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"THE INTEGRATED PROTECTION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN CONSTITUTIONAL LAW PERSPECTIVE"

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A tutte le persone che ogni giorno subiscono discriminazioni:
a Voi ho rivolto e continuerò rivolgere i miei studi, il mio impegno scientifico e sociale

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dell'uguaglianza e della giustizia sociale

ABSTRACT [ENG]

The research falls within the context of the Europe of rights and aims to assess the degree of maturity of integrated protection of fundamental rights, between national legal systems and the European legal framework. The study is based on the constant fluctuations between political Europe and the Europe of Courts, which have generated both advantages and uncertainties and imbalances in the system of fundamental rights protection.

In order to deepen the research on integrated protection, we will pose two distinct questions. First, we intend to investigate the integrated protection of fundamental rights that arises from the inter-system relationships between the European Union and the Member States. Secondly, the second question aims to examine the degree of integration and/or cooperation between constitutional jurisprudence and that of the Court of Justice in the protection of rights based on both national Constitutions and the Charter of Nice.

The scientific methodology that will be employed during the research is typical of European constitutional law, which focuses on the close relationship between the constitutional realities of the Member States and their interactions within the European Union.

The conclusion of the research suggests that in order to overcome the chronic imbalances between the Europe of Judges and political Europe, it is necessary to take real steps forward in the process of constitutionalization of the Union.

ABSTRACT [ITA]

La ricerca si colloca nell'ambito dell'*Europa dei diritti* e mira a vagliare il grado di maturazione della tutela integrata dei diritti fondamentali, tra ordinamenti nazionali e ordinamento europeo.

I presupposti dello studio si basano sulle costanti oscillazioni tra l'Europa politica e l'Europa delle Corti che hanno generato sia vantaggi sia incertezze e disequilibri nel sistema di protezione dei diritti fondamentali.

Al fine approfondire la ricerca intorno alla tutela integrata ci porremo due distinti interrogativi. Ci si propone di indagare sulla tutela integrata dei diritti fondamentali che viene a generarsi grazie ai rapporti inter-ordinamentali tra l'Unione europea e gli Stati membri. Al fine di approfondire la ricerca intorno alla tutela integrata, ci porremo due distinti interrogativi. Da un lato, ci si interrogherà sull'assetto istituzionale europeo, che risulta oggi fondato su uno "squilibrio" tra le scelte adottate dalla politica europea e le decisioni del Giudice europeo, cercando, in particolare, di capire se esso costituisca il punto d'approdo del processo d'integrazione, oppure se tale "squilibrio" avviene in via "eccezionale" per far fronte ad omissioni del potere politico. Dall'altro lato, il secondo quesito mira ad indagare sul grado di integrazione e/o cooperazione tra le giurisprudenze costituzionali e quella della Corte di Giustizia nella protezione dei diritti che trovano fondamento tanto nelle Costituzioni nazionali quanto nella Carta di Nizza.

La metodologia scientifica che verrà impiegata nel corso della ricerca è quella propria del diritto costituzionale europeo, il cui oggetto si rinviene nell'intimo legame che intercorre tra le realtà costituzionali degli Stati membri e le loro interazioni nell'ambito dell'Unione europea.

La conclusione della ricerca suggerisce che per superare i cronici squilibri tra l'Europa dei Giudici e l'Europa politica è necessario compiere reali passi in avanti nel processo di costituzionalizzazione dell'Unione.

RESUMEN [ESP]

La investigación se sitúa en el contexto de la Europa de los derechos y tiene como objetivo evaluar el grado de madurez de la protección integrada de los derechos fundamentales, tanto entre los sistemas legales nacionales como en el marco jurídico europeo. Los supuestos de este estudio se basan en las constantes fluctuaciones entre la Europa política y la Europa de los Tribunales, que han generado tanto ventajas como incertidumbres y desequilibrios en el sistema de protección de los derechos fundamentales.

Con el fin de profundizar en la investigación sobre la protección integrada, plantearemos dos preguntas distintas. En primer lugar, tenemos la intención de investigar la protección integrada de los derechos fundamentales que surge de las relaciones inter-ordinamentales entre la Unión Europea y los Estados miembros. Por otro lado, la segunda pregunta tiene como objetivo examinar el grado de integración y/o cooperación entre la jurisprudencia constitucional y la del Tribunal de Justicia en la protección de los derechos que se basan tanto en las Constituciones nacionales como en la Carta de Niza.

La metodología científica que se utilizará durante la investigación es característica del derecho constitucional europeo, que se centra en la estrecha relación entre las realidades constitucionales de los Estados miembros y sus interacciones dentro de la Unión Europea.

La conclusión de la investigación sugiere que, para superar los desequilibrios crónicos entre la Europa de los Jueces y la Europa política, es necesario dar pasos reales en el proceso de constitucionalización de la Unión.

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INTRODUCTION

I. Research Background: Europe of Rights and its Oscillations between Politics and European Jurisdictions

The field of legal knowledge in which this work is situated is the so-called "Europe of Rights", which constitutes one of the facets on which the European integration project has been and continues to be constructed. This project was born following a functionalist approach, that is, through the deliberate choice to share common policies in specific areas, mostly in economic matters. The choice of such a gradual approach from the outset prevented the political nature of that Union of States from being revealed, even though there was a perceived need to establish forms of cooperation. In fact, as early as 1952, every attempt to create a Political Economic Community that would have accelerated the federalization of the nascent European project, which would have immediately adopted a true European Constitution, failed.

With the principles of primacy and direct effect, the legal horizons quickly expanded, leading to a growing interest in the protection of fundamental rights. Indeed, if such protection had been granted solely through national Constitutions, it would have systematically legitimized an inconceivable derogation from these "new" structural principles. The increasingly substantial jurisprudential development of the Court of Justice (in the 1970s and 1980s) regarding fundamental rights was followed by the European-level codification of a normative corpus of rights, the Charter of Fundamental Rights of the European Union, which profoundly shaped the nature of the European Union itself.

The Nice Charter, although initially with limited legal effects, marked an important change in Europe: the protection of rights was no longer confined to the realm of jurisprudence alone. This observation was further reinforced by the transformation of the Charter into a legally binding act of primary rank, achieved through the explicit reference

in Article 6 of the Treaty of Lisbon. This latest development was preceded by the political failure of the Constitutional Treaty, which proposed incorporating within it the same European provisions expressing fundamental rights.

In this new context, the expansion of the European judicial space, characterized by both "closures" and "openings"[1], first and foremost led to an expansion of the protection venues where violations of fundamental rights can be invoked, accompanied by new judicial mechanisms in competition with existing ones. In this space, a specific relevance arises from the loyal institutional cooperation between judges, both European and national, which has historically initiated and consolidated the protection of fundamental rights. Historically, this has been made possible through the instrument of preliminary rulings, which has been used rather sparingly by the constitutional judges of the Member States.

However, recently, this "only" channel of communication has not led to comprehensive responses to the so-called crisis of the rule of law, which is still ongoing in Poland and Hungary. Specifically, particular fragility has emerged with regard to the political mechanisms provided by the Treaties (Article 7 TEU) to defend the fundamental values of the EU (Article 2 TEU), including the rule of law and the principle of equality. These mechanisms have not yet identified any effective solutions to address blatant and repeated violations of the fundamental rights of EU citizens.

In conclusion, the research premise is based on the observation that the protection of rights at the European level results from the intersection of various protection mechanisms, both of a political and jurisprudential nature, where the latter prevail and overshadow the former.

II. Research Questions Concerning the Integrated Protection of Fundamental Rights

Our objective is to investigate the integrated protection of fundamental rights that arises through the inter-system relationships between the European Union and the

[1] M. D'AMICO, *L'Europa dei diritti: tra "aperture" e "chiusure"*, in A. PÉREZ MIRAS, G. M. TERUEL LOZANO, E. RAFFIOTTA, M. P. IADICICCO (eds.), *Setenta años de Constitución Italiana y cuarenta años de Constitución Española,* Madrid, BOE, 2020, p. 403 ss.

Member States. In order to delve deeper into the research on integrated protection, we will pose two distinct questions. On one hand, we will inquire about the European institutional framework, which today is based on a "discrepancy" between the choices made by European politics and the decisions of the European Court, particularly seeking to understand whether it constitutes the culmination point of the integration process or whether such a "discrepancy" occurs in an "exceptional" manner to address political omissions. On the other hand, the second question aims to investigate the degree of integration and/or cooperation between constitutional jurisprudence and that of the Court of Justice in the protection of rights based on both national Constitutions and the Nice Charter.

III. The Structure of the Research and its Methodology

In order to develop possible solutions to the research question, this work will adopt the scientific-methodological approach of European constitutional law, considered as an autonomous legal discipline aimed at researching the constitutional density of the fundamental norms of the European Union[2].

This discipline, echoing the reflections of Professor Balaguer, has as its subject of study "the integration of the national constitutional reality of the Member States and their interaction with the European Union"[3]. With the clarification that, in this perspective, the "constitutional level" of EU norms is not relevant, as such development constitutes "only a part of the object of study" of this discipline[4]. This consideration logically entails that European constitutional law is based on a "methodological-integrative approach, whereby the constitutional problems of the Union are considered as constitutional problems in each of the Member States, [therefore] [s]uch problems fall fully within the constitutional law of each Member State, since EU constitutional law is a part of the

[2]F. BALAGUER CALLEJÓN, *Profili metodologici del Diritto costituzionale europeo,* in *La Cittadinanza Europea*, n. 1, 2015, p. 40., ID, *Derecho constitutional europeo,* F. Balaguer Callejón (eds.) *Manual De Derecho Constitional*, Madrid, Tecnos, 2022, p. 202 ss.

[3] F. BALAGUER CALLEJÓN, *Profili metodologici del Diritto costituzionale europeo,* op. cit., p. 40.

[4] *Ibidem*.

constitutional reality of each Member State" [5]. Thus, "European Constitutional Law is called upon to complement the existing constitutional law in the territory of each Member State" [6].

Applying these methodological coordinates to the research topic, it can be added that the genetic democratic deficit has led to a transformation in the resolution of social conflicts. When these conflicts "transit" within the European context, they lose the character of dialectical confrontation between majority and minority (unlike what happens in constitutional systems). Therefore, these conflicts, not being resolved through "democratic means", end up being reduced to a conflict between the nation and Europe. However, this hinders the formation of a European identity, which will always be subordinate to the national one.

Given these methodological foundations, the research will be structured into three chapters.

The first chapter will focus on the in-depth analysis of the historical-legal roots that led to the introduction and consolidation of the Union's interest in the protection of rights. First, we will analyze the reasons and jurisprudential consequences related to the so-called silence of the founding Treaties. Secondly, the focus will shift to the crucial role played by the Court of Justice, which, starting with the Stauder case, filled the original gap in the Treaties by introducing the category of general principles of EU law, through which a first corpus of fundamental rights was created. Thirdly, we will examine the "reactions" of the Italian Constitutional Court and the German Federal Constitutional Court to this judicial invention.

The second chapter aims to assess how European political institutions have, in turn, matured awareness of giving centrality to the protection of rights within the Union's legal framework. Inevitable stages of this rather long maturation process are at least three: the Charter of Fundamental Rights, the failed attempt to provide the Union with a Constitution, and the crisis of the rule of law. The common thread connecting these three profiles is constituted by the constitutional traces that have emerged during the European integration process aimed at ensuring greater protection of rights.

[5] F. BALAGUER CALLEJÓN, op. ult. cit., p. 47.
[6] *Ibidem*.

In the third chapter, the focus will be on the relationships between constitutional courts and the Court of Justice in the interpretation and application of the Nice Charter. The analysis of specific constitutional experiences will aim to evaluate the different approaches adopted by constitutional judges, who increasingly find themselves having to deal with cases where there is "double" protection. In these cases, a national norm is simultaneously in violation of a right protected by both the Nice Charter and national Constitutions. The in-depth examination of this aspect is based on the intention to assess the intensity of the transmission of the constitutional heritage relating to the protection of rights from national legal systems to the European legal framework and then evaluate the degree of integration between the different layers of protection.

In conclusion, the research as a whole aims to evaluate the "constitutional" level of the European integration project through fundamental rights.

INTRODUCCIÓN

I. Presupuestos de la investigación: Europa de los Derechos y sus oscilaciones entre política y jurisdicciones europeas

El ámbito del conocimiento jurídico en el que se encuentra el trabajo es el denominado "Europa de los Derechos", que constituye uno de los aspectos en los que se ha construido y sigue construyéndose el proyecto de integración europea. Este proyecto surgió siguiendo un enfoque funcionalista, es decir, a través de la precisa elección de compartir políticas comunes en áreas específicas, principalmente económicas. La elección de este enfoque gradual impidió desde el principio que se revelara el rostro político de esa Unión de Estados, que sin embargo sentía la necesidad de establecer formas de cooperación. De hecho, ya en 1952, fracasó cualquier intento de crear una Comunidad Económica Política que hubiera acelerado la federalización del naciente proyecto europeo, que desde el principio se habría dotado de una verdadera Constitución Europea.

Con los principios de primacía y efectos directos, los horizontes normativos se ampliaron rápidamente, lo que generó un interés en la protección de los derechos fundamentales. De hecho, si esta protección se hubiera otorgado solo a través de las Constituciones nacionales, se habría legitimado de manera sistemática una derogación incompatible con estos "nuevos" principios estructurales. Tras el cada vez más sólido desarrollo de la jurisprudencia del Tribunal de Justicia (en las décadas de 1970 y 1980) en materia de derechos fundamentales, se produjo la codificación a nivel europeo de un corpus normativo de derechos, la Carta de Derechos Fundamentales de la Unión Europea, que marcó profundamente la naturaleza misma de la Unión Europea. La Carta de Niza, aunque inicialmente con efectos legales limitados, marcó un importante cambio en Europa: la protección de los derechos ya no se limitaba al ámbito jurisprudencial. Esta constatación se fortalece aún más con la transformación de la Carta en un acto legalmente vinculante de rango primario, gracias a la referencia explícita en el artículo 6 del Tratado

de Lisboa. Esta última novedad fue anticipada por el fracaso político del Tratado Constitucional, que proponía, en cambio, incorporar en su interior las mismas disposiciones europeas expresivas de derechos fundamentales.

En este nuevo contexto, la expansión del espacio judicial europeo, entre "cierres" y "aperturas"[7], ha implicado en primer lugar una ampliación de los lugares de protección en los que es posible invocar la violación de los derechos fundamentales, que están relacionados con nuevos mecanismos judiciales, en competencia con los ya existentes. En este espacio, una relevancia específica deriva de la cooperación institucional leal entre jueces europeos y nacionales, que ha sido fundamental para la protección de los derechos fundamentales. Históricamente, esto fue posible gracias al instrumento de la remisión prejudicial, que los jueces constitucionales de los Estados miembros utilizaron de manera bastante parcimoniosa.

Sin embargo, recientemente, este "único" canal de comunicación no ha conducido a respuestas exhaustivas a la llamada crisis del Estado de derecho, que aún continúa en Polonia y Hungría. Específicamente, se ha observado una vulnerabilidad particular en relación con los mecanismos políticos establecidos por los Tratados (artículo 7 del Tratado de la Unión Europea) para defender los valores fundamentales de la UE (artículo 2 del Tratado de la Unión Europea), incluido el Estado de derecho y el principio de igualdad. Hasta el momento, estos mecanismos no han identificado ninguna solución efectiva para hacer frente de manera eficaz a los casos de violaciones evidentes y repetidas de los derechos fundamentales de los ciudadanos de la UE.

En resumen, el punto de partida de la investigación se encuentra en la observación de que la protección de los derechos a nivel europeo resulta de la intersección entre varios mecanismos de protección, tanto de naturaleza política como jurisprudencial, donde estos últimos prevalecen y superan a los primeros.

[7] M. D'AMICO, *L'Europa dei diritti: tra "aperture" e "chiusure"*, in A. PÉREZ MIRAS, G. M. TERUEL LOZANO, E. RAFFIOTTA, M. P. IADICICCO (cor.), *Setenta años de Constitución Italiana y cuarenta años de Constitución Española,* Madrid, BOE, 2020, p. 403 ss.

II. Preguntas de investigación que abordan la protección integrada de los derechos fundamentales

Nuestro objetivo es investigar la protección integrada de los derechos fundamentales que se produce gracias a las relaciones interinstitucionales entre la Unión Europea y los Estados miembros. Con el fin de profundizar en la investigación sobre la protección integrada, plantearemos dos preguntas distintas. Por un lado, nos preguntaremos sobre el marco institucional europeo, que hoy se basa en un "desequilibrio" entre las decisiones adoptadas por la política europea y las decisiones del Tribunal Europeo, buscando especialmente entender si constituye el punto culminante del proceso de integración o si dicho "desequilibrio" ocurre de manera "excepcional" para hacer frente a omisiones del poder político. Por otro lado, la segunda pregunta tiene como objetivo investigar el grado de integración y/o cooperación entre la jurisprudencia constitucional y la del Tribunal de Justicia en la protección de los derechos que tienen su fundamento tanto en las Constituciones nacionales como en la Carta de Niza.

III. Estructura de la investigación y su metodología

Con el fin de desarrollar posibles soluciones a la pregunta de investigación, este trabajo adoptará el enfoque científico-metodológico del derecho constitucional europeo, considerado como una disciplina legal autónoma orientada a la investigación de la densidad constitucional de las normas fundamentales de la Unión Europea[8].

Esta disciplina, siguiendo las reflexiones del Profesor Balaguer, tiene como objeto de estudio "la integración de la realidad constitucional nacional de los Estados miembros y su interacción con la Unión Europea"[9]. Con la aclaración de que, en esta perspectiva, el "nivel de desarrollo 'constitucional' de las normas de la Unión" no es relevante, ya que dicho desarrollo constituye "solo una parte del objeto de estudio" de esta disciplina[10].

[8] F. BALAGUER CALLEJÓN, *Profili metodologici del Diritto costituzionale europeo,* in *La Cittadinanza Europea*, n. 1, 2015, p. 40., ID, *Derecho constitutional europeo,* F. Balaguer Callejón (cor.) *Manual De Derecho Constitional*, Madrid, Tecnos, 2022, p. 202 ss.

[9] F. BALAGUER CALLEJÓN, *Profili metodologici del Diritto costituzionale europeo,* op. cit., p. 40.

[10] *Ibidem*.

Esta consideración conlleva lógicamente que el derecho constitucional europeo se base en un "enfoque metodológico-integrador en virtud del cual los problemas constitucionales de la Unión se consideran como problemas constitucionales en cada uno de los Estados miembros, [por lo tanto] [tales problemas] caen plenamente dentro del derecho constitucional de cada Estado miembro, ya que el derecho constitucional de la Unión Europea es parte de la realidad constitucional de cada Estado miembro"[11]. Por lo tanto, "el Derecho Constitucional de la Unión está llamado a complementar el Derecho Constitucional vigente en el territorio de cada Estado miembro"[12].

Aplicando estas coordenadas metodológicas al tema de investigación, se puede agregar que el déficit democrático genético ha llevado a una transformación en la resolución de conflictos sociales, que cuando "transitan" en el ámbito europeo pierden el carácter de confrontación dialéctica entre la mayoría y la minoría (a diferencia de lo que ocurre en los sistemas constitucionales). Por lo tanto, estos conflictos, al no resolverse mediante "medios democráticos", terminan reduciéndose a un conflicto entre la nación y Europa. Sin embargo, esto obstaculiza la formación de una identidad europea, que siempre será subordinada a la nacional[13].

Dado este marco metodológico, el trabajo se estructurará en tres capítulos.

El primer capítulo se centrará en el análisis en profundidad de las raíces histórico-jurídicas que llevaron a la introducción y consolidación del interés de la Unión en la protección de los derechos. Se analizarán, en primer lugar, las razones y consecuencias jurisprudenciales relacionadas con el llamado "silencio" de los Tratados fundacionales. En segundo lugar, se desplazará el enfoque hacia el papel fundamental que desempeñó el Tribunal de Justicia, que, a partir del caso *Stauder*, llenó el vacío original de los Tratados mediante la introducción de la categoría de principios generales del derecho comunitario, a través de los cuales se creó un primer conjunto de derechos fundamentales. En tercer lugar, se examinarán las "reacciones" del Tribunal Constitucional italiano y del Tribunal Constitucional alemán ante esta invención judicial.

El segundo capítulo tiene como objetivo evaluar cómo las instituciones políticas europeas han madurado su conciencia de otorgar centralidad a la protección de los

[11] F. BALAGUER CALLEJÓN, op. ult. cit., p. 47.
[12] *Ibidem*.
[13] F. BALAGUER CALLEJÓN, op. ult. cit., pp. 42-43.

derechos dentro del ordenamiento de la Unión. Etapas inevitables de este proceso, bastante largo, son al menos tres: la Carta de Derechos Fundamentales, el fallido intento de dotar a la Unión de una Constitución y la crisis del Estado de derecho. El hilo conductor que une estos tres perfiles está constituido por las huellas constitucionales que han surgido durante el proceso de integración europea, que busca garantizar una mayor protección de los derechos.

En el tercer capítulo, el enfoque se dirigirá hacia las relaciones entre los tribunales constitucionales y el Tribunal de Justicia en la interpretación y aplicación de la Carta de Niza. El análisis de experiencias constitucionales específicas se centrará en la evaluación de los diferentes enfoques adoptados por los jueces constitucionales, que cada vez más se encuentran teniendo que lidiar con casos en los que hay una "doble" protección. Estos son casos en los que una norma nacional viola simultáneamente un derecho protegido tanto por la Carta de Niza como por las Constituciones nacionales. El examen en profundidad de este aspecto se basa en la intención de evaluar la intensidad de la transmisión del patrimonio constitucional relacionado con la protección de los derechos de los sistemas legales nacionales al sistema legal europeo y luego evaluar el grado de integración entre las diferentes capas de protección.

En resumen, la investigación en su conjunto tiene como objetivo evaluar el nivel “constitucional” del proyecto de integración europea a través de los derechos fundamentales.

CHAPTER I

THE ORIGINS OF THE PROTECTION OF EUROPEAN FUNDAMENTAL RIGHTS IN THE EUROPEAN CONSTITUTIONAL FRAMEWORK

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1. "Constitutionalism" vs. "Functionalism": the First and Decisive Stages of the European Solidarity Construction Process

1.1. Crisis of Nation-States in the Post-World War II Era and the Development of Different Models of European Integration

The constitutional science possesses multiple profiles of interest focusing on the origins and developments of the European integration project. A project towards European political and legal unity began to take shape with the end of the Second World War and the Italian and German totalitarian regimes, which had left behind an extremely fragmented and torn social and economic fabric.

The efforts aimed at the recovery undertaken by the nation-states were diverse.

First and foremost, there was a need for "constitutional renewal"[1], which led to the adoption of new constitutional charters, not only in those countries that had directly experienced the Fascist and Nazi regimes, such as Italy (1948) and Germany (1949), but also in other nations like France where, in continuity with the past, a novel democratic-parliamentary-oriented Constitution, the Constitution of the Fourth Republic (1946), was approved. The post-war Constitutions was characterized their normative imprint which, in addition to revolutionizing the previous hierarchical order

[1] P. GROSSI, *L'Europa del diritto*, Bari-Roma, Editori Laterza, 2016, p. 250. The author, in his legal-historical analysis, emphasises how the entry into force of new Constitutions was not followed by the dismantling of the old codes. This happened in France, where the Code Napoleon remained in force, in Germany with the permanence of the BGB and, as is well known, the same can be said for Italy, where, moreover, the four main codifications had found their genesis precisely in the Fascist period (and, in truth, still cannot be said to have been superseded). One of the reasons for that failed "operation of 'disinfestation' from the parasites nesting in the living body of the codification" (an image that the author borrows from Calamandrei) (p. 253) is to be found in the circumstance that the jurists of Fascism continued to work even after the fall of the regime. On this subject, see the reflections of M. D'AMICO, *La continuità tra regime fascista e avvento della Costituzione repubblicana*, in M. D'AMICO, A. DI FRANCESCO, C. SICCARDI (eds.), *L'Italia ai tempi del ventennio fascista. A ottant'anni dalle leggi antiebraiche: tra storia e diritto*, Milano, FrancoAngeli, 2020, p. 219 ff. Similarly in Spain, the Código Civil approved at the end of the 19th century, by Royal Decree No. 206 of 1889, which underwent its first most significant reforms during the Franco dictatorship, is currently in force.

of the legal sources, ensured the rigidity of the primary norms through judicial review by Constitutional Courts[2].

Alongside the work of reconstructing the constitutional architectures of individual nation-states, there was also a general "climate of internationalist idealism"[3] in Europe, where there was a need to develop "common" responses that went beyond the individual choices of nation-states.

Therefore, the desire to give complete and concrete meaning to the value of solidarity was particularly clear, to be achieved through cooperative instruments that would maintain the long-desired and hard-won state of generalized peace, achieved through the sacrifice of many European citizens.

In other words, the first historical fact, to be read as a logical prerequisite for any form of cooperation, revolved around the idea of putting to rest those ancient but at the same time recent rivalries that, if not quelled, would facilitate the emergence of new conflicts.

However, if there was a shared intention to overcome the *status quo ante*, there were also, and still are, difficulties and obstacles in choosing the type of cooperation to be realized in practice.

One of the first occasions for discussion was the "Congress of Europe," held in The Hague from May 7 to 11, 1948[4]. Invited by Winston Churchill, seventeen nations participated in the Congress, with approximately 750 delegates from all over Europe:

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[2] F. BALAGUER CALLEJÓN, *Fuentes del Derecho*, Madrid, Centro de Estudios Polìticos y Constitucionales, 2022, pp. 85-86, where he says "[l]a situación básica hasta el constitucionalismo europeo siguiente a la Segunda Guerra Mundial era de predominio principio de jerarquía, especialmente en los términos de fuerza activa y pasiva de la ley sobre el resto de las fuentes. Esta situación práctica de los ordenamientos ha experimentado una cierta tendencia doctrinal a mezclarse con una determinada teoría de explicacíon del sistema jurídico en su conjunto come es la *Stufenbau*. [...] Esas consecuencias pueden resumirse en la irrupción de un principio de estructuración del ordenamiento que se añade al principio de jerarquía, a veces sustituyendo, a veces limitándolo, como es el criterio de competencia. De tal modo que no es posible ya determinar la norma aplicable a un supuesto concreto atendiendo tan sólo al criterio de jerarquía y a la forma de las normas sino que es necesario tener también en cuenta aspectos materiales que van referidos al principio de competencia".

[3] E. CANNIZZARO, Il diritto dell'integrazione europea. L'ordinamento dell'Unione, Torino, Giappichelli, 2022, p. 1.

[4] For an historical perspective of this first phase of the European integration project see B. OLIVI, R. SANTIELLO, *Storia dell'integrazione europea*, Bologna, Il Mulino, 2010, p. 11 ff.; M. GILBERT, *European Integration: A Concise History*, Lanham, Rowman & Littlefield, 2012, spec. il cap. II, *Enemies to Partner. The Politcs of Cooperation in Western Europe 1945-1950,* p. 9 ff.; e A. VARSORI, *Storia della costruzione europea*. *Dal 1947 a oggi*, Bologna, Il Mulino, 2023, p. 45 ff.

a heterogeneous audience, composed not only of politicians and institutional representatives but also of writers and intellectuals.

Within the framework of this first fundamental attempt to create a "bottom-up" United Europe, three major schools of thought emerged, with substantial differences in the degree of integration underlying each of them.

The first was the "confederalist" approach supported by Churchill and De Gaulle, which aimed to create a new international organization not dissimilar to those already existing in the world. Among the solutions proposed, this one suggested the softest model of cooperation, preserving the maximum level of state autonomy. In fact, the confederalist solution, on the one hand, did not presuppose the transfer of portions of sovereignty by the contracting states, thus keeping power dynamics confined within the individual national territories; on the other hand, it aimed to create a new interstate entity that would act unanimously, making the will of each state crucial in achieving collective goals[5].

At the opposite extreme was the federalist solution advocated by Spinelli and Rossi. They had already presented their ideas a few years earlier in the well-known "Ventotene Manifesto" and advocated the establishment of a European Federation, with the consequent "destruction" of the nation-states[6]. In particular, through the new federal state, a common exercise of power by the federation's organs would be ensured, rather than (or at least in a more limited manner) by the federated states themselves.

The federalist ideas were underpinned by the highest degree of integration. They were developed around solutions aimed at revolutionizing the political and institutional frameworks that had solidified until then, in order to lay the foundations for a new social coexistence.

On an intermediary view was exposed bt the functionalist theories of Schuman and Jean Monnet. They advocated for a gradual integration characterized by the initial devolution of specific matters to European institutions, tasked with creating common sectoral policies. As effectively pointed out, the functionalist method was nothing

[5] B. OLIVI, R. SANTIELLO, *Storia dell'integrazione europea*, Il Mulino, Bologna, 2010, p. 15.
[6] Ibidem.

more than the embryo of the federalist project, which was to be gradually realized (rather than all at once).

Within the Hague Conference's context, the strong fragmentation of the various factions prevented the embrace of any of these theories, and especially in the concluding resolution, there was not enough support for the federalists' proposal to convene a European Constituent Assembly elected by universal suffrage[7].

Nevertheless, these initial discussions led to an important outcome. One year later, on May 5, 1949, ten states (Belgium, Denmark, France, United Kingdom, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden) signed the Treaty of London, which established the Council of Europe. The essence of the Council revolved (and still revolves) around the European Convention on Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950, and a dedicated Court responsible for its interpretation and application, the well-known European Court of Human Rights.

While the confederalist faction prevailed with the establishment of the Council of Europe, the ideas supported by the other two factions were not entirely abandoned. In the months following 1949, France, West Germany, Italy, Belgium, the Netherlands, and Luxembourg initiated a fruitful dialogue, resulting in the creation of the European Coal and Steel Community (ECSC) through the Treaty of Paris in 1951. Six years later, in 1957, with the Treaties of Rome, the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) were born.

As evidence of the determination to promote a new form of effective cooperation, both winners and losers sat at the negotiation table[8]. This was one of the initial factors contributing to the success of the union project, which still holds scientific interest in evaluating its actual potential today.

On the political and institutional front, the three Communities embodied the functionalist integration model. The six Member States delegated authority to common

[7] B. OLIVI, R. SANTIELLO, loc. cit., p. 17.

[8] There were clear differences and ideological contrasts between the Versailles Peace Treaty (1919), which ended the First World War, and the Schuman Declaration (9 May 1950), which, on the other hand, came at the end of the Second World War. On the topic, see, M. CARTABIA, J.H.H. WEILER, *L'Italia in Europa. Profili istituzionali e costituzionali,* Bologna, Il Mulino, 2000, p. 18 ff.

institutions[9] to identify sectoral policies: with the ECSC and EURATOM, the goal was to promote coal and steel trade and peaceful development of atomic energy, while through the EEC, the objective was broader, encompassing the entire economic and social activities sector.

On an ideal level, through the three Communities, the primary aim was to construct, "through concrete achievements," a project centered around the idea of "solidarity in practice among peoples". The echoes of this solidarity could be found in Schuman's famous words spoken on May 9, 1950, as well as in the visionary ideas expressed by Rossi and Spinelli in the Ventotene Manifesto, whose profound ideal significance can be discerned in the preambles of the founding treaties themselves.

1.2. The Choice of a Functionalist Integration and the Absence of Provisions regarding Fundamental Rights in the Original Treaties

The preference for gradual sectoral integration in the Treaties of Paris and Rome generated, almost as a natural consequence, the choice not to provide specific rules on the protection of the fundamental rights of European citizens, who could potentially be harmed by the acts adopted by the new three Communities[10].

The reasons for this decision are diverse and can be traced back, initially, to both historical and political reasons. The atrocities of the war had brought about a particular sensitivity towards the protection of fundamental rights, which began to find concrete expression in the national Constitutions and international Treaties aimed at

[9] Initially, the three Communities shared some bodies, such as the European Parliament (composed of the representatives of the national parliaments until 1979, when it became a body elected by universal suffrage) and the European Court of Justice. Whereas, each Community had its own executive bodies, the Council and the Commission, until the Merger of the Executives Treaty of 1965, the year from which the Communities also began to share the latter bodies.

[10] On the link between the "silence" of treaties and the functionalist paradigm, v. G. CÁMARA VILLAR, Los derechos fundamentales en el proceso histórico de construcción de la Unión europea y su valor en el tratado constitucional, in Revista de Derecho Constitucional Europeo, n. 4, 2005, p. 12 ff.

safeguarding human rights, such as the Universal Declaration of Human Rights of 1948 and the European Convention on Human Rights (ECHR) of 1950[11].

Therefore, the solid structure of the founding Member States' constitutions was oriented towards the protection of fundamental rights, allowing us to assert from the outset that "the absence in the treaties was not an absence of protection"[12].

Furthermore, the limited economic purposes underlying the Treaties of Paris and Rome led to the belief that guaranteeing fundamental rights through the Communities was deemed unnecessary, especially when the Member States themselves could fulfill this protection requirement autonomously by applying their own Constitutional Charters. In this initial perspective, it was considered unlikely that "constitutional matters" could intersect with "community matters", so the constitutional level appeared distinct from that in which the three European Communities operated[13].

Confirmation of this profile was rooted in the very functionalist choice, inspired by the economic phenomenon of "spillover", whereby the continuation of the integration project would be justified only once successes and benefits in the initial areas of integration had been ascertained and appreciated[14].

However, today, in light of the expansion of the European Community, the explanation linked to the rigid allocation of competences no longer seems to precisely align with reality. This is because, especially in economic relations, the jurisprudence of the Court of Justice has experienced significant growth over the years, enabling it to assume a prominent role in the field of fundamental rights, extending beyond the realm of economic rights alone[15].

Another historical argument justifying this absence can be found in the considerable economic and social diversity among the various Member States. More

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[11] M. CARTABIA, L'ora dei diritti fondamentali nell'Unione Europea, in M. CARTABIA (ed.), Diritti in azione: Universalità e pluralismo dei diritti fondamentali nelle Corti europee, Bologna, Il Mulino, 2007, p. 15.

[12] M. CARTABIA, loc. cit., p. 17.

[13] M. CARTABIA, *Principi inviolabili e integrazione europea*, Milano, Giuffrè,1995, p. 15.

[14] G. PASQUINO, *Nuovo corso di scienza politica,* Bologna, Il Mulino, 2009, p. 312.

[15] M. CARTABIA, L'ora dei diritti fondamentali nell'Unione Europea, op. cit., p. 16; A. DAL FERRO, I diritti dell'uomo nella giurisprudenza della Corte di Giustizia delle Comunità europee, in Rivista quadrimestrale Pace, diritti dell'uomo, diritti dei popoli, n. 1, 1988, p. 56, and M. A. DAUSES, La protection des droits fondamentaux dans l'ordre juridique communitaire, in Revue Trimestrielle de Droit Européen, 1984, p. 115 ff.

specifically, the constitutional traditions of the Member States ensured different levels of protection, especially in economic and social rights, which would have constituted the defining element of a hypothetical Community Bill of Rights, precisely due to the immediate economic nature of the Community's goals. For this reason, it has been argued that reaching an agreement in this area would have been very difficult[16].

The reasons for this gap also rest on political motives, aiming to justify this "absence" through an analysis of the choices made by the founding fathers of the Communities.

In this regard, probably the most interesting thesis is that the founding fathers would have avoided introducing a catalog of fundamental rights out of fear that it would significantly expand the competences of the nascent Communities. Member States intended to delegate a specific and limited number of competences to these Communities[17].

Indeed, if, alongside the "typical" competences provided for in the founding Treaties, the "corresponding" fundamental rights had also been included, the powers of the Communities would have automatically expanded to the "boundaries" outlined by fundamental rights, surpassing the "boundaries" originally set[18].

In other words, it was a risky choice, the exact outcomes of which could not be foreseen ex ante, which is why a more cautious approach was favored[19].

Lastly, there is the argument that has remained stable over time, based on the initial absence of the principles of direct effect and the primacy of European Union

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[16] M. CARTABIA, loc. cit, p. 17. Similar statements are in A. DAL FERRO, loc. cit., p. 56.

[17] J.H.H. WEILER, Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities, in Washington Law Review, 1986, p. 1103 ff.

[18] J.H.H. WEILER, loc. cit., p. 1112. The author also draws a parallel with the American system. In particular, he recalls the parliamentary debate that took place during the passage of the Ninth Amendment, pointing out that the Founding Fathers were afraid that: "the inclusion of a bill of rights in the Constitution would be taken to imply that federal power was not in fact limited to [those powers granted by the Constitution], that instead it extended all the way up to the edge of the rights stated in [the newly introduced bill of rights]". In other words, incorporating the Bill of Rights into the Constitution automatically entailed the extension of federal powers, not only to the powers expressly provided for in the US Constitution, but also to the rights guaranteed by the Bill of Rights.

[19] *Ibidem*. Furthermore, the author emphasises that the fears of the Founding Fathers paradoxically would have been more useful to introduce a Community Bill of Rights, as this would have placed limits on the central power of the Community and, in so doing, would have produced an effect, not expansive, but only further limiting.

law. These two pillars of EU law emerged only after the well-known Van Gend & Loos judgment in 1963 and the *Costa v. ENEL* case in 1964[20]. It is argued that the omission of a reference to the protection of fundamental rights was justified to the extent that this protection belonged to the Member States (more accurately, to their constitutional charters, as interpreted by national Constitutional Courts and all ordinary judges)[21].

This implied that alleged violations by Community bodies were judged by national ordinary judges, who applied domestic constitutional law to disputes.

This led to the extreme situations that posed obstacles to the Community integration process, which is why the Court of Justice later deemed it necessary to introduce the aforementioned principles into its jurisprudence[22].

The first situation concerned citizens, who, when they believed that their rights had been violated by the acts of the Communities, could challenge them before domestic judges who assessed their legitimacy based on national legal standards. The second situation related to the possibility for Member States to enact internal laws amending or repealing Community legislative acts because they were considered non-compliant and, thus, contrary to national law. In such cases, the legislative conflict that arose between the internal norm and the Community norm was resolved by the so-called chronological criterion, succinctly summarized by the Latin maxim *"lex posterior derogat priori"*.

In summary, these were the consequences that arose in a traditionally internationalist integration, where there was no justification for asserting the prevalence of European common law on the sources level.

1.3. The First Attempt to Build a Political Europe through the "Constitutionalization" of the European Project: A Look at the Preparatory Work of the "Spaark Committee"

[20] Cfr. *infra* §3.2.

[21] M. CARTABIA, *L'ora dei diritti fondamentali nell'Unione Europea*, op. cit., p. 16 and J.H.H. WEILER, loc. cit., p. 1112-1113.

[22] J.H.H. WEILER, loc. cit., p. 1113.

Between 1952 and 1956, during the period between the Treaty of Paris and the Treaties of Rome, both of a functionalist nature, there was a significant attempt at European federalization. Unlike the founding treaties of the three Communities, this attempt took into due consideration violations of fundamental rights that could occur within the European space.

The opportunity arose in the spring of 1952 when the six states that had given birth to the European Coal and Steel Community (ECSC) signed the Treaty establishing the European Defense Community (EDC). The primary objective was to equip the emerging Union with a common European army.

This was a decisive step, especially from the federalists' perspective, towards building a true European political community that would make common decisions in the field of defense. States would thus have stripped themselves not only of another "sovereign sector" but also of one of the most politically significant sectors (alongside foreign policy) on the international stage, where states had always enjoyed full and total freedom of action and strategy.

In this perspective, while the federalist idea of providing an innovative remedy to the recent past resurfaced, the initial concept of functionalist integration, which would have left room for true constitutional integration, gradually weakened.

In support of the intention to reverse the course taken with the ECSC, within the negotiations for the EDC Treaty, Alcide De Gasperi succeeded in obtaining specific commitments aimed at providing the EDC with political institutions that would act on a direct mandate from the people. Specifically, De Gasperi's ideas, strongly influenced by those of Altiero Spinelli[23], aimed to provide the new Community with an Assembly democratically elected by universal suffrage, to which the executive body of the EDC would be accountable.

The result, when read today from a constitutional perspective, was of particular significance. Article 38 was included in the EDC Treaty, which tasked an ad hoc Assembly with studying "a) the constitution of an Assembly of the European Defense Community, elected on a democratic basis; b) the powers with which such an Assembly should be invested". In addition, the same provision mandated the

[23] On the agreement between De Gasperi e Spinelli, see D. PREDA*, De Gasperi, Spinelli e l'art. 38 della CED*, in *Il Politico,* Vol. 54, no. 4, 1989, p. 575 ff.

exploration of "the definitive organization to replace the present provisional organization, which must be designed to construct one of the elements of a further federal or confederal structure, based on the principle of the separation of powers and involving, in particular, a bicameral representative system"[24].

Thus, a mandate was given to an *ad hoc* Assembly[25] to draft a Statute for the political Community. This choice was immediately welcomed by Europeanist movements, such as the European Movement, presided over in those years by Belgian Prime Minister Paul-Henri Spaak, and the Union of European Federalists, led by Spinelli. They initiated fruitful collaboration, especially within the framework of the *Study Committee for the European Constitution*, convened to assist the *ad hoc* Assembly in drafting the project.

The role assigned to the *ad hoc* Assembly bore many similarities to that of a European Constituent Assembly, and it was perceived as such. However, among the influential members of the Committee, there was a strong divergence regarding the status that the Statute-Constitution of the Community would acquire once approved by the *ad hoc* Assembly. According to some, it should be considered an "act of constitutional law" (Spinelli) or "of international constitutional law" (Dehousse) capable of coming into force once ratified by national parliaments[26]. Some believed that the Statute-Constitution of the Community, even if approved, constituted a draft of a future project, the examination of which was entrusted to a subsequent intergovernmental convention that would specify the forms and methods for

[24] D. PREDA, Introduzione, in EAD (ed.), Per una Costituzione federale dell'Europa. Lavori preparatori del Comitato di Studi presieduto da P.H. Spaak 1952-1953, Padova, CEDAM, 1996, p. 7 (translation provided by the Author).

[25] Indeed, they did not wait for the entry into force of the ECSC Treaty to start the work of the ad hoc Assembly, but at the first meeting of the ECSC Assembly, the foreign ministers of the six Member States conferred this mandate on the ECSC Assembly itself in an 'enlarged' composition, i.e. integrated with the members of the assembly body provided for by the ECSC Treaty. This was a strategic choice to speed things up, but it was in vain as not all states decided to proceed with the ratification of the ECSC Treaty.

[26] MOVIMENTO EUROPEO – COMITATO DI STUDI PER LA COSTITUZIONE EUROPEA, *Progetto di Statuto della Comunità politica europea,* meeting 30 september 1952 (*post meridiem*), Bruxelles. Proceedings collected in the volume edited by D. PRED, op. cit., pp. 320-321.

completing the federal constitutional design. Among the two positions, the first prevailed among the Committee members in drafting the final project[27].

The Committee was chaired by Spaak, and over the course of a year, it produced nine detailed resolutions on key aspects of the emerging federal structure. These included a rigid competence system, outlining those granted to the federation and reserving all others for the federated states (Resolution I); the election of the government by the chambers, without a vote of confidence, but with the possibility (in exceptional cases) for the Senate to remove the government by a two-thirds majority vote (Resolution II); bicameralism, to be structured in the House of Deputies, directly elected by universal suffrage, and in the Senate, composed of members of national parliaments (Resolution III); the establishment of a Supreme Court serving as both a constitutional court and a court of appeals (Resolution IV); a focus on competences in coal and steel (Resolution V), defense (Resolution VI), foreign policy (Resolution VII), finance (Resolution VIII); and, finally, an aggravated procedure for the revision of the Statute of the Community (Resolution IX).

One of the themes addressed by the Committee was related to the protection of fundamental rights[28]. In particular, during the Strasbourg session, Fernand Dehousse, Secretary-General of the Committee, raised the question of whether human rights should be included in both the Community Constitution and the constitutional charters of member countries, or whether there should be a selection process to allocate rights to each of these two sources. In the latter case, he questioned the possible criteria for selecting the rights to be included in the Community Constitution.

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[27] MOVIMENTO EUROPEO – COMITATO DI STUDI PER LA COSTITUZIONE EUROPEA, *Progetto di Statuto della Comunità politica europea,* Risolution I – Preambol e general provision, where at footnote no. 1 we can read: "*Il trattato che istituisce la Comunità politica europea è un trattato dal punto di vista formale, poiché deve essere ratificato dagli Stati membri e non entra in vigore che dopo la sua ratifica. Ma in realtà, a principiare della sua entrata in vigore, esso crea delle istituzioni e dei legami diretti tra queste istituzioni e i popoli della Comunità. È quindi anche Statuto o Costituzione, cioè un atto di diritto pubblico interno. Il preambolo dovrà essere quindi redatto in modo da sottolineare senza equivoci questo carattere. [...] è molto probabile che lo Statuto della Comunità dovrà cominciare con una frase di questo genere: «Noi europei, rappresentati dai nostri organi costituzionali nazionali, dichiariamo, ecc.. ». Lo scopo della Comunità dovrà essere menzionato in termini generali, suscettibili di comprendere sia i poteri affidati alla Comunità sin dalla sua origine, sia i suoi poteri futuri [...]*" (D. PREDA (ed.), op. cit., p. 317).

[28] Cfr. G. DE BÚRCA, The Road not Taken: The European Union as a Global Human Rights Actor, in The American Journal of International Law, Vol. 105, No. 4, 2011, p. 649 ff.

The Belgian politician also highlighted how the issue could give rise to significant disputes between states (problems that partly emerged during the negotiations of the Rome Convention). Consequently, he proposed an explicit reference to the European Convention on Human Rights (ECHR), which all Member States would commit to respecting, even through "a procedure that allows, at the request of a citizen or *ex officio*, to restore violated rights through direct intervention of the competent authority of the Community"[29].

In contrast, Hans Nawiasky insisted on the importance of including the "most essential" principles and their corresponding rights in the Community Constitution. For this reason, he proposed the following three-part division of rights[30]:

a) "those that would be inscribed in the Statute of the Community";

b) "those that would be obligatory in national Constitutions";

c) "those whose recognition would be left to the free will of the Member States".

To support his argument and in opposision to Dehousse's thesis, Nawiasky added that "all the states of the future Community recognize classic rights of freedom. If a more advanced Constitution is not proposed to them, these countries could refuse to ratify a clause that adds nothing to what is already provided for in their Constitution".

In other words, on one hand, Dehousse's thesis aimed to "incorporate" the rights provided by the ECHR, which covered only political rights, while on the other hand, Nawiasky, through a careful distinction, proposed specifying "new" rights in the Community Constitution.

Lastly, Becker's note on Nawiasky's thesis is interesting: "The list being prepared [...] must be short. If all fundamental rights are included in the Community Constitution, there is a risk of creating differences in interpretation among different members. In this case, what would be the competent jurisdiction? A national Supreme Court, the one provided for in the Rome Convention, the United Nations, or the Community's Supreme Court?"[31].

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[29] MOVIMENTO EUROPEO – COMITATO DI STUDI PER LA COSTITUZIONE EUROPEA, *Progetto di Statuto della Comunità politica europea,* meeting 25 may 1952 (*post meridiem*), Strasbourg (D. PREDA (ed.), op. cit., pp. 104-105).

[30] *Ibidem* (D. PREDA (ed.), op. cit., p. 105).

[31] *Ibidem* (D. PREDA (ed.), op. cit., p. 106).

This final observation did not provoke a specific debate, probably indicating that the issue did not yet hold particular interest. However, it highlighted the core issues that would become evident a few decades later.

In the end, Dehousse's thesis prevailed, and in Resolution I, it was explicitly stated in the preamble that one of the Community's purposes was the protection of fundamental freedoms. For this purpose, the obligation for each state to respect and apply the ECHR was included. It was also added that, "if the Community is requested by the constitutional authorities of a member state, it shall assist in maintaining constitutional order, democratic institutions, or fundamental human freedoms". Furthermore, "if the Community's government finds that in a member state, constitutional order, democratic institutions, or fundamental human freedoms have been seriously violated without the constitutional authorities of that state being able or willing to restore them, the Community shall intervene in place of these authorities until the situation has returned to normal. In this case, the measures taken by the Community's government shall be submitted without delay for approval by the Community's parliament"[32].

In conclusion, the result achieved by the Spaak Committee was particularly forward-thinking. Not only did it emphasize the protection of rights at the constitutional-community level, but it also linked the issue of resolving cases of fundamental rights violations to the "common" political dimension. It envisaged the potential intervention of the European executive, with the approval of the parliament, in cases where serious violations had struggled to find a solution at the national level.

However, as is known, the meticulous work of the Spaak Committee and later the ad hoc Assembly was soon overshadowed by a cloud of uncertainty due to the failure of the EDC Treaty's ratification in the last months of 1954 by France and Italy, paradoxically the states that had initially welcomed the common defense project with greater enthusiasm[33].

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[32] MOVIMENTO EUROPEO – COMITATO DI STUDI PER LA COSTITUZIONE EUROPEA, *Progetto di Statuto della Comunità politica europea,* Risolution I – Preambol and general provisions, pt. no. 7.

[33]Determining this outcome were the political contingencies during the period when the ratification process of the CED Treaty was underway. In Italy, De Gasperi, a supporter of the initiative, lost the June 1953 elections; while, in France, Gaullist forces opposed the federalist vision incorporated in the CED Treaty.

2. The First Cases of Violation of Fundamental Rights and the Incompetence of the EU Court of Justice

2.1. On the Original Lack of Competence of the Court of Luxembourg

In 1959, the first year of activity of the Court of Justice of the European Communities (CJEC)[34], the first cases arose where the absence of explicit provisions safeguarding fundamental rights in the founding Treaties became evident.

Specifically, what generated uncertainty was the application of specific Treaty rules, closely linked to the establishment of the single market, which could potentially infringe upon rights recognized and guaranteed by national constitutional charters.

The first case that offers interesting insights for analysis is the one decided in 1959 by the Court of Justice of the European Communities in the *Stork v. High Authority of the ECSC judgment*[35].

The case was brought before the Community judge through an annulment action filed, under Article 33 of the ECSC Treaty (now Article 263 TFEU), by the German company Stork. Stork was engaged in wholesale coal sales and sought the annulment of a decision by the High Authority of the ECSC, which the applicant considered detrimental to its economic freedom.

To be precise, the contested decision was issued in November 1957 to confirm (although not retroactively) the conformity to Article 65 of the ECSC Treaty[36] of certain resolutions adopted in February 1953 by the coal sales offices of the Ruhr

[34] The decision to endow the European order with an ad hoc judicial body dates back to the 1951-52 ECSC Treaty, where the establishment of the 'ECSC Court of Justice' was provided for (Arts. 34-45). While, following the 1957 Treaties of Rome, the court common to all three Communities, the Court of 'Justice of the European Communities', was established, whose work began on 3 March 1959.

[35] Court of Justice of the European Communities, judg. 4 february 1959, C-1/58, *Stork c. Alta Autorità CECA,* ECLI:EU:C:1959:4.

[36] More precisely, the yardstick was Article 65(1) of the ECSC Treaty, which prohibited "agreements between undertakings, decisions by associations of undertakings and concerted systems tending directly or indirectly to prevent, restrict or distort normal competition within the common market".

mines. These resolutions effectively narrowed down the group of "first-hand" wholesalers, which had previously included the applicant company[37].

On a strictly procedural level, it is worth noting that the aforementioned resolutions were initially challenged before the ordinary court in Essen, which provisionally suspended their effects, awaiting the opinion of the High Authority, invoked by another route according to Article 65(4) of the ECSC Treaty, regarding their compatibility with the Treaty.

As anticipated, the High Authority issued a decision deeming the actions taken by the coal sales offices of the Ruhr mines consistent with the goals of the common market.

As a result, the applicant company, now classified as a "second-hand" wholesaler, suffered significant economic disadvantages and appealed to Luxembourg against the High Authority's decision.

Despite the Court rejecting the appeal, it may be interesting to analyze one of the reasons behind its submission. Specifically, the appellant raised concerns about the conflict between the High Authority's decision and Articles 2 and 12 of the German Constitution, which protect the inviolable right to the development of one's own personality and the unimpeded exercise of one's professional activity, respectively[38].

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[37] The resolutions in question were adopted by the Sales Offices for coal extracted from the Rurh mines, which in fact restricted the group of so-called 'first-hand' wholesalers, since, in the light of the new Community law, in order to fall into this category and thus enjoy the relevant purchasing advantages, companies were required to have a sales volume of at least 48,000 tonnes, whereas previously a volume of 6,000 tonnes was sufficient.

[38] Judgment *Stork*, cit., *In Fact*, Section III, pt. 2, On the merits of the case, fifth paragraph. In developing the second argument (the most interesting one for our purposes), the appellant used an argument that will be ignored by the Court of Justice in its resolution of this case, but which anticipated the element of "common constitutional traditions" that will play a key role in subsequent ECJ case law. This can be seen in the fact that the appellant in inferring the infringement of constitutionally guaranteed rights by the German State argues that such rights are "protected by almost all the constitutions of the Member States" and for that reason are "capable of placing limits on the application of the Treaty". In other words, the idea advocated by Stork was as follows: a common constitutional heritage would potentially be able to limit the application of the Treaties and, therefore, such a heritage could not be ignored even by the Community institutions that are in their function to apply and interpret the Treaties. Subsequently, in the similar Geitling case (see below), the Court of Justice held that in the review of legitimacy that it is called upon to exercise under Article 65(4) of the ECSC Treaty "it is not called upon to ensure compliance with the rules of domestic law, even if they are constitutional rules in force in one or other of the Member States". The Court here almost seems to have "responde" to the observation made by the appellant in the previous case and did so by radically denying the possibility that there

From the appellant's perspective, these fundamental rights were "protected by almost all the Constitutions of the Member States and [therefore] capable of limiting the application of the Treaty"[39]. Thus, the idea emerged, albeit incidentally, that the presence of the same fundamental rights in the Constitutions of the Member States could potentially limit the application and interpretation of the Treaties.

The appellant's argument did not persuade the Community Judges[40], who, on this point, declared themselves incompetent under Article 31 of the ECSC Treaty to adjudicate community disputes involving the "individual national rights" as a "rule"[41].

Additionally, the High Authority, in exercising the functions entrusted to it by the Treaty, was also incompetent to rule on violations of national constitutional provisions.

Therefore, on the one hand, the agreements and arrangements that the EC Executive was reviewing under Article 65(4) of the Treaty could be in compliance with national law but "contravene the prohibitions of Article 65 No. 1". On the other hand, "null and void agreements within individual States could nevertheless be put into practice in the common market, causing effects incompatible with the Treaty; the High Authority was therefore obliged to take into consideration this second type of agreement"[42].

In other words, the Court of Justice declared itself incompetent to adjudicate violations originating within national borders, even for those related to the primary sources of the Member States. This choice was justified by the idea of the separation and autonomy of the two legal orders[43].

Nevertheless, in the reasoning of the European Judge, a first small (yet significant) "crack" cannot be overlooked. In fact, although it did not exclude the possibility that a national agreement, invalid under national rules but valid under Community rules, could circulate within the common market, it did not *a priori* rule out the possibility that national invalidity might then generate "incompatible effects

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could be a "lowest common denominator" of constitutional principles of the Member States capable of limiting the Community Treaties.

[39] Judgment *Stork*, cit., *In Fact,* sec. III, pt. 2.

[40] Cfr. judgment *Stork*, cit., *In Fact,* pt. 4.

[41] Judgment *Stork*, cit., O*,* pt. 4, secondo cpv.

[42] Judgment Stork, cit., Conclusion on points of law, pt. 4.

[43] J.H.H. WEILER, *Eurocracy and Distrust,* op. cit., p. 1114.

[also] with the Treaty". In other words, even within the framework of a general incompetence of the Court to deal with issues affecting the constitutional law of the Member States, the emergence of legal consequences in terms of the application of the Treaties due to clear and shared constitutional disparities was not completely excluded.

This is one of the theoretical premises that contributed to the articulation of the general principles of Community law by the courts[44], the introduction of which would facilitate the resolution of normative conflicts that, although initially of an interstitial nature, still risked compromising the uniform application of Community law.

Aside from this aspect, it should be noted that in the early years of the Court's activity, the Stork case's jurisprudence found confirmation in some subsequent judgments.

Just a few months after the Stork judgment, the Court decided two annulment actions (*Nold* and *Geitling*)[45], brought to challenge various decisions of the High Authority issued under Article 65 of the ECSC Treaty. In both cases, the applicant companies complained of violations of Articles 3 (principle of equality), 12 (free exercise of trade and industry), 14 (protection of private property) of the German Basic Law and Article 43 of the Constitution of the State of Hesse (protection of small and medium-sized enterprises)[46] in one case and only Article 14 of the *Grundgesetz* in the other. In neither of these two cases did the Court find merit in the complaints regarding the violation of specific constitutional norms. To support its lack of competence in these matters, in the second judgment, the Court reiterated that when it was "called upon to review the legality of decisions issued by the High Authority, [...], it was not required to guarantee compliance with the internal legal norms, even if they were constitutional, in force in one or another of the Member States; when reviewing the legality of a decision of the High Authority, it could not directly interpret or apply Article 14 of the German Basic Law. Moreover, Community law, as arising from the ECSC Treaty, contained no general, explicit or implicit principle guaranteeing the

[44] Cf. case *Stauder, infra* §4.1.

[45] Court of Justice, judgements 20 march 1959, C-18/57, *Nold KG c. l'Alta Autorità CECA,* ECLI:EU:C:1959:60, e 15 july 1960, C-36/59, C-37/59, C-38/59, C-40/59, *Präsident*, *Geitling*, *Mausegatt* e *Nold c. Alta Autorità CECA,* ECLI:EU:C:36:1960.

[46] Judgement Nold KG, cit., In fact, C) On merit, pt. II.

preservation of acquired rights"[47] (constitutional rights invoked by the applicants before the Court of Justice).

In particular, in *Geitling*, although the existence of the category of general principles was mentioned, the Court excluded their applicability to EEC Treaty.

However, the Advocate General's Conclusions seemed to admit a different perspective, which, contrary to the Court's approach, positively characterized the general principles of law, allowing for their application.

The Advocate General stated that "it was for the applicant to bring any action before the courts of his country against a private commercial regulation, but it was not for the Court, which was called upon to review the legality of authorizations, to apply, at least directly, the internal legal norms — even if they were constitutional norms — in force in this or that Member State (Stork judgment, 4 February 1959). It could only take them into account, if necessary, if it perceived the application of a general legal principle that could be considered when interpreting the Treaty"[48].

The issue of common fundamental principles applicable to all Member States will be revisited by the Court in 1965 in the *Sgarlata* case[49].

The case in question differed from the first two mentioned, but here it is sufficient to underline that it was the first case in which Article 173 of the EEC Treaty was invoked (concerning the *locus standi* to bring an annulment action), and the applicants sought an extensive interpretation of it; otherwise, their claims would have remained without any form of judicial protection (either at the national or community level), which would have been in direct contrast with the fundamental principles in force in all Member States.

The negative response to the question posed was already evident in the part regarding the merits. In fact, "without delving into this issue, the Court considered that it could not attribute greater weight to it than the clearly restrictive wording of Article 173, which it was tasked to apply"[50].

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[47] Judgment *Geitling,* cit., conclusion on point of law, pt. II.

[48] Conclusion of General Advocate Lagrange, 24 may 1960, pt. III "*Le conclusioni in subordino nella causa 40-59*", emphasis added.

[49] Court of Justice, judgment 1 april 1965, C-40/64, *Sgarlata e altri c. Commissione* CEE, ECLI:EU:C:1965:36.

[50] Sent. *Sgarlata,* cit., conclusion on point of law, pt. II.

The Court avoided addressing the substance of the issue and preferred to conclude its judgment with a declaration of inadmissibility, which resulted from a faithful interpretation of the Treaty text. Thus, even in this circumstance, the protection of constitutional rights did not find a basis for safeguard within the scope of judgments by the Community Judge.

As has been effectively observed, these initial rulings represented the *"first contacts with the problem of protecting basic rights"*[51] and were united by the need to challenge European rules by appealing to the guarantees offered by national Constitutions[52].

This initial orientation was informed by the idea of the separation and autonomy of the two legal orders. As a consequence, the Court of Justice seemed to act as a true "International Court", far from endorsing the fusion of the two legal systems[53].

In addition, this initial "disinterest" on the part of the Court of Justice would have found its rationale in the intrinsic nature of the ECSC Treaty[54]. Indeed, the ECSC Treaty had a markedly economic focus, which meant that it could not be considered a *"Traite Cadre"*, or a "framework treaty" capable of establishing a genuine community system in which the teleological interpretation of Treaty provisions could find room (unlike what would happen with the Treaty of Rome).

Furthermore, in its early years of activity, the Court was more concerned with ensuring uniformity in the application of the law among the three newly established Communities, as prescribed in Article 31 of the ECSC Treaty. On the contrary, if it had immediately taken steps to introduce national constitutional principles into Community law, it would most likely have undermined its objective of uniform application of Community law[55].

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[51] This expression was used by P. PESCATORE, a Luxembourg judge of the Court of Justice of the European Communities, during the Parliamentary Conference organised by the Council of Europe on 18-20 October 1970 and the title of the speech was 'The Protection of Human Rights in the European Communities'. The speech was later published in ID, *Fundamental Rights and Freedom in the System of the European Communities*, in *The American Journal of Comparative law*, Vol. 18, No. 2, 1970, p. 343 ff.

[52] P. PESCATORE, loc. cit., p. 348.

[53] J.H.H. WEILER, *Eurocracy and Distrust,* op. cit., p. 1114.

[54] Ibidem.

[55] A. DAL FERRO, loc. cit. p. 60.

In conclusion, rather than "disinterest" in the protection of rights, one could speak of a natural "self-restraint" as a guarantee for the literal interpretation of the Treaties, which had only entered into force a few years earlier.

2.2. The Consequences of the Absence of Any Kind of Protection for Fundamental Rights on the Effectiveness of Sources of Community Law in the National Legal System

The omission in the Treaties of any form of protection for fundamental rights (especially in the judicial field) has had significant consequences for the value and strength of the sources of the European Communities. The thesis linking the absence of a European Bill of Rights with the exclusive competence of the Member States' judicial organs in the field of fundamental rights has already been mentioned[56]. It is worth noting that at that time, neither in the Treaties nor in Community case law, had the principles of direct effect and primacy yet emerged.

Indeed, at the beginning, the founding Member States committed to incorporating regulations and directives into their national legal systems. So, there was no practical obstacle to amending or repealing the sources previously incorporated into national legal systems if they were against national norms. Therefore, *a fortiori*, if a conflict arose between Community rules and Constitutional norms, considering that at the time the latter were the only ones that expressly protected the fundamental rights of European citizens.

Confirmation of the absence of such obstacles can be found in the provisions of the EEC Treaty regarding "approximation of laws"[57] (Articles 100 and following).

Specifically, Article 100 EEC Treaty affirmed, in principle, the need for uniformity of legislation to ensure the best functioning of the common market. The two following articles examined two specular situations: on the one hand, Article 101 dealt with the conflict between European and pre-existing national legislation, while

[56] Cfr. *supra* §1.2.

[57] EEC Treaty, Part III "Community Policy", Title I "Common Rules", Chapter III "Approximation of Laws", Articles 101, 102 and 103.

on the other hand, Article 102 provided a specific procedure to resolve the normative conflict that could arise when a subsequent national law modified, in whole or in part, the European law[58].

For our purposes, the only relevant element concerns the "sanction" that the Commission of the European Economic Community could adopt under the Treaty in the extreme case where a Member State did not take action to remove the contradiction generated by a subsequent national legislative act.

The Commission's sanctioning intervention could culminate in a mere recommendation, which is a non-binding act and, therefore, incapable of producing legal consequences in case of violation. This, in fact, demonstrates the initial absence of effective instruments to guarantee the enforcement of Community law in the face of deliberate legislative distortions introduced by one of the Member States.

Consequently, it can be argued that, in the early years of the Communities, Member States remained, in practice, free to amend the Community acts without encountering obstacles that invalidated the modifying internal acts[59].

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[58] Article 102 TEEC: "Where there is a danger that the enactment or amendment of laws, regulations or administrative provisions will cause distortion within the meaning of the preceding Article, the Member State wishing to do so shall consult the Commission. The Commission shall, after consulting the other Member States, recommend to the States concerned such measures as may be appropriate to avoid the distortion in question. 2. If the State desiring to enact or amend national provisions does not comply with the recommendation addressed to it by the Commission, the other Member States shall not, in applying Article 101, be required to amend their national provisions in order to eliminate such distortion. If the Member State which has disregarded the Commission's recommendation causes a distortion solely to its detriment, the provisions of Article 101 do not apply". The Treaty distinguished the two conflicting hypotheses, depending on their position at the temporal level, and also attached different consequences to them. Indeed, in the hypothesis of Article 101, where the conflicting domestic law had been enacted before the Community law, the possibility was provided for the adoption of specific directives addressed to the Member State, with which the removal of the conflicting domestic law could be requested.

[59] The same reasoning can be conducted with reference to the absence of a sanction in the event of non-compliance by Member States with a ruling by the EU Court. In this regard, Article 171 TCEE provided that "[w]henever the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, that State shall be required to take the necessary measures to comply with the judgment of the Court of Justice". The provision, however, did not explicitly refer to the possible sanction in the event of failure to fulfil the obligation. Subsequent amendments to the Treaties also do not add meaning to these cases of non-fulfilment. As observed by MIGUEL AZPITARTE SÁNCHEZ, *Las relaciones entre el Derecho de la Unión y el Derecho del Estado a la luz de la Constitución Europea,* in Revista de Derecho Constitutional Europeo, n. 1, 2004, pp. 79-80, "[l]os artículos 10 y 292 TCE conforman los fragmentos desde los que es posible montar un modelo de relaciones entre ordenamientos. La primera disposición impone la obligación a los EEMM de asegurar el cumplimiento del Tratado; la segunda excluye la solución de las controversias interpretativas o aplicativas fuera de la

A confirmation of this thesis can be found in the judgment of the Italian Constitutional Court dated February 24, 1964, No. 14, which originated from the referral by the Conciliation Judge of Milan, who doubted the constitutional legitimacy of Law No. 1643 of December 6, 1962, establishing ENEL (the Italian public entity aimed at nationalizing the production, transformation, transmission, and distribution of electric energy).

One of the issues raised by the referring judge concerned the violation of Article 11 of the Constitution, which (then, as now) provides that Italy "[…] consents, on an equal footing with other States, to the limitations of sovereignty necessary for an order that ensures peace and justice among Nations; it promotes and favours international organizations aimed at this purpose".

Specifically, the alleged constitutionality challenge under Article 11 of the Constitution was based on the assumption, according to the applicant in the main proceeding, Mr. Costa, that "the Italian State, which had consented to the limitation of its sovereignty by joining the Treaty of Rome of March 25, 1957, [...], by enacting the law on the nationalization of electric industries, would have practically revoked this self-limitation and, by violating some provisions of the Treaty, would have also violated Article 11 of the Constitution"[60].

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sede jurisdiccional prevista por el TCE. La lectura conjunta de ambas disposiciones nos empuja a concluir que será el TJ el órgano llamado a resolver las dudas sobre el cumplimiento estatal del Tratado. Ahora bien, tales fragmentos no son de gran ayuda. La lógica constitucional hace suponer que será en el estudio de los procesos ante el TJ cuando hallemos el resto de elementos normativos que nos permitan dotar de cierta precisión a las relaciones entre ordenamientos. Especialmente serían los efectos de las sentencias del TJ en el control de derecho estatal la pista que indicaría el modo de resolución de los conflictos ente ordenamientos. Sin embargo, son esperanzas vanas. En la regulación del proceso por incumplimiento de los Estados, se repite la retórica del art. 10 TCE y se dispone que "el Estado estará obligado a adoptar las medidas necesarias para la ejecución de la sentencia del TJ" (art. 228). Nada se dice, pues, de los efectos de la sentencia sobre el acto normativo estatal que causa el incumplimiento (pérdida de vigencia, invalidez, nulidad). A lo sumo se fija la posibilidad de una multa coercitiva, algo significativo ya que es una sanción que no está orientada a condicionar el acto que incumple, sino a reprimir al autor del acto (que, dicho sea de paso, quizás sea capaz de asumir, en un análisis coste-beneficio, la sanción pecuniaria). Y mucho menos nos añade la cuestión prejudicial de interpretación (art. 234 TCE), recurso que sirve para determinar el incumplimiento de los Estados. Aquí, los efectos de la decisión del TJ ni siquiera se manifiestan directamente sobre la controversia que conoce el juez nacional. Esta afirmación tiene mucho de ficción, dada la precisión con la que el TJ define la contradicción entre la disposición estatal y la comunitaria. Pero, en lo que ahora nos interesa, el art. 234 ni por asomo se aventura a predeterminar los efectos de la decisión interpretativa del TJ".

[60] Italian Constitutional Court, judgment 24 February 1964, n. 14. A clarification must be made with regard to the excerpt from the judgment quoted. In the main proceedings before the referring court,

This outline seems to call up the mechanism of the interposed parameter, as the referring judge invoked the violation of the parameter referred to in Article 11 of the Constitution for its ability to serve as a vector for the emergence of a violation of an external source, the EEC Treaty[61]. More precisely, among the suspected violations of Community rules[62] was Article 102, which, as already seen, provided a procedure whereby a Member State intending to adopt legislative measures potentially in conflict with competition conditions on the common market had to consult the European Commission.

In the case at hand, such consultation had not taken place, resulting in a violation of the Treaty, which, according to the applicant, justified a preliminary reference to the Court of Justice to be made by the Constitutional Court.

Mr Costa pleads the unconstitutionality, not of the law ratifying the EEC Treaty, but of the law establishing ENEL on the ground that it is contrary to certain provisions of the EEC Treaty. This specification clearly emerges from a reading of the writ of certiorari, in which the plea of unconstitutionality submitted to the Conciliating Judge of Milan by the applicant is reported. On closer inspection, the hypothesis of a breach of Article 11 of the Constitution, as formulated by Mr Costa, is shared by the referring court, which formulates in the same terms its reasoning on the not manifestly unfounded nature of Article 11 of the Constitution.

[61] The introduction of interposed norms has had a strong and significant impact on our system of constitutional justice, in particular by expanding the so-called "*constitutionality block*", i.e. all those norms whose violation gives rise to a declaration of unconstitutionality. The mechanism of the interposed norm thus makes it possible to assess the compatibility of the law with norms that are not formally constitutional, which in the hierarchy of sources lie between the Constitution and the law: this does not mean that these norms necessarily belong to sources of lower rank than the Constitution, they are simply external sources to it. These external sources exert these effects insofar as they are explicitly referred to in the Constitution, therefore, the violation of the interposed norm constitutes an indirect violation of the constitutional norm (cf. G. ZAGREBELSKY, V. MARCENÒ, *Giustizia Costituzionale*, Bologna, Il Mulino, 2018, vol. I, p. 238 ff.). The interposed norms, to date, are the main vector for the unconstitutionality of national norms contrary to the ECHR, which has certainly expanded the protection of fundamental rights in our legal system. Therefore, the idea proposed by Mr. Costa is far-sighted, especially if one considers that in 1956 this theoretical scheme was applied exclusively in the context of legislative delegation (cf. Constitutional Court ruling no. 3/1957), but it was unthinkable to place it at the basis of a system of liability for obligations undertaken by the Italian State in international fora. In conclusion on this point, it may be observed that the scheme proposed by Mr Costa concerned the law implementing the Treaty, which acted only as a source from which the obligation placed on the State was derived, but played no role in the scheme; in fact, he argued that the law establishing ENEL was unconstitutional and not the law implementing the EEC Treaty.

[62] The referring court considered that the Italian legislature, with the law setting up ENEL, had also infringed other provisions of the EEC Treaty, such as: Article 93 concerning the prohibition of State aid; Article 53 for introducing new restrictions on freedom of establishment; and finally Article 37(2) for creating a new national monopoly.

In its reasoning, the Court completely departs from the interpretation of Article 11 of the Constitution suggested by the referring judge, arguing, to the contrary, that the constitutional provision in question had a purely permissive effect, meaning it prevented the attribution of privileged status to the source of domestic law reproducing the content of the founding Treaty.

Thus, the initial interpretation given by the Court regarding Article 11 of the Constitution is as follows: "the provision means that, when certain conditions are met, it is possible to conclude treaties that assume limitations of sovereignty, and it is allowed to implement them through ordinary law; however, this does not imply any deviation from the existing rules regarding the effectiveness in domestic law of the obligations assumed by the State in relations with other States, as Article 11 has not conferred on ordinary law, which makes the treaty enforceable, a higher effectiveness than that inherent to such a source of law"[63].

In other words, while it is true that, on the one hand, Article 11 "allows" the entry into the Italian legal system of international treaties through the corresponding ordinary implementing law, on the other hand, the mechanism of derogation of national rules that might be in conflict with the international source does not operate automatically. Such conflicts would continue to be resolved according to the chronological criterion set out in Article 15 of the Preliminary Provisions of the Italian Civil Code, which states that a later law repeals a prior one.

Therefore, by denying the "*super-legislative*" value to the implementing law of the Treaty, the Constitutional Court concluded its judgment by finding the issues raised groundless (including those related to Article 11), while the invitation from the

[63] Judgment No. 14/1964, ci., pt. 6 of the conclusion on point of Law. Similarly, Spanish Constitutional Tribunal, Declaración of 1 July 1992, No. 1, affirms that there are limits to the cessions of sovereignty based on Article 93 of the Spanish Constitution. In this decision, at pt. 8, we read: "[e]n virtud del art. 93 las Cortes Generales pueden, en suma, ceder o atribuir el ejercicio de "competencias derivadas de la Constitución", no disponer de la Constitución misma, contrariando, o permitiendo contrariar, sus determinaciones, pues, ni el poder de revisión constitucional es una "competencia" cuyo ejercicio fuera susceptible de cesión, ni la propia Constitución admite ser reformada por otro cauce que no sea el de su Título X, esto es, a través de los procedimientos y con las garantías allí establecidos y mediante la modificación expresa de su propio texto".

referring judge for the Court to approach the Court of Justice for alleged violations of the EEC Treaty remained unheard[64].

Recapping what has been said so far about the very early days of the Communities:

- The protection of fundamental rights was exclusively a matter for the States.

- The institutions of the Communities, therefore, declared themselves "incompetent" in this regard.

- In the event of a conflict between a Community rule and a subsequent national one, the latter prevailed.

As a result, legislative authority could be exercised by Member States even in cases where a European norm came into conflict with fundamental rights. This justifies the implicit "corrective" intervention by national legislators who, through "new" national norms, modified the previously introduced Community sources. The subsequent "compatibility review" of Community law, which could be entirely or partially repealed due to a conflict with the rights enshrined in the national Constitution, could also fall within the ambit of the exercise of discretionary powers.

However, we must consider the other side of the coin. The aforementioned "compatibility review" could, in essence, translate into the legitimization of national parliaments to intervene whenever they found the Community regulations "undesirable", thus resulting in a highly uneven application of Community law. In this perspective, there was no national or supranational body capable of verifying that the subsequent legislative intervention was exclusively safeguarding constitutional norms.

In this situation, the uniform application of Community law was compromised, leading to institutional stagnation exacerbated by the absence of any competence regarding economic and social rights that naturally connected to Community norms.

Ultimately, as long as the protection of fundamental rights remains exclusively within national borders, it will be very difficult to imagine a function of Article 11 of the Constitution other than a "permissive" one, and this is quite logical if one considers

[64] V. ONIDA, A cinquant'anni dalla sentenza «Costa/ENEL»: riflettendo sui rapporti fra ordinamento interno e ordinamento comunitario alla luce della giurisprudenza, in B. NASCIMBENE (a cura di), Costa/Enel: Corte costituzionale e Corte di Giustizia a confronto, cinquant'anni dopo, Milano, Giuffrè, 2012, p. 30.

that the Treaty system attributed competences in specific matters and did not provide for mechanisms to protect fundamental rights.

To conclude on this point. It is already clear from what has been said that two guiding lines emerge - on the one hand, the evolution of the sources of European law and, on the other, the development of protection of fundamental rights by the Union. By virtue of the strong links, they will be addressed in the remainder of the analysis hand in hand.

3. From an "International" Union of States to a "Supranational" Union for Citizens: The Principles that Shaped the EU New 'Structure': Direct Effects and Primacy of the EU Law

If the founding Treaties of the 1950s laid the foundations of the European Community, the first significant and concrete step in constructing the entire community structure can be traced back to the principles of direct effect and primacy, introduced by the Court of Justice, respectively, through the judgments in *Van Gend & Loos*[65] and *Costa v. ENEL*[66].

It is thanks to the emergence of these principles that the European legal system began to be perceived and considered as a sui generis legal order, increasingly becoming a unique entity in the landscape of international organizations through the establishment of an "autonomous" judicial system[67].

Indeed, while it is true that even classical international law now recognizes forms of individual responsibility (think of crimes against humanity and the entire field that has developed around international criminal law following the Nuremberg trials), it is still not straightforward for an individual to directly request the application of an international source before a court before such an "external" source has been ratified

[65] Court of Justice, judgment 5 february 1963, C-26/62, *Van Gend & Loos c. Amministrazione olandese delle imposte,* ECLI:EU:C:1963:1.

[66] Court of Justice, judgment 15 july 1964, C-6/64, *Flaminio Costa c. ENEL*, ECLI:EU:C:1964:66.

[67] A. AGUILAR CALAHORRO, *La dimensión constitutional del principio de primacía,* Madrid, Thomson Reuters Aranzardi, 2015, p. 68 ff.

by the State[68]. On the contrary, with the aforementioned principles, the idea emerges that the Union (or more precisely, Union law) addresses not only the Member States but also (and especially) European citizens, who become holders of new subjective legal positions, enforceable (most of the time)[69] directly before a court.

Building on these premises, the analysis will first start with the *Van Gend & Loos* judgment (§3.1.) and then delve into the *Costa v. Enel* case (§3.2.).

3.1. *Van Gend And Loos* (C-26/62) and the Principle of Direct Effects

In the *Van Gend & Loos* judgment, the Court of Justice was approached by way of a preliminary ruling to clarify whether Article 12 of the EEC Treaty[70] had "*internal*

[68] On this aspect see B. CONFORTI, *Diritto internazionale*, Napoli, Editoriale Scientifica, 2015, p. 354 ff. The international (non-customary) norm after its formal introduction into the national legal system becomes a source of rights and obligations both for state bodies and for all public or private subjects (p. 339). Indeed, case law is unanimous in considering that in the absence of the enforcement order, the rule has no value. However, the author considers that a treaty norm that has not yet entered into force nevertheless has an 'auxiliary function at the interpretative level'. Lastly, it is noted that the Court of Cassation in the Englaro case (sentence no. 21748 of 16 October 2007) took into account in its decision the Oviedo Convention, which at the time (actually still not) had not been ratified by the Italian State (p. 357).

[69] This applies, in particular, to the legal relationships that arise following the entry into force of a European regulation, by definition, endowed with direct applicability, and to the so-called self-executing rules of directives, capable of producing immediate effects in national courts, although not yet formally incorporated into national legislation once the transposition deadline imposed by the directive has expired.

[70] In 1960, the Dutch company Van Gend & Loos imported a consignment of urea formaldehyde (an adhesive varnish for wood panels) from the Federal Republic of Germany. For this importation, a customs duty of 8% ad valorem (i.e. calculated on the basis of the quantity of goods purchased) was imposed instead of the 3% duty that generally applied to that type of substance under the new EU regulations. Thus, the company took legal action to ensure that the mark-up applied to it was contrary to Article 12 of the TCEE (later Article 25 of the TEC and now Article 30 of the TFEU). The latter provision stated (and still states today) that "[t]he Member States shall refrain from introducing between themselves new customs duties on imports and exports or charges having equivalent effect and from increasing those which they apply in their mutual trade relations." The reference for a preliminary ruling

effects"[71] in addition to its effects on the Member States, or as stated in the first preliminary question, "whether citizens of the Member States can directly derive rights from the said article that the judge is obliged to protect"[72].

In response to this interpretative doubt, the Court affirms this possibility, and below, we will attempt to reconstruct the motivations underlying this historic decision.

First and foremost, the Luxembourg Court believes that to examine whether the provisions of the Treaties have such value "one must consider their spirit, structure, and wording" [73].

In this passage, the Court introduces the element of teleological interpretation of the Treaties, making a methodological note of considerable importance, which constitutes an absolute novelty. Therefore, in the interpretative process, the European Judge must not consider the Treaty provisions in isolation, basing the interpretation solely on the literal wording, but must seek to place them in the overall context in order to emphasize the purposes that led to the conclusion of the Treaty.

Following this pattern, the Court highlights, first of all, that the purpose of the EEC Treaty was precisely to establish "a common market that directly affects the subjects of the Community"[74].

It follows that the original intention of the Treaties was not only to bind the Member States reciprocally but also to establish "common" bodies capable of exercising the sovereign powers conferred on them both in relation to the Member States and their citizens. In accordance with this assumption, the Court values the preamble of the EEC Treaty, where it sets among its core objectives the achievement of "*an ever closer union among the peoples*" as well as among the governments of the Member States.

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was formulated on the basis of two questions: the first question of interpretation as to whether it was possible for Community nationals themselves to derive directly from the 'internal effects' of Article 12 TCEE and the second question of validity, posed in the alternative, if the answer was in the affirmative, as to whether the increase imposed was in conformity with Article 12 TCEE.

[71] On the genesis and evolution of the institution, see D. GALLO, L'efficacia diretta del diritto dell'Unione Europea negli ordinamenti nazionale: evoluzione di una dottrina ancora controversa, Milano, Giuffrè, 2018.

[72] Judgment *Van Gend & Loos*, cit., fist preliminary question.

[73] Judgment *Van Gend & Loos*, cit., sez. II, lett. B), conclusion on point of law.

[74] Ibidem.

In these terms, the Court of Justice coins the famous phrase "a legal system of a new kind", asserting that this new legal order falls "within the field of international law, in favor of which the States have, even if in limited areas, renounced their sovereign powers, an order that recognizes as subjects, not only the Member States but also their citizens. Therefore – the Court continues – EU law, independently of the rules issued by the Member States, in the same way it imposes obligations on individuals, confers subjective rights upon them. It must be assumed that these exist not only in cases where the Treaty expressly mentions them, but also as a counterpart to specific obligations imposed by the Treaty on individuals, Member States, or Community institutions"[75].

In other words, while on the one hand, the Court asserts more generally that citizens are recipients of rights and obligations, on the other hand, it identifies the precise moment when these obligations-rights come into existence. These individual rights can be considered as a "*counterpart*" to specific obligations imposed on the Member States or Community institutions by the Treaty, so that a clear and unconditional prohibition by the State corresponds to an individual's right to its observance that can be invoked before a national court[76].

In other words, the "direct effect", as defined by Tesauro[77], "resides in the ability of the Community norm to create rights and obligations for individuals, both natural and legal persons, without the State exercising the function of a *barrier*, which consists of initiating some formal procedure to transfer to individuals the obligations or rights outlined by norms that are 'external' to the national legal system".

The absence of this "barrier function" translates practically into the possibility for individual citizens to directly approach a national court to assert their "Community" claims.

The definition above highlights another important aspect, which is the characteristics that the Community norm must possess to directly produce rights and/or obligations.

[75] *Ibidem,* emphasis added.

[76] G. TESAURO, *Diritto dell'Unione europea*, Padova, CEDAM, 2012, p. 167.

[77] G. TESAURO, loc. cit., p. 165.

First of all, direct effect qualifies as an intrinsic quality of the Community norm regardless of its qualification and placement in the EU legal sources system. Therefore, direct effect can exist with a provision of the Treaty, a regulation, or even a directive. The only relevant aspect is the ability of the norm to express a clear, precise, and unconditional precept, so that it can be argued, beyond any doubt, that there is no discretion left to national authorities (cf. "absence of the barrier function") in the ways of incorporating European rules (this is the case of self-executing provisions of directives) that, once the deadline set by the directive has passed, can have legal effects.

Furthermore, the production of direct effects is not hindered even in cases where the European norm is not explicitly addressed to individuals but to the Member States, to which is imposed "an obligation to do or not to do, but compliance with which is connected in any case with an individual right"[78].

Another aspect of particular interest is related to the ways in which "internal effects" of the European norm are realized in the individual's sphere, namely, when the individual can benefit from the European norm endowed with direct effects[79].

[78] G. TESAURO, loc. cit., p. 166. The author also points out that this was the case in the Van Gend & Loos case. The then Article 12 TECE placed an obligation on the Member States to refrain from introducing new customs duties; since this was a 'do nothing' obligation, it left little room for manoeuvre for the Dutch State, which simply had to comply with the Community obligation, because by not doing so it 'betrayed' first and foremost the expectations created in its citizens on the basis of the EEC Treaty.

Always remaining on the subject of rights created for individuals, the Court of Justice in 2004 recognised the so-called triangular direct effect, i.e. when the direct effect of self-executing rules of a directive, which has not been transposed, can be invoked in court, even in the event that the application of such a rule may affect the rights of third parties; thus Court of Justice, judgment 7 January 2004, C-201/02, *Delena Wells contro Secretary of State for Transport, Local Government and the Regions*, ECLI:EU:C:2004:12, on the same way, later, see judgment 17 july 2008, C-152/07 e C-154/07, *Arcor e a.*, ECLI:EU:C:2008:426. On the topic, see A. AGUILAR CALAHORRO, *La dimensión constitutional del principio de primacía,* op. cit., p. 223 ff. A. IERMANO, *L'effetto diretto nelle situazioni triangolari e i relativi "limiti" nei rapporti orizzontali*, in *Freedom, Security & Justice: European Legal Studies*, n. 1, 2018, p. 27 ff.

[79] The effects leading to non-application may also be indirect or incidental, i.e. when the rule of the directive, not yet transposed, does not immediately give rise to the non-application of the national rule, but allows the individual to invoke against the State a procedural obligation, the fulfilment of which prevents the application of the conflicting national rule. See Court of Justice, judgment 30 April 1996, C-194/94, *CIA Security International SA contro Signalson SA e Securitel SPRL*, ECLI:EU:C:1996:172, su cui, A. AGUILAR CALAHORRO, loc. cit., p. 217 ff. Recently, on the same way, judgment 19 december 2019, C-390/18, *Airbnb Ireland*, ECLI:EU:C:2019:1112, for a comment see G.

For this reasoning, it will be relevant to distinguish the type of source to which the European norm refers, since it will be necessary to understand the mode of its application in the context of the proceedings before a national court.

Specifically, in the well-established development of the principle of direct effect, European norms are distinguished based on whether direct effects occur in a *horizontal* or *vertical* dimension.

Horizontal effects are those that occur in relations between private citizens. This can happen in the presence of clear, precise, and unconditional provisions of the founding Treaties (today, the Treaty on European Union and the Treaty on the Functioning of the European Union), the Charter of Fundamental Rights of the European Union, and Regulations. The reason to produce these effects, which we could define as automatic, is that, for these Community norms, "any further measure is superfluous and cannot in any way condition their full effectiveness"[80]. Excluded from this discourse are norms from the three EU law sources mentioned above that are not clear, precise, and unconditional.

Vertical effects concern the relationship between a Member State and the citizen. Therefore, in this case, to invoke the directly effective norm, one of the parties involved in the dispute must be the state entity[81]. Some specific rules of directives produce these effects: generally, these sources, by their nature, do not meet the requirements of precision, clarity, and determinacy, as they set objectives that the Member State must achieve through discretionary legislative choices. For this reason, when dealing with a directive, an additional act by the addressee State is always necessary, the so-called transposition act.

FEDELE, *Sugli effetti della violazione di obblighi procedurali sostanziali: in margine alla sentenza* Airbnb, in *European Papers*, Vol. 5, No. 1, 2020, p. 433 ff.

[80] G. TESAURO, loc. cit., p. 170. Con la precisazione che l'Autore riferisce le parole riportate ai regolamenti, ma egli stesso riferisce che le norme dei regolamenti dotati di effetti diretti soggiacciono al medesimo trattamento delle norme di rango primario dotate, anch'esse, di effetto diretto.

[81] Over the years, EU case law has broadened the notion of the "State" to include any "body, regardless of its legal form, which has been entrusted by an act of public authority with the provision, under the supervision of public authority, of a service in the public interest and which has for that purpose powers which exceed the limits of those resulting from the rules which apply to relations between individuals" (Court of Justice, judgment 12 July 1990, C-188/89, *Foster e a.,* ECLI:EU:C:1990:313, pt. 20).

The absence of direct effects in traditional directives is justified by the fact that "only from the moment of correct transposition will the individual be able to adequately and with due certainty know the scope of the rights conferred upon him by the directive and thus, ultimately, be in a position to assess whether to resort to a judge"[82].

Often, in practice, norms of directives that possess the requirements for direct effect have been found. This can happen when "they have a prescriptive content that is sufficiently clear and precise, such that it is not conditioned – if not formally and for the sake of certainty – by the issuance of further acts"[83].

In such situations, the immediate effectiveness of the Community norm can be recognized in relations between the State and the individual citizen, provided that the deadline for the adoption of the transposition act has definitively expired.

According to the Court of Justice[84], this differentiated treatment for these specific provisions of directives finds its justifying reason not so much in the intrinsic characteristics of the act but rather in the need to prevent the State, by taking advantage of its non-compliance, from preventing individuals from benefiting from the Community rules that do not require its substantive intervention. It should always be considered that the aforementioned norms have been incorrectly transposed or that the deadline for their transposition has expired.

The legal basis to which these effects are linked for these specific legal norms is found in Article 4(3) of the Treaty on European Union (TEU), which enunciates the principle of sincere cooperation[85].

However, the case law of the Court of Justice has excluded that detailed provisions of directives can still have horizontal effects that involve private parties (whether individuals or legal entities)[86].

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[82] G. TESAURO, loc. cit., p. 177-178.

[83] G. TESAURO, loc. cit., p. 173.

[84] Ex multis, Court of Justice, judgment 26 February 1986, C-152/84, M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority, ECLI:EU:C:1986:84.

[85] Court of Justice, judgment 5 april 1978, C-148/78, *Ratti*, ECLI:EU:C:1979:110, see pt. 22 of the conclusion on point of law.

[86] Court of Justice, judgment 14 july 1994, C-91/92, *Faccini Dori c. Recreb*, ECLI:EU:C:1994:292., However, by way of exception, the Court of Justice has provided an exception for the principle of non-discrimination between men and women (Art. 157 TFEU) by applying the

In the latter case, the entity that cannot benefit from the detailed Community norm in a dispute with another party can seek compensation from its State, which, by delaying the implementation of Community discipline, has implicitly caused it harm[87].

In conclusion, since its first ruling in 1963, the Court has had the opportunity to apply the principle of direct effect to various sources of Community law, and as seen, the result of this application has produced different outcomes that will deeply impact the relationship with legal sources within the Member States. Furthermore, it should be noted that precisely because of the principle of direct effects, citizens become holders of subjective rights, and as such, they become *subjects* of European law, and in doing so, the European legal system abandons its international character to assume a *supranational* one.

3.2. *Costa V. Enel* (C-6/64) and the Principle of the Primacy of the EU Law

Through the principle of direct effect, the typicality of a "community of law"[88] began to develop, which, through the law produced, is capable of creating specific legal situations directly for individual individuals.

horizontal effects indiscriminately also to a directive (the first judgement in this sense is the judgement 4 June 1992, C-360/90, *Bötel,* ECLI:EU:C:1992:246).

[87] Court of Justice, judgment 9 november 1995, C-479/93, *Francovich c. Italia*, ECLI:EU:C:1995:372.

[88] The expression was coined by Walter Hallstein, the first President of the European Commission (1958-1957): W. HALLSTEIN, *Die EWG—Eine Rechtsgemeinschaft. Rede anlässlich der Ehrenpromotion (Universität Padua, 12. März 1962)*, in *Europäische Reden*, 1979, p. 341 ff., ove affervamava che *"[t]he European Economic Community is a community of law ... because it serves to realize the idea of law"*. Traduzione tratta da T. VON DANWITZ, *The Rule of Law in the Recent Jurisprudence of the ECJ,* in *Fordham International Law Journal,* Vol. 37, Issue 5, 2014, p. 1313.

However, this new principle risked remaining incomplete if its resistance to national legislation was not protected. To put it metaphorically, a piece of the puzzle was missing to complete this first significant construction of the European project, which, if not inserted, risked collapsing before it was even completed.

In this scenario, the "principle of supremacy" emerges with the *Costa v. ENEL* judgment (C-6/64).

The main actor in the case was Mr. Costa, a shareholder of Edisonvolta, a company that, before the nationalization of ENEL, was responsible for the distribution of electricity and had ceased its activities following the 1962 law[89].

Mr. Costa received a bill (of approximately 1,925 lire) from the new provider ENEL and decided not to pay it. As a result, he received a payment injunction, to which he objected by filing a complaint before the conciliation judge in Milan (Judge Carones).

Before this judicial body, Mr. Costa requested that a question of constitutional illegitimacy be raised, and the conciliation judge, considering the questions of constitutional illegitimacy raised to be relevant and not manifestly unfounded, decided, with order no. 192 of 1963[90], to refer the case to the Constitutional Court.

Subsequently, even before the constitutional scrutiny was completed, Mr. Costa received another payment injunction for another unpaid bill, to which he objected, thus generating another pending case before another Milanese Conciliation Judge (Judge Fabbri).

On January 16, 1964, another act of referral was issued[91], which simultaneously initiated a referral to the Court of Justice and a new referral to the Constitutional Court. This latter referral was based on constitutional parameters completely different from those invoked in the first order of referral.

A few months after this second referral, the Constitutional Court issued the reasons for the unfoundedness of the question of constitutional legitimacy (judgment no. 14 of 1964, already mentioned), as raised by Conciliation Judge Carones, while the referrals initiated by Conciliation Judge Fabbri would find a resolution at the

[89] For a detailed reconstruction of the facts of the case before the Court of Milan, see B. GABALDI VANNOLI, *La «storia» della causa*, in B. NASCIMBENE (ed.), op. cit., p. 81 ff.

[90] Giudice Conciliatore di Milano, referral order 10 semptember 1963, n. 192 (judge Carones).

[91] Giudice Conciliatore di Milano, referral order 16 january 1964, n. 122 (judge Fabbri).

European level in July 1964 with the *Costa v. ENEL*[92] judgment and, at the constitutional level, a second rejection for unfoundedness in June 1965, with judgment no. 66 of 1965[93].

The claims underlying the referrals of the second judge *a quo* were not entirely coincident.

In the first order of referral[94], the Constitutional Court was asked to account for potential violations of the EEC Treaty committed with the nationalization law of electric energy, not by requesting its immediate unconstitutionality declaration but through a preliminary reference promoted by the same Constitutional Judge.

The main reason, according to the idea of the (first) conciliation judge, was to be found in Article 11 of the Constitution, which, by allowing the entry of Community Treaties into our legal system, made it possible to "sanction" the legislator whenever it violated the Treaty's provisions[95].

While the second act of referral made a clear choice: on the one hand, it referred doubts about the 1962 law's compliance with internal parameters to the Constitutional Court (here, the parameter under Article 11 of the Constitution disappeared). On the other hand, it asked the Court of Justice to provide the correct interpretation of the Treaty articles suspected of being violated.

Regarding this aspect, the preliminary referral order specified that "when a dispute concerns the validity and interpretation of acts carried out by the institutions of a Member State in relation to the provisions of the Treaty, a dispute subject to proceedings pending before a national court (as in the case at issue) against whose decisions there is no possibility of internal judicial appeal [...] such jurisdiction is required to refer the matter to the Court of Justice of the EEC, so that it may declare whether there has been a violation of the Treaty articles by the aforementioned Italian law of December 6, 1962, No. 1643"[96].

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[92] Judgment *Costa c. ENEL*, cit.

[93] Italian Constitutional Court, judgment 23 june 1965, no. 66. In this case, the Constitutional Court was seized on the basis of entirely different parameters than those covered by Judgment No. 14 of 1964, such as Articles 81, 47, 102, 113, 25 and 76 of the Constitution. Also in this case, however, the Court rejected the question as unfounded.

[94] Referrarl order no. 192/1963, cit.

[95] Cfr. judgement n. 14/1964, 54° paragraph, cit.

[96] Referrarl order n. 122/1964, cit.

In other words, the substantial difference between the referral orders of the two conciliation judges lay in the fact that only the second judge believed that there was no internal jurisdiction capable of correctly interpreting the provisions of the Community Treaty and ascertaining potential violations by national legislation. The only jurisdiction that could take on this "interpretative task" was the Court of Justice, solicited through the preliminary referral.

In these terms, one can explain why the second judge decided to directly approach the Court of Justice, without waiting for the Constitutional Court to make this referral, as the first conciliation judge had hoped.

Furthermore, the observations of Conciliation Judge Fabbri regarding the type of judgment intended to be established before the Community judge allow us to distinguish between the preliminary referral and the constitutional referral.

In particular, he argues that the referral to the Court of Justice, based on Article 177 letter a) of the EEC Treaty, the so-called preliminary reference for interpretation, allows the Community judge (only) to "derive from the letter and spirit of the Treaty the meaning of Community provisions". Once this interpretation is made, it is then the responsibility of the referring judge to apply the interpreted provisions to the specific case.

Therefore, it seems that the second conciliation judge, at least in theory, kept the two preliminary tools distinct: with the "constitutional" one, he aimed to obtain the declaration of unconstitutionality of the ENEL founding law for the violation of certain constitutional parameters, while with the "Community" one, he was interested in knowing only the interpretation by the Community judge of certain provisions of the EEC Treaty, in order to draw its consequences (not yet well defined) in his main judgment.

However, this "distinction" did not convince the Italian government, which, on the contrary, argued that the preliminary referral was also aimed, like the one to the Constitutional Court, at obtaining a judgment of legality regarding the ENEL founding law.

This argument was based on the conclusions set out by the conciliation judge in his referral order, which stated "Considering Article 177 of the Treaty establishing the EEC of March 25, 1957, incorporated into the Italian legal system by Law No. 1203

of October 14, 1957, and considering that Law No. 1643 of December 6, 1962 [... and the related ministerial decrees] violate Articles 102, 93, 53, and 37 of the Treaty, suspends the judgment [...]"[97].

This argument convinced the Italian government to object to the admissibility of the referral to Luxembourg, arguing that the referring judge had not merely requested the interpretation of certain provisions of the Treaty, but that the subject of his request was the "preliminary investigation of illegitimacy" of the ENEL founding law "in relation to" the provisions of the EEC Treaty.

In other words, from the government's perspective, it was as if the conciliation judge had asked the Court of Justice for what he was simultaneously requesting from the Constitutional Court, namely a declaration of unconstitutionality of the 1962 law, but this time invoking its inconsistency with Community parameters.

The government concluded by asserting that such an intent – that is, the declaration of the internal legislative act's inconsistency with the provisions of the Treaty – could only be sought in an infringement procedure under Article 169 of the EEC Treaty.

The Court of Justice, before providing its detailed interpretation of the Treaty articles mentioned in the referral, clarified the "application of Article 177", in order to explain the occasions when the preliminary referral tool should be used.

The Court of the European Union, therefore, responded to the above-mentioned objection and, although not declaring it admissible, addressed it in its reasoning.

It stated that its task, under Article 177 letter a), was to interpret the Treaty, and therefore, it could neither apply the Treaty rules to a specific case nor assess the conformity of national law with Community law; the latter operation, on the contrary, could be carried out in an infringement procedure.

Therefore, the Court of Justice concluded on this point by stating that "if the referral decision is formulated imprecisely, it can only infer questions concerning the interpretation of the Treaty", and that, for the purposes of deciding at the Community

[97] *Ibidem,* emphasis added.

level, “the motives and objectives” that led the national judge to make the referral are superfluous[98].

Subsequently, the Court of Justice of the European Economic Community, in the opening lines of the Legal Background section, defined its competence in the context of preliminary reference for interpretation, stating that its task does not concern the compatibility of the Treaty with national law but instead involves interpreting the Treaty provisions, “taking into account the legal elements presented by the conciliation judge”.

The Court continued its reasoning by addressing another crucial aspect related to the EEC Treaty and ordinary judges. “The EEC Treaty has established its own legal system, *integrated* into the legal systems of the Member States upon the entry into force of the Treaty, *and national judges are bound to observe it*”.

This result was achieved through the transfer of portions of sovereignty by the Member States in favor of the Community, in order to create “a system of law binding on their citizens and themselves”.

These considerations seem to echo the idea of a “new type of legal system” from the *Van Gend & Loos* judgment.

However, now, the Court realizes the need to add a corollary, the *principle of supremacy of the European law* over national ones.

“The integration of rules stemming from Community sources into the legal system of each Member State, and more generally, the spirit and terms of the Treaty, have the corollary of the *impossibility for States to prevail*, against a legal system accepted by them on condition of reciprocity, *with any additional unilateral measure, which, therefore, cannot be opposed to the common order*. *If the effectiveness of Community law varied from one state to another depending on subsequent domestic laws* [...]. The transfer made by the States in favor of the Community legal system of

[98]Costa v. ENEL, cit., conclusion on point of law. In other words, the Court tries to “save” the question as much as possible in order to be able to judge the case submitted to its attention. Moreover, it is interesting to note the choice by two common judges, moreover belonging to the same office, to resolve the same dispute with different “instruments”. On this point, see B. GABALDI VANNOLI, loc. cit., p. 84. The second trial on the merits ends with the acceptance of Mr Costa’s claims, while the trial instituted before the first court (the outcome of which the author cited does not expressly mention) is supposed to have been lost by the appellant, since it followed the Constitutional Court’s pronouncement of non-foundation.

rights and obligations implies a *definitive limitation* of their sovereign rights, in the face of which any further unilateral act incompatible with the Community system would be entirely ineffective. Article 177 must, therefore, be applied, notwithstanding any national law, whenever a question of Treaty interpretation arises"[99].

According to scholars[100], these words constitute "the peremptory response" of the Court of Justice to the Constitutional Court. Although not explicitly mentioned by the Community Judge, the latter was almost certainly the recipient of these "few categorical words" aimed at rejecting the conclusions reached in its previous judgment no. 14 just a few months earlier.

However, it is necessary, as a preliminary step, to make a clarification aimed at specifying (and perhaps also limiting) the expansive scope of the statement made by the Court of Justice just mentioned.

The intention was not to outline a system in which Member States were absolutely prohibited from making derogations to the Treaties; on the contrary, as emerges in the subsequent reasoning, specific provisions within the Treaties allowed Member States either to unilaterally modify the Community rules or to request authorization to apply specific derogations. However, what a Member State could not do was simply derogate from Community law through subsequent domestic legislation, as this would fragment any attempt at uniform application of Community law.

In other words, the greatest risk identified by the Court of Justice concerned the integrity of the entire Community system, particularly with regard to the relationship between domestic and Community rules.

By not recognizing any exceptions to the principle "*lex posterior derogat priori*", the Constitutional Court effectively denied the peculiarities that were emerging in the European context, especially in relation to the new type of legal system that the Community aspired to build.

[99] Judgment *Costa c. ENEL,* cit., conclusion on point of law, emphasis added.

[100] R. LUZZATTO, *Il caso Costa/Enel cinquant'anni dopo*, in B. NASCIMBENE (ed.), op. cit., p. 21.

In this perspective, Community Treaties were equated with ordinary international treaties, which could only bind the contracting States with rights and obligations through domestic implementing legislation[101].

Conversely, the Court of Justice argued that exceptions could be made to the sovereign powers of the States (voluntarily transferred), based on the fact that the Community legal order was not only directed at Member States but also at their citizens.

What was just stated constituted the "logical and legal basis" on which the principle of direct effect emerged but also formed the basis of the *principle of supremacy*[102].

The disparities that could arise among citizens of Member States were well-founded; indeed, the rights of these citizens were "subordinates" to any subsequent modifications by their respective countries, which could render uncertain the application of the Community norm intended to harmonize the legal systems of the adhering countries.

Therefore, the *principle of supremacy* was born with the aim of preventing Member States from freely amending the law established by the Community through subsequent laws; only in this way could uniformity and effectiveness be ensured[103].

Consequently, a subsequent conflicting internal act with Community law – as argued by the Court of Justice in *Costa v. ENEL* – would be "*entirely devoid of effectiveness*".

Furthermore, as evidence of the strong link between the principle of supremacy and that of direct effect, the Court, in its 1964 judgment, clarified the purpose of its interpretation.

The Court of Justice, in interpreting the Treaty provision, specified that it was intended to have direct effects on individuals, and in the event that such scrutiny produced a positive response, the referring judge "must" protect the individual's position, who has turned to him for justice.

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[101] R. LUZZATTO, loc. cit., p. 20.

[102] G. TESAURO, *Costa/ENEL: qualche riflessione col senno di oggi*, in B. NASCIMBENE (ed.), op. cit., p. 57.

[103] G. TESAURO, loc. cit., p. 58.

The national judge would arrive at this result by declaring the internal norm "entirely devoid of effectiveness" and thus not applying that norm to the specific case under consideration[104].

In conclusion, it should be noted how this initial contrast between the two jurisdictions was clear, and the reasons developed both on a theoretical level, through different underlying ideas, and on a practical level, concerning the different outcomes reached by the two Courts[105].

4. The Protection of Fundamental Rights thought the General Legal Principles of European Community

4.1. The Emergence of Interest in the Protection of Fundamental Rights: The Leading Case *Stauder* (C-29/69)

In the late 1960s, the Court of Justice changed its jurisprudence on fundamental rights, thus overcoming the initial lack of competence outlined in its early rulings. The invention of a composite and varied European system of fundamental rights began with the judgment in the Stauder case, decided on November 12, 1969.

The preliminary question was raised by the Administrative Court (*Verwaltungsgericht*) of Stuttgart and concerned a decision[106] of the Commission of the European Economic Communities authorizing all Member States to distribute vouchers for the purchase of butter to certain categories of consumers (referred to as "protected"), at a greatly reduced cost compared to the normal market price of butter.

[104] "The questions raised by the conciliating judge with regard to Articles 102, 93, 53 and 37 are aimed primarily at ascertaining whether those provisions have immediate effect by conferring on individuals rights which the national courts must protect and, if so, what is their meaning" (Costa v. ENEL judgment). The Court specifically declared that Articles 102 and 93 are not directly effective, whereas Articles 53 and 37 are. The conciliating judge in rescission will uphold Mr Costa's claims on the basis of the EEC Treaty rules with direct effect .

[105] G. TESAURO, *Diritto dell'Unione Europea*, op cit., p. 193.

[106] Decision 69/71/CEE del 12 february 1969, in OJ 1969, L 52/9.

During the transposition of the decision by the Member States, a linguistic translation problem related to a term in the Community act emerged, making it impossible to determine with certainty what should be understood by an "individualized" voucher. More precisely, it was not clear whether the individuality of the voucher required the specific inclusion of the name of the beneficiary.

The German and Dutch versions, unlike the Italian and French ones[107], translated the ambiguous expression as "voucher indicating the name", requiring the name of the beneficiary to be present on the voucher, or else it would be considered unusable.

The main applicant in the case was Mr. *Stauder*, a war invalid veteran, who was entitled to the benefits resulting from the Community decision. However, he believed that the requirement regarding the specification of the name on each individual voucher, imposed by German Law No. 52 of March 15, 1969, which incorporated the Community decision into German law, violated his fundamental rights as guaranteed by the Basic Law of the Federal Republic of Germany under Articles 1 and 3.

For this reason, in April 1969, he filed a constitutional complaint with the *Bundesverfassungsgericht* to have the constitutionality of Law No. 52/1969 established. Shortly thereafter, he appealed to the Administrative Court of Stuttgart to obtain a provisional interim order suspending the aforementioned requirement.

During the course of the interim proceedings, the administrative judge decided to refer a preliminary question of validity to the Court of Justice of the EEC, formulated as follows: "whether it is compatible with the general principles of current Community law for Decision No 69/71/EEC of the Commission of the European Communities of February 12, 1969, to provide that, for the supply of butter at a reduced price to beneficiaries of certain forms of public assistance, the buyer must declare his name to the seller".

[107] In the French version, the name was not required on the voucher, but the requirement of individuality was fulfilled by the simple fact that the name had to appear on the card from which the vouchers were detached. This was to avoid the beneficiary being forced to reveal his identity to the seller. This problem of interpretation had the substantial effect of applying the same rule differently in the different Member States and the Commission, in order to remedy these asymmetries, intervened, at a date subsequent to the reference for a preliminary ruling, by amending its previous decision and essentially extending the French model to all the States of the Community.

As effectively emphasized by Advocate General *Roemer*[108], the question posed by the referring judge in Stuttgart did not concern the compatibility of the Community decision with the fundamental rights of the German Constitutional Charter, precisely to avoid it being declared inadmissible by the Court of Justice (cf. *Stork* case law).

The referring judge, convinced that the Community act violated Mr. Stauder's rights, "considered it contrary to the German concept of public assistance and the German system for the protection of fundamental rights, which must, at least in part, also be guaranteed to the same extent by the Community bodies through *superior Community rules*".[109] Based on this assumption, the referring judge asked the Court of Justice whether there were grounds to declare non-conformity with the "general principles of current Community law", which, in the opinion of the referring judge, constituted a source of Community law different from those previously known.

This specification helps to understand why the administrative court opted for a preliminary reference on validity rather than interpretation.

On the one hand, the question did not aim to seek the correct interpretation of the Community decision, but on the other hand, it aimed to discover whether "internal" fundamental rights could acquire some significance within the Community legal system through "*higher-ranking Community norms*". The latter was the true intention that justified the referring judge's choice to request the validity of the Community decision based on the general legal principles of the community (a European source that had only been hinted at until that moment)[110].

The European judge's legal response will capture (perhaps only partially) the insightful intuitions of the referring administrative judge.

Firstly, the Court of Luxembourg affirmed the need for uniformity in the application and interpretation of EEC law, particularly in the specific case, emphasizing that a decision addressed to all Member States could not allow for different interpretations and applications by each recipient. This was especially

[108]On this point, certain remarks made by Advocate General Roemer, who deposited his observations on the case in question on 29 October 1969, have been taken up. On this point, certain remarks made by Advocate General Roemer, who deposited his observations on the case in question on 29 October 1969, have been taken up.

[109] Court of Justice, judgment 12 november 1969, C-29/69, *Stauder c. città di Ulm-Sozialamt*, ECLI:EU:C:1969:57, pt. 1 della parte *In Fatto*.

[110] Cfr. Judgment *Geitling,* cit.

important when differentiation would have resulted in a different and more burdensome obligation in certain Member States.

For the reason just expressed, the Court concluded that "the provision in question must be interpreted to mean that it does not impose - albeit without prohibiting it - the nominative identification of the beneficiary. [...] Interpreted in this way, the provision in question does not reveal any element that could prejudice the fundamental rights of the person, which are part of the general principles of Community law, the observance of which the Court guarantees"[111].

The Court responded to the applicant's claim in a positive sense; however, the preliminary question, posed in terms of validity, was transformed into an interpretative issue, which was resolved by identifying the only norm capable of uniform application by the Member States.

This procedural choice allowed the Court of Justice of Luxembourg to avoid the scrutiny of compatibility between the decision's norm, the subject of the reference, and the general principles.

Apart from this procedural choice, the *obiter dictum* included in the concluding lines is of great importance but leaves certain doubts unresolved:

- What rank should these new general principles assume among the sources of Community law;

- To what extent must the fundamental rights guaranteed by the Constitutions of the Member States be taken into account in composing this new source of Community law, as it appears that all fundamental rights of the Member States may be automatically included;

- Or, since competence in matters of general principles belongs to the Court of Justice, will it also be responsible for selecting the rights from national Constitutions;

[111] Judgment *Stauder*, cit., pt. 7, emphasis added. The literature on general principles of EU law is particularly wide, above all, see A. PIZZORUSSO, *Il patrimonio costituzionale europeo*, Bologna, Il Mulino, 2003, p. 7 ff.; A. MASSERA, *I principi generali,* in G.F. CARTEI, M. P. CHITI, D.U.GALETTA, G. GRECO (a cura di), *Trattato di Diritto Amministrativo europeo*, Parte Generale, Milano, Giuffrè, 2007, p. 285 ff.; C. AMALFITANO, *General Principles of EU Law and the Protection of Fundamental Rights*, Cheltenham, Edward Elgar, 2018; E. CANNIZZARO, *Il diritto dell'integrazione europea,* op. cit., p. 237 ff.; A. AGUILAR CALAHORRO, *Naturaleza y eficacia de la Carta de Derechos Fundamentales de la Union Europea,* Madrid, Centro de Estudios Políticos y Constitucionales, 2021, p. 71 ff.

in other words, what will be the role of domestic constitutional courts in this process of selecting fundamental rights that will form part of the general principles.

These doubts will be resolved by the Court of Justice in its subsequent rulings, but it is interesting to note the definition of general principles of Community law provided by Advocate General *Roemer* in his conclusions to the case analyzed here.

He argued that these principles should be "derived through a comparative examination of the value parameters of domestic constitutional law, which should be considered an integral, unwritten part of Community law when enacting secondary Community law"[112].

In conclusion, this initial definition highlights innovative aspects, such as the ascribing of axiological value to domestic constitutional parameters that extend their relevance beyond the original legal order. Furthermore, these constitutional values contribute to creating a new, unwritten law that must be respected by derivative Community law. From this relationship between Community sources, the legal category of "*common constitutional traditions*" will develop, assuming particular relevance in defining European fundamental rights.

4.2. Towards the Enucleation of European Fundamental Rights: *Internationale Handelsgesellschaft* (C-11/70), *Nold* (C-4/73), and the Following Judgments

The Court of Justice soon revisited the issue of the general principles of Community law in order to provide further clarification to the categorical (yet highly significant) statement made in the *Stauder* judgment.

The first opportunity came just a year later with the *Internationale Handelsgesellschaft* case[113].

[112] Opinion of Advocate General Roemer on the Stauder case (C-29/69), delivered on 29 October 1969, pt. 1.

[113] Court of Justice, judgment 17 december 1970, C-11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114.

The main legal dispute in this case was very similar to the one addressed in the *Stauder* judgment. In this case, the administrative judge in Frankfurt doubted the compatibility of the export license regulations and related sanctions with the principles of freedom of action, economic freedom, and proportionality provided in Articles 2 and 14 of the Basic Law.

In other words, "according to the referring judge, the system of deposits would be in conflict with certain fundamental principles of national constitutional law that should be preserved in the Community legal system, so that *the primacy of supranational law would be reduced in the face of the principles of the Basic Law*"[114].

This consideration, especially when read in light of the Stauder judgment, did not appear entirely unfounded. In fact, the Community judge in the cited judgment incorporated fundamental (constitutional) rights into the category of general principles of Community law[115].

However, the logical framework proposed by the referring judge was not fully embraced by Advocate General *De Lamothe*, who, in his conclusions[116], suggested a different approach to the Court, although he eventually arrived at the same conclusions as the referring judge, namely the invalidity of the contested regulations due to their conflict with fundamental principles.

The Advocate General's analysis began with the resolution of an open question in the Stauder judgment, the definition of which represented a preliminary issue: what was the "source of law" that identified the fundamental principle to be opposed in assessing the validity of the Community act?

For the referring judge, the source was the same Basic Law of the Federal Republic of Germany, but in the Advocate General's view, this consideration would be an error because the validity of a Community act "can only be evaluated in the light of

[114] Judgment Internationale Handelsgesellschaft, cit., pt. 2.

[115] This topic has been raised by the political Institution. As observed by G. DE BÚRCA, *The evolution of EU Human Rights Law*, in G. DE BÚRCA, P. CRAIG (a cura di), *The evolution of EU Law*, Oxford, Oxford University Press, 2021, p. 489, "already some years before the ECJ's decision in Stauder, the President of the Commission had been arguing openly for an understanding of fundamental human rights as part of the 'general principles' of EC law, which although autonomous in source from national constitutions, nevertheless took into account the common legal conceptions of the Member States".

[116] Opinion of Advocate General De Lamothe on the Internationale Handelsgesellschaft case (C-11/70), delivered on 17 December 1970.

Community law, written or not, but never in the light of domestic law, even constitutional law"[117].

The basis for this argument was found in the *Costa v. ENEL* judgment, in which the Court of Justice stated that the Community act "by reason of its specific nature could not find a limit in any internal measure without losing its Community character and without undermining the legal basis of the Community itself".

The Advocate General continued his argument by linking the principle enunciated in the *Costa v. ENEL* judgment with the *Stork* case law.

In other words, it was believed that the principle that the "Community character" of the act prevented its evaluation based on domestic law (even constitutional law) had already been articulated in the late 1950s.

This demonstrated that the times were already ripe for overcoming the Court's initial incompetence, as affirmed in *Stork*, so that the immunity of the Community act from possible amendments by national acts would find its justification in the primacy of Union law from now on.

This outcome did not presuppose a disregard for the fundamental principles of domestic law, which – to paraphrase Advocate General *De Lamothe* – "contribute to forming that common philosophical, political, and legal basis among the Member States, upon which, according to the Court's pretorian system, an *unwritten Community law* arises, which, among other things, has the *essential purpose of guaranteeing respect for the fundamental rights of the individual*. In this sense, the fundamental principles of domestic rights contribute to enabling Community law to find *within itself* the necessary resources to ensure, if necessary, the respect of fundamental rights that constitute the common heritage of the Member States".

Therefore, the Advocate General resolved the preliminary question by supporting the *source* that identifies the violated fundamental principle in the general principles of Community law (not necessarily coinciding with the fundamental principles of the constitution) or in explicit provisions of the Treaty (as in the present case).

[117] *Ibidem,* emphasis added.

The Court of Justice fully embraced the Advocate General's position and dedicated points 3 and 4 of the "*In Law*" section to "*the protection of fundamental rights in the Community legal system*".

Reviewing the mentioned points, it is evident that the starting idea remains to ensure the unity and effectiveness of Community law, so that the validity of acts issued by Community institutions "can only be determined in the light of Community law". This is due to the fact that the law "originates" from an "*autonomous source*", namely the Treaty, which, by its nature, cannot admit limitations imposed by national legislation, as these would undermine not only the "Community character" of European rules but also the "legal foundation of the Community itself".

Implicitly, it seems to be reading passages from the *Costa v. ENEL* judgment, although the Court of Justice, unlike the Advocate General, does not make explicit reference to it in its reasoning.

Furthermore, the Court highlights - as if responding to the question posed by the referring judge - that the validity of a Community act and its effectiveness within the territory of the Member State *must* also be guaranteed when a Community act violates fundamental rights, as enshrined in the Constitution of one of the Member States[118].

After this "shock declaration", in the subsequent point, the Court almost seeks to mitigate the "subversive" impact of the principle enunciated[119].

In the European context, the protection of fundamental rights is concretized through the category of general legal principles, which the Community Court ensures compliance with. However, it is clarified that not all the fundamental rights of Member States automatically fall within the category of general principles, but only those that are "*informed by common constitutional traditions*".

[118] In this sentence, however, the Court seems to be referring to the Stork jurisprudence. In particular, the second sentence of pt. 3 of Part In Law states: "[t]he fact that either the fundamental rights enshrined in the constitution of a Member State or the principles of a national constitution are impaired cannot diminish the validity of an act of the Community or its effectiveness in the territory of that State".

[119] In this term, O. POLLICINO, Corte di Giustizia e giudici nazionali: il moto "ascendente", ovverosia l'incidenza delle "tradizioni costituzionali comuni" nella tutela apprestata ai diritti dalla Corte dell'Unione, in Consulta online, 2015, n. 1, p. 248.

It is also emphasized that the protection of rights must always be ensured in line with the purposes and structure of the Treaty, in accordance with the teleological interpretation criterion, as can be traced in *Van Gend & Loos*[120].

For these reasons, in practical terms, to establish a violation of a Community general principle, it is necessary to base its non-compliance on a "*similar guarantee inherent in Community law*" that can justify the intervention of the Community judge.

In addition to the *Stauder* and *Internationale Handelsgesellschaft* cases, the *Nold* judgment also deserves mention.

The three cases mentioned constitute a triptych of pronouncements by the Court of Luxembourg that mark a radical change in perspective, as it begins to experiment with a *protectionist* approach[121] to fundamental rights within the Community context.

The *Nold* judgment is characterized by an *obiter dictum* in which international treaties relating to the protection of human rights, to which all Member States of the Community have committed themselves, are considered relevant to defining common constitutional traditions[122].

The most precise reference in this case is provided by the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, signed in Rome on November 4, 1950, by all the States that later established the three Communities.

Therefore, these *common traditions* are derived mainly from international norms. Nonetheless, it can be noted that the *common traditions*, which can be identified as general principles of Community law, are found both on the national (constitutional) and international (conventional) sides.

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[120] Judgment *Internationale Handelsgesellschaft*, cit., pt. 4. "However, it must be ascertained whether any similar guarantee inherent in Community law has been infringed. Indeed, the protection of fundamental rights forms an integral part of the general legal principles whose observance is guaranteed by the Court of Justice. The protection of these rights, while being informed by the constitutional traditions common to the Member States, must be guaranteed within the framework of the structure and purpose of the Community. It must therefore be ascertained, in the light of the doubts expressed by the proposing court, whether the regulation of securities has infringed fundamental rights whose observance must be guaranteed in the Community legal order".

[121] G. CÁMARA VILLAR, Los derechos fundamentales en el proceso histórico, cit., p. 16; In argomento, si v. G. DE BÚRCA, loc. cit., p. 488 ff.; M.E. GENNUSA, La tutela dei diritti fondamentali nell'Unione Europea: tratti di continuità e discontinuità nella giurisprudenza comunitaria, in Il Politico, Vol. 71, n. 2, p. 27 ff.

[122] Court of Justice, judgment 14 may 1974, C-4/13, J. *Nold c. Commissione CE*, ECLI:EU:C:1974:51, pt. 13.

The first case in which the Court of Justice applies these early theorizations in the field of fundamental rights is represented by the *Hauer* case (C-44/79)[123], which concerns the protection of property rights.

The preliminary question arose following Mrs. Hauer's opposition to a refusal of authorization for the installation of new wine-growing facilities.

The public administration of the Land of Rhineland-Palatinate rejected the applicant's request and, in administrative litigation, justified the rejection both with the absence of requirements established by German legislation and by noting that a new Community regulation (No. 1162/76) had entered into force (after the authorization) blocking all authorizations in the wine-growing sector.

The first reason advanced was found to be unfounded in light of subsequent soil surveys, so, for the purpose of resolving the dispute, the "Community" question related to the retroactive application of the regulation had to be analyzed.

Therefore, a preliminary reference for interpretation was made: firstly, it was asked whether the regulation should also apply to Mrs. Hauer's case, who had submitted the authorization request before the regulation came into force; secondly, in case of an affirmative answer, it was asked whether the interpretation of the regulation should be understood as preclusive – "absolutely" - of any type of authorization (regardless of the suitability of the land).

The Court answered affirmatively to both questions submitted to its attention. However, what is most relevant to our purposes is that the Community judge devoted ample space to a statement made by the referring administrative judge, which was not reflected in the preliminary questions.

The statement in question concerned the suspicion held by the referring administrative judge that the Community regulation, if interpreted as strictly preclusive even against potentially suitable land (such as that of Mrs. Hauer), would risk conflicting with the constitutional fundamental rights protected by the German Constitution, particularly in safeguarding private property and the free exercise of professional activity.

[123] Court of Justice, judgment 13 december 1971, C-44/79, *Hauer c. Land Renania-Palatinato*, ECLI:EU:C:1979:290.

The Court believed that the doubt of the referring administrative judge raised an issue of the validity of the regulation in question with respect to "Community" fundamental rights, which are an integral part of the general principles of the Union.

Therefore, it examined, on the one hand, the ECHR provisions and, on the other hand, constitutional practices, in order to assess the compatibility of the regulation's provisions.

Both investigations led to a negative outcome, in the sense that the Court declared the provisions of the regulation compatible with the general principles, as an analysis of the right to property[124] revealed a common matrix, to be identified in its limitation for reasons of general interest.

Therefore, the Community judge found the existence of a "general interest of the Community" that justified the obligation to install wine-growing facilities on all land[125].

However, this investigation concluded positively, and thus, the Court ruled that in this specific case, the right to property had not been infringed by the Community regulations[126].

[124] The Court's analysis is first conducted with regard to Article 1 of Protocol No. 1 to the ECHR and then on the articles of national constitutions such as that of Italy (Art. 42 para. 2 and 43 para. 2) or of the Federal Republic of Germany (Art. 14 para. 2). The Court analyses the constitutional provisions in an attempt to outline their common elements. However, the Court in its assessment does not take into account the developments in the constitutional jurisprudence of the articles under consideration. In other words, the Court's interpretative operation is textual in nature, being more concerned with the constitutional 'provision' rather than the constitutional "norm".

[125]Hauer judgment, cited above, pt. 22-23 of the In re Law section follow. "It is therefore legitimate to assert, in the light of the constitutional principles common to the Member States and of constant legislative practice in the most varied of matters, that no reason of principle prevented the planting of new vineyards from being subject to limitations by Regulation No 1162/76. These limitations are known, in identical or similar forms, to the constitutional system of all the Member States, and are recognised by it as legitimate.[...] [I]t is also necessary to examine whether the limitations imposed by the legislation at issue are really justified by objectives in the general interest of the Community and do not constitute an unacceptable and disproportionate intervention, in relation to the aims pursued, in the prerogatives of the owner, such as to affect even the substance of the right of ownership".

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[126] The Court will declare that the right to freedom of economic activity has not been infringed either, since this right is also "justified by restrictions on the exercise of the right to property" (pt.. 33).

4.3. The Role of Common Constitutional Traditions and the ECHR in Defining "European" Fundamental Rights

In the first season of the Community's life, European judicial activity was characterized by a kind of "*European impermeability to domestic constitutional factors*"[127]. It is evident that the primary objective was to ensure a uniform interpretation and application of Community law. This translated into an attitude of "indifference" on the part of the Community regarding fundamental rights, the protection of which was believed to be exhaustively covered within national borders.

The change in perspective arises with the birth of the principles of direct effect and primacy, and their need to find concrete implementation in the Member States. This could not happen if the Community did not change its "*insensitivity*" regarding fundamental rights, which would still be the exclusive subject of constitutional charters that, in turn, could not be subject to Community law, precisely due to their exclusive competence[128].

Therefore, the Court of Justice, caught between two fires, finds its way out in the "common constitutional traditions" that offered an excellent solution to guarantee the role of the constitutional heritage, thus avoiding weakening the autonomy of the Community system and the Court of Justice itself[129].

The category of common constitutional traditions, therefore, emerges instrumentally for the definition of European fundamental rights. These rights are not "invented" anew by the Court of Justice, at least in this initial moment, but are found in the constitutional systems (as well as in the European Convention on Human Rights). In this perspective, to describe the new role as the interpreter of common values, the Court of Justice's role has been called "*maieutic*"[130].

Summarizing the elements highlighted so far, one can cite one of the definitions that doctrine has identified for "common constitutional traditions".

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[127] O. POLLICINO, loc. cit., p. 247.

[128] M. CARTABIA, Principi inviolabili e integrazione europea, op. cit., p. 25.

[129] Ibidem. See also EAD, L'ora dei diritti fondamentali nell'Unione Europea, op. cit., p. 29.

[130] M. CARTABIA, L'ora dei diritti fondamentali nell'Unione Europea, op. cit., p. 29.

This expression "seems to allude to that heritage of constitutional values that unites the legal systems of the Member States, regardless of whether they have a written or customary constitution, a heritage of values that naturally includes fundamental rights"[131].

Therefore, on one hand, the introduction of this category marks an initial stance of the Luxembourg Court on the issue of fundamental rights, while on the other hand, it constitutes one of the first *sources* of the review of the legitimacy of the acts of the Community institutions, and in some respects, as will be seen in the next paragraph, also of some national acts[132].

It is now necessary to understand what the best method for identifying the content of common traditions may be.

The methods most discussed in doctrine are *quantitative* methods, related to the adoption of the maximum or minimum standard of protection.

The first model would require the Court of Justice to search among the various legal systems for the one that provides the greatest protection for a certain right and take it as a reference[133]. This can be done through two techniques: the first involves a comparative analysis of the entire discipline of the right in question, and the national discipline that, at the end of the analysis, is the most "intense", becomes the Community model. Alternatively, another technique could involve a comparative analysis of the *maximum standard* concerning individual elements of the right[134]. Thus, Community acts would be measured against a fundamental right that is entirely new, characterized by a *patchwork* of disciplines from the Member States.

The method of the *minimum standard* (or common denominator) would instead require research among the various legal systems to discover the common features of national disciplines (or the individual elements of various disciplines) and use them as a reference in the evaluation[135].

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[131] L. COZZOLINO, Tradizioni costituzionali comuni nella giurisprudenza della Corte di Giustizia delle Comunità Europee, in P. FALZEA, A. SPADARO, L. VENTURA (a cura di), La Corte Costituzionale e le Corti d'Europa, Torino, Giappichelli, 2003, p. 5.

[132] L. COZZOLINO, loc. cit., p. 4.

[133] L. COZZOLINO, loc. cit., p. 11.

[134] L. COZZOLINO, loc. cit., p. 11-12.

[135] L. COZZOLINO, loc. cit., p. 12. According to the author, what the two quantitative methods have in common is the circumstance that the acceptance of either method would have the effect of

Another criterion for identifying constitutional traditions may be that of *greater progressiveness*, which in appearance does not seem to be related to quantitative evaluations. In this perspective, the Community Judge should focus the research on the selection of the most progressive disciplines and use them in the common model[136].

However, all these methods are not reflected in Community case law, and according to authoritative doctrine, one of the reasons may be related to the fact that a fundamental right cannot be subject to quantitative evaluation by its nature, as its exact scope only comes to light in its "*web of relationships among different values*" that are created within the legal system[137].

Moreover, the Court of Justice itself seems interested not in finding "*commonality*" but "*consonance*" among the constitutional principles of the Member States with the Community system[138].

The Court of Justice, to concretely trace common constitutional traditions, seems to have moved according to a perspective of "*selective integration*" of principles deriving from the Member States[139], which is carried out from time to time, without following rigid pre-established patterns.

On the other hand, the Luxembourg Court has never explicitly stated that it intends to be subject to the rules of national Constitutions. On the contrary, it has deemed it necessary to introduce the primacy of Community rules over national ones (even of a constitutional nature).

Then, as has been mentioned several times, a few years after the introduction of the principle of primacy, it became aware that its "incompetence" in this matter risked undermining the aforementioned principle, and for this reason, it felt the need to introduce general principles[140].

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transforming common constitutional traditions into sources of law production, as these assume the role of "sources of the regulation of those rights" (p. 10).

[136] M. CARTABIA, *L'ora dei diritti fondamentali nell'Unione Europea*, op. cit., p. 31. In the author's view (p. 32) this thesis, while presupposing an "apparent assessment of an axiological nature", also results in a quantum evaluation of the fundamental rights under consideration, as it leads to "a predetermination of the level of protection to be accorded at the level of the Community".

[137] M. CARTABIA, loc. cit., p. 32. On this point, see also J.H.H. Weiler, *Eurocracy and Distrust*, op. cit., p. 1127 ff.

[138] M. CARTABIA, loc. cit., p. 33.

[139] Ibidem.

[140] M. CARTABIA, loc. cit., p. 34.

Therefore, "unwritten principles are principles *of Community law* and belong to the Community legal system"[141].

In conclusion, the reasons presented lead to the conclusion that reference to national Constitutions plays a simple *inspirational role* for the Community judge[142], and indeed - using the words of the Court – "the safeguarding of these rights, while being based on common constitutional traditions among the Member States, must be ensured within the framework and purposes of the Community"[143].

4.4. An Expanding Judicial Doctrine: The Protection of Fundamental Rights through the Theory of Incorporation

Common constitutional traditions constitute one of the first "channels" through which it was possible to protect fundamental rights at the community level. Indeed, these traditions emerged as one of the sources to which the Court of Justice deemed it necessary to refer in order to assess the compatibility of acts issued by community institutions.

However, starting from the late 1980s, there was an expansion in the scope of application of the general principles of community law, of which common constitutional traditions and conventional rules constitute the foundations.

In particular, reference is being made to the phenomenon, noted by legal scholars as the "*doctrine of incorporation*"[144], which involves extending community scrutiny to national legislative acts in specific and particular circumstances.

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[141] *Ibidem*, corsivo aggiunto.

[142] M. CARTABIA, loc. cit., p. 35. Agrees on this point A. PIZZORUSSO, loc. cit., p. 20. The author argues that common constitutional traditions are characterised by a "cultural character", rather than constituting a genuine source of Community law. This analysis is carried out with regard to the notion of common constitutional traditions as included in the Maastrich Treaty.

[143] Judgment *Internationale Handelsgesellschaft*, cit., pt. 4, emphasis added.

[144] On the topic, see J. TEMPLE LANG, The sphere in which member state are obliged to comply with the general principles of law and community fundamental rights principles, in Legal Issues of European Integration, No. 2, 1991, p. 23 ff.; M. CARTABIA, L'ora dei diritti fondamentali, op cit., p. 25 ff.

These circumstances were identified by the Court in the *Wachauf* (C-5/88) and *ERT* (C-260/89) judgments.

In the first case, the administrative court in Frankfurt had to apply a German law that had been enacted in accordance with a community regulation on milk production.

The community act in question contained provisions for milk producers conducting their activities on leased farms, specifically introducing the possibility for them to request compensation from the lessee in the event of ceasing their activity within a specific time limit.

The German legislature decided to introduce an additional requirement for eligibility for compensation, which was the lessee's consent. The preliminary question revolved around the legitimacy of this additional requirement, which the referring judge suspected might be contrary to the general principles of community law[145].

The Court did not uphold the specific questions raised in this case due to the wide discretion enjoyed by the German legislature in implementing community regulations. However, the Court did acknowledge, in principle, the possibility of its judgment on national acts enacted to implement community law, with the aim of excluding the possibility that such national acts might conflict with community principles.

While the ERT case concerned the Greek law nationalizing television and radio services, which granted a public monopoly over these activities to the company *Elliniki Radiophonia Tileorasi Anonimi Etairi (ERT)*. Another radio company, authorized by some local authorities, engaged in television broadcasting activities, directly conflicting with national regulations. *ERT* then sued the competing company to have its activities ceased. However, the referring judge believed it was appropriate to refer the matter to the Court of Justice, formulating ten preliminary questions, one of which asked whether it was "consistent with the EEC Treaty and derivative law for a law to authorize a single operator to hold the television monopoly throughout the territory of a Member State and to carry out television broadcasts of any kind" (Question I).

[145] The referring court does not make its doubt explicit in either of the two preliminary questions, but lets it 'escape' in its reasoning, this (probably) because if it had formulated the question asking expressis verbis for the validity of the national law on the ground of conflict with the general principles, it would (almost certainly) have been faced with a flat-out inadmissibility.

The Court accepted only some of the questions, ruling on the incompatibility of the Greek law with certain rules of the single market. What was innovative about this case was the competence that, in principle, the Court (self-)attributed to itself: specifically, when the Treaties allowed Member States to introduce derogations to the fundamental freedoms of the common market (e.g., limiting freedom of movement for public order reasons), these derogations had to be subject to review by the Court of Justice, which could subsequently determine their compatibility with the general principles of community law after their enactment.

These two cases led to the conclusion that national legislation became the subject of judgment by the Court of Justice[146], only in cases where it concerned the implementation of community law (the so-called *Wachauf* line), or if Member States, in their legislative capacity, invoked one of the justifications provided by the Treaties to limit one of the fundamental economic freedoms guaranteed by the Treaties (the so-called *ERT* line)[147].

In more general terms, the objective of the Court of Justice was not to leave certain formally "national" situations devoid of protection but directly affecting community interests, precisely because national regulations were the means of making Community law effective[148]. The "community" nature of these internal rules could imply conformity with national constitutions[149], but not an automatic consistency with community general principles, which were indeed *informed* by constitutional traditions, but their content was not strictly identical to national fundamental rights.

Thus, within the same scope of protection, situations of compatibility with national constitutions and incompatibility with the general principles of community law could theoretically be identified[150].

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[146] Before these rulings, the only control that could be carried out on national acts by the Community was political, through the infringement procedure under Article 169 TCEE (now Articles 258 and 259 TFEU).

[147] M. CARTABIA, *L'ora dei diritti fondamentali*, op cit., p. 27.

[148] Ibidem.

[149] In any case, there were instruments that could ascertain conformity, first and foremost recourse to the Constitutional Court.

[150] On a practical level, this could materialise when Community and national protection differed in the standard of protection. More precisely, it could happen that an individual Member State adopted a lower standard of protection than that generally adopted by the other Member States. In this situation, the individual member state may not recognise a violation of the fundamental right on the grounds that

The problem, therefore, was based on the extent to which this hypothetical incompatibility could not be determined by any judicial authority.

On the other hand, the instrument of the preliminary reference, be it for validity or interpretation, allowed the common judge to understand the exact scope of a community act, but not that of a national act[151]. Furthermore, it was also impossible for the ordinary judge to disapply it because (at least for the *Wachauf* case), they were internal rules that did not have direct effect due to the discretion exercised by the legislature in their implementation; neither was it conceivable that such an evaluation, which had community principles as its parameters, could fall within the jurisdiction of the constitutional courts of the Member States.

Therefore, from the perspective of the Community judge, an extension of its jurisdiction logically became necessary if the goal was to ensure the uniform and proper application of community law to the maximum degree.

Such intent was well-suited to situations of the "Wachauf type". In fact, this ruling did not lead to significant objections from the Member States[152].

On the contrary, the ERT case law faced more criticism, both from legal scholars and from the Member States who perceived this extension in the realm of fundamental rights as an additional erosion of their sovereignty, especially in areas where they were allowed to make exceptions[153].

In conclusion, the protection of community fundamental rights comes into play whenever one is "within the scope of community law"[154].

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it contravenes its own constitution, but such a violation will only emerge in the European forum, when the national discipline is benchmarked against the general Community principles. In this situation, not recognising the possibility of the latter assessment (that in the European forum), may lead, in these limited cases, to less protection of the same fundamental rights by the various Member States.

[151] On this point, in our opinion, reference may be made to the Costa v. ENEL judgment, in which the uncertain formulation of the question by the Conciliating Judge, who seemed almost to be asking the Community judge about the compatibility of the law nationalising electricity with the rules of the EEC Treaty, was followed by a clear position of the Court of Justice on the scope of application of the instrument of the preliminary reference ("the Court must not therefore rule on the compatibility with the Treaty of an Italian law, but only interpret the articles indicated above").

[152] F. MICHELI, Diritti fondamentali e incorporation: i diversi percorsi di Stati Uniti e Unione Europea, in AIC, Osservatorio Costituzionale, n. 1, 2017, p. 11.

[153] F. MICHELI, loc. cit., p. 12.

[154] F. MICHELI, loc. cit., p. 13.

The protection of fundamental rights operates on three levels[155]: international-conventional, community, and national-constitutional, each of which corresponds to protection standards that various types of measures must adhere to, under penalty of nullification.

The protection provided on an international level by the European Convention on Human Rights aims to establish a "*minimum standard*" below which no state belonging to the Council of Europe (and therefore automatically all Member States of the European Community) can fall.[156] For this reason, a violation by a community or national measure (whether of the Wachauf or ERT type) results in a violation "by necessity" that can only culminate in the annulment of the measure. In this scenario, what differentiates a community measure from a national one (whether *Wachauf* or *ERT* type) is the judicial authority competent to annul it: in the case of the community measure, it is certainly the Court of Justice, whereas such competence is not certain in the case of a national measure since in this case, both national and community standards, which must be greater than or equal to the convention standards, are violated[157]. However, if community or national measures (the latter being of the *Wachauf* or *ERT* type) violate the standards on human rights defined at the community level, in such cases, the Court of Justice will annul them, respectively, by virtue of the

[155] In-depth analysis on this EU case-law, si v. J.H.H. WEILER, Diritti fondamentali e confini fondamentali: lo spazio giuridico europeo e il conflitto tra standard e valori nella protezione dei diritti umani, in ID (ed.), La Costituzione dell'Europa, Bologna, Il Mulino, 2003, p. 212.

[156] J.H.H. WEILER, loc. cit., p. 179.

[157] In the latter hypothesis, the author leaves two paths open, both of which lead to the annulment of the domestic act. In my opinion, it must be borne in mind that the conventional remedy in itself is of a subsidiary nature and that the courts cannot disapply a domestic rule for direct conflict with the Convention, but they do have at their disposal (in addition to the attempt at conventionally compliant interpretation) the possibility of raising the issue of constitutional legitimacy, but to date the declaration of unconstitutionality for conflict with the conventional parameters can only be achieved in cases where there is constant Strasbourg case law on the issue. This may imply a greater 'difficulty' for national judges (in the Italian case, this task may fall to the Constitutional Court alone) to annul the domestic act (of the ERT or Wachauf type). The latter, precisely because of its substantially Community character, could be examined (and possibly annulled) by the Court of Justice. Moreover, according to the ruling of the ECJ, Bosphorus v. Ireland (Rec. No. 45036/98) between the two European Courts there is a presumption of "equivalent protection" in the area of the protection of fundamental rights (see paras. 155 of the Bosphorus judgment). It concludes by arguing that since there are more similarities in the standards of protection adopted by the two supranational courts, in the case at hand it might be easier to pursue the Community route for the annulment of the national act that is contrary to the minimum standards imposed by the Convention.

classic preliminary reference jurisdiction under Article 177 of the EEC Treaty and the jurisdiction introduced by the *ERT* and *Wachauf* judgments. Finally, if a measure conflicts solely with the fundamental rights established by the national constitution, the ordinary judge must raise a constitutional issue if it is a national measure (at this point, it does not matter whether the measure falls into the *Wachauf* or *ERT* categories)[158]. Whereas if the conflict is with a community measure, there will certainly be no intervention by the Court of Justice, but there is no equal certainty when it comes to the Constitutional Court.

In conclusion, the *theory of incorporation* ultimately aims to bring elements of stability to the European judicial system for the protection of fundamental rights.

It is noteworthy to add that another element of "updating", falling within the same context, is the intention of the Court to move away from merely protecting rights related to the market. This aspect, with the Charter of Fundamental Rights, will be linked to the all-encompassing and indivisible nature of the rights protected by it.

Turning our attention to the field of social rights,[159] in particular, the statements made in the rulings delivered in the early 2000s, in the cases of *Kreil*[160] and *Schröder*[161] are interesting.

The first case concerns gender equality in access to military employment. The Court declares as non-compliant with European regulations[162] a national regulation, such as the German one, that barred women from access. It states that "it therefore does not allow women to be excluded from a job on the grounds that they should be better protected than men against risks that are different from the specific protection

[158] J.H.H. WEILER, loc. cit., p. 209. The author argues on this point that, once it has been established that the European standard has been unharmed by the action of the national legislature, in such a case it must not be excluded that there is a violation of national standards (logically stricter than the European standard), which can be scrutinised by the national court of law.

[159] Su cui, per tutti, S. GAMBINO, Stato e diritti sociali. Fra costituzioni nazionali e Unione Europea, Napoli, Liguori, 2009; e A.O. COZZI, Diritti e principi sociali nella Carta dei diritti fondamentali dell'Unione Europea. Profili costituzionali, Napoli, Jovene Editore, 2016; e S. LEONE, I diritti sociali nella Carta di Nizza, in C. AMALFITANO, M. D'AMICO, S. LEONE, La Carta dei diritti fondamentali dell'Unione europea nel sistema integrato, Milano, Giappichelli, 2021, p. 363 ff.

[160] Court of Justice, judgment 11 january 2000, C-285/98, *Kreil*, ECLI:EU:C:2000:2.

[161] Court of Justice, judgment 10 february 2000, C-50/96, *Deutsche Telekom AG contro Lilli Schröder*, ECLI:EU:C:2000:72.

[162] The Reference here is to Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

needs of women, as expressly mentioned. It follows that the total exclusion of women from military jobs involving the use of weapons does not fall within the scope of the treatment disparities permitted by Article 2 n.3 of the directive for the protection of women"[163].

In *Schröder*, the Court, when asked to decide a case concerning Mrs. Schröder's pay disparity at the time of her retirement, asserts that Article 119 of the Treaty does not merely serve an economic purpose. Instead, it "falls within the social objectives of the Community, as the Community does not limit itself to economic union but must also ensure, through common action, the social progress and the constant improvement of living and working conditions of the peoples of Europe, as emphasized in the preamble of the Treaty"[164].

Furthermore, "the economic purpose pursued by Article 119 of the Treaty [...] is secondary to the social objective set out in the same provision, which expresses a fundamental right of the human person"[165].

In conclusion, a new, increasingly complex framework for the protection of fundamental rights in Europe is emerging, operating on multiple legal levels that are becoming more integrated and less isolated from each other.

5. From the Protection of Constitutional Rights to the Safeguarding of the Cardinal Principles of each National System: A Look at the First "Reactions" of the Italian Constitutional Court and the *Bundesverfassungsgericht*

5.1. European Regulations before the Italian and German Constitutional Courts

[163] Judgment *Kreil*, cit., parte *In diritto,* nn. 28-29, see, S. PANUNZIO, loc. cit., p. 15.
[164] Judgment *Schröder,* cit., pt. 55.
[165] Judgment *Schröder,* cit., pt. 57. For a comment, see S. LEONE, loc. cit., p. 380 ff.

As is well known, the judicial construction of fundamental rights[166] and, alongside this, the emergence of the principles of primacy and direct effect, initially generated adverse reactions from both the Italian and German Constitutional Courts. These two Constitutional Courts from the outset shared a *dualistic* perspective of European integration, believing that the constitutional systems, on the one hand, and the European system, on the other hand, are "*autonomous and distinct, albeit coordinated, according to the distribution established and guaranteed by the Treaty*"[167].

In this regard, the pivot on which the interventions of the Constitutional Courts were based lies in the European clauses, Article 11 of the Italian Constitution and Article 23 of the *Grundgesetz*, which are the necessary constitutional provisions through which transfers of sovereignty to the national legal system are legitimized[168].

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[166] A construction with a constitutional function, in these terms F. BALAGUER CALLEJÓN, Niveles y técnicas internacionales e internas de realización de los derechos en Europa. Una perspectiva constitucional, in Revista de Derecho Constitutional Europeo, n. 1, 2004, p. 25 ff. The Author (p. 35) states that "[l]a situación de la jurisdicción europea que ejercita el TJCE es muy diferente de la que se ha descrito más arriba respecto de las jurisdicciones constitucionales nacionales. Entre los déficits podemos señalar:

-No existe, pese a la Proclamación de la Carta, un contexto normativo definido por medio de una auténtica proclamación constitucional de derechos que se impongan sobre todos los poderes públicos incluso cuando falta el desarrollo legislativo.

-No existe, por tanto, una determinación previa de disposiciones sobre las cuales la jurisdicción constitucional pueda precisar los posibles sentidos normativos.

-No existe una interacción posible con el legislador democrático que desarrolle y configure los derechos a partir del marco constitucional.

Estos déficits suponen que el TJCE, ante la ausencia de contexto constitucional y de desarrollo legislativo tiene que realizar una función constituyente propia para incorporar derechos al ordenamiento, esencialmente mediante el recurso a elementos externos al propio ordenamiento comunitario (tradiciones constitucionales comunes de los Estados miembros o CEDH)".

[167] Così, Corte cost. ita, sentenza del 18 dicembre 1973, n. 183, *Frontini*, n. 7 del *Considerato in Diritto* e sentenza 5 giugno 1984, n. 170, *Granital*, n. 4 del *Considerato in Diritto.* In senso analogo si v. *BVerfGE*, sent. del Secondo Senato del 29 maggio 1974, BvL 52/71, *Solange I* , pt. 40, il *BVerfGE* "ribadisce – conformemente alla giurisprudenza della Corte di Giustizia europea – la propria giurisprudenza secondo cui il diritto comunitario non fa parte né dell'ordinamento giuridico nazionale né del diritto internazionale, ma costituisce un ordinamento giuridico indipendente che scaturisce da una fonte giuridica autonoma; la comunità, infatti, non è uno Stato, e soprattutto non è uno Stato federale, ma "una comunità a sé stante in via di progressiva integrazione", una "istituzione intergovernativa" ai sensi dell'articolo 24 capoverso 1 Legge fondamentale".

[168] There are several consequences for the Constitutional Courts' review of the ratification law of the European treaties. On this issue, see N. ZANON, *Introduction*, in ID (ed), *Il controllo preventivo dei Trattati dell'Unione Europea*, Milano, Giuffre, 2015, and the essay includeded in the mentioned book.

Some initial elements of the first provision have already been introduced, but with regard to the second provision, it is worth noting that, in the first two sentences of its first paragraph, it states: "for the purpose of achieving a united Europe, the Federal Republic of Germany shall participate in the development of the European Union, which is committed to democratic, social, federal, and state-of-law principles and to a principle of subsidiarity, and which guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end, the Federation may transfer sovereign powers by a law, with the consent of the Bundesrat".

To draw some significant analogies between the two Constitutional Courts, it is necessary to start with a concise overview of two essential and well-known judgments of the *Bundesverfassungsgericht* (German Federal Constitutional Court): *Solange I* and *Solange II*[169].

In 1974, with the *Solange I* decision, the German Constitutional Court was referred to incidentally by the Administrative Court of Frankfurt on the Main, which doubted the compatibility of Regulation 473/67/EEC with Article 12 of the Basic Law, which safeguards economic freedom. The question had already been referred for a preliminary ruling by the same referring judge in 1970 and had resulted in a rejection in the well-known European ruling *Internationale Handelsgesellschaft* (as mentioned above in §4.2). The decision of the *Bundesverfassungsgericht* is significant due to a procedural aspect. Despite the question being rejected on the merits, thus leading to a conflict between the decision of the Luxembourg Court and the German Constitutional Court, the latter declared it admissible. In this way, it was affirmed that European regulations could be subject to constitutional scrutiny, similar to national laws (Article 100 of *Grundgesetz*).

To substantiate this legitimacy, the consideration is that "as long as the process of European integration has not progressed to the point where European law also includes a catalog of fundamental rights adopted by a parliament and in force that is adequate to the catalog of fundamental rights of this Basic Law, it is admissible, after obtaining the decision of the European Court of Justice provided for in Article 177 of the Treaty, for a court of the Federal Republic of Germany to bring a legal norm before the Federal Constitutional Court for constitutional review". This is because a judge

[169] *BVerfGE*, sent. del Secondo Senato del 22 ottobre 1986, 2 BvR 197/83, *Solange II*.

who does not share the interpretation of the Court of Justice must always consider himself free to refer the same question to the Constitutional Court[170].

This initial skeptical approach by the German Constitutional Court, not even widely shared by the judging panel[171], entrusts a crucial role to the common judge, who, after turning to the Court of Justice, can ask the *Bundesverfassungsgericht* to have the "final word".

One might wonder about the consequences that would arise in cases where it is the common judge himself who does not want to request this internal step.

This is precisely the underlying issue in the *Solange II* judgment, which, unlike the first one, is rendered following a direct action brought at the request of a petitioner who had her claims rejected before the administrative judge, who adhered to the European decision requested by the petitioner[172].

Setting aside the issue of merit, which results in the dismissal of the action, the *Bundesverfassungsgericht* takes the opportunity to partially modify its jurisprudence, affirming its self-restraint in disputes concerning derived European law.

Specifically, having established all the guarantees that must necessarily be provided by any judicial body, including the Court of Justice[173], the German

[170] Judgmet *Solange I*, cit., pt. 56

[171] The judgment, adopted by a majority of 5 votes to 3, is joined by the dissenting opinion of Judges Rupp, Hirsch and Wand, who, in pt. 2, point out that "[t]he legal system of the European Communities also has a system of legal protection appropriate to the respect of these fundamental rights. Individuals may bring actions before the European Court of Justice against acts of the Community institutions only if they are directly and individually concerned by those acts (Article 173(2) EEC). To the extent that Community legislation or decisions addressed to the Member States require implementation by the state organs of the Federal Republic of Germany, the individual has the right to take legal action against the national law. As part of this procedure, the German courts must also examine whether the provisions of Community law on which the contested act is based are compatible with the higher-ranking standards of the Community legal order. These higher standards also include those recognised by the European Court of Justice as fundamental rights and principles of the rule of law. If doubts arise as to whether the applicable legislation complies with fundamental rights or the principle of the rule of law, the German court has the possibility and, if it decides as a last resort, also the obligation to refer the matter to the European Court of Justice under the current Article 177 of the EEC Treaty.

[172] Court of Justice, judgment 6 may 1982, C-126/81, *Wünsche*, ECLI:EU:C:1982:144.

[173] Judgment *Solange II*, cit., where it is stated (pt. 76) that "the Court of Justice is a sovereign court established by the Community Treaties which, on the basis and within the framework of normatively defined powers and procedures, generally takes final decisions on legal questions in accordance with legal norms and standards with judicial independence. Its members are obliged to be independent and impartial; their legal status is normatively designed to guarantee personal

Constitutional Court believes that "as long as the European Communities, and in particular the case-law of the Court of Justice of the Communities, generally ensure effective protection of fundamental rights in relation to the sovereignty of the Communities, which must be considered to be substantially equivalent to the essential protection of fundamental rights according to the Basic Law, especially since the essence of fundamental rights is generally guaranteed, the Federal Constitutional Court will no longer exercise its jurisdiction over the applicability of secondary law of European law [...]"[174].

The decision made unanimously overturns the previous jurisprudence and, by endorsing a perspective based on a presumption of respect for rights by the Community, appears very similar to the *Bosphorus* decision of the European Court of Human Rights, which deals with the same issue but in relation to the relationship between the European legal system and the Convention system of the Council of Europe.

Regarding the scope and direct applicability of EU regulations, even the Italian Constitutional Court showed some hesitations before accepting what was prescribed in Article 189 of the EEC Treaty (now Article 288 of the TFEU) and required by the Court of Justice[175].

In Judgment No. 14 of 1964, the Constitutional Court, endorsing a "permissive" interpretation of Article 11, did not recognize the direct applicability of regulations, nor did it recognize their primacy over a subsequent national norm in case of conflict.

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independence. The Court's procedural law meets the constitutional requirements of due process; It guarantees in particular the right to be heard, procedural options of attack and defence appropriate to the subject matter of the proceedings, and a competent and freely chosen lawyer".

[174] Judgment *Solange II*, cit., pt. 132.

[175] On this matter, above all, see, F. SORRENTINO, Corte costituzionale e Corte di Giustizia delle Comunità Europee, Milano, Giuffrè, 1973; Diritto comunitario e diritto interno. Atti del Seminario svoltosi in Roma Palazzo della Consulta, 20 aprile 2007, Milano, Giuffrè, 2008, e i saggi ivi contenuti, tra cui V. ONIDA, *Nuove prospettive per la giurisprudenza costituzionale in tema di applicazione del diritto comunitario*, p. 47 ff., S. BARTOLE, *Separazione o integrazione di ordinamenti?*, p. 121 ff., e R. CHIEPPA, *Nuove prospettive per il controllo di compatibilità comunitaria da parte della Corte costituzionale*, p. 175 ff.; In argomento, si v. altresì, A. RUGGERI, *Le fonti del diritto eurounitario ed i loro rapporti con le fonti nazionali*, in P. COSTANZO, L. MEZZETTI, A. RUGGERI, *Lineamenti di diritto costituzionale dell'Unione europea*, cit., p. 318 ff.; E. CANNIZZARO, loc. cit., p. 311 ff.; R. ADAM, A. TIZZANO, *Manuale di Diritto dell'Unione Europea*, Torino, Giappichelli, 2017, p. 903 ff.

In the 1970s, the Court began to reconsider its position. The first significant judgment in this regard was the *Frontini* judgment[176], where immediate application of EU regulations was recognized[177], and there was no longer a need for an internal source to incorporate them. To reach this conclusion, the Court revisited Article 11 of the Italian Constitution in its reasoning and specified that the phrase "limitations of sovereignty" should be understood as related to "limitations of the state's powers in the exercise of legislative, executive, and judicial functions […]"[178]. Therefore, the Community, still within the framework of the competences provided in the Treaty[179], is delegated to exercise these three functions instead of the Italian state.

More specifically, with regard to the Community legislative function, this is outlined in Article 189 of the EEC Treaty, which grants the Council and the Commission "the power to adopt regulations of general scope, i.e. […] acts having general normative content similar to national laws, endowed with compulsory effect in all their elements, and directly applicable in each Member State, i.e., immediately binding on the States and their citizens, without the need for internal adaptation or incorporation"[180].

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[176] Judgment n. 183 del 1973, *Frontini,* cit.

[177] Previously, legislative practice in the legal system was oriented in the sense of the need for an act of transposition for both directives and regulations, with the consequence that the latter EU sources did not become binding at the moment of their entry into force, i.e. at the end of the EU legislative procedure, but only after their implementation by the national legal system. All this, however, was in open contrast to Article 189 of the EEC Treaty, which, on the contrary, expressly provided for the characteristic of the immediate applicability of regulations. On the subject of the scope of regulations, G. GAJA, voce *Fonti comunitarie,* in *Digesto delle Discipline Pubblicistiche*, Torino, UTET, Vol. VI, 1991, pp. 439- 441.

[178] Judgment Frontini, cit., n. 5, *Considerato in Diritto.*

[179] Judgment Frontini, cit., n. 7, *Considerato in Diritto.*

[180] Judgment *Frontini*, cit., n. 5, *Considerato in Diritto*. Moreover, in paragraph 7 below, the Court states that these characteristics of regulations under Article 189 TEC, which we could define as intrinsic qualities of the act, are not affected by the different effects that the act itself may produce. Therefore, for the purposes of direct applicability, it is of no relevance either that the regulatory norm is endowed with "completeness of operative content" (today, we would say a norm having "direct effects"), or, even less so, in the opposite case, where a subsequent intervention by the Italian legislature may be necessary, but only with a view to supplementing it, to be exercised within the limits of discretion "granted" by the regulation itself. What is most relevant in the latter case is that even "the fulfilment of these obligations on the part of the State could not constitute a condition or reason for the suspension of the applicability of the Community legislation, which, at least in its inter-subjective content, comes into force immediately".

The perspective with which the Court began to move was certainly "progressive", but the times were not yet sufficiently mature to abandon the idea that Article 11 merely had a permissive function. In fact, in the *Frontini* judgment, the Court recognized and ensured that the characteristics of regulations could be preserved but remained silent on the issue of their relationship with internal norms in cases of conflicts.

This latter aspect would be addressed in the *Industrie chimiche* judgment[181], issued just two years after the judgment on direct applicability. With this judgment, there is a real break from the past, as the Constitutional Court states that, in case of conflict between a regulatory norm and a subsequent internal norm, the former prevails[182]. However, the removal of the conflict cannot be done by the common judge through the mechanism of disapplication but only by the Constitutional Court. The reason for this choice lies in the fact that the common judge cannot, under any circumstances, be granted the power to nullify an internal legislative act, which would be subordinate to the EU source with which it conflicts. Meanwhile, such a task can be carried out by the constitutional judge, to whom the Constitution expressly attributes the power to review laws. In this perspective, it is the role of the judge to raise the incidental question[183].

With the famous *Simmenthal* judgment[184], criticisms from the Court of Justice soon followed.

The judgment was issued following a second preliminary reference made by the same referring judge, the Magistrate of Susa. The main issue in the trial arose from the lawsuit brought by *Simmenthal spa*, a company that imported beef from France, against the State Finance Administration for payment of an import tax due for the sanitary inspection of the imported goods, which the petitioner considered equivalent to an import duty.

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[181] Italian Constitutional Court, judgment 22 october 1975, n. 232, *Industrie chimiche.*

[182] More precisely, the conflict with the regulation could occur either with a subsequent domestic rule that de facto hindered the application of a regulation or with a national rule (not necessarily of primary rank) that was enacted in order to execute the regulation's requirements. The issue brought to the Court's attention in the judgment under review was part of the latter case.

[183] Italian Constitutonal Court, judgement 22 december 1977, n. 163, n. 8 *Considerato in diritto.*

[184] Court of Justice, judgement 9 March 1978, C-106/77, *Amministrazione delle finanze c. Simmenthal spa,* ECLI:EU:C:1978:49.

To prohibit any form of entrance tax, not only the EEC Treaty but also a community regulation (regulation no. 805 of 1968) was in place, while the contested tax for health checks was introduced by law on March 13, 1976.

The Magistrate decided to refer the matter to the Luxembourg Judge to inquire whether the aforementioned regulation was compatible with the tax on health checks, and the Court of Justice responded by asserting the incompatibility of the domestic provision with the rules of the European Common Market.[185]. As a result, the Magistrate subsequently ordered the finance administration to refund what had been unduly paid by the Simmenthal company.

The injunction decree was challenged by the administration, and during the second trial, another referral was made by the Magistrate of Susa. This referral aimed to determine whether, under EU law, the antinomic conflict between a directly applicable community norm and a domestic norm could not be resolved "immediately" by the ordinary judge through the mechanism of disapplication, but was subject to an additional removal procedure. This could be achieved in two ways: either by the legislator through the repeal of the conflicting national norm, or judicially by the Constitutional Court through a declaration of constitutional illegitimacy[186].

[185] Court of Justice, judgement 15 december 1976, C-35/76*, Simmenthal spa c. Ministero delle Finanze,* ECLI:EU:C:1976:180.

[186] The two questions, more precisely, were formulated in these terms: "a) given that, pursuant to Art. 189 of the EEC Treaty and the settled case-law of the Court of Justice of the European Communities, directly applicable Community provisions must, irrespective of any domestic rules or practices of the Member States, have full, complete and uniform effect in the legal systems of the latter, including for the purpose of safeguarding the subjective legal situations created for private individuals? it follows that the scope of those rules is to be understood as meaning that any subsequent national provisions contrary to them are to be disapplied immediately without there being any need to wait for their removal by the national legislature itself (repeal) or by other constitutional bodies (declaration of unconstitutionality), especially if one considers, with respect to the latter hypothesis, that until such declaration, the full effectiveness of the national law remaining in force, the application of the Community rules is prevented, and therefore their full, complete and uniform application is not guaranteed and the legal situations created in private individuals are not protected. (b) In relation to the preceding question, if Community law permits the protection of legal situations which have arisen as a result of directly applicable Community provisions to be postponed until such time as the competent national bodies have in fact removed any conflicting national measures, must that operation in any event have fully retroactive effect so as to avoid any detrimental consequences for the subjective legal situations?".

Furthermore, a few months earlier, the same issue had already been brought to the attention of the Constitutional Court by the Tribunals of Milan and Rome[187]. The Court, finding itself applying its "jurisprudential rule" announced in the *Industrie chimiche* judgment, takes into account the Luxembourg decision regarding the substantial assimilation of the national tax on goods inspections with the customs duty system[188].

In fact, precisely because of the community ruling, the Court accepts the question of constitutional legitimacy, believing that in the conflict between Italian regulations from 1970 and regulation no. 805 of 1968, the latter source should prevail, and consequently, Italian law is removed from the Italian legal system due to incompatibility with Article 11 of the Italian Constitution[189].

Just three months after the constitutional judgment, the Court of Justice issues its ruling, demonstrating that it is well aware that it is about to judge on rules that have already been formally "disapplied" by a national authority, but it decides not to annul its judgment due to mootness.

The Court initially emphasizes, in a very clear manner, the idea of a primacy principle that operates by depriving national provisions of all effectiveness, whether they are prior or subsequent to the directly applicable European norm[190].

Up to this point, the Constitutional Court had reached the same conclusion[191]. The Court then continues by asserting that "any national judge, when acting within the scope of his competence, is obliged to fully apply European law and to protect the rights that it grants to individuals, *disapplying* any provisions of national law that may be conflicting, *whether they are prior or subsequent* to the European norm; therefore, any provision or practice, whether legislative, administrative, or judicial, within the

[187] Due to the fact that the two questions were raised before the first Simmenthal judgement of December 1976 (March '75 and May '76 respectively), but were decided in December 1977.

[188] Ivi, n. 4 Considerato in Diritto.

[189] Cfr. supra §4.2., on the similarity with Costa case, see M. CARTABIA, Considerazioni sulla posizione del giudice comune di fronte ai casi di "doppia pregiudizialità" comunitaria e costituzionale, in il Foro it., 1997, VI, p. 222 ff.).

[190] Judgment *Simmenthal*, cit., pt. 17.

[191] Cfr. Judgment Industrie Chimiche, n. 7 del Considerato in diritto and judgment n. 163/1977, n. 8 Considerato in diritto.

legal system of a Member State that reduces the practical effect of European law is incompatible with the requirements inherent in European law […]"[192].

In other words, the Court reaffirms the basic premise that primacy invalidates both prior and subsequent national legislation and logically concludes that since national judges are responsible for directly applying the European source to the specific case, they are also responsible for resolving any normative conflict using the disapplication tool.

From this perspective, "additional" judicial or legislative steps before reaching disapplication are incompatible with European law[193].

In summary, it can be stated that the effectiveness of primacy requires widespread control of European law to be carried out by ordinary judges.

Finally, the definitive halt to this "conflict" comes with the *Granital* judgment[194], in which the Court aligns itself with the *Simmenthal* jurisprudence, albeit with some significant qualifications, which will be discussed in the next and final lines of this paragraph.

As is well known, the Court asserts the power to disapply regulations by ordinary judges, who are responsible for resolving the dispute in which the regulation must be applied.

This result is achieved through a "reinterpretation" of the constitutional jurisprudence discussed earlier.

In particular, what is most in contrast with this latest jurisprudential development is judgment no. 232 of 1975, which assigns the power of disapplication to the ordinary judge solely based on a chronological factor: more precisely, only if the conflicting domestic norm is antecedent to the community norm.

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[192] Judgment *Simmenthal*, cit., ptt. 21-22, emphasis added.

[193] *Ibidem*. As has been noted by M. AZPITARTE SÁNCHEZ, op. ul. cit. (p. 86) "[e]l TJ, tras las críticas a la sentencia Simmenthal, ha eludido cualquier pronunciamiento que espigue consecuencia más intensas que el mero desplazamiento aplicativo. Basta con éste efecto para asegurar la uniformidad en la aplicación del derecho de la unión. No obstante, la opción entre la prevalencia y la nulidad como efectos de la primacía no es una mera disquisición técnica. Durante algún tiempo importantes voces doctrinales sugirieron la necesidad de que la primacía del derecho comunitario conllevara la nulidad y con ella la expulsión del ordenamiento de la norma estatal. Bajo esta intención técnico-jurídica se escondía la voluntad de que el derecho de la unión sirviera como parámetro constitucional económico, capaz de construir una libertad económica amplia, garantizada incluso frente a las restricciones estatales que no fuesen discriminatorias por motivos de nacionalidad".

[194] Judgment n. 170 del 1984, *Granital,* cit.

The previous jurisprudence should be understood to mean that "the Italian legal system […] allows the European regulation to take effect in the national territory as such and for what it is. This legal act is attributed the "force and value of law", only and properly in the sense that it is recognized the effectiveness it possesses in the originating provision"[195].

In the subsequent legal point, the scope of disapplication is clarified – specifically, non-application – which surprisingly the Court does not only refer to regulations but also, more generally, to "EEC provisions that meet the requirements of immediate applicability", including the self-executing provisions of directives[196].

The effect of the disapplication tool is not to cause the incompatible domestic norm to expire, let alone to repeal or declare it null and void, "but only to prevent that norm from being taken into account for the resolution of the dispute before the national judge"[197].

In other words, the conflicting domestic norm is simply "not applied" and is not removed from the legal system. On this point, in particular, scholars have emphasized the possibility that the temporarily "set aside" norm may return to apply in the future as a result of a reduction in EU competencies[198].

Having clarified the scope of non-application, the Court states that this control over the compatibility between a directly applicable European norm and a conflicting (even subsequent) domestic norm "falls within the jurisdiction of the ordinary judge, even when a specific judicial body is invested, similarly to this Court, with the power of constitutional review of laws"[199].

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[195] Ibidem.

[196] Judgment Granital, cit., n. 5 Considerato in diritto.

[197] *Ibidem*. This will imply a tendency for the Constitutional Court to be estranged from Community law, thus S. PANUNZIO, *I diritti fondamentali e le Corti in Europa,* in ID (ed.), Napoli, Jovane Editore, 2005, p. 23 ff.

[198] M. D'AMICO, G. ARCONZO, S. LEONE, *Lezioni di diritto costituzionale*, Milano, FrancoAngeli, 2022, p. 211, where it states that "[l]a fonte statale, [...], non è invalida e non deve essere annullata dalla Corte costituzionale. Il giudice dovrà disapplicarla e risolvere il caso secondo la normativa riprodotta nell'atto comunitario; con la conseguenza che la fonte interna rimarrà vigente nel nostro ordinamento, e sarà potenzialmente in grado di applicarsi a fattispecie diverse o a trovare 'riespansione' nel caso in cui l'Unione europea decidesse di ritrarsi dalla materia o di disciplinarla in altro modo".

[199] Judgment Granital, cit., n. 6 Considerato in diritto.

In other words, while, on the one hand, the Court asserts the jurisdiction of ordinary judges, in these specific cases, it denies its own jurisdiction, so that a judge who raises a question of constitutionality would face inadmissibility (more precisely, due to lack of relevance).

However, this declination exists "*within the material scope*" of directly applicable norms, whereas in all other cases, the jurisdiction of the Constitutional Court remains intact[200].

In conclusion, the Court sets a general limit to the primacy of EU rules, which is constituted by respect for the fundamental principles of our constitutional order and the inalienable rights of the individual, the violation of which would be an obstacle to *any* community norm.

5.2. Consolidation of the so-called *Counter-limits* to Protect the Supreme Principles

The Courts, therefore, progressively accept the supremacy of European Union law, but not without considering their intervention in extreme cases. The underlying premise that leads the Italian Constitutional Court and the German *Bundesverfassungsgericht*[201] to theorize the so-called "*controlimits*" can be traced back to the idea that the inalienable rights enshrined in national Constitutions, especially with regard to their "*essential core*", cannot be violated under any circumstances, not even by EU institutions. Therefore, the competence of these Constitutional Courts must remain "unaffected" to allow them to intervene in defense of these rights when necessary.

The German Federal Constitutional Court, in the *Maastricht Utreil* judgment,[202] does not exclude the possibility of intervening in cases where the European norm adopted falls within an area that has not been subject to a transfer of sovereignty.

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[200] Judgment Granital, cit., n. 5 Considerato in diritto.

[201] M. CARTABIA, loc. cit., p. 23.

[202] *BVerfGE*, sent. del Secondo Senato del 12 ottobre 1993, 2 BvR 2134, 2159/92, *Maastricht Utreil.* Sulla pronuncia e sulle successive significative pronunce del *BVerfGE,* per tutti, L. VIOLINI, *I*

In particular, the *Bundesverfassungsgericht* aims to prevent the ratification law of the treaty, under Article 23 of the *Grundgesetz*, from violating Article 38 of the Basic Law, which concerns the sovereign powers of the German Parliament. On these grounds, it asserts that "the Federal Constitutional Court exercises its jurisdiction over the applicability of derived EU law in Germany in a "*cooperative relationship*" with the European Court of Justice"[203].

The Italian Constitutional Court addresses this issue for the first time in judgment no. 183 of 1973, historically known as the *Frontini* judgment.

Already in *Acciaierie San Michele*[204], the real potential of the Community begins to be perceived, as its law starts to raise more "concerns", especially because it could potentially affect constitutional norms (see *Costa v. ENEL* judgment). For this reason, the Constitutional Court starts thinking about "countermeasures" to preserve at least the inalienable rights[205].

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precari equilibri di un sistema giudiziario multilivello: i confini tra potere giudiziario nazionale e giudici europei in Germania, in N. ZANON (ed.), *Le Corti dell'integrazione europea e la Corte Costituzionale italiana*, Napoli, Edizioni Scientifiche Italiane, 2006; EAD, *Tra il vecchio e il nuovo. La sentenza Lissabon alla luce dei suoi più significativi precedenti:* Solange, Maastricht, Bananen, in *Astrid online,* 2009; M. AZPITARTE SÁNCHEZ, *Integración europea y legitimidad de la jurisdicción constitucional*, in *Revista de Derecho Comunitario Europeo,* n. 55, 2016, p. 941 ff.; P. FARAGUNA, *Il "sospettoso" cammino europeo del Bundesverffassungsgericht da Solange a Gauweiler,* in *La Cittadinanza europea*, n. 1, 2016, p. 211 ff.

[203] Sent. *Maastricht Utreil,* cit., pt. 70.

[204]The basic ideas around the theory of counter-limits had already emerged, albeit still in an embryonic state, in Judgment No. 98 of 1965, *Acciaierie San Michele*. In the latter ruling, the Constitutional Court was presented with a question of constitutional legitimacy concerning the Court of Justice's exclusive jurisdiction over jurisdictional conflicts between companies and the High Authority (now the European Commission). More precisely, the judge in question asked the Court to rule on the entire law ratifying the ECSC Treaty for alleged conflict with Articles 102 and 113 of the Constitution. The Constitutional Court's opinion that the law was unfounded was based on the Court of Justice's recognition of its jurisdiction to rule within the framework of the specific competences enumerated in the ECSC Treaty. This jurisdiction ran parallel to that exercised by the national courts, which operated, instead, on matters pertaining to the 'remaining' national competences. Thus, the two jurisdictions could be likened to two planets circulating "in separate legal orbits" (*Acciaierie San Michele*, citt., n. 2. It should be noted that such recognition by the Judge of Laws always takes place on the basis of a "permissive" view of Article 11 of the Constitution). However, in the Acciaierie San Michele ruling, the Court pointed out that "[i]t is not denied that such effects must be determined without prejudice to the individual's right to judicial protection; this right is one of the inviolable rights of man, which the Constitution guarantees in Article 2 [...]". The doctrine (M. CARTABIA, Inviolable Principles, op. cit., p. 101.) has read this last passage as "the first affirmation, albeit still veiled and unfinished, of the inviolability of fundamental rights on the part of community institutions".

[205] M. CARTABIA, loc. cit., p. 101.

With the Frontini judgment (no. 183/1973), the Court outlines its method for assessing the conformity of the EU system with inviolable values, now including not only "inalienable rights" but also the "fundamental principles of the organizational nature of the constitutional system"[206].

In this context, what changes first is the interpretation that the Court attributes to Article 11 of the Italian Constitution. It is no longer seen simply as permissive but now starts to take on the characteristics of a "European clause" on which to base the partial transfer of sovereignty by the Italian state to the Communities.

Nevertheless, the Court in the *Frontini* judgment argues that limitations on sovereignty under Article 11 of the Italian Constitution in favor of the Community "cannot, however, result in the EU institutions having an impermissible power to violate the fundamental principles of our constitutional order or the inalienable rights of the human person"[207]. Therefore, according to the Court, in the case of "such an aberrant interpretation", it leads to the constitutional obstacle of *controlimits*, which practically translates into declaring the Implementing Law of the EEC Treaty unconstitutional[208].

The rationale of this constitutional mechanism lies in the need for the provisions laid down in Article 11 of the Italian Constitution, which constitutionalizes Italy's accession to the Community but not without limitations.

Indeed, this article allows the so-called *limitations on sovereignty* for purposes of *peace and justice*. These purposes (especially the aim of justice) would be undermined if the system to which portions of sovereignty are being transferred violated inalienable rights and the fundamental principles of the constitutional system. In such a situation, the transfer would lose its reason for existence[209].

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[206] M. CARTABIA, loc. cit., p. 106.

[207] Judgment *Frontini*, cit., n. 9 *Considerato in diritto*. Similarly, Judgment *Granital*, cit., n. 7 *Considerato in diritto*.

[208] M. CARTABIA, loc. cit., p. 107. The author notes on this point how this concretisation of the counter-limits stems from the dualist view of the two systems, adopted in particular in Judgment No 98 of 1965. In the latter, it was said that the Court enunciated the principle of the separation of the legal systems; in fact, the formal mechanism of the counter-limits targets the law of execution of the EEC Treaty, not being able to "touch" with its judgment the Community acts, considered extra-ordinamental.

[209] M. CARTABIA, loc. cit., p. 109.

It can be argued, therefore, that this first pronouncement on *controlimits* places them in an extreme measure perspective, deeming the announced scenario as "*improbable*"[210].

However, it should be noted that in a subsequent judgment (no. 232 of 1989), the Constitutional Court adds significant details to the "controlimits" mechanism, to the point of almost completely transforming it.

What constitutes a novelty compared to the past is the fact that the Court considers it possible for it to pass judgment on "*any provision of the treaty, as interpreted and applied by the Community institutions and bodies* […]"[211].

As Cartabia observes, "it follows that the implementing law of the Treaty, as a direct object of the Constitutional Court's control, becomes merely an intermediate object of constitutional review of individual EU provisions, including derivative ones"[212].

In this situation, inviolable values are "protected" against any EU provision, and constitutional review no longer takes on the character of an extreme remedy but rather a "routine" constitutional judgment[213]. Furthermore, this also leads to a transformation in the scope of the constitutional review, which, according to the "original version" of *controlimits*, encompassed the entire implementing law, while now the scope is more limited, so that a ruling in favor of "controlimits" would make that specific EU provision inapplicable in our legal system, with no doubt about Italy's continued membership in the Community[214].

In other words, the *controlimits*, originally conceived as a condition for limitations on sovereignty, now become limits to the primacy of EU law[215].

To understand this latest change, it is necessary to specify the criterion that the Constitutional Court can use to assert *controlimits*.

The criterion will not be constituted by any constitutional norm but only by the inviolable values of the constitutional heritage (i.e., inalienable rights and fundamental

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[210] Judgment Granital, n. 9 *Considerato in Diritto*.

[211] Italian Constitutional Court, judgment 13-21 april 1989, n. 232, see n. 3.1 *Considerato in Diritto*.

[212] M. CARTABIA, loc. cit., p. 115

[213] Ibidem.

[214] Ibidem.

[215] Ibidem.

principles of the constitutional order). In this case, delimiting this scope is particularly important because the application of this system has the effect of derogating from the principle of primacy, which aims at the uniform and simultaneous application of EU law in all Member States' legal systems.

If, however, this "limitation" were not to operate, it would create a situation where the Community would be asked to adopt (all) the fundamental principles and rights of our constitutional order[216], under the threat of invoking *controlimits*, which would then be applied (almost) systematically.

Therefore, the crux of the matter lies in identifying which of the fundamental rights and principles should be considered so essential that they can be invoked to hinder the incorporation of an EU provision into our constitutional order.

The answer to the question is only seemingly simple.

Today, according to a constant line of constitutional jurisprudence, the *controlimits* can be considered to coincide with the *supreme principles* of the constitutional order.

While, on the one hand, this answer helps narrow down the field of fundamental rights and principles with the function of *controlimits*, on the other hand, it does not lead to their precise enumeration.

[216] M. CARTABIA, loc. cit., p. 119. The author emphasises that, by accepting such a hypothesis, the Constitutional Court would fall into a 'clear contradiction', due to the fact that with its previous jurisprudence it accepted the principle of primacy, also providing for the possibility of exceptions to constitutional norms, and then, instead, later with such a broad formulation of the counter-limits, in fact, allowed a systematic violation of the principle of primacy itself.

Indeed, the category of supreme principles is rooted in constitutional jurisprudence[217] and stands at the top of the material hierarchy of legal sources, to the point of serving as a limit even to laws amending the Constitution[218].

Therefore, probably precisely because their theoretical development was not followed by a formal "incorporation" into the Constitutional Text, it can be argued that the definition or "discovery" of these principles remains the exclusive task of the Judge of Laws. During its jurisprudence, the Constitutional Court has repeatedly referred to this legal category without ever providing a typical list.

The lack of a specific enumeration has led scholars to argue that within the supreme principles, "the discretion of national [constitutional] courts remains extremely high, so as to be able to freely shape *controlimits* according to the specific case and the contingencies of the historical moment"[219].

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[217] More precisely, the first appearance of supreme principles in the jurisprudence of the Italian Constitutional Court dates back to Judgment No. 30 of 1970. In extreme synthesis, the need for the introduction of this legal category was to be found in the circumstance that, given the reciprocal independence of the State and the Church (art. 7 paragraph 1 Const.), the Lateran Pacts were inevitably constitutionalised, due to their explicit reference to art. 7 paragraph 2 Const. and consequently were placed on the same level as the Constitution itself. Therefore, it was clear that limits had to be 'created' which, although they could not coincide with all the norms of the Constitutional Charter, should at least coincide with those values that are indefectible to the constitutional order and whose respect must in any case be guaranteed. On this point, the reflections of J. PASQUALI CERIOLI, *I principi e gli strumenti del pluralismo confessionale (artt. 7 e 8)*, in G. CASUSCELLI (a cura di), *Nozioni di Diritto Ecclesiastico*, Torino, Giappichelli Editore, 2015, p. 99 ff. Finally, the supreme principles enunciated so far by the Constitutional Court, in addition to those already mentioned of secularism and indepedence/separation of orders, are: the principle of unity of the State and unity of constitutional jurisdiction, the good of life and the prohibition of the death penalty, access to the courts and diplomatic immunity, and finally the principle of legality and taxability in criminal matters (cf. G. ZAGREBELSKY, V. MARCENÒ, *Giustizia Costituzionale*, Bologna, Il Mulino, 2018, vol. I, p. 187 ff.).

[218] Cf. Italian Constitutional Court, judgment 15-29 december 1988, n. 1146, see n. 2.1 *Considerato in diritto*. The ruling, by giving the Constitutional Court jurisdiction over constitutional revision laws, introduces the principle of constitutional rigidity in the substantive sense. This is added to the already existing formal principle represented by Article 138 of the Constitution, which regulates the aggravated procedure for revision. Finally, taking up the expression of G. ZAGREBELSKY, V. MARCENÒ, *Giustizia Costituzionale*, op. cit., vol. II, p. 77 ff., this pronouncement admits the existence of "constitutional substances" that act as an "absolute material limit to the power of constitutional revisio". On this subject see the reflection of N. ZANON, *Premesse ad uno studio sui 'principi supremi' di organizzazione come limiti alla revisione costituzionale*, in *Giurisprudenza costituzionale*, p. 1891 ff.

[219] A. BERNARDI, I controlimiti al diritto dell'Unione europea e il loro discusso ruolo in ambito penale, in A. BERNARDI (ed.), I Controlimiti: primato delle norme europee e difesa dei principi costituzionali, Napoli, Jovene editore, 2017, p. L. See also, P. FARAGUNA, Ai confini della Costituzione. Principi supremi e identità costituzionale, Milano, FrancoAngeli.

It is known that the topic of *controlimits* has recently returned to the forefront in relation to the well-known *Taricco saga*[220].

This saga is composed of various judgments rendered at the constitutional and European levels on the principle of legality in criminal matters, protected by the Italian Constitution under Article 25, paragraph 2, and Article 49 of the Charter of Fundamental Rights.

In summary, the saga originates from the referral made by the judge in Cuneo to the Court of Justice, who complained about the (systematic) impossibility of concluding the trial against the defendants charged with VAT fraud due to the excessively short prescription period[221].

The "initial" response from the Court of Justice was affirmative[222], highlighting that the direct effects of Article 325 TFEU allow the referring court to disapply the domestic rules of the criminal code on prescription that effectively prevented the assessment of these harmful conduct.

This latter European decision practically allowed the ordinary judge to disapply the provisions on prescription in the criminal code, but only in "serious violation" cases.

Two aspects then become crucial: first, that of specificity, as it was not easy to determine in which cases disapplication should be chosen, given that it was subject to "serious violation" cases; second, the nature, substantive, or procedural, of prescription in our legal system. In particular, this issue arose concerning the

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[220] he case has been much commented on by the scholars and there have been several collections of essays, among which, without any claim to completeness, we would like to mention two: A. BERNARDI, C. CUPELLI, *Il caso* Taricco *e il dialogo tra le Corti: l'ordinanza 24/2017 della Corte costituzionale,* Napoli, Jovene Editore, 2017 e C. AMALFITANO, *Il primato del diritto dell'Unione Europea e controlimiti alla prova della* "saga Taricco", Milano, Giuffrè Editore, 2018. From the first book, see the chapters of C. AMALFITANO, *Primato del diritto dell'Unione* vs *identità costituzionale o primato del diritto dell'Unione* e *identità nazionale?,* p. 3 ff.; M. D'AMICO, *Principio di legalità penale e "dialogo" tra le Corti. Osservazioni a margine del caso* Taricco, p. 97 ff.; F. VIGANÒ, *Le parole e i silenzi, Osservazioni sull'ordinanza n. 24/2017 della Corte costituzionale sul caso* Taricco, p. 475 ff. From the second one, see C. AMALFITANO, *La* "saga Taricco"*: dalla sentenza della Corte di Giustizia nella causa C-105/14 all'ordinanza n. 24/2017 della Corte costituzionale,* p. 3 ff.; M. D'AMICO, *Tra legislatore, Corte costituzionale e giudici comuni: alcune riflessioni intorno alle ricadute interne della sentenza* Taricco II *della Corte di Giustizia,* p. 235 ff., B. RANDAZZO, *Le Corti e la fascinazione del dialogo: tra cooperazione e negoziazione. A margine della vicenda* Taricco *e dintorni,* p. 293 ff.

[221] Cfr. Tribunale di Cuneo, referral order 17 january 2014.

[222] Court of Justice, judgment 8 september 2015, C-105/14, *Taricco e a.,* ECLI:EU:C:2015:555.

retroactive application *in pejus* of the "Taricco rule", which, if applied to a substantive rule, risked violating the principle of legality in criminal matters.

These two critical aspects were brought to the attention of the Constitutional Court by the third criminal section of the Court of Cassation and the Court of Appeal of Milan[223].

The Judge of Laws[224] identified the conflict of the mentioned aspects with the constitutional principles of specificity and legality, which can be classified among the supreme principles of the constitutional order. Therefore, even though the conditions for *controlimits* were met, the Constitutional Court avoided immediately activating them and decided to refer the case back to the Court of Justice.

Indeed, Order No. 24 of 2017 aimed to highlight the specificities of Italian fundamental principles on the one hand, and in light of these, to investigate whether there were interpretive margins to reconcile these specificities with the conflicting EU reasons that guided the Court of Justice in the "initial" *Taricco* judgment.

The Court of Justice in the *Taricco II* judgment[225] reconsidered its position and limited the effects of its previous ruling, so that it no longer clashed with the supreme principles of the Italian legal system.

In other words, this last judgment by the European Judge avoided triggering *controlimits*. As a result, the Constitutional Court concluded the constitutional review initiated by the Cassation and the Court of Appeal of Milan with a dismissal decision[226].

In conclusion, the *Taricco saga* had a positive final outcome. However, the underlying idea of *controlimits*, namely, that of a "*conspicuous yet uncomfortable conflict*" between constitutional and European jurisdictions, remains relevant to understand not only who has the "*final word*"[227] but also the decisive one.

[223] Corte d'Appello di Milano, referral order 18 sempteber 2015, n. 339 and Cassazione, sez. III pen., referral order 8 july 2016, n. 212.

[224] Italian Constitutional Court, order 23 november 2016, n. 24/2017.

[225] Court of Justice, judgment 5 december 2017, C-42/17, *M.A.S. e M.B.,* ECLI:EU:C:2017:936.

[226] Cfr. Italian Constitutional Court., judgment 10 april 2018, n. 115.

[227] A. BERNARDI, *I controlimiti al diritto dell'Unione europea*, op. cit., p. XX.

CHAPTER II

TOWARDS CONSOLIDATION OF THE COMMUNITY OF RIGHTS IN THE EUROPEAN PUBLIC SPACE: LIGHTS AND SHADOWS OF AN UNFINISHED POLITICAL PROCESS

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1. The First 'Political' Approaches to Fundamental Rights in the European Space: The Significant Shift from *Soft* to *Hard law*

1.1. The First Positions Taken by the European Parliament and the Commission through Policy Acts

The political institutions of the Union have not been silent to the creationism of the Court of Luxembourg on the protection of fundamental rights. Indeed, in the first thirty years of the three Communities' existence, they made extensive use of the power of externality, expressed in the production of acts of *soft law*[228], through which an ever-increasing awareness of the 'autonomous' protection of rights in the European space was built up, which would culminate in 2000 in an *ad hoc* source of European law.

These acts fall within the category of guideline acts, are not legally binding and, according to the ordinary categorisation, are among the *atypical* ones[229]. This *is because* their basic peculiarity lies in the fact that they are not mentioned in Art. 288 TFEU (formerly Art. 189 TCEE), which - on the contrary - explicitly states the legal effects only of *typical* acts (regulations, directives, decisions, recommendations and opinions), which the institutions use "to exercise the competences of the Union"[230].

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[228] On the role of *soft law* and its impact in constitutional systems, see A. POGGI, *Soft law nell'ordinaento comunitario,* in *Rivista AIC*, Annual Conference 2005, held in Catania, 14-15 October, *L'integrazione dei sistemi costituzionali europei e nazionali*".

[229] The list of atypical acts is particularly large and heterogeneous. They include communications of the European Parliament, conclusions, resolutions and guidelines of the Council, communications, white papers and green papers of the Commission, internal regulations of the institutions and opinions given in the context of inter-institutional relations. On the subject, see A. DI PASCALE, *Gli atti atipici nel sistema delle fonti del diritto dell'Unione europea,* Milan, Giuffrè, 2017; G. FIENGO, *Gli atti 'atipici' della Comunità europea,* Naples, 2008; G. FERRARIO, *Natura ed effetti degli atti atipici della Comunità europea,* in G. GUZZETTA (ed.), *Le forme dell'azione comunitaria nella prospettiva della Costituzione europea,* Padua, 2005.

[230] Art. 288 TFEU. Above all, see G. GAJA, entry on *Community Sources,* op. cit., p. 433 ff. A. RUGGERI, *Le fonti del diritto eurounitario,* op. cit., p. 286 ff.; E. CANNIZZARO, *Il diritto dell'integrazione europea,* op. cit., p. 104 ff.; C. AMALFITANO, M. CONDINANZI, *Unione Europea: fonti, adattamento e rapporti tra ordinamenti,* Turin, Giappichelli, 2015, p. 43 ff.

The first act of *soft law on the* protection of fundamental rights can be traced back to the 1967 European Parliament resolution on the "legal protection of private persons in the Communities"[231].

The first significant element is already to be found in the title of the resolution, which speaks more generically of the legal protection of individuals, rather than of their fundamental rights. This choice, in the writer's opinion, is reflected in the first pronouncements of the Court of Justice's jurisprudence, in which the incompetence of the Union Court to deal with a matter (such as that of rights) that was then the exclusive prerogative of the State clearly emerged.

In 1967, the European Assembly, like the Court, seems to have been more concerned with that sense of confidence in legality in relation to the provisions adopted by the Communities, considering "the formation of a common political conscience in the Community"[232] to be indispensable to this end. To this end, it is "considered [...] politically indispensable that private individuals and companies have sufficient and effective means at their disposal to have the legality of the measures affecting them reviewed by an independent court"[233] .

However, the Parliament does not fail to emphasize that there are "gaps in the legal protection of private individuals in the Community" and, in this regard, proposes that "the legislative bodies of the Member States examine, in the spirit and in compliance with Community law, possible amendments to national provisions"[234].

But whereas in the days when the protection of rights was 'foreign' to the European legal system, the resulting legal "loophole" could not be resolved by an appeal to the national parliaments, the situation found a different solution with the

[231] European Parliament, Resolution 'sur la protection juridique des personnes privées dans les Communautés européennes', *OJEU* 2 June 1967, 2055/67.

[232] Resolution 'sur la protection juridique des personnes privées dans les Communautés européennes', cit., pt. 1

[233] Resolution 'sur la protection juridique des personnes privées dans les Communautés européennes', cit., pt. 2

[234] Resolution 'sur la protection juridique des personnes privées dans les Communautés européennes', pt. 5. It should also be noted that Parliament urged "its committees, and in particular its Committee on Legal Affairs, [to] submit in future, during consultations, proposals on the means of ensuring, by means of new provisions of Community law, sufficient legal protection of private persons" (pt. 6).

praetorian introduction of general principles. Indeed, in a 1973 resolution[235], Parliament began to address the Commission as the holder of the power to propose legislation.

In particular, the European Parliament "[i]nvites the Commission of the European Communities when drafting regulations, directives and decisions, to prevent conflicts from arising with national constitutional law and to examine in particular how the fundamental rights of Member States' citizens may be safeguarded".

In other words, even at the European political level, one begins to worry about the possible infringement of rights by acts of the Union, and the remedy to this eventuality falls within the sphere of competence of the European institutions, which are called upon to *produce* law. In addition, it urges the Commission to produce a report on how to prevent any form of violation of the '*basic rights*' protected by the Constitutions of the Member States, given that the principles laid down therein '*represent the philosophical, political and juridical basis common to the Community's Member States*'[236].

This gave rise to a greater 'political' sensitivity towards a new form of European integration: integration through rights, which is immediately reflected in the Community's founding values themselves. Evidence of this is the 1975 resolution on the European Union[237], in which the Parliament, on the assumption that "[t]he European Union must be conceived as a pluralist and democratic Community", requests the Commission to present, within the overall programme of priority action of Community policies, a draft "Charter of the rights of the peoples of the European Community". Such a draft, in the Parliament's perspective, through the provision of 'practical measures capable of contributing to the development of a European Community consciousness', will enable the individuals of the Community to develop 'a sense of common destiny'.

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[235] Resolution of the European Parliament "on the Protection of the Fundamental Rights of Member States' Citizens when Community Lw is Drafted", in *OJEU* 30 April 1973, No C26/7.

[236] Resolution of the European Parliament on the Protection of the Fundamental Rights of Member State' Citizens when Community Lw is Drafted, 1973, cit., pt. 2.

[237] Resolution of the European Parliament "on European Union", in *OJEU*, 10 July 1975, No C179/28.

The realisation that action must be taken to create an ever more solid European platform of rights was also matured by the Commission, which in its report of February 1976 - produced on the instructions of the Parliament - analysed the subject in great detail.

First of all, the Commission adheres to the European Parliament's request to act within the *law-making process,* precisely because of that intimate link between the creation of the single market the related guarantees of freedom of movement[238]. On this point, in particular, the Commission specifies that, within the scope of its power of proposal, particular attention will be paid, including through more frequent hearings of experts. This is true for the *ex ante* commitment, while for the *ex post* commitment it does not exclude the possibility of using the infringement procedure in the hypothesis of violations of Community law by specific national provisions, which are in turn detrimental to the rights of European citizens.

Another interesting profile the report dwells on concerns the modalities and consequences of the introduction of a possible 'European catalogue' of fundamental rights[239]. In particular, the EU executive emphasises the advantages of the catalogue, including: greater legal certainty; "[it] would lend solid support to the law-making by the judiciary"; "it would emphasise the importance of fundamental rights and remove any remaining doubs about the relevance in Community law"; "it would enable the exercise of economic and social rights"[240].

As to the modalities, the Commission hightlights the importance of an intergovernmental approach, based on the unanimous consensus of the national States, since the catalogue itself would affect a subject matter already regulated by constitutional provisions. And therefore, in this perspective, the "catalogue" should

[238] With reference to the impact of freedom of movement on the family law of Member States, see S. NINATTI, *Ai confini dell'identità costituzionale. Dinamiche familiari e integrazione europea*, Torino, Giappichelli, 2012.

[239] In order to investigate the subject further, the Community Executive commissioned the then President of the. Max Plank Institute, Professor Bernhardt, a comparative study on the effects that would result from the introduction of the European catalogue (Annex to COM (76) 37, *The problems of drawing up a catalogue of fundamental rights for the European Communities*. *A study requested by the Commission*).

[240] European Commission, Report "The protection of fundamental rights as Community law is created and developed", COM (76)37, 4 February 1976, pt. 33

not simply act as the lowest common denominator, but should enable the achievement of an "optimun standard of protection of fundamental rights in the Community"[241].

The Commission is, however, aware that these ambitious objectives cannot be achieved with the Treaties unchanged and that their attainment necessarily presupposes a progression of the European integration project towards a true Union of states, with inevitable federal repercussions. Therefore, the theme of the introduction of a catalogue is accompanied by the idea of an expansion of the competences assigned to the Communities. On the contrary, in the Commission's opinion, there would be a risk of introducing a whole series of rights that would not be immediately applicable, since they would fit into a much narrower area of Community policies[242].

The Commission's report, shared in its ideal plot by the European Parliament[243], was followed a few years later by an even more solemn Joint Declaration of the main Community Institutions[244], which, in emphasising the essential nature of the issue, committed themselves to respecting fundamental rights, as enshrined in the Constitutions and the ECHR, both "in the exercise of their powers" and "in pursuance of the aims of the European Communities"[245].

This is precisely the spirit that led to the introduction, in 1987, of a specific point in the Preamble of the Single European Act *("RESOLVED to promote democracy together on the basis of the fundamental rights enshrined in the constitutions and laws of the Member States, the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, in particular freedom, equality and social justice"*).

[241] European Commission, Report "The protection of fundamental rights as Community law is created and developed", cit., pt. 29.

[242] European Commission, Report 'The protection of fundamental rights as Community law is created and developed', cit., pt. 37

[243] See European Parliament, Resolution "on the Report of the Commission of the European Communities on the Protection of Fundamental Rights", *OJEU,* 4 November 1976, C259/10.

[244] Joint Declaration of the European Parliament, the Council and the Commission 'concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedom', *OJEU* 27 April 1977, C103/1.

[245] Ibid.

1.2. Rights 'Entering' into European Treaties: from the 'Spinelli' Project to the Amendments to the Treaties in the Last Decade of the 20th Century

The objectives set with the possible introduction of a catalogue of fundamental rights would, as is well known, remain on *standby for* some time to come, while the idea of making reference to the main sources informing 'European' fundamental rights explicit in specific provisions of the Treaties advanced in the early 1990s.

In this sense, as early as 1977, the Parliament proposed in a resolution[246] that at least three distinct sources 'external' to the EU legal order be considered an integral part of the Treaties: (a) the ECHR of the Council of Europe, (b) the UN International Covenant on Civil and Political Rights, and (c) the civil and political rights protected by the constitutions and laws of the Member States.

Among the most significant attempts to reform the Treaties is the Spinelli Project.

Approved in the final months of the first legislature by the European Parliament, in February 1984[247], the Project deserves special mention not only for the innovations it intended to introduce in the subject under study here, but also for the 'constitutional' method that Spinelli himself, the promoter of the reform, intended to follow.

On the assumption that it was not explicitly stated in the treaties that an Intergovernmental Conference had to be convened to amend them, the practice was to do so, i.e. to require that the proposal first be discussed by the governments of the Member States, as had been the case with the founding treaties.

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[246] European Parliament, Resolution 'on the Granting of Special Rights to be Citizens of the European Community in Implementation of the Decision of the Paris Summit of December 1974 (Point 11 of the Final Communiqué)', *OJEU* 1977 12 December 1977, C299/21.

[247] For a careful reconstruction of the political process that led to the elaboration of the Spinelli Project, see F. CAPOTORTI, M. HILF, M. DONY, J.V. LOUIS, F. JACOBS, J.P. JACQUÉ (eds.), *Le Traité d'Union européenne : commentaire du projet adopté par le Parlement européen le 14 février 1984,* Bruxelles, Etudes européennes, 1985, and the contributions by S. PISTONE, *A trent'anni dal Progetto Spinelli: un'iniziativa parlamentare a favvore della Costituzione federale dell'Europa*, in *Il Federalista*, nn. 1-2, 2014, p. 34 ff. PISTONE, *A trent'anni dal Progetto Spinelli: un'iniziatica parlamentare a favore di una costituzione federale europea,* in *Il Federalista,* nn. 1-2, 2014, p. 34 ff.; in the same issue of the latter journal see also, M. CEVAT YILDIRIM, *Il "Progetto Spinelli" e la sua eredità*, p. 65 ff. and P. V. DASTOLI, *L'attualità del Progetto Spinelli,* p. 57 ff.

Spinelli attempted to turn the tide and supported by a broad and transversal parliamentary consensus, urged - first in the Constitutional Affairs Committee and then in the Plenary - the discussion and approval of a draft amendment establishing the European Union that would ultimately be ratified by national parliaments. The intention was to resume, with determination, the process of European construction, seeking to imprint the system with a real political turning point that, although not aimed at the creation of a federal order, was nevertheless intended to come significantly closer to it[248].

In other words, the Project proposed to build the 'new' European Union through the intimate connection between an ever-increasing political cooperation and the principles of pluralistic democracy, the protection of rights and the primacy of law.

Two important provisions were devoted to the protection of rights: Articles 4 and 44.

With Art. 4, the Union commits itself, on the one hand, to protect 'the dignity of the individual and [to recognise] for everyone within its sphere of competence the fundamental rights and freedoms as they result, in particular, from the common principles of the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms' (para. 1), and, on the other hand, 'to maintain and develop, within the limits of its powers, the economic, social and cultural rights as they result from the constitutions of the Member States and from the European Social Charter' (para. 2). 1), on the other hand, 'to maintain and develop, within the limits of its powers, the economic, social and cultural rights

[248] The same Spinelli, a few years later, wrote that "Parliament began to work and, in a debate that lasted three years, that went through committee meetings, group meetings, plenary debates, an awareness emerged on the part of all the countries and all the political groups that a very profound reform had to be carried out. It was not a question of modifying this or that detail, but, starting from the existing Treaty and considering it as acquired, even if it could be transformed, to create a new Treaty, a Union in which the Commission was a true government, legislative power was shared by Parliament and the Council, and there was no longer a right of veto. We allowed that, during a transitional period, when a government believes a vital interest is at stake, it would have a suspensive veto. But we set conditions: the first was that the veto had to be clearly justified; the second was that the justification for the veto also had to be recognised by the Commission, because there is not only the vital interest of this or that government, but also the vital interest of the Union. When the Union's vital interest is asserted there must be a second reading, a reworking, that is to say, basically reconsidering everything"(thus A. SPINELLI, *Il ruolo costituente del Parlamento europeo* in *Il Federalista*, No. 1, 1985, p. 74).

which result from the Constitutions of the Member States and from the European Social Charter' (para. 2).

Thus, the idea emerged that European construction also found its foundation on a solid system of protections, composed of the dual reference to national Constitutions, whose fundamental rights and principles were both recognised as common heritage, and the European Convention. And this system was then realised in the Union's commitment to adopt new and innovative European public policies to support the rights of European citizens.

There is more. This framework of protection was for the first time flanked by both a judicial review by the Court of Justice, which was given *ad hoc* jurisdiction[249], and also a political procedure aimed at sanctioning serious and persistent violations of the democratic principle and fundamental rights by the Member States[250]. With regard to the latter, in particular, an initial finding of the Court of Justice was required, according to Article 44, in order to arrive at a sanction and subsequently 'the European Council, after hearing the State in question and after obtaining the assent of the Parliament, may adopt measures:

- aimed at suspending the rights resulting from the application of part or all of the provisions of this Treaty to the State in question and its nationals without prejudice to the rights acquired by the latter,

- which may go so far as to suspend the participation of the State in question in the European Council and in the Council of the Union, as well as in any other body in which the State is represented as such'.

Due to the failure of Member States to ratify it, the Spinelli project foundered, but a few years later some of the innovations it aimed to introduce were taken up by the Maastricht Treaty[251] .

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[249] According to Article 43, under the heading 'judicial review' it was provided that "[t]he Community provisions on judicial review shall apply to the Union. They shall be supplemented by an organic law on the basis of the following principles: [...] jurisdiction of the Court for the protection of fundamental rights in respect of the Union; [...]".

[250] Article 4(4) of the Spinelli draft provided that "[i]n the event of a serious and persistent breach by a Member State of democratic principles or fundamental rights, sanctions may be taken in accordance with the provisions of Article 44 of this Treaty".

[251] On the innovations introduced by the Maastricht Treaty, see, for all, A. TIZZANO, *Appunti sul trattato di Maastricht. Struttura e natura dell'Unione europea,* in *Il Foro it.,* Vol. 118, No. 6, 1995, p. 209 ff.; C. CURTI GIALDINO, *Il Trattato di Maastricht sull'Unione europea. Genesi - Struttura -*

Article F introduced the following provision.

"The Union respects the national identity of its Member States, whose systems of government are based on democratic principles.

2. The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

3. The Union shall provide itself with the means necessary to attain its objectives and to carry out its policies'.

The aforementioned provision, which we know today as Article 6 TEU, was intended to transpose and reaffirm EU case law that enumerated fundamental Euro-unitary rights[252], but this intention was only partially achieved.

Article L of the Maastricht Treaty, in its later version[253], introduced a limitation to the application of Article F(2), insofar as the latter provision could only be applied by the Court of Justice with regard to "[t]he activities of the institutions" and "in so far as the Court [had] jurisdiction under the Treaties".

This delimitation of the scope of action of Article F implies a partial transposition of the Luxembourg jurisprudential direction, since the specification to acts of the institutions only, left out the "*ERT* and *Wachauf* exceptions*",* which provided for the application of the general principles of EU law to national acts implementing Union law. Thus, the justification for the latter hypotheses, sought by means of interpretative preliminary references, remained anchored to European case-law 'law'.

Regarding the role that the Maastricht Treaty attributed to 'common constitutional traditions', Pizzorusso emphasised that the reference made did not have

Contenuto - Processo di ratifica, Roma, Istituto Poligrafico e Zecca dello Stato, 1993; G. JANNUZZI, *Le prospettive dell'Unione dopo Maastricth,* in *Rivista di Studi Politici Internazionali,* Vol. 59, No. 1, 1992, p. 3 ff.; C. BISCARETTI DI RUFFIA, *Gli aspetti non istituzionali del Trattato sull'Unione Europea,* in *Il Politico,* No. 1, 1995, p. 109 ff.

[252] A. PIZZORUSSO, *Il patrimonio costituzionale europeo*, op. cit., p. 20.

[253] Article L of the Maastricht Treaty, as supplemented by Article K 17 (Art. 46(d) in the consolidated version) of the Treaty of Amsterdam. In fact, the aspect highlighted here is not to be found in the original version of Article L, but in its later amendment.

the effect of modifying rules and principles laid down in the Treaties, since, despite Maastricht, these cannot be defined as a true source of Community law[254].

This impossibility stemmed from the fact that Article F did not contain an actual *"referral clause" in* favour of the common traditions and the European Convention. Consequently, this provision was not intended to "transpose the normative content of these traditions and transform it into European law"[255], but merely required the Union to *"respect"* the common traditions and the ECHR as "sources *of* fundamental rights", but this did not imply the automatic transformation of these sources into European law[256].

In this regard, there was talk of *'privileged instruments of interpretation'* contributing to the determination of general principles of Community law[257].

Nonetheless, in the post-Maastricht era, respect for fundamental rights assumed a prominent *political* role in the Community system. For example, the inclusion in cooperation agreements with third countries of clauses requiring respect for and guarantees of democratic principles and human rights[258].

In 1993, the so-called *Copenhagen criteria* were enunciated, which still constitute the criteria for the entry of third countries into the Union, and these include respect for fundamental rights[259].

On the sanctioning side, the Maastricht Treaty did not intervene, and this gap was later filled by the subsequent Amsterdam Treaty with the introduction of Art. F.1 (now Art. 7 TEU) instituted a "political" procedure to ascertain manifest violations of

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[254] A. PIZZORUSSO, op. cit., p. 25. The author (p. 20), moreover, records the doctrine's difficulty in defining common constitutional traditions as a source of law, since they were considered rather a "*notion of cultural character*".

[255] A. PIZZORUSSO, op. cit., p. 26.

[256] *Ibid*. This applies *a fortiori* to the ECHR, to which the Union has never formally acceded.

[257] Ibid.

[258] A. TIZZANO, L'azione dell'Unione Europea nella promozione e protezione dei diritti umani, in Il Diritto dell'Unione Europea, No. 1, 1999, p. 158.

[259] A. TIZZANO, op. cit., p. 159. The author conducts an analysis aimed at bringing out the various facets of human rights protection, especially from an international policy perspective. Interesting is the conclusion he reaches (p.164), according to which in general the system of rights protection needs an important degree of *impartiality*, which must undoubtedly also apply to the EU level. However, this objective cannot be achieved without increasing the degree of autonomy of the institutions, which in their decision-making process must increasingly free themselves from national governments, which can steer the Union towards the adoption of "partial and unilateral solutions, conditioned by ideological winds or occasional political supremacies".

human rights by Member States. If the ascertainment procedure ended positively, sanctions could be imposed that suspended the exercise of certain rights of states within the institutions, such as the right to vote[260].

1.3. (Following...) The Construction of the *Area of Freedom, Security and Justice* as an Instrument for Sharing Policies Aimed at Increasing the Protection of Fundamental Rights

As is well known, the amendments to the founding treaties during the last decade of the 20th century introduced profound innovations that were intended to breathe new life into the European integration process through a reform process under the banner of achieving an '*ever closer Union*'.

We will not dwell on the political choices related to this first significant 'turning point', but will limit ourselves here to mentioning some of them.

First of all, think of the rules on European citizenship, introduced in the Maastricht Treaty, aimed at reaffirming and *strengthening*[261] the set of rights to which citizens of the Union are entitled. The same treaty also launched the creation of an Economic and Monetary Union, through the sharing of a single currency project that would bring greater stability and cohesion among the Member States. A crucial role was then played by the Schengen Agreement, which was signed in 1985 and came into force in 1995, and which, as is well known, had the merit of progressively 'tearing down' the barriers between individual states and thus facilitating the exercise of freedom of movement, the cornerstone of the entire integration project.

It is also well known that since 1993 the approach of the founding treaties also changed with the so-called three 'pillar' structure, which was only formally superseded by the Lisbon Treaty. In brief, the first pillar brought together the three original

[260] The introduction of this procedure, together with Article F, according to DE BÚRCA "formally marked the constitutional maturation of human rights within the EU legal and constitutional framework", so in *Road not taken,* op. cit., p. 671.

[261] In these terms, see Article 2 TEU: "The Union shall have the following objectives: [...] - to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union".

Communities and was inherent to matters such as the single market, monetary union and environmental, social cohesion, agricultural and visa and immigration policies. The second and third pillars, on the other hand, dealt with common foreign and security policy and judicial cooperation and home affairs, respectively. Within this composite structure, what differentiated the first from the other two pillars was the 'method' used: the first was informed by the principle of communitarianism, according to which greater decision-making autonomy was ensured to the European institutions by virtue of the cessions of sovereignty in specific matters; while for the second and third pillars, the 'classic' scheme of international cooperation was still pursued, where decisions were taken only by the governments of the Member States.

In this general context, there was also the choice, made by the Treaty of Amsterdam, to build an area of *Freedom, Security and Justice*[262], where the 'free movement of persons is ensured together with appropriate measures with regard to external border controls, asylum, immigration, crime prevention and the fight against crime'.

Facilitating its genesis was the 'communitarisation' of certain matters through their transfer from the first to the third pillar. This led to the insertion of an *ad hoc* title in the TEC, Title IV (Arts. 61-80), giving the Union competence over 'visas, asylum, immigration and other policies related to free movement of persons', such as cooperation in civil matters.

But not only that, because the project of building the Area of Freedom, Security and Justice included the common actions of the Member States, still hinged on the third pillar, in the field of police and judicial cooperation in criminal matters. In fact, Article K1 of the Treaty of Amsterdam linked the creation of this area to the objective of developing '*between the Member States common action in the field of police and judicial cooperation in criminal matters and preventing and combating racism and xenophobia*'. This was to be achieved through the prevention and repression of *'crime, organised or otherwise, in particular [of] terrorism, [of] trafficking in human beings*

[262] See the reflections in G. AMATO, E. PACIOTTI, Verso l'Europa dei diritti. Lo Spazio europeo di libertà, sicurezza e giustizia, Bologna, Il Mulino, 2005, esp. G. AMATO, Conclusioni, p. 241 ff.; E. PACIOTTI, Quadro generale della costruzione dello Spazio di libertà, sicurezza e giustizia, p. 13 ff.; E. DE CAPITANI, Lo Spazio di libertà, sicurezza e giustizia e il rafforzamento dell'Unione di diritto, p. 13 ff.; and I.J. PATRONE, La tutela giurisdizionale dei diritti, p. 187 ff.

and offences against children, [of] illicit drug and arms trafficking, [of] corruption and [of] fraud [...]'.

On these provisions, the Tampere Strategy was then built, which, on the assumption that 'European integration has been firmly based on a common commitment to freedom anchored in human rights, democratic institutions and the rule of law', emphasised the objective 'to ensure that freedom, which includes the right to free movement throughout the Union, can be enjoyed in conditions of security and justice accessible to all'. This objective presupposed a series of common actions in specific areas such as asylum and migration, access to justice, the fight against crime at the level of the union, and a stronger external action[263].

In short, it was clear that the area of freedom, security and justice was as important as it was necessary for the effective protection of the fundamental rights of those living in Europe. Over the years, however, in this area, alongside the steps forward that have been recorded (*ex pluribus*, see the EPPO Regulation, the Data Protection Regulation and, even more recently, the AI Act), there has also been no lack of contradictions and setbacks - first and foremost in the area of migration - which have made European citizens' confidence that the Union was really capable of meeting common challenges increasingly precarious.

[263] The Area of Freedom, Security and Justice makes the criminal law traces within Union law and their direct impact on the protection of rights even more evident, on the subject see, above all, M. D'AMICO, *Diritto costituzionale europeo e potestà punitiva dell'Unione,* edizione provvisoria, Torino, Giappichelli, 2000; EAD, *Lo spazio di libertà, sicurezza e giustizia e suoi riflessi sulla formazione di un diritto penale europeo*, in A. LUCARELLI, A. PATRONI GRIFFI (*eds.*), *Studi sulla Costituzione europea. Ipotesi e percorsi*, Naples, Edizioni Scientifiche, 2003, p. 191 ff.; EAD, *L'introduzione del principio di legalità in materia penale nella Carta europea dei diritti: problemi e prospettive*, in M. D'AMICO (ed.), fasc. monografico *Europa e Giustizia*, no. 1, 2003, p. 119 ff.; EAD, *Il principio di legalità in materia penale fra Corte costituzionale e Corti europee*, in N. Zanon (ed.), n. 1, 2003, p. 119 ff. ZANON (ed.), *Le Corti dell'integrazione europea e la Corte Costituzionale italiana,* op. cit., p. 153 ff.

2. The Charter of Fundamental Rights of the European Union as a Political Document: "an Unavoidable Step" in the Process of European Integration

2.1. The Convention and the "Merely" Reconnaissance Mandate of Cologne

At the Community level, the new millennium is inaugurated with the solemn proclamation of the Charter of Fundamental Rights of the European Union in Nice, which constitutes one of the most significant milestones in the Community's journey of fundamental rights.

Since its proclamation, and even in the absence of specific legal effects, the Charter seems to have marked the transition from a Europe of markets to a Europe of rights. Thus, it can now be said that the legitimacy of the Union no longer derives only from integration through markets and the single currency, but also, *'as an unavoidable step'*, from integration through rights[264].

One of the first peculiar aspects of the Charter of Fundamental Rights concerns its writing process, which was conducted not following any procedure described in the Treaty on the Union[265].

Although Article N of the Maastricht Treaty introduced a provision for amending the Treaties, the drafting of the text was entrusted to a committee, of varying composition, called the '*Convention'.* The decision alone not to follow the *ad hoc* procedure to amend the founding treaties makes us reflect on the fact that the Charter, at least in its genesis, was not intended to be a primary source of Community law[266].

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[264] S. RODOTÀ, *La Carta come atto politico e documento giuridico*, in A. MANZELLA, P. MELOGRANI, E. PACIOTTI, S. RODOTÀ (eds.), *Riscrivere i diritti in Europa*, Bologna, Il Mulino, 2001, p. 59, where the author observes that "[t]he integration of markets and a single currency are not by themselves in a position to confer such legitimacy [on the Union]. Economic and monetary integration is flanked, as an inescapable step, by integration through rights. Until this is fully realised, the European Union's deficit of democracy is accompanied by a deficit of legitimacy. It is therefore not only a question of more decisively tackling the indispensable reform of the European institutions, but of redefining their relationship with the citizens as a whole".

[265] G. DE BÚRCA, The Drafting of the European Union Charter of Fundamental Rights, in European Law Review, Vol. 26, No. 2, 2001, p. 126.

[266] On the conventional method see J. ZILLER, *La nuova Costituzione europea,* Bologna, Il Mulino, 2004, p. 91.

The Convention acted on the basis of the mandate drawn up in June 1999 by the European Council, which met in Cologne on that occasion.

The composition of the Convention was outlined in general terms in Annex IV of the Presidency Conclusions of the Cologne European Council, while the actual determination of its membership was decided at the subsequent European Council in Tampere in October 1999.

With regard to its structure, in the Annexes to the Tampere Conclusions, the Heads of State and Government agreed on the following composition: 62 members, of whom 15 representing the European Council, 16 from the European Parliament, 30 from national parliaments and one representative delegated by the President of the European Commission[267]. In addition to the official members, there were 'observer' members, who attended the meetings and were entitled to express their opinion[268].

The Convention bore "very little resemblance to the diplomatic instruments traditionally used"[269] and, in addition, although none of the 62 members were directly elected, the presence of representatives from the legislative, national and community bodies predominated[270] (there were 46 appointed members, about 75% of the entire body). This was an indication of the strong and important link that was intended to be established with European citizens[271], who were the 'direct' recipients of that precise political intention to make fundamental rights *'manifest'* in the European space.

Also in the Tampere Conclusions, a 'drafting committee', later to be called the *Praesidium, was* set up to prepare the first draft of the text. As will be made clear later (*infra* §2.3), the role of the *Praesidium did* not affect the actual participation of all members in the work, but had mostly a task of synthesising the different plenary sessions of the Convention[272].

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[267] Presidency Conclusions of the Tampere European Council 15-16 October 1999.

[268] *Ibid.* In particular, two members of the Court of Justice and two members of the Council of Europe participated as 'observer' members, as well as members of other Union bodies, such as the Economic and Social Committee, the Committee of the Regions and the Ombudsman. Finally, the possibility of an exchange of views with the candidate states to join the Union was also provided for.

[269] P. COSTANZO, *Il riconoscimento e la tutela dei diritti fondamentali*, in P. COSTANZO, L. MEZZETTI, A. RUGGERI, op. cit., p. 412.

[270] G. DE BÚRCA, The drafting of the European Union Charter, op. cit., p. 131.

[271] S. RODOTÀ, op. cit., p. 65.

[272] See *Praesidium*, session of the 2nd meeting of 1-2 February 2000.

The Convention's mandate was based on precise and detailed directives from the Cologne European Council, which were formulated as follows.

"The European Council considers that the Charter must contain the rights of *liberty and equality, as* well as the *fundamental procedural rights* guaranteed by the ECHR and resulting from constitutional traditions, as general principles of Community law. The Charter must also contain the fundamental rights reserved for EU citizens. The Charter must also contain the economic and social rights, which result from both the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers (Article 136 TEC), insofar as they do not merely serve as objectives for the Union's action'[273].

The characterising element of the mandate seems to be its 'exclusively reconnaissance' function, incapable - at least in appearance - of producing and introducing novelty[274]. As such, the Charter produced legal effects only as a '*source of knowledge of the* law'[275].

However, the reconnaissance activity involves a work of 'inclusion-exclusion' that inevitably results in a 'creative' operation. Indeed, as has been effectively noted in this regard[276], the 'selected' rights automatically assume a higher legal value than the 'excluded' ones.

In this respect, the Preamble to the Charter, which, on a first reading, seems to exclude the (inevitable) novative effects, should not be misleading, insofar as it only counts among the Charter's purposes the *'reaffirmation' of* fundamental rights.

In fact, in addition to the summarising function of the Community's jurisprudential heritage, general principles of Community law (as derived from common traditions and the European Convention) must *also* be taken into account in

[273] Presidency Conclusions of the Cologne European Council 3-4 June 1999, Annex IV.

[274] R. BIFULCO, M. CARTABIA, A. CELOTTO, *Introduzione de L'Europa dei diritti*, in R. BIFULCO, M. CARTABIA, A. CELOTTO (eds.), L'Europa dei diritti. Commentario della Carta dei diritti fondamentali dell'Unione europea, Bologna, Il Mulino, 2001, p. 15.

[275] On this topic, see L. TRUCCO, Carta dei diritti fondamentali e costituzionalizzazione dell'Unione Europea. Un'analisi delle strategie argomentative e delle tecniche decisorie a Lussemburgo, Torino, Giappichelli, 2013, p. 47, who on this point recalls the Conclusions of Adv. Gen. C-387 (spec. see nt. 69)

[276] A. MANZELLA, *Dal mercato ai diritti*, in A. MANZELLA, P. MELOGRANI, E. PACIOTTI, S. RODOTÀ (eds.), *Riscrivere i diritti in Europa*, op. cit., p. 32-34. Also in agreement on this point are R. BIFULCO, M. CARTABIA, A. CELOTTO, *Introduzione de L'Europa dei diritti,* op. cit., p. 15.

economic-social rights, so that the plurality of sifted and selected sources have created a document that goes beyond a mere summary of the existing, thus expressing novel potential.

On the subject of social rights, brief further specification is needed, as it is precisely in relation to this category of 'second-generation' rights that some *novelties* (in the aforementioned sense) of the Charter of Fundamental Rights can be glimpsed.

As noted by those who participated in the work of the Convention[277], the inclusion of social rights encountered not a few difficulties, as their absence in the European Convention on Human Rights automatically meant that the convention text was no longer faithfully reproduced.

However, an explicit demand for their inclusion in the European *Bill of Rights* was expressed in the Cologne Mandate, where, in addition to selecting rights from the two main sources on the subject, it is specified that these rights are to be taken into account *"insofar as they are not solely the basis of objectives for Union action"*[278].

This implied a transformation from *'objective rights'* to be protected, in a general way, through Community policies, to rights capable of giving rise to specific legal situations in the individual, to be protected as such[279].

This consideration produces effects on the structural level of the Community order, placing at the basis of the Community construction itself a *'European social model'*, which was absent in the previous logic of the treaties[280], which was essentially based on a mercantilist approach[281].

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[277] S. RODOTÀ, La Carta come atto politico e documento giuridico, op. cit., p. 78.

[278] Presidency Conclusions of the Cologne European Council 3-4 June 1999, Annex IV.

[279] A. MANZELLA, *Dal mercato ai diritti*, op. cit., p. 34.

[280] S. RODOTÀ, op. cit., p. 79. On this point see also E. PACIOTTI, *La Carta: i contenuti e gli autori*, in A. MANZELLA, P. MELOGRANI, E. PACIOTTI, S. RODOTÀ (eds.), *Riscrivere i diritti in Europa*, op. cit., p. 19. As an example, see the Conclusions of the presidency of the *Laeken* European Council (December 2001), in which, barely a year into the Charter's life, a paragraph dedicated to the *'concretisation of the European social model'* appeared on the political agenda of the Heads of State and Government. There is no basis for claiming with absolute certainty that an increasing commitment on the part of the Union in the area of social policy derives only from the new specific provisions of the Charter, yet it is very likely that a stronger 'political constraint' has influenced the Community institutions to envisage increasingly precise social policies.

[281] On the radical change of pace brought about by the Charter of Rights, see V. ANGIOLINI, *Sulla rotta dei diritti. Diritti, sovranità, culture,* Torino, Giappichelli, 2016, pp. 30-31 ("The Charter, in bringing to synthesis principles expressed elsewhere and in particular in the European Convention on Human Rights, historically relativises the very notion of the human personality. For not only does it

2.2. The Structure of the Charter of Fundamental Rights and the Overcoming of the "Classical" Categories of Rights

The Charter of Fundamental Rights of the Union, in its original version, consisted of 54 provisions divided into seven chapters. The first six contained the heading of a fundamental *value of* the Union (*dignity, freedom, equality, solidarity, citizenship and justice*), while the last chapter contained *general provisions,* aimed at clarifying the scope of the Charter, as well as its role in the Union's and the Member States' legal order.

By identifying rights and freedoms for each value, the wall formed by the classic categories or generations of rights[282] was 'broken down'. The objective was thus to be able to consider as absolutely equal the coexistence of community rights that, despite their different nature, all indistinctly enjoyed the status of 'fundamental rights'[283].

In these terms was the *principle of indivisibility*[284], which the Charter embodied and still embodies today.

Mention was already made of this principle in the work of the 1998 Commission of Experts, where the need to take both civil and social rights into account emerged. This was because, despite the structural and historical differences of these two

show itself to be aware that the human being is destined to be subjected to the conditioning of the social environment that surrounds him, from the moment it assures "*freedom of thought*" and "*freedom of conscience*" (Art. 10) as distinct from religious *freedom,* but it is also concerned with individual autonomy at the psycho-physical level: since the right to "*physical and psychic integrity*" (Art. 3) is also specified "in the *field of medicine and biology*", in conjunction with the principle of the "*free and informed consent of the person concerned*" to treatment, not only in the already well-known and tried and tested "*prohibition of making the human body and its parts as such a source of financial gain*", but also in the "prohibition *of eugenic practices, in particular those aiming at the selection of persons*", as well as in the "*prohibition of the reproductive cloning of human beings*").

[282] On this subject, reference should be made to the authoritative reflections of N. BOBBIO, *L'età dei diritti*, Torino, Einaudi, first ed. 1990, reprinted 2014.

[283] Ibid.

[284] On the principle of invisibility, see E. PACIOTTI, loc. cit., p. 17; A. MANZELLA, loc. cit., p. 38; S. RODOTÀ, loc. cit., p. 73.

different categories of rights, ignoring their interdependence would have called into question the effective protection of both[285].

The issue of classification therefore pertained to the very approach of the Charter, which was immediately reflected in the organisation of the work. For this reason, the basic choice was already adopted at the very first meetings of the Convention and the *Praesidium*. Specifically, at the first meeting, the newly elected President of the Convention, Roman Herzog, proposed to focus on five central themes ("freedom, equality, economic and social rights, procedure and the rights of citizens of the Union"). And the proposal was enthusiastically welcomed as the difficulty of identifying *ex ante* the appropriate category for each right was shared. In addition, it emerged that any division into categories would also have meant that sub-groups would have to be identified, and the idea of excluding some members from the general discussion was not convincing. This was on the assumption that the work that the members were called upon to do would have repercussions on the constitutions of the Member States; therefore, it was essential to "ensure that any knowledge or expertise relating to individual national laws [could] be made available to the working groups at any time"[286].

[285] The so called Simitis Report, commissioned by the European Commission (*Affirming fundamental rights in the European Union: time to act,* Brussels, European Communities, 1999), also dwells on this point: "[a]ny attempt to explicitly recognise fundamental rights just include both civil and social rights. To ignore their interdependence questions the protection of both. It is in this sense that their indivisibility has over and again been affirmed. Their separation in part has historical reasons. It reflects the late 'discovery' of social rights, as compared to civil and political rights. The more the attention concentrated on specific aspects of social rights, the more they were perceived as a different type of right, that had to be treated differently. [...] The history of the European Communities offers many examples of the efforts to regard social rights as a group of rights with less relevance than traditional civil and political rights. The quest for 'indivisibility' counters all attempts to maintain the separation and to deny social rights the rank conceded to civil and political rights. It should nevertheless be clear that 'indivisibility' does not imply a simple juxtaposition of social and civil rights. [...] 'Indivisibility' therefore demands, first and foremost, a meticulous review of civil rights in order to address and incorporate matters traditionally dealt with in a closed category of social rights. Where adaptation and completion of civil rights is not possible, formulation of new rights will be needed, as is particularly the case with collective rights, such as the right to resort to collective actions. Irrespective, however, of whether the recognition of social rights is effected by reinterpreting traditional civil rights, or by enlarging the list of fundamental rights, the inclusion of social rights does not fully cover fundamental social policies. All such policies must therefore, as in the past, be separately addressed as essential elements of the European Union's general policy goals" (pp. 21-22).

[286] Convention, I meeting 17 December 1999, Brussels, (CHARTE 4105/00).

Thus, the principle of indivisibility, in addition to ensuring the 'coexistence and interrelation of fundamental rights' and guaranteeing 'the proper interpretation of the scope of each in the context of all the others'[287], required in terms of method a choral and plural confrontation between all members.

In addition, it should be noted that, as far as the material scope of the catalogue was concerned, it did not only include 'traditional rights', but also 'new rights', i.e. those 'arising from new cultural and moral sensitivities, from the power of scientific and technological innovations, from responsibilities towards the environment and future generations'[288].

Ultimately, this significant fundamental choice also seems to have been decisive in facilitating that transition, already mentioned at the beginning, from a Europe of markets to a Europe of Rights. The change of perspective is to be read as an effect of the principle of indivisibility, i.e. the choice to protect both civil and political rights, as well as social and economic rights, which is a founding factor of the entire Community structure.

There is, therefore, a need for protection that goes beyond the corresponding economic competences and necessarily involves a more widespread action of guaranteeing rights.

2.3. The Reasons Behind the Introduction of the European Catalogue of Rights

The first amendments to the founding treaties played a fundamental role in the theoretical construction of EU fundamental rights, as these rules can be credited with having legitimised *ex post,* with the chrism of a written rule, the *constituent* work of the Court of Justice[289].

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[287] E. PACIOTTI, loc. cit., p. 18.

[288] S. RODOTÀ, loc. cit., p. 73.

[289] This function, according to F. BALAGUER CALLEJÓN, would find its *raison d'être* in the normative *deficits* and as a result of the solemn proclamation of the Charter, the latter could acquire 'jurídico valor a través de su posible aplicación por el TJCE es algo que no hace sino reafirmar la ausencia de valor constitucional de la Carta, cuyos enunciados tendrán que adquirir virtualidad jurídica

For this reason, it has been emphasised that Article F TEU, a provision subsequent to the now consolidated Luxembourg jurisprudence, has played a role of tendential transposition, if not even of explicit reference, to the latter.

Thus, while on the one hand, the problem of finding a solid anchorage of the protection of rights in the Union could be considered resolved, on the other hand, the problem of the enumeration of fundamental Community rights, the identification of which was always left to the numerous rulings of the Court of Justice, remained open.

The political institutions decided to fill this gap by issuing a proper EU *catalogue* of fundamental rights.

More precisely, in Cologne in June 1999, the Heads of State and Government agreed that "the fundamental rights in force at Union level [should] be *collected* in a Charter and thereby *made more manifest"*[290]. This requirement - the European Council also specifies in Annex IV - arises because "the protection of fundamental rights is a founding principle of the European Union and an *indispensable precondition* for its *legitimacy*".

The "paramount importance" of fundamental rights comes to the fore, no longer only as a "justification" of praetorian constructions, but also (and above all) of the entire community structure, which begins to base its legitimacy on human rights.

From this perspective, the need to make fundamental rights tangible to its real "addresses", i.e. the European citizens, appears necessary.

In fact, as has been noted by Stefano Rodotà, "the novelty lies precisely in the fact that the Charter can make citizens into protagonists in the construction of Europe, calling them into play with rights and mobilising them on rights. Through rights, the premises are laid for the constitution of a European public space and the conditions

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a través de esa función constituyente propia que seguirá desarrollando el TJCE (y siempre con los límites competenciales inherentes a la actuación de este órgano)". It should be pointed out that, in the Author's perspective, "[e]sa función constituyente tiene una vocación legislativa, necesaria para la realización del derecho fundamental, por lo que el TJCE tiene que actuar simultáneamente en el ámbito legislativo y en el constituyente. Ello lo hace mediante la configuración de los derechos como principios, lo que equivale, en cierta medida, a la garantía del contenido esencial de los derechos, de las facultades esenciales que pueden objetivarse en los derechos más allá de las facultades específicas que el legislador quiera incorporar en uso de su capacidad de configuración (garantía que, por cierto, recoge la Carta en su artículo 52.1)" (*Niveles y técnicas internacionales e internas de realización de los derechos en Europa. Una perspectiva constitucional,* op. cit., pp. 35-36).

[290] Presidency Conclusions of the Cologne European Council 3-4 June 1999, para. 44, emphasis added.

are created for the birth of that *demos*. Thus, the Charter begins the construction of the subject that will give it full legitimacy"[291].

The Charter was thus born out of political will and with a very strong symbolic value, addressed to the citizens of the Union who, already after almost half a century of Community activity, were beginning to feel disaffection towards the Community order. According to some, in fact, it was increasingly perceived as a bureaucratic apparatus devoted essentially to activities of an economic nature[292]. It is, therefore, in this context that the political will to make fundamental rights "*manifest"* in a "collection" emerges.

This reason supports the fact that the Catalogue has taken on a purely political value and therefore lacks binding legal effects.

But the circumstance that the Charter has not been assigned a specific place among the sources of EU law does not mean that the legal reasons for it are absent.

On this point, legal doctrine has speculated that the so-called *"catalogue problem"* could be solved, alternatively, either through the EU's accession to the European Convention on Human Rights[293], or through the drafting of its own Charter of Rights[294]. Consequently, the fact that the Union opted for the second solution has led some scholars to speculate that this was because the Union preferred the former[295]. In addition, one should also consider how the approval of 'its own' Charter further reduced the need for the EU to accede to the Convention. Of a different opinion has always been the Council of Europe, which has repeatedly had occasion to emphasise that the issues at stake are distinct and separate, and that no obstacle stands in the way of the Union becoming a member of the Convention[296].

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[291] S. RODOTÀ, op. cit., p. 67.

[292] E. PACIOTTI, op. cit., p. 10. Consider, in addition, that according to the author - although there was no trace in the official documents of the Cologne Council - the introduction of the Charter was also influenced by the war in Kosovo, which had weakened Europe (*ibid.*).

[293] On the topic, for all, M. AZPITARTE SÁNCHEZ, Autonomía del ordenamiento de la Unión y derechos funfamentales: ¿la adhesión al convenio europeo de derichos humanos como respuesta, in Revista Española de Derecho Europeo, no. 48, 2013, p. 37 ff.; C. AMALFITANO, General principles and Fundamental rights, op. cit., p. 35 ff. I. ANRÒ, L'accesso dell'Unione alla CEDU, Milan, Giuffre, 2015.

[294] R. Bifulco, M. Cartabia, A. Celotto, op. cit., p. 19.

[295] *Ibid*. A decisive factor was negative opinion No. 2/94 of the Court of Justice.

[296] R. BIFULCO, M. CARTABIA, A. CELOTTO, op. cit., p. 20. On this point, the authors recall some contributions of the representatives of the Council of Europe who took part as observer members in the work of the Convention created *ad hoc* for the writing of the Nice Charter.

In this context, it should be borne in mind that the initial non-binding effects of the Charter were not thought of as an obstacle to their future acquisition, but rather as part of the perspective of a gradual reform of the system.

Thus, the operation of *"political realism"*[297] appears to have been aimed merely at postponing to a future time the fulfilment of its legally binding effects, thus deeming it more effective to follow - once again - the logic of *"small steps"*[298].

2.4. The Legal Effects and the First Application of a Non-binding Charter of Rights

The European political will to protect *all the* fundamental rights of European citizens was initially declined in the sense of not immediately giving binding legal effect to the new source of EU law.

The question arose already during the preparatory work of the Convention, which, however, had to anchor its work on what was stated in the Cologne Mandate, which was partially deficient on this point. In the latter, in fact, no indication was given as to what effect the Charter would acquire once the approval process had been completed, and it was only indicated that, after its solemn proclamation, consideration would be given to 'the possibility and the necessary modalities for incorporating the Charter into the Treaties'.

Of no small importance here was the perspective in which Convention President Herzog decided to approach the codification project. He endeavoured to draft a text from the perspective of the '*as if'*, i.e. as if it were to have legal effects from the very first moment of its existence: this explains, in the first place, why the *draft* was composed of articles and not a mere 'political' manifesto[299].

In other words, *in nuce* there was the future potential of the Charter and the conviction began to spread that this text could constitute the first part of the future

[297] R. Bifulco, M. Cartabia, A. Celotto, op. cit., p. 24.
[298] S. RODOTÀ, op. cit., p. 59.
[299] E. PACIOTTI, op. cit., p. 14.

European Constitution[300]. A trace of this 'conviction' can be glimpsed in Declaration No. 23 annexed to the Treaty of Nice, which provided for the establishment of an Intergovernmental Conference called to resolve the most important issues on the *'future of the Union'*, among which was the question of 'the status of the Charter of Fundamental Rights'[301]. On this point, we will have the opportunity in the remainder of our discussion (§3.2. *below*).

The absence of binding effects did not imply a lack of legal effects, at least limited to the European institutions.

On this point, it has been effectively noted that the Charter, following its proclamation, has taken on 'the function of a "yardstick" against which to measure the legality of the Union's actions'[302] .

To be precise, the Commission issued a Communication to all its services requiring respect for rights; the Parliament amended its Rules of Procedure (Art. 34) in order to ensure that all its legislative acts comply with the Charter; finally, the Council also adopts guidelines to ensure respect for rights in the exercise of its functions[303].

In addition, it should be considered that the 'political' nature of the Charter alone has nevertheless been able to give it great importance, both from a practical and *orientational* point of view[304]. For this reason, some commentators have argued that the Charter has constituted a *'test of consistency'* both for Community acts and, more generally, for the institutional dynamics between the Member States, which in making their - admittedly - political decisions bind themselves to respect the rights described in the Nice Charter[305].

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[300] In a favourable sense, see A. BARBERA, *La Carta europea dei diritti: una fonte di ricognizione?*, in *Diritto dell'Unione Europea*, 2001, p. 254 ff., while on the point more perplexities were advanced by A. PACE, *A che serve la Carta dei Diritti fondamentali dell'Unione Europea? Appunti preliminari*, in *Giurisprudenza costituzionale*, 2001, p. 199 ff.

[301] Declaration No. 23 annexed to the Treaty of Nice.

[302] L. TRUCCO, op. cit., p. 39.

[303] On this point, see L. TRUCCO, op. cit., p. 39 ff.

[304] M. D'AMICO, *Trattato di Lisbona: principi, diritti e "tono costituzionale"*, in M. D'AMICO, P. BILANCIA (eds.), *La nuova Europa dopo il Trattato di Lisbona*, Milan, Giuffrè Editore, 2009, p. 71, emphasis added.

[305] S. RODOTÀ, La Carta come atto politico e documento giuridico, op. cit., p. 62-63.

The need to 'carve out' a space for the Charter responded to the need to avert the risk that these new European rights and principles had been 'written' unnecessarily.

What is more, as early as 2001, in Advocate General Tizzano's Opinion in Case C-173/99, there appeared the thesis that sought to specify that mere guidance effects could be considered, from a substantive point of view, as immediately effective[306]. Even if the Luxembourg jurisprudence itself did not immediately accept this innovative reading of the Charter[307], in the years that followed the political and doctrinal debate on the effects of the Charter became increasingly dense[308].

An important appreciation of the rights of the Nice Charter and of their function as an 'interpretative compass' also comes from the Italian Constitutional Court, which, in its judgment No. 132 of 2002, held that *'the Charter of Fundamental Rights of the Union is referred to - even though it has no legal effect - because of its expressive character of principles common to European legal systems'*[309].

In conclusion on this point, the Charter, if only with regard to its exclusively "political" value, has brought about *"a salutary step"*[310] for the European Union as a whole.

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[306] Opinion of Advocate General *Tizzano* on the *BECTU* case (C-173/99), delivered on 8 February 2001, pt. 1. 27 e 28. In accordance with Advocate General Tizzano's Conclusions, see the contribution of M. CARTABIA, *L'efficacia giuridica della Carta dei diritti: un problema del futuro o una realtà presente?*, in *Quaderni Costituzionali*, 2001, p. 424 ff. for a broader examination of the role of the Advocates General, see L. TRUCCO, loc. cit., p. 46 ff.

[307] On this point, see the reflections of A. CELOTTO, G. PISTORIO, *L'efficacia giuridica della Carta dei diritti fondamentali (rassegna giurisprudenziale 2001-2004),* in *Giurisprudenza italiana*, 2005, p. 427 ff. In the concluding remarks, it is pointed out how the general openness of the Advocates General is matched by an 'impassive' and 'paradoxical' silence on the part of the Court of Justice, which, in the years analysed by the authors, turns out to be reluctant to apply the Charter. While, again in extreme synthesis, slightly different was the attitude taken by the then EU Court of First Instance (today only the EU Court), which at first used the Charter *ad abundantiam*, i.e. simply as a reinforcing tool for the decisions adopted, while at a later stage these provisions were used as real arguments in support of the *ratio decidendi.*

[308] See on this point, for all, L. S. ROSSI, La Carta dei diritti come strumento di costituzionalizzazione dell'ordinamento dell'UE, in Quaderni Costituzionali, 2002, p. 565 ff., M. CARTABIA, L'efficacia giuridica della Carta dei diritti, op. cit., p. 424 ff., A. BARBERA, La Carta europea dei diritti: una fonte di ri-cognizione, op. cit., p. 249 ff.

[309] Italian Constitutional Court, judgment 24 aprl 2002, n. 135, n. 2.1. *Considerato in diritto*, on which see M. D'AMICO, *Trattato di Lisbona: principi, diritti e "tono costituzionale"*, op. cit., p. 7.

[310] The expression is from G. TESAURO, *European Union Law,* op. cit., p. 133.

This can also be said to be true with reference to national legal systems. Limiting our gaze to Italian constitutional jurisprudence, there are numerous references to[311] and the mere fact that the provisions of the Charter are used as an "interpretative aid" shows how the "legal formalization" of these norms has also assumed a decisive role at the national level.

3. From the Failure of the Constitutional Treaty to the Lisbon Treaty

3.1. The Intense Doctrinal Debate around the European Constitution

It is widely, though not unanimously, believed that the solemn proclamation of the Charter of Fundamental Rights in Nice in December 2000 started the process of constitutionalisation of the European Union.

However, enormous difficulties in making progress in the construction of the European constitutional identity have subsequently emerged and, even today, cannot be said to have been resolved.

In the literature, even before the draft Constitutional Treaty, the question had arisen as to whether the Union should have a constitution.

The debate was most likely triggered by the Court of Justice, which in 1986, in its judgment *Les Vert v. European Parliament,* held that "the European Economic Community is a community based on the rule of law in the sense that neither the States that are members of it nor its institutions are exempt from the control of the conformity of their acts with the *basic constitutional charter constituted by the* Treaty"[312].

A few years later, in Opinion 1/91, the Luxembourg Judge, in an even more incisive manner, added that 'the EEC Treaty, although it was constituted in the form

[311] See Report of the Study Centre of the Constitutional Court, R. NEVOLA (ed.), The Application of the Charter of Fundamental Rights of the European Union in the Jurisprudence of the Constitutional Court, 2021.

[312] Court of Justice, Judgment of 23 April 1986, C-294-83, *Les Vert v. Parliament*, ECLI:EU:C:1986:166, pt. 23. On the merits of the judgment, see the reflections of S. NINATTI, *Giudicare la democrazia? Processo politico e ideale democratico nella giurisprudenza della Corte di Giustizia Europea*, Milano, Giuffrè, 2004 p. 124 ff.

of an international agreement, constitutes the *constitutional charter of a Community of law*. [...]. the Community Treaties have established a new legal order of a new kind, in favour of which the States have renounced, in ever more extensive areas, their sovereign powers and which recognises as subjects not only the Member States but also their nationals [...].The fundamental characteristics of the Community legal order thus established are, in particular, its primacy over the rights of the Member States and the direct effect of a whole series of rules which apply to the nationals of those States as well as to the States themselves'[313].

In addition, the doctrine has long pondered the issue of a "*European* Constitutional Charter*"*.

This is a particularly broad topic that we can cover by following two main profiles.

The first has to do with the question of whether or not there is a European Constitution, with the Treaties *unchanged;* that is, whether the 'material' forms of a Constitution can be recognised in the structure of the Treaties.

The second strand concerns, on the other hand, the 'formal' side, addressing the question of the possible, if not necessary, materialisation of a constitution in the form of an act of international law.

The two questions, although connected, are distinct and therefore, wishing to proceed in order, in this section we will deal only with the first profile, postponing the exposition of the theses concerning the second in the following section, which will deal with the draft Constitutional Treaty.

Arguments for and against the possible existence of a European constitution were already being advanced in the 1990s. The issue, which not by chance began to arise after the transformations since the Maastricht Treaty, subtends other important fundamental questions, which emerge as a preliminary to the resolution of the main question.

One of the most important questions for a constitutionalist is first and foremost 'what is a constitution'; this is then linked to others, such as: can there be a constitution without a state? can the Union be considered a state? does it have a sovereign people?

[313] Court of Justice, Opinion of 14 December 1991, No. 1, ECLI:EU:C:1991:490, pt. 21.

within the Union, is power exercised democratically by its institutions? does the EU need a constitution?

Renouncing, now, any claim to completeness in answering these questions, the most important 'voices' of the doctrine will be taken up below, which, affirming or refuting the thesis about the existence of a European constitution, answer - in whole or in part - the important questions related to it.

Among the first affirmative theses that have been provided is that of Peter Häberle[314], who in a 1999 paper began as follows: "[a] doctrine of the European constitution can only exist on a scientific-cultural level" and pointed out that in it "the economic component constitutes only a sectoral aspect, and possesses an instrumental value".

Häberle, moved by the objective of 'correcting the unfortunate economisation of all thought and action of our time through a positive approach', states that 'constitutions are not merely a normative "work of regulation", but fundamentally an expression of the cultural self-representation of a people, a mirror of its cultural heritage and the basis of its aspirations. This applies *mutatis mutandis* to Europe: its legal system is a concentrate of 'European legal culture', its legal principles always constitute a 'condensate' of a specifically cultural nature. European legal principles, as a sectoral constitution recognisable e.g. in the European Convention on Human Rights or in fundamental rights as 'general legal principles', live within and outside the cultural context - with the validity proper to the classical texts, from Aristotle to Montesquieu and Kant understood as constitutional texts in the broad sense -; and they do not only possess 'normative force', but at the same time constitute an enduring culture, endowed with a radiating 'power' [...]".

A further element that characterises the German constitutionalist's theory is that of the "constitutional end of Europe"[315]. In particular, according to Häberle, in order

[314] P. HÄBERLE, *Per una dottrina della costituzione europea*, in *Quaderni costituzionali,* no. 1, 1999, p. 3 ff. By the same A. see also the subsequent contributions on the subject published in the *Revista de Derecho Constitutional Europeo,* including, ID, *Europa como comunidad constitucional en desarrollo,* no. 1, 2004, p. 11 ff.; ID, *La Constitución de la Unión Europea de junio de 2004 en el foro de la Doctrina del Derecho constitucional europeo,* no. 2, 2004, p. 9 ff.; ID, *Consecuencias jurídicas y políticas del doble "no" francés y holandés a la Constitución Europea*, no. 4, 2005, p. 431 ff.; ID, *Algunas tesis sobre el presente y el futuro de Europa: una aportación al debate*, no. 18, 2012, p. 423 ff.

[315] P. HÄBERLE, Per una dottrina della costituzione europea, op. cit., p. 23.

to overcome the obstacle constituted by the absence of a real state, "one must imagine the constitution before the state" and, consequently, the starting point is to be found in the "constitutional purpose of 'Europe'"[316] that emerges from each constitutional charter. And through the lens of comparison[317], the 'primary' constitutional purpose is identified in the *welfare state under the rule of law*[318].

The poignancy of the Union's *constitutional purpose*, shared by its Member States, is an element that also characterises the theses developed by Francisco Balaguer Callejón. The scholar, in fact, has affirmed that the choice of having wanted to configure the Community of law in the essential framework of the constitutional order, requires its structures to conform "a los elementos básicos que han configurado tradicionalmente el constitucionalismo"[319]. This imposition does not imply the choice of *a* single "closed" model of community, but it must feed, even in an innovative perspective, on the "incorporation of new techniques and models". This only with the limitation, set so as not to generate a contradiction, that the approaches selected must

[316] P. HÄBERLE, Per una dottrina della costituzione europea, op. cit., p. 23.

[317] In Häberle's perspective, comparison takes on a particular significance. The author argues (p. 4 ff.) that "[t]he doctrine of the European constitution can only establish itself through a twofold approach: in time, as a legal comparison of the history of law or future constitutional history; and in this respect it is also appropriate to initiate a "constitutional history of the European Union". Simultaneously, it is necessary to undertake legal comparison in space, in order to grasp the 'two sides' of the argument. This comparative method has long found its ideal environment in civil law, as names such as those of H. Coing, K. Zweigert and H. Kötz have recently shown. Comparisons can be made on various levels: on the level of constitutional, jurisprudential and doctrinal texts. There are also 'cross-references'. An example of this is the regionalism of the Spanish Constitution (1978), which can be traced in part to the Italian constitutional provisions of 1947 (and indirectly to the Weimar Constitution), which in its subsequent development incorporates classical texts and rulings of the German Federal Constitutional Tribunal on federalism. Loyalty to the Bund' (Bundestreue), for example, becomes loyalty to 'regionalism'".

[318] P. HÄBERLE, Per una dottrina della costituzione europea, op. cit., p. 26. In the same vein, see F. BALAGUER CALLEJÓN, Derecho y justicia en el Ordenamiento Constitucional europeo, in Revista de Derecho Constitutional Europeo, no. 16, 2011, p. 261 ff. ("[e]n la cultura constitucional europea, la idea de Justicia va unida, en todo caso, a un componente social necesario. No podemos olvidar que la transición del Estado Legal de Derecho al Estado Constitucional de Derecho es, simultáneamente, la transición del Estado Liberal de Derecho al Estado Social de Derecho. El principio de Estado social y los Derechos sociales son el resultado del pacto histórico que da lugar a las Constituciones normativas europeas (Italia, Alemania, Portugal, España...). Este principio forma parte indisoluble de la propia configuración normativa y democrática del constitucionalismo europeo de postguerra. Podemos decir que la Justicia se realiza en esos sistemas constitucionales no a través de cualquier Derecho sino de un Derecho que es, a la vez democrático y social").

[319] F. BALAGUER CALLEJÓN, Niveles y técnicas internacionales e internas de realización de los derechos en Europa. Una perspectiva constitucional, op. cit., p. 32.

not fall outside the outline of constitutionalism, on pain of the impossibility of the search for that necessary constitutional balance that, like its States, the Union must also aim to achieve[320].

A further node that intervenes in the debate is the link between the Constitution and the State, which is a profile that invests Barbera's analysis, but he considers it outdated Schmittian dogma[321] for reasons of both formal logic and legal experience[322].

That being said, in order to identify whether the European order is endowed with a constitution, the author questions the *constituent* role of the Member States and, in particular, whether they continue to act as subjects of international law or can be considered components of a European constituent power[323]. The answer cannot clearly lean towards either the first or the second solution, as 'we are faced with a European constitution in the making, the result of the constituent power of the states'[324].

Therefore, although "[t]he States of the Union are still moving, formally, within the orbit of the Treaties, the source of international law (...)", they "are already entering the orbit of the Covenants, the classic source of constitutional law (...). It is precisely for this reason that we cannot entirely exclude the possibility that the Community legal system, from being a mere *'ordo ordinatus'*, *'potestas constituta'*, has in itself the proper characteristics to set itself up as an *'ordo ordinans'*, *'potestas constituens'*".

In this perspective, Barbera, endorsing a ''legal-theoretical'' approach (i.e. not from the point of view of a specific legal system, but going back to the analysis of legal phenomena), concludes by stating that '[t]he Union therefore has a constitutional system in transition, and therefore in this respect has a constitution''[325].

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[320] Ibid.

[321] For Schmitt, the state *would* not have a constitution but 'the state *is* the constitution', cf. A. BARBERA, *Esiste una Costituzione europea?,* in *Quaderni Costituzionali,* no. 1, 2000, p. 59 ff.) who takes up Schmitt's theories (p. 76) and points out the differences with Kelsen's (see nt. 56)

[322] *Ibid*, "on the level of formal logic, the terms of the relationship can be inverted (one could say: the Union has a constitution therefore it has the connotations of statehood), and on the level of legal experience, there can be constitutions of non-state orders (there is a constitution of the Church and - the controversy on this point is ancient - there is a constitution of the international community, evolving from Westphalia onwards)".

[323] A. BARBERA, op. cit., p. 77.

[324] *Ibid*.

[325] A. BARBERA, op. cit., p. 80.

On opposite positions, however, is the position of Grimm[326].

Grimm is sceptical about the existence of a European constitution, as the Union would first and foremost lack the element of popular legitimacy. Indeed, due to its supranational nature, i.e. in an agreement between states and not between individuals, it enjoys a more limited legitimacy than nation-states and, as a consequence, a lesser ability to solve problems at the political level[327].

Therefore, "[w]hat obstructs democracy is accordingly the lack of cohesion of Union citizens as a people, but they weakly develop collective identity and low capacity for transnational discourse. This certainly means that the European democracy deficit is structurally determined. It can therefore not be removed by institutional reform in any short term. The achievement of the democratic constitutional state can for the time being be adequately realised only in the national framework'[328].

In other words, the German scholar excludes that even a future revision could solve the basic problem of democratic legitimacy and, therefore, the national level remains the only one in which a constitution can exist[329].

3.2. The First Failed Attempt to "Constitutionalise" the Charter: Focus on the Constitutional Treaty

[326] D. GRIMM, Does Europe Need a Constitution?, in European Law Journal, Vol. I, No. 2, 1995, p. 282 ff.

[327] D. GRIMM, op. cit., p. 298. Sharing Grimm's initial analysis, but arriving at different results, is J. HABERMAS, *Remarks on* Dieter Grimm's '*Does Europe Need a Constitution?'*, in *European Law Journal,* Vol. I, No. 2, 1995, p. 303 ff. A 'third' position is the one taken by J.H.H. Weiler, Does *Europe Need a Constitution? Demos, Telos and German Maastricht Decision,* in *European Law Journal*, Vol. 1, No. 3, 1995, p. 219 ff. For an in-depth discussion of the debate on these three Autor see, F. MEDICO, *Il doppio custode*, Bononia University, Bologna, 2023, p. 46 ff.

[328] D. GRIMM, op. cit., p. 297.

[329] *Ibid*. The author emphasises that "[t]he missing element, after all, has to do with the popular legitimation of the legal act constituting the Union, and the associated self-determination of Union citizens as to form and content of their political unity".

"Europe at a crossroads"[330]. This expression opened the conclusions of the Laeken European Council, where the 'foundation stone' was laid for the construction of the Constitutional Treaty in the awareness of wanting to advance the integration project that had begun in 1951. This latter necessity was imposed by different and concomitant needs: from facing the 'democratic challenge', through new instruments to give citizens a *voice* in the decision-making process, to the new role of the Union in the international arena that could not disregard the assumption of its responsibilities in the management of globalisation, to the need for a 'clear, transparent, effective and democratic Community approach' in place of a lack of concrete action perceived as too 'bureaucratic' and, as such, far from the citizens.

Ambitious goals that were on the 'road to a European citizens' constitution' and the way to combine them was identified in the establishment of a *Convention on the Future of Europe.* It had "the task of examining the essential questions that the future development of the Union entails and of seeking the various possible solutions" with a view to convening an Intergovernmental Conference, which, according to Article 48 TEU, would be responsible for discussing and approving the reform of the Treaty.

The European Council appointed V. Giscard d'Estaing as President, V. Giscard d'Estaing, and the two Vice-Presidents, G. Amato and J.L. Dehaene, of the Convention and outlined the general composition of the body, which consisted of 15 representatives of the Heads of State or Government of the Member States (one per Member State), 30 members of the national parliaments (two per Member State), 16 members of the European Parliament and two representatives of the Commission. The members of the forum also included, without taking part in the vote on the final draft, representatives of the non-Member States that had initiated the accession process and some 'observer' members representing other bodies or organs of the Union[331].

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[330] "Fifty years after its birth, the Union is nevertheless at a crossroads, at a crucial moment in its existence. The unification of Europe is imminent. The Union is about to open itself up to more than ten new Member States, mainly from Central or Eastern Europe, thus definitively closing one of the darkest chapters in European history: the Second World War and the subsequent artificial partitioning of Europe. Europe is in the process of becoming, without bloodshed, one big family; this is a real change that clearly requires a different approach from that of fifty years ago, when six countries started the process".

[331] With regard to the 'observer' members, in particular, it was stipulated that '[t]hree representatives of the Economic and Social Committee and three representatives of the European social partners will be invited as observers, to be joined by six representatives (to be designated by the

The 'Convention method' was nothing new. There were strong similarities, especially in terms of the methodologies and procedures adopted, with the then recent experience of the Convention that had led to the adoption of the Charter of Fundamental Rights. It was a matter of diluting that strongly intergovernmental import typical of conferences convened to adopt treaty amendments, which had the Heads of State and Government as mere protagonists[332], while with the new system the European constitutional norms were more influenced by the ideas of delegates of parliamentary origin[333]. If one keeps in mind that one of the Union's genetic *vices* has always been precisely its democratic *deficit*, then this 'pull factor' of this model could justifiably boast some merit.

But, going back further, even more significant were the similarities with the Committee of Studies for a European Constitution, convened in 1951 in the run-up to the ratification - which never took place - of the EDC Treaty, in order to assist the *ad hoc* Assembly which, following an explicit mandate (Art. 38 of the EDC Treaty), was to approve an initial draft of a Statute-Constitution of the European Political Community[334].

The Convention adopted by consensus the draft 'Treaty establishing a Constitution for Europe' in June-July 2003 and subsequently convened an Intergovernmental Conference that made changes to the draft that was finally signed in Rome on 29 October 2004 by 25 states.

The Treaty provided for the merging of all EU Treaties (the Union Treaty and the Treaty establishing the European Community) and the EU Charter of Fundamental Rights into a single text[335].

Committee of the Regions from the regions, cities and regions with legislative powers) and the European Ombudsman. The President of the Court of Justice and the President of the Court of Auditors may address the Convention at the invitation of the Praesidium'.

[332] M. CARTABIA, Riflessioni sulla Convenzione di Laeken: "come se" si tratta di un processo costituente, in Quaderni Costituzionali, no. 3, 2002, p. 443.

[333] B. DE WITTE, Il semi-permanente processo di revisione dei Trattati, in Quaderni Costituzionali, no. 3, 2002, p. 499 ff.

[334] On this subject, *supra* Chapet I, §1.3.

[335] On the normative level, there was also a much more solid and simplified system of the sources of EU law, in line with the Laeken Declaration that called for 'the simplification of the Union's instruments'. On the subject, for all, N. ZANON, *Le fonti del diritto europeo nel progetto di Trattato che istituisce una Costituzione per l'Europa*, in *La Rivista del Consiglio*, no. 2, p. 61 ff.; F. BALAGUER

Despite the fact that 17 states had already ratified the treaty, as is known, the inauspicious outcome of the ratification referendums in France and the Netherlands invalidated its entry into force, thus reversing the idea of a *European Constitution*[336], and with it the possibility of giving the Charter of Rights binding legal effect.

3.3. From Nice to Lisbon: The Legal Effects of the Nice Charter

The Charter, born as a *political act*, i.e. with the intention of binding, first and foremost, the institutions and bodies of the Union, undergoes its most important transformation with Article 6 of the Lisbon Treaty[337], which assigns it *precise binding legal effects.*

Article 6 TEU, in particular, states that:

"The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted on 12 December 2007 in Strasbourg, which shall have the same legal value as the Treaties.

The provisions of the charter do not in any way extend the competences of the Union as defined in the treaties.

The rights, freedoms and principles of the Charter shall be interpreted in accordance with the general provisions of Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, which indicate the sources of these provisions.

CALLEJON, *El sistema de fuentes en la Constitución Europea,* in *Revista de Derecho Constitutional Europeo,* no. 2, 2004, p. 61 ff.

[336] For a reconstruction of the major orientations in the doctrine on the value that the Constitutional Treaty would have had if it had entered into force, see N. WALKER, *After the Constitutional Moment,* in I. PERNICE, M. P. MADURO (eds.), *A Constitution for the European Union: First Comments on the 2003-Draft of the European Convention*, Baden-Baden, Nomos Verlaglaggesellschaft, 2004. PERNICE, M. P. MADURO (eds.), *A Constitution for tthe European Union: First Comments on the 2003-Draft of the European Convention,* Baden-Baden, Nomos Verlagsgesellschaft*,* 2004, p. 25 ff.

[337] On the differences between the Constitutional Treaty and the subsequent Lisbon Treaty, see J. ZILLER, *From the Treaty Adopting a Constitution for Europe to the Lisbon Treaty,* in M. D'AMICO, P. BILANCIA (eds.), *The New Europe after the Lisbon Treaty*, op. cit., p. 28.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the competences of the Union as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, form part of Union law as general principles".

In other words, the Lisbon Treaty performs a *"treatyisation*" operation[338] of the Charter of Fundamental Rights, specifying, through the technique of referral, that it *"has the same legal value as the Treaties"*.

The Constitutional Treaty also aimed at the latter result, which, unlike the Lisbon Treaty, provided for a formal incorporation of the Charter[339].

Comparing the two possible methods just mentioned, it can be seen that, as far as the possibility of producing binding legal effects is concerned, both methods arrive at the same result.

However, the doctrine has not failed to point out that between the two methods there can still be a difference in the procedure for amending the Charter in the future. In particular, only in the case of opting for a "Single Text" would the procedure for amending the Treaties *under* Article 48 TEU have to be followed, whereas the technique of mere referral, due to the fact that the Charter remains an autonomous and distinct source from the Treaties, would not necessitate recourse to the procedure *under* Article 48 TEU, which remains applicable only to the Treaties[340].

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[338] The expression is from M. D'AMICO, loc. cit., p. 70.

[339] The reasons behind the decision to incorporate the entire text of fundamental rights into the constitutional project are to be found in the very idea of the Constitutional Treaty. In fact, as M. D'AMICO, loc. cit., p. 70 ff. - *what* was 'constitutional' was not only the structure of the Treaty, but also its '*tone*', as it aimed at achieving 'a strong welding operation to a constitutional vision'. The scholar speculates that it was precisely this latter aspect, which we could define as a constitutional perspective, that was behind the referendum rejection.

[340] G. TESAURO, *Diritto dell'Unione Europea,* op. cit., p. 134. Moreover, in our opinion, an additional reason for the provision of an 'aggravated' procedure may be found in the circumstance whereby the Charter has acquired a particular predominance among the sources that contribute to realising the general principles of the Union. Thus, a procedure that makes it "more difficult" to amend the rights and principles on which the Union is founded may also be necessary with a view to establishing an amending process that is as inclusive as possible, involving a plurality of national and Community institutional subjects.

Behind the choice of making a reference to the Nice Charter lie choices of political expediency[341], but from a more strictly legal point of view one cannot help but notice some perplexities. More precisely, one is not convinced by the fact that the "aggravated" procedure provided for in Article 48 TEU for the other source of the same rank cannot be applied by analogy to this source (now of primary rank), especially if one considers that to date there is no rule regulating an *ad hoc* procedure for amending the Charter. The thesis of the applicability of Article 48 TEU also to the Charter has been supported by other authoritative doctrine that has justified this application by leveraging the rank of the Charter itself, despite its apparently "external" position[342].

Returning now to the subject of the binding legal effects enjoyed by the Charter of Nice, it can be said that these originate from the "new" position assumed by the Charter itself in the hierarchy of Community sources after the Lisbon Treaty.

This is qualified as a primary source, by virtue of the fact that it possesses the same *"legal value as the Treaties"*[343].

A first set of corollaries stemming from this last aspect - as the current judge of the Court of Justice L. S. Rossi[344] - might concern the fact that the Charter:

a) cannot be placed subordinate to the Treaties, as it is equal to them[345];

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[341] *Ibid*.

[342] L. S. ROSSI, 'Stesso valore giuridico dei Trattati?' Rango, primato ed effetti diretti della Carta dei diritti fondamentali dell'Unione europea, in Diritto dell'Unione Europea, 2016, p. 330. The Scholar makes a further very interesting specification, according to which the Charter, having found its genesis in the work of a Convention, would require the presence of a similar body (not necessarily in the same composition) even in the case of amendment. This specification is compatible with part of Article 48 TEU, i.e. only its ordinary procedure provides for the establishment of an IGC (Intergovernmental Conference), a body very similar in composition to the Convention established in 2000 (for the differences see G. DE BÚRCA, The drafting of the European Union Charter, op. cit., p. 132). Whereas, according to the thesis of L. S. Rossi, the simplified procedures for amending treaties, which, unlike the ordinary procedure, do not provide for the establishment of an IGC, would not be applicable.

[343] Art. 6 TEU, para. 1, first sentence.

[344] L. S. ROSSI, loc. cit., p. 332.

[345] In reality, according to L.S. ROSSI, loc. cit. (p. 353), if from a formal point of view there has been parity of rank, from a substantive point of view there are more difficulties in tracing a true parity. In the *first place,* this is due to the fact that the Charter was created with a view to 'bringing out the existing', in order to place a check on Community acts that could in no way be scrutinised as respecting fundamental rights. Hence, this perspective also explains the 'caution' of the Member States to avoid interference with national legal systems: in more practical terms, for example, this can be seen in the so-called *reservation of the law*, present in many articles of the Charter. In a nutshell, the rules of the Charter today find it more difficult to act as a parameter of legitimacy or validity than the rules of the

b) Furthermore, by virtue of its hierarchical superiority, it must be respected by non-primary EU acts, i.e. all acts of secondary law, but also the international agreements of the Union (including the Hague Convention, should the EU ever decide to accede to it);

c) Then, as a consequence of aspect (b), the Charter could become a parameter of legitimacy and validity of Community acts;

d) Finally, it would be able to influence, both positively and negatively, the legislative output of the EU.

In other words, if from a formal point of view there has been parity of rank between the Charter and the Treaties, from a substantive point of view there are more difficulties in tracing a true parity. In the *first place,* this is due to the fact that the Charter was created with a view to "bringing out the existing", in order to place a check on Community acts that could in no way be scrutinised as respecting fundamental rights. Hence, this also explains the "caution" of the Member States to avoid interference with national legal systems. This can be seen in the numerous "*reservations of law"* (here to be understood as reservation to the law of parliamentary origin of the Member States) found in several provisions of the Charter[346].

From this perspective, the rules of the Charter would find it more difficult to serve as a yardstick of legitimacy or validity than the rules of the Treaties, but these primordial differences may disappear as the "constitutional" character of the Charter becomes established[347].

However, the substantive incorporation of the Charter of Rights into the TEU has a direct impact on the process, albeit still in an "embryonic phase", of a "*statu nascenti"* European constitutionalism, in which "fundamental rights [...] no longer constitute a mere limitation imposed on the action of the Union's institutions or the Member States in the field of application of the relevant law. These obligations are now followed by an obligation that is both prescriptive and promotional in nature, that of respecting the rights, observing the principles and promoting their application "in

Treaties, but in the future, according to the Scholar (p. 355), the Charter will acquire a greater role than the Treaties, thanks to its (increasingly) 'constitutional' character.

[346] L.S. ROSSI, loc. cit., p. 353 ff.

[347] L.S. ROSSI, op. cit., p. 355.

accordance with their respective powers and within the limits of the powers conferred on the Union in the Treaties" (Article 51(1), Charter of Rights)"[348] .

4. From Rights to Common Values: The Crisis of the Rule of Law the Increasingly Complex Search for the Constitutional "Face" of the European Union

4.1. Common Values (Art. 2 TEU) and Constitutional Identities (Art. 4(2) TEU): Two Sides of the Same Coin?

Having defined the coordinates within which the protection of fundamental rights is developed in the European Union legal system, it is now necessary to explore the topic of the connections between common values and constitutional identity, which form the basis on which the protection of rights is grafted. These reflections are particularly relevant if we consider that the transition between the Constitutional Treaty and the Lisbon Treaty has not eliminated the constitutional traces; on the contrary, the European constitutional fabric, although still uncertain and not particularly clear, continues to envelop the integration process[349].

To develop our reasoning, we can only start from the text of two key provisions: Articles 2, 3(1) and 4(2) TEU.

- Article 2 TEU states that: "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society characterised by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men".

[348] S. GAMBINO, Metodo comparativo e tradizioni costituzionali comuni, in La Cittadinanza Europea, no. 1, 2021, p. 82. On this topic see also, A. SCHILLACI, Los derechos fundamentales en la interacción constitucional europea, in Revista de Derecho Constitutional Europeo, no. 17, 2012, p. 19 ff.

[349] In these terms, F. BALAGUER CALLEJÓN, *Profili metodologici del diritto costituzionale europeo*, op. cit., pp. 48-50.

- Article 3 TEU states that: "[t]he Union shall aim to promote peace, its values and the well-being of its peoples".

- Article 4(2) states that: "[t]he Union shall respect the equality of Member States before the Treaties and their national identities inherent in their fundamental structures, political and constitutional, including their system of local and regional self-government. It respects the essential functions of the State, in particular the functions of safeguarding territorial integrity, maintaining law and order and protecting national security. In particular, national security remains the sole responsibility of each Member State".

The first verb in Art. 2, is *founded* on, presupposes not only the EU's adherence to specific values, but makes explicit that the *pactum unionis* is based on them.

Put another way, common values constitute the identity of the Union.

In addition, as K. Lenard, these founding values "must" be with constitutional identities, for the primordial reason that failure to respect them prevents entry into the Union. Lenard goes on to say that it would be wrong to think that states' respect for values is limited to their entry, as this would lead to an untolerable *regression of* values[350].

Supporting this reading, in our view, is the letter of Article 3(1), which specifies that one of the objectives of the Union is the promotion of its values.

Moreover, justifying a "regress" of values undermines the equality between states, set out in Article 4(2) TEU.

On this point, in particular, it has been stated that constitutional identities and the equality of states before the Treaties constitute the "axiological foundation of primacy". A principle, the latter, placed at the defence of both, whose "union attests to the search for a balance between uniformity and respect for pluralism"[351].

Giving space to pluralism, to borrow Gustavo Zagrebelsky's thought, in the forms of democratic constitutionalism "is simply a proposal of solutions and possible

[350] K. Lenarts, *National identiy, the equality of Member State before the Treaties and primacy of EU law*, in Giornata di studio su "Identità nazionale degli Stati membri, primato del diritto dell'Unione Europea, stato di diritto e indipendenza dei giudici nazionali", Roma, Palazzo della Consulta, 5 Settembre 2022, disponibile sul sito www.cortecostituzionale.it, p. 15.

[351] E. NAVARRETTA, *National Identity and Primacy of the European Union,* in Giornata di studio su "Identità nazionale degli Stati membri, primato del diritto dell'Unione Europea, stato di diritto e indipendenza dei giudici nazionali",, cit. p. 25.

coexistences, that is, a "compromise of possibilities", not a rigidly ordering project that can be assumed as an a *priori of* politics endowed with its own force, from top to bottom". Such a result can only be achieved "[s]ome on this condition, we can have "open" constitutions, which allow, within constitutional limits, both the spontaneity of social life and competition for political leadership, both conditions for the survival of a pluralist and democratic society"[352].

The scholar adds, then, that this "open" vision of the Constitution is incompatible with the "dogma" of sovereignty, which the Union has helped, albeit not definitively, to dispel.

In this perspective, Zagrabelsky speaks of a *mild law.* A law that sees the coexistence of principles and values, without each of these possessing an "absolute value" and indeed, in Zagrebelsky's view, the only element to be endowed with absolute character is "the meta-value that is expressed in the dual imperative of maintaining the pluralism of values (as regards the substantive aspect) and their fair confrontation (as regards the procedural aspect)"[353] .

In an attempt to reconcile this thought with the reasoning that began in this paragraph, we cannot but consider constitutional identity as an identity shaped in pluralism. This is the idea behind the choice of several states to unite, but it is also the choice that leads states to "accept" an *extraneous* right that finds its genesis in shared choices.

If this solution is opted for, the sharing will be as much of sovereignty (or portions of it) as of values and principles, which - always resorting to Zagrebelsky's authoritative reflections - will have to aspire to mutual coexistence, without the conflict between values emerging, the resolution of which may be impossible[354].

There is an echo here of the tyranny of values by Carl Schimtt, who, believing that values cannot be made objective, concluded that they could only be considered in

[352] G. ZAGREBELSKY, *Il diritto mite. Legge, diritto, giusizia,* Turin*,* Einaudi, 1992, p. 10. In line with this thesis see M. D'AMICO, *I diritti contesi. Problematiche attuali del costituzionalismo,* Milan, FrancoAngeli, p. 290 ff.

[353] G. ZAGREBELSKY, op. cit., p. 11.

[354] G. ZAGREBELSKY, op. cit. p. 13

their subjective dimension and, therefore, renouncing the claim that one can prevail over another[355].

Thus, by embracing this perspective, the integration of "mild" pluralism will renounce the logic of *aut-aut in* order to give credence to that of *et-et*[356]. Thus, the perspective that will be endorsed here will see et-et constitutional identities *and et-et* common values as sides of the same coin.

4.2. The "European" Value of the Rule of Law and its Dense Pattern of Principles

As for the notion of the rule of law, it is one of the common values enshrined in Art. 2 TEU on which the Union itself is based (in particular, "*respect for human dignity, liberty, democracy, equality [...] and human rights, including the rights of persons belonging to minorities*" also fall within the scope of Art. 2 TEU).

The value of the rule of law is reflected in a number of principles, recently specified in Art. 2(a) of the 2020/2092 cross-compliance regulation. (a) of the Conditionality Regulation 2020/2092: these include the principle of legality, according to which the legislative process must be transparent, accountable, democratic and pluralistic; of legal certainty; of the prohibition of arbitrariness of the executive; of effective judicial protection, including access to justice, by independent and impartial courts, including with regard to fundamental rights; separation of powers; non-discrimination and equality before the law.

And what determines the relevance at the European Union level of such a set of principles is precisely the fact that they constitute the expression of a common constitutional tradition.

The Court of Justice recently expressed itself in these terms, noting that *"although they have distinct national identities, inherent in their fundamental political and constitutional structure, which the Union respects, the Member States adhere to a*

[355] C. SCHMITT, *La tirannia dei valori,* 1960, ed. consulted, Adelphi, Milan, 2008, p.60 ff.
[356] G. ZAGREBELSKY, op. cit., p. 15.

notion of the 'rule of law' which they share as a common value of their own constitutional traditions and which they have undertaken to respect on an ongoing basis"[357]. With the clarification that the object of the "constitutional tradition" is not the identity of the content of the principle per se, it may in fact take on different connotations within the 27 constitutional orders, but what is important is its presence and full operativity. To give just one example, the rule of law does not impose a single model of separation of powers, but that this principle be guaranteed in some form.

In addition, it should be noted that - although there is no formal hierarchy among EU values - it has been pointed out by the doctrine, but also by the EU institutions themselves, that the rule of law takes on particular significance because its existence ensures the protection of fundamental rights in all areas in which such protection is relevant.

Hence, there are European values - such as the rule of law - that possess an *essentially* constitutional character, and which the Union does not merely observe, but which it places at the foundation of the European project itself, so that their frustration within the territory of a state is also reproduced in a "direct" manner in the sphere of European law.

4.3. The Violation of "Value" *in Concrete.* A Look at the Cases of Poland and Hungary

The "responses" so far to the "crisis" of the *rule of law by* Hungary and Poland have seen the Court of Justice as the institutional actor, which has repeatedly made explicit the compression of the common value of the rule of law[358].

[357] See Court of Justice, Judgment of 16 February 2022, *Poland v. Parliament and Council,* C-157/21, ECLI:EU:2022:98, para. 266.

[358] On this topic, although relatively recent, the literature is already quite extensive, for all see F. BALAGUER CALLEJÓN, *Democracia y Estado de Derecho en Europa,* in *La Cittadinanza Europea,* No. 2, 2020, p. 33 ff., W. SADURSKI, *Poland's Constitutional Breakdown*, Oxford, Oxford University Press, 2019; G. DE BÚRCA, *Poland and Hungary's EU membership: On not confronting authoritarian governments,* in *International Journal of Constitutional Law*, Vol. 20, No.1, 2022, p. 13 ff.; L. PECH, P. WACHOWIEC, D. MAZUR, *Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action*, in *Hague Journal on the Rule of Law*, Vol. 13, No. 1, 2021, p. 1 ff.; G. DELLEDONNE, *Ungheria e*

Among the many peculiarities of this case law specifying the scope of a common value, two can be outlined here.

The first relates to the various fora in which the EU courts have consolidated their jurisprudence. One thinks of the rulings made in the contentious phase of the infringement procedure. It is especially on this side that there has been greater intervention by the Union. Just look at the numbers: against Poland there are currently 60 infringement proceedings pending, 10 of which have as their object the violation of the rule of law and to these 10, the 6 relating to cases already concluded must be added; while with reference to Hungary there are only 53 proceedings pending, 9 of which on the rule of law and 4 already concluded. However, as will be seen, the decisions of the Court of Luxembourg made following references for preliminary rulings and actions for annulment are also significant.

The second concerns, on the other hand, a "bitter" observation: in no case has there been a reference for a preliminary ruling by the two constitutional judges who, while not abdicating the possibility of defining *ultra vires* what was decided by the Court of Justice, have instead renounced cooperating with the latter in the search for convergence between constitutional identities and common values.

4.3.1. Reforms of the Judiciary in Poland "under Indictment" by the European Union

Over the past four years, the key issue of the independence of the justice system in Poland has prompted many decisions of the Court of Justice, through which certain pillar principles of the rule of law have been consolidated, such as: the principles of

Polonia: punte avanzate del dibattito sulle democrazie illiberali all'interno dell'Unione Europea, in *Rivista di Dritto Pubblico comparato ed europeo*, no. 3, 2022, p. 3999 ff.; in the same journal, A. ANGELI, A. DI GREGORIO, J. SAWICKI, *La controversa approvazione del "pacchetto giustizia" nella Polonia di Diritto e Giustizia: ulteriori riflessioni sulla crisi del costituzionalismo polacco alla luce del contesto europeo,* no. 3, 2017, p. 787 ff.; G. RAGONE, *La Polonia sotto accusa. Brevi note sulle circostanze che hanno indotto l'Unione Europea ad avviare la c.d. opzione nucleare,* in *Osservatorio AIC*, no. 1, 2018, p. 1 ff.

independence and impartiality of the judiciary, the right to an effective remedy and the principle of separation of powers.

In order to trace the most significant trends of this European jurisprudence, the distinction will not linger on the different types of judgments in which the rulings were made, in infringement and preliminary reference, but their treatment will follow these two thematic strands:

(a) the lowering of the retirement age of judges between the principle of non-discrimination and the effectiveness of judicial protection;

(b) the precariousness of the independence of the disciplinary chamber and its inevitable repercussions on the general exercise of jurisdiction.

(a) Lowering the retirement age of judges between the principle of non-discrimination and the effectiveness of judicial protection

The first occasion on which the Court of Justice intervenes on a specific breach of the rule of law by Poland is the *Commission v. Poland (Supreme Court Independence)* decision. *Poland (Independence Supreme Court)*[359]. It originates from an appeal by the Commission on a law reforming the Polish judiciary, which concerns the issue of lowering the retirement age of Supreme Court judges (*Sąd Najwyższy*).

Prior to the legislative change, the Supreme Court Act of 2002 made the termination of judicial office coincide with the age of 70. With the possibility of a two-year extension (until reaching the age of 72), which could be granted to the magistrate following his explicit request to the Chief Justice, where the person concerned declared that he was in good health and would thus be able to continue his work.

On 8 December 2017, a reform of the Supreme Court Act was passed (coming into force on 3 April 2018), lowering the retirement age to 65. Again, there is an extension scheme, which allows for an extension of up to 6 years.

However, the manner in which it is granted changes radically.

[359] Court of Justice, judgment 24 June 2018, C-619/18, *Commission v. Poland (Independence Supreme Court),* ECLI:EU:C:2019:531.

Now, Article 37 of the law of 8 December 2017 states that the request must be made between 12 and 6 months before the age of 65 and is subject to the authorisation of the President of the Republic (para. 1). The latter awaits the positive opinion of the National Council of the Judiciary (para. 1-bis), which must be received by the Head of State within 30 days of the request (once the latter has expired, silence is understood as assent). It is interesting to note that in rendering its opinion, "the National Council of the Judiciary shall take into account the interest of the judiciary or a relevant social interest, in particular the rational allocation of members of the Supreme Court or the needs relating to the workload of certain sections of the Supreme Court" (para. 1-ter).

After receiving the opinion, or after 30 days, the President of the Republic has three months to grant the authorisation and in the absence of the latter "the judge is considered to have retired from the day he reaches the age of 65 years" (para. 3).

In addition, Article 111 of the same law provides for a sort of transitional regime that aims to apply this new extension system to judges who have turned 65 years of age when the law enters into force (3 April 2018) or who will turn 65 years of age in the three months following the law.

The European Commission initiates infringement proceedings for breach of Article 19 TEU, in conjunction with Article 47 TFEU, due to Poland's failure to guarantee an effective remedy in matters of EU law. Attempts at dialogue with Poland having failed, the EU executive is seeking a ruling from the Court of Justice under Article 258 TFEU. The latter, in particular, concerned the above-mentioned rules on the retroactive lowering of the retirement age and the authorisation power of the President of the Republic for the extension of magistrates in early retirement.

The Court's ruling upholding the appeal deserves to be retraced here following three distinct profiles.

The first, in a preliminary key, concerns the perimeter of the Court of Justice's judgement in being able to express itself on the subject of the appeal and, therefore, to scrutinise compliance with Article 19 TEU in relation to national legislation, such as the reform of justice, not strictly related to European matters. While, the other two profiles relate to the violation of the principles of independence and immovability for the retroactive application of the new rules on early retirement, and of the sole

principle of independence for the unprecedented filter placed in the hands of the President of the Republic.

In arguing on the first aspect, the Court recalls an important precedent of its own, *Associação Sindical* dos Juízes Portugueses[360] , in order to affirm that Article 19 TEU, on the one hand, has the dignity of a general principle of EU law, as a common constitutional tradition and protected by Articles 6 and 13 ECHR, as well as by the aforementioned Article 47 CFREU , on the other hand, its scope ratione materiae "concerns the 'areas governed by EU law', regardless of the areas covered by EU law". 6 and 13 ECHR, as well as the aforementioned Article 47 CFREU[361] , on the other hand, its scope of application *ratione materiae "*concerns the "areas governed by Union law", regardless of the situation in which the Member States implement that law, within the meaning of Article 51(1) of the Charter"[362].

In fact, "the organisation of justice in the Member States falls within the competence of the latter, but this does not detract from the fact that, when exercising that competence, the Member States are bound to comply with their obligations under Union law"[363] , and thus those inferred from Article 19 TEU, paragraph 1, subparagraph 2, which "requires all Member States to establish the necessary remedies to ensure effective judicial protection, in particular within the meaning of Article 47 of the Charter, in areas governed by Union law"[364].

In this perspective, by the mere fact that the Polish Supreme Court may find itself applying or interpreting EU law, it can be defined as a "court" and as such "is part of the Polish system of judicial remedies in "areas governed by Union law" within

[360] Court of Justice, judgment 27 February 2017, C-64/16, *Associação Sindical dos Juízes Portugueses,* ECLI:EU:C:2018:117. In this case, the Court was called upon to rule on the possible infringement of the principle of independence of judges (Article 19 TEU and Article 47 Nice Charter) as a result of the salary reduction imposed on judges in order to eliminate an excessive budget deficit. The Court concluded its ruling in the sense that the reform in question did not prove to be detrimental to the independence of judges and thus also to EU law.

[361] Thus Associação Sindical dos Juízes Portugueses, cit., para. 35 and Commission v. Poland (Independence Supreme Court), cit., para. 49.

[362] Thus Associação Sindical dos Juízes Portugueses, cited above, para. 29 and Commission v. Poland (Independence Supreme Court), cit., para. 50.

[363] *Commission v. Poland*, *(Independence Supreme Court),* cit., para. 52, where it is stated that, "by requiring the Member States to comply with those obligations in this way, the Union in no way claims to exercise that competence itself or, therefore, to arrogate it to itself, contrary to the Republic of Poland's assertion".

[364] Commission v. Poland, (Supreme Court Independence), cit., para. 54.

the meaning of Article 19(1), second paragraph, TEU, which is why this body must fulfil the requirements of effective judicial protection"[365]. Closely linked to this aim, as its essential corollary, will be "preserving" the independence of the court within the meaning of Article 47 CFREU, since "access to an "independent" court is one of the requirements linked to the fundamental right to an effective remedy"[366].

Having made these preliminary considerations, the Court then turns to the merits of the two complaints under appeal.

With reference to the former, the argumentative path starts from some clarifications on the principle of independence of the judiciary, here considered in its external dimension (independence from influences coming from other powers) and internal dimension (thirdness and equidistance from the parties to the dispute), to which is linked the principle of non-removability, to be understood as a precondition for the free exercise of the judicial function until its "natural" expiry[367]. Particularly with regard to this last profile, the Court of Justice specifies that it is not *absolute in* character and therefore "may be subject to exceptions only on condition that they are justified by legitimate and imperative reasons, in compliance with the principle of proportionality"[368].

Having said that, the EU judges considered that the "contested reform, which provides for the application of the measure consisting in lowering the retirement age of judges of the *Sąd Najwyższy* (Supreme Court) to judges already in office at that court, entails the premature termination of the exercise of their judicial functions, and that it is therefore likely to give rise to legitimate concerns as to compliance with the principle of non-removability of judges"[369].

The same approach that has been traced in the reasoning leads the Court of the Union to conclude that the second censure raised, i.e. the one centred on the President of the Republic's discretionary power of extension, is also infringed. In particular, also in this case - the Court states - it is not possible to exclude that the reform instils "legitimate doubts, particularly in individuals, as to the impermeability of the judges

[365] Commission v. Poland, (Supreme Court Independence), cit., para. 56.
[366] Commission v. Poland, (Supreme Court Independence), cit., para. 57.
[367] See Commission v. Poland, (Supreme Court Independence), cit.,. paras. nos. 71-76.
[368] Commission v. Poland, (Supreme Court Independence), cit.,, para. 76.
[369] Commission v. Poland, (Supreme Court Independence), cit., para. 78.

concerned with respect to external elements and their neutrality with respect to the interests that may be opposed before them"[370].

On a partially coinciding topic is the judgment *Commission v. Poland (Independence of ordinary courts)*[371], delivered on 5 November 2019.

The Court of Justice is again upholding an appeal occasioned by an infringement procedure initiated against Poland in relation to significant aspects of the reform of the judiciary. Specifically, the subject of the Commission's appeal are several provisions recently adopted at the time which lowered and differentiated the retirement age for male and female magistrates, raising it to 65 for the former and 60 for the latter. This inequality had repercussions on the calculation of pension compensation. It is based on the calculation of length of service and the last salary received: therefore, being able to work "less" automatically means receiving a lower pension.

In particular, this system was imposed firstly through amendments to the Law on Ordinary Courts of 27 July 2001, which set the retirement limit for ordinary judges at 67 years, extendable for a further three years upon notification to the Minister of Justice of the willingness and physical fitness to continue in office.

The 2001 law was first amended by the law of 16 November 2016, which provided for early retirement of all judges of both sexes at the age of 65 on 1 October 2017. Subsequently, a second amending law, the Act of 12 July 2017, intervened before its entry into force, providing for two different retirement thresholds of 65 and 60, respectively, for male and female magistrates.

In addition, the law of 12 July 2017, on the one hand, modifies the extension scheme (Art. 1), which is always based on a request to the Minister, which is granted discretionally by the latter; on the other hand, it makes it explicit that the pension treatment follows the last salary received at the age of 60 by female magistrates and at 65 by male magistrates (Art. 13).

Also, in the Act of 12 July 2017, similar changes applied to prosecutors (Art. 13 pt. 3) and Supreme Court judges (Art. 13 pt. 2).

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[370] Commission v. Poland, (Supreme Court Independence), cit., para. 118.

[371] Court of Justice, Judgment 5 November 2019, C-192/18, *Commission v. Poland (Independence of ordinary courts),* ECLI:EU:C:2019:924.

Although an amending law came into force on 23 May, eliminating the unequal treatment regarding the retirement age of female and male magistrates in the ordinary courts and public prosecutors' offices, the Court decides on the merits of the two grievances proposed by the Commission, since the 2018 amendments come late[372].

And in particular, the first is based on alleged violations of Article 157 TFEU, Article 5(a) and Article 9(1)(f) of Directive 2006/54 (concerning the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation), for the unjustified treatment of female magistrates and male magistrates. In relation to this complaint, which deals in law with purely labour-law aspects of social security and pension treatment, we limit ourselves here to stating that it is upheld by the Court of Luxembourg on the ground that the national rules give rise to unjustified discrimination on grounds of sex. To this end, the Court does not seem persuaded by the idea - put forward by Poland - that unequal treatment can eliminate discrimination to the detriment of women[373]. On the contrary, "the fixing, for retirement purposes, of an age condition which differs according to sex is not such as to compensate for the disadvantages to which the careers of female civil servants are exposed by helping these women in their professional life and remedying the problems they may encounter during their professional career"[374].

The second complaint, on the other hand, hinges on the power of the Minister of Justice in relation to the extension of the term of office of individual judges, which, according to the Commission, would be too vague, exercisable without any obligation to state reasons and without such a decision being in any way justiciable[375] . For these reasons, the excessive discretion in the hands of the judge would risk restricting the

[372] In particular, *Commission v. Poland*, *(Independence of ordinary courts),* cit, at para. 45, it is observed that "[i]n this respect, and without there being any need to examine whether or not the legislative amendments to that effect invoked by the Republic of Poland may have put an end, in whole or in part, to the alleged failures to fulfil obligations, it is sufficient to recall that, as is settled case-law the existence of a failure to fulfil obligations must be assessed on the basis of the situation of the Member State as it existed at the expiry of the period laid down in the reasoned opinion, and that the Court cannot take account of subsequent changes (Case C-286/12 *Commission v Hungary [2012]* ECR I-1609, EUR I-1609, paragraph 27):C:2012:687, paragraph 41 and case law cited therein)'.

[373] Thus, Commission v. Poland, (Independence of ordinary courts), cit., para. 79.

[374] Commission v. Poland, (Independence of ordinary courts), cit., para. 81.

[375] See Commission v. Poland, (Independence of ordinary courts), cit., para. 89.

freedom of judges in the exercise of their functions, as well as the principles of independence, impartiality and immovability.

This censure appears similar to the second censure *Commission v. Poland (Independence of the Supreme Court) in* that, with it, it shares the suspected infringement of the principle of immovability, *intrinsically linked to* that of independence[376]. However, while in the first ruling the violation of immovability is found in the retroactive application of the sudden change of the age limit for retirement, in this second decision the dispute concerns the extension regime which is, instead, subject to a discretionary choice of the Minister of Justice.

In order to examine the latter complaint, the Court states that "the fact that a body such as the Minister for Justice is invested with the power to decide whether or not to grant an extension of judicial functions beyond the normal retirement age is not in itself sufficient to establish the existence of a breach of the principle of the independence of judges". Therefore, it is necessary to "ensure that the substantive requirements and procedural modalities governing the adoption of such decisions are such that they cannot give rise to legitimate doubts on the part of individuals as to the impermeability of the judges concerned to external elements and their neutrality with regard to opposing interests"[377].

The Luxembourg court, with regard to the present case, concludes that the substantive requirements are not met. This is because, on the one hand, the criteria underlying the Minister's decision[378] are "vague and unverifiable" and, on the other hand, such a ministerial decision "does not have to be reasoned" and "cannot be reviewed in court"[379].

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[376] Thus, *Commission v. Poland*, *(Independence Supreme Court),* cit., para. 96 and *Commission v. Poland*, (Independence of *Ordinary Courts), cited above,* para. 125. On immovability as a guarantee for external institutional independence, in doctrine see N. ZANON, F. BIONDI, *Il sistema costituzionale della magistratura,* Turin, Zanichelli, 2019, p. 103 ff.

[377] Commission v. Poland, (Independence of ordinary courts), cit., para. 119.

[378] With regard to the discretionary powers of the Minister of Justice, the Court of Justice also intervened on the subject of the transfer of ordinary magistrates, see Judgment of 16 November 2021, Joined Cases C-748/19 and C-754/19, *WB and Others,* ECLI:EU:C:2021:931.

[379] Judgment Commission v. Poland (Independence of ordinary courts), cit., para. 122.

b) The precariousness of the independence of the disciplinary chamber and its inevitable repercussions on the general exercise of jurisdiction

By means of a preliminary reference made by the Supreme Court, "Section for Labour and Social Security", the Union's Judge with the *AK* judgment decides a thorny question concerning the Disciplinary Section, the reform of which - it should be pointed out - was only tangential to the resolution of the main proceedings[380] . The latter, in particular, arose on the appeal of three magistrates (one serving in the Supreme Administrative Court, the other two in the Supreme Court), who were about to be retired by virtue of the new age limit, coinciding with their 65th birthday (see *above a)*). The object of appeal in all three cases was the measure of the President of the Republic imposing the "early" retirement[381].

In relation to these types of disputes, however, a conflict arose with the new competences assigned to the Disciplinary Section, established by the Supreme Court Act of December 2017. In Article 27, the new section is assigned competences over disciplinary offences (including those committed by Supreme Court judges), labour law disputes and the retirement of judges of last resort[382].

In addition to this, it should be added that the 2017 Supreme Court Act also introduced a new system for the appointment of judges of last resort, who must be

[380] Court of Justice, Judgment of 19 November 2019, Joined Cases C-585/18, C-624/18, C-625/18, *AK (Independence of the Disciplinary Chamber of the Supreme Court),* ECLI:EU:C:2019:982.

[381] To be precise, the measure of AK, an administrative judge of last resort, was finalised following an explicit refusal by the President of the Republic, who had discretionally decided not to grant the request for extension of time by the person concerned; whereas in the cases of the two Supreme Court judges, CP and DO, the measure placing them on retirement was not anticipated by a request for extension, but issued under the new law on lowering the retirement age of December 2017. Cf. Judgment. *AK (Independence of the Disciplinary Chamber of the Supreme Court),* cited above, paras. 37-39.

[382] Cf. Judg. *AK (Independence of the Disciplinary Chamber of the Supreme Court),* cit., para. 23. In the next paragraph, Article 79 of the new Supreme Court Act is also quoted, according to which "[t]he labour and social security law disputes involving judges of the [Sąd Najwyższy (Supreme Court)] and disputes concerning the retirement of judges of the [Sąd Najwyższy (Supreme Court)] shall be decided:

(1) at first instance, by the [Sąd Najwyższy (Supreme Court)], which sits with a single judge from the Disciplinary Chamber;

(2) in the appeal instance, by the [Sąd Najwyższy (Supreme Court)], sitting with a panel of three judges from the Disciplinary Chamber".

appointed by the President of the Republic, following a proposal by the Superior Council of the Judiciary, in order to hold that office.

Specularly for the composition of the judges of the Disciplinary Chamber, presidential appointment was also provided for, following a proposal by the National Council of the Judiciary[383].

The combined effect of the rules introduced was to take certain competences away from the labour section of the Supreme Court and entrust them to the Disciplinary Section, composed of presidentially appointed magistrates.

This leads the judges at first *instance* to doubt the independence and impartiality of the Disciplinary Chamber and for that reason they formulate a question for a preliminary ruling on interpretation, asking "whether Articles 2 and 19(1), second subparagraph, TEU, Article 267 TFEU and Article 47 of the Charter must be interpreted as meaning that a chamber of a supreme court of a Member State such as the Disciplinary Chamber, which is called upon to rule on cases concerning European Union law, satisfies, having regard to the conditions which governed its establishment and the appointment of its members, the requirements of independence and impartiality required by those provisions of European Union law. If the answer is in the negative, the referring court asks whether the principle of the primacy of European Union law must be interpreted as requiring it to disapply national provisions which reserve jurisdiction to hear and determine such cases to that judicial panel"[384].

Of the many questions, the one referred to here passes the admissibility test[385] , the Court bases its decision on Article 47 Nice Charter and Article 9 of Directive

[383] The National Council of the Magistracy, in turn, underwent profound changes as a result of a law amending the body (Law of 8 December), which now consisted of 22 members, 15 of whom were appointed by Parliament.

[384] *AK* Judgment (Independence of the Disciplinary Chamber of the Supreme Court), cit., para. 72.

[385] Contributing to the uncertainty of admissibility was the fact that, during the pendency of the proceedings, a new law (21 November 2018) repealed the previous law on age reduction and, as a result of the revival of the 2002 rules, the applicants were reinstated. By virtue of the 21 November revival, the CJEU on 23 January 2019 asked the reffering court to confirm the continuing need for the scrutiny they had requested. Just two days later, the referring court replied in the affirmative and informed the Court that it had suspended, by order, the effectiveness of the prosecutor's order not to proceed, in order to await the resolution of the preliminary questions. The reason for this was that the November 2019 Law 'would not repeal ex tunc the national provisions at issue, nor their legal effects', on the contrary, 'that law is intended to reinstate the appellant judges in the main proceedings after their retirement and to introduce a fictio juris as to the uninterrupted continuation of their term of office as a result of that

2000/78, which respectively affirm and "reaffirm" the fundamental right to an effective remedy, i.e. "the right of everyone to have his or her case heard fairly by an independent and impartial tribunal"[386].

What is important in determining the applicability of the Charter is the very concatenation of the two provisions: in fact, the fact that one finds oneself within the scope of Directive 2000/78, which prohibits discrimination on the basis of age, also determines the applicability of the corresponding right of action.

As in the cases already illustrated, the area in which the violations complained of fall is precisely that of the centrality of independence, "intrinsically linked to the task of judging, it constitutes an essential aspect of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee of the protection of all the rights deriving to the individual from Union law and the safeguarding of the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law"[387].

The Court concludes its judgment by authorising the national court to disapply national legislation that infringes the essential content of the right in question, stating, however, that it should be done only after an assessment of the same with regard to the

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reinstatement, the actions in the main proceedings would be seeking a declaration that the judges concerned never retired and remained fully in office throughout that period, which could result only from the disapplication of the contested national rules, by virtue of the primacy of European Union law' (Judgment *AK* (Independence of the Disciplinary Chamber of the Supreme Court), cit, para. 96). The reasoning set out above is sufficient for the Court of Justice, which declares the question admissible and specifies that the reasons for the reference do not relate to the substance of the disputes it has to decide, but are based "on a problem of a procedural nature on which it must rule in limine litis, in so far as it relates to the very jurisdiction of that court to hear the said disputes" (*AK (Independence of the Disciplinary Chamber of the Supreme Court),* cited above, para. 99).

[386] *AK* Judgment (Independence of the Disciplinary Chamber of the Supreme Court), cit., para. 119.

[387] *AK* Judgment *(Independence of the Disciplinary Chamber of the Supreme Court),* cit, para. 120. And again on this point, at para. 130, it is stated that '[i]n the present case, the doubts expressed by the referring court relate essentially to the question whether, in the light of the national rules relating to the creation of a specific body, such as the Disciplinary Chamber, and concerning, in particular, the powers conferred on that body, its composition and the conditions and procedures which governed the appointment of the judges called upon to take part in it, as well as the context in which that creation and those appointments took place, that body and the members of which it is composed satisfy the requirements of independence and impartiality which a court or tribunal must observe under Article 47 of the Charter when called upon to rule on a dispute in which an individual alleges, as in the present case, an infringement of European Union law against him.

specific factual elements of the case[388]. In this regard, in fact, the Court states that the mere fact that the possibility of the appointment of judges by the President of the Republic is introduced does not constitute an infringement of the right to appeal, precisely because they can guarantee their independence and impartiality following their appointment. Instead, it will be the combination of all the intervening circumstances that determine a violation in concrete[389].

The ruling, apart from the merits of the references, clarifies the relationship that at the systemic level intervenes between Art. 2 TEU, Art. 19 TFEU and Art. 47 CFAU. The logical-legal scheme is *value-principle-right*: the principle of effective judicial protection in Art. 19 TFEU, on the one hand, "concretises the value of the rule of law affirmed in Art. 2 TEU, rule of law"[390] and consequently, on the other hand, posits in Art. 47 Nice Charter a specific right to an effective remedy for the individual (a right that constitutes, as is well known, a general principle of EU law)[391].

While this pattern in *AK, the* genesis of which is in a reference for a preliminary ruling, the application of the same with reference to the same discipline is slightly nuanced in the subsequent 2021 ruling, *Commission v Poland (Disciplinary regime of judges)*[392].

The latter, in particular, is rendered in the context of the contentious phase of an infringement procedure concerning various aspects of the new legislation on the disciplinary section. Among these, the Court declares an infringement in relation to the following complaints[393]:

- the circumstance that the content of judicial decisions can be qualified as a disciplinary offence concerning judges of ordinary courts;

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[388] *AK* Judgment (Independence of the Disciplinary Chamber of the Supreme Court), cited above, para. 136 ff.

[389] *AK* Judgment (Independence of the Disciplinary Chamber of the Supreme Court), cited above, para. 142 ff.

[390] *AK* Judgment (Independence of the Disciplinary Chamber of the Supreme Court), cited above, para. 167 ff.

[391] AK Judgment (Independence of the Disciplinary Chamber of the Supreme Court), cited above, paras. 168 ff.

[392] Court of Justice, Judgment of 15 July 2021, Case C-791/19, *Commission v Poland (Disciplinary regime of judges),* ECLI:EU:C:2021:596.

[393] Judgment Commission v Poland (Disciplinary regime of judges), cit. par. 237.

- the discretionary power of the President of the Disciplinary Chamber to designate the court competent in the first instance for disciplinary disputes, in defiance of the principle of the natural court constituted by law;
- the fact that there is no time limit for the reasonable duration of such proceedings;
- the circumstance that suspension does not intervene in cases where a defence counsel is appointed, thus reducing the capacities associated with defence activity;
- the rights of defence are also compressed in relation to the continuation of proceedings even in the absence of the magistrate subject to disciplinary proceedings.

Avoiding going into the merits of the censures, it must be emphasised that the Court of Luxembourg, explicitly states the violation of Article 19 TEU alone, although it emphasises the scope and the link between this latter provision and Article 47 CFREU.

Another ruling in the disciplinary section is *M.F. v. J.M.*[394] , which, unlike the previous ones, concludes with a verdict of inadmissibility.

In summary on the facts which are the subject of the judgment *a quo.* In January 2019, disciplinary proceedings were instituted against M.F., a judge at a Polish District Court, on account of his alleged delays in the settlement of court cases assigned to him. Subsequently, J.M., as President of the Disciplinary Chamber, referred the disciplinary proceedings in the first instance to a Court of Appeal. Consequently, M.F., considering that J.M.'s appointment to that Disciplinary Chamber was tainted by irregularities, brought a civil action before the Supreme Court to establish whether or not a service relationship existed between J.M. and that court. At the same time, he asked the Supreme Court to suspend the disciplinary proceedings pending against him. The Supreme Court assigned the task of examining those applications to its Labour and Social Security Section. The latter suspended its judgment and made a reference for a preliminary ruling, noting that the court order concerned a matter of public law, not civil law, and therefore the action brought in the main proceedings did not fall within the scope of the Code of Civil Procedure. That being so, the referring court

[394] Court of Justice, Judgment 22 March 2022, C-791/19, *MF. v. JM,* ECLI:EU:C:2022:201.

asked whether the principle of effective judicial protection, and the obligation imposed on the Member States under Article 19 TEU to ensure that their courts operating in areas governed by Union law comply with the requirements, in particular independence, impartiality and establishment by law, confer on the referring court the power, which it does not possess under Polish law, to determine, in the context of the main proceedings, whether or not the respondent in question holds the office of judge.

In its judgment, the Court of Justice declared the request for a preliminary ruling inadmissible, emphasising that, within the framework of the jurisdictional tasks assigned to it under Article 267 TFEU, its function consists[395] in providing all the courts of the European Union with the necessary interpretations of European law in order to decide on genuine questions submitted to them. Whereas, in the present case, the questions raised are outside[396] this area of competence[397].

4.3.2. Hungary's Obstacles within the Area of Freedom, Security and Justice

[395] Judgment *MF. v. JM,* cit., paras. nos. 20-34.

[396] Thus *MF. v. JM,* cit, par. 71, where it is stated that "the questions referred to the Court in the present case intrinsically concern a dispute other than that which is the subject-matter of the main proceedings, in relation to which the main proceedings are, in fact, merely incidental, inasmuch as by those questions the referring court seeks to assess whether the appointment of J.M. as President of the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court) and the designation by that court of the disciplinary tribunal called upon to rule on disciplinary proceedings such as that relating to the applicant in the main proceedings are compatible with European Union law and, ultimately, whether the disciplinary tribunal thus designated by J.M. to hear disciplinary proceedings against that applicant constitutes an independent and impartial tribunal, pre-established by law within the meaning of the second paragraph of Article 47 of the Charter. In those circumstances, the Court would be obliged, in order to assess fully the scope of those questions and to provide an appropriate answer to them, to take account of the relevant factors characterising that other dispute, rather than confining itself to the configuration of the main proceedings, as required by Article 267 TFEU".

[397] For reasons akin to those in *MF v. JM*, the Court of Luxembourg recently declared inadmissible the preliminary questions raised by the Krakow District Court on a case concerning the appointment of judges, see Court of Justice, judgment 9 January 2024, Joined Cases C-181/21 and C-269/21, *G. v. M.S.,* ECLI:EU:C:2024:1, esp. paras. 74-75.

The crisis of the rule of law in the European space has, as is well known, also affected many measures approved in Hungary.

Among the reforms that pose a serious threat to the rule of law are not only those of the judiciary, but also those concerning transparency, LGBTQI+ rights and the reception system[398].

It is precisely with regard to the latter that the largest number of rulings of the Court of Justice is to be found.

With the judgments, *FMS* of 2020[399] and *European Commission v. Hungary* of 2021[400], the Union judiciary defines numerous issues related to the Hungarian asylum system that are contrary to European law.

In *FMS,* certain Afghan and Iranian nationals, who had arrived in Hungary via Serbia, submitted asylum applications from the Röszke transit zone, located on the border between the two countries. Pursuant to Hungarian law, these applications were rejected as inadmissible and the Hungarian authorities issued return decisions to Serbia, which in turn refused the readmission of the persons concerned, on the grounds that the conditions of the readmission agreement concluded with the EU were not met. Following that decision by Serbia, the Hungarian authorities did not proceed to examine the substance of the above-mentioned applications, but changed the country of destination in the initial return decisions to the country of origin of the persons concerned. The latter then lodged an opposition against the amending decisions, which was rejected. Against this last refusal, although there was no specific ad hoc procedure under Hungarian law, a new appeal was lodged requesting that the obligation to institute an asylum application procedure be established.

The applicants were detained in the Rözske transit zone in the course of the latter events, in the light of the rules governing both the detention of applicants for

[398] See European Commission, 5 July 2023, Rule of Law Report Country Chapter on the rule of law situation in Hungary, SWD(2023) 817 final.

[399] Court of Justice, Judgment 14 May 2020, Joined Cases C-925/19 and C-924/19, FMS e.a. v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság et Országos Idegenrendészeti Főigazgatóság, ECLI:EU:C:2020:367.

[400] Court of Justice, Judgment 16 November 2021, C-821/19, *European Commission v. Hungary* (criminalisation of support for asylum seekers), ECLI:EU:C:2021:930.

international protection[401] and the detention of third-country nationals in an irregular situation[402]. In this regard, the Court ruled that the placement of the persons concerned in that transit zone had to be regarded as a detention measure, which in the present case had to be considered as not complying with EU law[403].

The Court's ruling, rendered the following year in the course of an infringement procedure, concerns, on the one hand, the grounds for refusal of an asylum application and, on the other hand, the offence of aiding and abetting anyone who assists an asylum seeker.

In particular, the first concerns the introduction of a ground of inadmissibility for asylum applications made by persons who have first arrived in a country where they are not exposed to persecution or where an adequate level of protection is guaranteed. This rule, which is placed as a brake on any European redistribution policy, violates, according to the Commission, Article 33(2) of Directive 2013/32, and this violation is established by the Court, since, according to the latter provision, "Member States may deem an application for international protection inadmissible if a country which is not a Member State is considered a safe third country for the applicant pursuant to Article 38 of Directive 2013/32"[404]. According to the latter European standard, "there must be a connection between the applicant for international protection and the third country concerned according to which it would be reasonable for that person to travel to that country"[405], thus "the mere transit of the applicant for

[401] See Directive 2013/32/EU of 26 June 2013 of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (so-called Procedures Directive) and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (so-called Reception Directive).

[402] See Directive 2008/115/EC of 16 December 2008 of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (the Return Directive).

[403] *FMS* judgment, cit, para. 281 'Article 15 of Directive 2008/115 must be interpreted as precluding, first, the detention of a third-country national solely on the ground that he is the subject of a return decision and that he cannot meet his own needs, second, that such detention should take place without the prior adoption of a reasoned decision ordering such a measure and without its necessity and proportionality having been examined third, that there is no judicial review of the lawfulness of the administrative decision ordering detention and, fourth, that such detention may exceed 18 months and be maintained even if repatriation is no longer in progress or if there has been no diligent pursuit of its modalities'.

[404] *European Commission v. Hungary* (criminalisation of support for asylum seekers), cit. p. 35.

[405] *European Commission v. Hungary* (criminalisation of support for asylum seekers), cit. p. 36.

international protection through the third country concerned cannot constitute a "connection" with that third country within the meaning of Article 38(2)(a) of Directive 2013/32"[406].

The second profile of censure concerns the criminal offence, which applies to anyone who allows or simply aids a person wishing to initiate an asylum procedure (provided that the latter has not suffered persecution or been at risk of persecution in at least one of the countries through which he or she transited before arriving in Hungary) [407].

The *rationale of* the rule, at least on the surface, is the so-called fraudulent or abusive support[408], but in reality, as the Court observes, this regulation forces those who want to offer support to check from the moment they submit their application whether it is suitable under Hungarian law. Such a requirement is unreasonable since it may be very difficult for people to make such an assessment. Therefore, the risk of severe criminal sanctions, such as deprivation of liberty, for those who offer support even in good faith strongly discourages support in the asylum procedure, going beyond the need to combat fraudulent or abusive practices.

4.3.3. The Rule of Law Regulation (No 2020/2092) and the "Twin" Judgments on Conditionality

It is necessary to dwell, albeit briefly, on the novelties introduced by Regulation (EU, Euratom) 2020/2092 on a general system of conditionality for the protection of the Union budget. It establishes a mechanism to sanction states that fail to respect the rule of law by suspending payments from the Union budget or suspending the approval of one or more programmes from that budget.

[406] *European Commission v. Hungary* (criminalisation of support for asylum seekers), cit. p. 40.

[407] See Judgment *European Commission v. Hungary* (criminalisation of support for asylum seekers), cit. paras. 19-20.

[408] Cf. Judgment *European Commission v. Hungary* (criminalisation of support for asylum seekers), cit. par. 45 ff.

The measure suspending the funds is adopted by the Council on a proposal from the Commission and the sanction can only be imposed if there is a "sufficiently clear" link between the violation of the rule of law and the damage to the financial interests of the Union[409].

Thus, only a small circle of violations pertaining to the sphere of *rule of law* are covered by this mechanism.

It should also be considered that the regulation was introduced to overcome the political *impasse in the* Article 7 TEU procedure. In fact, Poland and Hungary challenged the regulation for annulment, each with their own appeal, and the Court of Justice in both cases rejected the appeal[410].

The Court of Justice has stated that "while having distinct national identities, inherent in their fundamental political and constitutional structure, which the Union respects, the Member States adhere to a notion of the "rule of law" which they share as a common value of their own constitutional traditions and which they have undertaken to respect on an ongoing basis"[411].

This leads to the conclusion that the regulation is in conformity with EU law, since its mechanism is complementary to that provided for in Article 7 and does not replace it[412].

To date, after quite some delays, this conditionality mechanism has been initiated for Hungary, due to the still insufficient reforms on anti-corruption and conflict of interest. This mechanism could lead to the freezing of EUR 6.3 billion, "as the corrective measures taken by Hungary so far are marred by significant weaknesses that seriously undermine their adequacy to address violations of the principles of the rule of law"[413] .

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[409] See Article 4(1) of Regulation (EU, Euratom) 2020/2092 on a general system of conditionality for the protection of the Union's budget.

[410] Court of Justice, judgments 16 February 2022, *Hungary v. Parliament and Council,* C-156/21, ECLI:EU:C:2022:97, and *Poland v. Parliament and Council,* C-157/21, ECLI:EU:C:2022:98.

[411] Judgment Poland v. Parliament and Council, cit., no. 266.

[412] Judgment *Hungary v. Parliament and Council*, cit., esp. nos. 155-198; and Judg. *Poland v. Parliament and Council*, cited above, esp. nos. 191-229

[413] Press release of the Council of the European Union of 12 December 2022, "Rule of Law Conditionality Mechanism: Council decides to suspend EUR 6.3 billion given Hungary's only partial corrective action".

With reference to this regulation, the doctrine has accentuated its "constitutional tone"[414], due to the fact that it ends up directly affecting the political choices of states that are in a certain sense "threatened" to change course.

In addition, I would like to emphasise that this new instrument also harbours aspects that may give rise to some concerns during its implementation. I was in the European Parliament when the introduction of this regulation was being discussed, and in the course of the lively parliamentary debate some criticism arose, based on the assumption that the reduction of funds could end up affecting the citizens of the states indiscriminately, who cannot be directly blamed for the political choices of their own countries. Therefore, should this procedure be concluded, it will be necessary to calibrate carefully which European funds will be cut and how these cuts will be made.

5. The Fragility of Article 7 TEU: A Political Procedure to Be Rethought from a Representative Perspective

The *former* Article 7 TEU procedure is the only mechanism provided for by the Treaties for violations of the Union's values. It consists of two phases: the first is preventive, the second sanctioning. In particular, the first stage ascertains the presence of a "clear *risk of* a serious breach by a Member State" (para. 1) and this assessment is made by the Council of Ministers by a 4/5 majority after receiving the assent of the European Parliament; the second, which consists of a sanctioning mechanism, aims to "establish the *existence of* a serious and persistent breach" (para. 2). This finding is made by a unanimous decision of the European Council and following this decision the Council may impose a sanction on the State held responsible.

This procedure was initiated against both Poland and Hungary, at the instigation of the Commission (December 2017) and Parliament (September 2018), respectively.

Although some years have already passed, the procedure is still stalled at its initial stage due to the vote not yet taken by the Council. In the latter forum, despite

[414] Cfr. A. BARAGGIA, *La condizionalità come strumento di governo negli Stati compositi*, Torino, Giappichelli, 2023; EAD, *La condizionalità a difesa dei valori fondamentali dell'Unione nel cono di luce delle sentenze C-156/21 e C-157/21*, in *Quaderni costituzionali*, No. 2, 2022, p. 371 ff.

the fact that the responsible state does not formally have a say (it does not take part in the deliberations), a "cordate" has been created among the Eurosceptic countries that hinder the progress of the procedure.

The European Parliament passed a resolution in which it considered Hungary to be a state under electoral autocracy and urged the Council once again to adopt the resolution on the existence of a persistent and systematic violation of the *rule of law*[415].

The Article 7 procedure *is* an eminently political mechanism, and the reasons for this are to be found, on the one hand, in the significant weight in both phases of the Council and the European Council (institutions linked to intergovernmental logic), which deliberate with particularly high majorities; on the other hand, a significant role of the Court of Justice is all but excluded, which can only be resorted to in order to challenge flaws that may have lurked within the procedure.

In other words, it is always the executive that prevails.

In particular, on the one hand, the European Council and the Council, where the heads of state and government and the ministers of the national executives meet respectively, are the main actors of the only procedure provided by the treaties to remedy violations of common values. On the other hand, there is the executive of the Union, the Commission, which discretionarily initiates political procedures, such as infringement and now also the one on conditionality, which is considered complementary to the one in Art. 7 TEU, which requires a final vote by the Council on possible measures to suspend funds.

We can affirm, therefore, that in the instruments of places to protect values (and therefore, fundamental rights) there is a predominance of the intergovernmental method, that is, the scheme that puts the state executives at the centre. Consequently, there is a marginal role for the institutions that act on the basis of the Community

[415] European Parliament resolution of 15 September 2022 on the proposal for a Council decision on the determination, in accordance with Article 7(1) of the Treaty on European Union, of the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)).

method - such as the European Parliament[416] -, a method that is, on the contrary, more disconnected from national governments[417].

To this basic observation, it should be added that these instruments for the most part have turned out not to be immediately functional in the pursuit of their intended goals. And one of the reasons for this *impasse* may lie precisely in the strong weight assumed by the institutions acting in an intergovernmental manner, such as the Council and the European Council.

In our opinion, in the light of what has been described, we could consider rethinking how, in the European perspective, "power" is exercised to protect "rights" and, therefore, imagine whether a different articulation of institutional arrangements could correspond to a more effective protection of fundamental rights.

In the wake of this line of reasoning, one could hope for a revision of the founding treaties in the sense of restoring the political weight of the only democratically elected institution. This would be achieved, firstly, by giving a more decisive role to the procedure *under* Article 7 TEU, which could ascertain the violation of common values following a transparent debate, possibly even providing for an "aggravated" procedure, at the end of which a qualified majority vote would be required.

These changes could bring not only positive implications in the protection of fundamental rights at the Union and national levels, but also (and above all) in the constitutionalisation process of the European integration project (to date, certainly, still unfinished). This process, in fact, was interrupted with the Constitutional Treaty, whose failure - due, as is well known, to the referendums in France and the Netherlands - also lies in having imposed too radical changes "from above", which deserved to be more meditated upon and constructed "from below"[418] .

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[416] On the role of the European Parliament in the perspective of European constitutional law, for all, P. RIDOLA, *La parlamentarización de las estructuras institucionales de la Unión Europea entre democracia representativa y democracia participativa*, in *Revista de Derecho Constitutional Europeo*, no. 3, 2005, p. 21 ff., and in the same issue of the same journal see also E. GUILLÉN LÓPEZ, *El Parlamento Europeo*, p. 57 ff.

[417] In-depth analysis on the connection between democracy and the involvement of the EU Institution in European decision-making process, see S. NINATTI, *Giudicare la democrazia?*, op. cit., p. 63 ss.

[418] M. D'AMICO, Trattato di Lisbona: principi, diritti e "tono costituzionale", op. cit., p. 70.

Following this approach, the hypothesis formulated here, which *envisages an enforcement of the* powers of the European Parliament - which is more closely connected to the social fabric of the 27 Member States - could lead to a greater integration of constitutional *diversity.* Thus, decisions (especially on rights violations) could be taken by representatives, elected "from below", who do not bring a *single voice* (i.e. that of the state government) to Europe.

Ultimately, that of the rule of law is one of the crises that the Union is facing, and the most significant hope is encapsulated in the words of Jean Monet, who argued that *"Europe will be made through crises, and will be constituted by the sum of the solutions that will be given to these crises".*

CHAPTER III

VARIABLE-GEOMETRY RIGHTS PROTECTION: THE EFFECTS OF THE JURISDICTIONALISATION OF CONFLICTS BETWEEN CONSTITUTIONS AND THE EU CHARTER OF FUNDAMENTAL RIGHTS

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1. Lights and Shadows on the Role of Constitutional Judges in the Increasingly Complex European Judicial Space

1.1. The Principle of the Primacy of Union Law and the Poor Use of the Instrument of the Preliminary Reference by Constitutional Courts

Cooperation in the judicial sphere between national courts and the Court of Justice took root thanks to the instrument of the preliminary reference, the regulation of which was already a special feature of the newly created three European Communities in 1957 (cf. Article 177 EEC Treaty, now transformed into Article 267 TFEU)[419].

As is well known, over the years the direct channel with the Union Courts has facilitated, first and foremost, a greater cementing of the Union's two structuring principles, direct effect and primacy, through an increasingly uniform application of *Community law* in national legal systems, made possible by the intense hermeneutic activity of the Court of Luxembourg.

In this perspective, the role of the common judge empowered to resolve "directly" the inconsistencies between national and European norms by making immediate use of the mechanism of non-application or disapplication[420] has become

[419] On the subject, for all, F. FERRARO, C. IANNONE (eds.), *Il rinvio pregiudiziale,* Torino, Giappichelli, 2020 and, more recently, for a quantitative analysis in relation to the use of the preliminary ruling instrument by Italian judges, see J. ALBERTI, *I rinvii pregiudiziali italiani dall'entrata in vigore del Trattato di Lisbona al 31.12.2021: uno studio sulla prassi e sulle prospettive,* in *Eurojus,* n. 4, 2022, p. 26 ff.

[420] It should be made clear that in the remainder of this discussion the two terms in question - "disapplication" and "non-application" - will be used as synonyms, since both terminologies can validly refer to the specific legal phenomenon that, on a concrete level, leads to the non-application of a rule in the course of a dispute. That said, it would not be possible to identify an exact coincidence of meaning between the two terms. As the Italian Constitutional Court specified in the well-known *Granital* judgment (no. 170 of 1984), the antinomy that is generated between two norms that belong to "distinct and autonomous", albeit "coordinated", systems (*Granital* judgment, cit., no. 4 *Cons. in dir.,* first clause), will be resolved by giving precedence to the European one. With the due specification that such a prevalence will have the effect "not to invalidate, in the proper meaning of the term, [the] incompatible domestic rule, but to prevent that rule from being taken into account for the definition of the dispute before the national court" (*Granital*, cit., n. 5 Cons. *in dir.,* second clause). This is one of the consequences of the partial cession of sovereignty arranged in favour of the EU and, consequently, the domestic rule that is not applied will keep "intact its effectiveness and value outside the material and

decisive. And it was precisely the consolidation of this instrument in the hands of the common court that led authoritative doctrine to define the latter as the "natural judge" of the Union[421].

Thus, an increasingly rich and wide-ranging *European judicial area has been* created[422], based on cooperation between jurisdictional actors, which, although operating on different jurisdictional levels, has strongly affected the resolution of national disputes.

In this judicial circuit, the constitutional courts of the Member States[423] entered rather late[424], struggling to identify themselves with the notion of "jurisdiction"

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temporal limits of application of the community legislation" (M. CONDINANZI, C. AMALFITANO, *European Union: sources,* op. cit., p. 139). It cannot, therefore, be theoretically ruled out that if the State were to regain possession of that ceded portion of sovereignty in the future, the rule that was not applied (if not subsequently repealed), would return to regular application.

Whereas, the term "disapplication" would evoke "vices of the rule that do not actually exist precisely because of the autonomy of the two systems". For more details on the theoretical implications of the distinction mentioned, see V. ONIDA, *A cinquanta anni dalla sentenza* "Costa/Enel", op. cit., p. 29 ff. On this topic, see also M. CONDINANZI, C. AMALFITANO, *Unione Europea: fonti, adattamento e rapporti tra ordinamenti,* op. cit., 137 ff., and A. AMATO, *La disapplicazione giudiziale e Carta di Nizza. Profili costituzionali,* Naples, Editoriale Scientifica, 2021, p. 138 ff.

[421] G. TESAURO, *European Union Law,* op. cit., p. 290.

[422] On this topic, please refer to the broader reflections of M. D'AMICO*, Lo spazio giudiziario europeo e la tutela complesso dei diritti*, in *Italian Review of Legal History*, 3, 2017, 1 ff., which develop around the complexity of this space of judges and protections in the supranational dimension. In the latter, in particular, the composite system does not only consist of the European Union and 'its' judiciary, but also the judicial bodies of the Council of Europe, such as the European Court of Human Rights and the European Committee of Social Rights, are relevant. Having said this fundamental premise about the broad coordinates of the European judicial space, it should be noted that this contribution aims to examine only the scope of protection proper to the European Union legal system.

[423] Above all, F. BALAGUER CALLEJÒN, Los tribunales constitucionales en el proceso de integración europea, in Revista de Derecho Constitutional Europeo, no. 7, 2007, pp. 327-378 (transl. it. by Angelo Schillaci, Le Corti costituzionali e il processo di integrazione europea, in Rivista AIC, 2006) and P. RIDOLA, La justicia constitucional y el sistema europeo de protección de los derechos fundamentales, in Revista de Derecho Constitutional Europeo, no. 18, 2012, p. 217 ff.

[424] The first constitutional courts to make a preliminary reference include the Belgian Constitutional Court (formerly called *Court d'arbitrage,* since 2007 *Cour constitutionelle*) in 1997 (C-93/97, *Fédération belge des chambres syndicales de médecins v. Gouvernement flamand et al,* judgment of 16 July 1998), the Austrian Court (*Verfassungsgerichtshof*) in 1999 (C-143/99, *Adria-Wien Pipeline and Others v. Finanzlandesdirektion für Kärnten,* judgment of 8 November 2001), the Constitutional Court of Lithuania (*Lietuvos Respublikos Konstitucinis Teismas*) in 2007 (C-239/07, *Julius Sabatauskas and Others,* judgment of 9 October 2008). More recently, by way of example only, consider also the references for preliminary rulings by the German Federal Constitutional Tribunal (*Bundesverfassungsgericht*) and the Danish Supreme Court (*Højesteret*), which resulted in the European Court's judgments of 16 June 2015 (Case C-62/14, *Peter Gauweiler and Others v. Deutscher Bundestag*) and 19 April 2016 (C-441/14, *Dansk Industri v. Succession Karsten Eigil Rasmussen*),

entitled to make a preliminary reference under Article 267 TFEU[425]. This is because the preliminary reference was for a long time considered an instrument only at the disposal of the common court, which had to settle questions related to the applicability of national legal rules in conflict with European rules.

Alongside the issue of referral, it should be considered here that the Charter of Rights, endowed with binding judicial effect, has been applied very differently in the Member States, and, in particular, by the constitutional courts.

The aim of this chapter will be to analyse the different approaches that have emerged over the years among constitutional judges in order to examine the degree of "integration" between constitutional rights and the rights protected by the Nice Charter.

1.2. The Nice Charter and the Problems Surrounding its Direct Application in Constitutional Systems

Before delving into these different approaches, it is first necessary to consider some of the issues related to the scope *ratione personae* and *materiae of* the Charter of Fundamental Rights of the Union[426].

To this end, the analysis will linger on Article 51 CFREU, which, under the heading *"scope of application"*, constitutes the opening article of Title VII, the last of the European *corpus*, devoted to the *"general provisions governing the interpretation and application of the Charter"*.

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respectively. In comparative perspective, proposes an interesting classification S. RAGONE, *Las relaciones de los Tribunales Constitucionales de los Estados miembros con el Tribunal de Justicia y con el Tribunal Europeo de Derechos Humanos. Una propuesta de clasificación,* in *Revista de Derecho Constitutional Europeo,* no. 16, 2011, p. 53 ff.

[425] See Constitutional Court. (ita), ord. no. 536 of 1995; TC (esp), sent. no. 28 of 1991.

[426] The Charter was proclaimed a second time, by the European Parliament, the Council and the Commission, on 12 December 2007 in Strasbourg on the occasion of the significant amendments made by the Lisbon Treaty. The changes made to the first six titles concerned the mere substitution of words (for a detailed list see B. NASCIMBENE, *European Union Treaties*, Turin, Giappichelli, 3rd ed., p. 251, footnote 1). While more relevant were the changes made to the last four articles of the Charter (Arts. 51-54).

Paragraph 1 of Article 51 CFREU defines the contours of subjective application. More precisely, *"[t]he provisions of this Charter shall apply to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and within the limits of the powers conferred on the Union in the Treaties".*

While paragraph 2 states that: *"[t]his Charter shall not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."*

The rules are addressed to two distinct institutional spheres: the European Union and the Member States.

As for the first institutional sphere, this is fully invested, i.e. it concerns all the acts of all the subjects operating within it. In fact, on the one hand, reference is made to the *"institutions"*, which, according to Article 13 TEU, are the Parliament, the Commission, the European Council, the Council of the Union, the Central Bank and the Court of Auditors; on the other hand, residually, *"bodies and organs"* are all those subjects that exercise powers and competences by virtue of the Treaty or acts of secondary legislation (e.g. agencies)[427].

Whereas, as far as Member States are concerned, the application is limited *"exclusively"*[428] to the acts they put in place in order to implement Community law.

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[427] M. CARTABIA, *Commentary on Art. 51*, in R. BIFULCO, M. CARTABIA, A. CELOTTO (eds.), *L'Europa dei diritti,* op. cit., p. 346-347. The specification of these subjects seems to be almost 'pleonastic', since the Charter is based on a mandate that tends to recognise the consolidated European jurisprudence which, in turn, was created to protect fundamental rights against the acts of the institutions and bodies of the Community, it can therefore be said that the acts of these subjects were subject to the compatibility screening of Community fundamental rights some time ago.

[428] The adverb - as reported by J. ZILLER, *Commentary on Art. 51*, in R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, F. PAPPALARDO, O. RAZZOLINI (eds.), *Commentary on the Charter of Rights of the European Union,* Milan, Giuffrè, 2017, p. 1045 - was strongly desired by the British representatives in the Convention, who had particular fears about the potential expansion of the Charter's scope of application. It is no coincidence that the United Kingdom then stipulated, together with Poland, Protocol No. 30 annexed to the Treaty of Lisbon, in order to prevent the hypothetical and possible interpretative expansions of the Charter. However, the Court of Justice in *NS and Others* (C-411/10 and C-493/10) practically 'emptied' the derogatory scope of the Protocol, as it cannot be interpreted either as meaning that the two states can be exempted from the application of the Charter's

The reference, which almost automatically arises here, is to those particular pronouncements of the Community Courts, analysed above as the doctrine of *incorporation*[429], according to which the Court of Justice extended its jurisdiction on fundamental rights not only over Community acts, but also over specific national acts, in particular those concerning the implementation of Community law (so-called *Wachauf* line).

The jurisprudential strand of *incorporation* had already been considerably enriched in the years prior to 2000, so that in short, it could be said that the Court of Justice exercised its *potestas iudicandi* on Community fundamental rights also on acts of the Member States, insofar as these acted *"within the scope of application of the Union"*, with acts that were completely outside the Community competences simply being excluded[430].

Article 51(1), therefore, for the first time positivises the doctrine of *incorporation*, which results in a partial Community influence also in the sphere of national acts, leaving, however, its boundaries uncertain.

Apparently the rule, in specifying *"exclusively within the scope of application of the Union",* seems to have opted for a restrictive view of *incorporation, in* particular by referring only and exclusively to the *Wachauf* case*,* i.e. to the situation of national acts enacted in implementation of Community law, leaving out all those rulings that had enriched the doctrine of *incorporation,* to the point of including any state activity that interferes with or enters into the scope of Community law[431].

provisions or that the courts of these states do not have to oversee the application of the Charter (para. 120). See R. ADAM, A. TIZZANO, *Manuale di Diritto dell'Unione Europea,* op. cit., p. 151.

[429] M. CARTABIA, *Commentary on Article 51,* op. cit., p. 347.

[430] M. CARTABIA, op. cit., p. 348. On this point, the author cites Community case law preceding the Charter: *Cinéthéque* (C-60/84), *Kremzov* (C-299/95), *Annibaldi* (C-309/96).

[431] M. CARTABIA, op. cit., p. 348-349.

However, the solution that is most faithful to the text of the provision must be disregarded in this case, and a first sign of this comes from Explanation[432] of Article 51[433] annexed to the Charter.

In fact, already on a first reading of the Explanation it can be seen that the EU case law on the point cited includes a whole series of rulings, through which the Court of Justice has extended the scope of *incorporation*.

Thus, the mere fact that the Explanation in question does not only refer to the *Wachauf* jurisprudence mitigates the idea of a restrictive interpretation of the expression in Art. 51.

That being said, it remains, however, to determine the scope of the expansive reading to which reference must be made. On this last aspect, the Explanations to Article 51 themselves do not come to a clear and unambiguous solution[434].

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[432] The Explanations to the Articles of the Nice Charter are very important interpretative tools, prepared by the *Praesidium of* the Convention that drafted the Charter. These were already provided for in the first version of the Charter, but with the 2007 revision, which also affected the Explanations, they were formally included as an annex to the Charter. To emphasise their importance, a double reference was made both in the TEU (6 of the TEU, para. 1, last sentence) and in Art. 52(6) of the Charter. One can, in my opinion, argue that, as a result of these two references, the audience to which the Explanations are addressed is rather broad. In fact, Art. 52(6) is addressed specifically to judges, both Community and national, whereas Art. 6 TEU is addressed in general to all those subjects that find themselves applying the principles, freedoms and rights contained in the Charter, also addressing both Community institutions, organs and bodies and all the bodies of the Member States (cf. Art. 51(1) on the subjective scope of application).

[433] "[...] As far as the Member States are concerned, the case law of the Court states unambiguously that the obligation to respect fundamental rights as defined within the framework of the Union applies to the Member States only when they act within the scope of Union law (judgment of 13 July 1989, Wachauf, Case 5/88, [1989] ECR 2609; judgment of 18 June 1991, ERT, [1991] ECR I-2925; judgment of 18 December 1997, Annibaldi, Case C-309/96, [1997] ECR I-725; judgment of 18 December 1997, C-219/96, [1997] ECR I-245). 1989, p. 2609; judgment of 18 June 1991, ERT, [1991] ECR I-2925; judgment of 18 December 1997, Annibaldi, Case C-309/96, [1997] ECR I-7493). The Court of Justice has confirmed this case law in the following terms: "Moreover, it must be borne in mind that the requirements inherent in the protection of fundamental rights in the Community legal order are also binding on the Member States when they implement Community rules ...". (Judgment of 13 April 2000, Case C-292/97, paragraph 37 of the grounds, [2000] ECR 2737). Obviously, this rule, as enshrined in this Charter, applies both to central authorities and to regional and local authorities as well as to public bodies when they implement Union law [...]".

[434] In particular, these do not provide a precise definition of what is meant by 'acting in implementation of *EU law*', as they refer to the notions used by the Court of Justice to refer to national acts within its jurisdiction, which were coined before 2000. In particular, at times the ECJ had spoken of national acts *enacted in implementation of* EU law (*Karlsson* judgment, C-292/97), while at other times it had generally spoken of acts that "*act in implementation of EU law*" (*Wachauf* judgment C-5/88, *ERT* C-260/89 and *Annibali* C-309/96). While of the two notions mentioned, the first can be said

The Court of Justice provides its first interpretation of Article 51 of the Charter of Rights ("legalised") in the *Åkeberg Fransson* judgment*,* where it states that "[d]ue to the Court's settled case-law, it follows in essence that the fundamental rights guaranteed in the legal order of the Union apply in *all situations governed by Union law*, but not outside them"[435].

The Court then goes on to state that "once such legislation falls within the scope of that law, the Court, when giving a preliminary ruling, must provide all the elements of interpretation necessary for the national court to assess the conformity of that legislation with the fundamental rights whose observance it guarantees. [...] Accordingly, since the fundamental rights guaranteed by the Charter must be respected when national legislation falls within the scope of European Union law, there cannot be cases falling within European Union law without those fundamental rights being applicable. *The applicability of Union law implies that of the fundamental rights guaranteed by the Charter*"*[436]*.

With this pronouncement, it can be said that the broad notion of the expression *"in implementation*" is accepted*[437]*, so that the domestic rule does not have to be submitted to the *interpretative* (not validity) test of the Court of Justice only when it is specifically implemented EU law, but also in cases of *"indirect implementation"*. In particular, the latter situation occurs in cases where the national rule, even prior to the EU rule, affects the subject matter of the EU rule[438].

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to be narrower than the other, the *Annibali* judgment can nevertheless be said to make it clear that the expression "in implementation"certainly goes beyond the meaning of the transposition of a Community act into a domestic one (i.e. one cannot refer only to directives, for example). See J. ZILLER, op. cit., p. 1052., but also L. S. ROSSI, '*Lo stesso valore dei Trattati?'*, op. cit., p. 336-337.

[435] Court of Justice, judgment 26 February 2013, C-617/10, *Åkeberg Fransson,* ECLI:EU:C:2013:105, para. 19, emphasis added.

[436] Fransson judgment, cit., paras. nos. 19 and 21, emphasis added. See M. CARTABIA, Convergenze e divergenze nell'interpretazione delle clausole finali della Carta dei diritti fondamentali dell'Unione Europea, in Riv. Aic, no. 2, 2008, p. 9 ff.

[437] On the application test of the Nice Charter in Spain, see A. AGUILAR CALAHORRO, *Il test di applicazione della Carta dei diritti fondamentali dell'Unione europea,* no. 2, 2018, p. 1 ff.

[438] B. NASCIMBENE, Il principio di attribuzione e l'applicabilità della Carta dei diritti fondamentali: l'orientamento della giurisprudenza, in Rivista di Diritto Internazionale, No. 1, 2015, p. 60-61.

These domestic rules, in the words of Nascimbene, "may be submitted to the Court [of Justice] for examination as to their *conformity with* the Charter and the protection of fundamental rights"[439].

Thus, according to this first case-law, the intervention of the Court of Justice is legitimate whenever the common court finds itself applying Community law. Therefore, if there is an obligation on Member States to comply with the Charter when they act within the *framework of* EU law, then that obligation arises regardless of whether the state action is aimed at implementing in its own law a particular EU provision that requires state implementing measures[440]. In other words, the obligation to comply with the Charter arises whenever a court applies a national rule *of EU* law.

Moreover, in addition to the broad interpretation of Article 51, another, not secondary, aspect can be derived from this ruling, which concerns the role of the Court of Justice itself in the scrutiny of the "compatibility" of the conflicting domestic rule with that of the Charter.

If, on the one hand, the compatibility of a rule of a regulation or a directive can be examined by the Community Courts through a scrutiny of its validity, this cannot happen in the presence of a contrast of a national rule "*in implementation*" with the Charter. In the latter case, the preliminary ruling instrument is declined (only) in its form of an interpretative reference, which presents differences with that of validity, in particular with regard to the effects of the Euro-Union ruling[441]. In particular, the upholding pronouncement of the Court of Justice made following a reference for a preliminary ruling on validity has *erga omnes* effects, thus expunging the EU rule of secondary legislation from all the systems in which it operates. On the other hand, the interpretative preliminary ruling reference is characterised by having binding effects *only for the* court *a quo,* which will find itself unable to apply the domestic rule if it *"obstructs"* EU law.

However, the boundary between the two types of reference for a preliminary ruling seems to have blurred as a result of this ruling. In fact, by "broadening the notion of "implementation" of EU law", it has been hypothesised that the Court of Justice

[439] *Ibid,* emphasis added.

[440] F. POCAR, *Art. 51*, in F. POCAR, M. C. BARUFFI (eds.), C*ommentario breve ai Trattati dell'Unione Europea*, Padua, CEDAM, 2014, p. 1791.

[441] See R. ADAM, A. TIZZANO, op. cit., p. 311.

intends to implement "a *system of review of constitutionality* (*i.e. EU compatibility*) typical of a federal state"[442], in which a court no longer limits itself to requesting the correct interpretation of an EU rule, but asks for a review of its "compatibility-validity" with the internal rule[443].

This last "transformation" has emerged not only from the pages written by legal doctrine, but also from "those" of some constitutional judges, in particular the German Constitutional Court, which, in a ruling in 2013, made it clear that the Court of Justice cannot assess the compatibility of a German law for conflict with fundamental rights[444]. For this reason, the *Bundesverfassungsghericht* provides its own interpretation of the *"Fransson* rule*",* so that it may be compatible with *its decisum.*

In particular, the Constitutional Court held that "the decision must thus not be understood and applied in such a way that absolutely any connection of a provision's subject-matter to the merely abstract scope of Union law, or merely incidental effects on Union law, wolud be sufficent for binding the Member State by the Union's fundamental rights set forth in the EUCFR"[445] .

After the "*Fransson* fuss" [446] the Court of Justice seems not to have defined with any particular degree of stability what interpretation should be given to the incision in Article 51 of the Charter of Rights.

In fact, the jurisprudence of the Court of Luxembourg remains ambiguous, sometimes favouring more restrictive readings, as in the *Siragusa* case[447] , and at other times sticking to positions that confirm the extension of the *Fransson* jurisprudence, as most recently in the *Berlioz case*[448].

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[442] G. AMOROSO, Sull'ambito di applicazione della Carta dei diritti fondamentali dell'Unione europea, in il Foro it., 2017, p. 229 ff.

[443] See, R. ROMBOLI, Caro Antonio ti scrivo (così mi distraggo un po' un po') in dialogo il Ruggeripensiero sul tema della doppia pregiudizialità, in Consulta online, 2019, no. 2, p. 648 and G. TESAURO, Diritto dell'Unione europea, op. cit., p. 294.

[444] *BVerfGE*, judgment 24 April 2013, 1-BvR 1215/07, as cited by L. S. ROSSI, *'Equal legal value of the Treaties?'*, op. cit., p. 338. See also G. AMOROSO, loc. cit., p. 229 ff.

[445] Judgment 1-BvR 1215/07, cited above, para. 91.

[446] L. S. ROSSI, loc. cit., p. 339. For an analysis of Community case law see also B. NASCIMBENE, loc. cit., p. 49 ff.

[447] Court of Justice, judgment 6 March 2014, C-206/13, Cruciano Siragusa v. Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo, ECLI:EU:C:2014:126.

[448] Court of Justice, judgment 16 May 2017, C-682/15, Berlioz Investment Fund S.A. v Directeur de l'administration des contributions directes, ECLI:UE:C:2017:373.

In *Siragusa* (C-206/13), the Court of Justice affirmed the need for *"the existence of a connection of a certain consistency, which goes beyond the affinity between the matters taken into consideration or the influence indirectly exercised by one matter on the other"*[449], the fact that the Italian legislation to be applied affects those of the Union being insufficient[450].

The *Berlioz* case arose from an interpretative referral made by a Luxembourg court, which found itself applying a financial penalty introduced by the national legislature in compliance with the obligations imposed by Directive 2011/16 on cooperation with public authorities in the field of taxation. To be precise, the directive in question did not require States to impose a financial penalty, but merely required them to take appropriate measures to comply with the obligations of the directive[451].

The referring court, with its first interpretative question, asked the Court of Justice whether the aforementioned domestic legislation fell within the scope of the Charter and to that question the European Court answered in the affirmative.

The reason for the affirmative answer is to be found in the circumstance that the domestic rules, imposing the fine, ensured the *effectiveness of the* directive and therefore fall *"reflexively" within the scope of* EU law[452].

The Berlioz judgment reaffirms the jurisprudential strand that overcomes *"a strict interpretation"*[453] of the Charter's scope of application for cases where it applies to national discipline, despite the fact that the Court of Justice seems not yet to have traced the defining systematic coordinates of Article 51, an article that still seems to be involved in a *"gradual process of clarification"*[454].

The doctrine has attempted to identify trends in this Euro-unification jurisprudence.

Some authoritative commentators have noted that the Court seems to refer to a broader notion when national laws do not conflict with the Charter, while it adopts a "narrower" notion when, on the other hand, it declares them incompatible[455].

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[449] *Siragusa* judgment, cit., pt. 24.
[450] G. AMOROSO, op. cit., p. 229 ff.
[451] See Art. 22(1)(c) of Directive 2011/16.
[452] *Berlioz* judgment, cit., pt. 38-39.
[453] G. AMOROSO, op. cit., p. 229 ff.
[454] L. S. ROSSI, op. cit., p. 340.
[455] Ibid.

Other scholars[456] have, on the other hand, glimpsed a more positive inclination of the Court of Justice towards the application of the Charter in areas concerning economic-financial integration and the single market, while a more cautious attitude in areas where the EU only has competences of *coordination,* and not harmonisation, of the Member States' disciplines.

In the latter hypothesis, applying the Charter "in exceptional cases" leaves more room for the principle of mutual trust between the states of the Union in the protection of fundamental rights[457].

The last mentioned doctrinal thesis offers the possibility to grasp another relevant aspect in the scope of the law, which is the one concerning the competences "attributed" to the European Union.

Lastly, the problem of the application of the Nice Charter *ratione personae* can be placed alongside that of the attribution of competences, which is the subject of Article 51 both in its paragraph 1, last sentence, and in paragraph 2[458].

Those to whom the Charter is addressed (EU institutions, bodies, offices and agencies and Member States) must respect the rights and observe the principles, and this must be done *"in accordance with their respective powers and within the limits of the powers conferred on the Union in the Treaties"* (Art. 51(1), last sentence). Having said that, it follows that, as a result of the application of the Charter, the European Union does not extend or modify its existing competences, let alone acquire new ones (Art. 51(2)).

Moreover, the above specification is found in Article 6 TEU itself, which reaffirms in the second sentence of paragraph 1 that *"the provisions of the Charter* shall *not in any way extend the competences of the Union as defined in the Treaties".*

This important specification of the principle of the attribution of competences finds its logical consequence in the *principle of subsidiarity[459]* and in the fact that the

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[456] E. SPAVENTA, The interpretation of Article 51 of the EU Charter of Fundamental Rights: the dilemma of stricter or broader application of the Charter to national measures, Study for the PETI Parliamentary Commission, 2016, available online at the European Parliament Think Tank website.

[457] M. CARTABIA, op. cit., p. 11.

[458] Calling such a choice "redundant", J. ZILLER, op. cit., p. 1044.

[459] For the principle of subsidiarity see, *ex multis,* P. BILANCIA, *La ripartizione di competenze tra Unione Europea e Stati membri,* in M. D'AMICO, P. BILANCIA (eds.), *La nuova Europa dopo il Trattato di Lisbona*, Milan, Giuffrè, 2009, p. 111 ff. The author (p. 113) emphasises how this principle

Union, being a secondary system, can only rely on the competences expressly attributed to it by the Member States[460].

It reaffirms, in other words, the importance and centrality of the principle of attribution, which allows the identification of matters in which the Union may intervene with acts of secondary legislation. It should be added, then, that these acts, once enacted, enjoy primacy over national legislative acts and this entails a number of consequences. What, on the other hand, can be emphasised here is the link between competences and primacy, namely that secondary legislation can only enjoy the supremacy it deserves to the extent that it respects the competences assigned and expressly listed in the Treaties[461]. Thus, the precedence of EU law over national law does not arise where there is an underlying lack of jurisdiction[462].

In conclusion, an attempt will be made to give a combined reading of the two parts into which Article 51 CFREU has been broken down.

When the Charter of Rights is applied to acts of the institutions, bodies, or organs of the Union, no problems of any kind arise. Thus, the situation arises in which a legislative act, such as a directive, is enacted on the basis of a specific competence, and therefore if the directive in question is in conflict with one or more rights enshrined in the Charter, the directive will be declared invalid by virtue of its legal effects. This has, for example, materialised in the *Digital Rights Ireland* case[463], in which the Court of Justice declared the whole of Directive 2006/24/EC invalid on the grounds of

constitutes 'a regulating element of competence', which 'on the *one hand* is aimed at safeguarding the sphere of state competence against any unnecessary European interference and, on *the other,* stands as a principle that justifies intervention by being part of a phase of progressive enlargement of the Union's sphere of action'.

[460] Explanations of Article 51, third sentence.

[461] M. CARTABIA, *"Unity in Diversity": The Relationship between the European Constitution and National Constitutions*, in *European Union Law*, 2005, p. 590. Prof. Cartabia's quotation refers to Article I-6 of the Constitutional Treaty, which expressly provided for a normative definition of the principle of primacy. This definition "disappeared" in the Lisbon Treaty, or rather was included in Declaration No 17. The principle of primacy constitutes the cornerstone of the entire Union system, despite the fact that there is no formal definition of it in the Treaties.

[462] Ibid.

[463] Court of Justice, Judgment 8 April 2014, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others,* ECLI:EU:C:2014:238.

conflict with Articles 7 and 8 of the Charter of Nice, concerning the protection of privacy and the protection of personal data respectively[464].

Thus, in such situations, the Charter performs a function of *limiting* the powers conferred on the EU institutions, bodies, and organs, requiring them to respect fundamental rights: in this way, there is no risk of "encroachment" of competences.

It can be more complex to come to the same conclusion when the Charter is applied to acts of the Member States enacted *"in implementation"* of EU law. This case turns out to be somewhat *borderline due to the* basic uncertainty that still exists as to which acts can be scrutinised by the Court of Justice and thus to which acts the Charter is to be applied.

In this situation, extending the meshes of *incorporation* too far runs the risk of overstepping the field of competences not expressly assigned to the Union, which, under Article 4(1) of the Union Treaty itself, *belong to* the Member States.

In the latter hypothesis, cases of *"double protection"* may occur, in which the competition of the sources set up to guarantee fundamental rights is accompanied by a competition of judicial remedies. The last mentioned "competition" develops in the so-called multilevel system of rights, which *"demands a dialogue"* between the Courts operating at the various levels[465], to ensure that none of the actors operating in the circuit of rights protection are excluded from such a system.

1.3. (Following...) *Rules* and *Principles*: Is Dworkin's Dichotomy Still Valid?

Article 51, in defining the scope of application of the Charter, can be said to enshrine a real obligation on the parties mentioned to respect the provisions of this Community source. It follows that *some* legislative acts[466], put in place in violation of

[464] For a more extensive commentary and illustration of similar casuistry, see the commentary by L. S. ROSSI, loc. cit., p. 335.

[465] A. BARBERA, La Carta dei Diritti: per un dialogo fra la Corte italiana e la Corte di Giustizia, in Riv. AIC, no. 4, 2017, p. 16.

[466] The specification may be imprecise since compliance with the Charter extends to all acts enacted by the entities on which the obligation rests (with the exception of the Member States, for whom the obligation in question is limited to acts enacted 'in implementation of EU law'). However, from now on, when dealing with the issue of the justiciability of rights, reference will be made only to national

such provisions, generate a real claim (in some cases even on the part of the individual) that is justiciable at community level, in particular before the Court of Justice, whose jurisdiction on the subject of community fundamental rights can be assumed as certain.

In order to investigate the actual substance of the Charter's obligation, one must take into account the *principles* and *rights,* which are its expression.

A first mention of these two legal concepts can be found in Art. 52(1): *"the* above-mentioned *persons shall respect the rights, observe the principles and promote the application thereof".*

While Article 52(5) specifies that provisions containing *principles "may be implemented by legislative and executive acts adopted by the institutions, bodies, offices and agencies of the Union and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They may be relied on before a court only for the purposes of the interpretation and review of the legality of those acts".*

The wording of the aforementioned norms has been described by Barbera as quite "convoluted"[467], since, as others have pointed out[468], although they provide relevant information on the nature of the two legal categories, there is no clear provision (not even in the *Praesidium*'s Explanations) for either a true definition of what is principle and what is law or what the discretional criterion should be.

However, in Barbera's opinion, the Charter's norms outline *"two distinct types of rights norms"*: on the one hand, there are *"rights-rules"* and on the other, *"rights-principles".*

Having set out these "coordinates", which, starting from the textual datum, problematise the interpretation and norms of the Bill of Rights, it is now necessary to explicate some of the issues raised in the legal-philosophical debate.

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and Community legislative acts, which are *ratione materiae* the only ones that can be the subject of a preliminary reference or a constitutionality case.

[467] A. BARBERA, loc. cit., p. 10.

[468] F. FERRARO, N. LAZZERINI, *Art. 52*, in R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, F. PAPPALARDO, O. RAZZOLINI (eds.), *Commentario alla Carta dei Diritti fondamentali dell'Unione Europea,* Milan, Giuffrè, 2017, p. 1076. The A. emphasise the lack of a real discretional criterion that can help the legal practitioner to distinguish principles from rights. In fact, the Explanations provide a short, merely *'illustrative'* list, in which it is pointed out that some rules contain only principles (Arts. 25, 26, 37), while others are mixed, i.e. it is possible that they contain both principles and rights (Arts. 23, 33, 34).

Therefore, in order to investigate the applicability of the Charter's provisions, reference will be made to the latter distinction.

Ronald Dworkin's theory[469] on rules, principles (and policies) starts from a critical perspective on positivism, with special reference to the theories of Austin and Hart. In Hart's perspective[470], there are two sets of rules, namely 'primary' and 'secondary'. Primary rules are those that safeguard rights or impose obligations on community members, while secondary rules "are those that determine how and by whom such primary rules may be formulated, recognised, modified or extinguished"[471].

Furthermore, Hart, departing from Austin's theory, believed that rules are not binding because authority can impose them through coercive power; on the contrary, they have this attribute to the extent that they are accepted by people or are valid (in the sense that they have been approved by correctly following the formal procedure established by the related 'secondary rule' called the 'rule of recognition'). This 'recognition rule' is the only rule in a legal system whose binding force depends on its acceptance. If we want to know which recognition rule a particular community has adopted or follows, we must observe how its citizens, and in particular its officials, behave'.

Thus, in Hart's perspective, the authority of the public institution is based "in the context of the constitutional standards against which they act, constitutional standards that have been accepted, in the form of a fundamental rule of recognition, by the community they govern". In short, this theory is structured in two types of rules, but a single test of legal force can be applied to them.

According to Dworkin, this theory is seriously "flawed", primarily because it does not adequately take into account the profound differences between rules and principles. In his exact words, "[t]he difference between legal principles and legal rules is a logical distinction. Both sets of rules indicate specific decisions regarding legal obligation in particular circumstances, but differ in the character of the direction they give. Rules are applicable in an "all or nothing" manner. In contrast, principles "do not

[469] R. DWORKING, *Takin rights seriously*, Bloomsbury Publishing, ed. 2013.
[470] H.L.A. HART, *Il concetto di diritto*, Turin, Einaudi, ed. 1991, p. 118 ff.
[471] R. DWORKING, *Takin rights seriously,* op. cit., p. 35.

establish legal consequences that follow automatically when the given conditions are fulfilled".

Another distinction can be related to the dimension of the "weight" of principles, which is "heavier" than that of rules. Indeed, when there is a conflict between two or more principles, the interpreter must "measure" them: in this way he will resolve the conflict by taking into account the "weight" of each principle at stake. In contrast, this idea does not fit perfectly in the case of a conflict of rules. Although they may or may not be functionally important (e.g. in regulating a specific behaviour, rule 1 is more relevant than rule 2), we cannot claim that there are no rules that are more important than others. Because of this assumption, a conflict between two rules can be resolved by deciding which of them is valid according to the chosen antinomy criterion.

In this way, Dworkin's theory proposes a "strong" distinction between rules and principles. Alongside this perspective, others have emerged in the philosophical debate that, on the contrary, have emphasised a "weak" view of this distinction.

In this sense one can read the theses of Giorgio Pino[472], who proposes a gradual distinction, arguing that rules and principles share certain properties and, consequently, their differentiation concerns the "degree" of these properties. For example, the question of "weight" (i.e. the effect of law due to its interpretation and application) is a concept that is indistinctly linked to both principles and rules. In fact, according to Pino, even rules have a gradual application, in the sense that the interpreter could choose to adopt an extensive or restrictive interpretation of the applicable rule.

Still on the subject of enforceability, G. Zagrebelsky - in line with Dworkin - maintains that *rules* respond to the logic of *"all-or-nothing"*, i.e. "they are immediately binding norms, either you comply with them in full or you violate them equally in full"[473]. *Principles*, on the other hand, are norms that "impart an orientation to action or decision" and therefore (unlike rules) are said to be "norms without a predetermined fact and with a generic prescription"[474].

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[472] G. PINO, Dirittti e interpretazione. Il ragionamento giuridico nello Stato costituzionale, Bologna, Il Mulino, 2010.

[473] G. ZAGREBLESKY, *Diritto per: valori, principi o regole? (a proposito della dottrina dei principi di Ronald Dworkin)*, in *Quaderni fiorentini*, vol. 31, no. 2, Milan, Giuffrè, 2002, p. 874. The scholar takes up the Kelsenian imperative hypothetical formula, according to which "if it is *a*, then it must or must not, may or may not be *b*".

[474] *Ibid*.

Furthermore, while rules have an immediate effectiveness, principles need to be "concretised", i.e. they must be translated into a "formula that contains a fact referable to a historical event and the consequence that must follow from it"[475].

This brief parenthesis may help to understand the *"use"* European citizens can make of the *principles*(-rights) and *rights*(-rules) contained in the Nice Charter.

In fact, with regard to their actionability by the recipients to whom they are addressed, rights (*and* rules), under certain conditions[476], "are directly usable in a dispute for the regulation of the behaviour of citizens (and the resolution of the relative disputes)"; whereas principles (which contain rights), due to their guiding character, require their "concretization" - in Zagrebelsky's words - in a precise act by the legislative body (European or national), which in this mechanism has the possibility of choosing from a plurality of options that the principle-rule has left (deliberately) "open"[477].

Now, in order to continue the analysis of the theme related to the justiciability of rights (both in their form as principles and in their form as rules) it is essential to consider the *in re ipsa* peculiarities of this source of European Union law. In other words, in order to understand how these EU rights can affect a dispute brought before any ordinary judge, one must understand how the *"principles of structure*" - of primacy and direct effect - act in relation to the two types of rules identified in the Charter of Rights.

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[475] G. ZAGREBLESKY, op. cit., p. 874-875. On the aspect of the 'concretisation' of principles one can add the further distinction that the concretisation of the principle takes place either by the legislator by means of a rule that looks to future events, or by the judge by means of a decision that looks to past events.

[476] Reference is being made in particular to the direct effects of the clear, precise and unconditional EU rule.

[477] G. ZAGREBLESKY, op. cit., p. 11. In my opinion, the example given by Barbera, who points out that Article 32, entitled "*prohibition of child labour and protection of young people in the workplace*", renders very well the idea of the distinction between rights-principles and rights-rules, as in the first paragraph a rule *is* laid down ("*1. The minimum age for admission to work may not be lower than the age at which compulsory schooling ends, subject to rules that are more favourable to young people and except for limited derogations".*); while in the next paragraph the rule is certainly more guiding in character, setting a generic objective to be achieved through Community and/or national legislation (*"2. Young people admitted to work must benefit from working conditions appropriate to their age and be protected against economic exploitation or any work that may undermine their safety, health, physical, mental, moral or social development or that may jeopardise their education."*).

The subject has already been touched upon when the legal effects of the Charter were examined, and in particular when it was said that the Charter possesses *"the same legal value as the Treaties"*, but further specification is needed here.

Since the 1978 *Simmenthal* ruling, the *"primacy-disapplication binomial*" has developed[478], whereby the supremacy of EU law over national law must be ascertained by the common court, with the possibility of disapplying national law if it conflicts with EU law.

A confirmation that this scheme can also be applied to the Charter of Rights comes from the Court of Justice, in particular with the case *A. v. B.* (C-112/13)[479] which affirmed the duty of national courts to proceed immediately to the disapplication of national rules that conflict with the rules of the Charter, moreover without the need to wait for the constitutionality judgement initiated for the examination of the national rule concerned in conflict with the European rule.

Thus, without any particular surprises, the Charter, stripped of its original "guise" as an act of *solft law* and donned that of a binding legal source, also begins to enjoy primacy and consequently can be a source of disapplication, in the event that a national rule conflicts with one or more rules of the Charter.

The latter situation, however, cannot occur every time there is a violation of a rule of the Charter, but can only occur when that rule is clear, precise and unconditional, i.e. when it is endowed with *direct effect*, otherwise the court will not be able to go any further than to try to interpret it in conformity.

Concretely, in order to understand whether a rule of the Charter permits the national court to disapply a domestic rule (for conflict with the former), two verifications must be carried out: *a) the* first aimed at understanding whether the rule of the Charter is among those expressive of a principle or a right (*i.e. a* rule), then *b)* the second verification is aimed at checking whether the requirements of precision, clarity and unconditionality are met.

a) The first test is necessary since principles cannot be norms with direct effects, and this by their intrinsic nature (they are in fact norms without facts). Thus, the second test can only be accessed by norms containing a law-rule.

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[478] Expression by L. S. ROSSI, loc. cit., p. 340.

[479] Court of Justice, judgment 11 September 2014, C-112/13, *A. v. C.*, ECLI:EU:C:2014:2195.

b) Now, secondly, it must be conceded that the three requirements for a rule to be defined as having direct effect do not exist in all "rules"[480] and only if the finding is positive may the court disapply the national act (provided that it falls within the limits of application *under* Article 51(1)).

It should be added that, although it is true that the principles cannot lead to disapplication, it cannot be concluded that they are irrelevant in national proceedings. Indeed, these rules *"may be relied on before a national court only for the purposes of interpretation and review of the legality of acts"* (Article 52(5), last sentence).

In conclusion, the differences now described make it clear why Article 51 uses the verbs "observe" and "respect" for (rights)*principles* and *rights*(-rules) respectively: this demonstrates that some Charter rights can determine the outcome of the national dispute in which they are invoked, others only direct it.

2. The integrated approach to the protection of rights. The case of Italian constitutional justice

2.1 The New Case-law on Double Prejudice: Simmenthal-Granital *revisited* or *overruled?*

With pronouncement No. 269 of 2017, the Italian Judge of Laws, on the assumption that "violations of personal rights postulate the need for an *erga omnes* intervention"[481], manifested its intention to change its jurisprudence in the now well-known hypotheses of *double prejudice.* That is, those cases in which a national rule is in simultaneous contrast with one of the Italian Constitutional Charter and one of the Nice Charter.

[480] The scholar (L. S. ROSSI, op. cit., p. 350) has observed that the rules of the Charter that could potentially enjoy direct effect are not a few (e.g. Articles 3.2, 5, 8, 21, 30, 31, 32), but most of them provide for a reference to national or Community legislation for their implementation. This is why they lack the requirement of "unconditionality".

[481] Thus, Italian Constitutional Court, Judgment No. 269 of 2017, n. 5.2. *Considerato in diritto.*

In such cases, the Court has ruled that "the question of constitutionality must be raised, without prejudice to the use of the preliminary reference for questions of interpretation or invalidity of Union law, pursuant to Article 267 TFEU"[482].

As it is well known, in the background of this "clarification" can be traced that particular choice - materialised with Article 6 TEU, in its post-Lisbon version - to endow the Nice Charter with binding legal effects. This determined a definitive enlargement of the spaces of protection of European citizens, whose fundamental rights are guaranteed not only by the norms of the constitutional charters of the Member States, but also by the *symmetrical* ones of the Charter of Fundamental Rights of the Union[483].

In addition to the above, it must be added that the *expansion of* protections was followed, as its logical consequence, by the introduction of new jurisdictional mechanisms, which are now in competition with those that already exist.

The reference here is twofold. On the one hand, there are the judicial practices tending to the immediate non-application of a national rule conflicting with one or more rules of the Charter of Rights with direct effect. On the other hand, the common court may make a reference to the Court of Justice by posing an interpretative question that underlies the possible conflict between a national rule and a rule of the Charter of Nice.

As far as the two European Union judicial remedies described, the first seems to be the one that most concerns the Constitutional Judge, to such an extent that the latter, in the *obiter dictum* of Judgement No. 269, hints at the mandatory nature of the referral itself to be made in the constitutionality judgment[484]. In particular, the risk feared here is that the non-application - to quote the Court's exact words - "inevitably transmogrify into a sort of inadmissible diffuse review of constitutionality", whereas the European preliminary ruling instrument - as, on the contrary, can be deduced from the above-mentioned fragment - does not seem to give rise to such concerns.

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[482] Judgment No. 269 of 2017, cited above, n. 5.2. *Considerato in diritto.* .

[483] The risk related to the "overlapping" of protections had been hypothesised by authoritative doctrine already before the ruling no. 269 of 2017, see in particular G. ZAGREBELSKY, *Intervento* in S. PANUNZIO (ed.), *I costituzionalisti e l'Europa: riflessioni sui mutamenti costituzionali nel processo d'integrazione europea*, p. 531 ff. and V. ONIDA , *Dopo cinquant'anni dalla sentenza* "Costa/ENEL"*,* op. cit.

[484] *Ibid*. In particular, note the use of the verb "should be raised".

On the other hand, in Judgment No. 269, when the Constitutional Court recalls the three conditions *Melki*[485], it does not "touch" the first condition, i.e. the one aimed at ensuring the activation of the preliminary reference also at the outcome of the examination of constitutionality, but "touches" the third condition, i.e. the one aimed at not affecting the judge's disapplicative power after any ruling of inadmissibility (or partial acceptance) made in the first instance by the Constitutional Judge[486].

In particular, the phrase "*for other profiles*" is added to the third *Melki* condition. This is with the intention of limiting the power of non-application to only those *other* profiles not scrutinised in the constitutional decision, so as to avert the possibility that the court, by disapplying, could "pass the day after" the Constitutional Court's decision[487].

There were no unambiguous opinions on this point in the doctrine[488] and the Constitutional Court itself in its subsequent decisions seems to have accepted precisely the most critical points made by the commentators.

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[485] In the *Melki* judgment, the Court of Justice held that a system of constitutional justice (such as the French one) that provides for a prior scrutiny of constitutionality, "provided that the other national courts remain free", was in conformity with EU law:

- to refer to the Court of Justice, at any stage of the proceedings they deem appropriate, and also at the end of the interlocutory proceedings for the review of constitutionality, any question for a preliminary ruling they consider necessary,

- to take any measure necessary to ensure provisional judicial protection of the rights conferred by the legal order of the Union, and

- to disapply, at the end of such an interlocutory procedure, the national legislative provision in question if they consider it to be contrary to European Union law' (Thus, Court of Justice, Judgment of 22 June 2010, C-188/10, *Melki and Abdeli*, ECLI:EU:C:2010:363, pt. 57). The preliminary question was raised by the Court of Cassation after the approval of the Constitutional reform that introduced the preliminary ruling before the French Constitutional Court, on these, see S. CATALANO, *La* question prioritarie de costituzionalité *in Francia: analisi di una riforma attesa e dei suoi significati per la giustizia costituzionale italiana,* Napoli, Edizioni Scientifiche Italiane, 2016, p. 162 ss.

[486] See Judgment No. 269 of 2017, cit., n. 5.2. *Considerato in diritto*.

[487] S. LEONE, Il regime della doppia pregiudizialità alla luce della sentenza n. 20 del 2019 della Corte costituzionale, in Riv. AIC, No. 3, 2019, p. 659.

[488] In particular, in a more critical sense see A. RUGGERI, Ancora in tema di congiunte violazioni della Costituzione e del diritto dell'Unione, dal punto di vista della Corte di Giustizia (Prima Sez., 20 December 2017, Global Starnet), in Rivista di Diritti Comparati, no. 1, 2018, p. 267 ff.; E. SCODITTI, Constitutional and common courts facing the Charter of Fundamental Rights of the European Union after the Constitutional Judgment No. 269 of 2017, in Il Foro it., 2018, p. 406 ff.; D. GALLO, Efficacia diretta del diritto UE, procedimento pregiudiziale e Corte Costituzionale: una lettura congiunta delle sentenze n. 269/2017 e 115/2018, in Riv. AIC, no. 1, 2019, p. 220 ff. While in an adhesive sense, see R. ROMBOLI, Dalla "diffusione" all' "accentramento": una significativa linea di tendenza della più recente giurisprudenza costituzionale (Nota a Corte cost. 31 maggio 2018, n. 115), in il Foro it., 2018, p. 2226

In particular, the latter rulings dispel any doubts as to whether the common court may, on the one hand, "itself make a reference to the Court of Justice of the European Union for a preliminary ruling, even after the incidental ruling"[489] and, on the other hand, "- where the conditions are met - not apply, in the specific case before it, the national provision that is contrary to the rights enshrined in the Charter"[490].

Thus, in the presence of "double protection" fundamental rights, the court remains fully entitled - *upstream* - to activate the judgement of constitutionality as a priority[491], and - *downstream* - to proceed to the disapplication, *for any profile,* of the same rule that just before passed the scrutiny of the Judge of Laws[492].

In this perspective, trying to read this case law in the light of the Union's structural principles, it seems to be possible to state that between the principle of primacy and that of direct effect, the only one to suffer a *partial* and *temporary* compression is the latter.

Indeed, by raising the question of constitutionality as a matter of priority, the ordinary court would renounce immediate disapplication, but only when the European rule of direct effect has the so-called *constitutional imprint,* and with the possibility, in any case, of exercising that power, *sine vinculis,* after the possible rejection decision of the Constitutional Judge.

However, in order to draw the "boundaries" of the aforementioned case law, it is necessary to clarify the *typically constitutional* European provisions[493] , the presence of which - as explained above - allows the common court to raise the issue of constitutionality as a matter of priority.

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ff.; S. CATALANO, Doppia pregiudizialità: una svolta 'opportuna' della Corte costituzionale, in Federalismi, no. 10, 2019, p. 2 ff.; S. LEONE, Il regime della doppia pregiudizialità alla luce della sentenza n. 20 del 2019 della Corte Costituzionale, cit.

[489] Italian Constitutional Court, Judgment No. 20 of 2019, n. 2.3. *Considerato in diritto.*

[490] Italian Constitutional Court, Judgment No. 63 of 2019, n. 2.3. *Considerato in diritto*.

[491] See Judgment No. 20 of 2019, cited above, pt. 2.1. *Considerato in diritto.*

[492] However, in such an eventuality, a part of the doctrine considers that the referring court must make a reference to the Court of Justice before not applying the domestic rule (in this sense see ANZON DEMING, *Applicazioni virtuose della nuova "dottrina" sulla "doppia pregiudizialità" in tema di diritti fondamentali,* in *Giurisprudenza costituzionale,* 2019, p. 1417 ff.).

[493] The expression is used by the Constitutional Court in Judgment No. 269 of 2017 (cited above, pt. 5.2., second clause) with reference to the rules of the EU Charter of Fundamental Rights. In the text, the expression is given a broader meaning: the reference is not only to the norms of the Charter of Rights, but also to those of secondary law expressive (or implementing) a fundamental right crystallised in one or more norms of primary law.

While it is undoubtedly the case that this character is inherent in the provisions of the Charter of Rights[494], it is not obvious that it is also inherent in the provisions of secondary legislation.

The latter aspect was "touched upon" by the Judge of Laws in Judgment No. 20 of 2019, where constitutional review is admitted even where the European parameter indicated is constituted by norms of directives that explicate principles and rights safeguarded by the Nice Charter.

In particular, the Court requires that there is a "*singular connection*" between the principles laid down in the directive and the relevant provisions of the Charter. This is "not only in the sense that [the former] provide specification and implementation, but also in the sense, even the reverse, that they have constituted a "model" for those rules [of the CFREU], and therefore participate in their very nature"[495] .

Thus, the *expansive vocation*[496] of "rule 269" is. manifested, which aims to prevent the court from "circumventing" the obstacle of referral to the Constitutional Court by applying a rule of the directive in place of that of the Nice Charter, which is "identical" to the former in content and purpose.

Here again, there was no shortage of critical remarks from the doctrine, from which concerns arose regarding the excessive elasticity of the application boundaries of the new double prejudice *doctrine*.

However, in the writer's opinion, in order to fully understand the scope of the phenomenon described herein, it is worth noting that this extension always operates in the context of a *new procedure* that the court has the power to activate. Therefore, without prejudice to the judge's powers to make a reference for a preliminary ruling (at any time) and not to apply the rule (after the constitutionality judgment), the Constitutional Court "ensures" that the referring judge, should he deem it appropriate,

[494] Thus, Judgment No. 269 of 2017, cit., pt. 5.2. *Considerato in diritto*.

[495] Judgment No. 20 of 2019, cit., n. 2.1. *Considerato in diritto.*

[496] S. LEONE 2020, *In che direzione va la nuova giurisprudenza costituzionale sui casi di violazione didiritto fondamentale a* doppia tutela*?*, C. CARUSO, F. MEDICO, A. MORRONE (eds.), Granital revisited? *L'integrazione europea attraverso il diritto giurisprudenziale,* Bologna, Bononia University Press, p. 118.

can raise a question of legitimacy that has as its parameters the interposed rules expressive of European fundamental rights.

2.2. *Focus* on the purpose of the "turning point" brought about by Judgment No 269 of 2017

Before focusing on the other jurisdictional actors involved in double jeopardy hypotheses, it is necessary to briefly address the purpose of this new course of constitutional jurisprudence.

As it is well known, already in its "first version" the need emerged to counter those tendencies aimed at marginalising the centralised review of constitutionality. This latter phenomenon is to be read here with reference to the "overflowing" practices[497] of directly applying the Bill of Rights instead of raising the issue of constitutionality.

In truth, the practice described constitutes only one piece of the much more complex *jigsaw puzzle* of the so-called decline in accidentality, to which, however, no space can be given here[498].

Thus, to the "widespread" non-application, the Court contrasts the priority referral of the question of constitutionality, so as to be able to guarantee *those erga omnes* effects that are so necessary in situations where violations of the most fundamental rights of the person may become apparent.

However, this is not without considering the specifics of the hypotheses at issue here. In fact, the Constitutional Court specifies that its examination may take place not only in the light of the constitutional parameters, but also in the light of the European ones (ex articles 11 and 117 of the Constitution). This is also "in order to ensure that the rights guaranteed by the aforementioned Charter of Rights are interpreted in

[497] A. BARBERA, *La Carta dei diritti*, op. cit., p. 3.

[498] R ROMBOLI, loc. cit.; G. SCACCIA, *L'inversione della doppia pregiudiziale nella sentenza della Corte costituzionale n. 269 del 2017 presupposti teorici e problemi applicativi*, in *Forum di Quaderni Costituzionali,* 25 January 2018; C. NARDOCCI, *Il diritto al giudice costituzionale*, Napoli, ESI, 2020, p. 267 ff.

harmony with the common constitutional traditions (...)". The Court, then, specifies that it is "[i]n a framework of constructive and loyal cooperation between the different guarantee systems, in which the constitutional courts are called upon to enhance the *dialogue* with the Court of Justice (...), so that the *maximum* safeguard is ensured at systemic level (Article 53 CFREU)"[499].

In other words, the Court admits that it wants to play the role of a "European judge", asking to be seised of a question that will be judged both with regard to the profiles of compatibility with the Constitution and those of conformity with the Charter. Possibly being able, as part of this review, to engage in dialogue with the Court of Justice, just as an ordinary judge can do.

Evidence that the trend of "re-centralisation"[500] is not followed by the trend of "interpretative dominance" of the Bill of Rights can be found in the fact that the Court seems to have taken the dialogue *seriously*[501].

In this regard, it should be noted that since December 2017, the Judge of Laws has already made two referrals to the European Court[502], making it clear that he himself will make a reference for a preliminary ruling "whenever necessary to clarify the meaning and effects of the provisions of the Charter"[503].

Reflecting, therefore, on the purpose of this constitutional jurisprudence, one cannot fail to register that, in addition to wanting to give new life to its judgment, the Court intends to ensure a systemic (and thus also maximised) protection of fundamental rights.

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[499] Thus, Judgment No. 269 of 2017, cit., n. 5.2. *Considerato in diritto*, emphasis added.

[500] See T. GROPPI, Il ri-accententramento nell'epoca della ri-centralalizzazione. Recenti tendenze dei rapporti tra Corte costituzionale e giudici comuni, in Federalismi, no. 3/2021, p. 128 ff.

[501] The expression refers to the valuable, and broader, reflections on the topic of dialogue between courts by M. CARTABIA, *Europe and Rights: Taking Dialogue Seriously,* in *European Constitutional Law Review,* 5(01), p. 5 ff.

[502] See Order No. 117 of 2019 and Order No. 182 of 2020.

[503] See Order No. 117 of 2019, cit., n. 2. of the *Considerato in diritto,* second paragraph and Order 182 of 2020, cit., pt. 3.1. of the *Considerato in diritto*. Commenting on these orders, see S. CATALANO, *Rinvio pregiudiziale nei casi di doppia pregiudizialità. Osservazioni a margine dell'opportuna scelta compiuta con l'ordinanza n. 117 del 2019 della Corte Costituzionale*, in *Osservatorio AIC*, n. 4, 2019, p. 1 ss., and D. GALLO, A. NATO, *L'accesso agli assegni di natalità e maternità per i cittadini di Paesi terzi titolari di permesso unico nell'ordinanza n. 182/2020 della Corte costituzionale*, in *Eurojus*, no. 4, 2020, p. 308 ff.

As already mentioned, the role played by the dialogue between the Constitutional Court and the Court of Justice will be crucial to achieving this latter goal.

To put it another way, the dialogical instrument is functional for the realisation of a real *contamination* between jurisprudences.

The result is twofold. On the one hand, from the European perspective, the fact that the constitutional traditions of a Member State are brought to the attention of the European Court will facilitate the latter in the work of "synthesis" leading to the identification of common constitutional traditions. On the other hand, from the perspective of the European Court of Laws, the dialogue also has useful effects on the constitutional provisions, which "must, in fact, also be interpreted in the light of the binding indications offered by European Union law"[504].

That being said, one final question remains: is there any change if the two courts are seised at the same time by the same *a quo* court*?*

This is the case of the Court of Appeal of Naples[505], which on 18 September issued both an order of referral to the Court of Justice and another of referral to the Constitutional Court. Now, the inadmissibility, pronounced, first, by the European Court of Justice with the order *TJ v. Balga* and, then, by the Constitutional Court with judgement no. 254 of 2020[506], prevents any response to the question posed.

However, in principle, it can be pointed out that the simultaneous activation of the incidental remedies generates uncertainty as to which of the two Courts will rule first, resulting in a drastic reduction of opportunities for dialogue.

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[504] In addition, the Constitutional Court in Order No. 182 of 2020, n. 3.2., observes that: "[t]he scope and latitude of these guarantees, which reverberate on the constant evolution of the constitutional precepts, in a relationship of mutual implication and fruitful integration, focus on the questions for a preliminary ruling which it is considered here to submit to the Court of Justice for consideration".

[505] Court of Appeal of Naples, Order of Referral to the Court of Justice of 18 September 2019, Case C-32/20, *Balga Srl*; Order of Referral to the Constitutional Court, reg. ord. no. 39/2020, published in OJ no. 20 of 13/05/2020. On the case, P. GAMBATESA, *Sulla scelta di esperire simultaneamente la questione di legittimità costituzionale e il rinvio alla Corte di Giustizia nelle ipotesi di doppia pregiudizialità*, in *Rivista del Gruppo di Pisa*, n. 2, 2020, p. 150 ss.

[506] Cf. S. LEONE, *I rischi di un dialogo senza ordine (in margine a Corte cost., sent. n. 254/2020),* in *Quaderni Costituzionali*, n. 1, 2021, p. 183 ss, the Author highlights the critical profiles on the contextual referral.

In conclusion, although the Court will have occasion to return to this and other aspects, again modifying or supplementing its "praetorian rule", the general coordinates of the latter can now be considered consolidated.

And in particular on this point, - taking up what has been argued by authoritative doctrine - it can be affirmed that the Court, in entrusting itself with the task of expressing the *first word*[507] , does not appear to be "moved by the will to 'close' our system to the rights protected at supranational level, but only by the will not to be excluded from the relative judgments, and at the same time by the will to enhance the Italian Constitution as a source of protection of fundamental rights"[508]. And the circumstance that the Constitutional Judge has already made three references for a preliminary ruling seems to favour this reading[509].

3. The Nice Charter as a *Purely Interpretative* Tool in the Experience of the Spanish *Tribunal Constitucional*

3.1. The Tribunal Constitutional, the Nice Charter and the Power of Disapplication in the Post-Melloni "Era"

[507] Expression used by the Constitutional Court in Judgment No. 20 of 2019, cit., n. 2.3. of the *Considerato in diritto,* first cpv, and by some scholars (GUAZZAROTTI, *Un "atto interruttivo dell'usucapione" delle attribuzioni della Corte costituzionale? In margine alla sentenza n. 269/2017,* in *Forum di Quaderni Costituzionali* (18 December 2017); G. SCACCIA, *Giudici comuni e diritto dell'Unione europea nella sentenza della Corte costituzionale n. 269 del 2017*, op. cit., p. 2948 ff.

[508] M. D'AMICO, L'Europa dei diritti tra "aperture" e "chiusure", p. 423.

[509] See the referral orders of the Italian Constitutional Court in the Consob case (order of reference no. 117/2019; Court of Justice, judgment of 2 February 2021 [GC], *Consob,* C-481/19, ECLI:EU:C:2021:84; Constitutional Court, judgment no. 84/2021, for a comment see P. GAMBATESA, *Riflessioni sulla prima occasione di "dialogo" tra Corte costituzionale e Corte di Giustizia in casi di doppia pregiudizialità*, in *Federalismi*, n. 23, 2021, p. 65 ss.), *baby bonus* (Constitutional Court, order of reference no. 182/2020; Court of Justice, judgment of 2 September 2021 [GC], *O.D. v. INPS,* C-350/20, ECLI:EU:C:2021:659; Corte cost. sent. n. 54/2022) and, more recently, in the matter of *MAE* (Corte cost., ordd. di rinvio nn. 216-217/2022; Corte di Giustizia, sent. del 18 aprile 2023 [GC], *E.D.L.,* C-699/21, ECLI:EU:C:2023:295; Corte cost. sent. nn. 177-178/2023).

In the context of the case law of the *Tribunal Constitutional*, the autonomy between European and constitutional preliminary rulings has been emphasised on several occasions, with the result that the common judge has been invited by the Spanish Constitutional Judge to give precedence to the remedies of European law[510]. This approach is based on the circumstance that in the Spanish constitutionality judgement, unlike the Italian one, European law does not take on the role of interposed parameter. This differentiation has repercussions on the meaning assumed by disapplication in Spanish law.

In order to examine the peculiarity of this instrument, it is necessary to trace some of the coordinates developed by the *Tribunal Constitucional on the* application of the Nice Charter by ordinary judges.

In this respect, the Spanish Judge of Laws initially distinguished two different regimes[511], which hinge on two different constitutional provisions: Articles 93 and 10(2) of the Spanish Constitution (hereinafter also "EC").

Firstly, by virtue of the principle of primacy, the common court gives precedence to the rules of the Nice Charter having direct effect in the event of a dispute governed by a national rule falling within the scope of Union law (cf. Article 51(1) Cf. The constitutional basis is to be found in Article 93 EC[512], which allows limitations of sovereignty following the ratification by organic law of international treaties[513] .

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[510] For a survey of the *Tribunal Constitutional*'s jurisprudence on the national application of European Union law, see the study by the Study Service of the TC, *Prontuario de jurisprudencia del Tribunal Constitucional sobre el Derecho de la Unión Europea.*

[511] A. AGUILAR CALAHORRO, *Naturaleza y eficacia de la Carta,* op. cit., p. 228.

[512] Art. 93 EC: "An organic law may authorise the conclusion of treaties by which the exercise of powers derived from the Constitution is assigned to an international organisation or institution. It shall be the responsibility of the Cortes General or the Government, as the case may be, to ensure the implementation of these treaties and of the resolutions issued by the international or supernational bodies holding the cession".

[513] On the *cooperative* nature of Article 93 see the authoritative reflections of M. AZPITARTE SÁNCHEZ, *El Tribunal Constitutional ante el control del derecho comunitario derivado*, Madrid, Civitas, 2002, p. 63 ff. The A., emphasising the "sentido politico-constitutional" of art. 93, considers that "el objeto de atribución, las competencias constitucionales, refiere inmediatamente a la idea de poder público manifestado a través del Derecho: ceder el ejercicio de competencias constitucionales no es otra cosa que habilitar el ejercicio de poder público, bien tome éste la forma de potestad normativa, de acción administrativa o de función jurisdiccional. En definitiva, el artículo 93 CE autoriza la integración del Estado español en instituciones supranacionales, donde los problemas internacionales se afrontan de forma cooperativa (jurídicamente y con ejercicio de poder público). Pero el artículo 93 CE no sólo determina la naturaleza cooperativa de nuestro Estado en cuanto que licita la atribución de competencias

Consequently, in such hypotheses, the common court must disapply the national rule and may not, on the other hand, refer the matter to the constitutional court, which will not invalidate the domestic provision once and for all.

Secondly, there are all other disputes in which national rules approved in implementation of EU law do not apply. In such cases, pursuant to Article 10(2) EC[514], the Charter - although not formally applicable - nevertheless plays an important hermeneutical role, especially in relation to the meaning and scope of the rights and freedoms enshrined in the Spanish Constitution[515].

In any case, it is stated that the Charter of Rights represents a "*garantía de mínimos*", whereby "the content of each right and freedom can be developed to the density of content guaranteed in each case by domestic law". This implies that "the application by the national court, as a European court, of the fundamental rights of the Charter must, almost without exception, presuppose the simultaneous application of the corresponding national fundamental law"[516].

To sum up, the Charter, although in theory it cannot be placed at a lower level than that occupied by constitutional provisions, has a dual regime of application[517] consisting, on the one hand, in its primacy of application under Article 93 EC and, on the other, in its hermeneutical value under Article 10(2) EC.

This "double" track narrows and becomes "single" following the well-known *Melloni* case (2010). In particular, the *Tribunal Constitutional* revised "its 2004 doctrine on the domestic effectiveness of the Charter, tending to generalise its mere hermeneutic effectiveness -10.2 EC- over its primacy -93 EC-"[518].

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derivadas de la Constitución a organizaciones internacionales. Impone también, al requerir para la autorización ley orgánica, que esa atribución se realice por la fuente que mejor refleja el consenso constitucional" (pp. 63-64).

[514] Art. 10(2) EC: "The rules relating to fundamental rights and freedoms, recognised by the Constitution, shall be interpreted in accordance with the Universal Declaration of Human Rights and the International Treaties and Agreements on the same matters ratified by Spain".

[515] *Ex multis*, TC, Judgment No. 61 of 2013. See Prontuario jurispudencia constitutional, cit., 9 ff.

[516] TC, dtc. no. 1 of 2004, as reported, A. AGUILAR CALAHORRO, Naturaleza y eficacia de la Carta de Derechos Fundamentales de la Union Europea, cit., p. 229.

[517] In this regard, A. AGUILAR CALAHORRO (in *Naturaleza y eficacia de la Carta de Derechos Fundamentales de la Union Europea*, cit., p. 226) speaks of the "*bifuncionalitdad*" of the Charter of Rights

[518] *Ibid*, 231 (translation by the author).

In the *Melloni* case[519] the *Constitutional Tribunal* found itself, in the context of a *recurso de amparo*[520], faced with a situation where the same right met different standards of protection. More precisely, the fact that the national standard was higher than the European standard justified the first preliminary reference by the Spanish Court of Laws. However, the Court of Justice held that the standard imposed by the Union, although lower than the national standard, should be applied in this case, as otherwise the uniformity of Union law would be jeopardised.

Singular was the TC"s "response" following the Court of Justice's pronouncement[521]. Although the *TC* reaffirmed the possibility *in extremis of* applying "its" counter-limits, it preferred to adhere to what the Luxembourg Court had decided, opting for an *overruling* of its jurisprudence. In other words, it re-interprets, pursuant to Article 10(2), "its" law in accordance with the standard of the ECJ, which, however, does not "prevail" by virtue of the principle of primacy (and thus, in the wake of Article 93 EC).

3.2. The Role of the EU Bill of Rights in the Interpretation of Constitutional Rights

Following the Melloni case, the TC placed the CJEU on a "single" track, which is the one that develops on the hermeneutic level. A precise choice of constitutional policy that in reality only produces effects on the side of the consolidation of

[519] See C. AMALFITANO, Mandato d'arresto europeo: reciproco riconoscimento vs diritti fondamentali?, in Diritto penale contemporaneo, in Diritto penale contemporaneo, 2013, 1 ff.; M. IACOMETTI, Il caso Melloni e l'interpretazione dell'art. 53 della Carta dei Diritti fondamentali dell'Unione Europea tra Corte di Giustizia e Tribunale Costituzionale spagnolo, in Osservatorio AIC, no. 1, 2013; and in the same journal see also A. AGUILAR CALAHORRO, Riflessioni sul primo rinvio pregiudiziale sollevato dal Tribunale costituzionale spagnolo, special issue on "Rinvio pregiudiziale", 2014.

[520] See F. ÁLVAREZ-OSSORIO MICHEO, Cuestión de inconstitucionalidad y derecho de la Unión Europea. El Tribunal Constitucional como juez "ad quo". El caso español, in J.M. MORALES ARROYO (ed.), Recurso de amparo, derechos fundamentales y trascendentia constitutional, Madrid, Reuter, 2014, 143 ff.

[521] TC, Sentence No. 26 of 2014.

constitutional rights, while it remains devoid of consequences on the subject of the creation of new rights.

This consequence finds its raison d'être, first of all, in the fact that it excludes (as recalled in the first lines of this paragraph) the possibility of the provisions of the Nice Charter constituting a canon of validity. The latter, in fact, can only find their way into the constitutionality judgment if they are "linked" to the "corresponding" right prescribed in the Spanish Constitution, which must therefore be interpreted in the light of the Nice Charter.

This mechanism, however, can only occur with reference to the *numerus clausus of* the rights enshrined in the Spanish Constitution. On this point, in particular, the TC stated that "the grounds underlying the appeal *de amparo* must always relate to the infringement of the fundamental rights and freedoms provided for in Articles 14 to 30 of the Spanish Constitution"[522].

However, this is not the only consequence of the *Melloni* case. The failure of the first attempt at "dialogue" urged by the Spanish Constitutional Judge also generated a more general "disaffection"[523] of the latter to make use of the preliminary reference. It is no coincidence that the TC's first referral, to date, has remained an isolated case[524].

It follows, therefore, that the so-called single track of protection added to the absence of referral has restricted the scope of application of the Nice Charter to the constitutional level.

3.3. The Jurisprudence on *Recurso de Amparo* in Cases of Non-application. An Opportunity to Avoid "Dialogue"

[522] Thus already TC Judgment No. 64 of 1991, more recently Judgment No. 41 of 2013, where, moreover, express reference is made to the CJEU. Cf. *Prontuario jurispudencia constitutional,* cit., 13 ff.

[523] In these terms, see P. CRUZ VILLALÓN, ¿Una forma de cooperación judicial no reclamada? Sobre la extensión del amparo a la Carta de Derechos Fundamentales de la UE, in Anuario Iberoamericano de Justicia Constitucional, Vol. 25, No. 1, 2021, p. 57 ff.

[524] A. AGUILAR CALAHORRO, Naturaleza y eficacia de la Carta de Derechos Fundamentales de la Union Europea, op. cit. p. 231 et seq.

Finally, the role of the common courts, which have the instrument of disapplication at their disposal, must be questioned.

On this issue, two phenomena have been recorded.

On the one hand, since the Melloni judgment, the common courts have also made greater use of the Charter at the hermeneutical level (pursuant to Article 10(2) EC), avoiding immediate disapplication for conflict with the Charter[525].

On the other hand, judges find themselves under increasing pressure to engage in dialogue with the Court in Luxembourg. In this regard, another guideline of the TC is of relevance, one that exclusively concerns the group of decisions rendered following direct actions[526]. This is the case. of actions brought to invoke an alleged violation of Article 24 EC (right to an effective remedy) in situations where the court of last instance has disapplied without first making a reference for a preliminary ruling.

In such cases, by means of the *recurso de amparo,* the party has the opportunity to bring a "very last" action before the Constitutional Court on the ground that the court of last instance has decided to disapply the national rule without having previously referred the question to the Court of Justice for a preliminary ruling. As is well known, the court of last instance is subject to a referral obligation to Luxembourg under paragraph 3 of TFEU 267, from which it can escape only in specific cases (see case law of the Court of Justice on *Cilfit*).

Therefore, in the case of an "unwanted" disapplication the party can invoke its "right to the EU court" before the *Tribunal Constitucional*. According to the Spanish Constitutional Judge, in fact, just as the Constitution has taken away from the common judge the possibility of disapplying a rule in contrast with the constitutional dictate, and for this purpose has instituted a *Tribunal* capable of expunging the rule with effect *erga omnes, in* the same way, "the possible judgement of incompatibility of an internal legal rule with EU law cannot depend exclusively on a subjective judgement of the person applying the law, i.e. its authority, but must be covered by certain precautions

[525] A. AGUILAR CALAHORRO, op. cit., p. 248 ff.

[526] On this topic, see the multiple contributions in J.M. MORALES ARROYO (ed.), Recurso de amparo, derechos fundamentales y trascendentia constitutional, Madrid, Reuter, 2014; E. CRIVELLI, Il recurso de amparo e la sua più recente evoluzione nella giustizia costituzionale spagnola, in M. IACOMETTI, C. MARTINELLI (eds.), La Costituzione spagnola quarant'anni dopo, 2020, Santarcangelo di Romagna, Maggioli editore, p. 231 ff., and EAD, La tutela dei diritti fondamentali e l'accesso alla giustizia costituzionale, Padova, 2003, 93 ff.

and guarantees"[527]. These guarantees include the instrument of the preliminary reference, which will be "essential to respect the system of sources established as an intrinsic guarantee of the principle of legality, to which the actions of the administration and the courts are subject"[528].

With the due clarification that, in the context of this particular judgement, the CT is not called upon to examine whether the court of last instance has correctly proceeded to non-application, but instead only to understand whether a margin of discretion remains with the aforementioned court in the choice to disapply; or whether such a choice is "imposed" by similar precedents of the Court of Justice.

The guidelines on the violation of Article 24 EC have fluctuated somewhat.

They were in essence two.

The former, affirmed in 2004 and recently revived in Judgment No. 37 of 2019, imposes a more stinging judgment that aims to prevent the court of last resort from disapplying except in cases where it is certain that it can do so; by doing so, the aim is to increasingly encourage the court of last resort to engage in dialogue with the Court of Justice.

The second orientation developed in 2010 around the violation of Article 24 of the Constitution is based on a more generic judgement aimed simply at "sanctioning" only the manifestly unreasonable use of the disapplicative instrument. Thus, there remains a greater discretion for the judicial authority to render a decision unobjectionable.

Ultimately, this line of jurisprudence places within the prism of constitutionality not the scrutiny of the "correct" use of a "typical" instrument of the common court, i.e. that of disapplication, but rather aims to regulate the degree of discretion of the common court to make the preliminary reference, which according to the now prevailing orientation would be very small. If this latter orientation, which in fact increasingly encourages the court to make preliminary references to the European Court, were to be placed in the wake of the *Melloni* case*, one* could probably deduce an increasing tendency on the part of the constitutional judge to delegate the possible opportunities for dialogue he might have with the Court of Justice.

[527] TC Sent. no. 58 of 2004.

[528] TC Sent. no. 194 of 2006.

From this perspective, disapplication would not only serve as an instrument for resolving antinomies between *rules*, which do not fall within the jurisdiction of the constitutional court, but it cannot be excluded that it could also encompass disputes concerning the protection of fundamental rights within its sphere of application.

4. The Conflict Approach While Avoiding the Emergence of Conflict. A Look at the Romanian Case

4.1. The *RS* Case and the Tension Between the European Judge and the Romanian Constitutional Judge

The ruling of 22 February 2022 of the Court of Justice in the *RS* case (C-430/21) testifies to how fractures and contradictions still exist today in the difficult balancing act between the primacy of Union law and constitutional identities[529]. This relationship, as is well known, constitutes one of the most complex aspects of the entire process of European integration, on which on several occasions the Courts of the Union, called upon to give preliminary rulings, have had occasion to intervene, expressing positions that are not always in line with what the constitutional courts of the Member States have affirmed.

[529] The pronouncement was discussed at the recent study meeting between the Italian Constitutional Court and the Court of Justice, "Identità nazionale degli Stati membri, primato del diritto dell'Unione Europea, stato di diritto e indipendenza dei giudici nazionali", held in Rome at the Palazzo della Consulta on 5 September 2022. See in particular the reports by K. LENAERTS, *National Identity, the Equality of Member States before the Treaties and the Primacy of Eu Law,* op. cit.; S. SCIARRA, *Identità nazionale e Corti costituzionali. Il valore comune dell'indipendenza,* p. 140 ss.*;* E. NAVARRETTA, *Identità nazionale e primato dell'Unione Europea,* op. cit.*;* L. S. ROSSI, *Regole dell'Unione Europea ed eccezioni nazionali: la questione "identitaria",* p. 63 ss.*;* G. PITRUZZELLA, *L'integrazione tramite il valore dello "stato di diritto"*, p. 129 ss. Mentre, in dottrina v. M. D'AMICO, *Riflettendo sullo spazio giudiziario europeo: al crocevia tra diritti, Carte e Corti,* forthcoming in the Scritti in onore di A. Padoaschioppa, pp. 81 ff.; D. GALLO, *Primato, identità nazionale e stato di diritto in Romania,* in *Quaderni costituzionali,* no. 2, 2022, p. 374 ff.; P. FARAGUNA, *La Corte di giustizia alle prese con identità costituzionali incostituzionali,* in *Quaderni costituzionali,* no. 2, 2022, p. 634 ff.; F. SEVERA, *Il caso romeno nella dimensione conflittuale dell'integrazione europea*, in *EU Blog*, April 2022.

The "clash" ground, once again[530], is the principle of independence of the judiciary, garrisoned at the European level by both Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the European Union, the infringement of which was ascertained by the Luxembourg Court in May 2021 in relation to the national legislation on the Specialised Prosecution Section for the investigation of crimes committed within the system. 47 of the Charter of Fundamental Rights of the European Union, the infringement of which was ascertained by the Court of Luxembourg[531] in May 2021 in relation to the national legislation on the Specialised Section of the Public Prosecutor's Office for the investigation of offences committed within the judicial system (*Secția pentru investigarea infracțiunilor din justiție*, hereinafter also "SIRG"), established at the Romanian High Court of Cassation and Justice *(Înalta Curte de Casație și Justiție*). The judgment of the European Union judicature was followed by a contrary ruling by the Constitutional Court, which held that those national rules did not conflict with the super-primary provisions, which were the parametric rules in its judgment. Consequently, from this perspective, in the conflict between national and European norms, it would be the latter that would suffer a recession, since the former constitute an expression of Romanian constitutional identity[532].

At the outcome of the two judgments, the Craiova Court of Appeal, called upon to settle a dispute in which it was necessary to apply the SIRG legislation, finds itself at a crossroads: to apply the national provisions, thus complying with the Constitutional Judge's ruling, but in breach of the obligation to disapply imposed by Luxembourg; or - vice versa - to act in accordance with the latter, but disassociating itself from the Constitutional *decisum* and risking the activation, against it, of

[530] See *above*, Chapter II, §4.3.1.

[531] Court of Justice, Judgment 18 May 2021, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociaţia 'Forumul Judecătorilor din România',* ECLI:EU:C:2021:393, with note by M. MORARU, R. BERECA, *The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociaţia 'Forumul Judecătorilor din România, and their follow-up at the national level*, in *European Constitutional Law Review*, Vol. 18, Issue 1, p. 82 ff.

[532] Similar to what happened in the decisions that led to two recent rulings by the Union judiciary, see Court of Justice [GC], judgment of 13 July 2023, Joined Cases C-615/20 and C-671/20 ,*YP and Others, M.M. v. Prokuratura Okręgowa w Warszawie*, ECLI:EU:C:2023:562. Court of Justice [GC], Judgment of 5 June 2023, Case C-204/21, *European Commission v. Republic of Poland (Independence and privacy of judges)*, ECLI:EU:C:2023:442.

disciplinary proceeding. In other words, in the third instance, the court of second instance finds itself deciding the balance between primacy, on the one hand, and constitutional identity, on the other. This choice is not made immediately and, on the contrary, is referred by the common court to the Court of Justice, which confirms its precedent and reaffirms the national court's obligation to proceed with disapplication by virtue of the principle of primacy.

Already these initial coordinates reveal the framework that forms the backdrop to the case study. On the one hand, there is the issue of the primacy of law and its founding values, which, by directly impacting on the national legal system, produce instability and uncertainties, first and foremost among ordinary judges; on the other hand, there is the increasingly delicate "relationship" - which here appears as a real "clash" - between the Court of Justice and the Romanian Constitutional Court. So, not new themes and issues that - albeit with different declinations - have characterised other well-known cases[533] that hinge on the complex role of constitutional judges in the European judicial space.

4.2. The Terms of the "Conflict": the Past Judicial Events Influencing Today's Reference for a Preliminary Ruling and the Preliminary Questions Raised

The first ruling delivered in the European Court is occasioned by six references made by the Romanian national courts in relation to certain justice reforms adopted since 2017 concerning judicial organisation, the disciplinary mechanism of magistrates and the liability, both state and individual, of judicial authorities for judicial errors committed. In particular, four out of the six references for a preliminary ruling, those promoted by the Courts of Appeal of Piteşti (C-127/19 and C-355/19), Bucureşti (C-195/19) and Braşov (C-291/19), were based on the doubtful compatibility of the SIRG discipline (especially, as reformed in 2018 by Law No. 207)

[533] See the so-called *Taricco* and *Melloni* 'sagas'.

with Articles 2 and 19 TEU and with the provisions of Commission Decision 2006/928/EC.

The latter decision was adopted on 13 December 2006, thus shortly before Romania's formal accession to the Union, which took place on 1 January 2007, and establishes a mechanism for cooperation and verification of progress in judicial matters, required by the Union during the accession negotiations[534]. In fact, by virtue of these obligations, in 2004 Romania had adopted three laws on justice, Nos. 303, 304, 317 (specifically, Law No. 304 introduced the SIRG), which were then subject to significant amendments between 2017 and 2019, many of which were at the heart of the doubts raised in the preliminary ruling procedure.

Therefore, a first fundamental point that this first decision emphasises concerns the scope of application of European law, which in cases involving national legislation on the organisation of justice is not *ictu oculi to be* found in a specific competence devolved on the Union. The reasoning developed around the admissibility of the Court's interpretative test in relation to the complaints made by the *a quibus* judges hinges on Article 49 TEU, a provision on accession, which requires countries wishing to join the "European family", first and foremost, to respect the values of the EU enshrined in Article 2 TEU and, among these, in particular the rule of law. On this pregnant axiological premise, namely that "respect by a Member State for the values enshrined in Article 2 TEU constitutes a condition for the enjoyment of all the rights deriving from the application of the Treaties to that State", the Court specifies that "a Member State may not therefore amend its legislation in such a way as to bring about a regression in the protection of the value of the rule of law [....]" and must therefore refrain "from adopting any measure which might undermine the independence of judges" (judgment *Asociaţia "Forumul Judecătorilor din România",* cit, pt. 162).

What has been said here in general terms is then confirmed by the incompatibility with European law of the SIRG's rules. The latter assigns to that specialised section the exclusive competence to initiate investigations, and at their outcome the possible prosecution, for offences committed by Romanian magistrates

[534] See Articles 37 and 38 of the Accession Treaty. More generally on the eastward enlargement of the EU, see O. POLLICINO, *Allargamento dell'Europa a est e rapporto tra Corti costituzionali e Corti europee*, Milan, Giuffrè, 2010.

in the performance of their duties (Article 88, par. 1, of Law 304 of 2004). The SIRG is made up of fifteen prosecutors appointed by the Council of the Magistracy following the positive judgement of an *ad hoc* commission set up, which preliminarily scrutinises the qualifications submitted by the prosecutors applying for office (the same procedure is used to choose the chief prosecutor). In 2018, an emergency decree provides for an exception procedure that allows the appointment of both chief prosecutor and prosecutor to those deemed suitable by the competition commission, although the latter is not completed.

Particular criticism of this system is made by the Venice Commission, and confirmed by the Court of Justice, which sees the infringement of the principle of independence of the judiciary under Articles 2 and 19 TEU, as well as the requirements included in Commission Decision 2006/928, which require the Romanian state authorities to respect the same principle. The most obvious risk is seen in the possible pressure that the members of the SIRG could unduly exert on the judges. "[T]he rules governing the competence and organisation of the SIRG, the modalities of its functioning as well as the appointment and dismissal of the prosecutors assigned to it would reinforce this fear and would, moreover, be capable of hindering the fight against corruption offences" (*Asociaţia* judgment*,* cit., pt. 209,). In other words, the underlying harm rests on the lack of appearance of independence and impartiality of the members of the SIRG, since these rules prevent "any legitimate doubt in individuals as to the impermeability of judges to external elements" (*Asociaţia judgment,* cit., pt. 212).

Therefore, also by virtue of the Commission's decision, the national court will be empowered to disapply the SIRG legislation, even if that legislation has successfully passed the constitutionality test by the national Constitutional Court (thus judgment *Asociaţia*, cited above, pt. 7 of the operative part).

This strong stance of the Court of Justice is followed by an equally strong stance of the Romanian Constitutional Court. The latter, in Judgment No. 390 of 9 June 2021, rejects the objection of unconstitutionality formulated in relation to the national regulations establishing the SIRG, and, on the basis of this consideration, considers that it is precisely the application of the primacy of European law that is an obstacle to the application of rules of constitutional rank. In particular, among the norms of the

Romanian Constitution that are most relevant to our case, we should recall Articles 11 and 148. The first rule explicitly states that in the hypothesis that Romania must accede to an international treaty that contains provisions contrary to the Constitution, an amendment of the constitutional norms concerned will be necessary before ratification. Whereas, Article 148 prescribes, in paragraph 2, that "[a]s a result of accession, the provisions of the Treaties establishing the European Union, as well as other Community legislation having binding force, shall prevail over the contrary provisions of national legislation, subject to compliance with the Act of Accession"; in paragraph 4, it is added that "[t]he Parliament, the President of Romania, the Government and the judicial authority shall ensure compliance with the obligations arising from the Act of Accession and the provisions of paragraph 2".

With regard to the latter constitutional provision, in Judgment No 390 of 2021, it is stated that, although the precedence of EU law (with binding character) over national law in conflict with the former is admitted, *"this priority of application must not be perceived as removing or disregarding the* ***national constitutional identity****, as enshrined in Article 11 (3), read in conjunction with Article 152 of the Basic Law, i. e. a guarantee of a substantive identity core of the Romanian Constitution and which must not be relativised in the process of European integration".e. a guarantee of a substantive identity core of the Romanian Constitution and which must not be relativised in the process of European integration".* And therefore, it is up to the Constitutional Court "*to ensure the primacy of the Basic Law in Romania"* (Sent. no. 390/2021, cit., pt. 74). And therefore, *"Article 148 of the Constitution does not give EU law priority over the Romanian Constitution, so that a national court does not have the power to examine the conformity of a provision of national law, found to be constitutional in the light of Article 148 of the Constitution, with the provisions of EU law"* (Sent. no. 390/2021, cit., pt. 76).

In addition, according to the Constitutional Judge, this thesis is supported by Article 4(2) TEU itself, which, in addition to sanctioning equality between Member States, provides for respect for their constitutional identity, "inherent in their fundamental political and constitutional structure". Hence, it is precisely in relation to this structure that European integration would find its limit (cf. Judgment No. 390/2021, cit., p. 75).

In other words, the Constitutional Court concludes its opinion that primacy cannot be granted to EU rules, especially those contained in Commission Decision 2006/928, as interpreted by the Court of Justice in its May 2021 ruling. Those rules, in fact, *"do not constitute rules of EU law, which the court should apply as a matter of priority, removing the national rule. Therefore, the national judge cannot be asked to decide that recommendations should be applied as a matter of priority to the detriment of national law [...]"* (Judgment No 390/2021, cit., 78).

The position expressed by the Constitutional Court is quite clear, although it should be noted that the above statements are not followed - at the "sanctioning" level - by the activation of the so-called counter-limits.

Lastly, it should be noted that a few months later, on 21 December 2021, the Court of Justice intervened with the *Euro Box Promotion and Others* judgment (Joined Cases C-357/19, C-379/19, C-547/19, C-811/19, C-840/19), again rendered following multiple references for a preliminary ruling made by Romanian judges, but concerning questions on the independence of national judicial authorities called upon to decide disputes relating to corruption and VAT fraud offences. As regards what is of interest here, the Court of Luxembourg reaffirms the binding nature of the Accession Agreement, and the related Commission Decision 2006/928, and as regards the principle of primacy, it "must be interpreted as precluding a national rule or practice under which the ordinary national courts are bound by the decisions of the national constitutional court and may not , on pain of committing a disciplinary offence, disapply, on their own initiative, the case-law resulting from those decisions, where they consider, in the light of a judgment of the Court, that that case-law is contrary to the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU or Decision 2006/928" (judgment *Euro Box Promotion and Others*, cit., pt. 263).

Barely a month after the Romanian Constitutional Court's ruling, the Craiova Court of Appeal, finding itself deciding the appeal filed by RS[535] , found itself dealing

[535] The national court case originates from an appeal filed by RS, who was convicted following criminal proceedings. As a result, RS filed a complaint against a prosecutor and two judges with the SIRG in April 2020. Here, the applicant charged all three magistrates with the offence of abuse of office (Article 297 of the Romanian Criminal Code) and the prosecutor alone with the offence of abuse of the judicial instrument (Article 283 of the Romanian Criminal Code). The complaints were based on the fact that the public prosecutor had brought the prosecution in disregard of RS's rights of defence and had made accusations against the defendant based on false testimonies. As for the two judges, it was

with the jurisprudential contrast that had arisen between the Court of Justice and the Constitutional Court. And as mentioned in the introductory lines, in the doubt as to which of the two options was more appropriate, on 7 July 2021 the *Curtea de Apel* of Craiova chose the *third* way and promoted a new preliminary reference before the Court of Justice, posing three questions for a preliminary ruling on interpretation, all having as their object the correct declination of the principle of independence of judges at the European Union level. Again, the reference to European law is to Articles 2 and 19 TEU and Article 47 of the Charter of Fundamental Rights of the Union.

With the first question, the referring party seeks to investigate "[w]hether the principle of independence of judges, [...], precludes a national provision, such as Article 148(2) of the Constitution of Romania, as interpreted by the Curtea Constituțională (Constitutional Court) in its decision no. 390/2021, according to which national courts are not entitled to examine the conformity of a national provision, declared constitutional by a decision of the Curtea Constituțională, with the provisions of European Union law" (*RS* Judgment, cit, pt. 25).

By contrast, the second and third questions focus on the disciplinary procedure which may, in the event, be triggered, under Article 99 of Romanian Law No 303/2004, if a municipal court does not follow the *decision of* the Constitutional Court. To be precise, by its second question, the *national court* asks whether it is consistent with the principle of independence that the abovementioned disciplinary mechanism in fact prevents the court in the main proceedings from exercising its power to disapply the national rule in accordance with the previous ruling of the Court of Justice on the matter. On the other hand, the third question seeks to ascertain whether the aforementioned limitation on disapplication should also apply in criminal proceedings where the reasonable duration of the same proceedings is contested, pursuant to Article 488a of the Romanian Code of Criminal Procedure.

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alleged that they had acted in an omissive manner during the trial at second instance with specific regard to a request by the defendant for a legal re-qualification of the facts.

Subsequently, the Specialised Section initiated investigations against the above-mentioned magistrates to ascertain the aforementioned offences, but the investigators delayed concluding the investigations. RS, in accordance with the Romanian Code of Civil Procedure, lodged a complaint with the *Curtea de Apel* in Craiovia, in order to obtain from the second-instance judge a deadline for the conclusion of the investigation.

The examination of the merits of the first of the three questions for a preliminary ruling begins with fundamental considerations on the principle of the independence of the judiciary, which is a cardinal principle of the Union itself enshrined in Articles 2 and 19 TEU and 47 CFREU.

The first profile of interest concerns the formal exclusion of Article 47 CFREU from the list of European parameters. This choice, the Court states, is first of all, due to the more limited scope of application of the Charter imposed by its Article 51(1). The latter provision, in fact, limits the application of EU fundamental rights only where there is a Union act or national legislation "enacted in implementation of EU law". Therefore, the legislation "challenged" by the referring party does not fall within the limits of this definition, which also means that the Charter is inapplicable in this case.

Apart from this "formal" clarification, however, the Court "retrieves" the content of Article 47 CJEU through Article 19 TEU, which is applicable here. There would be a twist of substantive interdependence between the two norms: in fact, Article 19(1)(2) requires Member States to ensure effective judicial protection in the areas regulated by the EU; on the other hand, Article 47 CFREU "completes" and specifies the scope of the guarantee of judicial protection[536]. In other words, the Court, although excluding the application of Article 47 of the Nice Charter, hermetically retains a trace of the latter provision due to its intimate connection with Article 19 TEU.

Turning now to the latter provision, it is important precisely because it "embodies the value of the rule of law affirmed in Article 2 TEU", thus entrusting "national courts and the Court of Justice with the task of ensuring the full application of Union law in all Member States and the judicial protection to which citizens are entitled under that law" (*RS,* cit., p. 39). Full application translates into the obligation of each Member State to ensure that the courts are able to interpret and apply European law by making use of the remedies provided by national law, so as to satisfy "the requirements of effective judicial protection, including, in particular, the requirement of independence" (*RS*, cited above, p. 40).

[536] For a detailed examination of the Nice Charter provision, see M. D'AMICO, *Art. 47,* in R. BIFULCO, M. CARTABIA, A. CELOTTO (eds.), *L'Europa dei diritti. Commentary on the Charter of Fundamental Rights of the European Union,* op. cit., pp. 319; EAD, *Article 47: right to an effective remedy and to a fair trial*, in W.T.B. MOCK, G. DEMURO (eds.), *Human Rights in Europe*, Carolina Academic Press, Durham, 2010, p. 289 ff.

In this perspective, the provisions of the primary European rules, which protect the independence of the judiciary[537], do not impose the choice of a particular constitutional model of justice. All those choices that contribute to defining their fundamental structure remain firmly in the hands of the States: thus in accordance with Article 4(2) TEU. This, however, with one (due) clarification: "in choosing their respective constitutional model, the Member States are bound to observe, in particular, the requirement of independence of the judges deriving from those provisions of Union law" (*RS* Judgment, cited above, p. 43). And therefore, on the basis of this consideration, national legislation and practices that would determine the binding nature of decisions of the State Constitutional Court would not preclude the application of Articles 2 and 19(1) TEU, "provided that national law guarantees the independence of that Constitutional Court vis-à-vis, in particular, the legislative and executive powers, as required by those provisions" (*RS*, cited above, p. 44).

The Court's considerations are anchored in the two principles of structure, primacy and direct effect, developed from the well-known *Costa v. Enel* and *Van Gend and Loos* cases. They require the prevalence of Union law in the event of conflict with national law, with the possibility for the common court to immediately remove the antinomy by means of disapplication if the European rule has direct effect.

The above mechanism, therefore, rests on the principle of *loyal cooperation under* Article 4(3) TEU, which will here reinforce the relationship between national courts and the Court of Justice where a breach of European law by national legislation emerges.

Shifting, now, the attention to the European rules that the petitioner alleges have been infringed, i.e. those enshrining the principle of independence, the Court confirms its previous case law (in particular, judgment *Asociaţia,* cited above) and ensures the direct effect of those rules. Consequently, "not being able to interpret the national rules

[537] As for the characteristics of independence *under* Article 19 TEU, however, the Court specifies that these can be of an 'external' and 'internal' nature. The first characteristic requires the judicial authority to be autonomous in the exercise of its functions, without any form of hierarchical attachment and subordination to entities that are on the 'outside', such as the governing body; while 'internal' independence aims to safeguard the magistrate in the context of the trial, lying he a position of impartiality and equidistance from the parties (cf. in this sense, Judgment of 24 June 2019, *Commission v. Poland (Independence of the Supreme Court)*, C-619/18, pt. 72 and 73, and Judgment *Euro Box Promotion and Others*, cit., pt. 224).

in conformity with that provision or with the above-mentioned parameters, the ordinary courts *must disapply, on their own initiative, those national rules*" (*RS* judgment, cited above, p. 59, emphasis added).

It follows that the national rule prescribing a disciplinary sanction for the magistrate, which it does not disapply in order to comply with the Constitutional Court's decision, will be contrary to Union law. On this point, of particular interest are some passages that the Court makes with reference to cooperation between judges, on the one hand, and respect for constitutional identities, on the other. "The effectiveness of the cooperation between the Court and the national courts established by the preliminary ruling procedure and, therefore, of European Union law would be liable to be undermined if the outcome of an objection of unconstitutionality before the constitutional court of a Member State could have the effect of dissuading the national court seised of a dispute governed by that law, from exercising its right, or, as the case may be, its obligation, under Article 267 TFEU, to refer to the Court questions on the interpretation or validity of acts of that law, in order to enable it to rule on whether or not a national rule is compatible with that law" (judgment of the Court of Justice of the European Union, RS, cit. *RS,* cit, pt. 65). And thus, such a practice imposed at the national level undermines effective cooperation between the Court and the national courts: this is also the case when "a judgment of the Constitutional Court of the Member State concerned refuses to comply with a preliminary ruling given by the Court of Justice, relying in particular on the *constitutional identity of* the Member State concerned and on the consideration that the Court has infringed its jurisdiction" (*RS,* cited above, p. 68, emphasis added).

Taking the view that it is not possible to invoke *sic et simpliciter* the prevalence of national identity over the principle of primacy, it appears as if the Court intends to preserve only the link with the common court, which has been tried and tested for many years now thanks to the many references for preliminary rulings requested by national courts.

In truth, there is reason to believe that the Union judiciary does not intend to "confine" in this sense the "field" of loyal cooperation that is expressed through the preliminary ruling remedy. On the contrary, the objective of the Court of Justice seems to be to develop around increasing the opportunities for dialogue with the

constitutional courts of the Member States, especially where a possible friction of constitutional values and principles emerges, which would prevent the proper application of primacy. Making a preliminary reference on such occasions would allow the Luxembourg courts to "verify [under Art. 4(2)] that an obligation of Union law does not affect the national identity of a Member State" and, where appropriate, clarify and amend what has been said before.

In order to confirm, and perhaps even to reinforce, such a *modus procedendi*, the Court of Justice, in an *obiter dictum,* adds a detail of no small importance. "If the Constitutional Court of a Member State considers that a provision of secondary Union law, as interpreted by the Court of Justice, infringes the obligation to respect the national identity of that Member State, that Constitutional Court *must* suspend its decision and refer a question to the Court of Justice for a preliminary ruling, pursuant to Article 267 TFEU, in order to ascertain the validity of that provision in the light of Article 4(2) TEU, the Court of Justice having sole jurisdiction to declare an act of the Union invalid" (Judgment of the Court of Justice, RS, cited above, p. 1). *RS,* cit, pt. 71, emphasis added).

4.3. (Following...) Towards an Obligation of Preliminary Reference for Constitutional Judges before the Activation of the so-called Counter-limits?

The reasoning of the Court of Justice unequivocally leads to an affirmative answer to each of the three questions of interpretation put to its attention. What compels such a threefold solution is precisely the combined reading of Article 19 TEU with Articles 2, 4 (paras. 2, 4 (paras. 2 and 3) TEU and 267 TFEU, which leads to the conclusion that, on the one hand, the function of the ordinary judge to disapply national legislation, which has passed the scrutiny of the national Constitutional Court (*first question*), prevails, and, on the other hand, that combined provision confirms the conflict at European Union level between any national mechanism that penalises

through disciplinary proceedings a magistrate who decides not to apply national legislation (*second and third questions*)[538] .

Thus, in the view of the Union judicature, any form of "constraint" envisaged at national level for the common court is in clear conflict with the principle of primacy, which is being permanently compressed by a judgment of the Constitutional Court. Thus, the continued application of national rules would undermine the unity and effectiveness of Union law.

This is the European Court's reaction to the Constitutional Court's decision to unilaterally activate a "brake" on European integration (albeit without the formal activation of mechanisms comparable to the so-called counter-limits) and, consequently, on the very driving force of the principle of primacy, believing that the *last* and *only* word *is*, in any case, yours alone.

In particular, the European *decisum* in the *RS* case attempts to offer a solution to the difficult contrast that can emerge, both on a substantive and procedural level, between constitutional and European values, which respectively connote the identity of the Member States and the Union[539]. But before examining, from the dual perspective mentioned, the issue of the contrast between the two distinct identities, let us consider their respective legal bases in primary law. If there is an immediate reference to national identity in Article 4(2) TEU (which must be respected with regard to "*their fundamental political and constitutional structure, including the system of local and regional self-government*", to "the *essential functions of the State, in particular the functions of safeguarding territorial integrity, maintaining public order and protecting national security*"), the same cannot be said for the European identity, on which there is a lack of normative specification. As to what is to be understood by "European identity", the Court of Justice has intervened on several occasions: first of all, it is necessary to refer to the common and founding values of the Union Art. 2

[538] In particular, judgment *RS,* cit., ppt. 78 e 93.

[539] On the topic of constitutional identity under Art. 4(2) TEU, for all, see A. VON BOGDANDY, S. SCHILL, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, in *Common Market Law Review*, Vol. 45, No. 5, p. 1405 ff.; M. CARTABIA *Art. 4(2)*, in A. TIZZANO (ed.), *Trattati dell'Unione Europea*, 2014 ; G. DI FEDERICO 2019, *Il ruolo dell'art. 4, par. 2, TUE nella soluzione dei conflitti interordinamentali*, in *Quaderni costituzionali,* No. 2, 2019, p. 333 ff. and S. NINATTI, *Dalle tradizioni costituzionali comuni all'identità costituzionale il passo è breve? Introductory reflections*, in *State, Churches and Confessional Pluralism*, 2019, no. 31, p. 102 ff.

TEU, such as the rule of law, but it is not uncommon for the latter rule to be juxtaposed with Art. 19 TEU and 267 TFEU. And the very ruling under comment here confirms how crucial such a combined provision can be not only to concretely define European identity, but also to sanction its prevalence over national constitutional identity.

As regards, on the substantive level, the difficult balancing act that becomes necessary when a contrast emerges between European and constitutional values, the Court of Justice specifies that its judgment is based on the assumption that EU law does not require all States to adopt a "precise constitutional model governing the relations and interaction between the various State powers" (*RS* judgment, cit., p. 43). On the contrary, it "merely" requires that such a model (presided over by Art. 4(2) TEU) be in conformity with the value of the rule of law (Art. 2 TEU), which encapsulates the principle of independence of the judiciary (Art. 19 TEU).

This specification seems essential to justify the Court's own judgement, which is anchored around the idea that it will not be possible to invoke the prevalence of national identity if the latter violates European values, common to the constitutional traditions of the Member States. The latter, in fact, as argued by the President of the Court of Justice, K. Lenaerts, at the time of accession accepted the Union's *aquis* and undertook to ensure its effective observance in their own legal system (also by introducing specific regulatory reforms)[540]. And the same force maintains this argument even after accession, since no kind of *regression of values* would be tolerable[541].

Common European values that, in order not to regress, *firstly, need to be* precisely translated into secondary legislation (decisions, directives, regulations, etc.) and, secondly, these must be applied as uniformly as possible in national legal systems, in accordance with the principle of primacy[542].

In these terms, i.e. through the joint declination of the primacy principle and the values of the EU, the principle of equality between the Member States vis-à-vis the

[540] This is also in the event of requiring these states to introduce specific regulatory adjustments in order to comply with the so-called *Copenhagen criteria.*

[541] K. LENAERTS, National Identity, the Equality of Member States before the Treaties and the Primacy of Eu Law, op. cit.

[542] M. CONDINANZI, L'Unione europea tra integrazione e differenziazione, in Federalismi, No 5, 2015.

Treaties, on which Article 4(2) TEU itself focuses, would materialise. It therefore aims to bring together two elements emblematic of the entire process of European integration (national identities and equality of the Member States), which as such will have to counterbalance each other in order to restore coherence to the supranational order. And for this to happen, a twofold automatism would have to be dispensed with: the possible infringement of a constitutional value (as interpreted by your Constitutional Judge) by a European rule should not entail the immediate activation of the counter-limits[543] and, in addition, in cases where such a risk emerges, it would be advisable to first make a reference for a preliminary ruling.

This reasoning on the subject of "conflicts" logically links the substantive level with the procedural one, which instead investigates *who,* and *with what instruments,* should intervene in such hypotheses. In fact, any conflict between values presupposes an interaction between the Judges empowered to define the scope of the values themselves. If - as in the case under study - the Constitutional Judge recognises a conflict with a constitutional principle, which is itself incorporated in a value that is also super-primary, he could not immediately rectify the conflict, since he does not have precise knowledge of the scope of the second "term" of the conflict (i.e. the European value). By "precise knowledge" we refer both to the case in which the infringement is raised for the first time on the interpretative level by the constitutional judge without there being any precedents of the Court of Justice attesting to the conflict, and also in the event that the Court of Justice has already recently ruled on the matter, announcing the infringement of Union law, following a reference for a preliminary ruling made by a common court.

In both eventualities, on the other hand, it would seem all the more appropriate for the Constitutional Court to "package"[544] or "re-package" (if there has already been a previous reference for a preliminary ruling) the question for a preliminary ruling, bringing to light the violation of a constitutional value/principle, which needs protection and balancing under Article 4(2) TEU. In other words, by uttering its "first word" (cf. Italian Constitutional Court, Sent. 20/2019), the Constitutional Judge

[543] E. NAVARRETTA, Identità nazionale e primate dell'Unione europea, op. cit.

[544] S. LEONE, Il regime della doppia pregiudizialità alla luce della sentenza n. 20 del 2019 della Corte costituzionale, op. cit., p. 659.

through the preliminary ruling instrument would bring to the attention of the European Judge the possible friction between European law and the constitutional rules, expression of the constitutional identity of the Member State.

From this perspective, the type of preliminary reference could also be particularly relevant. Although abstractly the court of laws could make both a reference of interpretation and one of validity, it is considered that especially the latter could be particularly relevant to resolve what we can briefly call a "conflict of values". In particular, by means of a reference of interpretation, the Constitutional Court could ask for the exact interpretation of the European norm of secondary law in the light of the norms of primary law that define the European identity, in order to be able to understand whether there is a violation with the internal norm of primary rank[545] . However, such a referral may not add much to the referral that the common court might make. Whereas, with the reference of validity, the constitutional court could request a scrutiny of the European rule of secondary law that directly impacts on constitutional identity, and thus on Article 4(2) TEU (provided, as mentioned above, that constitutional identity is not - in turn - in conflict with European identity). Consider, in addition, that the *erga omnes* effect resulting from the acceptance of the valid reference would benefit the entire European order, from which the aforementioned European rule would be expunged[546] .

Regardless of the type of referral, the Court of Justice in its ruling on the *RS* case theoretically imposes the referral by the Constitutional Court in terms of *mandatory nature*, although it does not make explicit the legal basis on which such a duty would be grafted.

The topic is reminiscent, *mutatis mutandis, of* the debate that took place in Italian doctrine following the well-known *obiter dictum* included in pronouncement No. 269 of 2017 of the Italian Judge of Laws. The latter pronouncement made explicit a partial derogation to the "Simmenthal-Granital" rule on the order of the preliminary rulings,

[545] One could exclude the hypothesis that the second term of interpretation could be a national norm of constitutional rank. On the contrary, the European judgement of interpretation (as is known, surreptitiously of validity) would directly affect a constitutional norm, not susceptible to disapplication.

[546] G. SCACCIA, Sindacato accentrato di costituzionalità e diretta applicazione della Carta dei Diritti Fondamentali dell'Unione Europea, in C. AMALFITANO, M. D'AMICO, S. LEONE (eds.), La Carta dei diritti fondamentali dell'Unione europea nel sistema integrato di tutela, Giappichelli, 2022, p. 147 ff.

constitutional and European, that the judge could equally propose. While previously the judge *a quo* was "required" to always give precedence to the European preliminary ruling question, the *obiter dictum* seemed to "impose" the referral of the acts to the Constitutional Court only in cases where the question intersected with rights that were likewise safeguarded by the Italian Constitution.

However, as emphasised by authoritative scholars, the constitutional dictate does not make explicit this form of referral obligation and the Judge of Laws himself has no formal instruments to sanction non-compliance with this obligation[547] . For the sake of completeness, it should be noted how the Italian Constitutional Judge since Sentence No. 20 of 2019 has "tempered" his new jurisprudential rule, clarifying that it arises in terms of expediency and not already of obligation for "*cases of* absolute *constitutional importance*"[548] .

The same could be said of the obligation of the constitutional courts to make a reference for a preliminary ruling. The wording of the Treaties reserves such an obligation to the national court of last resort, in the ranks of which it would be difficult to include the constitutional courts (unless they themselves define themselves as "court of last resort"[549]). Therefore, an interpretation of Article 267(3) TFEU would risk being *contra legem,* and such an obligation should, at most, be explicitly introduced into the Treaties following their amendment.

However, this does not detract from the fact that a reference for a preliminary ruling by the Constitutional Court in these hypotheses remains highly opportune, and the systematic interpretation of the second and third paragraphs of Article 4 TEU, which would erect respect for national identity (para. 2) as a function of the principle of loyal cooperation (para. 3), would lead to this result. To be precise, although not in the sense recalled here, it should be noted how the Court of Justice has repeatedly

[547] F. VIGANÒ, La tutela dei diritti fondamentali della persona tra corti europee e giudici nazionali, in Quaderni costituzionali, no. 2/2019, p. 481 ff.

[548] N. ZANON, Ancora in tema di doppia pregiudizialità: le permanenti ragioni della "precisazione" contenuta nella sentenza n. 269 del 2017 rispetto alla "grande regola" Simmenthal-Granital, in Giornata di studio su "Identità nazionale degli Stati membri, primato del diritto dell'Unione Europea, stato di diritto e indipendenza dei giudici nazionali", cit.

[549] As an example, consider that the Italian Constitutional Court in its first preliminary reference in an incidental case (Order No. 207 of 2013) formally defined itself as 'jurisdiction' under Art. 267 para. 3 (see last sentence of Cons. in dir.).

invoked the violation of the principle of loyal cooperation, for the sole purpose (however) of highlighting the unjustified interruption of its "direct relationship" with the common courts.

In conclusion, the Romanian case takes the "tension" in relations between the legal systems to the highest level. Each of the institutional actors had the opportunity to assert their divergent positions, which, however, remained so due to the failure to attempt to resolve the conflict. The absence of direct cooperation between the Courts has prevented a confrontation aimed at balancing constitutional identity and the primacy of EU law, thus leaving the multiple levels of protection, which would on the contrary have required an integrated solution, disconnected[550], and the common judges struggling to find a common course to follow.

[550] M. D'AMICO, La 'resilienza' della Carta dei Diritti fondamentali, in C. AMALFITANO, M. D'AMICO, S. LEONE (eds.), La Carta dei diritti fondamentali dell'Unione europea nel sistema integrato di tutela, Giappichelli, Torino, 2022, p. 243 ff.

FINAL REMARKS

It can be argued that the underlying objective of creating an ever more intense bond with European citizens characterises both the genesis of the three Communities as well as the European Union today, with particular significance for its future development prospects.

The initial desire to proceed according to the policy of "small steps" did not stand in the way of the Community unveiling its constitutional purpose. An end that, in our view, began to materialise first and foremost with the choice, initially absent from the founding treaties, to protect fundamental rights.

These constitutional dynamics, as is well known, were triggered and found life thanks to the creative jurisprudence of the Court of Justice, which, starting with the *Stauder* case in 1969, enumerated the general principles of Community law as a means of ensuring forms of protection of rights *also* at the European level.

The technical-legal operation connected with the introduction of a specific category within the EU legal system has certainly been of great significance in the European judicial space[551]. The formation of unwritten general principles made it possible to introduce the ECHR and common constitutional traditions into the European constitutional heritage[552], on the basis of which, step by step, referral after referral, contributed to the formation of a European *corpus of* fundamental rights.

It has been effectively noted that, in this context, the Union Judge has played a "constituent" role[553], facilitated first and foremost by the silence of the founding Treaties. Sharing and being fascinated by this perspective, we have, however, wondered when this function really began to pivot to the Union Judge.

[551] M. D'AMICO, Lo spazio giudiziario europeo, op. cit.

[552] A. PIZZORUSSO, Il patrimonio costituzionale europeo, op. cit.

[553] F. BALAGUER CALLEJÓN, Niveles y técnicas internacionales e internas de realización de los derechos en Europa. Una perspectiva constitucional, op. cit., p. 35.

Within the framework of the research conducted, a possible solution can be found in the shift that has taken place on the European jurisprudential front to ensure not only forms of protection (mainly in the economic sphere), but - in a broader perspective - to *guarantee* the fundamental rights of the individual. A clear trace of this shift can be found in the *Schröder* judgment, handed down in early 2000, before the solemn proclamation of the Charter in December of that year, in which the Court, interpreting Article 119 of the TEC, on the subject of equal treatment of women and men, specified that "the economic purpose pursued [by the provision] of the Treaty [...] is of a secondary nature compared to the social objective referred to in the same provision, which constitutes the expression of a fundamental human right"[554] .

Thus, the *constituent* function of the Court of Justice has generated "constitutional effects" in inter-organisational relations, such that - as Rodotà put it - "[t]he integration of markets and a single currency are not by themselves in a position to confer such legitimacy [on the Union], [but] [a]n economic and monetary integration is flanked, as an inescapable step, by integration through rights"[555] .

The question, however, if posed in terms of *legitimacy,* needs vigorous and decisive support both at the normative level, first of all primary law, and at the level of decision-making by the European political institutions.

On this basic assumption, the study in the second chapter was structured, pointing out the milestones reached, the milestones failed and the milestones still to be reached.

In summary on these three.

The awareness of the political institutions was first developed in acts of *soft law* and then in the crystallisation in a positive Treaty provision, Article F of the Maastricht Treaty, which had the consequence of legitimising the work of the Court of Justice, but also of reaffirming the functionalist perspective of the entire European integration process. Subsequently, again from the perspective of "small steps", came the solemn proclamation of the Nice Charter, which initially lacked binding legal effects.

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[554] Schröder judgment, cit., on which, see S. LEONE, *I diritti sociali nell'ambito della Carta di Nizza*, op. cit.

[555] S. RODOTÀ, La Carta come atto politico e documento giuridico, op. cit., p. 59.

The Constitutional Treaty, on the other hand, proved that the time was not ripe to take the next step, considered by some to be "longer than the leg". However, this failure has made a necessity emerge: to act in the constitutional construction of Europe "from below" and not to drop systemic changes "from above"[556] . This consideration remains, in our view, a solid anchor for identifying the steps to be taken, although today the Nice Charter has primary status and, as such, its norms are endowed with "primacy" and potentially even direct effects[557] .

This perspective is confirmed by the precarious responses that European policy has sometimes provided to the economic crisis, first, and then to the crisis of common values. With reference to the latter, more emphasis was given in the second part of chapter two, where the tendency of the Court of Justice, with the "support" of the Commission, to decline, in case law (and thus, only on a case-by-case basis), the trinomial *values, principles* and *rights was* noted, in a situation of complete political *impasse* that still requires general solutions. One thinks, in particular, of the stalemate in which the European political institutions find themselves in pursuing the procedure *under* Article 7 TEU, the only one provided for by the Treaties for the violation of common values and whose centre of gravity still rests too much on the power of governments alone.

To make up for these shortcomings, the regulation on cross-compliance was concocted, which, despite its more limited scope, is unlikely to be the means to solve "the problem". With the added risk of increasing the distance between the Union and the citizens of the countries concerned, on whom the consequences of the misappropriation of funds are then likely to be felt.

The tone of the conflict is increasingly characterised by constitutionalist accents and less and less by internationalist ones. Therefore, a possible solution can be found in the greater involvement of the representative institution, the European Parliament, in the context of the procedure under Article 7 TEU, possibly also with the provision of qualified majorities. This thesis is based on the assumption that the necessary "political" assessment of what the values and principles underpinning the Union *actually are* should be made by the subjects representing the peoples of Europe. If this

[556] M. D'AMICO, Trattato di Lisbona: principi, diritti e "tono costituzionale", op. cit., p. 71.

[557] See A. AGUILAR CALAHORRO, *Naturaleza y eficacia de la Carta*, op. cit., passim.

were the case, it would also bridge that "constituent" *gap*, hitherto left only to the judges.

To borrow an evocative expression from Prof. Balaguer, "the Court of Justice has been given too much power but has also been asked to do too much": the constituent function of the Court must be associated with the legislative function, and must not replace the latter[558] .

Not only can it not do *everything,* but above all it cannot do everything *alone*. This is the outcome of the third, and final, chapter focusing on the relationship between certain constitutional courts and the Court of Justice, where a "variable geometry" picture emerged.

In particular, the analysis lingered on the choice of specific constitutional jurisdictions, such as the Italian, Spanish, Polish and Romanian ones, from which three different approaches emerged in referring the question to the EU court for a preliminary ruling.

The first approach is what we have called the dialogic-cooperative approach, which is constituted by the Italian experience. In fact, the Constitutional Court, starting from Judgment No. 269 of 2017, reaffirming its role in the field of the protection of rights, has specified the virtues of its "dialogue" with the Court of Justice in the field of fundamental rights, at the outcome of which the Judge of Laws can declare, with *erga omnes* effects, the unconstitutionality of the national rule that violates, at the same time, both the Charter of Rights and the Italian Constitution. This cooperation is necessary since, although there is "repetition" in two different sources of the "same" rights, it is not automatic that this produces *more* protection. Therefore, in order to achieve integration between the two sources, and therefore between the two levels of protection, a preliminary reference by the Constitutional Judge will be necessary. From this perspective, of particular importance is the circumstance where the Constitutional Court makes a preliminary reference, not only of interpretation, but also of validity. In the latter case, the Union Court would be asked to examine the validity of the European rule, often of secondary law, which implements the rights of the Charter, in order to possibly eliminate the underlying "flaw" at the root, thus expunging the same European rule for all States.

[558] F. BALAGUER CALLEJÓN, loc. cit., pp. 36-37.

The second approach analysed is the Spanish one, which, unlike the Italian one, is much less focused on the prospects of cooperation between the *Tribunal constitutional* and the Court of Justice, and more on the mechanism of disapplication. There are at least two aspects that affect this approach: the first concerns the fact that in the context of Spanish constitutional jurisprudence, the Charter's norms cannot take on the value of an interposed parameter[559] ; the second concerns the "nefarious" outcomes of the Melloni case, the first (and so far the only) referral of the *Constitutional Tribunal* to the Court of Justice. There followed, probably also as an implicit consequence of the Melloni case, a particularly rigorous jurisprudence of the *Tribunal in* assessing, in the direct appeal, the choice of the judge of last instance not to refer to the Court of Justice, almost as if to avoid as much as possible "his" opportunities for dialogue with the Court of Luxembourg, making sure that this is activated by the common court.

The last approach is the one that has characterised the Polish and Romanian experience of deliberately not wanting to go to the Court of Justice, immediately declaring as *ultra vires* either the EU rule or the European ruling that EU law prevails in the national court. The effects of the lack of dialogue risk producing rifts both within the Union and within states, thus gradually disintegrating the hitherto painstakingly constructed European integration project.

Ultimately, the search for the important means of balancing the Europe of the Judges and political Europe not only consolidates European integration through its *Community of Rights*[560] , but also makes the protection of the latter increasingly indispensable for the Union to endow itself with those *constitutional peculiarities that have* long been announced, but not yet effectively assumed.

[559] See M. AZPITARTE SÁNCHEZ, El Tribunal Constitutional ante el control del derecho comunitario derivado, op. cit. p. 184 ff.

[560] M. D'AMICO, *Comunità di diritti*, op. cit.

CONCLUSIONES

Se puede afirmar que el objetivo fundamental de establecer un vínculo cada vez más fuerte con los ciudadanos europeos caracteriza tanto el origen de las tres Comunidades como la Unión Europea hoy en día, y también influye en sus futuras perspectivas de desarrollo. La intención inicial de seguir la política de "pequeños pasos" no impidió que la Comunidad revelara su propósito constitucional. Este propósito, en nuestra opinión, comenzó a materializarse principalmente con la elección, inicialmente ausente en los tratados fundacionales, de proteger los derechos fundamentales.

Estas dinámicas constitucionales, como se sabe, fueron desencadenadas y alimentadas gracias a la jurisprudencia creativa del Tribunal de Justicia, que, a partir del caso *Stauder* en 1969, articuló los principios generales del derecho europeo como una herramienta para garantizar formas de protección de los derechos a nivel europeo. La operación técnico-jurídica relacionada con la introducción de una categoría específica en el ordenamiento jurídico comunitario fue de gran importancia en el espacio judicial europeo[561]. La formación de principios generales no escritos permitió la incorporación del Convenio Europeo de Derechos Humanos (CEDH) y las tradiciones constitucionales comunes en el patrimonio constitucional europeo[562], sobre la base de las cuales, contribuyeron a la formación de un corpus europeo de derechos fundamentales.

Se ha señalado de manera efectiva que, en este contexto, el Juez de la Unión desempeñó un papel "constituyente"[563], facilitado en gran medida por el silencio de los Tratados fundacionales. Compartiendo y sintiéndonos fascinados por esta

[561] M. D'AMICO, Lo spazio giudiziario europeo, op. cit.

[562] A. PIZZORUSSO, Il patrimonio costituzionale europeo, op. cit.

[563] F. BALAGUER CALLEJÓN, Niveles y técnicas internacionales e internas de realización de los derechos en Europa. Una perspectiva constitucional, op. cit., p. 35.

perspectiva, nos hemos preguntado cuándo comenzó realmente esta función a pivotar en el Juez de la Unión.

Dentro del marco de la investigación realizada, una posible solución se puede encontrar en el desarrollo que ocurrió en la jurisprudencia europea destinada a garantizar no solo formas de protección (principalmente en la esfera económica), sino también a garantizar los derechos fundamentales del individuo. Un claro ejemplo de este desarrollo se encuentra en la sentencia *Schröder*, emitida en los primeros meses de 2000, antes de la solemne proclamación de la Carta en diciembre del mismo año, en la que el Tribunal, al interpretar el artículo 119 del TCE, relacionado con la igualdad entre mujeres y hombres, afirmó que "el propósito económico perseguido [por la norma] del Tratado [...] es secundario en relación con el objetivo social de la misma disposición, que constituye la expresión de un derecho fundamental de la persona humana" [564].

Por lo tanto, la función constituyente del Tribunal de Justicia ha generado "efectos constitucionales" en las relaciones interorganizacionales, de modo que, como afirmó Rodotà, "[l]a integración de los mercados y una moneda única por sí solos no son capaces de conferir tal legitimidad [a la Unión], [pero] [j]unto a la integración económica y monetaria existe una integración a través de los derechos" [565].

Sin embargo, si se plantea en términos de *legitimidad*, este problema requiere un fuerte y decidido apoyo tanto en términos normativos, principalmente en el derecho primario, como en términos del proceso de toma de decisiones por parte de las instituciones políticas europeas.

Sobre esta premisa fundamental, se estructuró el estudio en el segundo capítulo, destacando los hitos alcanzados, los fallidos y los que aún están por alcanzar.

En resumen, en estas tres áreas, la conciencia de las instituciones políticas se desarrolló primero a través de actos de *soft law* y luego se cristalizó en una disposición positiva del Tratado, el artículo F del Tratado de Maastricht, que tuvo la consecuencia de legitimar las acciones del Tribunal de Justicia, pero también reafirmó la perspectiva funcionalista de todo el proceso de integración europea. Posteriormente, en el espíritu

[564] Sentencia Schröder, cit., al respecto, véase S. LEONE, I diritti sociali nell'ambito della Carta di Nizza, op. cit.

[565] S. RODOTÀ, La Carta come atto politico e documento giuridico, op. cit., p. 59.

de “pequeños pasos”, se produjo la solemne proclamación de la Carta de Niza, inicialmente carente de efectos jurídicos vinculantes.

El Tratado constitucional, sin embargo, demostró que no era el momento adecuado para dar el siguiente paso, considerado por algunos como “más allá de nuestras posibilidades”. Sin embargo, este fracaso trajo consigo una necesidad: actuar en la construcción constitucional de Europa “desde abajo” en lugar de imponer cambios sistémicos “desde arriba” [566]. Esta consideración, en nuestra opinión, sigue siendo un anclaje sólido para identificar los hitos que deben alcanzarse, aunque hoy en día la Carta de Niza tenga un estatus primario y, como tal, sus disposiciones tengan “primacía” y posiblemente incluso efectos directos[567].

Esta perspectiva se confirma con las respuestas precarias que en ocasiones ha proporcionado la política europea a la crisis económica primero y a la crisis de valores comunes después. En cuanto a esta última, se ha puesto más énfasis en la segunda parte del segundo capítulo, donde se observó que el Tribunal de Justicia, con el “apoyo” de la Comisión, tiende a declinar, a través de la jurisprudencia (y, por lo tanto, caso por caso), la trinidad de *valores, principios* y *derechos* en una situación de completo estancamiento político que todavía requiere soluciones generales hoy en día. Esto se refleja, en particular, en el estancamiento en el que se encuentran las instituciones políticas europeas para avanzar en el procedimiento del artículo 7 del TUE, el único previsto en los Tratados para la violación de valores comunes y cuyo centro de gravedad sigue estando demasiado en manos de los gobiernos.

Para compensar estas deficiencias, se ha ideado el reglamento sobre condicionalidad, que, a pesar de su alcance más limitado, podría no ser el medio para resolver “el problema”. También existe el riesgo adicional de aumentar la brecha entre la Unión y los ciudadanos de los países afectados, sobre los que las consecuencias de la retirada de fondos probablemente tendrán un impacto.

El tono del conflicto está cada vez más caracterizado por acentos constitucionales y menos por acentos internacionalistas. Por lo tanto, una posible solución podría encontrarse en la mayor participación de la institución representativa, el Parlamento Europeo, en el marco del procedimiento establecido en el artículo 7 del

[566] M. D’AMICO, Trattato di Lisbona: principi, diritti e “tono costituzionale”, op. cit., p. 71.
[567] Cfr. A. AGUILAR CALAHORRO, *Naturaleza y eficacia de la Carta,* op. cit., *passim*.

TUE, posiblemente incluso con la previsión de mayorías cualificadas. Esta tesis se basa en la premisa de que la evaluación "política" de los valores y principios que sostienen *concretamente* la Unión debe ser realizada por los sujetos que representan a los pueblos europeos. En tal caso, se llenaría el vacío "constituyente" que hasta ahora solo han ocupado los jueces.

Retomando una expresión evocadora del Profesor Balaguer, "se le han dado demasiados poderes al Tribunal de Justicia, pero también se le ha pedido que haga demasiado": la función constituyente del Tribunal debe ir de la mano con la función legislativa y no debe reemplazarla.

No solo no puede hacer todo, sino que sobre todo no puede hacerlo todo por sí *solo*. Este es el resultado al que se llegó al final del tercer y último capítulo, centrado en las relaciones entre algunas Cortes constitucionales y el Tribunal de Justicia, donde se ha revelado un panorama de "geometría variable".

En particular, el análisis se centró en la elección de jurisdicciones constitucionales específicas, como las italianas, españolas, polacas y rumanas, de las cuales surgieron tres enfoques diferentes para remitir cuestiones prejudiciales al Tribunal de Justicia de la Unión Europea.

El primer enfoque es el que hemos denominado "dialogante y cooperativo", que es la experiencia italiana. De hecho, el Tribunal Constitucional, a partir de la sentencia n.º 269 de 2017, reafirmando su papel en la protección de los derechos, ha destacado las virtudes de su "diálogo" con el Tribunal de Justicia en cuestiones de derechos fundamentales, al final del cual el Juez de las Leyes puede declarar la inconstitucionalidad de la norma nacional que viola tanto la Carta de Derechos como la Constitución italiana, con efectos *erga omnes*. Esta cooperación es necesaria, ya que aunque exista una "repetición" en dos fuentes diferentes de los "mismos" derechos, no es automático que esto produzca una *mayor* protección. Por lo tanto, para lograr una integración entre las dos fuentes, y por lo tanto entre los dos niveles de protección, será necesario que el Juez Constitucional remita la cuestión prejudicial.

En esta perspectiva, cobra especial importancia el hecho de que el Tribunal Constitucional formule una cuestión prejudicial no solo de interpretación, sino también de validez. En este último caso, el Juez de la Unión estaría obligado a evaluar la validez de la norma europea, a menudo de derecho derivado, que implementa los

derechos de la Carta, con el fin de eliminar eventualmente el "defecto" en su raíz, eliminando así la misma norma europea para todos los Estados.

El segundo enfoque analizado es el español, que, a diferencia del italiano, se centra mucho menos en las perspectivas de cooperación entre el Tribunal Constitucional y el Tribunal de Justicia, y más en el mecanismo de inaplicación. Esto ocurre incluso cuando surge un conflicto entre una norma nacional y una disposición de la Carta de Derechos, que se aplica en virtud de su artículo 51, párrafo 1.

Al menos dos aspectos influyen en este enfoque: el primero se refiere al hecho de que, en la jurisprudencia constitucional española, las disposiciones de la Carta no pueden asumir el papel de un parámetro intermedio[568]; el segundo se refiere a los resultados "desastrosos" del caso Melloni, la primera (y hasta ahora única) cuestión prejudicial del Tribunal Constitucional al Tribunal de Justicia. Probablemente como consecuencia implícita del caso Melloni, ha seguido una jurisprudencia particularmente rigurosa por parte del Tribunal Constitucional en la evaluación, en los recursos directos, de la elección del juez de última instancia de no remitir al Tribunal de Justicia, casi como si quisiera evitar sus "propias" oportunidades de diálogo con el Tribunal de Luxemburgo, asegurándose de que esto sea activado por el juez común.

El último enfoque es el que caracterizó la experiencia polaca y rumana de no recurrir deliberadamente al Tribunal de Justicia, declarando inmediatamente como *ultra vires* la norma de la UE o la sentencia europea que impone la primacía del derecho de la UE a nivel nacional. Los efectos de la falta de diálogo pueden causar fracturas tanto dentro de la Unión como en los Estados, socavando gradualmente el proyecto de integración europea que se ha construido con esfuerzo hasta ahora.

En conclusión, las relaciones entre los Estados y la Unión todavía no están completamente consolidadas en el ámbito político, debido a las dificultades que surgen al tomar decisiones compartidas sobre valores comunes que afectan la protección de los derechos, así como en lo que respecta a las relaciones entre jueces europeos y jueces constitucionales, que no están inequívocamente orientadas hacia formas de cooperación garantista. Esto genera desequilibrios crónicos entre la Europa de los Jueces y la Europa política, los cuales probablemente solo se reducirán si se dan pasos

[568] Cfr. M. AZPITARTE SÁNCHEZ, El Tribunal Constitutional ante el control del derecho comunitario derivado, op. cit., p. 184 ss.

reales en el proceso de constitucionalización de la Unión. En este sentido, la búsqueda de herramientas constitucionales de equilibrio no solo fortalecería la integración europea a través de su *Comunidad de Derechos*[569], sino que también haría que la protección de estos derechos sea cada vez más indispensable para asegurar que la Unión adopte las características constitucionales que han sido anunciadas durante mucho tiempo, pero que aún no se han asumido efectivamente.

[569] M. D'AMICO, *Comunità di diritti*, op. cit.

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