SANT'ANNA LEGAL STUDIES

STALS RESEARCH PAPER N. 8/2009

Giuseppe Martinico

TOO GOOD TO BE "RIGHT"? STRENGTHS AND WEAKNESSES OF A CONSTITUTIONAL APPROACH TO THE DEVELOPMENT DEBATE

Sant'Anna School of Advanced Studies

Department of Law

http://stals.sssup.it

ISSN: 1974-5656

TOO GOOD TO BE "RIGHT"? STRENGTHS AND WEAKNESSES OF A CONSTITUTIONAL APPROACH TO THE DEVELOPMENT DEBATE

Giuseppe Martinico

Abstract

In this paper I argue that cooperation for development may be seen as a technique of the second-modernity constitutionalism. I base this argument on its goal to correct the asymmetries produced by the economic globalization and its stress on the idea of development as a process of emancipation of the person, especially as concerns the last generation of such policies. Indeed, all conditionality policies may be understood as an attempt to translate the development discourse from the mere economic level to a more comprehensive level, including human rights.

This tension in the new cooperation for development policies - conceived as a vehicle to extend and affirm constitutional goods such as human rights - inevitably have paved the way for a constitutional approach to such issues.

This paper focuses on the possible consequences of a constitutional approach to the development debate.

Key-words

cooperation for development, globalization, constitutionalism, human dignity, imperialism

TOO GOOD TO BE "RIGHT"? STRENGTHS AND WEAKNESSES OF A CONSTITUTIONAL APPROACH TO THE DEVELOPMENT DEBATE

Giuseppe Martinico*

SUMMARY: 1. Introduction.- I part. Scent of Constitution?- 2. The constitutional principles of the cooperation for development.- B). The internationalist principle.- C). The solidarity principle.- D). The "souverainiste" principle. - 3. Intermediate findings - II part. The notion of human dignity.- 4. The importance and the ambiguity of the notion of human dignity.- 5. Much ado about nothing? for a minimalist and procedural constitutionalism.-

1. INTRODUCTION

When describing the relationship between globalization and politics, Beck stressed how the former does not represent the end of the latter but, rather, the projection of national politics beyond the boundaries of the Nation-State[1]. To describe the features of politics, Beck began with the notion of "second modernity"[2]: the idea that the end of the on-State-one-culture parallelism implies the insufficiency of State (and of the classic sovereignty bodies) when faced with the power of transnational actors.

If globalization does not imply the end of politics but the reconsideration of the Nation-State arena, something similar applies to the law arena.

* STALS Senior Assistant Editor (www.stals.sssup.it). Visiting Research Fellow, Centre of European Law, King's College, London (www.kcl.ac.uk/cel). This essay collects two years of classes given in Pisa at the Center for Peace Studies (http://pace.unipi.it/) and at the Master of Arts in Human Rights and Conflict Management (http://www.sssup.it/context.jsp?area=46&ID_LINK=376). I would like to thank my students for their comments, passion and friendship. This article is dedicated to them with my best wishes for their future. Paper presented at the II International symposium of the Brazilian Academy of Human Rights "*Development and Human Rights*", Vitória, November 12, 13 e 14, 2009.

[1] U.Beck, *What is Globalization?*, Cambridge: Polity Press, 1999. "*The novelty of Beck's argument is that he does not fall into the trap of arguing that the second modernity simply supersedes the first - which would lead to the conclusion that national sovereignty is a thing of the past. Rather, he sees the advent of the second modernity signalling the beginning a "meta-game" of power, in which national power continues to play an important role, and the rules of national sovereignty remain operative, while, at the same time, the players are now able to play by the free-wheeling rules of the second modernity if they choose*". C.Leo, "What is the impact of globalization on politics?", available at http://blog.uwinnipeg.ca/ChristopherLeo/archives/2007/07/what_is_the_imp.html

[2] Second modernity is not a mere "chronological concept, "*it does not imply a division of epoch*" (U.Beck. E.Beck-Gernsheim, "Families in a runaway world" in J. L. Scott-J. Treas- M. Richards (eds.), *The Blackwell companion to the sociology of families*, Blackwell, 499 ff., 501. The characterizing elements of the second modernity are: "inner globalization" (which implies the end of "methodological nationalism"), "individualization", "the economy of insecurity" and "the intertwining of nature and society", 502 ff.

In his essays, Bobbio[3] pointed out that law and politics can be considered as two sides of the same coin: if Politics is the dynamic side of the political power and if the prevalent form of the policies after the XVII century was the Nation-State, then the Law is the main expression of such a political power.

This explains the importance given to the Civil or Penal Codes which were conceived as an important attempt to rationalize and govern the life of polities, hence the interest of political historians and scholars about the link between codification and absolutism for example[4].

If politics is the attempt to govern the reality, law represents the effort to rationalize that governance, which may also be found in the more democratic and liberal idea of law that emerged after the French Revolution[5].

In the second part of his book, Beck identified some examples of the so-called second-modernity politics: among them a relevant role is played by the cooperation for development policies.

In this paper I argue that cooperation for development may be seen as a technique of the second-modernity constitutionalism. I base this argument on its goal to correct the asymmetries produced by the economic globalization and its stress on the idea of development as a process of emancipation of the person, especially as concerns the last generation of such policies[6]. Indeed, all conditionality policies may be understood as an attempt to translate the development discourse from the mere economic level to a more comprehensive level, including human rights.

---

[3] N.Bobbio, entry "*Diritto*", in N.Bobbio-N.Matteucci-G.Pasquino (eds.), *Dizionario della Politica*, UTET, Torino, 1983, 334-338.

[4] See for example, G.Tarello, *Storia della cultura giuridica moderna. Assolutismo e codificazione del diritto*, Il Mulino, Bologna, 1998.

[5] In this respect the pages written by Mirkine-Guetzevich (B.Mirkine-Guetzevich (eds.)*: Les constitutions européennes*, II, Paris, P. U. F., 1951, 14 ff.) on the idea of rationalization of the power in his studies on Parliamentary regimes[5] or, more recently, the idea of constitutional pluralism by Maduro[5]- which is understood as a whole of practices aiming at combining coherence with heterarchy (i.e. absence of hierarchy. See M. Poiares Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action" in N. Walker (ed), Sovereignty in Transition, Oxford, 2003, 501 ff; M.Poiares Maduro, Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism, EJLS, 2/2007, http://ejls.eu/index.php?mode=htmlarticle&filename=./issues/2007-12/MaduroUK.htm, 2007 - are emblematic.

[6] See the very famous theory by A.Sen contained in *Development as Freedom,* New Delhi, Oxford University Press, 2000,

This tension in the new cooperation for development policies - conceived as a vehicle to extend and affirm constitutional goods such as human rights - inevitably have paved the way for a constitutional approach to such issues.

This paper focuses on the possible consequences of a constitutional approach to the development debate.

A constitutional reading of the legal issues is partially possible and desirable: taking the concept of development that emerged soon after the seminal work by Amartya Sen (development as freedom), a human rights-based reading of such issues becomes appropriate.

In fact, human rights are one of the two fundamental components of any constitution (eg. French Declaration of the rights of the man and the citizen of 1789, Art. 16)[7].

The constitutional openness (*à la* Saiz Arnaiz[8]) of the post-second world-war constitutionalism made a fundamental contribution to spreading the language of the human rights revolution by shifting intellectual curiosity, debate, money and ideas on to such an issue.

Moreover, the attention to rights - both at international and domestic levels - have provoked a sort of progressive re-approaching between human and fundamental rights [9], fostering an axiological field shared by international and domestic level (at least with regard to the European experience).

At the same time, the literature has shown how the human rights discourse is problematic: the structure of the global legal space and the ambiguity and vastness of human rights clauses have increased the role of judges. This effect is amplified by the absence of a representative power at international and supranational level that might serve as a balancing branch[10].

---

[7] That Art. 16 reads, "*Any society in which the guarantee of the rights is not secured, or the separation of powers not determined, has no constitution at all*".

[8] A.Saiz Arnaiz, *La apertura constitucional al derecho internacional y europeo de los derechos humanos. El articulo 10.2 de la Constitucion española*, CEPC, Madrid, 1999

[9] On this distinction see, among the others, G.Palombella, *L' autorità dei diritti*, Bari-Roma, Laterza, 2002.

[10] See the concept of "juristocracy" used by R.Hirschl, *Towards juristocracy: the origins and consequences of the new constitutionalism*, Harvard University Press, 2004. "*At the same time, judicial empowerment through constitutionalization has a transformative effect on political discourse. From foundational collective identity and nation building quandaries to restorative justice and regime change controversies, constitutional courts have become crucial fora for dealing with the most fundamental questions a democratic polity can contemplate. The global trend towards juristocracy is part of a broader process, whereby proponents of powerful social and economic interests, while they profess support for democracy, attempt to insulate policy-making from the vicissitudes of democratic politics*". From

The universal nature of "human rights" as a concept is another risk: the dangers of translating the balance between rights and power from one context to another. The idea of conditionality as a means of exporting the western understanding of "constitutionalism" is criticised precisely for this reason. This explains why some regional Charters of rights, such as the *African Charter on human and people's rights*, Article 17[11], provide for the interpretation of rights in a way that is consistent with local traditions and identity.

Consequently, a constitutional approach to the development debate has both negative and positive aspects, which are further explored here.

I PART

SCENT OF CONSTITUTION?

2. THE CONSTITUTIONAL PRINCIPLES OF THE COOPERATION FOR DEVELOPMENT

At least three guidelines govern the latest trends in development cooperation: its attention to the "human sphere"; its proceduralization, and its emancipation from the foreign affairs domain.

This paper focuses only on the first of these trends, leaving the other two aside.

Sen's conception of development as the possibility to choose freely, as "something" connected with immaterial goods, can be taken as a reference point. It reveals the "*ethical and cultural dimensions of development*"[12].

As already noted, in fact, "*the Sen conception of 'development as freedom' represents a departure from previous approaches to development that focused merely on growth*

R.Hirschl, "Towards Juristocracy: The Origins and Consequences of the New Constitutionalism", available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=503284

[11] Article 17: "*1. Every individual shall have the right to education. 2. Every individual may freely, take part in the cultural life of his community. 3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State*".

[12] W.Guan, "Development Deficit and Modern Law's Myth of Origin", Global Jurist: Vol. 8: Iss. 1 (Advances), Article 2, 2008, Available at:http://www.bepress.com/gj/vol8/iss1/art2, 5.

rates or technological progress"[13]. As a matter of fact, Sen describes development "*as a process of expanding the real freedoms that people enjoy*"[14].

According to Sen, poverty is "*a deprivation of basic capabilities*"[15] and not merely a low income and this implies that "*an adequate conception of development must go much beyond the accumulation of wealth and the growth of gross national product and other income-related variables*"[16]. Against this background a fundamental role is played by the substantive freedoms which are "*constituent components of development*" and "*the freedom of individuals as the basic building blocks of the development process*" because, as he pointed out, "*political unfreedom can also foster economic unfreedom*'[17].

It is also interesting to have a look at Sen's conception of the market: according to him "*markets can sometimes be counterproductive*" and "*there are serious arguments for regulation in some cases*"[18]. He also stresses "*the need to pay attention simultaneously to efficiency and equity aspects… "*[19]. Since "*the overall achievements of the market are deeply contingent on political and social arrangements*", Sen recalls the importance of democratic institutions in the search of development: "'*developing and strengthening a democratic system is an essential component of the process of development*"[20].

Sen's influence can be appreciated by looking at the UN's action and the adoption of a multi-dimensional approach that does not limit itself to an economy-oriented, single-dimension paradigm:

"This multi-dimensional development approach reflects the latest development perspective of the United Nations (UN). The 1986 UN Declaration on the Right to Development incorporates human rights in the development concept and identifies both individuals and peoples as the holders of the right to development. The human person is the central subject of development and should be the active participant and beneficiary of the right to development. The 1995 UNDP Human Development Report defines development as a process of "enlarging people's choices," and claims that '[t]here are four major elements in the concept of human development—productivity, equity, sustainability and empowerment.' The 1997 UN Agenda for Development maintains that '[d]evelopment is a

[13]B. Chimni, "The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels", in *The Law and Development Review*, 1/2008, 1, 1-22.
[14] A.Sen, "Development *cit*, 3.
[15] Ibidem, 20
[16] Ibidem, 14.
[17] Ibidem, p.8
[18] Ibidem, 112
[19] Ibidem, 120.
[20] Ibidem, 157.

multidimensional undertaking to achieve a higher quality of life for all people,' and identifies five dimensions of development: peace, economic growth, the environment, social justice, and democracy"[21].

These references to social justice, peace and democracy allow us to identify what I would like to call the "constitutional principles" of the cooperation for development:

- The dignity principle;
- The internationalist principle (understood both as openness to the international law order and as pacifist principle);
- The solidarity principle;
- The "*souverainiste*" principle.

All these principles belong to the constitutionalism of the western legal tradition constitutionalism and all the constitutions of post-World War II incorporate them. The formula "*Constitution born from the Resistance*"[22] explains well the spread of such principles, conceived as the ultimate axiological wall against the ghosts of Nazi-Fascism. This also explains why the principles recalling these values usually represent the untouchable core of new constitutions. Fundamental rights clauses and democratic principles typically are core to the German and the Italian experience, for example.
A comparative overview of the domestic nature of these principles demonstrates this, especially as concerns the most ambiguous among them: the principle on human dignity.

A). THE PRINCIPLE OF DIGNITY

The most famous constitutional provision devoted to such a principle is art. 1 of the German *Grundgesetz* reading:

"(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all State authority.

[21] W.Guan, "Development Deficit cit, 7-8. Guan cited the UN, Declaration on the Right to Development (A/RES/41/128, 4 December 1986) art. 1, 2. and the United Nations Development Program (UNDP), Human Development Report 1995 at 1, 12.
[22] C.Mortati, *Lezioni sulle forme di governo*, Cedam, Padova, 1973

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
(3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law."

The dignity discourse is strongly related to the idea of fundamental rights as the basis of the Constitutional State. Something similar may be found in the Spanish Constitution, at Article 10, paragraph 1: "*The dignity of the person, the inviolable rights which are inherent, the free development of the personality, respect for the law and the rights of others, are the foundation of political order and social peace*".
The strong connection between the idea of development of the personality and that of inviolable rights is evident. Among the other European Constitutions devoting a specific article to dignity, the Belgian Constitution is a case in point[23] while others refer to dignity in the provisions regarding fundamental rights or the fundamental principles of their own legal order[24].
Many examples can be found in the constitutional texts approved after the end of the Soviet Union or in the African contexts, here it suffices to recall Article 21 of the Russian Constitution[25] as well as those of Lithuania[26] or Latvia[27] with regard to the first

[23] Art. 23: *"(1) Everyone has the right to lead a life in conformity with human dignity.*
(2) To this end, the laws, decrees, and rulings alluded to in Article 134 guarantee, taking into account corresponding obligations, economic, social, and cultural rights, and determine the conditions for exercising them.
(3) These rights include notably:
1) the right to employment and to the free choice of a professional activity in the framework of a general employment policy, aimed among others at ensuring a level of employment that is as stable and high as possible, the right to fair terms of employment and to fair remuneration, as well as the right to information, consultation and collective negotiation;
2) the right to social security, to health care and to social, medical, and legal aid;
3) the right to have decent accommodation;
4) the right to enjoy the protection of a healthy environment:
5) the right to enjoy cultural and social fulfillment".
[24] See. For example, Romania, art. 1 or Brazil (among the others, art. 1 devoted to the principles of the State).
[25] *"(1) The dignity of the person is protected by the state. No circumstance may be used as a pretext for belittling it.(2) No one may be subjected to torture, violence or any other harsh or humiliating treatment or punishment. No one may be subjected to medical, scientific or other experiments without his or her free consent".*
[26] Art. 21: *"(1) The person shall be inviolable.*
(2) Human dignity shall be protected by law.
(3) It shall be prohibited to torture, injure, degrade, or maltreat a person, as well as to establish such punishments.
(4) No person may be subjected to scientific or medical testing without his or her knowledge thereof and consent thereto.

experiences, or South Africa[28] or Ghana[29] (among the "stable" African political system) with regard to the second.

Obviously however, the mere fact that so many constitutions make mention of dignity means neither that a universal concept of dignity exists nor that all these clauses are applied effectively.

B). THE INTERNATIONALIST PRINCIPLE

Another evident signal of the Nazi-fascist experience in such constitutional language may be found in the openness shown by the fundamental charters to international law and in acknowledgment of the peace as a fundamental constitutional principle, not only as a strategic foreign policy option.

Article 10, paragraph 2, of the Spanish Constitution[30] and Article 16 of the Portuguese[31] Constitution provide that provisions concerning human rights have to be interpreted in the light of certain international conventions. Similarly, the Argentine and Brazilian Constitutions provide an incredible openness, especially the former, which defines the international treaties on human rights as a form of super-primary law[32] .

As for the internationalist principle, peace in international relations is seen as a constitutional goal conditioning the international activity of the countries. In the German instance, the preamble to the Basic Law opens by saying:

"Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law.

---

[27] "Article 95 "*The State shall protect human honor and dignity. Torture or other cruel or degrading treatment of human beings is prohibited. No one shall be subjected to inhuman or degrading punishment."*

[28] *Section 10: "Everyone has inherent dignity and the right to have their dignity respected and protected"*.

[29] 15:, c.1 "*The dignity of all persons shall be inviolable*".

[30] "*The norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain*".

[31] Art. 16: *1) The fundamental rights embodied in the Constitution do not exclude any other fundamental rights, either in the statute or resulting from applicable rules of international law.(2) The provisions of the Constitution and laws relating to fundamental rights are to be read and interpreted in harmony with the Universal Declaration of Human Rights"*.

[32] For example see the p.23 of art. 75.

Germans in the Länder of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein, and Thuringia have achieved the unity and freedom of Germany in free self-determination. This Basic Law thus applies to the entire German people"[33].

Emblematically in Italy, the internationalist principle implies the "*repudiation of the war*" at its Article 11[34], according to which the pursuit of peace is a condition for limiting sovereignty in order to belong to international organizations.

Finally, the Portuguese constitution recognizes that, "*in its international relations, Portugal is governed by the principles of national independence, respect for human rights, the right of peoples to self-determination and independence, equality among States, the peaceful settlement of international disputes, non-interference in the internal affairs of other States, and co-operation with all other peoples for the emancipation and progress of mankind*"[35].

The Japanese Constitution includes certain similar provisions as well (even though the Japanese constitutional experience is somewhat peculiar, in that the constitution was imposed by the US after the Second World War). Indeed, Art. 9 reads:

"1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

(2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of aggression of the state will not be recognized"[36].

---

[33] See also art. 21: "*(1) The Federation may by a law transfer sovereign powers to international organizations.*
(1a) Insofar as the Länder are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighboring regions.
(2) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world.
(3) For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive, and compulsory international arbitration".

[34] *"Italy repudiates war as an instrument offending the liberty of the peoples and as a means for settling international disputes; it agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed; it promotes and encourages international organizations furthering such ends".*

[35] *Art.7*

[36] Analogously, the Preamble reads: "*We, the Japanese people, acting through our elected representatives in the National Diet, determined that we should secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty all over this land, and resolved that*

C) THE SOLIDARITY PRINCIPLE

Pizzorusso's remarks concerning the impossibility of tracing the principle of substantial equality back to the European constitutional heritage[37] might lead, perhaps, to a similar conclusion, even in the case of the solidarity principle. According to a reconstruction carried out by Somma,[38] it is nevertheless impossible to ignore the several references to a solidarity dimension (read not only as a framework for duties justifiable in the light of superior interests) present in the European constitutions (Art. 16, 22 and 24, Greek Constitution; Art. 81, Portuguese Constitution; Art. 9, Spanish Constitution). Somma also adds all those constitutional provisions related to the substantial side of the equality principle, disconnecting the notion of solidarity from the constitutional duties dimension (eg. Art. 2, Italian Constitution). One can also stress the further elements present in the Constitutions of new EU Member States: Art. 16, 17 Hungarian Constitution; Art. 28 Estonian Constitution; Art.35 Slovakian Constitution; Art. 64 Polish Constitution).

Starting from these assumptions in the context of national constitutions, European Treaties and other "forms" of EU Law (ECJ case law, normative acts, including soft law and the EU Charter of fundamental rights), it is possible to fill out the supranational dimension of solidarity:

---

never again shall we be visited with the horrors of war through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded. We reject and revoke all constitutions, laws, ordinances, and rescripts in conflict herewith.

We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression, and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want.

We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations.

We, the Japanese people, pledge our national honor to accomplish these high ideals and purposes with all our resources".

[37] A.Pizzorusso, *Il patrimonio costituzionale europeo*, Il Mulino, Bologna, 2002, 69.

[38] A.Somma, *Temi e problemi di diritto comparato*, II, Giappichelli,Torino, 2003, 179-213.

a) solidarity as a framework of rights of subjects characterized by situations of asymmetry (the reference to consumers as 'weak subjects' ceases therefore to surprise). This is solidarity according to the Nice Charter.

b) Solidarity as a framework of duties (a key example being the second part of Art. 2, Italian Constitution, regarding binding duties) invoking a common belonging (Art. 10 ECT). The positive side of this 'community building' is given by Article 308 of the Treaty establishing the European Community.

c) Solidarity as a principle aiming to characterize the Union (Preambles of the Union Treaties, Arts I-2 and I-3 of the Treaty Establishing a Constitution for Europe).

Similar conclusions can be drawn at comparative level, beyond the European Union: Article 3 of Brazilian Constitution refers to solidarity as a general principle governing State activity[39] while solidarity as a principle governing relations among African people is recalled in Cameroon's Constitution[40].

When looking at the African Charter on Human and Peoples Rights we can appreciate the coexistence of such different meanings of solidarity. In fact, Articles 21 and 23 refer to solidarity as a generic principle of coexistence among African peoples. Article 29 seems to refer to solidarity as umbrella of duties (Art. 27 and et seq.) to be balanced with the recognition of rights.

Certain provisions regarding social and economic rights also arise.

Development is affirmed as a right to be preserved:

"1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development"[41].

---

[39] *"The fundamental objectives of the Federative Republic of Brazil are:*
I. to build a free, just and solidary society;
II. to guarantee national development;
III. to eradicate poverty and marginal living conditions and to reduce social and regional inequalities;
IV. to promote the well being of all, without prejudice as to origin, race, sex, color, age, and any other forms of discrimination".

[40] See the Preamble and art. 55.

[41] Art.22.

D). THE "*SOUVERAINISTE*" PRINCIPLE

The history of development cooperation is haunted by the past, when it was used to pursue neo-colonialist or, at least, geo-political goals.
Looking at the constitutional provisions of many third world countries such ghosts are still present. For example, Article 28 of the 1988 Algerian Constitution stresses the inalienability of sovereignty in the provisions devoted to international cooperation:

*"Algeria works for the reinforcement of international cooperation and to the development of friendly relations among States, on equal basis**, mutual interest and non interference in the internal affairs**. It endorses the principles and objectives of the United Nations Charter"*.

Similarly, Article 15 of the Republic of Angola's Constitution of 1992 reads:

*"The Republic of Angola shall respect and implement the principles of the United Nations Charter, the Charters of the Organization of African Unity and the Movement of Non-Aligned Countries, and shall **establish relations of friendship and cooperation with all States, based on the principles of mutual respect for sovereignty and territorial integrity, non-interference in the internal affairs of each country and reciprocal advantages***" **[emphasis added]**.

All these countries are, rightly, protective of their sovereignty as the case of Cameroon confirms:

***"Jealous of our hard-won independence and resolved to preserve** same; convinced that the salvation of Africa lies in forging ever-growing bonds of solidarity among African Peoples, affirm our desire to contribute to the advent of a united and free Africa, while maintaining peaceful and brotherly relations with the other nations of the World, in accordance with the principles enshrined in the Charter of the United Nations;*
*Resolved to harness our natural resources in order to ensure the well-being of every citizen without discrimination, by raising living standards, proclaim our right to development as well as our determination to devote all our efforts to that end and **declare our readiness to co-operate with all States desirous of participating in this national endeavour with due respect for our sovereignty and the independence of the Cameroonian State**"*. **[emphasis added]**".

Finally, it is worth noting how some formerly colonialist countries expressly refused the colonialist temptations in international politics, the most famous case being the Portuguese Constitution:

"(2) Portugal advocates the abolition of all forms of imperialism, colonialism, and aggression, simultaneous and controlled general disarmament, the dissolution of politico-military blocs, and the setting up of a collective security system, with a view to the creation of an international order capable of safeguarding peace and justice in the relations among peoples.
(3) Portugal recognizes the right of peoples to revolt against all forms of oppression, in particular colonialism and imperialism.
(4) Portugal maintains special bonds of friendship and co-operation with the Portuguese speaking countries".

3. INTERMEDIATE FINDINGS

The language used by the most influential theorist of development and by some UN documents immediately recall that used in national constitutions: peace, democracy, human rights, dignity, justice and solidarity appear as the "ought to be" of the development cooperation.

The role of a constitutional lawyer working in this field seems to be crucial: since development implies the necessity to affirm a concept quite familiar to him, there could be many reasons for looking at development policies as a sort of Trojan horse of constitutionalism at global level[42].

Obviously the picture is much more complicated than it appears at first glance: first of all, from a methodological point of view, talking about a constitutional approach to the issue of international development might be conducive of the proposition of rhetorical domestic analogies: is the cooperation for development a form of global welfare? Probably any parallelism is denied by the sustainability precondition of every welfare system: at global level a system of taxation does not exist.

At the same time, the history of the Welfare State is the history of the progressively swelling national public administrations and, again, if the existence of a global

[42] See the consideration made by C. Pinelli "Conditionality and Enlargement in Light of EU Constitutional Developments", in *European Law Journal*, 2004, 354–362.

administrative law is something hard to prove[43], it is quite impossible to describe a global administration such as would be required by a welfare system.

These brief mention of these considerations is not intended to deny the importance of some "social factors" present at international level, such as the social clause in WTO commercial agreements, which has been interpreted as a primitive tool of social justice[44] and which serve to thwart any easy enthusiasm.

Undoubtedly, the emergence of the issue of the person in the development discourse represents a fundamental turning point. However, behind this there are many dangers concerning the ambiguity and relativity of the constitutional language used in development cooperation.

In the second part of this paper, I deal with some of these risks.

II PART

THE NOTION OF HUMAN DIGNITY

4. THE IMPORTANCE AND THE AMBIGUITY OF THE NOTION OF HUMAN DIGNITY

Recently Cristopher McCrudden argued that the "*concept of ' human dignity ' plays an important role in the development of human rights adjudication, not in providing an agreed content to human rights but in contributing to particular methods of human rights interpretation and adjudication*"[45]. To his merit he admits the ambiguity of a concept such as dignity (especially if applied at international and comparative level)

[43] For a global administrative law see N.Krisch-B.Kingsbury. "Introduction: Global Governance and Global Administrative Law in the International Legal Order." *The European Journal of International Law* 17:1-13, 2006; S. Cassese, "Administrative Law Without the State? The Challenge of Global Regulation", 37 *New York University Journal of International Law and Politics* 663 (2005); S.Cassese, The Globalization of Law, 37 *New York University Journal of International Law and Politics* 973; B.Kingsbury, "The Concept of 'Law' in Global Administrative Law", *European Journal of International Law* vol 20 (2009), 23-57. For a detailed bibliography see http://www.iilj.org/gal/bibliography/default.asp

[44] On this see, among the others, C.Blengino, *La dimensione sociale del commercio internazionale*, in G.Porro (ed)., *Studi di diritto internazionale dell'economia*, Giappichelli, Torino, 2006, 267 ff.

[45] C.McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", in *European Journal of International Law*, 4/2008, 655-724, 655.

without renouncing further consideration of its utility but insisting on the interpretive moment.

"Despite its relative prominence in the history of ideas, it was not until the first half of the 20th century, however, that dignity began to enter legal, and particularly constitutional and international legal, discourse in any particularly sustained way. The use of dignity in legal texts, in the sense of referring to human dignity as inherent in Man, comes in the first three decades of the 20th century. Several countries in Europe and the Americas incorporated the concept of dignity in their constitutions: in 1917 Mexico; in 1919 Weimar Germany and Finland; in 1933 Portugal; in 1937 Ireland; 59 and in 1940 Cuba. It seems clear that the combination of the Enlightenment, republican, socialist/social democratic, and Catholic uses of dignity together contributed significantly to these developments, with each being more or less influential in different countries" [46]

After a brief overview on the importance of dignity in domestic dimension, McRudden recalls how the notion of human dignity has become important in United Nations's (UN) conceptions of human rights since 1986[47] as well as at regional level. At same time, it is easy to see how such a diffusion favoured the emergence of different conceptions of the same idea:

"However, as might be expected from the variety of differing approaches that are apparent in the historical development of the idea of dignity, there are some significant differences in the use of dignity in human rights texts. A more pluralistic, more culturally relative approach to the meaning of human dignity can be identified by looking briefly at some of the differences in the use of dignity language between the regional texts, and between the regional texts and the international texts"[48].

Moreover, dignity is increasingly used in the interpretation of particular substantive areas assuming – or being connected to – different values or principles[49] but this variety

[46] Ibidem, 664.
[47] C.McCrudden, Human cit, 669.
[48] Ibidem, 673.
[49] McCrudden identifies the following areas of influence for dignity's conception:
1. Prohibition of Inhuman Treatment, Humiliation, or Degradation by One Person over Another ('*[i]n the present context it can be assumed that it is, or should be, intended to denote something seriously humiliating, lowering as to human dignity, or disparaging, like having one's head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one's sovereign or head of State, or dress up in a way calculated to provoke ridicule or contempt …"* Ireland v. United Kingdom, 2 EHRR 25, *Opinion of Judge Fitzmaurice, ibid., at para. 27"*, Ibidem, 686);

in the reading of human dignity does not forbid McCrudden to identify a minimum core of this concept consisting of three elements:

"*This concept of human dignity is, of course, stated at a very high level of generality. Even if we accept these three claims, the concept of human dignity holds within it the seeds for much debate. We can say, on the basis of what we have described up to this point, that whilst there is a concept of human dignity with a minimum core, there are several different conceptions of human dignity, and these differ significantly because there appears to be no consensus politically or philosophically on how any of the three claims that make up the core of the concept are best understood. They differ, in other words, on their understanding of what the intrinsic worth of the individual human being consists in (the ontological claim), in their understanding of what forms of treatment are inconsistent with this worth (the relational claim), and in their understanding of what the detailed implications of accepting the ontological and relational claims are for the role of the state vis-à-vis the individual, beyond the core idea that the individual does not exist for the state (the limited-state claim)*".[50]

If these three elements (the ontological claim, the relational claim and the limited-state claim) represent the minimum core of the concept of human dignity, the problem arises in any attempt to go beyond the minimum core. At the end of his overview, McCrudden concludes:

"But, although we see judges often speaking in terms of ' common principles for a common humanity ', in practice this is often rhetoric, however well intentioned and sincere. We appear to have significant consensus on the common core, but not much else. I am not arguing that there is no more precise conception of human dignity that is possible beyond this minimum content. Nor am I arguing that there is no coherent extra-legal conception of dignity which could form the basis of a common transnational legal approach. The problem is rather the opposite: as the historical examination of the development of dignity

---

2. Individual choice and the conditions for self-fulfillment, autonomy, and self-realization (Ibidem, 688. "*In the case of Thornburg v. American College of Obstetricians and Gynaecologists,2 36 Blackmun J explained the fundamental nature of the privacy of a woman's decision to terminate her pregnancy: '"[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision – with the guidance of her physician and within the limits specified in Roe – whether to end her pregnancy. A woman's right to make that choice freely is fundamental" , Judgment 476 US 747 (1986) . Ibidem,* , 692);
3. Protection of group identity and culture.
4. Creation of the necessary conditions for individuals to have essential needs satisfied ("*Necessary condition for guaranteeing survival by some courts. In cases dealing with the use of force by the security forces, the German Constitutional Court has emphasized the importance of reading the protection of the right to life and the protection of dignity as mutually reinforcing*" , McCrudden quoted the case Aviation Security Act Case , BVerfG, 1 BvR 357/05 of 15 Feb. 2006 (Germany); Bundesverfassungsgericht, Press release No. 11/2006 of 15 Feb. 2006. C.McCrudden, "Human dignity cit", 692).

[50] C.McCrudden, "Human dignity and cit" , 679-680

indicated, there are several conceptions of dignity that one can choose from, but one cannot coherently hold all of these conceptions at the same time"[51].

In conclusion, dignity may play an important interpretive role despite the absence of a strong consensus about its content.

This view pays attention to the interpretive moment and to the interpreters, to the increasing and fundamental role of judges in shaping the content of these principles. Insisting on the interpretive level, in the context of the latest American case law, another approach stresses the risks of the judicial "*use and abuse of human dignity*"[52]. Since its European origin, the export of judicial discourse on dignity may represent the introduction of a dangerous *virus* into a different legal background. Human dignity, in fact, would emphasize communitarian values and the so defined dignity based modern constitutionalism would prefer balancing and harmonizing rights with other political and social needs. "*The widespread acceptance of such tradeoffs minimizes the importance of rights because courts review rights as part of a political calculus. By focusing on values such as human dignity, modern constitutionalism deprives rights of their special force*"[53] . This is the essence of what I would call a "skeptical approach" to constitutional clauses: in my view it is grounded on an evident misunderstanding of the concept of dignity as such (a constitutional good) on the one hand, and a particular technique for ensuring constitutional goods such as the proportionality test or the balancing test on the other.

The negative consequences of the use of dignity is not caused by the vagueness of its structure but by the judicial implications of its use.

Actually, in my view, the same idea of dignity that Rao presents does not always imply the utilization of the balancing test. On the contrary, many constitutional experiences know judicial doctrines recognizing the existence of a hierarchy in rights, granting a core of rights by excluding them from the balancing. These rights are seen as expression of "incommensurability", which implies that any cost/benefit analysis is impossible[54].

---

[51]Ibide, 723.

[52] N.Rao, "On the use and abuse of dignity in constitutional law", in *The Columbia Journal of European Law*, 2008,201-256.

[53] Ibidem.

[54] For an original view on fundamental rights and conflicts of fundamental rights, see L.Zucca, *Constitutional Dilemmas- Conflicts of Fundamental Legal Rights in Europe and the USA*, Oxford University Press, Oxford, 2007.

This does not apply for other rights such as economic or social ones that may serve to limit other competing interests.

This is where the real issue arises: the outcome of this balancing test depends on what each legal order or political system recognizes as public interest and the idea as such of State.

Two categories of rights can be distinguished here: human rights (HR) and fundamental rights (FR). According to Palombella, the idea of fundamental rights is relative depending on what the national constitutions recognize as "fundamental" and the standard of review for the evaluation of the validity of primary norms[55].

On the contrary, the idea of human rights refers to the pre-legal concept: that of "human being", which is not described by the terminology of the constitution but is an anthropological concept aiming at being universal because it is founded on abstract and non-culture-sensitive reasons.

Nevertheless, to my thinking this relationship between HR and FR is a *genus-species* type relation, the second being a sub-system of the first. In this respect, a truly constitutional view of cooperation for development policies implies the establishment of a common constitutional core of human rights built around the idea of human dignity. In this sense, such policies could take on an *imperialistic flavour*: defining a sub-system of rights as "un-balanceable" according to a selective technique that was also used in the drafting of universal conventions on rights such as Universal Declaration of Human Rights[56].

Returning to the topic of human dignity, despite its undeniable ambiguity it is usually recognised as a part of the international constitutional core and although this idea is apparently shared by many international law scholars, there are different views on what international constitutional law is[57].

---

[55] G.Palombella, cit.11 ff.

[56] When looking at such a document, one can notice the "grey color" of its statements and the its partial character with regard to the number and types of recognized rights if compared with some national constitutions. This two apparent features (the grey-nature and the minimal approach of the declaration) are the outcome of the political compromise which permitted the document itself to be accepted , but, at the same time, to be hardly applicable and not so dangerous for the variety of human rights cultures. On this see also P.Carrozza, "Paesi in via di sviluppo e diritti umani", in T.Greco (ed.), *Violazioni e tutela dei diritti umani*, PLUS, Pisa, 45 ff

[57] On this debate see: J. D'Aspremont, "Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders", 69 *Heidelberg Journal of International Law* (ZaÖRV), 2009, 939-978.

There are also other scholars who do not acknowledge human dignity as playing any fundamental role in the idea of international constitutional rights. Gardbaum for example, mentions "dignity" only once in his essay *Human Rights as International Constitutional Rights*[58].

Why do I dwell on human dignity? Dignity is crucial in Sen's reading of development. Dignity means the "capability to choose" freely and without external imposition, which is the first expression of freedom.

This vision of dignity is shared by many national constitutional documents, also when using a slightly different terminology.

One of the most evident examples of this case is the Italian one. Article. 3 of the Italian Constitution refers to the mission of the Italian Republic to "*remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development*". According to many Italian scholars, such a notion of full development of the person can be traced back to the idea of dignity[59]. The same applies to Article 2 of the Italian Constitution, which is devoted to the fundamental rights and non-susceptible to derogation-duties. In this respect, dignity means the possibility to be the holder of both rights and duties.

This double meaning of dignity arises when dealing with the terminology of all the cooperation for development protocols or documents. Dignity is the constitutional ground for exercising the chance to be a person among people.

Dignity is thus the core of the personalistic principle, which usually means the shift from the liberal conception of freedom (which looks at the single holder of mere negative rights as a monad) to the idea of the holder of rights as a person who is a character living in the social relations and as the outcome of social relations. This implies the necessity for the State to help the single holder of mere negative rights to be inserted in the society also removing the economic and social obstacles provided by the spontaneous forces of the market.

---

[58] S.Gardbaum, "Human Rights as International Constitutional Rights", European Journal of International Law, 4/2008, 2008, 749-768. In that occasion the author refers to the distinction between "'*democratic constitutionalism' in the US and 'internationalist constitutionalism' in Europe, between self-government and the protection of one or more universal human rights, such as dignity, as the foundational normative basis of a constitution*", adding that such a distinction "*does not mean that European constitutions were not equally the products of a (democratic) constituent power*".

[59] See, for instance, A.Barbera, "Commento all'art. 2 Cost., G.Branca (ed), in "*Commentario alla Costituzione*", art. 1-12, Bologna-Roma, Zanichelli, 1975.

This is precisely the idea of Welfare State, providing the essential levels of rights-guarantees in order to ensure the citizens the chance to develop themselves.

As for the international level, I think something similar may be said for the cooperation for development understood as a whole of policies and practices aiming at ensuring the dignity (i.e. the chance to fully develop himself) to the people of the least rich countries[60].

5. MUCH ADO ABOUT NOTHING? FOR A MINIMALIST AND PROCEDURAL CONSTITUTIONALISM

In the words of their "discontents" there is no possibility to overcome the risk of universalism which hides behind the policies of development cooperation. In the light of this idea countries like Cameroon, for example, recognize the potential of development cooperation, although in respect of the national traditions and the sovereignty of the State.

Should we consider conditionality as a Trojan horse of the European continental constitutionalism? This would require an ambitious debate on Asian values and cultural imperialism in a field, that of cooperation for development, which has masked attempts to keep imperialistic practices behind the solidarity discourses.

Originally, in fact, development cooperation was conceived as a part of foreign affairs, which explains why in many countries the cooperation policies are part of the Foreign Affairs Ministry (Italy, France for example). And from the beginning, with regard to the EC experience, the first clauses in the EC Treaty which were used to conduct such policies – devoted to the association of overseas countries and territories – were introduced under French pressure. Such pressure can be explained by the attempt to maintain the relationship between France and the formerly dominated countries in Africa[61].

[60] Obviously this conclusion has to be taken together with the *caveat* before recalled regarding the lack of the preconditions of every Welfare system.

[61] For an overview see Volontariato Internazionale per lo sviluppo, *Sistemi di cooperazione a confronto: spunti dall'Europa* , available at http://www.volint.it/comunicazione/notizie_vis/archivio/allegati/2006-06-08o/CT-vis-cespi128p_1_128.pdf

Subsequently, new clauses[62] specifically devoted to development cooperation have been introduced to free it from the ghosts of the neo-colonialism, although the old clauses still remain in the EC Treaty.

At the same time, the "issue-person" entered the language of many EC international agreements in this field: paying attention to the evolution of the EC Conventions on this matter (Yaoundé, Lomé, Cotonou), one can perceive how the progressive entrance of the multi-dimension approach in the development discourse is strongly linked to conditionality clause.

The IV Lomé Convention of 1990 (and to the IV Lomé bis Convention, 1995) played a fundamental role in this respect. Article 5(2) in Chapter I thereof is devoted to the aims and principles of the cooperation. It provides that human rights, rule of law and democratic principle have to be respected and represents a turning point in the EC cooperation's activity[63].

---

[62] see now the artt. 177 ff. ECT.

[63] See The par. 3 of art. 5 of that Convention emblematically stressed that: "*1. La coopération vise un développement centré sur l'homme, son acteur et bénéficiaire principal, et qui postule donc le respect et la promotion de l'ensemble des droits de celui-ci. Les actions de coopération s'inscrivent dans cette perspective positive, où le respect des droits de l'homme est reconnu comme un facteur fondamental d'un véritable développement et où la coopération elle-même est conçue comme une contribution à la promotion de ces droits.*

Dans une telle perspective, la politique de développement et la coopération sont étroitement liées au respect et à la jouissance des droits et libertés fondamentales de l'homme. Sont également reconnus et favorisés le rôle et les potentialités d'initiatives des individus et des groupes, afin d'assurer concrètement une véritable participation des populations à l'effort de développement, conformément à l'article 13.

2. En conséquence, les parties réitèrent leur profond attachement à la dignité et aux droits de l'homme, qui constituent des aspirations légitimes des individus et des peuples. Les droits ainsi visés sont l'ensemble des droits de l'homme, les diverses catégories de ceux-ci étant indivisibles et interdépendantes, chacune ayant sa propre légitimité: un traitement non discriminatoire; les droits fondamentaux de la personne; les droits civils et politiques; les droits économiques, sociaux et culturels.

Chaque individu a droit, dans son propre pays ou dans un pays d'accueil, au respect de sa dignité et à la protection de la loi. La coopération ACP-CEE contribue à l'élimination des obstacles qui empêchent la jouissance pleine et effective par les individus et les peuples de leurs droits économiques, sociaux et culturels, et ce, grâce au développement indispensable à leur dignité, leur bien-être et leur épanouissement. À cette fin les parties s'efforcent, conjointement ou chacune dans sa sphère de responsabilité, de contribuer à l'élimination des causes de situations de misère indignes de la condition humaine et de profondes inégalités économiques et sociales. Les parties contractantes réaffirment leurs obligations et leur engagement existant en droit international pour combattre, en vue de leur élimination, toutes les formes de discrimination fondées sur l'ethnie, l'origine, la race, la nationalité, la couleur, le sexe, le langage, la religion ou toute autre situation. Cet engagement porte plus particulièrement sur toute situation, dans les États ACP ou dans la Communauté, susceptible d'affecter les objectifs de la convention, ainsi que sur le système d'apartheid eu égard également à ses effets déstabilisateurs à l'extérieur. Les États membres de la Communauté (et/ou, le cas échéant, la Communauté elle-même) et les États ACP continuent à veiller, dans le cadre des mesures juridiques ou administratives qu'ils ont ou qu'ils auront adoptées, à ce que les travailleurs migrants, étudiants et autres ressortissants étrangers se trouvant légalement sur leur territoire ne fassent l'objet d'aucune discrimination sur la base de différences raciales, religieuses, culturelles ou sociales, notamment en ce qui concerne le logement, l'éducation, la santé, les autres services sociaux, le travail.

After Lomé IV, cooperation aimed at the highest principles, going beyond the limited goals of the first Yaoundé Convention (1963).

Going further, the Cotonou Convention (2000) identified five pillars: political dialogue; participatory approach; poverty focus; new trade partnership; and reform of instruments and programming.

The focus on poverty implies a multi-dimension approach to development understood as economic development (centered around private sector development and investment, macro-economic and structural policies and reforms, sectoral policies), social and human development (focused on social sector policies, youth issues, cultural development) regional cooperation and integration[64].

Cotonou represented an importance step also for the conditionality clause. As we know there are different generations of these clauses.

The genesis of the clause may be found in the "Uganda guidelines", stating that "*any assistance given by the Community to Uganda does not in anyway have as its effect a reinforcement or prolongation of the denial of basic human rights to its people*". After that episode effort was made to give binding (and not merely rhetorical effects) effect to such requests for human rights' compatibility. The Lomé Convention, in fact, provided the possibility to suspend to benefits to third countries behaving so in similar situations in the future.

Since 1995, the EU has started including conditionality clauses in its international agreements on this matter. The peak of this trend is provided by Article 96 of the Cotonou Agreement.[65]

---

3. À la demande des États ACP, des moyens financiers pourront être consacrés, en conformité avec les règles de la coopération pour le financement du développement, à la promotion des droits de l'homme dans les États ACP, au travers d'actions concrètes, publiques ou privées, qui seraient décidées, en particulier dans le domaine juridique, en liaison avec des organismes dont la compétence en la matière est reconnue internationalement. Le champ de ces actions s'étend à des appuis à l'établissement de structures de promotion des droits de l'homme. Priorité sera accordée aux actions à caractère régional".

[64] Finally, Beside these issues three horizontal or "cross-cutting" themes (gender equality; environmental sustainability; institutional development and capacity building) .

[65]The possibility to suspend the payments in case of human rights' violations WAS considered in Argentina cooperation agreement. According to which the agreement is "*based on the respect for democratic principles and human rights which inspire the domestic and external policies of both the Community and Argentina*". Famous is also the so called Baltic clause reading that: "*that '[t]he parties reserve the right to suspend this Agreement in whole or in part with immediate effect if a serious violation occurs of the essential provisions of the present agreement*". In 1993 this 'Baltic' suspension clause was replaced with a 'Bulgarian' non-execution clause providing greater flexibility than a mere suspension clause. This clause read that: "*If either Party considers that the other Party has failed to fulfill an obligation under the Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Association Council with all relevant information required for a*

Having summarized the main steps of conditionality's genesis, we can conclude on the presumed imperialistic implications of such policies.

Frankly I think this issue is much more interesting from a philosophical-anthropological point of view than from a legal one: first of all, this is because development policies are "*policies"*, which implies the non-total neutrality or technicality of their choices. Moreover they reflect the internal evolution of EU law (now increasingly more constitutional, "comparable" with the protection standard to which the domestic legal orders are accustomed, as the evolution of *Solange* doctrine goes to show[66]).

In this respect it is obvious that, voluntarily or involuntarily, they are based on a certain idea of rights, because they are expression of political interest and constitutional culture. It would be dishonest to deny such aspect.

At the same time these clauses on human rights and rule of law are so vague that it is difficult to appreciate a more intrusive function than that exercised by the provisions, for example, included in the UN Universal Declaration on Human Rights.

Is this all "much ado about nothing" then? I do not want to deny the many problems in conditionality clause application but I think that all this debate on the cultural implication of conditionality masks the real issues at stake, it creates *alibi*.

Lawyers might play an important role in "neutralizing" these cultural implication, paying their attention to the mechanism of control, to the transparency of conditionality, and, above all, addressing their criticism against the lack of consistency of the EU policies in this field and against the evident asymmetry present in conditionality's recall.

Doing so we could "specify" and make these vague rights which at the moment, existing only on paper, making effective the conditionality system and providing it with more transparency, legitimacy and effectiveness as suggested by the European Parliament many times[67].

---

thorough examination of the situation with a view to seeking a solution acceptable to the Parties. In the selection of measures, priority must be given to those which least disturb the functioning of the Agreement. These measures shall be notified immediately to the Association Council and shall be the subject of consultations within the Association Council if the other Party so requests".
This 'Bulgarian' clause was seen as a model for the next conditionality clauses in other bilateral international agreements.

[66] *BVerfGE* 37, S. 271 ff., available at www.bundesverfassungsgericht.de/en/index.html.

[67] For instance, European Parliament resolution on the human rights and democracy clause in European Union agreements (2005/2057(INI)), 14 February 2006, [2006] OJ C290E/107.

As Bartels pointed out, these policies have been criticized because of their selectivity and because of their asymmetry: "*It is anomalous that development aid may be suspended under the Cotonou Agreement but a financial payment under a Fisheries Partnership Agreement cannot*"[68].

The impact of the sanctions must be evaluated to provide the system with an appropriate controls, maybe even identifying a common administrator and guardian of such conditionality policies: the European Parliament has suggested a body such as the Fundamental Rights Agency based in Vienna.

For the sake of effectiveness, such conditionality clauses should be limited "*with a sunset clause, in order that new measures are required to be justified"*[69], to establish clear benchmarks "*in the imposition of any measures under conditionality clauses sufficient to give the target country a clear indication of how the measures might be lifted*"[70].

Sanctions should be effective and their effectiveness evaluated:"*an ineffective sanctions regime is worse than no sanctions regime at all*"[71].

In terms of legitimacy, the European Parliament should be involved in the administration of such policies and, above all, to subject the conditionality policy to a human rights impact assessment.

Finally, these policies should be consistent with the WTO and human rights law.

In the search for the tools to fulfill such goals, a significant role may be played by the constitutional lawyer in identifying the best solutions and practices to reach such goals, favouring the circulation of legal solutions and keeping far away from contributing to political rhetoric of conditionality.

[68] L.Bartels, Policy department "External policies the application of human rights conditionality in the EU's bilateral trade agreements and other trade arrangements with third countries, European Parliament, Brussel, available at
http://www.europarl.europa.eu/activities/committees/studies.do?language=EN
[69] Ibidem
[70] Ibidem
[71] Ibidem