QUO VADIS PUBLIC LAW?

Alberto Febbrajo*

The article concentrates attention on the crisis of traditional theories of the state, probably never fully translated into reality, and on the emerging need of a new, more adequate constitutional semantics. After having considered, on the basis of a general system's theory approach , the legal system as the most abstract instrument that, thanks to adjustable borders, "constitutes" and "regulates" social games able to combine stabilisation, selection and variation of legal norms, the article draws critical attention to the borders of territory, sovereignty and people, traditionally considered as the main pillars of the state. Finally the article examines the present situation of the European Union, which offers a significant example of the difficulties met by nation states whenever they try to fulfil some of their traditional tasks within the framework of a supra-national entity.

1. Introductory remarks

The role of the state and of its constitution is generally under scrutiny in the present days. The problems are based not only on the crisis of traditional theories of the state, probably never fully translated into reality, but also on the emerging need of a new, more adequateconstitutionalsemantics. At the centre of this debate is the very ambiguous concept of "border". On the one side the traditional spatial borders of a modern state appear less and less controllable; on the other the internal structural borders between private and public law oreven the constitutional separation of powers into legislature, executive, and judiciary, appear more and more blurred under the pressure of transnational factors.

In the following pages I will try to point out some of these semantic changes. On the basis of a general system's theory approach (GST) I will tackle a still nation oriented concept of state in a pluralistic fashion. Thus I will consider the legal system as the most abstract instrument that, thanks to adjustable borders, "constitutes" and "regulates"in a modern society social games able to combine stabilisation, selection and variation (1)(par. 2). Starting from these presuppositions it is not surprising that the present crisis, having involved the traditional concept of state, produces diffuse uncertainty and still unclear attempts to envisage a higher level of equilibrium. I will thus draw attention to the borders of territory, sovereignty and people considered as the main pillars of the state. The present perception of each of these elements has contributedto eclipse the concept of state, still considered as the traditional point of reference of public law, and seems to require a new approach which has not yet found a clear outcome (par. 3). In the last section attention will be briefly oriented to the European Union, which offers a significant example of the difficulties met by nation states whenever they try to fulfil some of their traditional tasks within the framework of a supra-national entity (par. 4)

2. Towards a new concept of law and state

Classical sociology of law expressed criticisms against the formal borders of a state incapable of absorbing internal pluralism. Contemporary sociology of law, especially in its most important strand inspired by the general systems theory (GST), is developing a morearticulated and abstract idea of the state and its pluralistic borders (2). NiklasLuhmann, without any doubt the most articulate author to adopt this approach, devoted many of his wor-

* **Alberto Febbrajo**, professor of sociology of law, Department of Political Sciences, Communication and International Relations, University of Macerata, Italy.

ks to an in-depth analysis of the legal system in a way which could be considered adequate to the complexity of the present situation (3).

According to this approach the concept of border is important for many reasons. The perspective of Luhmann, centered on the distinction between system and environment, has the possibility toshift toa more abstract level the analysis of the "crisis" of a state-centred model of law [10, Kjaer, Teubner & Febbrajo, 2011]. Using a systemic terminology,crises could be seenas the result of insufficient degree of complexity in the social system which produces circular, self-reinforcing interactions among subsystems, and underlines the problems of their reciprocal borders. The constitution is thus presented as a sort of "structural coupling" that is as an inter-systemic bridge that controls, at the most abstract level, the borders of the legal system and its relations with the political system [4, Febbrajo & Harste, 2013].

All in all Luhmann's systemic approach does have the merit of calling attention to an issue of increasing relevance in contemporary theory of state: the tension between the requirements of internal differentiation and of external unity towards the outside world. The borders of every social system are constantly under pressure because social rules, in certain circumstances, become so powerful as to impose strategies for balancing the increasing levels of complexity of the outside world.A legal system, in order to survive in a complex environment, has to combine such conflicting qualities as rigidity and adaptability, closure and opening, normativity and cognitivity, change and identity.

Analysing these paradoxical aspects from a systemic standpoint [3, pp. 1-10], Luhmann concentrates on three main questions: how can the legal system achieve unity and stability? How can law select external social stimuli to translate into the borders of law? How can law be cognitively open to continuous adjustments and changes, and be normatively coherent with itself?

In order to answer these questions, Luhmann reconstructs the fundamental features of legal orders as the social factors that enable internal stabilisation, selection and variation of the "irritations"coming from society through the language of the legal system.

In particular social systems have to be equipped:

1) with mechanisms of *stabilisation* so that its borders are able to balance operationally closed and cognitively open strategies;

2) with mechanisms of *selection* able to decide about the inclusion or exclusion of what is internal and what is external to the legal system;

3) with mechanisms of *variation*, able to reconsider the possibilities of decision previously chosen and adapt them to the new situations [7, Morin, 1977].

I will here shortly illustrate these three mechanisms.

1) Law is a system that is ready to become increasingly open, but has also to defend a certain level of closure and *stability*. Revealing in this point a partial proximity to Kelsen's vision, Luhmann depicts law as a "self-referential" social system capable of using legal decisions to produce other legal decisions. An essential indicator for monitoring the borders of the legal system is provided by the typical *binary code*: legal/illegal, lawful/unlawful. The claims of "purity" so vigorously upheld in his day by Kelsen, can thus be revived in a rather more sophisticated and sociologically grounded version.

The binary code can be used in particular to combine cognitive and normative expectations at different levels. It is possible to combine in this way moments of normativity or of coercive stiffening in reaction to disappointing deviant behaviours, moments of learning or of readiness to take deviance into account, so as to make corresponding modifications to the expectations that are disappointed.

In such a framework of relations with the outside world, the borders of the legal system are established by the system's internal legal culturenot only through a binary code capable of observing itselfin a "pluralistic" way, but also through the binary code of expectation/disappointment to which the recipients of legal norms entrust their individual decisions. The self-observation makes it possible to establish whether and to what extent certain social elements involve a system which has to be interpreted.

2) Learning from the outside world is therefore necessary for the legal system. But according to which kind of norms?Paradoxically enough a legal order has to regulate *normatively* its capacity for *learning* [9, Luhmann, 1982] Luhmann argues that a normative structure that selects what is relevant and what is not relevant, what is inside and what is outside the legal system, normally needs the support ofa specific instrumental system: legal *procedure* (4). Through legal procedures, social rules and legal cultures, social facts and their legally relevant reconstruction, are *selected* by the legal systeme specially if they belong to other systems. In other words, legal procedures can signifi-

cantly augment the law's capacity to evolve in advanced societies, defining how and through which channels normatively selected social elements can be learned.

What can be introduced into the procedure has to pass through suitable filters, so as to ascertain which kind of social elements can be relevant for the procedure, and may influence the legal decisions that constitute its final outcome. The selective entrance into the legal system of social factors filtered by procedures is important not only to procedural law and to trials, but also to every legally relevant sequence of acts to be concluded by uncertain legal decisions [8, Luhmann, 1983].

The selective inclusion of external elements into social systems is so important for Luhmann that he introducesseveral specific concepts, so as to designate different ways of mapping the borders of the legal system. By means of an "operational coupling", for instance, a system can constantly produce operations and connect them to another system's environment, even without moving outside its own field of relevance.The concept of "irritation" – used mostly in the sense of a negative stimulus – is employed to indicate all the external messages that break through the selective barriers erected by the system to defend its identity and trigger reactions of rejection, or at least of neutralisation, comparable to the ones produced by an immune system. Also the term "interpenetration" is used by Luhmannto describe the possibility that a given system's screen (in particular the legal system's) displays images coming from other systems. Instead of erasing the borders between different systems, interpenetration hints at a process that enables images arriving from other systems, to be captured by the receiving system (first selection), translated in ways that are compatible with the specifics of that system's operations (second selection) and with the structures that order the operations (third selection), on condition that they pass through the filters set on the system's learning capacity by its normative limits (4).

3) Luhmann's work shows that the relations between systems and their respective environments are not only based on stabilisation and selectivity but also on the *variation* of the legal system. The structures and the models elaborated by the rule of law are legitimated not so much because they are formally valid, just or effective, but because they correspond,through their continuous variations,to the system's functional requirements and to the prevailing techniques of argumentation. Law is, so to say, a complex game which knows different tables and a self-controlled level of risk because the additional table of the interpretation makes itpossible tochange previous legal decisions.

Increasingly important is in this context the logic of *communication*. The type of operations that use the imperceptible mutations produced by single acts to redraw the system's borders can be traced back to communicationsthat can be classified in terms not solely of the structure of the language or of the intentions of the communicator, but also of the interpretation and the forecast of their possible effects on social systems.

The language used to communicate external stimuli is recognised as legally relevant, if they may be translated into the language of the law. The structure of the language and the interpretations of the actors contribute to setting the parameters of a legal system that contains not only communications of direct relevance to the law, but also other communicative acts, until the process of reproducing communications by communication ultimately loses its reference to the law. When this happens, the communication has succeeded in establishing a connection between one system and another, possibly after having passed through an intermediate area of relevance. In a nutshell the GST takes credit for having suggested a series of conceptual connections relevant for a reconsideration of the concept of state:

Table 1. Functional and Structural Mechanisms of the State

Functional Mechanisms	*Structural Mechanisms*
Stabilisation	Binary Code
Selection	Procedure
Variation	Communication

This means, according to a GST approach,thatthe state and its legal system combine stabilisation, selection and variation through an internal "autopoietic" circuitcapable to combine internally specific instruments (5).

Fig. 1 Legal autopoietic circuit

Stabilisation provided by Dogmatics through a self-reflecting and self-referential *binary code*

Legal Systems assure possibilities of: ***Selection*** provided by Judges through *legal procedures*

Variation provided by Legislation through *inter-systemic communication*

The problem we have now to face is: how is possible to apply this conceptual reconstruction to the model of state which is emerging in a new transnational perspective?

3. The eclipse of the state

When we look at the state as it appears today we could easily observe that some of the elements ofLuhmann's reconstruction have to be reviewed. Actually all the state's essential pillars are loosing their traditional borders, and the claim of the "monopoly" of sovereignty on a given demos living in a defined territory appears no longer corresponding to reality.We can rather say that in a situation characterised by an extremely flexible concept of border,the *demos* is no longer a homogeneous entity, but rather a cluster of multilevel citizenships, the-*sovereignty* is strongly limited by powerful external factors and the *territory* offers as such a too restrictive setting to relevant legal relations [1, p. 82].

Under the pressure of external influences the concept of the state has therefore to be deeply reconsidered. The production of new norms without the umbrella of nation-states and their material constitutions is becoming a problem also for jurists, who can no longer find adequate solutions in traditional legal theories. They have in particular to admit that the *social* concept of *demos*, based on the peaceful relations among subjects, is fragmented and raises the question of how to solve possible conflicts in a multicultural reality. The *spatial* concept of *territory*, traditionally defined by clear-cut borders, is increasingly crossed by transnational interests in a larger horizon than that of the state, and the question raises of how to assure their control in this area. The *substantial* concept of *sovereignty*, traditionally considered in a monopolistic version, is depleted by the external criteria of heterarchical organisations incompatible with an effective legal regulation.

Table 2. Aspects of the State's Crisis

Pillars of the State	*Dimensions*	*Instruments*	*Emerging Forms of Pluralism*
Demos*	Social*	Coexistence*	Plural* citizenships
Territory	spatial	Control	Transnational associations
Sovereignty	substantial	Regulation	Heterarchical organisations

These complex connections point out some important side-effects. The emerging pluralistic approach might stimulate the expansion of material constitutions in a transnational perspective and consequently legal change is no longer a national problem (6) but is opening up in particular situations long phases of collective transition [5, Febbrajo & Sadurski, 2010]. Furthermore important constitutional bodies such as organised parties, which in the past took up the essential task to transform through democratic processes social norms into legal norms, are exposed to increasing competitions by trans-national movements with closer relations to new media and more flexible organisations.

The very concept of state, which by international law is still considered to be sufficiently homogeneous, appears profoundly articulated by new sources of stratification (7). At least four types of state define in a differentiated way their positions in the global arena. In addition to *traditional* states, we can register the presence of *imperialistic* states, which follow, with varying degrees of success, the strategies of older empires constantly oriented towards expanding their areas of cultural, economic and political influence (8); of *emerging* states, which try to compete with the former states, concentrating more on economic and cultural expansion (9), and of *spectator* states, which struggle for survival within the community of states in order to defend the level of autonomy proclaimed by their constitutions (10).

Despite the present fragmentation relevant convergences are arising. Jurists have reasonable grounds to believe that it is necessary for the legal order of the single state either to totally absorb the external pressures coming from a large variety of norms, more or less independent of the state, or to construct additional storeys for higher authorities. In other words, the present situation could be described either by larger horizontal connections with the functional requirements of a transnational society or by new forms of vertical institutionalisation and by structural hierarchies, higher than in the past.

4. The case of the EU

So far we have concentrated attention on the instruments of selection, stability and innovation that a GST approach is emphasising in a socio-legal interpretation of the role of the state and its legal order in a modern society. In this context, the largely studied experience of the EU is offering an interesting example. In general it is possible to say that the EU represents a casestudy where both, programmed and unplanned changes in the role of the state, are following highly differentiated paths and are still floating among various alternatives. The EU is an entity which could provoke positive or negative reactions because its legal, political, geographical borders are still to be defined and its final aims are not openly declared. The EU is in other word in a constant phase of transition and its identity is still in progress.

Firstly we have to underline that the cultural uncertainty and continuous flexibility of the extension of the EU affects, not only its self-regulation but also its possible external borders. Actually from a theoretical point of view these borders could include geographically, the most powerful among the neighbour countries (Russia), ideologically, the culturally closest among the distant nations (Israel) , strategically, the less remote among the culturally distant (Turkey) (11).

The uncertainty regarding spatial and cultural borders [2, pp. 91-114] has a strong impact on the definition of the legal borders of this meta-system and of its international role. It has the potential, on the one hand, to enhance a more relativistic perspective of European values in a globalised vision and, on the other, to justify a more radical defence of them as a reaction against the dangerous threats to which they seem to be exposed in this context. (12). This ambivalent attitude is capable of stimulating the expansion of material constitutions following different strategies: either through an emerging cosmopolitan vocation or through a reinforced sense of cultural identity. It is no surprise that in this context the Member Stateson the one side seem gradually opening to transnational trends and on the other seem to rediscover nationalistic and self-referential accents.

Following the same scheme applied for the analysis of the state we could recognise three main reasons of the present crisis of the EU. At the level of demoswe have to point out thedifficulty that even an important democratic institution as the European Parliamentis encountering in reflectingthe expectations diffused among the citizens of the single Member States. As a matter of fact the national political parties have rarely presentedduring the European electoral campaign, at least through their European organisations,clearand specific programmes or ideas with a view to mobilise consensus and assure a future *political stability*. This explains,not only the low level of turnout in the elections, but also why European policy makers are often prevented from being directly involved in the attempt to meet at least the most visible expectations of the voters. Furthermore,the lack of a lifeline between voters and their representatives explains also why,in view of assuring a high level of homogeneity in the interpretations of general provisions,the European legislation is often resorting to merely quantitative indicators. The consequentunusual rigidity produces stability at the cost of a restricted range of adjustment, with consequent disaffection and a deficit of *legitimacy* reinforced by the bureaucratic image of the EU machinery [6, pp.269-302].

A further reason of the present crisis , at the level of *territory*, is not only the politics regarding the problems connected with migration, surely a strong reason of disaffection towards the EU way to control the borders of the single state, but also the limited possibility to transfer resources from one state to anotheron the basis of a fundamental principle of solidarity. What is possible, and even natural, in federal states is explicitly excluded in the EU because of a diffused *negative selectivity* towards specific local problems. The single Member State is not only let alone even in front of particularly difficult economic situations, but in view of its economic recovery it has to select only strategies compatible with abstract economic standards. The concrete consequence is a reduced *autonomy* and a stronger territorial dis-unity in terms of economic indicators, a phenomenon particularly visible in the so called euro area.

The third reason of the present crisis , at the level of *sovereignty*, is the limited possibility of every Member State to effectively influence *innovative decisionsat* the EU level and to transform in this way a cluster of democracies into a real meta-democracy. The *accountability* of every single governments in their own country canbe hardly transferred to the central organs of the EU. Every democratic government has to communicate to its voters that it was able to achieve what requested having persuaded the representatives of the other Member States. This demands,as in any group,a generally accepted style of communication. In order to avoid isolation this also encourage the adoption, by the representative of the single Member State, of a'role taking process'within the organs of the EU. The almost inevitable outcomeis amore or less structured oligarchy based on the relatively clear distinction between leaders and gregarious.

These multilevel connections which nowadays characterise the transnational pluralism in the European Union could be summarised in the following conceptual scheme:

Table 3. Three Roots of the EU Crisis

Pillars of the State	*Dimensions*	*Functional Mechanisms*	*Deficit of*
Demos	Social	Stabilisation*	Legitimacy*
Territory	Spatial	Selection	Autonomy
Sovereignty	Substantial	Variation	Accountability

In order to reduce the negative impact of the present confused scenario,it would be ne-

cessary to reach, according to the systemic terminology, a more complex level of *reflexivity*. The constitution of the EU needs, not only to be more open to different variables,but also to recover different elements rooted in the tradition of its Member States. This cannot depend on single decisions, but also requires a slow autopoietic process of critical self-reflexivity which could leave only in the long term visible effects.

In this context a first strategy could be suggested by a *reflexive legitimacy*. This strategy, applied to a too rigid circulation of norms, could expand the use of more articulated rules equipped with a wider range of possible interpretations. The consequent exceeding number of possibilities of decisions ("redundancies"), might broaden the possibility of future solutions perceived as more adequate in different situations. In this way it could be possible to combine a more sustainable combination of flexibility with an acceptable level of stability.

A second strategy is offered by a *reflexive autonomy*. This could allow the selection of more articulated instruments for supporting in the name of common goods economically weaker states and enlarging the possibility to meet specific interests of single Member States. A more extensive use of this reflexive mechanism is especially requested in situations of transnational financial crises, produced by self-reinforcing instabilities and overlapping inter-systemic borders [10, Kjaer, G.Teubner, A. Febbrajo , 2011].

The third strategy is suggested by a *reflexive accountability*. This could allow a step back which recognises to the single states, independently from theirspecific weight within the EU, a larger,even if not unlimited,sovereignty. Nevertheless this strategy does not mean that it would be possible to reinstate former ideological models.

We have to underline here that the process of re-nationalisation registered in many countries as a reaction against a never totally accepted reduction of their own autonomy, is de facto representing a profound change in the theoretical premises of public law. These fluctuations cannot be interpreted as a zero sum process, as a simple alternation of steps in opposite direction which could restore the previous phase because they are only apparently reproducing previous theoretical models. Every attempt to return to the past requires, on the contrary, deep adjustments and renovations since it seems impossible to purely and simply reproduce in concrete cases the level of nationalisation of the single states before theiraccession.

In this context sociology of law, following the new structural and financial settlements of state and public law, has just to continue its lifelong fight against the model of a state-centred society, (13) only adapting the anti-hierarchical awareness of its past to a new kind of pluralism.In general, we have to admit that in the present situation the reduced relevance of a functionalism of differentiation, which considers separately the different sectors of society,forces us to recognise the increasing relevanceof a functionalism of links, which analyses several inter-systemic bridges based on mutually reflexive legal cultures, and is more capable to connect, at various levels, the legal system with its transnational environment.

Notes.

1. For the distinction, important for public law, between regulative and constitutive rules cf. J. Rawls, Two Concepts of Rules, The Philosophical Review LXIV (1955):3-12.

2. See A. Febbrajo, Constitutionalism and Legal Pluralism, in Febbrajo and Corsi (eds), *Sociology of Constitutions. A Paradoxical Perspective*, Routledge, New York, 2016, pp. 68-98; see also in the same volume from a historical and socio-legal point of view C. Thornhill, The Sociological Origins of Global Constitutional Law, cit., p. 68-96.

3. It should be noted here that Luhmann's sociology of law did not maintain a unique conceptual and theoretical framework, but gradually enriched its contents by importing from a variety of fields, such as cybernetics, biology and cognitive and communicative sciences.

4. N. Luhmann, *Law as a Social System*, .

5. Luhmann, *Law as a Social System*, cit., p. 25. In this and other cases, for Luhmann "the conditions for evolution" themselves produce further social evolution, because every change of social structures creates the conditions for new legal and social change (ivi, p. 243). On the concept of autopoiesis see also G. Teubner, Law as an Autopoietic System, Blackwell Publishers, Oxford-Cambridge, 1993. The scheme here suggested is an attempt to combine the perspectives of both authors.

6. Cf. Watson A. (1993), *Legal transplants: An approach to comparative law*, 2nd edition, University of Georgia Press.; M. Rosenfeld, *Modern constitutionalism as interplay between Identity and diversity* in M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives,* Durham: Duke University Press, 1994, 35). These differentworks are clearly grounded on different aspects of the constitution, the first on the formal, the second on the material constitution.

7. On these issues cfr.A.Febbrajo, Constitutionalism and Legal Pluralism, cit. p. 83.

8. Russia can easily be identified with this type of state, being more aware than other comparable states not only of its global role, but also of its past at the head of an empire. The limits of historical experience apparently affect the parallel role of the USA.

9. With the exception of Russia, this seems to be the case of the countries normally identified as the BRICS, which are still trying to develop their global role. The nuclear weapons divide is obviously relevant in this context.

10. The limited size of some states or their institutionalised territorial divisions could be a precondition for playing this role, with at least one significant exception: the Vatican City, which in some circumstances exercises a much stronger cultural influence than that of a normal spectator.

11. Paradoxically enough the oldest embodiment of the paradigm of European integration (Switzerland) has remained, precisely for this reason, outside the EU.

12. For this second possibility cf. J. Weiler J, *The Constitution of Europe - do the New Clothes have an Emperor?* Cambridge University Press. 1998.

13. It seems still possible to overcome law's apparent disorder abandoning the fetishism of legislation and using the flexible and adaptive tools of jurisprudence . For a comparison of the present situation with that of theRoman empire cfr. R. Bragu*e, Europe, la voie romaine.* Paris: Criterion, 1992; M. T. Fögen, *Römische Rechtsgeschichten. Über Ursprung und Evolution eines sozialen Systems.* [Legal history in Roman Empire. The origins and evolution of the social system] Göttingen, Vandenhoeck&Ruprecht 2002 (here the judge is explicitly represented as the "thermostat of law").

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КАМО ГРЯДЕШИ, ПУБЛИЧНОЕ ПРАВО?

В статье концентрируется внимание на кризисе традиционных теорий государства, вероятно, никогда полностью не воплощенных в жизнь, и на возникающей потребности в новой, более адекватной конституционной семантике. Рассмотрев на основе теории общих систем правовую систему как наиболее абстрактный инструмент, который, благодаря способности к изменяемости, «составляет» и «регулирует» социальные игры, способные объединять стабилизацию, селекцию и изменение правовых норм, статья обращает внимание на границы территории, суверенитета и народа, которые традиционно рассматриваются в качестве основных опор государства. Наконец, статья анализирует нынешнее положение Европейского Союза, который представляет собой яркий пример трудностей, с которыми сталкиваются национальные государства, когда они пытаются решить некото-

рые из своих традиционных задач в рамках наднационального субъекта.

Альберто Феббрайо,
профессор социологии права, кафедра политических наук, коммуникации и международных отношений, Университет Мачерата, Италия.

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European Union-- General System's Theory - Crisis of the State- Supra-national organisations.