TOWARDS A REAL *CONSTITUTIONAL DIALOGUE*: THE NEED FOR AN "INFRASTRUCTURE" OF THE EUROPEAN CONSTITUTION

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Abstract

This article aims at defining the legal infrastructure for the European constitutional dialogue. The path of progressive "constitutionalization" of the European Union today faces a dilemma: how to reconcile the Union's constitutional "form" with its pluralistic "substance". 2004 Constitutional Treaty and European Charter of Fundamental Rights represented, respectively, either "failed" or "partial" solutions to the dilemma. This article claims that the future of European constitutionalism will depend on the ability to provide reliable and effective "legal" forms (not just political or social) to this constitutional dialogue. In its second part, the article analyses three main dialogic dimensions (judicial, political and societal) with corresponding legal instruments, assuming the European Union as a "3-D" constitutional space. The final remarks are about the meta-legal conditions that make this dialogue effectively happen, that is, factors able to transform the "potential" infrastructure of a European constitutional space into an "actual" one.

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1. The gap between "*experience*" and "*vocabulary*" in the European constitutional doctrine

If we consider the "legal experience"[1] as it derives from the process of European integration, it seems clear that it can be neither understood nor adequately expressed without using "constitutional" terms. As a matter of fact, the conventional origin of the European Treaty and the "international law" labeling of the Community legal system did not prevent its *transformation*[2] into a "constitutional order".

Since the 1960s, the European Court of Justice (*ECJ*) had identified in its case-law a certain number of principles of "constitutional nature" and since the 80s, the same Court, therefore, hadn't hesitate to explicitly define the Treaty of Rome as the *Constitution* of the Community[3]. But we have to complete this "self-definition" offered by the ECJ with a further observation that we may deduce from "actual" legal experience. Aside from theoretical dilemmas that lawyers may be puzzled about, there are no doubts that today the EU regulatory system is deeply affecting—in an even more compelling manner—the life of European citizens and public

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[1] We use here the concept of "esperienza giuridica" (*legal experience*) originally elaborated by the Italian legal philosopher Giuseppe Capograssi - G. Capograssi, *Studi sull'esperienza giuridica* (1932) - and developed as "*experience of law*" by P. Grossi, *A History of European Law*, xiii ss. (2010).

[2] J. H. H. Weiler, *The Transformation of Europe*, 100 (1991).

[3] ECJ C-294/83 *Les Verts.*

institutions (either nation-states or sub-national public authorities). In conclusion, we live in a legal order that—in the areas set by the Treaties – concretely ties and shapes the sovereignty of European nations and defines the freedom of European citizens.

The key point is that this transformation of European law not only affected the practical functioning of the legal and institutional framework, but also had a deep impact on the cultural and methodological attitude of legal scholars. European lawyers—and especially constitutional lawyers—were, on one hand, greatly "challenged" by the extent of innovations on the regulatory and institutional level, but, on the other hand, found themselves faced with the compelling need to discover new legal concepts and categories apt to express such novelty[4].

The main hermeneutical difficulty for European legal science stemmed from the evidence that the idea of *constitutionalism* implied by the process of European integration does not coincide with the constitutional "narrative" hitherto either known or consolidated. A. Miguel Maduro's[5] acute image effectively summarizes this interpretive gap: there is "an emerging trend", says the Portuguese professor, "*to agree with the use of the language of constitutionalism in the European integration without agreeing on the concept of constitutionalism which is behind this language*". Therefore, present-day European constitutional lawyers are almost in the same condition as those living during the new-constitutions-making period that began with the end of Second World War.

If we consider the five-year period between 1946-1951, we see, on the one hand, the birth of three new constitutions (France 1946, Italy 1948, and Germany 1949), which set the new model for many subsequent European constitutions, and on the other hand, during the same years, the signing of some international instruments that, especially in their evolution, would reveal their distinctive constitutional "nature": the *Universal Declaration of Human Rights*

[4] See, A. Pizzorusso, *Il patrimonio costituzionale europeo* (2002).

[5] M. P. Maduro, *The Double Constitutional Life of the Charter of Fundamental Rights of the European Union*, in Hervey and Kenner (eds), *Economic and social rights under the EU Charter of Fundamental Rights: a legal perspective* (2003), 270.

(1948), the *European Convention on Human Rights and Fundamental Freedoms* (1950) and the first "stone" of the European Union building: the *Treaty establishing the European Coal and Steel community* (1951). During that period—just as in our day—something radically new was emerging in the European continent that the well-known *vocabulary* of old liberal constitutions was not able to express completely and correctly.

This sort of "evolutionary jump"—and the consequent necessity of rethinking all the basic constitutional categories—is the most relevant contribution of the process of European integration to the very idea of the post-World War II *constitutional* state.

2. The European constitutional *taboo*

The point of departure for our reflections is, therefore, that the legal order created by the European Treaty system is indeed a *constitutional order*[6]. But even this initial assertion can not be considered obvious or taken for granted. As a matter of fact, until today there is no such legal act that could be called a "European Constitution", and the attempt to provide the EU system with a formal "*Constitutional" Treaty,* as we know, failed with the 2005 French and Dutch referenda. As a consequence of this failure, a new amending process of the Treaties was started: the so called "Lisbon Treaty" was signed by the EU member states on December 13, 2007, and entered into force on December 1, 2009.

This reforming process of the whole European Treaty system has been based on the sharp rejection of any explicit constitutional qualification of the new treaties. The mandate approved by the Intergovernmental Conference that had the duty of defining the overall objectives of the future Reform Treaty, was extremely clear:

"*The constitutional concept, which consisted in repealing all existing Treaties and replacing them with a single text called "Constitution" is abandoned. (...) The TEU and the Treaty on the Functioning of the Union will not have a constitutional character. The terminology used throughout*

[6] U. De Siervo, *La difficile costituzionalizzazione europea e le scorciatoie illusorie*, in De Siervo (ed), *La difficile Costituzione europea*, 112 (2010).

the Treaties will reflect this change: the term "constitution" will not be used (...)"[7].

Therefore, somehow paradoxically, the most recent phase of European unification begins from the explicit denial of the "constitutional character" of this step. If anything was clear to all European member states negotiating the Lisbon Treaty, it was the consensus on banishing the word "*constitution*" as well as the adjective "*constitutional*" from the text of the treaties[8]. Thus the "Constitution" issue seems at the moment to be a "taboo" within the European political debate.

But is this enough to exclude this "quality"? And if so, how dare we say, as in fact we did at the beginning of these notes, that the European legal system must be considered a *constitutional* order? The most reliable doctrine on the subject[9] showed that, although Europe was born as a classic international organization, "in 1963 and then continuing in the 70s and beyond, the Court of Justice set in a series of historic decisions, *four* principles that shaped the relationship between Community law and the law of the Member States, in such a way that it becomes indistinguishable from that of a federal constitution"[10].

a) The principle of direct effect

EU rules that are sufficiently clear, precise and self-executing must be obeyed by European citizens and can equally be invoked by those citizens before national courts without the need for implementing laws or enforcement orders[11].

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[7] *Note from the General Secretariat of the Council to Delegations: IGC 2007 Mandate* n. 11218/07 del 26.6.2007 POLGEN 74

[8] J. Ziller, *Il trattato modificativo del 2007: sostanza salvata e forma cambiata del trattato costituzionale del 2004*, 27 *Quad. cost.*, 875 (2007).

[9] E. Stein, *Lawyers, judges, and the making of a transnational constitution*, 75 *Am. J. Int'l L.* (1981); J.H.H. Weiler, *The Community system: the dual character of supranationalism*, 1 *Yearbook of European Law* (1981).

[10] J.H.H. Weiler, *In defence of the status quo: Europeís constitutional Sonderweg*, in Weiler and Wind (eds), *European constitutionalism beyond the state*, 45 (2003).

[11] ECJ C-26/62 *Van Gend and Loos*; with this doctrine the European law definitely abandoned all the classical either International law or International organizations conceptual schemes; it affirms the idea of EU as a "supranational" organization, on all these aspects see B. Beutler, R. Bieber, J. Pipkorn, J. Streil and J.H.H. Weiler,

b) The principle of supremacy

Within the scope of Community law, any rule deriving from European institutions (whether treaty provisions themselves or secondary legal sources provided by the treaty) trumps any conflicting national rule, regardless of *whether* it had been issued (before or after the EU law), regardless its *nature* (judicial, administrative or legislative) and regardless of its *rank* (either secondary, legal or constitutional)[12].

c) The doctrine of implied powers

The first two above-mentioned theories were developed with reference to powers expressly conferred by the Treaties to European institutions. But from a fundamental decision of 1971[13], the ECJ began to state that European institutions are not only entitled to explicitly enumerated powers, but also to those powers which may be *implicitly* considered proper and necessary to achieve a legitimate aim pursued by the Treaties.

d) The protection of fundamental rights.

The original Treaties did not prescribe the protection of fundamental rights. Through a sequence of major decisions starting in 1969[14], the ECJ ruled that it would ensure respect for fundamental rights by Community measures, using as criteria for judgment the constitutional traditions common to the Member States and international conventions on human rights to which they had subscribed.

It is evident that all these principles are *judicial* principles; i.e. they were not established by virtue of a political decision or through

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L'Unione Europea, 34 ss. (2001); B. Rosamond, *Theories of European integration* (2000), 14; J. De Areilza, *Sovereignty Or Management?: The Dual Character of the EC's Supranationalism-Revisited*, in http://www.jeanmonnetprogram.org/papers/95/9502ind.html (1995). See the criticism of T. Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations*, 37 *Harv. Int'l. L. J.* (1996).

[12] ECJ C-6/64 *Costa v. Enel* "The law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed".

[13] ECJ C-22/70 *Commission v. Council.*

[14] ECJ C-29/69 *Stauder,* C-4/74 *Nold.*

a formal treaty amendment. The ECJ was definitely one of the most important "driver" of the constitutional transformation of Europe. In a lot of cases, the political decision taken by the Member States and the corresponding amendment to the Treaty simply *followed* the ECJ case law.

Obviously you cannot say that all the present day "constitutional" features of the European integration are due to the European Court's activity, but still it is, doubtless, one of the *key* dynamic factor in the new "European" constitutionalism[15] and designates the main difference from the previous European constitutional experiences—at least, from the "continental" ones.

Classical European constitutionalism (on the mainland) has been developing around foundational *political choices* that have eventually found their prescriptive projection in *legal documents* named as "Charters" or "Constitutions". As a matter of fact, the two archetypes among the theoretical founders of contemporary European constitutionalism—Carl Schmitt and Hans Kelsen—respectively emphasized these two different reasons as the *proprium* of a Constitution: according to the former, the supreme political choice, and according to the latter, the basic rule of the legal system. The *political* vs. *normative*[16] nature of the constitution are actually the two crucial positions in European constitutional theory.

To use an enlightening image of Pizzorusso[17], attempting to unify these two diverging perspectives, "*the legal superiority* – in terms of hierarchical value – of the post World War II "rigid" constitutions, has always been understood as an expression of the "*greater intensity of political will*" that they express with regard to ordinary laws. The kind of "constitutionalism" developed and practically used by the ECJ, on the contrary, presents a different DNA, of judicial – and not legal-political – origin.

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[15] E. Mancini, *The making of a constitution for Europe*, 26 *C. M. L. Rev.* (1989).

[16] "Normative" in *Kelsenian* terms, not in the American legal-moral theory use of the term.

[17] A. Pizzorusso, *Delle fonti del diritto*, in Scialoja and Branca (eds), *Commentario al codice civile*, 11 (1977).

This means that in the field of human rights' protection—to take a highly sensitive area—legal reasoning is fully centered on *interpretation* rather than on *sources*, on *meaning* rather than on *validity*: all the legal principles regarding rights, no matter which source they derive from (treaties, national constitutions, soft law, customs, etc), can equally be utilized by the Courts to enforce protection through their *interpretation*[18].

Therefore, these kinds of constitutional principles do not express, first of all, a *quid pluris* in political or legal terms; they are, first and foremost, logical principles developed in an interpretive way and justified on the basis of eminently "*technical*" reasons. The four above-mentioned doctrines are simply means for the realization of a higher "meta-principle": *the effectiveness* of the European legal system. The ECJ is institutionally (together with the Commission) the guardian of the practical functioning of the EU and at the same time the guarantor of the Treaty's compliance by parties (states, institutions and individuals).

So far, the four "constitutional" doctrines are nothing more than "instrumental" principles necessary to ensure the effective enforcement of the Community legal system as far as the legal systems of member states are concerned. In this sense, the constitutional character of the European Union, although not based on the *politics* or the *law* (the typical values of a continental European constitutional tradition), is connected to another—still European—constitutional tradition, characterized by the absence of the constitution as a legal document, and by the presence of a *judge-made law:* the British constitution.

The comparison of the *de facto* European constitutional framework with the constitutional character of the United Kingdom

[18] Clearly reaches this conclusion, for example, A. Ruggeri, *Corte costituzionale e Corti europee: il modello, le esperienze, le prospettive*, in www.associazionedeicostituzionalisti.it/dottrina/...costituzionale/Ruggeri.pdf (2010) or O. Pollicino and V. Sciarabba, *La Corte europea dei diritti dell'uomo e la Corte di giustizia nella prospettiva della giustizia costituzionale*, in http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0206_pollicino_sciarabba.pdf (2010).

is, therefore, undoubtedly right[19]. The present-day European Union is one of the most meaningful examples of constitutional "hybridization" between British and continental European legal traditions and, in my perception, the new *European Constitutional state* is rising exactly at the confluence of these two legal traditions.

3. The European constitutional *dilemma*

The *paradox* of the birth of the new European constitutional State brings about a *dilemma*[20]. As we have seen, there are no doubts about the fact that the practical legal experience of the EU has a constitutional structure, even in the absence of an explicit qualification in the Treaties. And a great part of this result, we repeat, is due to the work of the ECJ; political institutions (Parliament, Council and Commission) have almost always *followed* the judicial path, simply "rubber stamping" the achievements of European Judges and consequently amending the Treaties[21].

The question is that this constitutional *transformation* occurred in the lack of any explicit provision in the European treaties. This absence represents both the strength and the weakness of the current constitutional structure of Europe, hence its *dilemmatic* nature.

As a matter of fact, on one hand, the existence of a judge-made "substantial" constitution is the only legal framework fitting and respecting the originality of European institutional experiment. "*Europe will not be made at once and will not be made all together,*" Robert Schuman prophetically wrote in his historic declaration of 1950, and only an "incremental" constitution - such as a judiciary-led one - can

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[19] J.H.H. Weiler, *The Constitution of Europe: "Do the new clothes have an emperor?" and Other Essays on European Integration* (1999).

[20] For the idea of the "constitutional dilemma" see F. Sucameli, *L'Europa e il dilemma della costituzione. Norme, strategie e crisi del processo di integrazione* (2007).

[21] A clear example is the text of art. 6.3 TFEU – as amended by the Lisbon Treaty - which is the literal "transcription" the ECJ's doctrine on the rights' protection ("*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*")

provide a sound structure to this "step-by-step" approach to European process.

On the other hand, in this way, the whole dynamic of the EU Constitution is concentrated in the hands of the Court of Justice, which today, paradoxically, has no limitations to its "*constitution-making*" power; and this contradiction deeply challenges the very essence of European post world-war-II constitutionalism, born exactly to provide the "rule of law" principle of an effective protection against all kind of public powers (Courts included).

Let us take the field of human rights protection. The "genetic mutation" of the ECJ, transformed from a *Treaty* Court to a *Rights* Court (or from an *international* court to a *constitutional* court), is doubtless a big step toward more effective human rights protection as far as the acts of European Institutions are concerned[22]. But the same evolution of European jurisprudence raises many delicate problems as it goes up to review *internal acts of the member states* [23]. We do not intend here to go into details, but it suffices to recall some decisions which have aroused harsh controversies, such as the case *Richards*[24] or *KB*[25], the *Tanjia Kreil*[26] or the *Tadao Maruko*[27] case.

In all these cases, the ECJ scrutinized *internal* acts of the member states, and to the extent that these measures are direct implementation of European law obligations, *nulla quaestio.*

The questions arise when, through these rulings, the Court substantially (even if not formally) targets matters—like the civil status regime or the constitutional regulation of military service—that are clearly outside the reach of EU law. And there are no doubts about the fact that, for a last instance Court, such as the ECJ, the limitation of the "EU competences" is a very weak perimeter, given the large interpretive flexibility in the interpretation of those competences. Thus it is quite easy for the ECJ to demonstrate that a certain area, even if outside of the formal scope of EU Law as

[22] P.P. Craig and G. De Bùrca, *EU law: text, cases, and materials*, 381 (2008).
[23] Ibid., 396.
[24] ECJ C-423/04, *Richards*.
[25] ECJ C- 117/01, *K.B.*
[26] ECJ C-285/98, *Tanja Kreil*.
[27] ECJ C-267/06, *Tadao Maruko.*

delimited by the Treaties, has a "substantial impact on the EU competences".

In all these fields, the jurisprudence of the ECJ hits a rather awkward area, and the risk of clashes especially when issues are "constitutionally sensitive" is extremely high. The reaction to this ECJ judicial activism has been impressive.

In political terms, on one hand, the United Kingdom and Poland asked for (and obtained) an additional protocol to the Lisbon Treaty, according to which the European Charter of Fundamental Rights does not apply in their boundaries[28]. On the other hand, Ireland, after its initial rejection of the Lisbon reform Treaty, in order to turn its "no" into a "yes", equally obtained a number of guarantees stating that a relevant part of the European Charter (family law, education and religious issues) will not be enforceable on the Irish territory[29].

In judicial terms, an even more serious reaction is represented by the well-known decision of June 2009 of the German Bundesverfassungsgericht[30]; a reaction that patently shows how the process of European integration, when it reaches the *constitutional* level, cannot be conceived as a sort of permanent constitution-making power, but must find an effective and transparent connection with the different constitutional identities of the member states.

These three different "reactions" (the UK and Poland "opting out" Protocol, the Irish Guarantees and the German Supreme Court decision) are clearly not equal in terms of either political or legal effects; but, nevertheless, they all express a very problematic step (if not a pure "step-back") on the road to the European integration.

As a matter of fact, the reason for—and, at the same time, the peculiarity of—the European constitutional integration, lies properly in its "pluralistic" structure that we have so far argued. It is what

[28] See the Protocol (N° 30) on the application of the charter of fundamental rights of the European Union to Poland and to United Kingdom.

[29] See the Annex 1 to the Conclusions of the European Council of June 18th and 19th, 2009, "Guarantees offered to Ireland by the other Member States in respect of the Lisbon Treaty"; http://ec.europa.eu/ireland/lisbon_treaty/lisbon_treaty_progress/index_en.ht

[30] BVerfG, 2 BvE 2/08 vom 30.6.2009.

Joseph Weiler named the principle of "constitutional tolerance", or what you might call "constitutional pluralism". In any case, it is openly demonstrated that "*the value of European constitutionalism is precisely in its pluralistic form and the openness to dialogue that it establishes with the national constitutions*" [31]. The European Constitution is therefore based on a plural structure of constitutional identities.

Thus we can summarize our argument as follows: *the future of European constitutionalism will depend on the ability to provide reliable and effective "legal" forms (not just* political) *to this constitutional dialogue.* We cannot see another possible way to resolve the constitutional *dilemma.* But before we continue to prove this hypothesis, we need to examine how, until now, the EU institutions have attempted to address and solve this dilemma.

4. Solutions to the *dilemma*

4.1 The failed "first best" solution: the Treaty establishing a Constitution for Europe

We have already seen that the *Constitutional Treaty* of Rome of 2004 seemed to the Member States the most immediate and – apparently – safe road to entangle again the "material" constitution of the European Union with the "formal" one: that is, approving a new Treaty and explicitly naming it "*constitutional*". During the negotiation and immediately after the formal adoption of the Constitutional Treaty, many scholars had raised numerous doubts about the real nature of such an Agreement[32]. But to dispel all doubts and to put a final word on the academic debates, the referendum by France and Holland rejected the new Treaty.

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[31] M. P. Maduro, *How Constitutional Can the European Union Be? The Tension between Intergovernamentalism and Constitutionalism in the European Union*, in Weiler and Eisgruber (eds), Altneuland: The EU Constitution in a Contextual Perspective, Jean Monnet Working Paper 5/04, www.jeanmonnetprogram.org/papers/04/040501.html, 39 (2004).

[32] For all, see O. Pfersmann, *The new revision of the old constitution*, in Weiler and Eisgruber (eds), Ibid.http://www.jeanmonnetprogram.org/papers/04/040501-10.html (2005).

4.2 The "second best" solution: the European Charter of Fundamental Rights

Once the "first-best" solution became unworkable, we turned out to a "second-best" choice. To minimize the risk of a limitless and boundless expansion of the ECJ's jurisprudence we decided to approve a specific *European Charter of Fundamental Rights (ECFR).* The Charter, as we know, is the outcome of a very special process, unprecedented in the history of the European Union. It was *signed* and *proclaimed* by the President of the European Parliament, Council and Commission, on behalf of their institutions on December 7, 2000 in Nice, and immediately triggered a harsh debate about the legal value of such a document[33]. Today these doubts have been hopefully removed by article 6 of the Lisbon Treaty, which establishes that "*The Charter (...) shall have the same legal value as the Treaties*"; the Charter has not been incorporated in the Treaties, according to the rejection of any possible constitutional qualification agreed during the 2007 IGC, but is equaled as *legal* force.

Returning, then, to our question: may the Charter be considered an effective tool to define the action of the ECJ and of the European Institutions, at least in the narrow but problematic field of fundamental rights? To avoid misunderstandings: I am not undermining the usefulness of the Charter itself, which like other international documents or acts aiming to improve the protection of fundamental rights, can only be positively welcomed. My question is more specifically related to the problem I am trying to tackle. Can the Charter be considered a good solution to the above defined European constitutional dilemma? In other words, may it be considered an effective way to secure both the positive acquisitions of the present *de facto* constitution and a new clear delimitation of the connection between the supranational constitutional structure and the national constitutional identities? I have some doubts that this can happen easily, for three reasons I would like to explain very briefly.

Firstly, as already mentioned, a somehow "de-regulated" expansion of the ECJ's role has created a strong political "suspicion"

[33] A. von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Unioní*, 37 *C. M. L. Rev.*, 37 (2000).

against the Charter. The most remarkable effect of this attitude was—as we know—the approval by all Member States of Protocol n.30 annexed to the Treaty of Lisbon "*on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom*" in which, surprisingly—given the purpose and nature of the Charter—it is stated that "the Charter does not extend the ability of the Court of Justice of the European Union or any other tribunal of Poland or the United Kingdom to find that the laws, regulations or administrative provisions, administrative practices or action of Poland or the United Kingdom are inconsistent with the rights, freedoms and principles that it reaffirms".

In the essence, the Charter has the same legal force as the Treaties and will be applied throughout Europe, but with two considerable exceptions—especially as matter of principle—UK and Poland.

And in addition to this Protocol, we have also the *Guarantees* annexed to the final adoption of the Lisbon Treaty, which Ireland required in order to approve it (after its initial rejection)[34]. For the Irish, "*nothing in the Treaty of Lisbon attributing legal status to the Charter of Fundamental Rights of the European Union, or in the provisions of that Treaty in the area of Freedom, Security and Justice affects in any way the scope and applicability of the protection of the right to life in Article 40.3.1, 40.3.2 and 40.3.3, the protection of the family in Article 41 and the protection of the rights in respect of education in Articles 42 and 44.2.4 and 44.2.5 provided by the Constitution of Ireland*".

The situation is consequently paradoxical: the Charter is fully recognized in all but three European countries, UK, Poland, and Ireland (with different degrees of non-application).

This state of affairs will have at least two major impacts.

Firstly, we are going to create a sort of "*two-speed*" Europe—and this is definitely not a novelty in the history of European

[34] See the Annex 1 to the Conclusions of the European Council of June 18th and 19th, 2009, "Guarantees offered to Ireland by the other Member States in respect of the Lisbon Treaty"; http://ec.europa.eu/ireland/lisbon_treaty/lisbon_treaty_progress/index_en.htm

integration[35]—but the bad news is that we are introducing this "*double standard*" with regard to *fundamental rights* and not monetary or foreign policy. Secondly, it's to be expected that the previous judicial doctrine of the ECJ on fundamental rights will find an extremely weak *formal* obstacle in these Protocols or Annexed Guarantees[36]. As we mentioned, the ECJ started to enforce the protection of fundamental rights in the absence of an express provision of the treaties, on the basis of the common constitutional traditions of the Member states and on the ground of the ECHR. It is thus very likely that it will keep on recognizing them even in spite of an express prohibition, considering also that all states that *opted out* are still parties within the ECHR Convention. We could barely imagine a mere "*moral*" influence.

There is also a more general reason to doubt that the ECFR can be considered an effective means of bordering the ECJ's reach—a reason that Marta Cartabia recently highlighted[37]. She demonstrated how the idea of a "Charter"—a written document with regulatory nature and designed to restrict judicial action—suffers from an illusion typical of the *civil law* tradition. In fact, when you give the judge a *text* to apply—inevitably drafted by broad and general phraseology as required by the same purpose of a fundamental Charter—even if he or she is expressly obliged to the most literal application, you end up with a further expansion of his or her sphere of action. These conclusions are the final outcome of a research conducted on the ECJ case-law before the entry into force of the Lisbon Treaty, so following the "mere proclamation" of the Charter of Nice. It is easy to predict, therefore, that art. 6 of the Lisbon Treaty will further strengthen those "legitimizing" and "hermeneutical" effects that the author attributes to the Charter in relation to the activity of the Court of Luxembourg.

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[35] Think about the application of the Euro as a common currency or to the "enhanced cooperation" provisions.

[36] M. Dougan, *The Treaty of Lisbon 2007: Winning minds, not hearts*, 45 *C. M. L. Rev.*, 667 (2008).

[37] M. Cartabia, *Europe and Rights: Taking Dialogue Seriously*, 5 *Eu. Const. L. Rev.*, 5 (2009).

Finally, there is a last reason why it is difficult to think about the Charter as the actual solution of the "dilemma" and depends on the very aim to which it was drafted. Symptomatic of this scope is the description offered in the official website of the European Union: "*The Charter of Fundamental Rights sets out in a single text, for the first time in the European Union's history, the whole range of civil, political, economic and social rights of European citizens and all persons resident in the EU*"[38]. From this description emerges a claim to *completeness, comprehensiveness,* and *exclusivity* that openly clashes with the *proprium* of the European constitutional structure that we identify in its pluralism. The idea behind it is that "*for the first time in history the Union",* we succeeded in *writing* into a single text[39] the whole complex and multicultural heritage of "*civil, political, economic and social* rights" enjoyed by European citizens and by all those who are in any capacity within Member States.

Once again we run the risk of misunderstanding the deep meaning of the constitutional evolution that has led the process of European integration to the present day situation: an incessant and continuous relationship between *different* constitutional stories and narratives—a constitutional *dialogue,* not a *monologue*. Hence the undoubted utility of the Charter to "record" some of the results obtained in this dialogue and set the "cornerstones" in this reciprocal relationship, but without the pretension of completeness and exclusivity. Otherwise the benefits of the Charter in terms of law's certainty are outbalanced by the huge costs in terms of constitutional diversity.

We must not forget that rights—especially fundamental ones—are primarily expressions of values and ideals rooted in different and plural stories that are the constitutive texture of today's Europe[40], whose motto is "*united in diversity*". Rights express a very specific mindset and today it is not possible—even extremely dangerous—to establish a *common* (or even *dominant)* European anthropology. Just think about the "personalistic" and anthropologically relational

[38] http://www.europarl.europa.eu/charter/default_it.htm
[39] See C. Pinelli, *Il momento della scrittura* (2002).
[40] See A. Pizzorusso, *Il patrimonio costituzionale…*, cit. at 4.

foundation of a constitution such as the Italian and the more markedly individualistic matrix of the French constitutional tradition or the British one; or think about the different assessments of the religious factor in constitutions such as the Greek, the Dutch or the Irish ones.

We cannot reasonably think about a uniform *codification* of these traditions without providing a "dialoguing" regulatory and institutional structure, that is, one able to keep the unification process in motion, recognizing its historical and dynamic nature as a "process" oriented to a common purpose and not as an "act" that is defined and conclusive.

5. Coordinates for a "substantial" solution: *actors* and *instruments* for a European *constitutional dialogue*

We have seen that all the solutions so far suggested—the "first-best" *Constitutional Treaty* and the "second-best" *Charter of Fundamental Rights* —have failed or may not be fully adequate to the purpose. As a matter of fact, if the dilemma we are facing is, once again, how to preserve at the same time either the existing *de facto* constitutional structure or the *pluralistic* nature of this structure, the only effective solution is to establish and keep open a real *dialogue* between the actors of the European constitutional system[41].

We should, however, be clear on this point: our point of view is *legal*, not political nor sociological[42]. Therefore, when we speak about *dialogue*, we intend to deal with the existence of *legal* instruments (rules, institutions and procedures) to carry out an effective constitutional dialogue. We are fully aware that present-day Europe is characterized by a dense web of relationships among political actors, and it is equally clear that we can study the

[41] Here I propose to extend the «dialogic» paradigm, typically used in the relationships among judicial actors, to all the key players in the European constitutional space [for a comprehensive proposal of considering the «judicial dialogue» as «the conceptual model for the ECJ's legitimacy in adjudicating fundamental rights» see A. Torres Pérez, *Conflicts of Rights in the European Union*, 5 (2009)].

[42] F. Snyder, *New directions in European community law* (1990).

constitutive links binding the different cultural and political constituencies in Europe. Sociologists and political scientists can properly analyze the degree, intensity, and effects of such relationships, but the main concern of this paper is to investigate how and to what extent these political, social, and cultural networks developed (or did not develop) *legal* means of communication and, in particular, those of a "*constitutional*" nature.

5.1 Actors in the European constitutional "space"

In order to answer this question, we should start by identifying the *actors* in the dialogue.

The first crucial point is that *in a real constitutional dialogue, the main actors cannot be only courts*. We are not talking about a conversation that takes place only in the courtrooms. As previously said, no one can reasonably doubt the role played in the European constitutional integration by the ECJ, on the one hand, and by the national constitutional courts with all the lower courts, on the other. But it is also patent that today the "constitutional conversation", as it was defined[43], runs the risk to be in many cases either a "monologue" or, more precisely, a dialogue among "deaf people"[44]. The reason is that, in this fluctuating relationship between the courts, we are completely missing certain other crucial players in a plural multi-vocal integration process: the national parliaments.

One of the central arguments developed in the famous already mentioned "Lisbon Case" of the German Constitutional Court is focused exactly on this point: the more you increase the constitutional level of integration among European states, the more you should enhance the degree of participation of the national expression of the democratic principle.

Obviously, in this dialogue, the interlocutors of national parliaments are, first and foremost, the "political-regulatory"

[43] M. Cartabia, *Europe and Rights*…, cit. at 37, 23.

[44] B. De Witte, *The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process*, in Paul Beaumont, Carole Lyons and Walker (eds), *Convergence and divergence in European Public law*, 39 (2002).

institutions: the Council, the Commission, and the Parliament. Indeed, in the European constitutional regimes, the power that is mainly responsible for the concrete *life* of the Constitution (that is, of its application and enforcement) is not the *constituent* power (*pouvoir constituant*), which is by its nature episodic and exceptional. Rather, the day-by-day implementers of constitutional principles in public life are the parliaments and the governments, i.e., the organs entitled with the executive and the legislative powers. Obviously, the other primary guarantors are the Constitutional Courts, in charge of constitutional review of legislation and of public powers; but always with the function o3Df "external limitation" rather than of "stimulus".

Therefore, dialogue ought to happen not only among judiciary institutions, but also among political institutions.

But, stepping on the same lines, we can also ask ourselves whether, within the new European constitutional state today, we could confine the dialogue only to the two "classical" political *law-making* institutions without considering other fundamental stakeholders such as the so-called "civil society". A distinctive aspect of the most recent development in European constitutional history is the growing crisis of the representative bodies (parliaments) because of the corresponding crisis of the political parties—traditionally the constitutive elements of the parliamentary system. This crisis is increasingly emphasizing the representative role, as key factors of democratic quality[45], of new (or old) social organizations different from parties; think, for example, about the non-profit sector or the so called "social partners"[46].

Thus, the "extended" map of constitutional actors has three different "dimensions" (judicial, political and societal) and this gives the European constitution – to use a geometric image - a 3D "spatial" projection.

So, Europe in constitutional terms, is not a line nor a plane, it is a "space"; and European "constitutional space" includes, firstly, the Courts (whether Constitutional or not), secondly, the other political institutions, (such as legislatures and executives or similar bodies)

[45] L. Diamond and L. Morlino (eds), *Assessing the quality of democracy* (2005).
[46] See Art. 152 TFEU.

and, finally, the civil society institutions, to borrow an interesting sociological formula[47].

The constant interaction among these different actors (we call it "dialogue"[48]) is the "engine" that produces a constitutional result.

5.2 Legal instruments

Are there, within the European treaties system, any *legal* instruments (rules, institutions or procedures) that allow this kind of effective *dialogue* at the constitutional level? In order to individuate these instruments, we will deal with the two main *characters* defining a dialogue: the *procedural* character (according to which communication happens through the power given to different actors to take part in the same procedure) and the *institutional* character (according to which communication happens through the power given to different actors to take part in the same decision-making body).

Obviously, our goal in this paper is simply to make a list of possible means of communication—"legal" conversation channels—through which dialogue can take place. Another issue, much more relevant but exceeding the aim of these notes, will be whether and to what extent these instruments have been actually used and, furthermore, if they have actually brought forth a real dialogue. In addition, it must be noted that the European Treaties established two Union *advisory 3. Dialo* –the Economic and Social Committee and the Committee of Regions – specifically dedicated to both *procedural* and *institutional dialogue*. We will consider these bodies as parts of the EU institutions

a) Dialogue among Courts

Given that we may have several "forms and patterns of judicial dialogue"[49], I would focus on three main legal instruments

[47] M. Magatti, *Il potere istituente della società civile* (2005).

[48] Following the definition of A.T. Pérez, *Conflicts of rights…*, cit. at 41 6 dialogue is an «argumentative communication based on the exchange of reasons (…) the most consistent form of interaction within a pluralist framework".

[49] See A. Rosas, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, 1 *Eu. J. L. S.*, 6 (2007).

that could play a key role in developing an effective constitutional "infrastructure".

a.1) The "procedural" instrument: "preliminary ruling"

The first and probably the most widely used instrument of dialogue between national courts and the ECJ is the *preliminary ruling*: a formal procedure provided by the Article 267 of the new TFEU. This procedure is one of the most significant factors in the success of the European system since it makes all national courts in some way tutors of the correct interpretation and application of Community law[50]. The main question, from our perspective, is when and how constitutional courts of member states use this instrument.

We are not saying that the preliminary ruling asked by lower courts has not, in its overall effects, a *constitutional* value, or does not substantially contribute to the general European dialogue. The point we would like to focus on is more specific: do *constitutional courts* (meaning, broadly, the courts or similar bodies responsible for the national observance of constitutional law) actually use this tool? And, secondly, has it produced a real *constitutional* dialogue?

As a matter of fact, until today the number of constitutional courts that have agreed to *talk* with the ECJ through the instrument provided by the art. 234 of the Treaty is still very low (especially if compared to lower Courts referrals)[51]. Among them are the British House of Lords, the Belgian Court of Arbitration, the Austrian, the Polish and the Lithuanian Constitutional Courts. Last on this list, but not least, is the Italian Constitutional Court with its Order No. 103 of 2008.

Therefore, remaining on purely quantitative grounds, the "preliminary ruling" instrument is certainly one possible means of communication between the national constitutional courts and the ECJ, even if the current state of affairs shows a very episodic and not widely-diffused application.

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[50] Bibliography on preliminary ruling M. Claes, *The National Courts' Mandate in the European Constitution* (2006).

[51] See A.T. Pérez, *Conflicts of rights…*, cit. at 41, 136 (note 181).

a.2) "Interpretive" instruments: the "deference" and "margin of appreciation" doctrine

But besides the formal procedures, probably the most important area of judicial dialogue can be found *within* the judicial reasoning of the supranational Courts, when they decide to involve in their decisions State constitutional courts (or other State authorities).

A clear example of this interpretive method is the so called "margin of appreciation" doctrine[52]. As we know, this doctrine, originally developed within international law jurisprudence and widely applied by the ECtHR case-law, spilled over the rulings of the ECJ[53] in a way that, as noted by Aida Pérez, the margin of appreciation doctrine "*may contain some lessons applicable to the interaction between ECJ and courts*" [54].

As a matter of fact, in the Luxembourg Court jurisprudence, we may find some landmark decisions in which the Court expressly states that "*it is not indispensable (…) for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected*"[55].

So doing the ECJ gives relevance in its reasoning to a national constitutional value (in the case, the protection of minors) to counterbalance a fundamental European constitutional principle (free circulation of goods), giving preference to the former.

But we have, indeed, to tune up our understanding of these doctrines. As a matter of fact, either the "margin of appreciation" or "deference"[56] could be interpreted in two different ways.

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[52] H.C. Yourow, *The margin of appreciation doctrine in the dynamics of European human rights jurisprudence* (1996).

[53] Y. Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 *Eu. J. Int'l L.*, 907-940 (2005); for the ECJ's jurisprudence see, among the others, Case C-83/94 *Germany v Leifer*, Case C-273/97, *Sirdar*.; see also the case-law analyzed in P. G. Carozza, *Subsidiarity as a structural principle of international human rights law*, 97 *Am. J. Int'l L.*, 55 (2003).

[54] A.T. Pérez, *Conflicts of rights…*, cit. at 41, 30.

[55] ECJ C-36/02 *Omega*; on the same perspective see also, C-112/00 *Schmidberger* or C-244/06 *Dynamic Mediens*.

[56] A.T. Perèz, cit. at 41, 172.

On the one hand, it could be understood in a "rule vs. exception" fashion: so far, granting a State a certain margin of appreciation (or of discretion) as far as a European law principle or rule is concerned means that the same State can—under special conditions— "derogate" the rule (or principle), and this exception does not inactivate the rule but, while excepting, it somehow *confirms* the rule. This way of considering the margin of appreciation (closer to the "classical" international law doctrine) is "mono-directional" and creates, actually, a "double standard" constitutional system[57]: in one (most valuable) area the international Court fully applies the general principle (or the rule), and in the other, the degree of protection of the constitutional value is lowered (but sooner or later the rule will be applied also in the "exceptional" area).

Another way of understanding the "margin of appreciation" or the "deference" doctrine (closer to the European law tradition) is to consider that *margin* as the preferential area of constitutional dialogue. In this different perspective, as P.G. Carozza pointed out[58], the relation between the Courts (or between the European courts and the Member States) is not definable in a "rule vs. exception" mode, but more appropriately on a "subsidiarity principle" ground.

The European legal system recognizes different constitutional levels—different but integrated—that require to enforce the maximum extent possible of legal protection to fundamental rights[59], taking into account that each right has to be *balanced* with other constitutional rights according to the different national constitutional contexts.

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[57] For those reasons, a lot of scholars argue that the "Margin of Appreciation" doctrine "to a large extent compromise the universal aspiration" of international or supranational norms, see, for example, E. Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 *NYUJ Int'l L. & Pol.* (1998).

[58] Carozza maintains that the respect showed by the ECJ for the "margin of discretion" of the Member states in the field of Human Rights protection, is a clear evidence of the underlying "subsidiarity principle at work": P.G. Carozza, *Subsidiarity as a Structural Principle of International Law…*, cit. at 53.

[59] On the issue of constitutional principles as "optimization requirements" see R. Alexy, *A theory of constitutional rights* (2002).

As recently pointed out in some Italian Constitutional Court decisions[60], it is exactly this type of *balancing* that could be better carried out by national courts (and parliaments) than by supranational courts when member States' internal acts and interplaying national constitutional rights are concerned.

The supranational courts (both ECtHR and ECJ) are surely better equipped for interpreting/enforcing the international/supranational constitutional tradition, but national constitutional courts (or similar) are reasonably the most reliable interpreters of the national constitutional tradition.

In this sense, the European constitutional ideal-type is not Federal (or quasi-Federal) but a Multidimensional Constitutional system committed to safeguard, on one hand, the "common constitutional traditions"[61] and, on the other, the European "constitutional diversity".

a.3) An "institutional" instrument: The Declaration on the dialogue between the ECJ and the European Court of Human Rights (ECtHR).

Another interesting example of dialogue—even if less emphasized than the previous two—is described in a Declaration annexed to the Lisbon Treaty[62]. The Declaration states that "*The Conference agrees that the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms should be arranged as appropriate to preserve the specific features of Union law. In this regard, the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights, and this dialogue could be reinforced when the Union accedes to that Convention*".

It is quite remarkable that while the European institutions and the member states are formally deciding—through the new art. 6 of the TEU—to allow the accession of the EU to the ECHR, and therefore, to accept the jurisdiction of the Strasbourg Court, they rise the question of how to preserve the "*specific features*" of Union law.

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[60] Ita Corte Cost. nn. 311 e 317/2009.

[61] That, I repeat, is not a static catalogue or a fixed Charter, but is a living and variable "space", susceptible of increasing or decreasing according to the results of the dialogue.

[62] N° A) 2, *Declaration on Article 6(2) of the Treaty on European Union*.

It is easy to predict that this new formal step in the EU-ECHR relationships will ignite a big dispute about the power of the "last word" between the two European constitutional Courts. This declaration annexed to the Treaty, whatever its formal value, is an explicit political recognition of the plural nature of the European constitutional structure that we have repeatedly invoked as far as the relations between European and National constitutions are concerned. When the EU itself becomes part of a broader constitutional order, it *requires* that the two "sovereign" courts of the two legal orders have a "*regular dialogue*". *The existence of viable means of communication allowing a regular dialogue between the European constitutional courts is therefore a fundamental "network infrastructure"* — borrowing this expression from communication sciences — *of the new supranational constitutionalism.*

If we would push beyond our thoughts turning to *de jure condendo* proposals, what this Declaration requires between the ECJ and the ECHR seems exactly what is necessary in the relations between national constitutional courts and the ECJ: some legally structured and formalized communications channels.

b) Dialogue among political institutions: the Protocols n. 1 and 2 (the role of national parliaments and of the principles of subsidiarity and proportionality)

As we said, the European constitutional game is not only played by courts but also — above all — by those non-judiciary institutions entitled to political and regulatory powers: European institutions (Council, Parliament and Commission) on the one hand, and national parliaments on the other.

To address the quest for a regular *dialogue* among these players, the new Lisbon Treaty supplied two annexed Protocols (on *the role of national parliaments* and *the principles of subsidiarity and proportionality*) with the scope of setting formalized channels of communication among different actors, firstly, to expand the role and participation of national parliaments in EU decisions and, secondly, to ensure in advance (given the difficulty of the *ex post* judicial review) a real implementation of the principles of subsidiarity and proportionality.

We do not intend here to analytically examine the history of these protocols, both already annexed to the Constitutional Treaty of 2004 and revised with "significant improvements"[63] in the new text. We simply observe that they both aim to create a fixed procedural framework - primarily of informative nature - through which national parliaments can be more effectively involved in either general EU decision-making procedures or, more specifically, in decisions in which subsidiarity checks are to be performed.

What is important for our purposes is to emphasize that both protocols achieve this involvement, mainly, by entitling national Parliaments to a "right of direct information from the EU institutions"[64] and obliging the same institutions to express and communicate the reasons for the proposed acts; i.e., the grounds on which decisions are intended to be taken at the EU level, enabling in this way the institutions representing member states to "reply" and propose amendments included the so called "zero option", meaning that parliaments can obtain—under certain conditions—either the blocking of the decision[65] or the activation of a judicial review of the act from the ECJ[66].

In Protocol 1 we also have an embryonic attempt of "institutional" dialogue – and not simply procedural – where, in the Title II devoted to "inter-parliamentary cooperation", it's clearly affirmed that "the European Parliament and national Parliaments shall together determine the organization and promotion of effective and regular inter-parliamentary cooperation within the Union", and "a conference of Parliamentary Committees for Union Affairs may submit any contribution it deems appropriate for the attention of the European Parliament, Council and Commission. That conference

[63] "Significant improvement can be found in the Protocol n.2 (…) National Parliaments, widely seen as the "loser" of Europeanization, become actors with a legal position laid down in primary law" J. Bast and A. von Bogdandy, *The Federal Order of Competences*, in Bast and von Bogdandy (eds), *Principles of european constitutional law*, 303 (2008).

[64] So, a direct way of dialogue, not channeled through the national governments; see Piris J., *The Constitution for Euro*pe, CUP, 116 (2006).

[65] Art. 7 With the so-called "yellow card" and "red card" system, see Piris J., *ibidem.*

[66] Art. 8 *Protocol n. 2*; see Piris J., *ibidem.*

shall, in addition, promote the exchange of information and best practice between national parliaments and the European Parliament, including their special committees", so keeping the formal recognition to the COSAC[67].

We are fully aware that today the degree of constitutional dialogue performed by national European parliaments and European political institutions is still in its infancy. This is partially due to the still existing lack of a *real* European public opinion able to generate a *real* European political debate and also due to the increasing weakness of the legislature in front of the growing role of the executive. But, as pointed out by some empirical studies, the creation or implementation of formal procedures involving member States' legislatures in European decisions may represent in some cases the way through which the same legislatures regain a central role (or, at least, a less peripheral one) in their respective institutional systems and *internal* political debates[68]. Most of recent analyses on this issue show, anyhow, that national parliaments are improving their constitutional, legal and statutory instruments in order to make Lisbon Treaty innovations in decision-making mechanisms effective and the number of subsidiarity checks is – even if slowly - increasing[69].

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[67] Artt. 9 and 10 of the *Protocol n.2.,* The history of the cooperation between national parliaments started in the 80s' through the inter-parliamentary "Conference of Community and European Affairs Committees" (called COSAC). The Amsterdam Treaty (1997) introducing the Protocol on the role of national parliaments gave formal recognition to the Conference. See COSAC, *Thirteenth Bi-annual Report: Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny*, May 2010.

[68] See, for the Italian case, M. Armanno, *Gli strumenti di garanzia democratica dell'ordinamento italiano nel processo di integrazione comunitaria*, in Cartabia and Simoncini (eds), *La sostenibilità della democrazia nel XXI secolo*, 223 (2009).

[69] See Joint CEPS, EGMONT and EPC Study, *The Treaty of Lisbon: A Second Look at the Institutional Innovations*, September 2010, 107 ss.; COSAC, *Thirteenth Bi-annual Report…,* cit.; P. Kiiver, *The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity*, in http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1417242; R. Passos, *Recent developments concerning the role of national parliaments in the European Union*, in *ERA Forum,* 9:25–40 (2008).

c) The dialogue with civil society: associations, churches, philosophical and non-denominational associations

In conclusion, we also want to mention two articles of the Lisbon Treaty (already present in the Constitutional Treaty) that aim to build channels of dialogue with the outer social environment. We refer to Art. 11 TEU and 17 TFEU in which European "*institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action*". The underlying principle is that "*the institutions shall maintain an open, transparent, and regular dialogue with representative associations and civil society*." The same goes for churches, associations, or communities of religious (and equally for philosophical and non-confessional) denominations. Even with these *social formations* –to use the wording of the Italian Constitution—"the Union shall maintain an open, transparent and regular dialogue". Obviously, here we are dealing with nothing more than a sort of embryonic structure, but the principle stated is relevant[70].

6. Conclusions. The *potential* vs. *actual* infrastructure of the European constitutional space and its *meta-legal* conditions

This *dialogue*, defined by the treaties as *open, transparent,* or *regular,* is, in short, *the infrastructure of a "pluralistic" and "tolerant" constitutionalism.*

Of course, the conclusions reached in the second part of this paper are only *potential;* in other words, we are here affirming that today all the key constitutional actors (Courts, Parliaments, European institutions, civil society), especially after the entry into force of the Treaty of Lisbon, do have tools to communicate and to play out their different constitutional identities.

This is a critical point of our thesis.

The very fact that the Lisbon Treaty provides channels for "3-D" constitutional relations (judicial, political and societal)

[70] For some reflections on the implications of these two articles see F. Margiotta Broglio, *Confessioni e comunità religiose o "filosofiche" nel Trattato di Lisbona*, in corso di pubblicazione su Rivista di Studi sullo Stato, disponibile in *www.unifi.it/rivsts/dossier/lisbona/Margiotta.pdf.*

demonstrates that there is a *potential* infrastructure for a "constitutional dialogue", having the above-mentioned characters.

On a theoretical ground this is a non-obvious conclusion; as a matter of fact, we reject the idea that the *judicial* dialogue could be considered neither the sole nor the main constitutional dimension of European integration. We want to point out – as far as constitutional theory is concerned – that either the *political* or the *societal* dimension, shares the same constitutional value as the *judicial*.

Under this aspect, this conclusion might be considered as a part of a broader doctrinal approach that considers the European system as the result of a complex relation between legal structure and political process[71]; our specific contribution is to emphasize the "multidimensional" character of that relation.

This conclusion, however, doesn't imply that the *potential* infrastructure is also an *actual* one for the following reasons.

First of all, each of the three dimensions doesn't have the same degree of legal formalization within either the Treaties – as normative texts – or the European practice – as institutional praxis -.

We move from highly institutionalized channels (as the *judicial* dimension) to nothing more than an embryonic structure (as the *societal* dimension).

But - we insist - this is only the result of a lacking awareness of the new constitutional dimensions of the European integration and not a good reason for saying that only the *judicial* dialogue has a constitutional dignity.

Secondly, to identify a potential infrastructure – assuming it is legally formalized – doesn't mean that the infrastructure is really *appropriate*.

This is the case of what we called the "societal dimension". In the existing European system this relationship is narrowed to the

[71] See J. Weiler, *Supranational law and supranational system: legal structure and political process in the European community* (1982); Id., *Il sistema comunitario europeo* (1985).

dialogue with "*associations, churches, philosophical and non-denominational associations*"[72].

It's clear that in this case the infrastructure is not only potential but also *inadequate*.

The normative principle - "the Institutions shall maintain an open, transparent, and regular dialogue with representative associations and civil society" – is perfectly right in its textual definition and the wideness of the formulation shows its constitutive (if not constitutional) character. But the concrete application of the principle is still too poor and weak. Here we have a *potential* channel, but not really appropriate.

On this perspective, the "societal dimension" of the European constitutional space is undeniably one of the most promising new areas of study and research on one hand, and of institutional improvement, on the other.

Thirdly, to identify a potential infrastructure – assuming it is formalized and appropriate - does not mean that this infrastructure is actually *used*.

This is clearly the case of the dialogue among parliaments and EU institutions, not yet really implemented[73].

Finally, to identify a potential infrastructure – assuming it is formalized, appropriate and actually used - does not mean that this infrastructure is *able to produce an effective dialogue*.

This is the case of the *judicial* dimension of the constitutional dialogue. As a matter of fact, in Europe Courts' dialogue is definitely the most formalized, appropriate and used within the European space.

As we noted previously, the preliminary ruling procedure on one hand, and the interpretive dialogue among Courts, on the other,

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[72] Consider that today the entire administrative task outlined by the Art. 17 of the Lisbon Treaty (the dialogue with associations, churches, philosophical and non-denominational associations) is carried out by a single office within the *Bureau of Policy Advisers* (http://ec.europa.eu/bepa/about/index_en.htm) an Advisory Commission of the Presidency of the European commission.

[73] P. Craig & G. De Burca, *EU Law*, 103-104; 155-156 and footnotes at the above paragraph 5.2., lett. *c*).

demonstrate that this dimension of the dialogue is doubtless the most advanced.

It is a completely different question to assess if this infrastructure during the last decades has actually generated a "constitutional dialogue", that is, a mutual understanding and improvement of the different European constitutional identities.

Nevertheless, we can clearly say that in the present-day European system, we can identify many *legal* tools allowing and aiming at a real communication among the constitutional actors—and not only informal or soft-law channels.

On this perspective, there are two examples from recent European institutional history which deserve further reflection: the 2004 reform in the system of enforcement of the European antitrust law and, secondly, the creation of the European System of Central Banks and of the ECB. Taking, of course, due account of the wide diversity of such subjects, it is yet worth to observe how the EU moved in these areas counteracting its natural tendency to centralize power and, instead, effectively applying the subsidiarity principle, without superimposing European institutions (and excluding all conflicting national institutions on the matter), but on the contrary, promoting the creation of *institutional networks* (the System of Central Banks[74] or the network of National Competition Authorities[75]).

These reforms are samples of a *formalized systems of communication (either in procedural or institutional terms*) *established in order to perform an effective dialogue among the networking terminals.*

Therefore, we can say that today within the European legal system there is a *potential* communication infrastructure.

But what is the factor that ignites the passage from *potential* to *act*?

We need today a new "evolutionary jump", as the one we mentioned above, speaking about the "constitutionalization" of the ECJ jurisprudence.

And we must be equally aware that this crucial step, in our opinion, depends essentially on a "meta-legal" condition, that is,

[74] http://www.ecb.int/ecb/orga/escb/html/index.en.html.
[75] http://ec.europa.eu/competition/ecn/competition_authorities.html.

prior to the logic of legal reasoning and regulation. The various subjects we have identified, in order to *actually* use the various available communications tools to dialogue, must share the same *language.*

Obviously we are not addressing the issue of language in a "linguistic" sense—although the linguistic diversity is not entirely irrelevant in respect of the functioning of European institutions[76]. We are raising the question of the *cultural* language of the European constitutional actors, understood as *that code of shared signs and meanings enabling a bidirectional communication.* In this sense, the key prerequisite either to establish an effective dialogue among European lower and higher courts and among national parliaments and EU institutions, or to achieve a really fruitful exchange of information and assessments with representatives of the civil society, is to bring their "cultural linguistic codes" closer. In this perspective, the most effective role is played by actors' legal and political *education*.

Treaties—or their reforms—may provide and improve legal instruments allowing different actors to communicate. But this effort could be completely ineffective if people are unable—or unwilling—to *use* these channels, for lack of real knowledge of the peculiarities of each partner. Take the already-considered example of the *European Charter of Fundamental Rights.* It is undoubtedly an important attempt to produce an exhaustive catalog of European rights; it has been conceived as (at least a part of) the *shared constitutional linguistic code* of European rights. But is it really so?

Remaining within the linguistic metaphor, we all know that language is formed—lawyers would say—in a *customary* way, mainly by using it. Indeed, *grammar* is an *ex-post* discipline trying to describe and define linguistic rules, created and living through concrete practice. Thinking about the scope of the European Charter—"to rule completely and comprehensively all the European language of fundamental rights"—is as if we were trying to create a new language, by "stipulating" a new grammar and then applying it to

[76] See the noteworthy remarks of S. Cassese, "*Eclissi o rinascita del diritto*"? in P. Rossi (ed.) *Fine del diritto?*, 29 (2009), about still existing problems using English as common language for European jurists.

our communication. It is an easy prophecy to say that the Charter will be much more effective as a new grammar of European rights only for those parts already shared and abided by as a legal tradition. It will have a much less "constitutive" effect where definitions or values are not already rooted in those traditions.

The existence of a common language, then, is the basic "meta-legal" requirement for a dialogue, but this requirement cannot be artificially produced. It depends more on the culture and education of people living in institutions, rather than on legal regulation and enforcement.

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