Neither Behind, nor Beyond a Thick 'Veil of Ignorance': The 'Difference Principle' in the Impending European Constitution

by

Carla Angela* and Giuseppe Eusepi**

*Department of Mathematics Applied to
Economics, Finance and Insurance
Faculty of Economics
University of Rome "La Sapienza"
Via del Castro Laurenziano, 9
00161 Roma
ITALY
Carla.Angela@uniroma1.it

** Department of Public Economics
Faculty of Economics
University of Rome "La Sapienza"
Via del Castro Laurenziano, 9
00161 Rome
ITALY
Giuseppe.Eusepi@uniroma1.it

ABSTRACT

Starting from the constitutional document drafted by the European Convention, the paper seeks to compare and contrast the two approaches of welfare economics and constitutional political economy to redistribution. EU's member countries have weathered financing problems during the last twenty years and with the enlargement to ten more countries they will irreparably confront yet further financially unsustainable situations. The paper suggests the introduction of *multiple difference principles* behind a thin veil of ignorance and addresses itself primarily to this latter aspect by extending the generality principle to disability benefits and support to low-income earners.

1. Introduction

The past forty years have witnessed a dramatic expansion of public budgets in all countries which have joined the European Union in the various succession of enlargements. The transition from individual member states to a European Union has involved larger redistribution especially in connection with the implementation of the Common Agriculture Policy. If provisions of the upcoming European Constitution are to remain such, it is easy to anticipate that they will produce an even larger redistribution. This will lead to either a reduction of public goods due to the constitutional provision of a balanced budget[1] or, alternatively, it will involve political pressures that may result in more flexibility in terms of both budgets and Stability and Growth Pact.

A great deal of concern has been expressed regarding the Convention proposal. The worry is that the creation of rights without a modus operandi to match works against any constitutional logic and this raises a number of feasibility issues. For example, the redistribution matter is only vaguely mentioned. Reference is made only to generalized rights to a high level of services for all European citizens and entitlements of disabled citizens to benefits. The vagueness of the actual design of the Constitution is anticipated to inexorably confront a scenario characterized by a redistributive activity fully available to majoritarian political choices. The foreseeable political implication is a formidable push towards harmonization by means of a centralization of the redistributive activity at the Union level. The constitutional political economy logic dictates that the proposal should be improved by including provisions setting limits to governments' redistributive activities. But how can it do so in a Union of states in flux

[1] Treaty Establishing a Constitution for Europe, Title VII, pp. 41-43, *The European Convention,* Brussels, 18 July 2003.

about to expand to 25 members? In an effort to unravel several of the many weaknesses of the Convention proposal we introduce the concept of *multiple difference principles* that should work within quantitative constraints, either in the form of a percentage of individual member countries' GDP or as a share of the general revenues of national governments.

The argument seeks a grounding in the Convention proposal itself that in the present incarnation gives rise to two jarring conflicts: the contents of articles I.4, 8:

> "Free movement of persons, goods, services and capital, and freedom of establishment shall be guaranteed within and by the Union, ……. any discrimination on grounds of nationality shall be prohibited[2]. …..Citizens of the Union…. shall have the right to move and reside freely within the territory of the Member States;…."[3]

and that of art. II-34-35:

> "The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment……Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages. ….In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance …..".[4]
>
> "Everyone has the right of access to preventive health care and the right to benefit from medical treatment….. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities"[5].

and between these and art. II-26, which is what interests us most here:

---

[2] Treaty Establishing a Constitution for Europe, PART I, Title I, Article 4: Fundamental freedoms and non-discrimination, 1-2, *The European Convention,* Brussels, 18 July 2003.

[3] Treaty Establishing a Constitution for Europe, PART I, Title II, Article 8: Citizenship of the Union, 2, p.8, *The European Convention,* Brussels, 18 July 2003.

[4] Treaty Establishing a Constitution for Europe, PART II, TITLE IV, Article II-34: Social security and social assistance, 1,2,3, p.54, *The European Convention,* Brussels, 18 July 2003.

[5] Treaty Establishing a Constitution for Europe, PART II, TITLE IV, Article II-35: Health care, p.54, *The European Convention,* Brussels, 18 July 2003.

> "The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community"[6].

All this produces a rather serious implication. The relationships between freedom of movement (especially residence) and entitlements to high services, as well as to the transferability of redistributive entitlements such as disability benefits could result in a gigantic welfare state. This dual approach to the problem has suggested the provoking title of the paper that is inexorably against any adjustment neither beyond the veil of ignorance, nor a constitutionalization behind too thick a veil of ignorance.

2. Two alternative views on redistribution.

In this section we set forth our view on how much redistributive power the Constitution should allow governments. We do this by looking specifically at two trends of thought perennially in a state of conflict. The welfare economists, according to whom any limit to the redistributive activity by the government would ring as inappropriate and the economists of constitutional political economy whose philosophy is based on a presupposition that a democratic government should be allowed to choose only within the limits fixed by the constitution. Moving from constitutional political economy, we use a nuanced form of the Rawlsian metaphor of the veil of ignorance: a thin veil of ignorance. From this perspective, it is not the initial decision-makers' ignorance as deriving from a present spatial-temporal position that is important, but the uncertainty of the position that anyone will have in a more or less far future. This tenet is perfectly general, but nevertheless legitimates the allotment of *ad personam* specific entitlements such as those that the European Constitution recognizes as disability benefits. The unequal treatment of unequals *de facto*, such as disabled persons, is the logical implication stemming out directly from the assumption that equals should be treated equally. Indeed, the latter principle fulfills the generality principle and, from whatever

[6] Treaty Establishing a Constitution for Europe, TITLE III, Article II-26: Integration of persons with disabilities, p.52, *The European Convention,* Brussels, 18 July 2003.

angle one wants to see it, no consideration can be advanced to turn it into its opposite: the discrimination principle.

We postulate a thin veil since our challenge is not a mere mind experiment, which would originate only a constitution *per se*, but the need to reorient cardinal articles of the European Constitution. In order to organize our argument, we introduce some qualifications, specifically the qualification that the constituents know themselves and evaluate possible futures in a context of uncertainty. Our contention is that the veil of ignorance from an abstract experimental device has the potential to become a methodologically oriented process. We therefore suggest that a contractarian perspective should be used not only as a basis for internal consistency between legitimate conflicting interests, which should be mediated, but also as a tool to implement those decisions.

Reasoning from behind too thick a veil is like reasoning from the ivory tower[8] and there cannot be terrain for any contractarian perspective. Consensus does not raise from different individuals such as the two contracting parties and *a fortiori* of a constitutional contract, which is destined to last quasi-permanently[9]. To investigate the role of the thin veil over the contractarian perspective we must devise its role. The thin veil would replace the indeterminacy of the future with the uncertainty of the future since an intertemporal link among individuals is also apt to mitigate the conflicts arising from the initial inequality between the two contracting parties in terms of property and abilities. With this choice we want to avoid the condition in which behind too thick a veil conclusions that are reached be of the absolute kind.

In the European convention the two contracting parties are at odds and push towards alternative configurations. Following the Musgravian approach on matter of competence assignment - or more plausibly bureaucratic and political incentives - the members of the Commission and the members of the European Parliament push towards centralization while the representatives of member countries' governments are prone to maintain a country-based competence. This is in line with our analysis suggesting that the latter dimension requires a European constitution with *multiple difference principles* where a certain amount of GDP has the function to limit redistribution.

[8] J.M. Buchanan (2003).
[9] J.M. Buchanan (1975).

The assumption made by some Public Choice scholars[10] is that the European Union budget is excessively redistributive with the consequence that public goods are scarce. If so, there would be then good reasons to foresee that the ongoing constitutionalization process is apt to modify the ratio public goods/redistribution in favor of the former so enabling the Union's governments to pursue a common foreign policy and a common defence policy. In its wording

> "The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy"[11].

This, however, would involve that a share of the sovereignty be transferred to the Union by the national states, and national governments are reluctant to do so.

Our argument is that to set limits to redistribution has become urgent and the inclusion of a quantitative constraint in the constitution should have preceded any enlargement. The new entrants' GDP averages around 50 per cent compared to that of the Union member countries[12], it is then reasonable that they will push for a further increase in redistribution. Consequently, if they were to find difficulties in gaining the majority, they would become adamantly opposed to any changes in the *status quo*. Only to those who are not familiar with the logic of constitutional political economy, switching from the level of the mind experiment *per se* to the contractarian logic behind a thin veil could appear a simple semantic change.

3. Contractarianism with a thin veil.

More than thirty years have elapsed since John Rawls introduced the constitutional logic in the form of consensus over rules attainable through the mind experiment. Little matters whether the initial position is Hobbesian or Lockian. Certainly in the case of the Hobbesian position characterized by a "solitary, poor, nasty, brutish and short life" the lip out of the state of nature is more promising. From such an original position, it was plausible to find an argument to stop the war of one against

---

[10] See D.C. Mueller (1997), C.B. Blankart (2004). For a different view see G. Brennan and A. Hamlin (2000).
[11] PART I, TITLE III, Article 15: The common foreign and security policy, 1, p.13.
[12] H.Kierzkowski (2002).

anyone else; and through consensus it was possible to expect the attainment of a condition that, at least potentially, would set everybody in a better position. Yet, welfare economists have gone on reasoning beyond the veil of ignorance in the name of a purported maximization of social welfare. Social welfare maximization would hardly be compatible with the thin version of the veil and *a fortiori* with the thick one. The objective to be maximized, in fact, must be visible and the operating context should be veil free as much as possible. Given that the Europeans are pressed by real choices, there is no reason to stick with the mind experiment. The *status quo* guarantees the Europeans such a level of living and security conditions that the constitutional provisions cannot guarantee Pareto superior positions for all. Some, perhaps few, will lose to the majority's advantage. Differently from an anarchic setting, changing the *status quo* may involve some risks at least for somebody. In a free game context, rigidity or flexibility of the *status quo* depends on the level of support/opposition enjoyed.

In a context less dramatic than anarchy, such as that of the EU member countries, a useful baseline to build democratic institutions would require moving into contractarian terrain, somewhat on the model of Buchanan and Tullock where uncertainty, not ignorance, arises as a consequence of the difficulty to clearly forecast which impact rules under approval will have on political conduct from which *lato sensu* results depend on. Probably, as Mueller[13] evokes, a latent, but permanent elitist component, which characterizes European history and European political vision, can explain, at least partly, why the contractarian perspective has not replaced the search for the first principles in the mind of the members of the European Convention. Even more. The discussion on the daily press has focused on the contents rather than on processes as if the task of the constitution were that of determining the results, in the typical fashion of the economic policy approach, and not that of changing the rules. Hence, in the formulation of the Convention, the scenario of a European Constitution is getting less and less persuasive. For instance, the search for self identification seems to find too much a space within the Convention not to say of the press, the Catholic circles and the Pope's Sunday appeals. All this bears the risk of pursuing a holistic entity that is the identification of an ideal Platonic Europe which equals to a rejection of the world *of limits* from which the Convention should start.

[13] Dennis C. Mueller Constitution Making the European Way, typescript.

In this scenario of spurious margins, which reminds more the Pigovian welfarist economics than constitutional political economy, economic instability and problems connected with the financing of public economies are destined to find solutions of the *ex post* kind. The thin veil of ignorance, which is at the basis of the *multiple difference principle*, allows us to consider that decision-makers, who behind the veil of ignorance determine redistributive limits, cannot be surrogated by an unspecified individual or by a mock individual. They are, in fact, real individuals, such as the members of the Convention, who represent national governments, national parliaments, the European Parliament and other European institutions. However, the expedient of *multiple difference principles* is neither a corrective nor a strained elaboration; it is instead a limit of the procedural kind that would impede that the governments' representatives might choose beyond the veil of ignorance. When we move from the welfare state institutions, such as those of the Union member states, the problem of right creation emerges dramatically. Rights created by the law violate the generality principle on which the constitutional welfare states hinge. By contrast, for pressure groups, especially bureaucracy, laws are used as a rent-seeking device. The systematic conflict between rights and obligations in welfare states is to be ascribed to the existence of rights or entitlements to receive transfers created by the law. The cycle is driven by the law that creates redistributive rights without fixing the corresponding covering obligations. Social security is an intriguing example of this cloven fisc. Unless we imagine anything like government owing the whole property, a law cannot assign rights to someone without imposing obligations on someone else. It becomes then clear that the logical step in redefining the constitutional limit to welfare states would be about the circuit obligations-entitlements-rights.

Conceiving of the difference principle as equality in results might derive, though bizarre may seem, just from its being a differential constitutional principle, which as such is quasi-permanent and cannot be circumvented. One might say that this perspective of the difference principle originates from the creation of robust, differential distributive rights. However, the European Constitution in the version devised by the Convention does not fix any limits to governments' redistributive power.

When the obligatoriness of the difference principle is related to a quantitatively robust redistribution - and this is rather likely if competence over redistribution is assigned at EU level - the consequence is the recognition of a unique, though spurious, difference principle. In this way the difference principle becomes a device instrumental

to the determination of the correct result (minimum level) that is procedurally dumb. So interpreted, the difference principle would involve equality in results for the individuals by endowing them with primary goods quite independently of their individual merit and the economic conditions of the country of residence.

4. Centralization of Redistribution

The allotment of competences to the various tiers of government, figures prominently in Musgrave's classic book *The Theory of Public Finance*[14]. His recommendations are based on the argument that for efficiency purposes redistributive competences should be conferred on the central government exclusively.

If extended to the European institutional setting, this logic would involve the shift of redistributive competences from individual member countries to the European Union consistently with the logic of the welfare economics and its institutional incarnation, the welfare state. The consequence is an upwards alignment and not a marginal one, also in light of the fact that the Convention insures a high level of services and disability benefits. An alignment of services and benefits to the disabled would violate the constitutional logic. And, in fact, the present version of the Constitution does not seem to interpret the philosophy of the constitutionalization of the welfare state delineated above.

Because of the severe feasibility problems raised by the Musgravian assignment of competences, scholars more and more agree this is a sour point in the allotment of powers to different tiers of government. In fact, according to this stance, the welfare state and its major component, social security, has not simply grown up in an incoherent manner, as Musgrave would put it, but it has overgrown compared to market economy. Transferring the competence to the government of the Union means to worsen the crisis that social security financing is facing at the Eu member states level. It would then be logical that basic rules be changed. This rationale should give a lot of leverage to the European Convention to identify which elements of the welfare state are compatible with the constitutional perspective and which are not. Yet the Convention seems reluctant, as mentioned, to measure itself with this theme, and the subject has largely been eclipsed by abstract statements. As it is, the constitutional document is hardly

[14] R.A. Musgrave (1959).

compatible with the thin veil of ignorance here proposed, unless the proposal of the Convention is completed by eliminating the conflicts underlined in the introduction. To this aim we extend the Rawlsian difference principle, tailored for a national level, to a supranational level through the use of *multiple difference principles*. What is distinctive about this logic is not only its internal coherence, but its capacity of providing that method for the shift from the welfare state of individual countries to the constitutional welfare state of the Union. Indeed, difficulties associated with such a shift are likely to occur. The first problem which could arise is that of checking whether in a context of multiple difference principles there is room for redistributive purposes without violating the generality principle. This point seems *prima facie* a hopeless one from a contractarian perspective because the redistributive activity produces net recipients and net payers. It might be thought that our critique to the welfare states concerns redistribution *per se*. But it is clear from what we have stated above that our attention concerns the privileges that the welfare states give rise to through the discretionary usage of budgets, not to say of regulation.

That the social security crisis, based on a PAY-AS-YOU-GO formula, is a phenomenon common to not only European countries is evident from the more or less big reforms that have been going on during a period of twenty years. Examples start from Chile to end with post-communist countries, including Slovakia, Hungary and Bulgaria.

In order to clarify the *modus operandi* of the generality principle behind a thin veil, we separate EU's citizens into two classes:

1. The *de facto* unequal citizens (disabled and poor)
2. Ordinary citizens

With respect to the first class the constitutional document should set limits

1.a. to the allotment of resources to cover disability benefits.

1.b. to the allotment of resources to support persons whose income is below the poverty line.

With respect to ordinary citizens, the generality principle commands a constitutional provision establishing a mandatory private insurance for all ordinary citizens.

The European constitution should include an article reading "each country shall decide with constitutional revision which percentage of GDP will be allotted to

disability benefits". The device of computing disability benefits on the basis of GDP and not on other parameters such as general revenues would impede that the differential of tax evasion in the various countries affect disability benefits. The financial conflict arising from citizens' freedom to move and disability benefits would be reduced by the GDP limit and by the provision to pay disability benefits to newcomers only after a certain period of residence. A time span of five years or more – fixed by constitutional amendment at a national country level – would impede the Tiebout effect. Constitutions of the member countries should also set a deadline for revision; we suggest a period of time not shorter than ten years.

The second step of action should concern transfers in favor of the poor in terms of support to incomes below the poverty line. Differently from the disability benefit case, here the transfer should be fashioned in terms of a negative income tax parameterized on general revenues. Moreover, in order to incentive individuals to work, the benefit should cover only a share of the income differential. The full coverage of the differential in income *vis à vis* the poverty line would result in a distortion in the incentive to work. Although for different reasons, the first two types of transfers are exclusively redistributive and require therefore public intervention as the philosophy of the *multiple difference principles* commands. The third broad change concerns ordinary citizens for whom the constitution should impose the obligation to secure that everyone insures himself on the market. Compulsory insurance is a tool against free-riding, but the solution that guarantees the keeping of the entitlements to give and to receive is a market relationship where anyone chooses his/her own level of security, in view, for instance, of a permanent income during the life cycle.

With its current structure based on a PAY-AS-YOU-GO formula, social security would violate the equal treatment of citizens if it were to produce intergenerational redistributive effects. And this would be so if governments are the only providers of social security.

5. Some Technical Comments

With reference to the first category of beneficiaries (disabled people), we adopt the definition of disability established under the functional classification by the European System of Integrated Social Protection ESSPROS, Manual 1996.

According to ESSPROS the disability benefit is defined as income maintenance and support in cash or in kind (except health care) in connection with the inability of physically or mentally disabled people to engage in economic and social activities.

The above mentioned proposal provides the criteria to calculate the total social benefit for disabled people as a fixed percentage of the GDP.

This formula on one hand reflects the general concept of the compatibility of the expenditure in respect to the country productivity, on the other meets the transparency requirement towards the beneficiaries within the European countries as well as between each European country and the European Union.

In addition, a quite new approach is suggested to the national governments about how to deal with the disabled people social protection cost. Governments are implicitly required to control (measure and manage) the risk that "the disability expenditures in a country are higher than a fixed percentage of the country's GDP in each year for a period of ten years".

The evaluation process of the percentage has to be designed as a provisional model under conditions of uncertainty.

With regards to this, useful information can be found on Eurostat publication (European social statistics) which *inter alia* contains Social Benefit Disability function tables[16] as a % of GDP for each European country.

In 1999 the Social Benefit for Disability was equivalent to 2.2% of GDP in the EU 15 (EUR 12 countries plus Denmark, Sweden and the United Kingdom). However the gaps are quite consistent: Ireland 0.7% of GDP, Italy 1.5% of GDP, Sweden 3.8% of GDP. The various rules on benefits linked to disability, the percentage of population aged 65 or over and the average annual GDP growth rate trend explain the discrepancies.

Between 1991 and 1998 the social benefits for disabilities increase everywhere in all EU 15 countries.

The figures of the social benefits as a % of GDP by country show a limited volatility in most of countries.

Then to find the appropriate percentage to be written in the national Constitution, we have to take into account:

a) the GDP is a stochastic variable over the 10 year period,

b) the total expenditure for the disabled people is the result of the product of two stochastic variables: the number of disabled persons in each year and the average amount of benefits they receive. The variable number of disabled persons in each year is subject to the demographic risk due to the ageing of the population and to "operational risk" which is the risk depending on the variation of the rules which entitle a person to request the benefits,

c) the average amount of the social benefit is subject to variations linked to the inflation rate.

The percentage is a result of projections of the above mentioned variables over a period of 10 years with the constraint that in each year social benefits for disabilities are topped just by the GDP percentage.

In case of positive result, in one year the difference should be allocated to a specific fund in order to create a kind of equilibrium technical reserve. The fund should be used in case the expenditures are higher than the GDP percentage.

The proposal suggests to fix a percentage α of GDP to finance the disabled benefits expenditure over a limited future period.

The evaluation model to compute this percentage may be written as follows

$$\sum_{t=1}^{T} \left(O_t - \alpha GDP_t\right) v^t = 0$$

where O_t represents the total expenditure at the year t with $1 \le t \le T$ and is given by

$$O_t = \sum_{x=0}^{\omega} D_x B_{x,t}$$

where D_x is the number of disabled people of age x and may be calculated as

$$D_x = D_{x-1} p_{x-1} + ND_x$$

with ND_x the new entrants of age x, $p_{x-1} = \left[1 - q^D_{x-1}\right]$ and q^D_{x-1} representing the probability to leave the status of disabled person for death or other reasons. $B_{x,t}$ is the amount of benefit for a disabled person of age x at time t.

GDP_t may be written as

---

[16] *European social statistics* (1980-99), p.85.

$$GDP_t = \rho_t GDP_{t-1}$$

where ρ_t is the annual rate of increasing of *GDP*.

The percentage α is the result of projections of the above mentioned variables O_t and GDP_t over a period T.

As an example, we suppose the projections exercise gives the following results:

t	GDP_t	O_t	α_t
1	10,000	200	2.00%
2	10,200	206	2.02%
3	10,404	220	2.11%
4	10,612	180	1.70%
5	10,824	190	1.76%
6	11,041	300	2.72%
7	11,262	230	2.04%
8	11,487	360	3.13%
9	11,717	200	1.71%
10	11,951	220	1.84%

The average percentage α over the period results equal to 2.1027%. What is the meaning of α? If $\alpha = 2.1027$ is fixed, in average the total expenditures for disabled people will be covered over the period T. If at time t the benefits for disabilities are less than αGDP_t, the difference should be allocated to a specific fund in order to create a kind of equalization reserve.

The percentage α, as evaluated in the above exercise, is based on the hypothesis of a binomial probability distribution of $[O_t - \alpha GDP_t]$. If this is not the case, as it is possible, it would be necessary to increase α of a percentage ε to get a higher probability, at a fixed level of 95% or 99%, that the amount $\sum_{t=1}^{T}(\alpha + \varepsilon)GDP_t$ may cover the expenditures over the period T.

6. The Constitutional Welfare State.

The basic conundrum facing institutions is to see to what extent they can at once make redistribution compulsory and satisfy also the equal treatment criterion on which the constitutional welfare state hinges. Supposing that this were possible, we would define the set of those institutions as an *ex ante* welfare state or simply a constitutional welfare state. From this point of view it would be possible to define rights as inalienable and this would imply that all citizens could have the guarantee "to be entitled to". For one thing, the lexicographic priority of the equal liberty principle as well as the difference principle in Rawlsian terms[17].

The identification of "who has right to" would be the most momentous. A welfare state that assigns titles satisfying those rights would, in fact, be compatible with a constitutional context. This, however, does not mean at all that all rights created by the legislation of the Union's member states may find their justification behind this "screen". Due to the way it has been introduced, the constitutional analysis has underlined the fact that the equal opportunity principle invoked by the liberal theory is certainly not a natural or spontaneous dimension. It is instead an artifactual or artificial one. From this perspective, the distributive component, especially in terms of *ad personam* transfers, represents the operating aspect of the difference principle and, hence, of the *multiple difference principles*.

Welfare states traditionally have favored the bureaucratic provision of goods and services. In a setting of *multiple difference principles*, transfers would be *ad personam* and, this notwithstanding, compatible with the generality principle. Almost by definition, the equal treatment of guiltless disabled individuals would involve a discrimination at their expense. What works for everyone it can in fact wind up working for no one and hence it is far from being a redistributive principle. The right to benefits has to be limited (we have suggested according to GDP). Though arising from different decisions taken behind thin veils of ignorance, benefits are constitutionally limited and therefore can be included under the generality principle rubric. Discrimination would arise instead if the different treatment concerned disabled individuals living in the same country. There wouldn't be any if different benefits concerned disabled individuals living in different countries. Almost certainly, *ad personam* transfers would heavily impede that fiscal duties be directed to the preservation of an oversized bureaucracy.

---

[17] Cfr. P. Johnston (1998).

The hypothesis of a robust difference principle from the distributive point of view finds its extreme limit in the ratio entitlements-to-rights/obligations.

The fact that we have chosen GDP as a parameter to calculate the disability benefit shouldn't mislead because it is just a devise to avoid that the benefit level may depend on the rate of tax evasion.

And, in fact, there can emerge redistributive entitlements that are constitutionally legitimate only if they are linked to fiscal duties on which an *ex ante* agreement has been reached. In this setting the coercive element is not the legitimating procedure of fiscal duties. As already mentioned, the legitimating procedure is, in fact, a voluntary choice behind the veil of ignorance. Here the coercive element emerges only at a post-constitutional level to impede that individuals might behave as free-riders.

Still more, since behind the veil of ignorance – and this is the decisive point – constituents necessarily reason in a scarcity context, *multiple difference principles* cannot cover all individuals' disadvantages. Given the constitutional nature of fiscal justice there is no reason to entrust the Union government with such a task.

When, however, the law creates robust redistributive rights, as is the case of the welfare states of the individual member countries, conflicts between fiscal rights and fiscal obligations sharpen, and they do not emerge until the government is able to introduce surreptitiously an illusion of abundance through debt illusion or money creation. By definition abundance is "beyond redistributive justice".

Clearly, in such a context, the Rawlsian difference principle would seem to violate intergenerational equality before the law because through debt financing the government pre-sets up unjustified constraints to the set of choices available to future individuals including those who would be entitled to receive transfers on the basis of the difference principle. But there cannot certainly be said that such result depends on the enforcement of the difference principle. On the contrary, it would depend on a non-constitutional usage of the difference principle that in the welfare state ends up by being a procedure on the ground of which the law creates rights divorced from fiscal obligations.

7. Conclusions.

Our argument can be synopsized as follows:

1. The inclusion of the difference principle in the European Constitution would at once act as a constraint for governments of member states and as a guarantee to cover disability benefits.

2. The inclusion of the difference principle in the European constitution does not imply at all the shift to the Union of competences connected to covering costs.

3. The constitutionalization at the European level of the difference principle is consistent with covering obligations on the part of national governments.

4. The coexistence of *multiple difference principles*- one for each country – is perfectly compatible with the criterion of procedural equality. Conversely it is not compatible with the criterion of substantial equality on the ground of which the difference principle would end up by giving rise to big discriminations for it would assign equal transfers regardless of the availability of resources of individual countries.

5. The "country" dimension is the most appropriate one. Centralization, instead, would involve an enlargement of the bureaucratic apparatus and the adoption of a single difference principle that would conflict with the logic of the preceding point.

6. The "country" dimension does not raise feasibility problems. Moreover, it does not call for substantial changes in the Union's budget procedures and at the same time, given the *constitutional constraint*, does not allow national governments to make an instrumental usage of the difference principle for electoral purposes.

REFERENCES

BLANKART, Charles B., Kirchner, Chr. (2004), "The Deadlock of the EU Budget", in Ch. B. Blankart, D.C. Mueller (eds.) *A Constitution for the European Union*, Cambridge, Mass.: MIT Press.

BRENNAN, Geoffrey, Hamlin, A. (2000) "Nationalism and Federalism: The Political Constitution of Peace" in G. Galeotti, P.Salmon, R. Wintrobe (eds.), *Competition and Structure. The Political Economy of Collective Decisions: Essays in Honor of Albert Breton*, Cambridge: Cambridge University Press.

BUCHANAN, James M. (2003), "Competitive Federalism by Default", CESifo Conference, 7-8 February.

BUCHANAN, James, M. (1975), *The Limits of Liberty: Between Anarchy and Leviathan*, (Chicago: University of Chicago Press).

EUROPEAN SOCIAL STATISTICS, Social protection, Expenditure and receipts 1980-99, Theme 3, European Commission.

JOHNSTON, PAUL (1998), *The Tree of Liberty*, The Blackstone Commentaries, No.2, Fairfax, Virginia: The Locke Institute.

KIERZKOWSKI, Henryk (2002), *Europe and Globalization*, New York: Palgrave MacMillan.

MUELLER, Dennis C. (1997), "Federalism and the European Union": A Constitutional Perspective", *Public Choice*, Vol.90, 255-280.

MUELLER, Dennis C.(2003), Constitution Making the European Way, Paper prepared for the ECSPC-CIDEI-MEP Conference, Rome, September, 25-27, 2003.

MUSGRAVE, RICHARD (1959), *The Theory of Public Finance,* New York: McGraw Hill.

RAWLS, John, (197 1), *A Theory of Justice*, Harvard: Harvard University Press.

THE EUROPEAN CONVENTION (2003), Treaty Establishing a Constitution for Europe, Brussels: The Secretariat.