ARTICLES

Complexity and Cultural Sources of Law in the EU Context: From the Multilevel Constitutionalism to the Constitutional Synallagma

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Premises and Objectives of the Work

In this work I will try to analyse the latest trends of the European integration process in light of the notion of complexity, conceived as a *bilaterally active relationship between diversities*.
This notion of complexity comes from a comparison among the different meanings of this word as used in several disciplines (law, physics, mathematics, psychology, philosophy) and recovers the etymological sense of this concept (complexity from Latin *complexus*= interlaced). The effort to find a common linguistic core could cause ambiguity but I would like to take the risk because only a multidisciplinary approach can "catch" the hidden dimension of the European process
I argue that the European Union legal order is a "complex" entity that shares some features with complex systems in natural sciences: *non-reducibility*, *unpredictability*, *non-reversibility* and *non-determinability*.

The aim of this paper is to contribute to the theory of multilevel constitutionalism by completing some points that may have been neglected in Pernice's reasoning.
In the interlaced nature of the EU a very important role is played by the constitutional synallagma, which is the whole of legal and permanent flows which connect the levels (national, international, supranational, subnational), determining the outcome of the coordination process described by Pernice.

I will develop my argumentation dividing this work in two parts. In the first part I will try to introduce the notion of complexity while in the second part I will focus

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on the role of the cultural sources of law in the communication and exchanges among the constitutional levels.

A. Diversity and EU Integration

Many authors have tried to find the "secret" of the European Constitution (in a "material" sense) starting from the idea of *diversity*. A confirmation of the rightness of this approach can be found in the maniacal reference to the notion of diversity contained in the Preambles of the Constitutional Treaty:

Convinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny, Convinced that, thus 'United in diversity', Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope. [1]

This idea is reaffirmed in the second Preamble of the document:

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organization of their public authorities at national, regional and local levels.[2]

I can also point to art. 22 of the Charter devoted to the "*right to diversity*": "*Cultural, religious and linguistic diversity. The Union shall respect cultural, religious and linguistic diversity.*"[3]

In these statements, Europe is described as suspended on cultural and historical diversities conceived as a factor of spiritual richness rather than as a danger for the common route. This "tension" is highlighted in the main works devoted to European integration which find a common core (leaving the different starting perspectives out of consideration) in the acceptance of this phenomenon as *novum*. The reflections of the most important scholars stress this aspect using different

[1] European Constitutional Treaty, Preamble of Part I.

[2] European Constitutional Treaty, Part II: Charter of fundamental rights of European Union

[3] Charter of fundamental rights of European Union, art. 22.

formulas: from the *constitutional tolerance*[4] to the notion of *cosmopolitan communitarism*[5]. For Weiler the main feature of Europe (content in its rejection of the federal State model)[6] is the capability to mix a high level of legal integration with the preservation and respect of the different political identities and the sovereignty of the member States. The interpretation adopted in order to summarize this combination is the *constitutional tolerance* which is the spirit of voluntary acceptance of the European peoples of a binding discipline not pronounced in their name (because in this case the authority is not founded on the existence of an European *demos*). In fact it derives from a *community of others*.[7] This constitutional tolerance is the main feature of Europe and the answer to *collective self-arrogance* and *constitutional fetishism*.[8] Bellamy and Warleigh also focus their reflection on diversity in their *cosmopolitan communitarism*, a synthesis of the communitarian and cosmopolitan perspectives on citizenship. These two approaches deal in different ways with the issue of the relationships between the individual and the group,[9] democracy and rights.[10] Trying to overcome the weaknesses of the other visions, the authors stress the multilevel nature of EU, "*a multitrack polity, involving co-operation between actors with different values and concerns*."[11] As a consequence, the identities are multiple rather than one-dimensional because the citizens of the Union are simultaneously members of several communities. The idea of the fluidity of power characterizes this approach

[4] J.H. Weiler, *European Democracy and the Principle of Constitutional Tolerance: The Soul of Europe, in* A SOUL FOR EUROPE I (F. Cerutti and E. Rudolph eds., 2001).

[5] R. Bellamy and R. Warleigh, *Cementing the Union: The Role of European Citizenship*, *in* A SOUL FOR EUROPE I (F. Cerutti and E. Rudolph eds., 2001).

[6] J.H.Weiler, *supra* note 4, at 35.

[7] J.H.Weiler, *supra* note 4, at 53.

[8] J.H.Weiler, *supra* note 4, at 53.

[9] "*Cosmopolitans accept individuals have different identities that reflect a given social background, culture, and other emotional commitments. But they view these as a private affair that ought not to influence political decision-making. Communitarians by the contrast, see a common identity stemming from such sources ad crucial in defining who is a citizen and explaining why and how a given people do politics together. Communitarian citizens are attached to the state because they feel it is* theirs *more than for the benefits it provides for them. "* R. Bellamy and R. Warleigh, *supra* note 5, at 62.

[10] "*By the contrast to cosmopolitans, communitarians do not think rights precede democracy and constrain democratic decisions. Instead, they emerge from a democratic process and stem from formulation of common policies*", R. Bellamy and R. Warleigh, *supra* note 5, at 63.

[11] R. Bellamy and R. Warleigh, *supra* note 5, at 69.

with the focus centred on the institutional dynamics of the Union (defined as an "*interlocking system.*").[12]

I. Constitutional Complexity and EU

The notion of complexity[13] does not deny the importance of diversity but permits, in my opinion, a distinction of the European miracle from the experiences, for example, of the multinational States. In this sense, I would like to link my reasoning to Weiler's suggestions which stress the difference between Europe (where the States accept the law of another institutional actor with an autonomous act of subordination and without the need of a reference to a common name of a people) and other instances (Weiler makes the example of Quebec). Complexity well describes the multilevel situation where the legal orders are not only distinguishable but also "interlaced."

Complexity offers us another profile of distinction that is the *constitutional synallagma*. All the disciplines have met this category and have attempted to apply it to several fields of knowledge. I am convinced that it is possible to extract a common notion of complexity from these different disciplines. My persuasion is confirmed by the fact that complexity is not only a particular concept but a general category which has caused a fundamental shift in the history of social and experimental sciences.[14] The notion of complexity is the result of a crisis of the

[12] R. Bellamy and R. Warleigh, *supra* note 5, at 69.

[13] For a similar but also different attempt to apply the notion complexity see: M.Delmas Marty, *Can We Facilitate the Transitions Between Horizontal Cooperation and Vertical Harmonisation Necessary to Create a Universal Legal Order?(2007)*, http://www.axess.se/english/2006/04/theme_delmasmarty.php

[14] In mathematics a number is defined as compound (conceived as complex) when it is formed by a real number plus (or minus) an imaginary number (example: 3+2i is a compound number). In sociology "the complexity is the dilation of possibilities of experience and action of the subjects, caused by an evolutionary trend which increases the functional differentiation, the specification and autonomy of the primary subsystems of the social system, of the economy, of science, of policy, of family and personal relations" (D.Zolo, *L'analisi sistemica del Welfare State*, in D.Zolo (a cura di), *Complessità e democrazia*, Torino, Giappichelli, 1987, 106). For Jung complex is "a structured and active set of representations, thoughts and remembrances partially or fully unconscious and with strong affective potential" (voce *Complesso: DIZIONARIO DI PSICOLOGIA 196-197(* U. Galimberti ed. 1992)). Among Jung's works on this topic: C.G.Jung, *Considerazioni generali sulla teoria dei complessi* (1934) *in Opere,* 1976, Vol. III, 1976). For the medieval logicians a complex term is composed of different words (example: "white man " or "rational animal") while *incomplexum* means *isolated* (voce: "*Complesso",* DIZIONARIO DI FILOSOFIA 134 (N.Abbagnano ed. 1968)).For a physicist a system is complex if it is characterized by the following features: *non reducibility* to its parts, *unpredictability* of its dynamics, *non reversibility* and *non determinability* (I.Prigogine- I.Stengers, *La nuova alleanza*, Torino, Einaudi, 1999). For a jurist an act is complex if it is the result of the expression of the wills of many subjects who have the same aim; their wills lose their individuality in this interpenetration. In this sense "complex" is different from

certainties of modern thought and expresses the relativity and the problematic nature of truth. It reflects the need to confront the "other" who forces us to share his destiny with us.[15] It is important to distinguish the notion of complexity from other concepts: "complex does not mean only complicated or composed of several elements. Complex is a system with non-determinable collective behaviour starting from the behaviour of its components."[16] One of the most important scholars of complexity, Edgar Morin,[17] also distinguishes complexity from completeness. For him, on the one hand, the thought of complexity aims at multidimensional knowledge but on the other hand it knows that it can not aspire to complete knowledge. This category is obviously polysemous if related to the different disciplines, but what we are now interested in stressing is the common element of these definitions: complexity as *relational phenomenon* among *elements characterized by diversity* (conceived as the opposite of identical in the Aristotelian sense).[18] Starting from with the physical meaning of complexity it is possible to identify the following features common to the other disciplinary acceptations:

Non-reducibility: the result of the relationship among diversities does not present itself as a mere sum of the latter but it is something different.

Non-reversibility: for a complex system non reversibility is the impossibility to return to the *status quo* spontaneously and precisely. Unlike the reversible processes, in fact, where from the final condition it is possible to return to the starting condition, the complex systems are non reversible due to the non linearity of the evolution.

Unpredictability: it is difficult to foretell or foresee its evolution by looking at the starting position. In a deterministic system it is always possible to predict the final

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"collective" (L.Bigliazzi Geri, U.Breccia, F.D.Busnelli, U.Natoli, *Diritto civile*, Vol. I Tomo II, Torino, UTET, 2000, 546- 547).

[15] G.Widmann, *Identità e diversità , Il Margine, n. 4*, 2001, http://archivio.il-margine.it/archivio/2001/f4.htm.

[16] V.Loreto, *Non equilibrio e complessità,* http://www.mosac.com

[17] Among his works: E. MORIN, Introduzione al pensiero complesso (Sperling & Kupfer 1993), and Conoscenza della conoscenza, (Feltrinelli 1989). About Morin's thought: M. Sandri, *La complessità: verità acquisite e falsi miti, 7* Kéiron. 98 (2001). About the Europe as complex: E. MORIN, Pensare l'Europa, (Feltrinelli 1988).

[18] In the history of philosophy there are three main definitions of identity: identity as convention (F. Waismann), identity as unity of substance (Aristotele) and identity as substitutability (G.Liebniz). For a summary of these opinions: DIZIONARIO DI FILOSOFIA 446-447 (N.Abbagnano ed. 1960).

state if the initial state is known. In a complex adaptive system it is not possible to predict the final state of its evolution if we know the initial state of the components.

Non-determinability (rectius, non determinism): the complex system does not follow necessary and univocal laws according to a linear concept of the evolution based on the dialectic cause/effect.

In my opinion, the notion of complexity is useful to understand the "secret" of the European Constitution. First of all, the European Constitution is not reducible to the sum of legal provisions at various levels. I mean that, for example, it is impossible to "find" the legal basis for the principle of supremacy in the letters of the Treaty or in the letters of the national Constitutions. In *Van Gend en Loos*,[19] in fact, the ECJ found the roots of such a principle in the "will" of the States signing the Treaties.

Secondly, it is very difficult to foresee the result of the coordination among levels by looking only at the formal provisions: the best example is given by the "constitutional tolerance" in those national legal orders which do not have a specific constitutional provision enabling the EC/EU to exercise their powers within national boundaries. When looking at the original Italian Constitution (art. 11 IC) it is very hard to understand how the constitutional guardians have permitted the erosion of competences caused by EC/EU interferences. Art. 11, in fact, "agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed."[20] This provision was conceived for participation in the UN or other limited-power organizations but not for the EU. The latter imposes limitations of sovereignty for goals that go beyond "peace and justice between nations"mentioned in art. 11. The Italian Constitutional Court was forced to "manipulate" the original meaning of art. 11 in order to allow such limitations. At the same time, when looking at art. 101 ("judges are only subject to the law"[21]), it is impossible to find the legal basis of the judge's power of non-application of the national rule contrasting with EU law. In conclusion, the knowledge of the starting (legal) condition does not allow us to foresee the development of the EU order.

Thirdly, European integration does not follow a precise political project (the triumph of "functionalism") and consequently the ECJ did not assume an

[19] Case C-26/62, Van Gend en Loos, 1963 E.C.R. 3.

[20] Constiituzione (Italian Constitution), art. 11.

[21] Constituzione (Italian Constitution), art. 101.

imperialistic approach in its interpretative function. In this sense it is possible to recall the famous dialectic between constitutional tolerance and judicial activism[22] in the European Court of Justice's activity and its effect on the coherence of ECJ case law: *Kalanke*[23] vs. *Marschall,*[24] *Grant*[25] v. *P/S*[26]. The non-determinability implies the non-manageability of the constitutional complexity; in this sense the attempt of the Constitutional Treaty is an effort to "manage" complexity without good results. The best confirmation of this statement can be found in the crystallization of the Supremacy Clause (I-6). The difficulty of this enterprise is also caused by the absence of a strong political power at the supranational level. It is not accidental that the most important sources of law in the building of the EU Constitution were the interpretative sentences of the ECJ and not the directives or the regulations. The former are flexible sources, more adaptable to the changing context and aims of EC/EU while the latter imply a constructivist and linear policy ("indirizzo politico"). I will try to explain this distinction in the second part of the paper, devoted to *political* and *cultura*l sources of Law.

Finally the EC/EU route was not a linear process because of functional predominance and State resistance. Thanks to art. 234 ECT, the Court had a fundamental role: this provision allowed the Court to manipulate the legal "material." Afterwards, the political legal sources (by revisions of the Treaty, constitutional amendments) attempted to adapt themselves to such interpretations.

Today it is probably impossible to return to the starting condition because all the systems involved in the coordination have evolved and changed, thanks to mutual implications and influence. Having said this, I argue that the European Union is a complex reality which is suspended on mutual diversities and requires legal and constitutional interpenetration. It is the outcome of a coordination which demands the solution of some incompatible antinomies. As a consequence, it is impossible to understand the whole (the system) starting from one of its parts.

If the EU as a complex system is characterized by the interlacement among different legal orders, the constitutional synallagma is the blood of its Constitution which

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[22] *See* O. Pollicino, *Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint*, 5 GERMAN LAW JOURNAL 3 (2004), *available at* http://www.germanlawjournal.com/article.php?id=402.

[23] Case C-450/93, Kalanke v. Freie Hansestadt Bremen, 1995 E.C.R. I-3051.

[24] Case C-409/95, Marschall v. Land Nordrhein-Westfalen, 1997 R.a.c.c. I-6363.

[25] Case C-249/96, Grant c. South West Trains Ltd., 1998 E.C.R. I-2143.

[26] Case C-171/88, P / S and Cornwall County Council, 1996 E.C.R. I-2143.

runs through the "bridge" connecting constitutional levels. By this formula I mean the whole of principles, practises and rules which uninterruptedly circulate from one level to another in a twofold direction (from top to bottom and vice versa). Constitutional synallagma concurs to the definition of a new kind of law which is not reducible to the legal provisions of the Treaty or of the national legislations. I will try to specify this formula with some examples below.

The most obvious symbol of this exchange among orders is the *directive*[27] which needs to be "completed" by the States, but we will focus on other types of complex sources: the common constitutional traditions in their relationship with the counter limits ("controlimiti").

II. From Multilevel Constitutionalism to Constitutional Synallagma

In this sense the European Legal system is a complex-configuration order. The approach of complexity is useful to overcome the application of holistic and reductionist visions. The complex systems seem homogeneous when they are seen from the point of view of the whole but they appear unhomogeneous if seen from the point of view of the part. This ontological indecision between heterogeneity and homogeneity also characterizes the European order, which is a continuous coordination of levels of Law. A theory which catches this dynamic aspect is the theory of multilevel constitutionalism. This approach stresses the complementarity between national and supranational levels, becoming one of the most important contributions to the debate on a Constitution for Europe. With regard to this point, I can identify two different groups of scholars.. The first group is formed by the scholars[28] who deny the possibility of a Constitution for Europe due to the lack of a European people. These authors conceive the Constitution as an expression of the people (seen as one the three classic elements of the State by Bodin). Without a European State and without a European people it is impossible to have a common Constitution. This opinion shows the importance of the State for the constitutionalist perspective, but it is completely inadequate for the understanding of the latest trends of constitutional law. The notion of sovereignty is in crisis[29] (or perhaps in transition) and undoubtedly globalization has reduced the margins for isolated actions of state actors. The second group of scholars, instead, admits the

[27] *"A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."* European Community Treaty, Art. 249.

[28] D. Grimm, *Una costituzione per l'Europa?,* in IL FUTURO DELLA COSTITUZIONE 339- 367 (J. Luther, P.P. Portinaio and G. Zagrebelsky eds. 1996).

[29] *See* N. WALKER, SOVEREIGNTY IN TRANSITION (2003).

possibility of a Constitution without a State, also looking at the experience of the medieval legal orders. Among these authors we can identify two different points of view: conservative and progressive. Authors like Weiler, for example, belong to the first option because they argue the current existence of a European Constitution which is represented by the Treaties and the principles of ECJ case-law (principle of direct effect,[30] supremacy[31]). There are instead some authors who deny the current existence of a Constitution for Europe but who do not deny the possibility of having one in the future.[32]

Constitutional lawyers must thank Ingolf Pernice for his idea of multilevel constitutionalism. Thanks to this formula, in fact, it is possible to study and analyse the dynamics of the European process from a constitutional point of view. Among the premises of his thought we can remember the following: sovereignty is conceived as integrated while the constitution is seen as a process rather than as 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 unique and composed Constitution. In support of this intuition see art. 6 of the Treaty on European Union (TEU), which refers to the national constitutional traditions as part of the European Legal order:

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.[33]

See also art. 288 of ECT:

In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.[34]

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[30] Case C-26/62, Van Gend en Loos, 1963 E.C.R. 3.

[31] Case C- 6/64, Costa v. ENEL, 1964 E.C.R. 1141.

[32] J.Habermas, *Una costituzione per l'Europa?Osservazioni su Dieter Grimm*, in IL FUTURO DELLA COSTITUZIONE 339- 367, 369- 375 (J. Luther, P.P. Portinaio and G. Zagrebelsky eds., 1996).

[33] Treaty on European Union (TEU), art. 6

[34] European Community Treaty (ECT), art. 288

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.[35]

Or instead:

The European Constitution, thus is one legal system, composed of two complementary constitutional lawyers, the European and the national, which are closely interwoven and independent, on cannot be read and fully understood without regard to the other.[36]
And:

What ever may be the general qualification (be it regarded as two autonomous and separate bodies of law174 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.[37]

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 subnational level, fundamental charters exist and this can cause some problems in the legal coordination.

In fact these fundamental subnational 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. [38]

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[35] I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making-Revisited?*, CMLR 703-750, 707 (1999).

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

[37] J. Dutheil de la Rochere-I.Pernice, *European Union Law and national constitutions*, WHI-paper, 17/02, 21.

[38] Corte Costituzionale, sent. 372/2004. About this A.Vespaziani, *Principi e valori negli Statuti regionali: much ado about nothing?, available at*

Another weakness of this approach is 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.[39] 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 *Rutilli,*[40] *Ert,*[41] and *Hauer*[42]. 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.[43]

Pernice's pattern is very useful because it gives a strong basis for our reasoning. However, I would like to insist on the dynamism of the notion of complexity, by trying to give a modest contribution to the constitutional theory of the European integration and by completing (ideally) Pernice's argument. According to this author, in fact, the European Constitution is the coordination between supranational and national levels. In my opinion, it is necessary to add something else: the national level is very diversified and not homogenous and this implies a constitutional asymmetry which complicates the coordination described.

From a theoretical point of view, if the European Constitution is the result of the coordination among legal orders, the outcome of this coordination will depend on the national legal order assumed as a parameter of coordination. Because of the different legal traditions of the member States we can not say that the coordination between these two levels is typical: on the contrary we can say that there are different kinds of coordination. As a consequence, the antinomies among orders are not typical because in some cases (for example "economic constitution") the Treaties will be forced to coordinate with more compatible legal orders (for example, the UK) while in other cases with less liberalist orders such as Italy. The

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http://www.associazionedeicostituzionalisti.it/dibattiti/riforma/vespaziani.html; E. Rossi, *Principi e diritti nei nuovi Statuti regionali*, *Riv.dir.cost.* 51-96 (2005).

[39] Although the author seems to "touch on" this level in some papers: for example, I.Pernice-R.Kantiz, *Fundamental rights and multilevel constitutionalism in Europe*, WHI paper 7/2004.

[40] Case C-36/75, Roland Rutili v Ministre de l'intérieur , 1975 E.C.R. 1219.

[41] Case C-260/89, Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others, 1991 E.C.R. I-2925.

[42] Case C-44/79, Liselotte Hauer v Land Rheinland-Pfalz, 1979 E.C.R. 3727.

[43] *See*, Case T-112/98, Mannesmannröhren-Werke AG/Commissione, 2001 E.C.R. 729. *See also,* Matthews v. Regno Unito 1999 *R.U.D.H.* 263.

Italian case is paradigmatic because the impact of the negative integration was heavy and caused the substantial abrogation of entire provisions of the Constitution. Another example is represented by the coordination among national administrative legal systems and the supranational principles of European Administrative law. There were different reactions to the European principle of proportionality, due to the characteristics of the various national orders: "refusal" in UK, "adaptation" in Italy and "mutation" in Germany.

From these premises we can infer that the compatibility among legal orders in fact facilitates the coordination but it is a quality of a "piece" of the national legal system that must be compared with the Treaties. In fact in other fields the Italian Constitution might happen to be more easily compatible with the Treaties than the English Constitution. To better understand this step, I would like to stress the frequent reference to the national orders in the Treaties. For example, "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership."[44] Similarly the Charter of Nice always makes a reference to the national legal orders by dividing rather than unifying them. In this sense, it can be said that the European Constitution is a "chameleonic constitution" and all this is in perfect continuity with notion of complexity as summarized above.

In conclusion, multilevel constitutionalism offers a strong but static basis for the identification of the "secret" of the European Constitution; it recognizes the diversification of the national legal systems towards EU penetration but does not care to specify the implications of such a diversification in the coordination. All this does not allow appreciatiation of the dynamic flows (from top to bottom and vice-versa) which are the heart of the constitutional "synallagma" of the EU Constitution.

III. Counter limits (controlimiti) Versus Common Constitutional Traditions?

Everybody knows the importance of the preliminary ruling (ex art. 234 ECT) in the history of European integration. The development of the Community occurred thanks to the institutionalisation of the link between ECJ and national judges provided in this article. On the one hand, art. 234 has worked as a norm regulating the production of the most important sources of EU law: the interpretative sentences of the ECJ. On the other hand, it has allowed the national judges to take part in the development of EC/EU law by opening a privileged exchange channel between national and supranational legal orders. The English High Court,[45] the

[44] European Community Treaty (ECT), art. 295.

[45] Case C-34/79, Henn and Derby, 1979 E.C.R. 3795.

Irish,[46] Greek,[47] Danish[48] and Finnish[49] Supreme Courts have accepted the dialogue with the ECJ while the Constitutional Courts (except for the Belgian[50] and Austrian[51] Constitutional Courts) in general have avoided it. They have always preferred to be excluded from the dynamics of the preliminary ruling by refusing to define themselves as "judges" under EC/EU law. On the contrary they have raised some impenetrable barriers against the penetration of EU law in order to define the fundamental principles of the legal orders of which they are the guardians.

Hypothetically, if an EU provision was in conflict with the fundamental principles of the national legal order, the Constitutional Court could strike out the national act of execution of the EC Treaty, thus causing a "break" between national and supranational legal orders. The Constitutional Courts normally have jurisdiction over national acts (like the legal source of the execution of the Treaties) and not over the EU provisions: the latter are out of their jurisdiction because, in their argument, they belong to another legal order. Thus, if they accepted the possibility of striking out the EU law provisions, they would in fact be adhering to the monistic theory of the ECJ. It is a legal *fictio* which makes it possible to defend the hard core of constitutional legal orders by preserving the formal autonomy of the national and supranational orders and the jurisdiction of the ECJ.

The theory of the counter-limits doctrine ("dottrina dei controlimiti") was conceived in *Solange* I by the German *Bundesverfassungsgericht*[52] and in case 183/73 (but see also 170/84)[53] by the Italian Constitutional Court, but a lot of constitutional courts accepted it in the following years. Recently *Conseil Constitutionnel*, [54] in 2004-

[46] Case C-182/83, Fearon c. Irish Land Commission, 1984 E.C.R. 3677.

[47] Case C-348/96, Calfa, 1999 E.C.R. 11.

[48] Case C-151/78, Sukkerfrabiken Nykobing, 1979 E.C.R. 1147.

[49] Case C-172/99, Liikenne, 2001 E.C.R. 475.

[50] *Court d'Arbitrage*, 19 February 1997, n. 6/97.

[51] Verfassungsgerichtshof, 10 March 1999, B 2251/97, B 2594/97.

[52] BVerfGE, 37, 321.

[53] Corte Costituzionale n. 180/74 :"*nella sent. n. 183 del 27 dicembre 1973, già avvertito come la legge di esecuzione del Trattato possa andar soggetta al suo sindacato, in riferimento ai principi fondamentali del nostro ordinamento costituzionale e ai diritti inalienabili della persona umana». See*: M.Cartabia, *Principi inviolabili e integrazione europea*, Giuffrè, Milano, 1995

[54] *But see also Conseil d'Etat, dec. Sarran*, 30 October 1998 ; *Cour de Cassation, dec. Fraisse*, 2 june 2000; *Conseil d'Etat, dec. SNIP*, 3 December 2001. In addition see: *Conseil Constitutionel* 2004-496-497-498-499 DC 2004-505 DC

505 DC, analyzing the consistency between Constitutional Treaty and French Constitution, said that: "Considérant, toutefois, que, lorsque des engagements souscrits à cette fin contiennent une clause contraire à la Constitution."[55] Such a statement should be read together with the cases 2004-496/497 DC of the Conseil Constitutionnel:

la transposition en droit interne d'une directive communautaire résulte d'une exigence constitutionnelle à laquelle il ne pourrait être fait obstacle qu'en raison d'une disposition expresse contraire de la Constitution.[56]

In Spain, (D-1/2004) the *Tribunal Constitucional* recognized the supremacy of EU law by stressing:

Producida la integración debe destacarse que la Constitución no es ya el marco de validez de las normas comunitarias, sino el propio Tratado cuya celebración instrumenta la operación soberana de cesión del ejercicio de competencias derivadas de aquélla, si bien la Constitución exige que el Ordenamiento aceptado como consecuencia de la cesión sea compatible con sus principios y valores básicos[57]

Similarly four years ago in England[58] the national judges admitted the supremacy of EU law by preserving a hard core of principles.

The theory of counter limits represents a strong refusal by the constitutional guardians of the dangers of a monistic approach in the reading of the relationship among legal orders. Despite the strictness shown in these sentences, the Constitutional Courts have never used this "weapon" and in the recent years the German *Bundesverfassungsgericht* changed its position by substituting the case by case control (hypothesized in *Solange I*) with an abstract control of the general

[55] Conseil Constitutionnel, 2004-505 DC.

[56] Conseil Constitutionnel, 2004-496/497 DC.

[57] Declaracion of the Tribunal Constitucional 1/2004. About this point see: V.Ferreres Comella, *La Constitución española ante la clausola de primacia del Derecho de la Unión europea. Un comentario a la Declaración 1/2004 del Tribunal Constitucional 1/2004*, in A.Lopez Castillo-A.Saiz Arnaiz-V.Ferreres Comella, *Constitución española y constitución europea*, 2005, 77-100, 80-89 and A.Saiz Arnaiz, *De primacia, supremazia y derechos fundamentales en la Europa integrada: la Declaración del Tribunal Constitucional de 13diciembre de 2004 y el Tratado por el que establece una Constitución para Europa*, *Ibidem*, 51-75

[58] *Mc Whirter and Gouriet v Secretary of State for Foreign Affairs, [2003], EWCA civ 384. See,*: A.Biondi, *Principio di supremazia e "Costituzione" inglese. I due casi "Martiri del sistema metrico" e "Mc Whirter and Gouriet"*, available at: www.forumcostituzionale.it.

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compatibility of EU law with the demands of rights' guarantee (*Solange II*[59], *Maastricht*[60], *Banana*[61]).

In the German *Grundgesetz* (art.23), and in the Finnish (art. 94) and Swedish Constitutions (X-5) the counter limits principle has also been codified. On the other hand the ECJ clarified the following:

Therefore the validity of a Community measure or its effect within a member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of its constitutional structure", although the "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member States, must be ensured within the framework of the structure and objectives of the Community. [62]

This kind of argument was resumed in a recent order of the European Court of First Instance:

Furthermore, in their observations on the objection of inadmissibility, the applicants cannot maintain that, to remedy this alleged lack of judicial protection, the Italian Constitutional Court could refrain from applying Community measures contrary to the fundamental rights proclaimed in the national Constitution since, in accordance with settled case-law, Community law has primacy over national law (Case 6/64 Costa [1964] ECR 614). [63]

Another confirmation of the interlacement among orders (as previously described) is given by the genesis of the common constitutional traditions which are the outcome of the comparison and selection of the national constitutional "material." In this sense it is curious to note the connection between the *counter limits* (quoting the language used by the Italian Constitutional Court) and the common

[59] BVerfGE 73, 339.

[60] BVerfGE 89, 155.

[61] BVerfGE 102, 147.

[62] Case C-11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, E.C.R. 1125.

[63] Case T-231/02, Gonelli e Aifo c. Commissione, available at: www.curia.eu.int.

constitutional traditions as pointed out by some scholars.[64] The common constitutional traditions and the counter limits are linked by means of the fundamental principles of the national legal order selected, compared and used as European sources of law by the European Court of justice.[65]

If 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 inner legal materials in the European legal order. Apparently they 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. As stressed, however, by Ruggeri,[66] thanks to the hermeneutical channel represented by the preliminary ruling, the constitutional principles of the inner legal orders arise from their origin (national level) and become common sources of EU Law; then these common constitutional traditions come back to the origin in a new form when they are applied by the ECJ. This circle confirms the complex (interlaced) nature of the European Union and demonstrates the evanescence of the nationalist arguments hidden in the theory of counter limits.

By looking at these flows we can find the best proof of the complex nature of the EU: in such a context common constitutional traditions and counter limits are two sides of the same coin as demonstrated, in my opinion, by the letter of the Constitutional Treaty which has codified the latter in art.I-5:

1. The Union shall respect the equality of Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.

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[64] A.Ruggeri, *"Tradizioni costituzionali comuni"e "controlimiti", tra teoria delle fonti e teoria dell'interpretazione, Dir. Pub. Comp. E. Eur.*, 102-120 (2003).

[65] About the interpretative method of the Court, *see* J. BENGOETXEA, THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE (1993); J. Bengoetxtea and N. MacCormick and L. Moral Soriano, *Integration in the Legal Reasoning of the European Court of justice*, *in* THE EUROPEAN COURT OF JUSTICE 43-85 (J. Weiler and G. De Bùrca eds. 2001). Specifically about the role of legal comparison in EU Law. *See* A.Pizzorusso, *Il patrimonio costituzionale europeo*, Bologna, Il Mulino, (2002) and I.Kaminski, *Comparative Law and Comparative Lawyer at the Turn of Centuries*, *available at* http://www.policy.hu/discus/messages/102/ceaserk-comparelaw.pdf, 2000.

[66] A.Ruggeri, *"Tradizioni costituzionali comuni"e "controlimiti", tra teoria delle fonti e teoria dell'interpretazione,* 102-120 Dir. Pub. Comp. E. Eur., 2003.

2. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution.[67]

The reference to the national identities (already included in art. 6 of EUT) and to the constitutional structures give the counter limits expressed constitutional degree. This fact might cause some problems identifying the guardians of these counter limits: the Constitutional Courts (following the traditions) or the ECJ?[68] When looking at the rationale of the Constitutional Treaty the counter limits as well should be considered as parts of the EC Law.

In such a context the role of the ECJ could change and perhaps cases such as *Berlusconi* and *Omega* testified the first signs of this evolution. [69] At the same time *Omega* - along with the example of the principle of proportionality -represents the best example of the flows of the constitutional exchange (*synallagma*) among levels.

As we know art. I-5 balances the codification of the supremacy clause (I-6)[70] and definitively demonstrates the inadequacy of the theory of monism and dualism for the understanding of integration dynamics. Another consequence of the complexity is the issue of dialogue among the guardians of the levels: the horizontal clauses[71] included in the second part of the Treaty Constitution, in fact, regulate the relationship between the European Convention[72] of human rights (thanks to the

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[67] European Constitutional Treaty, art. I-5

[68] *See,* A.Ruggeri, *Trattato costituzionale, europeizzazione dei "controlimiti" e tecniche di risoluzione delle antinomie tra diritto comunitario e diritto interno (profili problematici*), *available at* www.forumcostituzionale.it.

[69] Case C-36/02, Omega, 2004 E.C.R. I-9609.

[70]Article I-6 Union law: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States." Treaty Establishing a Constitution for Europe, art. I-6, available at: http://europa.eu/constitution/en/ptoc2_en.htm.

[71] Article II-113 Level of protection: *"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."* Treaty Establishing a Constitution for Europe, art. II-113, *available at* http://europa.eu/constitution/en/ptoc21_en.htm.

[72] Article I-9(2) Fundamental rights: " *The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution."* Treaty Establishing a Constitution for Europe, art. I-9(2), *available at* http://europa.eu/constitution/en/ptoc3_en.htm#a12.

Constitutional Treaty, the European Union would belong to this Convention) and the Charter itself but there are no other indications about this point.

Moving to the examples which can confirm the presence of these constitutional flows, we can start from the *Omega* case. In *Omega*, the Court said that:

Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity.[73]

This statement should be read as the final line of a long process which started after *Solange I*. This judgment aspires to demonstrate (in front of a German judge: not randomly) the ripeness of the EU legal system and in general the outcome of the constitutional dialogue with national interlocutors. Something similar happened in the *Berlusconi*[74] case (in front of an Italian reference), when the ECJ stated that:

The principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the Member States. It follows that this principle must be regarded as forming part of the general principles of Community law which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law and, more particularly in the present cases, the directives on company law.[75]

In such an argument, there is probably not a lack of strategic (and persuasive) reasons, due also to the broad notion of human dignity and retroactive application of a lenient penalty assumed by the Court; regardless, it is clear that such sentences are the results of a long comparison with the national instances.

The second example I have chosen is related to the development of the EC principle of proportionality. It 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.[76] A broad distinction between the cases involving the

[73] Case C-36/02, Omega, 2004 E.C.R. I-9609.

[74] Case C-387/02, Berlusconi and others…, 2005 E.C.R. I-3565.

[75] Case C-387/02, Berlusconi and others…, *2005* E.C.R. I-3565.

[76] *See* A. Tempelman e Coniugi T.H.J.M. van Schaijk c. Directeur van de Rijksdienst voor de keuring van Vee en Vlees, C-96/03 e C-97/03, ECR, 2005, I-1895.

EU institutions and cases involving member states can be found in ECJ activity. In the first case the ECJ seldom declares the illegitimacy of the measures. Rather, with regard to the Member States, the Court seems to insist on the reasons of the integration, declaring the violation of the "loyalty duty" to the Treaties.[77]. Then the translation of the German principle in the supranational context was enriched by the French experience of the "*bilan avanteges-coûts*" (costs and 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 I said above, the constitutional exchange among levels is continuous and implies a second constitutional flow from the EU level to the national levels. Because of the diversification of the national legal orders we can distinguish different "spill over" effects. Galetta 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 preferring the so called "*Wednesbury-test*"[78] until 1998, year of the Human rights Act which 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.[79] Last but not least, the German case: here the same principle of proportionality comes back after the "supranational transformation" causing new evolutions in judges' activity in order to adapt their case law to the supranational demands.[80]

B. The Cultural Sources of Law as Carriages of the Constitutional Synallagma - The Routes of the Constitutional Synallagma

If the constitutional synallagma is the whole of bi-directional (from top to bottom and viceversa) flows which gives European Constitution new blood, the cultural sources of law represent the "carriage" which conduct these flows from the national to the supranational (and back) legal orders thanks to the dynamics of art. 234 ECT.

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[77] D.U.Galetta, *Il principio di proporzionalità comunitario e il suo effetto di spill over? negli ordinamenti nazionali*, 541-557 NUOVE AUTONOMIE (2005).

[78] P.Craig, *Unreasonableness and proportionality in UK law*, in *The principle of proportionality in the Laws of Europe* 85, 95 (E. Ellis ed., 1999). *See also* Regina v. Chief Constable of Sussex EX Parte International trader's Ferry Limited [1998] 3 WLR 1260 (HL).

[79] TAR Lecce, Bari, Sez. III, from 2483/2004 to 2493/2004, available at: www.giustizia-amministrativa.it.

[80] Bundesverwaltungsgericht (*BVerwG- Federal Administrative Court)*, DEUTSCHES VERWALTUNGSBLATT (DVBl) 613 (1993),; Bundesverwaltungsgericht *(BVerwG*- Federal Administrative Court), DEUTSCHES VERWALTUNGSBLATT (DVBl) 68 (1997).

The scission between rules and political institutions represents a new form of "separation" in constitutional law and it is well described by Alessandro Pizzorusso,[81] thanks to the distinction between cultural and political sources of law which testifies the impact of these events on the ambit of 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 manifestation of the will of the state 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). As we have already seen, the interpretative sentences belong to the group of cultural sources of law. They have played a fundamental role in pushing forward the reasons of integration while the political sources (directives, regulation) were stopped by the traps of the intergovernmental mechanisms. Why? Very 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*"[82] described by Eric Stein.

Having said this it is curious to stress that the latest important judgement of the ECJ is *Francovich,*[83] which dates back to the early 1990s. After 1991 the Court limited itself to operations of "decisions enforcement", probably because of the greater attention given by the States to its work. EC members- aware of the supranational danger coming from the ECJ- attempted to "stop" its legal route (see the conclusions of the summit of Edinburgh for example).

Curiously from 1992 the semi-permanent process of Treaty revisions described by de Witte began, giving new energy to the political side of integration and consequently to the political sources of law and political actors. The new importance of such actors and of the political formulas is testified by the strategy of Conventions introduced with the Charter of Nice experience and by the fundamental rule of their work: the vote for consensus.

In the history of judicial cooperation, exceptions to this "lucky" alliance did occur and in the last few years it has become possible to identify some examples of this

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[81] A.Pizzorusso, *Fonti politiche e fonti culturali del diritto* in *Studi in onore di T.Liebman* 327 (Giuffrè Milano ed., 1979); A.Pizzorusso, *Sistemi giuridici comparati* 263-164 (Giuffrè Milano ed., 1998).

[82] E.Stein, *Lawyers, Judges and Making of Transnational Constitution*, 1 AMERICAN JOURNAL OF INTERNATIONAL LAW 75 (1981).

[83] Case C-6/90 e C-9/90, Francovich and Bonifaci v. Italy, 1991 E. C. R. I-5357.

judicial "tension." The best examples are represented by *Traghetti Mediterraneo*[84] and *Köbler,*[85] here the national judges committed violations of EC law, by not referring the question to the ECJ (although obliged to do so on the basis of 234 ECT) and not following the Court's previous orientations. In *Köbler* the ECJ said that: t

The principle according to which Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance.[86]

In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take into account all of the factors which characterise the situation before it. These factors are: the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC. 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 concerning the matter. In *Traghetti* the reference was made in the context of proceedings brought against the *Repubblica italiana by Traghetti del Mediterraneo SpA*, a maritime transport company currently in liquidation ('TDM'), for compensation for the damage suffered as a result of an incorrect interpretation by the *Corte Suprema di Cassazione* (Italian Supreme Court of Cassation) of the Community rules on competition and State aid and, in particular, because of the Court's refusal to accede to its request that the relevant questions of interpretation of Community law be referred to the Court of Justice.[87] The Court recalled *Köbler* saying:

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 instance by reason of the fact that the infringement in question results from an interpretation of provisions of

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[84] Case C-173/03, Traghetti del Mediterraneo, *available at:* http://www.curia.europa.eu/en/content/juris/c2.htm.

[85] Case C-224/01, Köbler, 2003 E.C.R. I-10239.

[86] Case C-224/01, Köbler, 2003 E.C.R. I-10239.

[87] Case C-173/03, Traghetti del Mediterraneo, *available at* http://www.curia.europa.eu/en/content/juris/c2.htm.

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, as set out in paragraphs 53 to 56 of the judgment in Case C-224/01 Köbler.[88]

Partially different is the case of the sentence *Commission versus Italy,*[89] when the ECJ said that that, by failing to amend Article 29(2) of Law No 428 of 29 December 1990- which is construed and applied by the administrative authorities and a substantial proportion of the courts, including the *Corte di Cassazione* (Italy), in such a way that the exercise of the right to repayment of charges levied in breach of Community rules is made excessively difficult for the taxpayer- the Italian Republic had failed to fulfill its obligations under the EC Treaty.

Another group of examples is given by the decisions of two Italian judges: the first case I am going to quote is the one concerning the decision of *Corte di Appello di Roma* (Sez. lavoro -ordinanza 11 April 2002)[90], which decided to apply art. 47 of the Charter of Nice directly although this document lacks binding legal force. The second case is the one of the *Corte di appello di Milano*, (II Sez.Civ., 20 April del 2005), which said that the European Constitution is already in force and characterized by constitutional status in the Italian legal system, challenging the EU/International treaty law and Italian Constitutional Court's orientation about the role of EU sources of law in the Italian hierarchy of legal sources.

Despite these judicial tensions, the relationship between the ECJ and national judges does not seem critical and the interpretative sentences continue to be fundamental in EU life. The Italian Constitutional Court in the cases n. 113/85[91] e 389/89[92] and the ECJ itself in cases like *Cilfit*[93] and *Köbler*[94] have implicitly

88 Case C-173/03, Traghetti del Mediterraneo, *available at* http://www.curia.europa.eu/en/content/juris/c2.htm.

89 Case C-129/00, Commission v. Italy, 2003 E.C.R. I-14637.

90 *See* R.Calvano, *La Corte d'Appello di Roma applica la Carta dei diritti Ue. Diritto pretorio o Jus commune europeo?*, available at: *www.associazionedeicostituzionalisti.it*.

91 Corte Costituzionale, sentenza 19 April 1985, n. 113.

92 Corte Costituzionale, sentenza 4 July 1989, n. 389.

93 Case C-283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, 1982 E.C.R. 3415.

94 Case C-224/01, Köbler, 2003 E.C.R. I-10239.

recognized the *erga omnes* effects of its interpretative sentences (not only for those resulting ex 234 ECT): if a previous judgment exists, the obligation of the first instance national judge becomes a "faculty"; such a modification (from duty to faculty) is an effect which involves all the national judges differently from the judge raising the question. The interpretative sentences are cultural sources of law (like English binding precedents), although their nature is different from the English precedent because of the absence of a real hierarchy of the courts in the EU law system, such as the one built by the English *Judicatures Act*.

The importance of *cultural* sources of law is related to the absence of a strong political power able to manage EU complexity beyond the state dimension:[95] cultural sources of law and flexibility of power are two sides of the same coin. The European Convention had given us the illusion of the existence of a strong and deterministic will at the supranational level but after the constitutional failure a new important role could again be played by the ECJ and its sources.

The difficulties of the ratification process of the Constitutional Treaty, in fact, force us to reflect on possible alternative options. Here I do not want to summarize the reasons of 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 arise from this document. [96]

What will happen after the result of the referenda? From a legal point of view the ratification process is continuing thanks to the provisions of art. IV-447[97] and the 30th Declaration:[98] unanimity in the ratification might not be essential for the entry in force of this document.

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[95] Without being neo-medievalist, we can recall the importance of the custom in the Middle Age to confirm this factor.

[96] To define all its ambiguities J.Bast uses the formula "*reflexive constitution*". *See* J. Bast, *The Constitutional Treaty as a Reflexive Constitution*, 6 GERMAN LAW JOURNAL 11 (2005), *available at* http://www.germanlawjournal.org/article.php?id=646.

[97] In fact, the Constitutional Treaty seems to consider the option of some difficulties in the ratification: ARTICLE 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."*

[98] 30th Declaration on the ratification of the Treaty establishing a Constitution for Europe "*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*."

Apart from this I would like to stress an element of strong continuity with the past. 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 Schengen (C-503/03) or Pupino (C-105/03), 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."[99] 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 faced 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 intuition can be found in the new resistance operated by the Polish[100] and German Constitutional Courts[101] with regard to the European arrest warrant that seems to be one of the *Trojan horses* of the European judge in this new phase.

C. Conclusion

In this paper I attempted to read the European constitution in light of the complexity conceived as a bilaterally active relationship among diversities. The EU, like all the other complex systems, is characterized by such features: non-reducibility, unpredictability, non-determinism, non-reversibility. In my opinion the notion of complexity can offer a very important contribution (in terms of dynamism) to the multilevel constitutionalism theory. The bridge of this interlaced (from the original meaning of the term *complex*) system is provided by the constant exchanges among levels. By the formula *constitutional synallagma* I mean the whole of flows, practises and rules which circulate from one level to another in a twofold direction (from top to bottom and viceversa) enriching in a mutual way the European Constitution which is a chameleonic and never ending process of constitutional coordination. The bridge linking the levels is represented by art. 234

[99] K Kowalik-Bañczyk, *Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, 6 GERMAN LAW JOURNAL 10 (2005), *available at* http://www.germanlawjournal.com/article.php?id=638.

[100] Trybunał Konstytucyjny w Polsce, P 1/05 of 27th April 2005, http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm.

[101] Bundesverfassungericht, (BVerfG-German Federal Constitutional Court), 2BvR 2236/04, para. 1, Jul. 18, 2005, http://www.bundesverfassungsgericht.de/en/decisions/rs20050718_2bvr223604en.html .

ECT: thanks to this provision the ECJ cooperates with the judges producing its interpretative sentences. The latter are typical examples of cultural sources of law which give new blood to the constitutional synallagma.