a possible dynamic of strengthening or weakening of both institutional and decision-making mechanisms and the enlargement or reduction of the areas involved (see Lindberg and Scheingold, 1970 and 1971; Schmitter 1969 and 1971). The theory thus assumed a markedly analytical character, potentially able to describe any evolution of the process, but without developing a proper analysis of the factors that could lead to one or another scenario, and therefore remaining unable to predict the process future developments. Therefore by abandoning a progressive and optimistic vision of the process, and the ultimate goal of political unification, it also lost its capacity as a guide and drive for political action.

The federalist tradition considered the integration process as an incomplete response to the crisis of the nation state, which would rather require the foundation of a European federal state through a constitutional process democratically involving European citizens. The role of personalities and movements in favour of European unity and the constituent potential of the European Parliament have been at the centre of much federalist literature.

Each theory essentially stresses the role of one set of actors, among those actually involved at different times in constitutional politics. A further limitation common to all macro-theories, then largely filled by the European constitutionalism literature, is the systematic underestimation of the role of the Court of Justice in advancing the process. This is a structural but understandable limitation for the intergovernmental theories that focus on the Member states and their negotiations. Such an underestimation is less understandable for the neo-functional theories that, by stressing the importance of



creating supranational technocratic elites, could consider the Court, and also the Commission, as a supranational institution characterized by such distinctive features. Such an underestimation is indeed strange for the federalist theories given the role played by the Supreme Court in developing the powers of the U.S. federal government, and Hamilton's observations about the crucial role of the judiciary within a federation.

However, within the federalist tradition, some authors developed a more sophisticated view of the dynamic of constitutional politics, of the role of the various actors and of its timing. This view was theoretically developed by Mario Albertini, also on the basis of an analysis of Spinelli's own activity, and focused on three elements: crisis, initiative, leadership. It was reached investigating why in certain moments the federalist theses had achieved widespread success in the political class, while in other cases they remained on the margins of public debate and not included in the official political agenda. It was necessary to identify the mechanisms and actors that marked time in the process of European unification. Experience showed that the supranational institutions, national governments, European and federalist personalities and movements had all played an important role in some specific moments, but not in others. It was thus necessary to conceptualize their interaction to understand the dynamics of the process and when it provides windows of opportunity for federalist proposals. This requires going beyond the traditional formulations of the various theories, including the federalist one. The result of this theoretical effort was a tripartite scheme focused on the concepts of crisis, leadership and initiative, which helps analyse the dynamic of the unification process.

The crisis refers to the acute social perception of a problem which has a supranational character and cannot thus be structurally solved at national level. When such a crisis arises, it is possible for new initiatives to transfer competences or powers to European level to solve the crisis - often promoted by pro-European figures, organizations, etc. - to find a favourable audience within the political class and the public<sup>V</sup>. Only if a European leadership - which can be provided by a national government, usually a Prime Minister or a foreign minister, or by a European institution - takes the initiative upon itself can it enter the official political agenda, and eventually, after a usually complex negotiation, be agreed upon in its main tenets if not completely<sup>VI</sup>.

I would like to stress that there is no inevitability implied by this scheme. There could have been, and in fact there were, several crises on which no effective initiative to



strengthen European integration was developed, or which did not find a suitable European leadership to put it on the agenda. The 1971 collapse of the Bretton Woods systems brought about a vast debate on monetary union culminated with the Werner Plan to establish a monetary union by 1980<sup>VII</sup>. The 1973 Oil Shock contributed to the demise of the Plan, and the only step forward on the monetary field was the establishment of the European Monetary System in 1979.

Furthermore, it is possible that the acute social perception of a crisis fades away, or that the European leadership collapses or is unable to gather the necessary consensus for the initiative to be approved. For example the Korean war and the following American demand to rearm West Germany brought about Monnet's initiative of a European Defence Community that was taken up by a European leadership provided by the French Pleven Governments. Spinelli seized the opportunity to suggest that a European army without a European government would undermine democracy throughout Europe, and De Gasperi provided a European leadership which brought to the EDC Treaty art. 38, and to the subsequent establishing of the Ad Hoc Assembly to draft a Treaty/Constitution for a European Political Community<sup>VIII</sup>. The end of the Korean War, Stalin's death, the collapse of the Pleven and De Gasperi governments before the whole decision making procedure was completed eventually contributed to the fall of the EDC at the French National Assembly on a procedural vote thanks to the alliance between Gaullists and communists.

Also the tension and contradictions, or the progressive application, of the European norms and institutions can occasionally play the role of the crisis, i.e. of windows of opportunities or catalysts for debates and possibly decisions on the competence and/or powers to the European level. For example the end of the transitory period of the Common Market with the foreseen introduction of QMV, coupled by the Hallstein Commission's proposal, led to the Empty Chair Crisis and eventually the Luxembourg Compromise. This shows that this theoretical scheme is not teleological and can be useful to explain the timing and the agenda setting of European constitutional politics, both with regards to its success as much as its setbacks.

Another useful example to grasp the significance of the scheme is the second Iraqi war during the Convention. This divided the member states governments, with some of them siding with the US notwithstanding Eurobarometer suggesting that 80% of European citizens, and anyway a majority of them in each and every European country, opposed the



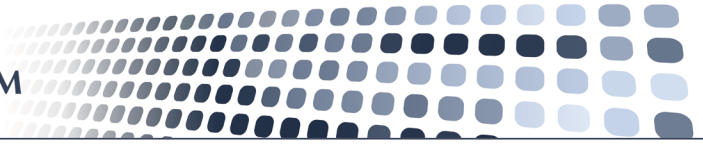


war. A military crisis brought about an initiative on military issues: France, Germany, Belgium and Luxembourg proposed and obtained the inclusion of the provisions about permanent structured cooperation on defence in the Constitutional Treaty, and then in the Lisbon Treaties. The changes in the international environment and in the national governments explain why those provisions have not been employed so far. Similarly the dramatic international change in 1989 led not only to the IGC on economic and monetary union but also an IGC on political union. The first produced the three stage plan to reach the Monetary Union which eventually resulted in the Euro. The second essentially failed, and brought to the formal attribution to the EU of some concurrent competences - the second and third pillars of the Maastricht Treaty - with basically no powers and effective institutional mechanisms to handle them.

These examples suggest that the crisis alone does not necessary bring steps forward. The crisis-initiative-leadership scheme helps to identify the relevant actors of constitutional politics at different times, and to analyse the timing and process of constitutional politics agenda setting. The other two crucial elements to be considered are the content of constitutional politics and some of its characteristic dynamics. Furthermore, there can be structural problems that only occasionally turn into a socially perceived crisis. Nonetheless, their underlying persistence can sustain a certain phase of the unification process and can be the basis of the activities of the federalist personalities and organizations. The contradiction of a monetary union not accompanied by an economic and fiscal one, has been the basis of federalist campaigning for a European constitution since 1992. The "asymmetry" of the planned EMU and the enlargement played a major role in the 2000s, and in the set up of the Convention, even if the Constitutional Treaty fell short of establishing a European economic government while the Penelope Project by the European Commission pointed in that direction.

## 1.2. The content and dynamics of European constitutional politics

In all multi-level systems of government – especially in federations, that are the democratic state-form of such systems – constitutional politics deals mainly with two issues: the competences of the different levels of government, and the powers and



decision-making procedures related to those competences. This fundamental recognition is shared by all main theories, even if adopting different words and stressing one element more than another as determining the dynamics of the whole process.

Albertini distinguishes construction, integration and unification<sup>IX</sup>. The concept of "unification" refers specifically to the political process related to the progressive overcoming of absolute national and exclusive sovereignty, through its transfer or pooling with regard to a defined and limited number of issues at European level. This is the general concept to capture the historical significance (from a long-term perspective) of what is usually called European integration. Unification, therefore, includes both the gradualist phase and the possible and eventual decision to set up a European federal state. The historical significance of the process was the unification of several states and is based on two aspects: the integration of competences and the construction of supranational institutions. The term "integration", whose semantic connotation refers to something technocratic should be used instead to focus on the competences attributed at European level, which historically have been accumulated mainly through a process of economic integration along an essentially neo-functionalist path<sup>X</sup>. The term "construction" indicates the process of institution building in Europe, which can be analyzed by using constitutional or federal criteria. Its semantic connotation refers to the element of planning and the political will necessary to "build" Europe, i.e. its institutions and decision-making mechanisms, or its powers.

To put it in a nutshell, the process of unification was conceived for the function of transferring competences from national to European level with the consequent implementation of European policies (integration) and the building of institutions and decision-making mechanisms to manage these responsibilities (construction). The decision to create the common market, and then the common agricultural policy, the single market, the single currency, the area of internal freedom provided by the Treaty of Schengen, are all examples of integration. The direct election and then the extension of the powers of the European Parliament, the introduction and then the extension of qualified majority voting in the Council, the creation of the European Central Bank, and other aspects related to decision-making and to the institutional structure of the Union are examples of institutional construction.



Similarly the neo-functionalist revision which followed the Empty chair crisis identified several possible dynamics to account for a strengthening or weakening of both institutional and decision-making mechanisms and the enlargement or reduction of the areas involved (see Lindberg and Scheingold, 1970 and 1971; Schmitter 1969 and 1971). Moravcsik holds a very similar view, by distinguishing between the “substantive agreement” - reached in one of the “grand bargains” characterizing the stages of the process - on economic issues (policies, funding, etc.) and the following “institutional choices”.

Different theories held different views about the dynamics of constitutional politics and of its two main contents: competences and institutions, integration and construction.

Moravcsik suggests that “institutional choice” is always subordinate and functional to the previous and essential “substantive agreement” - reached in one of the “grand bargains” characterizing the stages of the process - on economic issues (policies, funding, etc.). This is a necessary stand for liberal intergovernmentalism which considers European institutions merely as an instrument for the correct enforcement of the bargains. Moravcsik gives priority to integration, the establishment of policies and the transfer of expertise and possibly resources, rather than to selected institutional choices, although acknowledging that the element of novelty characterizing the Community and then the Union was its own institutional framework.

On the contrary, Albertini argues that the level of construction is the key variable to assess the unification process, because the achievement of certain objectives, including the economic ones, is not possible without a sufficiently democratic and efficient institutional framework. This idea fits with the distinction between “positive” and “negative” integration (see Pinder and Pryce 1969; and then Pinder 1989) developed to explain the initial success of the EEC in establishing a Common Market by eliminating obstacles, and its failure to develop a single market until the SEA introduced QMV, which was initially foreseen at the end of the transitional period, and which contributed to the Empty chair crisis<sup>XI</sup>.

Albertini also developed a normative vision of this interaction, bridging Monnet and Spinelli’s initial positions, and eventually theorizing constitutional gradualism, summarised by the program: European election, European currency, European government (see Albertini 1966, 1969, 1971, 1976, 1979, now all in 1999b; and 1968, now



in 1999a; see also Pinder 1985). He took note of the gradual nature of the process, while stressing the need for a democratic constituent transition to reach political unification, and focused on the conditions for the possibility of such a constituent process. It could only begin when Europe had achieved significant powers that affected citizens' lives, while its institutional structures and decision-making procedures were not yet fully democratic, but only potentially democratic. The direct election of the European Parliament - substantially powerless at that time - and the creation of a single currency were identified as the key partial goals of the process. Together they could lead to the contradiction of a European power without a European democratic government. This could be the basis for a potentially successful struggle to start a constitutional process designed to create a federal constitution and government. Indeed the constitutional language, dismissed with the fall of the European Defence Community Treaty in 1954, came back with the Convention and the Constitutional Treaty, when those two intermediate goals had both been reached.

I suggest that there is a continuous and complex interaction between integration and construction, and that none of them can be considered as a dependent variable of the other (see also Montani 2008). The fact that sufficiently strong and democratically legitimised mechanisms for decision-making institutions are necessary in order to achieve shared goals has been historically proven: for example the introduction of majority voting in the Council, provided by the Single European Act of 1986 only with regard to the creation of the single market, was clearly linked to the objective of establishing the Single market by 1992. This required the adoption of over three hundred directives, impossible to be achieved unanimously. Nonetheless, most deliberations were then passed unanimously, because when QMV applies, all states have an incentive to cooperate in drafting the bill, and not to be outvoted. On the other hand, when unanimity is required, there is little incentive for compromise since each government knows it can block any decision that does not satisfy its demands.

At the same time, the history of the process also shows the opposite case, namely aspects of the institutional construction that have triggered other changes both at the level of construction and integration. Two examples are particularly relevant. The creation of the Court of Justice whose power is binding has led to an expansion of Community competences and powers through the jurisprudential affirmation of the principles of implied powers and of the primacy and direct applicability of the EU rules<sup>XII</sup>. Similarly, the



direct election of the European Parliament has triggered a process of continuous and progressive increase in Parliament's powers during all subsequent amending of Treaties. Moreover, the initiative of Parliament with the approval in 1984 of the draft Treaty of European Union, also known as Spinelli Project, favoured the re-launch of the integration process through the Single European Act transposing some of the content of that project, especially with regard to the aim of the single market, as well as other parts that have been recovered by subsequent treaties (see Lodge 1984 and 1986).

The interaction between construction and integration takes time. They are like two columns on which unification is based. If they are not developed symmetrically a dynamic tension arises. But improvements can start on each of them first. This distinction also helps to focus on the longer term, generally progressive but not linear, trend of the unification process. Generally, when a new competence is attributed at European level – i.e. a new step of integration is made – it is handled through essentially intergovernmental procedures. Only when a positive result is achieved, but not all potential advantages are achieved due to the constraints of unanimity, does a communitarization of the relevant decision-making procedure take place.

The 1957 Rome Treaty provided for a transitional period in which unanimity applied, before establishing QMV. The Empty chair crisis and the Luxembourg compromise prevented this, and the establishment of a complete European market had to wait until 1992, after QMV was introduced in 1986. The 1992 Maastricht Treaty provided for the creation of the monetary union, and for the first time attributed to the EU new competences in the fields of foreign policy and justice and home affairs – the so-called second and third pillars – on strictly intergovernmental terms. Many scholars, especially intergovernmentalists and neo-functionalists, suggested that the Treaty checked the progress of supranationality, reinforcing the intergovernmental character of the EU. This was a short-term and short-sighted view, disconfirmed by the fact that all subsequent treaties up to Lisbon have abolished the three-pillar structure, and progressively if not completely extended the use of QMV, the co-decision procedure of the Parliament, the role of the Commission and the judicial role of the Court of Justice also in these fields. I have already summarised the impact of the Court of Justice and of the direct election of the Parliament in triggering new powers and competences at European level.



All this shows the usefulness of the distinction between integration and construction within the unification process. A significant increase in competences or power alone is likely to result in an increase in the other elements too. Historical record suggests that none of them can be considered as a variable dependent on the other, but that adequate attention must be paid to their interaction.

To project a long-term view onto the process I have so far developed a theoretical toolkit based on two analytical schemes. The first analyses the timing of the agenda setting of constitutional politics and the relevant actors through the concepts of crisis, initiative and leadership. The second focuses on the content of constitutional politics distinguishing between unification, integration and construction and investigating their interaction, without giving analytical preference to any of them. I will now employ this theoretical toolkit to analyse the European unification process and assess if there are significant and consistent trends that can project some light on the definition of the EU.

## 2. The EU: a federation in the making?

For decades the literature has dealt with the definition of the EU, exploiting the federal versus confederal models or ideal types. And any sensible author has invariably concluded that, since 1950, the European institutional setting has been characterised by both federal and confederal elements. Many scholars have thus suggested abandoning the federal and confederal models altogether, as the EU would constitute a hybrid model. This argument is basically flawed as it stems from a static view of the EU, rather than from a dynamic one.

The unitary state, the federal state and the confederal organization represent models because each of them historically existed and manifested a reasonable degree of stability. They are models because they seem to represent a reasonable institutional crystallization of certain types of social preferences with regards the attribution of ultimate decision-making power about fundamental social issues. Between these models there can be several kinds of organizations with characteristics of two models, but they would



probably be institutionally unstable. An inherent tension would push for institutional reform towards one of the models. The EU perfectly fits this option. The very fact that its institutional transformation – in terms of competences and powers - is the core of the unification process, suggests that it cannot be taken as an institutional model. If and when it will achieve a reasonable institutional stability, keeping federal and confederal features, it may be proposed as a new institutional model or ideal.

From the Schuman Declaration of the 9th May 1950 up to the Lisbon Treaties, there has been a relatively consistent trend towards the increase of European competences and/or powers. The transfer of competences and powers has not always proceeded at the same pace. Often a transfer of competences, to be handled in a purely or mainly intergovernmental manner, preceded the actual transfer of powers and/or the set up of supranational decision-making procedures with regards to those competences. The opposite was also true: the direct election of the European Parliament preceded the achievement of real powers by the Parliament with regards to the various European competences. There are two major exceptions to this trend, and two mixed ones, more difficult to be assessed properly

The European Coal and Steel Community was created with limited competences and extensive powers on those competences, mainly vested in the High Authority - among them legal personality, fiscal powers with regards to coal and steel, and the possibility to contract debts. The Korean war and the American request for German rearmament resulted in the proposal for the European Defence Community, and to the linked Ad Hoc Assembly and European Political Community Draft Treaty. Their collapse was the first major exception to the trend of increasing European competences and/or powers. However, it should be observed, that this prevented a new transfer of competences and power, but did not unravel anything that had been already achieved.

The 1957 Rome Treaties is usually considered a great success. However, it can be considered a mixed case. Indeed, they provided a significant increase in competences, thus strengthening integration. At the same time they granted more limited powers than the ECSC had done for handling those competences. The new Communities in particular were not assigned a legal personality, and the supranational executive, the High Authority, was now called Commission, and was not granted the fiscal and borrowing capacity which characterized the ECSC. The end of the transitory period of the EEC - within which new



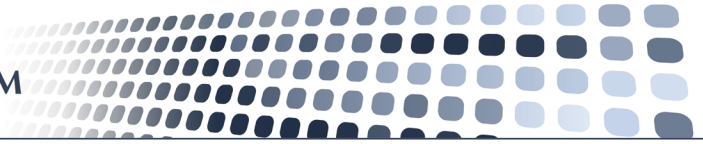
European policies, such as the Common Agricultural Policy were created - the Hallstein proposals and the scheduled arrival of qualified majority voting provoked the Empty chair crisis and the Luxembourg Compromise. This essentially prevented the full application of the Rome Treaty and was the second major exception to the mentioned trend.

In the meantime the European Court of Justice shaped the process through its sentences, establishing the European system as an autonomous legal order, the prevalence and direct effect of European norms, and later on the mutual recognition principle. Since then a significant and consistent trend can be discerned, punctuated by the creation of the European Council; the establishment of the European Monetary System; the direct election of the European Parliament; the Single European Act and the creation of the Single Market; the Maastricht Treaty, significantly expanding the European competences and setting the path towards monetary union, which brought to the creation of the European Central Bank and the Euro; the Amsterdam and Nice Treaties which provided for limited increases of European competences and for more supranational decision-making by strengthening Parliament and increasing the use of QMV.

The collapse of the Constitutional Treaty was the second mixed case or the third possible exception. Its content has been almost completely incorporated into the Lisbon Treaties but purged of all constitutional language. It is still difficult to assess how this will impact on the process. It certainly provoked at least a significant loss of time and impetus. The Lisbon Treaties communitarised most competences granted at Maastricht, strengthened Parliament and the Commission by establishing a closer link between the two and by acknowledging their power to initiate the treaty amendment procedure, made the use of enhanced cooperation easier, and established the possibility for a group of countries to go forwards on military integration through the brand new permanent structured cooperation on defence and, by means of the *passerelle clause*, made it easier to pass to QMV as regards those competences where unanimity still applies.

A dynamic analysis of the development of the EU indicates a relatively consistent trend of the strengthening of its federal features, punctuated by a number of significant institutional developments. The Court of Justice has essentially a federal character, and its jurisprudence – much like the early US Supreme Court – has significantly strengthened the federal character of the European legal order. The direct election of the European Parliament and its gradual but continuous increase of powers, accompanied by the



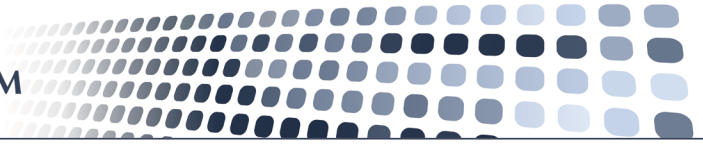


introduction and progressive expansion of QMV, up to the introduction of the double majority principle, also strengthened the federal nature of the EU. The European Central Bank and the Euro are clearly federal institutions. The expansion of the Union competences to comprise essentially all those characteristic of federal states, at least in a concurrent form, and the gradual but continuous communitarization of the relative decision-making procedures, also points in this direction.

There were other institutional developments less amenable to a clear classification between the classic federal vs. confederal model. The European Council was initially established on the basis of Monnet's proposal to create a European provisional government on an intergovernmental basis as a step towards a proper European democratic government. The Lisbon treaty provides for the election of the Commission by Parliament when proposed by the Council, taking into account the results of the European election. Potentially, the Council may assume the character of a collective presidency, with a power similar to that recognized in countries like Italy and Germany for the President. At the same time, the creation of the permanent president of the Council pushes towards a dual executive, made up of the Commission and the European Council. However, the possibility – not excluded by the Treaties – of merging the position of President of the Commission and of the European Council, may trigger a different dynamic.

Recalling the whole EU development it is hardly surprising that, within comparative law and politics, the EU has started to be systematically compared with federal polities<sup>XIII</sup>. Indeed, the EU is not (yet?) a fully-fledged federation. But it resembles a federation more than anything else (Dosenrode 2007). This was not the case at the beginning of the process. Therefore it may be reasonable to dynamically conceive the EU as a "federation in the making", as suggested long ago by federalist scholars<sup>XIV</sup>.

What is missing from the EU for it to look like a fully-fledged federation? There are only a few but important features lacking: the complete abolishment of unanimity, even as regards approval and ratification of Treaty/constitutional reforms, the budget, and security policies; and the attribution of fiscal powers and a full co-decision for the Parliament for defining revenue and all expenditures. It is possible to argue that two more elements are needed: a clear identification of the federal government with the Commission, rather than the current dual system based on the Commission and the European Council, and a significant federal competence with regards to the military and security issues.



However, the establishment of the Commission as a federal government may well be possible under the current institutional arrangements. It would be enough for the European parties to present a candidate and a program for the President of the Commission to politicize the European election and strengthen the Commission's popular legitimacy and its role as a federal government. It would be politically impossible for the Council not to propose the candidate receiving most votes and able to form a majority coalition in the Parliament as President of the Commission. Furthermore, even with the current institutional setting it is possible to nominate the President of the Commission as President of the European Council too, creating de facto the President of the Union. Eventually, the direct election of a single President for the two posts could create a new form of dual executive with a strong legitimate head to ensure the coherence of the two bodies.

As far as military issues are concerned - even if Riker was right in noticing that security concerns played an important if not decisive role in all federalising processes - considering that Europe does not face significant military threats, it may well be possible that such a competence remains a concurrent competence. Looking at the European unification history, it is possible to suggest that security was one of the last competences to be granted to the EU, and it will take some time to communitarise or federalize it.

### **3. Overcoming the current crisis: towards a European supranational federal democracy?**

The long constitutional process that started at Laeken and concluded with the ratification of the Lisbon Treaties has produced in the actors involved a sense of "fatigue". Some of the leading European politicians have emphatically declared that the 'Pandora's box' of institutional reform will not be re-opened for a long time to come. The Lisbon Treaties would thus be the last of the series opened by the Single European Act (SEA), and continued through Maastricht, Amsterdam, Nice, and the failed Constitutional Treaty. Indeed, the Lisbon Treaties were written as if they had to last for a long time. There is no evolutionary clause, unlike the Maastricht, Amsterdam and Nice Treaties, which all



acknowledged the need for a new reform within a certain time, or when the EU reached a certain number of member states, or to deal with the “leftovers” which the last Treaty had not been able to tackle. However, the agenda of constitutional politics is largely the result of external factors to which the main actors have to provide answers, and which can be observed through the conceptual scheme outlined before with regards to crisis, initiative and leadership. Furthermore, there are internal EU institutional dynamics that cannot be easily circumvented.

This hybrid institutional setting which was supposed to become stable after Lisbon has been shaken by several tensions and structural crises which are triggering a new round of decisions in constitutional politics. It is now clear that the Lisbon Treaties did not equip the EU with adequate powers to cope with all these problems. The issues of competences and powers – the contents of constitutional politics – are coming to the fore again.

The EU, and particularly the Eurozone, is now in the midst of a severe crisis, which has spurred a major debate on how to solve it, and resulted in several proposals and initiatives. Essentially, a new Treaty is in sight, and constitutional negotiations are open again. The current crisis is the result of two different crises<sup>xv</sup>.

The 2008 financial crisis which started in the US brought a significant slowdown of the world economy. The EU was unable to provide credible answers because the member states had to comply with the Stability Pact, and the EU budget is too small to provide a stimulus. The economic and financial crisis of 2008 thus hit Europe significantly. The limits of a situation characterized by a single market, a single currency and twenty-seven national economic and fiscal policies started to be socially perceived. Faced with the economic crisis, the EU, which is the world’s largest economy, has launched a 1.5% stimulus plan through the national governments. The US, with higher public debt and lower private saving, launched a 5.6% plan; and China a 7% plan. If national budgets must be kept under strict control to avoid “beggar-thy-neighbour” policies, the task of the economic re-launch will have to be dealt with collectively at European level, which requires a structural transformation of the European budget and of its revenues sources.

The weak economic growth at a time of financial instability was followed by the Irish Government’s intervention to save its banking system and by the new Papandreu Government uncovering wide-scale fake data in the Greek budget of the previous government. These are two small countries at the periphery of Europe, which in 2008



made up about 7% of the Eurozone public debt, that started the sovereign debt crisis. A decisive move by the Eurozone could probably have calmed down the markets. But it did not come. Austerity measures were imposed all round. Economic downturn followed. The ability of those countries to repay their debt faced with spiking interest rates and recession further decreased. The sovereign debt crisis got worse and now involves Portugal, Italy, Spain, and has started approaching France.

The sovereign debt crisis is putting the monetary union at risk and puts the issue of the economic and fiscal governance at the centre of the political agenda. The Council has discussed several proposals with an essentially intergovernmental character, up to the signing of the so-called Fiscal Compact. The Commission initially made relatively weak proposals to ensure a better coordination of national fiscal policies (“Reinforcing economic policy coordination” - Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social Committee, and the Committee of the Regions of 12/5/2010) and only later on developed bolder proposals. The ECB, which felt most of the pressure from the market, was the first to explicitly demand more powers from the Commission and for new decision-making procedure to be agreed upon (“Reinforcing Economic Governance in the Euro Area”- 10/6/2010) that were then also supported by the Commission.

The establishment of the European Financial Stability Facility, the provision of a new permanent European Stability Mechanism, then anticipated by one year, and other such measures did not convince the markets. After about twenty European Council meetings aimed at saving the Euro and confirming the will to do "all that it takes" to save the monetary union, the crisis is still ravaging Europe and undermining growth throughout the world. Member states pledged around 5% of GDP to the EFSF over time. Had they done that at the beginning it would have almost completely covered the Irish and Greek debt, avoiding the spiking interest rates and the following worsening of the crisis. But fiscal indiscipline had to be punished. Essentially, the German government view that the crisis was due to lack of fiscal discipline is still prevalent. Unfortunately, it does not stand close scrutiny. The fundamental macroeconomic indicators in the Eurozone are much better than in the US and Japan in terms of public debt and deficit, of public reserves, and of private savings. The EU is the largest economy in the world and it has the best public finances among the most developed countries. What it lacks is a government. Nobody is in



charge. Therefore the EU was unable to intervene at the start of the crisis, and still now does not offer convincing answers to the markets. Essentially, the issue is that a single market of twenty seven countries, a single currency for seventeen countries, without a single fiscal and economic policy, does not stand up.

The national governments have now decided to draft a new intergovernmental treaty to provide for semi-automatic sanctions for countries in breach of fiscal discipline and substantially curbing their fiscal sovereignty, putting their fiscal and budget decisions under substantial European control. This would be an enhanced Stability Pact rather than a proper fiscal union which is the declared aim.

However, the Commission presented different documents about a European tax, and even Eurobonds, notwithstanding the first being opposed by the British and the second by the Germans. Eventually, especially on the first issue, and despite the British refusal to participate in the new intergovernmental treaty, an enhanced cooperation, or the inclusion in the new Treaty of the first proposal was agreed upon. And pressure is building on Germany to accept the creation of Eurobonds in return for the strengthening of the Stability Pact.

For a long time, the European Parliament was the weakest institution, but following its direct election it has acquired a strong legitimacy. Since then, the Parliament has continuously demanded and progressively achieved new powers. And it always made use of the new powers acquired. The Lisbon Treaties recognizes to the Parliament the power to initiate a Treaty Reform. This was precisely what it lacked at the time of the 1984 Spinelli Draft Treaty.

The Parliament already started a political struggle about the long-term prospects of the European budget and the demand for own resources. The Parliament also proclaimed that it will propose an alternative plan to the intergovernmental Treaty - even though now it seems satisfied with the fact that four MEPs will be invited to the negotiations of the new Treaty, and the EP designated all members of the Spinelli Group, which gather politicians and opinion-makers in favour of a federal Europe. However, within the Parliament there are already discussions about different amendment proposals, mainly proposed by Andrew Duff, a liberal MEP, president of the parliamentary branch of the Spinelli Group and of the Union of European Federalists. One proposes an enlargement of the number of MEPs to create a Europe-wide constituency beside the national ones.



Another suggests to reform the Treaty amendment procedure, substituting the unanimity of the ratifications with a 4/5 majority. After the decision to draft a new intergovernmental Treaty was reached, Duff proposed a whole specific agenda for a new Convention. If adopted it would imply significant steps towards a European federal government for the economy, and an economic federation or a European federal democracy without military competences.

All these issues can be seen in the current debates and agendas of the European institution and in the inter-institutional dynamics. The European unification process shows that often the integrative proposals which were not approved at one time were then inserted later into the Treaties. Some scholars suggest for example that more than 80% of the 1984 Spinelli Draft Treaty has been incorporated into the Treaties (see Ponzano 2007 and Bonvicini 2010), and the current debate relates to much of the rest.

It should be noted however that, even if the most advanced proposals were adopted, the EU would still be quite different from traditional federations. From this perspective the idea of the EU becoming a "supranational federal democracy" can help to conceptualise the differences and the similarities alike. These regard institutional and fiscal issues alike.

The MacDougall Report suggested that even a fully federalised EU, including monetary, economic and political union, assuming entirely the burden of defence, would require a budget of between 7% and 10% of GDP at the most<sup>xvi</sup>, while existing federation usually have a budget of over 40% of GDP; the EU budget is currently 1% of GDP. The Member states have also pledged the equivalent of about 5% of GDP to the EFSF and the ESM. And their defence expenditure is about 1.6% of the EU GDP. The current situation thus seems to confirm the estimates of the MacDougall Report. Therefore, the EU would be a much more decentralised federation than any existing one, requiring a much more limited budget.

From an institutional perspective, while all federations are characterised by a second Chamber representing the member states, nowhere is such an institution as powerful as in the EU<sup>xvii</sup>. The existence of the European Council on the one hand and of the several formations of the Council of Ministers on the other, is a clear indication of the role of member states government in the EU institutional system. Even the proposals to make the Council more similar to the conventional second chamber would only partially



transform, rather than diminish, the enormous role of member states government in the EU institutional architecture. For example, the Convention proposal of the Constitutional Treaty to significantly reduce the formations of the Council providing for a single General Affairs and Legislative Council, transformed into a fully-fledged second legislative chamber, and a Foreign Affairs Council. But the proposal, aimed at ensuring higher legislative coherence, did not impinge on the paramount role of the European Council for example.

Furthermore, the linguistic and cultural differences make the formation of a potential European national identity unlikely, and not just undesirable. This is what Beck and Grande with their vision of a cosmopolitan Europe have been pointing out. This does not imply however that a supranational and post-national federal democracy cannot be established. The current crisis is showing how interdependent Europeans are. How the problem of even a small state can soon and easily become a problem for the whole Eurozone. To establish a fully democratic system to manage this interdependence and provide the consequently required European public goods would probably be more acceptable than continuing to go through endless intergovernmental negotiations and meetings that have so far proved unable to cope with the crisis.

## Conclusions

I have tried to show that a long-term dynamic consideration of the European unification process highlights a quite consistent tendency towards the increase of European competences and powers. This trend has made the EU more and more similar to a federation, even if it is not (yet?) a fully-fledged federation.

I discounted the possibility that the EU may constitute a new model or ideal type because it lacks the stability required. An institutional setting remains stable if it is able to satisfy, to a reasonable degree, the expectation of citizens by handling the main problems. The crises of the last few years have clearly shown that, even after Lisbon, the EU lacks many essential instruments to cope with them, and could jeopardise its own greatest



achievements, such as the Euro. This fundamental tension is behind the debates about new instruments, i.e. new powers and decision-making procedures, which is going on within all European institutions.

The current crisis has spurred a debate and an agenda, which includes several proposals that would further strengthen the trend towards a progressive federalization of the EU. They may or may not be approved. But the markets seem to consider that, up to now, the various intergovernmental solutions to the sovereign debt crisis attempted have been insufficient. This may provide a strong incentive to turn towards a more supranational and federal approach.

Indeed, the EU can be considered as the laboratory of a new federalism, precisely for being made up of nation-states with centuries-old stories and identities, unlike most other federations around the world (Pinder 2010). This forces the EU to identify new institutional avenues, to a certain extent more coherent with the federalist principles, and very respectful of subsidiarity. Within the EU a new kind of federal system is emerging. The current crisis is so structural and dangerous that the alternative between integration and fragmentation is more present than ever and brings back to mind Beveridge's advice: the alternative for the European states and citizens may now well be "unite or perish".

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\* This paper constitutes a thoroughly revised version of the one presented in March 2011 at a workshop on "Treaty Reform Beyond Lisbon?" held at the Robert Schuman Centre for Advanced Studies of the European University Institute, jointly organised with the European Union Democracy Observatory, the Centre for Studies on Federalism, the Sant'Anna Legal Studies, and the Max Weber Program of the EUI. I would like to thank Bruno De Witte, Giuseppe Martinico, Antonio Padoa Schioppa and all other participants at that workshop for their insightful and fruitful comments and criticisms on that paper, which helped me significantly in its revision. In that paper "Why Constitutional Politics Will Continue" I claimed, contrary to the common wisdom at that time, that a new wave of institutional reform was approaching. As events have confirmed that claim, which would now look obvious, I took away that part. But I employ here the theoretical framework on which that claim was based, to support the main thesis of this paper, namely that steps towards a federal democracy are needed to overcome the current EU crisis. I just had the opportunity to present the revised paper at the Seminario de investigadores of the Centro de Estudios Políticos y Constitucionales in Madrid in January 2012 before submitting this final version. I would like to thank Ana Mar Fernández Pasarín, Mario Kölling, Hélder Ferreira do Vale, and all other participants at the seminar for the very interesting and useful discussion we had on the paper, which again helped me significantly in the final revision, up to this current form, for which I alone am responsible.

<sup>1</sup> This attitude is rather widespread in the literature, also among scholars who have contributed significantly to the study of the EU. I will just mention as an example Mario Telò, whose analysis of the development of the EU is usually timely and insightful, even if the long-term effects foreseen after each new Treaty were not confirmed. Telò considers the Maastricht Treaty as a qualitative change, the first step and the start of a constitutional phase of European integration (1992, especially 85-88). In 1993 in a pioneering analysis of the European social-democratic parties he invites to study European parties and notices the inability of the functionalist dynamics to Europeanise parties. He then invites the social-democratic parties to take a more federalist stance, more coherent with the new constitutional phase of the process (1993, especially 30-35 and





46-50). Later on, in another pioneering book, when he launched the idea of new regionalism, he considers the Amsterdam Treaty as the end of the long evolutionary functionalist-federalist period and the come-back and the start of a new phase of intergovernmentalism, through the re-nationalization of part of the *acquis* (1998, especially 23, but see also 23-25). In just six years the European integration process would have changed phase twice. And other shifts would follow after each new Treaty.

<sup>II</sup> A useful methodological analysis of this issue with regards to the whole of social sciences is offered by Elias (1987).

<sup>III</sup> Beside these three schools of thought there are some theoretical precursors, not developed specifically in relation to the European integration process, which can only be mentioned here, i.e. transactionalism and functionalism<sup>III</sup> developed by Karl Deutsch (1953) and David Mitrany (1933, 1963, and 1965) respectively. There are also other interesting strands of research, that have not yet developed a fully-fledged theory of the process as such, namely social constructivism (For an overview of social constructivist research about European integration see contributions published in "Journal of European Public Policy", VI, no. 4, 1999, entirely devoted to this theme) - which stresses the role of ideas and social perceptions - and European constitutionalism (a useful overview of this vast literature is proposed by Martinico 2009, and the classic and fundamental contributions by Weiler 1999, and Mancini 2000) which highlights the fundamental role of the Court of Justice in the process. Considering the main focus of this paper an analysis of the neo-institutionalist scholarship could also have been undertaken. However, considering that the paper includes a normative conclusion, I have chosen to focus on the classic grand theories which share this approach of combining an analytical aspect with a normative one.

<sup>IV</sup> Obviously, an old-fashioned conception of unitary and indivisible sovereignty underlies this kind of view. There follows that the possibility to give it up to European institutions is considered as an essentially zero-sum game.

<sup>V</sup> That crises provide occasions to advance European integration was often mentioned also by Monnet and Spinelli (1976; Spinelli 1979, 1984, 1987, 1989, 1992a, 1992b).

<sup>VI</sup> A first sketch of this analytical scheme can be found in Albertini 1965 and 1966 with regard to the role of crises, in Albertini 1961, 1969, 1980 about the initiative role of the federalist organizations. I discussed it and tried to develop it further in Castaldi 2001, 2005, 2009, and 2010.

<sup>VII</sup> On the basis of Triffin's studies (especially 1966, 1971) the federalists organizations considered the prospect of the collapse of Bretton Woods as a potential crisis that could open the way to the monetary union, and developed several studies on the various aspects of such a plan throughout the Seventies [see Iozzo and Mosconi 1969; Majocchi 1974; Montani 1974; Moro 1974; Velo 1974a, 1974b, and 1976; Jenkins and others 1978; Movimento Europeo e Movimento Federalista Europeo 1978] as recalled by Tommaso Padoa Schioppa (2002).

<sup>VIII</sup> The failure of this attempt has contributed to bring scholars' attention away from it. A notable and useful exception is Preda's detailed studies (1990 and 1994).

<sup>IX</sup> See especially Albertini 1985 and 1986, both now in 1999a, particularly pp. 275-276 and 290-292. This distinction, however, was referred to much earlier in Albertini 1963, now in 1999a pp. 66-71. I discussed this proposal with reference to the contemporary academic literature in Castaldi 2005 and 2010.

<sup>X</sup> From a purely legal perspective Itzcovich (2005) analyses the concept of "legal integration" providing a useful review of the literature.

<sup>XI</sup> The Commission's power is much greater in a system in which its proposals can be approved by QMV and modified by unanimity, than in a system in which also the approval requires unanimity, and thus obliges the Commission to water down the proposals to gather a unanimous consensus.

<sup>XII</sup> Also on the Court of Justice's role however, there was a scholarly debate between intergovernmentalists (Carrubba, Gabel, Hanka 2008) on the one hand, and neo-functionalists and/or federalists on the other (Mancini 2000; Stone Sweet and Brunell 1998, 2010; Stone Sweet 2012).

<sup>XIII</sup> A consistent trend in this direction started after the Maastricht Treaty provided for a monetary union and the establishment of the European Central Bank. See among others: Hesse and Wright 1996; McKay 1996, 1999, 2001; Follesdal and Koslowski (eds.) 1998; Dobson and Follesdal (eds.) 2004; Nicolaidis and Howse (eds.) 2001; Filippov, Ordeshook, Shvetsova 2004; The Journal of European Public Policy, XII, 2005, no. 3, devoted to federalism and the EU; Fabbrini (ed.) 2005; Longo 2006, Hueglin and Fenna 2006; Finn 2010, Burgess and Pinder (eds), 2011.

<sup>XIV</sup> In addition to Albertini's papers already mentioned, see Burgess 1986, 1989, 2000; Burgess and Gagnon (eds.) 1993, 2010; Burgess and Pinder 2011; Dosenrode 2007; Levi 1979, 1990; Majocchi L.V. 1996; Montani



1999; Pinder 1984, 1985, 1986, 1993, 2002, 2010; Rossolillo 1975; Sidjanski 1992, 2001.

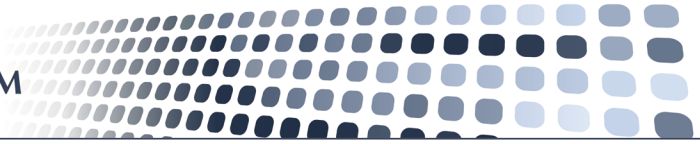
<sup>XV</sup> I have analysed this issue in more details in Castaldi 2010.

<sup>XVI</sup> Cfr. *Report of the Study Group on the Role of Public Finances in European Integration*, Vol. I, p. 70. The Report, delivered in 1977 is available at [http://ec.europa.eu/economy\\_finance/emu\\_history/documentation/chapter8/19770401en73macdougallrepvol1.pdf](http://ec.europa.eu/economy_finance/emu_history/documentation/chapter8/19770401en73macdougallrepvol1.pdf).

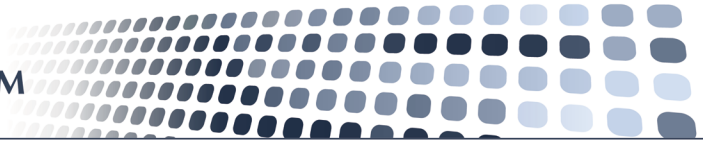
<sup>XVII</sup> For an overview of second chambers in federal systems cfr. J. Luther, P. Passaglia and R. Tarchi (eds.), *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milan, 2006.

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