
Editorial

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Fateful Elections? Investing in the Future of Europe

In an earlier Editorial I speculated on the potential transformative effect that the 2014 elections to the European Parliament might have on the democratic fortunes of Europe. I spoke of promise and risk. So now the results are out. How should we evaluate them?

I will address the three most conspicuous features of the recent elections – the anti-European vote, the continued phenomenon of absenteeism, and the innovation of the *Spitzenkandidaten*.

The Anti-European Vote and the I-don't-Care-About-Europe Vote The fathers have eaten sour grapes and the children's teeth shall be set on edge.

In trying to explain the large anti-European vote (winners in France and the UK as well as some smaller Member States of the Union), much has been made of the effect of the economic crisis. Sure, it has been an important factor but it should not be used as an excuse for Europe to stick its head in the sand, ostrich-like, once more. The writing has been on the wall for a while.

In 2005 the constitutional project came to a screeching halt when it was rejected in a French referendum by a margin of 55% to 45% on a turnout of 69%. The Dutch rejected the Constitution by a margin of 61% to 39% on a turnout of 62%. (The Spanish referendum which approved the Constitution by 76% to 24% had a turnout of a mere 43%, way below normal electoral practice in Spain – hardly a sign of great enthusiasm.) I think it is widely accepted that had there been more referenda (rather than Ceausescian majority votes in national parliaments) there would have been more rejections, especially if the French and Dutch peoples had spoken at the beginning of the process.

It is also widely accepted that the French and Dutch rejections and the more widespread sentiment for which they were merely the clamorous expression were 'a-specific': they did not reflect dissatisfaction with any concrete feature of the 'Constitution' but expressed a more generic, inchoate, inarticulate unease, lack of enthusiasm not only for 'more Europe' but for Europe as it had become.

This early and less pathological 'anti-European' manifestation could not be explained away as a reaction to 'the crisis' – it occurred at a moment of prosperity and

reasonably high employment. Europe was also riding high in the world, a promising contrast with America at its post-Iraq worst. Xenophobia was less *à la mode* and the immigrant issue less galvanizing – the supposed ‘invasion from the East’ was not a real issue. Europe was not ‘blamed’ for anything in particular, but it was clear that it had largely lost its mobilizing force.

Political legitimacy typically rests on three pillars: process (input – what we call democracy), results (output) and narrative (identity, myth, dream – what some political historians call political Messianism). Process and narrative are the deep political resources to which polities turn in times of crisis. Europe suffered and continues to suffer, unless you are happy to stick your head in the sand, from a persistent democracy deficit so that its input legitimacy has always been very weak. The potent narrative of the early decades had dissipated (in part as a result of its very success, in part because of the aging of the founding generation). Its legitimacy rested on the most precarious pillar of the three: results. And those were impressive. But precarious. It is one of the most profound features of the current European circumstance that the ontological position of Europe as part of the polity has been replaced by a utilitarian rationale – a project in need of constant justification, even in major Member States.

That was the true lesson to be taken from the constitutional debacle. It could not be business as usual.

Instead, the reaction of the powers that be, *la classe politique*, we included, ranged from the wilfully blind (a French and Dutch accident rooted in local conditions), to the dishonourable, and shocking. Dishonourable? The immediate reaction of the Commission when the Constitution tanked was to explain that ‘we failed to explain Europe well enough’ – a manifestation in all but name of the odious Marxist theory of false consciousness. We are right, they – the people – simply do not understand. Brecht famously ironized: The People have disappointed, let’s change the people.

That’s not easy, but what we did was a close second best: the ‘Constitution’ was repackaged as the Treaty of Lisbon, of course with no referenda, and it was back to business as usual. What was bronchitis in times of prosperity becomes pneumonia in times of crisis – but the bacillus is the same.

(In passing, I note in these very days similar reactions. One Prime Minister: ‘We have to simplify Europe’ (too complicated for the people to understand.) Or: ‘jobs jobs jobs’ – back to a bread and circus view of politics and European citizens, as though all that citizens cared about were bread and butter issues. It would really be a profound mistake to explain away the combination of active anti-Europeanism and passive apathy simply by reference to the economic crisis and Europe’s inability or way of solving it. Sure, that is a catalyst, but the malaise is far deeper.)

I do not find it alarming at all to have 15% of the European Parliament composed of anti-Europeans. Democracy thrives on contestation. Far more worrying is the triangulating impact that some of these parties have on mainstream politics and what they tell us about the depth, or otherwise, of liberal pluralistic ideals in broad swathes of society.

Absenteeism: A Proxy for the Community Deficit

It used to be denied, in both political and academic circles, that Europe still suffered from a democracy deficit. The usual trope trotted out to defend the democratic

credentials of the Union was the historic increase in the powers of the European Parliament, which even before the Lisbon Treaty could credibly be called a veritable co-legislator with the Council. But here is the classic and embarrassing paradox: the more powers the European Parliament has gained, the greater popular indifference toward it seems to have developed. The turnout rate has declined persistently from election to election ever since the first direct elections in 1979, and reached historical lows in many Member States as well as for the Union as a whole in 2009. There was an expectation that the elections this year would reverse the trend: the early campaign start, the *Spitzenkandidaten*, the fact that Europe had become a central question for national politics. And yet the most generous thing one can say is that there was not a further decline. If we exclude Belgium and Luxembourg, where voting is legally obligatory, the turnout drops below 40%, i.e. it is still the case that less than four out of 10 Europeans bothered to vote.

The persistently low turnout is alarming not only as a sign of apathy, but because it compromises the ability of the European Parliament to speak authoritatively as the European *vox populi*. It is a true problem for a polity when a branch of government powers – and the EP has very considerable powers – are not matched by its political authority. And that, I fear is the current condition of the European Parliament.

How to explain this decline? Are ‘the people’ stupid? Quite the contrary. At the heart of democracy there is choice. The people get to choose. And reduced to its most primitive they get to choose a ‘who’ and a ‘how’. Who will govern? He from the Left or perhaps She from the right? And How will one be governed? Austerity or Growth? It is basic, is it not?

And yet that is precisely what did not happen in the EP elections. Because of the very design of Europe, governance without government, one did not get, as a voter, the possibility ‘to throw the scoundrels out’ – a basic feature of democracy in all our Member States. What’s more, there was only a very weak connection between voter preference as expressed in the EP elections and the Union’s political orientation and legislative programme.

The large absenteeism is, in my view, a proxy for another phenomenon – the visible proof of the collapse of the much vaunted European solidarity – or what today might only be called the ‘solidarity myth’. There are many reasons for this – but the world of law bears its responsibility too. The continuous enthrallment to the culture of rights, the continuous self-satisfied affirmations in one way or another of how wonderful we are in ‘putting the individual at the centre’, comes with a price: an erosion of Europe as community or, rather, its replacement with a community of self-centred individuals. This is most notable in the discourse (and the jurisprudence) of European citizenship in which the discourse of responsibility, duty, social nexus, loyalty – the hallmarks of political citizenship – are either absent or weak.

The Spitzenkandidaten – An Investment in the Future

Credit goes to the President of Parliament and his colleagues for trying to change this in the 2014 elections.

Has the exercise been a success? It is easy to trash the experiment. Overall turnout did not rise (but did not decline either); few voters, it seems, outside Benelux and Germany were aware that they were voting for a President of the Commission; the selection of

the candidates could perhaps have been more public; the elections remained national; even the European issue became part of national politics. The list goes on.

But all that is understandable and predictable. The measure of success will only be known at the next elections in five years. This needs some explaining.

First, of course, Parliament will have to get its act together and have an agreed candidate who enjoys the required majority. Junker has been given the first shot, but even in Parliament the outcome is not certain. The real problem is far deeper – even fundamental and contradictory. If, as is likely, whoever emerges as the choice of Parliament will require the support of both the EPP and S&D – it will complicate the ability of the President-elect to offer a clear political-ideological identity to the presidency, one of the main objectives of the whole exercise, at least as described by the candidates themselves.

It brings into sharp relief possibly the most profound issue to which the *Spitzenkandidaten* gives rise: Should the President of the Commission be ‘political but not partisan’ (the Barroso thesis) or should voter preference in choosing not only this or that President but this or that party (with an ideological line) be translated into the policies espoused by the President of the Commission and indeed the Commission. Strange as it may seem, it appears that this issue was not addressed with real seriousness even within Parliament itself.

Second, for the exercise to succeed, the European Council will have to follow the choice of Parliament.

I think the argument, based on Article 17, that the European Council is *obligated* to follow the parliamentary choice is overstated both as a matter of law and as a matter of politics.

Article 17 allows the Parliament to block all proposals by the Council but not to impose its candidate. It allows, likewise, the Council to propose but not to impose. In effect, it recognizes that the European Council and the European Parliament represent, as is common in many federal states, two different forms of democratic legitimation, and creates a design which requires the consent of both institutions in the choice of the President. Either institution has the legal power to block the process, but not to impose its choice. It is not a flawless formulation. One could imagine a composition of Parliament in which no candidate proposed by the Council receives the necessary majority. There is no express ‘fall-back position’. But on the whole, one can see a certain political wisdom in the procedure of Article 17: the President of the Commission needs to enjoy legitimation and authority deriving from both ‘houses of democracy’ which make up the Union.

In exercising its role of submitting a name to the Parliament, the European Council must take into account the results of the elections. ‘Must take into account’ cannot plausibly be interpreted as ‘must follow’. It is clear that by speaking of consultations, and providing for majority voting, the Council is meant to be a deliberative body and not a mere rubber stamp. Taking into account is a soft term. It could, for example, be credibly claimed that by nominating someone from the winning party due account has been taken of the elections.

There is, thus, certainly no legal duty on the European Council to follow the choice of Parliament – indeed, to suggest such would be to run against what is, in my view, the letter and spirit of the law. Neither institution is meant to be a rubber stamp to the other.

If there is an imperative of the Council to accept the choice of Parliament it must be a political imperative rather than a legal one.

But here, too, the issue is not straightforward.

- I think the argument that in the current circumstance of European politics, the Heads of State and Government speak with no less democratic legitimacy than the European Parliament is not a specious one. Given that the leading candidate had an outright victory in only 12 of the Member States and in two others shared the podium with his rival adds poignancy to this point.
- I think, equally, it is a stretch to claim that, other than in a highly formal sense, the European peoples have really chosen any one of the five candidates as their choice for the Presidency of the Commission. The polls we have at the time these observations are being written are sketchy, but I think the common observation that in most jurisdictions the elections remained 'national' and that few electors were casting their vote with a view to who would emerge as President of the Commission must hold a lot of truth. It does not detract from the legally binding result but compromises the ability in a political sense for this or that candidate to say with authority 'I was elected by the peoples of Europe'.
- I think that there will be many who might think that right now Europe needs a different profile of person for the job.

I do not necessarily endorse any of the above arguments, but they are not irrational or unprincipled or specious.

There is, thus, in my view not only no legal imperative, but the reality of the electoral results – a clear victory in less than half of the Member States, a low turnout in all but the ones where voting is obligatory, and a sense that the electors had not really turned their mind to the presidential issue – all suggest that no compelling political imperative is dictated by these results.

So what is the European Parliament to do? I think that the principled and correct approach is as follows. The European Council has the constitutional right and the duty to consult, take into account the results of the elections and propose a candidate who enjoys the support of at least a majority of Council Members. The selection of the President of the Commission should be the result of the voice of the peoples speaking through their two channels as provided by the Treaty. It is a wise choice.

Having said that, I think that in exercising its political discretion, it would be the wisest and most prudential choice (understanding prudence in its deepest meaning) for the Council to follow the outcome of the elections and propose the winning candidate as agreed by Parliament. Not, as is argued stridently these days, because to do otherwise would be to thwart the will of the people. That is a weak case. But because, on the one hand, to do otherwise would inflict huge damage on the European Parliament – something clearly not in the interest of Europe, particularly not at this moment. Parliament is a body with important powers but weak political authority. This is not good for democracy. What is more, such a choice might precipitate a constitutional crisis in which it is not clear who would be the winner, Council or Parliament, but it is clear who would be the loser: the credibility of the Union.

But even more importantly, to follow the logic of the *Spitzenkandidaten* exercise would be a most important investment in the future of European democracy. Establishing this precedent will have the potential of transforming the *next* elections. It will help galvanize moves towards truer pan-European parties; it will create a new dynamic for the choice of future candidates; it will above all help Parliament match its formidable legislative powers with appropriate political authority, since the lesson of this outcome will most likely have an important impact on voter behaviour in five years. It is wise to invest in the economic future and promise of Europe. It is equally wise to invest in its democratic future and promise.

Masthead Changes

The time has come to renew our Board of Editors and Scientific Advisory Board. We thank Iain Scobbie for his valuable service to the Journal, particularly as blog master for EJIL: Talk!, and we welcome Jean d’Aspremont and Jan Klabbers to the SAB. Dapo Akande and Anthea Roberts will now join the Board of Editors, whilst Francesco Francioni, after a number of years on the Editorial Board, will return to the SAB. We thank him for his committed and extraordinarily constructive contribution to the Journal.

In this Issue

We are pleased to open this issue with a second entry under our new rubric, *EJIL: Keynote*. In this lightly revised text of her lecture to the 5th European Society of International Law Research Forum, Anne Orford traces, with characteristic elegance and insight, the changing notions of science and scientific method that have shaped the international legal profession over the past century. Her account suggests important lessons for contemporary debates regarding the profession’s relevance and ability to respond to world problems.

The next three articles in the issue illustrate the growing toolkit of methodologies for the study of international law. Sergio Puig’s study of the social structure of investor-state arbitration makes innovative use of network analytics. Sharing some of the same methodological inclinations, Grégoire Mallard provides an extraordinarily rich historical-sociological account of the formation of the nuclear non-proliferation ‘regime complex’. And Tilmann Altwicker and Oliver Diggelmann adopt a broadly social constructivist approach to analyse the techniques used to create progress narratives in international law.

This issue includes a selection of papers from the Second Annual Junior Faculty Forum for International Law, held at the University of Nottingham in May 2013. Surveying the discourse and practice of minority language rights, Moria Paz analyses the striking disparity between the rhetoric of maximal diversity-protection found in human rights treaties and the writings of scholars, on the one hand, and the much more attenuated rights that are actually recognized in the jurisprudence and practice of international human rights adjudicatory bodies, on the other. Arnulf Becker Lorca recounts a ‘pre-history’ of

self-determination that highlights the role of semi-peripheral élites in converting that political concept into an international legal right. We hope to publish one or two more papers from the Second Annual Junior Faculty Forum in future issues of the Journal.

In *Roaming Charges*, we feature a photograph of Places of Social and Financial Crisis: Dublin 2014.

Under our regular *EJIL: Debate!* rubric, an article by László Blutzman reviews the current state of thought and scholarship on customary international law (CIL), and concludes that it is riddled with conceptual and methodological problems. A Reply by Andrew T. Guzman and Jerome Hsiang takes up the challenge by examining the relationship between CIL and consent, offering a perspective that challenges the traditional view. The debate will continue on *EJIL: Talk!*

This issue features both of our occasional Critical Review series. Under *Critical Review of International Jurisprudence*, Loveday Hodson canvasses the jurisprudence of the CEDAW Committee, and assesses its contributions to shaping women's rights to date. And under *Critical Review of International Governance*, Wolfgang Hoffmann-Riem considers the opinions and other statements issued by the Council of Europe's 'European Commission for Democracy through Law', gauging the impact and effectiveness of these 'soft law' means of regulation.

The Last Page in this issue presents a poem entitled The Waiting Room, by Kim Lockwood.

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* The views expressed here are personal to the Editor-in-Chief and do not reflect the official position of either the *European Journal of International Law* or the European University Institute.