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Bocconi Legal Papers

Law and Business: Profiles of European Law

In collaboration with Professor Andrea Biondi (King's College London)

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Personally, I have always interpreted *Bocconi Legal Papers* (BLP) as one of the most fascinating editorial projects enriching today's academic world. Born out of the desire to challenge current legal discussions, the energy and enthusiasm underpinning the realization of BLP publications find their further confirmation in this Volume.

Indeed, while proposing an editorial focus which still aims to reflect the legal tradition and research sensitivity of Bocconi University (much connected to the interrelation between law and business), BLP n. 7 has as its objective that to foster a critical dialogue on one of the most contentious subject matter attracting the attention of jurists, technicians, politicians, and citizens: the European Union, with its underlying forces, its weakening inconsistencies, and, especially, its unique features that make of it the most outstanding political and legal creation of modern times.

However, I have to admit that when, back in summer 2015, I first came up with the idea of dedicating the herein introduced Volume of BLP to «European Law», I could not have imagined that, in only few months, the European scenario would have evolved so dramatically: BLP n. 7 sees the light some days after the «Brexit» referendum. In this historical context, nevertheless, the value and the significance of this Publication have, if I may dare say, increased. Indeed, never before there has been a similar «need» to discuss and talk about the European Union. And this is why we, members of the Editorial Board, have opted for using the means we have (and, namely, this Journal) to encourage a positive and constructive debate on this enriching, fascinating project of economic and social integration. The following pages will thus present the European Union as it has evolved and progressed, and as it still deserves to be moved towards.

In conclusion, I would like to express my gratitude to those who have enabled the «energy» and «enthusiasm», mentioned in the first lines above, to take form and materialize in the pages of this Volume. The Authors for their active contribution.

All members of the Editorial Board for their valuable work. The Faculty Advisors for their irreplaceable support. A special thanks goes to Professor Andrea Biondi, whose expertise and advice have proven essential to shape the present BLP Publication.

Alessandra Moroni
Editor in Chief
Academic Year 2015-2016

Preface

I am finishing drafting this short introduction on the 23th of June. It is an extremely rainy day all over the United Kingdom and is the day of the «Brexit» referendum. What a day to comment on some extremely insightful, in depth, engaging analysis of the good things and also the bad things that the European Union is about. And still, I feel that the Editors should be commended for their choice to devote the whole issue of the *Bocconi Legal Papers* to European Law.

In times of crisis, and these are truly bad times, it takes some courage to keep on making the argument for a transnational and complex legal system like the European Union. Initially gathered in a simpler economic «community», the European countries have then gradually integrated into an actual «union» whose objectives and aims go further than the mere facilitation of commercial and business activities. The law of the European Community, first, and the law of the European Union, subsequently, have thus grown at an incredible pace over recent years and now span the most diverse economic and social fields. Nevertheless, such development of the European legal order has not occurred without difficulties and contrasts. In particular, the events that have marked the history of the last decade, both at the international stage and at the regional level, have certainly sharpened the complexities that challenge the progress of the European integration. Financial crises, immigration flows, environmental degradation, energy needs, market competition, international conflicts, terrorism: hints of some of the factors that have recently risked jeopardizing the stability and effectiveness of the Union. The consequent threats to the structural basis of the European Union find expression in both the challenging task faced by the European institutions to intervene in the most problematic sectors in order to provide for constructive responses, and the contrasting voices raising in each Member State of the Union and narrowly focused on national instances.

In such a complex context, the aim of the *Bocconi Legal Papers* is not, of course, that of providing an answer that fits it all. The contributions included in the present

Volume are instead devoted to some specific topics ranging from Energy, Taxation, Finance, Corporate Governance, and Competition. Despite their variety, there is a thread going through all of papers as they are all about «EU at its best», that is to say specific even practical regulatory approach (or in some of the cases the lack of) rather than grand and sometimes illusory constitutional designs. After all – and I really feel today is the right day to quote it, in the Schumann Declaration it says that «*Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.*»

And by the way, it still rains.

Andrea Biondi
Kings College London and a fan of Bocconi
London, 23 June 2016

Longing for a Lost Simplicity. Regenerating Europe: Why Not – (Minus) Instead of + (Plus)?

di Romano Ferrari Zumbini[1]

Law in a global context is steadily becoming a technological *machinerie* consecrated to the GDP cult, which appears to inform nearly every regulatory option. Fundamental values and symbolic choices (which, di historically have always represented the authentic foundation for stable and solid juridical rules) are neglected or blurred. This conclusion is clearly reflected in the juridical approach followed by the EU institutions: the European political construction is imbued by ideological categories stemming from the Enlightenment, and, as such, stresses an ever-constant strive towards «more progress», to be reached producing «more rules». This article argues for the opportunity of a change, contemplating the possibility of a multi-track approach-oriented, flexible, more linear and less bulimic Europe.
Juridical normativism – which has so far held sway over the EU institutional mindset – leads to consequences that can be analyzed through two focuses. The first focus is on overlapping, which has become a phenomenon inherent to the European juridical context and can be observed both at an institutional and at a regulatory level; the second focus is on the *fading-away of political responsibility*, which obviously reflects on the regulatory production and can be easily linked to the proliferation of so-called «technical» entities/Authorities, which rely on a frail, bureaucratic legitimacy, and prosper in an over-complex legal framework (themselves contributing to the intricacy with their own regulatory production). Thus, any attempt to foster the clarity and linearity of the system appears futile (notwithstanding a plenty of rhetorical calls for «better regulation» and «simplification»).
Providing examples and tentatively tracing some theoretical outline, this paper wishes to contribute to debate providing cases for a renewed outlook on European integration, based on a *sustainable (juridical) growth*.

«My ministers, during my reign I will sign all acts that you want me to sign, but I demand that such acts are well understood even by the most uncultured peasant at the outermost fringes of my empire»

Maria Theresa of Austria on the day of her coronation as Empress
29 October 1740

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[1] Full Professor in Storia delle istituzioni e delle dottrine politiche . Professor in Storia del diritto at the Luiss School of Law (Rome). Member of the Advisory Board of the Centro Studi sul Parlamento-Luiss (Cesp) at the School of Government of Luiss University. Member of the Jury for the Mittner-Preis of 2015 granted by DAAD for the Italian-German dialogue.

1. Between Real Europe and Perceived Europe: A Cultural Divide

If it is possible to quote, a century later, the Swiss urban planner Le Corbusier – who depicted the house as a «machine for living» –, we could configure also European Union Law as a «machine for living». In both cases, the idea of technology as an informing (or, possibly, deforming?) factor in all aspects of social life emerges. So, having lost the nostalgia of a distant legal simplicity, we have also lost «the claim of the law as a value», to quote the Italian private law scholar N. Lipari. The law has become, by now, more like a technological *machinerie,* dedicated to the worship of Gross Domestic Product (GDP), whose theology self-imbues each regulatory option, notwithstanding the fact that globalization and digitalization increasingly show how GDP itself may be regarded as an incomplete and misleading figure which fails to provide an adequate understanding of «wealth», and, above all, totally omits to acknowledge «well-being» and quality of life.[2]

The clichés – the *idola* of Baconian memory – are comfortable: they prevent us from thinking and offer deceptively safe anchorages. One of these clichés pushes the European constitutional engineering on the arithmetic symbol «+» (more Europe, more integration, more harmonization, etc.: *even more* translated as «more statutory products», which is accompanied by the imperative of an ever-growing GDP). But how have we got to this regulatory imperative, absolute and absolutist, not infrequently suffocating? Why do not we think about less written rules and, on the contrary, about a balanced economic system and ecological sustainability, beyond GDP?

The European construction has grown under the shades of the Enlightenment, whose rationalism leads to dream of ever newer «progressive achievements», hence the up-thrust to the «+» sign in all fields. Voltaire, after all, trying to indoctrinate the Tsarina Catherine of Russia, proposed her new legislative choices in the name of

[2] The debate on the limits of GDP as an indicator of wealth dates back as far as the '30s, when economists like Nobel-prize laureate Simon Kuznets (himself a pioneer in quantitative studies) warned that such indicators may result in "illusions" regarding "the outlines of the objects measured" (see S. KUZNETS, *National Income, 1929-1932: Letter from the Acting Secretary of Commerce Transmitting in Response to Senate Resolution No. 220 (72nd Cong.) a Report on National Income, 1929-32*, United States Government Printing Office, Washington, 1934, spec. Chapter 1, «Concept, Scope and Method», pp. 5-7. More recently, GDP has been even more deeply criticized, *e.g.* in the famous report produced by the so-called Stiglitz-Sen-Fitoussi Commission (Commission on Measurement of Economic Performance and Social progress, 2009), which argued for the introduction of completely new econometric indexes. The whole final document summarizing the findings and conclusions of the Commission may be accessed on the Internet at http://www.insee.fr/fr/publications-et-services/dossiers_web/stiglitz/doc-commission/RAPPORT_anglais.pdf

the «+» sign (projects of codes and innovative collection of regulations, thus more written rules). Then, she, with feminine good sense – taking into account the cultural sensitivity of her people – rejected them, making him gravely outraged. That matters for the purposes of this paper. In fact, the same self-complacent attitude of the philosopher seems to harbor in some Eurocrats today: in the clash between their mental apriorisms and «ordinary» facts, they obviously condemn the facts: «that is their problem». It does not matter that many fringes of the European population do not love Europe, «they will understand that they are wrong». And this is the crux: understand why a part of Europe, or a certain idea of Europe, is not loved. Perhaps, today, the key to reverse the trend could be using the «-» symbol.

This paper wants to draw the attention on the idea of a geometrically variable Europe, less rigid than the present one, more linear and less bulimic in its regulatory action, more respectful of the long time process of institutional change, and – finally – more effective in the pursuit of the purposes and authentic values of the common European identity without resorting to «+» rules. Perhaps, it could also be desirable a parallel paper showing, on the economic side, the faults that the monopoly of the «+» has on the quality of life (does not the pursuit of «+» GDP also determine «+» pollution? And «+» exploitation of limited resources, first of all food supplies?). In a recent paper I have distinguished between *real* Europe and *perceived* Europe – on the «real/perceived cold» and «real/perceived inflation» models – inviting not to overlook the importance of the second factor.[3] The cultural divide between reality and perception of reality must be filled by listening to the common feelings of the populations, not demonizing and summarily dismissing any doubts as ignorance.

2. The State of Juridical Art

The legal factor has now been reduced to an algorithm (moreover, confused), devoid of the symbolic resources and values that have always supported the reasons for the existence of a particular juridical rule.

The regulatory imperative brings legal consequences that can be analyzed from three perspectives.

[3] On this topic, see also R. FERRARI ZUMBINI, «L'Europa fra Sovranità Indecisa ed Ipertrofia. Sciogliere le Sovrapposizioni per un'Europa più Snella», in *Federalismi*, n. 13, 1 July 2015, available at http://www.federalismi.it; B. Caravita, «Quanta Europa c'è in Europa», in Studi di Federalismi.it, n. 22, 25 November 2015.

2.1 *The Disruption of Secular Categories*

The European integration has created a reality devoid of any institutional precedent in the history of Western culture. The secular elaboration of concepts like (subjective) right, authority,faculty, etc., has never been interrupted: jurists like Jean Domat and Robert-Joseph Pothier, for example, although they had been intellectually bred within the medieval common law, could be considered as the ancestors (grandfather and father) of the revolutionary 1804 Civil Code. Nonetheless, they did not disregard traditional categories.

Law, in the medieval juridical world as well as in the modern one, answered a shared feeling, which comprised the background values of the liveliest social forces. Today, the process of European integration has brought the juridical dimension to a point of no return, as opposed to the past (both distant and near), and has especially questioned the identity between juridical rule and common sense. The gap between the real and the perceived starts here.

The categories appear dispersed. The very concept of juridical source has undergone grueling twists, wearing its use out.

In conclusion, Europe has left behind the fundamentals that – despite the differences between the experiences on the two shores of the Channel, following a common and recognizable *fil rouge* from Bracton to Dicey – it had settled in centuries of theoretical elaboration and historical experience.[4]

The crucial moment of rupture is represented by Maastricht 1991, whose institutional structure and derived legislation, although rewritten by Lisbon 2007, have overturned centuries of legal history. The sources can no longer be organized according to the classical criteria of competence and (even less) hierarchy, whose everlasting usefulness as a work tool (and as a pattern for the organization of thought) till recent times has permeated the unitary reconstruction of the legal system. Traditional legal categories, the result of centuries of doctrinal elaboration, have become obsolete.

The operational schemes, that have always accompanied the action of the modern State in Europe, have been challenged. For example, the dichotomy between public and private is deeply affected by the cross-sector notion of «economical sustainability» (of jurisprudential coinage). Consider the case of the subjective legal

[4] An example: corporate governance provisions (in the CRD IV Directive of 26th June 2013) are disruptive: the traditional model of limited company, where we can spot out the main bodies (shareholders' meeting, board of directors, board of auditors...) and *status* (shareholder, director, member of the audit committee...), is given up. We get to a legal technique that identifies functions (management, control, strategic oversight...). Clearly, this situation shades centuries of clear legal order.

positions. The concepts of power, capability, (subjective) right, (legitimate/simple) interest are shaken by the European legislation and law, which – using an argumentative style – avoid qualifications, moving in a substantial perspective. The latter is a peculiar perspective, created to respond to practical operational requirements (attaining the objective pursued in this case), but the value of the rule as such is thus given up. This has led to a reshaping and homogenizing tendency in the legal systems of individual states, with consequent problems of congruence regarding the lower institutional level. The very notion of property, once monolithic, seems to be crushed (think about the popularity of the *shared economy*). But are we aware of these changes as well as of the consequences of these changes?

The *pars destruens* of the ongoing process is clear; its *pars construens* is less clear. What are the conceptual roots of the new regulatory countenance? On the one hand, the law – no longer characterised by the general requirements and abstract nature – becomes the concrete tool for the administration of interests. The rule does not express the point of convergence of a number of problematic levels as it had been for centuries: generality and abstraction have become obsolete ways. The angle of perspective of the «regulatory answer» is no longer the search for a value, but the pursuit of GDP growth and/or employment levels (at least the latter, be it understood, is a goal that can be deemed completely agreeable).

Jurisdiction distances itself from the interpretative-applicative moment and becomes the primary place of interest composition. The judge slips from the role of interpreter (from «mouth of the Law» of Napoleonic memory) to that of administrator of the interests involved in the single case.

The European Union impact on the administrative law is similar: the procedural protection as *judgment on the administrative act* has become *judgment on the substantive matter.* The administrative court seeks to ensure the substantial protection of the interest affected. Consequently, the main question we must ask ourselves today is whether there still is the principle of separation of State powers (at least partially); in other words, whether the recurrent replacement of the administration by the judge is conceptually supported suitably.

Are we aware, from a historical point of view, of all this distortion of categories – both regulatory and institutional? The suspicion is that the mental monopoly of GDP darkens any consideration. Even the sacrifice of legal rules involves costs, which – although intangible – affect GNW (Gross National Well-Being), not GDP, and the quality of life of a system with unpredictable consequences.

The point of balance is often achieved at the expense of the legal, institutional and economic capacity of the system.

2.2 *Overlapping*

The cultural trajectory of so many choices has, in fact, ended up to follow the policy of «no choice», which has led to further overlap and thus more unnecessary costs. How else can we explain the existence of two seats for the European Parliament (just to make an example)?

We simplistically celebrated the abolition of borders years ago: one more commonplace. As if the persistence of differentiated roaming charges does not prove the opposite, that borders have continued to exist beyond superficial simplifications. Borders, as well as the respective States, have remained, despite resounding slogans. How else can we explain that some States have nuclear power plants, which are banned in others? Boundaries do exist. The existence of such differentiated energy policies could not be explained without the persistence of individual States (and their boundaries).

How can we reconcile the alleged free movement of capital with the income taxation in Italy created by a bank account opened in Hamburg by an Italian citizen? If there were no borders, taxation should not have to refer to the Italian financial authorities, but to the place where the individual has created the capital gains. In the field of privacy rights protection, we do not make any distinction in forms of protection based on the residence of the server. The free movement of global product requires comprehensive protection.

The overlaps are between institutions and even among juridical rules.[5] The roles of many Authorities (European and national) operating in the same areas are not clearly outlined. The same happens with the European Central Bank (ECB) and the Single Resolution Mechanism (SRM), which are called to take action in delicate administrative proceedings, replacing in those areas the competence of national authorities. On paper, we read that in these areas the European authorities should apply the national law (they are harmonized areas, but not completely attracted to a single legal center of gravity, though): regulatory complexes (and therefore, also, both protections and guarantees) are actually continuously modified. The entity that *de facto* controls the procedure is likely to employ its own rules of procedure, as if to evoke the relevance of well-known Schmittian reconstructions on the tendency

[5] On this point, see also R. FERRARI ZUMBINI, «Overcoming Overlappings (In Other Words...Beyond 'This' Europe)», in *Luiss Sog Working Paper Series*, n. 16, April 2014; D. CAPUANO, «Overcoming Overlappings in the European Union», in *Luiss Sog Working Paper Series*, n. 24, March 2015; G. STOLFI, «Tempi (Post-)Moderni: Nuovi Impulsi Normativi Europei alla Prova delle Sovrapposizioni», in *Luiss Sog Working Paper Series*, n. 32, January 2016; these papers are all available at http://sog.luiss.it/it/ricerca/working-papers.

of concrete power relationships to determine the juridical-formal relations. The risk of overlapping appears to be immanent in every sphere of action of the European institutions. For example, it can be seen between the Impact Assessment Board (IAB) and the new department of the European Parliament. Is this proliferation of organs/structures likely to aim at scattering indefinitely the profiles of decision-making responsibility?

2.3 *The Blurring of Responsibilities*

Basic choices, either diplomatic or on legal policy, are often made at so-called «technical» level, whose theoretical reconstruction is in all aspects troublesome. Then, the conclusions drawn up in those seats (*e.g.* as regards banking and financial matters, the Financial Stability Board (FSB), which is on a further detached level than the European institutional one) seep in the Commission's offices and are translated into white books, green papers, «non-papers», etc. Finally, the legislative proposal moves from there, following a windy path through which it is changed, integrated, reformed without clear accountability.

A glaring example of this contorted conceptualization can be seen in the European legislative approach to the banking crisis, where the principle of «bail-in», which was originally developed by the Basel Committee in 2011 (guidelines on «*Key Attributes of Effective Resolution Regimes for Financial Institutions*») and later became the cornerstone of the Directive 2014/59/EU, or BRRD as it is broadly known, is stated. Everything happened through passages wrapped in «technique», but they were basically allocative decisions, thus political decisions. The moment of political decision-making, however, was unclear: the machinery did work because of the relentless forward motion of the Commission ... but how was this incessant and perpetual legislative initiative born? Who controls it? Who holds it back? «Europe demands it...» is a stale *refrain*. But who decides in Europe and how? Who takes political decisions and who suffers the law-making mechanism? In the classical mechanics of the modern state, the political decision is characterized by recognisability and unity. The proposal and the enforcement are (were) up to the Administration while the decision itself, on the high level, rests to Politics. All the admirable dogmatic construction of sovereignty aims (aimed) at giving and blaming responsibility and power to the top (which, to make it simple, was originally identified with the Sovereign, then with the Government-Parliament circuit). Within the scattered panorama of European public powers, decision-making levels overlap and are doubled, becoming difficult to read. What is missed is above all the «responsibility for initiative», which is actually entrusted to a peculiar «executive» lacking control on political policy,

without a direct relationship with the source of legitimacy, often lacking the opportunity – theoretically, at least – and the concrete instruments to control the «fulfillment» of its action, because there is no longer the clear chain which tied the top to the acts and measures that characterized the actions of the public administration.

Again, let us think about a statement related to banking regulations, «the losses must be charged to those who have interests in the bank» (it is the postulate of the so called *Bail-in*). But at the same time, you might decide that the opposite is better: «instead of a few paying a lot, better a lot paying little» (as in the so-called *Bail-out* logic: the State, one way or another, is the guarantor of an economic activity that is not considered similar to the others). We do not want to take sides, we would rather ask a methodological question, beyond the ratifications enacted in the many «councils» imagined by the Treaties: was there any real discussion in a proper political circuit or not? If so, where? When?

And again, on the one hand (CRD directives I, II, III, IV and now even V; SSM) banks are to have more and more solid assets (on this point, remember also the result of the so-called Asset Quality Review (AQR) exercise held last year, which pointed out the capital *shortfalls* of Italian banks). The solution lies inevitably in collecting more «sound» bonds (consider the case of the so-called subordinated bonds, which have recently peaked a dubious fame. From a prudential point of view, a title provided with a subordination clause is a clear advantage for the issuer...). But, on the other hand, allocative – thus political – decisions are taken, as the previously evoked *bail-in,* which go in the opposite direction: «losses must be charged to those who have interests in the bank» (liberalist dogma). The combined effect of these two policies will perhaps be virtuous as regards the accounting result (again, as always, the guiding value of GDP), but it results in an increased risk and uncertainty for the citizens, especially in a situation like this, where (except for certain powerful funds) it is unrealistic to reckon the investor as a great capitalist speculator as he was in the 20th century: he is, at the end of the chain, a simple customer-saver, who relies on a complex and diffuse financial system. Has this fundamental preference on the distribution of risk been adequately discussed?

3. The Distorting Mirrors: Simplification, Hyper-liberalism, Inclusiveness

Another *cliché* is given by the slogan of the so-called legislative simplification, which abounds in the documents on the so-called better regulation. However, the documents prepared in Brussels since the end of the twentieth century seem

self-referential.[6] Thus, one could wonder what the status of the legislation would be had we not dealt with the issue. To what extent has simplification been effective? The concerns arise when we take into account the continued establishment of new boards: it is not clear how the increase of collegial bodies can lead to a simplification in regulation.[7] We indulge in the word «simplification», but does it mean reduction in the consumers and workers' protection? The (false) «GDP-God» is worshipped on the altar of productivity («+» growth) and, in the name of the hyper-liberal dogma, it sacrifices the «protection of rights» (have these words become now sinful?). In which seat have we faced the problem of what determines a reduction of entrepreneurs' social burdens in order to make the market more dynamic? Does the GDP create politics? The hyper-liberalist factor hides deceptively under the cloak of inclusion. Every legislative procedure is shaped according to the criterion of «inclusive» consultation. There are various types of consultations but no one clearly defines the ways and effects of this procedure. This procedural conception of democracy leads to a total dissolution of the deliberative mechanism in its technical aspect, dismissing the supreme moment of pure political decision.

When collecting the results of these consultations, who sums up the outcomes? Which leeway is necessary? Who has to be held accountable for?

The «political apathy» of sections of the population as well as the «depoliticization» do not surprise, when the centre of power shuts itself off on an ivory tower far from the citizens' feeling. Law must match with – and that of Europe does not always do so – and reflect the common feeling, as it has been for centuries in European legal history.

4. Free Words: Imagination in Power

Overlapping is an evil that plagues from a further third perspective: the linguistic one. It is hard to understand the conceptual boundaries between overlapping words. *Regulation* and *regulatory* are not synonyms, though they seem to overlap even the word *law-making*. *Better regulation* is often used in European documents

[6] Since 1995, the Commission's annual report on subsidiarity principles has also dealt with the measures taken to improve the quality of legislation. For years, the initiatives on the so-called simplification have been included in the Commission's annual work programs.

[7] The establishment of an «impact assessment» Directorate at the European Parliament has recently taken place.

as a mere synonym for *law-making*.[8] How do *smart* or *better regulation* differ? The words *effectiveness* and *efficiency* are sometimes used together, other times separately. Where does the meaning of one term end and where does the other begin? Did not they raise the issue in Brussels, while the national constitutional doctrine has rather cleverly made a distinction?[9] The exasperated stratification of regulatory levels has led to contradictory and redundant outcomes in various regulatory processes. We have come to a point of no return and to the need for clarification: linguistic clarity will lead to mental clarity as well. Labels abound: on the one hand there are the *guidelines,* of uncertain cogency (they should not possess this quality, but they end up determining the operating positions of institutions which are given penetrating application powers, as the Commission and the ECB). On the other side, there are the *standards,* which should be binding, but which, before fully entering into force, must be embraced by another authority (the Commission) – different from the one that has originally emanated them, *e.g.* EBA, ESMA, EIOPA. Each category, though, is enriched with nuances: we have *binding* technical standards and *regulatory* technical standards, not to mention the *implementing* technical standards (whose differences remain at least obscure: is there perhaps a gender-to-species ratio? Certainly, the distinction cannot be made on the effectiveness of these legal acts, which cannot be uniformly categorised). Again, we must admit that we have reached a point of no return.

What does the sentence «*urges the Commission to put more emphasis on implementation, enforcement and evaluation of Community legislation*», to be found in the first point of the European Parliament resolution 2007/2096 (INI) of 4th September 2007,[10] mean?

The meaning of words and phrases used in official documents of the preparatory work of the acts of the European Parliament[11] sometimes escapes. And again: what

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[8] As we find, for instance, in the first point of the preamble contained in the report made by the Committee on Legal Affairs – 2 July 2007 – on the draft resolution of the European Parliament on the strategy for simplifying the regulatory environment (the future 2007/2096 (INI) of 4th September of the same year), where the words *better Lawmaking* and *better regulation* are identified as synonyms. That report is to be found on the website of the European Parliament at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2007-0271+0+DOC+XML+V0//IT#title1

[9] See, concerning Italian juridical science, P. PIOVANI, *Il Significato del Principio di Effettività*, Giuffrè, Milan, 1953, and F. MODUGNO, A. CERRI, «Rassegna Critica sulle Mozioni di Efficacia ed Effettività», in *Annuario bibliografico di filosofia del diritto,* n. 3, Giuffrè, Milan, 1970.

[10] The text is available (in several languages), on the website of the European Parliament at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0365+0+DOC+XML+V0//EN

[11] Referring to the aforementioned resolution 2007/2096 (INI) of 4th September 2007, we notice, for instance, the opinion given by the Committee for the Environment, Public Health and Food Safety

does the phrase «*the economic and financial crisis has revealed costs of non-action, weak legislation for enforcement*», to be found in the first point of the Commission communication on the adequacy of regulation in the European Union (COM (2012) 746) of 12 December 2012, mean?

The entire planning on simplification focuses on procedural aspects (let us say «external»), thus eluding the centrality of political decision and the search for the maximum value achieved by the rule.

5. The Recovery of the Sense of Ancient History for an Ancient Novelty: An Essential Simplicity

It has been argued that it is the large number of States (28) to cause the regulatory complexity. Yet, it is not: in the course of the Seventies (in the US first, then among European scholars) the so-called *social democracy limits* were perceived. It may be useful to use that theory to understand that it is not the number of States to cause difficulties: J. Buchanan tied the theme of «ungovernability» to the hypothesis of «overload»,[12] according to which the development of democracy takes place at its own expense, producing an overload of questions on the institutions and the growth of expectations. Overload and growth in social groups eventually end up causing irrationality in the institutional process. The key point is then elsewhere, not in the number 28.

We have to search for solutions without an algorithm. Otherwise, the symbolic resources are missing and we are confined to a one-dimensional reality, as happens today in Brussels, or to a three-dimensional reality (as the *reports* of listed companies), devoid of any historical «sense of the line».

We must have the time and the courage to realise that now we are operating with non-juridical declinations and misleading emphasis on the informal dimension: it undoes years of European history characterized by the clarity of the political decision. The current mechanisms of perpetual «consultation» erase responsibilities.

to the Juridical Committee (the one who was, theorically, charged with substantial decisions), on 5 June 2007, where the sentence in paragraph 5, point 1 that says «the simplification process must under no circumstance entail lowering the standards contained in current legislation», and the text in point 3 «Calls on the Commission to develop [...] a checklist which can facilitate the work of the institutions in ensuring better or smarter regulation», are both unclear. The opinion is to be found in the abovementioned report of 2 July 2007 (cf. note 6).

[12] J. M. BUCHANAN, *The Limits of Liberty*, Chicago University Press, Chicago, 1975; S. P. HUNTINGTON, «The Democratic Distemper», in *The Public Interest*, n. 41, 1976, pp. 9-38.

We must retrieve, instead, a certain simplicity, reminiscent of the ancient «*actio finium regundorum*» to be found in Roman Law, according to which the boundaries of responsibility between the subjects were outlined. This would undo the overlaps (between institutions, between rules, between words) that often hide non-choices and attempts to mediocre and misleading compromises. Europe has been longing for a legislative simplification for over 20 years. There must be a reason if, as Europe itself admitted, this is an objective yet to be fulfilled.[13] The market power has taken over and favors the exclusion of value-choices. The dissolution of legal categories states the fading of value-categories.

We insist fiercely on the «+» sign as if it were the universal cure for all of Europe's weaknesses. But we forget History, the unforgettable wealth of European History. We sometimes take the United States of Europe as our final destination, forgetting that the lack of history there has made that legal construction possible. Despite all the love for the USA, can we compare the history of North Dakota and South Dakota to that of Saarland on the border between France and Germany?

History teaches that in the Constitutional field England is the Master, and from London (with Cameron's Government) a set of considerations starts which should not be ignored: a geometrically variable constitutionalism to be put to test.

History reminds us of the Roman *honos et virtus*; concepts that expressed a bonding value according to which the acceptance of any institutional post expressed the *synallagma* between high commitment to public affairs and the respect of the community for the holder of the *munus* in the name of shared ideals.

Giving up every value-based dimension of the legislation, we forget that for ages the law has not been the result of any technique, but primarily an expression of synthesis between politics (appointed by the charisma, now the democratic one) and associates.

This oblivion of shared contents emerges today with evidence, as shown in the lack of historical dimension of the European project. That historical dimension that was still present in the first decades of the European integration, and that enabled it to pave the way to results whose greatness today we certainly do not want to forget, but rather re-conceptualise and reproduce.

The hope is that we can contribute to the resumption of a genuine momentum in building a kind of Europe that must be able to return to its being fully the «Europe of Law» and not just the lifeless and disappointing «Europe of rules».

[13] Finally, on this regards, *Decision of the European Parliament,* 9 March 2016, on the conclusion of an inter- institutional agreement on «Better Lawmaking».