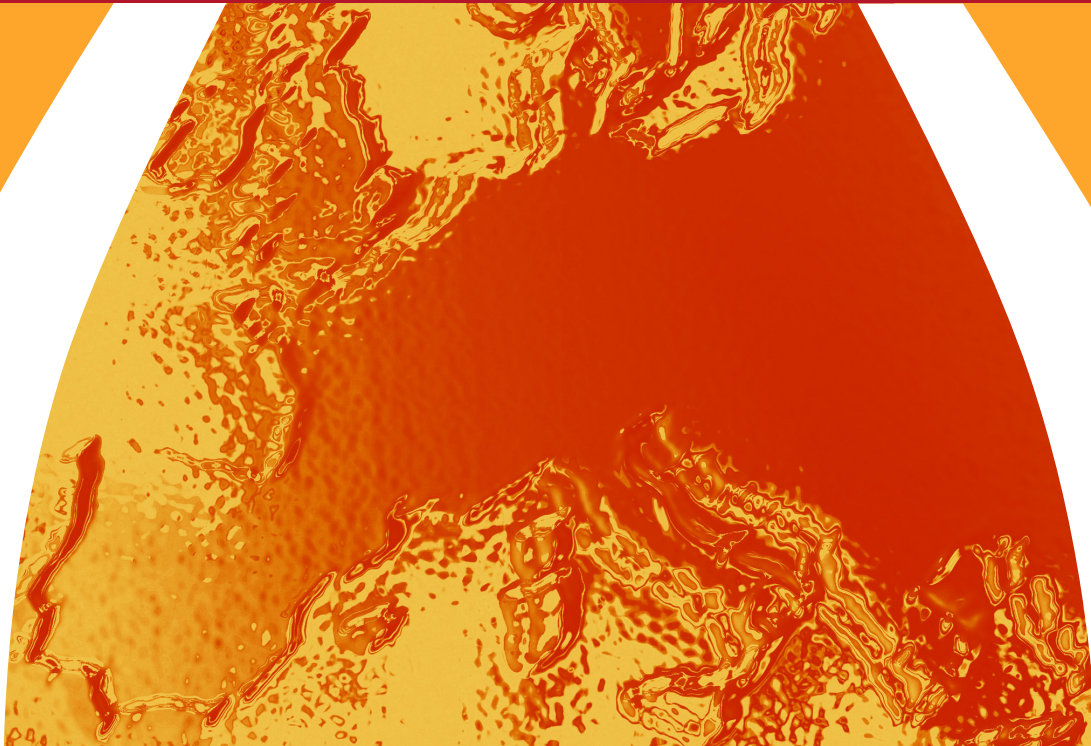


IRER

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DELLA LOMBARDIA



# IDEAS OF EUROPE

Dialogues for a new constitutional process

POSITION PAPER

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Contacts:

[colombo@irer.it](mailto:colombo@irer.it)

[mazzoleni@irer.it](mailto:mazzoleni@irer.it)

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## *Introduction*

This paper has been written to support the debate that will develop in the series of seminars “Ideas of Europe. Dialogues for a New Constitutional Process” that IReR is promoting. It has the aim to re-open and invigorate – beyond any temptation of “political correctness” – a public debate on the role of identity in the process of European integration.

This series of events is an attempt to contribute to the cultural process of re-launching of Europe, in particular to gain and disseminate understanding of the objectives and possible ways for a European integration that is not only political and economic. Attention will be paid notably to people's urgent needs and wishes, especially those related to coexistence. In the seminars authoritative international commentators dialogue on themes such as Europe's sense of belonging and boundaries, citizenship and rights, people and history. Some fundamental questions appear to be very relevant at this regard: what are the ideal roots, the cultural factors, the historic traditions, the principles and values that identify a “European model” differentiating it from other ones? Are the premises and goals of the integration process that Europe has experienced so far the only ones possible? Could it be possible to overcome the apparent trade-off between economic and cultural (or even value-related) reasons for the integration?

This paper offers a review of arguments, ideas and remarks about these issues originating in the European cultural world (history, art, philosophy, political thought). It does not aim to be comprehensive or to provide answers. It has the purpose to offer a starting point to the seminars by illustrating some basic categories for the debate. This paper comprises two parts. The former centres on the relationship between European identity and belonging: the historic and cultural heritage of Europe, the dialectic with other civilizations,

the role of the sense of belonging in the context of an economic and monetary union (as the EU is today). The latter elaborates on the relationship between European belonging – which is inherited from history – and citizenship – which is usually referred to as an apparatus of rights recognized in the European law.

The paper thus aims to propose to the seminar speakers information, interpretations, and stimulations – with different points of view and goals, reflecting the actual variety of perspectives on the European scene – on which they can express their own thought and invite others to give their opinions. The seminars are indeed thought as real “dialogues” as high-level public arenas for the confrontation and exchange among different “ideas of Europe” which often find it difficult to dialogue.

## Chapter 1

### *Belonging and borders. The European integration as a way of identity*

#### 1.1. Belonging: sources and dimensions of the European identity

To belong means above all to be conscious of one's own identity, which is built and defined by the 'self'. John Henry Newman argues:

«I am what I am or I am nothing. I cannot believe I am sufficient for the need of myself, because I cannot make of myself anything different: in order to change me, I can only destroy me. If I do not use myself, I do not possess anybody else to use » (1980, p.214).

The personal dimension of self-respect, always present in a person's life, is preliminary to the social dimension of belonging, which unfolds in relation to the environment and the actors who make up one's community, from which tradition comes. Belonging means "to feel part of" – hence it is both source and impulse for participation – and is developed in the sharing of contents and proposals. According to psychology, at the basis of the sense of belonging usually lies a process of identification, where the sphere of 'self' identifies with that of 'us', which makes it possible to recognize oneself and to be recognized as member of a group, possibly through the use of some distinctive signs. The sense of belonging acquires consciousness through the critical assessment of one's own experience. The awareness of one's own roots and culture creates the conditions for a belonging that also makes it possible to acknowledge the differences as well as to be open to others and relate with them. At the same time, each person experiences multiple senses of belonging defining the individual and social dimensions of his/her identity, and which are structured in a hierarchy usually corresponding to a higher (or lower) affective attachment and experience of satisfaction.

There are various theoretical positions on the definition of European identity, and several attempts have been undertaken to systematize the factors and conditions for the development of "integration through belonging". The topic of identity lies at the heart of a wide theoretical and political debate including philosophy, religion, economy, law and other facets of human experience, but that often seems to make use of established patterns, which iterates its limits. The contribution of historians has had a prevailing role. Visceglia considers that, after the end of the confrontation between geopolitical blocks in 1989-1991:

«the project of writing a history of Europe has become, for the Community institutions, an "implicit" cultural objective underlying the search for common elements in a spatial horizon that nowadays includes once again Central Europe and a part of Eastern Europe. (...) The paradigm of European history has been taking the same character of that of national history in the XIXth and XXth centuries; yet on this fundamental issue, on its theoretical and methodological implications there is probably a lack of thought.» (2007, pp. xi-xii)

Undoubtedly, it is complex to define the European identity also because of problems of epistemological nature. On one side (Visceglia 2007, xi-xii), the ambiguity of the concept of identity, that can be used both in historical-descriptive and in normative terms. On the other side, the fact that:

«a large part of the abundant production of historiography on Europe (...) is concerned with the history of the idea of Europe as a project, an image, and not of Europeans and their material and intellectual life». According to Visceglia the «framework of extraordinary complexity» of the concept of European identity must be «declined in plural, since it is «the fruit of the melting-pot of a series of variables, an open configuration which is in movement, not a long-term linear path » (p. xxvi).

As we have said, there is no doubt that "belonging" lies among the variables making up an identity. In this respect, Umberto Galimberti supports the following view:

«Every time we claim our "identity" we often forget that this is almost totally made by our "belonging": religious, cultural, ideological, of family, gender and sexual preferences. As the result of all these senses of belonging, identity does not possess in itself any "natural" footprint, but it is "constructed" in all its aspects.»

Nor can we forget the theoretical heritage of the concept of nationalism. Ernest Renan asserted in a lecture at the Sorbonne university in 1882:

«A nation is a soul, a principle of the spirit. Two things, that in reality are one only, make up this soul, this principle. One belongs to the past, the other to the present. One is the common possession of a rich heritage of memories, the other is the agreement, the desire to live together, the willingness to keep up this heritage».

Through several centuries historiography, like all humanities, has indeed identified – and offered different views – the multiple stages of a long stratification which has led to the building of Europe's *proprium* and, hence, to the gaining of knowledge of a belonging by the Europeans. Dawson (1932) points out the following underlying structures of the formation of European unity (from the 5<sup>th</sup> to the 11<sup>th</sup> century):

- the heritage of Ancient Greece's culture;
- the process of Latinization North of the Alps;
- the organization of the Church as an autonomous society beside – and in place of – the state;
- the Christianization and the inclusion in the area of the Roman Empire of Germanic populations.

Nikolaus Lobkowitz (1984) compares the European culture to a "tree with three roots":

- the search for a rational understanding of reality developed by the Greek experience;
- the Roman Empire, where was established the concept of a community governed under a law according to which every citizen had the same rights;
- the Judeo-Christian thinking and faith that have conveyed the Greco-Roman culture, contributed to the "de-deification" of nature and hence to the secularized development of science and technology, and set the cultural centrality of the human person in the world.

Pietro Rossi (2007) adds further elements:

- liberal democracy;
- market freedom;
- the effort to widen social justice;

- the mutual tolerance of religious faiths;
- the public use of reason<sup>1</sup>.

Among all these factors and phases of the continent's history, Joseph Weiler (2003, 43-44) insists on the relevance of the role of the Christian religion:

«the Christian influence on our European culture is simply overwhelming. The evidence lies everywhere around us: in architecture, in music (...), in figurative arts, as well as in literature and poetry. (...) The historic prevalence of the Christian influence, moreover, has produced a sophisticated dialectic effect, on the basis of which most of non-Christian art has been realized in opposition to that dominant influence, therefore it is inextricably linked to it and would not be understood outside this context. This is even more actual in the sphere of political culture, of ideas and values. The European moral feelings is influenced by the Christian heritage and, even in recent times, by the struggles against it.»

The central role of Christianity as a religious experience original to Europe is underlined by many other historians<sup>2</sup>. In brief and balanced terms, Cardinal Tauran (2006) thus synthesizes the issue:

«It is not possible to identify Europe with the Christian religion, nor to reduce the Christian religion to Europe: the great religions and lay messianisms have crossed and sometimes clashed in the European continent. By reading history, nonetheless, we cannot but acknowledge that the Christian faith is more than a simple "ingredient". It was maybe St. Peter's choice to go to Rome, the world's capital at the time, to make Europe one thing with the Christian religion.»

The jurist Silvio Ferrari (2003), instead, stresses the fact that natural law was made free from the divine origin as an element distinctive of the West, and notably of Europe:

«it is not by chance that the concept of basic rights of the human being was born in the West and is accepted with many more reservations in other parts of the world». However, even this is partially a fruit of Europe's Christian heritage: «the image of a lay state where everybody – believers, non believers, faithful of different religions – can live together was born in Europe because the Greco-Roman and Christian cultural heritage has given us the idea of natural law: this enables us to identify a common

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<sup>1</sup> This last element would distinguish Europe from the Islamic fundamentalism and from other radical philosophies, which do not recognize these values.

<sup>2</sup> see Schilling (1981).

platform of rights and duties from which people with different origins, traditions, and beliefs can work together in peace and equality<sup>3</sup>.»

As we can see, there is not a univocal interpretation of Europe's identity. According to some authors, it is even hard to find in history any continuity of the European identity, which therefore should not be considered at all. Rossi (2007) supports that it is not possible to speak about Europe's roots as this concept would imply «a continuity in European history that has never existed, a steady development across time from an original kernel » while, instead, European culture and society have been deeply modified and have differentiated in time. With regard to Europe's Christian roots, Rizzi asserts that «it is difficult to make strong statements, it is hard to assert that Christianity is or is not the cultural root of Europe» (2003, p. 53). That pluralism is the constitutive character of Europe is perhaps the most widespread opinion among scholars and observers of Europe's past as well as present; incidentally, we remind that "unity in diversity" is the European Union's motto.

In fact, there exist multiple senses of belonging in Europe and they are not necessarily mutually exclusive. The history of Europe is the history of individual and collective belongings that have been able to integrate. An integration that has taken place not between cultures, yet between people with, indeed, different belongings.

Some point out that there is not just a dialectic between different senses of belonging (and hence identities), but also between types of belonging. Roberto Esposito<sup>4</sup> highlights (2006) two opposing dimensions of the European identity: cosmopolitanism and universalism, on one side, and nationalism on the other. They:

«are two options present in the history of Europe. We could perhaps say that the Enlightenment was the cosmopolitic push, while romanticism brought back the idea of motherland, of nation, and of ethnic roots. However, it is not possible to oppose romanticism to Enlightenment in a straightforward way, because they have been inter-penetrating cultural vectors.»

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<sup>3</sup> Moreover, Ferrari (2003) observes that: «Today more than ever it is clear that the opposition between Christianity and secularism is false. Not only on the philosophical but also on the historical ground. (...) As deeply secularized as it is, contemporary Europe remains based on principles and values of a religious origin and, more precisely, the Christian one: this is the sense of Carl Schmitt's statement: "all most significant concepts of modern state doctrine are secularized theological concepts"», while the liberal and secular philosopher Benedetto Croce asserted that "we cannot say we are not Christian".

<sup>4</sup> Roberto Esposito teaches theoretical philosophy at the Istituto Universitario Orientale of Naples.

Therefore, while the issue of “roots” lies at the centre of a controversy among experts – as we well know in the light of the debate on the European Constitution, and particularly on its Preamble – a common and less problematic effort among scholars has been that of identifying the “boundaries” of Europe and of the idea of Europe.

## 1.2. The boundaries: Europe and the Other

On the ontological ground, the identity of oneself is more easily defined when it is confronted to another identity. While arguing about the dialectic between religion and secularism, Weiler asserts:

«I can understand the uniqueness of my identity, be it individual or collective, only by tracing a borderline which includes me and excludes you. The Other is not simply a social reality; it is ontologically necessary for the Me to exist. If there isn't any Other, there cannot be a distinct Me. Hence, the affirmation without compromise of truth, a truth that may even look abusive, is necessary exactly for the uniqueness of my identity. Yet, at the same time, it is an affirmation of the otherness of the Other. It is the acknowledgement of his otherness, of his identity. In this sense, it is profoundly respectful of him» (2003, p. 136).

On the historical ground, Allott (2002, p.234) considers that «there have always been external *others* that have helped to constitute the European *self*.» Federico Chabod (1961) reminded that the first opposition between Europe and something that was not Europe took place in the Greek world, which identified the other in Asia. The spirit of freedom of the citizens notably differentiated the Greek *poleis* from Asiatic despotism<sup>5</sup>. Ancient Rome experienced and promoted its own diversity in respect of the populations living beyond the Empire borders, even though it frequently had a fruitful relationship with those that were progressively included. Medieval Christendom, argues Allott (2002, 234), «found a formidable *other* in Islam, which seemed to challenge both Christianity as a religion

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<sup>5</sup> A differentiation that was taken again by Machiavelli, who distinguished Europe, where there were many republics, from Asia, where princedoms abounded. During the Enlightenment period, Montesquieu in his *Persian Letters* opposed the European model, characterized by the limitation of central political authority in favour of the freedom of individuals, to Asian despotism.

and Christianity as a social formation»<sup>6</sup>. With the voyages of exploration and the discover of the Indian and Chinese civilizations, and successively of the pre-Columbian ones in America, Europe reorganized its own idea of the world – at least in geographical terms, surely not for its own political ambitions. In contemporary times, the rise of economic and political superpowers outside the Old Continent has certainly marked a further growth in the awareness of the otherness in Europe, maybe more strongly and distinctly than the awareness of a self identity. As we have seen, actually there is no unanimity on the definition of an *unicum*, of a specific character of the European identity.

Nowadays the “other” is frequently identified in the political-religious radicalisms that do not recognize, in fact strive to tear down some of the basic elements of the European civilization such as secularism, the public use of reason, the equality of rights before the law.

«The idea of natural law – the idea that there is a law which is common to all human beings even before the law stemming from their religious, political, national belonging – is very weak in the Muslim thought and is significantly criticized in the Jewish cultural tradition. In the absence of a natural law, the law of religious origin immediately becomes the point of reference also for the construction of the political society, where those who do not share the dominant religion frequently remain marginalized.» (Ferrari 2003)

### 1.3. The European identity and integration in the Union

What relevance may identity have in a Europe – if we think to the Union – where there often seems to exist a trade-off between economy-driven and value-related motivations?

Even to naïve observers it is clear that the EU genetic model (the common market which was born in the Fifties and fully realized in

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<sup>6</sup> Tauran (2006) reminds: «the term “Europe” was used for the first time in modern ages by Pope Nicholas V (1447-1455) in 1453, the year of the fall of Constantinople. Previously, the word “Christianity” was commonly used but, in the face of the Ottoman danger and Islamic expansion, emerged the urgent need to unite the continent's forces. Thus, the Papacy resorted to the unifying term “Europe”, which had been neglected for centuries, to designate altogether the whole land West of the Hellespont.» Yet Visceglia (2007, XIII-XV) also reminds Huizinga (2004) and Reinhard (2001) underlining the cleavage existing within Europe after the “Great Eastern Schism”, in the Middle Age, when Europe was identified with the sole West.

the Nineties) still today influences a system that, in spite of an abundant rhetoric, is an «economy» more than a «society, nation, or state» (Allott 2002, 205). And it is evident to all observers that no “enlightened” initiative of economic nature can by itself be able to generate a people. It can certainly contribute to the growth of a “feeling of people” in case this is somehow already present. But this is problematic where, as we have seen, there is a plurality of dimensions and forms of identity.

The debate between those who identify a “community of values” in the EU and those who privilege the community of interests is established. Michalski (2004) argues:

«we have reached the belief that more cohesive forces cannot be searched either in an economic union, or in any political danger that has disappeared. In particular, the economic cohesion can stimulate integration only up to a certain point: the market itself is not cohesive, it does not produce solidarity, rather supposing it as it supposes political institutions based on a sound culture. The market tends to separate instead of uniting.»

Nevertheless, within the privileged venue for the identification of Europe’s common foundations, the European Convention, the answers that were provided and inserted into the text of the Constitutional treaty did not satisfy everybody. The traditional categories of European integration (the economic liberties), even though constrained within a framework of basic rights, were stressed as if there was the need to reassert the materialist and technocratic creed that has over time replaced the ideals of the protagonists in the post-war European integration phase. Today it is meaningful that the concepts of belonging and identity are conceived as potentially opposite to the development, to rights, to living together, to freedom, to self-fulfilment.

The issue of rights and freedoms seems therefore crucial for the search of an equilibrium between an economic-only vision of Europe and the acknowledgment, but also the continuous building, of shared foundations and hence of a common mission and destiny.

## Chapter 2

### *Europe and law. Re-founding the way of citizenship*

The law is among the main contributions of Europe to the history of mankind. The French philosopher Rémi Brague recalls its origins: at the dawn of European civilization, Rome's culture:

«added an element which was not present in the Greek heritage, if not in minimal part: the law, the idea of rules before which everybody is equal, whatever be their origin. This idea developed in following times, under the influence of the Christian religion. This process took centuries, yet it managed to include subjects whom the Greek polis and the Roman Republic had not considered as fully entitled with rights: slaves and women» (2007, p. 86).

Today this fundamental element of European history is in question. The traditional landmarks of law need to be re-formulated in the context of a post-modernity characterized by uncertainty, by individualistic claims and pushes, by the echo of media hollowing out demands and words. In past times threats – which often used to come from outside the community – exasperated the sense of belonging and (both personal and collective) duties; today, the growth of uncertainty may exacerbate the desire for auto-nomy and individual rights.

The idea of European citizenship risks being the victim of this exacerbation; it requires a new balance between duties and rights against the temptation to acknowledge a right following any demand, as well as to reassert the positivist vision of rights that are recognized in a top-down manner and not as originating bottom-up from persons, from economic and civil actors and from their groupings.

In this respect, a recent text by Dr Marta Cartabia (2007) seems extremely interesting. We quote here some excerpts given their

relevance for the argument of this research and for their clarity. The author notably focuses on the risks of the activism of judicial institutions that are not always in tune with both the history and the political context of the communities where their rulings are enforced. Cartabia recalls the road followed by the protection of fundamental human rights in the European community (the Union):

«The Paris and Rome Treaties, which set up the European communities, did not originally contain any list of fundamental rights to be protected by the Community's institutions, nor was there any mention of the need to guarantee the safeguard of these rights.» The reason was that, on one hand, «within the Community legal system the main role in the safeguard of fundamental rights was originally allotted to national Constitutions and courts<sup>7</sup>»; on the other, «in the European continent at that time there existed a clear pluralism in fundamental rights»: there were differences, more than in rights, in the ways to protect them.

Afterwards, «the Court of Justice introduced through case law the first form of guarantee for basic rights in the Community legal order. This guarantee did not fully coincide with the protection ensured by national constitutions since these were only a source of inspiration for the Court, which remained free to forge the protection of basic rights in accordance with the aims and structure of the Community.» Then, through several verdicts «the Court widened its sources of inspiration, adding to the constitutional traditions common to the Member states the international treaties that these have signed and in particular the European Convention of Human Rights.»

Subsequently, «according to the doctrine of incorporation, elaborated and consistently applied from the late 1980s, the European Court started to maintain an expansionary view with regard to the extent of application of basic Community rights, arguing to be empowered with the authority to judge the respect of basic rights also by acts of national legislations».

Thus emerged the need for a definitive codifying of the fundamental rights, and the idea of a specific venue to this purpose made its way through. In June 1999 the European Council of Cologne set up a Convention with the task of drafting a project of charter. The Convention, sitting from December 1999, adopted on 2 October 2000 the draft Charter of Fundamental Rights of the European Union which, after both the Parliament and the Commission backed it, was signed and promulgated on 7 December 2000 in Nice by the Presidents of the European Parliament, Council and Commission on behalf of their respective

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<sup>7</sup> «In the Treaties there was not really a lack of protection because the Community legal order could rely on the sound structure of national constitutions, which pay particular attention to citizens' rights.»

institutions. The Charter, which was successively incorporated by the European Convention in the (aborted) text of the Constitution for Europe, for the first time includes in a single document the civil, political, economic and social rights of European citizens as well as of all people living within the Union's territory<sup>8</sup>.

In the light of the first experiences of application of this Charter, Cartabia offers a reading of the use the Court of Justice has made of it thus far:

«Apparently the value of the Charter is just that of setting in legal order the safeguards of fundamental rights that were already existing in the Community's legal system and to make them known and, hence, more usable.<sup>9</sup> According to its own preamble, the main function of the Charter should be indeed that of giving *visibility* to the basic rights that are already guaranteed by the law. The main purpose of the Charter should be: "to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more *visible* in a Charter." The reason was probably only to set a code (...) yet one could easily foresee that the effects of the Charter would largely overcome the original intent.»

«Critics of the Court of Justice have frequently doubted on the authenticity of the Community protection of basic rights. Many have repeatedly underlined the instrumental use that the Court has made of basic rights, aiming not really at protecting values that are worth protecting *per se*, but actually at enhancing European integration<sup>10</sup>. Such an account would back the mainstream Community jurisprudence that has given the status of basic rights to the freedom of movement of people, services, goods, and capitals, on whose basis the common market has been created. The common protection of fundamental rights would be shaped by the general goals of European integration and hence, above all, by the needs related to the implementation of the single market.» In addition, «Community institutions have frequently been blamed for using different weights and measures as far as basic rights are concerned, and showing to be very much demanding to Member states (and even more to third States or accession countries) while being more permissive toward the actions of Community institutions. With his usual effectiveness, Prof Weiler some years ago stressed all this by putting in a metaphoric Community's mouth the statement: "do not do what I do, do what I tell you to do." The common jurisprudence, that has repeatedly asserted the principles of the protection of basic rights, has actually

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<sup>8</sup> These rights are grouped in six big chapters: dignity, freedom, equality, solidarity, citizenship, justice.

<sup>9</sup> J. Ziller (2003, pp. 17ss.).

<sup>10</sup> Coppel – O'Neill (1992, pp. 669ff) and recently also L.S. Rossi, (2002, pp. 249ff) and Young, (2005, p. 219). Bibliographical references by the author.

seldom recognized a violation of the same rights by Community institutions, whereas it has often done so with regard to member states.»

While concluding her historic account, Dr Cartabia opens up a series of issues that seems extremely relevant for both European citizenship and institutions, notably in today's context. A context characterized by, on one hand, the extraordinarily rapid developments of technology and life science and, on the other, the coming to Europe of millions of new residents (and citizens) who do not share the same historical, cultural, and religious background of the large majority of Europeans. These issues can be assimilated to the dialectic between individual rights, whose protection is a priority and a distinctive character of Europe's political and juridical orders, and the law as a shared system of norms that stem from the history and the values of a political community, and that have been codified over time.

«The problems which have to do with, for example, the tension between the protection of the family and the admission of homosexual marriage, or (...) between the respect of any form of human life and the freedom of scientific research, between the possibility to take advantage of the medically assisted procreation and the ban on eugenic practices», all the ethically critical issues «address to public institutions new demands for protection, notably asking for a decision on whether *new fundamental rights* should be added to our legal and cultural heritage. To put the solution of these dilemmas into the hands of the courts may easily nurture a trend toward treating as basic right any individual interest, any demand of safeguard that society addresses to the law, any need for protection that emerges in social life, thus excessively extending the contents of the charters of rights. To direct toward the courts the demand to solve the abovementioned issues, without the intermediation of any legislative decision, implies the risk that all needs could be qualified as basic rights and that, in the end, basic rights would get *trivialized*.<sup>11</sup> (...)»

Today the issues that are ethically and scientifically controversial and the problems having to do with the coexistence of different cultures highlight new questions that may not be suitable to address directly and exclusively to courts. Does it exist and do we want to recognize a basic right to abortion, to euthanasia, to be born healthy, to give birth to a child? These questions – that are nowadays the burning issues on the fundamental rights – require most of all decisions, which probably should be taken first by political institutions, since in these decisions can be mirrored both universal needs and the culture and *Weltanschauung* of every people in a given period. The role of courts should actually be

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<sup>11</sup> Our italics.

secondary, to ensure that political decisions do not harm rights that are already present and established in the legal order.»

In the European context, «moreover, when this activism is exercised by courts of a multi-level system such as the EU Court of Justice, the national constitutional courts and the national Constitution themselves risk being among their victims», with an «invasion of the Community safeguard of rights in fields falling under the competence of national Constitutions», so that «it could happen that the Community's version of some rights does not fully correspond to that of one or many Member states»<sup>12</sup>.

We ought to recall Ralf Dahrendorf's assertion (1993):

«Constitutions represent rights. The rights are guarantees that can be claimed in legal ways. They are not simple promises, nice words (...) The rights hence need a constraining apparatus able to punish those who breach them. All three classical powers have their place (in constitutions). These powers, nonetheless, now exist only within nation states. He who abandons the nation state hence loses the only (so far) effective guarantee for his fundamental rights. He who regards the nation state as superfluous, asserts – even if not intentionally – that citizens' rights are also superfluous.»

Cartabia concludes by reminding the indissoluble link between law and history:

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<sup>12</sup> In another part of her text, Cartabia considers with regard to the Charter of Fundamental Rights of the Union that «among the most extraordinary lacks there is certainly that of social groups and intermediate bodies: family, political parties, religious denominations, linguistic minorities, trade unions and others are not listed among the subjects entitled with the rights recognized by the Charter, and are at most taken into consideration only as collective transfers of individual rights. This individualistic perspective, according to which many basic rights are asserted in the Charter, stands out in front of many constitutions, such as the Italian, that are strongly moulded on personalism, which considers the human person in his/her social relations – as an individual but also as a student, a worker, a spouse, a child, a believer, and so on – and hence on social pluralism. Thus, for instance, family rights are interpreted in terms of “the right to marry and to found a family” (art.9) and of “rights of the child” (art.24), where the stress is put on the individual and any form of protection of the family disappears. Similarly, the rights of the various cultural, religious, union, political, environmental, civic associations are marginalized in a slender article 12 stating the “right to freedom of peaceful assembly and to freedom of association at all levels”. Churches and religious associations, as well as philosophical and non-denominational organizations are ignored by the Charter (...). Without exaggerating, it is possible to assert that in many formulations, and certainly in its anthropological perspective, the Charter of rights has made Europe closer to the United States, somehow dissipating a character of the Old Continent, the powerful culture of personalism.»

«The basic human rights have an aspiration to universality. This justifies the need to overcome the limits of written texts – which end up soon to look obsolete in front of new demands coming from society – as well as to overcome the limits of a single legal order; yet there exists in them also a *historic dimension*, in which is mirrored the tradition and deepest conscience of a people, whose constitution is one of the main expressions. When the idea of basic rights is entrenched in the value of human dignity, it necessarily includes a *universal dimension*. When the concrete implementation of these rights is entrenched in the religious, moral, linguistic, and political specificities of each people, it is carried out in the light of particularity and pluralism<sup>13</sup>.»

Similarly, writing on the European constitution, Weiler reminds that a constitution is not merely a text which sets the separation and organization of the powers of a state (or of a political system, if we consider the EU), but:

«also a sort of storage in which are kept those values, ideals, and symbols that are shared in a given society. A constitution is therefore a mirror of that society, an essential element for its self-understanding, and it plays a fundamental role in the definition of the national, cultural and value-related identity of the people that has adopted it » (2003, p.55)<sup>14</sup>.

To forget this link between history, community, and law means to accept the risk that Cartabia names “jurisdictional colonialism” in the field of basic rights:

«as history has shown, colonialism develops on behalf of civilization but in many circumstances, in the name of civilization, existing historical and cultural heritages have been sacrificed. (...) The more distant we get from the core kernel of basic rights, the more evident become the historical and cultural divergences between the various legal orders that today – we ought to remind it even if we may appear trivial – are 27 in the European Union. (...) It is therefore necessary to show much prudence in including new fundamental rights into the European law, because any new element could unhinge the existing balance. After all, the main function of courts is to *protect* basic rights more than *recognize*, or even *create* new ones. »

Rizzi argues on the same line:

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<sup>13</sup> P. G. Carozza (1998).

<sup>14</sup> He acknowledges that this function «may also be implicit, i.e. can be indirectly inferred from the norms» concerned with the powers of the State, and can be found in the normative definition of the relations between individuals and public authority.

«in Europe today the relationship between religion and secularism is not really at stake; the issue concerns what kind of secularism should be in place. We witness a process that has certainly been slow but which has now boomed, not only on the ground of ideas but notably as regards public and private attitudes: secularism today is no longer conceived as individual freedom constrained by the practical reason, by an ethic conscience, rather as a no-limit freedom, the right to do whatever we like with the only constraint not to harm others. This definition of freedom was already present in the 1789 *Declaration of the Rights of Man* but there it was mitigated by a different concept of the 'self' which was still aware of social relations. It seems to me that, in the last years, freedom has become both in discourse and in behaviour the sovereignty of individual desires, the freedom not only to realize them but also to claim them as rights» (2003, p.62).

Arguing on the same topic, specifically within the European Union context, Weiler asserts in his usual *trenchant* terms that:

«in the discourse of European integration, (the basic rights) have almost become a myth. On one side, they are an expression of our respect for human dignity (...) but in the political game of Europe human rights become a substitute of political rights, a good which is sold to the individual person to make him/her feel important and guaranteed – but guaranteed against whom? Against the same political authority in whose decision-making processes his role is very much minimized. What dignity may a person have, even if fully covered by fundamental rights, if he/she does not control the decisions and the rule-making processes that are determinant for his/her life? Socrates called it "aristocracy with the approval of the mass"; we call it market-consumer mentality transferred to the political arena» (2003, p.180).



## *Conclusions*

The approach that this paper has deliberately adopted possesses a dynamic character, and aims to distinguish itself from the immobilism that is nowadays widespread in the European arena. Many crystallized positions, perceived by citizens as utterly outdated, have now exhausted their historical function. For this reason, this paper does not want to offer conclusive or strict arguments. It opens the debate on matters that are frequently considered "high-level" yet are often actually neglected by observers so that debates remain sterile and harmless for established schemes.

The word "dialogue", from the ancient Greek "dialogos", identifies the word (the λόγος) emerging between (διὰ) two or more persons who make up the space for it to emerge. This space is a valuable good, to be defended and strengthened. This paper aims to be its starting point.



## Annex

### *Treaty establishing a Constitution for Europe*

(The Heads of state of the Member States...)

«drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law;

believing that Europe, reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world;

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;

determined to continue the work accomplished within the framework of the Treaties establishing the European Communities and the Treaty on European Union, by ensuring the continuity of the Community acquis;

grateful to the members of the European Convention for having prepared the draft of this Constitution on behalf of the citizens and States of Europe, (...)



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