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From the Constitution for Europe to the Reform Treaty: a literature survey on European Constitutional Law

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Abstract

The aim of this paper is to offer a brief overview of the international literature regarding the European Constitutional Law.

It is possible to identify five groups of studies which will serve as guidelines of this review article:

1. The Constitution for Europe and the constitutional moment;
2. The Constitutional Treaty and the innovations “proposed”;
3. The European Court of Justice’s activism;
4. The Constitutional stop and the rise of the Reform Treaty
5. The notion and the nature of a Constitution for Europe after the constitutional failure.

Key-words:

European constitutional law, European Union, constitutionalization, fundamental rights



Preliminary remarks

The aim of this paper is to offer a brief overview of the international literature regarding the European Constitutional Law.

European Constitutional Law is an emerging branch of scholarship born after that ideal turning point represented by the Charter of fundamental rights of the EU^I.

Normally by the formula “constitutionalisation” of the EC legal order, authors^{II} mean the progressive shift of the EC law from the perspective of an international organization to that of a federal state. Another meaning of constitutionalisation of the EC legal order can be found with regard to the progressive “humanization” of the law of the common market^{III}.

It is a very famous story which started with judgements by, among others, *Nold*^{IV} and *Stauder*^V and was enriched, in the last years, by judgements by, among others, *Omega* and *Berlusconi*.^{VI}

In this respect, the proclamation of the Nice Charter gave - at least- new blood to the debate about the writing of a European Constitution^{VII} and the possibility of a Bill of Rights at the supranational level^{VIII}, since it testified the possibility to give the rights a written dimension at the supranational level, overcoming the ECJ's logic of *ius praetorium* in this field.

As we know, this document is still not binding from a *stricto sensu* legal point of view: it was just proclaimed by the national governments in Nice without being included in the text of the Nice Treaty.

In this sense we can say that a *fil rouge* in the European constitutional law's history is the continuous attempt to give the Charter a binding effect, trying to insert it in the body of the *acquis communautaire*.

The failure of such a strategy was evident after the Dutch and French referenda, that imposed the transformation of the Constitutional Treaty into a more modest Reform Treaty.

The literature on the Constitution for Europe is huge - although we are going to assume the years from 2001 to 2008 as a reference period -, but perhaps it is possible to identify five groups of studies which will serve as guidelines of this review article:



1. The Constitution for Europe and the constitutional moment;
2. The Constitutional Treaty and the innovations “proposed”;
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4. The Constitutional stop and the rise of the Reform Treaty
5. The notion and the nature of a Constitution for Europe after the constitutional failure.

1) The Constitution for Europe and the constitutional moment

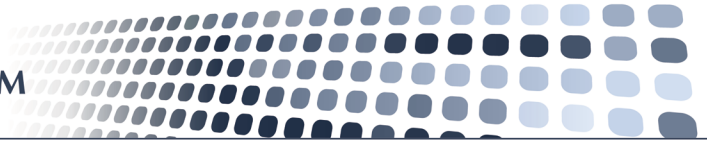
The start of the works of the Convention on the Future of Europe gave new blood to the classic topic of the possibility of a Constitution for Europe^{IX}.

In several papers, Neil Walker^X attempted to “map” the major positions present in the debate, providing the scholars with a very interesting schematization which I will use to classify the huge and pre-existing literature on this issue.

Walker identified four groups of theoretical movements: *constitutional scepticism*, *constitutional serialism*, *constitutional processualism*, *constitutional historical contextualism*^{XI}.

Within the *constitutional scepticism* he distinguished the deep and the contingent scepticism. The former ‘simply holds that the EU is just not the kind of entity that is worthy of characterisation in constitutional terms^{XII}’. The latter -defined as ‘contingent scepticism’- ‘holds that while we should not rule out the possibility of a ‘truly’ constitutional status for the EU, and so should not entirely dismiss the prospect of a constitutional moment, no such status is yet appropriate and no such moment has yet arrived^{XIII}’.

The opposite of this approach would be represented by the *constitutional historical-contextualist* approach, according to which ‘the gradual development of a constitutional register of debate and self-interpretation by the ECJ [European Court of Justice] and, gradually, by other European institutions over the past 30 years, provides abundant evidence that the EU already has a constitutional heritage^{XIV}’.



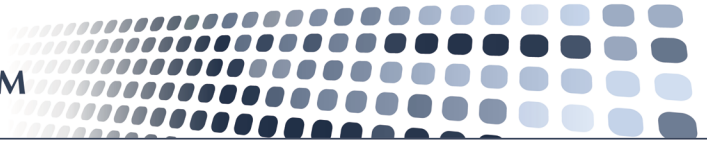
The third approach identified by Walker is that of *constitutional serialism* according to which 'European constitutional development is best characterised as an iterative series of constitutional events rather than as a long process of normal politics interrupted by one or very few constitutional moments^{XV}'.

Finally, there is the *constitutional processualism* approach according to which:

'constitutional discourse and practice within the European Union should not be seen exclusively or even mainly as a matter of Treaties and self-styled constitutional documents. Rather, the test of constitutional relevance should be functional rather than formal, and any activity and any form of reflection that is concerned with the overall legitimacy of the European juridico-political order should be seen in terms of a constitutional register^{XVI}'.

Obviously each approach considers the Constitutional Treaty in a different perspective, as the following table attempts to sum up:

Constitutional approaches	Key concepts	Authors	How they consider the Constitutional Treaty
constitutional scepticism	The pillars of this approach can be found in a state-centred perspective of constitutionalism and in the supposed lack of legitimacy and demos- prerequisites of a polity status; in few words, according to this vision the EU lacks that 'sense of common attachment necessary to make decisions which are seriously committed to and capable of addressing matters of common interest and are broadly perceived as	Grimm	The Constitutional Treaty is seen as an example of false constitutionalism, 'a text which illegitimately frames an essentially state-derivative legal configuration in autonomous and original terms, rather than an event which recognises or brings into being a new <i>pouvoir constituant</i> for the European Union'.



	so doing’.		
constitutional historical-contextualism	According to the historical contextualist, the constitutional moment would imply a clear-cut discontinuity and transformation-upon ‘a qualitative change within constitutional discourse’.	Weiler	The Constitutional Treaty is seen predominantly as an exercise in documentation
constitutional serialism	‘The idea of a defining constitutional moment clearly distinguished from the past and stably framing a constitutional future, is comprehensively challenged’	De Witte; Haltern	The Constitutional Treaty is seen as a part of the European ‘tragic cycle of constitutional inflation’, the latest expression of that semi-permanent revision of Treaties which characterizes the EU.
constitutional processualism	‘Processes and mechanisms which are given little direct recognition within the Treaty structure, such as comitology or OMC or partnership agreements or other “new” forms of governance...[can be seen] as vital constitutional processes which are in danger of being obscured by the focus on surface activity’.	De Burca	‘the drafters of the Constitutional Treaty have drawn uncritically on the state template, giving undue attention to matters such as a Bill of Rights, the horizontal division of power between federal-level institutions, the vertical division of powers between “federal” and “state” institutions, external relations etc., in a way which may fail to grasp the <i>sui generis</i> quality of the EU order’.

It is possible to start from this classification for reading the literature on the European Constitution appeared on reviews and journals in the last six years.

As Walker himself points out, it is very difficult to clearly cut between the second and the third groups of scholars, for example, thus his classification results so much fascinating as sophisticated.



Among the authors who stress the current existence of a European Constitution, we can distinguish those who identify the Constitution in the EC Treaties and in the ECJ's case law^{xvii} from others scholars who conceive the constitution as the result of the never-ending confrontation between national and supranational principles.

This is precisely the case of Pernice^{xviii} and of the supporters of the multilevel constitutionalism approach.

Among the premises of Pernice's theory, we can mention the following: sovereignty is conceived as integrated, while the constitution is seen as a process rather than a document. This Constitution is the outcome of the complementarity of the national and supranational legal orders and these two constitutional levels are parts of a single and composite Constitution. In support of this concept, see Art. 6 of the Treaty on European Union (TEU), which refers to the national constitutional traditions as part of the European Legal order^{xix}.

Following Pernice's reasoning, the European Constitution is the result of the coordination between two different legal orders. Pernice sometimes identifies two levels of analysis (national and supranational) while in other cases three or more:

“The European Union is a divided power system in which each level of government- regional (or Länder), national (State) and supranational (European)-reflects one of two or more political identities.”^{xx}

Or instead:

“The European Constitution, thus, is one legal system, composed of two complementary constitutional layers, the European and the national, which are closely interwoven and interdependent, one cannot be read and fully understood without regard to the other”.^{xxi}

And:

“Whatever may be the general qualification (be it regarded as two autonomous and separate bodies of law or be it qualified as two elements in a multilevel



constitutional system), there is no doubt that European and national law are distinct and have each its own source of legitimacy'.^{XXII}

This difference, however, is important because the “enlargement” of levels involved in the reasoning helps to increase the “complexity” of the resulting legal order. At the sub-national level, fundamental charters exist and this can cause some problems in their legal coordination.

In fact, these fundamental sub-national charters only sometimes limit themselves to reflecting the values of national Constitutions, but they usually renew the language of rights and principles by modernizing the old provisions of the national Constitutions. In Italy, for example, there is a huge debate on the legal value of some fundamental, rights-based principles contained in the “*Statuti*” (that is, the fundamental charters of the Regions), and the Italian Constitutional Court concluded in case n. 372/2004 that they only have a cultural value.^{XXIII}

Another weakness of this approach is its carelessness towards the international level, in spite of the frequent reference to the International Covenants of fundamental rights made by the EU documents and by the ECJ case-law.^{XXIV} The exclusion of the international level implies the lack of consideration of the European Convention of Human Rights which was instead fundamental in the ECJ legal reasoning of cases such as *Rutili*,^{XXV} *Ert*,^{XXVI} and *Hauer*^{XXVII}. The international level was also crucial for the genesis of Art. 6 of the EUT and for the dialogue with the European Court of fundamental rights.^{XXVIII}

In a short book, Leonard Besselink^{XXIX} presents a criticism of the multilevel constitutionalism’s notion on the following grounds: first of all, according to Besselink, ‘thinking in terms of ‘levels’ ...involves inescapably the concept of hierarchy’, because levels imply “by definition the existence of ‘higher’ and ‘lower’ levels, super-ordination and sub-ordination, superiority and inferiority”^{XXX}; secondly: ‘even if the dynamics between the ‘levels’ are emphasized- the higher level influences the lower one and the lower one tries to influence the higher one- the implicit point of departure is that these are separate levels’.

In a word, the author contests the fact that Pernice describes the “levels” as autonomous legal orders.



On the contrary, by “composite constitution” Besselink means a constitution ‘whose component parts mutually assume one another’s existence, both *de facto* and *de iure*’^{XXXI}.

In Besselink’s perspective, the ‘levels’ are seen as incomplete and interlaced and the dimension of the European Constitution’s heteronomy seems to prevail: merely looking at the treaties, in fact, it is not possible to appreciate the important contributions offered to the European constitutional law by elements which are formally external to the treaties (such as the national constitutional traditions and the European Convention on Human Rights).

The idea of mutual relationship is therefore central in this perspective.

After having explained the grounds of his criticism of the notion of multilevel constitutionalism, Besselink moves on to deal with the burning issue of primacy.

Does the primacy principle represent a counter-argumentation to the idea of composite constitution?

Does primacy imply a hierarchical vision of the relationship between legal orders?

Given the absence of a perfect impermeability between the EU and national constitutions, the primacy principle as a rule of precedence is construed as a norm conceived with the purpose of avoiding conflicts.

The relation between the EU and member states is not a two-level junction, they do not operate on different levels; on the contrary, they meet ‘*each other on the same level*’ (this way Besselink once again opposes the idea of a multilevel constitutionalism).

Furthermore, Besselink argues that the hierarchical approach is not adequate to explain the relationship between the EU and national constitutions, by reason of the increasing sensitivity shown by the ECJ with regard to the significance of national constitutional identities.

The best instance of such a statement is provided by the comparison between the *Internationale Hadesgesellschaft* doctrine and the recent ECJ case law in the field of human rights (see, for example, *Omega*^{XXXII} or *Dynamic Medien*^{XXXIII}).

The example is not casual, because the field of human rights represents the best example of EU law’s constitutional heteronomy, and ‘the content of human rights norms within EU Law is largely derived from constitutional sources outside the EU sources in a strict sense: from the point of view of content, the protection of human rights by the EU institutions is heteronomous’^{XXXIV}.



Concluding this section and looking at the debate, we can therefore say that the ultra-state dimension of such a constitutional entity implies the absence of the classic cultural and constitutional homogeneity which characterized the usual national constitutional dimension^{xxxv}.

The European Constitution is thus conceived as a *monstrum compositum*, composed of constitutional rules and principles developed at the European level and complemented by (common) national constitutional rules and principles^{xxxvi}.

In this sense one could conclude that in such a context national law as well as European law partake in defining the European constitutional law.

2) The Constitutional Treaty and the innovations “proposed”

As we know, the Constitutional Treaty attempted to give an answer to many aspects of the so-called European democratic deficit, especially with regard to the following issues: the strengthening of the Commission’s authority, the establishment of a stable European Council Presidency, the enhancement of powers for the European Parliament, the democratic legitimacy and the role of national parliaments, the improvement of decision-making efficiency in the enlarged Union, the coherence of European foreign policy.

The long road which conducted to the Constitutional Treaty started from the Declaration of Laeken, which is indeed usually defined as the beginning point of the constitutional moment^{xxxvii} and which provided the first European Convention with a mandate consisting of four main themes: the division and definition of powers, the simplification of the treaties, the institutional set-up and the moving towards a Constitution for the European citizens^{xxxviii}. It also convened a Convention in order to examine such fundamental questions and prepare the 2004 Intergovernmental Conference.

The text of the Constitutional Treaty is composed of four parts^{xxxix}:

Part I: Definition of the goals, powers, decision-making procedures and institutions of the Union.



Part II: The Charter of Fundamental Rights of the EU.

Part III: Policies and actions of the Union.

Part IV: Final clauses (revision, entry into force).

The literature focused on the possible implications of such an institutional framework^{XLI}, especially insisting on the figure of the President of the European Council, seen as one of the most important novelties for the efficacy and coherence of the EU's functioning^{XLI}.

Looking at the coherence question as a dual issue, the scholars stressed the importance that this figure could play at the level of international relations as well^{XLII}.

He should have taken part in a sort of triumvirate composed also of the Commission President and the Minister of Foreign Affairs^{XLIII}, that was to be a new role which combined the duties of the present foreign policy High Representative and the EU External Relations Commissioner^{XLIV}.

The Constitutional Treaty also simplified the legal instruments used in EU action.

The number of instruments used would have been reduced to six: laws (formerly regulations) and framework laws (directives), regulations and decisions (implementing acts), recommendations and opinions (non-binding acts)^{XLV}.

The Constitutional Treaty overcame the three “pillars” structure, although special procedures were maintained in the fields of foreign policy, security and defence^{XLVI}.

According to the Constitutional Treaty, the EU was provided with a single legal personality under domestic and international law.

Following the rationale of simplification, the existing Treaties were replaced by a single (although enormous) text and the co-decision procedure was extended, becoming the ordinary procedure^{XLVII}.

With regard to the “hot issue” of the democratic deficit^{XLVIII}, the Constitutional Treaty attempted to deal with all of its related aspects, introducing provisions aimed at increasing transparency and effectiveness in institutions^{XLIX} and citizens' participation^L, and at strengthening the EU Parliament^{LI}'s role. At the same time, a catalogue of competencies was introduced, although the scholars pointed out that it is not a hard list^{LII}.



At the same time, the Constitutional Treaty contained several articles devoted to the involvement of the national parliaments, also thanks to the provisions regarding the so called early warning mechanism^{LIII}.

One of the most important novelties was the introduction of a clearly-expressed primacy clause (Art. I-6^{LIV}) which codified the ECJ's case-law from the *Costa/Enel*^{LV} case: as the literature stressed, the introduction of such a provision had to be read together with Art. I-5 which codified the respect of the national constitutional structures of the member states.

As we know, the EC law's primacy principle, devised by the genius of the ECJ in 1964, is not based on written grounds, despite its diffuse acceptance.

Some authors attempted to investigate the possible consequences of the combination between Art. I-6 -which could mean the end of voluntary obedience and constitutional tolerance- and Art. I-5 which would represent the communitarization of the so called “*counter-limits*”^{LVI}.

The progressive communitarization of national fundamental principles can be seen as another limit to the EU law primacy, as the scholars have stressed reading together Art. I-5 (Art. 4 of EUT after the Reform Treaty of Lisbon) and Art. I-6 of the Constitutional Treaty (disappeared in the Reform Treaty of Lisbon): in this sense, we can see such a communitarization of the counter-limits as a result of the judicial dialogue between the Constitutional Courts and the ECJ^{LVII}.

The rapprochement between legal orders is confirmed by the ‘structural continuity’ between common constitutional traditions and counter-limits. From a theoretical point of view, in fact, the counter-limits are related to the input of the communitarian legal materials in the inner order; the common constitutional traditions, instead, are related to the input of domestic legal materials in the European legal order. Apparently they both follow opposite routes and are inspired by different rationales: the former by the rationale of integration, while the latter by the rationale of constitutional diversification. However, as stressed by Ruggeri^{LVIII}, thanks to the hermeneutical channel represented by the preliminary ruling, the constitutional principles of the domestic legal orders arise from their origin (national level) and become common sources of EU Law; then these common constitutional traditions return to the origin in a new form, when they are applied by the ECJ. The Charter of Nice itself, included in the second part of the Constitutional Treaty,



can be seen as the outcome of a never-ending interpretative competition between the ECJ and the Constitutional Courts.

Another important point stressed by the scholars is the method followed in the preparation of the Constitutional Treaty, that is, the “Convention method”^{LIX}, which was also codified as a possible method for the future Constitutional Treaty revision^{LX}. Here again I would like to point out the importance which the experiment of the EU Charter of Nice had in the European Constitutional law’s history, since the Convention method was introduced for the first time with regard to the process of writing the Nice Charter.

Concluding this part of my review article, it is worth mentioning the curiosity raised by the introduction of the withdrawal clause in the final text^{LXI}, which put in doubt the real constitutional nature of the Treaty.

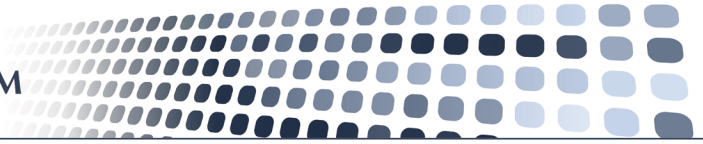
3) The European Court of Justice’s activism

After the constitutional failure, a new important role could again be played by the ECJ and its judgements.

The difficulties of the ratification process of the Constitutional Treaty, in fact, force us to reflect on possible alternative options. After the refusal of ratification in France and The Netherlands, a lot of doubts and questions about the work of the European Convention and of the Council arose^{LXII}.

In the history of the European Communities, when the political integration seemed to fail the reasons of the supranational interest found a guardian in the mission of the ECJ. We think that in this case something similar may happen.

In cases like *Pupino* in fact, the Court tried to deepen the reasons of integration by applying, for example, its concepts of the EC Law (the first pillar) to other pillars, in order to extend the prerequisites of the supremacy (direct effect) to the framework decision on the Arrest Warrant.^{LXIII} This approach shows an attempt by the ECJ to “horizontally” extend the principles of the first pillar to the other two pillars. All this is occurring after a long period of relative silence, characterized by the prevalence of the political sources of law, due to the semi-permanent revision of the Treaties (Maastricht, Amsterdam, Nice). Now the political sources have to face the refusal of the European peoples and, not by



chance in our opinion, the *cultural* sources of law (first of all the case law of the ECJ) could recover a fundamental role in European integration. A confirmation of this can be found in the new resistance opposed by the Constitutional Courts^{LXIV} to the European arrest warrant, that seems to be one of the *Trojan horses* of the European judge in this new phase.

After *Pupino*^{LXV}, in fact, the scholars began to write about a sort of de-pillarization caused by the above-discussed ECJ case-law.

In the *Pupino* case, reference was made to the Court of Justice of the European Communities by the Florence Tribunal in the criminal proceedings against Maria Pupino.

The ECJ was asked to rule on the following question:

‘Are Articles 2, 3 and 8 of Council Framework Decision 220 of 15 March 2001 on the standing of victims in criminal proceedings to be interpreted as precluding national legislation such as that in Articles 392(1a) and 398(5a) of the Italian Code of Criminal Procedure, which do not provide that, in respect of offences other than sexual offences or those with a sexual background, the testimony of witnesses who are minors under 16 may be heard at the stage of the preliminary enquiries, in a Special Inquiry ("incidente probatorio") and under special arrangements, for example for the recording of testimony using audio-visual and sound recording equipment?’.

The ECJ argued that the children could be classified as vulnerable victims, giving them right to the special out-of-court hearing, stressing, at the same time, that the granting of such a right would have to be considered in the light of the system of criminal procedure and that the right to fair trial should not be violated.

The Court of Justice concluded its reasoning stressing that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union.

It pointed out, however, that the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is limited by the general principles of law, especially those of legal certainty and non-retroactivity.



Commenting *Pupino*, some scholars have spoken of a third pillar's attempted 'supranationalization' or 'constitutionalization'^{LXVI}, while other authors have correctly pointed out that the direct effect's principle has not been extended to the framework decision (as it would have been in contrast with the terms of Art. 34 EUT): the Court has "only" extended the obligation of the framework decisions' consistent interpretation (which is a form of "indirect" effect)^{LXVII}.

In other words, as Piqani^{LXVIII} said, the ECJ performed a sort of scission between direct effect and supremacy (better: primacy), in the attempt of avoiding a clash with the letter of the EU Treaty. Obviously, the lack of direct effect itself with regard to the framework decisions and the ECJ limited jurisdiction - according to Art. 35 EUT - provides the consistent interpretation principle with a very peculiar role in this pillar.

Although Advocate General Colomer defined the framework decisions as a sort of directive "surrogate"^{LXIX} the Court's role in the third pillar is different, as the ECJ itself has admitted in the *Segi* case^{LXX}. It is true that, as regards the Union, the treaties have established a system of legal remedies in which, by virtue of Article 35 EU, the jurisdiction of the Court is less extensive under Title VI of the Treaty on European Union than it is under the EC Treaty'.

Stressing existing similarities and differences between the first and the third pillar, some scholars have tried to compare the mechanism of the preliminary ruling described by Art. 234 ECT and Art. 35 EUT^{LXXI}.

The general impression is that a confirmation of the ECJ's different interpretative positions in the third pillar can be found through a comparison between these two provisions: undoubtedly the jurisdiction of Art. 234 ECT seems to be wider than Art. 35 EUT's^{LXXII}.

Although in *Dell'Orto*^{LXXIII} the ECJ strongly stressed the analogy between control mechanisms, scholars^{LXXIV} have recently insisted on the non-perfect continuity between *Pupino* and *Dell'Orto* (going through *Advocaten voor der Wereld*^{LXXV}).

In *Dell'Orto* the ECJ was asked (the preliminary reference was made by the *Tribunale* of Milan) to rule on the meaning of Articles 2 and 9 of Council Framework Decision of 15 March 2001, on the standing of victims in criminal proceedings and Article 17 of Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims.



It is interesting to notice that several governments had submitted observations questioning the admissibility of the reference for a preliminary ruling; for example, the UK said that the reference for a preliminary ruling was inadmissible, arguing that, in such a case, the reference should be based exclusively on Article 35(1) EU, whereas Article 234 EC was not applicable.

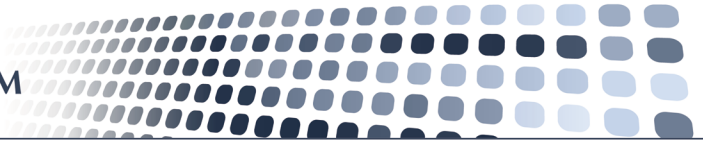
According to the ECJ, the fact that the order for reference did not mention Article 35 EU, but referred to Article 234 EC, could not make the reference for preliminary ruling inadmissible, saying that:

‘In those circumstances, and regardless of the fact that the questions referred for a preliminary ruling also concern the interpretation of a directive adopted under the EC Treaty, the fact that the order for reference does not mention Article 35 EU, but refers to Article 234 EC, cannot of itself make the reference for a preliminary ruling inadmissible. This conclusion is reinforced by the fact that the Treaty on European Union neither expressly nor by implication lays down the form in which the national court must present its reference for a preliminary ruling (see, by analogy, with regard to Article 234 EC, Case 13/61 De Geus [1962] ECR 45, 50)’.

These authors argued that in the last two cases the ECJ lost the possibility of specifying *Pupino’s* consequences and emphasized the ambivalence of the Advocate General’s Conclusions concerning the EU nature in *Dell’Orto*^{LXXVI}.

In Herlin-Karnell’s words: ‘Dell’Orto is much more cautious, although it is true that this does not rule out a more extensive application of a *Pupino* dogma, should the setting be different^{LXXVII}’.

Although the latest judicial developments have shocked the pillars’ architecture, I think that the normative triangle provided by ECT Articles 220, 234 and 292 has enabled us to recognize the Community judge’s stronger position, which cannot be compared with the one he enjoys in the third pillar.



4) The constitutional stop and the raise of the Reform Treaty

As well explained by Bruno De Witte^{LXXVIII}, the mechanism for the revision of Treaties presents a double dimension (national and supranational) since it is not entirely governed at the supranational level; on the contrary, it refers to the national constitutional or primary provisions with regard to the ratification process.

Such a double (supranational and national) nature of the Treaties' revision procedure caused several problems to the constitutional moment of the EU.

In order to overcome the critiques on the presumed *elitarian* approach which had characterized the works of the second European Convention, many national governments decided to look for the people's consent through referenda also when they would not be forced to do so according to their national provisions^{LXXIX}.

Soon after the French and Dutch referenda, the scholars pointed out the reasons behind those “no”, providing a very massive literature (journals' articles, instant papers, brief notes and books^{LXXX}) on this point.

At the same time, they tried to identify the best strategy to follow for escaping the impasse, suggesting several options: enhanced cooperation, opting out mechanism, repetition of the referenda, the de-constitutionalization of the third part of the text, the production of a new document^{LXXXI}.

Although the ratification procedure did not stop immediately^{LXXXII} after the mentioned referenda, the idea of a “reflection period” prevailed.

A new “input” to the European integration was given by Germany in 2007, when the Berlin Declaration was adopted by all Member States.

This declaration outlined the intention of all Member States to reach an agreement on a new treaty in time for 2009.

On the 21st of June 2007, the European Council met in Brussels and at the end of the negotiations a new mandate for an Intergovernmental Conference was given.

The Reform Treaty was signed by the Heads of State or Government of the 27 Member States in Lisbon on 13 December 2007.

Substantially, the Lisbon Treaty^{LXXXIII} does not differ too much from the Constitutional Treaty but, at the same time, some differences exist. The most important



difference consists in the fact that the Treaty of Lisbon amends the precedent Treaties. Moreover, it renounces to unify all the Treaties in one body, since it intervenes on two texts: the European Union Treaty (EUT) and the Treaty on the Functioning of the EU (EUFT).

Secondly, it renamed the Union's Minister for Foreign Affairs, that becomes the “High Representative of the Union for Foreign Affairs and Security Policy”.

From a symbolic point of view, it is important to note the disappearance of terms like “Constitution” and “law”; a new series of additional opt-outs have been negotiated, in particular for the UK; because of Polish pressure, the new voting system will not enter into force before 2014; the primacy clause disappeared from the main body of the Treaties (but it is included in a declaration- n. 17 - attached to the Treaties); the Charter of fundamental rights of Nice is not included in the Treaties, although it acquires binding force from Art. 6 EUT (new version).

Concerning the institutions: they seem to maintain the competencies acquired by the Constitutional Treaty, although the scholars stressed the non-exact correspondence between the two texts^{LXXXIV}, while the national parliaments would have gained more influence (but on this point the scholars are divided^{LXXXV}).

Despite its symbolic dimension, nothing special seems to have happened and in Corthaut's words: “The Reform Treaty looks more like the (evil?) twin of the Constitutional Treaty than its distant cousin”^{LXXXVI}.

Something similar is argued by Ziller as well^{LXXXVII}, when he points out that the possibly major changes (the disappearance of the primacy clause, for example) were just functional to overcoming the risk of the national governments' denial, so all this belongs to the rhetoric dimension of the political bargaining.

Ziller argues that, after the constitutional failure, the goal was not to elaborate a new project but to ‘translate the “language” of the Constitutional Treaty into the language of the Treaties in force’^{LXXXVIII}.

Although Ziller denies that this operation of constitutional restyling is an example of ‘legal Machiavellism’^{LXXXIX}, he is forced to admit that this operation could appear to have been conceived with the scope of blurring the issue to public opinion- at least looking at it from the euro-sceptics' view point).



Ziller is perhaps the best “*connoisseur*” of the constitutional art of both Treaties, since he has already written a book^{XC} devoted to the analysis of the specific provisions of the Constitutional Treaty (CT).

The author compares the two documents in order to ascertain if, how, and where the “rescued substance” of the CT has been confirmed.

Ziller is aware that only a perfect knowledge of the RT’s new geography could allow him to achieve his goal.

The “mission” is quite difficult due to the structure of the new Treaties: the main difference between CT and RT, in fact, consists in the fact that the Treaty of Lisbon amends the precedent Treaties. Moreover, the RT renounces the idea of unifying all the Treaties in one body since it intervenes on two texts: the European Union Treaty (EUT) and the Treaty on the Functioning of the EU (EUFT).

The CT’s rescued substance is shown through the aid of several comparative tables by the author, who also tries to highlight what he calls the ‘lost substance’, providing the reader with a complete overview of the post-constitutional situation.

Then the author attempts to emphasize the persistence of the constitutional substance despite the de-constitutionalized form .

Ziller compares the Reform Treaty to Lemuel Gulliver (the well known character devised by the genius of Jonathan Swift): a giant bridled by several laces represented by Protocols and Declarations.

This image pictures the difficulty underlying an enlarged European Union, which risks not to “work” because of the expedients of a very complicated text.

Another metaphor used by the author to describe the new configuration of the Treaties after Lisbon is that of the ‘Butterfly-Treaty’ whose wings would be represented by the EUT and the TFEU, while its main body would be constituted by the Charter of Nice^{XCI}.

Some conclusive remarks on a possible comparison between the two books I have reviewed: as remarked at the beginning of this paper, their perspective, structure and aims are very different.

It is worth spending a few lines on the authors’ conception of the current constitutionalization process.

The final impression I have gained from reading Ziller’s volume is an optimistic one: the Constitutional Treaty was a text rich of virtues and faults but it attempted to



introduce several significant innovations, which have been drawn up again in the Reform Treaty.

In this sense, the Lisbon Treaty represents a good chance for the European Union and it maintains a constitutional substance, it is a ‘mechanism for going on’^{XCII}, although it presents itself as a fragile butterfly.

Having understood this, it is clear that the primacy principle is a fundamental part of the *acquis communautaire* since it was devised by the ECJ in 1964 and that it will resist after the constitutional failure.

On the June 13 2008, the Irish people voted “no” to the (new?) Lisbon Treaty. Soon after the result of the referendum, Jose Manuel Barroso, President of the European Commission, declared that “The ratification process is made up of 27 national processes, 18 Member States have already approved the Treaty, and the European Commission believes that the remaining ratifications should continue to take their course”^{XCIII}

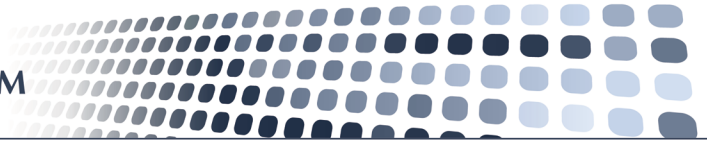
What about the Reform treaty now? In June 2001 Ireland said no to the Nice Treaty, and despite this political precedent the referendum was attempted again^{XCIV}. Are we dealing with a similar scenario?

5.) The notion and the nature of a Constitution for Europe after the constitutional failure

As we saw above, some scholars have insisted on the continuity existing between the Constitutional Treaty and the Reform Treaty^{XCIV}, while other authors stressed the sense of disappointment which would characterize the document, defining it just (and perhaps merely) as a “Post-constitutional Treaty”^{XCVI}.

According to Somek in fact:

‘A post-constitutional ordering, by contrast, cannot settle contested issues, for it cannot find sufficient support for a clear solution. A post-constitutional 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'.^{XCVII}

A very good contribution to the debate regarding the notion and the nature of the Constitution for Europe was given by Leonard Besselink^{XCVIII}.

In Besselink's vision, the notion itself of Constitution as applied to the EU results ambiguous, being more suitable that of fundamental law (*Grundgesetz* instead of *Verfassung*).

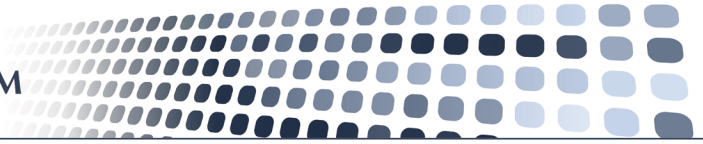
This seems to imply a sceptical approach to the issue of the 'formalization' of a European Constitution conceived as a *constitutional moment*.

The author reaches this conclusion after having distinguished between two categories of constitutions: the 'revolutionary' constitutions and the 'evolutionary' ones:

'The former find their origin in some major political cataclysm, a revolution, a war or other political atrocities, to which they are the political response, the original cataclysm functioning as the moving myth inspiring life into the constitutional project... 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. They take in past experiences in a more inclusive and constructive manner. Codification, consolidation and adaptation are more predominant motives than modification. The constitution reflects historical movements outside itself'^{XCIX}.

The semi-permanent revision process of the Treaties^C makes the attempt to translate the idea of Constitution at the 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', they seem to be snapshot constitutions. This is precisely what Besselink argues writing that: 'a formal EU 'constitution', if ever realized, would only be a momentary reflection, no more than a snapshot; it would be a *Grundgesetz* rather than a *Verfassung*^{CI}'.



Probably it is possible to frame Besselink's distinction between evolutionary and revolutionary constitutions in the wider reflection on the so-called "*post-modern constitutionalism*".

According to Volpe^{CII}, it is possible to notice the impact of postmodern crises on the categories of constitutional law and on the notion itself of constitution. Constitutions (which would belong to the space of "meta-narrations"), conceived as the foundation of social coexistence, would be involved in the postmodern crisis, since in this context Constitutions would be conceivable only as "protocols", i.e. general procedural and organizational rules, functional to the spread of technology. Against this background, the constitutional discourse could not be based on strong and substantive values or fundamental goals, and the only dimension for the constitutional form would be the dimension of the 'achievement- constitution'.

'With this definition (costituzioni "bilancio") Mortati explained the periodical constitutional reform typical of socialist countries owing to the Marxist doctrine, according to which a constitutional reform is the in time necessary and progressive adjustment of formal constitution to the achievements reached in the social order^{CIII}.

These types of constitutions could not manage and tackle the social coexistence; on the contrary, they could render an image of reality, suffering from the dynamics of the market.

The image of the snapshot constitution explains the metamorphosis of constitutions and explains why 'in European Law we do not know exactly where the boundary is between 'constitutional' and 'ordinary' law, just as is the case with other constitutions of the 'historic type''. This conclusion is partially due to the lack of a clear hierarchy of legal sources in the EU, but also to the progressive "ordinarization" of constitutions (caused by their never-ending changes): now, given the above, the fundamental nature itself of constitutions is -at least- put in doubt.



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^{II}For example Cartabia Marta- Weiler Joseph, 2000 *L'Italia in Europa*, Mulino, Bologna, 73. About the ambiguity of the notion of constitutionalisation in EC/EU Law see: Snyder Francis, 2003, 'The unfinished constitution of the European Union: : principles, processes and culture' in Weiler Joseph - Wind Marlene (eds.), *European constitutionalism beyond the state* Cambridge University Press, 55-73, Cambridge; Rittberger Berthold – Schimmelfennig Frank, 2005, 'The Constitutionalization of the European Union. Explaining the Parliamentarization and Institutionalization of Human Rights', paper presented at the workshop 'The State of the Union' at Princeton University, 16 September 2005 available at <http://www.princeton.edu/~smeunier/Rittberger&Schimmelfennig%20Princeton%20memo.pdf>.

^{III}On this process see K.Lenaerts, *Fundamental Rights in the European Union*, in *European Law Review*, 2000, 575 ff.

^{IV}ECJ, Case C-4/73, *Nold*, 1974, ECR 491.

^VECJ, Case C-29/69, *Stauder v. City of Ulm*, 1969, ECR 419.

^{VI}ECJ, Case C-387/02, *Berlusconi and others*, 2005, ECR I-3565.

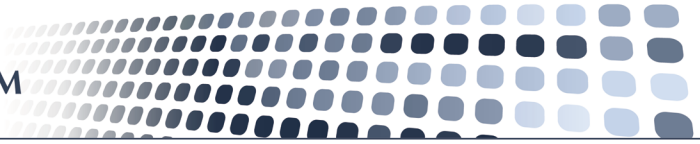
^{VII}See the image by Pinelli Cesare, 2002, *Il momento della scrittura*, Il Mulino, Bologna.

^{VIII}Grimm Dieter, 2003 'Il significato della stesura di un catalogo europeo dei diritti fondamentali nell'ottica della critica dell'ipotesi di una Costituzione europea', in Zagrebelsky Gustavo (ed.) *Diritti e Costituzione nell'Unione Europea*, Laterza, Roma-Bari: 15 ff.; Mayer Franz, 2003, 'La Charte européenne des droits fondamentaux et la Constitution européenne', in *Revue trimestrielle de droit européen*: 194-195; Skouris Vassilios, 2004, 'La protezione dei diritti fondamentali nell'Unione europea nella prospettiva dell'adozione di una Costituzione europea', in Rossi Lucia Serena (ed.), *Il progetto di Trattato-Costituzione, verso una nuova architettura dell'Unione europea*, Giuffrè, Milano: 254 ff.; Rossi Lucia Serena (ed.), 2002, *La Carta dei diritti fondamentali e la Costituzione dell'Unione Europea*, Giuffrè, Milano; Rossi Lucia Serena, 2002, 'La Carta dei diritti come strumento di costituzionalizzazione dell'ordinamento dell'UE', in *Quaderni costituzionali*: 565-576; Ferrari Giuseppe Franco (ed.), 2002 *I diritti fondamentali dopo la Carta di Nizza. Il costituzionalismo dei diritti*, Giuffrè. Milano.

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^XWalker Neil, 2003, 'After the constitutional moment', available at <http://www.le.ac.uk/la/ce/i/moment.pdf>

^{XI}*Ibidem*.



- ^{xii}Walker Neil, 2003, 'After *cit.* Walker quotes Grimm Dieter, 1995, 'Does Europe need a Constitution?', *European Law Journal*, 282 ff.
- ^{xiii}Walker Neil, 2003, 'After *cit.*
- ^{xiv}Walker Neil, 2003, 'After *cit.* The classical example is provided by Weiler Joseph, 2003, "In Defence of the Status Quo: Europe's Constitutional Sonderweg," in Weiler Joseph- Wind Marlene (eds.), *European Constitutionalism cit.*: 7-26.
- ^{xv} Walker Neil, 2003, 'After *cit.* Walker mentions de Witte Bruno, 2002, "The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process", in Beaumont Paul et al. (eds), *Convergence and Divergence in European Public Law*, Hart, Oxford: 39-57; see also U.Halter, 2003, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination', *European Law Journal*, 14-44.
- ^{xvi}Walker Neil, 2003, 'After *cit.* Walker quotes de Búrca Gráinne, 'The Constitutional Challenge of New Governance in the European Union' *European Law Review*, 2003, 814-839.
- ^{xvii}Weiler Joseph, 2003, "In Defence, 7 ff.
- ^{xviii}Pernice Ingolf, 1999, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?', in *Common Market Law Review*: 703-750; Pernice Ingolf, 2002, 'Multilevel constitutionalism in the European Union', *WHI Paper* 5/02, available at <http://www.rewi.hu-berlin.de/WHI/papers/whipapers502/constitutionalism.pdf>.
- ^{xix}Art. 6 EUT and art. 288 ECT for instance.
- ^{xx}Pernice Ingolf, 1999, 'Multilevel *cit.*', 707.
- ^{xxi}Pernice Ingolf, 2002, 'Multilevel constitutionalism in the European Union', *WHI Paper*, 5/02, available at <http://www.rewi.hu-berlin.de/WHI/papers/whitepapers502/constitutionalism.pdf>.
- ^{xxii}Dutheil de la Rochere Jacqueline –Pernice Ingolf, 2002, 'European Union Law and national constitutions', *WHI paper*, 17/02: 21, available at www.whi-berlin.de/documents/whi-paper1802.pdf - .
- ^{xxiii}Corte Costituzionale, judgment 372/2004. About this, Vespaziani Alberto, 2005, 'Principi e valori negli Statuti regionali: much ado about nothing?', available at : <http://www.associazionedeicostituzionalisti.it/dibattiti/riforma/vespaziani.html>; Rossi Emanuele, 'Principi e diritti nei nuovi Statuti regionali', in *Rivista di diritto costituzionale*: 51-96.
- ^{xxiv}Although the author seems to "touch on" this level in some papers: for example, Pernice Ingolf -Kantiz Ralf, 2004, 'Fundamental rights and multilevel constitutionalism in Europe', *WHI paper*, 7/2004, available at www.whi-berlin.de/documents/whi-paper0704.pdf .
- ^{xxv}ECJ, C-36/75, *Roland Rutili vs Ministre de l'intérieur*, 1975, ECR, 1219.
- ^{xxvi}ECJ, C-260/89, *Elliniki Radiophonia Tileorassi AE and Panellinia Omospondia Syllogon Prossopikou vs Dimotiki Etairia Pliroforissis and Stotirios Kowelas and Nicolaos Avdellas and others*, 1991, ECR, I-2925.
- ^{xxvii}ECJ, Case C-44/79, *Liselotte Hauer vs Land Rheinland-Pfalz*, 1979, ECR, 3727.
- ^{xxviii}CFI, Case T-112/98, *Mannesmannröhren-Werke AG/Commission*, 2001, ECR. 729.
- ^{xxix}Besselink Leonard, 2007, *A Composite European Constitution/Een Samengestelde Europese Constitutie*, Europa Law Publishing, Groningen.
- ^{xxx}*Ibidem*, 6.
- ^{xxxi}*Ibidem*, 6.
- ^{xxxii} ECJ, Case C-36/02, *Omega*, 2004, ECR., I-9609.
- ^{xxxiii} ECJ, Case C-244/06, *Dynamic Medien*, not yet published.
- ^{xxxiv} *Ibidem*, 15
- ^{xxxv}On constitutional pluralism see: Walker Neil, 2002, 'The Idea of Constitutional Pluralism', in *Modern Law Review*, Vol. 65, 317-359; Maduro Miguel Poiars, 2003, 'Contrapuntual Law: Europe's Constitutional Pluralism in Action' in Walker Neil, *Sovereignty in Transition*, Hart, Oxford: 501-537; Maduro Miguel Poiars, 2007, 'Interpreting European Law: Judicial Adjudication in a context of constitutional pluralism', in *European Journal of Legal studies*, 2/2007, available on <http://ejls.eu/index.php?mode=htmlarticle&filename=./issues/2007-12/MaduroUK.htm>; for a comparison between the different visions of constitutional pluralism see Avbelj Matej- Komarek Jan (eds.), 2008, 'Four Visions of Constitutional Pluralism', *EUI Working paper* No. 21/2008, available on http://cadmus.iue.it/dspace/bitstream/1814/9372/1/LAW_2008_21.pdf
- ^{xxxvi}See among others: Claes Monica, *The National Courts' Mandate in the European Constitution*, Hart, Oxford, 2006.



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xxxviii Barbier Cécile, 2002, *La Convention européenne - Genèse et premiers résultats*, CRISP, Bruxelles.

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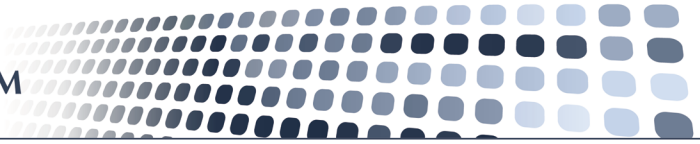
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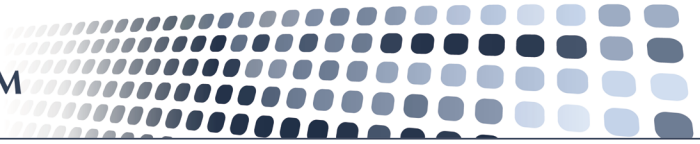
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^{LV}ECJ, Case C-6/64, *Costa vs Enel*, 1964, ECR, 1141.

^{LVI}This formula has been introduced in the Italian scholarly debate by Paolo Barile: Barile Paolo, 1969, 'Ancora su diritto comunitario e diritto interno' in *Studi per il XX anniversario dell'Assemblea costituente*, VI Firenze, 49 ff.

^{LVII}The model of Art. I-5 is undoubtedly represented by Art. 6 EUT ('current' version), which efficaciously described the proximity between common constitutional traditions and national fundamental principles: in this article, in fact, these two kinds of legal sources (common constitutional traditions and national fundamental principles) are mentioned in two subsequent paragraphs.

Here it suffices to recall the reference that Art. 6 ('current' version), para. 2, makes to the common constitutional traditions, and the reference to the "national identities" of its Member States that is set in para. 3 of Art. 6. I argue that within a legal context, by the formula "national identities", the European legislator meant the constitutional identities of the Member States, that is the counter-limits, as defined by national constitutional courts. In this sense we can say that Art. I-5 of the Constitutional Treaty has only expressly



codified such an interpretation by speaking about “constitutional structure” and in this way it delivered the interpretation of the counter-limits to the ECJ.

^{LVIII}Ruggeri Antonio, 2003, ‘Tradizioni costituzionali comuni’ e “controlimiti”, tra teoria delle fonti e teoria dell’interpretazione’ in *Diritto pubblico comparato ed europeo*: 102-120.

^{LIX}Rasmussen Hjalte, 2005, ‘The Convention Method’, in *European Constitutional Law Review*, 141-147; Closa Carlos, 2004, ‘The Convention method and the transformation of EU constitutional politics’, in Erikssen Erik Oddvar *et al*, ‘Developing a European constitution’, Routledge, London: 183 ff.

^{LX}de Witte Bruno, 2005, ‘Revision’, in *European Constitutional Law Review*: 136-140.

^{LXI}Herbst Jochen, 2005, ‘Observations on the Right to Withdraw from the European Union: Who are the ‘Masters of the Treaties?’’, in *German Law Journal*: 1755-1760.

^{LXII}To define all its ambiguities, J.Bast uses the formula “reflexive constitution”. See Bast Jürgen, 2005, ‘The Constitutional Treaty as a Reflexive Constitution’, *German Law Journal*: 1433-1452.

^{LXIII}Kowalik-Bańczyk Krystyna, 2005, ‘Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law’, in *German Law Journal*: 1355-1366.

^{LXIV}On the European Arrest Warrant saga see Pollicino Oreste, 2008, ‘European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in an Attempt to Strike the Right Balance Between Legal Systems’, in *German law Journal*: 1313-1354.

^{LXV}ECJ, Case C-105/03, *Criminal Proceedings against Maria Pupino* 2005, ECR, I-5285.

^{LXVI}On this concept: Lebeck Carl, 2007, ‘Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after Pupino’ in *German Law Journal*: 501-532.

^{LXVII}Fletcher Maria, 2005, “Extending ‘Indirect Effect’ to the Third Pillar: the Significance of Pupino” , in *European Law Review*: 862 ff.

^{LXVIII}See, Piqani Darinka, 2007, ‘Supremacy of European Law revisited: New developments in the context of the Treaty Establishing a Constitution for Europe’, <http://www.enlsyn.gr/papers/w4/Paper%20by%20Darinka%20Piqani.pdf>; about the relationship between primacy and direct effect, see also Claes Monica, 2006, *The National Court’s cit*, 589; Spaventa Eleanor, 2007, ‘Opening Pandora’s Box: Some Reflections on the Constitutional Effects of the Ruling in Pupino’, in *European Constitutional Law Review*: 5-24.

^{LXIX}AG Conclusions of 12 September 2006, C-303/05, *Advocaten voor de Wereld*, ECR 2007, I-3633

^{LXX}ECJ, Case C- 355/04 P, *Segi and other/ Council*, ECR .2007, I-1657.

^{LXXI}See Munari Francesco- Amalfitano Chiara, 2007, ‘Il ‘terzo pilastro’ dell’Unione: problematiche istituzionali, sviluppi giurisprudenziali, prospettive’, in *Il Diritto dell’Unione Europea*: 773-809, 780-784.

^{LXXII}*Ibidem*, 780 ff

^{LXXIII}ECJ. Case C-467/05, *Giovanni Dell’Orto*, 2007, ECR, I-5557. “First of all, it should be noted that, in accordance with Article 46(b) EU, the provisions of the EC and EAEC Treaties concerning the powers of the Court of Justice and the exercise of those powers, including the provisions of Article 234 EC, apply to the provisions of Title VI of the Treaty on European Union under the conditions laid down by Article 35 EU. Contrary to what is argued by the United Kingdom Government, it therefore follows that the system under Article 234 EC is capable of being applied to the Court’s jurisdiction to give preliminary rulings by virtue of Article 35 EU, subject to the conditions laid down by that provision (see, to that effect, *Pupino*, paragraphs 19 and 28)”.

^{LXXIV}See Herlin-Karnell Ester, 2007, ‘In the Wake of Pupino: Advocaten voor der Wereld and Dell’Orto’, in *German Law Journal*: 1147-1160.

^{LXXV}ECJ, C-303/05, *Advocaten voor de Wereld*, ECR 2007, I-3633. In *Advocaten* the Belgian *Arbitragehof* made reference to the Court of Justice of the European Communities concerning the assessment as to the validity of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

^{LXXVI}Herlin-Karnell Ester, 2007, ‘In the Wake 1157.

^{LXXVII} *Ibidem*, 1160.

^{LXXVIII}de Witte Bruno, 2004, *The National Constitutional Dimension of European Treaty Revision – Evolution and Recent Debates, The Second Walter van Gerven Lecture*, Europa Law Publishing, Groningen.

^{LXXIX}Ziller extensively studied the different options of national ratification according to the national constitutional provisions: Albi Anneli- Ziller Jacques (eds.), 2007, *The European Constitution and National Constitutions: Ratification and Beyond*, Alphen aan den Rijn, Kluwer Law International, London; Ziller Jacques, “Le processus des ratifications du traité établissant une Constitution pour l’Europe et la période de

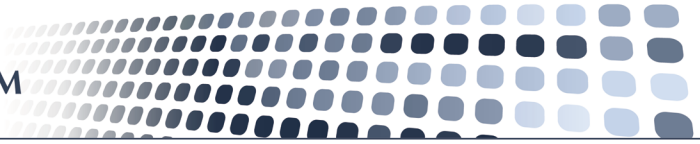


réflexion”, EUI LAW working paper, 2006/29, available at <http://cadmus.iue.it/dspace/handle/1814/6294>; Reuchamps Min, 2007, ‘Referendum as a Tool for Building European Identity. The Case of Belgium, Luxembourg, and The Netherlands’, available at <http://popups.ulg.ac.be/csp/document.php?id=91>

^{LXXX} Auer Andreas, 2007, ‘National Referendums in the Process of European Integration: Time for Change’ in Albi Anneli- Ziller Jacques (eds.), *The European Constitution cit.*: 261-271; Tridimas George- Tridimas Takis, 2007, ‘Electoral v Politicians: The 2005 French and Dutch Referendums on the EU Constitutional Treaty’, in Albi Anneli- Ziller Jacques (eds.), *The European Constitution cit.*: 273-285; Vollaard Hans, 2006, ‘Protestantism and Euro-scepticism in the Netherlands’, in *Perspectives on European Politics and Society*: 276 – 297; Shaw Jo, 2005, ‘The Constitutional Treaty and the Question of Ratification: Unscrambling the consequences and identifying the paradoxes’, in Xuereb Peter (ed) *The Constitution for Europe: An Evaluation?* European Documentation and Research Centre, University of Malta: 1-33; Wagner Markus, 2005, ‘France and the Referendum on the EU Constitution’, *European Policy Brief*, The Federal Trust, available at <http://www.fedtrust.co.uk/admin/uploads/PolicyBrief8.pdf>; Taggart Paul et al., 2005, ‘The Politics of Bifurcation: The 2005 Referendums in France and the Netherlands’, available at <http://aei.pitt.edu/5746/> 2005; .Schwarzer Daniela, 2005, ‘Lessons from the Failed Constitutional Referenda - The European Union Needs to be Politicized’, SWP Comment 2005/25, available at [http://www.notre-europe.eu/uploads/tx_publication/Elcano-GRN-Referendum-2005_01.pdf](http://www.swpberlin.org/en/produkte/swp_aktuell_detail.php?id=4760;G.Ricard-Nihoul-; Larhant Morgan, 2005, ‘How to Explain the Unexpected: An Assessment of the French Constitutional Referendum’, available at <a href=); Deloy Corinne, 2005, ‘Les Neerlandais rejettent massivement la Constitution Européenne’, available at http://constitution-europeenne.info/special/pays-bas_ref.pdf; Closa Carlos, 2004, ‘Ratifying the EU Constitution: Referendums and their Implications’, U.S.-Europe Analysis Series, Center on the United States and Europe, Washington, D.C., http://www.brookings.edu/articles/2004/11europe_closa.aspx; Closa Carlos, 2004, ‘La ratificación de la Constitución de la UE: un campo de minas’, available at <http://www.realinstitutoelcano.org/analisis/548.asp>; de Boisgrollier Nicolas, 2005, ‘The French Political Landscape After the “Non”’, available at http://www.brookings.edu/papers/2005/0601europe_boisgrollier.aspx; Aarts Kees- van der Kolk Henk, 2006, ‘Understanding the Dutch “No”: The Euro, the East, and the Elite’, available at http://www.apsanet.org/content_30354.cfm; Aldecoa Luzarraga Francisco, ‘El proceso político en la laberíntica ratificación del Tratado Constitucional’, available at http://www.realinstitutoelcano.org/documentos/238/238_Aldecoa.pdf 2006; Marthaler Sally, 2005, ‘The French Referendum on Ratification of the Constitutional Treaty’, available at http://www.sussex.ac.uk/sei/documents/epern_rb_france_2005.pdf; Moravcsik Andrew, 2006, ‘What Can We Learn from the Collapse of the European Constitutional Project?’, available at <http://www.princeton.edu/~amoravcs/library/PVS04.pdf>

^{LXXXI} Tosato Gian Luigi- Greco Ettore, 2004, ‘The EU Constitutional Treaty: How to Deal with the Ratification Bottleneck’, in *International Spectator*: 7-24; Tosato Gian Luigi-Greco Ettore, 2005, ‘The European Constitution: How to proceed if France or the Netherlands Vote “No”’, available at <http://www.epin.org/pdf/TosatoGrecoIAI250505.pdf>; Leonard, Mark, 2005, ‘Europe will survive a French Non, Foreign Policy’, available at http://www.cer.org.uk/articles/leonard_foreignpolicy_20april05.html; Lippert Barbara- Goosmann Timo, 2006, ‘The State of the Union: Period of Reflection or the Sound of Silence’, available at <http://www.realinstitutoelcano.org/analisis/924.asp> 2006; Grant Charles, 2005, ‘Europe beyond the referendums’, CER Bulletin, available at http://www.cer.org.uk/articles/42_grant.html 2005; Keohane Daniel, 2005, ‘Don’t forget the Dutch referendum’, CER briefing note, available at http://www.cer.org.uk/pdf/briefing_dutch_ref_may05.pdf; Keohane Daniel, 2005, ‘A French Lesson for Europe? A guide to the referenda on the EU constitutional treaty’, CER briefing note, available at http://www.cer.org.uk/pdf/briefing_keohane_referenda_april05.pdf; de Schoutheete Philippe, 2006, ‘Scenarios for escaping the constitutional impasse’, available at http://home.um.edu.mt/edrc/de_schoutheete_scenarios_for_escaping.pdf; Berezin Mable, 2006, ‘Appropriating the “No”: The French National Front, the Vote on the Constitution, and the “New” April 21’, available at http://www.apsanet.org/content_30354.cfm.

^{LXXXII} From a legal point of view, in fact, the ratification process continued thanks to the provisions of Art. IV-447 and the 30th Declaration . In fact, the Constitutional Treaty seemed to consider the option of some difficulties in the ratification: Art. IV-447- Ratification and entry into force “1. 1. *This Treaty shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements. The instruments of ratification shall*



be deposited with the Government of the Italian Republic. 2. 2. This Treaty shall enter into force on 1 November 2006, provided that all the instruments of ratification have been deposited, or, failing that, on the first day of the second month following the deposit of the instrument of ratification by the last signatory State to take this step". Moreover the 30th Declaration on the ratification of the Treaty establishing a Constitution for Europe reads: "The Conference notes that if, two years after the signature of the Treaty establishing a Constitution for Europe, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council".

LXXXIII For a commentary see Ziller Jacques, 2008, *Il nuovo Trattato europeo*, Il Mulino, Bologna; Bassanini Franco- Tiberi Giulia (eds), 2008, *Le nuove istituzioni europee. Un commento al Trattato di Lisbona*, Il Mulino, Bologna; the special issue 1/2008 of the *Maastricht Journal of European and Comparative Law*; Mastronardi Francesco- Spanò Anna Monica, 2008, *Conoscere il Trattato di Lisbona*, Edizioni Simone, Napoli.

LXXXIV See Corthaut Tim, 2008, 'Plus ça change, plus c'est la même chose? A Comparison with the Constitutional Treaty', in *Maastricht Journal of European and Comparative Law*: 17-31,

LXXXV See f.e. Kiiver Philipp, 2008, 'The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity', *Maastricht Journal of European and Comparative Law*: 77-83.

LXXXVI Corthaut Tim, 2008, 'Plus ça cit' : 34.

LXXXVII Ziller Jacques, 2008, *Il nuovo Trattato cit.*: 27 ff.

LXXXVIII *Ibidem*

LXXXIX *Ibidem*, 30.

XC Ziller Jacques, 2006, *La Nuova Costituzione europea*, 2nd edition, Il Mulino, Bologna.

XCI *Ibidem*, 166.

XCII *Ibidem*, 193.

XCIII See the official statement here: http://ec.europa.eu/commission_barroso/president/pdf/statement_20080613.pdf

XCIV Doyle Peter, 2002 'Ireland and the Nice Treaty', 2002, available at http://www.zei.de/download/zei_dp/dp_c115_doyle.pdf

XCV Ziller Jacques, 2006, *Il nuovo cit.*,

XCVI Somek Alexander, 2007, 'Postconstitutional Treaty', in *German Law Journal*, 1121-1132.

XCVII *Ibidem*, 1126-1127.

XCVIII Besselink Leonard, 2008, 'The Notion and Nature of the European Constitution after the Reform Treaty', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086189

XCIX *Ibidem*

Cde Witte Bruno, 2002, 'The Closest Thing cit', 39-57.

CI Besselink Leonard, 2008, 'The Notion cit'

CII Volpe Giuseppe, 2000, *Il costituzionalismo del Novecento*, Laterza, Roma-Bari, 258.

CIII Carozza Paolo, 2007, 'Constitutionalism's Post-Modern Opening', in Loughlin Martin - Walker Neil (eds.), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*, Oxford University Press, Oxford: 169-187, 176.