EDITORIAL

WHEN RIGHTS ARE CONTROVERSIAL, ARE DIALOGUES BETWEEN COURTS STILL ENOUGH?

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The dialogue between Courts in Europe is by and large the most recurrent topic in constitutional law studies in recent years. Colloquia, conferences, researches, doctoral theses, not to speak about books, articles and essays etc., all converge on the problems of the multiple interactions between national courts and the European Courts, including the European Court of Justice and the European Court of Human Rights.

Indeed, the topic is not new and it is a rather trite one. For years legal scholars have debated and written about the preliminary ruling to the European Court of Justice as the main form of judicial dialogue between judges in the European construction. However, in recent years not only the topic has been re-discovered but it has also been adjusted to the new context. More specifically, the scope has been broadened, under several respects. For a start, a new player has been included in the network of the European judicial architecture and it is the European Court of Human Rights: whereas in the past the European judicial dialogue mainly referred to the relationship between the national judges and the European Court of Justice under the formal rules of the European treaties, at present it also encompasses the relationship between national authorities and the European Court of Human Rights as well as the relationship between the two European Courts. Secondly, the idea of judicial dialogue is now more comprehensive, for it refers not only to formal dialogues through preliminary rulings, but also to informal kinds of dialogues, as for example references made to the case law of foreign courts and the attention paid to the jurisprudence of the European court far beyond the strict obligations imposed by the treaties and the convention. Judge-made law circulates intensely

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in Europe and the main ground on which these fervent interactions are based is that of individual rights.

This topic is at the center not only of legal studies, but also of legal practice. In recent years there have been several events that are worth recalling: the "twin decisions" no.s 348 and 349 of 2007 of the Italian Constitutional Court and then the following decisions no.s 311 and 317 of 2010 started a new course in relations with the European Court of Human Rights; moreover, with decision no. 102 of 2008 the Italian Constitutional Court issued the first preliminary ruling to the European Court of Justice and – looking beyond national borders – one cannot help mentioning the Lisbon ruling of the German Constitutional Court in June 2009 and the Mangold decision in July 2010, the reform of the judicial review of legislation in France and the subsequent decision of the European Court of Justice on preliminary ruling, etc. All these and many other acts have nourished the debate on the European judicial dialogue in recent years.

Why all this fuss about European judicial dialogue in theory and in practice? Why this revival of attention around the courts and their reciprocal interactions in Europe?

The emphasis on the judicial dialogue in Europe is an important ramification of two major trends in European constitutional law of the XXI century.

The first trend can be described as a new era of individual rights. If the second part of the XX century has been described as "the age of rights" by Norberto Bobbio, the beginning of the XXI century can be labeled as "the age of new rights", where all the most important issues and problems of social life are tentatively dealt within the legal framework of individual rights. The right to a clean environment, the rights of immigrants, the rights of disabled people, the rights of children, etc. are all new rights characterizing our time. The emphasis on individual rights brings about an emphasis on judges: after all every individual right is susceptible to be claimed before a judicial authority. That's why rights and courts are closely tied together.

The second trend of European contemporary constitutionalism is the shift in the protection of individual rights from a national level to a European one. Indeed, the national constitutional protection of rights cannot be totally superseded by the European institutions. National Courts, both ordinary judges

and Constitutional Courts, still play a fundamental role in the protection of individual rights. However, since the beginning of the century, Europe has been going through a stage of "integration through rights" –to paraphrase the title of a famous book – the outcome of which is that the epicenter of the protection of fundamental rights is being displaced/shifted in the European Courts.

Within this debate about rights, courts and Europe there is however a blind spot, and it concerns a crucial issue, not a minor one, which deserves attention. Often rights of the new generation are controversial. They are not necessarily part of a common core of unquestionable legal principles. New rights are often matter of discussion and disagreement. They are under debate.

This problem was made clear at the time of the European constitutional saga and more recently with the approval of the Treaty of Lisbon. As a matter of fact, during the negotiations of the Lisbon Treaty a new set of controversial issues emerged among the Member States: from the stance taken by some Member States, it has become clear that even fundamental rights can be an obstacle to the process of integration and a reason for incrementing Member States' Euro-scepticism or Euro-resistance. In particular the attitude maintained by the United Kingdom and Poland during the negotiations, and by Ireland during the ratification process, shows a sort of new distrust towards the 'Europe of rights' that should not be understated.

Unlike other aspects of European integration, the 'Europe of rights' has always been presented and perceived as being a result of an existent common constitutional tradition, as opposed to the outcome of a political bargain. In the first steps of the European Court of Justice's case law on fundamental rights this was an explicit statement and the legitimacy of the judicial activism of the Court was based on the idea that it was 'just' interpreting some common and shared principles that needed only to be spelled out. Fundamental rights in Europe claim to be part of a *jus commune europaeum*, capable of unifying the different national constitutional identities, while at the same time distinguishing European tradition from other western countries. Even the Charter of Fundamental Rights was presented as a 'restatement of law': the claim made was that the Charter was but

a codification of unwritten principles implicit in the European system on which all the Member States agreed.

Certainly, some national institutions have always been 'alert and vigilant' with regard to the activities of the European institutions on fundamental rights. Starting with the German '*Solange*' doctrine and the Italian '*controlimiti*' doctrine, a growing number of constitutional or supreme courts have maintained a cautious attitude towards European developments on the matter and have affirmed over and over again the possibility of contradicting the European interpretations of fundamental rights, if necessary. Those doctrines, however, have never been applied.

During the negotiations of the Treaty of Lisbon dissent broke out. Protocol no. 30 to the Treaty of Lisbon expresses some serious concerns on the part of the United Kingdom and Poland on the evolution of fundamental rights in Europe, and specific reference is made to the expanding role of the European Court of Justice. As to the substance, the British concerns regard, quite unsurprisingly, the entire chapter on social rights whereas the Polish ones seem to be rather addressed towards rights involving ethical disputes, in particular those regarding family and the "edges of life".

In the Irish case, the issue of fundamental rights was raised during the ratification stage. After the first negative referendum, the European Council issued one decision and one declaration regarding all the problematic matters, in order to pave the way to a second and hopefully positive consultation of the Irish people. In those documents a relevant place was occupied by some issues concerning fundamental rights such as the right to life, family and education.

All this points to the fact that a common understanding of individual rights, in particular of new individual rights, cannot be taken for granted. Sometimes they are debated, even harshly debated.

The simple fact that rights can be disputed and disagreed raises a new question that remains to be addressed: when rights are controversial, are the courts the appropriate venue for the dialogue?

In front of the growing problem of controversial rights, on the other side of the Atlantic the case has been made for "political constitutionalism", questioning the legitimacy and the authority of

judges in those cases where rights are divisive. In the present debate about rights and courts in Europe instead the problem is not yet in the spotlight.