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The Eurozone decisions: a step towards a European lender of last resort, but others must follow

by
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Abstract

The decisions taken by the recent meeting of the Heads of State and Government - held in Brussels on 21 July 2011- strengthen the European Financial Stability Facility (EFSF) and constitute a first step towards a European lender of last resort. But other steps will have to follow to make this credible

Key-words:

European Financial Stability Facility (EFSF), Euro, Eurozone

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1. Introduction

In the meeting of the Heads of State and Government in the Euro-zone, held in Brussels on 21 July 2011, the loan available from the EFSF[I] was considerably boosted-up to 440 billion Euros – and, above all, the possibility was provided to buy the bonds of any Euro-zone country on the secondary market (as well as substantially improving the terms under which loans are granted and extending their maturity dates).

These decisions are leading to a radical transformation of the EFSF which, from being purely a means for issuing loans to avoid defaults by countries struggling with a sovereign debt crisis, is now tending to acquire the characteristics of a lender of last resort, being able to buy public securities also on the secondary market in order to support their value and reduce the debt burden (the securities are devalued and thus bought at a lower price than their issue value. As a consequence, vulnerable countries become debtors to the EFSF for an amount lower than the face value).

A further step will be taken, in the institutional area, with the transformation of the EFSF into the European Stability Mechanism (ESM), which is an intergovernmental institution created by a Treaty signed by the Euro-zone countries. The ESM will be headed by a Board of Governors consisting of the various Ministers of Finance and will pass decisions by a qualified majority. Only the granting and the terms of a loan to an economically troubled country and the variation in the size and composition of the instruments available to the ESM will have to be decided by means of mutual agreement, which means that such a decision requires unanimous consent from all countries voting and that, therefore, an abstention by a country will not nullify the decision.

Many limitations still remain in this new institution since every decision about granting funds depends on the unanimous consent of the governments participating in the decision. Furthermore, the loans are granted at high rates of interest (the cost of the loan plus 200 basis points) and are conditional upon a fiscal correction that will have a high social cost and is also unrealistic when there is no Europe-wide policy to assure a return to growth. But, as long as this evolution is announced to the market as a step towards creating a fully federal Fiscal Union[II], founding a European Treasury responsible for defining and

implementing general lines of economic policy and which can rely on a federal budget with its own resources and the possibility to issue Eurobonds to finance a European plan for sustainable growth, it will be possible to immediately guarantee the financial stability of the weaker countries and, as a result, narrow the spread with the bonds from stronger Euro-zone countries, as happened in the 1990s with the reduction of interest rates for those countries aiming to meet the terms for joining the single currency.

[I] The European Financial Stability Facility is a company that issues bonds and other debt instruments on the market, guaranteed by member states, in order to offer financial support to member countries having difficulty with issuing new emissions. Such loans are dependent on the receiving countries implementing austerity measures

[II] For a more in-depth discussion of a plan for achieving by successive steps a fully-fledged federal Fiscal Union, see: Majocchi, 2011, *Towards a European Federal Fiscal Union*, available at http://www.on-federalism.eu/index.php/component/content/article/96-towards-a-european-federal-fiscal-union

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Constitutional Interpretation in Federations and its Impact on the Federal Balance

by

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Abstract

Most of the existing literature on judicial interpretation of federal constitutions focuses either on individual federations or on comparative studies of specific judicial techniques and/or specific fields. This paper argues that the general interpretative philosophy underlying the judicial approach has a huge impact on the balance of power in a federation; an originalist interpretation tends to favour the constituent units, while progressive or 'living' constitutionalism tends to have a centripetal effect. However, even the adoption of an originalist approach is not sufficient to fully counter the general centralising trend noticeable in the constitutional jurisprudence of all the federations studied. Further, the analysis suggests that constitutional courts often adopt a different approach to interpretation in federalism-related issues than they do in other areas of constitutional law, such as fundamental rights.

Key-words:

Comparative federalism, division of powers, constitutional interpretation, originalism

"Federalism … means legalism - the predominance of the judiciary in the constitution -"
- A.V. Dicey

1. Introduction

Constitutions play a special role in federal systems. A federal constitution, while retaining all the essential characteristics of unitary constitutions, is at the same time conceived of as a compact between theoretically sovereign entities. This traditional vision is not directly applicable to federations formed by disassociation, but in these cases it is precisely the creation of entities with a specifically defined sovereignty that gives the federal constitution its special character. However, contemporary constitutional discourse often tends to overlook, or at least ignore, this particularity of federal constitutions. In most of the older federations, sovereignty-based arguments are not as prevalent today as they were in the early stages of constitutional debate. Appeal to 'fundamental principles' is more common in other areas, of which the most evident is that of fundamental rights. Even when the 'federal balance' and 'state sovereignty' are invoked, the notion of the constitutional document as a compact, or an agreement between the governments constituting the federation, does not come to the fore.

When a federal constitution is looked at in this classical perspective, the distribution of powers and functions between the federation and its constituent units as contained in the constitutional document takes on a particular significance. This distribution is not merely a question of practical convenience; the constitutional provisions defining legislative and executive powers are in effect the concrete embodiment of the theoretical sharing of sovereignty that federalism is supposed to entail. Even more so than in unitary systems, precise attention to these provisions is thus fundamental both to understanding federalism and to 'working' federalism. This explains the above quotation from Dicey about legalism in federations and the role of the judiciary: given this conception of what a federal constitution is, the interpretation and application of constitutional rules and principles are essential factors that determine how federalism functions in practice. Specifically, the interpretation of the division of legislative competence laid out in the constitution plays an

important role in defining what one may call the federal equilibrium or the federal balance, i.e. the balance of power between the federation and the constituent units.

This role is well-recognized by both scholars and practitioners. There is a vast literature on how constitutional courts interpret certain specific grants of power in various federal constitutions: the commerce clause in the United States, the 'peace, order and good government' clause in Canada, the corporations power in Australia, and so on. Comparative studies often focus on the evolution of case-law in these areas in different federations. There is also extensive analysis of specific interpretative concepts applied by the courts, such as the negative commerce clause, or the doctrine of pith and substance, or the notion of occupied field preemption. In-depth comparative studies of these technical aspects, while rare, have also been attempted (Gilbert 1986; Taylor 2006).

However, there is little comparative work that attempts to coherently analyse trends in constitutional interpretation in federations in a more general perspective. This is because of the extremely heterogeneous character of federalism jurisprudence in different federations. Among the older federations, in particular, the body of case-law on the division of powers is so vast, and so complex, that attempting to make sense of any one system is in itself a difficult task. An attempt to reach comparative conclusions is therefore fraught with the danger of losing oneself in a swamp of technical analysis at the one extreme, and, at the other, the danger of relying on – or arriving at – too-general notions of how and why constitutional decision-making actually proceeds in this fundamental area.

These epistemological remarks are necessary in order to clearly define the limited parameters of the analysis attempted here. This paper studies the impact not of specific interpretative techniques but of the more general interpretative philosophy underlying constitutional decision-making in several federations. I limit my discussion of actual cases to a minimum, referring instead to more detailed and in-depth work pertaining to each of the jurisdictions studied.

I start with the hypothesis that the judicial approach to constructing the specific constitutional provisions allocating powers between the units of a federation is conditioned, implicitly or explicitly, by how judges conceive of the nature and function of the constitutional document. The process of determining what a constitution *says* necessarily involves certain assumptions as to what a constitution *is*. It is hoped that more detailed and systematic, technical analyses of case-law will benefit from an understanding

of how these assumptions influence and condition the interpretation of the constitutional division of powers.

I will attempt to show that an originalist interpretation that sees the constitution as a fixed body of rules tends to favour the constituent units in a federation, whereas progressive or 'living' constitutionalism, i.e. treating the constitution as a set of general principles to be adapted to changing circumstances, tends to have a centripetal effect on the federal balance. It is also true, however, that all the federations studied have shown a general tendency towards centralisation over the course of their evolution. While a full analysis of the myriad economic and social factors at work in this process is beyond the scope of this paper, I will discuss how some of them influence the interpretation of the legislative competences attributed by federal constitutions. Particular attention will be paid to the oft-neglected aspect of scientific and technological development. These factors are analysed through the prism of the formal distribution of powers in constitutional provisions; the study shows that certain structural elements of this distribution in several federations tend to facilitate the process of centralisation.

Finally, I will touch briefly on the question of whether constitutional courts adopt different interpretative philosophies in federalism-related issues than they do in other areas of constitutional law - such as fundamental rights - due to the particular nature of federalism jurisprudence, i.e. the definition not of the extent of state power but of the relative limits of power between different levels of government within the state. This suggests, further, that comparative studies of constitutional interpretation need to take into account not only the overall interpretative approach prevalent in different legal systems, but also how these approaches vary according to the subject matter in question.

For this study I focus on the United States, Canada and Australia, and, additionally, on Austria due to the special importance of originalism in Austrian constitutional doctrine. Discussion of younger federations is limited for the simple reason that the originalism debate is less relevant in these federations: due to the relatively short period of time that has elapsed since the writing of the constitution, the divide between 'original meaning' and other possible meanings is much less significant.

2. Modes of constitutional interpretation

Constitutional scholarship and judicial doctrine have developed several different theories of constitutional interpretation. The subject has become an especially fashionable one in the last few decades, and there is no dearth of commentary in the area. It is hardly possible to elaborate an exhaustive list of the theoretical approaches developed in the academic literature, as each one comprises several variations and the same words are sometimes used to describe rather different approaches.[I] Further, the actual process of interpretation involves various steps and assumptions that one cannot always classify under a well-defined theory. "Meaning" itself is a nebulous concept that can refer to several different aspects and be defined in several different ways (Balkin 2009: 552; Lessig 1993: 1174-1178). It is not my intention here to explore these issues in detail.

However, for the limited purposes of this paper, it is possible to briefly identify the major strands of academic discourse on the subject, revolving around certain basic 'modes' of interpretation. Originalist approaches stress the need to interpret the constitution in light of its original meaning. In this perspective, the constitution provides a fixed set of rules for governance, which are to be applied as such by the legislative, executive and judicial branches. Originalists argue that continuous evolution of these rules by judges defeats the very purpose of adopting a constitution (Kay 1998). They consider the alternatives to originalism as being incompatible with the democratic foundations of constitutionalism, allowing too much judicial discretion as well as admitting too much indeterminacy in applying the constitution (Scalia 1989).

Opponents of originalism, on the other hand, believe that the constitution should be considered a living document that provides general guidelines and principles of governance. This approach emphasizes that fidelity to the constitution should not necessarily involve strict conformity to the framers' intentions (Friedman and Smith 1998: 6). Further, non-originalists point out that some of today's cherished constitutional values would be incompatible with such a strict interpretation (Grey 1975: 710-714).

Related to these notions is the debate between interpretivism and non interpretivism, i.e. whether or not judges should restrict themselves to applying norms explicit or implied in the text of the constitution. The interpretivist answer is in the

affirmative, while non interpretivists argue that judges may enforce norms and use principles not found within the constitutional document (Goldford 2005: 96; Grey 1975: 703).

Other 'modes' of interpretation often cited in academic literature are 'textualism', 'intentionalism' and 'purposive interpretation'. Some idea of the semantic hazards in this area can be had from the fact that textualism and intentionalism are sometimes considered two branches of originalism (Brest 1980; Lyons 1993), while some authors identify the search for the original 'public meaning' as a third branch (Smith 2007: 162-163). Others speak of textualism as a theory separate from - even opposed to – originalism, emphasizing the idea of an 'objective' textual meaning (Pushaw 2006; Nelson 2005). And in the same logic, 'originalism' is sometimes considered a synonym for 'intentionalism'. Opponents of originalism have indeed pointed out that the term actually covers several disparate and even mutually contradictory theories (Colby and Smith 2009). Some commentators attempt, through various steps of theoretical and semantic argument, to put forward a synthesis of originalism and living constitutionalism (Balkin 2009). Finally, 'progressive interpretation' is sometimes contrasted not just with originalism but also with textualism in its independent form.

For the purposes of this paper, I will work with a simplistic contrast between the two general ideas of original meaning-based interpretation - including all its various branches - and progressive interpretation, i.e. interpretation that seeks to adapt the constitution to changing circumstances, as they have been applied in federal systems. This admittedly reductionist approach is adopted as the subject of this paper is not an evaluation of - or a contribution to - theories of interpretation, but an analysis of how interpretation in federal constitutions conditions federal-state relations. The two very general conceptions of orginalism and progressivism are therefore taken to represent two contrasting ways of defining the nature and functions of a constitutional document, i.e. whether it is to be conceived of as a fixed set of rules intended to rigidly define judicial, legislative and executive practice, or rather as a flexible framework that can be evolved and adapted.

3. The 'original meaning' of federalism

How do these different ways of approaching constitutional provisions influence how we conceive the relationship between the federal government and the states or provinces in a federation? Returning to the idea of the constitution as a compact, classical federalism doctrine envisioned the creation of a system in which the constituent units reserved significant spheres of power for themselves. In the United States and Australia, as in many other modern federations, this idea manifests itself in the residual competence which the constitution attributes to the states. The states were seen as equal partners in the system, retaining sovereignty in many areas of governmental action.

Adherence to the original meaning of constitutional texts naturally favours this underlying vision of what a federation is[II], and this translates into an interpretation of constitutional heads of power that is more likely to attempt to safeguard state sovereignty. Commerce clause jurisprudence in the United States provides a clear example: the generous interpretation of the commerce power since the New Deal of the 1930s up until some decisions of the Rehnquist court in the 1990s was very far from the original conception of the role of the federal government in regulating inter-state commerce, and it greatly eroded state legislative power in a number of areas. The federation was originally intended to have specific, well-defined powers, and the unlimited expansion of federal regulation to all things even remotely commercial was hardly compatible with this vision (Tushnet 2006: 36-37).

The idea of a progressive and adaptive interpretation was of course already present in American constitutional debate, having been invoked for example as far back as Chief Justice Marshall's famous judgement in *McCulloch v. Maryland* [17 US 316 (1819)]. But despite subsequent shifts in judicial trends, it never translated into as one-sided a vision of the division of legislative power as during the New Deal period and after. The economic and political context for the New Deal court's interpretation of the commerce power are of course common knowledge: the measures needed to lift the country out of the Great Depression required a new role for the federal government in regulating the economy, which put political pressure on the court to accept the constitutionality of the new federal

laws. This is certainly an example of how judicial interpretation of federalism provisions in the constitution provides a legal framework for the centralisation of power in a federation, while at the same time being shaped and influenced by 'external' economic, social and political factors.

However, the progressive nature of the U.S. Supreme Court's interpretation was largely implicit, there being no clear and authoritative pronouncement on the interpretative methodology employed. This is in stark contrast to Canadian constitutional doctrine, where since 1930 the Judicial Committee of the Privy Council, and then the Supreme Court of Canada, have clearly and explicitly stated that the constitution must be adapted to reflect changing circumstances, a principle embodied in the metaphor of the 'living tree'. The 'living tree' image comes from the Privy Council decision *Edwards v. Attorney-General for Canada* [(1930) AC 124], in one of the most famous passages in Canadian constitutional law:

"*The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits … Their Lordships do not conceive it to be the duty of this Board — it is certainly not their desire — to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation….*" (per Lord Sankey).

Edwards was actually a decision about a woman's right to stand for election to the Senate. But it has been often cited in support of a generous interpretation of the legislative powers enumerated in the constitution (Hogg 2006: 87). Even before *Edwards*, the Privy Council tended to reject originalist arguments, refusing for example to admit evidence of the drafter's intentions as relevant to the interpretative process (Hogg 2006: 74-79). However, this earlier period – as well as a handful of later Privy Council decisions – was certainly much more favourable to the provinces than the subsequent evolution of case-law under the Supreme Court.[III]

It is, of course, too simplistic to cast the 'original meaning' of Canadian federalism in the same mould as that of the United States. The drafters of the British North America Act were conscious of the need to avoid troubles such as those which occurred between the American States in the 19th century, and hence took a deliberate decision to create a strong central government. It is, however, no coincidence that the markedly centralising tendency in Canadian jurisprudence began *after* the adoption of the 'living tree' metaphor as

a guiding principle in constitutional interpretation. This shows that the centripetal effect of progressivism is not solely dependent on the contrast with an originally state- or province-centred federalism.

The place of originalism in Australian constitutional law is more ambiguous. In the first two decades of its existence, the High Court of Australia was very sensitive to the original understanding of federalism in the constitution: the restrictive interpretation of federal legislative competences and the 'reserved powers' doctrine was consistent with the drafters' concern for preserving state sovereignty (Allan and Aroney 2008). The example of the United States was very influential, as the High Court worked with the double presumption that the drafters were aware of the evolution of American doctrine, and that the similarity between the two constitutions meant that they should generally be interpreted in the same manner. Faithfulness to original intentions was obviously reinforced by the fact that several High Court judges had themselves been involved in the drafting process (Allan and Aroney 2008: 266).

However in its seminal decision *Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd.* [(1920) 28 CLR 129], the High Court declared that the Constitution ought to be interpreted so as to give it its 'natural' and 'clear' meaning, and that the constitutional text itself was paramount. This brand of textualism - often called 'literalism' or, more generally, 'legalism' - dominated Australian judicial doctrine for most of the 20th century (Goldsworthy 2006; Selway and Williams 2005; Tucker 2002).

While the rejection of originalism was not as explicit and systematic as it was in Canada[IV], the emphasis on the text tended to relegate the drafters' intentions to the background, which allowed the Court to move away from its earlier approach towards one much more favourable to the federal government. For instance, before *Engineers*, the reserved powers doctrine had been invoked to interpret the federal heads of power in a holistic manner, so that what was impliedly left out of one head of power was not admitted under another. Thus, the grant of power with respect to 'interstate commerce' was interpreted as implying that purely intra-state commerce did *not* come under federal jurisdiction, and that other enumerated powers – such as the power with respect to 'corporations' – were therefore not to be read in a manner that would permit federal regulation of commerce that did not have a clear interstate dimension. The move away from the drafter's intentions meant that this interpretative approach was gradually rejected.

Under the new paradigm, each federal power was to be interpreted independently of the others; no restrictions were to be read into the words used in the grant of power by Sections 51 and 52 of the Constitution.[V]

Whether or not one characterizes the post-*Engineers* approach as 'progressive', it is beyond doubt that the change in interpretative philosophy reflected an underlying change in how judges conceived of the relation between the federation and the States. In fact, the *Engineer's* court explicitly rejected the classical American doctrine of double sovereignty - which until then had been followed in Australia[VI] – stating that federal powers needed to be interpreted generously in order to ensure that the federation could effectively handle issues requiring regulation on a national scale. This underlying problem of an increasing need for national regulation was of course similar to the one faced by the New Deal court in the United States.

4. Austria: originalism concretized

Austria provides a unique example of the dynamic discussed in this paper, due to the special role of originalism in Austrian constitutional law. According to the theory of 'petrification' (*Versteinerungstheorie*), the words employed in constitutional provisions are 'petrified' at the time of their coming into force, and must therefore be given the exact same meaning today as they had then (Douin 1977: 49-52; Gamper 2005: 15-16; Taylor 2006: 98-103). The singularity of Austrian constitutional doctrine is that the theory of petrification is not an underlying philosophy or a guiding principle - as originalism or progressivism are in other jurisdictions - but a specific, well-established rule applied systematically in the process of interpreting the constitutional texts.

This concretization of originalism as an interpretative technique means that the anti-centralising effects of originalism are even more evident in Austria. The constitutional division of powers in itself heavily favours the federation, as it is granted extensive exclusive competences as well as concurrent and framework competences. While the residual competence is attributed to the *Länder*, they have very few enumerated powers, and these only in certain carefully defined fields; if federal powers were to be interpreted broadly, there would be very little scope remaining for *Länder* legislation. The theory of

petrification helps to preserve state power by not allowing enumerated federal powers to be interpreted expansively. As their meaning and scope is 'petrified' in time, new areas of legislation cannot be accommodated under a certain head of power in the constitution. The categorical rejection of progressivism helps maintain the federal balance, albeit only to a certain extent.

5. The structure of the division of powers

Our discussion of the Austrian constitution demonstrates that, apart from external factors, the centripetal effect of progressive interpretation is also related to the manner in which powers are distributed in the constitution. As we have seen, the residual power is given to the states in many federations, but in the American and Australian model it is also the *only* power the constitution gives them. These constitutions do not contain an enumerated list of state powers. How does this affect judicial interpretation of the powers that are in fact enumerated, i.e. federal powers?

There are several complex factors at work. Firstly, a deep-seated respect for the separation of powers influences how judges interpret legislative powers. Many courts start with the basic presumption that the legislature is acting within its competence. Being conscious of the need to avoid encroaching on legislative functions, judges tend to avoid a finding that otherwise validly adopted laws are in fact void for lack of legislative competence in a certain field.[VII] There is thus a predilection for 'justifying' the constitutionality of a law by bringing it within the scope of a certain head of power. Secondly, constitutional provisions are often framed in more general terms than ordinary statutes, and general terms allow for more flexible interpretation than specific terms.

As a result, the meaning of the words used in the enumeration of powers - and hence the limits of the fields of power they define - are consistently open to a wider interpretation, which allows a wider variety of laws to be adopted within the scope of the same power. This is where the structure in which the division of powers is expressed becomes relevant: when state powers are not enumerated, they cannot benefit from this expansive interpretation. At the same time, in such cases, the expansion of federal enumerated powers is not limited by the existence of well-defined fields of state power; in

some ways, the enumeration of state powers provides a barrier against the ever-widening interpretation of federal fields of competence. Judges may also tend to favour specific enumerated powers over a vague and undefined 'residual' power. Thus, in federations where only federal powers are enumerated, there is a very marked tendency towards progressive centralisation (Herperger 1991).

The question of a generous interpretation is related to the originalism-progressivism debate, because in this context 'progressive' usually translates to 'generous'. It is important to note that there need not be an automatic equation of the two: in principle, a progressive interpretation could very well demand a *restrictive* interpretation of a certain constitutional provision or head of power (Miller 2009: 13; Allan 2006: 6). But in practice, the progressive interpretation of an enumerated head of legislative power tends to broaden the scope of the power. Consequently, when the only enumerated powers are federal powers, a gradual erosion of state sovereignty becomes almost inevitable.

But what about those federations where the constitution enumerates powers for the both the federation and the constituent units? The Canadian constitution, for example, contains two lists of enumerated powers: federal powers in Section 91 and provincial powers in Section 92. On the simple hypothesis that the generous interpretation of an enumerated competence expands the legislative power of the level of government concerned to the detriment of the other level, the fact that there are two lists of exclusive powers means that this dynamic can work in both directions, i.e. favouring either the federation or the provinces.[VIII] And, yes, despite the clear choice of progressivism over originalism, Canadian federalism jurisprudence presents a less one-sided picture of the division of legislative power than its Australian and American counterparts, at least in the 20th century. In fact, for several decades of Privy Council jurisprudence, it was the provinces that benefited from a generous interpretation of enumerated powers, as the provincial competence with respect to 'property and civil rights' was extended so as to cover a very wide range of legislation (Hogg 2007: 392, 499-500).

6. The overall centralising tendency

But whatever the structure of the division of powers and the choice of interpretative approach, a general tendency towards centralisation in each of the federations studied can be clearly established.[IX] The enumeration of state powers or the emphasis on original meaning counter this tendency only to a certain extent.
For example, despite the exception of the property and civil rights clause, on the whole the scope of federal powers in Canada has widened far more significantly than that of provincial powers, especially since the abolition of appeals to the Privy Council in 1949.

This can be explained in part by various external, i.e. non-constitutional developments. We have already seen how a perceived need for greater federal control over commercial affairs influences the choice of interpretative approach with respect to the division of powers. This aspect has been extensively analysed by scholars, in particular in the United States, and so I do not intend to explore it in greater detail here.

However, another non-constitutional factor - much less remarked-upon - that shapes the interpretation of the heads of legislative power is the development of new technologies that require new forms of government regulation not always envisaged at the time of drafting. In such cases, a progressive interpretation is required almost by definition, since *none* of the existing constitutional provisions would be sufficient if understood strictly in their original sense. The equation of 'progressive' and 'generous' is quite justified in this context, as these developments usually do require an expansion of government power to deal with unforeseen situations.

So, judges must decide how new technologies are accounted for in the division of legislative competence. In Canada, the Privy Council and later the Supreme Court were faced with several questions as to which level of government retained legislative power over matters such as telephony, television, aeronautics and atomic energy. But the very nature of these technologies often required uniform regulation on a national scale, as their application and functioning transcended provincial boundaries.[X] It is not surprising, therefore, that the decisions of both the Privy Council and the Supreme Court in these areas were generally in favour of the federal government, albeit sometimes based on very different reasoning.

Thus, the federation was held to retain legislative power with respect to aeronautics, at first by virtue of the federal competence to conclude international treaties [*In Re Regulation and Control of Aeronautics in Canada* (1932) AC 54], and later under its residual 'peace, order and good governance' power as it was a matter of national interest [*Johannesson v. West St. Paul* (1952) 1 SCR 292]. Telecommunications provides another example: the federation was held to be competent to regulate telephone companies by virtue of its power over works and undertakings connecting the provinces or extending beyond the limits of a province, under the exceptions to provincial power listed in Section 92(10) [*Toronto v. Bell Telephone Co.* (1905) AC 52]. While this particular ruling seems perfectly logical, the centralising tendency becomes evident in later decisions where the federation was allowed to regulate even those companies operating entirely within provincial limits (on the ground that they had the technical capacity to provide national and international connections) [*Alberta. Government Telephones v. CRTC* (1989) 2 SCR 225; *Téléphone Guèvremont v. Québec* (1994) 1 SCR 878].

Similarly, the petrification theory in Austria, while usually favouring the *Länder* due to its restrictions on the possible expansion of federal enumerated powers, was relied upon to reach a pro-central conclusion in a decision concerning legislative competence over radio broadcasting [VfSlg 2721/1954]. The Constitutional Court held that since the radio had already been invented when the Constitution was drafted, the framers had to have been aware of its existence. And since there was a relation between radio broadcasting and the telegraph, the fact that there was no mention of the former in the Constitution meant that it was intended to be grouped with the latter. By this rather tortuous reasoning, the Court succeeded in adhering to the letter of the petrification theory while actually employing a generous interpretation of the federal power in order to accommodate national regulation.

Interestingly, in an earlier decision on the Canadian constitution, the Privy Council – soon after elaborating its 'living tree' metaphor - had also accepted an expansive definition of 'telegraph' so as to include radio broadcasting under the federal power in Canada, as telegraphs are also listed as exceptions to provincial power under Section 92 (10) [*In re Regulation and Control of Radio Communications in Canada* (1932) A.C. 304]. And the same generous interpretation of the competence with respect to telegraphs under Section

52(v) of the Australian constitution was used as well by the High Court of Australia, with the same result [*R. v. Brislan* (1935) 54 CLR 262].

Another aspect of Austrian constitutional doctrine is the concept of 'intra-systemic' powers, according to which the federal government can legislate on a matter not falling directly within the ambit of a 'petrified' head of power as long there is a close link between the federal law and the original power (Gamper 2005: 16; Taylor 2006: 101). This facilitates a much more generous interpretation of an enumerated power than would otherwise be permitted under the petrification theory.

And finally, the ease with which the Constitution is amended has further diluted the pro-*Länder* effects of the petrification theory in Austria. As the words in the Constitution are petrified in their meaning at the time of original enactment, new words introduced by a later constitutional amendment are to be understood in the meaning they had at the time of the amendment. Since the procedure for constitutional amendment is much simpler in Austria than in many other federations, it is much easier for federal powers to be updated to meet changing circumstances. And on the whole, amendments to the division of powers have indeed been favourable to the federation (Douin 1977: 54-58).

In the United States and Australia, too, the centrifugal effects of originalism have not been strong enough to reverse the well-entrenched tendency towards increasing federal power. While the United States Supreme Court's decisions in *United States v. Lopez* [514 U.S. 549 (1995)] and *United States v. Morrison* [529 U.S. 598 (2000)] sparked a renewed interest in possible limitations on federal commerce clause regulation, it must be noted that they did not give rise to a dramatic change in the federal balance of power, as later Supreme Court cases did not necessarily continue this trend (Williams 2007). One relevant factor is that it would be impossible, as a practical matter, for the Supreme Court to invalidate the entire framework of federal regulation established in the decades since the New Deal. The respect for judicial precedent is also an important element in constitutional interpretation (Tribe 2000: 78-85; Tushnet 2006: 40-42); a certain interpretative approach can become part of the judicial conventions regarding certain constitutional provisions. The U.S. Supreme Court's decades-old refusal to admit limits to federal power, while departed from by the majority in the two decisions mentioned, remains deeply rooted in American constitutional thought.

In Australia, the legalism established by the *Engineers* court was also disturbed towards the end of the 20th century, which saw a renewed emphasis on a purposive interpretation that gave more consideration to framers' intentions. But this Australian version of the New Originalism showed itself mainly in the field of implied rights, and it did not have a major impact on Australian federalism (Greene 2009: 43-49). Recent case-law has been as favourable – if not more favourable - to the federation as anything that went before. For example, in the *Work Choices* case of 2006 [*New South Wales v. Commonwealth* (2006) 229 CLR 1] the Court upheld a federal law on industrial relations under the corporations power. Repeatedly citing *Engineers*, the majority explicitly rejected the idea that one should take the federal balance into account when interpreting the constitution.[XI]

7. Interpretative philosophy and subject matter

The absence of any notable impact on federalism of the originalist/intentionalist revival in Australia also suggests that very different, even mutually contradictory interpretative approaches may underlie constitutional jurisprudence in different areas. In its implied rights jurisprudence, the High Court has shown a much greater willingness to adopt a teleological, structural interpretation than is evident in *Engineers*-style textualism (Greene 2009: 43-49; Allan and Aroney 2008: 292-293). Similarly, to take an example from a newer federation, the Indian Supreme Court is known for its progressive and expansive interpretation of the fundamental rights provisions in the Indian constitution (Jain 2008: 833); on the other hand, while the Court has recognized federalism as one of the unwritten general principles – the "basic structure" – of the constitution, it has adopted a far more textual approach towards the resolution of federal-state disputes.

One apparent reason for these seemingly contradictory approaches is the fundamental difference between the interpretation of the federal division of powers and the interpretation of provisions guaranteeing fundamental rights. While the latter involves the definition of the scope and limits of government power, the former is more concerned with the distribution of power between different levels of government within the state, i.e. the definition of *relative* limits of power. When a court interprets the division of legislative

competence, one of the two levels of government in the federation retains legislative power; in the interpretation of a provision granting individual rights, an expansive interpretation implies a restriction of *all* legislative power (Huscroft 2004: 422).[XII]

The reasons for the choice of a particular approach in a particular context are manifold, and complex. With respect to fundamental rights, there have been changes in the underlying perception of the relation between the individual and the state. In a more 'realpolitik' perspective, inter-institutional rivalry may also be cited as a relevant factor sometimes favouring a generally expansive interpretation that restricts legislative power. While this is a subject for another study – one that compares the Australian example to those of Canada and the United States as well - its general implication is clear: the interpretative philosophies adopted by constitutional courts are not constant and may change as a function of the subject matter in question. Studies of constitutional interpretation must take this into account when comparing the interpretative approaches prevalent in different legal systems.

8. Conclusion

In the final analysis, what does the comparison of constitutional interpretation tell us about federal constitutions, and about federalism?

Judicial interpretation channels the influence of economic, technological and other non-constitutional developments in a federation, while at the same time exerting its own influence in shaping the legal system within which these forces act. As federalism is itself a response to political and social realities, this is to be expected, even welcomed; the progressive centralisation evident in so many federations is only a further manifestation of this dynamic.

While recognizing the interrelatedness of legal and non-legal factors, the 'pure' study of constitutional law can be a valid – and valuable – approach to understanding the phenomenon of federalism. As mentioned above, the legal order provides a framework where the various factors operating in this phenomenon manifest themselves, and it is at the same time one of these factors. And so, noting the influence of economic and technological developments in federal-state relations and on the interpretation of the

constitution should not lead one to overlook the complex nature of these questions, or the fact that the evolution of constitutional law is not a direct function of these developments.

In this perspective, we have seen how the interpretative approach adopted by each jurisdiction tends to influence the federal balance. As stated at the beginning of this paper, the choice of an originalist or progressive approach involves not merely a certain way of looking at the words and expressions used in constitutional provisions, but also a certain way of conceiving what a constitution is and what it is meant to do. At the same time, as judicial interpretation is also conditioned by constitutional language, a study of the concrete terms of these provisions is indispensable to studying the case-law of federalism: the manner in which legislative powers are divided in federal constitutions is an important factor in how the federal balance evolves. Certain forms of distribution of legislative competences, in particular those without enumerated state powers, are more amenable to an expansion of federal power. While it is difficult to 'quantify' the role played by this aspect, the existence of such a role is beyond doubt. The marked differences in the way the constitutional resolution of federalism disputes has evolved in federations with very different structures of power-allocation are in themselves proof of this phenomenon.

Thus, if one's goal is to preserve the balance of power between the federation and its constituent units – and it is important to recognize that such a goal would be a normative, political choice - interpretative techniques are not in themselves sufficient tools without an appropriate structuring of the constitutional division of powers. Other federations provide examples of this: the recent German constitutional reform was necessitated precisely by the need to better organise the allocation of legislative competence between the Bund and the Länder; Switzerland has seen several overhauls of its constitutional structure, often motivated in part by the need to clarify and elaborate the division of powers. These examples put the role of constitutional interpretation as an evolutive factor into perspective; it is only when constituent power is wielded to its fullest extent that Dicey's prediction of judicial predominance may be proved wrong.

[I] A useful overview is provided by (Clark 2002).

[II] This is reflected in the fact that the development of the 'New Originalism' in American constitutional jurisprudence and doctrine roughly corresponded with the rise of the 'New Federalism'; indeed, one gets the impressions that the terms are sometimes used almost interchangeably.

[III] In a classic study, J. Brossard identified several different pro-central and pro-provincial periods in the Privy

Council's jurisprudence: (Brossard 1968: 169-186).

[IV] As is to be expected, how this jurisprudence is characterised varies according to the definition of 'originalism' adopted. Certain writers conceive of Australian legalism as nothing but a form of originalism: see for example (Greene 2009).

[V] Examples of the later approach are provided by the decisions in *Strickland v. Rocla Concrete Pipes Ltd.* (1971) 124 CLR 468 and the *Work choices* case (discussed below). For a detailed analysis of the reserved powers doctrine, see (Allan and Aroney 2008). For an overall discussion of the corporations power, see (Zines 2008: 107-137)

[VI] Good examples of the early State-centred approach are provided by the High Court's decisions in *Attorney-General (NSW) ex rel Tooth & Co Ltd. v. Brewery Employees' Union of NSW* (1908) 6 CLR 469 and *Huddart, Parker & Co. Pty Ltd. v. Moorehead* (1909) 8 CLR 330.

[VII] As suggested in the final section of the paper, however, this does not always hold true in other areas of constitutional doctrine.

[VIII] Some scholars note that the existence of two relatively long and detailed lists of powers has tended to give a greater importance to judicial interpretation in determining the balance of intergovernmental relations in Canada; see for example (Hodgetts 1974).

[IX] This has of course been the subject of extensive comment in each of the federations mentioned. However, detailed and in-depth comparative studies of this phenomenon – as opposed to brief remarks - are surprisingly rare. For one such attempt, see (Orban 1984). A recent study undertakes an empirical analysis of the broad phenomenon of 'legal unification' in several different federations: (Halberstam and Reimann 2010)

[X] The centralising or decentralising effects of technological developments in the larger social and political context are more complex and ambiguous. The nationalisation of information and communication systems tends to be a centralising factor, but some scholars argue that the spread of these systems and the growth of interactive technologies may have the effect of decentralising power to citizens: see generally (Dutton 1982, 110-111).

[XI] Some commentators see the *Work Choices* decision as a clear abandonment of originalism in Australia; see (Gisonda 2007). The author notes that only the dissenting judgement of Callinan J. explicitly endorsed originalism as the best interpretative approach.

[XII] In the same logic, G. Sawyer observes: "If the purpose of the liberal interpretation is to extend the range of competence of a legislature – usually the Centre legislature – then in dealing with prohibitions it is necessary to *narrow* the meaning syndrome of the relevant class expressions." (Sawer 1969: 177). While I do not explore this subject here, it is worth noting that, in general, scholars tend to hold the view that the development of fundamental rights in federal systems favours the federal government; see for example (Morton 1995; Orban 1991: 72-76; Bothe 1991: 130-131).

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Closer to the citizens? European constitutional processes, communication policy and publicity

by

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Abstract

This essay proposes that the emergence and failure of the debate on the EU constitutional reform depends, amongst other things, on the rise of what it calls 'publicity' as public policy and governance function: the public management of communication aimed at creating public sphere, improving political communication, participation and trust, building consensus and legitimacy for a governance agency. Publicity originally emerged from the domain of public relations in corporate governance and bears some similarity with commercial marketing and political propaganda. By analysing the constitutional process, this essay provides a short genealogy of publicity within European governance: from publicity concerning specific institutions and epistemic communities, namely the courts and the jurists, to its gradual extension to the general public. Finally, the essay addresses the normative question, 'What is to be done?'. What can we learn from the failure of the constitutional debate? Should Europe remain a matter of technicians and lobbyists, or should it strive toward becoming a democratic polity? In the latter case, how should Europe improve the quantity and quality of political communication within its public sphere?

Key-words:

European Constitutional Process, Communication Policy, Democratic Deficit, Deliberative Democracy, European Citizenship, Laeken Declaration, Constitutional Treaty, Lisbon Treaty.

Still unborn and already compelled to walk around the streets and speak to people

Franz Kafka, *Diaries*

1. Introduction

In December 2001 the European Council, gathered in Laeken, adopted a Declaration on the Future of the EU committing the Union to becoming 'more democratic, more transparent and more efficient'. According to the Laeken Declaration, one of the main challenges facing Europe was to bring the European institutions 'closer to its citizens': the problem was 'how to bring citizens, and primarily the young, closer to the European design and the European institutions?'. In order to face the challenge, at Laeken the European leaders set up a Convention designed 'to pave the way for the next Intergovernmental Conference as broadly and openly as possible'. They also created a forum for organisations representing civil society 'in order for the debate to be broadly based and involve all citizens'.

Regardless of the outcomes of the constitutional debate – a failure, as I will try to show – the idea of promoting a public debate in order to bring Europe closer to the citizens deserves careful scrutiny. The project of strengthening the legitimacy of a given governance agency by promoting a public debate as wide and inclusive as possible is relatively new, curious and – I will argue – worrisome. The slogan 'closer to the citizens' – coined in 1975 by the Tindemans Report and codified in 1992 by the Maastricht Treaty[I] – invites us to examine the changing relationships between transnational governance, constitutional reforms and communication policy.

Undeniably, there is something new going on. Until now one of the traditional purposes of liberal constitutionalism, indeed the classic one, has not been to bring the institutions closer to the citizens, but to distance and protect the citizens from institutions that were already too close. Liberal constitutionalism sharply distinguished between state and civil society – between *bourgeois* and *citoyen*, between political equality and social inequality, between public law and private law as well as between electorate and representatives – in the effort of keeping civil society as separate as possible from the state, and vice versa.

Liberal constitutionalism distinguished them in the attempt to separate the civil society from the potentially intrusive and oppressive government and, reciprocally, in the attempt to protect the state from the particularistic interests and private appetites of civil society. It is clear that from a liberal perspective the project of bringing the citizens closer to the public authority – no matter if it is the state or the European Union – in order to gain their consent, trust and participation, is at least suspect.

From a democratic perspective also, the idea seems surprising and questionable. Indeed, the project of bringing the European Union closer to the citizens says something about an authority which self-critically perceives itself as being not fully democratic, remote, far away from the public, almost private, an authority which in order to react to this situation tries to democratise itself. However, the idea of bringing Europe closer to the citizens is not equivalent to the notion of democratisation, which it implies. Firstly, the project cannot be easily identified with the ideal of self-government because the power which has become closer to the citizens still remains distinct from the citizens. 'Bringing the power closer to the people' and 'power to the people', whatever they mean, are not synonymous expressions, and the 'general will', whatever it is, is not willingness to become closer to the citizens in order to be more accessible.

Secondly, and most importantly, the project of bringing Europe closer to the citizens cannot be easily identified with the ideal of self-government because here the issue at stake is to increase the legitimacy (in a sociological sense) of the European Union to strengthen an existing authority, and democratisation is conceived solely as a means to that end. Democracy is not conceived of as a precondition for legitimacy (in a normative sense) of government, as an intrinsic value, but as a precondition for efficiency of the political process, as an instrumental value. Public authority is not regarded as a means of democratic self-government, but self-government is considered as a technical device for enhancing the effectiveness of the decisions adopted at the European level.

The thesis I intend to explain and argue for is that the creation and the failure of the constitutional debate has much to do with the gradual development of what I will call 'publicity' as policy object and governance function (§ 4.): the attempt to catalyse the public sphere by means of a communication policy aimed at fostering political debate, at creating participation and trust, and at building consensus and legitimacy. Publicity originally emerged from the domain of public relations in corporate governance and bears some

similarity with commercial marketing and political propaganda. By analysing the constitutional process, I will provide a short genealogy of publicity within European governance: from publicity concerning specific institutions and epistemic communities, namely the courts and the jurists, to its gradual extension to the general public (§§ 2. e 3.).

The rejection of the Constitutional Treaty shall be regarded, amongst other things, as a rejection of publicity, and it can be taken as a starting point for addressing the normative question, 'What is to be done?' (§ 5.): What can we learn from the failure of the constitutional debate? Should Europe remain a matter of technicians and lobbyists – a common market organization, an international forum for intergovernmental bargaining, an unpolitical 'regulative State' – or should it strive toward becoming a democratic polity? In the latter case, how should Europe improve the quantity and quality of political communication within its public sphere?

2. The secret origins

> Every institution has a right to privacy, every organ has an inner life that is the expression of the independence attached to it … There are not only individual secrets, there are also collective ones
> Paul Reuter, *Le droit au secret et les institutions internationales*

During the first period of European integration history, in the 1950s and the 1960s, the issue of the relationship between Community institutions and public opinion was rarely addressed and, when it was addressed, it was usually answered in the sense of the consciously planned and practised exclusion of Community politics from the general political debate. This was a consequence of the political impasse of the European federalist movement, of its cultural and political defeat in post-Second World War period, and of the resulting prevalence of an essentially bureaucratic, technocratic, 'neofunctionalist' understanding of European dynamics.

In crafting the Community institutions, Jean Monnet and his collaborator, the jurist Paul Reuter, were inspired by the model of the administrative authorities in the United States (Gerbet 1992, R. Mogan 1992): 'to entrust independent personalities with the responsibility of exercising a semi-judicial, administrative or even economic function'

(Reuter 1979: 65, Reuter 1955). In 1957 the French international law scholar René-Jean Dupuy recognised in the High Authority (the forerunner of the Commission) 'the first historical example of the international advent of technocrats' (Dupuy 1957: 564). One year later, Ernst Haas explained the 'emphasis on elites in the study of integration' with the 'bureaucratized nature of European organizations of long standing, in which basic decisions are made by the leadership, sometimes over the opposition and usually over the indifference of the general membership' (Haas E. 1968: 17).

During this first phase, the public debate on European issues never fully ceased, but the politics of European integration remained to a great extent an *affaire de haute administration*, decided by narrow political, technical and economic elites, largely dependent on the activity of the experts. 'The idea of European unity was pushed on the dead track of study groups and cultural debates' (Mammarella-Cacace 2008: 23). The politics of European integration was not inspired by the highly demanding and somehow intangible 'European ideal' but – in a more modest and pragmatic way – it resulted from the interaction of more or less accountable authorities: the Community institutions, the national governments, the courts. The opinion of the general public was nearly absent from the dynamic. Indeed, if we give credit to the influential historian Alan S. Milward, the diplomats deliberately kept European integration away from the influence of popular will, 'for popular opinion if allowed to intrude too early might well have stopped the whole construction' (Milward 2000: 17). Definitely, at the time Europe did not aim to bring itself 'closer to the citizens'.

Besides, it is commonly known that the success of the European Court of Justice (ECJ) in its 'constitutionalising' endeavour (Slaughter et al. 1998, Weiler 1999, Stone Sweet 2004) – i.e., the success of the autonomous, proactive constitutional policy that the ECJ expressed during the 1960s and the 1970s – was the result, at least in part, of the 'benign neglect of the powers that be' (Stein 1981: 1). Paradoxically, the ECJ could draw advantage from the 'legislative gridlock' following the empty chair crisis, from the self-interested unconcern of the Member States' governments, from the 'silent' cooperation of the national judiciaries (Martinico 2009). Ultimately, the ECJ could draw advantage from the absence of the citizen – from lack of public interest in Community affairs.

In order to explain constitutionalisation in a time of political crisis of the European project, political theorists often stress the role of the national courts, their interest in self-

empowerment – as if that interest does not deserve to be investigated and explained as such – and the role of private litigants. Constitutionalisation appears thus to be the result of a 'spill-over' dynamic between the courts, the academic jurists and the practitioners, the lawyers and their clients, i.e., the litigants – mainly private companies and professionals. Public opinion, let alone social movements, hardly played any role. According to Milward, 'to judge from contemporary newspapers the most serious question in the middle of that decade [the 1960s] for the future of a united Europe was the price of wheat' (Milward 2000: 224). According to Carl Schmitt, the EC had obtained an 'effective political neutralization' of certain conflicts, regulative problems and decision-making procedures: 'the attempt to realise the political union of Europe by means of neutralizations (so called integration)' (Schmitt 1972: 177-178 note 4 – added footnote to the 1963 edition of *Begriff des Politischen*).

After all, neofunctionalism proved to be, if not a self-fulfilling prophecy, at least a good theory of European integration: in order to create a common constitutional structure, highly controversial political issues should be kept away (Tranholm-Mikkelsen 1991, Rosamond 2000: 100, Hooghe-Marks 2006).

3. Publicity in practice. A short history

The social as a script, whose bewildered audience we are
Jean Baudrillard, *Simulacra and Simulation*

The situation began to change in the 1970s and the Maastricht Treaty marked the turning point. Actually what changed was not the role of the citizen in the European dynamic: the Maastricht Treaty and the 'semi-permanent treaty revision process' which started after Maastricht were not the product, not even the indirect product, of some strong political movement favouring the deepening of European integration. Political initiative simply shifted from the ECJ – or, more precisely, from the circuit of ECJ-national courts-private litigants – to the governments of the Member States. However, this shift occurred in the context of the erosion of the so-called 'permissive consensus' – the attitude of passive and detached acceptance that until now had supported the process of European

integration within the national public opinions of the Member States. So, in short, what changed was not the role of the citizen in the European political process as much as the political costs of the enduring exclusion of public opinion from the European dynamic.

After Maastricht, such costs became unbearable: suffice to recall the *Maastricht-Urteil* of the German Constitutional Court, the initial Danish 'no' vote to Maastricht, the very close referendum in France, and the problems that ratification caused to the government in the UK. As Gráinne de Búrca observes, 'it is largely since the Maastricht process that the debate on the European Union has been in terms of a 'crisis' of legitimacy' (De Búrca 1996: 349, De Búrca 2004: 561). The perception of a crisis of legitimacy meant that the time had come for the European Union to develop an information and communication policy (Shore 2000, Haltern 2003, Schlesinger 2007). The European institutions and the national governments had now to seriously consider the largely new issue of 'bringing Europe closer to the citizen'.

Actually the idea of bringing Europe closer to the citizen, that is the attempt to reduce the legitimacy deficit by creating discussion, participation and trust, was not at all new in the experience of European integration. One may argue that the main function of the European Parliament has been to perform this kind of function by 'rousing the European public opinion' (Dehousse 1965: 67), raising consciousness and sponsoring the European ideal and European policies[II]. Moreover, the practice of 'bringing the jurists closer to the ECJ' has been a common concern of the Commission and the ECJ since the 1960s and 1970s. Already at the time of the ECJ-led constitutionalisation process we can individuate the first steps of publicity as transnational governance function. The integration process could only advance to the extent that the Community was able to create public involvement and participation in its activities. At the beginning the scope of this 'public' was actually quite narrow, almost private: the 'epistemic communities' (Haas P. 1992), and especially the jurists. Pro-European jurists started to speak openly of 'European propaganda' as a 'vital social and individual need for the formation of the civic consciousness of the citizens' (Valenti 1973: 116). The legal culture of the Member States became the target of a comprehensive set of initiatives aimed at creating information and discussion on EC law (Vauchez 2010, Id. 2008, M. Rasmussen 2010, Cohen 2007, Itzcovich 2006: 305-306, Schemers 1974: 448, Schermers-Waelbroeck 2001: 228-229, H. Rasmussen 1998: 118). As the challenge consisted – according to one of the most

authoritative and influential judges at the ECJ of the time – of creating a 'transnational judicial branch', therefore the ECJ was charged with the task of establishing a true 'judicial diplomacy' with the national courts (Pescatore 1975: 113). The goal was to create a European 'Community of law', and so a European community of judges and lawyers had to be constructed (Pescatore 1975: 113). In this way, European law discovered communication as a problem and as a resource.

At the time, the European communication policy was mainly focused on the national judiciaries. However, already in this early phase the project of bringing Europe closer to someone began to address the general public. As the first step toward getting closer to the citizen is to see what the citizen thinks about Europe, the creation of Eurobarometer in 1973 should be mentioned, although it still represents a 'passive' stage of publicity. Publicity became active and citizenship-building became a conscious policy objective only after the Copenhagen Summit in 1973. Here the Heads of State and Government issued a Declaration on the European Identity according to which the 'defining the European Identity' involved 'taking into consideration the dynamic nature of European unification' and 'reviewing the common heritage, interests and special obligations of the Nine'. The Declaration provided some guidelines for developing the 'special rights' of the European citizen, and one year later, at the Paris Summit of December 1974, the European leaders established a working group lead by Leo Tindemans to study the issue of the special rights and the issue of the European passport. The 1975 Commission report *Toward European Citizenship* strongly supported the introduction of a European passport and argued, among other things, that 'such a passport would have a psychological effect, one which would emphasize the feeling of nationals of the nine Member States of belonging to the Community' (Commission 1975). The Tindemans *Report on European Union*, released in 1975, included a chapter on 'People's Europe' and, as far as I know, it coined the motto 'Europe must be close to its citizens' (Tindemans 1975). It was followed in 1983 by the European Council's *Solemn Declaration on European Union* (the Stuttgart Declaration, 19 June 1983), which acknowledged the common objective of promoting 'closer cooperation on cultural matters, in order to affirm the awareness of a common cultural heritage as an element in the European identity' (European Council 1983).

Following the disappointingly low turnout in the 1984 elections for the European Parliament, the European Council at Fontainebleau considered 'it essential that the Community should respond to the expectations of the people of Europe by adopting measures to strengthen and promote its identity and its image both for its citizens and for the rest of the world' (European Council 1984). Therefore, the European Council set up an ad hoc committee for a 'People's Europe' – the Adonnino Committee – charged with the elaboration of proposals on matters such as the European passport, the adoption of a flag and an anthem, the creation of European football teams etc. The report of the Committee urged action in the areas of culture and communication: 'It is also through action in the areas of culture and communication, which are essential to European identity and the Community's image in the minds of its people, that support for the advancement of Europe can and must be sought'. The report envisaged a wide range of initiatives to address the 'minds of European people', the most surprising of which was the creation of a 'Euro-lottery': 'to make Europe come alive for Europeans, an event with popular appeal could help promote the European idea' (Adonnino 1985: 21).

One of the aspirations of the Treaty of Maastricht – surely not the most important one – was to make European institutions closer to the citizen: the Member States were 'resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen' (Preamble of the TEU; see also Article A, now 1 TEU). At Maastricht these declarations of intent translated only into some constitutional *maquillage*, such as changing the name of the European Economic Community to 'European Community' and introducing a section on citizenship in the EC Treaty.

In this regard it is worth recalling that European citizenship has always been totally dependent upon national citizenship and almost void of normative content. It is little more than the right to petition the Ombudsman and to vote in elections to the European Parliament: 'a list of civil rights of marginal value. If they have a greater value it is undoubtedly symbolic.' (Ward 2003: 268, Closa 1992); 'some fancy words on a piece of paper', which do not 'confer on the holder any rights which he or she did not already have' (Guild 1996: 30). However, the introduction of European citizenship succeeded in generating political rhetoric and academic debate. The studies on European citizenship generally reinforced the 'normative turn' of contemporary political philosophy and political

sciences (Bellamy-Castiglione 2003). Participation in the public sphere, belongingness in the political community, which once were the premises of a citizen's rights, became the objective of the codification of the citizen's rights: bringing the citizens closer to the EU by making them aware of the rights they already have.

Participation and belongingness were interpreted as a possible outcome of several European promotional campaigns[III], amongst which the drafting of the Nice Charter of Fundamental Rights deserves particular attention. As Rubio Llorente wrote (2003: 405), the Charter had a 'pedagogical and, in a certain sense, propagandistic purpose', as its goal was 'to help us to appreciate the rights that the legal order of the European Union has guaranteed for years'. According to Gráinne de Búrca (2004: 562), it was a 'showcase "Charter of Rights"'. Instead of creating new rights, the Charter reaffirmed pre-existing rights as they resulted from the constitutional traditions of the Member States, international instruments such as the ECHR, and the ECJ case law. Its innovative effect was almost insignificant. Moreover, the provisions set out in the last chapter of the Charter were designed to make sure that the Charter could have no effect on the legal orders of the Member States and on the vertical distribution of competences. Some argued that, due to drafting deficiencies, the Charter might even have threatened the supremacy of EC law over national law (Liisberg 2001). In comparison with the ECJ's settled case law, the Charter unintentionally narrowed the scope of fundamental rights protection in EC law[IV]. Nonetheless, the Member States gathered in Nice were not 'courageous' enough to incorporate the Charter into the EU primary law: the Charter exhibited too much of a constitutional tone, it seemed to threaten national sovereignty and therefore for a long time it remained a non-binding political declaration, a source of soft law. Especially in the United Kingdom, the publicity about the constitutional nature of the Charter, by raising identity-based concerns, might have had destabilising effects on the government's European policy. The Constitutional Treaty incorporated the Charter, and the Lisbon Treaty reached the same practical effect by means of a short cross-reference (*renvoi*). The United Kingdom and Poland opted out. In 2007 the Member States, in an effort to save the constitutional reform process from the pernicious effects of this useless Charter, introduced a dangerous distinction between 'rights' and 'principles', the latter being not 'judicially cognisable' according to article 52(5) of the Charter.

To sum up: the Charter unintentionally created both bad law and bad politics. European constitutional law has tended to become extremely 'soft', almost impalpable, in order to avoid being politically unacceptable at the national level. But soft law, being non-binding, requires publicity in order to be effective, and thus it might well be intrusive, irritating and distortive for public opinion and the political process.

However, it is apparent that the main achievement, and eventually the most visible failure of European constitutional publicity, is represented by the Convention, the Constitutional Treaty and the wide range of institutional initiatives and official documents aimed at sustaining the public debate in Europe. Among the latter, the most original and imaginative Commission policies; *Plan D for Democracy, Dialogue and Debate* and the *White Paper on a European Communication Policy* should be mentioned[v]. In order to strengthen and stimulate dialogue, public debate and citizen participation during the period of reflection ('a wide-ranging discussion on the European Union – what it is for, where it is going and what it should be doing'), the *Plan D* proposed several EU initiatives and actions – assistance for Member States in the organisation of national debates, visits by Commissioners to Member States, the European Round Table for Democracy, and European Goodwill Ambassadors. The *White Paper on Communication Policy* proposed 'a forward-looking agenda for better communication to enhance the public debate in Europe'. The proposals ranged from adopting a 'European Charter on Communication', to 'empowering the citizens' by 'improving civic education', 'working with the media and new technologies' in order to give 'Europe a human face', 'understanding European public opinion' by setting up a special series of Eurobarometer polls, a network of experts in public opinion research, an observatory for European public opinion, and, most importantly, 'doing the job together', i.e., involving the Member States, other EU institution, the political parties, the NGOs, etc., in the creation of 'a robust European debate'.

All this was perfectly in line with the main goal of the Convention, which was – as I have already said – to broaden participation in the 'constitutional conversation' and to promote public discussion on the institutional reform process in order to achieve greater legitimacy for its outcomes: 'what the constitution demands from us is that we genuinely engage in debate precisely as if there were a European constitution' (Palombella 2005: 357). True, some of the issues under discussion at the Convention were highly technical and politically sensitive, such as the voting procedures and the composition of the institutions, the

distribution of competences, the simplification of the treaties, the overcoming of the division into three pillars, the creation of a normative hierarchy, and the inclusion of the Charter. A democratic public debate on these issues was highly improbable as well as pointless and not desirable in the perspective of achieving greater legitimacy and effectiveness for European law. Other issues under discussion were of a purely symbolic nature: The Convention urged the European people to debate the establishment of a European Constitution which was already largely in force and functioning and on the content (Christian roots?) of a Preamble which was as legally irrelevant as it was rhetorically overloaded[VI]. A wide-ranging and open discussion on the adoption of the idols of modern politics, the relics of the age of the nation states, such as flag, anthem and motto, should have begun[VII]. The point was that there should have been debate and participation in order to have legitimacy: the general public should not have remained the 'ghost at the IGC table' (De Witte 2002: 48), as it has always been; it should have been brought at the centre of the stage, under the spotlight of publicity.

Unfortunately, the public was revealed to be ghostly – evanescent, uncanny, and indistinct, almost unintelligible, and nonetheless hostile to the constitutional discourse and publicity. The debate on the future of Europe proved to be the last concretisation of the 'Euro-lottery' stream of European polity-building, and the bet was lost. It comes as no surprise that the Lisbon Treaty is almost the institutional photocopy of the Constitutional Treaty, deprived of all constitutional 'pathos and patina' (Haltern 2003). 'In a purely legal reading, the difference between the two Treaties is lost or made a matter of cosmetics' (Claes-Eijsbouts 2008: 1). Nor is it surprising that the evanescent public is urged to vote and vote again, until it gets it right, by learning and accepting, as happened in Denmark and Ireland[VIII], or until the public simply disappears, as has almost happened for the elections of the European Parliament. For the first time in their history, the Dutch, traditionally one of the most pro-European peoples of the EU, were called to vote on a consultative referendum and they all got it wrong by voting in mass against the Constitutional Treaty. Their opinion will no longer be required; there will not be another Dutch referendum on the Lisbon Treaty.

True, the results of the referendums cannot be attributed to one single cause. This consideration, however, cannot but reinforce the finding about the essentially 'publicitarian' nature of the whole constitutional debate. As no clear and univocal question

was formulated in the referenda, no informed and reasonable choice could be made. Being almost politically unintelligible, the results of the referendums were also of little political relevance – they did not provide the decision-makers with a clear course of action: what precisely should have been changed in the Treaty, what could have been kept? The citizens' response to the referenda could not but be 'ignorant, irrelevant and ideological' (Moravcsik 2006: 227)[IX], as they were confronted with confusing and ill-formulated questions. Baudrillard was right in believing that the reforms foreseen in the Treaty eventually would have been adopted, no matter the result of the referendum: 'The vote is fixed. If the "no" side wins the day this time, they will make us vote again (as in Denmark and Ireland) until the "yes" wins. We may as well vote yes right now.' (Baudrillard 2005). The major political parties, the quality press and the opinion makers agreed on the 'yes' – 'progressive Europeanism became the general code of conduct for political actors to appear in the media' (Trenz 2007: 108-109[X]). The referenda appeared as mere means of legitimisation that the politicians were using to promote their own views. They had already decided, and thus the 'no' at the referendum 'was not a no to Europe, but a no to the unquestionable yes' (Baudrillard 2005). To put it differently, the 'no' vote in the referenda was, amongst other things, a 'no' to the reduction of politics to publicity; it was a 'no' to the attempt to eliminate that unpredictable and indeterminate element which distinguishes political processes from administrative procedures and liturgical ceremonies.

The fact remains that, if the point of the constitutional debate was to bring Europe closer to the citizens in order to make its authority more legitimate and more effective, then – regardless of any opinion one may have as to the merit of the adopted reforms – it is difficult to imagine a more spectacular failure – a preposterous, irreparable failure, which urges anybody interested in the European project to reflect in a detached but radical way upon how things have gone and how they could have gone differently. Before doing this, let us try to better understand what are we talking about when we talk about publicity.

4. Publicity in theory. The concept

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According to Chris Shore, at the turn of the 1990s the 'emphasis on consciousness-raising as a strategy for bringing Europe "closer to its citizens" and creating "Europeans" signalled a new departure in EU approaches to the neglected domain of culture' (Shore 2000: 45). However, already during the constitutionalisation phase, in the ECJ and the Legal Services of the Commission a new way of 'interact[ing] with the public, secur[ing] professional expertise and explor[ing] the interest definitions of private actors' was taking shape: a new approach that 'no longer [had] much in common with the way that traditional bureaucracies [had] defined their relationship with the public' (Joerges 2001).

Thus, in the 1960s and 1970s communication became the object of a distinctive policy aimed at catalysing the public sphere, fostering political debate, creating dialogue and trust: what I propose to call 'publicity', both in the sense of creation of *Öffentlichkeit* – and in particular creation of a public sphere as open, transparent and enlivened by political debate as possible – and in the sense of advertisement, consensus-building, public opinion management and agenda-setting strategies. The concept of publicity tries to express the threshold of indistinction and mutual confusion of these two processes that characterises the European constitutional process and communication policy.

In the constitutional debate constitutional publicity boomed and eventually failed. Indeed, one may wonder if there is really something new going on. After all, publicity may not be a new governance function, it may well be just the latest example of other well known political processes and power relationships. We know that 'creating allegiance has been an unremitting effort by the nation-state since its origins' (Milward 2000: 25, Anderson 1991, Hobsbawm 1990, Sassen 2006). The sense of belonging to a community produces an attitude of prompt compliance which lies at the basis of legitimacy. In the case of nation states, such a feeling of belongingness was by no means a pre-political bond emerging spontaneously from social cooperation; on the contrary, it has been artificially created by the state, which eradicated local cultures, transformed traditional ways of life, created a public education system, set up national myths, official national history, armies and banners of allegiance such as flags, anthems and nationalistic rhetoric. As we have

seen, the European constitutional process and the other publicity initiatives might even bear some vague similarity to this approach to nation-building.

However, there is something new in the contemporary European publicity, something that makes it different from the nation-building experiences in Europe. Publicity is a distinctive way of managing political communication that promotes public discussion in order to strengthen the legitimacy of the decisions to be taken. It aims at catalysing the public sphere, encouraging debate and discussion, in the effort to build consensus on the outcomes of the political process. The goal might be conventional – to enhance the authority of a governance agency, to create allegiance to a political community in the making – but the means to that end are quite new. The key-word is discussion, dialogue, and in this respect publicity is clearly distinct from propaganda. The new European identity-building process is not primarily based on coercion, but on publicity.

True, the project of bringing Europe closer to the citizens bears an uncanny similarity to the old-fashioned political propaganda. Both are the object of public policies and operate with communication and not with coercion. But propaganda aims to destroy public opinion, while publicity, even when it fails, aims to create it. Publicity may be intrusive, but it is not a violent and destructive intervention in the general political communication. Publicity is a communicative proposal requiring attention, not a unified system of beliefs requiring acceptance. It aims to create public concern and interest, not obedience.

Moreover, publicity is one possible response to the legitimacy deficit which affects the European Union – according to the intentions, 'publicitarian' consensus should be the premise of voluntary acceptance and compliance – whereas propaganda is a manifestation of political sovereignty and cultural hegemony. Propaganda conveys a message that is already embodied in social movements, political parties, mass organisations, and everyday conversations; the message is invariably already present in the community addressed by propaganda, it is deeply rooted in the social spheres that propaganda colonises. Although it might be seen as an expression of the regime's weakness, propaganda as such consists in the exercise of power and strength. On the contrary, publicity is an expression of weakness and lack of authority. There is no political sovereignty behind publicity, there is just the 'autonomy' of a set of agencies, institutions and processes. There is no hegemony behind the message conveyed by publicity, but simply lack of interest, unconcern, unawareness.

Publicity is distinct from propaganda but both have in common the fact of being vertical, top-down forms of political communication: both contribute to the 'inner colonisation of the *Lebenswelt*', as Habermas would say; they endanger the autonomy of the civil society, and corrupt the 'general intellect'. Publicity may well create public opinion and consensus, when it succeeds, but it impoverishes the public sphere and hinders political innovation. The ultimate end of publicity might be the catatonic stupor of the consumer-spectator-citizen.

The project of bringing Europe closer to the citizens bears an uncanny similarity not only to the idea of propaganda – bringing the citizen closer to the power – but also to the idea of bringing a (political) good closer to its customers (citizens), which is at the core of marketing: 'the selling of Europe' (Weiler 1996[XI]). Indeed, publicity is much more similar to advertisement than to political propaganda, and historically the practice of publicity arose from the ground of corporate governance and public relations (Fasce 2000, Marchand 1998, Ewen 1996). Politics makes itself publicity – both in the sense that it makes advertising for itself and in the sense that it becomes publicity – and, as consequence, publicity makes politics, it becomes a possible form of political action, conveys political contents and invites to participation. As Baudrillard (1981: 88) wrote,

'It is not by chance that advertising, after having, for a long time, carried an implicit ultimatum of an economic kind, fundamentally saying and repeating incessantly, "I buy, I consume, I take pleasure," today repeats in other forms, "I vote, I participate, I am present, I am concerned" – mirror of a paradoxical mockery, mirror of the indifference of all public signification'.

Finally, as well as propaganda and marketing, the affinities between European publicity and the theory of deliberative democracy are also important and deserve to be emphasised. As is well known, the theory of deliberative democracy is inspired by a tradition of Enlightment and Kantian moral philosophy according to which publicity is a condition of the legitimacy of public authority. Kant advocated freedom in the public use of reason, as 'the prohibition of publicity impedes the progress of a people toward improvement', and enthusiastically saluted the birth of public opinion seen as the 'disinterested participation' in an event – the French revolution – which was addressed to

the universal mankind (Kant 1798: 233 ff., Kant 1784: 54 ff.). He assumed as 'transcendental formula of public right' the principle according to which 'All actions affecting the right of other human beings are wrong if their maxim is not compatible with their being made public' (Kant 1795: 126). Here publicity meant the possibility of criticism and thus the possibility of progress and continual improvement of the human race.

This classical concept of publicity is not without relationship with European publicity understood as a function of transnational governance. However, the relationship is that of a historical nemesis or ironic reversal. The reason is that, since the 1980s and the 1990s, the classical concept of publicity has been resumed and revised by a group of theoretical proposals destined to have great influence on the European studies and, more generally, on the political semantics and political practices in Europe and elsewhere: the theory of deliberative democracy.

The idea spread that collectively binding decisions are legitimate insofar as they are the outcome of public discussion and rational argumentation, and of the consensus as wide as possible that follows that discussion (Habermas 1992, Bohman-Rehg 1997, Bohman 1998). Democracy is no longer the government of the people, by the people, for the people. It is not *volonté générale* expressed by means of general laws, nor is it merely a procedure for aggregating individual preferences into collective decisions or for selecting political *élites*. Democracy is even less 'constituent power' – collective counterpower that is inherent to society and resists any attempt to enclose it in a definitive legal formalisation. Instead democracy is the set of essentially procedural requirements that allow for the reproduction of an understanding-oriented communicative action in the public sphere and thus for the rational formation of political will and public opinion. There is democracy when the political system, instead of autistically closing upon itself through an autoreferential communication, is affected by the sense contents that come out of public opinion by means of formal channels (e.g. general elections) and informal channels (e.g. socialisation processes, widespread participation etc.). For Habermas the problem is thus how to ensure the survival of the communicative preconditions – such as direct universal suffrage, personal secret ballot, fundamental rights protection, effective freedom of information etc. – that allow for the feeding of debates on the common good; debates,

both within the state and in civil society, which, according to the theory, should be as open, inclusive, transparent and informed as possible.

In order to achieve a level of public communication of such kind, the 'legal medium' is crucial and therefore Habermas believes, with regard to contemporary European politics, that it is indispensable to move towards constitutionalization (Habermas 2001). In order for a European constitution to be viable it is necessary to promote the creation of a European civil society, a European public sphere and a common European political culture. A European constitution-building process could help to establish a kind of civic solidarity that is no longer based on ethnic belongingness but on dialogue or, better, on the common goal of continuing to maintain a dialogue by taking part to the same political community.

It is clear that the European constitutional debate and the other publicity initiatives are an attempt to implement institutionally the theory of deliberative democracy (Closa 2005). The constitutional process was an effort to reform the Treaty revision procedure according to that theory: to bring the Treaty revision 'out in the open' in the transparency of a debating European public sphere and far away from the closed doors of the intergovernmental conferences and diplomatic negotiations; to create the opportunity for a common discussion on the future of Europe in order to invert the trend that each Treaty revision must be accompanied by national debates often oriented toward domestic issues and always non-communicating, isolated one from the other. The relationship with the theory of deliberative democracy is evident, as Habermas acknowledged[XII]. The goal was to bolster the legitimacy of collective decisions on the constitution of Europe by submitting them to a process of preventive debate, public discussion, through which a consensus as wide as possible should have been reached.

This is the reason why it is appropriate to speak of an ironic reversal, by means of the theory of deliberative democracy, of Kantian publicity into publicity as governance function. For Kant publicity was the principle that makes possible a convergence of politics and morality: the possibility of an improvement towards the better, the possibility of progress. In the European constitutional process, publicity does not aim at granting the subordination of politics to morality (justice) nor does it aim at granting, as the old-fashioned propaganda used to do, the subordination of morality to politics (obedience); instead, contemporary publicity should produce the harmonic and pluralistic

correspondence of morality and politics – 'good governance'. Thus it purports to create, if not the possibility of progress, at least a legitimate presumption of consent to the institutions and decisions of the common polity.

5. What is to be done?

The quest for 'universals of communication' ought to make us shudder
Gilles Deleuze, *Control and Becoming*

The premise of the constitutional debate was 'the idea that institutional reforms could significantly improve the democratic quality of the Union and, by thus strengthening its normative legitimacy, bolster popular support for EU institutions' (Hurrelmann 2007: 343). The goal was to decrease the legitimacy deficit by improving the democratic quality of the EU institutional architecture. However, the constitutional process revealed that the EU could not rely upon a silent majority – let alone a 'debating majority' – with regard to far-reaching treaty reforms, even if the EU might still enjoy a certain degree of 'permissive consensus' – passive and detached acceptance – for the 'normal operations' of ordinary politics[XIII].

I think that the challenge of democratising the EU today has less to do with the institutional reforms than with the destruction of that 'permissive consensus' surrounding the EU's normal activities. Permissive consensus originates from the relative unconcern by the public about European policies, its lack of interest and knowledge about the EU and its institutions, and from the relatively high degree of trust that the EU institutions enjoy in the public opinion of several Member States. According to the Eurobarometer, the trust placed in the EU is higher than that placed in national governments and parliaments. But if the goal is to democratise the EU, then the challenge is to end such disinterest and ignorance, and the trust-by-default relationship with the EU. The challenge of Europe is the destruction of the silent majority.

Note that the solution to the democratic deficit might well increase the European Union's legitimacy deficit[XIV]. Democracy produces legitimacy – voluntary acceptance – but it also produces illegitimacy – conflicts, resistance, non-compliance, disobedience.

Democracy presupposes the existence of conflict, and disagreement is essential to democracy no less then procedures. A democratic polity cannot enjoy full legitimacy, and a fully legitimate authority – an authority that encounters no opposition and is always obeyed – cannot be democratic in nature.

Therefore, the issue of democratic deficit should be sharply distinguished from the issue of legitimacy deficit. In a pluralist legal space, the legitimacy deficit might be structural and, most importantly, it might even prove to be a political opportunity if we believe that cross-cutting and flexible authorities and allegiances can help to shape an open and inclusive political community. The legitimacy deficit might hint at a community which is freely chosen, rather than based on ethnic belongingness, tradition, authority and coercion.

If the democratic deficit were addressed and resolved, then its solution might not necessarily produce legitimacy and in any case it would not be achieved by means of institutional reforms. The quality of democratic life does not depend solely on rules, rights and procedures. Fundamental rights, the rule of law, fair election and voting procedures, indispensable as they are, may not be sufficient to ensure democratic self-government. Democracy is not only a set of rules, it is also an event which sometimes happens, sometimes not. In order for it to happen, there must be people capable of engaging in meaningful political discussion and effective political action. Democracy requires procedures and constitutional standards as much as it requires dissent and conflict. Thus, if we want the EU to become a democratic polity, permissive consensus should not be supported by publicity. It should be abolished and replaced by wide-ranging political discussion and focused disagreements. Even non-compliance with European law and effective campaigns against EU policies might in some cases be welcomed.

The European project has much more to gain than to lose from becoming the subject of political and social conflicts and harsh political debate, on one condition. Public debate should not address many of the so-called EU's constitutional issues currently under discussion. The debate should address the substantive issues of European politics, issues usually covered by permissive consensus; it should affect the 'normal operations' of the EU, its everyday decision-making processes[XV]. If the goal is to promote meaningful public discussion on 'the future of Europe', an inclusive political debate that produces public involvement and democratic decisions, then the object of such debate should be the policies and the decisions of the EU as well as of the Member States. Not only the future,

but also the past and present of Europe should be discussed, if the goal is to create a European public sphere and to democratise European governance.

There is no point, however, in promoting public discussion on the procedures and competences of the European institutions and of the governance agencies in general. Policy decisions directly affect people's lives – both of European citizens and of non-Europeans – while procedures affect us only indirectly. Procedures change too quickly, and perhaps it is better so. Procedures are not the kind of 'future' we can really choose. We lack too much information for making conscious decisions concerning procedural matters, and we also lack time and interest in gathering such information, because procedures affect our interests only indirectly. Paradoxical as it may sound, EU constitutional law may not be as politically relevant as the ordinary policies of the EU, the 'secondary norms' (the rules of recognition, change and adjudication) may not be as relevant as the 'primary norms' (the rights and duties of the citizens), the 'higher law' may not be as relevant as the lower, and the 'law that regulates power' may not be as relevant as the decisions actually taken by the power.

Unfortunately, the constitutional debate has not only been strongly hetero-directed and based on publicity, but it has also been almost void of substantive political contents and policy decisions. An astonishing example is provided by the provisions in the military instruments of the fight against terrorism. These provisions received little academic attention and no media coverage. Nonetheless, here we find some of the most radical and potentially controversial political decisions of the Constitutional Treaty, all preserved by the Lisbon Treaty.

Nobody knows, even in France and the Netherlands, that the Constitutional Treaty literally *constitutionalised the Bush doctrine* of preventive war. Under the 'solidarity clause', the EU can 'mobilise all the instruments at its disposal, including the military resources … to … prevent the terrorist threat in the territory of the Member States' (Article I-43 CT; new Article 222 TFEU after Lisbon). The Constitutional Treaty made it clear that the EU 'may use civilian and military means' in the course of 'joint disarmament operations … conflict prevention' and that the EU 'contribute[s] to the fight against terrorism, including by supporting third countries in combating terrorism in their territories' (Article III-309 CT; new Article 43 TEU). If the Constitutional Treaty had been approved by the national referenda, the Europeans would have had a Constitution stating, in its first part, that the

'Member States shall undertake progressively to improve their military capabilities' (Article I-41 CT; new Article 42 TEU)[XVI]. The Constitutional Treaty and the Lisbon Treaty employ the words 'terrorist' and 'terrorism' eleven times, in the attempt to be 'terroristically' closer to citizen, one is tempted to say[XVII].

However, the constitutional debate officially administered has not addressed these potentially controversial provisions. A sort of selective and collective amnesia occurred in the quality newspapers, the political parties, the NGOs and academia, and the general public remained, and still is, totally unaware of the reforms going on. The democratic nature of the constitutional debate could not be more effectively refuted.

I 'This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken *as closely as possible to the citizen*' (Article 1 TEU; the 1997 Amsterdam Treaty added the clause 'as openly as possible').

II According to the Italian ambassador Gerardo Zampaglione, the task of the European Parliament was to be 'an effective animator' of the public opinion, and to 'arouse public interest towards specific issues' (Zampaglione 1965: 311). For Piet Dankert, president of the European Parliament in 1982–1984, the Parliament, lacking real political powers, was just a 'non-political pressure group' (Dankert 1984: 8)..

III Shore (2000: 54) recalls the 1993 De Clercq Report on information and communication policy. Written by a 'committee of wise men' composed mainly of communications professionals and public relations experts, the report coined the slogan 'Together for Europe to the Benefit of Us All', suggested that Europe 'must be presented with a human face: sympathetic, warm and caring', and that the European institutions 'must be brought closer to the people, implicitly evoking the maternal, nurturing care of "Europa" for all her children'. From the standpoint of public relations, the De Clercq Report – received with indignation by journalists – was a spectacular own goal.

IV According to Article 51, 'The provisions of this Charter are addressed to the institutions and bodies of the Union … and to the Member States only when they are implementing Union law'; therefore, at first sight, the provisions of the Charter do not apply to the Member States acting in derogation law, as held by the ECJ, Case C-368/95, *Vereinigte Familiapress Zeitungsverlag- und vertriebs GmbH v.Heinrich Bauer Verlag*, 1997 ECR I-3689. See Dougan 2008: 663.

V Commission 2005b: 'restoring public confidence in the European Union', 'publiciz[ing] the added value that the European Union brings', 'assisting national debates', 'stimulating a wide-ranging public debate', 'promoting citizens' participation in the democratic process'. Commission 2006: 'Communication should become an EU policy in its own right, at the service of the citizens'. See also three communications adopted by the Commission between 2001 and 2004 dealing with information and communication (Commission 2001, 2002, 2004) and *Action Plan on Communicating Europe* (Commission 2005a), formulating specific proposals.

VI The Preamble of the Constitutional Treaty, which contains statements such as 'to forge a common destiny', 'United in diversity', 'the great venture which makes of it [Europe] a special area of human hope', etc., is the more publicity-inspired part of a text, the Treaty, that for the rest is mostly unreadable. In the Preamble the members of the Conventions even manage to declare themselves 'grateful to the members of the European Convention for having prepared the draft of this Constitution on behalf of the citizens and States of Europe' – that is, they congratulate themselves, on our behalf, for having written what they have written in the Treaty.

VII As J.H.H. Weiler has rightly observed with regard to the creation of European citizenship, these symbols of belongingness represent 'a failure of the imagination. An inability to think of citizenship in any terms other than those resulting from the culture of the State and the Nation' (Weiler 1996).

[VIII] Dutch referenda on the Treaty of Maastricht in 1992 and 1993, Irish referenda on the Treaty of Nice in 2001 and 2002, and the next Irish referendum on the Lisbon Treaty in 2009, after the first rejection in 2008.
[IX] '*Ignorant* because individuals have no incentive to generate sufficient information … *Irrelevant* because publics are likely to react to efforts to stimulate debate on non-salient issues by "importing"' more salient national and local (or global) issues with little to do with the matter at hand … *Ideological* because intense efforts to stimulate electoral participation tend to encourage symbolic rather than substantive politics' (Moravcsik 2006: 227).
[X] '[T]his misunderstanding of progressive Europeanism as speaking in the name of the public has ultimately added fuel to the present impasse of constitution-making … The challenge is rather to make sense of the new spaces of politicisation that are breaking with the consensus culture of the EU.' (Trenz 2007: 109).
[XI] 'Almost uniformly in every single Report and Resolution, official and unofficial, I have read on the IGC the same phraseology is employed when the issue of citizenship and rights is discussed: The problem is defined as alienation and disaffection towards the European construct by individuals. The medicine is European citizenship. What is the content of this medicine? Human Rights, more rights, better rights, all in the hope of bringing the Citizen "...closer to the Union"' (Weiler 1996).
[XII] See his criticism of the Lisbon Treaty and the comments on the constitutional process: 'A political constitution was supposed to create European citizens out of bearers of mauve-coloured passports and the mobilization of citizens during the constitution-founding process could already have contributed to this goal. The intention, at any rate, was to promote a higher level of participation from citizens across national frontiers in a more visible process of political will formation in Strasbourg and Brussels. Instead of this, the slimmed-down reform treaty now definitively sets the seal on the elitist character of a political process which is remote from the populations' (Habermas 2009: 80 f.).
[XIII] According to Hurrelmann (2007: 352 ff.), 'the 'permissive consensus' model still performs remarkably well', and 'contrary to the hopes that are often placed in this kind of 'forced' participation [the constitutional debate] as a mechanism to generate EU attachments, the result might actually be reduced support for the EU'. See also Sedelmeier-Young 2006: 'A widespread sense of crisis … in the wake of the negative referendums … Yet beyond these eye-catching events … the EU went on to have quite a successful year'.
[XIV] The same point is made, although with different arguments, by Weiler 1991: 84.
[XV] Walker 2004 distinguishes between first-order disagreements – conflicts of interests, ideologies, values and identities – and second-order disagreements – concerning 'the nature of the institutions of justice necessary and appropriate to address and decide upon the resolution of these first order differences'. I am here arguing that European public discourse should be mainly interested in first-order disagreements.
[XVI] See also Article I-41 CT (new Article 42 TEU): 'The Union may use them [common security and defence policy] on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter'; however, 'Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation'.
[XVII] The first reference to terrorism was made by the Treaty of Amsterdam (fight against terrorism as objective of the police and judicial cooperation in criminal matters), and the second reference was made in the Treaty of Nice (measures establishing minimum rules to be progressively adopted).

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Constitutional Failure or Constitutional Odyssey? What Can We Learn From Comparative Law?

by

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Abstract

According to many scholars, the rejection of the Constitutional Treaty and the disappointment caused by the contents of the Lisbon Treaty –- defined by Somek (2007) as a mere post-Constitutional Treaty – mark the failure of any possible constitutional ambition for the European Union (EU). This point can be challenged both from a theoretical point of view – by describing the EU as an example of "evolutionary constitutionalism" – and a pragmatic one (i.e., looking at the functioning of concrete constitutional experiences), I will focus my paper on this second point, insisting on comparative argument. The research question of this work is: Can we compare the "constitutional crisis" of the EU to the constitutional difficulties encountered by other multinational experiences? My idea is that the latest attempts at amending the EU treaties – the period of the "Conventions" – can be traced back to the genus of mega-constitutional politics and starting from this parallelism I argue that the so-called constitutional "failure" of the EU is actually a confirmation of the current constitutional nature of the EU rather than the proof of the impossibility of transplanting the constitutional discourse to the EU level.

Key-words:

European Union, European Constitution, Canada, Switzerland, Comparative Law, Constitutional Odyssey.

1. Goals of the paper

According to many scholars,[I] the rejection of the Constitutional Treaty and the disappointment caused by the contents of the Lisbon Treaty – defined by Somek (Somek, 2007) as a mere post-Constitutional Treaty – mark the failure of any possible constitutional ambition for the European Union (EU). This point can be challenged both from a theoretical point of view – by describing the EU as an example of "evolutionary constitutionalism"[II] – and a pragmatic one (i.e., looking at the functioning of concrete constitutional experiences), I will focus my paper on this second point, insisting on comparative argument.

The research question of this work is: Can we compare the "constitutional crisis" of the EU to the constitutional difficulties encountered by other multinational experiences? My idea is that the latest attempts at amending the EU treaties – the period of the "Conventions"[III] – can be traced back to the *genus* of mega-constitutional politics and starting from this parallelism I argue that the so-called constitutional "failure" of the EU is actually a confirmation of the current constitutional nature of the EU rather than the proof of the impossibility of transplanting the constitutional discourse to the EU level.

In order to do so, I have twisted the argument taken by the "discontents" of constitutionalism at the EU level in order to challenge their conclusion, by trying to show how the EU is suffering from a crisis common to that experienced by entities such as Canada and Switzerland, for instance, which are provided – no doubt about that – with a constitution and characterized by constitutionalism properly understood.

As for the focus of this article, three things should be clarified. First, a comparison does not mean that two things are identical and, of course, when comparing something with the EU one should keep in mind the international origins of the EU. In any case in this essay I am not going to compare the reform procedures of the Treaties and of the Swiss and Canadian Constitutions, I am not interested in "amendment" as such. It is not the subject of this work. The real issue at stake here is the comparability of the "constitutional processes", a broader formula which also includes those transformative practices that happen without a formal change of the constitutional text. Secondly,

Switzerland and Canada represent just two of the federal experiences that can be compared with the EU. Another case might be Belgium, but in the interests of economy in this paper I am going to take into account only these two cases. Thirdly, this paper does not aim to offer strategies or proposals for overcoming the current impasse, it just limits itself to showing how the EU is facing challenges that are common to many other constitutional experiences.

2. The idea of mega-constitutional politics

In his masterpiece, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*[IV], Peter Russell describes the long striving for the "patriation"[V] of the constitution, the constitutional failures of the Meech Lake and Charlottetown accords and the difficulty of recovering Québec after the constitutional rupture of 1980. By "constitutional odyssey" Russell refers to at least two different historical events that can be logically distinguished although they present themselves as historically connected: firstly, the struggle to "bring the constitution home" after the formal independence of Canada from the United Kingdom; secondly, the attempt to heal the constitutional rupture with Québec after the approval of the Constitution Act of 1982, decided without the consent of Québec and with the support of the Supreme Court of Canada.[VI]

Although these two events are closely connected one can understand the first as the logical cause of the second, which produced a series of (failed) attempts at modifying the constitution and recovering Québec. The agreements of Meech Lake (1987) and Charlottetown (1992), with a "no" expressed by the people in a national referendum, seems to have slammed the door on mega-constitutional politics.

In order to explain the Canadian picture better, Russell devised the distinction between low and mega constitutional politics:

Virtually all constitutional democracies are constantly engaged in low level, piecemeal constitutional change, whether through formal constitutional amendments, informal political practice, or judicial interpretation. This is ordinary constitutional politics. Canada's constitutional politics fits this pattern through most of its first century after confederation in 1867. When constitutional politics moves well beyond disputing the merits of specific constitutional proposals and addresses the very nature and principles of the political community on which the constitution is based, it is a horse of a very different color. At this "mega" level, "precisely

because of the fundamental nature of the issues in dispute-their tendency to touch citizens' sense of identity and self-worth-mega constitutional politics is exceptionally emotional and intense" (Russell 1992, 75). The constitutional question tends to dwarf all other issues in public discussions and media coverage when a country's constitutional politics is at the mega level (Russell, 1993).

Russell's idea of mega-constitutional politics presents two premises: first, the idea according to which behind the constitution there is a pre-existing social entity: "That is, it makes no sense to attempt to create a constitution – or a state – for a group of people who do not share some minimum commonalities"(Kay, 2005). The second premise refers to the rise of popular participation in the constitution-making process and to the idea of a constitution as an act of the people, the real sovereign entity.

As Russell pointed out, mega-constitutional politics is not exclusive to Canada. It can be found in other legal experiences as well[VII] and that is why some scholars have recovered this distinction and attempted to apply it to the supranational level to describe the process of semi-permanent revision of the EU Treaties which started after 1992.[VIII] I am going to start from these considerations in order to specify why the EU can be compared to other domestic (although multinational) constitutional experiences, namely Canada but also Switzerland.

As a matter of clarification, it is better to specify what I mean by "constitutional odyssey". By this formula I refer to cases of tension between the "constitutional form" (i.e., the texts or texts representing the constitutional document in a given legal order) and its constitutional substance (i.e., the set of principles governing the equilibrium between powers in the frame of government and in the form of State – i.e. the relationship between centre and periphery – and the protection of fundamental rights). Canada and Switzerland represent two different examples of constitutional odyssey: while in Canada the tension between the constitutional form and the constitutional substance has produced a long series of failed attempts at amending the constitutional charter, in other cases (the Swiss case is the best example of this) this tension has produced a continuous series of revisions of the formal constitution.

3. Can we compare?

Traditionally the word federalism has been seen as an "infamous f-word" (Puder, 2003) in European Studies and similar ostracism has been opposed to all those studies characterised by a comparative approach to the EU. Recently, this tendency seems to have been abandoned thanks to the works of Schütze (Schütze, 2009), Howse and Nikolaidis (Howse-Nikolaidis, 2001), Burgess (Burgess, 1991) and Laursen (Laursen, 2010). which can be understood as attempts to recover a comparative approach to the EU's integration process. A similar approach will be followed in this paper, aware of the useful results that can be achieved through the comparison, since – as the authors of the "Integration through Law" project[IX] emphasized – comparison serves as a laboratory which permits us to test and verify the theoretical constructions and the risks connected to the absolutisation of the EU.[X]

With specific regard to the subject of this paper, undoubtedly the works by Fossum (Fossum, 2004) about the comparability between Canada and the EU are fundamental in order to expand the concept of "constitutional odyssey" beyond the Canadian boundaries. Fossum explained the reasons that allow us to compare Canada and the EU: among others, a high level of complexity in both cases, different coexisting conceptions of "belonging" (which caused the emergence of different forms of nationalism – from that in Québec to that of the "aboriginal people"). Fossum seems to compare what Russell called "mega constitutional politics"(Russell, 1992) with what de Witte defined as the semi-permanent Treaty revision process (de Witte, 2002), by showing their common features; lack of legitimacy and constitution making processes driven from the top, and exclusion of some actors from the constitutional dynamics (aboriginal people in the Canadian case):

In a similar manner, albeit not portrayed as constitutional by the key actors involved, just since the mid 1980s, the EU has gone through three major treaty changes, the Single European Act of 1985, the Maastricht Treaty of 1991 and the Amsterdam Treaty of 1997 and is in the process of ratifying the fourth, the Nice Treaty 2000. At present the EU is preparing further reforms to make itself ready for enlargement. This lengthy and continuous effort at polity-building is now explicitly referred to as constitution making (Fossum, 2004).

These constitutional processes thus display similarities: the necessity to involve citizens and national parliaments in order to overcome the democratic deficit of the Union, the difficulty of finding "a satisfactory and comprehensive constitutional settlement", (Kay, 2005) and the important role played by courts in reshaping the relation between centre and periphery. Moreover, both Canada and the EU have discovered the importance of alternative sources of constitutional update: intergovernmental agreements for Canada (see the importance of the Social Union Framework Agreement[XI]) and new governance products in the EU (de Búrca, 2003). The importance of these alternative and non-legally binding sources of constitutional update produced another common feature; the asymmetry and flexibility that characterises the two constitutional experiences. This explains why Bruno Theret (Theret, 2002)[XII], for instance, described Canada and the EU as two examples of multinational and asymmetrical federalisms.

Before analysing such analogies, we need to challenge any possible objection concerning the possibility of comparing the EU with federal experiences, by starting from a brief overview of the factors that make the EU and other pluricultural contexts (namely Canada and Switzerland):

- The coexistence of different languages, cultures and even legal systems
- The coexistence of different patterns of welfare
- The important asymmetries characterising the respective integration processes

(a) The coexistence of different languages and cultures

This point does not need to be explained in detail since it is self-evident. It refers not only to the factual co-existence of different languages and cultures in Canada, Switzerland and in the EU but also to the existence of particular forms of disciplines aimed at ensuring respect for and disciplining the use of such language diversity[XIII]. This set of constitutional provisions makes a linguistic and cultural pluralism one of the fundamental principles of the constitutional core of these contexts.

As for Canada, such a multiculturalism has an impact on the nature of the domestic legal system, which has been often described as an example of mixed jurisdiction. The classical definition of *mixed jurisdiction* is that given by Walton, according to whom "mixed

jurisdictions are legal systems in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law" (Walton, 2000). The debate about the possibility of defining mixed jurisdictions in a clear and univocal manner is a very live one.[XIV] According to Palmer,[XV] for instance, a mixed jurisdiction is characterised by the presence of three factors: a mix of elements of the civil and common law traditions that co-participate in founding the core principles of a given legal system (Palmer 2001, 7-8.); and the legal actors' awareness of the dualist character of the law in a given legal system or, rather, the existence of these dual elements should be obvious to the ordinary observer (Palmer 2001, 8). Thirdly, the last element is the structural one, namely the predominance of the civil law tradition in the private law domain and that of the common law tradition in the public law domain. As for the Canadian case the roots of this particular system can be found in the *Québec Act* of 1774 the real starting point of the dual nature of the Canadian legal system. This acknowledged that "in matters of property and civil rights (private law), the civil law tradition, inspired by French civil law, applied in Quebec in the same way that the common law tradition, inspired by British common law, applied in such matters of property and civil rights outside of Quebec" (Cuerrier-Hassan-Gaudreault, 2003). The bi-systemic nature of Canada has a great impact on the activity of the federal legislator as the example of *bijuralism* confirms. Bijuralism requires that "Canadian legislation must not only be drafted in both official languages (bilingualism) but it must also respect the duality of two Canadian legal traditions: common law and civil law (bijuralism)" (Cuerrier-Hassan-Gaudreault, 2003). In order to do that, a Legislative Committee of Bijuralism has been set up whose specific task is to "ensure the application and unfettered accessibility of federal legislation in a country in which two official languages and two distinct traditions of private law serve as a backdrop. The goal of legislative bijuralism is to ensure respect for the essence of each legal tradition in both language versions of the Act".[XVI]

One could perceive how a similar necessity inspires provisions like Article 345 of the TFUE or even Article 4 of the EUT, concerning the national (here understood as national-legal) identity of the Member States and is present in all the debates about the possibility of a European Civil Code.[XVII] The necessity to deal with these diversities has forced all the European institutions to devise mechanisms aimed at respecting both the linguistic and the legal peculiarities of the member States: examples of this can be found in

the legislation regulating the publication of the official acts[XVIII] of the EU and even in the interpretative activity of the European Court of Justice.[XIX]

Of course there also some differences between Canada and the EU, but the possibility to hazard the extension of the formula of "mixed jurisdiction" in order to define the EU has been endorsed by one of the major scholars of the notion, William Tetley:

Mixed jurisdictions and mixed legal systems, their characteristics and definition, have become a subject of very considerable interest and debate in Europe, no doubt because of the European Union, which has brought together many legal systems under a single legislature, which in turn has adopted laws and directives taking precedence over national laws. In effect, the European Union is a mixed jurisdiction or is becoming a mixed jurisdiction, there being a growing convergence within the Union between Europe's two major legal traditions, the civil law of the continental countries and the common law of England, Wales and Ireland (Tetley, 1999).

(b) The coexistence of different patterns of welfare

In their works on welfare policies, Esping Andersen (Esping Andersen, 1990) and Ferrera (Ferrera, 1998) have distinguished at least three or four worlds of welfare coexisting in Europe. This is one of the reasons for the difficulty of harmonization in the field of social policies, and partly explains why more recently the EU has resorted to soft law instruments and to the Open Method of Coordination (with questionable results in the majority of the cases[XX]). A similar variety can be found in Canada, according to the studies by Bernard and Saint Arnaud (Bernard-Saint Arnaud, 2004). Remarkable differences exist among the Canadian Provinces and in this respect the Provinces of Alberta and Québec (Morel, 2002) represent two extreme points which can be traced back to the European patterns of welfare identified by Bernard and Saint Arnaud; the liberal, the familist, the social-democratic and the conservative regimes.

Table 3. Indicators for which Provinces are Similar to the Various Regimes (Except for the Liberal Regime, which They Belong To)

Characteristics for which the Province Is Similar to the Regime			
	Social-democratic	Conservative	Familist
Quebec	• Final government consumption expenditure • Payroll taxes as % of GDP (trend*) • Education expenditure • Rate of government employment (trend) • Infant mortality rate • Proportion of scientists and technicians	• General government expenditures • General government receipts • Percentage of public expenditure on health and public expenditure as % of total health expenditure • Female labour participation rate (trend)	• Social security transfers • Debt interest payments • Unemployment rate • Percentage of voter turnout • Daily newspapers read
Ontario	• Employment rate • Proportion of scientists and technicians	• Final government consumption expenditure (trend) • Rate of government employment	• Debt interest payments (trend) • Rate of union membership
Alberta	• Public expenditure on vocational training • Female labour participation rate		• Debt interest payments (trend) • Rate of union membership
British Columbia	• Education expenditure (trend) • Employment rate • Female labour participation rate	• Public expenditure as % of total health expenditure • Unemployment rate	• General government receipts • Daily newspapers read • Rate of union membership
* The use of the word trend indicates that the province's level on this indicator diverges from the level of the liberal model in the direction of another regime, but does not reach the latter level.			

Source: Bernard- Saint Arnaud, 2004

The coexistence of different worlds of welfare can be easily explained keeping in mind the identity implications of welfare policies as confirmed by several studies on Québec nationalism (Béland-Lecours, 2006). Welfare is a matter of identity and culture, the social policies in Québec are seen as a distinctive element of the local identity: "Solidarity conceptualised in terms of equality and social justice ties nationalism to the welfare state" (Béland-Lecours, 2006,79), as Béland and Lecours powerfully pointed out. Indeed the "jealousy" of Québécois for their social policies explains the reactions to some judgments

of the Canadian Supreme Court – like *Chaoulli v. Québec*[XXI] for instance – perceived as imperialistic attempts to jeopardise the local specificity or the reluctance to participate in the *Social Union Framework Agreement*.

A similar variety of worlds of welfare can be found in Switzerland, as the studies by Armingeon, Bertozzi and Brogli show (Armingeon- Bertozzi–-. Brogli, 2000), focusing on social security, education, taxation and employment regimes ("The term denotes the patterns of employment and unemployment and the patterns of wage regulation", Armingeon- Bertozzi–-. Brogli, 2000). The results of their research can be summarised in the two following tables:

TABLE 3
SUMMARY OF THE OPERATIONALISATION OF VARIABLES FOR THE DIFFERENT ASPECTS OF THE CANTONAL WELFARE STATE

	Dimension 1	Dimension 2	Outcomes
Employment (a)	Level of public employment	Continuity of female employment	
	High	*High*	*Social democratic*
	Low	*Low*	*Conservative*
	Low	*High*	*Liberal*
	High	*Low*	*Unclear (statist-conservative)*
Taxation (b)	Level of taxation	Progressivity of taxation	
	High	*High*	*Social democratic*
	High	*Low*	*Conservative*
	Low	*Low*	*Liberal*
	Low	*High*	*Unclear (redistributive-liberal)*
Education (c)	Education expenditure and share of diplomas		
	High		*Unclear (social democratic or liberal)*
	Low		*Conservative*
Social Security (d)	Number of cantonal social security schemes and per capita social security benefits paid by canton and municipalities	Degree of familialism (birth grants, child benefits to 4th child minus expenditure on pre-school facilities)	
	High	*Low*	*Social democratic*
	High	*High*	*Conservative*
	Low	*Low*	*Liberal*
	Low	*High*	*Unclear (liberal-conservative)*

Source: Armingeon- Bertozzi - Brogli, 2000

TABLE 3
WORLDS OF WELFARE IN SWITZERLAND: CLASSIFICATION OF THE 26 SWISS CANTONS (EMPLOYMENT, EDUCATION, TAXATION AND SOCIAL SECURITY)

List of Cantons		Employment	Education*	Taxation	Social Security
AG	Argovia	2	2	1	1
AI	Appenzell Inner-Rhodes	2	2	1	1
AR	Appenzell Outer-Rhodes	1	2	2	1
BE	Berne	1	2	2	1
BL	Basle-Country	1	4	4	3
BS	Basle-Town	4	4	3	3
FR	Fribourg	3	4	3	2
GE	Geneva	3	4	3	3
GL	Glarus	1	2	1	1
GR	Grisons	4	2	1	1
JU	Jura	3	4	3	1
LU	Lucerne	2	2	2	4
NE	Neuchâtel	3	4	2	2
NW	Nidwalden	1	2	1	4
OW	Obwalden	1	2	2	4
SG	St Gall	1	2	2	1
SH	Schaffhausen	3	4	1	3
SO	Solothurn	1	2	4	4
SZ	Schwyz	1	2	1	4
TG	Thurgovia	2	2	3	1
TI	Ticino	4	4	4	3
UR	Uri	4	2	1	4
VD	Vaud	1	4	3	2
VS	Valais	1	2	2	2
ZG	Zug	2	4	1	2
ZH	Zurich	4	4	1	3

Notes:
1 = liberal
2 = conservative
3 = social democratic
4 = unclear, in case of employment '*statist-conservative*', in case of education either '*liberal*' or '*socio-democratic*', in case of taxation '*redistributive-liberal*', in case of social security '*liberal-conservative*'.
*only category 2 and 4 are possible under this dimension.

Source: Armingeon- Bertozzi - Brogli, 2000.

According to these findings, it is not possible to trace back to any canton a precise univocal welfare pattern.

This variety in welfare models can also explain the social tourism which is due to the different quality and level of services performed by the cantons (Tabin -Keller Hofmann-Rodari-Du Pasquier.-Knüsel-Tattini, 2004). Some scholars argue that the strong autonomy of the 26 sub-systems has produced a series of inter-cantonal differences both in terms of financial effort and legal discipline passed (Filippini-Crivelli-Mosca, 2006). The welfare state of Switzerland is based on:

strong social security systems while also being coupled with a decent system of social assistance. The Swiss welfare state system does not apply large systems of general universal benefits, or social savings accounts. The Swiss health care insurance system is rather unusual, in the sense that public, subsidized private and fully private elements have been intertwined. Also, the decentralization of the health care system has been given rise to significant differences between cantons in terms of health care spending and provision (Wang-Aspalter, 2006).

The role of Cantons and communes in social policies is essential and has favoured the emergence of different systems of welfare (Filippini Crivelli Mosca, 2006; Crivelli-Filippini, 2003)[XXII].

(c) Important asymmetries characterising the respective integration processes

Flexibility and asymmetry are two of the most important features of Canadian federalism, elements partly explicable by taking into account the cultural and economic diversity present in the territory: "Federal symmetry' refers to the uniformity among member states in the pattern of their relationships within a federal system. 'Asymmetry' in a federal system, therefore, occurs where there is a differentiation in the degrees of autonomy and power among the constituent units" (Watts, 2005). However, asymmetry does not refer to the mere differences of geography, demography or resources existing among the components of the federation or to the variety of laws or public policies present in a given territory.

The debate on the importance of asymmetry in federal contexts is also a live one and the word asymmetry has acquired a variety of meanings. When talking about asymmetries one can distinguish between *de jure* and *de facto* asymmetries[XXIII], or between financial[XXIV] and constitutional – some arrangements, in order to combine the particular needs of some components of the federations and the principle of equality, are recognized in the constitutional text –, and between necessary or optional asymmetry ("… which stems from the different relations that develop between the federal government and the other governments within the federation. Some may choose to exercise all of their constitutional responsibilities, while others prefer to assign some of them to the federal government". (Dion, 1999).

Canada presents all these three forms of asymmetry. The following table offers an overview of the different forms of asymmetry present in Canada.

Table 2
Constitutional Asymmetry in Law: Selected Examples

Subject of Provision	*Section*	*Notes*
Constitution Act, 1867		
denominational education	93(2)	extends minority education rights in Ontario to Quebec
language and civil law	133 129	bilingual legislative regime and civil law system only in province of Quebec
uniformity of laws in certain provinces (opting-in)	94	Ontario, New Brunswick, and Nova Scotia (but *not* Quebec) are invited to unify laws on property and civil rights and court procedure by opting for federal control
Senate representation	22, 23	unequal representation of provinces, different qualifications for senators from Quebec
judges' qualifications	97, 98	section 98 applies only to Quebec; different system of appointment of judges from other provinces if section 94 is activated
Provincial Constitutions		
natural resources	109	Alberta, Saskatchewan, and Manitoba are not given this jurisdiction until 1930
language	23 (Manitoba Act)	Manitoba joins Quebec with bilingual regime in its legislature
subsidies	118, 119	differential direct grants
denominational education rights	various	different denominational rights (some in section 93, others in provincial constitutions)
terms of union (British Columbia, Prince Edward Island, Newfoundland)	various	different constitutional commitments to provinces (e.g., P.E.I. steamship & telegraph service)

Table 3
Constitutional Asymmetry in Practice: Selected Examples

Subject of Provision	*Section (Act)*	*Form of Asymmetry*
pensions	94A (1964)	concurrency with provincial paramountcy permits QPP and CPP asymmetry
amending procedure	38 (3), 40 (1982)	opting-out of constitutional amendments increases asymmetry
notwithstanding clause	33 Charter (1982)	provincial overrides permit unequal applications of the Charter
mobility	6(4) Charter (1982)	limit to mobility rights of Canadians in provinces with high unemployment

Source: Milne, 2005.

As Watts pointed out, "cultural, economic, social and political factors in combination have in all federations produced asymmetrical variations in the power and influence of different constituent units" (Watts, 2005), and this makes asymmetry a constant element present in all the federalising processes, even in Switzerland and the EU.

Switzerland is often described as an example of symmetric federalism but on closer examination it is characterised by strong asymmetries, given the important role acknowledged to the Cantons in many key sectors (education, fiscal federalism – each Canton has an its own fiscal regime) and a confirmation of its asymmetrical nature is given by the *Réforme de la péréquation financière et de la répartition des tâches entre la Confédération et cantons* (RPT)[XXV] approved in 2004, and by the importance of the equalization payments mechanism based on Article 135 of the Swiss Constitution.[XXVI] Further evidence of the asymmetric nature of Switzerland's federalism can be found in the wording of the Constitution which acknowledges great organisational autonomy (Art. 37 Const.)[XXVII] with the only limitation being the necessity to have a constitution (Art. 51 Const.)[XXVIII] and to guarantee the exercise of political rights (Art. 39 Const.)[XXIX] and by the constitutionalisation of the Communes (Art. 50 Const.).[XXX]

In the European Union among the main factors of asymmetry are enhanced cooperation,[XXXI] the opting out mechanism (Miles, 2005), and the open method of coordination (Scharpf, 2007).[XXXII]

4. European mega-constitutional politics: the conventional method and its constructivism

The last phase of the EU constitutionalisation process has been dominated throughout by the attempt to give the Charter of Fundamental Rights a binding nature, a goal achieved thanks to the entry into force of the Lisbon Treaty. The Charter of Fundamental Rights has represented a turning point. This is not just in terms of contents (Rubio Llorente, 2003), since it represents a codification of many principles already taken into account by the ECJ in its case law or already codified in other international conventions from which the ECJ has taken inspiration over the years. It is also important for the attention created around the EU among continental European scholars interested in constitutional law (traditionally committed to more domestic themes of investigation) and for the procedure followed in its preparation. The latter is due to the introduction of the so-called conventional method, then adopted even in the draft of the Constitutional Treaty.

As many authors have pointed out, the Convention has represented a rupture in the traditional European "constitutional politics":

Legal and political science scholars have for a long time propounded the notion that the EU has a constitution, even though both this notion and its connotations remain disputed. The European constitution resulted from a gradual process of interaction—between primary norms and the case law that interpreted them. The European Court of Justice (ECJ) acted as the leading 'constitutionalizing actor' by extracting constitutional principles from a body of law that also encompassed national constitutions. In parallel, Intergovernmental Conferences (IGCs) were largely treated as episodes of Treaty reform. The intellectual hegemony of 'liberal intergovernmentalism' in the explanation of Treaty changes, and its emphasis on a model of preference aggregation that came closer to the model of normal pluralistic politics (Moravcsik 1991, 1998), had the effect of removing their consideration from the prism of 'constitutional polities'. The Convention on the Future of Europe has subtly modified this landscape.
Nominally at least, the Convention has expressed a larger constitutional ambition, the most evident trait of which is the naming of its product a draft constitution" (Closa, 2004).

Another "rift" caused by the conventional method is given by the language adopted in that particular phase: the decision to name this body "Convention" made the comparison with the US federalising process evident and recalled the American analogy. Hoffmann, in his works on the Convention, attempted to summarise the novelties introduced by the conventional method, by reading the activity of the second Convention in light of three features: *socialisation*[XXXIII], *institutional involvement*[XXXIV] and *consensus rule*.[XXXV] Other authors, like Karlsson (Karlsson, 2010. See also Karlsson, 2008), have insisted on the partial innovativeness introduced by the conventional method, since "it has not done much to increase the quality of responsiveness and accountability in EU treaty reform. The main problems from a democratic viewpoint are therefore left unresolved".

At the end of this spectrum of opinions one could also recall Magnette who pointed out that: "*Although a number of political leaders described it as the victory of a new 'constitutional doctrine', the Laeken Declaration, which created the Convention and raised a long list of questions its members would had to address, was the result of a classical intergovernmental compromise".*(Magnette, 2005). In any case, all the scholars interested in this phenomenon have emphasised the new communication strategy adopted by the Convention, the great announcements, the constitutional rhetoric, the publicity, a new symbolism[XXXVI] fostered by the use of words like "constitution", "law" and "minister":

Although it was the Treaty establishing a Constitution for Europe that first gathered together these basic rules and principles in a treaty-based written constitution, its content was largely a codification (or recodification) of the existing treaties and case law; only a small number of its provisions were actually new. These provisions were partly prompted by dissatisfaction with the functioning of the EU, and were designed to improve it. However, the main difference between the Treaty establishing a Constitution for Europe and the earlier amending treaties, such as the Treaties of Maastricht, Amsterdam and Nice, lay not so much in its content as in the constitutional symbolism that it was meant to convey, with a strong emphasis on democracy and fundamental rights, and hence on European citizenship.[XXXVII]

The Conventions phase reminds me of the definition of mega-constitutional politics given by Peter Russell in his works, its attention to the policy of big announcements, its obsession with involvement and participation (despite its élitist nature). As mentioned above, Russell's idea of mega-constitutional politics presents two premises. The first is the idea according to which behind the constitution there is a pre-existing social entity. The second premise refers to the rise of popular participation in the constitution-making process and to the idea of a constitution as an act of the people, the real sovereign entity. This implies that mega-constitutional politics presents an emotional grasp, it talks to the soul, to the heart and even to the stomach of the people (conceiving the constitution as the product of a professed *Volksgeist* even in those cases where the existence of such a common culture is problematic and questionable). It presents itself as an identity-based concept. Mega-constitutional politics wants to involve the people, it is obsessed with this idea of popular participation. Why? Mega-constitutional politics aimed at curing a sort of original sin present in Canada's constitutional history: a sort of democratic deficit, consisting of the fact that the first Canadian Constitution was a document approved by a foreign parliament. Mega-constitutional politics attempted to achieve a sort of *a posteriori* legitimacy that was missing at the beginning of Canadian constitutional history. In order to do so, constitutional politics created another constitutional wound by excluding Québec, and this created a new round of mega-constitutional politics aimed at curing this wound.

I think similar elements can be found in EU history: the Convention was conceived as an attempt to react to the democratic deficit of the Union, to present the EU as closer to the citizens, by involving them, by creating a common constitutional and rhetorical language (see also at the discussion concerning the possibility of identifying some common European roots to be mentioned in the Preamble of the Constitutional Treaty[XXXVIII] which triggered a debate on the commonalities of the Europeans). Another similitude is given by

the end of the current round of mega-constitutional politics both in the EU and in Canada and by the role played by the instrument of referendum in this respect. In the following passage taken from a piece written by Russell, in which he describes the sense of frustration and fatigue of Canadians after the failure of the mega-constitutional politics rounds, one could replace the words "Canadians" or "Canada" with "European Union" or "Europeans", such are the similarities between the two contexts:

The recent referendum may have demonstrated that Canadians are deeply divided in their sense of identity and political justice but it has, nonetheless, left them united in their constitutional fatigue. There are no politicians of any consequence in post-referendum Canada with any stomach for resuming the effort to fashion a grand constitutional restructuring designed to strengthen national unity… There are still some well-meaning intellectuals and some constitutional junkies who would like to have another kick at that can. But they will find no support from political leaders or the general public (Russell, 1993).

Europe seems to be suffering from a similar reaction after the "referenda rounds" involving both the Constitutional Treaty and the Lisbon Treaty. However, again, this should not be understood as a signal of the impossibility of constitutionalisation of the EU; rather it seems to be a problem shared by other constitutional experiences characterised by cultural plurality and diversity.

However, despite these similarities there are also important differences. While the Canadian attempts to modify the constitution after 1982 have been unsuccessful, since 1992 the European Union has experienced a long series of approved amendments to the original Treaties. In any case, Canada is just one of the two examples that can be taken into account in this respect: another pattern of constitutional odyssey might be represented by the Swiss case, where it is possible to count two total revisions of the constitution and more than 140 partial revisions (*sic*!). How can we explain such a constitutional instability? First of all, this is due to the absence of a real constitutional court able to give fluidity and flexibility to the wording of the constitution: in fact, constitutional interpretation is a valuable and soft alternative to the constitutional revisions in many constitutional experiences. Secondly, I refer to the very detailed contents of the Swiss Constitution (and the same applies to the EU Treaties and to the text of the Constitutional Treaty) – the Constitution disciplines almost all the institutional life of the Swiss Confederation. In this way it does not present itself as adaptive and flexible, it codifies social changes, presenting

itself as a "constitution-achievement" (Carrozza, 2007)[XXXIX] or a "snapshot constitution" (Besselink, 2007). Against this background both the European Treaties and the Swiss Constitution seem to be unable to lead social forces: they can only "reflect the historical movements" (Besselink, 2007), thus seeming to be mere *snapshot constitutions*, creating a sort of never ending sense of frustration, since the constitutional form seems not to be able to catch, entirely at least, the constitutional substance (resulting finally in a form of constitutional odyssey).

The ideas of the semi-permanent revision process of the EU Treaties and that of the mega-constitutional politics rest on the view that the political sources of law are the sources *par excellence*, the "normal" sources in a constitutional context which aims at being democratic. This reveals the constructivist nature of this politics, since it implies a "constructivist" nature in every "real" constitutional moment, that is, "a conception which assumes that all social institutions are, and ought to be, the product of deliberate design".[XL] According to this view, in order to be binding and normative (and not merely descriptive), constitutions are supposed to be "constructivist", since they are directed at the achievement of an ideal society characterised by those values deemed fundamental.[XLI] The constructivism that seems to accompany modern (continental, at least) constitutionalism seems to be oriented towards the political sources of law, which are the conclusive result of a debate where opposing political forces struggle to influence the manifestation of states' wills, represented by the *loi* (*legge*, *ley*, statute). The *loi* resulting from political sources of law is an act characterised by abstractness and generality, and in this sense laws are the product of a rational legislator moved by a clear intent to build coherence, unity and order, conceived as ταξις (constructed order). From this perspective, the (second) European Convention gave us the illusion of a strong and constructivist will at a supranational level, which has failed miserably. The consequence of this failure could have been the absence of legitimacy and unity, or, in other words, fragmentation, disorder and obscurity.

This is a view that often accompanies the idea that in a system characterised by a separation of powers – a principle characterising the democratic system[XLII] – the legislative monopoly should be exercised by the legislature. This is of course understandable, but history is very rich in examples of constitutionalisation processes driven by forces and sources other than political ones, namely examples of "evolutionary constitutionalism".[XLIII]

5. Final Remarks

The last few centuries are rich in examples of constitutions *octroyée*[XLIV] or, at least, not completely democratically decided. Of course the mission of constitutional lawyers should be to improve the constitutional design that already characterises the EU, but nevertheless this does not mean that a European constitution does not currently exist or that a supranational constitutionalism cannot exist. Against this background one should wonder whether we really need mega-constitutional politics at the EU level. Russell himself seemed to advocate the abandonment of the idea of mega-constitutional politics after the failure of Meech Lake and Charlottetown (Russell, 1993).

Indeed, if we enlarge our perspective we can see how the difficulties encountered by the EU are common to those lived by many other multinational entities, like Canada and Switzerland, and how probably the Treaties' semi-permanent revision process and the Canadian constitutional odyssey are two consequences of the general crisis of the constituent power.[XLV] This is a power that is not able to express itself *uno acto* and in a disruptive way and that cannot be considered as really sovereign because of the international pressures imposed by the international community on the new constituent moments (Lollini -Palermo, 2009). In this respect, perhaps, the EU is not as special as the inventors of supranationalism would argue.

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I "What do we ultimately make of the demise of EU constitutionalism? Does its swan song ring as an elegy or as an ode to joy? Well, none of it. The demise of EU constitutionalism is neither a cause to regret nor a reason for joy. Constitutionalization of [the] EU, while possible, was obviously premature, insufficiently reflected upon and not well prepared. Its failure can be hailed only to the extent that it has made clear that EU is not destined to become a state, at least not any time soon" (M. Avbelj, 2009).

II See my considerations in Martinico, 2009, For the application of the idea of evolutionary constitutionalism to the EU, see: Besselink, 2007; Brunkhorst, 2004; Peters, 2006; Westlake,: 1998.

III Shaw, 2003; Maurer, 2003; Pollak - Slominski, 2004; Fossum - Menéndez, 2005; Magnette, 2005; Risse - Kleine, 2007. Hoffmann, 2009

[IV] Russell, 1992.
[V] "The word 'patriation', a genuine Canadian invention, refers to Canada's final 'bringing home' of its constitution from Westminster, with full patriotic fanfare, on 17 April 1982. Although Canada enjoyed sovereignty since at least 1931, it nonetheless continued to depend on requests to the United Kingdom Parliament for making amendments to its constitution. The reason for this anomaly was clear: Canadian governments had proved unable to agree on an internal amending procedure by which legal changes to the constitution could be made at home without having recourse to Britain", Milne
[VI] Re: objection by Québec to resolution to amend the constitution, 1982, 2 SCR, 793.
[VII] "Mega constitutional politics is not peculiar to Canada. The United States knew this kind of politics last in the Civil War. Recently, much of eastern Europe passed through mega constitutional upheavals", Russell, 1993, 33.
[VIII] "First, mega constitutional politics goes beyond disputing the merits of specific constitutional proposals and addresses the very nature of the political community on which the constitution is based. Mega constitutional politics, whether directed towards comprehensive constitutional change or not, is concerned with reaching agreement on the identity and fundamental principles of the body politic. The second feature of mega constitutional politics flows from the first. Precisely because of the fundamental nature of the issues in dispute – their tendency to touch citizens' sense of identity and self-worth – mega constitutional politics is exceptionally emotional and intense. When a country's constitutional politics reaches this level, the constitutional question tends to dwarf all other public concerns." Fossum, 2004.
[IX] Cappelletti- Seccombe – Weiler, 1985.
[X] Dehousse, 1994.
[XI] Lazar, 2000; Gibbins, 2001; Philips, 2001; Mendelsohn McLean, 2000
[XII] Theret also points out the differences existing between the two processes : "Au Canada, un État-nation, le Québec, cherche à se constituer. L'État nation est sans doute également en gestation chez les nations autochtones qui revendiquent leur reconnaissance institutionnelle et son émergence remet en cause un ordre politique fédéral constitué à l'origine sur un mode centralisateur. La question de la reconnaissance du caractère multinational de la fédération y est ainsi de plus en plus souvent posée18. Dans l'UE, où l'État-nation est le point de départ, c'est l'inverse : le palier fédéral en devenir cherche à se faire une place en réorganisant l'ordre politique régional sans pour autant pouvoir en dépasser le caractère multinational. On peut alors considérer que, sauf accident de parcours, l'UE et le Canada se dirigent tous deux vers une reformulation similaire des principes du fédéralisme, reformulation par laquelle un compromis stable serait trouvé entre supranationalisme et intergouvernementalisme, ce que le schéma i1 veut illustrer."
[XIII] See Arts. 4, 18, 70 and 175 of the Swiss Constitution. Arts. 16–23 of the Canadian Charter of Rights and Freedoms, for example, Arts. 3 TEU, 4.2 TEU, 165 TFEU, in the European Treaties.
[XIV] See, for instance, Örücü, 2001. Tetley defines a mixed legal system as "one in which the law in force is derived from more than one legal tradition or family", and a mixed jurisdiction as "a country or a political subdivision of a country in which a mixed legal system prevails" (Tetley, 1999). Milo and Smits state that the adjective "mixed" may mean many things: a "combination of various legal sources", a "combination of more than one body of law within one nation, restricted to an area or to a culture", and "the existence of different bodies of law applicable within the whole territory of a nation" (Milo- Smits, 2000). As for the origin of a mixed jurisdiction, Tetley wrote: "It is my view that mixed jurisdictions are created when one culture, with its law, language and style of courts, imposes upon another culture, usually by conquest. The imposition on Québec of the English common law, together with England's administrative, judicial and legislative system, leaving the French civil law to continue unchanged, is an example. The intrusions of other cultures by armies and treaties, as seen in Belgium and much of the rest of Europe at the time of Napoleon, as well as in the cases of South Africa and Louisiana, provide further examples. Mixed jurisdictions may also be created by the voluntary 'reception' of foreign law." Tetley, 1999.
[XV] Palmer 2001, 7-8.
[XVI] "Aside from the need to reconcile linguistic differences that may exist between the French and English versions of legislation, there is a further requirement to reconcile the differences that result from our different private law systems. How does the drafter of tax legislation ensure that it applies to Francophones and Anglophones alike and also applies equally to taxpayers whether in the civil law tradition or the common law tradition? To meet this challenge, federal tax legislation must use terminology that is compatible with each of the two legal systems, in both official languages", Cuerrier-Hassan-Gaudreault, 2003.
[XVII] See, for instance, Collins, 2008; Hesselink , 2004; Study Group on Social Justice in European Private

Law, , 2004.

[xviii] For the sources concerning multilinguism in the EU, see: http://eur-lex.europa.eu/it/dossier/dossier_11.htm; Fernández Vítores, 2010, Bobek, 2007.

[xix] See, for instance, cases like C-449/93, *Rockfon A/S v. Specialarbejderforbude*, *Racc.*, 1995, 4291; C-30/77, *Regina/Bouchereau*, *Racc* 1977, ECR, 1999. On this see Vaiciukaité-Klimas, 2005.

[xx] Hatzopoulos, 2007.

[xxi] *Chaoulli v. Québec (Attorney General)* [2005] 1 SCR 791, 2005 SCC 35, Bateman, 2006. See also Maioni, , 2006, 135.

[xxii]More info available at www. socialinfo.ch.

[xxiii] "The former refers to asymmetry embedded in constitutional and legal processes, where constituent units are treated differently under the law. The latter, de facto asymmetry, refers to the actual practices or relationships arising from the impact of cultural, social and economic differences among constituent units within a federation, and as Tarlton noted is typical of relations within virtually all federations", Watts, 2005

[xxiv] "This consists in establishing intergovernmental transfer mechanisms that are specifically designed to assist the less wealthy components of the federation. The objective is to ensure that, despite the inequality of their autonomous revenues, the components are more equal in actual fact", Dion, 1999.

[xxv] On this see: Mottu, 1997; Cornevin-Pfeiffer, 1992, 185-263; Dafflon-Della Santa, 1995; Departement federal des finances, 1996; Frey- Spilmann- Dafflon Jeanrenaud-Meier, 1994; Bullinger, 2007 Dafflon, 1999.

[xxvi] "The Confederation shall issue regulations on the equitable equalisation of financial resources and burdens between the Confederation and the Cantons as well as among the Cantons.
2. The equalisation of financial resources and burdens is intended in particular to:
a. reduce the differences in financial capacity among the Cantons;
b. guarantee the Cantons a minimum level of financial resources;
c. compensate for excessive financial burdens on individual Cantons due to geo-topographical or socio-demographic factors;
d. encourage intercantonal cooperation on burden equalisation;
e. maintain the tax competitiveness of the Cantons by national and international comparison.
3. The funds for the equalisation of financial resources shall be provided by those Cantons with a higher level of resources and by the Confederation. The payments made by those Cantons with a higher level of resources shall amount to a minimum of two thirds and a maximum of 80 per cent of the payments made by the Confederation."

[xxvii] Art. 47: Autonomy of the Cantons. "The Confederation shall respect the autonomy of the Cantons.
It shall leave the Cantons sufficient tasks of their own and respect their organisational autonomy. It shall leave the Cantons with sufficient sources of finance and contribute towards ensuring that they have the financial resources required to fulfil their tasks.".

[xxviii] Art. 51: Cantonal constitutions. "Each Canton shall adopt a democratic constitution. This requires the approval of the People and must be capable of being revised if the majority of those eligible to vote so request.
Each cantonal constitution shall require the guarantee of the Confederation. The Confederation shall guarantee a constitution provided it is not contrary to federal law.".

[xxix] Art. 39 "Exercise of political rights. The Confederation shall regulate the exercise of political rights in federal matters, and the Cantons shall regulate their exercise at cantonal and communal matters".

[xxx] Art. 50 "Communes. The autonomy of the communes shall be guaranteed in accordance with cantonal law. The Confederation shall take account in its activities of the possible consequences for the communes.
In doing so, it shall take account of the special position of the cities and urban areas as well as the mountain regions".

[xxxi] Art. 20 TEU, Arts. 326–335 TFEU. See the recent decision in the fields of divorce and unitary patent. On this, see J.M. Beneyto, 2009 C. Cantore, 2011. See in general, de Burca Scott , 2000. From a slightly different perspective, Bauböck, 2001.

[xxxii]"Le Canada et l'Union européenne peuvent ainsi être vus comme des espace politiques où, plus inintentionnellement qu'intentionnellement, une nouvelle forme d'organisation des pouvoirs publics et de la société internationale est en train d'être inventée. Y émergent en effet des formes similaires de fédéralisme multinational asymétrique mêlant supranationalisme et intergouvernementalisme, fédéralisme fondé non plus sur une hiérarchie de pouvoir entre l'État fédéral et les entités fédérées, mais sur une hiérarchie de valeur entre ordres de gouvernement égaux et en compétition pour l'allégeance des citoyens." Theret, 2002. Theret

also points out the differences between the two processes : "Au Canada, un État-nation, le Québec, cherche à se constituer. L'État nation est sans doute également en gestation chez les nations autochtones qui revendiquent leur reconnaissance institutionnelle et son émergence remet en cause un ordre politique fédéral constitué à l'origine sur un mode centralisateur. La question de la reconnaissance du caractère multinational de la fédération y est ainsi de plus en plus souvent posée18. Dans l'UE, où l'État-nation est le point de départ, c'est l'inverse : le palier fédéral en devenir cherche à se faire une place en réorganisant l'ordre politique régional sans pour autant pouvoir en dépasser le caractère multinational. On peut alors considérer que, sauf accident de parcours, l'UE et le Canada se dirigent tous deux vers une reformulation similaire des principes du fédéralisme, reformulation par laquelle un compromis stable serait trouvé entre supranationalisme et intergouvernementalisme, ce que le schéma i1 veut illustrer".

[xxxiii] "The Convention membership was more coherent than that of an IGC, allowing for members to socialise and cooperate more closely than is possible in the environment of an intergovernmental conference. Socialisation took place in and around the Convention and led to changes in government positions because it clarified and emphasised different viewpoints and thereby highlighted the importance of certain issues during the Convention negotiations. Sebenius points out that when there is a 'perceived conflict' dynamics in groups come into play that may enable negotiated results because 'a powerful norm towards reciprocity operates in most groups'. Socialisation in the Convention, especially compared with an IGC, was further reinforced by the group dynamics that developed as a result of different meetings at different levels with often overlapping", Hoffmann, 2009.

[xxxiv] "The Convention membership consisted not only of government representatives but it included members of national parliaments, the European Parliament (MEPs) and the European Commission. So institutional participation led to changes in government positions because it created additional value through an increase in knowledge. In multi-actor negotiations knowledge is of great importance. As Sebenius points out, the different 'histories, personalities, motivations and styles' of negotiators affect the outcome. Positions will change depending on how much knowledge participants have. This refers to knowledge about the issue at hand, possible solutions and the positions and preferences of other negotiators. The participation of representatives from institutions other than member state governments added a substantial amount of knowledge to the negotiations in the Convention. Most of the non-governmental Convention members, especially participants from the European Parliament and the Commission, brought well-informed views to the negotiating table, thereby greatly enlarging the pool of knowledge available to the conventionnels in general and the member state government representatives in particular (compared to an IGC)." Hoffmann, 2009.

[xxxv] "Consensus rule: the fact that the Convention Praesidium determined the Convention outcome by consensus mean that the veto power of that member state governments was removed and the power of non-agreement was reduced if not removed. As Tsebelis and Proksch point out, the Convention Praesidium was responsible for the determination of where the consensus in the Convention laid. The lack of voting meant that conventionnels were able to voice their disagreement on individual issues but not to vote them down. The Praesidium also established that the final document was submitted to the Convention as one draft treaty, thereby presenting participants with two options: giving their consent to the document or rejecting it in its entirety." Hoffmann, 2009.

[xxxvi] "The main novelty brought in by the Constitutional Treaty, and abandoned by the Lisbon Treaty, was precisely that constitutional symbolism, rhetoric and publicity", Itzcovich, 2009.

[xxxvii] *Raad van State*, opinion on the ICG mandate to revise the EU Treaty and the EC Treaty, 12 September 2007, http://www.raadvanstate.nl/adviezen/zoeken_in_adviezen/zoekresultaat/?zoeken_veld=&advicepub_id=7694.

[xxxviii] For instance, the long debate on the Christian roots: Weiler, 2003.

[xxxix] Carrozza, 2007.

[xl] Hayek, 1973. The dualistic structure of Hayek's thought links the idea of constructivism to that of order, which can be conceived in two different ways; order ("... the situation where one author could argue with regard to a given phenomenon that it was artificial because it was the result of human action, while another might describe the same phenomenon as natural because it was evidently not the result of human design", *Ibid.*) as κοσμος (spontaneous order) and order as ταξις (constructed order).

[xli] For example, the concept of constitution (and constitutionalism) inferred from Article 16 of the Declaration of the Rights of Man and of the Citizen is to pursue the division of powers and the protection of

rights, strive for change and address the social forces that lead to a common goal. Declaration of the Rights of Man and of the Citizen, Art. 16: "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all".

[XLII] Today the principle of separation powers knows many exceptions, however; see, for instance, the "legislative" power conferred on the executive in many constitutional systems, or the rise of the judicial review of legislation as an exception to the pure idea of separation of powers.

[XLIII] "As just pointed out, the European Constitution was not 'given' in a specific constitutional moment by a single authority. There was no single event which created a European Constitution, but only an accumulation of steps of diverse legal character. Constitutionally relevant innovations were in part reactions to acute crises, in part the consequence of gradual changes in power constellation of the Union.
Often, *de facto* arrangements were formalised only *ex post*… But who is the *pouvoir constituant* in that multi-dimensional process of constitutionalisation? Empirically, a number of actors can be discerned.There are first of all the Member States governments, which dominate the Treaty revision procedure and which agree on informal arrangements. We have the national parliaments which ratify the Founding Treaties and Treaty amendments. There are the European bodies and institutions which participate in the formal Treaty revision procedure and which may also effect autonomous Treaty modifications. Finally, the European citizens elect the members of the European Parliament and the Member States' governments, represented in the European Council. The citizens also occasionally express their views in referendums on European issues. These empirical findings support the idea of a 'pouvoir constituant mixte' or even of multiple *pouvoirs constituants*. The concept of constitutional evolution (as opposed to punctual constitution-making) abandons the neat distinction between the *pouvoir constituant* (understood as the pre-constitutional power creating the constitution) and the *pouvoir constitué* (the legalised powers, notably the institutions which act within the constitutional system any which may, *inter alia*, effect constitutional change). That classic distinction cannot be upheld when speaking of a process of constitutionalisation of the Union. In that process, all actors just mentioned, notably the Member States, are in a way both *pouvoir constituant* and *pouvoirs*", Peters, 2006.

[XLIV] See, for instance, the Italian Statuto Albertino of 1848, the French Constitution of 1814 etc.

[XLV] On the recent evolutions of the constituent power, see: Loughlin- Walker, 2008.

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Towards a European Federal Fiscal Union

by

Alberto Majocchi

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Abstract

The financial crisis revealed the inadequacy of the European Economic and Monetary Union. The response of the EU and of the countries of the Eurozone has been slow and weak, due to the substantially confederal character of the Union and to the limited dimensions of its budget. To try getting out of this impasse it is necessary to promote as soon as possible an initiative to start a political project envisaging the creation of a European Federal Fiscal Union, along the lines followed in the past to achieve the single currency. The first stage should be the creation of a European Fiscal Institute, whose main task should be to save those countries that risk being swept away by the sovereign-debt crisis and to pave the way for the subsequent institutional move toward a Federal Fiscal Union and the institution of a European Treasury. The Fiscal Institute could play the role, in the realization of the Fiscal Union, that had been entrusted to the European Monetary Institution as a prerequisite for the start of the ECB. During a second phase, an issue of Eurobonds would be necessary to supply the UE the financial means needed to support the setting up of a recovery plan of the European economy, to favour a productivity and competitiveness increase, to promote a transition toward a sustainable economy. To be politically manageable, the European budget should increase moderately and should not exceed, in the medium term, 2% of GDP. However it should be necessary to anticipate the return to a system of real resources, substituting what is known as the fourth resource with a European surtax on the national income taxes paid directly by the citizens to the European budget. A new resource could also be assured with the approval of the proposal recently put forward by the European Commission in a Draft Directive to introduce a carbon/energy tax as from 2013. Still from this budget reform perspective, the introduction of a tax on the financial operations of a speculative nature could be considered in the perspective of also guaranteeing a more orderly development of the international financial system. During the last phase, aimed at creating a real Federal Fiscal Union, the budget, based on own resources, would be managed by a federal European Treasury, responsible for the coordination of the EU economic policy and the transition to

a sustainable economy. Once this institutional reform is carried out, it would be quite realistic to envisage the creation of a European Finance Minister.

With the creation of a Federal Treasury, after the single currency, would see the birth of a second arm of the Federal State in view of the attribution process to the Union of a decision-making power in foreign policy and in the security sector, starting within the perimeter initially of the Eurozone, where an ever increasing interdependence is manifest and where it is possible to foresee further development in a Federal direction.

The decision to go ahead with the constitution of a Fiscal Union, with a Treasury and a Federal Finance, must be accompanied by a contextual decision fixing the date for the start of a fully fledged completed European Federation since one fundamental principle of democracy is "No Taxation without Representation".

Key-words:

European Federal Fiscal Union, European Economic and Monetary Union, Eurozone.

I- From the financial to the sovereign debt crisis

1.- The greatest crisis that the world economy was forced to face since the end of WWII started in 2007 with the crash of the housing bubble in the United States. The origin of the crisis has a financial nature: the American banks had granted mortgage loans for the purchase of houses also to families with low incomes, with the declared aim to give everybody the possibility to own a property. In reality, for the banks, the guarantee was based on the fact that the ever increasing housing demand did favour a constant price increase of property and that the properties' value did represent a real guarantee for the repayment of the loans: should the new owner fail to repay the loan's instalments, the banks could always make up by repossession and then putting the property on the market at a purchase price higher than the amount of the loan itself. Furthermore, the widespread housing possession did favour the granting of further loans to the families, enabling them to purchase not only home furnishing on credit, but also cars and other consumer goods. The generalized use of credit cards for everyday purchases, far above the families' economic means, represented another step for the increase of the demand and, by consequence that of production. A land of plenty built on a house of cards: the continuous credit expansion. At a certain point, when the housing bubble crashes and the banks are forced to ask the repayment of the granted credits, the pyramid collapses. For many banking companies it is the start of the financial difficulties until the crisis reveals all its gravity with the Lehman Brothers bankruptcy on 15 September 2008.

But the financial crisis also clearly reveals the structural weakness of the American economy. Since many years, internal demand exceeds domestic production, and the difference is made up by net imports of goods from abroad (i.e. imports exceed exports). The federal budget deficit should be added to this external deficit. And these imbalances are managed not only by capital imports from China, but also from other emerging industrialized countries: to put to use the huge budget surplus of the balance of payments and the consequent accumulation of foreign exchange reserves, these capitals are reinvested on a large scale in American *Treasury bonds*. At the same time the consumer

goods imports, at a much lower prices than the American ones, help to guarantee on the one hand a huge outlet market for the emerging industrialized countries' products, and on the other hand to keep up the American families living standard in spite of the low pro-capita income dynamics, especially for the middle-low classes. The dream of a limitless American growth, backed by the housing bubble, by the domestic credit without limits, by the role of the dollar as International currency and by the New York financial centre that attracts capitals from the rest of the world comes to a rude end with explosion of the financial crisis.

Very soon, the crisis, born in the United States, becomes a worldwide one. The American banks sold the "toxic" titles (those who have no chance of being covered by the payment of those that received the loan) wrapped up in other titles of different nature that are resold on the International markets. Very soon also the European banks became involved with the American banks, forcing the European States to intervene in support of the banking system with great injections of public money. At the same time, the banks, facing serious financial difficulties, are forced to impose a credit squeeze on their customers and in particular on the productive system. The enterprises in financial straits reduce their levels of productive activities with the consequent contraction of the families' income, with a further impact on the demand of consumer goods. At this point, the crisis extends itself to the real sector and involves, even if to a different extent, all the other industrialized areas of the world.

2.- Faced by the risk of a recession at world level, the states react strongly overcoming the tendency to limit more and more the public intervention that become dominant since the Reagan and Thatcher times and finance heavily the real economy, guaranteeing at the same time - in Europe in particular – the levels of employment through the extensive use of the social support provisions. The reaction to the crisis is stronger and immediate in the United States than in Europe, where only the ECB – which is an organ of a federal nature – is in the position of taking the necessary decisions to face the greatest crisis of the postwar period. The reaction of the EU and that of the countries of the Eurozone is slower and weaker for two reasons which become stronger reciprocally: first of all, the European Union is an institution of a confederal nature as far as the interventions in economic policy are concerned, that must essentially be based on coordination – slow and inefficient – of decisions taken at a national level; furthermore, as

far as the interventions of a fiscal nature are concerned, the decision must be taken unanimously giving rise to further delays with – inevitable - compromises necessary to reach the agreement.

The second reason of the weakness is due to the fact that in a strictly interdependent economic area, for each country it's convenient to act as *free rider*, i.e. wait that the other countries take the initiative, because the positive effects of interventions in other countries quickly spread to the whole area. In conclusion, no country has any interest in taking on the burden of financing the recovery of the European economy, whose cost would fall on its citizens, while all the countries of the economically integrated area would benefit from it; on the other hand, the intervention of the European Union is also slowed down by the institutional weakness, by the limited budget dimensions. In conclusion, the United States, with their Federal Government and a budget of adequate dimensions, can sustain with strength the economic recovery, in Europe, the intervention is entrusted to the Member States, has more restricted dimensions also because of the constraints imposed by the Maastricht Treaty to the all extents of public deficit and has the limited aim of – of great importance, but totally inadequate as regards the scale of the phenomenon – avoiding that the crisis turns into a recession of catastrophic dimensions.

3.- Thanks to the interventions carried out by several countries, family income holds and gradually the productive processes assume a faster pace. All countries undergoing a new industrialization start growing again at a high rate and the expansion of the world demand contributes in keeping up the export of the strong countries, Germany's in particular, that is growing also thanks to a greater dynamism of its internal market. But it becomes immediately clear that the crisis has moved from the private sector to the public one.

Ireland which for years was held up as the model to imitate is the most emblematic case. To save the banking system in crisis, the Irish Government was forced to make available huge funds to the domestic banking system and the result of this increase of public expenditure was a budget deficit of 32,3% of the GDP in 2010. In Greece, instead, the conservative government, eager to bring the Drachma in the Eurozone, swept the dust under the carpet, showing a GDP budget deficit inferior to 3%, in line with restrictions imposed by the Maastricht Treaty. But when the new government, led by the socialist Papandreou, comes to power it discovers and denounces in public the enormous cash

deficit in the public accounts (the budget deficit in Greece reached 10,5 in 2010 and the debt stock 142,8%). The financial markets react immediately with a loss of confidence that makes placing the new issues of Greek bonds more difficult: that's the birth of the crisis of the sovereign debt.

The weak countries of the Eurozone (i.e. PIGS – Portugal, Ireland, Greece and Spain, according to a disparaging Anglo-Saxon acronym) are greatly penalized by the market that believe they are no longer in the condition to meet their obligations. To issue the new bonds necessary to finance their deficits they must pay increasingly higher interest rates, with a greatly negative impact on the public finance equilibrium. The risk of default of these countries provokes a reaction in the other countries of the Eurozone that, after long and exhausting negotiations, arrange a loan of 110 billion Euros - and a further loan of 109 billion is agreed upon in the extra-ordinary meeting of the Heads of State and Government of the euro area held in Brussels on 21 July 2011 to avoid forcing Greece to turn to the market for help before 2014 -, in exchange of a plan of serious restrictive measures in a country where the GPD decreased of 4,5% in real terms in 2010 after a fall of 2,0% in 2009. And, after having granted Ireland a 85 billion loan (35 of which earmarked to rescue the banks), a plan of slightly inferior dimensions – 78 billion Euros – is being drawn up to rescue Portugal.

But the political consequences are being heavily felt. The German Government lost important regional elections, highlighting the aversion of the German taxpayers for rescue operations of countries considered guilty of having managed their public finances incorrectly, forgetting that a huge quantity of the bonds of the countries that are today facing a serious financial crisis were bought by German banks (from the data of the Bank for International Settlements it emerges that the German banks hold 62 billion dollars of countries peripheral to the Eurozone, of which 22,7 billion of Greek bonds), attracted by the high interest rates that can be earned with these bonds. And during the recent Finnish elections, a new party anti-European obtained 19% of the vote.

4.- To face the crisis of the sovereign debts, Daniel Gros and Thomas Meyer, in a Policy Brief of Ceps, put forward the proposal to create a European Monetary Fund and this idea has been successively taken up by the German Finance Minister, in an interview with Welt. Gros and Meyer start from the consideration that seen that the Member States of the Eurozone must follow the principle of reciprocal solidarity and can therefore expect

to receive aid from the other countries in case of financial difficulties, they are likewise obliged to create a fund of resources necessary to meet prospective support requests. To avoid the moral hazard risks inevitably connected with each insurance mechanism – as the Member countries of the Eurozone could be induced to adopt an irresponsible financial conduct knowing they can count on an external resource support in case of need-, the two authors suggest that the European Monetary Fund should be exclusively supplied by the countries that break the fiscal rules of the Treaty of Maastricht. In particular, the contributions would be calculated to an extent equal to a yearly 1% of the debt stock exceeding the 60% limit and likewise 1% on the excess of the yearly deficit with respect to the 3% limit. Thus, in 2009 Greece with 115% ratio debt/GDP and a deficit of 13%, should have paid to the Fund a contribution of 0,65% of its GDP (0,55% for the debt excess and 0,10 for the deficit excess).

The intervention of the Fund to help a State in difficulty could be realized either through the granting of a loan or through a guarantee granted for the new issue of public debt bonds. The drawing on the Fund would be without conditions within the limits of the transfer from each State; beyond these limits the State in difficulties should present a program of adjustment that would be evaluated by the Eurogroup and by the Commission. The concrete execution of this plan would be guaranteed by the enforcement instruments held by the EU. In the first place, the guarantee granted by the Fund could be withdrawn or the outpayments of the structural Funds could be suspended. As a last instance, the ECB could decide to stop accepting as collateral for the new liquidity the bonds of the defaulting country. In conclusion, the Fund could support the country in difficulty, which, however, would lose its own sovereignty as far as the management of the economic policy is concerned which would fall under the control of the European level that granted the aid..

Another proposal envisaging the issue of a European Bond to face the crisis of the sovereign debt crisis is put forward by Depla and von Weizsäcker. In a Policy Brief of the think tank Bruegel, the two authors suggest that on the one side the European States should put together their public debt to an extent not exceeding 60% of the GDP (approximately 5.600 billion Euros) by means of an issue of a European Bond (Blue Bond), thus significantly reducing the cost of this share of the debt. For the part of the debt exceeding 60%, the issues would remain a national responsibility (Red Debt), with higher costs that would become a strong incentive to promote a stricter fiscal discipline. Juncker's

and Tremonti's proposal to issue European Bonds through a European Debt Agency is moving along a similar line, in a measure that should progressively attain 40% of the GDP of the member States, absorbing at least 50% of the new issues of the member States. Furthermore, the Agency could exchange national bonds for European bonds with a discount on the face value that increases in proportion to the growth in the level of debt of the country from which the bonds are bought. This would represent a strong incentive to reduce the deficit, the same would apply to the Red Debt of the Depla and von Weizsäcker proposal. A hypothesis similar to the conversion of the national debt and of a financing of a European New Deal issuing Euro bonds was also put forward by Amato and Verhofstadt, supported by Baron Crespo, Rocard, Sampaio e Soares.

5.- A more advanced proposal aiming at further developments of the European Debt Agency was also put forward in Belgium at a political level by Prime Minister Yves Leterme – and taken up again by the President of the Liberal-Democratic Group of the European Parliament Guy Verhofstadt – and at an academic level by Paul De Grauwe and Wim Moesen. In an interview on Le Monde of 5 March 2010 Leterme points out that "the recent market tensions show the limits of the monetary union lacking an economic government" and suggests "creating a common treasury in the Eurozone or a European Debt Agency". The Agency would act as a European Union institution charged with the issue of the government debt of the Eurozone, under the authority of the finance ministers of the Eurogroup and of the European Central Bank. The European Investment Bank will act as the Agency's secretariat.". The Agency could take on the burden of existing debt, but each State would continue to pay the market interests according to their solvency degree. This way, observe De Grauwe e Moesen, the risk is avoided that the weak countries would behave as free riders shifting the burden of their debt on the financially stronger countries. Instead, the new issues could benefit from a uniform interest rate, and as the debt becomes due, the Eurozone governmental debt would take the form of a unified debt "which implies that each Member State would implicitly guarantee the debt of all the others".

During a first phase, after the debt level for each State within the Eurogroup is established, the Agency will gather the corresponding resources and will lend them to the State in question, which, should it not respect the deficit target, will be forced to turn directly to the market paying higher interest rates as consequence of non respect of the Pact. And this penalization will represent a strong incentive to respect the rules of the Pact

itself. Subsequently, a real unified European public debt market will be established, with significant advantages in terms of liquidity, especially for the smaller countries or those more exposed to the risk of a financial crisis, as well as a in terms of a reduction of the interest rates, which will also benefit the bigger countries. Finally, at longer term, according to Leterme, the Agency could become "a financing organ for the great projects of transeuropean infrastructures and an instrument to achieve an anti-cyclical budget policy". It is clearly a proposal with a political relevance as it prefigures, beyond the short term advantages, to come through the Greek crisis in a positive way, the creation of a fund to finance a European development policy and, in perspective, of a federal finance side by side with the national policies of anti-cyclical stabilization.

6.- An analysis of the sovereign debt origins in the countries of the Eurozone is clearly put forward by a paper of De Grauwe, who uses as starting point a comparison between the English and the Spanish economies. In 2011 public debt stock in the UK amounts to 89%, that is 17% higher than the Spanish one (62%). However, the financial markets have picked on Spain and not on the UK, with a gap between the respective interest rates that, in the beginning of 2011 reached 200 basis points (this means that in order to sell its State bonds Spain must offer two percentage points more than the UK).

According to De Grauwe, the explanation for this difference of behaviour of the markets is due to the fact that Spain is a member of a monetary Union, while the UK maintains the control of the currency in which it issues its debt. "National governments in a monetary union issue debt in a 'foreign' currency, i.e. one over which they have no control. As a result, they cannot guarantee to the bondholders that they will always have the necessary liquidity to pay out the bond at maturity. This contrasts with 'stand alone' countries that issue sovereign bonds in their own currencies. This feature allows these countries to guarantee that the cash will always be available to pay out the bondholders".

In such a situation, should the International investors perceive a risk of default for the United Kingdom, they would immediately sell the English state bonds in their hands thus provoking a fall of the price of these bonds and, in parallel, an increase of the interest rate. But those who sold the bonds will not want to hold the pounds thus obtained and, most probably, will sell them on the currency market, causing a reduction of the pound's value. Consequently, the pounds remain available on the internal market and the currency stock remains unchanged. Part of this currency will then be reinvested in State bonds.

Should this not happen and should the government have difficulties in selling its bonds on the market at reasonable interest rates, the Bank of England would be forced to buy new bonds, averting thus that the liquidity crisis triggers a default of the United Kingdom government.

In a situation where the default risks should show up in Spain, the investors would sell their share of Spanish bonds, with a subsequent increase of the interest rates; but it is probable that they would use the Euro realized from these sales to buy German bonds. Consequently, the potential crisis of the sovereign debt would become a liquidity crisis and the Spanish government would have ever increasing difficulties in placing the new issues at reasonable interest rates and, on the other hand, it would not have the power to induce either a support intervention from the Bank of Spain or from the ECB, which is the only one in the position to control the liquidity level within the monetary Union. Therefore, a country within the monetary Union is strongly conditioned by the behaviour of the financial markets.

Analogue considerations are put forward by De Grauwe as regards the problem of the differentials of competitiveness among the countries of the monetary Union. If the unit labour costs grow more in the PIGS than in the rest of the Eurozone and the countries involved cannot devalue their currencies, the only alternative is to start a deflationary process that would lead to a wage and price reduction to render the economy more competitive. But a recession situation leads endogenously to a worsening of the deficit through a contraction of the revenues induced by reduction of the growth rate of the GDP. The worsening of the deficit will provoke a further loss of confidence by the financial markets that can increase the risk of default, with negative consequences even on the other countries of the monetary Union due to the high level of financial integration existing within the area.

De Grauwe's conclusions are also important to evaluate the recent decisions of the European Council in terms of governance. "Like with all externalities, government action must consist in internalizing them. This is also the case with the externalities created in the Eurozone. Ideally, this internalization can be achieved by a budgetary union. By consolidating (centralizing) national government budgets into one central budget, a mechanism of automatic transfers can be organised. Such a mechanism works as an insurance mechanism transferring resources to the country hit by a negative economic

shock. In addition, such a consolidation creates a common fiscal authority that can issue debt bonds in a currency under the control of that authority. In so doing, it protects the member states from being forced into default by financial markets". And concludes: "This solution of the systematic problem of the Eurozone requires a far-reaching degree of political union". The problem to be solved is not of a technical nature, but is a political one and it is therefore necessary to single out the course to follow to achieve at last a real Federation. As Amartya Sen rightly points out in a comment on The Guardian with the significant title (Europe's democracy itself is at stake), "monetary freedom could be given up when there is political and fiscal integration (as the States in the USA have)". And even more clearly, Joschka Fischer concludes that "at the heart of resolving the crisis lies the certainty that the Euro - and with it the EU as a whole – will not survive without greater political unification. If Europeans want to keep the Euro, we must forge ahead with political union now; otherwise, like it or not, the euro and the European integration will be undone".

II. The recovery plan and the creation of a Federal Fiscal Union

7.- With the worsening of the sovereign debt crisis and the slowness of the European economic recovery, the member countries of the EU find themselves clamped in a vice increasingly tight: on the one hand they were forced to adopt measures, many very hard and of immediate effectiveness, to avert the risk of collapse of whole sectors, financial as well as industrial; on the other hand, they were forced to meet the unavoidable need to support the workers that lost their jobs and, in general, lower income classes that suffer the effects of the crisis to a greater extent. All this in a situation where the public finance is deteriorating endogenously due to the contraction of the revenues following the fall of income, which is also tied up by the necessity to avoid overcoming in a significant manner the restrictions imposed by the Maastricht Treaty to avoid being strongly penalized by the markets.

Considering the budget problems that weigh heavily on the countries of the Eurozone, limiting heavily the possibility to launch a recovery policy, at this point it is widely felt that a decisive role to help the recovery should be played by the European

Union, reducing the social tensions that are becoming unbearable in many countries and reducing – through the automatic expansive effects on the tax revenues – the ties that weigh on the national budgets. But the budget resources of the Union are limited and, in any case, at the moment the governments seem taken up by discussions about the measures of bailout without taking the trouble to implement a wider ranging plan. Therefore, to try getting out of this impasse it is necessary that the federalists understand how to promote as soon as possible an initiative to launch – in full syntony with similar initiatives that are gaining ground within the European Parliament – the accomplishment of a political project envisaging the creation stage by stage of a federal finance in Europe, along the lines followed in the past to arrive at the single currency. And the starting point for the elaboration of this plan is represented by the consciousness that the current crisis marks the end of a phase of the growth process of the European economy and that the current crisis will not be overcome with a policy exclusively aiming at supporting the demand of consumer goods.

Instead, to launch the recovery in Europe, it is necessary to promote the realization of a sustainable development model on the economic, social and environmental plan; by consequence, the motor for this new development phase is represented by the public investments for production not only for material goods- necessary as much as the infrastructures (transports, energy, broadband) – but rather for the immaterial ones, in particular basic research and higher education and investments aimed at supporting technological innovation, with the aim of increasing the productivity and competitiveness of the European industry that by now has reached the technological frontier. But in Europe and in the member States, this revival of the public investments clashes with the budget limits: as a consequence of the financial restrictions common to all the Eurozone countries, from 1980 to 2010 the ratio of public investments/GDP fell from more than 3,5% to less than 2,5%. As it was recently pointed out in the report "Europe for Growth. For a Radical Change in Financing the EU", presented by the members of the European Parliament, Haug, Lamassoure e Verhofstadt, the revival of the European economy requires a strong inversion of tendency, with an increase of approximately 1% of new public investments of the European GDP, that is 100 billion Euros.

8.- In this perspective, to overcome the financial crisis that is holding back the growth of investments and, consequently the GDP growth in Europe, with the ensuing

serious social tensions and with the difficulties of balancing the public budgets in a stagnating economy, the first step of the plan is to create a European Fiscal Institute, whose main task is to arrange the bail-out of the countries that risk to be swept away by the sovereign debt and to pave the way for the subsequent evolution toward a Federal finance and the setting up of a European Treasury. The Fiscal Institute could play a role in the setting up of a Fiscal Union that was entrusted to the European Monetary Institute and as prerequisite for the start of the ECB.

An important step in this direction was the decision of the European Council with the resolution of 24-25 March 2011 to go ahead with the creation of a European Stability Mechanism, also through an amendment to article 136 of the Treaty that allows activating the support mechanism when necessary to guarantee the stability of the Eurozone. The ESM loan capacity will be 500 billion Euro and should become operative in June 2013, replacing the European Financial Stability Facility (EFSF), launched by the Eurozone in May 2010 and made operative in the following June. The EFSF is a company that issues bonds and other debt instruments on the market to fund the States of the area in difficulty with loans guaranteed by the other member States and conditional on the accomplishment of a plan of debt reduction by the countries receiving the loans. In the meeting of the Heads of State and Government of the euro area, held in Brussels on 21 July 2011, the lending capacity of the EFSF was largely increased – up to 440 billion Euros – and, furthermore, the right to purchase bonds of every State of the Eurozone on the secondary markets is guaranteed, with limited constraints. At the same time, the conditions of the loans are improved and the time for reimbursing the loans received is extended.

These decisions support a radical change of the EFSF that was previously only an instrument for granting loans to avoid the risk of default of countries that are facing a sovereign debt crisis, and is now aiming at becoming effectively a lender of last resort, having the power to purchase bonds, on the secondary market, of those countries risking default. But a further step forward is carried out, on the institutional field as well, with the agreement for launching the ESM, which is an intergovernmental institution created with a treaty endorsed by the Eurozone countries. It will be led by a Board of Governors formed by the Finance Ministers and will take decisions by a qualified majority vote and only the granting and the conditions of a loan to a country with financial difficulties and the changes of the dimensions and instrument composition at the ESM disposal will have to be decided

by mutual agreement, which implies that the decision will have to be taken unanimously by the countries that are taking part in the vote, therefore, an abstention will prejudicial to the taking of a decision.

The limitations of this institute are obvious as each decision about the allocation of funds is subject to the unanimous consensus of the governments that take part in the decision; furthermore the granting of loans is penalized by the rates of interest (the provision cost plus 200 basis points) and is subject to a costly fiscal adjustment at the social level, as well as unrealistic in the absence of a European policy that can guarantee the starting up of a renewed phase of growth. But this first phase of the process – if it is clearly announced to the market with a political decision as a prelude to the creation of a true Federal Fiscal Union – should be able to guarantee the financial stability of the weak countries and, by consequence, reduce the spread vis-à-vis the bonds of the stronger areas, as was the case in the '90 with a reduction of the interest rates for the countries engaged in organizing the conditions the entry in the single currency.

In a second phase it is necessary to start the issue of Eurobonds to contribute to the provision of the necessary financial means to support the realization of the plan for the recovery of the European economy, in order to favour an increase of the European productivity and competitiveness and at the same time to promote a transition toward a sustainable economy. The European Investment Bank could provide the financing of the investments that could guarantee a yield on the market, thus covering - with the income generated from the investments - the cost of the interests and the repayment of the capital, through the issue of Eurobonds. But to finance the investments earmarked for the production of European public goods (secondary education, research and innovation, new technologies, environmental conservation, as well as of the natural resources and of the artistic heritage, renewable energies, soft mobility) that represent a *conditio sine qua non* to guarantee a long term sustainable growth of the European economy, it is necessary, on the one hand, to provide the issues of Eurobonds, and at the same time to guarantee to the European budget the necessary fiscal resources for the service and the repayment of the debt.

To make it politically manageable, the increase of the European budget must be very moderate and must not exceed in the medium term 2% of the GDP, as was already suggested in 1993 by the commission of experts charged with studying the role of the fiscal

policy in a monetary and economic Union through the report "Stable Money - Sound Finances. Community Public Finance in the Perspective of EMU". It is clear that if the needs of investments to be financed with the European debt grow, the necessity to proceed to a reform of the structure of the European budget will gain strength. Obviously it is necessary in the first place to envisage the return to a system of veritable own resources. In fact, the c.d. fourth resource is not real own resource, but only a National contribution proportional to the GDP that could be replaced by a European surtax on the National income tax – that would not be affected by the reform – paid directly by the citizen to the European budget guaranteeing a greater transparency of the levy and at the same time strengthening the responsibility of those who use the resources.

9.- A new resource could be guaranteed to the European budget by the approval of the proposal of a Directive, recently put forward by the Commission, relative to the introduction of a carbon/energy tax as from 2013. In a situation where the risks connected to the climate changes are by now more and more clear and the need of replacing the fossil fuels with alternative energy sources is becoming more and more pressing, a tax also in line with the carbon content of the energy sources appears as an adequate instrument to start up virtuous processes of energy-saving and of fuel-switching to renewable energy sources, thus reducing the negative impact of the energy consumption on the environment and facilitating the introduction of productive processes less energy-intensive. In this prospective of budget reform, the introduction of a taxation of the financial operations of a speculative nature could be taken into consideration in perspective of guaranteeing as well a more orderly development of the international financial system At the same time, part of the yield of this tax could be earmarked to the financing of the production of global public goods by means of a European contribution to promote the constitution – in agreement with the United States and the other countries of the G20 – of a world fund for a sustainable development. During the last phase of the realization of a Federal Fiscal Union, the budget, financed with own resources by the Union, should be run by a European Treasury of a federal nature, responsible of the realization of a sustainable development plan and for the coordination of the economic policy of the member states.. In this way, also the attractiveness of the debt instruments issued by the Union would grow, guaranteed by the levies flowing directly into the Federal coffers. Once this institutional change is made, it would then seem realistic to envisage the creation of a European Finance Minister,

as was proposed by the ECB President, Trichet and, later, by the Dutch Governor, Wellink and by Jacques Attali.

The plan aimed at the creation of a Federal Fiscal Union and at the institution of a European Treasury should be the subject of a decision of the European Council, establishing the deadlines for the different phases and, most of all, the final date that will mark the beginning of Fiscal Union operations. But a decision of this nature , as relevant as it might be, is not sufficient. There is a basic difference between the Fiscal Union and the Monetary Union. The ECB is a constitutional organ whose independence is ratified by the Treaty of Maastricht and whose task – important but limited – is to guarantee price stability with interventions decided in full autonomy. The Treasury is a constitutional organ of a different nature because the fundamental principle of democracy is "No Taxation without Representation". The Treasury can operate efficiently only if it has consensus and therefore must be subject to the democratic control of the Parliament and act within the framework of a government representative of the people's will. In conclusion, the decision to go ahead with the construction of the Fiscal Union, with a Treasury and a Federal Finance, must be backed by a contextual decision fixing the date for the start of the complete Federation, also contemplating, in perspective, a European Foreign and Security policy.

10.- A plan including from the beginning the objective to arrive at a Federal Fiscal Union, could presumably have the same impact on the market as the single currency had on the interest rates. Various proposals for the creation of a European debt have been put forward several times, but, as was the case for the single currency, these proposals have been rejected so far, in particular by the German and English governments. This last objected as a matter of principle because it is quite aware that to go forward on the field of European finance presupposes that in the meantime the Union evolves toward a federal type structure. On its side, the German government rejected the idea of a common European bond because its issue would imply an additional cost for Germany.

The validity of this prediction is based on the idea – questionable insofar as the creation of a European debt is connected with the step by step setting up of a Fiscal Union of a federal nature – that the market must necessarily incorporate in the price of the European bond the risk of the emissions issued by the weakest countries. Furthermore, the German government does not take into account the negative effects that the public finance deterioration, fuelled by the increase of the issue cost triggered by the widening of the

spread, and the risk of default of these countries would have all the same on the German economy and, more generally on the development perspectives or, even on the Eurozone survival. Likewise, financing a European plan for the recovery of the economy financed by a European debt is no longer avoidable since, given the interdependence of the economies of the monetary Union, it is in the interest of each country to act as a free rider, avoiding to launch measures backing the economy at the national level as it can benefit from the positive effects stemming from the recovery policies carried out in the other countries.

11.- Two conclusive comments can be drawn from these considerations. First of all, Europe following the crisis is increasingly seen as something, not only unrelated to the citizens' ordinary lives, but even as something hostile, imposing restrictions and sacrifices without guaranteeing a better and safer future. It is therefore time to change, setting rapidly up in the Eurozone a development plan to relaunch the European economy and employment. The plan can be financed with the issue of Bonds denominated in Euro, guaranteed by the European budget and bound to collect the huge money stock circulating in Europe. With a change of the development perspectives and the solution of the problems connected with the sovereign-debt crisis, the citizens' confidence will be reinstated, thus favouring the evolution towards a Federal outcome of the European unification process through the creation of a Federal Treasury responsible for the budget management and the coordination of the European economy policy to promote a sustainable development. In this way, after the single currency, the second arm of a Federal State would be created, in view of the process completion assigning to the Union of a decision-making power even in foreign and security policy.

The second consideration regards the perimeter within which this process can be started off. The point of departure is certainly represented by the Eurozone, where an ever increasing interdependence is manifest and where it is possible to foresee further development in a Federal direction. Within this perimeter – whose contours cannot be defined a priori, but that surely does not correspond with the framework of the Union of 27 – it is necessary to reckon which are the countries that can take on the initiative. Historically at the start there has always been a Franco-German initiative, with Italy pushing in the direction of a Federal outcome of the process. The Federalists' task, as at the epoch of the struggle for the European currency, is to devote themselves to the mobilization of the political and social forces, with the aim of promoting a political

decision from the Eurozone governments, pushed by the support of the European Parliament, to achieve the creation of a European Treasury and of a Federal Fiscal Union, an important step in the direction of a completed European Federation.

At the moment is difficult to foresee how the sovereign-debt crisis will develop, but it already had the effect of showing the inadequacy of the present set up of the Economic and Monetary Union. The ten years growth of the euro seemed to have swept away the doubts on the efficiency of the Maastricht norms and of the restrictions of the Stability Pact. But, first the financial tsunami that hit the world economy and then the Greek crisis and the effect arising in other countries emphasized the weakness of the institutional structure of the EMU. The Eurozone governments succeeded in avoiding the collapse of the economy putting into effect the bailout of the banking system and guaranteeing a minimum of support to the productive system also in order to avoid a collapse of the social stability. But nor within the Ecofin, nor within the Euro Group it was possible to start off a serious strategy to guarantee in a short time a significant economic recovery and consequently of the competitiveness of the European industrial system.

Furthermore, the Greek crisis highlighted the weakness of the government structure of the European economy. While the European Central Bank, being a Federal body, with a decision-making power, acted immediately to promote the financial sustainability, guaranteeing to the system the liquidity supply using as collateral even the bonds of the Greek public debt, the decisions about the financial support mechanisms within the Eurogroup have been slow and most probably inadequate. The reason for this weakness clearly derives from the confederal nature of Europe in the economic policy management, which favours free rider behaviours and, with the right of veto, guarantees an unjustifiable privilege particularly of the stronger States.

As it already happened in the past, each European crisis presents a twofold aspect: on the one side it makes the break-up of the results already achieved concretely possible. Today the more concrete risk is that speculative attacks can arise against the other countries of the Eurozone, with serious risk for the survival of the single currency itself. But, at the same time, each crisis makes new headways possible for a greater integration within the Union, and in particular for the countries where the integration level already reached is more advanced. In fact, after the Greek crisis, a debate started up among those that intend to carry on with the integration process, also with the creation of new

institutions and the start of new policies, and those who instead plan to strengthen the decision-making power at a national level, preventing in fact the solution of the European crisis.

Lately, the balance pendulum between the National levels and the Union level shifted considerably in favour of a return of the decision-making power in the hands of the National governments and of the body at the highest level that unites them in the Union, i.e. the European Council, that many consider as the natural depositary of the decision-making power as regards the economic policy management But some proposal put forward recently include instead significant passages toward a more efficient governance of the European economy, less bound by the national powers. But it is necessary to make clear that the decisive point is essentially political: it is a question of transferring at a European level the power – that up to now had been jealously guarded by the Member States – to manage autonomously the fundamental decisions in political economy matters, thus completing the construction of the Economic and Monetary Union through the creation of a Federal Treasury with the possibility of guaranteeing an effective coordination of the national policies by means of a power, limited but real, at a European level of government.

In the sovereign debt crisis that started in Greece, the first thing that surfaced was the serious behaviour of the Greek Government, with the manipulation of the data relative to the public budget. But the crisis is also the consequence of a steadily growing divergence between the real trend of the economy of the weak countries and that of the other partners of the EU. In this sense even a tightening of the restrictions of the Stability Pact, as recently proposed by various sources, appears totally inadequate. Instead, it's necessary to strengthen the possibility of starting a development policy at the European level through the availability of greater funds to promote an increase of the productivity and by consequence of the competitiveness of the Eurozone economic system. But it's also necessary to strengthen the coordination powers of the National economic policies to avoid that the diverging trends of the different economic systems within the Eurozone that cannot be balanced by currencies exchange variations, lead to an implosion of the Eurozone. *Hic Rhodus, hic salta.* The Greek crisis proved that the modest institutional progress obtained with Treaty of Lisbon are totally inadequate to achieve the establishment of a European Federal State, with temporarily limited competences in the sector of the

economy and currencies management, in the context of the group of countries within the EU where the integration level is more advanced, and in particular in the Eurozone.

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Speaking in Name of the Constituent Power: the Spanish Constitutional Court and the New Catalan *Estatut*

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Abstract

In June 2010 the Spanish Constitutional Court rendered a very important judgment on the constitutional legitimacy of the new fundamental charter (*Estatut*) of the Autonomous Community of Catalonia. Faced with a very long and ambitious legal document, the Court succeeded in not condemning as illegitimate most of its controversial provisions by means of interpretation consistent with the Constitution. Thus, those provisions aiming at 'constitutionalizing' Catalan identity have been widely neutralized or deprived of their legal significance. By doing so, however, the Court has attracted widespread criticism, possibly paving the way for further conflicts

Key-words:

Spanish Constitutional Court, *Estatut* of Catalonia, Subnational constitutionalism, Identity clauses, Constituent power, Fundamental rights.

1. Introductory Remarks

On 28 June 2010 the Constitutional Court of Spain (*Tribunal Constitucional*, TC) rendered a much-waited judgment concerning the constitutional legitimacy of a great number of provisions of the new fundamental charter of the Autonomous Community of Catalonia[I]. The *Estatuto de Autonomía* (*Estatut*, in Catalan) was approved by the Parliament of Spain in 2006 and soon after confirmed by referendum on 18 June 2006. It has come into force, as *ley orgánica* no. 6/2006, on 9 August 2006. After that, the main opposition party, the right-wing *Partido Popular*, questioned the constitutional legitimacy of the new Catalan charter – almost in its entirety – before the TC. Six other complaints – concerning more specific points – were filed by the national ombudsman (*Defensor del Pueblo*[II]) and five other Autonomous Communities (Murcia[III], La Rioja[IV], Aragon[V], Valencian Community[VI], and the Balearic Islands[VII]).

The judgment of the TC can be seen as a milestone in European sub-national constitutionalism[VIII]. It is a wide-ranging analysis of one of the most significant outcomes of the recent wave of constitution-making in sub-national legal orders throughout Europe. Even if only some of the provisions of the *Estatut* were challenged before the TC, they were the most meaningful and controversial both from a political and symbolic viewpoint. Thus, the judges were inevitably 'forced' to develop a complete analysis of the whole text, its place within the Spanish system of sources of law, its relations with the Constitution of Spain, and the balance of power in the Spanish 'autonomic State' (*Estado autonómico*). Many questions which the TC had to face in this judgment and in other, less emotional previous decisions were similar to debates conducted in other European countries. It is easy to make comparisons between the arguments used by the TC and the Italian Constitutional Court in some 'hard cases' which have arisen during the 'second wave' of regional charter-making after 1999[IX]. The dramatic series of events which led to the publication of the judgment in Summer 2010 put into question the very legitimacy of the Spanish TC and, more broadly, the role of constitutional courts (and their fitness) in solving conflicts in federal or regional systems[X].

2. The New *Estatut* of Catalonia

The new Catalan *Estatut* has been widely regarded as the chief expression of the 'last wave' of *Estatutos de Autonomía* in the Autonomous Communities of Spain (CAs)[XI]. The discussion on whether and how to revise their most important legal documents has concerned both Communities corresponding to 'historical nationalities' (*nacionalidades históricas*) and the other, 'ordinary' Communities. Because of the manifestly unconstitutional character and the subsequent breakdown of the so-called 'Ibarretxe Plan' for a new Basque charter, the Catalan *Estatut* rapidly turned into the cornerstone of the debate concerning the new charters and, more generally, the future of the 'autonomic State' established by the Spanish Constitution of 1978.

Catalonia is by far the wealthiest CA in Spain. Leaving aside other peculiar exceptions like the Basque Country, Catalonia's linguistic identity – based on the Catalan language – is quite distinct from that of the rest of Spain, where Castilian is spoken. Claims for greater political and, significantly, financial autonomy are strongly linked with the resurgence of Catalan identity. According to some scholars, the main reasons for this process are legal, financial and cultural. As for the legal side of Catalan claims, the central State has been progressively eroding Catalan legislative competencies thanks to its exclusive or 'transversal' competencies. 'Identity' or 'symbolic' topics, in turn, have occupied a more and more significant role in political debate 'due to the non-recognition by the Constitution of 1978 of the existence of national realities alongside the Spanish one'[XII].

3. Factual Background: 1. The Drafting of the *Estatut*

In 2003 a left-wing autonomist coalition took office in Catalonia. One of its main electoral pledges was the writing of a fully new *Estatuto de autonomía*. The drafting of a new *Estatuto* was seen as instrumental both in giving Catalonia a 'real' constitution and 'forcing the hand' of the central State in bilateral negotiations on such sensitive issues as financial relations and judicial organisation. Thus, the drafting of the *Estatut* has been both a constitution-making process and a policy-oriented forum, much in the general tradition of subnational constitutionalism[XIII]. In 2004 a new national government presided by J.L. Rodríguez Zapatero took office, a national government supposed to be more autonomy-friendly than its conservative predecessor. The *Estatut* was approved in 2006 after a

difficult debate and the search for a compromise between Catalan nationalist parties, on one side, and the State and non-nationalist Catalans, on the other side[XIV].

4. Factual Background: 2. The TC facing the Estatut

After that, the leading force in the parliamentary opposition in Madrid, the *Partido Popular* (PP) immediately questioned the constitutional legitimacy of the new Catalan fundamental charter. The Spanish Constitutional Court finally gave its decision at the end of a long-drawn-out deliberation process, during which the very legitimacy of the *Tribunal* was often put into question.

The PP asked the Court to exclude the President of the TC María Emilia Casas Baamonde and Judge Pablo Pérez Tremps from taking part in the decision because they had allegedly been involved in different ways in the preparatory works of the *Estatut*. The *Generalitat* of Catalonia, in turn, did the same with reference to Judges Roberto García-Calvo y Montiel and Jorge Rodríguez-Zapata Pérez. None of these initial applications was successful. However, after a second objection, Judge Pérez Tremps was eventually excluded from taking part in the decision[XV]. Judge García-Calvo y Montiel died in 2008 and has not been replaced yet.

Four other judges – including the President and the Vice-President of the TC – whose term of office had expired could not be replaced until January 2011. All of these judges had been elected by the Spanish Senate, where a three-fifths majority is required to designate the new constitutional judges. Due to the difficult case which the TC had to deal with and the lack of consensus among political parties, the upper house of the Spanish *Cortes* could not comply with its constitutional task. Furthermore, this procedure was partly revised after the entry into force of some amendments to Article 16(1) of the *ley orgánica* concernig the TC. Nowadays, CAs may propose candidates for the posts of constitutional judge when the Senate – qualified by the Spanish Constitution as 'chamber of territorial representation' (Art. 69(1)) – has to choose a replacement for a vacant seat. Thus, the *Cortes* have implicitly coped with a Catalan claim which had been written down at Article 180 of the *Estatut*[XVI].

5. The Judgment

From a morphological point of view, this very long *sentencia* has quite a complex structure. It consists of an opinion of the Court, drafted by President María Emilia Casas Baamonde and five individual opinions (*votos particulares*), presented by Judges Vicente Conde Martín de Hijas, Javier Delgado Barrio, Eugeni Gay Montalvo, Jorge Rodríguez-Zapata Pérez, and Ramón Rodríguez Arribas.

As for the content of the judgment, only few provisions in the *Estatut* are recognized as unconstitutional. A greater number of provisions 'are not unconstitutional, insofar as they are construed' in accordance with what is stated in the judgment.

Due to space concerns, this analysis of the judgment cannot look into all the legal questions with which the TC has dealt in the opinion of the Court – rather, it will focus on the general theoretical premises of its reasoning and the most relevant complaints concerning the *Estatut*.

The TC has analyzed the *Estatut* from a strictly legal perspective, whose foundations lie in the distinction between constituent power (*poder constituyente*) and legally established powers (*poderes constituidos*): the latter are encompassed by the Constitution, which also determines their scope and meaning[XVII]. In other words, *Kompetenz-Kompetenz* (*la competencia de la competencia*) only belongs to the Constitution, as construed by the case-law of the TC. The prominent role of the *Tribunal Constitutional* in providing authoritative interpretations of the Constitution and its provisions concerning fundamental rights or the allocation of legislative competencies is insistently stressed in the *sentencia*. As one of the major goals of the *Estatut* is to provide narrow definitions of the legislative competencies of Catalonia (*blindaje competencial*), the TC recognizes that 'an *Estatuto* may grant legislative competencies in a given subject-matter, but what these 'competencies' entail ... is a matter of the Constitution ... As the supreme interpreter of the Constitution, only the *Tribunal Constitucional* is entitled to provide an authoritative – and unquestionable – definition of constitutional categories and precepts'[XVIII]. The provisions of the *Estatut* concerning the allocation of legislative competencies (above all, Articles 110 to 112) are 'constitutionally acceptable insofar as, according to their alleged purpose of describing and accommodating the system, they adapt themselves to the normative and dogmatic reconstruction which can be drawn from our case-law in any historical moment'[XIX].

The autonomic charters are subject to the Constitution, as always happens with normative acts which are not elaborated by a sovereign power[XX]. The foundations and the guarantee of the autonomy of Catalonia lie in the Constitution. As the Constitution is the fundamental law in the legal system, it cannot allow any other norm to be other than hierarchically subject to itself.

The other necessary premise concerns the contents of an *Estatuto de autonomía*. Is the *formal* Constitution, as approved in 1978 and subsequently amended, the only possible source of constitutional principles and rules in the legal system? The Catalan *Generalitat* argued in its pleading for a *substantially* constitutional view of *Estatutos*. In fact, said the Court, 'no legal system lacks legal norms performing functions which, within the normative system, are to be qualified as substantially constitutional, since their goals are conceptually viewed as intrinsic to the fundamental law of any legal system'. Even conceding that, 'such a qualification has no other scope than a purely doctrinal or academic one'. Although many provisions of the *Estatutos* may have a constitutional flavour, this does not involve a higher normative value for them. This distinction is crucial to the understanding of the *sentencia* no. 31/2010, as it allows the TC to 'weaken' many ambitious provisions of the TC 'from inside', without formally declaring that they are constitutionally illegitimate.

According to some critics, the TC has not upheld its previous statements on the nature of *Estatutos* in Judgment no. 247/2007, concerning the charter of the Valencian Community[XXI]. In 2007, the TC had stated that the relation between the Constitution and the *Estatutos de autonomía* is one of subordination as well as mutual integration, since the *Estatutos* are also part of the *bloque de constitucionalidad* which the TC uses to assess the legitimacy of a norm. On that occasion, the TC had also remarked that *Estatutos*, unlike the other kinds of *leyes orgánicas*, are the result of a *complex* procedure, in which both the State and the Autonomous Community are involved. In 2010, however, the TC argued that the *Estatut* is, in fact, a *ley orgánica*, whose relations with the Constitution of 1978 are basically hierarchical. Moreover, 'constitutional illegitimacy for violation of an *Estatuto* is actually a violation of the Constitution, the only norm able to grant ... competencies'[XXII].

As Article 147(2) CE states, there is a necessary, 'core' content of the *Estatutos*: denomination, territory, institutional organization and competencies of a given Autonomous Community. According to the Court, 'This necessary content may be a sufficient content, as well – but the Constitution itself allows to fill the *Estatutos* with

additional contents'[XXIII]. Thus, the TC clarifies that the *Estatutos*, which the Constitution qualifies as 'basic institutional norms of the Autonomous Communities' (Article 147(3)), can host additional contents, but they are subordinated to the Constitution and must comply with its provisions. Because of the fundamental distinction between constituent power and constitutional powers, there are some qualitative limitations, 'affecting the definition of constitutional categories and concepts. Among them, there is the definition of the *Kompetenz-Kompetenz*, which, as an act of sovereignty, is only intrinsic to the Constitution. These limitations cannot be trespassed by any legislator and are only within the reach of the interpretative task of the Constitutional Court'[XXIV].

As far as substantial questions are concerned, five points are very interesting for the purposes of this note.

First, the Preamble of the *Estatuto* contains an ambiguous statement: 'In reflection of the feelings and the wishes of the citizens of Catalonia, the Parliament of Catalonia has defined Catalonia as a nation by an ample majority. The Spanish Constitution, in its second Article, recognises the national reality of Catalonia as a nationality'. According to a well established doctrine of the TC, the Preambles in the *Estatutos* have no normative value but only an interpretative one. However, 'a lack of normative value is no lack of legal value' – therefore, the Court has to deal with these 'concepts and categories which ... seek to give the *Estatuto* foundations and a scope incompatible with its condition of subordination with respect to the Constitution'[XXV]. As a result of this challenge, the TC stated that the most controversial passages of the Preamble had no interpretative value. Whilst a group is entitled to call itself a nation for the purposes of political or cultural debate, when it comes to legal language there is only one nation in the Kingdom of Spain, the Spanish nation. On the contrary, Catalans are just a 'nationality' (Article 2 of the Spanish Constitution and Article 1(2) of the Catalonian *Estatut*)[XXVI]. This argumentation also affects the problem of the allocation of sovereignty in Spain: thus, since the Spanish legal system is based on the principle of popular sovereignty, the only holder of sovereignty can be the Spanish people at large. The judicial treatment of the provisions affecting language rights can be analyzed against this framework, as well. Article 3 of the Spanish Constitution allows the Autonomous Communities to give their local languages an official status alongside Castilian, 'the official Spanish language of the State'. Thus, the provisions of the *Estatut* on the co-official status of Castilian and Catalan are plainly legitimate. The only

unconstitutional norm is that providing for the 'preferential use [of the Catalan language] in Public Administration bodies' (Article 6(1)), whilst Catalan can indeed be 'the language of normal use for teaching and learning in the education system' 'insofar as this does not involve the exclusion of Castilian as teaching language'[XXVII]. The approach of the TC seems clear: any norms which may appear a legal contribution to the building up of a Catalan nation, if they cannot be interpreted consistently with the Constitution, are illegitimate or without legal value.

Second, as for the legitimising force of Catalan autonomy, the Preamble says that 'Catalonia's self-government is founded on the Constitution, and also on the historical rights of the Catalan people, which, in the framework of the Constitution, give rise to recognition in this *Estatuto* of the unique position of the *Generalitat*'. Again, interpretations claiming that the Catalonian autonomy has foundations other than the provisions of the Spanish constitution have to be rebutted. The legal foundations of autonomy are the constitutional provisions concerning the territorial organisation of the Kingdom of Spain. In fact, two CAs, Navarre and the Basque Country, enjoy a privileged financial status due to some historical rights (the so-called *derechos forales*) – these rights, however, are explicitly mentioned (and recognised) in the Constitution (Article 149(1)(8)). As the Court stated, 'Only in an improper way could these historical rights be intended to be, even legally, the foundation of Catalonian self-government, because ... they can only explain the fact that *Estatutos* take up some determined competencies in accordance with the Constitution, but they cannot at all explain the foundation of the legal existence of the Autonomous Community of Catalonia and its constitutional entitlement to self-government'[XXVIII].

Third, the *Estatuto* contains a detailed bill of rights. In 2007, the TC had already laid down that the provisions of *Estatuti* concerning rights were not fundamental rights but only directive propositions needing ordinary legislation to be implemented[XXIX]. In 2010 the Court held again that 'To be rigorous, fundamental rights are only those rights which limit every legislature, i.e. the *Cortes Generales* and the legislative assemblies of the Autonomous Communities, in order to guarantee freedom and equality. This function of limit can only be performed by a superior norm which is common to every legislature, i.e. by the Constitution'[XXX]. In the TC's view, this assumption is confirmed by Article 37(4) of the *Estatuto*, according to which:

'The rights and principles of this Title shall not imply any alteration to the system for distribution of powers nor the creation of new Titles regarding powers nor the modification of those that already exist. None of the provisions of this Title shall be enacted, applied or interpreted in any way that reduces or restricts the fundamental rights recognised in the Constitution and in international treaties and conventions ratified by Spain'.

Therefore, the global meaning of the Catalan bill of rights is greatly diminished.

Two other aspects of the judgment are worth recalling. The treatment of the provisions concerning the allocation of legislative competencies, the Catalan judiciary and financial arrangements is striking. These are perhaps the most 'political' provisions in the *Estatut*, aiming at conditioning the national debate on judicial and financial topics towards a significant 'autonomization' of both of them. In fact, the *ley orgánica* no. 3/2009, revising the LOFCA (*Ley orgánica* on the financing of Autonomous Communities), has been prompted by the 'last wave' of *Estatutos de autonomía*[XXXI]. Most of the provisions of the *Estatut* concerning those subjects have not been condemned by the TC as illegitimate because those provisions are ultimately not able to regulate them – the Constitution says that a *ley orgánica*, stemming from the State legislature, is necessary. Thus, many provisions of the *Estatut* are not properly preceptive statements – rather, they express some political claims of the Catalan *Generalitat*.

As far as financial arrangements are concerned, it is worth pointing out that Catalan attempts at providing a unilateral (re-)definition of the financial regime of the Autonomous Community fatally clash with the fundamental role of the State in this domain[XXXII]. This is a very interesting point, which also illuminates a distinctive feature of contemporary fiscal federalism in most jurisdictions around the world.

As for judicial and constitutional review, the Court makes a fundamental point: 'it is self-evident ... that one of the defining traits of the autonomic State, insofar as it is different from the federal State, is that its functional and organic pluralism does not affect the judiciary at all. In the autonomic State, the diversification of the legal system, resulting in more autonomous normative systems, does not take place at the constitutional level – entailing the existence of more constitutions ... Conversely, it only starts at the level of ordinary laws, in presence of one national constitution'[XXXIII]. Thus, even if the practical operation of the Spanish federalizing process has gone well beyond a mere autonomic frame, the traditional scholarly distinction between federal systems and autonomous (or

regional) ones is still relevant to the self-understanding of the system[XXXIV]. In the light of these considerations, the deliberations of the *Consell de Garanties Estatutàries* (Council for Statutory Guarantees) cannot bind the legislature – the *Consell* cannot aim at becoming a sort of Constitutional Court of Catalonia[XXXV]. Since the Spanish legal system has just one Constitution, there can be only one Constitutional Court. Correspondingly, the provisions of the *Estatut* concerning the High Court of Justice of Catalonia and the Council of Justice of Catalonia are not illegitimate 'insofar as' those organs can be viewed as decentralized branches of the (unitary) state judicial systems.

6. Assessing the Judgment

Sentencia no. 31/2010 is clearly the result of a compromise between very different states of mind within the *Tribunal Constitucional*. Whereas some judges aimed at declaring the full illegitimacy of the *Estatut*, others were reluctant to be too aggressive towards it, fearing a dangerous overinvolvement of the TC in political questions. However, this compromise has undergone widespread criticism. The magnitude of the conflict is witnessed e.g. by the dissenting opinion of Judge Jorge Rodríguez-Zapata Pérez:

'*The Estatut takes the place of the constituent legislator and modifies the Constitution without conforming to the [constitutional] procedures; it incurs in a colossal flaw of incompetency overthrowing the division of power between the State and the Autonomous Communities in every domain; it harms the human dignity of all Spaniards affecting their rights, above all their right ... to use in Spain the Spanish official language of the State; lastly, it upsets the constitutional system of sources of law and, at the same time, the operation of the State itself*'.

Some commentators have stressed the particular significance of this judgment in defining the role of the TC within the Spanish legal system. The TC is a constitutional power (*poder constituido*), too. Still, it tends to behave like a commissary of the constituent power (*comisario del poder constituyente*), as Eduardo García de Enterría once suggested[XXXVI]. Others have argued that the judgment reveals a lack of deference by the TC towards the *complex legislator* entrusted with enacting *Estatutos de autonomía* – a complex procedure in which the Catalan Parliament, the national *Cortes Generales* and the people of Catalonia had taken part[XXXVII].

In fact, the TC seems to have paid dearly for its attempt at 'rescuing' many provisions of the *Estatut* by means of interpretation "consistent with the Constitution.". One scholar argued that the TC might not have been exercising its power within the scope of constitutional review, 'i.e., with the highest deference towards the legislative'[XXXVIII].

This criticism cannot be entirely rejected. The TC tried to stop a serious political conflict, whose magnitude is reflected by the contestations over the fitness of many members of the TC itself to deal with the case. However, in overemphasizing its monopoly of constitutional interpretation it adopted a questionable strategy. Whereas many provisions of the *Estatuto* dynamically reflect 'hard' constitutional and political debates – concerning e.g. the Catalan identity, language rights, or financial resources – the TC has tried to provide a solid, basically stable interpretation of those norms. It has searched for a viable compromise, so as to avoid a serious clash with the State or Catalonia. By doing so, however, it has perhaps invaded an area where political negotiations between institutional levels should hold sway. The hard political conflict before the final approval of the *Estatut* could hardly be solved by a constitutional court, whose chief mission is to evaluate the *constitutional* – neither historical, nor political – legitimacy of *legal* norms. Furthermore, the conflict might have only been postponed. Even if the Preamble of the *Estatut* has no legal value and its 'bill of rights' merely contains 'directive norms', they could form the basis for regional legislation which could clash with the Spanish Constitution. Thus, the 'basic institutional norm' of Catalonia continues containing a latent source of possible legal conflicts.

In conclusion, the TC faced a serious challenge between 2006 and 2010, whose solution has led some scholars and a part of the public to question its very legitimacy. Only in the long run, however, can the sustainability of its hard-fought *sentencia* be verified.

I See the *sentencia* no. 31/2010, available at http://www.tribunalconstitucional.es/en/jurisprudencia/Pages/Sentencia.aspx?cod=9873. See Castellà Andreu 2010.

II See the *sentencia* no. 137/2010, issued on 16 December 2010.

III see the *sentencia* no 49/2010, issued on 29 September 2010.

IV See the *sentencia* no. 138/2010, issued on 16 December 2010.

V See the *sentencia* no. 46/2010, issued on 8 September 2010.

VI See the *sentencia* no. 48/2010, issued on 9 September 2010.

VII See the *sentencia* no. 47/2010, issued on 8 September 2010.

[VIII] See Gardner 2008; Ginsburg and Posner 2010. Both contributions strongly stress differences between an 'American' and a 'European' model in sub-national constitutionalism.
[IX] See the *sentenze* of the Italian Constitutional Court no. 106/2002, 372/2004, 378/2004, 379/2004, 365/2007, 170/2010. See also Delledonne and Martinico 2009.
[X] See. Carrozza, 1989.
[XI] For a detailed analysis of this process, see Martinico 2010. See also Ruggiu 2007.
[XII] See Viver Pi-Sunyer 2009. See also Castellà Andreu 2008: 219.
[XIII] See Williams, 2009.
[XIV] See Article 147(3) of the Spanish Constitution: 'Amendment of *Estatutos de autonomía*, shall conform to the procedure established therein and shall in any case require approval of the *Cortes Generales* through an organic act (*ley orgánica*)'. According to Article 56(1) of the Catalan *Estatuto* of 1979, in turn, 'Reform of the *Estatuto* will comply with the following procedure: a. The reform initiative may come from the Executive council or Government of Catalonia, the Parliament of catalonia in the form of a proposal by one fifth of its members, or the Spanish Parliament. b. In all cases, the reform proposal will require approval by a two-thirds majority of the Parliament of Catalonia, approval by the Spanish Parliament in the form of an Act of Parliament and, finally, a positive result in a referendum of electors'.
[XV] See the *auto* no. 26/2007, issued on 5 February 2007. See also Delgado del Rincón 2008; Iacometti 2007.
[XVI] 'The *Generalitat* participates in the processes for the designation of magistrates of the Constitutional Court and members of the General Council of Judicial Power in the terms established by law, or where appropriate, by parliamentary regulations.'
[XVII] Spanish Constitutional Court, *sentencia* no. 76/1983.
[XVIII] Spanish Constitutional Curt, *sentencia* no. 31/2010, par. 57.
[XIX] Spanish Constitutional Court, *sentencia* no. 31/2010, par. 58.
[XX] Spanish Constitutional Court, *sentencia* no. 31/2010, par. 3.
[XXI] See Vintró Castells, 2010.
[XXII] Spanish Constitutional Court, *sentencia* no. 31/2010, par. 4.
[XXIII] Spanish Constitutional Court, *sentencia* no. 31/2010, par. 4.
[XXIV] Spanish Constitutional Court, *sentencia* no. 31/2010, par. 6.
[XXV] Spanish Constitutional Court, *sentencia* no. 31/2010, par. 7.
[XXVI] Ibidem.
[XXVII] Spanish Constitutional Court, *sentencia* no. 31/2010, par. 24.
[XXVIII] Spanish Constitutional Court, *sentencia* no. 31/2010, par. 10.
[XXIX] Spanish Constitutional Court, *sentencia* no. 247/2007, available at: http://www.tribunalconstitucional.es.
[XXX] Spanish Constitutional Court, *sentencia* no. 31/2010, par. 16.
[XXXI] See Carboni 2010.
[XXXII] Spanish Constitutional Court, *sentencia* no. 31/2010, pa. 130.
[XXXIII] Spanish Constitutional Court, *sentencia* no. 31/2010, par. 42.
[XXXIV] See also Italian Constitutional Court, *sentenza* no. 365/2007.
[XXXV] Spanish Constitutional Court, *sentencia* no. 31/2010, par. 32.
[XXXVI] See Aparicio Pérez 2010: 3; Barceló i Serramalera 2010: 1.
[XXXVII] See Barceló i Serramalera 2010; Vintró Castells 2010.
[XXXVIII] Vintró Castells 2010:1

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PERSPECTIVES ON FEDERALISM

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Economic Epistemology and Methodological Nationalism: a Federalist Perspective

by

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Abstract

Economics is based on the assumption that the only administrative and juridical relevant framework of both theory and policy is the nation-State.

We claim that such methodological nationalism is detrimental to the capacity to understand the operation of economic relations and to effectively achieve economic policy goals. The high interdependence worldwide of economic relations calls for a multi-layer perspective of both analysis and governance in economics, where the constitutional principles of federalism may play a significant role.

Key-words:

Economic theory, economic policy, methodological nationalism, multi-layer governance, constitutional federalism.

Introduction

Is economics immune from the evils caused by what the sociologist Ulrich Beck (1999) called *methodological nationalism*, meaning that the only juridical framework implicitly or explicitly assumed in social sciences is the *absolute* and *exclusive sovereignty* of the nation-State?

The goal of this short note is to provide some hints to cope with such a question and suggest the need for a collective effort and a wide scientific discussion aiming at a reconsideration of the epistemological and ontological foundations of economic science.

In order to accomplish this task, we first need to address some crucial problems. The first is: why should a juridical and political concept such as *sovereignty* be important in economics? The second: is there any existing intellectual guidance for the reformulation of the epistemological foundations of economics which may allow us to overcome the flaws, if any, brought about by methodological nationalism?

We will deal with the former question in the first section, where the concept of sovereignty in economics will be observed through the lens of methodological nationalism. The following section will be devoted to considering some literature which might be of help in facing the theoretical and normative challenges posed by methodological nationalism, with a particular consideration of constitutional federalism. The third section suggests some epistemological and ontological reconsideration of economics. Section four tackles with the importance and shortcomings of multi-level governance and functional governments. The final section offers some conclusions.

1. Economic Theory, Economic Policy, and Methodological Nationalism

Both economic analysis and economic policy normally assume a unique level of legitimate authority in economic matters: the nation-State.

Those sections of the economic thought which do not assume this explicitly, do so implicitly. Only some minor, marginalized contributions to economic theory abandon this assumption.

Most economic models are (or pretend to be) a-political, in the sense that they are intended to be independent of political and administrative jurisdictions. The

microeconomic foundations of economics are based on the behaviour of individual subjects – both human beings and firms – with their maximization functions, in most cases irrespective of the institutional context where choices are made. The ontological framework of microeconomics is mainly constituted by social atomism, where each individual chooses among alternative consumption patterns according to his own preferences and exogenous constraints. Institutional administrative structures play no role in this process.

As concerns macroeconomics, it was born and finds its epistemological foundations in the attempt to shift the economic system of a nation towards the goals set by its government. At least in a Keynesian perspective, it is therefore methodologically nationalist in principle, as the only sovereign economic powers are assumed to be the national ones. Open macroeconomic models should not be considered outside this logic: even international cooperation games are only an attempt to analyse from the national perspective certain international phenomena characterized by high and increasing interdependence.

Interdependencies among national systems, that is externalities on national choices generated by the behaviour of a foreign individual or national entity, are obviously acknowledged but only aiming at making them as exogenous as possible in both analysis and policy-making.

Unfortunately, this attitude leads to major positive and normative shortcomings, as the very nature of interdependencies can and should be analyzed only by making them endogenous in a wider system of observation and action. The constraints upon single national economic policies should be managed so as to analyse and decide which is the appropriate level and under which conditions a specific economic policy can become effective. Economic policy is therefore the discipline where methodological nationalism most affects the effectiveness of normative economics and where its evils are most evident.

The traditional approach to economic policy based on the use of specific (national) tools to achieve (national) goals is meaningless in the context of enormous interdependence and externalities which characterize today's economic systems and relations. The national authorities of economic policy are incapable of tackling problems whose control lies outside their realm. They are therefore equipped only with ineffective tools to face challenges which imply global strategies.

2. Multi-Level Constitutions and Economic Federalism

The questions are now: a) is there any specific approach to economic theory and policy which can help overcome the flaws we have underlined concerning methodological nationalism; b) has there been any conscious attempt to recognize the negative effects it made to economics? For both questions the answer is: yes, there are.

In politics, a constitutional principle which explicitly tries to overcome the exclusiveness of national sovereignties is federalism. Based on historical experiences such as the USA Philadelphia Convention of 1787, federalism recognizes some guiding constitutional principles for an effective multilevel system of government.

The constitutional principles of federalism have managed to surface in economic thought in two very different ways.

The first is well known and is part of mainstream economics: *fiscal federalism*. Its aim is to establish whether certain budget competences should be attributed to sub-national bodies.

The second is a neglected and even marginalized contribution to economic theory and might be labelled as *international federalism*, according to which some internationally shared public goods, such as peace (conflict resolution), monetary stability, etc should be provided by some supranational legitimate body (as suggested for example by Luigi Einaudi, Lionel Robbins, Robert Triffin). Both challenge the exclusive sovereignty of the nation-State, although in different, separate directions.

These two approaches to the use of constitutional federalism in the realm of economic relations have never communicated with each other.. Although they cannot be accused of methodological nationalism *stricto sensu*, as they both intrinsically aim at overcoming it, they nevertheless face and challenge only one of the two sides on which methodological nationalism is founded.

Why should the logical consequences of fiscal federalism stop at the level of national federations? And why should constitutional federalism claim that the legitimate governing body which can surrender its exclusive sovereignty should only look upwards and not also downwards?

The challenge ahead is to overcome this asymmetrical behaviour and attempt a sort of epistemological reconstruction of economic theory and policy based on some kind of *integral federalism*.

In the perspective of such integral federalism, economics should be founded on concentric levels of choice and on sets of concentric institutions which allow those choices to be made effectively.

. Vito Tanzi (2008) has recently attempted exactly this when suggesting that the models applied to fiscal federalism should be also valid when designing the provision of global, supranational public goods. He has concluded his study on *The Future of Fiscal Federalism* underlining "two large gaps in the fiscal federalism literature: the link of prevailing views on fiscal federalism to historical development; and the de facto on-going, step by step creation of a layer of government, or a power, above that of national governments. We have been spending too much time looking down from the central government's layer. It is time to look up from that layer" (Tanzi 2008: 710).

The literature on collective public goods concerning supra-national collectivities is also relevant in this context: European public goods such as transport and communication infrastructures, research, etc suggest the need to reshape the economic governance of the European Union according to a multi-layer perspective. Some academic articles concerning the provision of global public goods point in the same direction, stressing the need to design at least a double-layer institutional arrangement worldwide were genuine and enforceable global institutions tackle global problems along with national governments.

In other research fields like the literature on multilevel governance, on subsidiarity, on "fiscal competition" (Oates 2001), on "functional overlapping and competing jurisdictions" (Frey and Eichenberger 1999) other relevant suggestions are raised concerning the question of multi-layer economic government.

Nevertheless, unfortunately, no comprehensive attempt to put all this together in a coherent whole has yet been made[I].

3. Economic epistemology: a suggested path

In the bottom-up perspective of the principle of subsidiarity, let us first consider single human beings. Let us further consider a condition where the individual is isolated

from others as Robinson Crusoe was. In such a case, he is called to satisfy most of his needs by himself. This might be time consuming but he has no better alternative.

When Friday comes in, both he and Robinson Crusoe can satisfy more needs than those which each of them could satisfy alone. They can specialize in what they can do best and exchange the products of their respective work. They can even join in some common tasks, such as that of providing some degree of security against dangerous animals.

If the community increases, it is likely that the provision of collective goods will be easier and more efficient, as well as the satisfaction of each individual's needs. Furthermore, they now have a greater market where they can exchange the products of their highly specialized work.

The group can then become bigger and bigger, until the operation of the market and the provision of certain basic collective goods might become difficult to attain. Contracts might become hard to enforce and collective choices might not be unanimously shared. The community must work out and agree on a decision making process which allows collective choices to be taken and institutional arrangements be designed to guarantee the operation of the market. This is where politics comes in.

The birth of nation-States can be considered a further step in this process. Given a framework of potential conflict (peace is the most difficult global public good to provide), the defence of territories and of people requires the maximum effort of the community. Hence the pact whereby the State exchanges citizens' security and other fundamental public goods with military service and taxes.

During the XIX century, the State becomes the only institutional framework where collective public goods are provided. It is exactly at this stage of history, which coincides with the formation of an autonomous status for social sciences, that methodological nationalism is born and grows stronger.

In the first decades since the birth of social science, this was not a "disease" in Beck's terms. It actually helped both the consolidation of the nation-State, providing intellectual legitimacy to its political-cultural consolidation and to the provision of national-collective public goods.

But history has proved that nation-States have been only a step in the evolution of the production of collective public goods, in the satisfaction of shared human needs. Interdependence has grown in economic (as well as political, social, cultural) relations.

Interdependence weakens the capability of monolithic absolute and exclusive sovereign States to achieve the objectives which come out of a national decision making process. Interdependence implies potential conflict and a systematic effort to escape problems of collective action at a supranational level. Hence the attempts for *decentralization* on one side (within States), *coordination* and *governance* on the other (outside and among States).

But the key point is that such attempts represent the highest symbols of economic nationalism, not their overcome. They imply the recognition that the only legitimate powers are nation-States which are mandated by their peoples to allocate parts of their duties to local authorities or to negotiate the best possible arrangements for the sake of alleged national interests at an international level.

This is where the concept of sovereignty comes in and appears in all its importance for economics. As we have previously underlined, this analysis leads to one of the two following scenarios: a) global public goods are underprovided due to collective action problems deriving from a decision-making process based on the veto right; b) they are provided according to the logic of diplomatic negotiations managed with the rule of strength, which is the only enforceable rule when no juridical framework exists. The alternative, within the so-called "cooperative" scenario, is only between the defence of the status quo and the dominance/hegemony of a (political, economic and military) power in international relations.

4. Multi-Level Governance and Functional Governments

An example of this can be observed in the most recent and refined version of the theory of international cooperation: the concept of multilevel economic governance (MLG). MLG is a way to solve the difficult task of making collective choices in a diplomatic, non-enforceable setting.

Negotiation is the key to MLG decision-making. As such, it is subject to the laws of negotiating strength, not to the enforceable rules of a higher sovereign juridical order. Furthermore, decisions in such contexts are quite often made according to the unanimity rule, which certainly allows for the maintenance of Pareto optimality but can hardly be used to make effective decisions[II].

What is needed is to move from a weak Multi-Level-Governance to a system where the decision making process is given by democratic legitimacy and is made under the rule of a constitutional law.

This is where methodological nationalism should be abandoned. Absolute and exclusive national sovereignties imply the intrinsic impossibility to share the responsibility of choices with individuals belonging to a *different* area of national absolute and exclusive sovereignty. True cooperation is therefore impossible, where by *true cooperation* is meant not just a process *attempting* to achieve a collective choice but a constitutionally ruled mechanism *bound to* attain a collective decision.

For this reason the provocative suggestion by Frey and Eichenberger is attractive: it implies that for each function (collective public good) a specific decision-making process should be assigned where all those who are affected by its choices can take part in the decisions.

The problem with this suggestion is that democratic assemblies would become virtually infinite, so as to enormously increase the transaction costs implied in each decision-making process.

Is there any better way to solve this problem, without incurring the risk of such flaws? The difficulty lies in the need to overcome the dichotomy between "structure" and "system" suggested by Bertalanffy (1968)[III]. The *economic policy* question is in fact how to *reconcile* a democratically legitimised decision making process which implies some kind of simple bottom-up multi-layer *institutional structure* with an *economic system* characterized by strong interdependencies among all layers. Furthermore, which competences should be assigned to each level of the multi-layer governing architecture?

At the same time, there is a *theoretical question* requiring the search and definition for new economic categories, trying to substitute those which appear to be too much linked to the context of methodological nationalism from which they sprang . Is the Ricardian theory of comparative advantage of any help in a multi-layer world where no clear-cut *in* and *out* national borders exist? Are the present theories of exchange rates and monetary policy-making sufficient to analyse and manage a highly interdependent world? Is the concept of externality as we know it a still viable economic category if we recognize that most economic phenomena have external effects?[IV] These are some of the points upon which further reflection is needed and a debate should be opened.

Concluding remarks

Intellectual cross-fertilization is often viewed with scepticism by some academics. But economics, as a social science, crucially depends on the institutional framework where economic relations take place and economic agents act. Economics is therefore inherently intertwined (at least) with law, politics, and sociology.

The increasing interdependence of economic facts and acts worldwide makes it even more important to abandon ineffective cultural habits like methodological nationalism - which no longer helps read and change economic relations - and suggests the need to make an effort of creativity to design a more effective system of analysis and policy in economic matters, more coherent with the multi-layer, complex dimension of challenges. Federalism can give an important contribution to this. An effort to overcome the flaws of partial approaches to multi level governance and single-sided federalism may give a fundamental hint for a more coherent relationship between economics and the framework where its forces express themselves.

Multi-Level Governance and, in particular, *Functional Overlapping and Competing Jurisdictions* both provide an interesting base for a more effective approach to the way economic relations should be observed and decisions taken. But they should be coupled with the legitimated and existing structure of institutional public authorities, so that a cost-minimizing decision-making system can be designed and realistically implemented for the provision of concentric collective goods, from the local to the global dimension.

This seems to be not only a major challenge in bridging the gap between the constitutional theory of federations with economic (policy) theory but also the crucial topic to test the capability of economics to escape a trap of radical and increasing incoherence between its positive dimension and *the world as it really is*. This gap risks condemning economics to irrelevance and ineffectiveness.

[I] A very interesting writing is an Appendix on *Institutions, Economics and Politics* in Montani (2008: 227-234) but it is unfortunately in Italian.
[II] Imagine everyday decisions in our lives were taken according to a veto rule!
[III] I here recall that both share the multi-layer nature but a "structure" is characterized by a lack of any bi-univocal relation between the different layers whereas a "system" is a complex set of relationships of interdependence among such layers with one or more common functions.

[IV] I thank the two anonymous referees of this journal for suggesting such questions.

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Why Immigration Policy Should Be a Federal Policy: Considerations on the EU and the US

by

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Abstract

In a union of states such as the EU or the US, should immigration policy be decentralized or should it be a federal policy? Experience and economic logic offer a simple argument against decentralization. Because immigration reforms in one state are felt beyond its borders, other states will respond in kind. Decentralization will, therefore, create coordination problems between states and will reduce their individual and collective ability to manage immigration. In the EU and the US, the existence of a federal policy is a precondition for an effective management of migratory flows

Key-words:

Immigration Policy, Decentralization, Coordination Failures

In the immigration policy debate the contradiction between the long-run interests of societies and the short-run incentives of politicians is striking. This is visible on both sides of the Atlantic. Policy-makers in the EU member states and in the states of the US appear irresistibly attracted to unilateral immigration measures. "Decentralize immigration policy!" seems to be the new mantra. Whatever the reasons that motivate this new trend, succumbing to these temptations would be wrong.

Immigration in the EU is in principle a common policy. According to Article 63a(1) of the Lisbon Treaty, "The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings." The response to the immigration shock caused by the turmoil in the Arab world, however, poorly reflects the spirit of the text[II]. The Council Conclusions on April 12 did not go beyond general statements in support of co-operation. This in a context where member states are reluctant to provide the central authorities the resources for an effective common policy and some leading politicians openly call for unilateral actions and question the wisdom of a single EU policy.

In the US the debate has surprisingly similar elements. The law passed in Arizona in April 2010 required local police to detain suspected illegal immigrants and proposed to make it a state crime not to carry immigration papers. Aside from having an alarming discriminatory nature (President Obama argued that the law risks "to undermine basic notions of *fairness* that we cherish as Americans"[III]), the Arizona reform shifted important responsibilities on immigration matters back to the state level. In July 2010 a federal judge in Phoenix blocked the Arizona law, a decision that has been upheld this week by a Court of Appeals. However, several other US states are considering similar reforms.

State policy-makers in the EU and in the US should ask themselves if unilateral immigration measures are in the long-run interests of the societies they represent. Will the decentralization of immigration policy (that is, the move away from central authorities to state intervention) improve the control over immigration? Experience and simple economic logic offer a clear and negative answer to this question. Because immigration

reforms in one state are felt beyond its borders, other states will respond in kind. Decentralization will, therefore, create coordination problems between states and will reduce their individual and collective ability to manage immigration.

Data on international migration show that migrants (legal or not) choose their destination in response, among other things, to differences in policies in host economies. In their historical account of migratory flows and immigration policy, Professors Hatton and Williamson find that receiving countries paid close attention to each other's policies as migrants were pulled from and pushed toward one country in response to less or more restrictive policies in others. (Hatton and Williamson, 2005). For instance, in the late 19th and early 20th century Australia's open immigration policy decreased flows to Canada, while Argentina saw an influx of migrants as the United States closed its doors. It will not come as a surprise that something that was true over a century ago for loosely interconnected countries is highly magnified at present times within a union of states.

A first well-documented example is provided by recent European history. In January 2004, the European Union incorporated ten new member states from Eastern and Central Europe. Transitional arrangements allowed individual EU states to postpone for a transitional period their complete implementation of the principle of free movement of people inside the Union and to impose temporary restrictions on immigration from the new members. As shown by Boeri and Bruecker (2004), these varying arrangements affected the geographical orientation of migrants from Eastern and Central Europe (Boeri and Bruecker, 2005). Specifically, different unilateral measures resulted in substantial diversion of migration flows from states with tougher rules to states with more open rules.

A second example is provided by the consequences in the US of the passing of the Arizona immigration law. Even though its central provisions had been suspended, in the shadow of legal ambiguity the effects on migratory decisions started to materialize. In November 2010, The Economist reported a study of BBVA Bancomer, a Mexican Bank. Researchers estimated that around 100,000 Hispanics, both legal and illegal, are leaving Arizona for other destinations in response to the adoption of the law.[IV] Some immigrants return to Mexico, many find their way to other states of the US.

The mobility of migrants across different jurisdictions makes immigration policy choices interdependent. This interdependence is stronger for host economies that are closely interconnected, as is the case for the states of the US and the members of the EU.

Specifically, the choice of one state will inevitably affect others through the location decisions of migrants. In this environment, individual states will easily mismanage immigration as unilateral decisions will trigger reactions of other state governments.

In a recent paper (Giordani and Ruta, 2011), we show that the decentralization of immigration policy may lead to what economists refer to as "coordination failures" - a situation where policy choices are driven by beliefs rather than fundamentals and are associated with a lower social welfare. (Giordani and Ruta, 2011). These coordination failures are likely to emerge when state policy-makers are uncertain about the immigration reforms of other states. For instance, fears that other states will be tougher on migrants will trigger an unnecessary escalation in restrictions as governments set up barriers to avoid possible sudden influx of migrants. In brief, properly controlling immigration is a powerful argument for a single policy on this matter in a union of states.

There are many open and difficult questions related to the management of the flows of migrants in receiving economies, but there is something that we know in any case: The end result of decentralization of immigration policy in a union of states, such as the EU or the US, will be an increased inability to address the challenges presented by immigration. This is not in the long-run interest of proponents of unilateral state interventions and - what matters more - of the people they represent.

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[II] The recent influx of migrants has also prompted a debate on the reform of the Schengen Treaty which allows the free mobility of people across signatory states in Europe. For a critical assessment of this proposal, see Tito Boeri, 2011

[III]The speech is available online at the following address: http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform

[IV]The study can be accessed online at the following address: http://www.bbvaresearch.com/KETD/fbin/mult/101025_PresentationsMexico_66_eng_tcm348-234645.pdf

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The returns directive in light of the El Dridi judgment

by

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Abstract

The judgment of the Court of Justice of the EU in the El Dridi case clarifies the scope of application of the Returns Directive, in particular with regard to the difference between criminal detention and pre-return detention and to the general objectives of the EU's immigration policy. The ruling will have far-reaching consequences not only on the Italian criminal and expulsions system, but also on the national legislations of a number of Member States.

Key-words:
Returns directive; El Dridi; irregular migration; detention; human rights; removal.

1. Introduction

The recent judgment of the Court of Justice of the European Union in the El Dridi case (Case C-61/11 PPU, *El Dridi*, 28 April 2011) has come to put an end to some months of judicial and administrative chaos in Italy, during which the application of national criminal provisions related to irregular migration, and in particular of the crime of non-compliance with expulsion orders, was subjected to an unacceptable level of legal uncertainty. Moreover, the judgment may affect all national legal systems providing for detention of irregularly staying third-country nationals merely based on their migration status, since in it the Court has set a balance between national criminal legislation and European immigration policies. Before moving to examine the case, and its potentially very broad consequences, it seems necessary to briefly recall the main elements of directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (hereafter "returns directive"), whose interpretation gave rise to the request for a preliminary ruling in the present case.

The directive provides for a common procedure to return irregularly staying third country nationals to non-EU States (countries of origin, of transit, or other third States willing to accept the immigrants, provided that they consent – art. 3.3), removing them from the territory of the European Union. According to the directive, States must issue a return decision to any irregularly staying third-country national, save in exceptional circumstances (article 6); as a general rule, such decision must include a period for voluntary return of between 7 and 30 days, during which the person is under an obligation to leave the national territory (article 7).[I] If the person concerned does not comply with such obligation, or if (exceptionally) no period for voluntary return is granted, States must take all necessary measures to enforce the decision, including by using coercive measures in order to remove the person (article 8). During the procedure, the person concerned may also be detained, if less coercive measures appear insufficient; articles 15 and 16 provide for a number of guarantees with regard to detention. In particular, article 15 limits its maximum length to 6 months (which may exceptionally be extended to 18) and establishes a number of measures to ensure that detention lasts only until there is a reasonable prospect of removal and that

it may be subjected to judicial review, while article 16 provides that irregular migrants should be kept in specialized detention facilities, and in any case separate from ordinary prisoners. Finally, return decisions may, and in some cases must, be accompanied by a re-entry ban, lasting no longer than 5 years (article 11). The final text of the directive, adopted after long and complex negotiations between Council and Parliament (Acosta 2009), has been strongly criticized by a number of actors, including the UNHCR and many NGOs, which condemned its lack of attention for fundamental rights;[II] on the contrary, in Italy, the directive has been regarded as an instrument aimed at protecting fundamental rights, as the procedure it sets is much more lenient than the national expulsion procedure.

2. Legal framework

Before moving to examine the case, it seems necessary to summarize the national provisions whose application gave rise to the present request for a preliminary ruling.[III] According to the Italian immigration law (law decree 286/98), which has not been amended in order to transpose the directive, the return of irregularly staying third-country nationals is ordered by a decree of the Prefetto (local representative of the Government) and implemented through a decree of the Questore (head of the local police). The latter decree should, as a general rule, order the person to be forcibly removed (article 13 of the immigration law); if forcible removal cannot be immediately carried out, migrants must be detained in special detention facilities (the so-called centers for identification and expulsion, or CIE). If neither forcible removal nor detention are possible (for instance, because time is needed to obtain travel documents for the person, or to identify him/her, and the CIEs are full), the Questore may issue a decree ordering voluntary departure in 5 days. If the person does not comply with such order, he/she commits an offence punishable by detention for up until 4 years, according to article 14 para. 5 *ter*; the maximum sentence increases to 5 years in case of reiteration.[IV] Since December 2010, thus, administrative authorities and Courts have been faced with a returns procedure which clearly does not comply with directive 2008/115, as well as with criminal provisions which allow the interruption of such procedure by imprisoning irregularly staying third-country nationals who do not voluntarily comply with a return decree. While administrative authorities have

made efforts to render the national expulsion procedure compatible with the directive, this was clearly neither lawful nor sufficient;[V] on the other hand, judges questioned the admissibility of the crime of non-compliance with a return decision. According to a number of scholars, such a crime was not compatible with the returns directive, as it deprived it of its *effet utile* with regard to the protection of fundamental rights (Viganò - Masera, 2010; Natale, 2011): according to this view, which many judges also shared,[VI] while the primary objective of the directive was to ensure the removal of third-country nationals irregularly present in the EU, its secondary objective would have been to protect the migrants' fundamental rights, and in particular their personal freedom. Thus, the penalties envisaged by article 14 of the immigration law were considered not to be compatible with the directive, since the offence was punishable by a maximum sentence much longer than that allowed by the directive and whose enforcement did not comply with any of the guarantees of articles 15 and 16 of the directive. Judges sharing this view thus refused to apply article 14, while other judges continued to sentence irregular migrants to detention –a framework of legal uncertainty and judicial chaos to which the present judgment of the EUCJ has come to put an end.

3. The facts of the case

Mr. El Dridi is a third country national whose stay in Italy was irregular, since it violated a decree ordering voluntary departure issued by the Questore of Udine. He was found on the national territory in violation of this order, arrested and sentenced to one year's imprisonment, but he appealed against this decision. The Court of Appeals of Trento thus took into examination, first of all, the decree issued by the Questore, the violation of which formed the basis for the defendant's criminal conviction; in the Court's view the decree was lawful according to both national law and the returns directive. Indeed, while the Court found that the decree could appear to violate the latter, since Mr. El Dridi had been granted a period for voluntary departure of 5 days (instead of 7), the judges underlined that article 7 of the directive also provides for exceptions, and that, in the specific circumstances of the case, a shorter period could be justified given the existence of

a risk of absconding.[VII] Thus, the Court, after coming to the conclusion that the directive has direct effects, decided to request an interpretative judgment on the part of the Court of Justice, since it was in doubt as to the interpretation to be given to articles 15 and 16 of the directive.[VIII] In particular, the Court raised the following question: whether, in the light of the principle of sincere cooperation, the purpose of which is to ensure the attainment of the objectives of the directive, and the principle that the penalty must be proportionate, appropriate and reasonable, these articles preclude the possibility that criminal penalties may be imposed in respect of a breach of an intermediate stage in the administrative return procedure, before that procedure is completed, by having recourse to the most severe administrative measure of constraint which remains available; and the possibility of a sentence of up to four years' imprisonment being imposed in respect of a simple failure to cooperate in the deportation procedure on the part of the person concerned, in particular where the first removal order issued by the administrative authorities has not been complied with.

4. The view expressed by the Advocate General

The reasons at the basis of the Court's judgment may be clarified by an analysis of the view of the Advocate General (View of Advocate General Mazàk, 1st April 2011). The AG firstly addressed the applicability of the directive to the case, and thus the interpretation of its article 2(2)(b):[IX] in his view, this rule only allows for exclusions from the scope of the directive in so far as a return obligation is imposed as a criminal law sanction. In the case of Mr. El Dridi, on the contrary, the obligation to return derived from an administrative decision: his situation therefore fell within the scope of the directive.[X] After comparing the national expulsion procedure with the directive, the Advocate General concluded that, while both envisaged the possibility of the third-country national's non-compliance with a decision ordering voluntary departure, they provided for very different legal consequences: according to the directive, such conduct could result in pre-removal detention, while under Italian legislation it was an offence punishable by criminal detention. In the Advocate General's view, the main question was therefore whether the national criminal provisions could be considered as "necessary measures to enforce the return decision", as such in line

with article 8(1) of the returns directive, or, on the contrary, as measures that could hinder its enforcement: clearly, the answer could not be but that they can delay the returns procedure, hampering its conclusion. In his reasoning, the AG also referred to the position expressed by the Italian Republic in the course of the proceedings, according to which the penalty of criminal detention for the crimes set out in article 14 was conceived as a punishment for non-compliance with an order issued by public authorities, designed to maintain the authority of the public powers: thus, national criminal legislation gave preference to this aim over the directive's objective, that is, the enforcement return decisions. The AG therefore concluded that criminal detention taking place in the course of the expulsion procedure is *per se* incompatible with the directive, as it precludes enforcement of the decision, delaying it for the whole detention period, and thus the achievement of the directive's purpose: the establishment of an effective returns policy.

5. The judgment of the Court

The judgment begins with an analysis of the returns directive, its objectives and its scope of application: according to article 1, its aim is to establish "common standards and procedures" for returning illegally staying third country nationals. The EUCJ then briefly summarizes the expulsions procedure set out in the directive, highlighting that this establishes an order in which the various stages of that procedure should take place: such order corresponds to a gradation, going from the measures which allow the person concerned the most liberty to measures which restrict that liberty the most, namely, detention (para. 41). After recalling the principle of proportionality, according to which detention of a person against whom a deportation or extradition procedure is under way should not continue for an unreasonable length of time,[XI] the Court proceeds to examine the specific questions referred by the Court of Appeals of Trento.

Firstly, after recognizing that the directive has not been transposed into Italian law, as admitted by the Italian Government itself, the EUCJ states that its articles 15 and 16, being unconditional and sufficiently precise, may be relied upon by individuals against the State; thus, the Court very clearly rejects the view according to which these provisions would have no direct effect (Epidendio 2011, Focardi 2011).[XII] Secondly, the Court also dismisses

the argument according to which the case referred would not fall into the scope of application of the directive, given its article 2(2)(b), since in the case of Mr. El Dridi the obligation to return was not a criminal sanction, but resulted from an administrative order (para. 49). Moreover, the judgment adds that "the criminal penalties referred to in that provision do not relate to non-compliance with the period granted for voluntary departure": what seems to emerge from this - partly obscure - statement is that the Court interprets article 2(2)(b) as not allowing States to criminalize the conduct of non-compliance with a return decision, sanctioning it with expulsion as a criminal penalty, and to refer to article 2(2)(b) to exclude such expulsion from the scope of application of the directive.[XIII] The Court then also clearly states that the removal procedure set out by Italian law is incompatible with the returns directive.

After this preliminary analysis, the Court proceeds to examine the core of the problem: the admissibility, under directive 2008/115/EC, of criminalizing non-compliance with a return decision granting a period for voluntary departure. Firstly, the Court takes into examination article 8(4) of the directive, which refers to the use of coercive measures: whenever such measures, which may include forcible removal and deportation, do not lead to effective removal of the persons concerned, "Member States remain free to adopt measures, including criminal law measures," aimed at dissuading them from remaining illegally on their territory (para. 52). However, the Court also recalls that, according to general EU law, States may not apply rules, even criminal law rules, which may jeopardize the achievement of the objectives pursued by the directive, depriving it of its effectiveness. Thus, the Court seems to search for a balance between the State's competence with regard to criminal law matters, including in order to deter illegally staying third country nationals whose expulsion is impossible to achieve, and the need to ensure the *effet utile* of the directive: the conclusion is that States may not detain irregularly staying third-country nationals who do not comply with a decision ordering voluntary departure, but they must "pursue their efforts to enforce the return decision". Indeed, in the Court's view, a custodial penalty "risks jeopardizing the attainment of the objective pursued by that directive, namely, the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals," as it could frustrate the application of measures aimed at enforcing the return decision, by delaying it (para. 59). The Court then expressly recalls national judges to their duty to refuse to apply national legislation contrary to the results of the directive, including article

14 para. 5 ter, and to take due account of the principle of retroactive application of the more lenient penalty, which forms part of the constitutional traditions common to the Member States.[XIV]

It seems particularly useful to compare these last paragraphs of the judgment with the national debate which preceded its adoption. Indeed, the argument according to which article 14 para. 5 *ter* is incompatible with the directive had been originally based on the need to ensure its effectiveness with regard to its (assumed) "secondary" objective, that is, the protection of fundamental rights of irregularly staying third country nationals, first and foremost their personal freedom. The Luxembourg judges, on the contrary, have not considered the question from the point of view of fundamental rights – an aspect which is merely touched upon by the judgment, – but have come to the conclusion that criminal detention inflicted during the return procedure jeopardizes the attainment of the "principal" - and sole expressly recognized - objective pursued by the directive, as it delays the enforcement of the return decision and thus renders the expulsion procedure less effective.

The judgment of the Court is very clear in establishing what States may and may not do: as expressly stated in paragraph 58, once a return decision has been issued, States must pursue their efforts to enforce it. While States are allowed to adopt criminal law provisions aimed at dissuading those third-country nationals against whom coercive measures were unsuccessful from remaining illegally on their territory,[XV] they cannot punish with criminal detention anyone against whom the return procedure is still ongoing; once an irregular immigrant is found, a return decision must be issued, and its enforcement must be pursued with all reasonable efforts. The Court thus clearly excludes the admissibility of criminal provisions sanctioning with imprisonment irregular migrants who can, and therefore should, be returned: a conclusion which may have a very strong impact on national criminal legislations of EU Member States.

6. Consequences of the judgment

With regard to the Italian legal system, the first consequence of the decision is that persons who are currently under trial for the crime that has been declared incompatible with the

directive (as well as for the crime set out in article 14 para. 5 *quater*, which is also inspired by the same logic) will have to be acquitted: indeed, the Supreme Court has already adopted the first few decisions in this sense.[XVI] Secondly, persons who are currently detained for these crimes will have to be immediately released, and the judgments which convicted them will need to be withdrawn.[XVII]

In addition to these "direct" effects, the judgment also bears further consequences for the national system. Indeed, the Court has clearly stated (para. 45 and 50) that the Italian expulsion procedure does not comply with the directive, which has not been transposed into national law: consequently, all expulsion decrees issued under articles 13 and 14 of the Italian immigration law are to be deemed unlawful under EU law.[XVIII] It therefore seems that, at the moment, third-country nationals irregularly present on the national territory may not be lawfully removed following the administrative expulsion procedure, as any administrative decision aimed at their return and removal would violate the returns directive: a consequence of the inaction, on the part of the Italian Government, in transposing and implementing the directive (Miraglia 2011). Moreover, as stated by the Consiglio di Stato, the judgment also bears consequences for the regularization procedure for irregularly staying third-country nationals who work as domestic help, which was launched by law 102/2009: indeed, according to some interpretations, the law would have hindered regularization of foreigners who had been convicted of the crime provided for by article 14, para. 5 *quater*. Since this provision has been declared inconsistent with EU law all employers whose (irregularly staying foreign) domestic employees were denied regularization may request re-examination of their claim.[XIX]

The El Dridi judgment seems, however, to bear further consequences for national criminal provisions which criminalize irregular entry *per se*, providing for a custodial sentence:[XX] indeed, such provisions frustrate the removal procedure, delaying the person's return, as they take place either *after* issuance of a return decision (interrupting the return procedure) or *instead* of such issuance (delaying the opening of the procedure itself). It thus seems that all Member States criminalizing, and sanctioning with a custodial sentence, illegal immigration, are called to amend their national legislation in order to ensure full implementation of the directive: the judgment of the Court therefore may have very far-reaching consequences.[XXI]

With regard to the Italian situation, an additional comment seems to be necessary: in the national immigration law, article 10 *bis* (introduced in 2009) criminalizes illegal entry or stay, subjecting it to a criminal fine and providing for a special procedure for its trial, which is usually to end with suspension of the fine and criminal expulsion. The crime has been introduced as a way to simplify the return procedure, at the same time ensuring – in the Government's view – its compatibility with directive 2008/115: indeed, the crime was intended to allow for immediate expulsion of irregular migrants without directly breaching the directive, as in these cases expulsion is a criminal sanction and thus may be excluded from the directive's scope of application according to article 2(2)(b).[XXII] This provision, however, seems, again, to run counter the spirit of the directive and to deprive it of its effectiveness: while the directive aims at establishing common procedures for the repatriation of irregularly staying third-country nationals, Italian legislation establishes a completely different expulsion procedure, which is only considered to be criminal in order to exclude it from the scope of application of the directive. Such an interpretation is clearly not allowed under the principle of sincere cooperation; an indication in this sense comes directly from the judgment of the Court in the case under consideration, where, referring to article 2(2)(b), the Court states that "the criminal penalties referred to in that provision do not relate to non-compliance with the period granted for voluntary departure."[XXIII] It seems that the same conclusion could be reached with regard to penalties imposed directly for illegally staying on the national territory: such a conduct should, according to article 6, give rise to the issuance of a return decision, opening the repatriation procedure described in the directive. Criminalizing irregular entry and stay in order to punish it with criminal expulsion, eluding the application of the directive, renders it totally ineffective, as the expulsion procedure applied in Italy does not comply with the "common standards and procedures" set out in the directive, thus depriving it of its harmonizing effect (Viganò – Masera 2010).[XXIV]

It therefore seems that the judgment of the Court in the El Dridi case has the potential to affect the national legislation of a high number of Member States, in particular with regard to their criminal legislation: if the Court confirms this interpretation of its judgment in its future decisions, criminalizing irregular immigration will no longer be an option in the national immigration policies of EU Member States.

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I As stated in the Preamble, recital 10, the directive is inspired by the principle of preference for voluntary return, which was already included in the *Council of Europe's Twenty Guidelines on Forced Return*, adopted in September 2005 and available at www.coe.int/t/dg3/migration/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf

II See, for instance, the Position adopted by the UNHCR on the 16th of June 2008. http://www.unhcr.org/refworld/pdfid/4856322c2.pdf. ECRE, *Information Note on the directive 2008/115/EC*. www.ecre.org/files/ECRE_Information_Note_Returns_directive_January_2009.pdf. Save the Children, *Letter to the Members of the European Parliament* of 11 June 2008, available online at http://www.savethechildren.net/separated_children/publications/reports/Letter_to_MEP_on_Returns_directive-1.pdf.

III As well as to the other requests which were submitted to the Court of Justice of the European Union in the short period since the deadline to transpose the returns directive expired (on the 24th of December 2010): see Tribunale di Ragusa, 9 February 2011, Mohamed Mrad, case C-60/11, OJ OJ C 113, 09.04.2011, p.8; Tribunale di Ivrea, 4 February 2011, Lucky Emegor, case C-50/11, OJ C 113, 09.04.2011, p.7; Tribunale Ordinario Di Milano, 31 January 2011, Assane Samb, Case C-43/11, OJ C 113, 09.04.2011, p.7; Tribunale di Bergamo, 28 February 2011, Survival Godwin, Case C-94/11 (unpublished); Tribunale di Rovereto, 11 February 2011, John Austine, Case C-63/11, OJ C 120, 16.04.2011, p.5; Tribunale di Santa Maria Capua Vetere, 7 March 2011, Yeboah Kwadwo, Case C-120/11; Corte Suprema di Cassazione, 21 March 2011, Demba Ngagne, Case C-140/11.

IV In practice, however, immediate forcible removal is hardly ever possible: in most cases, migrants are firstly detained in the CIE (so as to allow time to organize their expulsion) or simply notified an order for voluntary departure – as happened to Mr. El Dridi.

V See Ministero dell'Interno, Dipartimento della Pubblica sicurezza, Circolare 17 dicembre 2010. 2011, *Guida al diritto* 5, pp. 20-23. On the principle according to which States must remedy the incompatibility of national legislation with EU law by means of national provisions of a binding nature having the same legal force as those which must be amended, and the insufficiency of implementing EU legislation through mere administrative practices, see the jurisprudence of the EUCJ (i.a., case 168/85, *Commission v. Italy*, 15 October 1986; case 334/94, *Commission v. France*, 7 March 1996).

VI See for instance Court of Cassation, decision n. 11050/2011, 18 March 2011 (reference for a preliminary ruling to the Court of Justice); Procura della Repubblica presso il Tribunale di Firenze, Document of 18 January 2011; Procura della Repubblica presso il Tribunale di Milano, Guidelines of 11 March 2011. All documents available online, at http://www.penalecontemporaneo.it/materia/3-legislazione_penale_speciale/41-stranieri/

VII The decision of the Court on this point seems, however, very questionable: according to art. 3(7) of the directive, a risk of absconding implies "the existence of reasons in an individual case which are based on objective criteria defined by law." Italian law, on the contrary, does not define such objective criteria: a decision on the existence of a risk of absconding could thus not be taken in accordance with the directive.

VIII See Corte d'Appello di Trento, Ordinanza nel procedimento a carico di Ei Dridi Hassen, 2 February 2011, at http://www.penalecontemporaneo.it/upload/Appello%20Trento%20-%20Ordinanza%20Corte%20Giustizia%20UE.pdf

IX Article 2(2)(b) allows States not to apply the directive to third-country nationals who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures. In the national debate, some suggested that this rule implied that the directive could have no impact over criminal law: see Procuratore Generale di Torino, *Ricorso per Cassazione avverso la sentenza del Tribunale di Torino del 5 gennaio 2011*, filed on 4 February 2011 and available online, at http://www.penalecontemporaneo.it/upload/direttiva%20rimpatri%20ricorso%20maddalena.pdf

X The AG also added that a Member State which has not adopted the provisions transposing a directive cannot rely on the application of a right deriving from it, such as the right to restrict the scope *ratione personae* of the directive, as otherwise the State would be able to benefit from rights deriving from the directive without fulfilling its obligations to transpose it: see para. 28 of the view.

XI See paragraph 43 of the decision: the Court also makes reference to the jurisprudence of the European Court of Human Rights, and in particular to its judgment in the case *Saadi* v *United Kingdom*, 29 January 2008.

[xii] See the reference to the Constitutional Court by Tribunale di Busto Arsizio, 21 January 2011. *Gazzetta Ufficiale della Repubblica Italiana, I Serie Speciale*, n. 19, 4 May 2011, p. 37

[xiii] A conclusion which may be used to call into question the compatibility of the Italian legislation criminalizing illegal immigration and sanctioning it with immediate expulsion. For an in-depth examination of this issue, see below, § 6.

[xiv] And, we may add, which is expressly recognized by article 49(1) of the Charter of Fundamental Rights of the European Union. Mention of this principle is particularly relevant, as its applicability to cases such as the present one had been questioned by national judges, and given its interpretation by the national Court of Cassation: see for instance its judgment in Grand Chamber n. 2451, 27 September 2007, *Magera* (the Court ruled that article 14, 5 *ter*, was still applicable to Romanian citizens after the enlargement, if they had violated the decree ordering voluntary departure before becoming EU citizens).

[xv] This statement seems to allow to criminalize violation of a re-entry ban (issued in accordance with article 11 of the directive) on the part of a third-country national who was effectively expelled: in this case, it seems, the directive would no longer apply. See for instance article 13, para. 13 and 13 bis, of the Italian immigration law.

[xvi] See Corte di Cassazione, Sez. I penale. Notizie di decisione. http://www.penalecontemporaneo.it/upload/Informazione%20Cassazione%20sentenza%20UE.pdf

[xvii] See i.a. Tribunale di Milano, 29 April 2011, at http://www.penalecontemporaneo.it/upload/673%20Milano.pdf. Also see the position adopted by the Procuratore generale presso la Corte di Cassazione on the 2nd May 2011, in which the Prosecutor invited all national prosecutors to file requests to obtain withdrawal of judgments convicting detainees for the crimes which have been declared incompatible with the returns directive, available in www.penalecontemporaneo.it.

[xviii] See, already before the adoption of the present judgment, Giudice di Pace di Milano, 26 April 2011, available at http://www.asgi.it/public/parser_download/save/giudice.di.pace.di.milano.sentenza.n.29521.2011.pdf; Giudice di Pace di Cremona, 25 March 2011, in http://stranieriinitalia.it/briguglio/immigrazione-e-asilo/2011/aprile/gdp-cremona-rimpatri.pdf; Giudice di Pace di Napoli, 11 April 2011, in www.asgi.it.

[xix] See Consiglio di Stato, Adunanza Plenaria, 10 May 2011, n. 7, Charaf, at http://www.penalecontemporaneo.it/. Also see the *Circolari* (administrative memoranda) issued by the Ministry for Home Affairs: *Circolare* n. 3958 of 24 May 2011; n. 4027 of 26 May 2011; and n. 17102 of 23 June 2011, all available at http://www.meltingpot.org/. On the judgment of the Consiglio di Stato see Caruso C. (2011).

[xx] See for instance Articles L. 621-1 and L-621-2 of the French immigration law (Code de l'entrée et du séjour des étrangers et du droit d'asile), punishing illegal immigration by detention and a fine; § 95 of the German immigration law (Aufenthaltsgesetz), punishing illegal immigration by detention or a fine.

[xxi] See in particular Cour d'Appel de Douai, *Ordonnance*, 6 May 2011; Cour d'Appel de Toulouse, *Ordonnance*, 9 May 2011; Cour d'Appel Nimes, *Ordonnance*, 6 May 2011; all ordering immediate release of third-country nationals irregularly present in France who had been arrested for the crime of irregular entry. Judgments available in http://www.actuel-avocat.fr/droit-justice-cabinet/index.html. Also see the order issued by the Justice Minister, contesting this interpretation: *Circulaire*, 12 May 2011, at http://gisti.org/IMG/pdf/circ_2011-05-12.pdf.

[xxii] This speech of the Minister, On. Roberto Maroni, is available at http://www.camera.it/470?stenog=/_dati/leg16/lavori/stenbic/30/2008/1015&pagina=s020#Maroni%20Roberto%204%202.

[xxiii] See para. 49 of the judgment.

[xxiv] On the question of the compatibility of article 10 *bis* of the Immigration law with the returns directive, see Giudice di Pace di Torino, 22 February 2011 (ruling that the crime does not comply with the directive as it is punishable even before the irregular migrant has been given a term for voluntary return). Also see the reference for a preliminary ruling from the Giudice di pace di Mestre lodged on 24 March 2011, Criminal proceedings against Asad Abdallah, Case C-144/11.

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