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**THE EUROPEAN “CONSTITUTIONAL CORE”,  
KEY TOOL FOR FURTHER INTEGRATION**

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### 1. A true constitutional law without a constitution

At the beginning of this paper it is important to stress that it is already possible to talk about a European constitutional law despite the fact that the European Union still lacks a constitution<sup>1</sup>. Indeed, it is well known that a first, though only nominal<sup>2</sup>, attempt in this last direction proved unfruitful with the failed entry into force of the so-called “Treaty establishing a Constitution for Europe” following the 2005 referenda in the Netherlands and in France.

Nevertheless it is not difficult to overcome this first argument since talking about a constitutional law does not necessarily coincide with setting down a constitution as a (unique) formal document including the norms that establish a society’s fundamental organization<sup>3</sup>.

Rather, looking beyond and considering, from a substantial point of view, what we should assume as “constitution” – identifiable as a set of rules suitable to give identity to the members of a political community since they express “what they stand for, the values they want to affirm and that are distinctive for them”<sup>4</sup> – it is possible to conclude that, despite the fact that formally the Lisbon Treaty is another international Treaty, *ergo* an intergovernmental agreement<sup>5</sup>, after its entry into force the EU is finally provided with norms that one might define “ontologically” constitutional, *id est* constitutional in nature<sup>6</sup>.

In this light, it is needed to consider first and foremost Art. 2 TEU and the values this article sets down as shared values among all member States that constitute – one might say – the “common constitutional platform”, in order to serve both as hermeneutic criteria and legitimacy parameters of both all other European and national norms<sup>7</sup>. Moreover, the EU common values represent at the same time a warning and an evaluation criterion for further requests of accession to the EU<sup>8</sup>.

And it is also worth remembering that these values are protected with adequate guarantees, including political ones<sup>9</sup>, such as the procedure set in art. 7 TEU in order to manage the “clear risk of a serious breach by a Member State of the values referred in Article 2”.

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\* This paper, provided with footnotes, stems from the Keynote speech delivered, with another title and other slight differences, at the 2019 PECSA International Conference “Connecting the European Union of Shared Aims, Freedoms, Values and Responsibilities” (SGH Warsaw School of Economics, 5 Dec. 2019).

<sup>1</sup> The issue is not new: a summary of the doctrinal debate on the topic is offered by G. MARTINICO, *La complessità costituzionale dell’ordinamento europeo*, in *Studi in onore di Gaetano Silvestri*, Torino, 2016, Vol. II, 1364 ff.

<sup>2</sup> From a strictly constitutional-law perspective it is clear that Treaty did not represent a true constitution, first and foremost because of the procedural path followed for its signature, see *ex multis*, R. BIN – P. CARETTI, *Profili costituzionali dell’Unione europea*, Bologna, 2001, 141 ff.

<sup>3</sup> See J.H.H. WEILER, *The European Union: Enlargement, Constitutionalism and Democracy*, Vortrag im Rahmen des Forum Constitutionis Europae (FCE 7/99), 1-16; 37-69.

<sup>4</sup> A. FERRARA, *Constitutional Narratives and the Future of Europe*, in *A New Narrative for a New Europe*, D. Innerarity- J. White-C. Astier-A. Errasti (eds.), London, Rowman & Littlefield International Ltd., 2018, 44.

<sup>5</sup> As underlined by D. GRIMM, *The Democratic costs of Constitutionalisation: The European Case*, in *European Law Journal*, 2015, Vol. 21, No. 4, 465.

<sup>6</sup> As already stressed in A. CIANCIO, *Perché un diritto costituzionale europeo? Quattro brevi risposte a partire dalle elezioni del 2019*, in *Federalismi.it*, 2019, No. 11, 3.

<sup>7</sup> See G. DE VERGOTTINI, *Forma di governo dell’Unione europea*, in *Treccani.it*, 2009.

<sup>8</sup> *Ibidem*.

<sup>9</sup> As highlighted by B. CARAVITA, *Quanta Europa c’è in Europa?* Giappichelli, 2015, 21.

Furthermore, as well known, a Charter of Fundamental Rights has been established and – with the entry into force of the Lisbon Treaty – it has been given the same efficacy of the Treaty itself<sup>10</sup>.

By the way, the above-mentioned assumption also faces the argument sprouting from the famous 1789 *Declaration of Human and Civic Rights* where it is clearly affirmed that “any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution” (art. 16). And the EU’s functioning does not yet rely on a clear separation between the legislative power and the executive one, as it is easily verifiable looking at the Council’s functions. Rather, the EU inspires itself more to a principle of “collaboration” among functions instead of the traditional principle of separation.

Though, it would be difficult to deny that the functioning of the European Union is however based on a form of functions’ distinction as the one set between decision-making powers (as those exercised by the European Council, the Commission, the Parliament and the Council itself), on the one hand, and powers of control (as those entrusted to the Court of Justice and the European Court of Auditors), on the other. Nor is it possible to deny that this distinction of functions is set to limit the EU powers in order to guarantee the aforementioned EU shared values and principles at large as well as the fundamental rights and freedoms<sup>11</sup>, as ruled by the EU Court of Justice in its most recent case law<sup>12</sup>.

Therefore, even from this perspective we can conclude that – after the entry into force of the Lisbon Treaty – the European Union, despite the persistent lack of a formal constitution, is already provided with a true constitutional law that includes both Art. 2 TEU and the Charter of Fundamental Rights<sup>13</sup>, jointly representing what could be described as the EU “constitutional core”, protected through the EU institutional set-up, by and large entrusted to guarantee these values and rights.

## 2. *Fostering an “idem sentire de Europa”*

This statement is hard to accept for those who consider the concept of “constitution” – of “any” constitution we might say – as well as the idea of “constitutional law” strictly depending on the notion of State<sup>14</sup>, since the EU is not a State yet, not even of federal scope.

But looking at Lisbon provisions as a whole, even with the (intended) absence of any “federalist” reference, the EU appears now shaped as a truly, even if still in an embryonic state, political union, sufficiently defined in its legal and institutional profile<sup>15</sup>. Indeed, it is provided with common institutions and related attributions, with a defined balance of powers (legislative, executive and judicial), even if according to a scheme of collaboration and complementarity towards a reciprocal equilibrium, rather than a separation, as just said. Competences are assigned according to the attribution and subsidiarity principles. An original system of sources of law is set, furthermore destined to prevail over national ones. A body of inalienable rights is defined and European Judges

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<sup>10</sup> About the long and complex path that led to give efficacy as constitutional law to the Charter of fundamental rights, see, *ex multis*, P. COSTANZO, *Il riconoscimento e la tutela dei diritti fondamentali*, in P. COSTANZO-L. MEZZETTI-A. RUGGERI, *Lineamenti di diritto costituzionale dell’Unione europea*, Torino, 2019, 387 ff.

<sup>11</sup> More widely on the topic, also, A. CIANCIO, *A margine dell’evoluzione della tutela dei diritti fondamentali in ambito europeo, tra luci ed ombre*, in [Federalismi.it](http://Federalismi.it), 2012, No. 21, spec. 12 f.

<sup>12</sup> Recalled also by M. GONZÁLEZ PASCUAL, *Which Narrative for the CJUE? EU Powers and Fundamental Rights*, in *A New Narrative for a New Europe*, cit., 119 ff.

<sup>13</sup> Similarly A. Ferrara, *Constitutional Narratives*, cit., 45 ff. In the same sense, in many papers, B. CARAVITA, lastly in *Lecture edificanti per combattere gli idola sull’Europa*, in [Federalismi.it](http://Federalismi.it), 2019, No. 9, 4.

<sup>14</sup> See D. GRIMM, *Does Europe need a Constitution?* in *European Law Journal*, 1995, Vol. I, No. 3, 282 ff. *Contra*, among others, A. RUGGERI, *L’integrazione europea attraverso i diritti e il “valore” della Costituzione*, in *Nuove strategie per lo sviluppo democratico e l’integrazione politica in Europa*, A. Ciancio (ed.), Roma, 2014, 473 ff., who considers the EU already provided with a “constitution”, even if not intrinsically connected to a state-like nature, but rather according to a notion which places the same at the centre of a plurality of (political-institutional, legal and axiological) systems, of which it would be at the same time summary and expression; and ID., *Una Costituzione ed un diritto costituzionale per l’Europa unita*, in P. COSTANZO-L. MEZZETTI-A. RUGGERI, *Lineamenti di diritto costituzionale*, cit., 6 ff.

<sup>15</sup> As already underlined by J.H.H. WEILER, *La Costituzione dell’Europa*. Bologna, 2003, *passim*, part. 511.

recently have shown to apply them even over traditional economic freedoms. Moreover, European case law ensures uniformity in the interpretation of the law through preliminary ruling ex art. 267 TEU, essential for the very process of, at least, judicial integration<sup>16</sup>. Even more upstream, there is a common value heritage, expressed in the above-mentioned art. 2 TEU, as guaranteed by the ECJU against infringements both by Member States and, even more importantly, by the European institutions themselves.

Nevertheless, considering the European integration project, one cannot but consider that, in contrast with a sufficiently defined, even “sophisticated”, legal institutional system, already defining the EU – as said – as a, however embryonic, political union, it is possible to perceive among the European peoples a persistent lack of consent towards the project of “an ever closer union”<sup>17</sup>.

In order to discover the main obstacle facing the implementation of a full political union<sup>18</sup>, it is easy to find out this issue consists in the absence of the needed presupposition of each political community that, from a sociological point of view, is to be found in the so-called “*idem sentire*”, in this case about Europe, its future and aims.

The statement is easily verifiable just looking at the genuine hostility that a big part of the EU citizens shows towards the European integration process claiming more and more urgently restorations of sovereignty as the outcomes of both domestic and European elections<sup>19</sup> have revealed in some Member States through growing of populism, nationalism and sovereign political movements, even at the cost of exiting from the EU, as chosen by the majority of the British voters in the well-known 2016 referendum on the so-called “Brexit”<sup>20</sup>.

The main causes of such “detachment” between (a large part of the) European society and the Union, its institutions and policies are easily summed up<sup>21</sup>: an evident inability to effectively manage epochal challenges, both domestic and international, such as the economic-financial crisis and migration; the still-lingering issue of democratic legitimacy of the EU decision-making process in the new and different shapes it has taken after the signature of Lisbon<sup>22</sup>; and, further upstream, the persistent lack of a genuine system of European political parties able to foster the political synthesis at supranational level<sup>23</sup> and to “contribute to forming European political awareness” as hoped for by the Treaties since Maastricht<sup>24</sup>. These are among the most evident reasons preventing European citizens from feeling a deep sense of common political belonging to the EU.

Conversely, only fostering an *idem sentire* (*de “Europa”*), which represents the necessary condition for the establishment of any political community, it could be possible to cope with the widespread disaffection of European citizens towards the prospect of a truly political union.

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<sup>16</sup> In the same sense, even though from a critical perspective, D. GRIMM, *The democratic costs*, cit., 467 ff.

<sup>17</sup> As stressed by D. GRIMM, *La forza dell’UE sta in un’accorta autolimitazione*, in *Nomos*, 2014, No. 2.

<sup>18</sup> See C. OFFE, *Europe Entrapped*, Cambridge, 2015.

<sup>19</sup> On the outcomes of the 2019 EU elections, see *Le elezioni del Parlamento europeo negli Stati membri*, in *Federalismi.it*, 2019, No. 11.

<sup>20</sup> The first fundamental steps of the Brexit “saga” are summarized in F. SAVASTANO, *Uscire dall’Unione europea. Brexit e il diritto di recedere dai Trattati*, Giappichelli, 2019, 47 ff.

<sup>21</sup> On the topic, it is also possible reading A. CIANCIO, *Quali prospettive per l’integrazione politica in Europa dopo le elezioni?*, in *Federalismi.it*, 2014, No. 11., 2 ff.

<sup>22</sup> See, *ex multis*, A. MANZELLA, *Verso un governo parlamentare euro-nazionale*, in *Il sistema parlamentare euro-nazionale*, A. Manzella-N. Lupo (eds.), Torino, 2014, 5 ff.; and D. GRIMM, *The Constitution of European Democracy*, Oxford, 2016, *passim*.

<sup>23</sup> As since longtime argued, see A. CIANCIO, *European parties and the process of political integration in Europe*, in *dirittifondamenti.it*, 2016, No. 2, 10; ID., *European Party System and Political Integration in Europe*, in S. Mangiameli (ed.), *The Consequences of the Crisis on European Integration and on the Member States*, Cham, 2017, 29 ff., spec. 36-37; and ID., *What democracy for the European Political Union? Lessons for a European party system*, in *Europeanisation and Renationalisation. Learning from Crisis for Innovation and Development*, U. Liebert-A. Jenichen (eds.), Opladen-Berlin-Toronto, 2019, 281 ff.

<sup>24</sup> See K. TSATSOS, *European Political Parties? Preliminary reflections on interpreting the Maastricht Treaty article on political parties (Article 138A of the EC Treaty)*, in *Human Rights Law Journal*, 1995, Vol. XVI, No. 1-3, 1 ff.

Therefore, also considering the lack of a common language<sup>25</sup> as well as the growing ethnical and religious pluralism, it is needed to identify other integration factors able to replace the lack of, so to say, “natural” cultural identifiers, in order to consolidate among European citizens a feel of collective identity apt to root each national identity in the wider supranational context, strengthening the perception of belonging to the “European common home”. Indeed, it becomes urgent to raise what others, *mutatis mutandis*, call a sense of “civic solidarity” among strangers<sup>26</sup>.

From this point of view, it is easy to grasp the basic “mission” of the above-described EU constitutional core. As heritage of common principles, it is destined to constitute the fundamental – one might say – “catalyst element” of a true European people, identifiable, other than just the sum of all EU citizens, as a real political community brought together and unified thanks to shared values. Thus, its spreading and complete implementation throughout Europe would represent a unique and fundamental mean of integration, strengthening a general sense of belonging to the Union. In other words, it would ultimately serve to give the Union’s legal system “effectiveness”, in the sense of spontaneous and generalized adherence, beyond the one achievable through judicial means, which however have so far represented an important channel for integration<sup>27</sup>.

Conversely, without this perception, it would be unlikely (and in any case futile) to re-launch the constitutional process to sign a true formal constitution<sup>28</sup>, long argued for to abandon the intergovernmental method<sup>29</sup>, in order to overcome all the limits that the Lisbon “compromise” has revealed<sup>30</sup>, particularly considering the spread of the economic and social crisis<sup>31</sup> and, more recently, because of the big “external” challenges of immigration and international terrorism.

### 3. From national constitutions to the EU constitutional law and back

These shared values and inalienable rights have well-known origins. They represent the transposition as EU primary law of the so-called Member States’ “common constitutional traditions”<sup>32</sup>, initially identified thanks to the ECJU’s case law<sup>33</sup> and later set down in the aforementioned art. 2 TEU and EU Charter of Fundamental Rights<sup>34</sup>.

This European constitutional heritage acts as a sort of constitutional “lower common denominator” among countries with different legal cultures and with various political and institutional Histories and

<sup>25</sup> As it is well known, this issue is highlighted by D. GRIMM, *Una costituzione per l’Europa*, in G. Zagrebelsky-P.P. Portinaro-J. Luther (eds.), *Il futuro della Costituzione*, Turin, 1996, 360 ff.

<sup>26</sup> J. HABERMAS, *The Crisis of the European Union in the Light of a Constitutionalization of International Law. An Essay on the Constitution of Europe*, in [European Journal of International Law](#), 2012, Vol. 23, No. 2, 345 f.

<sup>27</sup> See A. RUGGERI, *Costituzione, sovranità, diritti fondamentali, in cammino dallo Stato all’Unione europea e ritorno, ovvero la circolazione dei modelli costituzionali e adattamento dei relativi schemi teorici*, in [Federalismi.it](#), 2016, 18 ff.

<sup>28</sup> Considered pointless by J.H.H. WEILER, *Does Europe need a Constitution? Reflections on Demos, Telos, and the German Maastricht Decision*, in *European Law Journal*, 1995, Vol. I, No. 3, 219 ff. More recently, see also J.H.H. WEILER-U. R. HALTERN- F.C. MAYER, *European Democracy and its Critique*, in *West European Politics*, 2005, Vol. 18, No. 3, 4 ff.

<sup>29</sup> As strongly hoped by J. HABERMAS, *Why Europe Needs a Constitution*, in [New Left Review](#), 2005, No. 11, 5 ff. In the same sense, it is also possible to read A. CIANCIO, *A true European Constitution to recover from the economic and social crisis through political integration deepening*, in *The Future of Europe. The Reform of the Eurozone and The deepening of Political Union*, F. de Quadros-D. Sidjanski (eds.), Lisbon, 2017, 29 ff.

<sup>30</sup> See, *ex multis*, S. FABBRINI, *The constitutional conundrum of the European Union*, in *Journal of European Public Policy*, 2016, Vol. 23, No. 1, 84 ff.

<sup>31</sup> J. HABERMAS, *The Crisis of the European Union*, cit, 347 f.

<sup>32</sup> Recently on the topic M. FICHERA – O. POLLICINO, *The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?*, in [German Law Journal](#), 2019, No. 20, 1102 ff.

<sup>33</sup> See, at least, G. TESAURO, *I diritti fondamentali nella giurisprudenza della Corte di Giustizia*, in *RIDU*, 1992, 426 ff.

<sup>34</sup> See, *ex multis*, M. CARTABIA, *L’ora dei diritti fondamentali nell’Unione Europea*, in *I diritti in azione. Universalità e pluralismo dei diritti fondamentali nelle Corti europee*, M. Cartabia (ed.), Bologna, 2007, 15 ff.



experiences<sup>35</sup>, sometimes even in opposition (far-right totalitarianism; communism). Therefore, all Member States are expected to comply with the same fundamental values, including, as declared in Art. 2 TEU, the protection of human rights, freedom, equality, democracy and, more in general, the rule of law in a society based on pluralism, non-discrimination, tolerance, justice, solidarity and gender equality, even though with different meanings, interpretations and applications, depending on each country's history and legal tradition.

Conversely, if these values, and the rule of law above all, are not fully respected in any Member State, the EU institutions are entitled to recourse to all the remedies provided in the Treaty for their safeguard, as the initiatives recently undertaken against Poland and Hungary show<sup>36</sup>. In fact, as already mentioned, those values and fundamental freedoms must be protected by the supranational institutions via both judicial and political means, as stressed by the new EU Commission President Ursula von der Leyen in her speech delivered on November 27, 2019 at the EP Plenary session.

Thereby, the so-called European "constitutional core" appears to be committed with another fundamental task: ensure the protection of democracy with its corollaries of rule of law, pluralism and human rights even within each Member State's legal system<sup>37</sup>.

#### 4. Why it is not possible to give up the European constitutional law

Looking more in depth at the topic from the domestic perspective, it is possible to conclude that Member States can no longer forgo the EU constitutional law. Indeed, considering the European political integration process, on the one hand, and the national Constitutions' implementation path, on the other, it is clear that the two phenomena are inextricably linked<sup>38</sup>.

This statement is easily evincible for those countries whose current Constitutions have been established after the EU's birth, like all those Central and Eastern Member States that have gained independence with the Soviet Union's end<sup>39</sup>. In this case it is patent that the national fundamental rules' application has always gone in parallel with the EU's development so that the former has naturally been strongly influenced by the latter<sup>40</sup>.

But the same is true even in those countries, as Italy or Germany, whose Basic Laws entered into force well before the Treaty of Rome, considering all the relevant transformations the national institutions have gone through as a result of the European integration process, sometimes even without formal revisions of the respective constitutions<sup>41</sup>.

This state of affairs cannot surprise since it seems the natural aftermath of the growth of the EU public law, as a set of rules sprouting from the national legal systems, which, after being harmonized at the supranational level, are later suitable to further influence the domestic set-ups from which they

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<sup>35</sup> More in depth on the topic, B. ACKERMAN, *Three Paths to Constitutionalism – and the Crisis of the European Union*, in *British Journal of Political Science*, 2015, Vol. 45, No. 4, 705 ff.

<sup>36</sup> H. GRABBE – S. LEHNE, *Defending EU Values in Poland and Hungary*, in *Carnegie Europe*, 2017.

<sup>37</sup> As already argued in A. CIANCIO, *Perché un diritto costituzionale europeo?*, cit., 8. In the same sense, more recently, also A. RUGGERI, *Rischi d'involuzione autoritaria e integrazione sovranazionale come garanzia della democrazia*, in *Consulta OnLine, Studi 2019, No. III*, 641 ff.

<sup>38</sup> See B. CARAVITA, *Le trasformazioni istituzionali in 60 anni di integrazione europea*, in *Le trasformazioni istituzionali a sessant'anni dai Trattati di Roma*, A. Ciancio (ed.), Torino, 2017, 5 ff.

<sup>39</sup> See the essays collected in the volume *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders*, W. Sadurski-A.Czarnota-M. Krygier (eds.), Dordrecht, 2006; and, more recently, the papers included in the book *Democratization and the European Union: Comparing Central and Eastern European Post-Communist Countries*, L. Morlino-W. Sadurski (eds.), Abingdon, Oxon, 2015.

<sup>40</sup> More in depth on this process, which is considered bidirectional, W. SADURSKI, *Constitutionalism and the Enlargement of Europe*, Oxford, 2012.

<sup>41</sup> See P. COSTANZO, *La Costituzione italiana di fronte al processo costituzionale europeo*, in *Consulta OnLine, Studi, 2008* (8.VI.2008).

stem, bringing them closer and closer, as the consequence of a sort of circular motion<sup>42</sup>. Thus, the final outcome is a deep interpenetration between European constitutional law and national ones that make extremely difficult, not to say almost impossible, by then to conceive the national institutions' organization and functioning autonomously from the process of European integration.

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<sup>42</sup> A. CIANCIO, *Presentazione*, in *Le trasformazioni istituzionali a sessant'anni dai Trattati di Roma*, cit., 2; and ID., *Perché un diritto costituzionale europeo?*, cit., 9 ff.