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CENTRO STUDI SUL FEDERALISMO
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APPEAL TO EUROPEAN LEADERS

For the euro and the European stability and development

Perspectives on Federalism, Vol. 3, issue 3, 2011

APPEAL TO EUROPEAN LEADERS

For the euro and the European stability and development

The international economic and financial crisis and the problem of European sovereign debt is seriously undermining the foundations of the Eurozone: the European Union could disintegrate.

The decision-makers of the Union and its Member States are being called upon to show fortitude, courage and vision by immediately putting measures in place able to stave off the hugely serious worldwide risks that the credibility crisis in the Eurozone can engender.

Only by combining rigour with development, the present urgency with future opportunities, will it be possible to provide a coordinated and credible response to the crisis.

It is necessary for European leaders to be able to give a concrete, factual response to the expectations of the markets and, above all, to the fears and hopes of millions of European citizens.

This can only happen if the members of the European Council work as one in concert at the meeting of 9 December in order to take three coordinated and unequivocally announced steps:

- keeping control over the public finances of the Member States in the Eurozone

- a credible Europe-wide action for stabilising the public debt of Member States in the Eurozone

- the launch of a European plan for sustainable development.

A package of measures needs to be defined for strengthening - overseen by the European Commission - the budgetary discipline of Member States by means of binding measures in terms of control, sanctions and constitutionalisation of the commitments undertaken. This must come with the necessary internal reforms, particularly in those Member States where the burden of public debt is highest.

It is the guarantee of national discipline that can and must pave the way to a European response to the problem of debt. This should take the form of stability bonds and a reinforcing of the EFSF, including its capability for rapidly funding on the market. The European Central Bank's mandate allows it to take the necessary steps to ensure the liquidity indispensable for the financial system.

But it is essential that, on 9 December, there is also announced the launch of a "European plan for sustainable development", to be implemented as of 2012. "To the Member States, rigour; to the Union, development". Support must given to the position of the European Commission and the European Parliament for a budget of the European Union funded by independent own resources instead of national ones, which could be the basis for an investment plan focused on infrastructures, research and common goods, financed by project bonds.

To consolidate the Eurozone's ability to deal with future crises - and to benefit from the growth opportunities in a changing world - it will be necessary to reform the Treaties, also aiming to the final objective of a European federal financial plan. However, the EU leaders

and the Member States of the Eurozone can begin straight away by acting as a "**Provisional Government of the European economy**".

Only if we are able to build a bridge between the present and the future will it be possible to overcome the limitations of our project of unity, which still continues to be a formidable and irreplaceable achievement for the whole of Europe, and which has ensured peace, stability and growth. A European Union able to rise to the challenge of the crisis requires an immediate show of **leadership and vision**.

Turin, 1 December 2011

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We're one, but we're not the same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU

by

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Abstract

The aim of this article is to analyse one of the main features of asymmetry in the EU legal order: enhanced cooperation. After the entry into force of the Lisbon Treaty, two enhanced cooperation schemes (on divorce and patent) have already seen the light of the day. The paper first focuses on the evolution of the rules on "closer cooperation"/"enhanced cooperation" from the Treaty of Amsterdam onwards, then it analyses the first two cases. Enhanced cooperation is a unique test to understand how the EU manages to balance unity and asymmetry, thus an analysis of the rules and the relevant practice is very useful to this extent. The last section of the paper compares asymmetric integration at the EU and the WTO level, in order to understand how different legal orders deal with sub-unions and what degree of asymmetry can a system tolerate.

Key-words

Enhanced Cooperation, Asymmetry, Lisbon Treaty, Preferential Trade Agreements

1. Introduction - Asymmetry: rule or exception?

Over the last decades, an impressive number of scholars have investigated the issue of the nature of the European Union legal order (Weiler, 1991; Amato *et al.* (eds.), 2007). Some scholars think that a "constitutionalisation" process is ongoing, although -in the aftermath of the rejection of the Consitutional Treaty in the French and Dutch referenda- the approval of the Lisbon Treaty, which is an evolution of the former project, has essentially deprived it of some of its constitutional symbols (Ziller, 2007). Some of them have even tried to compare the EU with federalising processes at the national level, highlighting the commonalities among the systems (Martinico, 2011).

The aim of this article is to analyse the first cases of enhanced cooperation in the EU. Asymmetric integration in the EU legal order has largely been investigated (Curtin, 1993) and the so-called *"multi-speed Europe"* is one of its main features. This issue is of particular interest nowadays, due to the various asymmetric solutions proposed to face the current Eurozone crisis. The first two enhanced cooperation schemes approved by the European Council (on divorce[I] and patent[II]) are undoubtedly unique experiments that help us understand whether asymmetry is sustainable at the EU level and whether it is a threat or an opportunity for the evolution of the EU legal order.

All evolutions of the EU legal order and all treaty reforms have always preserved, as a cornerstone of the entire integration process, the principle of diversity, as is also affirmed in official documents. In fact, the preamble of the Charter of Nice reads: *"The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local level (...)"*.

The concept of diversity traditionally concerns the protection of national identities and cultures from the threats they may suffer from the progressive loss of sovereignty. However, a general attitude of the European Union, as a compound legal order[III], is to deal with differences and asymmetries and preserve them.

Asymmetry is a fundamental feature of most compound legal orders, since it applies to many of them either *de facto* (political or economic differences) or *de jure* (constitutional differences) (Palermo, 2007, p. 149). To this extent, the European Union

legal order and its evolution do not differ from most federalising processes (Carrozza, 2005, p. 259) when dealing with the difficult balance between unity and asymmetry. Indeed, the features of asymmetry in the EU legal order are many and multifaceted: enlargement (with accession to the EU by member states with heterogeneous constitutional identities and traditions); the dynamic of the accession treaties (transition periods, temporary derogations etc.); the opt-out provisions from some institutional arrangements that do not apply to all EU member states (i. e. EMU, Schengen Area) as well as the opt-in mechanisms[IV]; the possibility for some but not all member states to be authorised to agree on enhanced cooperation among them in pursuit of some policy goals. The task of this paper is to investigate how the first cases of enhanced cooperation work and what role they play in the asymmetric EU legal order.

Enhanced cooperation can be briefly defined as the procedure by which some member states may integrate -under certain conditions- their policies within the EU without all the other members necessarily being involved, at least at the first stage[V]. Its rationale is that members wishing to make steps towards integration should not be blocked by some countries' veto. However, enhanced cooperation was designed as a tool for future integration at the general EU level, thus its regulatory scheme provides guarantees for members which are not involved and gives the EU political institutions (mainly the Commission and the Parliament) a crucial role in the approval of those schemes.

The structure of this paper is as follows: Section 2 is devoted to an analysis of the historical evolution of the rules on enhanced cooperation; Section 3 examines the provisions introduced by the Lisbon Treaty; Section 4 deals with the first two cases of enhanced cooperation (on Divorce and Unitary Patent); Section 5 analyses the pros and cons of enhanced cooperation as regards the difficult balance between unity and asymmetry in the European Union. In order to do this, it offers a comparison between the different approaches the EU and the World Trade Organization to asymmetric integration. The WTO is a useful comparator to understand how peculiar the dynamic of asymmetry is at the EU level, compared to that of international organisations. At the end of the section, some conclusive remarks will be provided.

2. From "closer cooperation" to "enhanced cooperation"

At the beginning of the integration process, in the 1950s, the idea was that all members were to be considered as equal and that they were to jointly take all the necessary steps towards deeper integration.

The progressive enlargement of the EU's boundaries, the accession of countries with different economic and institutional backgrounds from the original group and the increase of *de facto* asymmetries led the EU institutions to think about a new institutional balance between asymmetry and unity, without calling into question all the achievements reached so far by the integration process. Moreover, some challenges were not common to all EU member states (i. e. the Euro, the Schengen Area etc.), thus *ad hoc* institutional frameworks were arranged in order to allow a group of member states with the political will to foster integration to bypass the veto of unwilling countries. Bribosia (2007, p. 624) argues that the idea of a general mechanism for asymmetric integration on specific policy areas emerged after the approval of the Treaty of Maastricht[VI], because at that point it was clear that institutional adjustments were needed in order to avoid disaggregation and strike the balance between member states willing to take steps towards further integration and others that were more cautious.

The Treaty of Amsterdam (entered into force in 1999) first contained general rules on the possible authorisation of the "closer cooperation" of some member states. To this extent, the general provisions included in the TEU (Arts. 43 - 45 of the former TEU), plus specific rules on the first pillar (Community law) could be found in the ECT. The TEU itself also regulated cases of closer cooperation in the fields covered by the third pillar (mostly Criminal law). Such rules could be undoubtedly defined as strict (Ehlermann, 1998, p. 269): closer cooperation was considered a last resort option and had to involve the majority of the member states, could not be in contrast with the *acquis communautaire* or measures adopted, could not "affect the competences, rights, obligations, and interests of those member states which do not participate therein" (Art. 43(1) TEU, before the entry into force of the Treaty of Nice) and had to be open to all other member states. Moreover, further specific rules limited the concrete application of the closer cooperation mechanism. Indeed, as in the case of the first pillar, closer cooperation could not be established in

policy areas which fell within the EC exclusive competence. Furthermore, some other restrictions were applied (Art. 11 ECT, before amendment by the Treaty of Nice).

The Commission had to launch the procedure following a request by the majority of member states and the European Parliament had to be consulted. Authorisation had to be granted by the Council, acting by qualified majority voting (QMV), but any member of the Council could oppose it for important reasons of national policy. In that case, the Council, again by QMV, could "request that the matter be referred to the Council, meeting in the composition of the Heads of State or Government, for decision by unanimity" (Art. 11 (2) ECT, before amendment by the Treaty of Nice). Probably, such a complicated mechanism is the main reason why the closer cooperation provisions set out by the Treaty of Amsterdam never applied. However, this is how the evolution of the rules started and the current discipline is strongly influenced by the original one in its very nature. The idea that closer/enhanced cooperation schemes are only "last resorts" is the most emblematic factor to this extent.

The provisions introduced by the Treaty of Amsterdam were renegotiated as part of the Treaty of Nice. On that occasion, "closer cooperation" was renamed "enhanced cooperation". Significant changes in the procedures were made: a single member state was no longer able to block the procedures, rules on enhanced cooperation in the field of foreign policy were introduced, the European Parliament was given the power of assent (co-decision procedure), the minimum threshold to launch enhanced cooperation was lowered from the majority to the fixed number of eight member states. There was an appreciable modification also in the substantive conditions to be met for enhanced cooperation proposals to be approved. The *acquis communautaire* and other EU measures had to be respected (Art. 43(c) TEU) rather than not be affected, and this clearly was not just a slight terminological modification (Rossi, 2003, p. 47; Craig, 2010, p. 439).

Even after the entry into force of the Treaty of Nice no enhanced cooperation project was approved[VII]. There was only one proposal on the choice of the law applicable to divorces of international couples, but it sat on the JHA Commissioner's desk for some time and then, as it will be shown *infra*, the process followed the new rules introduced by the Lisbon Treaty. Nonetheless, the EC treaty provisions on the authorisation of member states to join enhanced cooperation were effectively used (see the authorisation of the UK

and Ireland to join immigration, asylum or civil law measures already adopted) (Peers, 2010, p. 343).

3. Enhanced cooperation rules in the Treaty of Lisbon

The new discipline on enhanced cooperation consists of a single Article of the TEU (Art. 20) and a special Title in the Treaty on the Functioning of the European Union (Arts. 326 - 335 TFEU). The regulatory scheme for the establishment of enhanced cooperation is significantly different from the one that was recalled earlier in this paper. The very nature of the discipline is preserved, since acts adopted under the framework of an enhanced cooperation scheme are binding only for the participants. Most importantly, the TFEU -generally speaking- sets out uniform rules for the establishment of enhanced cooperation in all sectors that do not fall within the EU's exclusive competence[VIII]. This is because all member states agreed on a complete transfer of sovereignty in those matters. Therefore, allowing a group of member states to move further ahead than the EU could be detrimental for the unity of the system.

The discipline sets out rules regarding the conditions to be met when some of the member states wish to integrate in particular policy areas. Some of them relate to the goals that enhanced cooperation schemes should necessarily pursue. Art. 20, Para. 1, TEU, reads: "(...) Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process (...)". This is of fundamental importance because it reveals the essence of the regulatory framework for enhanced cooperation: it was clearly created as a means to foster European integration first among those member states whishing to deepen political integration, leaving the door open to other members to join them at a later stage. Other rules were drawn up in order to provide some caveats to the member states embarking on a new enhanced cooperation scheme: enhanced cooperation *"shall comply with the Treaties and Union law"* (Art. 326, para. 1 TFEU), *"shall not undermine the internal market or economic, social and territorial cohesion"* nor *"shall* [it] *(...) constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them"* (Art. 326, Para. 2). Enhanced cooperation should not be used as a means to harm members which have decided not to join it[IX].

The pivotal provision in the architecture of enhanced cooperation is Art. 328 TFEU, whereby legislators have provided strong guarantees in order to ensure the unity and the stability of the EU legal system as a whole. First of all, it is clearly acknowledged that it should be open to all member states able to prove that they have met the requirements set up in the authorising decision. Moreover, enhanced cooperation should leave the door open to third parties also at a later stage, provided that they have met all the conditions imposed by the Treaties and by the participating members in enhanced cooperation[X]. However, without any experience in this area, we do not know exactly how it will work.

Arts. 329 TFEU and ff. clarify the procedure to be followed in order to establish enhanced cooperation among at least nine member states[XI]. Those national governments whishing to engage in enhanced cooperation in any field except those falling under the exclusive competence of the Union and the CFSP, need the Commission to back their proposal. Indeed, they have to submit a request to the Commission, clarifying the goals they aim to achieve, and the Commission can decide whether to submit a proposal to the Council or reject the request issued by the member states, motivating its decision.

It is particularly worth examining the wording of Art. 329, Para. 1 TFEU. The first subparagraph reads: *"The Commission may submit a proposal to the Council to that effect"*. The Commission "may" decide to back the request of nine or more member states to foster their integration through enhanced cooperation, but the Treaty does not oblige the Commission, not even under certain circumstances, to submit a proposal to the Council (Craig, 2010, p. 441). This provision is of crucial importance, since it was drawn up to safeguard the unity of the system and avoid the risk of a completely fragmented European Union. Art. 329, Para. 1, TFEU goes on to affirm that after the Commission has submitted a proposal to the Council, the latter has the power to authorise proceeding with it by qualified majority voting (QMV), after obtaining the consent of the European Parliament. It is crucial to highlight that under the new rules set out in the Lisbon Treaty, the European Parliament has the power to give its consent on all enhanced cooperation proposals, except those in the field of foreign policy. Again, this can be seen as evidence of the concerns for the unity of the EU political institution system. The extension of the co-decision procedure to all enhanced cooperation schemes strengthens the powers of the EU Parliament and potentially gives it the role of co-protagonist in the evolution of the EU system, if the

renewed regulatory scheme is considered by the member states to be the powerful instrument that it undoubtedly is.

Transparency plays an important role in the architecture of the norms that are described here. Art. 330 TFEU authorises all members of the Council to participate in the deliberations on enhanced cooperation, irrespective of whether or not they are part of it. However, they cannot vote and they do not have to be counted in for decisions.

Along with the principle of transparency, the principle of openness is another fundamental pillar of the whole regulatory framework for enhanced cooperation. Art. 331 TFEU sets the conditions for third parties to subsequently join pre-existing enhanced cooperation schemes. The norm under analysis here is of fundamental importance, since the decision regarding the admission of other members is up to the Commission and not to the original members of the enhanced cooperation scheme. If the Commission believes that the applicant member does not fulfil the conditions *"(...) it shall indicate the arrangements to be adopted to fulfil those conditions and shall set a deadline for re-examining the request"* (Art. 331, Para. 1 TFEU). In the event of unsuccessful re-examination, the member state can even "appeal" to the Council, which will then be in charge of the final decision. I will return to this issue later on in this paper, but it is worth stressing how important this safeguard clause is for the unity of the entire EU legal system. The insight not to leave the decision on later accessions to the original group of member states, which decided to establish enhanced cooperation, is the key to governing asymmetry properly at the EU level and to avoiding a situation whereby a group of states decides to move too fast in a multi-speed Europe.

Art. 333 TFEU allows members of enhanced cooperation schemes to unanimously agree to modify the decision-making processes, except for measures having military or defence implications. Indeed, the Council[XII] may decide that in cases where the Treaties would normally require unanimity, decisions could be adopted by QMV instead. Moreover, the Council can also decide as well to move from special to ordinary legislative procedure if it deems appropriate.

The last provision of the Title of the TFEU devoted to enhanced cooperation provides another "assurance" for the unity of the system. The Treaty refers to the Commission and the Council as the institutions with the responsibility to ensure that

activities undertaken in the context of enhanced cooperation are not in contrast with the policies and the objectives of the EU.

Now it is worth to briefly summarising the main innovations introduced by the Lisbon Treaty: the threshold of member states required to table the proposal of enhanced cooperation was increased to nine; there are no longer different rules for third pillar issues since they now share the same discipline as the first pillar, the European Parliament has the power of assent over all authorisations for enhanced cooperation (except when relating to foreign policy); in the event the Commission does not approve a member state's application for a pre-existing enhanced cooperation, the applicant member state can "appeal" to the Council to obtain the authorization to join the latter. Furthermore - and this is maybe the most interesting part - states participating in enhanced cooperation can change the decision-making rules of the measures in the areas that regard them (Art. 333 TFEU).

Craig (2010) writes: *"The message from the Lisbon Treaty is very much that enhanced cooperation should be used where action by the EU as a whole has not proven possible, coupled with the hope that it will then be a catalyst and that other Member States will subscribe to such initiatives"*. This undoubtedly reflects the framers' spirit, and their hope to use enhanced cooperation as a twofold mechanism. On the one hand -at least potentially- the mitigation of the rules on enhanced cooperation can help overcome the political *impasse* the integration process is facing. On the other hand, its last-resort nature and the safeguard clauses described above apparently represent a fair way to strike a balance between unity and asymmetry in the EU. In the next section, the first two cases of enhanced cooperation (on the choice of the law applicable to divorces of international couples and on unitary patent) will be analysed.

4. The first cases of enhanced cooperation: Divorce and Unitary Patent

It is now worth to analysing the first two cases of enhanced cooperation. Indeed, a closer look at the procedures for the approval of the first two schemes and the identity of the member states involved can help interpret the very role of enhanced cooperation in the EU institutional architecture.

4.1 Divorce

The issue of the choice of the law applicable in divorce cases is becoming more and more important since the number of international couples is increasing[XIII] and, before the approval of the enhanced cooperation scheme described herein, there were no rules at the EU level. Yet steps towards the clarification of the issue of *jurisdiction* in cases of the divorce of international couples were taken[XIV], although the possibility to choose the applicable law was not taken into account[XV]. This increased the likelihood of a dramatic "rush to the courts" whereby divorcing spouses tried to file their complaints before tribunals of country A rather than country B because of more favourable legislation.

In 2006 the Commission proposed a regulation on the issue of the conflict of laws and jurisdiction rules in divorce cases. The UK and Ireland opted out and Denmark did not opt in (Denmark had a complete opt-out from Title IV issues - "immigration, asylum and civil judicial cooperation"). The Council officially acknowledged that it was impossible to reach an agreement on the subject within a reasonable period of time[XVI]. Nevertheless, a group of member states decided to boost legal integration on such issues, at least among a limited number of states. For this purpose, they decided to follow the rules for the establishment of "enhanced cooperation". For almost two years the Commission did not issue a formal response. Then the Treaty of Lisbon entered into force in December 2009 and the new European Commission was appointed.

The new Commissioner for Justice, Viviane Reding, decided to back the proposal of a group of member states to launch enhanced cooperation on the choice of law in divorce cases and the Commission formally submitted the proposal to the Council in March 2010. The European Parliament gave its consent in June and the Council issued its final decision on authorisation in July 2010. Eventually, in late December 2010[XVII], the Council approved the final Regulation, which will enter into force by July 2012.

In brief, the main outcome is that international couples will be able to choose which law to apply to their divorce at the moment of their marriage, thus preventing a rush to the courts and costly litigations, both economically and emotionally. In the case that the couple does not choose which law to apply, the above-mentioned Regulation will provide automatic mechanisms to establish the competent forum and the applicable law[XVIII], in order to guarantee the certainty of law.

It could be of some interest to look at the group of fourteen member states involved in enhanced cooperation in the field of law applicable to divorces of international couples. At the beginning, a proposal was put forward by eight member states (Greece, Spain, Italy, Hungary, Luxembourg, Austria, Romania and Slovenia). They were later joined by two others (Bulgaria and France) and then Greece withdrew its request. After the Commission's proposal, Germany, Belgium, Latvia, Malta and Portugal joined the pre-existing group, adding up to fourteen members. Peers[XIX] argues that this proves that enhanced cooperation was not created to help old members to move ahead faster than newer ones in the integration process. As it has been shown *supra*, the Treaties themselves already contain some provisions that can be seen as guaranteeing the unity of the system. However, since enhanced cooperation is potentially a very powerful tool to boost legal integration and avoid vetoes, a certain degree of asymmetry must still be taken into account. This means that we cannot foresee whether - and to what extent - enhanced cooperation will also be applied in cases that have greater economic or political impact, wherein the interests of the member states are really conflicting.

Enhanced cooperation on unitary patent, which will now be briefly described, again is not the perfect stress-test since it is in the interest of many different EU members, with the sole exception of Italy and Spain, for reasons that will be explained *infra*.

4.2 Unitary Patent

In December 2010, twelve member states tabled a proposal for enhanced cooperation on a common European patent, after many failed attempts over the years to introduce EU legislation to regulate this area[XX]. This is a very sensitive issue for private investors and companies, since they currently have to seek patent protection in each European country (EU and non-EU countries) separately. A so-called "European patent" does already exist, within the framework of the European Patent Office (EPO)[XXI], but it is nothing more than the sum of the individual countries' patents. Thus, private investors and companies seeking patent protection for their products have to validate it (and eventually litigate) in every single European country. This process is obviously expensive, mainly because of translation costs. As Bonadio points out: *"It has been estimated that protecting an invention using the current EPO procedure in all twenty-seven EU Member States would cost applicants*

roughly €32,000, of which €23,000 would be incurred for translation fees alone. On the other hand, a US patent costs €1,850 on average" (Bonadio, 2011, p. 416). Thus, it goes without saying that such a situation is detrimental for the competitiveness of European companies and represents a potential disincentive for investments in innovation.

At the beginning of 2011, the number of member states backing the proposal before the European Commission increased to the impressive number of 25, not including Italy and Spain, whose governments opposed the proposal for linguistic reasons. The project for a unitary patent follows the "three - language" scheme of the European Patent Office: English, French and German. Spanish officials and politicians, in particular, tried to lobby in favour of a different solution: they would rather the unitary patent be only in English[XXII]. However, the Commission decided to submit a proposal to the Council to establish enhanced cooperation in the field of patents. After the consent of the European Parliament, on March 10th, 2011, the Council issued the authorising decision for the enhanced cooperation scheme.

This is a very rare situation in enhanced cooperation, since only two member states have been left out, and only because of linguistic issues, not because of disagreement about the policy. Enhanced cooperation, therefore, can slightly change the geography of intra-EU relationships since, in this case, it was approved despite the opposition of two major member states, one of which -Italy- was also a founding member of European integration and, traditionally, one of the most euro-enthusiastic ones. However, Italy and Spain lodged a complaint before the Court of Justice, which is still pending and the outcome is unforeseeable. According to the complainants, the authorising decision undermines the internal market in that it makes the procedures more expensive for companies and investors of countries where English, French and German are not the official languages. Moreover, as their argument goes, the decision would be discriminatory since it does not respect linguistic diversity, thus violating Art. 21 of the Charter of Fundamental Rights of the European Union.

In the event that the Court rejects the complaint filed by Italy and Spain, Italian and Spanish companies will have to bear higher costs *vis-à-vis* their EU competitors, since they have to register their products for patent protection both at the national and the EU level. However, the situation will be much clearer after the decision of the Court of Justice.

5. The pros and cons of Enhanced cooperation and the difficult balance between asymmetry and unity (and some conclusive remarks)

Contrary to what happened from the entry into force of the Treaty of Amsterdam until the Treaty of Lisbon, EU member states have started to take enhanced cooperation seriously and take steps towards multi-speed integration. The March 11th approval by the Council of the request for enhanced cooperation in the field of patents (a very sensitive issue for developed economies) demonstrates that, given the difficulty of deeper integration at the EU level, member states are becoming aware of this new (and easier) opportunity to foster integration at least with some other countries. Moreover, this also proves that member states are well aware of the economic consequences of taking steps towards greater integration in some policy areas. Also, the approval of two enhanced cooperation schemes so far, in a period of disillusion with European integration, demonstrates the huge potential of this powerful tool. Therefore, the question is no longer whether or not the rules on enhanced cooperation are useful. Rather, it remains to be properly assessed how far forward they will push European asymmetry, whether more asymmetry is desirable and what level of asymmetry is sustainable. To sum up, it is worth highlighting the pros and cons of enhanced cooperation when striking a balance between asymmetry and unity.

On this subject, European public opinion and academic circles have been involved in an intense debate on the possibility of accepting a multi-speed Europe even in policy areas that are different from those covered by the Euro and the Schengen Area. Some people have considered enhanced cooperation to be the second best option in cases where decisions at the central level are not likely to be taken, as long as some guarantees are provided for non-participating member states (Baldwin *et al.*, 2001). Others, while not taking a position specifically against mechanisms of asymmetric integration, have expressed concerns over the cons of a multi-speed Europe (Philippart *et al.*, 1999).

It would be useful to compare this debate to the long-standing discussion within World Trade scholarship regarding "regionalism vs. multilateralism" in order to understand what level of asymmetry a system can tolerate and how important safeguard mechanisms for third parties to sub-unions are within legal orders. The WTO allows its members to

sign Preferential Trade Agreements (PTAs) with one or more other members, provided that some requirements are met. Therefore, it is an international *forum* which permits asymmetric integration among its members, thus representing a useful comparator for the issues discussed so far in this paper. It is rather interesting to see how the WTO strikes a balance between unity and asymmetry compared to what happens at the EU level according to the general rules for the establishment of enhanced cooperation schemes.

Given the impressive proliferation of PTAs at the WTO level, scholars have investigated the issue of whether this phenomenon represents a threat or an opportunity for unity and what the welfare implications are for third parties (WTO members not participating in PTAs). On the one hand, some scholars consider the PTAs termites undermining the WTO architecture and compromising free trade (Bhagwati, 2002); on the other hand, others consider PTAs the building blocs towards future integration at the multilateral level (Baldwin, 2006), envisaging a sort of "domino effect".

Going into further detail, we can assume that the rules on enhanced cooperation as they were modified by the Lisbon Treaty, given the "no veto - no exclusion" structure of the regulatory scheme (Bordignon *et al.*, 2006: 2082) (third parties cannot impede the establishment of enhanced cooperation and have the right to join in at a later stage), may potentially represent an effective way to foster European integration. This is undoubtedly true if we look at the guarantees for third parties provided by the rules on enhanced cooperation and compare them to what happens in the WTO. There are four considerations that must be made:

1) Common agents (control): In the case of enhanced cooperation, the Commission and the European Parliament play a fundamental role. This means that the remaining member states, by means of their representatives in the Commission and the European Parliament, can influence relevant decisions regarding whether or not to authorise the establishment of enhanced cooperation or at least can participate in all the stages of the procedures, thus avoiding the lack of information. Furthermore, the Commission (along with the Council as a whole) is in charge of overseeing the implementation of enhanced cooperation schemes, thus ensuring that they respect the unity of the EU system. This does not happen at the WTO level, since members wishing to sign a PTA only need to notify it to the Secretariat, without the approval of a common agent;

2) Transparency: Asymmetry of information can be a serious threat in cases of sub-unions, because it could create some problems for third parties as they are trying to meet the necessary requirements for joining enhanced cooperation. Contrary to what has been laid down under Art. XXIV GATT and Art. V GATS, EU member states can participate in the Council meetings in the case of enhanced cooperation even if they are not parties to it (obviously, they do not have the right to vote). Lack of information regarding what is being decided at the regional level is one of the main concerns regarding the proliferation of PTAs among WTO members. Indeed, this is why some scholars have argued in favour of solutions that give interested WTO members *"the right to participate in the activities of PTAs to which they are not parties"* (Davey, 2011, p. 248);

3) Sector specificity: In order to comply with the rules of WTO Treaties (Art. XXIV GATT for trade in goods and Art. V GATS for trade in services), PTAs among members must commit to liberalising "substantially all trade" (for trade in goods) or must have "substantial sectoral coverage" (as regards trade in services). This is exactly the opposite of what the EU rules require for the establishment of enhanced cooperation, since it can be established only in specific and detailed policy areas. This is a guarantee not only for those member states without the political will to join enhanced cooperation from the beginning, but also for those which do not meet the objective requirements for joining the enhanced cooperation scheme. Indeed, allowing for very specific enhanced cooperation is the only way for member states that still are not ready to commit to further supranational integration not to lose too much ground *vis-à-vis* other European partners;

4) Openness: WTO rules do not regulate the possibility for third parties to join already existing PTAs. However, since there is no common agent comparable to the EU Commission at the WTO level, the decision on later accessions is completely at the discretion of the original PTA members. This is what best legitimises the concerns related to fragmentation and asymmetry in the WTO context. To this extent, enhanced cooperation rules in the EU Treaties provide again for third party friendly rules. Member states that wish to join a pre-existing enhanced cooperation scheme at a later stage have to submit their request to the Commission. Moreover, in the event that the Commission rejects their request, they can even "appeal" to the Council for the final decision.

Enhanced cooperation rules are based on three main principles: transparency, openness and control. The combination of these principles along with the absence of a

power of veto for member states without the will (or the possibility) to join the enhanced cooperation make the system apparently well balanced and respectful of all member states' needs. Contrary to what happens in the WTO, the EU seems to have provided the necessary guarantees to third parties, thus preserving unity. Although it is too early to make forecasts or to learn lessons from the enhanced cooperation experience, we can still highlight the pros and cons of the regulatory scheme.

The pros of the possibility of agreeing on enhanced cooperation schemes are that policy innovation can be faster and these schemes can lead to new experiences in terms of policies and agency design as well. Conversely, the cons are that the repeated use of enhanced cooperation or the malfunctioning of openness and transparency mechanisms could progressively undermine the unity of the integration process. Such a situation would be highly detrimental for third parties, since transaction costs may rise. Moreover, one classic concern regarding enhanced cooperation, i. e. the increase in centrifugal tendencies, still lies in the background.

After the various enlargements, the European Union experienced a long period of institutional *impasse* and failed reform attempts because of constant tensions between integration and sovereignty. The Lisbon Treaty made it easier to integrate policies, at least for the member states that are ready to do it, without obliging them to wait for all the other EU members to agree. All the safeguards provided for by the Treaties and the nature of the "last resort option" make enhanced cooperation a powerful tool towards integration at the broader EU level.

This said, there is another concern which must be addressed and should not be underestimated. While the issue of later accession to pre-existing enhanced cooperation schemes has been widely investigated thus far, little has been said about the possibility of the members of an enhanced cooperation scheme to withdraw from it and the possible implications of such a decision. An editorial published on the *Common Market Law Review* (2011, p. 322) has tried to assess the issue, outlining some possible future scenarios. However, the Treaties remain mute on this matter and so far there have been no such cases within the context of the two enhanced cooperation schemes approved. The impression is that member states wishing to withdraw from enhanced cooperation will have to push for a modification of the authorising decision; otherwise, this would hardly be compatible with

the guarantees for the unity of the system provided by the Treaties. However, we cannot go into further detail on this subject because of a lack of experience in this area.

It is now time for some conclusive remarks.

Enhanced cooperation is a relatively new experience in the EU and its evolution is still hardly predictable. The impression, however, is that enhanced cooperation schemes are not an unbearable stress test for the institutional architecture of the European Union. Asymmetry is in the DNA of the European Union, and it has been a constant in all the main evolutions of the integration process. The guarantees it provides for third parties and the combination of openness, transparency and control principles make enhanced cooperation an interesting and powerful tool to help the EU overcome its difficulties in taking the necessary steps towards further integration.

Furthermore, this paper has tried to compare the EU's way of managing asymmetry to that of an international organisation like the WTO, which also allows its members to establish some sub-unions. This analysis has showed how differently the issues of transparency, openness and control are assessed at the EU and the WTO level, with the former striking a balance between unity and asymmetry in a much fairer way than the latter.

Until this paper's submission (January 2012), only two cases of enhanced cooperation have been approved (with Italy and Spain challenging the scheme for a unitary patent before the CJ). However, institutional actors and public opinion are starting to become familiar with the rules on enhanced cooperation and their potential.

Craig (2010, p. 449) wrote: *"The idea that acts adopted in pursuance of enhanced cooperation only bind the parties thereto, and do not form part of the more general acquis, has always been central to the conceptualization of this area and remains so. (...) The idea that acts adopted pursuant to enhanced cooperation and the judicial interpretation thereof by the EU courts can be hermetically sealed from the remainder of EU law may well prove considerably more difficult in practice than in theory"*. This is a serious concern and it should be verified in practice. However, one of the ideas behind the regulatory scheme on enhanced cooperation is that it can be established only in very specific policy areas. Therefore, it will probably not be so hard for courts to separate the wheat from the chaff when issuing judgements on particular policy areas. Furthermore, enhanced cooperation was devised as a tool for the progressive integration of the EU as a whole. The *two-speed* situation it leads to should only be considered temporary, and this is

probably why the issue of the different laws that must be applied by the EU courts was not addressed extensively by the framers.

A legal analysis of the provisions shows that, in theory, enhanced cooperation was devised as a balanced tool to foster European integration. However, only time will tell how the legitimate concerns expressed by some scholars regarding the alleged threats to the unity of the system will be addressed.

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I Council Decision of 12 July 2010 (2010/405/EU), OJEU, L 189/12.

II Council Decision of 10 March 2011 (2011/167/ EU), OJEU, L 76/53.

III Fabbrini (2007) wrote *"The EU is a combination of intergovernmental (confederal) institutional elements and supranational (federal) structures (...). It is a mixed institutional system, with a variable geometry or balance, overlapping jurisdictions, and with an uncertain territorial identity."*

IV For a comprehensive overview of opt-out and opt-in mechanisms, see Warleigh, 2002 and Miles, 2005.

V Bribosia, in Amato *et al.*, 2007: *"Il s'agit d'un mécanisme qui ne peut être enclenché qu'un «dernier ressort», lors qu'il est établi qu'une action de l'Union ne peut aboutir avec la participation de tous les États membres."*

VI *Ibid.* p. 624, fn. 4: *"Ainsi, le premier ministre français E. Balladur avait suggéré d'organiser l'Europe en différents cercles concentriques d'intégration, les parlamentaires de la CDU/CSU guidés par K. Lammers et W. Schaüble évoquèrent l'idée d'un noyau dur, tandis que l'ancien premier ministre britannique J. Major prônait une Europe à la carte".*

VII *"Their use was seriously considered in 2007 when a qualified majority of member states supported the adoption of a proposal on Framework Decision on criminal suspects' procedural rights, but a small group of member states exercised a veto on the proposal. However, there was insufficient support among the member states supporting the proposal to go ahead with the measure on the basis of enhanced cooperation".* Peers, 2010, p. 342.

VIII There are some important differences in the field of the EU Common Foreign and Security and Defence Policy (CFSDP), but since no enhanced cooperation in this field has been established so far, I decided not to dwell on the topic in this paper. For a detailed overview of this issue, see Cremona, 2009.

IX *"Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States".* Art. 327 TFEU.

X The openness mechanism must respect the decision taken by the members of enhanced cooperation to impose some "objective" requirements for later accessions to the pre-existing group, like the Euro-group and the Schengen area. It cannot be excluded at this stage that some Member States will decide to integrate particularly delicate policy areas and this will obviously require stricter conditions for third parties wishing to join in later.

XI This is of fundamental importance. The minimum threshold for the establishment of an enhanced

cooperation scheme is not expressed in terms of a proportion (i. e. one third, one half etc.). Art. 20 TEU clearly reads "at least nine member states", so this number is not going to change even if other countries join the EU in the coming years. Tiberi emphasises this innovation, adopting the stance that unbinding the minimum threshold from the whole number of EU member states will eventually help create enhanced cooperation schemes in increasingly more policy areas. See Tiberi, 2010, p. 317.

[XII] Art. 333 TFEU makes an explicit *renvoi* to Art. 330, so the Council must be considered as being in the composition described in the latter provision.

[XIII] Dethloff 2003, p. 37: *"The number of binational marriages is growing constantly. Today, more than 15% of those entering into marriage are of different nationalities, often of European states"*. The author provides a footnote as well, quoting numbers from various national statistics institutions.

[XIV] For a comprehensive overview of the main achievements of the "Brussels II" convention, please see Peers, cit., pp. 344 and f.

[XV] This shortcoming is even more evident if we consider that in other sensitive policy areas the EU has already provided for rules in order to choose the applicable law (i. e. contractual liability).

[XVI] See the JHA Council Press Release, 5-6 June 2008, 9956/08 (Presse 146), available at http://91.194.202.11/ueDocs/cms_Data/docs/pressData/en/jha/100983.pdf.

[XVII] Council Regulation (EU) N° 1259/2010 of 20 December 2010.

[XVIII] Preferably, the law of the state where the couple was habitually resident at the time the court was seized (See Art. 8).

[XIX] *"It is notable that the participating member states comprise eight of the first fifteen member states and six of the twelve newer member states – i.e., about half of each category – (...) [thus it] does not represent a move by the older member states to go ahead without the newer ones"* Peers, 2010, p. 347.

[XX] For a comprehensive overview of the negotiations on enhanced cooperation regarding European patent, see Bonadio, 2011.

[XXI] The EPO is the Munich-based institution set up by the European Patent Convention, an international agreement signed by EU and non-EU countries (currently, its members are thirty-eight).

[XXII] For a detailed account of the positions, please see Lamping, 2011, at 922.

References

- Amato Giuliano et al. (eds.), 2007, "Genèse et Destinée de la Constitution européenne", Bruylant, pp. 1353;
- Baldwin Richard et al., 2001, "Nice Try: Should the Treaty of Nice be ratified", in CEPR, *Monitoring European Union*, vol. 11, CEPR, London;
- Baldwin Richard, 2006, "Multilateralizing regionalism: Spaghetti bowls as building blocs on the path to global free trade?", in *World Economy*, 11, pp. 1451 - 1518;
- Bhagwati Jagdish, 2002, "The unilateral freeing of trade versus reciprocity", in Baghwati Jagdish (ed.) "Going alone: The case for relaxed reciprocity in freeing trade", MIT Press, pp. 1 - 30;
- Bonadio Enrico, 2011, "The EU embraces enhanced cooperation in patent matters: Towards a unitary patent protection system", *European Journal of Risk Regulation*, 3, pp. 416 - 420;
- Bordignon Massimo and Brusco Franco, 2006, "On Enhanced Cooperation", *Journal of Public Economics*, 90, pp. 2063 - 2090;
- Carrozza Paolo, 2005, "Sistema delle fonti e forma di governo europea", in Bianchi Paolo et al. (eds.), "Le "nuove" fonti comunitarie", CEDAM, Padova, pp. 255 and ff.;
- Craig Paul, 2010, "The Lisbon Treaty - Law, politics and treaty reform", OUP, 2010;
- Cremona Marise, 2009, "Enhanced Cooperation and the Common Foreign and Security and Defence Policy", *EUI Working Paper*, LAW 2009/21;
- Curtin Deirdre, 1993, The constitutional structure of the union: A Europe of bits and pieces, *Common Market Law Review*, 30, pp. 17 - 69;

- Davey William J., 2011, "A model Article XXIV: Are there realistic possibilities to improve it?", in Bagwell Kyle W. and Mavroidis Petros C. (eds.), "Preferential trade agreements - A law and economic analysis", Cambridge, pp. 233 - 261;
- Dethloff Nina, 2003, Arguments for the unification and harmonisation of family law in Europe, in Boel-Woelki Katharina (ed.), Perspectives for the unification and harmonisation of family law in Europe, Intersentia, pp. 37 - 64;
- Editorial, 2011, "Enhanced cooperation: A Union à taille réduite or à porte tournante?", *Common Market Law Review*, 48, pp- 317 - 327;
- Ehlermann Claus Diether, 1999, "Differentiation, flexibility closer co-operation: The new provisions of the Amsterdam Treaty", *European Law Journal*, 4, No. 3, pp. 246 - 270;
- Fabbrini Sergio, 2007, "Compound democracies - Why the United States and the European Union are becoming similar", OUP, 2007;
- Lamping Matthias, 2011, "Enhanced cooperation - A proper approach to market integration in the field of unitary patent protection?", *International Review of Intellectual Property and Competition Law*, n. 8, pp. 879 - 925;
- Martinico Giuseppe, 2011, "Lo spirito polemico del diritto europeo", Aracne;
- Miles Lee, 2005, "Introduction: Euro-outsiders and the politics of asymmetry", *Journal of European Integration*, 27:1, pp. 3-23;
- Palermo Francesco, 2007, "*"Divided we stand"*. L'asimmetria negli ordinamenti composti", in Volpe Luigi *et al.* (eds.), 2007, "Processi di devolution e transizioni costituzionali negli Stati unitari (dal Regno Unito all'Europa)", Giappichelli, Torino
- Peers Steve, 2010, "Divorce, European Style: The First Authorization of Enhanced Cooperation", *European Constitutional Law Review*, pp. 339 - 358;
- Philippart Eric and Edwards Geoffrey, 1999, "The provisions on closer co-operation in the Treaty of Amsterdam: The politics of flexibility in the European Union", *Journal of Common Market Studies*, 37, pp. 7 - 108;
- Rossi Lucia Serena, 2003, "Cooperazione rafforzata e trattato di Nizza: quali geometrie per l'Europa allargata?", in Tizzano Antonio (ed.), Il Trattato di Nizza, Giuffré, pp. 41 - 55;
- Tiberi Giulia, 2010, "L'integrazione differenziata e la cooperazione rafforzata nell'Unione Europea", in Bassanini Franco and Tiberi Giulia (eds.), "Le nuove istituzioni europee. Commento al Trattato di Lisbona", Il Mulino, pp. 303 - 324;
- Warleigh Alex, 2002 "Flexible integration: Which model for the European Union", Continuum;
- Weiler Joseph H. H., 1991, "The transformation of Europe", *Yale Law Journal*, No. 100 (No. 8), pp. 2403 - 2483;
- Ziller Jacques, 2007, "Il nuovo trattato europeo", Il Mulino.

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The European Union's Charter of Fundamental Rights two years later

by

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Abstract

After the entry into force of the Lisbon Treaty, the European Union's Charter of Fundamental Rights has found a place among the formal sources of EU law, and has become a standard of review for the validity of EU acts. This article aims to analyse whether this momentous change is reflected in the judgments of the Court of Justice, and more precisely how the Luxembourg judges are dealing with this source. From an analysis of the cases, it emerges that there still are some uncertain issues, such as the extent of the competences of the EU, the paradigmatic function of the case-law of the European Court of Human Rights, the possibility to bypass the limits of the European Convention's direct effect through the application of the Charter's equivalent rights.

Key-words

European Union's Charter of Fundamental Rights; Court of Justice of the European Union; Fundamental Rights; Competences of the European Union

Introduction and purpose of the paper

The purpose of this paper is to take stock of how the Charter has been applied since its re-birth in 2009. To do so, I examine the case-law of the Court of Justice to ascertain whether this revitalised instrument contributes to the emancipation of the European Union (EU) from its alleged pro-market bias and facilitates its development into a more constitutionally-mature environment, where competing values are balanced and fundamental rights are, in principle, ensured regardless of their trade-restrictiveness. There have been too few decisions to allow for general remarks or reasonable predictions, but the detection of some trends may be possible; in particular, verification of whether application of the Charter has indeed brought added value to the legal reasoning of the Court.

In the first part of the paper, I summarise those features of the Charter that might trigger this 'sea-change' effect (both in terms of normative content and historical impact). The second part comprises a judicial review of the most relevant recent decisions, followed by a few tentative conclusions.

1. The Charter and its content

The original purpose of the European Union's Charter of Fundamental Rights (the Charter)[I] was to consolidate those fundamental rights applicable at the EU level into a single text "*to make their overriding importance and relevance more visible to the Union's citizens*"[II]. As such, it should have served as a showcase of the achievements of the EU in the field of human rights protection.[III]

This effort was premised on the reassuring assumption that the rights listed would not entail additional State duties; the modest purpose of the Charter, as reflected in the Preamble, was that of "*making those rights more visible*,"[IV] *i.e.* not to create them anew (nor to extend the existing ones).

In fact, this "restatement" approach[V] is not reflected by the final text of the Charter.[VI] Granted, all rights listed in the Charter are traceable either to the common constitutional traditions, the general principles of the EU, the European Convention on Human Rights (ECHR), the European Social Charter or other shared instruments.[VII] However, not all of them were already recognised as fundamental principles of the EU. The Charter did not invent any new rights, but certainly smuggled into the Union some that had not been previously contemplated as Union rights *per se*. The drafters put together civil, political and cultural rights, on the one hand, and a selection of social and economic rights, on the other hand.[VIII]

This approach had been deliberately avoided in previous codification efforts (*e.g.* the ECHR is mostly concerned with the former kind of rights, but consider also the separation of the 1966 UN Covenants[IX]). The classic (and simplistic) view is that civil rights and liberties mostly require that States abstain from acting against them (a negative obligation), whereas economic and social rights impose a positive obligation on States to provide their citizens with tangible benefits, through which the enjoyment of those rights is possible. Accordingly, States are reluctant to enter into commitments.

Instead, the concept that no new State obligations could be derived from the Charter prevented at the outset the trite debate about negative and positive obligations, and defused concerns that positive rights, once written into the Charter, might give rise to obligations enforceable in courts. In fact, the reality now might be a little different, and the issue of enforceability of positive obligations might indeed arise (see the cases analysed below).

Concern about the direct invocability of certain norms is, in fact, visible in the Charter itself, which specifies that its provisions can be either rights or principles (or both).[X] The main purpose of this distinction was clearly to single out those clauses that could not be deemed directly enforceable, and Art. 52(5) – a clause that was introduced at the request of the United Kingdom – tries to make this point painstakingly clear.[XI]

However, in order for this distinction to be relevant a head-count would be necessary: which of the provisions are rules and which are principles? The Charter is silent or ambivalent on this point, and the Presidium's explanations failed to establish clear distinctions.[XII] Ultimately, it seems to be something for case-law to decide upon; the courts will clarify which principles deserve direct application, *i.e.* which economic rights impose

positive obligations on Member States.[XIII] Below, in the review of case-law, this case-by-case adjustment of the scope and enforceability of the Charter emerges with some clarity.

2. Application of the Charter: the horizontal provisions

Together with the allegedly descriptive nature of the Charter, the most important limitation for its applicability, which should have initially reassured recalcitrant Member States to approve the document, is that it is only binding on EU bodies and on Member States when they "*are implementing Union law.*"[XIV] *A contrario*, States have no obligation to comply with the Charter when they are not acting as the EU's agents,[XV] *i.e.* when acting on purely domestic matters. However, this specification merely shifts the focus to the next question: when is it that States act in the implementation of EU law? In *ERT*, the Court found that EU human rights law applies to Member States not only when they are implementing EU law, but whenever they are "*acting within the scope of Community law.*"[XVI] If this is the criterion, then the Charter applies not only when States directly implement an EU norm, but also when they derogate therefrom,[XVII] maybe even when their acts may simply affect Union law at large.[XVIII] The external limits of the Charters' effects are still to be delineated, admittedly, and will probably remain unresolved unless the Court of Justice of the EU (CJEU) sets up a new test to identify them.[XIX]

Indeed, the divide between national and EU legislation, on which the limits to the applicability of the Charter are based, is fated to be blurred, if only due to the combined effects of the principle of non-discrimination and the case-law on citizenship[XX] (see the series of cases culminating with *Zambrano*[XXI]). Also, the incorporation doctrine (whereby the EU has the domain over national regulations affecting the preconditions for the enjoyment of EU rights) might expand the reach of EU competences and, subsequently, that of its human rights scrutiny.[XXII] In a passionate invocation of clarity, AG Sharpston advocated constitutional development of the EU and the Court, and suggested that the "implementation" requirement should be abandoned in favour of a clearer, although admittedly federal-like, criterion; if the EU has a competence, be it shared or exclusive, the Charter applies, regardless of whether the EU has actually exercised its competence on a particular matter.[XXIII]

In summary, it appears that the safeguards provided for in the horizontal clauses of the Charter will hardly suffice to contain the expansive force of EU competences. Granted, this might happen at a faster or slower rate, and this creeping expansion would not necessarily be motivated by a willingness to apply the Charter. However, once the EU has put its stamp on a subject matter, *non regredietur*, the Charter then arguably becomes binding for national regulators (and the CJEU can exercise its jurisdiction accordingly), regardless of however feeble the link is between the EU order and the national action.[XXIV] This aspect is also problematic with respect to the use of general principles (see below).

3. The original status of the Charter and the pre-existing HR regime of the Union

Although it purportedly did not add to State obligations already in place, Member States were privy to its potentially innovatory nature, and preferred to endorse the Charter as a solemn declaration, deprived of binding force. This was due, among other things, to the fact that some of the social and economic rights of the Charter already existed in the European Social Charter, but these were subject to a very soft system of enforcement and their inclusion into a new, binding Charter was perceived as an unwelcome leap towards a status of effectiveness and justiciability.

Soft as it might have been, the Charter was used as a cultural source for a long time. Advocates General started citing the Charter to support their opinions,[XXV] followed hesitantly by the Court, which seldom drew upon it to reinvigorate the interpretation of other EU legal sources.[XXVI] Before the entry into force of the Lisbon Treaty and the connected strengthening of the Charter, human rights (apart from those arising under the provision of the Treaties) existed in the EU legal order in the form of general principles of law.[XXVII] Their formulation is incumbent on the CJEU, which shapes them by means of a comparative procedure that at times has yielded Delphic results (see *Mangold*) and that is, by definition, subject to a certain degree of uncertainty.[XXVIII] In short, the Court is expected to "infer" fundamental rights (a *species* of the category of general principles) either by running a comparative survey of the constitutional traditions of the Member States or by

looking at the international instruments common to the Member States (particularly the European Convention of Human Rights) – or using the two procedures at once.[XXIX]

The ECHR is certainly the priority model to look at for this purpose, particularly in light of its recognised hermeneutic power (EU Courts must inform their human rights interpretation based on the case-law of the European Court of Human Rights, ECtHR).[XXX] After 2000, however, the Charter itself was also deemed to be an optimal arsenal of ready-made general principles, which were the by-product of universal EU endorsement, and its explicitly conservative design reinforced the presumption that the rights listed therein had already attained the status of EU principles.[XXXI] Among the few undisputed effects of the (then) non-binding Charter, is that it represented a privileged instrument for identifying fundamental rights,[XXXII] and certainly for identifying "*a fundamental right as a general principle of Community law*."[XXXIII] Arguably, the Charter could even be used "*to supplement principles of law already recognized in binding legal norms and contribute to their broader interpretation*."[XXXIV]

4. Transition/anticipation of the Charter and the *Defrenne* doctrine

This relationship between the Charter and the general principles of the EU was not explicitly recalled in *Mangold*, and was only touched upon in *Kücükdeveci*;[XXXV] two cases where, in fact, a clearer reference to the inspirational value of the Charter might have helped the Court to support the use of a specific general principle (non-discrimination on the grounds of age). Even absent an express reference to the Charter, *de facto* these two cases anticipated its forthcoming effects,[XXXVI] and the Charter's lack of binding force was found to be compensated temporarily by the general principle; a pre-figuration of the codified right to be. This came at the price of an unprecedented move; the acknowledgment that general principles have at least some horizontal direct effect, which was an aspect that had never been validated by the Court before then.[XXXVII]

To achieve this, the Court applied the *Defrenne* doctrine to the general principle at hand: a norm that is formally (or arguably, in the case of the principle) addressed to public authorities can equally bestow obligations in horizontal relations, as concisely recalled in *Angonese*:

> *"..the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down (see Case 43/75 Defrenne v Sabena [1976] ECR 455, par. 31). Such considerations must, a fortiori, be applicable to Article 48 of the Treaty [on discrimination on grounds of nationality], which … is designed to ensure that there is no discrimination on the labour market."*[XXXVIII]

Along these lines, the Court found no objection to granting the same horizontal treatment to the general principle of non-discrimination on grounds of age, and indirectly showed the way to treat the post-Lisbon Charter. Indeed, the Charter obtained the "same legal value as the Treaties,"[XXXIX] therefore becoming an integral part of the primary law of the EU and a possible parameter of adjudication for the CJEU and national courts dealing with EU matters. As a consequence, Charter norms would arguably enjoy the *Defrenne* treatment, and acquire horizontal effect, just as the general principle has done in *Mangold* and *Kücükdeveci*.[XL] Or is there something that would hinder this development? As seen above, the Charter itself tries to limit the reach of its application, and vigorously recalls that it is binding only on public bodies of the Union. It has, in other words, an exclusively vertical effect.[XLI]

Would that be enough to block the Court from applying *Defrenne* to Charter rights? And if so, would it make any difference, given that general principles of identical content are readily applicable *à la Kücükdeveci*? It would be ironic if the Charter, just after becoming binding, were virtually superseded in the context of horizontal disputes by the general unwritten principles of the EU, which provide for the protection of the same fundamental rights, but enjoy more incisive application.

5. The first cases of direct application (vel non) of the Charter

A. MCB

In *MCB,*[XLII] the CJEU was asked whether Art. 7 of the Charter (right to family life) affected the interpretation of the Brussels II bis Regulation[XLIII] as to the wrongfulness of the behaviour of a mother who removes[XLIV] her children from the country of the father,

without his consent. In the main proceedings, the parents were not married, and under Irish law the father did not have the right to custody of the children. Therefore, formally, the mother had the right to choose the place of residence of the children and, when she removed them, the father could not obtain a court judgment declaring the wrongfulness of her conduct. The father assumed that the peculiarity of Irish law disproportionately affected his parental rights and that the Regulation should have been interpreted in light of the Charter (and of Art. 8 ECHR), so as to afford the natural father with custody rights *de jure*. This would have allowed him to seek a court declaration of the wrongfulness of the removal of his children by the mother.

The CJEU confirmed that the Regulation must be construed to allow a parent with custody to invoke the wrongfulness of removal without his consent.[XLV] However, custody rights are conferred exclusively according to domestic law; a subject matter that, under Art. 51(2) of the Charter, is outside the competence of the EU, *i.e.* outside the reach of the Charter.[XLVI] The case-law of the ECtHR was of little help to the father's cause: a similar case was resolved by the Strasbourg court in recognising that national legislation conferring custody rights on only one of the natural parents was legitimate, provided that the other had the right to seek a court order reversing this initial allocation (this being the minimum standard of protection that the Convention ensures).[XLVII]

In its ultimate analysis, the CJEU (in complete agreement with the Advocate General)[XLVIII] rejected the extensive interpretation of the Regulation advocated by the father in the main proceedings, and arguably made clear that, for the time being, it was not keen on abusing any incorporation doctrine in order to expand the competence of the EU.[XLIX]

B. Schecke

In *Schecke,*[L] the CJEU invalidated some clauses of a regulation for violating a norm of the Charter, and this case marked the first time that the Charter was actually used as a determinative standard of review for the legality of an EU act of secondary legislation.

The CJEU was called to issue a preliminary ruling regarding the validity of a regulation that required Member States to publish the list of all natural persons who had received agricultural subsidies. In the opinion of the referring judge, this obligation was at

variance with the right to protection of private life and personal data under Articles 7 and 8 of the Charter, as well as Art. 8 of the ECHR. The Court recalled that the right to privacy can be subject to limitations[LI] that are provided for by law and are proportionate, as required by Art. 52(1) of the Charter.[LII] It also recognised its duty, under Art. 52(3), to take into account the jurisprudence of the ECtHR,[LIII] and actually did so in construing the element of "private life" (that includes professional information).[LIV] The Court verified that the publication requirement was provided for in a legal instrument, and that it was supposed to pursue a legitimate purpose (transparency in the allocation of State aid).[LV] It then introduced the proportionality test, and significantly cited as authority an ECtHR precedent and one of its own judgments,[LVI] explicitly pointing to the synergy between the case-law of the two courts.

The outcome, however, was reached through a very simple procedure. Since it appeared that the EU legislator had not taken into account the possibility of introducing a transparency measure entailing a less-restrictive effect, the Court took for granted that a better balance could have been struck.[LVII] In other words, the measure failed to pass the balancing test (run by the Court) because it did not incorporate or reflect any balancing at all (by the law-maker). In the end, there was no actual need to balance the two rights. The Commission and Council's case failed, more because they did not meet the burden of proof than for the weakness of their argument. However, it is still reassuring to observe how the Court took balancing seriously, as required under Art. 52(1). As was noted, quite apart from the final result of the balancing test:

> "…*from a constitutional point of view the important point is that the balancing exercise takes place (see Rosas and Armati, EU Constitutional Law, Hart, 2010, at p.190, ...). Going even further, the technique of balancing is also an important tool in realizing the role of the judge. In fact, "[o]pen balancing restrains the judge and minimizes hidden or improper personal preference by revealing every step in the thought process; it maximizes the possibility of attainting collegial consensus by responding to every relevant concern of disagreeing colleagues; and it offers a full account of the decision-making process for subsequent professional assessment and public appraisal" (See Coffin, "Judicial Balancing: The Protean Scales of Justice", 63 NYU L. Rev., at p. 25 (1988)).*"[LVIII]

Granted, balancing is not a novelty (proportionality has always been a tool for the CJEU, which includes a component of weighing values[LIX]). However, it is under the

Charter that balancing will be consistently carried out, not only between fundamental rights and market freedoms, but also between fundamental rights.

This is all the more necessary because the maxim of this judgment is not conclusive on the legality, in general, of the online publication of personal information of subjects benefitting from subsidies. The Court only declared that the particular provision challenged was invalid, due to its impact on privacy, and its poor design in terms of necessity and proportionality.[LX] In this case, as was noted,[LXI] the Court specified a two-step proportionality test, which did not include the third step of narrow proportionality, or proportionality *stricto sensu*. Granted, the measure failed to meet the second step (necessity) and, therefore, there was no need to perform any balancing. However, it is yet to be seen whether the Court, in its judicial treatment of Charter rights, will stick to this truncated test (somewhat in line with the practice of WTO judicial bodies[LXII]) or will rather 'dirty its hands' with some constitutional balancing, thereby trying to ensure respect for the essence of the Charter's rights and freedoms, as set forth in Art. 52(1).

C. DEB

In the *DEB* case,[LXIII] the Court was called upon to answer a preliminary question: the referring judge had asked whether EU law precluded, in the context of a procedure aimed at obtaining compensation for State liability under EU law, a national rule making the pursuit of a claim subject to an advance payment in respect of costs, without entitling legal persons to benefit from legal aid when they are unable to pay that deposit disbursement.[LXIV] The referring judge pointed to a possible conflict of the domestic rule with the principle of effectiveness, requiring that "the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law."[LXV]

The Court noted that the principle of effective judicial protection is a general principle of EU law, stemming from the constitutional tradition of Member States and protected under the ECHR (Articles 6 and 13). After recalling that the same principle is also provided for in Art. 47 of the Charter, the Court took cognizance of the equivalence with Art. 6 of the ECHR, as required under Art. 52(3) of the Charter, and deemed it "necessary to recast the question referred so that it relates to the interpretation of the

principle of effective judicial protection as enshrined in Article 47 of the Charter."[LXVI] The decision then detailed an impressive study of ECtHR case-law on legal aid,[LXVII] stemming from the seminal judgment *Airey v. Ireland*.[LXVIII] The analysis confirmed that it is possible for legal persons to receive legal aid, in light of their specific situation and needs, and that it is incumbent on the national court "to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve."[LXIX]

In other words, States (national courts) are provided with the margin of appreciation to decide whether to grant such benefit or not – after all, this is the customary approach adopted by the ECtHR when it comes to costly State obligations. However, national authorities acting as EU bodies must justify their decision under certain criteria (of proportionality and non-arbitrariness), in order not to incur a finding of violation (both of the Charter *and* the Convention).

D. Test-Achats

In March 2011,[LXX] the Court declared the invalidity of the provision of a Directive[LXXI] whereby States could allow insurance providers to use gender-related statistical data in their risk assessment calculation for the determination of premiums and benefits. This clause had already been designed as an exception to the rule prohibiting the use of sex as a determining factor in the calculation of premiums and benefits,[LXXII] but the Belgian Constitutional Court submitted a preliminary question, raising doubts as to the possible violation of Art. 6(2) of the Treaty on European Union (TEU), in connection with the general principle of non-discrimination (on grounds of sex).

The CJEU immediately reframed the question in light of the new regime of fundamental rights. Granted, Art. 6(2) TEU commands the Union to respect fundamental rights, but there is no longer a need to look far to identify those rights since "fundamental rights are incorporated in the Charter." In light of the accepted methods to identify general principles of the EU, this move might have been controversial some years ago. Now, it is

as simple as that, so long and thanks for all the *Mangold* drama. Accordingly, the relevant norms are Articles 21 and 23 of the Charter.[LXXIII]

In this case, the solid EU case-law on non-discrimination on grounds of sex spared the Court from looking at the ECHR: the Court needed no lesson. Moreover, no balancing was needed either; the provision ran counter to the very purpose of the Directive, leaving no room for arguing that it served some general interest of the EU, alternative to that of the elimination of inequalities based on sex.[LXXIV] There was another difficulty in this case: after all, it is reasonable to expect that insurance premiums and benefits are not uniform for all clients, and that their differentiation is based on the analysis of statistical and factorial data. In other words, it would seem acceptable that a different treatment is accorded to persons in different factual situations, and that insured users are grouped into risk-homogeneous (and price-homogeneous) categories.[LXXV]

Intuitively, purely statistical data cannot be imputed a discriminatory intent/effect only because they are broken down by sex; it appears to be objective enough to justify economic differentials in insurance contracts. Moreover, it has not been demonstrated that one sex is discriminated against because of this calculation practice, either directly or *de facto* since statistical data related to sex-sensitive presumptions points at differently increased levels of risk for both sexes.

Even in the absence of a prejudice, however, the very use of sex as a distinctive category is illegal in the EU: "…the use of a person's sex as a kind of substitute criterion for other distinguishing features is incompatible with the principle of equal treatment for men and women."[LXXVI] In other words, to use WTO jargon, even before checking whether the challenged measure had a disparate impact on one of the two sexes and therefore afforded protection to the other, the CJEU struck it down for not treating men and women as "like products" – *absit iniuria verbis*. Sex is not a valid comparator for any other purpose than the adoption of affirmative actions in the EU's legal order.[LXXVII]

An anecdotal note can be added, in retrospect, about the successful challenge to the discriminatory measure by *Test-Achats* (the claimant in the domestic proceedings). In her Opinion, the Advocate General Kokott made this statement:

> *"While Test-Achats is of the opinion that [the measure infringes the principle of equality], all the Member States and European Union institutions involved in the proceedings are of the opposite view. The European Union is a union based on the rule of law; neither its institutions nor its Member States can therefore avoid a review of the question whether the measures adopted by them are in conformity with the 'basic constitutional charter' of the European Union, as it is set out in the Treaties."* [LXXVIII]

This obvious statement is nevertheless a nice illustration of the rule of law in action: an individual can corner all the institutions and the bodies of the Union, if their claim is founded. It also portrays the role of the Charter as an inherent limit to the action of the EU based on the rule of (human rights) law.

E. Hennings

In September 2011, the Court decided two cases[LXXIX] that were very similar to the infamous *Mangold – Kücükdeveci* couple, only this time all the hurdles relating to the applicability of the legal instruments prohibiting discriminations were conveniently removed: the term for implementation of Directive 2000/78' had expired, the general principle of non-discrimination on grounds of age was already firmly established in practice, and the Charter had gained a binding nature. Therefore, it is no surprise that the Court focused only on the merits of the issue, *i.e.* whether the provisions being challenged did in fact entail an unjustified or disproportionate discrimination on grounds of age.

The facts were relatively straightforward. Some German employees had challenged the relevant rules of the collective pay agreements stipulated by the social partners and that governed the treatment of the employees working for the public administration. Under these collective agreements, employees were divided into salary groups and basic pay in the salary groups was determined according to age categories. The age-related classification, according to the referring German courts, could represent an instance of discrimination on grounds of age, because it would be comparatively disadvantageous for younger employees whose work experience is analogue to that of older ones.

The Court identified the discriminatory edge of the challenged measures,[LXXX] and carried out the proportionality test to ascertain whether they were justifiable in light of the pursued objective, which was alleged to be the interest of rewarding work experience. Predictably, the Court found that the group classification depending purely on age-related

data could not stand up to scrutiny.[LXXXI] Interestingly, the Court noted that it was not relevant that the challenged provisions were set in collective agreements, and that the right to collective bargaining is protected under Art. 28 of the Charter. Indeed, the fundamental right to collective bargaining must be performed in compliance with EU law,[LXXXII] including the provisions of the Charter. When social partners negotiate with a view to stipulating an agreement affecting the matters covered by Directive 2000/78, their contractual autonomy cannot prevail over EU law.

Incidentally, the Court also allowed the age-related scheme to survive provisionally in order to avoid that the transition to the new one would cause a loss of income for many employees;[LXXXIII] a choice that recalls the rationale of *Test-Achats* (where the discriminatory measure was also struck down because of its potentially permanent nature).

F. Brüstle v Greenpeace e.V.

In October 2011, the much-awaited *Brüstle* decision was published.[LXXXIV] In a preliminary ruling, the Court ruled that, for the purpose of patentability under a Directive,[LXXXV] the formula "human embryo" encompassed virtually any human ovum (either fertilised or with a transplanted nucleus, or otherwise artificially induced to develop), whereas it would be for national courts to decide whether stem cells obtained from a human embryo at the blastocyst stage qualify as a "human embryo" and, accordingly, are not patentable.

The legal issue was the interpretation of the "human embryo" formula, because the Directive clearly excludes from patentability inventions based on the use of human embryos for commercial purposes, as their commercial exploitation would be contrary to *ordre public* or morality.[LXXXVI] The Charter seems to dictate some relevant principles in Articles 1 and 3,[LXXXVII] and Advocate General Bot recalled them, concluding that in his view not even blastocyst cells could be patented under the Directive.

The Court took a somewhat different view, as seen, but more interestingly took another route to reach it. Rather than listing the Charter among the relevant sources of guidance, the Court mentioned the preamble of the Directive, and in particular recital No. 16 which reads: "… patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person." In so doing, it made the central issue

of the case internal to the Directive,[LXXXVIII] thereby defusing the risk that such a delicate matter would be decided once and for all under the Charter.

This move was understandable, and yet stopped short of magnifying the synergy between the Directive and the Charter. Consider Advocate General Bot's comment on the inclusion of the reference to human dignity in the preamble of the Directive:

> "*These references expediently illustrate that the Union is not only a market to be regulated, but also has values to be expressed. Before it was even enshrined as a fundamental value in Article 2 of the EU Treaty, the principle of human dignity had been recognised by the Court as a general legal principle.*"[LXXXIX]

What the Court did, instead, was to limit the scope of its inquiry to the four corners of the Directive. Respect for human dignity was already detailed therein, so there was no need to look further into the set of primary legislation. In my view, a reference to the Charter would have helped to clarify that the finding would have been the same, even if the preamble had lacked any reference to the protection of human dignity. Moreover, the text of recital No. 16, quoted above, undoubtedly points to a primary source – the "fundamental principles safeguarding the dignity and integrity of the person". Therefore, the careful obliteration of every reference to the Charter in the judgment seems a little deliberate. It could maybe even be deemed an attempt not to have public opinion "blame it on the Charter" for a decision that is unwelcome to many.

G. NS v SSHD

In December 2011, the Court of Justice issued a preliminary ruling[XC] on the requests raised by an English and an Irish court. The fact-pattern was similar in the two main proceedings: some Afghani, Iranian, and Algerian citizens had submitted an asylum request to the authorities of the UK and Ireland, after first accessing the territory of the EU through Greece. Under Regulation 343/2003,[XCI] the State in charge of the asylum application was Greece, but Art. 3(2) provides all Member States with the possibility to examine an application from a third country national that is not its responsibility, rather than to transfer them to the responsible State.

The referring judges asked the Court whether the right to examine a third-party request, under Art. 3(2), falls within the reach of EU law, and should accordingly be

exercised with due regard to the primary law of the Union, including the Charter and Art. 6(1) of the TEU. The Court responded in the affirmative, noting that although Art. 3(2) only conferred a discretionary power on Member States, it had to be read in the framework of the Common Asylum Policy and therefore could not escape from the straight-jacket of EU rule of law.[XCII] In so doing, the Court upheld the view of AG Sharpston who, referring to the *Wachauf* precedent (see above, para. 2), equated implementation of EU law to derogation from it, as well as to the exercise of discretionary powers provided by EU law.[XCIII]

Accordingly, the Court noted that national authorities, in their capacity as bodies implementing EU law, must exercise that discretionary power in compliance with the Charter, and in particular with the prohibition of degrading and inhuman treatment. This might lead the national authority to take charge of an application which is not its responsibility if transferring the applicant to the responsible State might expose them to the risk of inhumane and degrading treatment. This seemed to be the case in the main proceedings, due to the difficulties encountered by Greek authorities in dealing with the flow of immigrants and granting them adequate assistance. However, this cannot mean that *any* violation or alleged violation of a fundamental right by the responsible State entitles the third State to exercise its power under Art. 3(2) of the Regulation: an automatism of this kind would be against the basis of reciprocity and mutual trust which is the backbone of the asylum system.[XCIV] Only serious violations reflecting systemic flaws in the country's ability to ensure the dignity of asylum-seekers may, and indeed must, be taken into account for the purpose of the discretionary decision under Art. 3(2).[XCV]

The final issue, therefore, is how to assess one country's record on fundamental rights' protection for the purpose of exercising the power of decision under Art. 3(2). In this respect, the Court turned to the case-law of the ECtHR, not so much looking for normative or judicial guidance, but rather to borrow the set of evidence that had led the Court of Strasbourg some months before to rule that Greece's treatment of asylum seekers was so unsatisfactory that Belgium, merely by complying with the duty to transfer an applicant to the responsible State, committed a violation of Art. 3 of the Convention.

The facts and background of the *MSS* case before the ECtHR[XCVI] were comparable to those in the main proceedings leading to the request for a preliminary ruling, and the ECtHR based its findings on several reports available to the general public. In light of this,

the Court dismissed the arguments of the Italian, Polish and Belgian governments, which had argued that it is not possible for a State to know with reasonable precision to what degree human rights protection is exercised in the responsible State, for the purpose of making a reasoned decision under Art. 3(2) of the Regulation.[XCVII] Ultimately, the Court ruled that a State *must* make use of the discretionary power of taking charge of an asylum request that is not its responsibility, when it cannot ignore that not doing so would result in a likely serious violation of a right protected by the Charter.

Interestingly, this case shows the 'ECHR-ification' of the Charter, insomuch as it clarifies that Member States must not only protect the fundamental rights listed therein, but will also incur responsibility for failure to avoid a serious violation committed by other subjects (in this case, the responsible State). In the framework of the Convention, this has led to a quasi-horizontal effect of the rights and duties derived therefrom, because States have been found liable for not protecting individuals from serious violations committed by other individuals. The same issue is probably occurring in the EU system, maybe even at a faster pace, in light of the *Kücükdeveci* doctrine on the horizontal application of general principles.

6. The new life of the Charter – some reflections

The case-law is far too scant to allow for far-reaching predictions. However, it is clear that reference to the ECtHR and its case-law is no longer a matter of nicety and comity but an actual precondition for the application of the Charter. It remains to be seen how the CJEU will choose to treat the doctrine of the margin of appreciation, which appears to run counter to the policy of uniform application of EU law that has always been of special concern for the CJEU.[XCVIII]

The CJEU can certainly borrow some of the balancing that the ECtHR has already made (between rights, or between a right and a general competing interest), and feed it into its own proportionality test, but it is difficult to understand how the margin of appreciation will fit in there. When the ECtHR applies this concept, its findings are premised on the assumption that the State measure must be tolerated, being one of those that does not entail a disproportionate limitation of the protected right.[XCIX] Proportionality in Luxembourg has traditionally had a stricter meaning: if the challenged measure is not the

least restrictive measure (reasonably) available, it should fall.[C] Moreover, the Court made clear that even when EU law accords to Member States some margin of appreciation in the implementation of a norm,[CI] States are not shielded from a judicial scrutiny of their conduct in terms of human rights compliance.[CII]

Another interesting aspect is the role of national courts in the direct application of the Charter. The Italian position might be taken as an example: the Constitutional Court of Italy has prohibited ordinary courts from disapplying domestic norms in conflict with the provisions of the ECHR, and ordered them to raise instead a claim of unconstitutionality. This position was premised on the clear distinction between the legal order of the ECHR and that of the Union.[CIII] Is this approach still tenable? Would it not be easier for national courts to invoke the supremacy and direct effect of the rights of the Charter (as interpreted in light of the Convention) to elude the intervention of the Constitutional Court? Recent decisions have shown that even when ordinary courts try to ensure the direct effect of the Charter,[CIV] the Constitutional Court's position is that the ECHR is still the (only) applicable standard of review, and therefore disapplication is not an option for ordinary courts.[CV]

On the theme of national courts, how will they perform in applying the inextricable set of horizontal provisions of the Charter (Articles 51-53)? In a recent case,[CVI] an English court was called to pronounce on a delicate issue centred on the application of *ratione materiae*[CVII] and *ratione personae*[CVIII] of the Charter. Moreover, the High Court had already taken the opportunity to issue some consequential views: the *Soering* doctrine[CIX] applies to the Charter by virtue of its connection with the Convention. The Italian example, mentioned above, is revealing in this sense; not only is the identification of the boundaries of EU competences difficult, but domestic inter-court dynamics might slow down the direct application of the Charter.

Ultimately, the big change that the Charter has yet to make is to demonstrate that there are not some rights which are more equal than others in the EU (namely, the market freedoms). Since the Court is almost always careful in framing its decisions in terms of proportional reasoning, it is not immediately clear if a pro-market bias is actually (still) there, but cases such as the 2010 *Commission v. Germany*[CX] are hardly convincing in demonstrating that fundamental rights and market freedoms have an equal status, as AG Trstenjak advocated.[CXI] In this sense, it has yet to be seen whether the apparent divergence between the ECtHR and the CJEU on the relative importance of collective action and

collective bargaining[CXII] – and on other issues – will be resolved over time or will create a permanent situation of double standards for equivalent rights.

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I OJ C 364, 18 December 2000, at 1-22.

II Presidency Conclusions of the Cologne European Council, June 1999, para. 44. For a concise but exhaustive account of the historical process behind the adoption of the Charter see Anderson and Murphy 2011.

III An accurate reconstruction of the origin of each right is provided in the Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02), accounting for the "conservative" value of the Charter. We recall that Art. 6(1), subparagraph 3 of the new TEU demands "due regard" to the explanations of the Praesidium, in the interpretation of the Charter (see also Art. 52(7) of the Charter).

IV See the Preamble of the Charter.

V Here, by "restatement," I intend to convey the idea of a collection reflecting the established consensus in the legal community on the existence of certain general principles of law.

VI As it was noted: "it is possible to argue that some of the charter's rights are "new" to the extent that the ECJ has yet to explicitly guarantee them as general principles of law" (Groussot and Pech 2010: 5).

VII A full list of the sources of the rights included in the Charter is set out in the updated "explanations" of the Praesidium, see OJ 2007 C 303/17.

VIII On the different approach adopted during the drafting sessions by the States and EU bodies, see De Burca: 2001.

IX Namely, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.

X In the Preamble the Charter is said to contain "rights, principles and freedoms."

XI Reading "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."

XII A very accurate appraisal of the Praesidium's explanations, which also accounts for their ambiguity on the right/principle divide, is provided in Sciarabba: 2005.

XIII On the similar duty as undertaken by the ECtHR (through the expansive use of Arts. 2, 3, and 8 of the Convention, and through the development of new safeguards for non-discrimination and procedural fairness (Arts. 6 and 14), see Brems: 2007; Palmer: 2009; Tomuschat: 2007.

XIV Art. 51(1).

XV Weiler and Lockhart 1995: 73.

XVI Case C-260/89 *ERT* [1991] ECR I-2925, see in particular para. 43.

XVII Case C-578/08 *Chakroun* v. *Minister van Buitenlandse Zaken*, judgment of 4 March 2010. The British courts have taken a similar view: *R (on the application of Zagorski and Baze) v. Secretary of State for Business, Innovation and Skills* [2010] EWHC 3110 (Admin), per Lloyd Jones J. On this last case, see below, in para. 6.

XVIII This reading seems validated by the revised commentary prepared by the *Presidium*: "As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493)."

XIX See the Advocates' perplexity on this point in Case C-108/10 *Ivana Scattolon* (AG Bot, Opinion of 5 April 2011, paras 116-120) and Joined Cases C-483/09 and C-1/10 *Magatte Gueye and Valentín Sánchez Salmerón* (AG Kokott, Opinion of 12 May 2011, para 77), mentioned in Anderson and Murphy, cit. 8.

XX See Wind 2009; Hancher and Sauter 2010 and the bibliography referred to therein; Jorgensen 2009. See

also the analysis of the implications of this case-law in Kochenov 2009.

[xxi] Case C-34/09 *Zambrano* (8 March 2011). This development was aptly preconized in Eeckhout 2002: 970 ff. See also De Mol: 2011.

[xxii] See among others Cartabia 2009: 15, recalling the cases Case C-117/01, *K.B.* (7 January 2004); Case C-423/04 *Richards* (26 April 2006), and Case C-267/06 *Maruko* (1 April 2008).

[xxiii] See Opinion of AG Sharpston of 30 September 2010, paras 156-177 (Case C-34/09 *Zambrano*).

[xxiv] Think of the matters previously belonging to the third pillar: their absorption into the general competence of the Union at the same time extends upon them the jurisdiction of the CJEU and the application of the Charter.

[xxv] See accurate account of the case-law and AG's opinions in Bazzocchi 2011.

[xxvi] See for instance Case C-47/07P *Masdar* (ECJ 16 December 2008), par. 50; Case C-402/05P e C-415/05P *Kadi v Council and Commission* (ECJ 3 September 2008), par. 335; Case C-450/06 *Varec* (14 February 2008), par. 48; Case C-275/06 *Promusicae* (ECJ 29 January 2008), par. 69; Case C-341/05 *Laval un Partneri ltd* (ECJ 18 December 2007), par. 90 and 91; Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union, v Viking Line ABP, OÜ Viking Line Eesti* (ECJ 11 December 2007), par. 43 and 44; Case T-194/04 *Bavarian Lager v Commission* (CFI 8 November 2007), par. 14; Case C-303/05 *Advocaten voor de Wereld VZW* (ECJ 3 May 2007), par. 46; Case C-432/05 *Unibet* (ECJ 13 March 2007), par. 37; Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* (CFI 12 december 2006), par. 71; C-540/03 *Parliament v. Council* (2006) ECR I-05769, par. 38; Case 47/07; Case C-244/06 *Dynamic Medien* (2008) ECR I-505, par. 41. More recently, see for example, *Alassini*, 18 March 2010, C- 317, 318, 319 and 320/08; *Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, 14 September 2010, C-550/07 P; *Blanco Pérez and Chao Gòmez*, 1 June 2010, C-570 and 571/07; *Chakroun*, C-578/08, 4 March 2010.

[xxvii] *Hauer*, 3 December 1979, Case C-44/79. See also Case C-45/08, *Spector Photo Group NV v. Commissiee voor het Bank-, Financie- en Assurantiewezen*, 2009 WL 4927720, par. 40 (Dec. 23, 2009); Case C-402/05, *Kadi v. Council*, 2008 E.C.R. I-6351, par. 283; Case C-305/05, *Ordre des barreaux francophones et germanophone v. Conseil des Ministres*, 2007 E.C.R. I-5305, par. 29; Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, par. 3; Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419.

[xxviii] Weiler and Lockhart 1995: 51-92 and 579-627; Groussot 2006: 10-11 ("*principles do not fall from heaven*"). See also Rodriguez Iglesias 1999: 1-16. Also Advocate Mazák, in the opinion of *Palacios*, acknowledged that "*it lies in the nature of general principles of law, which are to be sought rather in the Platonic heaven of law than in the law books, that both their existence and their substantive content are marked by uncertainty*" (par. 86).

[xxix] Advocate General Léger has proposed a third way to identify a general principle of the EC in his opinion in the *Hautala* case. In particular, he noted that to identify a general principle *"*[i]*t may suffice that Member States have a common approach to the right in question demonstrating the same desire to provide protection, even where the level of that protection and the procedure for affording it are provided for differently in the various Member States*" (par. 69). In the post-Lisbon scenario, the relationship between the three pillars of fundamental rights (common traditions, ECHR and the Charter) is briefly discussed in Ekardt and Kornack 2010.

[xxx] See joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99/P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij v. Commission* [2002] I-8375, para. 274 and C-301/04 P *Commission v. SGL Carbon* [2006] I-5915, para. 43.

[xxxi] The connection between the Charter and the case-law of the ECtHR is famously regulated by Art. 52(3) of the Charter.

[xxxii] Under this perspective, the conservative content of the Charter accounts for higher reliability: if a right is listed therein it is likely to be undisputedly acknowledged by all Member States. As noted in Groussot 2006: 107, the Charter is deemed to be a "*show case of existing rights*." See also, for instance, Advocate General Léger's opinion in the case C-353/99, *Council of the European Union v. Heidi Hautala* (*Hautala*), [2001] ECR I-9565, par. 80: "*aside from any consideration regarding its legislative scope, the nature of the rights set down in the Charter of Fundamental Rights precludes it from being regarded as a mere list of purely moral principles without any consequences. It should be noted that those values have in common the fact of being unanimously shared by the Member States, which have chosen to make them more visible by placing them in a charter in order to increase their protection.*"

[xxxiii] See Groussot 2006: 113. See also the statement of the Court, in case C-540/03 *Parliament v. Council* [2006] ECR I-05769, par. 38: "*the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the*

Council of Europe and the case-law of the Court … and of the European Court of Human Rights."
[XXXIV] See Tridimas 2006: 362.
[XXXV] See par. 22. The ruling just notices – in passing – that the principle of non-discrimination of grounds of age is enshrined in the Charter (Art. 21, first paragraph), and that under Art. 6(1) of the Treaty on the European Union (TEU) the Charter is as binding as are the Treaties.
[XXXVI] Kokott and Sobotta 2010: 3. See also Case C-407/08 P *Knauf Gips v Commission* [2010] ECR I-0000, paragraph 91, regarding the general principle of fair trial and effective judicial remedies, as codified in Art. 47 of the Charter.
[XXXVII] On this, see extensively Fontanelli 2011, and bibliography referred to therein.
[XXXVIII] Case C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA* (*Angonese*) [2000] ECR I-4139, paragraphs 34-35.
[XXXIX] See Art. 6(1) TEU.
[XL] On the horizontal application of general principles, see Wyatt 2008. *Contra*, see Spaventa 2011.
[XLI] See Art. 51.
[XLII] Case C-400/10 PPU *McB* (5 October 2010).
[XLIII] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1).
[XLIV] Under Article 2(11)(a) of that Regulation.
[XLV] Par. 44.
[XLVI] Paras. 51-52.
[XLVII] Para. 54, citing cases *Guichard v. France* ECHR 2003-X 714 and *Balbontin v. United Kingdom*, No. 39067/97, 14 September 1999.
[XLVIII] See the Opinion of Advocate General Jääskinen delivered on 22 September 2010.
[XLIX] After all, the issue of the right to custody was a pre-condition for the enjoyment of the rights to challenge the wrongfulness of a removal under the Regulation. See above regarding incorporation doctrines, Part 2.
[L] Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*.
[LI] Para. 48, referring to *Schmidberger*.
[LII] Para. 51.
[LIII] Para. 52.
[LIV] Para. 59.
[LV] Paras. 66-71.
[LVI] Para. 72, *Gillow v United Kingdom*, 24 November 1986, § 55, Series A no. 109, and C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, par. 83.
[LVII] The alternative measures that the CJEU proposes in paras. 81-83 are worded in a very vague fashion. Note that in her Opinion, AG Sharpston had called instead for a careful assessment of the measure in terms of necessity and proportionality, which could only be based on the clear identification of the objective pursued (alternatively, macro-transparency or micro-transparency). See para. 105 of of the Opinion.
[LVIII] See 'La possibilité d'un juste équilibre and the Charter', anonymous post on adjudicatingeurope.eu.
[LIX] See cases *Schmidberger* and *Laval*, cit. On proportionality in the EU, see recently Harbo 2010. For a wider study, see Ellis 1999. For an accurate comment on *Schmidberger* and *Omega*, which explains the Court of Justice's balancing practice, see Alemanno 2004.
[LX] This is also the point made by Bobek 2011.
[LXI] See ibid., 2018-2019.
[LXII] On this, see extensively Fontanelli and Martinico 2011.
[LXIII] Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* (22 December 2010).
[LXIV] Para. 27.
[LXV] Para. 28 and case-law referred to therein.
[LXVI] Para. 33.
[LXVII] Paras. 45-52.
[LXVIII] *Airey v. Ireland* of 9 October 1979 (Eur. Court H.R., Series A, No 32, p. 11). This is the case in which the ECtHR inaugurated the imposition of positive obligations on States (involving public expenditure) arising out of guarantees laid down in the ECHR, see the bibliography on the protection and implementation of ESCR through the ECHR, above at note XII.

[LXIX] Para. 60.
[LXX] Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL*, (1 March 2011). See Tobler 2011.
[LXXI] Namely, Art. 5(2) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37).
[LXXII] Art. 5(1) of the Directive.
[LXXIII] Concerning, respectively, the prohibition of discrimination based on sex and the right to equality between sexes in all areas.
[LXXIV] The sense of the challenged clause was that of providing for a transitional period of adaptation prior to the general application of unisex premiums, but it was formulated in a way that left open the possibility to conclude and keep in force sex-sensitive contracts indefinitely, therefore the Court had to rule its invalidity.
[LXXV] See Advocate General Kokott's Opinion, paras. 44 and 46: "Recourse to prognoses is indispensable in actuarial calculations of premiums and services in order to make that risk calculable and develop the products in such a way as to do justice to the risk … It is therefore in principle perfectly legitimate with regard to risk evaluation to carry out a group examination instead of – or in addition to – an individual examination."
[LXXVI] Ibid., para. 66.
[LXXVII] On the issue of comparability and on the underlying questions, see Tobler 2011: 2051-2053.
[LXXVIII] Paras. 25-26.
[LXXIX] Joined cases C-297/10 and C-298/10 *Hennigs v Eisenbahn-Bundesamt, Land Berlin v Mai*, decision of 8 September 2011, nyr.
[LXXX] See para. 59.
[LXXXI] See para. 78.
[LXXXII] As already made clear in the cases Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union ('Viking Line')* [2007] ECR I-10779, paragraph 44, and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 91).
[LXXXIII] See para. 98.
[LXXXIV] Case C-34/10 *Oliver Brüstle v Greenpeace e.V.* decision of 18 October 2011, nyr.
[LXXXV] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions.
[LXXXVI] See Art. 6(2)(c).
[LXXXVII] Art. 1 proclaims the inviolability of human dignity, whereas Art. 3(2) reads: "In the fields of medicine and biology, the following must be respected in particular: … (c) the prohibition on making the human body and its parts as such a source of financial gain."
[LXXXVIII] See the precautionary statement at para. 30.
[LXXXIX] Opinion of AG Bot, issued on 10 March 2011, C-34/10 *Oliver Brüstle v Greenpeace e.V.*, para. 46.
[XC] Joined cases C-411/10 *N.S. v Secretary of State for the Home Department* and C-493/10 *M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, judgment of 21 December 2011, nyr.
[XCI] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.
[XCII] See para. 68-69.
[XCIII] See in particular para. 80 of the Opinion: "decisions taken by the Member States on the basis of Article 3(2) of Regulation No 343/2003 are also to be regarded as implementing measures, despite the discretion available to them."
[XCIV] See para. 79.
[XCV] See para. 86.
[XCVI] See *M.S.S. v. Belgium and Greece* (Application no. 30696/09), 21 January 2011; Syring 2011.
[XCVII] See para. 91.
[XCVIII] See for instance para. 25 of *Brüstle* cit.
[XCIX] This description of the margin of appreciation is concededly simplified, and should be accepted only to highlight its difference with the principle of proportionality used by the CJEU. For a complete review of the concept, see Letsas 2006; Yourow 1996.
[C] *Volker und Markus Schecke GbR* (C-92/09), *Hartmut Eifert* (C-93/09), par. 74: "It is settled case-law that the principle of proportionality, which is one of the general principles of European Union law, requires that measures implemented by acts of the European Union are appropriate for attaining the objective pursued and

do not go beyond what is necessary to achieve it (Case C-58/08 Vodafone and Others [2010] ECR I-0000, paragraph 51 and the case-law cited)." Note that the margin of discretion accorded to national authorities by the CJEU (see eg *Schmidberger*, para. 81) must still be subject to a "quite strict "no less restrictive means" test," see De Burca 2007: 7.

[CI] See *Family Reunion*, cit., para. 62: "the final subparagraph of Article 4(1) of the Directive cannot be regarded as running counter to the right to respect for family life. In the context of a directive imposing precise positive obligations on the Member States, it preserves a limited margin of appreciation for those States which is no different from that accorded to them by the European Court of Human Rights, in its case-law relating to that right, for weighing, in each factual situation, the competing interests."

[CII] See *Family Reunion*, cit., paras. 22-23.

[CIII] See judgments No. 348 and 349 of 2007 and the comment in Fontanelli and Biondi 2008.

[CIV] See the judgment of the Civil Tribunal of Pisa (Labour section) *Hane v. INPS* of case N. RG. 1080/2008 (hearing and judgment of 27 September 2010).

[CV] See *Corte Costituzionale*, judgment no. 329/2011, available at www.cortecostituzionale.it, of 16 December 2011.

[CVI] *Zagorski & Baze*, R (on the application of) v Secretary of State for Business, Innovation and Skills & Anor [2010] EWHC 3110 (Admin) (29 November 2010), available at http://www.bailii.org/ew/cases/EWHC/Admin/2010/3110.html.

[CVII] See par. 70: "... in deciding whether or not to exercise the power of derogation the Defendant is implementing EU law in the sense of applying it or giving effect to it and he is bound to do so in accordance with the fundamental principles and rights which form part of EU law."

[CVIII] See par. 74: "I consider that the rights recognised by Articles 2 and 4 of the Charter are co-extensive with the rights in the Convention with which they correspond, not only in terms of their content but also in terms of the scope *ratione personae* of their application. These provisions of the Charter do not confer any rights on these [non-EU] Claimants."

[CIX] In *Soering v. UK* (1989) 11 EHRR 439 the European Court of Human Rights held that extradition to the United States, with the prospect of being held on death row for 6-8 years, would give rise to a breach of Article 3 ECHR.

[CX] Case C-271/08 *Commission v Federal Republic of Germany*, decision of 15 July 2010.

[CXI] See para. 81 of the Opinion to the case C-271/08 *Commission v Germany* cit., of 14 April 2010: "In the case of a conflict between a fundamental right and a fundamental freedom, both legal positions must be presumed to have equal status. That general equality in status implies, first, that, in the interests of fundamental rights, fundamental freedoms may be restricted. However, second, it implies also that the exercise of fundamental freedoms may justify a restriction on fundamental rights

[CXII] On the "dramatic" distance between the two courts on the same issues, see the exhaustive essay of Ewing and Hendy 2010.

References

- Alemanno Alberto, 2004, 'À la recherché d'un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur Quelques réflexions à propos des arrêts « Schmidberger » et « Omega »' in *Revue du Droit de l'Union Européenne* IV: 1-44
- Anderson David, Q.C. and Cian C. Murphy, 2011, 'The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe' *EUI Working Paper LAW* 2011/08
- Bazzocchi Valentina, 2011, 'The European Charter of Fundamental Rights and the Courts' in *Ius Gentium: Comparative Perspectives on Law and Justice* VIII(1): 55-75
- Bobek Michal, 2011, 'Case-note on Cases C-92/09 and C-93/09' in *Common Market Law Review* XLVIII(6): 2005-2022
- Brems Eva, 2007, 'Indirect Protection of Social Rights by the European Court of Human Rights', in Barak-Erez Daphne and Aeyal M. Gross (eds.), *Exploring Social Rights: Between Theory and Practice*, Hart Publishing, Oxford, 135-170
- Cartabia Marta, 2009 'Europe and Rights: Taking Dialogue Seriously' in *European Constitutional Law Review* V: 5
- De Burca Grainne, 2001, 'The drafting of the European Union Charter of Fundamental Rights' in *European Law Review* XXVI: 126-138

- De Burca Grainne, 2007, 'The Monitoring of Fundamental Rights in the Union as a Contribution to the European Legal Space (IV): The role of the European Court of Justice in balancing economic freedoms and fundamental rights' *Working paper series of the Université Catholique de Louvain*, REFGOV-FR-8
- De Mol Mirjam, 2011, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?' *Maastricht Journal of European and Comparative Law* XVIII(1/2): 109
- Eeckhout Piet, 2002, 'The EU Charter of Fundamental Rights and the Federal Question' in *Common Market Law Review* XXXIX(5): 945-994
- Ekardt Feliz and Daniel Kornack, 2010, 'Of Unity in Diversity and Inherent Tensions: Interpreting the European Union's New Architecture of Fundamental Rights' in *Columbia Journal of European Law Online* XVI(3): 89-93
- Ellis Evelyn (ed), *The Principle of Proportionality in the Laws of Europe*, Hart Publishing, Oxford
- Ewing Keith D. and John Hendy QC, 2010, 'The Dramatic Implications of Demir and Baykara' in *Industrial Law Journal* XXXIX(1): 2-51
- Fontanelli Filippo, 2011 'General Principles of the EU and a Glimpse of Solidarity in the Aftermath of *Mangold* and *Kücükdeveci*' in *European Public Law* XVII(2): 225-240
- Fontanelli Filippo and Giuseppe Martinico, 2011, 'Browsing the XX-files – The necessity test in the GATT and the test of proportionality in the EU: so close, yet so different' in *SWUPL International Law Review* III: in press
- Fontanelli Filippo and Francesca Biondi dal Monte, 2008 'The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System' in *German Law Journal* IX(7): 889-932
- Groussot Xavier and Laurent Pech, 2010, 'Fundamental Rights Protection in the European Union post Lisbon Treaty' in *European Issue* 173
- Groussot Xavier, 2006, *General Principles of Community Law*, ELP, Gronigen
- Hancher Leigh and Wolf Sauter, 2010, 'One step beyond? From Sodemare to Docmorris: The EU's freedom of establishment case law concerning healthcare' in *Common Market Law Review* XLVII(1): 117-146
- Harbo Tor-Inge, 2010 'The Function of the Proportionality Principle in EU Law' in *European Law Journal* XVI(2): 158–185
- Jorgensen Stine, 2009, 'The Right to Cross-Border Education in the European Union' in *Common Market Law Review* XLVI(5): 1567-1590
- Kochenov Dimitry, 2009, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights' in *Columbia Journal of European Law* XV(2): 169-238
- Kokott Juliane and Christoph Sobotta, 2010, The Charter of Fundamental Rights of the European Union after Lisbon, *EUI Working Paper AEL* 2010/06
- Letsas George, 2006 'Two Concepts of the Margin of Appreciation' in *Oxford Journal of Legal Studies* XXVI(4): 705-732
- Yourow Howard C., 1996, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence,* Martinus Nijhoff, Leiden
- Palmer Elizabeth, 2009, 'Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' in *Erasmus Law Review* II(4): 397-425
- Rodriguez Iglesias Gil C., 1999, 'Reflections on the General Principles of Community Law' in *Cambridge Yearbook of European Legal Studies* II: 1-16
- Sciarabba Vincenzo, 2005, 'Le spiegazioni della Carta dei diritti fondamentali dell'Unione' in *Diritto Pubblico Comparato ed Europeo* I: 59-93
- Spaventa Eleanor, 2011, 'The Horizontal Application of Fundamental Rights as General Principles of Union Law' in Arnull Anthony et al. (eds) *A constitutional order of states?*, Hart Publishing, Oxford, 199-217
- Syring Tom, 2011, 'European Court of Human Rights' Judgment on Expulsion of Asylum Seekers: M.S.S. v. Belgium & Greece' in *ASIL Insights* XV(5)

- Tobler Christa, 2011, 'case-note on Case C-236/09' in *Common Market Law Review*, XLVIII(6): 2041-2060
- Tomuschat Christian, 2007, 'Social Rights under the European Convention on Human Rights', in Breitenmoser Stephan et al. (eds.), *Human Rights, Democracy and the Rule of Law - Liber Amicorum Luzius Wildhaber*, Nomos, Baden Baden, 837-865
- Tridimas Takis, 2006, *The General Principles of EU Law*, 2nd edition, Oxford University Press, Oxford
- Weiler Joseph H.H. and Nickolas N.J.S. Lockhart, 1995, "Taking Rights Seriously' Seriously: The European Court of Justice and Its Fundamental Rights Jurisprudence' in *Common Market Law Review* XXXII(1): 51-92
- Wind Marlene, 2009, 'Post-National Citizenship in Europe. The EU as "Welfare-Rights Generator?"' in *Columbia Journal of European Law* XV(2): 239-264
- Wyatt Derrick, 2008, 'Horizontal Effect of Fundamental Freedoms and the Right to Equality after Viking and Mangold, and the Implications for Community Competence' in *Croatian Yearbook of European Law & Policy* IV: 1

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The 'enemy' at the gates? Assessing the European military contribution to the Libyan war

by

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Abstract

According to the 'Defense Strategic Guidance' (2012), the growing military capabilities of US allies will create new opportunities for sharing responsibilities in world affairs. The US strategic document considers the recent military operation in Libya a successful example in terms of burden sharing. The paper aims to assess the validity of such perspective, analyzing the concrete military contribution provided by the most relevant European counties involved in the intervention: UK, France and Italy.

The NATO military mission has triggered a controversial debate in International Security Studies (ISS). Three months after the end of operations, it is possible to provide a strategic and military overview of the intervention. What are the key results and lessons learnt of the mission? What have been the shortfalls? What has been the role played by European armed forces (and by the EU defense policy)? Can 'Unified Protector' be considered a success in terms of burden sharing?

Through the analysis of primary (official documents) and secondary sources (especially ISS literature), the article aims at answering these questions. After illustrating the current debate over the operation and how Libyan campaign represents the most recent evolution of contemporary military operations, the paper critically examines the crucial features of 'Unified Protector'. The preliminary results of the analysis reject the Strategic Guidance's optimism on European military capabilities, emphasize shortages, problems and a massive dependence on US assets.

Key-words

Libya, NATO, EU, R2P, contemporary warfare, ISTAR

Introduction

> *On a visit to Vietnam, Senator Hollings from Westmoreland's home state of South Carolina was told by Westmoreland: 'We're killing these people,' the enemy, 'at a ratio of 10 to 1.' Said Hollings, 'Westy, the American people don't care about the ten. They care about the one.' Westmoreland didn't get it.*
> (Lewis Sorley)

At the very beginning of 2012, Barack Obama announced the new 'Defense Strategic Guidance'. (US Department of Defense 2012). Oddly enough, the President personally went to the Pentagon to illustrate the contents of the document that will drive the US future strategic rearrangements in next years (Cobb 2012). '*De-emphasis*' (Walt 2012) on counter-insurgency and nation-building, military budget reductions, strategic prominence of Asia, downsizing of ground forces and growing relevance of cyber warfare are the key-points of the new Pentagons' perspective[I].

The Defense Guidance highlights a 'strategic opportunity to rebalance the U.S. military investment in Europe, moving from a focus on current conflicts toward a focus on future capabilities'[II]. In other words, the US posture in Europe will evolve. The document anticipates dramatic changes in America's role in NATO. While the Article 5 commitments will be firmly maintained, a 'smart defense approach' will be developed with NATO allies in order to 'pool, share, and specialize capabilities as needed to meet 21st century challenges'[III]. According to the Defense Guidance, the growing military capabilities of US allies will create new opportunities for burden sharing. Consequently, Washington will encourage NATO allies to 'develop the integrative capacity they need to simultaneously conduct a Libya-style war and a Balkans-style peace support operation -- without the United States' (Kay 2012). Indeed, the Defense Guidance considers the operation in Libya the most recent successful example in terms of burden sharing.

Undoubtedly, European countries such as France, UK and Italy, which are all now producers of security rather than consumers of it, played a central role in NATO operation

'Unified Protector' (OUP). The military intervention in Libya seems to fit perfectly with the idea of a small-footprint approach for achieving US security goals, sharing costs and responsibilities. However, one could wonder if the European countries really have the capabilities to lead (without the United States) a 'Libya-style war', a complex military operation at their borders, facing multidimensional threats (terrorism, regional instability, organized crime, waves of migrants, etc) to the European security. Considering the current European military capabilities, is this option already feasible? What, if any, are the main military European shortages hindering such possibility? Above all, is it correct, as noted by the Defense Guidance, to consider 'Unified Protector' as a success in term of burden sharing?

A detailed analysis of NATO military intervention in Libya will provide preliminary answers to these questions. Before looking at the main features of the operation from the perspective of the European armed forces involved in North Africa, the article will briefly illustrate the contribution of the Libyan war to the current debate over the evolution of contemporary military operations.

1) The evolution of the international security and the Libyan War

The debate in International Security Studies (ISS) over the supposed changing nature of the warfare is extremely lively and controversial[IV]. The traditional strategic view, focused on the role of state and armed forces as principal explaining variables of security issues, since the end of Cold War has been robustly challenged by a wide range of new approaches, such as conventional and critical constructivism, post structuralism, critical security studies, etc. (Buzan and Hansen 2010). The incontestable raise of intra-state conflicts occurred in the last decades[V], brought many authors to develop new conceptual tools in order to understand the post-interstate industrial conflicts era (Van Crevald 1991; Kaldor 1999; Smith 2006). After the Berlin Wall collapsed, western armed forces faced a profound transformation. Instead of focusing only on a traditional military threat to states (e.g., an external invasion by foreign troops) they have adopted a multidimensional approach to security problems, such as terrorism or organized crime (Murray 1999). Moreover, after the end of the bipolar era, the dramatic spread of civil wars led to

massacres and genocides, harming mainly civilians rather than soldiers. Consequently, the number of 'humanitarian interventions' undertaken by the 'international community' notably increased[VI].

The conflict in Libya represents a remarkable case because it provides additional and innovative elements to the contemporary debate. From its analysis, it is possible to distinguish three significant aspects of warfare transformation in the new century: the 'revival' of air superiority, the 'responsibility to protect' (R2P) and the multidimensional nature of security threats.

Firstly, the 'Libya-style conflict' mirrors a specific way of waging war, mainly based on air superiority without boots on the ground[VII]. A 'model' adopted in several interventions undertaken in the 90s by western armed forces (i.e. Bosnia, 1995 and Kosovo, 1999). Despite the peculiarities of the Libyan crisis[VIII], the importance of air power, the formal humanitarian aims of the operations and the support to local forces, represent crucial shared elements with those missions. Such a model of intervention deviates to a large extent from the counterinsurgency (COIN) approach that has shaped western military doctrines in recent years. In fact, the operations undertaken in Iraq and Afghanistan have been largely inspired (especially after 2006) by the COIN doctrine[IX]. Both conflicts fostered a growing debate on counterinsurgency (Galula 2005; Nagl 2005; Gray 2006 and Kilcullen 2009), downsizing the strategic importance of mechanized warfare for contemporary armed forces. The so-called Petraeus's doctrine ('*U.S. Army and Marine Corps Counterinsurgency Field Manual 3-24*') spread an increasing attention towards COIN and its key principles: conquering 'hearts and minds' and protecting civilian population are considerably by far more important than destroying enemy in a 'conventional way'. Despite the recent western 'enthusiasm' for counterinsurgency[X], switching emphasis from eliminating enemies to providing security for the local populace still requires considerable cultural and operational efforts. Indeed, the COIN 'version' applied in Iraq and Afghanistan represents a significant departure from the post-Vietnam western way of war, which has always preferred air power to infantry-on-infantry warfare (Coticchia and Giacomello 2011). The huge technological advantage of western armies, and the casualties aversion of public opinion represent the main explaining variables behind the 'post-heroic soldiers' (Luttwak 1996) of last decades. If 'Iraqi Freedom' and ISAF seemed to transform a consolidate way of war, the Libyan operation reintroduced the previous model of

intervention. Economic crisis (with huge financial constraints to the defense sector), mounting problems faced in current COIN operations (Walt 2011; Bacevich 2010) and peculiarities of Libyan conflict (geography, rebels on the ground, proximity to the EU), clarify the renewed strategic relevance of air superiority in contemporary military interventions abroad.

Secondly, 'Unified Protector' has been interpreted as the first military enforcement of the Responsibility to Protect norm (Patrick 2011). The United Nations Security Council (UNSC) Resolution 1973 highlights the Libyan authorities' responsibility to protect its population[XI]. Since the end of the bipolar era states have increasingly deployed troops to 'protect citizens other than their own from humanitarian disaster' (Finnemore 1996: 153). Responsibility to protect (International Commission on Intervention and State Sovereignty 2001, Weiss and Hubert 2001; Pace and Deller 2005; Bellamy 2009) represents a massive challenge for state sovereignty because 'it makes a state's presumed right of nonintervention contingent on its ability and willingness to protect its citizens and threatens 'collective, timely, and decisive action' if it does not' (Patrick 2011). Consensus on when and how to intervene has never been reached in the international community[XII], especially regarding the feasibility of military action to halt genocide, war crimes, crimes against humanity, and ethnic cleansing (Weiss 2004). The absence of a veto in the Security Council (China and Russia had not 'special relationship' with Libya), the unusual appeals of the Arab League to intervene, the growing global support to popular protests against undemocratic regimes both in Middle East and North Africa, substantially paved the way to a R2P operation, as 'Unified Protector' was labeled and presented. According to Patrick (2011), all these 'favorable' political conditions were deeply related to a specific geographical and historical moment and unlikely to be repeated in a near future.

Thirdly, the challenges posed by the Libyan crises well describe the profound evolution of contemporary security and the multidimensional nature of threats. After the end of Cold War, when homeland defense was the primary task of armed forces, European troops have been constantly involved in military operations abroad, facing a wide range of 'new' menaces to national security. Terrorism, organized crime, regional instability, illegal migration, drug and weapons trafficking are among the main threats defined by the European Security Strategy (2003)[XIII]. NATO soldiers, employed for decades at the eastern

European frontiers, 'waiting' for an eventual Soviet attack, are nowadays engaged in Afghanistan aiming at protecting national security from terrorism.

According to Gustafson: 'Globalisation has facilitated the interconnected nature of global organised crime, insurgency and terrorism' (2010: 74). European armed forces are deeply concerned about the instability at the EU borders. Also the European Union is becoming far more active across its periphery, through a wide range of instruments, from Frontex to CSDP civil-military operations, to promote stability along its boundaries by contrasting 'new' threats as smuggling or terrorism (Strazzari and Coticchia 2012). In contemporary conflicts there is an evident correlation between the permeability of boundaries and the instability brought by military or political crises. The Libya war has strongly confirm such correlation: Gaddafi used migration as a 'weapon' against the European countries involved in the operation, aiming at influencing their domestic support to the military intervention (as partially occurred in the Italian case)[XIV]. 'The enemy at the gates' is not a foreign army at the border, but a flow of desperate migrants, alimented by the crisis and partially fostered by the Gaddafi regime (Cadalanu 2011). The analysis of 'Unified Protector' can shed light on how European forces (within the NATO framework, due to the EU political and institutional inability to create and support an operation on its own) have contributed to face new threats, providing security in instable areas at the EU periphery.

In summary, the Libyan war adds several elements to the current debate over the transformation of international security. However, as stressed by the Africa Command Chief, General Carter Ham, the Libyan operation will not be the blueprint for future interventions (Munoz 2011). Ham made clear that every conflict is different, and consequently the template adopted in Libya may produce a very different result elsewhere. According to Patrick (2011), the peculiarities of the Libyan case (i.e., a small geographical context that favors logistics for external military interventions) make the attempt to generalize extremely dangerous. However, the war in Libya undoubtedly provides important lessons learnt on contemporary military operations and, above all, it well illustrates the current military capabilities of the European countries involved in 'Unified Protector'.

2) 'Operation Unified Protector (OUP)'

Protests against Gaddafi's regime spread across Libya in mid February 2011[XV]. United Nations Security Council initially imposed an arms embargo (through the Resolutions 1970, February 26th) and later authorized a 'no-fly zone' over Libya (UNSC Resolution 1973, March 17th). While Gaddafi forces launched a counteroffensive towards Benghazi, a US-led multinational coalition ('Operation Odyssey Dawn') started air and maritime operations against the regime[XVI]. NATO took control of the mission some days later: the 'Operation Unified Protector', which began on March 31st under UN mandate[XVII], was officially composed by three elements: arms embargo, no-fly-zone and interventions aiming to protect civilians and civilian-populated areas. A peak of 8.000 soldiers were involved in the operation, through 260 air assets (e.g., fighter aircraft and attack helicopters) and 21 naval assets (e.g., frigates and aircraft carriers)[XVIII]. The pro-Gaddafi forces[XIX] were noticeably hit by the extended campaign of air-strikes. According to NATO official final stats over 26.500 sorties were carried out by sixteen countries[XX] (including over 9,700 strike sorties), destroying over 5.900 military targets (such as artillery, rocket launchers, tanks or armored vehicles)[XXI]. Arms embargo allowed NATO warships to hail 3.100 vessels, boarding 300 of them[XXII]. At the same time, 600 migrants were directly rescued by NATO forces[XXIII].

The massive military effort sustained by NATO finally helped rebels to defeat Gaddafi troops. At the end of August Tripoli was conquered by the National Transitional Council (NTC) and on 20th October Gaddafi was killed near Sirte. 'Unified Protector' officially ended on 31 October 2011[XXIV].

The debate over the Libyan war has been lively, especially in ISS literature (Clarke 2011; Eyal 2011; Lacher 2011; Patrick 2011; Vira and Cordesman 2011). Several think thanks (such as Stratfor, Center for Strategic and International Studies - CSIS, Royal United Services Institute for Defence and Security Studies – RUSI and International Institute for Strategic Studies - IISS) illustrated the conflict in detail, even throughout the operation. Three months after the end of the intervention it is possible to provide a comprehensive military and strategic analysis of 'Unified Protector'.

Before looking at the elements that help to assess the real military capabilities showed by European countries, we should emphasize the ambiguous nature of the operation: NATO forces were engaged in a 'war of attrition [that means] a significant expansion from the letter of the UN Security Council Resolution 1973' (Vira and Cordesman 2011: 5). Commentaries agree on the fact that the way through which NATO has waged war effectively expanded the restricted objective of the UNSC Resolution (i.e. to take all necessary measures to protect civilians). Looking at the military campaign (the introduction of attack helicopters and special forces, whose presence on the ground was ruled out by the Resolution, the air strikes against regime centers of gravity and even the Gaddafi's compound in Tripoli, etc.) it seems clear that 'regime change' became the main unsaid goal of the intervention (ISS 2011). As stated by Eyal: 'After Benghazi was secured, the operation was expanded and became open-ended' (2011: 4). Despite official denials[XXV], the operations were visibly designed to remove Gaddafi. In that sense, it is quite illustrative that OUP formally ended few days after Gaddafi's death[XXVI].

3) Military and Strategic overview: a preliminary assessment of the European countries' capabilities

While literature reports a broad consensus on the ambiguity of mandate, strategic reflection over the mission is extremely controversial. The paper will illustrate the key elements through which it is possible to assess the military capabilities of the main European armed forces involved in the operation.

Does OUP confirm the optimistic view adopted by the US Defense Guidance on the European military capabilities? What have been the foremost military and strategic lessons learnt of the intervention in Libya? The next paragraphs, through the analysis of primary (official documents) and secondary sources (literature, reports, etc) will answer these questions.

3.1 Burden sharing?

The US Defense Guidance highlights new opportunities for burden sharing created by the growing military capabilities of allies. The Libyan operation is portrayed as a positive

example in that sense. However, the analysis of military intervention shows a different picture. France and Britain undoubtedly played a crucial role in the operation, taking the diplomatic (and later also the military) lead of the mission. The 'unprecedented limitations' (Clarke 2001: 5) imposed by the Obama administration to the US military involvement fostered an Anglo-French leadership. The legitimacy of their role (as well as of the whole operation) was increased by the unusual sustain provided by the Arab League towards the imposition of a no-fly-zone. However, in term of burden sharing, NATO was internally divided, with several 'reluctant allies' that denied their military contribution. Former US Defense Secretary, Robert Gates, openly called for Germany, the Netherlands, Poland, Spain and Turkey to contribute to the fights[XXVII]. As noted by Gates, despite the large political support to the mission and the absence of boots on the ground, less than half of NATO members were involved in the operation. In his words:

> "*Frankly, many of those allies do so not because they do not want to participate, but simply because they can't. […]. It has become painfully clear that similar shortcomings – in capability and will –have the potential to jeopardize the alliance's ability to conduct an integrated, effective and sustained air-sea campaign*" (The Wall Street Journal 2011).

The fact that OUP was a mission that attains at European crucial interests (e.g. oil and gas, stability in the neighborhood, etc.) along the European borders, makes the hesitant participation of several countries extremely significant in terms of burden sharing. Occasional disputes erupted over command arrangements and military coordination among partners (e.g., the attack helicopters were deployed by France unilaterally, irritating the UK), several countries gradually reduced or withdrew their military support (i.e. Norway pulled out its F-16 aircraft), some others refused to deploy crucial assets or imposed on them rigid constraints (the Netherlands did not employ F-16 aircraft for airstrikes). As noted by to Vira and Cordesman: 'The burden of the Libya operations is increasingly borne by a small number of countries. Others have erected strong political obstacles to participation, or caveats on their military contributions.' (2011: 7). Notwithstanding the relatively small scale of the operation, undersized in comparison with other recent NATO interventions (e.g., Afghanistan), several European countries were unable (or unwilling) to deploy aircraft (Quintana 2011). In summary, as reported by Secretary Gates, Libyan war

showed a divided NATO: '[…] between those willing and able to pay the price and bear the burdens of alliance commitments, and those who enjoy the benefits of NATO membership, be they security guarantees or headquarters billets, but don't want to share the risks and the costs' (The Wall Street Journal, 2010). Such image openly contrasts with the US Defense Guidance optimism on burden sharing.

3.3 Air campaign: results and shortages

Literature agrees in considering NATO's air campaign successful regarding the capability to halt the counteroffensive of the Gaddafi's forces, maintaining air dominance, effectively supporting the rebels and avoiding (mainly through the use of precision-guided munitions) 'collateral damages' (ISS 2011). According to NATO's final report: 'Targeting is done with extreme care and precision, using the weapon with the smallest yield possible, to avoid harm to the Libyan people and their infrastructure'[XXVIII]. However, recent journalist reports have drawn a less rosy picture. 'The New York Times' found 'accounts of dozens of civilians killed by NATO in many distinct attacks' (Chivers and Schmitt 2011).

If the debate on civilians casualties needs more investigation on the ground to assess properly the 'collateral damages' of the intervention, most of strategic analyses in the ISS literature shared the same perspectives on key lessons learnt, shortages and problems concerning the Libyan air campaign.

First, out of all the combat aircraft deployed by NATO members, less than half were able to conduct air to ground operations and only six European countries (Belgium, Denmark, France, Italy, Norway, and the UK) contributed to strike missions[XXIX]. Other nations (Netherlands, Qatar, Spain, Jordan, Sweden and Turkey) deployed aircraft to enforce the no-fly zone without attacking ground targets. In conformity with Gates' views, several countries did not take part to the intervention because they had not adequate military capabilities.

Secondly, the air campaign has highlighted shortages in ISTAR capabilities (Intelligence, surveillance, target acquisition, reconnaissance), since they depended heavily on US support. As noted by the International Institute for Strategic Studies: 'Operations remained largely dependent on American JSTARS (joint surveillance target attack radar system) and AWACS (airborne warning and control systems) aircraft'[XXX]. ISTAR is a

crucial asset in a military campaign as OUP without booths on the ground (apart for few special forces deployed in covert operations), because it represents the main way to obtain information[XXXI]. Cordesman and Vira refer to 'chronic shortfalls in ISTAR capacity' (2011: 21).

Thirdly, considerable budget cuts (which have involved several European countries) directly affected the military contributions provided by the armed forces throughout OUP. The European inadequacy regarding ISTAR has been deepened by recent cuts, forcing some countries to extend the service of relevant assets (e.g. the UK Nimrod R1 reconnaissance aircraft). The so called 'carrier debate' is another illustrative example. The UK, having renounced to its carrier for financial constraints imposed by the government, was unable to deploy it during OUP. Therefore the Libyan campaign represented a useful test for the new UK-France bilateral defense co-operation arrangement. On one hand, as reported by RUSI (2011), the Britain's amphibious assault ship HMS Ocean acted as a 'helicopter carrier', supporting allies in launching aircraft[XXXII]. On the other, OUP was unable to take the advantages a carrier can provide, worsening the dependence on the allies military assets and land-bases, which were mainly in Italy. The initial Italian ambiguity towards the operation[XXXIII] demonstrates that: 'the assumption of available shore-basing always involves a balance of risks' (Willet 2001: 9).

As pointed out by this last example, looking at the specific national contributions provided by the most important European armed forces supplies additional elements for assessing their military capabilities.

3.3.) National contributions in details: UK, France and Italy

Apart from Washington, the main military contribution given to the operation has been provided by three European countries: UK, France and Italy.

The UK mission to enforce the UN resolutions was called 'Operation ELLAMY'. According to the official stats released by the UK Ministry of Defense: 'at its peak, the UK had around 4,000 personnel, 37 aircraft and four ships'[XXXIV] committed to the intervention. The official documents emphasize the positive performance given by the RAF Typhoons, especially due to their versatility, the significant threat posed by Gaddafi's forces (which were considered 'very well equipped and trained and well-motivated'[XXXV]) and the crucial

role played by the AH-1 Apache helicopters embarked on HMS Ocean. It is worth noting how the military 'positively' considered such operation in comparison to its intervention in Afghanistan. In the words of Major Mick Neville, Officer Commanding 4 Regiment AAC: 'In Afghanistan we are used in a reactionary way, giving support to guys on the ground, so it was nice to be involved in deliberate targeted operations'[XXXVI]. This sentence well illustrates the different nature of the two missions, highlighting the cultural and operational problems western troops are facing in counterinsurgency warfare.

'Harmattan' is the name attributed by France to the national operation that started March 19th. The official documents illustrate the details of the French military contribution: 4.200 personnel, 40 aircraft (among them Rafale, Mirage 2000 D and Mirage 2000 N), 20 helicopters and the Charles the Gaulle carrier. France contributed at the 35% out of the air to ground operations undertaken by the coalition[XXXVII]. The role played by the French helicopters ('SA-342 Gazelles' and 'Eurocopter Tiger'[XXXVIII]) was even more important, carrying out 90% of the overall attacks launched through such asset throughout OUP[XXXIX]. Attack helicopters were employed since the beginning of June in urban areas (mainly in Misurata) to target Gaddafi's forces on the ground after the main air defense had been removed. Their role was significant, especially due to the capabilities to engage enemies in urban areas effectively and with less fear of civilian casualties. According to Cordesman and Vira: 'Their ability to loiter and provide close-fire support is an important asset but comes with their vulnerability to ground fire, particularly MANPADs [Man-portable air-defense system], but also RPGs [rocket-propelled grenade] and small-arms[XL]' (2011: 216).

On a whole, the French military contribution was considerable and it reflected a noticeable activism on the diplomatic stage: France and UK made pressure on the UN Security council since the very beginning of the Libyan crisis, playing a leading role in the multinational coalition[XLI].

On the contrary, the Italian approach towards the crisis was initially ambiguous and ambivalent. Miranda emphasizes the 'vacillations' (2011: 17) of the government, which had initially excluded a national involvement in the air strikes, due to the strong economic, political and military ties with Gaddafi's regime and the unpleasant colonial past in the country[XLII]. Probably, such initial ambiguity helps to explain the scarce international recognition attributed to the significant Italian military involvement in OUP. For example, the considerable role played by Italy in the Libyan campaign was completely forgotten by

President Obama during its statement at the UN General Assembly, fostering a vigorous political controversy[XLIII].

Securing energy supplies, contrasting migratory flows and preserving the national economic investment in Libya to cope with the activism of other international actors, led Italy to intervene, following what Miranda calls an 'interest-driven approach' (2011: 16). However, the humanitarian mission deployed at the Tunisian border and the strong appeal to build a multilateral framework to 'Odyssey Dawn' confirm once again the relevance of the key-values through which Italian leaders traditionally justify military operations abroad: humanitarianism and multilateralism. According to Ignazi, Giacomello and Coticchia:

> "*Frameworks such as "multilateralism" and "peace", which were fundamental cultural guidelines of the Italian foreign and defense policies during the Cold War, are still central in the national strategic culture. Despite an effective evolution of the Italian defense policy in the last two decades, the military dimension of the operations still appears "removed" from the political debate*" (2012: 4).

The Italian involvement in Libyan crisis is pretty adherent to such perspective on the 'national way' to military operations abroad: strong caveat and constraints to military action (Gaiani 2011a), substantial consensus by the main political parties to the mission[XLIV], scarce information over the air campaign[XLV], extreme reluctance to involve troops in combat operations. On a whole, the Italian participation to OUP confirms the national attitude for sending troops overseas in a wide range of operations: peacekeeping, peace-building, peace-enforcement and humanitarian interventions. 'Deploying a carrier and eight other ships, Italy took a leading role in the NATO operation, especially with French, UK and US assets operating under national tasking' (Willet 2011: 9).

In addition to a preeminent responsibility assumed in the NATO maritime operations[XLVI] (which were officially led by an Italian admiral), Italy contributed to OUP in a considerable way, providing seven air bases in its territory[XLVII], employing the best assets of the national Air Force (i.e., Tornado, F16 Falcon, Eurofighter 2000, AMX, Predator B, G 222, AV-8B) throughout 1182 missions[XLVIII]. Gaiani (2011b) estimates the Italian contribution to 10% of NATO's air campaign, after US, UK and France[XLIX].

In summary, despite positive results achieved (especially in terms of diplomatic activism) and extensive efforts made by European armed forces during OUP, all the

shortfalls and problems described above contribute to reject an optimistic view on European military capabilities in contemporary operations. The degree of military dependence on US assets is still massive. Moreover, if the involvement of key European countries proved some shortages, the role played by the European Union confirms the crisis of the EU defense policy.

4) The (absent) role of the EU

> *'I am ready to take work forward on possible new CSDP missions – in particular in regions of such strategic importance to Europe's security as such as Sahel and Libya'.*
> (High Representative Catherine Ashton on the Common Security and Defense Policy in the European Parliament in Strasbourg, 13 December 2011)

> *'The CFSP died in Libya – we just have to pick a sand dune under which we can bury it'*
> (Unnamed European diplomat quoted by the Deutsche Presse-Agentur, 24 March 2011)

In front of the outbreak of the Libyan crisis, the European Union was unable to react rapidly and in coherent way. Its response was widely criticized for being too slow and too divided (Koenig 2011). Brussels implemented sanctions against Libya adopted by the UN Security Council imposing also an arms embargo to the Gaddafi's regime[L]. In April the EU approved a military mission to provide humanitarian assistance, activating also the civil protection mechanism: European experts were deployed in Libya and at the borders with Tunisia, Egypt, Algeria, and Chad[LI]. Around 5,800 EU citizens were evacuated. As of 11 January 2012, the Commission and member states had provided over 158 million Euros for humanitarian aid and civil protection.[LII] The EU is still the biggest humanitarian donor to Libya.

However, unanimity was reached by the EU members only on humanitarian support. In the words of High Representative Catherine Ashton, there were: 'different approaches from different member States to the military issues […] they are sovereign nations. They determine what approach they take to military action, and that's right and proper. That's for them to do. They are sovereign states'[LIII]. Any intervention under the framework of the Common Security and Defense Policy (CSDP) was taken into consideration due to the divisions among EU members. Brussels has been almost a sort of 'spectator' in the face of war (Santini 2011). According to Menon (2011) the EU was incapable of agreeing on how to act, failing miserably in the Libyan crisis. The disunity of the EU has been widely interpreted by European diplomats and policy-makers as 'the end of the illusion' for CSDP (Armellini 2011). In addition, as noted by Santini, the crisis exposed: 'two serious flaws of European foreign policy: the lack of a common migration approach beyond the creation of Frontex, a border control agency, and the death of collective energy security policy' (Santini 2011).

It is impossible to say whether the Libyan crisis will mark the end of the CSDP, but EU inactivity has definitely illustrated the dramatic weaknesses of the European defense policy in terms of coherence and capabilities (Menon, 2011). Since the European Union has proven to be so internally divided towards a political and military crisis at its borders, the US Defense Strategic Guidance's confidence on burden sharing appeared misplaced.

5) Conclusion

> *'Your chief of staff couldn't' lead a platoon around the corner to buy a newspaper', the American ambassador, Winthrop Brown, once told him. 'I know', Phoumi answered, 'but he's loyal'*
> (David Halberstam on former Laotian leader Phoumi Nosavan)

Sustaining the victory obtained by operation 'Unified Protector' requires a massive effort (Cordesman and Vira 2011). Despite a diminishing global attention towards Libya, the current situation is dramatically worsening[LIV]. Libyan National Transitional Council chairman Mustafa Jalil openly warned that Libya faces a civil war (Ditz 2012). Inter-militia fighting erupted, especially around Tripoli. After the war, different militias obtained the

control of various spheres of influence in the country and the disarmament process appears extremely complex and intricate. The violent protests at the National Transitional Council's headquarters, attacked by hundreds , well illustrate the huge problems faced by the interim government to get control over the country (Stack 2012). Growing instability and fragmentation, civil war, jihadist sanctuary for al-Qaeda, are some of the worst-case scenarios for the new Libya. The international community still has a considerable strategic and economic interest in maintaining stability in the area. At the moment we are unable to predict if, eventually, the European countries will provide further military support to the National Transitional Council (training missions[LV]). US Defense Strategic Guidance, which has portrayed the Libyan war as a successful model of burden sharing, has probably provided an inadequate example.

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I For a comprehensive, even if preliminary, analysis of the 'Defense Strategic Guidance' see the open debate held at the Council of Foreign Relations, available at: http://www.cfr.org/defense-strategy/obamas-defense-strategy/p27012 (Accessed January 2012).

II U.S. Department of Defense (2012: 3)

III Ibid.

IV For an overview of the debate over the transformation of war see, among others: Buzan and Hansen, 2010.

V See, among others, Centre for the Study of Civil War at PRIO and Uppsala Conflict Data Program (UCDP), available at: http://www.prio.no/CSCW/Datasets/Armed-Conflict/ (Accessed January 2012).

VI See the dataset in: www.sipri.org/contents/conflict/conflictdatasets.html (Accessed January 2012).

VII In that sense, we rule out covert operations and Special Forces, which actually played a relevant role during the NATO operation.

VIII On main differences between the operations in Libya and Kosovo see, among others: RUSI (2011).

IX According to Strachan: 'the ideas of counterinsurgency […] are means to an end, not an end in themselves' (2010: 159). In conformity to such perspective, talking about COIN 'strategy' is misleading because the counterinsurgency approach attains at the operational level of war.

X For a critical perspective see: Gentile, 2008

XI UN Security Council Resolution S/RES/1973 (17 March 2011), available at: http://www.un.org/News/Press/docs/2011/sc10200.doc.htm#Resolution (Accessed January 2012).

XII For a critical perspective on humanitarian interventions and R2P see, among others: Duffield (2003) and Zizek (2005).

XIII See the European Security Strategy: A *Secure Europe in a Better World*, 2003

XIV 'Lega Nord' (Northern League), which was a crucial Berlusconi's ally in the majority coalition, was openly critical towards NATO's military intervention (even though without voting against the parliamentary approval of the mission). See: Casadio (2011).

XVSee: http://www.bbc.co.uk/news/world-africa-12477275 (Accessed January 2012).

XVI The operation began on March 19th. Key contributors were France ('Operation Harmattan') and United Kingdom ('Operation Ellamy') See: http://www.defense.gov/home/features/2011/0311_libya2/ (Accessed January 2012).

[xvii] UN Security Council Resolution 1973 mandates all necessary measures to protect civilians and civilian-population areas under attack or threat of attack in Libya. See: UN Security Council Resolution S/RES/1973. (17 March 2011), available at: http://www.un.org/News/Press/docs/2011/sc10200.doc.htm#Resolution (Accessed January 2012).

[xviii] Operation UNIFIED PROTECTOR - Final Mission Statistics available at: http://www.nato.int/cps/en/natolive/71679.htm (Accessed January 2012).

[xix] According to Cordesman and Vira: 'At the start of the uprising, unclassified sources estimated that the 50,000-man Libyan Army, included 25,000 poorly trained conscripts, and constituted the bulk of Libya's 76,000 active forces. The 40,000 strong People's Militia, a paramilitary organization was sometimes included as part of the army, but was really an additional and autonomous defense institution. The Libyan army seemed to lack anything approaching an effective and well-trained reserve system and was deliberately weakened by Qaddafi, who did not trust in its loyalty, particularly after an attempted military coup in 1969' (2011: 21).

[xx] Nations were: Belgium, Canada, Denmark, France, Greece, Italy, Jordan, Netherlands, Norway, Qatar, Spain, Sweden, Turkey, United Arab Emirates, United Kingdom and United States.

[xxi] Operation UNIFIED PROTECTOR - Final Mission Statistics, available at: http://www.nato.int/cps/en/natolive/71679.htm (Accessed January 2012). NATO's forces carried out reconnaissance, surveillance and information-gathering operations through fighter aircraft, surveillance and reconnaissance aircraft, air-to air refuellers, unmanned aerial vehicles (UAV) and attack helicopters.

[xxii] Twelve nations (Belgium, Bulgaria, Canada, France, Greece, Italy, Netherlands, Spain, Romania.
Turkey, United Kingdom, and United States) have provided naval assets to enforce the embargo. Operation Unified Protector: NATO-led Arms Embargo against Libya - October 201, available at: http://www.nato.int/cps/en/natolive/71679.htm (Accessed January 2012).

[xxiii]Ibid. On the political disputes between Italy and NATO on rescue operations see, for instance: *La Repubblica* (2011) and *Libero* (2011).

[xxiv] Concerning costs, NATO's official report of OUP highlights that: 'each contributing nation paid the costs resulting from the use of their capabilities deployed as part of Operation Unified Protector. Airborne Early Warning and Control Aircraft (AWACS) were the only NATO-owned capabilities subject to NATO common funding. The total cost of the 24/7 deployment of NATO AWACS were estimated at 5.4 million EUR/month. In addition, the complementary cost for the structural and personnel augmentation of headquarters involved in Operation Unified Protector was estimated at 800,000 EUR/month, subject to final verification by NATO financial authorities'. Final Mission Statistics available at: http://www.nato.int/cps/en/natolive/71679.htm (Accessed January 2012).

[xxv] See NATO's official statements available at: http://www.nato.int/cps/en/natolive/71679.htm (Accessed January 2012), or *United States Activities in Libya*, White House, June 15, 2011. Available at: http://bit.ly/lWT54Z (Accessed January 2012).

[xxvi] Additional criticism towards NATO's intervention was also related to the 'double standard' of the Western approach, especially after the massive violence erupted contemporarily in Syria. See, among others: Bruba (2011).

[xxvii] NATO defense ministers' meeting in Brussels, June 8th. See Burns and Shanker (2011).

[xxviii] 'Operation Unified Protector: Protection of civilians and civilian-populated ares & enforcement of the No-Fly Zone - October 2011, available at: http://www.nato.int/cps/en/natolive/71679.htm (Accessed January 2012).

[xxix] Also US and Canada employed aircraft for air strike mission (RUSI 2011).

[xxx] 'The US also flew around 30 of the 40 air-refuelling tankers upon which coalition airplanes depended' (IISS, 2011).

[xxxi] Traditional human intelligence (HUMINT) was obviously crucial. Special forces provided relevant intelligence information, especially in a context where air-to-ground communications were minimal. At the same time, special forces played an important strategic role in the conflict, mainly due to training activities to rebel forces. In that sense, it is worth noting the huge effort made by the Qatari special forces in advising rebels in Nefusa Mountains before the decisive offensive towards Tripoli.

[xxxii] French ('Charles de Gaulle') and Italian ('Giuseppe Garibaldi') carriers and a US amphibious assault ships (initially USS Kearsarge then USS Bataan) represented the key assets of the OUP in the maritime operations.

[xxxiii] See, among others, *Il Messaggero* (2011).

[XXXIV] 'The UK's contribution to freeing Libya', available at:: http://www.mod.uk/DefenceInternet/DefenceNews/MilitaryOperations/TheUksContributionToFreeingLibya.htm (Accessed January 2012).
[XXXV] Ibid.
[XXXVI] Ibid.
[XXXVII] In details: '27 000 heures de vol et environ 5 600 sorties réparties comme suit : 3 100 sorties offensives, 1 200 sorties de reconnaissance, 400 sorties de défense aérienne, 340 sorties de contrôle aérien, 580 sorties de ravitaillement' See : 'Libye : point de situation n° 50 - bilan de l'opération Unified Protector', available at: http://www.defense.gouv.fr/operations/autres-operations/operation-harmattan-libye/actualites/libye-point-de-situation-n-50-bilan-de-l-operation-unified-protector (Accessed January 2012).
[XXXVIII] According to Cordesman and Vira: 'The Tigers however are believed to be the HAP version, and armed with only guns and Mistral air-to-air missiles, rendering them less useful against heavy armor than for reconnaissance, fire support or escort duties'. (2011: 54).
[XXXIX] 'Le GAM (groupement aéromobile), constitué par les hélicoptères de l'aviation légère de l'armée de Terre (ALAT), a réalisé une quarantaine de raids au cours desquels 600 objectifs ont été détruits. Ils ont ainsi effectué 90% des frappes par hélicoptères de la coalition', See : 'Libye : point de situation n° 50 - bilan de l'opération Unified Protector', available at: http://www.defense.gouv.fr/operations/autres-operations/operation-harmattan-libye/actualites/libye-point-de-situation-n-50-bilan-de-l-operation-unified-protector (Accessed January 2012).
[XL] Cordesman and Vira believe that the strategic relevance of the helicopters in the Libyan conflict (and especially in the battle for Misurata) should not be overrated. 'Despite their introduction in theater, a few days later on June 6-7 it was reported that loyalist forces had mounted another major assault on the city, with —thousands of troops advancing along multiple axes' (2011: 216).
[XLI] France appeared eager to employ its military forces against Gaddafi. Such behaviour undoubtedly spread a pressing sense of emergency in order to halt violations to human rights. On negative consequences of a so called "just do it approach" in humanitarian interventions see Rieff (2005). On French political and diplomatic activism see, among others, Bumller (2011).
[XLII] See, among others: di Caro (2011) and Franco (2011).
[XLIII] See Caprara (2011)
[XLIV] Main parties presented different resolutions but they all approved the Italian involvement in the operation.
[XLV]An Italian aviator that released information over the air campaign was relocated (Mastrolilli 2011).
[XLVI] The Italians deployed the carrier 'Giuseppe Garibaldi', which was withdrawn in July to save on costs. According to official documents released by the Ministry of Defense, the Italian Navy employed during the operations also frigates ('Euro', 'Bersagliere' and 'Libeccio'), destroyers ('Andrea Doria'), submarines ('Todaro' and 'Gazzana'), amphibious assault ships ('San Giusto', 'San Giorgio' and 'San Marco') corvettes ('Minerva', 'Urania', 'Chimera', 'Driade' and 'Fenice'). The data are provided by the official report relaled by the Ministry of Defense, available at: http://www.difesa.it/Operazioni_Militari/operazioni-internazionali_concluse/Libia-odissea-alba/Pagine/Contributonazionale.aspx (Accessed January 2012),
[XLVII] The bases were: Trapani, Gioia del Colle, Sigonella, Decimomannu, Aviano, Amendola and Pantelleria. The 80% of OUP air missions took off from the Italian bases. For a critical perspective on the Italian military involvement see: Mazzeo (2012).
[XLVIII] The Italian C130J have been deployed also for humanitarian missions.
[XLIX] According to the NATO Joint Force Command in Naples, General Leandro De Vicenti, the Italian air strikes proved extremely effective, with a success rate of 79%. Reported by Gaiani (2011b)
[L] The Council adopted decision 2011/137/CFSP (28 February, 2011) in order to implement UNSC Resolution 1970.
[LI] European Commission - *ECHO, Libyan Crisis, Factsheet*, 21 June 2011, available at: http://ec.europa.eu/echo/files/aid/countries/libya_factsheet.pdf. (Accessed January 2012).
[LII] Ibid.
[LIII] http://www.euronews.net/2011/03/22/ashton-defends-eu-unity-over-libya/(Accessed January 2012)
[LIV] See, among others, *The Associated Press* (2012).
[LV] As announced at the end of January by Minister Di Paola, Italy will deploy in Libya around 100 soldiers for a training mission in defence and security sector. See Gaiani (2012).

References

- Armellini Alvise, 2011, 'Diplomats mourn 'death' of EU defense policy over Libya', in *Deutsche Presse-Agentur*, 24 March 2011, available at: http://news.monstersandcritics.com/africa/news/article_1628333.php/Diplomats-mourn-death-of-EU-defence-policy-over-Libya (Accessed January 2012).
- Bacevich Andrew J., 2010, *Washington Rules. America's Path to Permanent War*, New York: Palgrave Macmillan.
- Bellamy Alex J., 2009, 'Realizing the Responsibility to Protect', in *International Studies Quarterly*, 110: 111-128.
- Bruba Elisabetta, 2011, 'Due dittatori, due misure', in *Panorama*, 18 August 2011: 70-71.
- Bumller Elisabeth, 2011, 'Libyan War Goes a Long Way to Improve the Pentagon's View of France as an Ally, in *The New York Times*, August 26, 2011, available at: http://www.nytimes.com/2011/08/27/world/africa/27military.html (Accessed January 2012).
- Burns John F. and Shanker Thom, 2011, 'Nations Bombing Libya Ask For Help Amid Strain', in *The New York Times*, June 8, 2011. Available at: http://www.nytimes.com/2011/06/09/world/africa/09gates.html (Accessed December 2011).
- Buzan Barry and Hansen Lene, 2010, 'Beyond the evolution of international security studies?', in *Security Dialogue*, 41(6): 659-667.
- Cadalanu Giampaolo, 2011, 'Gheddafi ci dava denaro per partire verso l'Italia', in *La Repubblica,* 6 September 2011: 14-15.
- Caprara Maurizio, 2011, 'Ringraziamenti Usa per la Libia. "Voluta" l'omissione dell'Italia', in *Il Corriere della Sera*, 22 September 2011: 21.
- Casadio Giovanna, 2011, 'Al Senato passa la linea della Lega: Si alla missione, stop ai profughi', in *La Repubblica*, 24 March 2011: 16-17.
- Chivers C. J., Schmitt Eric, 2011, 'In Strikes on Libya by NATO, an Unspoken Civilian Toll', in *The New York Times,* 17 December 2011, available at: http://www.nytimes.com/2011/12/18/world/africa/scores-of-unintended-casualties-in-nato-war-in-libya.html?pagewanted=all (Accessed February 2012)
- Cobb Ty, 2012, 'The Defense Strategic Guidance: What's New? What is the Focus? Is it Realistic?', *National Security Journal*, available at: http://harvardnsj.org/2012/01/the-defense-strategic-guidance-whats-new-what-is-the-focus-is-it-realistic/.(Accessed January 2012).
- Coticchia Fabrizio, 2010, 'Opinione Pubblica e Politica di Difesa', in *Il Politico*, 223(1): 169-205 Coticchia Fabrizio and Giacomello Giampiero, 2011, 'All Together Now: Military Operations Abroad as a "Bipartisan" Instrument of Italian Foreign Policy', in Giampiero Giacomello and Bertjan Verbeek (eds), *Italy's Foreign Policy in the 21st Century: The New Assertiveness of an Aspiring Middle Power?*', Lanham: Lexington Books.
- Clarke Michael, 2001, 'The Road to War', in *Accidental Heroes. Britain, France and the Libya Operation*, RUSI Campaign Report, 3-5, available at: http://www.rusi.org/news/ref:N4E7B610E8D672/ (Accessed December 2011).
- di Caro Paola, 2011, 'La Russa e i Tornado fermati da Berlusconi', *Corriere delle Sera*, 16 April 2011: 11.
- Ditz Jason, 2012, 'Libya NTC Chief: Militias Could Cause Civil War In Benghazi Speech, Jalil Says Crushing Militias Top Priority', in *Antiwar*, January 04, 2012, available at: http://news.antiwar.com/2012/01/04/libya-ntc-chief-militias-could-cause-civil-war/ (Accessed January 2012).
- Duffield Mark, 2003, *Le guerre postmoderne*, Bologna: Il Ponte.
- European Council, 2003, *A secure Europe in a better World – European Security Strategy*, Bruxelles, December 13.
- Finnemore Martha, 1996, *National interest in international society*, Ithaca: Cornell University Press.

- Franco Massimo, 2011, 'Centrodestra spiazzato e il Caroccio sceglie la linea neutralista', in *Il Corriere della Sera*, 19 March 2011: 9
- Gaiani Gianandrea, 2011a, 'L'Italia dice no alla Nato: i nostri jet non bombarderanno i tank di Gheddafi', in *Panorama*, available at: http://blog.panorama.it/mondo/2011/04/15/litalia-dice-no-alla-nato-i-nostri-jet-non-bombarderanno-i-tank-di-gheddafi/ (accessed January 2011)
- Gaiani Gianandrea, 2011b, 'La guerra italiana in Libia: ecco le prime cifre ufficiali', in *Panorama*, available at: http://blog.panorama.it/mondo/2011/11/03/la-guerra-italiana-in-libia-ecco-le-prime-cifre-ufficiali/#more-56724 (Accessed January 2012)
- Gaiani Gianandrea, 2012, 'Operazione Cirene: i militari italiani tornano in Libia', in *Panorama*, available at: http://blog.panorama.it/mondo/2012/01/20/operazione-cirene-i-militari-italiani-tornano-in-libia/#more-64755 (Accessed January 2012).
- Galula David, 2006, *Counterinsurgency Warfare: Theory and Practice*, Westport: Praeger.
- Gentile Gian P., 2008, 'Our COIN doctrine removes the enemy from the essence of war', in *Armed Forces Journal*, available at: http://www.armedforcesjournal.com/2008/01/3207722 (Accessed January 2012)
- Gray, Colin S., 2006, *Irregular Enemies and the Essence of Strategy: Can the American Way of War Adapt?*, Carlisle, Pa.: Strategic Studies Institute, U.S. Army War College.
- Eyal Jonathan, 2011, 'Did This Operation Set a Precedent?', in *Accidental Heroes. Britain, France and the Libya Operation*, An interim RUSI Campaign Report:4, available at: http://www.rusi.org/news/ref:N4E7B610E8D672/.(Accessed December 2011)
- Halberstam David, 1972, *The Best and the Brightest*, New York: Ballantine Books.
- Il Messaggero, 2011, *Il Cavaliere irritato con La Russa e Frattini: mossi solo a cose fatte*, 20 March 2011: 5.
- Ignazi Piero, Giacomello Giampiero and Coticchia Fabrizio, 2012, *Italian Military Operations Abroad: Just Don't Call it War*, Houndmills: Palgrave Macmillan.
- International Commission on Intervention and State Sovereignty, 2001, *The Responsibility to Protect,* Ottawa.
- ISS, 2011, 2011, 'Early military lessons from Libya', in *ISS Strategic Comments*, available at: http://www.iiss.org/whats-new/iiss-voices/?blogpost=267, Posted By IISS at 30/09/2011 (Accessed October 2011).
- Kaldor Mary, 1999, New and Old Wars: Organized Violence in a Global Era, London: Polity Press.
- Kay Sean, 2012, 'A new kind of NATO', in *Foreign Policy*, available at: http://walt.foreignpolicy.com/posts/2012/01/11/a_new_kind_of_nato (Accessed January 2012)
- Kilcullen David, 2009, *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One*, New York: Oxford University Press.
- Koenig Nicole, 2011, 'The EU and the Libyan Crisis: In Quest of Coherence?', in *IAI Working Papers* 11(19).
- Krepinevich Andrew F. Jr., 1986, *The Army and Vietnam*, Baltimore: Johns Hopkins University Press.
- Lacher Wolfram, 2011, *Libya after Qaddafi. State formation or state collapse*, SWP Comments (9), German Institute for International and Security Affairs.
- La Repubblica, 2011, *Mancato aiuto a profughi dalla Libia. Frattini a Nato: "Mandato preveda soccorsi"*, 05 August 2011, available at: http://www.repubblica.it/esteri/2011/08/05/news/frattini_a_nato_mandato_preveda_soccorsi-20060218/ (accessed January 2012)
- Libero, 2011, *Libia, Maroni chiama Nato: Navi contro i clandestini*, 17 June 2011, available at: www.liberoquotidiano.it/news/763883/Libia-Maroni-chiama-Nato-Navi-contro-i-clandestini.html (accessed January 2012).
- Luttwak, Edward, 1996, 'A Post-Heroic Military Policy: The new season of Bellicosity', in *Foreign Affairs*, 75(4): 33-44.
- Mastrolilli Paolo, 2011, 'Gli Italiani sparano? Censurato il pilota che ha parlato troppo', in *La Stampa*, 23 March 2011: 4.
- Mazzeo Antonio, 2012, 'Guerra alla Libia con settecento super bombe italiane', in *Peacelink*, available at: http://www.peacelink.it/disarmo/a/35334.html (accessed January 2012).

- Menon Anand, 2011, 'European Defense Policy from Lisbon to Libya pages', in *Survival* 53(3): 75-90.
- Miranda Valérie Vicky, 2011, 'Striking a Balance Between Norms and Interests in Italian Foreign Policy: The Balkans and Libya', *IAI Working Papers*, 11(11).
- Munoz Carlo, 2011, 'Libya Won't Be Blueprint For Future Wars: General', in *AOL Defense*, September 14, 2011, available at: http://defense.aol.com/2011/09/14/libya-wont-be-blueprint-for-future-wars-says-general/ (Accessed January 2012).
- Murray, William, 1999, 'Does Military Culture Matter?', in *Orbis*, 43(1):27-42.
- Nagl John A., 2005, *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam*, Chicago: University of Chicago Press.
- Pace William and Deller Nicole, 2005, 'Preventing Future Genocides: An International Responsibility to Protect', in *World Order*, 36(4): 15-30.
- Patrick Stewart, 2011, 'Libya and the Future of Humanitarian Intervention. How Qaddafi's Fall Vindicated Obama and RtoP', in *Foreign Affairs*, 26 December, available: http://www.foreignaffairs.com/articles/68233/stewart-patrick/libya-and-the-future-of-humanitarian-intervention?page=show (Accessed January 2012)
- Rieff David, 2005, *At the Point of a Gun: Democratic Dreams and Armed Intervention*, New York: Simon & Schuster
- RUSI, 2012, *Accidental Heroes. Britain, France and the Libya Operation*, RUSI Campaign Report, 3-5, available at: http://www.rusi.org/news/ref:N4E7B610E8D672/ (Accessed December 2011).
- Quintana Elizabeth, 2011, 'The Air Operation', in *Accidental Heroes. Britain, France and the Libya Operation*, An interim RUSI Campaign Report: 5-7, available at: http://www.rusi.org/news/ref:N4E7B610E8D672/(Accessed December 2011).
- Santini Ruth Hanau, 2011, 'Libya and the EU: Ashton's moment of truth, 28.02.2011' in *Euobserver*, available at: http://euobserver.com/7/31882 (Accessed January 2011).
- Smith Rupert, 2006, *The Utility of Force: The Art of War in the Modern World*, London: Penguin Books.
- Stack Liam, 2012, 'Protests Shake Libya's Interim Government', in *The New York Times*, January 22, 2012, available at: http://www.nytimes.com/2012/01/23/world/africa/protests-shake-libyas-interim-government.html?_r=1&ref=global-home (Accessed January 2012).
- Strachan Hew, 2010, 'Strategy or Alibi? Obama, McChrystal and the Operational Level of War', in *Survival*, 52(5): 157–182.
- Strazzari Francesco and Coticchia Fabrizio, 2012 (forthcoming), 'The Phantom Menace: Transnational Organised Crime', in Solioz, C. and Stubbs, P. (eds), *Towards Open Regionalism in South East Europe*, Baden-Baden: Nomos.
- The Associated Press, 2012, 'Moammar Khadafy loyalists seize Libyan city of Bani Walid', January 24th, in *The Associated Press*, available at: http://www.nydailynews.com/news/world/moammar-khadafy-loyalists-seize-libyan-city-bani-walid-article-1.1010933 (Accessed January 2012)
- The Wall Street Journal, 2011, *Transcript of Defense Secretary Gates's Speech on NATO's Future*, June 12, 2011. Available at http://on.wsj.com/k0ODZr (Accessed January 2012).
- U.S. Department of Defense, 2012, *Sustaining U.S. Global Leadership: Priorities for the 21st Century Defense*, Washington DC, January 5th 2012.
- Van Creveld Martin, 1991, *The Transformation of War*, New York: Free Press.
- Vira Varun and Cordesman Anthony H., 2011, *The Libyan Uprising: an uncertain trajectory*, Centre for Strategic and International Studies (CSIS), available at: http://www.google.it/search?q=The+Libyan+Uprising%3A+an+uncertain+trajectory%E2%80%99&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:it:official&client=firefox-a. (Accessed December 2011).
- Walt Stephen, 2011, 'We will lose in Iraq and Afghanistan', in *Foreign Policy*, available at: http://walt.foreignpolicy.com/posts/2011/08/16/lessons_of_two_wars_we_will_lose_in_iraq_and_afghanistan. (Accessed December 2011).
- Walt Stephen, 2012, 'The new defense guidance is still interventionist', in *Foreign Policy*, available at:http://walt.foreignpolicy.com/posts/2012/01/09/why_the_new_defense_guidance_is_still_interventionist (Accessed January2011).

- Weiss Thomas G. and Hubert Don, 2001, *The Responsibility to Protect: Research, Bibliography,*
- *and Background*, Ottawa: International Development Research Centre.
- Weiss Thomas G., 2004, 'The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era', in *Security Dialogue*, 35(2): 135-153.
- Willet Lee, 2011, 'The Maritime Contribution', in *Accidental Heroes. Britain, France and the Libya Operation*, An interim RUSI Campaign Report: 8-9, available at: http://www.rusi.org/news/ref:N4E7B610E8D672/(Accessed December 2011).
- Zizek Slavoj, 2005, *Contro i diritti umani*, Milano: Il Saggiatore.
- FM 3-24/Marine Corps Warfighting Publication (MCWP), 3-33.5, 2006, *Counterinsurgency*, Washington, DC: Headquarters, Department of the Army, and Headquarters, U.S. Marine Corps.

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Federalism, Fiscal Federalism and Health Federalism: Standard Costs in Legislative Decree No. 68 of May 6th, 2011*

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Abstract

This paper analyses the regulation of standard costs in Legislative Decree No. 68/2011. It begins with an examination of some concepts that are often confused in the scientific and political debate, such as federalism, fiscal federalism and health federalism (see first section). Then, in the second section, it investigates the main differences between the regional and federal State and verifies whether references to federalism are made in the Italian Constitution under the new Title V. The third section focuses on the notion of fiscal federalism in Law No. 42/2009 and in Legislative Decree No. 68/2011 regarding the standard requirements of Municipalities, Metropolitan Cities and Provinces. The fourth section examines the close relationship between fiscal federalism and health federalism in Legislative Decrees No. 229/1999 and No. 56/2000 while also trying to understand the historical context in which the two concepts were initially envisaged. Finally, with the firm belief that federalism and health protection must go hand in hand, especially after the constitutional reform of 2001, the fifth section examines the procedure laid down by Legislative Decree No. 68/2011 in order to identify the benchmark Regions and consequent standard costs that will be applied from 2013 on in all the other Italian Regions. In the conclusion of this paper, some critical points, such as the age factor, the only criteria of calculation employed by Legislative Decree No. 68/2011, are highlighted, leading us to propose some minor amendments to the text of the Decree.

Key-words

Federalism, fiscal federalism, health federalism, standard costs, essential levels of care

1. Introduction

The reading of Legislative Decree No. 68 of May 6th, 2011, "Provisions of autonomy of tax incomes of the ordinary statute Regions and Provinces, as well as determination of standard costs and standard requirements in the health sector"[I], offers some remarks about federalism, fiscal federalism and health federalism (in the order in which they are presented in this paper) which are more and more frequently alluded to in politics and by the Parliament.

These expressions, which are sometimes used casually (see Balduzzi, 2012), are elusive and can be confused, though they are markedly different from one another. Above all, in addition to being purely terminological, and also for the specific purpose of this paper, they are definitions that must be measured against elusive concepts such as that of standard cost, a fundamental feature of Law No. 42 of May 5th, 2009, "Delegation to the Government on fiscal federalism in the implementation of Article 119 of the Constitution".

In the light of this, anticipating some conclusions, it may be argued that the concrete ways in which so-called fiscal federalism will be implemented in the health sector could be an ideal gauge of future constitutional reform introducing federalism in Italy. In other words, if fiscal federalism was applied in an area like health care, which accounts for an average of eighty percent of regional budgets (see, for example, Relazione sul federalismo fiscale, 2010, 7), thus truly guaranteeing all constitutional values, particularly those referred to in Articles 2, 3, 5, 32, 117, paragraph 2, letter m, and 119 of the Constitution, it would be a good "calling card" for those wanting to create a federal State in Italy, by also trying to import some models used in federal Countries.

2. Are there elements of federalism in Title V (and in Article 5) of the Constitution?

a) A *de jure condito* perspective

An easy (but not obvious) starting point for reflection is that currently Italy is not a federal State. The reasons why are well-known as well as the differences between our regional State and the traditional rules of the most authentic experiments in federalism, such as the United States of America, Switzerland and Germany (for a study of the criteria for differentiation between the regional and federal State see Grasso 2009, 1 ff.), even following the constitutional reform of 2001 using the residual clause of powers in favour of regional legislation, which seems to indicate the first substantial–step towards the construction of a federal State.

Moreover, once the Italian Constitution is placed into the regional State category, it is necessary to investigate whether it already contains some elements of a federal system or whether the Constitution actually forbids the transformation of Italy in a federal State. In Article 5 of the Constitution it is easy to find the maximum value of autonomist demands appropriately listed among its fundamental principles, whereas the constitutional text provides for all forms of distribution of power between the centre and the periphery, never interfering with the unity and indivisibility of the Republic. Therefore, *prima facie*, federalism cannot be contrary to the logic of our Constitution, unlike the idea of secession, which would be completely incompatible because it interrupts the unity and indivisibility of the Republic. If anything, Article 5 of the Constitution already contains a potential complication for the future evolution of the introduction of federalism in our State since the Constitution encourages the development not only of Regions but also of intra-regional local authorities (specifically Metropolitan Cities, Provinces and Municipalities).

This dual level of the constitutional decentralisation of powers is not so marked in other countries with federal Constitutions. Only Regions can aspire to become the pillars of a federal system, like the States in the USA, the Cantons in Switzerland, the *Länder* in Germany, but the other local authorities have (and should have) their own unlimited space within the structure of the future federal State, with some possible (but not insurmountable) anomalies with respect to the rules implemented in federal contexts (see for example Lupo, 2009, 28; Groppi 2009, 44).

However, it is evident that, despite Article 5 of the Constitution, federalism may contain a kind of diversity that recklessly emphasises the unity and

indivisibility of the Republic as well as the equality and solidarity among people (Articles 3 and 2 of the Constitution, see Balboni, 2012). Nevertheless, the Constitution (see Luciani, 2010, who also cites Article 53, paragraph 2 of the Constitution on the principle of progressivity in the tax system) seems to link federalism, a process of moving resources and functions from the centre to the periphery, to equality before the law, substantive equality and the solidarity principle.

In this context, we must now verify whether it is possible to interpret the provisions of the Constitution contained in Part II Title V, in the light of the principles of federalism.

Therefore, the idea of equal order among all the territorial authorities in the Republic, including the State, as laid down in Article 114, paragraph 1, may provide another element for our discussion and paragraph 2 of Article 114 does not constitute an obstacle. It is worth noting that paragraph 2 of Article 114 defines Municipalities, Provinces, Metropolitan Cities and Regions as autonomous bodies–without referring to the State of course, which is a sovereign entity.

Given the different paths followed, the reference to federal models does not seem to hold to the contrary. A federal system, such as Switzerland, has a Constitution which states that "the Cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution", even if it establishes that the federal government shall respect the autonomy of the Cantons.

Another support to this argument is the tendency of the 2001 reform of Title V of the Constitution to put Municipalities before all the other territorial authorities, including the State (Article 114, paragraphs 1 and 2, above cited; Article 117, paragraph 2, letter p, related to basic functions; Article 117, paragraph 6, concerning regulatory power; Article 118, paragraphs 1 and 2, concerning administrative tasks and the principle of vertical subsidiarity; Article 119, paragraphs 1, 2, 4, 5 and 6, concerning fiscal autonomy). Despite the above-mentioned relationship of equality between Regions and other territorial authorities, this seems to be a sign, or rather the first sign of a shift towards an unusual structure of federalism, with the exception of Article 118, paragraph 4 (principle of horizontal subsidiarity) and Article 120, paragraph 2 (substitutive power of the Government), wherein Municipalities are, however, placed last among the entities involved.

Nevertheless, these two exceptions may provide further support to these reflections: in the case of horizontal subsidiarity, the idea of federalism means that, first of all, it is the States', then respectively the Regions', the Metropolitan Cities', the Provinces' and the Municipalities' responsibility to promote autonomous citizens' initiatives, both as individuals and as members of associations, in order to fulfil activities of general interest[II].

Similarly, another element that is quite consistent with the spirit of federalism is that the subsidiary powers of the Government, i.e., the State (Article 120, paragraph 2), are in decreasing order: Regions, Metropolitan Cities, Provinces and Municipalities, and not the contrary. Therefore, if a Region is in default only the Government may intervene, but if a Province is in default the Region should be the first to intervene, if a Municipality is in default the Province should be the first to intervene, and so on.

The recognition of statutory regional powers and the discipline of the financial autonomy of Regions and other local authorities are other elements that indicate additional efforts to approach federalism.

The second topic will be discussed later (see section 3), while the first leads to the examination of Article 123, which gives the regional statute the power to define the form of regional government and the basic principles of regional organisation and operation in accordance with the Constitution.

In fact, if we compare this wording with the provisions of federal Constitutions, such as Article 51 of the Swiss Constitution which states that "every Canton has a democratic Constitution" and "the federal government provides a guarantee if the cantonal Constitution is not contrary to federal law", we find some similarities and differences. It is easy for supporters of federalism to focus on the fact that in federal systems we refer to constitutions rather than regional statutes, as is the case in Italy. However, it is also easy to see (particularly considering the Swiss case) that the obligation to be in accordance with the Constitution seems less penetrating than the obligation not to contradict the (whole) federal law, whether constitutional or not.

Perhaps these two issues can be reconciled by focusing on the subject of regional statutory power, dealing specifically with the discipline of the form of government of the Region. In fact, giving regional statutes the power to choose the form of government, even considering the limited significance attributed to regional statutes by the Constitution, means strengthening the decision-making power of the Region, since the form of

government denotes the relationship among the regional political bodies (it is important to highlight that the term "the internal organisation of the Region" was used in the previous text of the Constitution, before the constitutional amendment to Article 123 of 1999). A substantial consolidation of the political role of the Regions is certainly not too far from the essence of federalism as regards the regional statute, with the knock-on effect that has accompanied the approval of new regional statutes, starting from that of Calabria in 2004.

Nevertheless, of all the new provisions of Title V, Article 117 is dedicated to State and regional legislative power and, as aforementioned, it has more potential than the others to overlap with the themes of the federal State.

One list of issues is predicted to fall under the exclusive legislative power of the State and another under a concurrent legislative power. In addition, a provision is foreseen that gives the regional legislation authority in all matters not expressly covered by State legislation. This prediction evokes the clause regarding residual powers that is typical of federal Constitutions.

In reference to this point, the reform of Article 117, already anticipated by Law No. 59 of March 15th, 1997, as far as administrative functions are concerned, marks a very strong break with the past and the previous wording of the rule because this rule was limited to assigning to the legislative power a handful of regional matters, leaving the rest under State jurisdiction.

It is true that the most significant matters fall under State jurisdiction. Not only those in which sovereign power is exercised but also many others, including those that, given their cross-cutting nature, tend to compress the sphere of regional competence (competition protection, environmental protection, at least before the 2007-2009 overturning of constitutional jurisprudence, essential levels of benefits relating to civil and social rights), but this element of residual power is crucial to a pro federalist reading of the constitutional reform.

However, against this background, it is marginal to define this regional legislative power as exclusive (according to the "devolution reform" that was rejected by the constitutional referendum of June 25th-26th, 2006), while Article 116, paragraph 3, could be used to extend the range of regional residual matters through the mechanism of differentiated regionalism or asymmetrical regionalism.

b) A de *jure condendo* perspective

Any effort to find elements of federalism in the Constitution is clearly useless, if it is never accompanied by an initiative to create a constitutional amendment, pursuant to Article 138 of the Constitution. On the one hand, the aim is to make the Senate an authentically federal Chamber and, on the other, to assign the Regions a key role in the process of creating a constitutional amendment[III].

Regarding the first aspect (but concerning the second criteria, see Grasso, 2009, p. 3), there has never been any serious attempt to give the second Chamber the power to directly, fully and firmly represent the interests of the individual territories. Without this effort, it is quite useless to talk about federalism. Therefore, it is necessary to agree whether to choose the American and the Helvetian models, based on the equal representation of all member States (genuine federalism for many scholars, see Balduzzi 2009), or the model of the German *Bundesrat*, composed by members of the 15 *Länder* governments, which appoint and dismiss them and in which the position of each *Land* is expressed by one vote per unit, as we all well know[IV].

3. Federalism and fiscal federalism in Law No. 42 of May 5th, 2009 (and in the first Legislative Decrees of implementation)

The ambiguity of the relationship among the reform of Title V, the prospect of federal constitutional reform and fiscal federalism is especially evident in Law No. 42/2009 and its implementing provisions.

First, fiscal federalism must be depoliticised because Law No. 42/2009 is substantially in keeping with the past (see Balduzzi, 2009; De Fiores 2010, 436) and belongs to "the long history of this Country" (see again Balduzzi, 2009).

In fact, it should be stressed that Law No. 42/2009 implements Article 119 of the Constitution and Legislative Decree No. 56 of February 18th, 2000, "Provisions relating to fiscal federalism, in accordance with Article 10 of Law No. 133 of May 13th, 1999", which already contains some elements of federalism even anticipating the constitutional

amendment of 2001 (during those years there was a very different government majority in Italy).

So, following this trend the issue of fiscal federalism has not just recently emerged and cannot be considered the exclusive domain of the government majority or of one political party because Law No. 42/2009 is the result of a process involving different institutional actors: the government majority, the opposition parties, the regional and local communities and the Constitutional Court, which has urged its approval in many decisions (see De Fiores, 2010, 431-432; Antonini, 2009).

Therefore, Law No. 42/2009 was approved by a large majority[V], even if the Legislative Decrees implementing this Law have not always been supported by the same large majority[VI]. The paradox, however, was (and still is today) that some of the political forces that supported Law No. 42/2009 are now challenging the reform of Title V, while the new Article 119 of the Constitution is the fundamental basis of the Law (see also Relazione sul federalismo fiscale, 2010, 5).

Article 1, paragraph 1 of Law No. 42/2009 summarises the objectives of fiscal federalism very well: local authorities' autonomy over revenue and expenditures and the protection of the principles of solidarity and social cohesion, in order to gradually replace the criteria of historical expenditure for all levels of government and ensure the maximum accountability of elected officials and the effectiveness and transparency of democratic controls.

Within this context (see again Article 1, paragraph 1 of Law No. 42/2009), the Law also contains the provisions to establish the fundamental principles of the coordination of public finance and the taxation system to regulate the equalisation fund and the use of additional resources and special measures by pursuing the development of underdeveloped areas to overcome the economic dualism of the Country. The Law then regulates the general principles concerning the allocation of the assets of all the local authorities and establishes transitional rules on the organisation of Rome as the capital of Italy. The Law has finally established a 24 month delegation by defining more than fifty principles and criteria in accordance with Article 76 of the Constitution.

For the purpose of this paper (for an in-depth analysis of Law No. 42/2009, see, for example, Foglia, 2012), the main keywords of fiscal federalism are territoriality and standard costs (and standard requirements). However, even the aforementioned term

solidarity must also be included (in Law No. 42/2009 the word territoriality is mentioned four times, while solidarity is mentioned eight times).

Law No. 42/2009 attempts to implement the principle of territoriality[VII] in Article 2, paragraph 2, letter p, which states the "trendy correlation between taxation and benefits, linked to the functions exercised on the territory in order to facilitate the link between financial and administrative responsibility" (but see also Article 7, paragraph 2, letter d), while making the Legislative Decrees implementing the Law, including the one this paper focuses on, responsible for determining the content of the standard costs and standard requirements (see Article 2, paragraph 2, letter f, which simply refers to the "cost and requirement which, by maximising efficiency and effectiveness, is the indicator against which public action may be compared and evaluated")[VIII].

However, the regulation of standard costs (and of standard requirements) seems to be a very curious "matryoshka" (see Balduzzi, 2012). It also poses some problems regarding the legitimacy of the delegation of Law No. 42/2009 both for Legislative Decree No. 216 of November 26th, 2010, concerning the setting of standard requirements for Municipalities, Metropolitan Cities and Provinces and for Legislative Decree No. 68/2011 incorporating the provisions on standard costs and requirements in the health sector. These Decrees only regulate the articulation of the processes for the (future) setting of standard costs and requirements, but not the extent of their (numerical) values of reference.

Legislative Decree No. 68/2011 will be analysed in the following sections. In short, Legislative Decree No. 216/2010 is significant because it regulates the fundamental functions of Municipalities and Provinces[IX], but does not seem entirely convincing because it may give too much power to the Society for the Study of the Field ("S.o.s.e. S.p.A."), mentioned in the Decree as a purely technical body.

In fact, this organisation must develop the methods to identify standard requirements and determine their values through statistical techniques, emphasising the individual features of individual Municipalities and Provinces according to a range of criteria specified under Law No. 42/2009 and Legislative Decree No. 216/2010[X]. Furthermore, this structure must monitor the application phase and update the process for the determination of standard requirements.

Other technical bodies collaborate with S.o.s.e. S.p.A., for example, the Institute for Finance and Economics, the National Institute for Statistics and the Joint Technical Committee for the Implementation of Fiscal Federalism.

The political bodies (the State-Cities and local Government Conference, the Committee for the Implementation of Fiscal Federalism and the Parliamentary Committees responsible for Financial Consequences) play an advisory role in the drafting of the Decree of the President of the Council of Ministers, which must use methodological notes to calculate standard requirements and, above all, the standard requirements for each Municipality and Province.

The impression is that there is a great lack of balance between the technical and the political decision-makers, all in favour of the former[XI]. This is worrisome because the success of fiscal federalism is based on the capability of standard costs and requirements to ensure the coverage of the most basic functions of Municipalities and Provinces as well as the essential levels of performance that Regions must ensure in the health, education and welfare sectors. In this context, the political representative bodies must maintain a leading role and should not give an overly broad scope of action to some technical bodies, which, however, are not entirely neutral[XII].

Here it is also clear how the use of an expression like "fiscal federalism" can be tricky. Law No. 42/2009 and its implementing provisions may have permanently left this concept to constitutional analysis without completely defining all its multiple meanings, those of the name and the thing (see Balduzzi, 2012).

4. Fiscal federalism and health federalism in Article 19-ter of Legislative Decree No. 229/1999 and in Legislative Decree No. 56/2000. Some of the problems of the health governance system under the new Title V of the Constitution

Continuing on this subject, the deeper meaning of the relation between fiscal federalism and health needs to be understood. This relationship should also be assessed by

trying to understand the overall context in which the two notions were initially designed by the Parliament, the time period being immediately prior to the reform of Title V of 2001.

In fact, "health federalism" is mentioned for the first time in a legislative text, in the title of Article 19-ter of Legislative Decree No. 229 of June 19th, 1999, "Health federalism, the stability pact and interventions to ensure the cohesion and effectiveness of the National Health Service". It is a very pompous reference that significantly conceals the content of the article, which aims at establishing some measures to contain the costs of regional health services with respect to the anomalies in their management. All this occurs while almost subtly anticipating the subsequent regulation regarding the so-called financial recovery plans in a manner that makes it easy to understand why this Article has been considered a mere statement of principle or even a slogan, more political than legal in nature (see Jorio, 2008, 2).

The reference to fiscal federalism using a title that is more consistent with its meaning is contained in Law No. 133 of May 13th, 1999, "Provisions for equalisation, rationalisation and fiscal federalism", and especially in its executive Decree, the aforementioned Legislative Decree No. 56/2000. It is well-known that, since 2001 with this measure a series of public tax transfers in favour of the Regions with ordinary statute have been ordered to cease. These transfers were offset by providing the Regions with a regional partnership to VAT, an excise on petrol and the increase of the tax rate of the additional regional tax.

For the purposes of this paper, it is worth mentioning some of the transfers abolished by Legislative Decree No. 56/2000 specifically concerning the financing of health expenditures in current and capital accounts. The Decree established that the share of funding to be paid to each Region, in particular in order "to enable all Regions with ordinary statutes to carry out their functions" and "to deliver services within their competence, at essential and uniform levels throughout the Country", was determined "according to parameters related to the resident population, fiscal capacity (…), health requirements and the size of each geographic Region", as defined and determined by the technical specifications attached to Legislative Decree (see Article 7, paragraph 2, of Legislative Decree No. 56/2000).

In addition, Legislative Decree No. 56/2000 prescribed an earmarking bond for health care costs to ensure essential and uniform levels of care in each Region and

established procedures to monitor the health care provided in each Region, also by invoking the formal procedure between the Region and the Ministry of Health, as stated in the aforementioned Article 19-ter of Legislative Decree No. 229/1999 (see Articles 8 and 9, Legislative Decree No. 56/2000).

Cautiously, but with significant consequences, the two disciplines shared some features and it is rather doubtful whether this was truly federalism, with or without the adjectives (fiscal federalism or health federalism)! This was also entirely a consequence of the history of Italian regionalism and, despite the approximations discussed so far, the fact that fiscal federalism and health federalism had to come together not only because the Regions have been involved in health, according to the previous wording of the Constitution ("health care and hospital") since their actual introduction in the early 1970s, but mainly because "the implementation of the social right to health and the implementation of regional autonomy" (see Balduzzi, 2006) have systematically proceeded together since then.

In this context it is useful to briefly examine some of the problems of the health care governance system under the new Title V of the Constitution.

Article 117, paragraph 3 of the Constitution lists "health protection" among the matters under the concurrent legislative power. As a result, the State establishes the fundamental principles of health care legislation as well as the essential levels of care (see the aforementioned Article 117, paragraph 2, letter m of the Constitution), which are not the lowest levels, but rather the appropriate ones (see, for example, Cosulich-Grasso, 2012, 344). In turn, the Regions make laws concerning the organisation and functioning of each regional health system. Every Region has developed different models of organisation for public and private hospitals, but health costs vary greatly from Region to Region (for example, the same TAC 64 slice in Emilia Romagna costs € 1,027,000, while in Lazio it costs € 1,397,000, see Relazione sul federalismo fiscale, 2010, 12) and the levels of care for citizens are not equal (see again Relazione sul federalismo fiscale, 2010, 12).

Moreover, since the National Health Service was established in 1978, the connection between regionalism and health protection has influenced it (see Law No. 833 of December 23rd, 1978; see also Legislative Decree No. 502 of December 30th, 1992 and Legislative Decree No. 229/1999) and this will intensify if Italian constitutional system is strongly oriented towards a federal model. While waiting to achieve this possible

constitutional reform, the discussion concerning the relationship between fiscal federalism and health protection has finally led us to examine the regulation of standard costs in Legislative Decree No. 68/2011, which has already been mentioned several times.

5. Standard costs of health care in Legislative Decree No. 68/2011: An overview

According to the observations made so far, it is no coincidence that, even in the definition of standard costs and standard requirements, the health sector is a forerunner, although Legislative Decree No. 68/2011 made a completely separate Decree responsible for determining the standard costs associated with the essential performance levels set out by State law for areas not related to health, i.e. social care, education and local public transport in particular, and established an initial mechanism for the determination of the essential levels for these areas. This process is similar to the methodologies and procedures used by the aforementioned Legislative Decree No. 216/2010, as far as the standard requirements of Municipalities and Provinces are concerned (see Article 13 of Legislative Decree No. 68/2011)[XIII].

In the health field the solution proposed by Legislative Decree No. 68/2011 aims at gradually but definitively overcoming the financing mechanism of health spending, based on the criteria of allocation required by the law in force (see Article 1, paragraph 34, Law No. 662 of December 23rd, 1996), by using the instrument of standard costs and standard requirements instead.

The Decree specifically sets the thresholds of the percentage of health expenditure financing for the three traditional macro levels of health care (see the Decree of the President of the Council of Ministers of November 29th, 2001, "Definition of essential levels of care"), at 5% for collective health care in the living and working environment, 51% for district assistance and 44% for hospital care, specifically referring to the Pact for Health from 2010 to 2012. The Decree also establishes a special procedure for the determination of standard costs and standard requirements, all focused on the selection of a group of virtuous Regions, defined in the draft Decree as benchmarks[XIV] that will serve as

a guide to other Regions, since the cost values reported in the three Regions of reference, finally identified with respect to the five previously selected, will be applied to all other Italian Regions[XV].

A fundamental aspect of this procedure is the way in which standard cost is quantified. The Legislative Decree establishes, *inter alia*, that: a) the "value of standard cost [is] given for each of the three macro levels of care, which are provided in a position of effectiveness and appropriateness, by the average *per capita* weighted cost recorded by the Regions of reference"; b) "the weights [are] carried out with weights for age classes, considered in the determination of health requirements, for the second year preceding the year of reference"; c) in the original text, before the agreement during the Joint Conference, the level of spending in the three macro levels of the benchmark Regions is "applied, for each Region, relative to regional population, weighted according to the criteria established by the agreement in the permanent State-Regions Conference, which also contemplates the indicators related to specific local situations which are considered useful to defining health needs".

However, this procedure leads to some concerns. First of all, the reason why the adjective "weighted" is used along with the average *per capita* cost of benchmark Regions[XVI] is not persuasive. Secondly, using the age factor as the only criteria of calculation is not satisfactory (see also Antonini, 2010) because it does not take into account any other variables that also affect health care needs. For example, in the aforementioned Article 1, paragraph 34, Law No. 662/1996, a list of these variables is indicated as follows: resident population, frequency of health care use by age and sex, population mortality rates, indicators related to specific local situations deemed useful to defining the health needs of Regions and epidemiological regional indicators. It is also important to take into account the variables indicated in Legislative Decree No. 56/2000, already mentioned several times, such as the resident population, fiscal capacity, health needs and geographical size of each Region.

Regarding these profiles, Legislative Decree No. 68/2011 has not taken into account a parliamentary resolution approved unanimously by the Health and Hygiene Committee of the Senate of the Republic in November 2010, which, in order to determine the percentage of resources for each Region, suggested adopting a procedure that "corresponds to certain objective criteria and does not seem to be the result of confused

calculations and messy compromises, in order to determine the percentage of resources for each Region. The criteria must consider the actual number of inhabitants in the Region and the number of incidences by age in order to determine the care needs and weight of factors like poverty and cultural and social deprivation as well as any other factors which could significantly effect variations in the health care needs of different areas of the population identified in an agreement with the Regions" (see XII Commissione permanente del Senato della Repubblica, 2010). Legislative Decree No. 68/2011 has also disregarded an important document drafted in the Spring of 2010 by the National Agency for Regional Health Services to investigate the issue of the financing of the health care system and the allocation of resources to the various different Regions. This document widely criticises the idea of standard costs in the health field (see AGE.NA.S, 2010). Finally, Legislative Decree No. 68/2011 has ignored the long debate on this issue within the Parliamentary Committee for the Implementation of Fiscal Federalism[XVII].

Nevertheless, in addition to this debatable issue, the regulation of standard costs may have a feature that goes back many years and that is cause for even greater concern regarding the allocation of health care funds to the Regions concerning the method of historical expenditure that fiscal federalism would permanently set aside.

In fact, in health care the mechanism of historical spending was overturned at least a decade ago and has since been replaced (see AGE.NA.S. 2010, 15; Caruso-Dirindin, 2011, 7 ff.; Moirano, 2011) by the "principle by which funding should be proportional to the needs of the individual Regions".

However, if the "new" standard cost is applied to all Regions as recommended by the Legislative Decree in the form of weighted average *per capita* of the recorded cost by the benchmark Regions, the real risk is that funding will end up being "nothing more than the weighted average of the previous funding, and this would mean proposing "historical funding" again, i.e., the method of historical spending" (see AGE.NA.S., 2010, 15 and Belisario, 2010).

If this actually happened, the breakdown in funding in the health care sector would subside. Despite numerous proclamations, even more than in the past, standard costs would be "top-down formulas" (see Relazione sul federalismo fiscale, 2010, 17, which stresses that standard cost "is not a number, but rather a method, the formula to determine standard requirements"; see also PISAURO 2010, who talks about an "excess of rhetoric on

the role standard costs actually play") and it might not suffice to emphasise that "the great leap forward, which the Legislative Decree on regional standard costs allows, is to remove the expectation of balancing regional deficit" (see Antonini, 2010)[XVIII].

Furthermore, Article 26 of Legislative Decree No. 68/2011 is very problematic in that it states that "starting from 2013 the national standard requirement in health care will be determined in line with the overall macroeconomic framework and within the constraints of public finance and the obligations imposed by the Community Law". With the aforementioned agreement of the Joint Conference of December 16th, 2010, the provision was completed by adding these words: "through the agreement and consistent with the requirement arising from the determination of the essential levels of care provided in conditions of efficiency and appropriateness". Finally, to strengthen the meaning of this rule, Article 25, paragraph 2 was added by the Parliamentary Committee for the Implementation of Fiscal Federalism and states that, "as determined according to Article 26 and subject to the constraints of public finance and the obligations imposed by the Community Law, the standard requirement in health care is equal to the amount of resources needed to ensure the essential levels of care in terms of efficiency and appropriateness".

It is easy to note that this provision is different from the discipline of Article 1, paragraph 2, of Legislative Decree No. 502/1992, as amended by Legislative Decree No. 229/1999 which states that "the identification of essential and uniform levels of care provided by the National Health Service is carried out along with the identification of the financial resources for the National Health Service".

In turn, the use of the words "along with", "consistent" and "according to" highlights a distinction that is not merely terminological, because only the first of the three words refers to time ("along with" also means "simultaneously") in order to ensure adequate financing and, therefore, the effective coverage of the essential levels of care, because the essential levels are not the lowest levels (see also Bordignon-Dirindin, 2010, 1; Cuocolo, 2012, Pezzini 2012 and Politi, 2012).

However, the second word (the adjective "consistent") expresses an essentially negative constraint, i.e., a formal constraint, as if financial conditioning, which undeniably exists, was only a numerical limit, against which the amount of the essential levels may be measured.

All of this seems to undermine the delicate balance between the fundamental right to health care (Article 32 of the Constitution) and the financial and budgetary constraints established in health care in recent years. This happens without substantially solving the problem of balancing regional deficit.

In fact, the Regions that have a structural standard deficit in health care or have had to activate regional financial recovery plans have not been able to fully comply with the spending threshold, which is based on standard costs starting from 2013, the year when the reform of health federalism will become effective in the absence of a temporary provision in the Legislative Decree, which refers to balancing regional deficit only in order to identify the benchmark Regions.

Nevertheless, the choice to eliminate the prospect of a State financial recovery plan, prepared *ex-post* via the Legislative Decree, could possibly evolve into a betrayal of the universal principle of our National Health Service.

If this is fiscal federalism, the difficult synthesis of the principles of territoriality and solidarity attempted by Law No. 42/2009 would hardly be realised and the constitutional right to health protection and the constitutional principle of formal and substantial equality would be compromised. Finally, it would hardly be considered a strategic move towards creating constitutional reform in line with federalism (see section 2).

Yet, as has already been argued in this paper, the destiny of federalism and health care is necessarily shared. Therefore, to start concluding, we must continue to think about Legislative Decree No. 68/2011 and the notion of standard cost regulated by the Decree.

In this context, we must analyse the Legislative Decree and try to make it more closely adhere to the content of Law No. 42/2009 and the constitutional principles underlying fiscal federalism in health care (see also Pezzini, 2012 and Politi, 2012) in order to indicate what "remedial work" must be done on the critical elements emphasised here, with no intention of completely abandoning the standard cost "philosophy", which may be even abstractly supported (see above all AGE.NA.S., 2010).

It is worth remembering Article 2, paragraph 7, of Law No. 42/2009 that makes it possible to adopt some Legislative Decrees containing supplementary and corrective provisions within two years after the entry into force of the first Decrees implementing the Law. It seems unlikely that there could be any corrective action taken just a few months after the adoption of the Decree and its subsequent entry into force, but it is not

impossible (if, for example, the new government headed by Mr. Monti is going to make some amendments).

In this regard, an initial and easy amendment should concern Articles 25 and 26 regulating the determination of the national standard requirements in health care, with the inclusion of a simple rule safeguarding the contextual identification of the essential and uniform levels of care and the financial resources that must be allocated to the National Health Service (see the above-mentioned Article 1, paragraph 2, of Legislative Decree No. 502/1992 and the subsequent amendments).

Therefore, the discipline of Article 27 and the method described for the determination of regional standard costs and regional standard requirements should be modified in this way: a) regional standard costs should better reflect the actual estimate of health needs so as to abandon the idea that the same benchmark Regions are virtuous only because their spending indices have exceeded the funding received during the reporting period (see AGE.NA.S. 2010, 15)[XIX] by neglecting the standards of efficiency, effectiveness and appropriateness specified by the Decree[XX]; b) regional standard costs should be calculated by adding other significant variables to the weight by age of the regional population. These variables are especially based on socio-economic indicators of social deprivation (such as education, employment status, type of dwelling) in order to correct the potentially distorting profiles resulting, as aforementioned, from a weighing based on a mere correlation between age and health needs (see also AGE.NA.S., 2010, 33; Bordignon-Dirindin, 2010, 1; Caruso-Bordignon 2011, 21; for an opposite opinion regarding the inclusion of socio-economic variables, see Pammolli-Salerno, 2010, 12).

Now, this second amendment proposal appears to be a losing game, according to the discussion that has developed within the Parliamentary Committee for the Implementation of Fiscal Federalism, also because the political majority and Berlusconi's Government had expressed strong opposition to the use of deprivation indices.

Yet, even in this regard, it would probably be enough to introduce in Article 27, and in particular in paragraph 6, letter e, an explicit reference to the socio-economic indicators reported in this paper, or, more generally, to the determinants of economic and social deprivation, all to be defined in an agreement to be made during the State-Regions Conference.

Therefore, among other things, a foundation should be provided for implementing Article 29 of Legislative Decree No. 68/2011, which is actually the result of poor wording, and in particular of dubious constitutionality, as has already been noted.

However, we cannot compensate for the lack of these indicators with Article 28, included in the debate in the Parliamentary Committee for Fiscal Federalism, which states that, for the implementation of Article 119, paragraph 5 of the Constitution, according to the principles established by Law No. 42/2009 "there are specific interventions to remove structural weaknesses in certain geographical areas which are likely to affect the cost of benefits". These structural weaknesses "are identified based on specific socio-economic and environmental indicators, taking into account their link with special financial measures for the sanitary building industry, provided by the law".

Apart from the fact that we cannot confuse special structural measures, which will be made *ex post*, with the predetermined criteria, which are made *ex ante* and are usually designed to better quantify standard costs, it is very clear that this provision is applicable only to the sanitary building industry[XXI].

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[*] A different version of this paper is forthcoming in Balduzzi, 2012. The author sincerely thanks Moris Foglia, Gabriella Franchi, Francesca Sabatelli and Paolo Zuddas for their support and for their final reading of this paper.

[I] The draft Legislative Decree was approved by the Council of Ministers on October 7th, 2010; on December 16th, 2010 during the Joint Conference an agreement was reached which also changed the original text. On March 24th, 2011 the Parliamentary Committee for the Implementation of Fiscal Federalism approved a favourable recommendation, provided that, however, the Government reformulates the text of the draft Legislative Decree on the basis of a different text adopted by the Committee. On March 31st, 2011 the Council of Ministers approved the final text of the Decree.

[II] Vertical subsidiarity, on the other hand, suggests that administrative competencies are allocated to the territorial authorities (i.e. the Municipalities, under article 118, paragraph 1, of the Constitution) which are closer to citizens.

[III] However, reflections on possible regional participation (even indirectly) seem rather less important in the choice of one or more members of the renewed composition of the Constitutional Court since it is not a decisive element in the construction of a federal system. Moreover, even if it did not change the rules regarding the election of constitutional judges, the creation of a genuine federal Senate already meets this need, thanks to the participation of senators in Parliament via a joint session–electing five members of the Constitutional Court.

[IV] However, the Austrian model, in which the election of the members of the *Bundesrat* is attributable to the provincial Diets corresponding to the legislative power, must be rejected since this method of appointment makes the position of the second Austrian Chamber weaker: see Luther 2009.

[V] Di Pietro's IDV voted in favour of the bill, the PD abstained and only Casini's UDC voted against the bill.

[VI] In particular, in the Parliamentary Committee for the Implementation of Fiscal Federalism, the PD abstained, while the IDV, the UDC, Rutelli's API and Fini's FLI voted against the draft Legislative Decree No. 68/2011.

[VII] A political key to the interpretation of the principle of territoriality is the slogan "everybody is the owner at home", which was a winning formula yet lacked solidarity during a (past?) political season in Italy.

[VIII] Concerning the links between fiscal federalism and health federalism discussed in this paper, see also Article 8, paragraph 3, of Law No. 42/2009, which includes health expenses among those related to Article 117, paragraph 2, letter m of the Constitution.
[IX] See also the aforementioned Article 21, paragraphs 3 and 4, of Law No. 42/2009. Regarding the list of fundamental functions, the main objection seems to be related to the setting of a percentage limit at seventy percent of expenses, as certified by the last account of the budget available on the date of entry into force of Law No. 42/2009, as regards the general functions of directors and the management and control of Municipalities and Provinces. In fact, the risk is that the distinction between what is essential and what is not essential only depends on its financial sustainability.
[X] Legislative Decree No. 216/2010 would guarantee a "shared process" in order to make the criteria politically acceptable for Municipalities and Provinces (see Relazione sul federalismo fiscale, 2010). Nevertheless, the Legislative Decree does not really enable Municipalities and Provinces to communicate to S.o.s.e. s.p.a. the functions deemed particularly worthy of consideration in the area of their jurisdiction and the list of particularly critical public services, which gives priority to the allocation of resources.
[XI] Therefore, it is uncertain whether the mechanism of field studies can be effectively used in the public field by correcting the alterations sometimes produced regarding the accounting data of firms and the self-employed, for example, by overestimating or underestimating revenue values and taxable income.
[XII] In particular, S.o.s.e. s.p.a. is a public corporation established with 88% participation in the share capital of the Ministry of Economy and Finance and 12% participation of the Bank of Italy, entitled to carry out all the activities related to the construction, use and updating of sector studies, and any other methodological supports to the Administration on tax and financial business economy. This organisation is considered neutral and able to operate in an impartial way (see Relazione sul federalismo fiscale, 2010), but it certainly does not enjoy the independence of other bodies such as administrative agencies or administrative independent authorities, because the Ministry can choose S.o.s.e. s.p.a.'s members and interfere with its activity. From this perspective, if the structure of Italian public finances has become a "crooked tree" (see again Relazione sul federalismo fiscale, 2010, 1), in any case, only political bodies (Municipalities, Provinces and Regions) have been and will be accountable to it, without considering the kind of technical methods used and their authors (in particular S.o.s.e. s.p.a.).
[XIII] The introduction of this provision was strongly supported by the PD during the work of the Parliamentary Committee for the Implementation of Fiscal Federalism.
[XIV] This word, which characterised the draft Legislative Decree, was removed during the work of the Parliamentary Committee for the Implementation of Fiscal Federalism, but it is only a purely formal amendment because it is a benchmark.
[XV] Article 27, Paragraph 5, states that the State-Regions Conference chooses three out of five benchmark Regions. The five Regions are selected by the Minister of Health in consultation with the Minister of Economy and Finance after consulting with the Minister for Relations with the Regions. The five Regions must ensure the delivery of the essential levels of care in conditions of economic equilibrium, must not be subject to financial recovery plans and must be identified according to the criteria of quality, appropriateness and efficiency. The provision, compared to the draft Decree of October 7th, 2010, also states that "in the identification of the Regions the need to ensure the geographical representation of the North, Centre and South, with at least one small geographic Region, should be taken into account". Nevertheless, it is easy to understand how this provision, mainly dictated by political motivation, complicates the selection of the benchmark Regions because the selection could be in conflict with the above-mentioned conditions of quality, efficiency and appropriateness.
[XVI] A weighted average is certainly not by definition a mathematical average but, if the only relevant element is the distribution of regional population according to the age factor, a (further) weighting, required by the Legislative Decree, could probably simply involve the relationship between the high number of those belonging to a particular age group and the high number of those belonging to all the other age groups (for a different approach see Pammolli-Salerno, 2010, 11, and Pammolli-Salerno, 2011, who propose an algorithm that finds the arithmetic mean of the values of *per capita* expenditure by age group).
[XVII] In particular, we must highlight the numerous interventions by members of the PD, the advice of this parliamentary group and the intervention of Felice Belisario (IDV), in which he stresses the "lack of any reference to demographic characteristics, topography, infrastructure and the distribution of hospitals in relation to those characteristics".
[XVIII] Nevertheless, during the hearing of March 2nd, 2011 in the Parliamentary Committee for Fiscal

Federalism, the same Antonini pointed out, with reference to the standard costs in health care, the conservative nature of the Decree that "does not intend to distort the law in force". A way out for the matters discussed in this paper could be represented by Article 29 of Legislative Decree No. 68/2011, according to which the criteria referred to under Article 27 must be updated every two years and subject to agreement in the State-Regions Conference. However, in the draft Decree agreed upon on December 16th, 2010, purely political reasons prevailed that aimed at preserving the previous proportions between large and small Regions and among the Regions located in the South, the Centre or the North of our Country. Moreover, the constitutionality of this rule, which literally assigns the task of changing the provisions of an act having the force of law (an entire Article of the Decree) to an agreement in the State-Regions Conference, seems very problematic.

[XIX] See also Belisario, 2010, 2, who stresses that, "in theory, the requirement of a balanced budget can be found both in the Regions with high levels of spending and in the Regions with low levels of spending". As a consequence, the standard cost would be "a multiplicative constant of weighing population" and would be "irrelevant to the allocation of funds and boosting the efficiency of the Regions".

[XX] Article 27, Paragraph 4, of Legislative Decree No. 68/2011, could be amended by adding a clause stating that in the Regions of reference cost values receive funding that is proportional to the requirements of individual Regions.

[XXI] According to what has been argued in this essay, we must rapidly analyse some recent contributions by scholars who have tried to calculate standard costs pursuant to Legislative Decree No. 68/2011, even given the broad design of this provision. From this perspective, Pammolli-Salerno, 2011, 3 ff., carried out a simulation and shared the National Health Fund for 2011, which represents the reference for 2013, the year in which the reform will be applied using three Regions considered benchmarks (Umbria, Emilia-Romagna, Lombardia). The percentages obtained from the simulation differ only marginally from those of the apportionment of 2010. The limit of this exercise is that it is not perfectly in line with the final text of the Decree: in fact, there is a small Region, which is also in the Centre of Italy, but there is no Southern Region. Caruso-Dirindin 2011, 11 ff., instead used the following Regions in their simulation based on Legislative Decree No. 68/2011: Lombardia (North), Toscana (Centre) and Basilicata (South and small Region), and by comparing the old and the new methodologies they argued that the result of the distribution is independent from the Regions identified as benchmarks. In turn, through a research that temporally precedes Legislative Decree No. 68/2011, Nuti-Vainieri, 2011, 113 ff., chose four different areas with a set of indicators measuring the performance of all the Regions, and then for each level identifying the Regions of reference. These indicators obviously do not correspond to the discipline of the Decree. Finally, see also Gallazzi, 2012, who estimates the standard costs by using deprivation indices and then selecting Lombardia, Umbria and Puglia as benchmark Regions.

References

- AGE.NA.S., 2010, *Riflessioni sui criteri da utilizzare per il riparto del fabbisogno sanitario. Relazione commissionata dalla Conferenza delle Regioni e delle Province autonome*, Roma, April 30th, 2010.
- Antonini Luca, 2009, "Intervento" (oral speech) at the Seminar *Il ruolo del Parlamento nella transizione verso il federalismo fiscale*, Roma, Camera dei deputati, May 21st , 2009.
- Antonini Luca, 2010, "Intervento" at the Seminar *Fabbisogni standard e decisioni di finanza pubblica nell'attuazione del federalismo fiscale*, Roma, Camera dei deputati, October 19th, 2010, 3-7.
- Balboni Enzo, 2012, "Prolegomeni al federalismo fiscale e sanitario, quando ci sarà", in Balduzzi Renato (ed.), *La sanità italiana alla prova del federalismo fiscale*, Il Mulino, Bologna, forthcoming.
- Balduzzi Renato, 2006, "L'impatto della devolution sul Servizio sanitario nazionale", in *Cosmopolis*, www.cosmopolisonline.it.
- Balduzzi Renato, 2009, "Introduzione" (oral speech) at the Seminar *Che cosa è il federalismo fiscale?*, Università del Piemonte orientale, Alessandria, March 18th, 2009.
- Balduzzi Renato (ed.), 2012, *La sanità italiana alla prova del federalismo fiscale*, Il Mulino, Bologna, forthcoming
- Balduzzi Renato, 2012, "Presentazione", in Balduzzi Renato (ed.), *La sanità italiana alla prova del federalismo fiscale*, Il Mulino, Bologna, forthcoming.

- Belisario Felice, 2010, "Schema di risoluzione presentato dal senatore Belisario sull'affare assegnato n. 301", 12ª Commissione permanente del Senato della Repubblica, Igiene e Sanità, Resoconto sommario n. 209, November 10th, 2010.
- Bordignon Massimo-Dirindin Nerina, 2010, "*Costi standard: nome nuovo per vecchi metodi*", in www.lavoce.info/, September 28th, 2010.
- Caruso Enzo-Dirindin Nerina, 2011, "Costi e fabbisogni standard nel settore sanitario: le ambiguità del decreto legislativo n. 68 del 2011", paper for the Espanet Conference *Innovare il welfare. Percorsi di trasformazione in Italia e in Europa*, Milano, September 29th-October 1st, 2011.
- Cosulich Matteo-Grasso Giorgio, 2012, "Le prestazioni sanitarie", in Balduzzi Renato-Carpani Guido (ed.), *Manuale di diritto sanitario*, Il Mulino, Bologna, forthcoming, 339-359.
- Cuocolo Lorenzo, 2012, "I "costi standard" tra federalismo fiscale e centralismo", in Balduzzi Renato (ed.), *La sanità italiana alla prova del federalismo fiscale*, Il Mulino, Bologna, forthcoming.
- De Fiores Claudio, 2010, "Federalismo fiscale e Costituzione. Note a margine della legge n. 42/2009", in *Studi in onore di Vincenzo Atripaldi*, Jovene, Napoli, I, 431-452.
- XII Commissione permanente del Senato della Repubblica, 2010, Risoluzione: *Indirizzi per il federalismo nella sanità*,-November 10th, 2010.
- Foglia Moris, 2012, *L'autonomia finanziaria degli enti locali nel rinnovato contesto del federalismo fiscale*, Università degli Studi di Pisa, Phd Thesis, June 2012.
- Gallazzi Alex, 2012, *I costi standard nella sanità: verso un federalismo fiscale efficiente*, Università degli Studi dell'Insubria, Facoltà di Economia, Degree Thesis, February 2012.
- Grasso Giorgio, 2009, "Costituzione e federalismo. Nell'Italia delle Regioni e dell'Unione europea", www.amministrazioneincammino.it, July 21st, 2009, 1-11.
- Groppi Tania, 2009, "C'è il federalismo in Italia?", in *Quaderni di Italianieuropei*, n. 2/2009, 35-47.
- Jorio Ettore, 2008, "Federalismo fiscale e sanità", in www.federalismi.it, December 17th, 2008, 1-12.
- Luciani Massimo, 2010, "Intervento" (oral speech), at the VIII Convegno nazionale di diritto sanitario *La sanità italiana alla prova del federalismo fiscale*, Università del Piemonte orientale, Alessandria, November 19th, 2010.
- Lupo Nicola, 2009, "Perché il federalismo in Italia?", in *Quaderni di Italianieuropei*, n. 2/2009, 24-34.
- Luther Jörg, 2009, "Intervento" (oral speech) at the Seminar *Che cosa è il federalismo fiscale?*, Università del Piemonte orientale, Alessandria, March 18th, 2009.
- Moirano Fulvio, 2011, "Intervento" (oral speech) at the Seminar *Il decreto legislativo sui costi e fabbisogni standard in sanità: prime valutazioni*, Alessandria, May 6th, 2011.
- Nuti Sabina-Vainieri Milena, 2011, "Federalismo fiscale e riqualificazione del Servizio sanitario nazionale. Un binomio possibile", Il Mulino, Bologna.
- Pammolli Fabio-Salerno Nicola C., 2010, "I numeri del federalismo in sanità. Benchmarking e standard su profili di spesa in sanità", in www.cermlab.it, November 2nd, 2010, 1-36.
- Pammolli Fabio-Salerno Nicola C., 2011, "Il riparto del FSN per il 2011. Much Ado about Nothing?", in www.cermlab.it, April 18th, 2011, 1-21.
- Pezzini Barbara, 2012, "Polisemia del fabbisogno sanitario. Prime osservazioni sull'impostazione del d.lgs. n. 68/2011", in Balduzzi Renato (ed.), *La sanità italiana alla prova del federalismo fiscale*, Il Mulino, Bologna, forthcoming.
- Pisauro Giuseppe, 2010, "Retorica e realtà nella determinazione dei fabbisogni standard nella sanità", in www.nelmerito.com, October 22nd, 2010.
- Politi Fabrizio, 2012, "Il decreto legislativo sui costi e fabbisogni standard in sanità: prime valutazioni", in Balduzzi Renato (ed.), *La sanità italiana alla prova del federalismo fiscale*, Il Mulino, Bologna, forthcoming.
- Relazione sul federalismo fiscale, 2010, i.e. Relazione del Governo alle Camere in ottemperanza alla disposizione dell'art. 2, comma 6, della legge 5 maggio 2009, n. 42, 2010, June 30th, 2010.

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Redefining Parliamentary Sovereignty: the example of the devolution referenda

by

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Abstract

The goal of this paper is to draw attention to a critical issue regarding the decline in the traditional doctrine of Parliamentary sovereignty in the United Kingdom. Devolution has proven to be a serious threat to Westminster's supremacy in view of the fact that until now it has evolved with a degree of complexity that the original proponents had scarcely imagined. One of the most peculiar examples of this evolution is the extent to which the referendum has been used to put forward major constitutional changes in this new order. In that regard, this paper, which is divided into two parts, retraces the crucial points of Dicey's reasoning and then attempts to verify what the devolution process has entailed for the referendum within the United Kingdom's constitutional framework, up to the latest developments.

Key-words

Parliamentary sovereignty, United Kingdom, Devolution, Referenda, Dicey

1.1 The Diceyan Theory of Parliamentary Sovereignty

Dicey defines Parliamentary sovereignty as the legal right of the British Parliament, under the Constitution, to make or unmake any law and do so without the possibility of its decisions being overridden or set aside by another body or person[I]. In order to explain the workings of the Constitution from this particular point of view, the author cites the 1716 Septennial Act[II] as a perfect example, both in theory and practice, since by enacting this particular law Parliament did something which was perceived, even at the time, as a deviation from the most basic principles of the British Constitution. The incumbent legislature authoritatively prolonged its own term far beyond the time for which it had been elected by declaring the Septennial Act applicable to itself, thus extending the duration of the legislature by four years. However, as some of his contemporaries pointed out[III], the problem was that Parliament had essentially bypassed the need for a general election and hence forsaken the cardinal principle, by virtue of which the members of the House of Commons had to be appointed exclusively by popular vote. Perhaps it is not at all surprising that Dicey's view on this issue is in favour of those who enacted the Bill. Even though the author does not question the People's constitutional right to choose their representatives, he argues that no use of parliamentary power, even if unprecedented, may be labelled "illegal" because it violates the electoral mandate, since, once a general election has been held, the transfer of powers from the electorate to the legislature is complete and, therefore, in theory, the latter is not accountable to the former for the laws it enacts, nor can it be constrained by principles that are generally designated "constitutional" because it is up to the Parliament to establish what is constitutional and what is not. Therefore, electors have the sole legal right to elect members of Parliament. To further substantiate his theory, Dicey reflects on Parliament's interference in the private sphere. His assumption is that, if Parliament can meddle with private rights, held sacred in most civilised states, then it can by no means be prevented from changing the basic elements of the constitution[IV]. He draws upon the example of the Acts of Indemnity, statutes which render certain transactions[V] that were by law illegal at the time they took place legal or exclude

liability for the individuals to whom the statute applies. According to Dicey, such enactments[VI] represent the maximum exertion of supreme power and, for this reason, whether or not the Parliament may authoritatively change the very foundations of the British constitutional system should not be questioned since its supremacy pervades not only the public aspects of legality but also, most importantly, its private aspects, which encompass the most inviolable rights of the individual as construed by the advocates of natural law.

However, we must not forget that Dicey has a clear inclination towards the practical and more worldly aspects of law and, for this reason, his deliberations on the nature of Parliamentary sovereignty fully reflect the mood of the early Twentieth century, the time in which he lived. Even though he stresses the importance of the fact that electors have no legal means of initiating, sanctioning or repealing legislation, Dicey plainly admits that the notion of "restricted omnipotence", i.e. the idea of the utmost authority ascribable to any human institution, does not apply to the British Parliament, since its asserted supremacy is, in fact, legal fiction. Bringing into play Austin's theory of sovereignty[VII], the author observes that the concept of sovereignty is closely related to the long-standing familiarity of English jurists with the historical existence of a supreme legislature whose law-making power cannot be restricted by any legal limit. However, if the strictly legal significance of the notion of sovereignty is put aside to allow for the theorisation of a political notion of sovereignty, the balance of power shifts dramatically in favour of the electors, who always manage to enforce their will in the long run since Parliament's supremacy is ultimately measured by the degree of obedience that British citizens convey upon the laws passed by the former. Legal sovereignty from the People's point of view implies, firstly, that judges may question the validity of a statute by taking into account the electorate's opposition to its enactment or continued application and, secondly, that a legal mechanism of delegation and representation exists in order to ensure that the House of Commons acts as a trustee for the electors[VIII]. However, Dicey points out that British courts have never affirmed or even alluded to the idea of a "bond of trust" between members of Parliament and their electors, and the unchallenged validity citizens are endowed with is factual[IX] and coexists with a historical element that also limits the actual exercise of legal authority. In this regard, Dicey refers to "external" and "internal"

limitations: the former are meant to ascertain the degree of certainty that a sovereign power has with respect to the possibility of some laws being disobeyed or resisted by the governed[X], or, from a different perspective, to establish the degree of certainty that Parliament can expect from the electors' readiness to comply with its directives; the latter constitute an evaluation criterion of a more sociological nature, as they seek to discover the peculiar social and historical features that result in the legislature's exercise of authority in accordance with that distinct framework.

In Dicey's concluding opinion, the mark of a truly representative Parliament is a more or less precise convergence, which in the long run is a correspondence, between external and internal limitations, which means that Parliament cannot survive very long without passing laws that meet the People's desires[XI]. A similar conclusion may be drawn when considering the original end for which the House of Commons was created[XII], i.e., not to become a part of the government, but rather to monitor its conduct from the outside as an intermediate body between those who govern and those who are governed, elected directly from amongst the People, in the hope that their needs and concerns would find a more attentive listener, as opposed to the more permanent and remote branches of government.

1. 2 Dicey's View on the Referendum

Dicey's theorisation of the referendum has fascinated and bewildered scholars because of its apparent peculiarity when compared with the author's general outlook on the British Constitution. The only way to retrace the steps of Dicey's theory, which underwent a long and constant evolution, is to start with the notion of political sovereignty within the historical context of the Home Rule Bills[XIII]. It is a fact that between 1832 and 1911 the passage of long-disputed measures, which nowadays would surely be ascribed to the constitutional sphere, was made to depend upon the People's consent. The first notable example of this practice was the 1832 Great Reform Act, which changed the composition of the Commons by allowing members elected from amongst the middle class to sit on its benches. In 1910[XIV], Dicey wrote that the 1831 elections had been fought by Earl Grey's Whigs on the basis of the aforementioned Bill and, therefore, electors were asked not so

much to choose representatives, but rather to decide whether or not they wanted the Bill to pass into law. In his view, it was an informal referendum in the guise of a formal election in order to overcome a political crisis. However, despite the landslide majority obtained by the Whigs, the Upper House vetoed the Bill, causing the popular riots which became known as the nine "Days of May". King William IV then declared that he would create new peers, should the Lords' obstructive conduct linger any further, and the latter finally resolved that the People had sanctioned the Act and, on account of that fact alone, they would accept its passage[XV]. According to Dicey, the second example worthy of mention is the 1869 Irish Church Act, which amended the previous Act of Union by disestablishing the Church of Ireland, formally protected by that Act, and instituting religious freedom in Ireland. In this case, the measure was approved by the Lower House before the dissolution of Parliament but, nevertheless, the 1868 election focused on its preservation and resulted in an unquestionable victory for Gladstone's Liberals, who had proposed the Bill while in opposition. Dicey interpreted this victory as the People's ratification of the Bill, otherwise their aversion would have resulted in an electoral defeat for the advocating party. Even the Upper House, originally against the Bill on account of its merits, chose to pass it on the grounds of popular approval, as demonstrated by the unambiguous outcome of the election[XVI].

We have now come to the Home Rule Bills. Dicey's views on the referendum are best remembered, criticised and debated on the basis of his extensive writings, more than three decades worth, on the recurring issue of Home Rule. His writings have sparked an ongoing debate amongst scholars regarding the true meaning Dicey attributes to the People's sovereignty, and thus also to the constitutional role of the referendum as the main instrument of direct democracy. In order to fully understand the evolution of Dicey's theory over the years it is perhaps better to begin by stating that the omnicompetent legislative supremacy which - according to the author - Parliament is entrusted with cannot endure the allocation of law-making powers to other bodies, something which would diminish its own power. Thus, any kind of federal arrangement, like the one resulting from the passage of the Home Rule Bills, is out of the question. Dicey believes that a written constitution is necessary for federalism to work. Therefore, it weakens any national government not only because of the power-sharing mechanism, which inevitably tends to produce conservatism, but also due to the fact that federalism implies the existence of a

judiciary body, whose will is meant to prevail in the event of a political crisis. Dicey's firm opposition to a written constitution for the United Kingdom is of great importance, since the very notion of a Referendum Act stems from the conviction that the effectiveness of the British Constitution depends upon its flexibility, a peculiarity which allows the political sovereign, i.e. the People, to assert their will more rapidly than in other countries. It is perhaps for this same reason that he rejects the idea of proportional representation, or any kind of broader representation for that matter, arguing that the People do not need it to manifest their will effectively, and that government cannot be reduced to a mere "debating society".

In light of all this, we can now delve into Dicey's never-ending crusade against the passage of Home Rule Bills in order to understand the peculiarities of his referendum theory. The first Home Rule Bill had a very short existence, since it failed to pass in the House of Commons, where even ninety-three members of the same party as Gladstone – the proponent – voted against it. Parliament dissolved and the following 1886 election favoured the opposing party, something that Dicey interprets as the People's clear sanction of the Bill's lack of mandate (A.V. Dicey, 1890). The second Home Rule Bill is a much more interesting case for Dicey's theory on representative government, because it did not fail on account of political squabbles within the proposing party, but rather because it involved the House of Lords, which was exercising its constitutional prerogative. The facts were as follows: after Gladstone obtained a victory in the 1892 election, he decided to work towards the passage of a second Home Rule Bill, which was approved by the Lower House. However, the Lords vetoed the Bill by a landslide majority. The 1895 election was fought on the issue of Home Rule and resulted in a decisive victory for the opposing party, i.e. the Conservatives. Dicey writes that the Lords exercised their constitutional prerogative in the only way which was compatible with the democratic sentiment, i.e., by stepping in during a time of crisis, when the Commons failed to represent the will of the People, and putting a check on unwarranted fundamental constitutional change. The main detectable fault in the British system of representative government is that it allows a small majority in the Commons to bring about massive constitutional change. Moreover, according to Dicey, if that small majority does not represent the interests of the People, but rather those of a political party, the risk of subverting the constitution without a proportionate and actual

support to match such great power is all the more obvious. The Lords are thus entrusted with an indispensable constitutional safeguard, i.e., impelling a dissolution of Parliament so that the issue at hand may meet its fate once confronted with a direct appeal to the electors. However, Dicey is well aware of the fact that the House of Lords, as a non-elective body[XVII], cannot appear to legitimately veto a Commons Bill without admitting it has done so because there is conclusive evidence to suggest that the House of Commons has misrepresented an existing national deliberation - in whatever form it may have come to be - with regard to a fundamental constitutional change. In other words, constitutional conventions which attribute discretionary prerogatives to non-elective bodies must only be exercised in times of crisis, when there is a noticeable gap between the interests of the electorate and those of their representatives, inasmuch as the People need another election to choose representatives who might actually embody their will regarding the fundamental issues at hand[XVIII].

We have now come to a truly crucial point in Dicey's reasoning: since the Lords are supposed to compel a dissolution of Parliament whenever a matter of fundamental constitutional importance is dealt with by a small majority without having been "tested" before the entire nation, it naturally follows that the People must be given the chance to confront *that* particular issue themselves. But how? After all, in a general election voters choose parties or, at the most, single representatives, but they are not asked to embrace any specific policy and, in fact, they often have to vote for a party that stands for a particular issue – amongst many others of course – which they do not approve of. Subsequently, compelling a dissolution is not enough, an *addendum* is needed in the form of a clause conditioning the passage of the Bill on the attainment of the formal assent of the nation. Dicey takes into account the possibility that an election following a dissolution might result in the pre-existing majority being re-appointed. Therefore, especially in his works opposing the second Home Rule Bill, he begins to distance himself from the notion that the People's consent on the passage of a specific Bill must necessarily be expressed through an election fought on the grounds of that very same Bill and called for after a dissolution caused by an unsolvable dispute concerning its passage. The main risk of asking the People to vote on a specific issue while, at the same time, making them choose their representatives is that what has been aptly defined as a "systematic mix up" may take place, because electors are

faced with the dilemma of prioritising a single policy over a party programme or personality, whose views they approve of[XIX]. For this reason, the topic needs to be isolated and thus encompassed in a referendum independent of a concurrent election. In addition, the question must be posed in a way that underlines the constitutional nature of the issue[XX], also because the turnout might increase in constituencies where there is a dominating party and hence a minority of voters who usually steer clear of elections in the certainty of defeat. According to Dicey, the isolation of the issue in a referendum produces other beneficial effects. Firstly, he believes that a Bill submitted to the People's assent is less susceptible to being changed in the final phases of its parliamentary debate and, therefore, political negotiations managed by parties are considerably limited. Secondly, group interests, or even class interests[XXI], have no voice, since the whole of the nation is involved in the referendum and therefore the result is unbiased by party influences or otherwise.

Having resolved, albeit not definitely[XXII], the question of "how" a referendum should be held, in his later works Dicey focuses almost exclusively on "why" it should be held, while bearing witness - and partly because of the fact that he bore witness - to historic developments in the fabric of the British constitution. He believes that, although the referendum itself is a breach of well-established parliamentary practice since it calls upon the assent of a fourth actor in addition to the Houses and the Monarch for a Bill to become an Act, it certainly derives from the democratic sentiment, i.e. the idea that the power to make laws is transferred from the People to their representatives, and the principles that embody it[XXIII], which means that when there is an *impasse*, a return to the basic principles of the constitution is absolutely necessary to restore representative government to its former glory.

Regarding the second Home Rule Bill, Dicey argues that it is a measure implemented by a party - precisely, the Liberal party - arrogating to itself powers belonging to the State by disguising the constitutional revolution that would result from the passage of the Bill as a moderate reform, by refusing to openly debate it in Parliament and, ultimately, by exploiting its majority well beyond its actual political power in the constituencies to impose a radical transformation which, by evading any form of popular assent, should be considered profoundly undemocratic. The referendum's efficacy and

main purpose duly lies in establishing a check on party management of parliamentary government by thwarting the legislative omnipotence of the Commons majority, not to mention the fact that any Bill sanctioned by the People cannot be repealed as easily as an ordinary Act of Parliament, therefore limiting reactionary tendencies, while, at the same time, preventing hasty innovation.

By the time the third Home Rule Bill came around, Parliament had gone through several crucial transformations: class restraints no longer existed and, most importantly, the party system was fully functional. The independence of the members of Parliament lacked credibility and was further diminished by two new practice rules: the 1881 closure rule, which enabled the Commons to close the debate and move for a vote on the Bill under discussion[XXIV],and the 1887 *guillotine* rules[XXV], which allowed for a restriction of the time dedicated to the discussion of a particular Bill in the Commons by establishing dates and times at which specific provisions of the Bill had to be voted upon.

Up to this point, Dicey's belief in the effectiveness of the referendum is closely related to his faith in the validity of indirect democracy, since the former is a small price to pay to maintain political stability and efficiency. This is supported by the fact that law-making powers are in the hands of an intellectually educated minority rather than at the mercy of plebiscites, which would lead to spasmodic and irregular legislation[XXVI] and also to the strengthening of the bonds of accountability. Though a referendum could actually stand in the way of salutary reforms, it could also delay or prevent heavily opposed or far too hasty innovations and, for this reason, Dicey believes that the only place for direct democracy in the British Constitution is in referenda on controversial laws involving matters of fundamental constitutional importance that have already been passed by Parliament. The emphasis put on the nature of the laws susceptible to a referendum and on the level of completion the same law must have reached for a referendum to be proposed is a symptom of the fact that Dicey conceives the referendum as having a purely negative effect, thus making it a conservative instrument of liberal democracy[XXVII]. According to Dicey, the restriction of the use of referenda to exceptional circumstances is a means of securing a high turnout and also, most importantly, the only way to ensure that the referendum does not hinder progressive legislation by allowing the People to block necessary - albeit unpopular - reforms[XXVIII]. However, the most interesting aspect related to the conservative nature of the referendum is the exclusion of legislative initiative from the

counts of direct democracy. Not only does Dicey fear that if the referendum were to be construed as a channel of legislative initiative, it may surely be employed as an instrument to enact plebiscitary legislation, but he is also aware that the quality of legislation depends upon the committee stage, during which highly regarded members of the legal profession are entrusted with making the clauses of the Bill workable in practice[XXIX]. Therefore, the referendum can only be made compatible with a representative government by ensuring that it operates as a (mere) national veto.

Dicey's support of the referendum intensified after one of the fundamental checks on party dictatorship was annihilated, i.e. the 1911 Parliament Act, which transformed the Lords' veto on legislation initiated by the Commons from absolute to suspensory. Therefore, the House of Lords could no longer limit its consent by referring the issue to the People's decision at the following election, since the House of Commons was enabled to pass legislation without the Lords' approval with a two-year delay. At this point, it is clear that the radicalisation of majority dictatorship in the Commons also radically influenced Dicey's theory on the referendum. The author is well-aware of the fact that a referendum needs a mechanism capable of guaranteeing both the impartiality and the effectiveness of its proposal. For this reason, neutralising the Lords' veto means risking the transformation of the very nature of the referendum, making it a channel through which plebiscitary legislation is carried out or making it obsolete, since the Commons can stand on its own even when dealing with massive constitutional change.

Fearful that the first consequence of the Parliament Act could be the passage of Home Rule, Dicey envisioned several different options to prevent such a change from taking place. In addition, even though his first proposal - a popular petition for a referendum - is based on a purely factual evaluation of public opinion as an indicator of soft power, it is inspired in that it requires a pre-legislative consultation of the People in order to assert the legitimacy of a constitutional reform and avoid a plebiscite. It may not be surprising that when Tony Blair put forward a proposal to hold referenda on devolution in Scotland and Wales, he insisted upon holding them before the pertinent legislation was introduced into Parliament.

Dicey's second proposal for restraining party dictatorship is the royal prerogative to dissolve Parliament and withhold Royal Assent. There is not much to say about this solution because, despite the fact that in theory these powers can be legitimately exercised,

in practice a sovereign who actually did so would, in this day and age, be perceived as attempting to carry out a *coup d'état*, given that the constitutional conventions which attribute royal prerogatives were tacitly intended to limit and not favour royal power. In other words, an aggressive exercise of royal prerogatives would be contrary to the spirit - if not the letter - of the pertinent conventions.

The final option that Dicey suggests is also the most criticised, since it introduces the idea of unconstitutionality into the British system and hence seems to demolish the very core of his theory of Parliamentary sovereignty. Dicey challenges the idea that a constitutional reform passed without the consent of the People may be declared unconstitutional, even though earlier he acknowledged that judges could not rise to the function of interpreting legislation with regard to its consistency, accordance and coherence with the Constitution. He later goes even further by asserting that unconstitutionality does not need formal recognition, since the People are, in fact, the legal sovereign in that they cannot relinquish their sovereignty and allow Parliament to change the British system from dualist to monist, because they do not simply hold *de facto* sovereignty, but rather their sovereignty is also entrenched as an immutable rule against their will. However, in the light of this, the referendum would be emptied of its purpose, since there would be no need to test the legitimacy of a constitutional reform if there were a clear distinction between constitutionality and unconstitutionality in the British system, as Dicey seems to imply, given the fact that the People's approval could be verified in many other ways, such as the sleeker and more informal opinion polls.

Although Dicey is committed to the principle of popular sovereignty, he finds it hard to overcome the difficulties related to an uncodified constitution, since the mandatory nature of the referendum on constitutional issues can only be achieved through its codification in an Act of Parliament. In a somewhat paradoxical manner, he acknowledges that in order to maintain the British Constitution's flexibility, in the light of which the People enjoy *de facto* sovereignty by deciding issues and not just parties or representatives in elections, an entrenchment of the referendum in an Act of Parliament is needed, a small price to pay for a flexible constitution and the only check compatible with the United Kingdom's constitutional tradition. However, even excluding the possibility that such an Act could be repealed by a subsequent legislation by invoking political rationale, the only way for the People to enjoy any semblance of legal sovereignty would be if referenda on

constitutional issues became unanimously legitimised to the point of transforming them into constitutional conventions, perhaps the sole uncodified part of the constitution which is truly almost immovable. Therefore, those who study the referendum must monitor constitutional practice to verify whether the referendum is or has the potential to become an indispensable, or at least highly resistant, part of the British Constitution.

2.1 The Devolution Referenda: A new way of discharging power

At this point, the cardinal features of Dicey's referendum can easily be pointed out, but the question remains whether any concrete evidence of these features can actually be found in practice. In order to establish the extent of Dicey's influence on British constitutional practice, the best example to take into consideration is the number of devolution referenda that have taken place from the 1970s until today at the sub-national level. The radically exceptional nature of referenda outside of local interests, even more so than in other European democracies[XXX], makes it very difficult to measure the fruitfulness of referenda theories. Hence the lengthy devolution process, during which referenda have acquired and still play a primary role to this day, is the only *tertium comparationis* which shows real promise.

The devolution process started in the late 1960s, when the Labour party found itself trapped inside its own ideology, which refused the idea of a devolution of power to sub-national entities. This was based on the fear that a dispersion of power would occur, thus undermining the goals of the working class movement, such as the welfare state and employment, and the ever-growing electoral strength that the party had gained in Scotland and Wales, where there was a steady decentralist tradition dating back to the beginning of the Twentieth century[XXXI].

In 1969, the Wilson Government set up a Royal Commission on the Constitution to resolve the conflict of interest which had arisen and assigned it extremely wide-ranging objectives, requiring it to "examine the present functions of the central legislature and government in relation to the several countries, nations and regions of the United

Kingdom […] whether any changes are desirable in those functions or otherwise in present constitutional and economic relationships". The members of the Commission interpreted its requirements as mainly ascribable to the possibility of transferring responsibility for the exercise of government functions from the central government to new institutions to be established at a sub-national level. They drew conclusions that have massively impacted the current devolution arrangement and, indirectly, the structure of the devolution referenda. While the Commission's report, published in 1973, is comprehensive in how it deals with the various aspects of devolution, its impact on the referenda has only been indirect, in that it identifies the issue at hand as being exclusively ascribable to the regions towards which a transfer of power is meant to take place and, therefore, deliberately avoids involving England in questions arising from devolution. This peculiarity has undoubtedly influenced the structure of the referendum.

In 1975, the devolution proposals for both Scotland and Wales were presented by the government[XXXII] as a single Bill, even though the shape of devolution that would eventually take place in each region was unique to that particular territory. Then, in December 1976, the Bill passed its second reading by forty-five votes. However, the Labour government led by Callaghan was well aware that it needed the Liberals' support for the final passage of the Bill to be successful and that, at the same time, giving into their requests for proportional representation and revenue-raising powers would inevitably cause a mutiny amongst Labour backbenchers. The only way to keep the Labour dissidents at bay was to provide for a referendum on the devolution proposals, a concession that would allow the Welsh Labour opponents of devolution to test the asserted existence of a powerful popular demand for devolution both in Scotland and Wales, while, at the same time, lending their support to a Bill which would avert the threat of nationalism in Scotland. After all, if an English-dominated Parliament rejected devolution, the reaction on the nationalist front would be catastrophic and would fuel the demand for independence.

It was Leo Abse, MP for Pontypool and leader of the Welsh dissidents, who put forward an amendment proposing that the implementation of the Bill not be carried out unless referenda in Scotland and Wales were held. The peculiarity of the amendment was that it was introduced after the Bill had already been published and was approaching its committee stage, an absolute novelty for British constitutional practice. At the time, as witnessed by the 1976 edition of *Erskine May*, an amendment to a Bill which suggested that

the provisions of that very Bill be subject to a referendum was seen as an authoritative modification of legislative procedure contrary to constitutional practice. Given its wide support[XXXIII], the amendment was introduced by the government in committee on February 10th, 1977 and this infraction of constitutional procedure gave way to bitter objection from backbenchers.

In the midst of all this, many Labour MPs began to ponder whether the difficulties surrounding the Scotland and Wales Bill might be overcome by allowing the electorate to express its views on devolution at the coming general election. It was argued that if the electorate chose the Labour party once more, the government could propose a stronger Bill for devolution[XXXIV]. It was, if nothing else, the assertion of the early Diceyan theory, explained in the first part of this paper, according to which before a fundamental change in the Constitution could take place, the proposing government had to be tested, so to speak, by obtaining a clear-cut victory in two consecutive general elections fought on the constitutional issue that it wished to tackle.

However, a startling turn of events radically changed the parliamentary devolution process. The *guillotine* mechanism, which Dicey had fervently opposed on the grounds that it would secure a dictatorship for the party that formed the government, worked against the government's intention to cut the debate on the devolution Bill short, and the *guillotine* motion it put forward on February 22nd, 1977 was rejected by twenty-nine votes, with twenty-three abstentions from Labour MPs. As a result[XXXV], devolution proposals underwent a radical, one might even say surgical, modification. Proposals for Scotland and Wales were divided into two separate Bills and, in November 1977, both of them were successfully guillotined after the second reading. At this stage, the referendum acquired a fundamental role, since many Labour MPs who were opposed to devolution saw it as an opportunity to support the devolution Bills in Parliament - thus avoiding a new general election[XXXVI] - while hoping for a defeat at the referendum stage. Therefore, as S.E. Finer marvellously put it, the referendum became "the Pontius Pilate of British politics" (Finer, 1975, p. 18).

After the second reading, an amendment of crucial importance was introduced: the so-called "forty percent rule". George Cunningham, Labour MP for Islington South and Finsbury, argued that, since devolution would bring about irreversible constitutional

change, convincing evidence that those directly involved were in fact in favour of such a ground-breaking modification was absolutely necessary. The amendment was carried out on January 25th, 1978, with 166 MPs voting in favour and 151 against, and clause 82 (2) was introduced into the Scotland Bill[XXXVII], providing that if the Secretary of State, with respect to the result of a referendum and all other circumstances, believed that the Act in question should not be implemented, he could lay the draft of an Order in Council providing for its repeal before Parliament. According to section 85(2) of the same Act, if fewer than forty percent of Scottish electors voted in favour of devolution, the aforementioned repeal order had to be laid before Parliament, with no discretionary evaluations attributed to the Secretary of State on the matter[XXXVIII]. This specific section goes right to the core of issues relating to the legitimacy of the referendum in a nation that, as Benjamin Disraeli famously said "is not governed by logic but by Parliament". The referendum is the only way of preventing a small majority from changing the constitution and whether this majority is comprised of members of Parliament - *rectius*, of a party majority - or electors is, for the most part, irrelevant. The Cunningham amendment was subtly conceived, inasmuch as it combined a rather high threshold in determining the minimum percentage of the electorate with necessarily unequivocal and considerable support for the measure. Even though the amendment was advisory and not mandatory, by allowing the Parliament to vote down the repeal order and pass the Act, it undoubtedly constituted a very powerful instrument of soft law. In fact, on the one hand, a decisive electoral majority in favour of devolution would force the Parliament to implement the Act and, on the other hand, a low turnout or a small majority would allow those who opposed devolution to present a strong case for the repeal of the Bill and put pressure on the government to reconsider the measure. Recalling Dicey's conclusions on Parliamentary sovereignty underlined in the first paragraph of this paper it is clear that the aforementioned progressive convergence between external and internal limitations was, in this instance, fully operational.

One of the main problems related to the provision of a threshold for a referendum is of course that of identifying the electorate and, in this particular case, such a task proved very hard to achieve, since the electoral register was not accurate enough to determine once and for all the exact number of People entitled to vote, its main purpose being that of making sure that all those entitled to vote were included. In order to make sure that mere

arithmetic did not get in the way of the effective workings of the newly designed referendum, the government made a list of those who were to be considered not legally entitled to vote[XXXIX], amidst objections that the final discount was much less than required when considering every possible error in the electoral register[XL]. On March 1st, 1979 the referenda were held both in Scotland and Wales[XLI]. In Scotland, with a turnout of 62.9 percent, devolution narrowly avoided the forty percent "Yes" threshold and the results were as follows[XLII]:

PREFERENCE	VOTES	PERCENTAGE OF THOSE VOTING	PERCENTAGE OF THE ELECTORATE
YES	1,253,502	51.6	32.85
NO	1,230,937	48.5	30.78

In Wales, the results were much more discouraging and straightforward:

PREFERENCE	VOTES	PERCENTAGE OF THOSE VOTING
YES	243,048	20.2
NO	956,330	79.8

The failure of devolution proved to be the last straw for those whose faith in the Labour government had been oscillating for some time, and when the new Conservative government was elected in May 1979, one of its first orders of business was to repeal both Acts. It managed to do so in June 1979[XLIII] and, consistent with its ideology of a strong centralised government, both the Thatcher and the Major administrations accurately delayed or circumvented the issue. However, at the same time, Labour was becoming increasingly committed to devolution, conscious of the fact that, even though England had chosen the Conservatives, the Scottish and Welsh electorate had remained loyal[XLIV].

In 1994, when Tony Blair became the leader of the Labour party, the devolution issue had already been resurrected, since the Scottish Constitutional Convention had been established in 1989, counting Labour and the Liberal Democrats amongst its participants, and it had laid out a detailed scheme for devolution[XLV] which was supported by the majority of Scottish public opinion. In June 1996, Blair proposed that referenda on devolution be held in Scotland and Wales before the pertinent legislation was introduced into Parliament, and in May 1997, after the Labour victory, a Referendum (Scotland and Wales) Act was passed, providing for referenda which were held in September 1997[XLVI] with the following results[XLVII]:

SCOTLAND

PREFERENCE[XLVIII]	VOTES	PERCENTAGE OF THOSE VOTING
YES	1,775,045	74.3
NO	614,000	25.7

WALES

PREFERENCE	VOTES	PERCENTAGE OF THOSE VOTING
YES	559,419	50.1
NO	552,698	49.9

Tony Blair had insisted that the referenda be held exclusively in Scotland and Wales, thus avoiding the involvement of the English regions. His proposal was not a first, since the Royal Commission which had been established in the 1970s had reached the conclusion that devolution had nothing to do with England, but, in this case, it was ancillary to a further proposal, that of holding the referendum before the devolution

legislation was introduced into Parliament. A "Yes" majority on the issue of constitutional change rather than on its formal translation into a Bill, rendered exclusively by those directly involved, would prove to be the strongest endorsement capable of overcoming the strongholds of parliamentary procedure. There is no doubt that, from a strictly constitutional point of view, devolution affects the United Kingdom as a whole and not just the devolved areas, since it changes the distribution of powers across the nation's territory and therefore the very essence of the British Constitution. Even though devolution has always been construed to avoid separatist threats, thus serving an even higher purpose than that of representative democracy, we can hardly ignore the fact that English voters were left out in favour of a small majority, the kind of majority that the referendum - according to the Diceyan theory emphasised in the first part of the paper - meant to avoid. In 1998 the government continued its bid for devolution by holding a referendum in Northern Ireland on whether to establish a partnership system of devolved government according to the terms set by the Belfast Agreement. On a turnout of eighty percent, seventy-one percent endorsed the agreement and twenty-nine percent rejected it.

Other cases in which a transfer of power within the United Kingdom was subject to referendum include the 1998 referendum concerning the establishment of a Greater London Authority consisting of a directly elected mayor and an assembly, and the 2004 referendum concerning the establishment of a directly elected assembly for the North-East regions in accordance with the 2003 Regional Assemblies (Preparation) Act. The former was successful, with seventy-two percent of the votes in favour and twenty-eight against, but the turnout was very low, only reaching thirty-four percent. The latter was a defeat for the proponents, with only twenty-two percent of the votes in favour and seventy-eight percent against on a forty-eight percent turnout.

Most recently, on March 3rd, 2011, a referendum was held in Wales on the proposal to grant the National Assembly of Wales legislative powers in all twenty subject areas: with 517,132 votes in favour and 297,380 against - 63.49 versus 36.51 percent on a turnout of 35.2 percent - the result was a clear-cut victory for the proponents, even more so because of the emphasis that had been put on the necessity to consult the Welsh electorate before transferring the exercise of primary legislative powers to the Assembly, to the point of

making it a statutory provision. The 2006 Government of Wales Act is one of the three peculiar cases - at least to this day - in which a statute requires a referendum in order for one or more of its provisions to be implemented. The other two are the 1998 Northern Ireland Act, which requires any proposal concerning the separation of Northern Ireland from the United Kingdom to be put to a referendum[XLIX], and the 2003 Regional Assemblies (Preparation) Act, which provides for a referendum every time a new directly elected regional assembly is to be established. All of the above-mentioned referenda have one single thing in common: the proposals to endorse for which they were held sought to achieve a transfer of powers from Westminster to a devolved body at a sub-national level. However, when considering various factors, such as the portion of electorate involved, the thresholds and other requirements for the referendum's success or even the nature of the proposed transfer of powers, it seems clear that Dicey's warning to limit the use of referenda to fundamental constitutional issues - as previously reported in this paper - has not been heeded.

To be fair, the lack of a codified constitution basically allows for a flexible use of the referendum. Dicey himself admits that the only way of preserving the British constitution's flexibility is to leave it non-codified, but he concedes that the People need to be put in a position to take advantage of that same flexibility by providing them with a safeguard, i.e. the codification of rules concerning the "if", "when" and "how" of a referendum. Dicey recognises that the elasticity of the British Constitution combined with the conservative nature of the referendum creates a paradox. It is a fact that the government is at leisure to hold or not to hold a referendum, but, if this is the case, how can the latter be a check on the former? In other words, how can a constitutional safeguard, which is conceived to test a legislature's legitimacy amongst its electors by allowing them to limit, if necessary, the decisions made at Westminster, operate effectively, provided that the mechanism which sets the check in motion is at the discretion of those who are meant to be checked and not of those who perform the check? One of the main risks is that the referendum may be led astray from its original purpose and produce the opposite effect, i.e. the enactment of plebiscitary legislation to increase the government's strength and diminish that of their political opponents. The circumstances under which the 1970s devolution referenda were held clearly illustrate this: the government needed to get the devolution legislation through Parliament, but in order to do so it needed to win over

the backbenchers who vehemently opposed the measure. The referenda were thus introduced to keep the government in office by keeping backbenchers of the same party from voting against devolution.

However, it has been argued (Bogdanor, 2009, pp. 190-191) that the referenda which have been held so far have established a precedent no government can easily avoid. The devolution referenda, along with the EC referendum, dealt with issues relating to the extent of Westminster's powers and hence with the principle of Parliamentary sovereignty. It is clear that devolution was an entirely new constitutional arrangement which would interfere with more than merit, since it involved a fundamental alteration in the procedure by which laws were constructed. This is a point Dicey strongly emphasises, when, in accordance with the liberal theory of limited government, he argues that Parliament's law-making powers are the result of a direct transfer from the People, i.e. the political sovereign, and, therefore, cannot be transferred themselves[L]. However, the 1997 referendum held in Wales, the 1998 London referendum and the 2004 North-East referendum mentioned nothing about a transfer of legislative powers, as they were merely intended to create a new tier in the administrative area.

Another problem which makes it difficult to imagine how a constitutional convention regarding the "if" of a referendum is established is actually a question of "when". The interchangeable nature of the pre-legislative and post-legislative phase as the moment in which a Bill is put to referendum creates two radically different situations from a strictly constitutional point of view. A referendum held in the post-legislative phase, such as the 1970s devolution referenda, not only has a merely conservative nature, but, most of all, intervenes on an already perfected Bill, and whether or not it concerns a constitutional issue becomes irrelevant, since there is no option to investigate the merits of the proposed legislation. On the other hand, a referendum held in the pre-legislative phase is by definition a referendum on merit and therefore does not concern provisions but rather issues in their substance. In the latter case, the limitation of referenda to fundamental constitutional issues makes sense, since it would be profoundly irrational for any government to go to the trouble of proposing a pre-legislative referendum, with all the political risks it entails, especially when collective responsibility is concerned, in order to consult the electorate on marginal issues or even issues which could be resolved by

employing ordinary parliamentary procedures, albeit with more obstacles along the way. However, the question of "when" to hold a referendum is completely inadequate to provide a satisfying solution regarding the use of referenda for the purpose of enacting plebiscitary legislation. This particular problem is strictly connected with the difficulty of identifying a clear separation between constitutional and non-constitutional issues. While we might venture to assert that constitutional issues are similar in nature within most nations, where they usually concern questions relating to sovereignty and the division of powers as well as territorial matters and fundamental rights, there is no way of preventing a government from deciding what should be constitutional and what should not, given that the British courts are not enabled, as are most courts in other countries, to identify the substantial nature of a particular measure in spite of its formal designation.

Perhaps the only effective way of providing for a referendum on constitutional issues lies not in merit but rather in procedure. If the Parliament itself declared a referendum mandatory, the principle of Parliamentary sovereignty would undoubtedly suffer no particular fault, providing at the same time the electorate with a legally binding constitutional instrument, albeit through an ordinary legislative procedure. In fact, a precedent has already been set in British constitutional practice. In February 1977, when the Callaghan government added clause 40, the referendum clause, to the Scotland and Wales Bill, it was decided that the devolution referenda would be mandatory[LI], but that option did not last long since the government soon changed its view and turned the referendum into an advisory one.

If a referendum were to become mandatory, the issue of thresholds would certainly be unavoidable. Even though at the 1998 Greater London referendum the turnout was thirty-four percent, the government interpreted the seventy-two percent in favour of the proposed measure as a sufficient indication that it should be implemented, on the grounds that a simple majority was required and, in this case, the numbers in favour were high. However, a simple majority may not be the best solution for a referendum concerning a fundamental constitutional issue, since it would create the same kind of inequity that Dicey condemns when pointing out that a small majority in the Commons could change the constitution. If that small majority were a portion of the electorate instead of a group of MPs, it would make very little difference and it could actually be argued that in this case no

one may be held accountable. A government that manages to bring about a constitutional reform without the People's consent may be delegitimised once the successive general election is held, whereas a small majority amongst the People is a fact that is not sanctioned or opposed by any legal rule. Perhaps it is not too far-gone to suggest that a government which implements a measure approved by a marginal portion of the electorate may be held collectively responsible, but, once again, this is a solution which can be made effective through practice rather than theory.

As regards the mandatory nature of the referendum, a question that must be resolved prior to a debate on the opportunity of introducing a certain type of threshold, it has been suggested (Bogdanor, 2009, pp. 194-196) that the best way to entrench the referendum as a requirement for the passage of fundamental measures is to redefine the validity of legislation on a particular topic. This theory has been construed for the purpose of making the devolved bodies immune to the absolute discretion that a legislature has in preserving or repealing the laws enacted by its predecessors and it proposes that a referendum be made the condition for the Royal Assent given to a Bill, the aim of which is to abolish the devolved bodies.

This kind of mechanism already has a precedent which has proven very solid: the 1911 and 1949 Parliament Acts. By establishing that Bills, at first only those of a financial nature and then any type, may be passed without the consent of the House of Lords provided that the House of Commons expresses its approval in two subsequent sessions, these Acts redesign the rules concerning the validity of legislation, a hurdle which is difficult to overcome due to the fact that a successive legislature cannot redesign the rule in question without actually implementing it. In the case of devolution, for example, a decision to repeal the mandatory referendum for the abolishment of the devolved bodies would have to be submitted to mandatory referendum in order for it to be implemented. However, we cannot help but notice that the success of this device depends upon the willingness of a legislature to entrench the referendum to its own detriment. In fact, judging by the referenda which have been held so far at the national or regional level, devolution referenda in particular, they appear to be the main instruments of parliamentary appeasement, allowing governments to saw up fractures within their parties or contain backbencher opposition, rather than being considered a necessary step towards changing the constitution. The reason for this does not only attest to the resilience of the doctrine of

Parliamentary sovereignty, but also lies in the fate of European history. Until the 1970s, the referendum was considered the main political instrument employed by totalitarian governments to monitor mass consensus and, therefore, it appeared not only alien to the British legal system, but also profoundly unconstitutional, since it had proven to be the ideal instrument to substantially bypass the basic principles of democracy while formally retaining a democratic *façade*. The first referenda to be held in the United Kingdom were largely a matter of reinforcing support rather than actually weighing the mood of the voters, to defeat a certain policy, whether it concerned the European Community or devolution, and it is not surprising that this has been the case until the end of the Twentieth century.

Be that as it may, the way in which referenda have been proposed and held over the years is very significant and must be carefully considered. The proposed devolution for Scotland and Wales in the 1970s was put forward by the Labour government with a meagre 39% of voter support. The referendum on EU membership was held while disregarding all constitutional objections. The 1990s settlements concerning Northern Ireland were explicitly committed to referenda by the Conservative government led by John Major, irrespective of the actual issue brought before the People of the region. These are just a few examples of the singular use that has been made of the referendum which, far from dealing with fundamental constitutional issues, has become a very convenient instrument for Commons minorities or even the Cabinet in order to propose legislation which otherwise might have had difficulty getting past mere informalities.

Nowadays, the *stigma* which has eerily surrounded the notion of referendum has seemingly vanished, but, nevertheless, this undoubtedly constitutional instrument is only capable of imposing a mere moral obligation upon Parliament, provided of course that Parliament decides to exercise its supreme power by consulting the People and that the result of the referendum is fairly clear-cut.

The absence of a written constitution contributes to the uncertainty encompassed in discussions concerning “if” and “when” a referendum should be called. It is clearly perceptible that governments usually resort to popular consultations where constitutional issues are affected, but in the United Kingdom the constitutional nature of a particular

issue is discretionary, since it is up to Parliament to make the distinction, if it wishes to do so.

However, it is still possible to identify an established practice which may not easily be disposed of: so far the referenda held in the United Kingdom have concerned a proposed transfer of powers from the Parliament to another body, either in Europe or in the devolved territories. Therefore, it could be argued that one of the traditional themes of liberal constitutionalism, the idea of transferring power from the People to their representatives for specific purposes which the latter cannot divert from, has somehow been channelled into the practice of consulting the People before a transfer of powers which they previously entrusted solely to Parliament takes place, thereby suggesting that the People retain a small measure of sovereignty which consists in deciding if some of the powers which they transferred to the Parliament in the first place should be exercised by another body or not. At this point, Dicey's theory seems to have come full circle: setting aside all discussions on the nature of the referendum, it is clear that constitutional practice has set a pattern in the light of which the People have managed to preserve their political sovereignty, thus proving that the flexibility derived from the very absence of a written constitution has achieved a relatively favourable effect towards implementing direct democracy, as previously highlighted in the first part of this paper. The true question is whether there is any indication that they may be on their way to acquiring legal sovereignty or whether the dogma of Parliamentary sovereignty is determined to remain untainted.

In an article which recently[LII] appeared in "The Guardian", the question of the Scottish devolution referendum to end all devolution referenda was clearly laid out for the benefit of UK-wide public opinion. The leading political figures in Scottish politics are preparing for a referendum on devolution which, judging by the current state of affairs, may be held as soon as 2014. It will undoubtedly involve the most revolutionary development since the 1997 referenda, as the questions brought into play in the most recent debates have had to do with the degree of independence that Scotland can achieve without actual secession, and therefore with the very concept of sovereignty. The issue at the heart of the widespread call for a devolution referendum is welfare: if Scotland controlled about 90% of its taxes, the process of devolution would reach its maximum[LIII], since the area would depend on Westminster for little more than foreign policy. However,

it seems that there is some confusion within Holyrood as to the structure of the proposed referendum. Whereas important figures in the Scottish National party - currently the majority party in the Assembly - have taken into consideration the idea of proposing two separate questions, one for a stronger devolution and the other for independence, key members of the Labour party have noted that independence has nothing to do with devolution, the purpose of which is to make sure that Scotland remains in the United Kingdom. Devolution is, in fact, a process which has always been propelled by Labour and, therefore, it is hard to imagine that the referendum will be successful if the current majority does not abandon the independence question. While the Scottish Liberal Democrats are presently heading a Home Rule Commission aimed at updating proposals for greater devolution in Scotland and, at the same time, lending continuous support to the idea of a federal United Kingdom as the final step of the devolution process, a Bill approaching its Committee Stage in the House of Lords[LIV] makes provisions for an increase in tax control by the Scottish Assembly. It is unclear whether such an adjustment is enough to prevent a referendum, but what is certain is that in constitutional practice no major changes involving a new dent in Parliament's sovereignty can take place without a referendum. As far as devolution is concerned, it is far from obvious that the preferred means to introduce - or at least affirm - constitutional change is that of direct democracy and even less obvious that such a tendency only increases as the issues at hand become more controversial. Perhaps the extent to which referenda have been used in the devolution process is a worrisome sign on the one hand of the shortcomings in the legal structures holding together the devolution process as a whole and on the other of the inability to put forward constitutional changes within the traditional political system, or it may simply represent a defining feature of the new constitutional order that devolution has established. If this is the case, there is no reason to believe that if and when fundamental questions of sovereignty are taken into consideration on the political scene, the referendum will not be the decisive instrument to resolve the matter once and for all.

2.2 Dicey's Influence in 21st Century Britain

It is no secret that the referendum as originally theorised by Dicey has not made it to our time. The principle of Parliamentary sovereignty has proved even stronger in practice than in theory, and the introduction of the referendum at a national or regional level[LV] was due more to the necessity of overcoming harsh political conflicts within Parliament than to answering to a call for the entrenchment of the principle of popular sovereignty. However, the referenda which have been held so far seem to have been blessed with a life of their own, which has transcended the intentions of their respective proponents, all in all creating solid precedents which have helped scholars to identify a semi-constant pattern of issues on which referenda are expected to be held. Nowadays, referenda may not be legally confined to fundamental constitutional issues as Dicey intended, but there is certainly a tendency in constitutional practice which suggests that such a restriction may be actually taking place. In some cases, referenda have been entrenched in Acts of Parliament, thus acquiring the function of a national veto set to hinder ill-formed or unwarranted legislative reforms, as Dicey himself pointed out, or go even further by suggesting that the People may use it to channel their constituent power. Dicey sought desperately to make the referendum untouchable and this is probably the reason why his theory was not accepted in full, but rather found its way through the cracks of constitutional practice with regard to specific, but nevertheless fundamental, aspects. The *vacuum* left by the Lords' check, the persistence of an uncodified constitution, the absence of a Court qualified to protect popular sovereignty with declarations of unconstitutionality… these are all issues that Dicey struggled with and tried to overcome. However, after the 1911 Parliament Act he reached a point where he could no longer support his conclusions if not by making them appear self-evident and later scholars punished him for it by delegitimising his entire theory on the referendum. However, it would be extremely unfair to limit Dicey's legacy to Parliamentary sovereignty, given that he strenuously supported the referendum for the better part of his life. Therefore, we can undoubtedly conclude that his theory was not so much followed as it was demonstrated by practice. It is a theory which finds it difficult to overcome the hurdles connected with the discretionary nature - for the government, of course - of the referendum, but, at the same

time, allows for a systematic reorganisation of constitutional practice, giving it the coherence necessary to perhaps bring about the establishment of a constitutional convention in the not too distant future. A constitutional convention would be the only way of transforming the referendum from a weapon of political appeasement into a check on the conduct of parliamentary affairs in the name of the principle of popular sovereignty, a principle which is in fact implied by Parliamentary sovereignty - the result of a transfer of powers from the political sovereign - and therefore cannot weaken it.

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I Dicey writes that "English judges do not claim or exercise any power to repeal a Statute, whilst Acts of Parliament may override and constantly do override the law of the judges. Judicial legislation is, in short, subordinate legislation, carried on with the assent and subject to the supervision of Parliament" (Dicey, 1915, Part I: The Sovereignty of Parliament).

II In 1694 an Act was passed whereby the term of a legislature was limited to a maximum of three years. However, since a general election could not be deferred beyond 1717 and King George I, supported by the Ministry, feared that the forthcoming election would reignite the Jacobite cause, the Parliament was induced to pass a law under which the legal term of a legislature was extended from three to seven years.

III Dicey supports the view of the thirty-one peers who protested against the Bill by pointing out that "it is agreed, that the House of Commons must be chosen by the People, and when so chosen, they are truly the representatives of the People, which they cannot be so properly said to be, when continued for a longer time than that for which they were chosen; for after that time they are chosen by the Parliament, and not the People, who are thereby deprived of the only remedy which they have against those, who either do not understand, or through corruption, do willfully betray the trust reposed in them; which remedy is, to choose better men in their places" (Dicey, 1915, Part I: The Sovereignty of Parliament).

IV Dicey believes that the so-called "public rights" can be subject to absolute power much more easily than "private rights", which are entirely ascribable to the individual and do not concern the exercise of public powers.

V Such Acts cover a very wide range of topics, from dissenting to accepting municipal offices without the necessary qualifications.

VI Dicey refers to such enactments as "the legalisation of illegality".

VII John Austin (1790 - 1859) is a legal theorist who embraced positivism and, amongst other things, dedicated some of his works to the concept of sovereignty.

VIII Austin writes that "the members of the Commons' House are merely trustees for the body by which they are elected and appointed: and, consequently, the sovereignty always resides in the King and the Peers, with the electoral body of the Commons. That a trust is imposed by the party delegating, and that the party representing engages to discharge the trust, seems to be imported by the correlative expressions *delegation* and *representation*. It were absurd to suppose that the delegating empowers the representative party to defeat or abandon any of the purposes for which the latter is appointed: to suppose, for example, that the Commons empower their representatives in parliament to relinquish their share in the sovereignty to the King and the Lords" (John Austin, 1879).

IX It is of fundamental significance to repeat that the strictly legal validity of parliamentary legislation, whatever its nature, remains unstained, despite the existence of limits imposed upon the legislature.

X Dicey quotes (Dicey, 1915, Part I: The Sovereignty of Parliament) a passage from Hume, who in his *Essays* writes that "as force is always on the side of the governed, the governors have nothing to support them but opinion".

XI Dicey notes that enlightened sovereigns knew that in order to preserve their throne they could not cross the line where external and internal limitations no longer converged.

XII Dicey quotes (Dicey, 1915, Part I: The Sovereignty of Parliament) Edmund Burke, who writes that "the House of Commons was supposed originally to be no part of the standing government of this country. It was

considered as a control, issuing immediately from the People […] It was hoped that, being of a middle nature between subject and government, they would feel with a more tender and nearer interest everything that concerned the People, than the other remoter and more permanent parts of legislature".

[XIII] Simply put, Home Rule is a devolution of powers from Parliament to a newly appointed body. In the case of Northern Ireland, it was the result of a movement, the Home Rule League, replaced in 1882 by the Irish Parliamentary Party, that put pressure on the government to create an Irish Parliament.

[XIV] In *The Referendum and its Critics* (1910) Dicey writes that the Great Reform Act "was passed in 1832 to the cry of 'The Bill, the whole Bill, and nothing but the Bill' […] the peculiar course of events placed the electors in a position very like that occupied by the People of Switzerland when asked under a Referendum to accept or reject constitutional change which has been formally passed by the Federal Legislature. There have been one or two other crises in which a general election has been a rough kind of Referendum".

[XV] In *The English Constitution* (1867) Walter Bagehot writes: "Just as the knowledge that his men can strike makes a master yield in order that they may not strike, so the knowledge that their House could be swamped at the will of the king - at the will of the People – made the Lords yield to the People".

[XVI] "At the general election of 1868 the question of the Disestablishment of the Irish Church had been brought most distinctly before the constituencies, and a great majority of the members returned to the House of Commons were pledged to support such a measure. When in 1869 the Irish Church Bill came before the House of Lords, Lord Cairns, in urging the House not to reject a measure of which he personally disapproved, said: 'There are questions which arise now and again - rarely but sometimes - as to which the country is so much on the alert, is so nervously anxious and so well acquainted with their details, that it steps in as it were, takes the matter out of the hands of the House of Lords and the House of Commons, and substantially tells both Houses of the Legislature in this country what it requires; and in those cases either House of Parliament or both together cannot expect to be more powerful than the country, or to do so otherwise than the country desires" (Sir William R. Anson, 1909).

[XVII] The implications of Dicey's theory with regard to the reformed House of Lords shall be discussed further on.

[XVIII] In *Introduction to the Study of the Law of the Constitution* Dicey writes: "How, it may be said, is the 'point' to be fixed at which, in case of a conflict between the two Houses, the Lords must give way, or the Crown ought to use its prerogative in the creation of new Peers? [...] This reply is, that the point at which the Lords must yield or the crowd intervene is properly determined by anything which conclusively shows that the House of Commons represents on the matter in dispute the deliberate decision of the nation".

[XIX] In *The Paralysis of the Constitution*, Contemporary Review, 88 (September 1905), p. 311, Dicey writes: "(the) Unionist government has ceased to represent the belief in free trade which to all appearance commands the assent of the nation; the Opposition does not represent the national and unshaken faith in the maintenance of the Union. Both government and opposition seem inclined to use their party machine to crush out of existence that small but vigorous body of Free Trade Unionists who share the beliefs that constitute the political creed of the nation".

[XX] Dicey suggests that the Unionists should push for a referendum formulated in the following terms: "The one course of safety is to take care that at the next general election the country has laid before it for determination a clear and unmistakable issue. The question for every elector to answer must be reducible to the form Aye or No; will you, or will you not, repeal the Union and establish an Irish Executive and an Irish Parliament in Dublin? If the question be so raised Unionists have no reason to fear an answer. The policy of Unionism has always relied on an appeal to the nation. The one desire of Unionists has always been to fight their opponents on the clear unmistakable issue of Home Rule. The policy of Separatists has been to keep Home Rule in the background whilst making its meaning indefinite, and to mix up all the multifarious issues raised by the Newcastle programme, as well as many others, with the one essential question whether we should or should not repeal or modify the Act of Union" (Dicey, 1893, p. 106).

[XXI] The House of Lords was perceived as the stronghold of aristocracy and the fact that it did not exercise the power of veto when the Conservatives were in office as much as they did when the Liberals headed the government posed some serious threats to its credibility as a body committed to protecting the rights of the nation as a whole against unwarranted fundamental changes in the constitution.

[XXII] Dicey's persistent uncertainty regarding the method via which to hold a referendum has been a source of much criticism from scholars who believe that his support of the referendum is exclusively related to his opposition to Home Rule Bills.

[xxiii] Dicey seems to include amongst such principles that of the nation's assent to the government's policies, although he does not give a clear justification of why it is so. Such designation is probably best explained by reading Dicey's argument against the 1911 Parliament Act, which shall be taken into consideration further on.
[xxiv] The rule was meant to place a check on filibustering, i.e. obstructive speaking by members opposed to the Bill in question.
[xxv] These rules can also be found under the designation "closure by instalments" or "closure by compartment".
[xxvi] In *The Law of the Constitution*, p. CXI, Dicey writes: "[to substitute] the authority of the electorate for the authority of the House of Commons and the House of Lords [would be] to transfer the government from the rule of intelligence to the rule of ignorance".
[xxvii] Dicey's view on the referendum as a conservative instrument places him in the Liberal tradition of limited government which includes John Locke and Friedrich Hayek, but it has one fundamental difference, which can be found in the theories of the radical American populists, in that it identifies in the People the main check on elected politicians rather than a particular élite.
[xxviii] A pertinent example of this is the issue of women's vote, on which Dicey himself had mixed feelings.
[xxix] J. St. Loe Strachey, a personal friend to Dicey, writes that "under the initiative you do not get the committee stage for legislation. The stage under which trained advocates, critics, and lawyers debate the Clauses of the bill and render it workable in practice as well as sound in theory" (Strachey, 1924).
[xxx] To date only Germany has not employed the referendum at a national level.
[xxxi] After its introduction into the political scene, the Labour Party very soon began to support the idea that a centralisation of party power would favour the achievement of the class policies it pursued, but, nevertheless, in its earlier years it had been strongly committed to Scottish and Welsh Home Rule.
[xxxii] In November 1975 the government published the White Paper "Our Changing Democracy: Devolution to Scotland and Wales" (Cmnd. 6348).
[xxxiii] By the time it was introduced, the amendment had already received eighty signatures.
[xxxiv] John Mackintosh, MP for Berwick and East Lothian, believed that the Bill "should be thrown out and the electorate should make their views known at a General Election, so that the government can come back with a better bill at a later stage"(cited in Bogdanor, 1999, p. 182).
[xxxv] The Liberals had a rather advanced plan for devolution, which included proportional representation and revenue raising powers, but they had to give up their requests in order to give devolution a chance. However, the separation of the Bill for the two regions was a result of negotiations with the Liberals.
[xxxvi] In November 1977, Enoch Powell, backbench opponent of devolution and an Ulster Unionist, stated that it was "an event without precedent in the long history of Parliament... that members openly and publicly declaring themselves opposed to the legislation and bringing forward in debate what seemed to them cogent reasons why it must prove disastrous, voted nevertheless for the legislation and for a guillotine, with the express intention that after the minimum of debate the Bill should be submitted to a referendum of the electorate, in which they would hope and strive to secure its rejection"(cited in Bogdanor, 1999, p. 185).
[xxxvii] "If it appears to the Secretary of State, having regard to the answers given in a referendum and all other circumstances, that this Act should not be brought into effect, he may lay before Parliament the draft of an Order in Council providing for its repeal". All of the 1978 debates can be found at www.theyworkforyou.com/debates.
[xxxviii] "If it appears to the Secretary of State that less than 40 percent of the persons entitled to vote in the referendum have voted "yes"... he shall lay before Parliament the draft of an Order in Council for the repeal of this Act". The use of the term "appears" seems to be more a question of symmetry with the previous Clause 82(2).
[xxxix] The discount consisted of four categories: those on the electoral register who had not yet reached the age of eighteen by by March 1st, 1979; those who had died between October 1978 and March 1979; students and student nurses away from home, registered both at home and at their college or hospital address (in Scotland); prisoners legally disbarred from voting but registered at their home address. The total discount amounted to 90,002 votes.
[xl] Examples of this included hospital patients, the severely disabled, those nursed at home, etc.
[xli] Similar provisions to that of the Scotland Act were added to the Wales Act before the referendum.
[xlii] The following figures are reported in Bogdanor, 1999, p. 190.
[xliii] The repeal of the Wales Act passed 191 votes to 8, that of the Scotland Act 301 to 206.

[XLIV] The back-bone of Thatcherism was to avoid the dispersal of power in favour of a more uniform system of government and, during the years of the Conservative government, the dual polity, which had allowed Scotland and Wales to enjoy a considerable degree of autonomy at the local government level. After the highly unpopular poll tax was introduced in Scotland in 1989, a year earlier than the other regions, devolution was brought up again from its warm ashes, since it now seemed the only way to prevent further centralisation.
[XLV] The Convention produced two reports: "Towards Scotland's Parliament" (1990) and "Scotland's Parliament, Scotland's Right" (1995).
[XLVI] There was a week's gap between the two referenda, especially designed to encourage the undecided Welsh voters, whose support of devolution had faltered in the past, to approve the measure. Therefore, the Scottish referendum was held on September 11th, 1997 and the Welsh referendum followed on September 18th, 1997.
[XLVII] The following figures are reported in Bogdanor, 1999, p. 199.
[XLVIII] The Scottish referendum was more complex than the other one, since there were two questions posed at the polls, aptly construed in affirmative sentences: "I agree that there should be a Scottish Parliament" or "I do not agree that there should be a Scottish Parliament"; "I agree that a Scottish Parliament should have tax-varying powers" or "I do not agree that a Scottish Parliament should have tax-varying powers". The latter question was approved with 63.5 percent of votes in favour (while thirty-six percent voted against), but had the forty percent rule been kept in place, it would not have made it, since only 38.1 percent of the electorate voted for tax-varying powers.
[XLIX] This provision is probably inspired by a precedent set in history. In 1973, the electorate in Northern Ireland was asked to express a preference on whether or not Northern Ireland should remain part of the United Kingdom. On a sixty-five percent turnout, around sixty-five percent of the votes were in favour of remaining part of the United Kingdom.
[L] In his *Second Treatise of Government* John Locke wrote that "the Legislative cannot transfer the power of making laws to any other hands. For it being but a delegated power from the People, they who have it cannot pass it to others".
[LI] "If the decisions in the referendum are that no effect is to be given to the provisions of the Act, this Act shall not take effect" (House of Commons Debates, Vol. 926, cols. 275 *ff*, February 15th, 1977). In case of a favourable result, the government would have been under legal obligation to put forward a commencement order for the establishment of the devolved bodies.
[LII] Severin Carrell, *Scottish devolution: what questions will future referendum ask voters?*, "The Guardian", Wednesday November 23rd, 2011.
[LIII] It comes as no surprise that this option has been called "devolution max" or "devolution plus".
[LIV] Scotland Bill 2010-11 (HL Bill 79).
[LV] Local referenda are quite different both in scope and operation, posing a different set of problems compared with other kinds of referenda.

References

- Anson , Sir William R., 1909, *The Law and Custom of the Constitution*, 4th ed., Clarendon Press, Oxford.
- Austin John, 1879, *Lectures on Jurisprudence*, 4th ed., J. Murray, London.
- Bagehot Walter, 1867, *The English Constitution*, Chapman and Hall, London.
- Bingham of Cornhill, Lord Thomas, 2002, 'Dicey Revisited', in *Public Law*, XLVII(3): 39-57.
- Bogdanor Vernon, 1997, *Power and the People: A Guide to Constitutional Reform*, Gollancz, London.
- Bogdanor Vernon, 1999, *Devolution in the United Kingdom*, Oxford University Press, Oxford.
- Bogdanor Vernon, 2009, *The New British Constitution*, Hart Publishing, Oxford.
- Carrell Severin, 'Scottish devolution: what questions will future referendum ask voters?', in *The Guardian*, Wednesday November 23rd, 2011.
- Dicey A.V., 1886, *England's Case against Home Rule*, J. Murray, London.
- Dicey A.V., 1890, 'Ought the Referendum to be Introduced into England?', in *Contemporary Review*, Vol. 57: 489-511.
- Dicey A.V., 1893, *A Leap in the Dark or Our New Constitution*, J. Murray, London.
- Dicey A.V., 1905, 'The Paralysis of the Constitution', in *Contemporary Review*, Vol. 88: 305-316.

- Dicey A.V., 1910, 'The Referendum and its Critics', in *Quarterly Review*, 212, p. 538.
- Dicey A.V., 1911, *A Leap in the Dark: A Criticism of the Principles of Home Rule as Illustrated by the Bill of 1893*, J. Murray, London.
- Dicey A.V., 1911, *The Parliament Act, 1911, and the Destruction of All Constitutional Safeguards*, in Sir William Anson *et al*, 1912, *Rights of Citizenship: A Survey of Safeguards for the People*, Frederick Warne, London.
- Dicey A.V., 1915, *Introduction to the Study of the Law of the Constitution*, 8th ed., Macmillan and Co., London.
- Leyland Peter, 2007, *The Constitution of the United Kingdom: A Contextual Analysis*, Hart Publishing, London.
- Qvortrup Mads, *Is the Referendum a Constitutional Safeguard?*, www.iandrinstitute.org.
- Scottish Constitutional Convention, 1990, *Towards Scotland's Parliament*, http://www.almac.co.uk/business_park/scc/.
- Scottish Constitutional Convention, 1995, *Scotland's Parliament, Scotland's Right*, http://www.almac.co.uk/business_park/scc/.
- Strachey, J. St. Loe, 1924, *The Referendum. A Handbook to the Poll of the People, Referendum, or Democratic Right of Veto on Legislation*, T. Fisher Unwin, London.
- Trench Alan, 2004, *Has Devolution Made a Difference? : The State of the Nations 2004*, Imprint Academic, Exeter.
- Trench Alan, 2008, *The State of the Nations 2008*, Imprint Academic, Exeter.
- Weill Rivka, 2003, 'Dicey Was Not Diceyan', in *Cambridge Law Journal*, LXII(2): 474-494.
- White Paper, November 1975, *Our Changing Democracy: Devolution to Scotland and Wales* (Cmnd. 6348).

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Towards a Federal Democracy in Europe? *

by

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Abstract

The paper endorses a dynamic rather than a static analysis of the EU at super-systemic level of analysis. It sketches a toolkit to analyse the actors and contents of constitutional politics, exploiting the insights of the main grand theories, based on the interpretative scheme of crisis-initiative-leadership, and the distinction between unification, integration and construction. Applying this toolkit, a trend towards an increase of the EU federal features can be discerned. Eventually, to overcome the current crisis more steps in this direction are needed.

Key-words

European Union, Federal Democracy, Crisis, Federalism

Introduction

The EU is often considered a *sui generis* polity, and is recognised as a multi-level system of government. The European Parliament defined it a supranational democracy. It can be analysed from different perspectives, but essentially it challenges traditional notions of modern politics associated with the nation-state. In this paper I will argue that it may be reasonable to consider it as the laboratory of a new form of supranational federal democracy.

To argue my case it is necessary to assess what is the EU in comparison with a federation. Such an assessment requires an historical and dynamic perspective, and not a static one, to assess if there are consistent trends in its development. I am inspired by an old academic debate on federal studies about the opportunity to focus on federal institutions from a legal and static perspective, or rather on federalising processes. Wheare's approach, systematised in his seminal work *Federal government*, was criticised for being too static - even if beside the actual design and functioning of federal government, it analysed also the reasons why a federal arrangement would be a suitable choice, and had a pioneering comparative perspective. Friedrich's classic *Federalism in theory and practice* moved the debate to a more dynamic conception of federalising processes. Elazar followed Friedrich's path, trying to propose a federalist paradigm throughout his works, and summarised in *Exploring Federalism*. However, his dynamism brought him too far, jeopardising the very basis of federal studies, as Elazar tended to consider any institutional settings between a unitary state and an international organization within federal arrangements. This way he blurred together the classic distinction between federation and confederation, which had been the basis of federal studies since the creation of the American federation and the publication of *The Federalist Papers*. Albertini's *Il federalismo. Antologia e definizione*, proposed a complex theory of federalism as an active political thought, combining a dynamic vision of federalising processes with a firm classic definition of the federal state institutions.

A similar debate needs to take place with regards to the EU. Far too often after each new Treaty comes into force, a new wave of studies describes the new features of the

EU and often attempts to identify new trends and suggest that whole phases of the integration process are open or closed on the basis of that last step. Unfortunately, such analyses tend to last only until a new Treaty enters into force[I]. Such attempts at drawing long-term conclusions from the analysis of relatively short-term developments are fashionable, because there is always a heated academic and public debate on the EU, but their short life suggests that they are methodologically weak. It is more sensible and fruitful to interpret the short-term developments in the light of a long-term analysis of the process[II]. To do that it is necessary to address the proper level of analysis, and to combine the most fruitful insights of the main integration theories, which I will do in the first section.

I will then summarise the whole development of the European integration process to identify the main institutional trends. Such an analysis will also highlight the relevance of classical categories such as federation and confederation. I will suggest that there is a rather consistent trend towards an expansion of EU competences and towards strengthening supranational decision-making processes. In other words, I claim that while at any time from 1950 until today, a static view of the EU would suggest that it has both federal and confederal features, a dynamic view shows a significant increase of the former over the latter. On this basis I will discuss the current crisis and the possibility that it may trigger new steps forwards, contributing to the establishment of a new kind of supranational federal democracy.

1. The theoretical toolkit for a long-term analysis of the EU development

Peterson (1995) suggests that the EU can be studied at three main levels of analysis: super-systemic, systemic and sub-systemic. History-making decisions, basically corresponding to constitutional politics, are his super-systemic level, on which so-called grand theories have focused. They can be broadly grouped into three families: the intergovernmentalist, the neo-functionalist, and the federalist traditions[III] (cfr. Rosamond 2000). They differ with regards to the identification of the key players in the process; the motives (economic, political, ideological) of their choices; the relationship between

economic integration and the creation of supranational institutions and decision-making procedures; the dynamics of the process and the decision-making mechanisms that determine it; and the possible/desirable ultimate goal of integration. For different reasons and in different ways all have difficulties in explaining - not just foreseeing - the "time" of the various steps of European integration, which is a crucial element of the process. All traditions passed through phases of revision or spread according to the relative congruence with a certain stage of the process. It is not possible to analyse them in any detail here (see Castaldi 2005), but I will consider their different views about the main actors and their agenda setting power with regards to constitutional politics. This will necessarily include an examination of their explanatory capacity regarding the timing of constitutional politics.

1.1. Identifying and analysing the actors of European constitutional politics

The intergovernmental - or confederal or internationalist - school of thought identifies national governments as the key players that control the integration process. Constitutional politics revolved mainly around Treaty reforms that result from Intergovernmental Conferences. The dynamics of the intergovernmental bargaining is thus the key element to be analysed. Moravcsik's sophisticated liberal intergovernmentalism (see especially 1991, 1993, 1995 and 1998) also considers the interaction with domestic constituencies and stakeholders as determinants of the national preferences that confront each other within the European intergovernmental bargain. Usually intergovernmentalism essentially discharges European institutions as main players in constitutional politics. However, against the initial assumption that member states would not to give up their sovereignty to supranational bodies[IV] and integration may bring about at most a confederation, intergovernmentalist thought had then to explain the gradual but significant strengthening of the supra-national or federal features of the EU. Moravcsik deals elegantly with this problem suggesting that European institutions are instruments to ensure a correct implementation of the grand bargains that would otherwise not have been applied entirely by some member states because of their relative costs.

The neo-functionalist strand initially interpreted European integration as a gradual dynamic process superseding states' absolute sovereignty. Integration would eventually lead to political union under the leadership of technocratic elites heading supranational

institutions. The political entrepreneurial role of the European Commission as agenda setter, steering the integration process has been traditionally emphasized by neo-functionalist scholarship. However, after the Empty Chair crisis a significant theoretical revision took place, acknowledging the significant role of national governments too. In the second 1968 edition of his classic *The Uniting of Europe*, Haas proposed a profound self-questioning and criticism, acknowledging the central role of states and national governments, the limits of supranational technocratic elites, and especially the possibility that, instead of spill-over, other integrative or disintegrative dynamics could take place. On this basis, an extensive neo-functionalist literature highlighted the concept of spill-around, build-up, retrench, muddle-about, spill-back, encapsulate, each of which indicated a possible dynamic of strengthening or weakening of both institutional and decision-making mechanisms and the enlargement or reduction of the areas involved (see Lindberg and Scheingold, 1970 and 1971; Schmitter 1969 and 1971). The theory thus assumed a markedly analytical character, potentially able to describe any evolution of the process, but without developing a proper analysis of the factors that could lead to one or another scenario, and therefore remaining unable to predict the process future developments. Therefore by abandoning a progressive and optimistic vision of the process, and the ultimate goal of political unification, it also lost its capacity as a guide and drive for political action.

The federalist tradition considered the integration process as an incomplete response to the crisis of the nation state, which would rather require the foundation of a European federal state through a constitutional process democratically involving European citizens. The role of personalities and movements in favour of European unity and the constituent potential of the European Parliament have been at the centre of much federalist literature.

Each theory essentially stresses the role of one set of actors, among those actually involved at different times in constitutional politics. A further limitation common to all macro-theories, then largely filled by the European constitutionalism literature, is the systematic underestimation of the role of the Court of Justice in advancing the process. This is a structural but understandable limitation for the intergovernmental theories that focus on the Member states and their negotiations. Such an underestimation is less understandable for the neo-functionalist theories that, by stressing the importance of

creating supranational technocratic elites, could consider the Court, and also the Commission, as a supranational institution characterized by such distinctive features. Such an underestimation is indeed strange for the federalist theories given the role played by the Supreme Court in developing the powers of the U.S. federal government, and Hamilton's observations about the crucial role of the judiciary within a federation.

However, within the federalist tradition, some authors developed a more sophisticated view of the dynamic of constitutional politics, of the role of the various actors and of its timing. This view was theoretically developed by Mario Albertini, also on the basis of an analysis of Spinelli's own activity, and focused on three elements: crisis, initiative, leadership. It was reached investigating why in certain moments the federalist theses had achieved widespread success in the political class, while in other cases they remained on the margins of public debate and not included in the official political agenda. It was necessary to identify the mechanisms and actors that marked time in the process of European unification. Experience showed that the supranational institutions, national governments, European and federalist personalities and movements had all played an important role in some specific moments, but not in others. It was thus necessary to conceptualize their interaction to understand the dynamics of the process and when it provides windows of opportunity for federalist proposals. This requires going beyond the traditional formulations of the various theories, including the federalist one. The result of this theoretical effort was a tripartite scheme focused on the concepts of crisis, leadership and initiative, which helps analyse the dynamic of the unification process.

The crisis refers to the acute social perception of a problem which has a supranational character and cannot thus be structurally solved at national level. When such a crisis arises, it is possible for new initiatives to transfer competences or powers to European level to solve the crisis - often promoted by pro-European figures, organizations, etc. - to find a favourable audience within the political class and the public[V]. Only if a European leadership - which can be provided by a national government, usually a Prime Minister or a foreign minister, of by a European institution - takes the initiative upon itself can it enter the official political agenda, and eventually, after a usually complex negotiation, be agreed upon in its main tenets if not completely[VI].

I would like to stress that there is no inevitability implied by this scheme. There could have been, and in fact there were, several crises on which no effective initiative to

strengthen European integration was developed, or which did not find a suitable European leadership to put it on the agenda. The 1971 collapse of the Bretton Woods systems brought about a vast debate on monetary union culminated with the Werner Plan to establish a monetary union by 1980[VII]. The 1973 Oil Shock contributed to the demise of the Plan, and the only step forward on the monetary field was the establishment of the European Monetary System in 1979.

Furthermore, it is possible that the acute social perception of a crisis fades away, or that the European leadership collapses or is unable to gather the necessary consensus for the initiative to be approved. For example the Korean war and the following American demand to rearm West Germany brought about Monnet's initiative of a European Defence Community that was taken up by a European leadership provided by the French Pleven Governments. Spinelli seized the opportunity to suggest that a European army without a European government would undermine democracy throughout Europe, and De Gasperi provided a European leadership which brought to the EDC Treaty art. 38, and to the subsequent establishing of the Ad Hoc Assembly to draft a Treaty/Constitution for a European Political Community[VIII]. The end of the Korean War, Stalin's death, the collapse of the Pleven and De Gasperi governments before the whole decision making procedure was completed eventually contributed to the fall of the EDC at the French National Assembly on a procedural vote thanks to the alliance between Gaullists and communists.

Also the tension and contradictions, or the progressive application, of the European norms and institutions can occasionally play the role of the crisis, i.e. of windows of opportunities or catalysts for debates and possibly decisions on the competence and/or powers to the European level. For example the end of the transitory period of the Common Market with the foreseen introduction of QMV, coupled by the Hallstein Commission's proposal, led to the Empty Chair Crisis and eventually the Luxembourg Compromise. This shows that this theoretical scheme is not teleological and can be useful to explain the timing and the agenda setting of European constitutional politics, both with regards to its success as much as its setbacks.

Another useful example to grasp the significance of the scheme is the second Iraqi war during the Convention. This divided the member states governments, with some of them siding with the US notwithstanding Eurobarometer suggesting that 80% of European citizens, and anyway a majority of them in each and every European country, opposed the

war. A military crisis brought about an initiative on military issues: France, Germany, Belgium and Luxembourg proposed and obtained the inclusion of the provisions about permanent structured cooperation on defence in the Constitutional Treaty, and then in the Lisbon Treaties. The changes in the international environment and in the national governments explain why those provisions have not been employed so far. Similarly the dramatic international change in 1989 led not only to the IGC on economic and monetary union but also an IGC on political union. The first produced the three stage plan to reach the Monetary Union which eventually resulted in the Euro. The second essentially failed, and brought to the formal attribution to the EU of some concurrent competences - the second and third pillars of the Maastricht Treaty - with basically no powers and effective institutional mechanisms to handle them.

These examples suggest that the crisis alone does not necessary bring steps forward. The crisis-initiative-leadership scheme helps to identify the relevant actors of constitutional politics at different times, and to analyse the timing and process of constitutional politics agenda setting. The other two crucial elements to be considered are the content of constitutional politics and some of its characteristic dynamics. Furthermore, there can be structural problems that only occasionally turn into a socially perceived crisis. Nonetheless, their underlying persistence can sustain a certain phase of the unification process and can be the basis of the activities of the federalist personalities and organizations. The contradiction of a monetary union not accompanied by an economic and fiscal one, has been the basis of federalist campaigning for a European constitution since 1992. The "asymmetry" of the planned EMU and the enlargement played a major role in the 2000s, and in the set up of the Convention, even if the Constitutional Treaty fell short of establishing a European economic government while the Penelope Project by the European Commission pointed in that direction.

1.2. The content and dynamics of European constitutional politics

In all multi-level systems of government – especially in federations, that are the democratic state-form of such systems – constitutional politics deals mainly with two issues: the competences of the different levels of government, and the powers and

decision-making procedures related to those competences. This fundamental recognition is shared by all main theories, even if adopting different words and stressing one element more than another as determining the dynamics of the whole process.

Albertini distinguishes construction, integration and unification[IX]. The concept of "unification" refers specifically to the political process related to the progressive overcoming of absolute national and exclusive sovereignty, through its transfer or pooling with regard to a defined and limited number of issues at European level. This is the general concept to capture the historical significance (from a long-term perspective) of what is usually called European integration. Unification, therefore, includes both the gradualist phase and the possible and eventual decision to set up a European federal state. The historical significance of the process was the unification of several states and is based on two aspects: the integration of competences and the construction of supranational institutions. The term "integration", whose semantic connotation refers to something technocratic should be used instead to focus on the competences attributed at European level, which historically have been accumulated mainly through a process of economic integration along an essentially neo-functionalist path[X]. The term "construction" indicates the process of institution building in Europe, which can be analyzed by using constitutional or federal criteria. Its semantic connotation refers to the element of planning and the political will necessary to "build" Europe, i.e. its institutions and decision-making mechanisms, or its powers.

To put it in a nutshell, the process of unification was conceived for the function of transferring competences from national to European level with the consequent implementation of European policies (integration) and the building of institutions and decision-making mechanisms to manage these responsibilities (construction). The decision to create the common market, and then the common agricultural policy, the single market, the single currency, the area of internal freedom provided by the Treaty of Schengen, are all examples of integration. The direct election and then the extension of the powers of the European Parliament, the introduction and then the extension of qualified majority voting in the Council, the creation of the European Central Bank, and other aspects related to decision-making and to the institutional structure of the Union are examples of institutional construction.

Similarly the neo-functionalist revision which followed the Empty chair crisis identified several possible dynamics to account for a strengthening or weakening of both institutional and decision-making mechanisms and the enlargement or reduction of the areas involved (see Lindberg and Scheingold, 1970 and 1971; Schmitter 1969 and 1971). Moravcsik holds a very similar view, by distinguishing between the "substantive agreement" - reached in one of the "grand bargains" characterizing the stages of the process - on economic issues (policies, funding, etc.) and the following "institutional choices".

Different theories held different views about the dynamics of constitutional politics and of its two main contents: competences and institutions, integration and construction.

Moravcsik suggests that "institutional choice" is always subordinate and functional to the previous and essential "substantive agreement" - reached in one of the "grand bargains" characterizing the stages of the process - on economic issues (policies, funding, etc.). This is a necessary stand for liberal intergovernmentalism which considers European institutions merely as an instrument for the correct enforcement of the bargains. Moravcsik gives priority to integration, the establishment of policies and the transfer of expertise and possibly resources, rather than to selected institutional choices, although acknowledging that the element of novelty characterizing the Community and then the Union was its own institutional framework.

On the contrary, Albertini argues that the level of construction is the key variable to assess the unification process, because the achievement of certain objectives, including the economic ones, is not possible without a sufficiently democratic and efficient institutional framework. This idea fits with the distinction between "positive" and "negative" integration (see Pinder and Pryce 1969; and then Pinder 1989) developed to explain the initial success of the EEC in establishing a Common Market by eliminating obstacles, and its failure to develop a single market until the SEA introduced QMV, which was initially foreseen at the end of the transitional period, and which contributed to the Empty chair crisis[XI].

Albertini also developed a normative vision of this interaction, bridging Monnet and Spinelli's initial positions, and eventually theorizing constitutional gradualism, summarised by the program: European election, European currency, European government (see Albertini 1966, 1969, 1971, 1976, 1979, now all in 1999b; and 1968, now

in 1999a; see also Pinder 1985). He took note of the gradual nature of the process, while stressing the need for a democratic constituent transition to reach political unification, and focused on the conditions for the possibility of such a constituent process. It could only begin when Europe had achieved significant powers that affected citizens' lives, while its institutional structures and decision-making procedures were not yet fully democratic, but only potentially democratic. The direct election of the European Parliament - substantially powerless at that time - and the creation of a single currency were identified as the key partial goals of the process. Together they could lead to the contradiction of a European power without a European democratic government. This could be the basis for a potentially successfully struggle to start a constitutional process designed to create a federal constitution and government. Indeed the constitutional language, dismissed with the fall of the European Defence Community Treaty in 1954, came back with the Convention and the Constitutional Treaty, when those two intermediate goals had both been reached.

I suggest that there is a continuous and complex interaction between integration and construction, and that none of them can be considered as a dependent variable of the other (see also Montani 2008). The fact that sufficiently strong and democratically legitimised mechanisms for decision-making institutions are necessary in order to achieve shared goals has been historically proven: for example the introduction of majority voting in the Council, provided by the Single European Act of 1986 only with regard to the creation of the single market, was clearly linked to the objective of establishing the Single market by 1992. This required the adoption of over three hundred directives, impossible to be achieved unanimously. Nonetheless, most deliberations were then passed unanimously, because when QMV applies, all states have an incentive to cooperate in drafting the bill, and not to be outvoted. On the other hand, when unanimity is required, there is little incentive for compromise since each government knows it can block any decision that does not satisfy its demands.

At the same time, the history of the process also shows the opposite case, namely aspects of the institutional construction that have triggered other changes both at the level of construction and integration. Two examples are particularly relevant. The creation of the Court of Justice whose power is binding has led to an expansion of Community competences and powers through the jurisprudential affirmation of the principles of implied powers and of the primacy and direct applicability of the EU rules[XII]. Similarly, the

direct election of the European Parliament has triggered a process of continuous and progressive increase in Parliament's powers during all subsequent amending of Treaties. Moreover, the initiative of Parliament with the approval in 1984 of the draft Treaty of European Union, also known as Spinelli Project, favoured the re-launch of the integration process through the Single European Act transposing some of the content of that project, especially with regard to the aim of the single market, as well as other parts that have been recovered by subsequent treaties (see Lodge 1984 and 1986).

The interaction between construction and integration takes time. They are like two columns on which unification is based. If they are not developed symmetrically a dynamic tension arises. But improvements can start on each of them first. This distinction also helps to focus on the longer term, generally progressive but not linear, trend of the unification process. Generally, when a new competence is attributed at European level – i.e. a new step of integration is made – it is handled through essentially intergovernmental procedures. Only when a positive result is achieved, but not all potential advantages are achieved due to the constraints of unanimity, does a communitarization of the relevant decision-making procedure take place.

The 1957 Rome Treaty provided for a transitional period in which unanimity applied, before establishing QMV. The Empty chair crisis and the Luxembourg compromise prevented this, and the establishment of a complete European market had to wait until 1992, after QMV was introduced in 1986. The 1992 Maastricht Treaty provided for the creation of the monetary union, and for the first time attributed to the EU new competences in the fields of foreign policy and justice and home affairs – the so-called second and third pillars – on strictly intergovernmental terms. Many scholars, especially intergovernmentalists and neo-functionalists, suggested that the Treaty checked the progress of supranationality, reinforcing the intergovernmental character of the EU. This was a short-term and short-sighted view, disconfirmed by the fact that all subsequent treaties up to Lisbon have abolished the three-pillar structure, and progressively if not completely extended the use of QMV, the co-decision procedure of the Parliament, the role of the Commission and the judicial role of the Court of Justice also in these fields. I have already summarised the impact of the Court of Justice and of the direct election of the Parliament in triggering new powers and competences at European level.

All this shows the usefulness of the distinction between integration and construction within the unification process. A significant increase in competences or power alone is likely to result in an increase in the other elements too. Historical record suggests that none of them can be considered as a variable dependent on the other, but that adequate attention must be paid to their interaction.

To project a long-term view onto the process I have so far developed a theoretical toolkit based on two analytical schemes. The first analyses the timing of the agenda setting of constitutional politics and the relevant actors through the concepts of crisis, initiative and leadership. The second focuses on the content of constitutional politics distinguishing between unification, integration and construction and investigating their interaction, without giving analytical preference to any of them. I will now employ this theoretical toolkit to analyse the European unification process and assess if there are significant and consistent trends that can project some light on the definition of the EU.

2. The EU: a federation in the making?

For decades the literature has dealt with the definition of the EU, exploiting the federal versus confederal models or ideal types. And any sensible author has invariably concluded that, since 1950, the European institutional setting has been characterised by both federal and confederal elements. Many scholars have thus suggested abandoning the federal and confederal models altogether, as the EU would constitute a hybrid model. This argument is basically flawed as it stems from a static view of the EU, rather than from a dynamic one.

The unitary state, the federal state and the confederal organization represent models because each of them historically existed and manifested a reasonable degree of stability. They are models because they seem to represent a reasonable institutional crystallization of certain types of social preferences with regards the attribution of ultimate decision-making power about fundamental social issues. Between these models there can be several kinds of organizations with characteristics of two models, but they would

probably be institutionally unstable. An inherent tension would push for institutional reform towards one of the models. The EU perfectly fits this option. The very fact that its institutional transformation – in terms of competences and powers - is the core of the unification process, suggests that it cannot be taken as an institutional model. If and when it will achieve a reasonable institutional stability, keeping federal and confederal features, it may be proposed as a new institutional model or ideal.

From the Schuman Declaration of the 9th May 1950 up to the Lisbon Treaties, there has been a relatively consistent trend towards the increase of European competences and/or powers. The transfer of competences and powers has not always proceeded at the same pace. Often a transfer of competences, to be handled in a purely or mainly intergovernmental manner, preceded the actual transfer of powers and/or the set up of supranational decision-making procedures with regards to those competences. The opposite was also true: the direct election of the European Parliament preceded the achievement of real powers by the Parliament with regards to the various European competences. There are two major exceptions to this trend, and two mixed ones, more difficult to be assessed properly

The European Coal and Steel Community was created with limited competences and extensive powers on those competences, mainly vested in the High Authority - among them legal personality, fiscal powers with regards to coal and steel, and the possibility to contract debts. The Korean war and the American request for German rearmament resulted in the proposal for the European Defence Community, and to the linked Ad Hoc Assembly and European Political Community Draft Treaty. Their collapse was the first major exception to the trend of increasing European competences and/or powers. However, it should be observed, that this prevented a new transfer of competences and power, but did not unravel anything that had been already achieved.

The 1957 Rome Treaties is usually considered a great success. However, it can be considered a mixed case. Indeed, they provided a significant increase in competences, thus strengthening integration. At the same time they granted more limited powers than the ECSC had done for handling those competences. The new Communities in particular were not assigned a legal personality, and the supranational executive, the High Authority, was now called Commission, and was not granted the fiscal and borrowing capacity which characterized the ECSC. The end of the transitory period of the EEC - within which new

European policies, such as the Common Agricultural Policy were created - the Hallstein proposals and the scheduled arrival of qualified majority voting provoked the Empty chair crisis and the Luxembourg Compromise. This essentially prevented the full application of the Rome Treaty and was the second major exception to the mentioned trend.

In the meantime the European Court of Justice shaped the process through its sentences, establishing the European system as an autonomous legal order, the prevalence and direct effect of European norms, and later on the mutual recognition principle. Since then a significant and consistent trend can be discerned, punctuated by the creation of the European Council; the establishment of the European Monetary System; the direct election of the European Parliament; the Single European Act and the creation of the Single Market; the Maastricht Treaty, significantly expanding the European competences and setting the path towards monetary union, which brought to the creation of the European Central Bank and the Euro; the Amsterdam and Nice Treaties which provided for limited increases of European competences and for more supranational decision-making by strengthening Parliament and increasing the use of QMV.

The collapse of the Constitutional Treaty was the second mixed case or the third possible exception. Its content has been almost completely incorporated into the Lisbon Treaties but purged of all constitutional language. It is still difficult to assess how this will impact on the process. It certainly provoked at least a significant loss of time and impetus. The Lisbon Treaties communitarised most competences granted at Maastricht, strengthened Parliament and the Commission by establishing a closer link between the two and by acknowledging their power to initiate the treaty amendment procedure, made the use of enhanced cooperation easier, and established the possibility for a group of countries to go forwards on military integration through the brand new permanent structured cooperation on defence and, by means of the *passerelle clause*, made it easier to pass to QMV as regards those competences where unanimity still applies.

A dynamic analysis of the development of the EU indicates a relatively consistent trend of the strengthening of its federal features, punctuated by a number of significant institutional developments. The Court of Justice has essentially a federal character, and its jurisprudence – much like the early US Supreme Court – has significantly strengthened the federal character of the European legal order. The direct election of the European Parliament and its gradual but continuous increase of powers, accompanied by the

introduction and progressive expansion of QMV, up to the introduction of the double majority principle, also strengthened the federal nature of the EU. The European Central Bank and the Euro are clearly federal institutions. The expansion of the Union competences to comprise essentially all those characteristic of federal states, at least in a concurrent form, and the gradual but continuous communitarization of the relative decision-making procedures, also points in this direction.

There were other institutional developments less amenable to a clear classification between the classic federal vs. confederal model. The European Council was initially established on the basis of Monnet' proposal to create a European provisional government on an intergovernmental basis as a step towards a proper European democratic government. The Lisbon treaty provides for the election of the Commission by Parliament when proposed by the Council, taking into account the results of the European election. Potentially, the Council may assume the character of a collective presidency, with a power similar to that recognized in countries like Italy and Germany for the President. At the same time, the creation of the permanent president of the Council pushes towards a dual executive, made up of the Commission and the European Council. However, the possibility – not excluded by the Treaties – of merging the position of President of the Commission and of the European Council, may trigger a different dynamic.

Recalling the whole EU development it is hardly surprising that, within comparative law and politics, the EU has started to be systematically compared with federal polities[XIII]. Indeed, the EU is not (yet?) a fully-fledged federation. But it resembles a federation more than anything else (Dosenrode 2007). This was not the case at the beginning of the process. Therefore it may be reasonable to dynamically conceive the EU as a "federation in the making", as suggested long ago by federalist scholars[XIV].

What is missing from the EU for it to look like a fully-fledged federation? There are only a few but important features lacking: the complete abolishment of unanimity, even as regards approval and ratification of Treaty/constitutional reforms, the budget, and security policies; and the attribution of fiscal powers and a full co-decision for the Parliament for defining revenue and all expenditures. It is possible to argue that two more elements are needed: a clear identification of the federal government with the Commission, rather than the current dual system based on the Commission and the European Council, and a significant federal competence with regards to the military and security issues.

However, the establishment of the Commission as a federal government may well be possible under the current institutional arrangements. It would be enough for the European parties to present a candidate and a program for the President of the Commission to politicize the European election and strengthen the Commission's popular legitimacy and its role as a federal government. It would be politically impossible for the Council not to propose the candidate receiving most votes and able to form a majority coalition in the Parliament as President of the Commission. Furthermore, even with the current institutional setting it is possible to nominate the President of the Commission as President of the European Council too, creating de facto the President of the Union. Eventually, the direct election of a single President for the two posts could create a new form of dual executive with a strong legitimate head to ensure the coherence of the two bodies.

As far as military issues are concerned - even if Riker was right in noticing that security concerns played an important if not decisive role in all federalising processes - considering that Europe does not face significant military threats, it may well be possible that such a competence remains a concurrent competence. Looking at the European unification history, it is possible to suggest that security was one of the last competences to be granted to the EU, and it will take some time to communitarise or federalize it.

3. Overcoming the current crisis: towards a European supranational federal democracy?

The long constitutional process that started at Laeken and concluded with the ratification of the Lisbon Treaties has produced in the actors involved a sense of "fatigue". Some of the leading European politicians have emphatically declared that the 'Pandora's box' of institutional reform will not be re-opened for a long time to come. The Lisbon Treaties would thus be the last of the series opened by the Single European Act (SEA), and continued through Maastrict, Amsterdam, Nice, and the failed Constitutional Treaty. Indeed, the Lisbon Treaties were written as if they had to last for a long time. There is no evolutionary clause, unlike the Maastricht, Amsterdam and Nice Treaties, which all

acknowledged the need for a new reform within a certain time, or when the EU reached a certain number of member states, or to deal with the "leftovers" which the last Treaty had not been able to tackle. However, the agenda of constitutional politics is largely the result of external factors to which the main actors have to provide answers, and which can be observed through the conceptual scheme outlined before with regards to crisis, initiative and leadership. Furthermore, there are internal EU institutional dynamics that cannot be easily circumvented.

This hybrid institutional setting which was supposed to become stable after Lisbon has been shaken by several tensions and structural crises which are triggering a new round of decisions in constitutional politics. It is now clear that the Lisbon Treaties did not equip the EU with adequate powers to cope with all these problems. The issues of competences and powers – the contents of constitutional politics – are coming to the fore again.

The EU, and particularly the Eurozone, is now in the midst of a severe crisis, which has spurred a major debate on how to solve it, and resulted in several proposals and initiatives. Essentially, a new Treaty is in sight, and constitutional negotiations are open again. The current crisis is the result of two different crises[XV].

The 2008 financial crisis which started in the US brought a significant slowdown of the world economy. The EU was unable to provide credible answers because the member states had to comply with the Stability Pact, and the EU budget is too small to provide a stimulus. The economic and financial crisis of 2008 thus hit Europe significantly. The limits of a situation characterized by a single market, a single currency and twenty-seven national economic and fiscal policies started to be socially perceived. Faced with the economic crisis, the EU, which is the world's largest economy, has launched a 1.5% stimulus plan through the national governments. The US, with higher public debt and lower private saving, launched a 5.6% plan; and China a 7% plan. If national budgets must be kept under strict control to avoid "beggar-thy-neighbour" policies, the task of the economic re-launch will have to be dealt with collectively at European level, which requires a structural transformation of the European budget and of its revenues sources.

The weak economic growth at a time of financial instability was followed by the Irish Government's intervention to save its banking system and by the new Papandreu Government uncovering wide-scale fake data in the Greek budget of the previous government. These are two small countries at the periphery of Europe, which in 2008

made up about 7% of the Eurozone public debt, that started the sovereign debt crisis. A decisive move by the Eurozone could probably have calmed down the markets. But it did not come. Austerity measures were imposed all round. Economic downturn followed. The ability of those countries to repay their debt faced with spiking interest rates and recession further decreased. The sovereign debt crisis got worse and now involves Portugal, Italy, Spain, and has started approaching France.

The sovereign debt crisis is putting the monetary union at risk and puts the issue of the economic and fiscal governance at the centre of the political agenda. The Council has discussed several proposals with an essentially intergovernmental character, up to the signing of the so-called Fiscal Compact. The Commission initially made relatively weak proposals to ensure a better coordination of national fiscal policies ("Reinforcing economic policy coordination" - Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social Committee, and the Committee of the Regions of 12/5/2010) and only later on developed bolder proposals. The ECB, which felt most of the pressure from the market, was the first to explicitly demand more powers from the Commission and for new decision-making procedure to be agreed upon ("Reinforcing Economic Governance in the Euro Area"- 10/6/2010) that were then also supported by the Commission.

The establishment of the European Financial Stability Facility, the provision of a new permanent European Stability Mechanism, then anticipated by one year, and other such measures did not convince the markets. After about twenty European Council meetings aimed at saving the Euro and confirming the will to do "all that it takes" to save the monetary union, the crisis is still ravaging Europe and undermining growth throughout the world. Member states pledged around 5% of GDP to the EFSF over time. Had they done that at the beginning it would have almost completely covered the Irish and Greek debt, avoiding the spiking interest rates and the following worsening of the crisis. But fiscal indiscipline had to be punished. Essentially, the German government view that the crisis was due to lack of fiscal discipline is still prevalent. Unfortunately, it does not stand close scrutiny. The fundamental macroeconomic indicators in the Eurozone are much better than in the US and Japan in terms of public debt and deficit, of public reserves, and of private savings. The EU is the largest economy in the world and it has the best public finances among the most developed countries. What it lacks is a government. Nobody is in

charge. Therefore the EU was unable to intervene at the start of the crisis, and still now does not offer convincing answers to the markets. Essentially, the issue is that a single market of twenty seven countries, a single currency for seventeen countries, without a single fiscal and economic policy, does not stand up.

The national governments have now decided to draft a new intergovernmental treaty to provide for semi-automatic sanctions for countries in breach of fiscal discipline and substantially curbing their fiscal sovereignty, putting their fiscal and budget decisions under substantial European control. This would be an enhanced Stability Pact rather than a proper fiscal union which is the declared aim.

However, the Commission presented different documents about a European tax, and even Eurobonds, notwithstanding the first being opposed by the British and the second by the Germans. Eventually, especially on the first issue, and despite the British refusal to participate in the new intergovernmental treaty, an enhanced cooperation, or the inclusion in the new Treaty of the first proposal was agreed upon. And pressure is building on Germany to accept the creation of Eurobonds in return for the strengthening of the Stability Pact.

For a long time, the European Parliament was the weakest institution, but following its direct election it has acquired a strong legitimacy. Since then, the Parliament has continuously demanded and progressively achieved new powers. And it always made use of the new powers acquired. The Lisbon Treaties recognizes to the Parliament the power to initiate a Treaty Reform. This was precisely what it lacked at the time of the 1984 Spinelli Draft Treaty.

The Parliament already started a political struggle about the long-term prospects of the European budget and the demand for own resources. The Parliament also proclaimed that it will propose an alternative plan to the intergovernmental Treaty - even though now it seems satisfied with the fact that four MEPs will be invited to the negotiations of the new Treaty, and the EP designated all members of the Spinelli Group, which gather politicians and opinion-makers in favour of a federal Europe. However, within the Parliament there are already discussions about different amendment proposals, mainly proposed by Andrew Duff, a liberal MEP, president of the parliamentary branch of the Spinelli Group and of the Union of European Federalists. One proposes an enlargement of the number of MEPs to create a Europe-wide constituency beside the national ones.

Another suggests to reform the Treaty amendment procedure, substituting the unanimity of the ratifications with a 4/5 majority. After the decision to draft a new intergovernmental Treaty was reached, Duff proposed a whole specific agenda for a new Convention. If adopted it would imply significant steps towards a European federal government for the economy, and an economic federation or a European federal democracy without military competences.

All these issues can be seen in the current debates and agendas of the European institution and in the inter-institutional dynamics. The European unification process shows that often the integrative proposals which were not approved at one time were then inserted later into the Treaties. Some scholars suggest for example that more than 80% of the 1984 Spinelli Draft Treaty has been incorporated into the Treaties (see Ponzano 2007 and Bonvicini 2010), and the current debate relates to much of the rest.

It should be noted however that, even if the most advanced proposals were adopted, the EU would still be quite different from traditional federations. From this perspective the idea of the EU becoming a "supranational federal democracy" can help to conceptualise the differences and the similarities alike. These regard institutional and fiscal issues alike.

The MacDougall Report suggested that even a fully federalised EU, including monetary, economic and political union, assuming entirely the burden of defence, would require a budget of between 7% and 10% of GDP at the most[XVI], while existing federation usually have a budget of over 40% of GDP; the EU budget is currently 1% of GDP. The Member states have also pledged the equivalent of about 5% of GDP to the EFSF and the ESM. And their defence expenditure is about 1.6% of the EU GDP. The current situation thus seems to confirm the estimates of the MacDougall Report. Therefore, the EU would be a much more decentralised federation than any existing one, requiring a much more limited budget.

From an institutional perspective, while all federations are characterised by a second Chamber representing the member states, nowhere is such an institution as powerful as in the EU[XVII]. The existence of the European Council on the one hand and of the several formations of the Council of Ministers on the other, is a clear indication of the role of member states government in the EU institutional system. Even the proposals to make the Council more similar to the conventional second chamber would only partially

transform, rather than diminish, the enormous role of member states government in the EU institutional architecture. For example, the Convention proposal of the Constitutional Treaty to significantly reduce the formations of the Council providing for a single General Affairs and Legislative Council, transformed into a fully-fledged second legislative chamber, and a Foreign Affairs Council. But the proposal, aimed at ensuring higher legislative coherence, did not impinge on the paramount role of the European Council for example.

Furthermore, the linguistic and cultural differences make the formation of a potential European national identity unlikely, and not just undesirable. This is what Beck and Grande with their vision of a cosmopolitan Europe have been pointing out. This does not imply however that a supranational and post-national federal democracy cannot be established. The current crisis is showing how interdependent Europeans are. How the problem of even a small state can soon and easily become a problem for the whole Eurozone. To establish a fully democratic system to manage this interdependence and provide the consequently required European public goods would probably be more acceptable than continuing to go through endless intergovernmental negotiations and meetings that have so far proved unable to cope with the crisis.

Conclusions

I have tried to show that a long-term dynamic consideration of the European unification process highlights a quite consistent tendency towards the increase of European competences and powers. This trend has made the EU more and more similar to a federation, even if it is not (yet?) a fully-fledged federation.

I discounted the possibility that the EU may constitute a new model or ideal type because it lacks the stability required. An institutional setting remains stable if it is able to satisfy. to a reasonable degree, the expectation of citizens by handling the main problems. The crises of the last few years have clearly shown that, even after Lisbon, the EU lacks many essential instruments to cope with them, and could jeopardise its own greatest

achievements, such as the Euro. This fundamental tension is behind the debates about new instruments, i.e. new powers and decision-making procedures, which is going on within all European institutions.

The current crisis has spurred a debate and an agenda, which includes several proposals that would further strengthen the trend towards a progressive federalization of the EU. They may or may not be approved. But the markets seem to consider that, up to now, the various intergovernmental solutions to the sovereign debt crisis attempted have been insufficient. This may provide a strong incentive to turn towards a more supranational and federal approach.

Indeed, the EU can be considered as the laboratory of a new federalism, precisely for being made up of nation-states with centuries-old stories and identities, unlike most other federations around the world (Pinder 2010). This forces the EU to identify new institutional avenues, to a certain extent more coherent with the federalist principles, and very respectful of subsidiarity. Within the EU a new kind of federal system is emerging. The current crisis is so structural and dangerous that the alternative between integration and fragmentation is more present than ever and brings back to mind Beveridge's advice: the alternative for the European states and citizens may now well be "unite or perish".

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[*] This paper constitutes a thoroughly revised version of the one presented in March 2011 at a workshop on "Treaty Reform Beyond Lisbon?" held at the Robert Schuman Centre for Advanced Studies of the European University Institute, jointly organised with the European Union Democracy Observatory, the Centre for Studies on Federalism, the Sant'Anna Legal Studies, and the Max Weber Program of the EUI. I would like to thank Bruno De Witte, Giuseppe Martinico, Antonio Padoa Schioppa and all other participants at that workshop for their insightful and fruitful comments and criticisms on that paper, which helped me significantly in its revision. In that paper "Why Constitutional Politics Will Continue" I claimed, contrary to the common wisdom at that time, that a new wave of institutional reform was approaching. As events have confirmed that claim, which would now look obvious, I took away that part. But I employ here the theoretical framework on which that claim was based, to support the main thesis of this paper, namely that steps towards a federal democracy are needed to overcome the current EU crisis. I just had the opportunity to present the revised paper at the Seminario de investigadores of the Centro de Estudios Políticos y Constitucionales in Madrid in January 2012 before submitting this final version. I would like to thank Ana Mar Fernández Pasarín, Mario Kölling, Hélder Ferreira do Vale, and all other participants at the seminar for the very interesting and useful discussion we had on the paper, which again helped me significantly in the final revision, up to this current form, for which I alone am responsible.

[1] This attitude is rather widespread in the literature, also among scholars who have contributed significantly to the study of the EU. I will just mention as an example Mario Telò, whose analysis of the development of the EU is usually timely and insightful, even if the long-term effects foreseen after each new Treaty were not confirmed. Telò considers the Maastricht Treaty as a qualitative change, the first step and the start of a constitutional phase of European integration (1992, especially 85-88). In 1993 in a pioneering analysis of the European social-democratic parties he invites to study European parties and notices the inability of the functionalist dynamics to Europeanise parties. He then invites the social-democratic parties to take a more federalist stance, more coherent with the new constitutional phase of the process (1993, especially 30-35 and

46-50). Later on, in another pioneering book, when he launched the idea of new regionalism, he considers the Amsterdam Treaty as the end of the long evolutionary functionalist-federalist period and the come-back and the start of a new phase of intergovernmentalism, through the re-nationalization of part of the *acquis* (1998, especially 23, but see also 23-25). In just six years the European integration process would have changed phase twice. And other shifts would follow after each new Treaty.

[II] A useful methodological analysis of this issue with regards to the whole of social sciences is offered by Elias (1987).

[III] Beside these three schools of thought there are some theoretical precursors, not developed specifically in relation to the European integration process, which can only be mentioned here, i.e. transactionalism and functionalism[III] developed by Karl Deutsch (1953) and David Mitrany (1933, 1963, and 1965) respectively. There are also other interesting strands of research, that have not yet developed a fully-fledged theory of the process as such, namely social constructivism (For an overview of social constructivist research about European integration see contributions published in "Journal of European Public Policy ', VI, no. 4, 1999, entirely devoted to this theme) - which stresses the role of ideas and social perceptions - and European constitutionalism (a useful overview of this vast literature is proposed by Martinico 2009, and the classic and fundamental contributions by Weiler 1999, and Mancini 2000) which highlights the fundamental role of the Court of Justice in the process. Considering the main focus of this paper an analysis of the neo-institutionalist scholarship could also have been undertaken. However, considering that the paper includes a normative conclusion, I have chosen to focus on the classic grand theories which share this approach of combining an analytical aspect with a normative one.

[IV] Obviously, an old-fashioned conception of unitary and indivisible sovereignty underlies this kind of view. There follows that the possibility to give it up to European institutions is considered as an essentially zero-sum game.

[V] That crises provide occasions to advance European integration was often mentioned also by Monnet and Spinelli (1976; Spinelli 1979, 1984, 1987, 1989, 1992a, 1992b).

[VI] A first sketch of this analytical scheme can be found in Albertini 1965 and 1966 with regard to the role of crises, in Albertini 1961, 1969, 1980 about the initiative role of the federalist organizations. I discussed it and tried to develop it further in Castaldi 2001, 2005, 2009, and 2010.

[VII] On the basis of Triffin's studies (especially 1966, 1971) the federalists organizations considered the prospect of the collapse of Bretton Woods as a potential crisis that could open the way to the monetary union, and developed several studies on the various aspects of such a plan throughout the Seventies [see Iozzo and Mosconi 1969; Majocchi 1974; Montani 1974; Moro 1974; Velo 1974a, 1974b, and 1976; Jenkins and others 1978; Movimento Europeo e Movimento Federalista Europeo 1978] as recalled by Tommaso Padoa Schioppa (2002).

[VIII] The failure of this attempt has contributed to bring scholars' attention away from it. A notable and useful exception is Preda's detailed studies (1990 and 1994).

[IX] See especially Albertini 1985 and 1986, both now in 1999a, particularly pp. 275-276 and 290-292. This distinction, however, was referred to much earlier in Albertini 1963, now in 1999a pp. 66-71. I discussed this proposal with reference to the contemporary academic literature in Castaldi 2005 and 2010.

[X] From a purely legal perspective Itzcovich (2005) analyses the concept of "legal integration" providing a useful review of the literature.

[XI] The Commission's power is much greater in a system in which its proposals can be approved by QMV and modified by unanimity, than in a system in which also the approval requires unanimity, and thus obliges the Commission to water down the proposals to gather a unanimous consensus.

[XII] Also on the Court of Justice's role however, there was a scholarly debate between intergovernmentalists (Carrubba, Gabel, Hanka 2008) on the one hand, and neo-functionalists and/or federalists on the other (Mancini 2000; Stone Sweet and Brunell 1998, 2010; Stone Sweet 2012).

[XIII] A consistent trend in this direction started after the Maastricht Treaty provided for a monetary union and the establishment of the European Central Bank. See among others: Hesse and Wright 1996; , McKay 1996, 1999, 2001; Follesdal and Koslowski (eds.) 1998; Dobson and Follesdal (eds.) 2004; Nicolaidis and Howse (eds.) 2001; Filippov, Ordeshook, Shvetsova 2004; The Journal of European Public Policy, XII, 2005, no. 3, devoted to federalism and the EU; Fabbrini (ed.) 2005; Longo 2006, Hueglin and Fenna 2006; Finn 2010, Burgess and Pinder (eds), 2011.

[XIV] In addition to Albertini's papers already mentioned, see Burgess 1986, 1989, 2000; Burgess and Gagnon (eds.) 1993, 2010; Burgess and Pinder 2011; Dosenrode 2007; Levi 1979, 1990;, Majocchi L.V. 1996; Montani

1999; Pinder 1984, 1985, 1986, 1993, 2002, 2010; Rossolillo 1975; Sidjanski 1992, 2001.

[XV] I have analysed this issue in more details in Castaldi 2010.

[XVI] Cfr. *Report of the Study Group on the Role of Public Finances in European Integration*, Vol. I, p. 70. The Report, delivered in 1977 is available at http://ec.europa.eu/economy_finance/emu_history/documentation/chapter8/19770401en73macdougallrepvol1.pdf.

[XVII] For an overview of second chambers in federal systems cfr. J. Luther, P. Passaglia and R. Tarchi (eds.), *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milan, 2006.

References

- AA.VV. *Journal of European Public Policy*, VI, no. 4, 1999, entirely devoted to social constructivist research about European integration.
- AA.VV. *Journal of European Public Policy*, XII, 2005, 3, entirely devoted to Federalism and the EU.
- Albertini Mario, 1993 (first published 1963), *Il federalismo*, Il Mulino, Bologna.
- Albertini Mario, 1963, *Un progetto di manifesto del federalismo europeo*; English version published in 1992: 'A Draft manifesto for European Federalism', in *The Federalist*, 1992, XXXIV, 1.
- Albertini Mario, 1965, *L'integrazione europea, elementi per un inquadramento storico*, now in 1999a.
- Albertini Mario, 1966, *La strategia della lotta per l'Europa*, now in 1999b.
- Albertini Mario, 1971, 'Aspects politique de l'unification monétaire', in *Le Federaliste*, XIII, 1, Mars 1971.
- Albertini Mario, 1973, *Il problema monetario e il problema politico europeo*, now in 1999b.
- Albertini Mario, 1985, *L'Europa sulla soglia dell'Unione*, now in 1999a; English version: 'Europe on the Threshold of Union', in *The Federalist*, 1986, XXVIII, 1.
- Albertini Mario, 1986-1999a, *L'unificazione europea e il potere costituente*, now in 1999a.
- Albertini Mario, 1999a, *Nazionalismo e federalismo*, Il Mulino, Bologna.
- Albertini Mario, 1999b, *Una rivoluziona pacifica: dalle nazioni all'Europa*, Il Mulino, Bologna.
- Beck Ulrich and Grande Edgar, 2007, *Cosmopolitan Europe*, Polity Press, UK.
- Bonvicini Gianni, 2010, *Dal Trattato che istituisce l'Unione Europea (1984) al Trattato di Lisbona (2007)*, in Morelli (ed.) 2010.
- Brunell, Thomas L. and Stone Sweet, Alec, 2010, *Overriding the European Court of Justice? Qualitative Evidence from Cases in the Carruba, Gabel, and Hankla Data Set (1987-1997)*, Yale Law School, Public Law Working Paper No. 217. Available at SSRN: http://ssrn.com/abstract=1679063
- Burgess Michael (ed.), 1986, *Federalism and Federation in Western Europe*, Croom Helm. London.
- Burgess Michael, 1989, *Federalism and European Union: Political Ideas, Influences and Strategies in the European Commnity, 1972-1987*, Routledge, London.
- Burgess Michael, 2000, *Federalism and the European Union*, Routledge, London.
- Burgess Michael and Gagnon A-G. (eds), 1993, *Comparative Federalism and Federation: Competing Traditions and Future Directions*, Harvester Wheatsheaf, Hemel Hempstead.
- Burgess Michael and Gagnon A-G. (eds.), 2010, *Federal Democracies,* Routledge, Abingdon.
- Burgess and Pinder (eds), 2011, *Multinational Federations*, Routledge, Abingdon.
- Carrubba C.J, Gabel M., Hankla C., 2008, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice', in *American Political Science Review*, Vol. 102, no. 4, November 2008.
- Castaldi Roberto, 2001, 'The Political Phase and Strategic Phase of Unification Processess', in *The Federalist*, XLIII, 1, 2001, also at www.euraction.org/rivfiles/1_01.pdf
- Castaldi Roberto, 2005, *A Federalist Framework Theory of European Integration*, research paper of the Centro Studi sul Federalismo, http://www.csfederalismo.it/attachments/1360_PP_Castaldi_05.pdf.
- Castaldi Roberto, 2009, 'Attori e tempi del processo di unificazione europea', in *Il Ponte*, LXV, no. 5.

- Castaldi Roberto, 2010, 'Europe needs iniziative and leadership to overcome the crisis', in *Perspectives on Federalism*, Vol. II, no. 1/2010, also at www.on-federalism.eu
- Deutsch K.W.,1953-1966, *Nationalism and Social Communication*, Cambridge (Massachussets) and London, M.I.T. Press.
- Dosenrode Soren (ed.) , 2007, *Approaching the European Federation?*, Alderhot, Ashgate.
- Elazar Daniel, 1987, *Exploring Federalism*, University of Alabama Press.
- Elias Norbert, 1987, *Involvement and Detachment*, Basil Blackwell, Oxford.
- Fabbrini Sergio (ed.), 2005, *Democracy and Federalism in the European Union and the United States*, Routledge, Abingdon.
- Finn Laursen (Ed.), 2010, *The EU and Federalism*, Ashgate, Farnham.
- Follesdal Andreas and Koslowski Peter (eds.),1998, *Democracy and the European Union*, Springer, Berlin.
- Dobson Lynn and Follesdal Andreas (eds.), 2004, *Political theory and the European constitution*, Routledge, London e New York.
- Filippov Mikhail, Ordeshook Peter C., Shvetsova Olga, 2004, *Designing federalism: a theory of self-sustainable federal institutions*, Cambridge University Press, Cambridge and New York.
- Friedrich J. Carl, 1968, *Trends of Federalism in Theory and Practice*, Pall Mall Press, London.
- Haas E.B., 1958 and 1968 2nd revised edition, *The Uniting of Europe*, Stanford (California), Stanford University Press.
- Haas B. Ernst (Ed.), 1963, *Limits and Problems of European Integration*, Martinus Nijhoff, The Hague.
- Hamilton Alexander, Madison James, Jay John, 1788-1987, *The Federalist Papers*, Penguin, London.
- Hesse Joachim Jens and Wright Vincent, 1996, *Federalizing Europe?: costs, benefits, and preconditions of federal political systems*, Oxford university press, Oxford.
- Hueglin Thomas O. and Fenna Alan, 2006, Comparative Federalism, Broadview Press.
- Jenkins R., Werner P, Triffin R., Biehl D., Montani G., 1978, *Una moneta per l'Europa*, Istituto universitario di studi europei, Torino.
- Jozzo Alfonso and Mosconi Antonio, 1969, 'Pour un système européen de réserve', in *Le Federaliste*, XI, 2, 1969.
- Itzcovich Giulio, 2005, *Integrazione giuridica. Un'analisi concettuale*, in Diritto Pubblico, no. 3/2005.
- Levi Lucio, 1979, *Verso gli Stati Uniti d'Europa. Analisi dell'integrazione europea*, Guida, Napoli.
- Levi Lucio, 1990, *Altiero Spinelli and Federalism in Europe and in the World*, Angeli, Milano.
- L.N. Lindberg and S.A.Scheingold, 1970, *Europe's Would-Be Polity: Patterns of Change in the European Community*, Englewood Cliffs, NJ, Prentice Hall.
- L.N. Lindberg and S.A. Scheingold (eds.), 1971, *Regional Integration; Theory and Research*, , Cambridge, MA, Harvard University Press.
- Lodge Juliet, 1984, 'European Union and the First Elected European Parliament: The Spinelli Initiative', in *Journal of Common Market Studies*, XXII, 4.
- Lodge Juliet, 1986, 'The Single European Act: Towards a New Euro-Dynamism?', in *Journal of Common Market Studies*, XXIV, 3.
- Longo Michael, 2006, *Constitutionalising Europe: Processes and Practices*, Ashgate, Aldershot.
- J. Luther, P. Passaglia and R. Tarchi (eds.), *A World of Second Chambers. Handbook for Constitutional Studies on Bicameralism*, Giuffrè, Milan, 2006.
- D. MacDougall (ed.), *Report of the Study Group on the Role of Public Finances in European Integration*, Vol. I, p. 70. The Report, delivered in 1977, is available on the European Commission website at http://ec.europa.eu/economy_finance/emu_history/documentation/chapter8/19770401en73macdougallrepvol1.pdf.
- Majocchi Alberto, 1974, 'Compatibilité entre l'équilibre de la balance de paiements et d'autres objectifs de politique économique dans une union monétaire (Une analyse critique du rapport Werner)', in *Le Federaliste*, XVI, numero unique, 1974.
- Majocchi Luigi Vittorio, 1996, *La difficile costruzione dell'unità europea*, Jaca books, Milano.
- Mancini F.G., 2000, *Democracy and constitutionalism in the European Union : collected essays*, Oxford, Hart.

- Martinico Giuseppe, 2009, *L'integrazione silente*, Napoli, Jovine.
- McKay David H., 1996, *Rush to Union: understanding the European federal bargain*, Clarendon press, Oxford.
- McKay David H., 1999, *Federalism and European union: a political economy perspective*, Oxford University press, Oxford.
- McKay David H., 2001, *Designing Europe: comparative lessons from the federal experience*, Oxford University press, Oxford.
- Mitrany David, 1933, *The progress of International Government*, Unwin Brothers LTD., Woking.
- Mitrany David, 1963, *Delusion of Regional Unity*, pp. 37-46 in Haas (Ed.), 1963.
- Mitrany David, 1965, 'The Prospect of Integration: Federal or Functional', in *The Journal of Common Market Studies*, IV, 1965, 2.
- Montani Guido, 1974, 'Considérations sur les institutions monétaires de la Fédération européenne', in *Le Federaliste*, XVI, numero unique, 1974.
- Montani Guido, 1999, *Il federalismo, l'Europa e il mondo*, Lacaita, Manduria.
- Montani Guido, 2008, *L'economia politica dell'integrazione europea*, Torino, UTET (De Agostini).
- Moravcsik Andrew, 1991, 'Negotiating the Single European Act: national interests and conventional statecraft in the European Community', in *International Organization*, 45, 1, Winter 1991;
- Moravcsik Andrew, 1993, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', in *The Journal of Common Market Studies*, XXI, 1993, 4.
- Moravcsik Andrew, 1995, 'Liberal Intergovernmentalism and Integration: A Rejoinder', in *The Journal of Common Market Studies*, XXXIII, 1995, 4.
- Moravcsik Andrew, *The Choice for Europe*, London, University College of London Press, 1998.
- Morelli Umberto (ed.), 2010, *Altiero Spinelli: Il pensiero e l'azione per la federazione europea*, Giuffrè, Milano.
- Moro Domenico, 1974, 'Les mécanisme d'ajustement de la balance régionale des paiements dans un systéme fédéral: l'exemple des Etats-Unis', in *Le Federaliste*, XVI, numero unique, 1974.
- Movimento Europeo e Movimento Federalista Europeo (eds.), 1978, *L'Unione economica e il problema della moneta europea*, Angeli, Milano.
- Nicolaidis Kalypso and Howse Robert (eds.), 2001, *The federal vision: legitimacy and levels of governance in the United States and the European Union*, Oxford university press, Oxford.
- Padoa Schioppa Tommaso, 2002, 'La costituzione economica europea', in *Il Federalista*, XLIV, 3, 2002.
- Peterson John, 1995, 'Decision-making in the European Union: towards a framework for analysis', in *Journal of European Public Policy*, 2.1, March 1995.
- J. Pinder e R. Pryce, 1969, *Europe after De Gaulle: towards the United States of Europe*, Harmondsworth, Penguin.
- Pinder John, 1984, 'Economic Union and the Draft Treaty', in *The Federalist*, XXVI, 3, 1984.
- Pinder John, 1985, 'European Union: steps and constitution', in *The Federalist*, XXVII, 3, 1985.
- Pinder John, 1986, 'European Community and nation-state: a case for neo-federalism', in *Journal of International Affairs*, 1, pp. 41-54.
- Pinder John, 1993, *The New European Federalism: The Idea and the Achievements*, in Burgess and Gagnon (eds), 1993.
- Pinder John, 2002, 'Mario Albertini in the history of federalist thought', in *The Federalist*, XLIV, 3, 2002.
- Pinder John, 2010, *Federal democracy in a federal Europe*, in Burgess and Gagnon (eds.), 2010.
- Ponzano Paolo, 2007, 'The Spinelli's Treaty of February 1984', in *The Federalist Debate*, XX, no. 3, November 2007.
- Preda Daniela, 1990, *Storia di una speranza. La battaglia per la CED e la Federazione europea nelle carte della Delegazione italiana (1950-1952)*, Jaca Books, Milano.
- Preda Daniela, 1994, *Sulla soglia dell'unione: la vicenda della Comunita' politica europea (1952-1954)*, Jaca Books, Milano.
- Rosamond Ben, 2000, *Theories of European Integration*, MacMillan, Basingstoke and London.

- Rossolillo Francesco, 1975, 'Il ruolo delle istituzioni nella lotta per l'Europa', in *Il Federalista*, XVII, 3, Settembre 1975.
- Schmitter P.C.,1969, 'Three Neo-Functional Hypotheses about European Integration', in *International Organization*, XXIII, no. 1, 1969.
- Schmitter P.C., 1971, *A Revised Theory of European Integration*, in Lindberg and Scheingold (eds.) 1971.
- Sidjanski Dusan, 1992, *L'Avenir fédéraliste de l'Europe, La Communauté européenne des origines au Traité de Maastricht*, Paris, PUF, 1992
- Sidjanski Dusan, 2001, *L'approche fédérative de l'Union européenne ou la quête d'un fédéralisme européen inédit*, Notre Europe, Paris.
- Stone Sweet Alec and Brunell Thomas, 1998, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community', in *American Political Science Review*, 92 (1998): 63-81. Available at: http://works.bepress.com/alec_stone_sweet/15.
- Stone Sweet Alec, 2012, 'The European Court of Justice, State Non-Compliance, and the Politics of Override: Reply to Carruba, Gabel, and Hankla' in *American Political Science Review* (forthcoming 2012). Available at: http://works.bepress.com/alec_stone_sweet/40
- Taylor Paul, 1983, *The limits of European integration*, Croom Helm, London.
- Telò Mario (Ed.), 1992, *Vers une nouvelle Europe?*, Bruxelles, Editions de l'Université de Bruxelles.
- Telò Mario, (Ed.), 1993, *De la nation à l'Europe*, Bruxelles, Bruylant.
- Telò Mario e Magnette Paul (Eds.), 1998, *De Maastricht à Amsterdam*, Bruxelles, Editions Complexe.
- Triffin Robert, 1966, *The World Money Maze*, Yale University Press, New Haven and London.
- Triffin Robert, 1971, 'La scène monétaire internationale aujourd'hui et demain', in *Le Federaliste*, XIII, 1, Mars 1971.
- Velo Dario, 1974a, 'La crise du système monétaire international et le problème de la monnaie européenne', in *Le Federaliste*, XVI, numero unique, 1974.
- Velo Dario, 1974b, 'Le marché européen des capitaux et les entreprises multinationales', in *Le Federaliste*, XVI, numero unique, 1974.
- Velo Dario, 1976, 'Piano a medio termine per l'Unione monetaria europea nella prospettiva dell'elezione europea, in *Il Federalista*, XVIII, 2-3, 1976.
- Weiler H.H. Joseph, 1999, *The Constitution of Europe : do the new clothes have an emperor? and other essays on European integration*, Cambridge University Press, Cambridge.
- Wheare C. Kenneth, 1963-1980, *Federal Government*, Greenwood Press, Westport.

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European cooperation in counter-terrorism and the case of individual sanctions

by

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Abstract

This paper assesses European cooperation in counter-terrorism, which was prompted by the terrorist attacks at the beginning of this century. The first part of the paper will provide a description of the main features of the European counter-terrorism policy together with the most important achievements attained in this field. Attention is then focused on the combat against terrorist financing; in particular on the implementation within the European Union of the regime of targeted financial sanctions adopted by the United Nations Security Council. The transposition of these measures within the EU uncovered the shortcomings regarding the institutional structure of the European Union during the pre-Lisbon period and the problems ensuing from the UN regime of financial sanctions, most namely as regards fundamental rights. Finally, the article evaluates the enhancements introduced by the Treaty of Lisbon and the future challenges in this field.

Key-words

European counter-terrorism strategy, financial restrictive measures, UN resolutions, judicial cooperation in criminal matters, Area of freedom, security and justice (AFSJ), terrorism.

1. Outline of the European Union cooperation in counter-terrorism

After the terrorist attacks on 11 September 2001 most States and international organisations started to issue measures to cope with international terrorism, among them the European Union (EU). A concerted reaction by European Member States was all the more necessary since the EU constitutes a space without internal frontiers. In fact, since the Amsterdam Treaty came into force in 1999, the *Schengen acquis*[I] was integrated within the framework of the European Union, extending the gradual abolition of controls at common internal frontiers to all participating Member States[II]. Consequently, no Member State can now deal with international organized crime, and above all terrorism, on its own. And yet the need for cooperation in preventing and fighting cross-border organized crime among European Member States is crucial.

The EU always had very limited powers in the field of police and judicial cooperation, Member States privileging *intergovernmental* action. The cooperation in Justice and Home Affairs (JHA), which among others includes the police and judicial cooperation in criminal matters, started as an *informal* collaboration among States[III]. All negotiations in this field were framed as public international law rather than Community law. It was only when the Maastricht Treaty came into being in 1993 that a *formal*, but still intergovernmental system for JHA cooperation was created. The Treaty of Maastricht provided for three different approaches to integration commonly referred to as "pillars". Next to the first pillar referring to the European Community (EC) and governed by the so-called community method, there were other two pillars: respectively, the Common Foreign and Security Policy (second pillar) and the Cooperation in Justice and Home Affairs (third pillar). Under the third pillar were collected many different policies ranging from asylum to judicial cooperation in criminal matters[IV]. Within the JHA pillar the powers of the European institutions were very limited, and the intergovernmental method prevailed. Many aspects of the third pillar testify that condition: the European Commission did not enjoy monopoly on proposal; the procedure for the adoption of legal instruments required almost always unanimity in the Council; the European Parliament (EP) used to play a very marginal role; the European Court of Justice (ECJ)[V] did not enjoy full jurisdiction; the third

pillar had *ad hoc* legal instruments that differed from those of the first pillar; lastly, the effect of the measures of the third pillar was unlike the acts of the first pillar, for example, by rule they didn't have direct effect[VI].

With the entry into force of the Amsterdam Treaty the new concept of an area of freedom, security and justice (AFSJ) appeared. This new treaty introduced some important changes to the so-called third pillar; it transferred the areas of immigration, asylum, borders and civil law within the first pillar, while leaving judicial cooperation in criminal matters and police cooperation under the third. Even if divided, the two areas once constituting the JHA pillar remained united in terms of Union's objective. That was, under article 2 TEU, fourth indent, the maintenance and development of the Union as an area of freedom, justice and security. The AFSJ was designed for the creation of a common European space affording to European citizens an adequate level of "security and justice", were the improvements undertaken with relation to the *freedom of movements* goes hand in hand with progress in the field of *police and judicial cooperation*.

The Amsterdam Treaty generally enhanced the role of the European institutions and went in the direction of shortening the distances between the procedures governing the first and the third pillar, but the latter remained mostly intergovernmental[VII]. Until the Treaty of Lisbon there were no further amendments touching upon the AFSJ worthy of mention.

That was the state of European cooperation in JHA when the 9/11 attacks took place. It should be noted that the AFSJ includes those policies normally falling under the interior justice and home affairs ministries of national States, fields in which the European Member States jealously guard their sovereignty. Accordingly, the European Union could not play a prominent role in the field of counter-terrorism; indeed the fight against organized crime is usually a primary responsibility of local and national authority. Therefore the action of the European Union in the fight against terrorism is mostly confined to coordination between Member States' own policies. Besides, the EU role in counter-terrorism was never intended to supplant the efforts of its Member States; rather it has always been presented as a value added to national policies. This is clear when one reads the European Union Counter-Terrorism Strategy (CTS) of 2005[VIII], which reorganized into a single framework the unsystematic measures adopted up to that moment by the EU in response to the terrorist threat. This overall strategy is based upon four

strategic objectives: Prevent, Protect, Pursue and Respond. Each of them covers one particular aspect of the EU strategy to dismantle current terrorism and prevent future radicalisation. Equally, in order to assure a comprehensive and coordinated effort of the Union, the European Council had already established in 2004 the position of the Counter-Terrorism Co-ordinator[IX].

However, the lack and uncertainty of powers given to the EU in the field of counter-terrorism has proven to be a significant challenge. Firstly, it prevented the EU from planning a concerted counter-terrorism strategy from the beginning, and made EU response to terrorism event-driven rather than scheduled. Secondly, the EU has been experiencing difficulties in ensuring that the AFSJ cooperation took place according to the democratic principle of accountability, the rule of law and fundamental rights. The pre-emption of power retained by the Council, the marginalisation of the European Parliament and the numerous cases held before the European Union judicature attest to some of the problems of European counter-terrorism cooperation. The next section of the paper will focus on the concrete measures adopted by the EU to enhance judicial cooperation among Member States authorities with a view to contrasting organized crime and terrorism.

2. The concrete response of the European Union

The 9/11 attacks and still more the bombings that directly concerned Europe – Madrid and London – fostered the existing cooperation and prompted further integration in the field of counter-terrorism in particular, and in that of police and judicial cooperation in general. Immediately after the 9/11 attacks, the European Heads of State and Government gathered in a special Council meeting[X] and issued a Plan of Action containing the European policy to combat terrorism threat. The main strands of action constituting the first European counter-terrorism strategy were: the enhancement of police and judicial cooperation; the development of the existing international legal instruments; the blockage of international financing of terrorism; the strengthening of air security; and finally, the coordination of European Union's external action. The unprecedented Council meeting suggested the adoption of concrete measures that would constitute the most important achievements of the Union in the fight against organized crime and against terrorism.

The first important measure was the introduction of the European arrest warrant[XI], which supplanted the former system of extraditions between Member States and was designed in order to reduce the formalities for cooperation between national judicial authorities. The Council then considered of utmost importance to agree on a common list of acts that should be considered terrorist offences[XII] by all EU national authorities. Apart from strengthening mutual trust between Member States, a common definition of terrorist offences is very useful for enhancing judicial cooperation among Member States since it guarantees a common ground for devising national counter-terrorism policies. It should, however, be kept in mind that not every Member State had already experienced national or international terrorism, and above all some Member States had never instituted counter-terrorism legislations.

Both the EU arrest warrant and the definition of terrorist offences were measures already set in the agenda of the Tampere European Council[XIII] of 1999, the first multiannual programme striving for the development of "the area of freedom, security and justice". It was namely at the Tampere meeting that the European Council endorsed the principle of mutual recognition as the cornerstone of judicial cooperation both in civil and in criminal matters. Another plan previously proposed was the establishment of Eurojust[XIV]; a European coordination unit among national prosecutors and magistrates to reinforce the effectiveness of national judicial authorities of the Member States when prosecuting and conducting criminal investigations of cross-border and serious organized crime cases.

In addition to the aforementioned measures, a very important commitment of both the European and the international fight against terrorism aims at cutting off the financing of terrorism. The combat against terrorism financing is based on two main strands of action: the first aims at directly cutting off the funds and economic resources of terrorist suspects or terrorism supporters, the other at stopping the misuse of the financial system in order to channel money (criminal or not) to terrorist purposes[XV]. In the first case, the fight against terrorism financing makes use of a list of natural or legal persons related to terrorism for the purpose of freezing their assets. This practice is based on the anti-terrorism regime of sanctions endorsed by the United Nations Organisation (UN) before and in the aftermath of September 11. The UN Security Council (UNSC) has enacted two types of sanctions: the first introduced by Resolution 1267 of 1999[XVI] and the other

governed by Resolution 1373 of 2001[XVII]. This latter constitutes a direct response to the 9/11 attacks and calls upon UN member States to adopt a number of general obligations to contrast international terrorism. The third pillar of the European Counter-Terrorism Strategy[XVIII], "Pursue", also covers the action to be taken by the European Union in this field. The following part will further investigate this aspect of the European strategy against terrorism. In particular, this paper addresses EU legislation concerning the financing of terrorism, specifically the measures imposing the freezing of assets belonging to persons and entities related to terrorism

3. Counter-terrorism targeted financial sanctions: a system of multilevel intervention

The international fight against terrorism is based on a certain number of actions enforced on a multilevel basis; normally national States, regional and international organizations are involved. Since the end of the nineties the United Nations Security Council has been adopting resolutions to counter terrorism, and among these measures aiming at tackling international terrorism, the ones creating the most concern are *targeted sanctions*[XIX]. This is a special category of sanctions, not involving the use of armed force, adopted under Chapter VII of the UN Charter for the purpose of restoring international peace and security wherever here is a threat to peace. The specific feature of targeted sanctions lies in the fact that they target natural or legal persons regardless of any *link* with a certain State or government[XX]. Indeed, the imposition of these sanctions is justified by a specific behaviour or a personal quality of the target.

The most important sanctions regime was established by Resolution 1267 (1999) and Resolution 1333 (2000)[XXI], concerning Al-Qaeda, the Taliban and associated individuals and entities[XXII]. Three main coercive measures form this sanctions regime: an asset freeze, a travel ban and an arms embargo[XXIII]. The sanction attracting most attention, at least before Courts, is the *financial measure*. This is a *preventive* tool that aims at freezing all funds and financial assets belonging to individuals held to be close to international terrorism. Targeted sanctions are *preventive* in nature[XXIV], thus their charge is not based on a conviction but solely on intelligence information provided by UN Member States. These

administrative measures entail the use of financial instruments and institutions to apply coercive pressure on transgressing parties. In concrete terms, the UNSC Sanctions Committee[XXV] provides a "Consolidated list" containing names and personal details of those natural or legal persons thought to be associated with terrorism.

When firstly enacted the sanctions regime effected by Resolution 1267 completely lacked a delisting procedure enabling targeted individuals to challenge their inclusion in the so-called "blacklist". That was a significant gap in UN anti-terrorist action because restrictive measures entail heavy negative consequences for the individuals concerned. Fortunately this situation has been improved over the years; the UNSC has constantly ameliorated its practices, for instance improving access of petitioners to delisting procedures. Nevertheless, the way forward to a fair review mechanism was not firm, but responded to episodic criticisms raised by States, scholars and NGOs (See e.g. Biersteker and Eckert 2006; Ciampi 2006: 85; Eckes 2009). The latest improvement concerning delisting was introduced by UNSC Resolution 1904 (2009)[XXVI], which established the office of the Ombudsmanperson in charge of receiving and managing delisting requests forwarded by individuals and entities concerned by sanctions. So, about ten years after the first counter-terrorism resolution, the UNSC framed a delisting procedure trying to respect the international standard of protection of fundamental rights.

When assessing European strategy against terrorism one cannot ignore that this is made up of many measures enforced by different levels of government, first of all: the UN, the EU itself, and the States participating in both organisations. Accordingly one can speak of *multilevel* fighting against international terrorism; this suggests that all these levels cooperate for the ultimate objective of fighting international crime and maintaining international peace and security. However, the overlap between different legal systems led to problems of competency and coordination. The European Union found itself in an uncomfortable position, between the UN and its Member States. This happened because common European legislation was deemed necessary in order to avoid distortion of competition and to ensure maximum legal certainty within the EU. Besides, the European Community[XXVII] wanted to assert itself as a global actor, able to implement Member States' obligations under UNSC resolutions (Cremona 2009: 573). But its institutional structure, namely the third and the second pillar, was immature for such measures. In fact, the EU turned out to be unable to provide a firm response to the quest for justice advocated by

listed applicants and criticism was levelled against both the UN and the EU procedures governing the sanctions regimes (See Cameron 2006; Eckes 2009; Andersson et al. 2003; Cannizzaro 2009; Couzigou 2008; Eeckhout 2007).

The most important issues left unresolved by the UN sanctions regime regarded the review mechanism and the lack of transparency in the procedure leading to listing. This appeared evident in particular as regards targeted financial sanctions, which impinge upon several rights of alleged terrorists, which are: the right to property, the right to reputation, family rights and, possibly, the right to privacy. The UN review mechanism, once arranged, proved to be insufficient because it substantially mirrored some models of diplomatic protection. So, alleged terrorists could only submit a petition for delisting through the intermediary of their State (either of nationality or residence), and this was handled on a bilateral basis between the designating State and the petitioned State. Additionally, since financial sanctions are preventive in nature, blacklisting is not solely dependent a criminal charge or conviction but merely on intelligence information. There was a general lack of transparency surrounding listing and delisting procedures of the Sanctions Committee that, in any case, didn't notify targets either of their blacklisting or of the reasons justifying their inclusion on the list. Hence different problems affected the imposition of targeted financial sanctions; ranging from the lack of transparency of the procedure for blacklisting to the inefficiency of the review mechanism, which impeded petitioners from appealing to an independent authority.

As a consequence, the simple transposition of the UN targeted sanctions within the EU legal order led to the imposition through mixed EC and EU instruments of acts infringing upon the rights of targeted individuals. This situation challenged the autonomy of the European legal system and disregarded one of its fundamental principles, that is, respect for human rights. In particular, the problem of international counter-terrorism resolutions lay in the lack of adequate legal safeguards for alleged terrorists and thus on the infringement of their rights of defence. The individual aspect[XXVIII] that characterises targeted sanctions makes all the more evident the necessity for an efficient and fair review mechanism in order to afford *due process* rights to targets.

The introduction of restrictive measures within European Union law turned out to be troublesome in some particular ways. First of all, they involve the non-institutionalized relationship between the EU and the UN system. It is worth noting that the EU cannot be

a member of the UNO[XXIX], whereas the EU Member States join that organisation and have the duty to implement its acts. However, *ex* art. 48 of the UN Charter, regional organizations, such as the EU can carry out the measures decided by the UNSC on behalf of their Member States. The central question was whether the European Union pursuant to the pre-Lisbon Treaties had the competence to adopt targeted sanctions, that is, sanctions aimed directly against individuals rather than third States. Mostly through an expansionist[XXX] use of the Treaty provisions, this competence was provided. The imposition of targeted economic sanctions required a two-step procedure and an inter-pillar legal basis: firstly, a CFSP decision was adopted, and then, on its authorization, a first pillar regulation[XXXI]. At all events, the legal bases used for the introduction of the sanctions regimes within the EU legal order were not created to serve this purpose; this is the reason why EU competence was debated since it started to adopt these kinds of actions (Lang 2002: 63 ss). Secondly, as was already pointed out, restrictive measures created considerable concerns about human rights. Finally, those measures, and more particularly, the consequences of the violation of human rights, put the European legal order under stress as some fundamental principles of the Union were being ignored.

To sum up, the main shortcomings concerning the institutional structure of the EU consisted of: the lack of a clear legal basis, the exclusion of the European Parliament on a sensitive subject such as individual rights, and the limited powers of review attributed to the ECJ.

Through a series of important judgements, the Court of Justice of the European Union paved the way for an improvement in the protection of the rights of targeted individuals and stressed the need for a reform of the third pillar. As regards the legal basis, the contention *should* have finished with the arrival of the Treaty of Lisbon, which contains two articles that respond to former concerns about EU competence in this field[XXXII]. Likewise the Lisbon Treaty lifted the divide between pillars offering a renewed institutional framework for AFSJ policies. However, once again the question of restrictive measures stands before the Court of Justice of the European Union.

4. The steady string of judgements delivered by the Court of Justice of the European Union

Six years after the first *Kadi* ruling of 2005[XXXIII], the European landmark judgement regarding individual sanctions, there are still cases concerning restrictive measures and their encroachment upon fundamental rights pending before the Court of Justice of the European Union[XXXIV]. The first organ of the European judicature dealing with counter-terrorism *restrictive measures* was the former Court of First Instance (CFI), now the General Court[XXXV]. Its judgement mostly drew criticisms in literature and was then reversed by the ECJ[XXXVI]. Both the *Kadi* rulings attracted a large amount of attention and comments by European and international legal writers (See e.g. Cannizzaro 2009; Conforti 2006; de Burca 2009; De Sena and Vitucci 2009; Eckes 2009; Tridimas and Gutérrez-Fons, 2009). The majority of them dealt with the following issues: the resort to *jus cogens* made by the CFI; the "dualistic or monistic" approach respectively applied by the CFI and ECJ; and in general, they lingered over the infringement of applicants' fundamental rights. This analysis will primarily deal with the most important consequence of the *Kadi* cases: initially, with the judgement of the CFI, the establishment within EU law of a double standard of protection for alleged terrorists, then, with the appeal, the return to a single legal framework. This will describe the European response to the problems triggered by the transposition within its legal order of the UN counter-terrorism resolutions.

Since no other Court was available, alleged terrorists brought actions for annulment against counter-terrorism restrictive measures before the Court of Justice of the European Union. Nevertheless, the European judicature was not able to grant a clear and swift response to the quest for justice advanced by targeted individuals. Most problems regarded EU acts transposing UN sanctions, rather than restrictive measures operated on a European autonomous basis. The fundamental difference between the two restrictive measures regimes[XXXVII] lies in the list of suspects. The UN blacklist is drawn up directly by the Sanctions Committee or the UN Security Council according to UN Resolution 1267 (1999), whereas the EU autonomous list applies to those alleged terrorists specifically identified by the EU Council according to UN Resolution 1373 (2001).

The Court of Justice held a significant number of judgements concerning both types of sanctions. The most important case regarding the EU *autonomous* sanctions regime is the *Organisation des Modjahedines du Peuple de l'Iran (OMPI)* case[XXXVIII]. The *OMPI* case of 2006 is the first successful challenge of a European counter-terrorism restrictive measure

operated against individuals. For the first time the Court of First Instance annulled, as far as the applicant was concerned, an act of the European Community. This was Council Decision 2005/930/EC[XXXIX] implementing article 2(3) of Regulation EC 2580/2001[XL], which contained the updated list of persons and entities against whom the regulation applied. Indeed, the Court found that the Council decision listing the *OMPI* did not comply with the procedural safeguards normally afforded by the European legal order when a measure is liable to create adverse effects against an individual[XLI]. *De facto*, the Court stated that the decision of the EU Council infringed upon the applicant's rights of defence and right to a fair hearing. According to the Court, the contested decision did not contain a sufficient statement of reasons and it was adopted through a procedure within which the applicant's right to a fair hearing was not observed. Furthermore the Court was not, even after the oral procedure, in a position to review the lawfulness of the decision; this was due to the shortage of file materials and information justifying the inclusion of the applicant in the list. Accordingly, the applicant was not even placed in the position to avail himself of the right of action before the Court.

Thanks to this judgement the EU Council improved its practice concerning listing and statement of reasons. The CFI maintained that alleged terrorists should be notified, either concomitantly or as soon as possible, about the specific information and material in the file that justify a listing decision according to art. 1(4) of Council Common Position 2001/931[XLII]. In any case, they should be afforded the possibility to make known their view on the matter. In this connection, the EU Member States that gather information and issue the initial decision are *in primis* responsible to grant at national level the right to a fair hearing. At the same time, the Court recognised that there were significant restrictions to the rights of alleged terrorists, in particular as regards notification, since overriding considerations concerning the security of the European Union and of its Member States may preclude the disclosure of certain evidence. The Court restricted its review to checking that the rules of procedure, namely the procedural safeguards afforded to applicants, had been respected[XLIII].

So, as far as EU autonomous sanctions are concerned the European judicature guaranteed the protection of the rights of defence of alleged terrorists in compliance with EU law. Yet, the answer of the Court was different for those applicants from the UN list, even if they were complaining about the infringement of the same rights recognised

patently not respected in the following *OMPI* judgement. In the *Yussuf* (2005)[XLIV] and *Kadi* (2005)[XLV] cases, concerning sanctions against individuals specifically identified at UN level, the Court denied its jurisdiction, depriving alleged terrorists of a review mechanism. According to the Court, the difference between the two sanctions regimes lies in the powers of the EU Council: those resolutions and decisions of the UNSC and of its Sanctions Committee, designating alleged terrorists by name, were implemented within the European legal order under *circumscribed* powers; whereas, resolution 1373 (2001) charged the Community (through which Member States decided to act) with *autonomously* identifying suspects with a view to freezing their assets. Consequently, the *OMPI* case did not depart from the previous case law of the ECJ. Rather, since the *OMPI* ruling was pronounced, the Court distinguished between the two regimes of sanctions and set up a *double standard* of protection of fundamental rights within EU law.

The *Kadi* ruling of 2005 suffered from a deferral of powers made by the CFI in favour of the UN. The Court of First Instance held that Community acts, such as the contested regulation[XLVI], implementing UN obligations *without* power of *discretion*, as a matter of principle fall outside of the scope of its jurisdiction. Most namely, the Court could not review the contested act because it would amount to an indirect review of the UN resolution itself. As a consequence, the applicants were deprived of the only possibility of review before an impartial judge and the CFI attributed a primacy status to UN obligations even departing from primary European law, most namely the protection of fundamental rights.

The coexistence of a double standard ended only in 2008, when the Court of Justice overturned the first *Kadi* ruling handed down by the CFI, and restored uniformity in the standard of protection of human rights within EU law. In the *Kadi* appeal the ECJ firmly made out a clear-cut distinction between the EU legal order and the international one. It stated that the Court of Justice of the European Union has the duty, in accordance with article 230 TEC (now 263 TFEU), to rule on the legality of the acts of the European institutions. The judicial review of an act of the European Union[XLVII], even if implementing a UN resolution, is confined to the European legal order itself. Accordingly, its review does not affect the international legal order, which instead is governed by public international law. The Court confirmed the Opinion of Advocate General (AG) Maduro[XLVIII], which stressed the autonomy of the European legal order and its respect for the rule of law. The

Court, after confining its review to the realm of EU law, held that, as far as the applicant was concerned, the rights of defence were patently not respected[XLIX]. As it already made for autonomous European sanctions, the Court annulled the disputed act on the basis of the infringement of the procedural rights governing listing procedure. The Court did not enter the merits of the lawfulness of the contested regulation, since the Council adduced no evidence. Thus, apart from the first part of the judgement distinguishing the autonomy of the EU legal order from the international one, the ECJ reached the same conclusions as in the *OMPI* case. In fact, following the *Kadi* appeal of 2008 an equal treatment concerning procedural safeguards was restored for both types of sanctions.

After this latter judgement, on a proposal of the Commission the Council passed an important legislative act concerning procedural rights applying to those alleged terrorists included in UN sanctions lists[L]. That regulation codifies the due process procedures urged by the Court of Justice in the *Kadi* appeal of 2008.

The case law of the Court of Justice of the European Union demonstrates that the European Union, and all the more so, the UN, set up a strategy to counter terrorism that did not take account of the fundamental rights of those listed. That situation was worsened by the fact that the European Union did not apply its fundamental principles when transposing UN resolutions.

5. The amendments introduced by the Treaty of Lisbon

The settlement of the European Union before the Treaty of Lisbon in 2009 attributed an outstanding role in counter-terrorism to the Council. In the Treaty on the European Union (TEU) most of the law-making powers in this field were attributed to the Council of the EU. It suffices to mention the Framework Decision on combating terrorism[LI] and the Framework Decision on the European arrest warrant[LII], both adopted under article 34 TEU. The most democratic institution of the European construction, the European Parliament, was in most cases marginalised. After 9/11, which should be considered a central date for the beginning of a structured European counter-terrorism policy, European cooperation made the greatest improvements in this field. The pre-Lisbon anti-terrorism cooperation was founded on a mixed third and second pillar basis,

which suffered not only from a mostly intergovernmental integration but also from gaps regarding the jurisdiction of the ECJ. In a field such as that covered by the third pillar, the participation of the European Parliament, the only directly elected institution, and the supervision of the ECJ proved to be essential.

The Treaty of Lisbon improved the previous situation introducing enhancements in relation both to the powers of the Court of Justice of the European Union and to law-making powers of the European Parliament.

In the first place, the Treaty of Lisbon provided a new "*unambiguous*" legal basis for the adoption of individual sanctions, updating the treaties to adapt to the shift towards the use of smart sanctions instead of state sanctions. This is a very important change considering the difficulties encountered by the European judicature to find an adequate legal basis for individual restrictive measures[LIII]. The Treaty contains two different articles founding the EU competence to adopt such acts. The former is article 75 TFEU pertaining to Part three concerning Union Policies and Internal Action, Title V Area of Freedom Security and Justice. This should be used with the intent that administrative measures with regard to capital movements and payments are adopted when one of the objectives of the AFSJ (article 67 TFEU) should be attained. The second is article 215 (2) TFEU included within Part V on External Action of the Union, which should be employed following a prior decision adopted under Chapter II, Title V of the TEU that charges the Council with the adoption of restrictive measures against natural or legal persons and groups or non-State entities. Hence, the concrete restrictive measures adopted under article 215 (2) TFEU are based on a prior CFSP decision (art. 31 TEU), as was the case in the pre-Lisbon framework.

The choice of the legal basis shall not be understated; the legislative procedures of the two articles differ in a significant manner. On the one hand, article 75 TFEU requires the *ordinary legislative procedure*, according to which the Council and the European Parliament are co-legislators[LIV]. Instead, pursuant to article 215 (1) TFEU the European Parliament only has the right to be informed. Both articles contain a final paragraph stating that those acts adopted on their basis *shall include necessary provisions on legal safeguards*, in accordance with the case law of the Court of Justice of the European Union.

Even though the addition of these articles provided the Union with the explicit competence for the adoption of restrictive measures, it is still not clear which article should

be used and in which circumstances. A current case brought by the European Parliament before the Court of Justice of the European Union raised this problem[LV]. The European Parliament challenges EU Regulation 1286/2009[LVI] affirming that it was adopted on the wrong legal basis, namely under article 215 (2) TFEU, rather than under article 75 TFEU. The practice is that the CFSP decisions lay down the overall sanctions; then part of the sanctions is implemented via regulations, in the case at issue under art 215 (2), whereas sanctions involving travel bans or arms embargoes are implemented by Member States.

Actually, compared to article 215 TFEU, article 75 TFEU is more specific. It concerns specifically the freezing of funds, financial assets or economic gains and it explicitly refers to the prevention and combating of terrorism. In addition, *rationae personae,* it only mentions natural or legal persons, groups or non-State entities. On the other hand, article 215 TFEU is primarily aimed at third countries and includes a broader category of measures for the interruption or reduction of economic and financial relations in general.

On being asked to give its opinion on the matter, the Committee on Legal Affairs of the European Parliament held that the Treaty clearly distinguishes between sanctions concerning EU lists and sanctions concerning UN lists[LVII]. However, a further distinction regards measures aimed at third countries or measures that are not addressed to a specific country but whose objective concerns, for example, counter-terrorism in general. Hence, the distinguishing element should be the *objective* of the measure. Therefore, according to the EP, if a measure aims at preventing and combating terrorism in general, it should be adopted pursuant to article 75 TFEU, especially when it does not address a specific country. This is in short the position held by the EP in the case brought before the Court of Justice of the European Union.

Unfortunately, the Opinion[LVIII] delivered by Advocate General Bot on the 31 January 2012 does not support the plea of the European Parliament. In the case at issue the primary task of the Court is to assess the respective sphere of application of article 75 TFEU and article 215 TFEU, which is not immediate from the wording of the Treaty. According to settled case law the choice of the legal basis should rest on objective factors which should be amenable to judicial review: in particular the aim and content of the measure. The purpose of the contested regulation is the same of the regulation that it amends, that is Regulation 881/2002. Its essential objective is the prevention of terrorist crimes, including terrorist financing, in order to maintain international peace and

security[LIX]. On these premises, the AG retains that this purpose falls within the European Union's external action, the objectives of which are enlisted under article 21 (2) (a) to (c) TEU. Moreover, the AG affirms that it was within the framework of the CFSP that initially the system of interaction between the decisions taken by the UNSC and the EU was established. Specifically, art. 301 TEC (art. 215 is recorded as its successor) was introduced with the intention of providing the EU with the competence to implement UNSC sanctions. Therefore, AG Bot upholds the view of the Council maintaining that the contested regulation was correctly adopted on the basis of art. 215 (2) TFEU on account of its CFSP dimension[LX]. In the opinion of the AG, article 215 (2) TFEU should constitute the appropriate legal basis for the adoption of: measures intended to support third States anti-terrorist actions within their territory; restrictive measures directed against persons and entities expressly designated by the UNSC; and also those measures decided by the UNSC and implemented by the EU under a certain discretion, that is when the selection of the persons and entities concerned is left to UN Member States[LXI]. If the Court of Justice of the European Union were to follow this argument, article 75 TFEU would only be used for autonomous sanctions of the EU not relying on a UN resolution.

However the choice of the legal basis is not straightforward. One first aspect to point out relates to the fact that many recipients of UNSC anti-terrorist sanctions are European, that is to say that they are either EU citizens, organizations, groups or bodies located or constituted under the law of one of the EU Member States. This means that those measures inevitably have an AFSJ side. Since the measures under discussion include persons residing in the EU, the use of CFSP would be odd. Even more so given that article 75 TFEU is more specific and explicitly refers to terrorism as well as to asset-freezing measures. Another important aspect to be underlined is that article 75 TFEU is recorded as the successor to article 60 TEC[LXII]. Article 60 TEC was the *lex specialis* used in combination with article 301 TEC for the adoption of financial restrictive measures. However, the combined use of the current legal bases seems to be out of discussion; primarily because the two articles pertain to different policies, then for the differences regarding their decision-making procedures[LXIII]. Nevertheless, article 75 TFEU could be read as *lex specialis* for counter terrorist measures. On the other side, article 215 (1) TFEU could be used for general state sanctions and article 215 (2) for those targeted sanctions aimed at government officials that both have a clear CFSP aim. In my view, if the fight against terrorism is to

succeed, it should be international by definition[LXIV], but this does not mean that the reference to the international community automatically implies a CFSP scope. A last remark that needs to be made regards the geographical scope of article 75 and 215 TFEU. The United Kingdom and Denmark have an opt-out for measures adopted on the basis of article 75 TFEU pursuant to Protocol No 21 and 22 on their positions regarding the AFSJ[LXV]. Anyway, it is worth noting that the United Kingdom made a unilateral declaration[LXVI] annexed to the Treaty stating the intent to exercise its right[LXVII] to take part in the adoption of all proposals made under article 75 TFEU. This situation could create problems regarding the uniform application of restrictive measures in all EU Member States.

If the Court of Justice of the European Union were to back the opinion of the European Parliament, the EU would have a unique framework for all targeted sanctions against individuals without any link to a specific country and with the objective of countering terrorism. Moreover, the adoption of any such action would always benefit from the surveillance by the EP. On the other side, under article 215 the EU would adopt all restrictive measures aimed at third countries or at their governing elites, both those adopted following an underlying UNSC Resolution and those adopted on an EU autonomous basis. Instead, if the Court were to follow the opinion of AG Bot, the European Union would adopt almost all restrictive measures under article 215 TFEU and article 75 TFEU would only be resorted to for restrictive sanctions adopted on an autonomous basis without any underlying UN Resolution.

6. The enhanced role of the Court of Justice of the European Union

The most significant change brought about by the Treaty of Lisbon is the establishment of a single legal framework for the EU. The previous three-pillar structure has been terminated and thus, in principle, all EU law should be governed by the same rules. This change matters first of all for the jurisdiction of the European Court of Justice. In fact, to the extent that specific provisions do not provide otherwise[LXVIII], the jurisdiction of the Court of Justice of the European Union applies to EU law as a whole and to all institutions, organs and agencies of the EU. Therefore, since the enacting of the Treaty of

Lisbon, the provisions belonging both to the Common Foreign and Security Policy (CFSP) and the Area of Freedom Security and Justice (AFSJ) are, as a matter of principle, subjected to the jurisdiction of the ECJ. Yet, some restrictions are still in force. As far as restrictive measures are concerned, at least formally, the situation has been largely improved. According to article 75 TFEU the Court holds full jurisdiction; measures adopted under this legal basis are subjected to judicial review as is any other legal act issued by European institutions. It is thus possible to rely on article 263 TFEU, concerning the jurisdiction of the ECJ to review the legality of the acts of EU institutions, to challenge acts adopted under article 75 TFEU. It should also be noted that the amending Treaty improved individuals' right of appeal. The new article 263 (4) TFEU, which grants the right of appeal to any natural or legal person, responds to criticisms made against the highly restrictive interpretation held by the ECJ regarding the condition of "direct and individual concern"[LXIX].

The extension of the jurisdiction of the ECJ within the AFSJ represents a considerable improvement for the legal protection of the individuals, as well as a step ahead for the uniform interpretation and application of acts adopted in this area. However, it should be noticed that, until 1 December 2014, pursuant to Protocol No 36 on transitional provisions, former third pillar rules remain into force.

The Treaty of Lisbon retains the former exclusion of the Court's jurisdiction over CFSP; nevertheless there are significant exceptions to this general rule. Article 40 TEU charges the Court with assessing the correctness of the legal basis; put differently, the ECJ can rule on proceedings relating to institutional conflicts concerning CFSP measures. Moreover, article 275 TFEU explicitly allots to the Court the power to rule on proceedings brought against decisions providing for restrictive measures adopted by the Council on the basis of Chapter 2 of Title V of the TEU. Thus, the Court of Justice of the European Union can now review the legality of legislative acts and decisions imposing restrictive measures against natural or legal persons.

7. Brief conclusions

The Treaty of Lisbon considerably ameliorated some aspects of the fight against international terrorism, namely the problems raised in the implementation of individual sanctions. Firstly, it abolished the pillars structure and *ended*, apart from the specifications made above, the special regime governing CFSP and AFSJ. It improved the right of appeal of the individuals concerned by restrictive measures and finally explicitly conferred to the Union the power to adopt individual restrictive measures. In the recent years the Court of Justice of the European Union has delivered numerous judgements assessing the flaws in the protection of human rights as regards counter-terrorism restrictive measures; finally, the Treaty of Lisbon codified these achievements.

Yet, the ECJ still has to specify other important questions concerning this subject. In *Parliament* v *Council*[LXX] the Court should clarify which one of the two possible legal bases should be used and in which cases. If the Court were to find that individual sanctions, aiming at combating terrorism in general, should be adopted under article 75 TFEU as the European Parliament wishes, that would guarantee the exercise of stricter control by the only democratically elected institution of the Union. Moreover, in the *Kadi* II appeal[LXXI], brought up by the Commission, the Council and the UK, the Court has to specify what the standards of fundamental rights are and which judicial review can be undertaken for European Union restrictive measures implementing mandatory UNSC resolutions. The contradictions that initially marked the implementation of individual sanctions within EU law have almost all been cancelled, however a few problems still remain to be settled.

[I] The *Schengen acquis* consists of the 1985 Schengen Agreement, the 1990 Convention and the measures implementing the Convention. This kind of cooperation, at first initiated among 7 Member States, was made possible by the provision on "closer cooperation" (art. K.7) of the Maastricht version of the TEU.
[II] Denmark, Ireland and the United Kingdom have decided to participate in the Schengen cooperation under certain conditions.
[III] The first organized platform for European counterterrorism cooperation dates back to mid seventies and was Terrorisme, Radicalisme, Extrémisme et Violence Internazionale, the so called TREVI.
[IV] Article K.1 Treaty on the European Union, Maastricht version.
[V] It should be stressed that the Treaty of Lisbon has modified the denomination of the European judicial institution. According to article 19 (1) TEU, now this institution is called "The Court of Justice of the European Union", which includes the Court of Justice, the General Court (previously Court of First Instance) and specialised courts. Nonetheless, already before the entry into force of the Lisbon Treaty the name "Court of Justice of the European Communities" was incorrect, since the Court already had jurisdiction over certain matters of the TEU. Within this paper the term "Court of Justice of the European Union" will be used both for the pre-Lisbon and the post-Lisbon period. Besides it will be also implied referring to the highest judicial body of the European judicature. Instead, for the pre-Lisbon period the denomination Court of First instance will be maintained. For further analysis see e.g. Barents 2010: 709
[VI] For further analysis see Peers 2006.

[VII] For further analysis see Monar 1998: 320; Peers 2006.
[VIII] The European Union Counter-Terrorism Strategy, Doc. 14469/4/05 of 30 November 2005.
[IX] Declaration on Combating Terrorism, European Council, Brussels, 25 March 2004.
[X] Conclusions and Plan of Action of the Extraordinary Council Meeting, 21 September 2001, Press Release 21/9/2001 No 140/01.
[XI] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States, OJ L 190/1. This measure enhances cooperation among national judicial authorities, which are required to recognise with the minimum formalities (and in the shortest time) requests for the surrender or the arrest of a person made by the judicial authority of another Member State.
[XII] Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ L 164/3.
[XIII] Presidency Conclusion of the Tampere European Council, 15 and 16 October 1999.
[XIV] Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63/1.
[XV] Directive 2005/60/EC of the European Parliament and of the Council of the European Union of 26 October 2005 on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing, OJ L 309.
[XVI] S/RES/1267 (1999) of 15 October 1999.
[XVII] S/RES/1373 (2001) of 28 September 2001.
[XVIII] See *supra* note n. viii.
[XIX] On the origin of targeted sanctions (also called smart sanctions or individual sanctions) see e.g.: Ciampi 2007: 42; Lang 2002.
[XX] The first resolution against the Taliban and Al Qaeda lacking the link with the Afghan state was Resolution 1390, S/RES/1390 (2002) of 28 January 2002.
[XXI] S/RES/1333 (2000) of 19 December 2000.
[XXII] Since the entry into force of Resolution 1988 (2011) listed Taliban and listed individuals and entities of Al-Qaeda and its affiliates will be treated differently. Two different lists are now available.
[XXIII] See for example the most recent Resolution 1989 (2011).
[XXIV] Guidelines of the Committee for the conduct of its work, adopted on 7 November 2002, as amended lastly on 26 January 2011. Available at: http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.
[XXV] The sanctions Committee was established by Resolution 1267 (1999), which states that it has the duty to update the list of international terrorist suspects on the base of the submissions received by Member States.
[XXVI] S/RES/1904 (2009) of 17 December 2009.
[XXVII]This essay mostly uses the current terminology introduced by the Treaty of Lisbon. In this case the term European Community is employed since, before the Lisbon amendments, the Treaties only conferred express legal personality to the EC.
[XXVIII] The Individual aspect distinguishes targeted sanctions from traditional State sanctions. These last ones are indiscriminately directed against all or some sectors of the economy of a State, whereas targeted sanctions affect the economic and personal sphere of selected individual explicitly named within the act.
[XXIX] Art. 4 of the United Nations Charter states that only States can be member of the UN.
[XXX] The expansionist use of Treaty provisions to provide a strong legal basis for Union's competence to impose economic sanctions is underlined by Cremona 2009: 559.
[XXXI] The pre-Lisbon relevant articles for the imposition of targeted sanctions were: art 301, 60 and 308 TEC.
[XXXII] See *infra* next paragraphs, in particular, "The amendments introduced by the Treaty of Lisbon".
[XXXIII] CFI, Case T-315/01, *Kadi v. Council of the European Union and Commission*, 2005 ECR II-3649.
[XXXIV] In particular, ECJ, Case C-130/10, *European Parliament v. Council of the European Union*; ECJ, Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission, Council of the European Union and the UK v. Kadi.*
[XXXV] The Court of First Instance was renamed General Court by the Treaty of Lisbon, see note n. v.
[XXXVI] ECJ, Joined Cases C-415/05 P and C-402/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union*, 2008 ECR I-6351.
[XXXVII] The first one relates to UNSC Resolution 1267 (1999) and 1989 (2011) concerning Al-Qaeda and associated individuals and entities implemented by Council Regulation (EC) No 881/2002 as amended by Council Regulation (EU) No 1286/2009. The second one is the EU autonomous regime concerning foreign terrorist organisations operated by Council Regulation 2580/2001.
[XXXVIII] CFI, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union and UK*

(*OMPI*), 2006 ECR II-4665.
[XXXIX] Council Decision 2005/930/EC of 21 December 2005 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2005/848/EC, OJ L 340/64.
[XL] Council Regulation 2580/2001/EC of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L 344/70.
[XLI] CFI, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council*, cit., para. 91 ss.
[XLII] Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, OJ L 344/93.
[XLIII] In the string of cases following the first *OMPI* ruling, the Court carried out a stricter and in-depth review of the reasons justifying the maintenance of the alleged individuals on the list. See for example CFI, Case T-256/07, *Organisation des Modjahedines du peuple de l'Iran v Council of the European Union*, (*OMPI III*), 2008 ECR II-3019.
[XLIV] CFI, Case T-306/01, *Ahmed Ali Yusuf and al Barakaat International Foundation* v *Council of the European Union*, 2005 ECR II-3533.
[XLV] Cited *supra* note xxxiii.
[XLVI] Council Regulation 881/2002/EC of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, Al-Qaeda network and the Taliban, and repealing Regulation No 467/2001/EC, OJ L 139/9.
[XLVII] Within this article the current nomenclature is used. In fact, since the Treaty of Lisbon on the 1st December 2009, the European Community has ceased to exist. However, the act challenged in the *Kadi* case was an EC act, see *supra* note n. xlvi.
[XLVIII] Opinion of Mr. Advocate General Poiares Maduro delivered on 16 January 2008 in Joined Cases C-415/05 and C-402/05, *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union.*
[XLIX] ECJ, Joined Cases C-415/05 P and C-402/05 P, cit., para. 316.
[L] Council Regulation 1286/2009/EU of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban, OJ L 346/42.
[LI] Council Framework Decision 2002/475/JHA, cit., see note xii.
[LII] Council Framework Decision 2002/584/JHA, cit., see note xi.
[LIII] The question concerning Community competence was handled by the CFI, the ECJ and by the AG Maduro, both in the first *Kadi* case and in the following appeal. Even though all three have agreed to recognise Community competence, they disagree on the proper legal bases.
[LIV] The ordinary legislative procedure corresponds to the old co-decision and is enshrined within article 294 TFEU.
[LV] ECJ, Case C-130/10, *European Parliament v. Council of the European Union*, now pending.
[LVI] Council Regulation (EU) 1286/2009, cit.
[LVII] Committee on Legal Affairs, The Chair, 4 December 2009, AL/798553EN.doc
[LVIII] Opinion of Mr. Advocate General Bot delivered on 31 January 2012 in Case C-130/10, *European Parliament v Council of the European Union.*
[LIX] Council Regulation (EU) 1286/2009, cit, recital 11 of the preamble.
[LX] Opinion of Mr. Advocate General Bot in Case C-130/10, cit., para. 72 ss.
[LXI] Opinion of Mr. Advocate General Bot in Case C-130/10, cit., para. 81.
[LXII] However it should be noted that article 60 TEC was included within the chapter on capital and payments, whereas article 75 TFEU forms part of the general provisions on the AFSJ.
[LXIII] Also AG Bot upheld this view, see Opinion of Mr. Advocate General Bot in Case C-130/10, cit., para. 69.
[LXIV] The EP is of that opinion. Opinion of Mr. Advocate General Bot in Case C-130/10, cit., para. 26.
[LXV] Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice and Protocol No 22 on the position of Denmark.
[LXVI] Declaration No. 65 by the United Kingdom of Great Britain and Northern Ireland on Article 75 of the Treaty on the Functioning of the European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.
[LXVII] Under article 3 Protocol No. 21, cit.
[LXVIII] See for example article 24 TEU second paragraph and article 275 TFEU relating to CFSP. See also

Peers 2008.

[LXIX] To be more precise the problem concerned the fact that the interpretation provided by the Court of the condition of "direct and individual concern" prevented standing for individuals against act of general and direct applicability. See Barents 2010.

[LXX] See *supra* note n. lv.

[LXXI] ECJ, Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission, Council of the European Union and the UK v. Kadi*, still pending.

References

- Andersson T. et al., 2003, 'EU Blacklisting: The Renaissance of Imperial Power, but on a Global Scale', in *European Business Law Review*, 111-141.
- Arcari M., 2009, 'La tutela dei diritti umani nel quadro dell'attività del Comitato delle sanzioni del Consiglio di Sicurezza dell'ONU', in Gargiulo P. and Vitucci M.C. (eds), *La tutela dei diritti umani nella lotta e nella guerra al terrorismo*, Editoriale Scientifica, Napoli, 55-75.
- Arcari M., 2007, 'Sviluppi in tema di tutela dei diritti degli individui iscritti nelle liste dei Comitati delle sanzioni del Consiglio di Sicurezza', in *Rivista di diritto internazionale*, 3, 657-680.
- Arcari M., 2006, 'Tutela dei diritti umani e misure del Consiglio di Sicurezza', in *La tutela internazionale dei diritti umani*, Pineschi L. (eds), Milano, 41-66.
- Argomaniz J., 2009, 'Post 9/11 institutionalisation of European Union counter-terrorism: emergence, acceleration and inertia', in *European Security*, Vol. 18 no. 2, 151-172.
- Atteritano A., 2008, Targeted sanctions e tutela giurisdizionale', in Francioni F. et al. (eds), *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione Europea*, Giuffré, 423-459.
- Barbe E., 2002, 'Une triple étape pour le troisième pilier de l'Union Européenne – mandat d'arrêt européen, terrorisme et EUROJUST', in *Revue du marché commun et de l'Union Européenne*, no. 454, 5-9.
- Barents R., 2010, 'The Court of Justice after the Treaty of Lisbon', in *Common Market Law Review*, Vol. 47, 709-728.
- Bassu A., 2007, *Il mantenimento della pace nel diritto dell'Unione Europea*, Giuffré.
- Bianchi A., 2007, 'Assessing the Effectiveness of the UN's Security Council Anti-terrorism Measures: The Quest for Legitimacy and Cohesion', in *European Journal of International Law*, Vol. 17 no.5, 881-919.
- Bierstecker T. and Eckert S., 2009, *Addressing Challenges to Targeted Sanctions: An Update of the 'Watson Report'*, White Paper prepared by the Watson Institute – Targeted Sanctions Project.
- Bierstecker T. and Eckert S., 2006, *Strengthening Targeted Sanctions Through Fair and Clear Procedures*,
- Bore Eveno V., 2006, 'Le contrôle juridictionnel des résolutions du Conseil de Securité: vers un constitutionnalisme international?', in *Revue Générale de Droit International Public*, 827-859.
- Bossong R., 2008, 'The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance', in *Journal of Common Market Studies*, Vol. 46 no. 1, 27-48.
- Cameron I., 2006, *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, Council of Europe, available at www.coe.it.
- Cannizzaro E., 2009, 'Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the *Kadi* Case', in *Yearbook of European Law*, 593-600.
- Casolari F., 2008, 'L'accesso degli individui alla giustizia rispetto alle misure di recepimento, nell'ambito dell'Unione Europea, delle decisioni del Consiglio di Sicurezzain material di lotta al terrorismo internazionale', in Francioni F. et al. (eds), *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione Europea*, Giuffré, 533-565.
- Cassese S., 2008, 'Ordine comunitario e ordine globale', in *Giornale di diritto amministrativo*, n.10, 1091-1092.
- Ciampi A., 2007, *Sanzioni del Consiglio di Sicurezza e diritti umani*, Giuffré, Milano.
- Conforti B., 2006, 'Decisioni del Consiglio di sicurezza e diritti fondamentali in una bizzarra sentenza del Tribunale comunitario di primo grado', in *Il diritto dell'Unione Europea*, 333-345.

- Conforti B., 2000, *The Law and Practice of the United Nations*, The Hague.
- Couzigou I., 2008, 'La lutte du Conseil de Sécurité contre le terrorisme international et les droits de l'homme', in *Revue Générale de Droit International Public*, 49-84.
- Cremona M., 2009, 'EC Competence, 'Smart Sanctions', and the *Kadi* Case', in *Yearbook of European Law*, 559-592.
- De Burca G., 2009, *The European Court of Justice and the International Legal Order after Kadi*, Jean Monnet Working Paper no. 01/09, http://centers.law.nyu.edu/jeanmonnet/papers/09/090101.html.
- De Sena P. and Vitucci M.C., 2009, 'The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values', in *European Journal of International Law*, Vol. 20 no.1, 193-228.
- Eckes C., 2012, 'EU Counter-Terrorist Sanctions against Individuals: Problems and Perils', in European Foreign Affairs Review, 17, no. 1, 113-132.
- Eckes C., 2009, *EU Counter-Terrorist Policies and Fundamental Rights. The Case of Individual Sanctions*, Oxford.
- Eckes C., 2007, Case-note, Case T-228/02 *Organisation des Modjahedines du people d'Iran* v. *Council and UK* (*OMPI*), in *Common Market Law Review*, Vol. 44, 1117-1129.
- Eeckhout P., 2011, *EU External Relations Law*, Oxford, 501-548.
- Eeckhout P., 2009, 'Kadi and Al Barakaat: Luxembourg is not Texas or - Washington DC", first appeared on "EJIL: Talk!', the blog of the European Journal of International Law, available at: www.ejiltalk.org.
- Eeckhout P., 2007, 'Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit', in *European Constitutional Law Review,* Vol. 3, 183-206.
- Eeckhout P., 2000, 'The European Court of Justice and the "Area of Freedom, Security and Justice": Challenges and Problems', in O'Keeffe D. and Bavasso A. (eds), *Judicial Review in European Union Law*, The Hague, 153-166.
- Fabbrini F., 2009, 'The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice', in *Yearbook of European Law*, 664-697.
- Fijnaut C., 2008, 'Controlling Organized Crime and Terrorism in the European Union', in Bassiouni M. Cherif et al. (eds), *European Cooperation in Penal Matters: Issues and Perspectives*, CEDAM, 243-263.
- Flore D., 2009, *Droit pénal européen. Les enjeux d'une justice pénale européenne*, Bruxelles.
- Gaja G., 2009, 'Are the Effect of the UN Charter under EC Law Governed by Article 307 of the EC Treaty?', in *Yearbook of European Law*, 610-615.
- Gattini A., 2009, Case-note, Joined Cases C-402/05 P & C-415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation* v. *Council and Commission*, judgment of the Grand Chamber of 3 September 2008, in *Common Market Law Review*, Vol. 46, 213-239.
- Giannelli A., 2008, 'L'«autonomia» del sistema giuridico comunitario rispetto al diritto delle Nazioni Unite', in *Rivista di diritto internazionale*, 1078-1084.
- Gestri M., 'Portata e limiti del diritto individuale di accesso alla giustizia nell'ordinamento dell'Unione Europea', in Francioni F. et al. (eds), *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione europea*, Milano, 463-499.
- Guild E., 2008, 'The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the "Terrorist Lists"', in *Journal of Common Market Studies*, Vol. 46 no. 1, 173-193.
- Halberstam D. and Stein C., 2009, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Fundamental Rights in a Plural World Order' in *Common Market Law Review*, Vol. 46, 13-72.
- Husabø E. J., 2005, 'The Implementation of New Rules on Terrorism through the Pillars of the European Union', in E. J Husabø and A. Strandbakken (eds), *Harmonization of Criminal Law in Europe*, Oxford, 53-78.
- Kautrakos P., 2008, 'Legal Basis and Delimitation of Competence in EU External Relations', in Cremona M. and De Witte B. (eds), *EU Foreign Relations Law*, Oxford, 171-198.

- Lagrange P., 2008, 'Responsabilité des états pour actes accomplis en applications du chapitre VII de la Charte des Nations Unies', in *Revue Générale de Droit International Public*, 85-110.
- Lang A., 2002, *Le risoluzioni del Consiglio di sicurezza delle Nazioni Unite e l'Unione Europea*, Milano.
- Lavranos N., 2009, 'The Impact of the *Kadi* Judgment on the International Obligations of the EC Members States and the EC', in *Yearbook of European Law*, 616-625.
- Mitsilegas V., 2009, *EU Criminal Law*, Oxford.
- Monar J., 1998, 'Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation', in *European Law Review*, Vol. 23, 320-335.
- Monar J., 2007, 'Common Threat and Common Response? The European Union's Counter-Terrorism Strategy and its Problems', in *Government and Opposition*, Vol. 42 no. 3, 292-313.
- Nettesheim M., 2007, 'U.N. Sanctions Against Individuals – a Challenge to the Architecture of the European Union Governance', in *Common Market Law Review*, Vol. 44, 567-600.
- Parisi N. and Rinoldi D., 1996, *Giustizia e affari interni nell'Unione europea*, Torino.
- Pavoni R., 2009, 'Freedom to Choose the Legal Mean for Implementing UN Security Council Resolutions and the ECJ *Kadi* Judgment: A Misplaced Argument Hindering the Enforcement of International Law in the EC', in *Yearbook of European Law*, 626-636.
- Peers S., 2008, 'Finally "Fit for Purpose"? The Treaty of Lisbon and the End of the Third Pillar Legal Order', in *Yearbook of European Law*, Vol. 27, 47-64.
- Peers S., 2007, 'Salvation Outside the Church: Judicial Protection in the Third Pillar after the *Pupino* and *Segi* Judgements', in *Common Market Law Review*, Vol. 44, 883-929.
- Peers S., 2006, *EU Justice and Home Affairs Law*, Oxford.
- Pirrone P., 2009, 'Attuazione delle risoluzioni del Consiglio di sicurezza contro il terrorismo e tutela giurisdizionale dei diritti fondamentali nell'ordinamento comunitario: la sentenza della Corte di giustizia relativa ai casi *Kadi* e Al *Barakaat*', in *Diritti umani e diritto internazionale* fasc. 1, 55-83.
- Poli S. and Tzanou M., 2009, 'The *Kadi* Rulings: A Survey of the Literature', in *Yearbook of European Law*, 533-558.
- Radicati Di Brozolo L. G. and Megliani M., 2004, 'Freezing the Assets of International Terrorist Organizations', in A. Bianchi (ed), *Enforcing International Law Norms Against Terrorism*, Oxford, 377-414.
- Reich J., 2008, 'Due Process and Sanctions Targeted Against Individuals Pursuant to Resolution 1267 (1999)', in *Yale Journal of International Law* Vol. 33. Available at SSRN: http://ssrn.com/abstract=1268163
- Salerno F., 2009, 'Quale « comunità di diritto » per il signor Kadi ?', *Rivista di diritto internazionale*, fasc. 1, 110-116.
- Sandulli A., 2008, 'I rapporti tra diritto europeo ed internazionale. Il caso *Kadi*: un nuovo caso *Solange*?', in *Giornale di diritto amministrativo* n. 5, 513-520.
- Savino M., 2008, 'Libertà e sicurezza nella lotta al terrorismo: quale bilanciamento?', in *Giornale di diritto amministrativo* n. 10, 1096-1099.
- Sciso E., 2005, 'Fundamental rights and article 103 of the UN Charter before the Court of First Instance of the European Communities', in *The Italian Yearbook of International Law* Vol. XV,137-151.
- Spaventa E., 2008, 'Fundamental rights and the interface between second and third pillar', in Dashwood A. and Maresceau M. (eds), *Law and Practice of EU External Relations*, Cambridge, 129-151.
- Tomuschat C., 2009, 'The *Kadi* Case: What Relationship is there between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?', in *Yearbook of European Law*, 654-663.
- Tridimas T. and Gutérrez-Fons J. A., 2009, 'EU Law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress?', available at: www.coleurop.be
- Van Den Herik V., 2007, 'The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual', in *Leiden Journal of International Law* no. 20, 797-807.

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The Euro-Area Crisis: A First Legal Analysis

by

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Abstract

What should the European Union do to challenge the Eurozone crisis? Examining the recent debate, one can identify the following options to overcome the EU's institutional crisis:

1. reform of the EU treaties;
2. enhanced cooperation;
3. the conclusion of an international agreement.

In this brief note, I am going to stress both the negative and the positive aspects of these options, trying to read them in light of the constitutional dynamics of the EU.

Key-words

Crisis, Reform of EU Treaties, Enhanced Cooperation, Asymmetry, Lisbon Treaty

"It is common in literature, as well as in the broader political discourse on Europe, to think of the European Union (EU) as a one-way street towards ever-greater integration. Such a viewpoint is well captured in the colloquial "bicycle theory" of European integration, which holds that – —just as a cyclist – —the EU's survival depends on a constantly forward trajectory, with stasis leading to collapse.- The recent, and continuing, sovereign debt crises of several EU states has cast doubt on this accepted wisdom."

M.Turk, "Implications of European Disintegration For International Law", *Columbia Journal of European Law*, 2011, 395 ff., 396.

1. Listing the Alternatives: A Constitutional Appraisal

What should the European Union do to challenge the Eurozone crisis? This is indeed a crucial question and this note does not have the ambition to give a final answer to it. My more modest aim is to develop the institutional options that have been taken into account in the last few months and to explore their impact on the constitutional architecture of the EU.

Examining the recent debate, one can identify the following options to overcome the EU's institutional crisis:

1. reform of the EU treaties;
2. enhanced cooperation;
3. the conclusion of an international agreement.

In this brief note, I am going to stress both the negative and the positive aspects of these options, trying to read them in light of the constitutional dynamics of the EU.

The first option (reform of the EU Treaties) would be the best one, but it also presents some disadvantages: it would be time consuming and it seems to be unworkable now due to the UK veto (although recently the British deputy prime minister Nick Clegg has predicted the UK will eventually drop its veto on EU fiscal reforms[I]).

However, it would be a mistake to discard the possibility of reforming the EU Treaties like some sort of non-option. In fact, the EU institutions might have an interest in

bringing the discipline of Euro-governance back into the Treaties in the near future, and there are several think-tanks that are currently proposing something along these lines.[II].

The revision of the EU Treaties would be "consistent" with the recent rounds of constitutional politics in the EU. The current crisis is in fact the confirmation of what has been called the "the semi-permanent Treaty revision process" (de Witte, 2002) and the unfinished constitutionalisation of the EU (Snyder, 2003)

According to this idea, the semi-permanent revision process of the Treaties would make the attempt to transpose the idea of Constitution to a supranational level very difficult: the Constitution, in fact, should be the fundamental charter, that is, a document characterised by a certain degree of resistance and continuity. Against this background, the European Treaties seem unable to lead social forces: they can only "reflect the historical movements", thus appearing to be mere snapshot constitutions. This is precisely what Besselink argues, writing that "a formal EU 'constitution', if ever realized, would only be a momentary reflection, no more than a snap-shot", hence the comparison with a *Grundgesetz* (Besselink, 2008)[III]. In other words the EU Constitution (partly written and partly not) would limit itself to the "codification" of the constitutional dynamics that emerged through changing circumstances. This trend seemed to be concluded with the coming into force of the Reform Treaty, but now the implications of the Euro sovereign debt crisis seem to need another round of constitutional politics.

Regardless of the possible contents of a new Treaty[IV], this reform would be the next link of this chain of reforms, it would confirm the nature of the EU Treaties as a mere snapshot constitution and would give new blood to the EU constitutional odyssey (Martinico, 2011).

However, Treaty reform is actually just one of the possible solutions to the institutional impasse triggered by the European debt crisis. Potentially, in fact, other solutions could be found, namely represented by the enhanced cooperation and by the conclusion of an international agreement to be understood as external to the wording of the EU Treaties.

The two alternative options listed above would be conducive to asymmetrical solutions and there is nothing strange in this: asymmetry is an option which has been frequently experimented within all the federalising processes (Palermo, 2007; Watts, 2005), especially in those federal or quasi-federal contexts characterised by the coexistence of

different legal and cultural backgrounds (Canada, for instance). One should take this into account before conceiving, for instance, enhanced cooperation as a form of "constitutional evil" conducive to a "disintegrative" multi-speed Europe.

On the contrary, asymmetry might serve as an instrument of constitutional integration as comparative law shows. In fact, 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 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[V].

Enhanced cooperation belongs to the universe of the asymmetric option: it aims at ensuring, at the same time, unity and diversity. In fact it allows member States to experiment with different forms of integration without "shutting the door" to those other member States. What was established by the Amsterdam Treaty and reformed by the Treaty of Nice can be conceived as a sort of *extrema ratio* to be exploited when the Council realises that the goals of integration cannot be achieved by relying on the Treaties' provisions and following the normal dynamics of the European integration process.

The legal framework is today represented by Article 20 TEU[VI] and Articles 326–334 TFEU: in order to be "activated" it needs a minimum number of participants (nine States) and shall be authorised by the Council and be deliberated according to Article 329 TFEU[VII].

In any case such a cooperation – within the EU – encounters some procedural safeguards: it shall be understood as open to any other member States that could wish to join it at a later date. Moreover, enhanced cooperation shall respect the fundamental principles of the *acquis communautaire* and it may not insist on areas of exclusive competence of the EU.

Moreover, enhanced cooperation could be an option *per se* but it could be also used together with another instrument, namely the *passerelle* clause, governed by Article 48 TEU.

In fact, Article 333 TFUE *expressis verbis* allows for the use of the *passerelle* within enhanced cooperation:

> *"1. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall act unanimously, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act by a qualified majority.*
> *2. Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall adopt acts under a special legislative procedure, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act under the ordinary legislative procedure. The Council shall act after consulting the European Parliament.*
> *3. Paragraphs 1 and 2 shall not apply to decisions having military or defence implications.".*

Exploiting this clause in our case might be problematic, however. First of all, it should be excluded for monetary policy *stricto sensu* conceived, since it is matter of exclusive competence of the EU (and so excluded thanks to the combination of Article 329 TFEU and Article 3 TFEU). The euro is just a part of the monetary policy of the EU since it does not exclude other forms of monetary policy that concern all the member States of the EU as the TFEU seems to acknowledge by distinguishing between provisions specific to member States whose currency is the euro (Article 136 TFEU) and provisions applicable to all the member States of the EU (Articles 119–135 TFEU). However it might be argued that:

1. it is not possible to separate monetary policy from the complex design of the Treaties (due to, among other things, their possible economic impact);
2. hence its discipline may not be altered through decisions taken by majority.

A different discourse might be applied with regard to the possibility of using enhanced cooperation in fiscal matters: from a theoretical point of view, this might be legitimate, but enhanced cooperation in this field would probably have an impact on the common market[VIII]. This point should be evaluated from an economic point of view also, not limiting the discourse to a mere legal level.

This risk is seemingly foreshadowed in the text of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, in the part that calls

for an active use of enhanced cooperation "without undermining the internal market" (Article 10).

The advantages of enhanced cooperation are obvious: it could avoid a time-consuming reform of the Treaties. It could also demonstrate the maturity of the current constitutional architecture of the Treaties, since it is an instrument governed by the current fundamental charter of the EU, without the necessity of finding a solution to the European debt crisis out of the present system.

Finally, enhanced cooperation would not lead to an irreducible "rupture" with the UK or with other member States which could decide to join the enterprise at a later date, whereas such a reunion would be much more complicated in the case of a "pure" international agreement.

Again, this course of action might seem outdated in light of the recent political developments, but if one takes a closer look at the draft of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union it is possible to notice that the use of enhanced cooperation techniques is recurrently advocated therein. Enhanced cooperation still remains a valid option, yet its use is encouraged in a text which is formally out of the Treaties' armoury, and this is why the concerns expressed above might apply nevertheless[IX].

2. The Solution Adopted: Back to Intergovernmentalism?

As recalled at the beginning of this note, asymmetry is an institutional solution experienced by many constitutional and even international systems. The EU already knows forms of asymmetry and enhanced cooperation[X] is just one of these, together with the opting-out mechanism (Miles, 2005), and the open method of coordination (Scharpf, 2007).[XI]

Even in international law, asymmetry is well known. A confirmation of this comes from WTO law where, for instance, the blockage of the negotiations of the Doha Round has been partly bypassed thanks to the conclusion of some bilateral and multilateral agreements (i.e. Preferential Trade Agreements)[XII]. These kinds of agreements are permitted by Article XXIV of GATT (the General Agreement on Trade and Tariffs): they could be either "WTO + (plus)" if implying a deepening of obligations on matters

pertaining to the WTO, or "WTO x (extra)" if insisting on matters that do not belong to the WTO (e.g. protection of the environment or foreign investments)[XIII].

To what extent can this model be exported at the EU level? There are some differences that should be taken into account before comparing these models, and these rest in the *openness clause* (i.e. the possibility for the other member States to join the enhanced cooperation) which ensures the sustainability of this form of asymmetry in the EU context (Cantore, 2012). Having said that, can we imagine some "EU +" (or "EU x") agreements as a way to overcome this crisis or to constitutionalise the Euro-group?

What would be the impact of such agreements on the EU institutional architecture? In this sense it might be possible to apply the provision for enhanced cooperation (Article 330 TFUE):

"All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote".

An international law agreement among the member States – and here I come to the last institutional option – could be used in order to produce an effect which might be defined as equivalent if compared with that pursued by enhanced cooperation, but with a minor role played by the supranational actors and with a consequent moving back in terms of supranationalism and return to the logic of international law.

The actor that could be excluded from the possible dynamics of this agreement is the one that has traditionally acted as the European federator (Starr-Deelen-Deelen: 1996): the European Court of Justice. Moreover, from a legal point of view, this agreement should be assessed in light of the principle of loyal cooperation (former Article 10 ECT, now partly substituted by Article 4 EUT). Even the possibility of concluding international agreements by the member States encounters limitations arising from this principle of loyal cooperation like those codified in Article 351 TFEU.

In my view an international agreement aimed at covering a sphere of competence that might not be covered by enhanced cooperation would be inconsistent with the principle of loyal cooperation. This conclusion brings us back to the necessity to assess the compatibility between this agreement and the goals of the EU. The agreement in question

is rich in references to the EU treaties (see Article 2[XIV]) but there are some clauses that are at least ambiguous in this respect like, for instance, Article 8[XV].

The package included in the "Statement by the Euro Area Heads of State or Government" – issued at the end of the European Council held in Brussels on 9 December 2011 – proposed a set of measures designed to face the European debt crisis: a reinforced architecture for the economic and monetary Union, the strengthening of stabilisation tools, the acceleration of the entry into force of the European Stability Mechanism (ESM) treaty, a stronger policy coordination and governance and, above all, the creation of a new fiscal compact[XVI].

Notwithstanding the proposed connections between this agreement and the European Treaties it is difficult to understand how to involve the European institutions in the functioning of this agreement:

> *"I fail to see, though, how the European Commission [can] participate in the monitoring of fiscal stability in this case. Enhanced cooperation (Art. 20 TEU and art. 329 TFEU) seems more appropriate. The problem there is that only the European Commission can propose an enhanced cooperation to the Council, and the European Parliament must also approve it. This can lead to substantial delays of the procedure[XVII]". (Georgiev, 2011).*

The present author shares these doubts.

3. Final Remarks

Scholars have recently stressed that, despite the intergovernmental nature of this agreement, its conclusion does not imply an alteration of the supranational character of the EU enterprise:

"This is a tempting, but I think, misleading, conclusion. Whereas it would seem that national governments have had the upper-hand in maintaining ownership and control of the process of integration at the expense of the Union's institutions, particularly in the Euro-crisis, it is important to remember that the current political drama unfolding in the crisis is completely unscripted from the EU's viewpoint. To a large extent, there is simply no law available to empower supranational institutions to act when a Eurozone member goes bust and the currency itself is threatened and such legal provision, where it does exist, is by way of an express prohibition of the EU institutions (notably the ECB) taking much of the palliative measures touted in the media (e.g. Art. 123 & 125 TFEU). . As the ECJ never tires of telling us, the EU is a community based on the rule of law which, in

essence, means the principle of conferral, such that unlike in state constitutional systems, Union institutions have no residual power to govern in the public interest given that their powers are "'legalized'" to within an inch of their lives. Even the residual powers clause in the treaties, Article 352 of the TFEU, lacks the requisite flexibility to deal with crisis comparable to the prerogative or emergency powers enjoyed by national administrations… However, even if it seems that the position has inverted from when Weiler was writing in the early 80s, the proposals being put forward for a new Treaty as the last ditch attempt to save the currency, with a rigid implementation of the rules of the currency enforced by inter alia the ECJ , may mark a return to the relevance of supranational law in pushing forward the integration process, promoting the role of the other EU institutions in its wake."[XVIII] (Mac Amhlaigh, 2011).

I do not agree with this conclusion since one of the reasons for amending the Treaties is the fact that the current Treaties have actually shown their inadequacy, as Ruffert pointed out: "From the beginning, the Member States' rescuing activity has been under close legal scrutiny by European legal scholars, and rightly so. There are good reasons to submit that this policy is in breach of important provisions of the TFEU" (Ruffert, 2011: 1785)[XIX].

Should we consider such a return to the intergovernmental method irreversible? What can we do in order to ensure – at least – consistency with the European Treaties? What should we do in order to involve as much as possible the European institutions, starting with the Commission, the European Parliament and the ECJ?

The amendments proposed by the European Parliament went in that direction. In fact, the Parliament proposed integrating the text of the agreement as follows, by adding a provision that would limit the duration of the new treaty. The latest version (the February draft[XX]) of the Treaty reads: "Within five years at most following the entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in compliance with the provisions of the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union."[XXI].

The agreements (now called "Treaty") reached by the Heads of State and government of the member States may represent a relief mission in order to overcome the current European debt crisis, but the price to be paid could be very high. Much better would be to revise the Treaties, but the logic of the necessity of urgent measures and the opposition of the UK does not seem to permit this kind of intervention.

It has been argued that supranational constitutionalism would play a complementary role in the attempt to protect some goods that are deemed as fundamental by all the levels of the multi-layered constitutional system (Poiares Maduro, 2011)[XXII]. Intergenerational equity and sustainability seem to be two of these goods. The impression one gains from the current scenario, however, is that of an EU which is currently struggling with its own constitutional limits, putting pressure on national institutions and actors (the Greek and Italian cases are emblematic from this point of view): are we sure that this increases EU's legitimacy? Events will tell whether constitutional pluralism will be the best constitutional theory possible for the EU.

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[I] "British deputy PM: EU veto is 'temporary'", 10 January 2012, http://euobserver.com/19/114817

[II] For instance see the "Appeal to European Leaders for the Euro and the European stability and development" launched by the Centre for Studies on Federalism, http://csfederalismo.it/index.php/en/component/content/article/17-convegni/2317-appello-ai-leader-europei-per-un-euro-e-uneuropa-della-stabilita-e-dello-sviluppo

[III] In fact, according to Besselink (Besselink, 2008), the notion of Constitution itself as applied to the EU results in an ambiguous picture, with that of a fundamental law (*Grundgesetz* rather than *Verfassung*) being more suitable. This seems to imply a sceptical approach to the issue of the European Constitution's formalisation, conceived as a real constitutional moment. The author himself reached this conclusion after having distinguished between two categories of constitution: revolutionary and evolutionary. "These revolutionary constitutions tend to have a blueprint character, wishing to invent the design for a future which is different from the past ... Old fashioned historic constitutions are, to the contrary, evolutionary in character". When observing evolutionary/historical constitutions, one realises that "Codification, consolidation and adaptation are more predominant motives than modification. The constitution reflects historical movements outside itself." (Besselink, 2008).

[IV] See the proposals made by Andrew Duff (ALDE, UK) http://www.europolitics.info/pdf/gratuit_en/304954-en.pdf

[V] The word asymmetry has acquired a variety of meanings: when talking about asymmetries one can distinguish between financial and constitutional asymmetry, or between *de jure* and *de facto* asymmetry. *De jure* asymmetry "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).

[VI] Art. 20 TEU: 1. Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the Treaty on the

Functioning of the European Union. Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.
2. The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 329 of the Treaty on the Functioning of the European Union..
3. All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote. The voting rules are set out in Article 330 of the Treaty on the Functioning of the European Union..
4. Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the acquis which has to be accepted by candidate States for accession to the Union".

[VII] "1. Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Treaties, with the exception of fields of exclusive competence and the common foreign and security policy, shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it shall inform the Member States concerned of the reasons for not doing so.
Authorisation to proceed with the enhanced cooperation referred to in the first subparagraph shall be granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament.
2. The request of the Member States which wish to establish enhanced cooperation between themselves within the framework of the common foreign and security policy shall be addressed to the Council. It shall be forwarded to the High Representative of the Union for Foreign Affairs and Security Policy, who shall give an opinion on whether the enhanced cooperation proposed is consistent with the Union's common foreign and security policy, and to the Commission, which shall give its opinion in particular on whether the enhanced cooperation proposed is consistent with other Union policies. It shall also be forwarded to the European Parliament for information.
Authorisation to proceed with enhanced cooperation shall be granted by a decision of the Council acting unanimously".

[VIII] See the editorial in the last issue of *Common Market Law Review* (1/2012), 1 ff., at page 12

[IX] See the Preamble of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ("NOTING, in particular, the wish of the Contracting Parties to make more active use of enhanced cooperation, as provided for in Article 20 of the Treaty on European Union and in Articles 326 to 334 of the Treaty on the Functioning of the European Union, without undermining the internal market, as well as to make full recourse to measures specific to the Member States whose currency is the euro pursuant to Article 136 of the Treaty on the Functioning of the European Union, and to a procedure for the ex ante discussion and coordination among the Contracting Parties whose currency is the euro of all major economic policy reforms planned by them, with a view to benchmarking best practices") and its Article 10 ("In accordance with the requirements of the European Union Treaties, the Contracting Parties stand ready to make active use, whenever appropriate and necessary, of measures specific to those Member States whose currency is the euro as provided for in Article 136 of the Treaty on the Functioning of the European Union and of enhanced cooperation as provided for in Article 20 of the Treaty on European Union and in Articles 326 to 334 of the Treaty on the Functioning of the European Union on matters that are essential for the smooth functioning of the euro area, without undermining the internal market").

[X] See the recent decision in the fields of divorce and unitary patent. On this, see Beneyto (2009) and Cantore (2012). See in general, de Burca - Scott (2000). From a slightly different perspective, see Bauböck (2001).

[XI] "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 posée. 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" (Ibidem).

[XII] "We always use bilateral free trade agreements to move things beyond WTO standards. By definition, a bilateral trade agreement is 'WTO plus'. Whether it is about investment, intellectual property rights, tariff structure, or trade instrument, in each bilateral free trade agreement we have the 'WTO plus' provision." (Pascal Lamy, *Jakarta Post*, 9 September 2004).

[XIII] On the content of these agreements, see Horn, Mavroidis and Sapir (2009)

[XIV] "1. This Treaty shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the European Union is founded, in particular Article 4(3) of the Treaty on European Union, and with European Union law, including procedural law whenever the adoption of secondary legislation is required.

2. The provisions of this Treaty shall apply insofar as they are compatible with the Treaties on which the Union is founded and with European Union law. They shall not encroach upon the competences of the Union to act in the area of the economic union".

[XV] See the first version of the agreement: "Any Contracting Party which considers that another Contracting Party has failed to comply with Article 3(2) may bring the matter before the Court of Justice of the European Union. The judgment of the Court of Justice of the European Union shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgment within a period to be decided by said Court. The implementation of the rules put in place by the Contracting Parties to comply with Article 3(2) will be subject to the review of the national Courts of the Contracting Parties". The new version states: "1. The European Commission is invited to present in due time to the Contracting Parties a report on the provisions adopted by each of them in compliance with Article 3(2). If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes in its report that a Contracting Party has failed to comply with Article 3(2), the matter will be brought to the Court of Justice of the European Union by one or more of the Contracting Parties. Where a Contracting Party considers, independently of the Commission's report, that another Contracting Party has failed to comply with Article 3 (2), it may also bring the matter to the Court of Justice. In both cases, the judgment of the Court of Justice shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgment within a period to be decided by the Court.

2. If, on the basis of its own assessment or of an assessment by the European Commission, a Contracting Party considers that another Contracting Party has not taken the necessary measures to comply with the judgment of the Court of Justice referred to in paragraph 1, it may bring the case before the Court of Justice and request the imposition of financial sanctions following criteria established by the Commission in the framework of Article 260 of the Treaty on the Functioning of the European Union. If the Court finds that the Contracting Party concerned has not complied with its judgment, it may impose on it a lump sum or a penalty payment appropriate in the circumstances and that shall not exceed 0,1 % of its gross domestic product. The amounts imposed on a Contracting Party whose currency is the euro shall be payable to the European Stability Mechanism. In other cases, payments shall be made to the general budget of the European Union.

3. This Article constitutes a special agreement between the Contracting Parties within the meaning of Article 273 of the Treaty on the Functioning of the European Union".

[XVI] "4. We commit to establishing a new fiscal rule, containing the following elements:

• General government budgets shall be balanced or in surplus; this principle shall be deemed respected if, as a rule, the annual structural deficit does not exceed 0.5% of nominal GDP.

• Such a rule will also be introduced in Member States' national legal systems at constitutional or equivalent level. The rule will contain an automatic correction mechanism that shall be triggered in the event of deviation. It will be defined by each Member State on the basis of principles proposed by the Commission.

We recognise the jurisdiction of the Court of Justice to verify the transposition of this rule at national level.
• Member States shall converge towards their specific reference level, according to a calendar proposed by the Commission.
• Member States in Excessive Deficit Procedure shall submit to the Commission and the Council for endorsement, an economic partnership programme detailing the necessary structural reforms to ensure an effectively durable correction of excessive deficits. The implementation of the programme, and the yearly budgetary plans consistent with it, will be monitored by the Commission and the Council.
• A mechanism will be put in place for the ex ante reporting by Member States of their national debt issuance plans." , http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/126658.pdf

[XVII] Georgiev, 2011.

[XVIII] Mac Amhlaigh, 2011.

[XIX] "To begin with, Article 125(1) TFEU is rather explicit: 'The Union shall not be liable for or assume the commitments of central Governments . . . of any Member State. . . A Member State shall not be liable for or assume the commitments of central Governments . . . of another Member State, …' In the present legal situation, a bailout by the Union (first sentence) or by one or more Member States (second sentence) is forbidden. As a result, the decision of the Eurogroup of 2 May 2010 concerning Greece, the establishment of the EFSF, the extension of both in 2011 and the Eurogroup's support for Ireland and Portugal are in breach of European Union law" (Ruffert, 2011: 1785).

[XX] http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/12/2&format=HTML&aged=0&language=EN&guiLanguage=en

[XXI] The previous version of this agreement read: "The Contracting Parties agree to bring the provisions of this Agreement as rapidly as possible within the framework of EU Law.
2. With a view to ensuring democratic accountability, the Contracting Parties, within 5 years of the entry into force of this Agreement, shall propose the amendment of the EU treaties in accordance with Article 48 TEU to integrate this Agreement and in particular its Article 13.
3. This agreement shall remain in force for 7 years from its entry into force".

[XXII] "First, European constitutionalism promotes inclusiveness in national democracies by requiring national political processes to take into account out-of-state interests that may be affected by the deliberations of those political processes. By committing to European integration, EU states accept to mutually open their democracies to the citizens of other Member States. This amounts to an extension of the logic of inclusion inherent in constitutionalism. Second, European constitutionalism allows national democracies to collectively regain control over transnational processes that evade their individual control. While in the former case we could talk of outbounded democratic externalities (States impacting on out-of-state interests) in the latter we can refer to inbounded democratic externalities (out-of-state decisions and processes affecting domestic interests). Third, European constitutionalism can also constitute a form of self-imposed external constitutional discipline on national democracies. There are many instances where domestic political malfunctions can be better corrected by external constraints. These may force national political processes to rationalise national policies that have, for example, become locked in into certain path-dependences or captured by a certain composition of interests. In many such instances, EU law's discipline rationalises and, often, reignites a more informed and genuinely open deliberation in the national political process." (Poiares Maduro, 2011).

References

- Bauböck, Rainer, 2001, "United in Misunderstanding? Asymmetry in Multinational Federations", ICE Working Paper series, no. 26, http://www.eif.oeaw.ac.at/downloads/workingpapers/IWE-Papers/WP26.pdf
- Beneyto, Jeronimo Maillo (ed.), 2009, "Unity and Flexibility in the Future of the European Union: The Challenge of Enhanced Cooperation", http://www.ceuediciones.es/documents/ebookceuediciones1.pdf
- Cantore, Carlo Maria, 2011, "We're one, but we're not the same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU", Perspectives, on Federalism, Vol. 3, Issue 3, 2011, E-1-21.

- de Burca, Grainne- Scott, Joanne (eds.), 2000, *Constitutional Change in the European Union*, Hart, Oxford
- de Witte, Bruno, 2002, "The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process", in P. Beaumont, C. Lyons and N. Walker (eds), *Convergence and Divergence in European Public Law*, Hart, Oxford, 39–57.
- Dion, Stéphane, 1999, "Notes for an Address by the President of the Privy Council and Minister of Intergovernmental Affairs", Mexico City, Mexico.
- Editorial Comments, 2012, *Common Market Law Review*, 1 ff,
- Georgiev, Vihar, 2011, "What's Behind the New Eurozone Fiscal Stability Union?", http://eulaw.wordpress.com/2011/12/09/whats-behind-the-new-eurozone-fiscal-stability-union/
- Horn, Henrik, Mavroidis, Petros and Sapir, André, 2009, "Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreement", http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1411066
- Mac Amhlaigh, Cormac, 2011, "The Dual Character of Supra-nationalism and the Euro-Crisis", http://eutopialaw.com/2011/12/07/the-dual-character-of-supra-nationalism-and-the-euro-crisis/#more-814
- Martinico, Giuseppe, 2011, "Constitutional Failure or Constitutional Odyssey? What Can We Learn From Comparative Law?", *Perspectives on Federalism*, E-51–77.Miles Lee, 2005, "Introduction: Euro outsiders and the politics of asymmetry", *Journal of European Integration,* 73 ff
- Palermo, Francesco, 2007, "Divided We Stand. L'asimmetria negli ordinamenti composti", A. Torre, L. Volpe, G.C. Feroni, E. Ceccherini, A. Rinella, M. Carducci, C. Casonato and T. Frosini (eds), *Processi di devolution e transizioni costituzionali negli Stati unitari (dal Regno Unito all'Europa)*, Giappichelli, Torino, 149–170.
- Poiares, Maduro Miguel, "The Three Claims of Constitutional Pluralism", 2011, http://cosmopolis.wzb.eu/content/program/conkey_Maduro_Three-Claims-of-Pluralism.pdf
- Ruffert, Matthias, 2011, " The European debt crisis and European Union law", *Common Market Law Review*, 1777–1805.
- Russell, Peter, 1992, *Constitutional Odyssey: Can Canadians Become a Sovereign People*? 1st edn, University of Toronto Press, Toronto.
- Scharpf, Fritz, 2007, "The European Social Model: Coping with the challenges of diversity", http://ideas.repec.org/p/zbw/mpifgw/028.html
- Snyder, Francis, 2003, "The Unfinished Constitution of the European Union: Principles, Processes and Culture" in J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism beyond the State*, Cambridge University Press, Cambridge, 55–73.
- Starr-Deelen, Donna – Deelen, Bart, 1996, "The European Court of Justice as a. Federator", *Publius*, 81-97
- Tarlton, Charles D., 1965, "Symmetry and Asymmetry as Elements of Federalism", *Journal of Politics*, 861–874.
- Theret, Bruno, 2002, *L'Union sociale canadienne dans le miroir des politiques sociales de l'Union européenne*, http://www.irpp.org/fr/pm/archive/pmvol3no9f.pdf
- Turk, Matthew 2011, "Implications of European Disintegration for International Law", *Columbia Journal of European Law*, 395 ff.
- Watts, Roland L., 2005, "A Comparative Perspective on Asymmetry in Federations", www.iigr.ca/pdf/publications/359_A_Comparative_Perspectiv.pdf

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