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Abstract

The debate on the EU's constitutionalization is at a crossroad: if constitutionalization is conceived as a constructivist design which is characterized by a written document and led by a precise and linear political will, we are forced to conclude for the irremediable constitutional failure of the EU.
On the other hand, when constitutionalization is conceived as a spontaneous process sprung from the activity of "cultural" forces, the latest judicial trend can be regarded as the strongest attempt to ensure the coherence of the EU's "*constitution composée*" .
This paper is divided into two parts: in the first part, by adopting the "constructivist" approach to constitutionalization, I am going to describe the feeling of fragmentation which would characterize the EU after the national referenda. In the second part- after changing the perspective- I am going to show how the ECJ has reacted to the centrifugal judicial forces which would threaten the interpretive monopoly of the master of treaties.
As we will see, the change of the perspective (from that viewpoint of the *political sources* of law to that of the *cultural sources of law*) implies a different evaluation of the current phase of EU integration and this factor allows us to overcome (partially at least) the sense of disappointment which seems to characterize the main literature currently.

Key-words: European Constitution, evolution, integration, European Court of Justice, constitutional pluralism

European Constitution and European Evolution: Why does the ECJ matter?*

Giuseppe Martinico[1]

SUMMARY: 1. Structure of the paper. - Part. I.- 2. Is there any room for a "constructivist" constitutionalization?.- 3. Europe, don't be afraid!.- Part II.- 4. Why dwelling on interpretive competition?-. 5. Interpretive struggle: the latest judicial trends.- 6. How can the ECJ assure the coherence and unity in a constitutional "fragmented" legal order.- 7. Is Lucchini' s doctrine the end the judicial dialogue?.- Synopsis.

1. **Structure of the paper**

The debate on the EU's constitutionalization is at a crossroad: if constitutionalization is conceived as a constructivist design which is characterized by a written document and led by a precise and linear political will, we are forced to conclude for the irremediable constitutional failure of the EU. On the other hand, when constitutionalization is conceived as a spontaneous process sprung from the activity of "cultural" forces, the latest judicial trend can be regarded as the strongest attempt to ensure the coherence of the EU's "*constitution composée*"[2] .

This paper is divided into two parts: in the first part, by adopting the "constructivist" approach to constitutionalization, I am going to describe the feeling of fragmentation which would characterize the EU after the national referenda. In the second part- after changing the perspective- I am going to show how the ECJ has reacted to the centrifugal judicial forces which would threaten the interpretive monopoly of the master of treaties[3].

As we will see, the change of the perspective (from that viewpoint of the *political sources* of law to that of the *cultural sources of law*) implies a different evaluation of the current phase of EU integration and this factor allows us to overcome (partially at least) the sense of disappointment which seems to characterize the main literature currently.

Part I

2. **Is there any room for a "constructivist" constitutionalization?**

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[2] On this concept see: I.Pernice-F.Mayer, "De la constitution composée de l'Europe", in *Revue trimestrelle de droit européen*, 2000, pp. 623 ff.; L.Besselink, *A Composite European Constitution/Een Samengestelde Europese Constitutie*, Groningen, Europa Law Publishing, 2007.

[3] Quoting the image by K. Alter, 'Who Are the 'Masters of the Treaty'?: European Governments and the European Court of Justice", 52 International Organizations, 1998, pp. 121 ff.

At first glance, the rejection of the Constitutional Treaty (CT) and the Irish "No" to the Reform Treaty (RT) may give the impression of an inescapable constitutional crisis for Europe.

Although the RT does not bear the name "Constitution", in fact, the substantial continuity between these two documents these two documents is evident as Ziller stressed writing about a "constitutional substance" which would have been "rescued"- despite the elimination of some "dirty words" such as "constitution", "law", "minister"- in the text of the Lisbon Treaty[4].

From this point of view "*the Reform Treaty looks more like the (evil?) twin of the Constitutional Treaty than its distant cousin*"[5].

Something similar is argued by Ziller[6] himself, when he points out that the possible major changes (the primacy clause's disappearance, for example) were just functional to overcoming the risk of the member states' refusal.

Despite this substantial continuity other authors have stressed the sense of disappointment which would characterize the document defining it just and (perhaps merely) as a "Postconstitutional Treaty" [7] .

According to Somek in fact:

"A postconstitutional ordering, by contrast, cannot settle contested issues, for it cannot find sufficient support for a clear solution. A postconstitutional norm does not speak with one voice. It is a document recording the adjournment of an ongoing debate. Maybe this is addressed by those talking about the Union's alleged lack of a pouvoir constituant. Ideally, a constitution is about channelling political dealings, not about postponing their resolution."[8].

According to such a scholarship the RT cannot be regarded as a constitution since it limits itself to reflect the problems without solving them: it seems to suffer the social forces rather than leading them.

This point is crucial because a very similar criticism was argued by Bast with regard to the CT, as follows:

"Wading through the complete text—some 474 pages of reading material in the Official Journal—one experiences how far away the Constitutional Treaty is from the ideal of a concise, expressive constitutional document. This is not, or at least not primarily, an editorial deficiency. The structure and length of the constitutional text reflect the unsolved problems involved with fostering unity [...] *The tension between—only partially "correct"—self-description (Part I) and*

[4] J.Ziller, *Il nuovo Trattato europeo*, Bologna, Il Mulino, 2008, at p. 127.
[5] T.Corthaut, "Plus ça change, plus c'est la même chose ? A Comparison with the Constitutional Treaty", in *Maastricht Journal of European and Comparative Law*, 1/2008, pp. 21 ff, at p. 34.
[6] J.Ziller, *Il nuovo Trattato* o.c., 27 ff.
[7] A.Somek, "Postconstitutional Treaty", *German Law Journal*, 12/2007, pp. 1121-1132.
[8] *Ibid.*, at pp. 1126-1127.

normative reality (Part III) cannot, for the most part, be resolved by jurisprudence, but by constitutional politics. This confers on the Constitutional Treaty the status of a reflexive constitution. Such a constitution makes normative demands of itself, without (yet) fully accounting for them"[9].

The real issue thus concerns the nature of a whichever Constitution for Europe: what kind of Constitution would it be? And, would the idea of a Constitution as such applicable to the European Union experience?

A very good contribution to the debate on the notion and the nature of the Constitution for Europe was furthered by Leonard Besselink[10]; in Besselink's vision, the notion of Constitution itself as applied to the EU results in an ambiguous picture, that of fundamental law (*Grundgesetz* rather than *Verfassung*) being more suitable.

This seems to imply a sceptical approach to the issue of the European Constitution's 'formalization', conceived as a real *constitutional moment*. The author himself reaches this conclusion after having distinguished between two categories of constitutions: 'revolutionary' and 'evolutionary'ones:

"*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*" [11].

When observing the evolutionary/historical constitutions one could realize that: "*Codification, consolidation and adaptation are more predominant motives than modification. The constitution reflects historical movements outside itself"* [12].

The semi-permanent revision process of Treaties[13] makes the attempt to transpose the idea of Constitution into a supranational level very difficult: the Constitution, in fact, should be the fundamental charter, that is a document characterized by a certain degree of resistance and continuity.

Against this background the European Treaties seem to be unable to lead the social forces: they can only "*reflect the historical movements*"[14], thus seeming mere *snapshot constitutions*.

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[9] J. Bast, "The Constitutional Treaty as a Reflexive Constitution", *German Law Journal*, 11/2005, pp. 1433-1452, at pp. 1438 and 1449.

[10] L.Besselink, "The Notion and Nature of the European Constitution after the Reform Treaty", 2007 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086189

[11] *Ibid.*

[12] *Ibid.*

[13]B.De Witte, "The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process'", in P. Beaumont- C. Lyons - N. Walker (eds), *Convergence and Divergence in European Public Law*, Oxford, Hart, 2002, pp. 39-57.

[14] L.Besselink, "The Notion" *o.c*.

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; it would be a Grundgesetz rather than a Verfassung"* [15].

This idea of Constitution implies the premise of a "constructivist" nature in every "real" constitutional moment.

By constructivism I mean "*a conception which assumes that all social institutions are, and ought to be, the product of deliberate design*"[16].

The dualistic structure of Hayek's thought links the idea of constructivism to that of "order", which can be conceived in two different ways: "order"[17] as *κοσμος* (a spontaneous order) and order as *ταξις* (a constructed order).

The Constitutions conceived as binding and normative (not merely descriptive) documents are supposed to be "constructivist" since they are directed to the achievement of an ideal society which should be characterized by those values the Constitution itself considers as fundamental.

This is the case, for example, of the concept of constitution that can be inferred from art. 16 of the "*Declaration of the Rights of Man and of the Citizen*"[18]: a document aiming at a society characterized by the division of powers and the protection of rights.

Rather than limiting itself to providing a snapshot of the society, this kind of constitution (and constitutionalism) is aimed at changing it, addressing the social forces toward a common goal.

The constructivism which seems to accompany the modern (continental, at least) constitutionalism seems to show a clear preference for the *political sources of law*.

The political sources of law are the conclusive result of a debate where opposing political forces clashed in order to influence the state will's manifestation, represented by the law and its content; the cultural sources are inferred from the experience of the past (customs, judicial precedent) or from the rational analysis of legal phenomena (the role of the scholars for example).

The most famous example of political sources of law, the "*loi*" (legge, statute) is an act characterized by abstractness and generality and in this sense laws are the product of a rational legislator who is moved by a clear intent to build coherence, unity and order conceived as ταξις *(constructed order*).

From this perspective the (second) European Convention had given us the illusion of the existence of a strong and constructivist will at supranational level, which has miserably failed.

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[15] *Ibid.*

[16] A. Hayek, *Law, Legislation and Liberty*, Volume 1, *Rules and Order*, London, Routledge, 1973, at p. 5.

[17] "*... the situation where one author could argue with regard to a given phenomenon that it was artificial because it was the result of human action, while another might describe the same phenomenon as natural because it was evidently not the result of human design*". A. Hayek, *Law, Legislation o.c.*, at p. 20.

[18] Declaration of the Rights of Man and of the Citizen, at art. 16: "*A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all*".

The consequence of this failure would be the absence of legitimacy and unity or, in other words, fragmentation, disorder and darkness.

3. **Europe, don't be afraid!**

In these first pages I have tried to sum up the feeling of scepticism which dominates the literature (with a few exceptions), the current phase of EU integration and the fear of plurality which seems to emerge after the last attempt to govern the complexity of European integration and combine the multiple hierarchies (constitutional supremacy versus EC law primacy) that coexist in a context of constitutional pluralism.

The concurrent presence of several constitutional poles is the essence of what Maduro calls "*constitutional pluralism*"[19].

According to Maduro, in fact, generality, comprehensiveness, and coherence- that would be the values of constitutionalism as a project of modernity- can be reached, in the context of constitutional pluralism, without an "*authoritative definition"*[20].

According to Baquero Cruz, instead, this absence of an authoritative decision would imply the addition of a "*post-modern flavour to constitutionalism*" since it involves the end of constitutional law and of constitutionalism as an ideal:

" By post-modern, I mean all that is fluid and fragmented. And that is what pluralism tries to reflect, the reality of a fragmented law which is always in flux. Perhaps it is more realistic, if the reality of law is more like that, and not at all like the modern constitutional ideal. But there may be a risk in that step. Lawyers have probably been the last to embrace postmodernism. First were the architects, then philosophers, linguists, etc., and a minority of academic lawyers have been the last to embrace it, and perhaps they have done it with a risk to their social role, because they may not be compatible. We renounce to an ideal of constitutional law if we embrace the post-modern view of law which is reflected in radical pluralism, not only in the European Union but also in state constitutional law"[21].

Is that true? Is constitutional pluralism a form of postmodernism[22]?

Against this interpretation Maduro argues that unity and coherence can be reached in lack of authority because the latter does not automatically imply the absence of power[23], and the virtues of

[19] M. Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action* in N. Walker (ed), *Sovereignty in Transition*, Oxford, Hart, 2003, pp. 50 ff.

[20] M.Avbelj- J.Komárek (eds.), "Four Visions of Constitutional Pluralism – Symposium Transcript", EUI working paper, 2008/21, http://cadmus.iue.it/dspace/bitstream/1814/9372/1/LAW_2008_21.pdf

[21] *Ibid.*

[22] On the notion of postmodern constitutionalism, see: P.Carrozza, "Constitutionalism's post-modern opening", in M.Loughlin- N.Walker (eds.), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*, Oxford, OUP, 2007, pp. 169-187; M. Balkin, "What is a Postmodern Constitutionalism?" *Michigan Law Review*, Vol. 90, 1992, pp. 1966-1990; G.Volpe, *Il costituzionalismo del Novecento*, Bari, Laterza, 2000, at pp. 258-259.

[23] As Cassese argues, in fact,: "*Power, not authority, is central in the global arena. Power can be exercised through*

cooperation inspired by the principles of *contrapunctual law*[24] can substitute the means of hierarchy.

Anyway, Baquero Cruz opens post-modernity's Pandora's box and stresses the risk of fragmentation when he says that "*the costs* [of pluralism] *in terms of clarity, certainty and effectiveness may be too high*"[25].

As it was said by Douzinas-.Warrington and S.McVeigh, in their role of supreme laws of the land, Constitutions decide "the question of validity of all parts of the legal system" [26].

According to him, "Constitutional jurisprudence is the third grand narrative of modernity"[27] since every theory of constitutionalism expresses a claim to the constitution 's supremacy (conceiving the constitution as the highest law)[28] while, on the contrary, the actual postmodern jurisprudence's goal is to deconstruct the justificative feature of constitutionalism.

In this sense postmodern jurisprudence, focusing on its politics of deconstruction, challenges the sense of unity coming from the constitutions, emphasizing "*plurality over authoritarian unity, a disposition to criticise rather than to obey, a rejection of the logic of power and domination in all their forms, an advocation of difference against identity, and questioning of state universalism*"[29].

Although the emphasis on plurality is present in Maduro's concept of contrapunctual law, honestly we have to acknowledge that his constitutional pluralism does not barely accept the mere plurality. On the contrary, the procedural principles of contrapunctual law aim to ensure coherence in a context characterized by the existence of several constitutional poles: constitutional pluralism attempts to "rationalize" the plurality and in this sense its intent is proudly modern.

This work of rationalization finds its roots in the substantial action of several actors: among them a very peculiar role can be played by the judges and by their interpretive activity.

The feeling of fragmentation caused by the lack of a constructivist constitution seems to disappear when considering the latest judicial trend and the extraordinary struggle conducted by the ECJ to

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authoritative means (such as the 'command and control' models familiar from domestic administrative systems), but also through agreements, contracts, incentives, standards and guidelines". S.Cassese, "Is there a Global Administrative law?", http://www.irpa.eu/public/File/Articoli/is%20there%20a%20gal.pdf

[24] According to Maduro's words: "*These meta-methodological principles aim to secure those values in a context where you do not have an ultimate authoritative source to do that. But certainly, I do not see it necessarily as a post-modern project. To the contrary, since my conception of constitutionalism is deeply embedded by a concern with the rationalisation of the democratic process*." M. Poiares Maduro in M.Avbelj- J.Komárek (eds.), "Four Visions" o.c.

[25] M.Avbelj- J.Komárek, "Four Visions" *o.c.*

[26] C.Douzinas-R.Warrington-S.McVeigh, *Postmodern jurisprudence: the law of text in the texts of law*, London, Routledge, 1991, at p. 28

[27] *Ibid*.

[28] "*As law, it is a text comprised of clear words whose meaning is given in the intentions of its authors; as a legal rule, it has a normative content that empowers and limits political power. The unity of the law is to be found in the original text that authorises all laws*, C.Douzinas-R.Warrington-S.McVeigh, *Postmodern jurisprudence o.c.*, at p. 28

[29] M.Ryan, *Marxism and deconstruction*, Baltimore, Johns Hopkins University Press, 1982, at p. 213.

dominate the interpretive centrifugal forces coming from the plurality which characterizes the "*constitution composée*"[30].

Part II

4. **Why dwelling on interpretive competition?**

In my opinion, all the recalled theories, which have read sceptically the EU's constitutionalization process, present a common core: they do not accept the idea of a material constitution deriving from the judicial acquisitions of a culture-based development.

They do not trust the activity of rationalization ensured, in this phase at least, by the judges, and they disregard the judicial dialogue's systematic function in the multilevel and pluralistic constitutionalism.

Rightly Maduro recognizes the judicial actors' systemic function, contextualizing their activity, stressing that they are part of a political bargaining process and that the "*motives behind the* [judicial] *transactions may vary greatly. Judicial criteria are not simply a result of judicial drafting but of a complex process of supply and demand of law in which the broader legal community participates*"[31].

The judicial actors contribute to the development of a new legal order, which is the outcome of the coordination between national and supranational level, providing interconnections and links between different legal cultures, mediating values (interpretation from the Latin "*inter-pretia*" ie. intermediation among values), comparing experiences as the case of the many seasons, for example, of proportionality principle shows[32].

[30] On this concept see: I.Pernice-F.Mayer, "De la constitution" *o.c.*, pp. 623 ff.

[31] M.P.Maduro, "Contrapuntual Law" o.c, ,2003, at p. 514

[32] The principle of proportionality was clearly "extracted" from the German legal tradition, although the classic three-step partition (*Geeignetheit*, *Erforderlichkeit*, *Verhältnismäßigkeitsprüfung im engeren Sinne*) elaborated by the German judges is rarely respected by the ECJ (ECJ, C-96/03 and C-97/03, *A. Tempelman* and *Coniugi T.H.J.M. van Schaijk c. Directeur van de Rijksdienst voor de keuring van Vee en Vlees*, 2005 ECR I-1895). A broad distinction between the cases involving the EU institutions and the ones involving member states can be found in the ECJ activity. In the former the ECJ seldom declares the illegitimacy of the measures. On the contrary in the latter, involving the Member States, the Court seems to insist on the reasons of integration, declaring the violation of the "loyalty duty" to the Treaties. Then the transposition of the German principle into the supranational context was enriched by the French experience of the "*bilan avantages- coûts* "' (costs /advantages analysis) as elaborated in the *Conseil d'Etat* case law.

Such bottom-up flows (from the national traditions to the supranational level) induced the creation of a supranational principle. As above said, the constitutional exchange among levels is continuous and implies a second constitutional flow from the EU level to the national levels. Due to the diversification of the national legal orders we can distinguish different "spill over" effects. Galetta (D.U.Galetta, "Il principio di proporzionalità comunitario e il suo effetto di spill over negli ordinamenti nazionali", *Nuove autonomie*, 2005, pp. 541-557) has identified three examples of different reactions to this top-down flow. The first case is that of England where the judges refused to apply the proportionality test opting for the so-called "*Wednesbury-test*" until 1998, year of the Human rights Act which has represented a fundamental turn in this sense. Another example is given by Italy, where national judges misunderstood the test of proportionality: clear proof of such a situation can be found in the confusion between reasonableness and proportionality (TAR Lecce, Bari, Sez. III, from 2483/2004 to 2493/2004, available at: www.giustizia-amministrativa.it). Last but not least, the German case: here the same principle of proportionality has come back after

In order to define the impact of judicial actors on the EC system's evolution we may use the notion of *cultural sources of law*.

The cultural sources are not the result of an activity purposely aimed at the creation of law; on the contrary, they are inferred from the experience of the past (customs, judicial precedent) or from the rational analysis of legal phenomena (the role of the scholars for example).

The acceptance of said sources of law is based on the idea that the law is not only the pursuance of the sovereign's will (the king, the people or the parliament) "*but responds to the need of rationally determinated justice"*[33]

The ECJ's interpretative rulings belong to the group of cultural sources of law. They played a fundamental role in pushing forward the reasons of integration while political sources (directives, regulation) were trapped into the intergovernmental mechanisms.

Why? Quite simply, they are flexible sources, more adaptable to the changing aims of "functionalism", less "exposed" to the attention of national governments, due to the "*benign neglect"*[34] described by Eric Stein.

The cultural sources of law renounce to the constructivist aim, contributing to the reflection of a κοσμος (*a spontaneous order*), outcome of the case-by-case judicial cooperation.

I would start from this double dichotomy (political sources/constructivism versus cultural sources versus evolutionism) to suggest the very different impressions that a partial reading of the current phase from the point of view of the law in action (the case law of the ECJ).

The theoretical framework supporting the need for a research like the one I am proposing can be linked to the existence of a multi-level constitutional legal order and of a constitution which is perceived as the outcome of the never-ending comparison and dialectic between "*closely interwoven and interdependent*[35]") levels of governance (states and EU).

The interplay between levels renders the idea of the non-simple distinction between the territorial actors' legislative *domaines*.

As a matter of fact, one of the most relevant difficulties in the multilevel legal system is represented by the existence of shared legal sources which make the attempt of defining legal orders as *self contained regimes* very difficult.

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the "supranational transformation" causing an evolution in the judges' activity, in order to adapt the case law to the new supranational demands (*Gundesverwaltungsgericht*, BVerwG- Federal Administrative Court, *Deutsches Verwaltungsblatt* (DVBl) 613, 1993; *Gundesverwaltungsgericht* ,BVerwG- Federal Administrative Court, *Deutsches Verwaltungsblatt* (DVBl) 68, 1997).

[33] A. Pizzorusso, *Sistemi giuridici comparati*, Milano, Giuffrè, 1998, at pp. 263-264. See also A.Pizzorusso, *Fonti politiche e fonti culturali del diritto in Studi in onore di T.Liebman*, I, Milano,Giuffrè, 1979, at pp. 32 ff.

[34] E.Stein, *Lawyers, Judges and Making of Transnational Constitution*, 1 American Journal of International Law 75, 1981, pp. 1-27.

[35] I. Pernice, *Multilevel constitutionalism in the European Union*, Working Paper, 5/02, 4, http://www.rewi.hu-berlin.de/WHI/papers/whipapers502/constitutionalism.pdf.

This is coherent with the effort of providing an integrated and *complex* (i.e. interlaced[36]) reading of the levels and represents one of the most fascinating challenges for constitutional law scholars.
At the same time, as a consequence of the lack of a precise distinction within the *domaine* of legal production, it is sometimes impossible to resolve the antinomies between different legal levels on grounds of the prevalence of a legal order (e.g. the national) on another (e.g. the supranational).
Moreover, in this context, because of the inextricability of such a complex system, many legal conflicts present themselves as *conflicts of norms* (conceived as the outcome of the interpretation of legal provisions[37]) rather than *conflicts of laws*[38].
The interpretative competition thus represents the dynamic side of the European legal order's interlaced nature and it exalts the relational activity of its actors.
In the following chapters I am going to describe briefly the interpretive position of the ECJ in the multilevel legal system and then how the ECJ seems to respond to the need of interpretive uniformity in such a context.

5. **Interpretive struggle: the latest judicial trends**

The interpretive position of the ECJ is well described by art. 220 ECT, p. 1, reading that: "*The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed*"[39].
Before the Nice Treaty the ECJ was granted by the ECT the exclusive mandate to ensure the interpretation and application of EC law, thus becoming the lord of interpretation.
Such a role is repeatedly confirmed by a careful reading of the ECT After the Nice Treaty, for example, according to art. 225 ECT, p 3:

"*Where the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling.*
Decisions given by the Court of First Instance on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Community law being affected".

[36] G. Martinico, *Complexity and Cultural sources of Law in the EU context: from the multilevel constitutionalism to the constitutional synallagma*, *German Law Journal,* 2007, 3/ 2007, pp. 205-230.
[37] According to the distinction between statements (disposizioni) and norms (norme) by V.Crisafulli.V.Crisafulli, entry "Disposizione (e norma)", in *Enc. Dir*., XIII, Milano, Giuffrè, 1964, pp. 195-209, at p. 195
[38] J. Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to other Rules of International Law*, Cambridge, Cambridge University Press, 2003, at pp. 6-8.
[39] See the precedent version: "*The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed*".

The interpretive function of the ECJ expresses itself not only within the limits of the preliminary ruling mechanism (234 ECT) as the ECJ itself acknowledged in the famous *Cilfit*[40] case where the Court excluded the duty to raise the question, for the national last instance judge, also when: "*there previous decisions to the Court have already dealt with the point of law in question,* ***irrespective of the nature of the proceedings which led to those decisions,*** *even though the questions at issue are not strictly identical"*.

This is confirmed by art. 104, p. 3, of the ECJ Rules of procedure where there is no- from this point of view- distinction between the preliminary ruling and other proceedings[41].

The importance conferred by the ECJ to its relevant case law is due to the need of guaranteeing stability and interpretive uniformity to EC law since "*[a]ny weakening, even if only potential, of the uniform application and interpretation of Community law throughout the Union would be liable to give rise to distortions of competition and discrimination between economic operators, thus jeopardizing equality of opportunity as between those operators and consequently the proper functioning of the internal market*"[42].

Moreover, the national constitutional courts themselves acknowledged the particular nature of the ECJ's interpretive rulings (once again, irrespective of the nature of the proceedings which led to those decisions): the best example of this fact is represented by judgments 113/85 and 389/89[43] of one of the ECJ's most important enemies, the Italian Constitutional Court.

In the Italian Constitutional Court's reasoning, these interpretative rulings present the normal effect of the classical EC legal sources when they contain the interpretation of EC legal provisions characterized by such effects: direct applicability and direct effect. In this way the Italian Court put the classic EC acts (regulations, directives) on an equal footing with the Court of Justice interpretative rulings. Following this reasoning, according to the Italian Constitutional Court, the ordinary judge's duty to non-apply the internal law contrasting with the EC law has to be extended to the case of non-conformity between the national law and those interpretative rulings of the Court of Justice. The reasoning of the Italian Constitutional Court takes as its starting point the particular position covered by the Court of Justice in the EC legal system.

The interpretative rulings of the Court of Justice would be second grade sources because they infer their legal power from the interpreted provisions. In fact, the Italian Court recognised the

[40]ECJ, C- 283/81, *SRL Cilfit e Lanificio di Gavardo SPA contro Ministero della Sanità*, 1982 *ECR* 3415

[41] "*3. Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, or where the answer to such a question may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, at any time give its decision by reasoned order in which reference is made to its previous judgment or to the relevant case-law*".

[42]European Court of Justice, Report on certain aspects of the application of the Treaty on European Union, Luxembourg. May 1995, http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/cj_rep.html (24.6.2004), point 11.

[43]*Corte Costituzionale*, *sentenza* 113/1985 and *sentenza* 389/1989, both of them are available on www.cortecostituzionale.it

content and the effects of the classic communitarian sources (direct effect and direct applicability) only if the interpreted provisions have such effects.
This is an indirect recognition of the strong role of the Court of Justice and implies (for the national judge) the extension of the obligation of non-application of national law contrasting with the interpretative rulings of the Court of Justice.

6. **How can the ECJ assure the coherence and unity in a constitutional "fragmented" legal order**

As seen above, looking at the current situation of the European integration one could perceive a general sense of constitutional fragmentation which jeopardizes the unity and coherence of the multilevel legal system.
This leads to the following question: how can the ECJ deal with the issue of coherence in such a context?
Traditionally the preliminary ruling mechanism has allowed the ECJ to develop a successful alliance with the national judges: judgments such as *Van Gend en Loos*[44] and *Costa/Enel*[45] were made possible thanks to the cooperation between the ECJ and the national ordinary judges.
As Weiler said in 1993:

"*In the past the European Court was always careful to present itself as primus inter pares and to maintain a zone of autonomy of national jurisdiction even at the price of non uniformity of application of Community law. If the new line of cases represents a nuanced departure from that earlier ethos, the prize may be increased effectiveness, but the cost may be a potential tension in the critical relationship between the European Court and national courts*"[46].

After *Köbler*[47], *Commission versus Italy*[48] and *Kühne & Heitz*[49] case Komarek wrote about the "*end of the 'sincere cooperative relationship*"[50] and about a judicial attempt to build coherence and unity by establishing a *de facto* hierarchy which looks like that of the classical federal judicial systems.
This is the core of the so-called appellate theory, according to which "*One possible way of reading Köbler is to see the referral sent in the context of the claim of liability for a judicial breach as a*

[44] ECJ, C-26/62, *Van Gend en Loos*, 1963 *ECR* 3.
[45] ECJ, C- 6/64*, Costa / ENEL*, 1964 *ECR* 1141.
[46] J.H.H. Weiler, "The least-dangerous branch: A retrospective and prospective of the European Court of Justice in the arena of political integration" in J.H.H. Weiler, *The Constitution of Europe*, Cambridge, Cambridge University Press, 1999, at p. 216.
[47]ECJ*,* C-224/01, *Köbler*, 2003 *ECR* I-10239.
[48]ECJ, C-129/00,*Commission v. Italy*, *ECR* I-14637.
[49] ECJ, C-453/00, *Kühne & Heitz* , 2004 *ECR* I-837.
[50]J. Komarek, "Federal elements in the Community judicial system- building coherency in the Community legal order", *Common Market Law Review*, Vol. 42, Issue 1, 2005, pp. 9-34, at p. 21.

special kind of an appellate procedure whereby the questions of Community law, improperly treated by the national court the judgement of which gave rise to the liability action, may eventually reach the Court of Justice on the "second attempt"[51] or, in other words*: "liability action can be seen as an indirect possibility to appeal and reach the Court of Justice*"[52].

As Komarek specified, the term appeal is used in metaphoric way since the fact that "*the decision whether to refer a preliminary question to the Court of Justice remains exclusively in hands of the national judge, not the parties*"[53].

Irrespective of the acceptance of the "appellate theory", it is unquestionable that the ECJ has chosen to govern the centrifugal judicial forces by insisting on the authority and equating the infringement of EC Law's obligations (coming from the classical sources of law as described in art. 249 ECT) to the violation of its own case law[54].

In *Köbler* the ECJ answered to the preliminary reference raised by the *Landesgericht für Zivilrechtssachen Wien* (Austria) for a preliminary ruling in the proceedings, pending before that court, between Prof. Gerhard Köbler and the Austrian Republic.

In that case the *a quo* judge asked, among other matters whether the *Francovich*[55] doctrine was also applicable when the conduct purportedly contrary to Community law was a decision of a Member State's supreme court .

The ECJ's answer was affirmative, but in this case the infringement caused by the judicial body should be "manifest":

"In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation"

Along *Köbler*'s line in *Traghetti del Mediteranneo* the ECJ ruled that: "*Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last*

[51] *Ibid.*, at p. 33
[52] *Ibid.,* at p. 33
[53] Ibid., at p. 14
[54] In *Köbler* case, for examples it acknowledges that: "*The principle that it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law, subject to the reservation that effective judicial protection be ensured, is applicable to actions for damages brought by individuals against a Member State on the basis of an alleged breach of Community law by a supreme court*". And before: "*In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter*".
[55] ECJ, C-6/90 and C-9/90, *Francovich and Bonifaci / Italy* 1991 *ECR* I-5357.

instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court.

Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed"[56].

In the *Köbler* case, one of the counter-arguments supported by the national governments (Austria, France and UK)- in order to avoid the extension of the *Francovich* doctrine to the judicial field – was the principle of the untouchability of the national *res judicata principle*[57].

In order to challenge that argumentation the ECJ specified that:

"It should be borne in mind that recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as res judicata. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of res judicata. The applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of res judicata of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage"[58].

The problem of the equilibrium between the need for interpretive uniformity and the respect for the *res judicata* principle was drawn up by the ECJ in *Kühne & Heitz* case.

This decision was the outcome of the preliminary reference raised by the *College van Beroep voor het bedrijfsleven* (Netherlands) for a preliminary ruling in the proceedings pending before that court

[56] ECJ, C-173/03, *Traghetti del Mediterraneo*, 2006 *ECR* I-5177. This judgment was given after a preliminary reference raised by the *Tribunale di Genova* in the proceedings "*Traghetti del Mediterraneo SpA versus Italian Republic*". The *a quo* judge asked the following questions to the ECJ:

"*'(1) Is a Member State liable on the basis of non-contractual liability to individual citizens for errors by its own courts in the application of Community law or the failure to apply it correctly and in particular the failure by a court of last instance to discharge the obligation to make a reference to the Court of Justice under the third paragraph of Article 234 EC?*

(2) Where a Member State is deemed liable for the errors by its own courts in the application of Community law and in particular for failure by a court of last instance to make a reference to the Court of Justice under the third paragraph of Article 234 EC, is affirmation of that liability impeded in a manner incompatible with the principles of Community law by national legislation on State liability for judicial errors which:

– *precludes liability in relation to the interpretation of provisions of law and assessment of facts and of the evidence adduced in the course of the exercise of judicial functions,*

– *limits State liability solely to cases of intentional fault and serious misconduct on the part of the court?*"

[57] "*For their part the Republic of Austria and the Austrian Government (hereinafter together referred to as 'the Republic of Austria'), and the French and United Kingdom Governments, maintain that the liability of a Member State cannot be incurred in the case of a breach of Community law attributable to a court. They rely on arguments based on res judicata, the principle of legal certainty, the independence of the judiciary, the judiciary's place in the Community legal order and the comparison with procedures available before the Court to render the Community liable under Article 288 EC*". ECJ, C-224/01, *Köbler*, 2003 *ECR* I-10239.

[58] ECJ, C-224/01, *Köbler*, 2003 *ECR* I-10239.

between *Kühne & Heitz NV* and *Productschap voor Pluimvee en Eieren* on the interpretation of Community law and, in particular, the principle of cooperation arising from Article 10 EC.
The *a quo* judge asked the ECJ whether, under Community law (art. 10 ECT), an administrative body was required *"to reopen a decision which has become final in order to ensure the full operation of Community law, as it is to be interpreted in the light of a subsequent preliminary ruling"*.
In order to provide an answer the ECJ recalled that:

"*the answer to the question referred must be that the principle of cooperation arising from Article 10 EC imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where*

- *under national law, it has the power to reopen that decision;*

- *the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;*

- *that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 EC; and*

- *the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court*"[59].

Here the Court clearly expresses its preference for the national *res judicata*'s overcoming (with regard to administrative decisions), where allowed by the national law.
This reference to the national autonomy (which was suggested by the *a quo* judge when he raised the preliminary question) seems to mitigate the strong acceleration for the ECJ's interpretive uniformity.
In *Kapfer* the ECJ answered to a preliminary question raised by the *Landesgericht Innsbruck* (Austria) in the proceedings *Rosmarie Kapferer* versus *Schlank & Schick GmbH*.
The *a quo* judge expressly proposed the possibility to extend the *Kühne & Heitz* principle to the case of a *res judicata* in a judicial decision.
With regard to this possible extension the ECJ stressed that: "*It should be added that the judgment in Kühne & Heitz, to which the national court refers in Question 1(a), is not such as to call into*

[59] ECJ, C-453/00, *Kühne & Heitz*, 2004 *ECR* I-837.

question the foregoing analysis. Even assuming that the principles laid down in that judgment could be transposed into a context which, like that of the main proceedings, relates to a final judicial decision, it should be recalled that that judgment makes the obligation of the body concerned to review a final decision, which would appear to have been adopted in breach of Community law subject, in accordance with Article 10 EC, to the condition, inter alia, that that body should be empowered under national law to reopen that decision (see paragraphs 26 and 28 of that judgment). In this case it is sufficient to note that it is apparent from the reference for a preliminary ruling that that condition has not been satisfied"[60].

The *Kapferer* doctrine seemed to have resolved this issue but a few months after that decision the ECJ dealt with another interesting case: *Lucchini*[61].

In *Lucchini* the ECJ, following the Opinion of General Advocate Geelhoed, concluded that: "*that Community law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of res judicata in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission which has become final*".

Is it a blatant overruling? What about the consequences of such decision on the national legal orders? As Komarek rightly recalled, in fact: "*Otherwise the Court may, when promoting coherency of the Community legal order in a narrower sense (i.e. only on a Community level), create serious disturbances for national legal orders. We should have in mind that the multilevel system of the Community legal order is 'composed of two complementary constitutional layers, the European and the national, which are closely interwoven and interdependent'*"[62],"[63].

7. **Is *Lucchini*' s doctrine the end the judicial dialogue?**

My impression is that the final conclusion reached in *Lucchini* could be explained by the *ultra vires* nature which characterizes the contested decision of the national judge.

As recalled by the ECJ itself, in fact, in that case the Court dealt with a judicial act which had been adopted in a field covered by an undisputed Community competence, since the national courts *"do not have jurisdiction to give a decision on whether State aid is compatible with the common market*".

[60] ECJ, C-234/04, *Kapferer*, 2006 *ECR* p.I-2585.
[61] C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato versus Lucchini SpA*, *ECR*, 2007, I-6199. About *Lucchini* case see: X.Groussot-T.Minseen, "Res Judicata in the Court of Justice Case-Law:.Balancing Legal Certainty with Legality?", *European Constitutional Law Review*, 2007, pp. 385-417.
[62] I. Pernice, "Multilevel constitutionalism in the European Union" *o.c.*
[63] J.Komarek, "Federal elements" *o.c*, , at p. 30.

As was said by Geelhoed the principle of *res judicata* cannot permit the persistence of a judicial decision which is a clear violation of the simplest separation of competences between ECs and States[64].

This would better explain the particularity of that case and, at the same time, it should enable us to confirm the persistence of the judicial dialogue.

More in general, I would not speak about the end of the dialogue between ordinary judges and ECJ on the following grounds:

1. firstly, these cases regard the preliminary ruling mechanism which is only a part (although the most important one perhaps) of the phenomenon. Looking at relationship between Constitutional Courts and ECJ, in fact, one can appreciate how the judicial dialogue in this case has followed alternative ways to those of the preliminary ruling. One of the most important cooperative techniques between judges is then constituted of consistent interpretation (*Marleasing* doctrine[65]) and it represents, formally, an exception to the preliminary ruling. We can therefore conclude that the judicial dialogue cannot be restricted to cooperation through the preliminary ruling mechanism.
2. As we have seen, the ECJ seems to respect the Member States' autonomy by requiring the overcoming of the *res judicata* principle only when permitted by the national law (see *Kühne & Heitz*).
3. The ECJ seems to maintain a strong distinction between the principle of *res judicata* concerning an administrative body decision and its application with regard to the judicial decision. *Lucchini* case, in this sense, could be seen as an exception caused by the manifest violation of one of the most elementary European principles: the division of competencies between the ECJ and the national judges.
4. The ECJ started to pay attention to the national constitutional structures quoting the constitutional materials of the national judges or finding in national (and not in common) constitutional traditions the exception to the application of obligations due to belonging to the EC: "*In that connection, it is not indispensable that restrictive measures laid down by the authorities of a Member State to protect the rights of the child, referred to in paragraphs 39 to 42 of this judgment, correspond to a conception shared by all Member*

[64] "*In short, the key question is whether a final judgment which came about in the circumstances referred to above, which, as is evident from the previous point, may have serious implications for the division of powers between the Community and the Member States, as this results from the Treaty itself, and which would also make it impossible for the powers assigned to the Commission to be exercised, must be considered inviolable. To my mind, that is not the case*", Opinion of the AG Geelhoed on *Lucchini* case, available at http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-119/05&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

[65] ECJ, C-106/89, *Marleasing / Comercial Internacional de Alimentación*, 1990 *ECR* I-4135.

States as regards the level of protection and the detailed rules relating to it (see, by analogy, Omega, paragraph 37). As that conception may vary from one Member State to another on the basis of, inter alia, moral or cultural views, Member States must be recognised as having a definite margin of discretion". [66]

5. There is a new intriguing frontier for the judicial dialogue, represented by the beginning of a cooperative era between the ECJ and some constitutional courts. Recently the Belgian[67], Austrian[68], Lithuanian[69] and - lastly - Italian[70] Constitutional Courts (within the *principaliter* proceeding) have accepted to raise the preliminary reference to the ECJ.

Against this background, confirming the validity of the judicial dialogue does not mean a complete adhesion to the contrapunctual law principles.

I could only hypothesise without any certainty - this issue requiring further research- precise and consciously deliberated cooperation strategies to be employed by the courts; nor am I cognizant whether these prospective strategies could be read in the light of the principles described by Maduro: instead it seems to me a sort of judicial *catallaxy* - here again I am using a notion by Hayek- a cooperation without planned ends.

However, what I attempted to stress is that the so called "constitutional failure" is not such at all and the vitality shown by the judicial formant demonstrates the possibility to conceive a European Constitutional Law as a phenomenon moved by "cultural" forces.

Synopsis

As we saw, observing the current phase of the European integration from the perspective of the political sources of law the final impression is that of an extremely fragmented law, just a postconstitutional disorganised mass of legal material.

Looking at the same situation from the perspective of the cultural sources of law, instead, the final impression is that of a merciless guardian who does not want to renounce his interpretative monopoly and is fighting his battle against any attempt of centrifugal interpretation.

In order to deal with the extreme fragmentation which characterizes multilevel legal systems, the ECJ avails itself of a strategy based on authority and rationality.

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[66] ECJ, C-244/06, *Dynamic Medien*, 2008 ECR I-505

[67] *Cour d'Arbitrage*, 19th of February 1997, No. 6/97, available at www.arbitrage.be/fr/common/home.html.

[68] *VfGH*, 10th of March 1999, B 2251/97, B 2594/97, available at www.vfgh.gv.at/cms/vfgh-site.

[69] *Lietuvos Respublikos Konstitucinis Teismas*, Decision of 8th of May 2007, available at www.lrkt.lt/dokumentai/2007/d070508.htm.

[70] *Corte Costituzionale*, sentenza No. 102/2008 and ordinanza No. 103/2008, both available at www.cortecostituzionale.it.

At the same time, I would not say that the ECJ is building a federal jurisdiction, nor would I talk about an appellate theory, due to the persistence of a spirit of cooperation with the national judges, which is rooted in the reference to national legislation.