FUNDAMENTAL COMMUNITY RIGHTS: THE EUROPEAN COMMUNITY COURT OF JUSTICE, TREATIES AND *BILL OF RIGHTS*[*]

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This paper aims at exploring the origins and major features of the European Union's fundamental rights. These rights initially underwent a jurisprudential phase and later a statutory phase when they were introduced in the EU Treaties, especially since the Amsterdam Treaty. This study occurs in a period when political and institutional initiatives have been developed in order to complete the European 'constitutionalization process' concerning organisational principles and fundamental rights. The paper mainly focuses on two aspects. The first aspect is the Kreil case analysis, which highlights the overcoming of a traditional resistance by a national constitutional Court (the German one) towards the principle of superiority of European Union law over a national constitutional law concerning fundamental rights. The second aspect analyses the protection of fundamental rights and social rights in particular, according to the Charter of Nice, which are still considered as 'goal rights', as opposed to 'claim rights'.

1. Fundamental Community rights: a judicial creation

An examination of the slow evolution of how fundamental Community rights are to be protected – at least up until the Maastricht Treaty, where respect for basic rights was affirmed as a value for the first] time in the Community legal order[1] – makes it clear that the Court of Justice and its rulings have played a central role in this process. The notion of general principles elaborated by

[1] In this regard, see, in particular, E. Pagano, "I diritti fondamentali nella Comunità europea dopo Maastricht", in *Il diritto dell'Unione Europea,* 1996, n. 1, p. 164 ss.

the Court itself includes a reconstruction of both what forms of protection already exist and why they are needed.

This reconstruction, eminently judicial in the beginning and later on included in Community Treaties' provisions, has greatly influenced Member States' judicial norms[2]. Since Nice, it has brought the Member States of the European Union to emphasize the need for visibility and a subsequently interconnected protection of basic rights, through the approval of a Charter of Fundamental European Rights.

Due to the fact that there is no catalogue of rights that were present in the original Community Treaties and that were subsequently modified and integrated, it is only within the general principles of Community law – and as part of their basic content – that these fundamental rights can be found, especially from the 1970's onward. It is with regards to these basic rights that the Court of Justice recognizes its competence in "vigilating" over them[3].

The provisions found in the European Economic Communities' Treaties make up a sufficiently clear legal base for the definition and the delimitation of the Court of Justice's areas of competence. It is, in fact, called upon to assure "the respect of the law in the interpretation and the application of the present Treaty" (art. 220 ECT), thus availing itself of the previsions mentioned in ECT art. 288 regarding the "general principles held in common with the laws of the Member States". A Community legal system based on general principles originated from and was developed around these provisions[4], which the same Community Court later invoked, first prudently and then with determination, as "parameters of the legitimacy of acts emanated by Community bodies"[5], recognizing

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[2] See G. Tesauro, "Il ruolo della Corte di Giustizia nell'elaborazione dei princìpi generali dell'ordinamento europeo e dei diritti fondamentali", in AA.VV. (A.I.C.), *La Costituzione europea,* Padova, 2000, p. 305 ss.; A. Adinolfi, "I princìpi generali nella giurisprudenza comunitaria e la loro influenza sugli ordinamenti degli stati membri", in *Rivista italiana di diritto pubblico comunitario,* 1994, p. 525 ss.

[3] See *Stauder* Judg., 12nd november 1969, case 29/69, in *Racc. Uff.* 1969, p. 420; *Internationale Handelsgesellschaft* judg., 17th December 1970, case 11/70, in *Racc. Uff.* 1979, p. 1125; *Hauer* judg., case 44/1979, in *Racc. Uff.* 1979, p. 3727.e

[4] That, on principle, restrict their significance to the liability in tort of the Community and to the consequent compensatory obligations (art. 288.2 ECT, vers. cons.).

[5] Sec G. Gaja, "Princìpi del diritto (dir. intern.), in *Enc. dir,* p. 542.

them, as such, as norms capable of establishing rights and obligations[6].

It is within this principally case law context that the judicial foundation of fundamental human rights[7] is collocated, being, as they are, conceived as an integral and necessary part of a legal system that fully recognizes itself as a "legal Community"[8], thus concurring as a sort of *Bill of Rights* of the European Constitution (in the process of being perfected and legitimised), and contributing to the creation of an essential component of European Community constitutional law.

A study on the material content of the Court of Justice case law with regards to basic Community principles and rights also leads to a consideration about how constitutional scholarship, and previously international scholarship as well, has dedicated ever more attention to the dialogue between National Constitutional Courts and the Community Court. This dialogue's goal is to assure that the various National Constitutional Courts become ever closer to each other, through the "circulation of the principles from some Member States' laws to Community law, and from this body to the legal systems of other Member States" [9].

In this dialogue between Courts, the problems posed by the constitutional limitations ('counter-limitations'), which the single National constitutional legal systems can turn to when faced with a potential limitation of their powers, especially in regards to

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[6] Sec G. Tesauro, "Il ruolo della Corte di Giustizia ...*cit.*, p. 298. See too A. Adinolfi, "I princìpi generali ... *quot.*, p. 561 ss.; P. Pescatore, "Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison de droits des Etats membres", in *Revue internationale de droit comparé,* 1980, p. 337 ss.; V. Capelli, "I princìpi generali come fonte di diritto", in *Diritto comunitario e degli scambi internazionali,* 1986, p. 541; G. Gaja, "Aspetti problematici della tutela dei diritti fondamentali nell'ordinamento comunitario", in *Rivista di diritto internaz.,* 1988, p. 574.

[7] Though the aim of this paper is to stress the general principles created through case law, and among them, fundamental rights, the dynamic approach necessary to take the need for their positive application into consideration, can not be disregarded. On this subject, we can suggest, for instance: the *Dichiarazione comune del Parlamento europeo, del Consiglio e della Commissione* of 5th April 1977 on the respect of fundamental rights (G.U.C.E. on 27/4/1977, C. 103).

[8] CJEC judg., 23rd April 1986, case 294/83, in *Racc. Uff.* 1986, p. 1339 e 1365.

[9] See also A. Adinolfi, "I princìpi generali ... *cit.*, p. 524.

supreme principles and fundamental rights, take on a prominent position.

Moreover, this dialogue – considering the current state of things and the delays encountered in (necessarily) overcoming the Community's constitutional *deficit* – seems to be important for the development of the process of Community integration. The most complete prospective for the development of this process is, in this phase, one that takes into consideration a (necessary) "cohabitation" of legal systems, which requires that the Constitutional Courts and the Court of Justice develop a "cooperative relationship"[10]. This type of relationship allows for the constitutional union of Community norms to remain fully active, as a contrast to basic Community system principles through the legal control of Treaty reinforcement. At the same time, it gives judges the possibility to use those tools of interpretation and persuasion that allow the needs of the constitutional systems of the single Member States and their relative fundamental elements to be taken into consideration on a European level (and especially before the Court of Justice), without having to declare Community norms unconstitutional[11].

Up until this point, we have briefly recalled how the general principles of Community law have been a creative force in establishing law (and rights), and how important the dialogue is between the national constitutional legal orders and the Community Court. It is now necessary to outline how the Court of Justice has been instrumental in the creation of a "catalogue", albeit limited, of fundamental Community rights, due to the fact that for a long period there were no specific provisions made for fundamental rights in the Community Treaties. Only recently, first in the Maastricht Treaty and then in the Treaty of Amsterdam, were the respect for human

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[10] See also M. Cartabia, *Princìpi inviolabili e integrazione europea,* Milano, 1995, p. 241; A. Pizzorusso, Il patrimonio costituzionale europeo, Bologna, 2002; L. Dubois, "Le role de la Cour de justice des Communautés européennes. Objet et portée de la protection", in Cour Constitutionnes et droits fondamentaux", in L. Favoreau, *Cours constitutionelles et droits fondamentaux,* Aix-en-Provence, 1983.

[11] See also M. Cartabia, *Princìpi inviolabili ... quot.,* p. 242. This is also currently the orientation of the Constitutional Court, as can be noticed in its first controversial case between Community rules and supreme values of the Italian Constitutional system (judg. C.C. n. 232 in 1989), to which the Community Court recently seems to adhere (judg. on 26th april 1994, case 228/94).

rights and for the fundamental freedoms of the person made part of the European Union's foundations, together with freedom, democracy and of the legal State as principles common to all Member States.

1.1 Fundamental rights in Community case law

It is here useful to briefly outline the evolution of case law in relation to fundamental rights, as well as to highlight the more significant elements involved in this evolution, so as to discuss how the recognition of such rights has taken shape and how effective the measures adopted to protect them really are.

After a first phase of substantial indifference to this subject, it was only in the 1960s, with the *Stauder*[12] case, and then especially with the historical 'preamble' in the *Internationale Handelsgesellschaft*[13] case, that the Court of Justice recognized that the

> *"protection of fundamental rights constitutes an integral part of the general legal principles whose observance is guaranteed by the Court of Justice"*

and that

> *"the protection of these rights, while being informed by the constitutional traditions of the Member States, must be guaranteed by the structure and the goals of the Community".*

In the *Internationale Handelsgesellschaft* case, the Court of Justice, for the first time ever, asserted the central notion of the "constitutional traditions held in common by the Member States" in determining the material content of Community law general principles, and recognized that the protection of fundamental rights is an integral part of these principles. With the later *Nold* case[14], the Court of Justice completed such a recourse to common constitutional traditions by incorporating internationally used tools for the protection of human rights and of basic freedoms (which the Member States cooperate or agree with).

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[12] 12th November 1969, case 29/69, in *Racc. Uff.* 1969, p. 420.
[13] 17th December 1970, case 11/70, in *Racc. Uff.* 1970, p. 1125.
[14] 14th May 1974, case 4/ 73, in *Racc. Uff.* 1974, p. 491.

After this case law ruling by the Community Court, the incorporation of fundamental rights in Community law was considered fully accomplished, at least in the sense that the law is applicable not only to Institutions and Community acts (as established in the *Wachauf* case[15]), but also to norms regarding the Member States themselves and reinforced by Community law. The only national norms that can be excluded from such reinforcement regard those that have no connection whatsoever with Community law (as established in the *Kremzow* case[16]). In this manner, the idea that the fundamental rights guaranteed and protected by the Court of Justice are "fundamental rights, yes ... but in the sense that they are instrumental in obtaining the Treaties' economic goals, i.e. as guarantees for the Community system[17]", is fully emphasized.

It is not the case here to examine the reasons behind this ruling's orientation, having to concentrate, instead, on how it has accompanied the affirmation of the principles of the supremacy and direct applicability of Community law within the national systems.

For the goals of such an analysis, it could be useful to refer to Italian constitutional case law and how it has dealt with the issue of fundamental rights in reference to Community law.

In the *Frontini* (27th December 1973) case, the Constitutional Court, while fully confirming the principles of the supremacy and direct applicability of Community law, expressed considerable

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[15] 13th July 1989, case 5/88, in *Racc. Uff.* 1988, p. 2609, in which, the CJEC acknowledges that "fundamental rights are an integral part of general legal principles whose observance is ensured by the Court. To accomplish this task, it is necessary to comply with the constitutional traditions common to Member States, so that remedies which are incompatible with the fundamental rights acknowledged by their Constitutions can not be accepted by the Community (our translation)", the Court adds that "*the fundamental rights recognized by the Court are not absolute* (our italics) but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common market organization, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights"

[16] 29th May 1997, case C-299/95, in *Racc. Uff.* 1995, p. I-2695.

[17] See also G. Tesauro, "Il ruolo della Corte di Giustizia ... *quot.*, p. 313; E. Pagano, "I diritti fondamentali ...quot., p. 170, in part. note 22.

reservations towards fundamental rights[18], by underlining the basically instrumental nature of the protection of these rights by the Court itself. The Court expressed a similar position in the *Fragd / Amministrazione Finanze Stato* (21st April 1989)[19] case.

However, the method applied by the Court of Justice in its judicial construction of community fundamental rights does cause for some perplexity.

Indeed, due to a lack of strict previsions in the Treaties with regards to their role as guarantors of the "respect of the law in the interpretation and application of the ..... Treaty" (art. 220 and 230 ECT, vers. cons.), the Community Court has undeniably applied an overly wide interpretation of the Treaties' provisions in terms of extra-contractual liabilities. As mentioned earlier, it has done so by

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[18] Const. Court judg. n. 183 of 1973: "On the other hand, it must be recalled that the jurisdiction of EEC bodies is provided for by the art.189 of the Treaty of Rome, restricted to subject-matters concerning economic relations, that is to subject-matters with regard to which our Constitution decrees the legal reserve or reference, but the precise and accurate provisions of the Treaty provide a certain guarantee, so that the hypothesis that a community regulation may affect civil, ethical-social and political relations, through provisions contrasting the Italian Constitution, even though abstractly, appears difficult to affirm. It is only necessary to add that under art. 11 of the Constitution, sovereignty restrictions are allowed only for the pursuance of the aims here indicated; *and it must be refused to believe that such restrictions ... in any case may mean that of EEC bodies have the unacceptable power to break the fundamental principles of our constitutional system, or the inalienable rights of human beings" (our italics and translation).* In this regard, see too G. Recchia, "Osservazioni sul ruolo dei diritti fondamentali nell'integrazione europea", in *Diritto e società*, 1991, n. 4, p. 133 ss.

[19] Const. Court judg. n. 232 of 1989: "The truth is that the community system ... envisages a wide and effective system of judicial protection of rights and individual interests, whose incidental application to the Court of Justice, under the ex art. 177 of the EEC Treaty, is the most important instrument; and it is also true that fundamental rights, inferable by principles common to Member States' systems, are... an integral and essential part of the community system. But this does not mean that the jurisdiction of this Court can fail to ascertain, through the review of constitutionality of legal enforcement, that any rule of the Treaty, so as it is interpreted and applied by Community institutions and bodies, does not quarrel with the fundamental principles of our constitutional system or compromise the inalienable rights of human beings. In substance, what is extremely unlikely is anyway possible; besides, it is worth considering that, theorically at least, *it may not be certainly recognised that all fundamental principles of our constitutional system are among principles common to Member States' systems and, therefore, are part of the community system"* (our italics and translation).

"referring to general principles also in those matters where it is not foreseen to do so, at least explicitly, in the institutive Treaties"[20].

In conclusion, it has been by following this line in case law that the Court of Justice has elaborated a "literal catalogue of fundamental rights"[21], although restricted to the category of civil rights[22] and to those subjective legal situations regarding the effectiveness of legal protections[23], and especially those regarding economic and social issues[24].

1.2 The recent evolution of Community case-law with reference to fundamental rights (Kreil case)

With the recent *Kreil*[25] sentence, emitted by the Community Court in relation to a fundamental right not recognized by art. 12.a of the BFL (prohibition to discriminate between men and women in job access and particularly in the armed forces), the Community frontier for fundamental rights seems to have been moved considerably forward. It brings back to the forefront the recurring issue of the relationship between the supremacy of Community law and the superiority of national constitutional legal systems. In the light of such a ruling, Community law is rightly seen by Spanish scholarship as being "a danger and an opportunity" for rights[26].

In the interpretation of the 76/207 EEC Directive referring to the

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[20] See G. Gaja, "Princìpi del diritto (dir. intern.)", in *Enc. dir*, pp. 542/3.

[21] See E. Pagano, "I diritti fondamentali ... *quot.*, p. 169.

[22] See E. Pagano ("I diritti fondamentali ... *quot.*); see too, among others, G. Tesauro, "Il ruolo della Corte di Giustizia ...quot., p. 309 ss.; A. Apostoli, *La 'Carta dei diritti' dell'Unione Europea,* Brescia, 2000.p. 20 ss.; L. Cassetti, "Princìpi supremi e diritti fondamentali nel Trattato di Amsterdam", in *Gazzetta Giuridica*, 1999, n. 36, p. 6.

[23] See E. Pagano, "I diritti fondamentali ... *cit.*.

[24] See E.Pagano, "I diritti fondamentali ... *cit.*.

[25] 11th January 2000, case C-285/1998.

[26] See M.A. Cabellos Espiérrez, "La contribución del derecho comunitario a la interpretación de los derechos constitucionales: la sentencia de TJCE de 11 de enero de 2000 (*Kreil*) y el art. 12.a de la Constitución alemana", in M.A. Aparicio (edited by), *Derechos constitucionales y formas politicas,* Barcelona, 2000, p. 757 ss.; A. Barbera, "La Carta dei diritti dell'Unione Europea", Report to the Meeting to the memory of Paolo Barile (Firenze, 25th June, 2001) (*paper*); A. Pizzorusso, "La codificazione internazionale dei diritti fondamentali e la loro influenza sugli ordinamenti nazionali" (*paper*) and by the same Author, "La Carta dei diritti

prohibition of sexual discrimination in job access, the Court of Justice reaches the conclusion that the above-mentioned Community directive "*allows for the application of National norms*[27], such as those of German Constitutional Law which exclude, in general, woman from military jobs that include the use of weapons and that authorize access to women only in medical and in military-music services".

By recognizing the contrast between this Directive and art.12.a of the BFL, the Community Court considers the latter constitutional provision inapplicable and thus prevents it from being interpreted as a source of general Constitutional exclusion of women from service that involves the use of weapons.

When examining this ruling even on a basic level, with regards to the relationship between Community law and national constitutions, it seems to confirm the conviction that Community rulings must not be considered limitations regarding those protections that are guaranteed on a National level, unless the rulings can be used as a "reinforcement of protections" [28]. Community rulings are not to be intended as having a binding effect (although that would be auspicious) on constitutional review done by the single national constitutional systems, but rather are to be considered as a sort of interpretative guideline for national law and especially in those regarding constitutional law.

Briefly over-viewing the *Kreil* case, the Court explains here in greater detail what its role is in the control of the application of Community law, which has to do with identifying absolutely compulsory levels of protection of fundamental rights, borrowing thus their "essential content" from art. 19.2 of the BFL. The Court also affirms, however, that the jurisdiction of the National Constitutional Courts will be exercised in a "cooperative relationship" with the Court of Justice.

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fondamentali dell'Unione Europea: le principali tappe preparatorie", in G. Rolla (edited by), *Tecniche di garanzia dei diritti fondamentali,* Torino, 2001; E. Denninger, "I diritti fondamentali nel quadro dell'Unione Europea", in *Osservatorio costituzionale Luiss,* 1999.

[27] Our italics

[28] See M.A. Cabellos Espiérrez, "La contribución del derecho comunitario a la interpretación de los derechos constitucionales: la sentencia de TJCE de 11 de enero de 2000 (*Kreil*) y el art. 12.a de la Constitución alemana", in M. A. Aparicio, *Derechos constitucionales ... quot.,* p. 779.

shall not prevent Union law providing more extensive protection." (art. 52.3), and "nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions." (art. 53).

In contrast to the aforementioned orientation, which is obviously the product of particular cultural sensitivity, there appears another, which many consider to be the only one possible, although not free of problems. This can be defined as a "constitutionalization of the 'interpretative coordination', that could be guaranteed by the Constitutional Court"[37]. This solution recalls the often mentioned problems regarding coordination between sovereign legal systems and, as of today, confirms how the incorporation of Convention provisions in Community law has come about by applying art. 220 of the ECT. This article set the foundation on a judicial level for general legal principles and, among them, fundamental rights. It left the way open, however, as verified in the past, for possible censure by the Court of Human Rights of acts or behaviours carried out by Community institutions that were damaging towards such rights.

On the other hand, the Amsterdam Treaty completely avoided the whole issue. Although it makes provisions for the respect of fundamental rights as guaranteed by the Rome Convention in art. 6.2 and for the power to verify grave and persistent violations of the principles ratified under art. 6 of the EUT in art. 7.1, it does not face the crucial question regarding guarantees of fundamental rights within the Community. These remain basically delegated to those institutions and the prevalently International approach mentioned in art. 7 of the EUT[38].

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[37] See F. Cocozza, *Diritto comune ... quot.*, p. 134.

[38] See E. Pagano, "I diritti fondamentali ...*quot.*, p. 195; L. Cassetti, "Princìpi supremi ... *quot.* p. 9 ss.

1.3 The 'Constitutional traditions common to Member States'

The analysis of the modalities adopted by Community judges in their legal creation of 'principles and Constitutional traditions common to Member States', and in reference to such 'principles and traditions' when attempting to assure a solid base of the recognition and protection of fundamental Community rights, leads to similar considerations as above.

Legal scholarship stresses the limitations of this type of judicial foundation and identifies its reasoning as stemming from the utilitarian and opportunistic ends inherent to the notion of fundamental rights that are to be protected when solving single cases as they come up[39].

On the other hand, this same 'comparative method', adopted by the Community Court in an attempt to define the 'Constitutional traditions common to the Member States' seems to be difficult to apply maintaining the categories established in comparative scholarship. The Community Court does not seem to show any real interest in following this method, nor does it produce articulated sentences motivated on the basis of extensive comparative research pertaining to those standards that establish the recognition of the principles and of fundamental rights in the Member States' Constitutions. Instead, it merely mentions them, using language that is at once dry, peremptory and flexible, while assertively stressing that the Court is 'expected to be inspired'[40] by such common traditions[41]. Within the Court's praetorian reasoning, in some cases these traditions are

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[39] As rightly mentioned, (A. Baldassarre, "La Carta europea dei diritti ...quot.., p. 3) "it is difficult to achieve a common tradition and its most likely meaning ... not the one referring to the forming of a European general ownership of these rights, but to the property of State rights which is better adjustable to the solution of the case under examination of the Court". In the same text, see too F. Sorrentino, "La Costituzione italiana di fronte al processo di integrazione europea", in *Politica del diritto,* 1993, p. 11 e A. Cannizzaro, "Princìpi fondamentali della Costituzione e Unione Europea", in *Riv. it. dir. pub. com.,* 1994, p. 1176.

[40] Our italics.

[41] As rightly noted, what is really of interest to the Court is to reaffirm that "it is imperative that rights and fundamental principles are guaranteed, but it is not imperative that the Court conforms to what has been established in national constitutions" (see also M. Cartabia, *Princìpi inviolabili ... quot.,* p. 35).

transformed into mere sources of inspiration, whereas in others they become directly applicable sources[42].

It can be thus observed that even from this point of view the reasoning behind Community principles and fundamental rights, as reconstructed by the Community Court through this interpretative approach that is largely pragmatic and not amply debated, mostly reflects the own Court's wish to assure that Community law, intended as an organic system, remain autonomous, and that its self-sufficiency be increased[43].

It can also be seen how the Community Court operates as a creator of both law and rights. The Court refers to national constitutions and to the laws adopted in the Treaties so as to legitimise its judicial orientation and to consolidate Community law, but also to overcome the problems that have arisen due to the Community *deficit* with regards to the protection of fundamental rights.

It does, however, seem important to stress that this contribution and its stratification over time are destined to leave an important mark on the greatly hoped-for adoption of a European *Bill of Rights*[44]. This would be the first act in the European constitutional process that would clearly demonstrate an intention to overcome all of the anomalies of the long "transitional" period, as well as the persistent Constitutional *deficit* that accompanies it, that the creation of a European Constitution is requiring. In this new Charter of Rights, which is at the same time a "political action and a legal document"[45], it will be difficult to ignore – as has happened and as could continue to happen – the "effective consolidation of common values"[46] found

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[42] Furth. *work quoted,* p. 35; E. Pagano, "I diritti fondamentali ... *quot.*, p. 172.

[43] In the same regard, sec also E. Pagano, "I diritti fondamentali ... *quot.*, p. 174; M. Cartabia, *Princìpi inviolabili ... quot.*, p. 35 ss.; L. Cassetti, "Princìpi supremi ... *quot.*, p. 9 ss.; M. Pi Llorens, *Los derechos fundamentales en el ordenamiento comunitario,* Barcelona, 1999, p. 73.

[44] See L. Cassetti, "Princìpi supremi ... *quot.*, p. 10 ss.; G. Recchia, "Corte di Giustizia delle Comunità europee e tutela dei diritti fondamentali nella giurisprudenza costituzionale italiana e tedesca. Verso un 'catalogo' europeo dei diritti fondamentali?", in AA.VV., *La Corte costituzionale tra diritto interno e diritto comunitario,* Milano, 1991, p. 133.

[45] See S. Rodotà, "La Carta come atto politico e documento giuridico", in AA.VV., *Riscrivere i diritti in Europa,* Bologna, 2001.

[46] L. Cassetti, "Princìpi supremi ... *cit.*, p. 10.

among European peoples and in their Constitutions. Nevertheless, this type of recognition seems essentially limited to the arena of already existing rights, whereas with regards to other issues, such as social rights, the Charter would seem to necessitate some review.

2. Social rights in National Constitutions and in Community Law

There is by now a general recognition of classical fundamental rights on the Community level, at least in the sense of their being a part of the basic principles expressed within its legal system. This has happened gradually, due to the fact that the different means of protection of those rights within national constitutions must be taken into consideration. There have been, on the other hand, significant delays in fully recognizing social rights, whose "Community minority" compared to the national constitutional models (and especially the Italian, Spanish and German ones) was confirmed by the provisions set in art. 136 of the ECT. According to this provision, in fact, "the Community and its Member States, *keeping in mind fundamental social rights*[47] as defined in the European Social Charter signed in Torino on October 18, 1961, and in the Community Charter for fundamental social rights of workers of 1989, have a common goal to promote employment, to better living and working conditions ... adequate social protection, social dialogue, the development of human resources aimed at allowing for a high and long-lasting employment level as well as the fight against alienation"[48].

The most significant gaps between proactive laws and their relative protections within national constitutions, the International one and the Community one appear most clearly particularly at this level. This will be discussed by recalling some instances within the Italian Constitution, as a mere example of how social rights have been recognized as fundamental freedoms and as an application of the fundamental principle of basic equality (art. 3, II co. Const.). This discussion will conclude with some observations on the delays encountered in Community law making as far as this issue goes

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[47] Our italics.

[48] See M. Luciani, "Diritti sociali e integrazione europea", in *Politica del diritto*, 2000, n. 3, p. 378.

and on the limitations inherent in the prospects *de jure condendo* (European Charter of Rights). At this time, little can be said about the choices that will be made by the Convention with regards to Europe's future.

From the Weimar Constitution onward, modern constitutional efforts have made it evident how the evolution of the affirmation (and the crisis) of the Welfare State[49] has brought about a new conception of equality. This new conception is no longer based only on a definition coming from the classical tradition that considers discrimination based on differences in sex, religion or race as unacceptable. It is, rather, an idea of equality that considers differences based on economic and social relationships unacceptable, thus considering discrimination based on earning capacity[50] unacceptable as well. In this new conception, equality "is only such if it includes equality and effectiveness of social rights" [51].

Social rights, together with classical ones that deal with freedoms, are thus considered "constitutive conditions" and basic elements within the constitutional principle of equality (art. 3 Const.), as well as of the value of the individual (art. 2 Const.).

This concept of equality, that considers individual differences as enrichments but defines economic – social differences as unacceptable, makes up the underlying thread of European constitutionalism, in

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[49] For an essential list of refernces in this regard see Colapietro, *La giurisprudenza costituzionale nella crisi dello Stato sociale*, Padova, 1996; G. Corso, "I diritti sociali nella Costituzione italiana", in *Riv. trim. dir. pub.*, 1981; M. Luciani, "Salute. I) Diritto alla salute - Dir. cost.", in *Enc. giur.*, XXVII, Roma, 1991; A. Baldassarre, "Diritti sociali", in *Enc. giur.*, XI, Roma, 1989; M. Luciani, "Sui diritti sociali", in *Dem e dir.*, 1994, 4 e 1995. Finally, see also AA.VV. (edited by L. Chieffi), *I diritti sociali tra regionalismo e prospettive federali*, Padova, 1999 and edited by the same Author, *Evoluzione dello Stato delle autonomie e tutela dei diritti sociali*, Padova, 2001; B. Pezzini, *La decisione sui diritti sociali*, Milano, 2001. See also our "Dai diritti naturali ai diritti sociali. Un approccio storico-costituzionale nella prospettiva comparatistica", in *Diritto pubblico comparato ed europeo*, 2002, n. 1, p. 126 ss.

[50] Within the large number of references available in this regard see at least A. Cerri, "Uguaglianza (principio costituzionale di)", in *Encicopledia Giuridica Treccani.*

[51] See R. Greco, "Diritti sociali, logiche di mercato e ruolo della Corte costituzionale", in *Questioni Giustizia*, 1994, n. 2-3; A. Di Giovine e M. Dogliani, "Dalla democrazia emancipante alla democrazia senza qualità?", in *Questione Giustizia*, 1993.

general, in the post – WWII period. This is particularly true in Italy, both with regards to the fundamental principles found in its Constitution and with regards to the proactive types of new protections founded on this concept, such as those that enrich the types of fundamental rights that were included in and protected by the Constitution (from classical negative freedoms to positive ones such as social rights, as well as political and economic ones)[52].

Starting off from the Constitutional affirmation of the principle of formal and substantial equality, Italian constituents defined social rights as an undeniable antecedent that is not connected in any way to economic or political conditions. In this manner, all public powers, and especially National legislators (but also Regional ones), are obliged to represent values, principles and provisions that the Constitution defines as undeniable, binding and inviolable.

The difference between the classical freedoms pertaining to the liberal State and the new rights made possible through the intervention of public powers, essentially resides in the fact that while the former protect a context where the individual can freely operate, the latter – social rights (rights/expectations) – aim at obtaining the intervention of public authorities "to satisfy some basic needs of the citizens"[53]. Their theoretical justification is thus found in the "different conception of freedom from certain forms of privation", whose goal is to realize equality, or, more precisely, "a synthesis between freedom and equality, or in other words, equal freedom"[54].

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[52] For a more recent reworking of social rights classification, see also Cheli, "Classificazione e protezione dei diritti economici e sociali nella Costituzione italiana", in *Scritti in onore di L. Mengoni. Le ragioni del diritto,* Milano, 1995.

[53] See M. Mazziotti, "Diritti sociali", in *Enciclopedia del diritto,* p. 805.

[54] See A. Baldassarre, "Diritti sociali", in *Enciclopedia Giuridica, p. 6.* Constitutional scholarship refers to social rights as being first of all rules for special situations, in particular for contingent or inchoate rights founded on rules implying the exercise of a legislative power of decision (See also V. Crisafulli, *La Costituzione e le sue disposizioni di principio*, Torino, 1970; G. Lombardi, *Poteri privati e diritti fondamentali,* Torino, 1970) though another influential source states how this power of decision concerns not so much the *se* and *quid*, i.e. the essential content of law, but only the *quomodo* and, anyway, as Mortati rightly notes, "in not such a way as to compress the minimum content necessary to not make the satisfaction of the protected interest seem illusory" (Cfr. C. Mortati, "Appunti per uno studio sui rimedi giurisdizionali contro comportamenti omissivi del legislatore", in *Foro italiano,* 1970, V, p. 257). On the grounds of this approach, which increases thevalue of the

In this light, the catalogue of social rights has an unusual width and systematic nature, and their relative protections are found on a Constitutional level rather than on a "legal" one.

If we move from a theoretical-constitutional definition of the Welfare State, and in particular from the definition of social rights as inviolable rights of the individual, to an analysis of how effective these rights really are, we are forced to recognize an extreme gap between their definitions as absolute and universal rights and a depressingly low level of effectiveness.

Thus social rights end up being relegated to situations where their guarantee and effectiveness is left to ordinary judges and, especially, by Constitutional judges.

The favourite tool used by Constitutional judges to assure social rights' effectiveness is found in the recourse to innovative types of Constitutional sentences, such as "additive (in application and principle)" sentences. Through these measures, the Constitutional judge extends a legislative provision so as to assure that only certain subjects are protected. This has happened especially in matters regarding health care and welfare, even though the Court has repeatedly applied art. 38 Const. to declare the illegitimacy of those laws that unjustly precluded the extension to all categories of subjects from the possibility to receive health care and welfare services earlier granted by legislators only to certain categories. Thus for the Court, social rights, as well as those rights that have been legislatively conditioned, are considered "inviolable and irrevocable rights of the person, as they are expressions of supreme Constitutional values or principles"[55].

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programmatic profile of constitutional provisions concerning social rights, and the 'law', rather than the constitutional nature which rules them, constitutional scholarship from the'70s onward suggests more complex typologies, among which, in particular, one that explains the difference between 'contingent' social rights (artt. 38; 34; 32; 38, par. III; 46) and 'absolute' social rights (artt. 36, par. I, II and III; 32, par. II; 37; 29; 30; 4): the former imply the intervention of the law-maker, or political power, on the *quando*, *quomodo* and *se*; the latter, on the contrary, are structured so that further intervention to realize them is not needed.

[55] This is so in the case of the protection of health (judgs. 1011 in 1998, 294 and 184 in 1986 and 88 in 1979), of the right to housing (judg. 19 in 1994, 404 and 217 in 1988), of the right to work (judg. 108 in 1994 and 232 in 1989). In this regard, see too F. Modugno, "La tutela dei 'nuovi diritti'", in AA.VV., *Nuovi diritti dell'età tecnologica*, Milano 1991, p. 66.

Social rights, too, and *a fortiori* the positive rights conditioned by law, are also for the Court like other fundamental rights: "inviolable and not subject to withdrawal personal rights, as expression of supreme constitutional values or principles"

In short, Constitutional Court law makes it clear how social rights must be guaranteed by Constitutional protections that are fully equal to protections guaranteed for other fundamental rights. In this sense, social rights, too, are irremissible, inalienable, non transferable, inviolable and cannot be disposed of. This does not mean, however, that the immediate application of these rights, as well as the rights of those subjects who work in the public sector, must not be "ascertained case by case, without confusing what is possible solely in virtue of Constitutional law with what is historically possible", once laws or regulations have been established that guarantee a certain discipline of the issue[56].

The conclusions that can be reached from such a reconstruction can, while basic, nevertheless offer us the chance to observe how the use of a series of guiding criteria by Constitutional judges can cause a somehow changeable and uncertain guarantee of effectiveness of these rights.

Indeed, the techniques used to balance interests deserving equal protection can bring the Constitutional judge to make continuous comparisons between different Constitutional principles and values. This occurs on the basis of an assumption that the principle of preponderance or of balance between Constitutional values represents the basic parameter that must determine the limitations and contents of fundamental rights. This parameter also establishes how conflicts that arise between values that are equally protected on a Constitutional level can be resolved. This last prospect puts the Constitutional Court in the position of a negative legislator (when it is not a positive legislator, as it authoritatively defines itself), and the ambiguities that arise from this position cause worry among the more attentive Italian doctrinaires, as it does more generally on the European constitutional level.

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[56] See A. Pace, "La garanzia dei diritti fondamentali nell'ordinamento costituzionale italiano: il ruolo del legislatore e dei giudici 'comuni'", in AA.VV., *Scritti in onore di P. Barile. Nuove dimensioni nei diritti di libertà,* Padova, 1993, p. 61 ss.

2.1 Community social rights as 'residual' rights

If we now proceed to a reflection on Community law with regards to social rights after this brief discussion on the nature and form of justice in social rights according to the Italian Constitution, the perplexities that have arisen frequently concerning how these rights are protected seem to be fully confirmed[57].

If we compare the provisions of art. 3 of the European Charter of Rights (equality before the law) with the legal complexity of comma I and II of art. 3 of the Constitution, it would seem they express a backwards movement in the general debate around these rights as well as in the protections guaranteed in modern constitutionalism.

Here the problems found in attempting to harmonize legal systems (national constitutions and the European Union) are once again put off to be resolved in an indefinite future, by relying on the fact that in art. 53 of the Charter of Rights there is a (obviously necessary) clause which safeguards rights on the basis of how they are both constitutionally and internationally protected[58].

As mentioned before[59], Community law regarding social rights contrasts on a basic level with how they are conceived within the Welfare States' national constitutional legal systems (and among these definitely the Italian, Spanish and German ones). In these,

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[57] In accordance with the most influential scholarship already interested in such problems, whose reasoning we fully agreed with (see also M. Luciani, "Diritti sociali e integrazione europea", in *Politica del diritto,* 2000, n. 2, in part. p. 527 ss.).

[58] See also J. Rideau, "Rapport introductif", in D. Mauss e O. Passalecq, *Le Traité d'Amsterdam face aux constitutions nationales,* Paris, 1998.

[59] See M. Luciani, furth. work quoted, to which *adde* as well, Parlement européen, *Droits sociaux fondamentaux en Europe,* (Séries Affaires Sociales – SOCI 104 FR), 1999; C. Grewe, "Les droits sociaux constitutionnels: propos comparatifs à l'aube de la Charte des droits fondamentaux de l'Union europeenne", in *RUDH,* 2000, n. 12; E. Virgala Foruria, "Los derechos sociales comunitarios y su proteccion en Europa y en Espana", in M.A. Aparicio, *Derechos constitucionales y formas politicas,* Barcelona, 2000; F. Carinci e A. Pizzoferrato, "Costituzione europea e diritti sociali fondamentali", in *Lavoro e diritto,* 2000, n. 2; R. Foglia, "Corte di Giustizia, giudici nazionali e politiche sociali", in *Questione giustizia,* 1999, n. 3; L. Cassetti, "Princìpi supremi e diritti fondamentali nel Trattato di Amsterdam", in *Gazzetta Giuridica,* 1999, n. 36; D. Gallo, "Mercato e diritti sociali nella costruzione europea", in *Questione giustizia,* 1999; n. 2; G. Bronzini, "I diritti sociali nella Costituzione europea", in *Democrazia e diritto,* 2000.

"social rights are imagined to be a condition which exists a priori to the action of public powers and to the social interests connected to them as mere *Reflexinteresse*"[60].

What seems to be important about such rights within the actions of Community law and in how its goals are reached is, therefore, how "functional" they are for the needs of economic development and the European common market.

In this light, within the constructs of the Community legal order, social rights bear the nature of 'residual' rights that are functional to the economic goals of the unified European market[61]. We are thus forced to draw the conclusion that Community law itself only regulates mere plans that are little more than 'goals', and that can not be reinforced by Community Institutions except when applying to the social function of the economic market.

The Court of Justice, as mentioned earlier, took on the same stance when, after a first ruling in which it states that the existence of limitations on fundamental rights applies only to economic rights,[62] it decreed that

> "the fundamental rights acknowledged by the Court do not appear ... to be absolute privileges and are to be considered in relation with the role they play in society[63].

Consequently, restrictions on such rights can be exercised, in particular within the context of a common market organization, as long as these restrictions respond to general goals pursued by the Community and do not end up being so out of proportion or so inadmissible that such rights are put into jeopardy"[64].

The imprecise and uncertain legal nature of such provisions can be overcome only by rendering them positive within a

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[60] See M. Luciani, "Diritti sociali ... cit., p. 379.

[61] In the same regard, see also, G. Maestro Buelga, "Los derechos sociales en la Union Europea: una perspectiva constitucional", in *Revista vasca de administration pùblica, 1996*, n. 46, p. 119 ss

[62] 14th May 1974, *Nold* judg., case 4/73, in *Racc. Uff.*, 1974, p. 491; 13rd December 1979, *Hauer* judg., case 44/79, in *Racc. Uff.*, 1979, p. 3727, with reference to which, see, among others, F. Mancini, "La tutela dei diritti dell'uomo: il ruolo della Corte di Giustizia delle Comunità europee", in *Riv. trim. dir. proc. civ.*, 1989, n. 1.

[63] Our italics.

[64] 13rd July 1989, *Wachauf* judg., case 5/88, in *Racc. Uff.*, 1989, p. 2609 ss.

'catalogue' of social rights, within a broader 'Charter of Rights', which European institutions and legal scholarship have been discussing over the last few years. It is obvious that the adequacy of such a Charter of social rights depends on the political and constitutional choices that will be made regarding the future of the Welfare State in Europe.

In conclusion, the future of social rights in the process of Community building should no longer be solely decided upon by the eminently judicial law of the Court of Justice and by the types of conflicts that arise between it and national constitutional law. To the contrary, a positive legal approach should be adopted which would be able to defend the more advanced 'common Constitutional traditions' with greater conviction.

3. The European Charter of Rights

As seen above, despite the widespread optimism expressed in some circles[65] it does not seem that the solutions offered by the European

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[65] In this regard, see among others, AA.VV., *Riscrivere i diritti in Europa,* Bologna, 2001. Actually, according to an influential scholar, (A. Barbera, "La Carta dei diritti dell'Unione europea", in *Convegno in memoria di Paolo Barile* (Firenze, 25th June 2001 (paper) and already in "Esiste una 'costituzione europea'?", in *Quaderni costituzionali,* 200, 1), a European Constitution already exists and, in this regard, the essential reasons behind the 'Charter of rights' and its political-institutional functions by can be synthesized in the following manner: a) to make European values trasparent and 'visible'; b) to further strengthen the common heritage of rights, considering that with regard to civil rights, a satisfying convergence has been constructed over the years, whereas regarding collective and social rights it has not always been so; c) to oppose xenophobic and racist tendencies, by ensuring a legal basis for the power to enforce sanctions against countries responsible for 'serious and persistent' fundamental rights abuses; d) to make the integration of the 13 candidate countries (Slovakia, Slovenia, the Czech Republic, Romania, Bulgaria, Turkey, Malta, Cyprus, Lithuania, Latvia, Estonia, Hungary, Poland, not all Countries having high standard of rights acknowledgement and protection), easier and more secure especially as, in accordance with art. 49 of the Treaty, the condition for the admission is to be in order with the respect of fundamental rights; e) to ensure a foundation of values in common foreign politicy, as the second pillar of the Union (it is not insignificant that the initiative for the Charter speeded up intervention in Kosovo); f) to ensure a safeguarding structure for the progressive reinforcement of judicial, criminal law and police cooperation; i.e. reinforcement for the third pillar of the Union, till

Charter of Rights, while pertaining nonetheless to the process of building a united Europe, are yet adequate enough. Nor do they assure that the barriers that exist between fundamental social rights and the other fundamental rights as defined by the Rome Convention and the social Charters will be overcome.

One of the biggest problems remaining open in this respect has to do with the position of the European Charter of Rights in the context of the hierarchy of Community law sources. Whereas the will of the Commission, the European Parliament and of some States (including Italy) was to include the Charter in the *corpus* of the EU Treaties, and while even the committee responsible for writing it worked on the assumption that it would be binding, the European Council of Nice proclaimed the Charter of Fundamental Rights without integrating it into the Community Treaties. What is presently notable about this document is that the solutions found regarding the problem of rights have sometimes been considered to have consequences within the evolutionary process of the UE, that sees it shifting from the International organization that it started out as being, to a form that is more similar to a Federal or Confederate State. In the context of the hierarchy of Community law sources, it must be noted, in fact, that the Charter of fundamental rights could very well become an essential component in a proper European 'Constitution' in the future[66].

Though devoid of any binding effectiveness, it will, however, be necessary to settle what role the Charter will be given on a practical

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now left out of the context of Court of Justice intervention (as a 'non Community' matter: for example, the Convention that led to Europol, does not fall within citizen protection with reference to the collection of personal data contained in the 1995 directive); g) to protect, regarding the first pillar itself, European citizens against community institutions and bureaucracies; h) to supplement national rights and Community law and to avoid eventual controversies with domestic Courts; i) to check controversies between the system of rights protection of the Union and of the Council of Europe, between the Courts of Luxemburg and the Strasburg Court of Rights (especially after the negative opinion of the Court of Justice – March 1996 – on the adhesion of the Union to the ECUD), on which some thousand petitions are pending, after the application of Protocol 11.

[66] The Council of Cologne (3rd/4th June 1999), in its conclusions, pointed out that only after the common proclamation of the Charter by the European Parliament, Council and Commission, will it be possible "to value whether, and eventually how, the Charter can be supplemented to Treaties".

level, during decisions made during the year 2004. Should the Charter be granted practical application in general, and specifically in Community Court law, the Charter would represent an important step forward in a future super-national European Constitution. It would also probably render the need to reconsider certain statutes already decided upon more evident, including those regarding constituency procedures. If this does not happen, the risk is that the Charter could remain a declaration of intent or of laws that are not legally binding, which the history of International organizations is full of; a document that simply explains laws that have already been recognized in all the States in the Union.[67]

However, it must be stressed that the Charter has already begun to become an important point of reference, especially in judicial settings.[68]

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[67] A. Pace (in "A che serve la Carta dei diritti fondamentali dell'Unione Europea? Appunti preliminari", in *Giur. cost.*, 2001, p. 194) stresses how important political declarations, though clearly devoid of legal validity (for ex. the Universal Declaration of Human Rights in 1948), were, already in the past, a "'rhetorical' reference point of great importance". In the same regard, see too G.G. Floridia, "'Nell'intenzion dell'artista, e agli occhi degli abitanti' (osservazioni sulla 'Dichiarazione dei diritti' di Nizza", in *Dir. pub. comp. ed europeo,* 2001, n. 1, p. 163 ss.

[68] The Advocate General of the Court of Justice Antonio Tizzano, in his conclusions on the case *BECTU vs. Secretary of State for Trade and Industry* (Case C-173/99 presented on 8 february 2001), stated "... However, without wishing to participate here in the wide-ranging debate now going on as to the effects which, in other forms and by other means, the Charter may nevertheless produce, *the fact remains that it includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments... (our italics)* I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved – Member States, institutions, natural and legal persons – in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right".
With "clearly hermeneutic recklessness", the Charter of Rights was recently "mentioned and used" by Italian judges to solve, in a moot way, a question pertinent to legal aid in the event of a labour dispute before the Court of Appeal of Rome, by using the document override Italian law on legal aid. In this regard, see too an early comment by R. Calvano, "La Corte d'Appello di Roma applica la Carta dei diritti UE. Diritto pretorio e Jus commune europeo?", in www.associazionedei costituzionalisti.it.materiali.

According to some, the Charter has the advantage of allowing for a clear and definitive setting for human rights, so that a sometimes tumultuous process has been established that has allowed the Community Court to overstep the limits of the Treaties and indulge in interpretation. It is also true, though, that a rigid setting of fundamental rights could reduce the possibilities for protection, since they would be limited to only what is expressly established in the Charter itself[69]. Others have observed that the Charter ends up being a list of rights, without any regulation of duties, or at least of limitations, regarding the exercise of the same (i.e. in the case of property rights, the limitations of social function were not included). Charter provisions, therefore, are only applicable to actions carried out by Union Institutions and Bodies and by those Member States that adhere to Union law, as expressly stated in art. 51, par. 1, of the Charter, where par. 2 states that the Charter does not introduce any new Union authority, nor does it modify any of the duties defined by the Treaties.

The new document does not require that the Member States modify their Constitutions, nor does it substitute them. Instead, it only proposes that a common denominator between judicial traditions and different sensitivities be created, thus becoming a sort of premise for an almost complete "European citizenship". In any case, the Charter already has a value of its own, in that it is a product of a growing common European sentiment based on laws and important civil achievements and it shows the profound personality of a Europe that is no longer simply economically oriented.

The problems regarding the legal nature of the Charter (and consequently the problem of its collocation in the context of the hierarchy of Community sources) have been put off to a later phase. As far as the connected issue regarding the context in which the Charter can be applied goes, it has been observed that some provisions made in the Charter seem to regulate issues that go beyond the limits of Union authority. A "horizontal clause" has been added so as to clarify that the Charter does not intend to modify Union authority, in that this type of innovation could only be introduced by following the procedures applied to Treaty revision.

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[69] See also A. Pizzorusso, "La codificazione internazionale dei diritti fondamentali e la loro influenza sugli ordinamenti nazionali" (*paper*)

What must be stressed, in conclusion, is that the basic choices regarding content, extension and jurisdictional guarantees of single rights are not simply technical and/or editorial problems. To the contrary, these choices are of very basic and political nature, which are foundational parts of a democratic – constitutional process that is almost finished and is therefore self-referring. According to some studies[70] – whose position we do not concur with due to the lack of a finished constitutional procedure – the Charter of Rights could very well transform the European legal order's legitimacy, shifting decision making from Member States over to the Union.

Such a position is most certainly based on solid comparative political grounds, which dates back to the historical origins of liberal-democratic constitutionalism, when Preambles and Charters of Rights were super-constitutional and constitutionally binding. What is not convincing about such a position, is that it does not take into account the needs that have emerged during the historical and constitutional evolution of this type of constitutionalism, that, after its period of crisis during the first twenty years of the last century, and perhaps because of it, has returned to the prevailing theories and tools pertaining to rigid (in terms of how constitutions can be modified) and protected (by constitutional jurisdictions) constitutionalism.

A lack of emphasis on the validity of this type of defence of constitutional theory seems to be thus unconvincing, as it is not well founded in its reasoning and dogmatic statements. These indeed seem to call for an unjustified need for discontinuity in the passage from modalities applied up until now in European constitutionalism

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[70] See A. Baldassarre, *"La Carta europea dei diritti"*, report (edited by F. Politi and G. Scaccia) on the meeting held at the L.U.I.S.S. on 28th May 1999 in the context of the Seminar about *"I mutamenti costituzionali in Italia nel quadro dell'integrazione europea"*, in www.luiss.it/semecost/europa/carta/index.html.

[71] See also our papers "Verso la formazione di un diritto comune europeo: metodo comparatistico e ricerca costituzionale", in *Politica del diritto*, 2001, n. 1, "L'Unione europea e la Costituzione italiana: prospettive e limiti del costituzionalismo europeo (in via di formazione)", in AA.VV. (edited by A. Catelani e S. Labriola), *La Costituzione materiale. Percorsi culturali e attualità di un'idea*, Milano, 2001, and, finally, "Il diritto costituzionale europeo. princìpi strutturali e diritti fondamentali", in S. Gambino (edited by), *Costituzione italiana e diritto comunitario. Princìpi e tradizioni costituzionali comuni. La formazione giurisprudenziale del diritto costituzionale europeo*, Milano, 2002.

that are aimed towards assuring Community integration, to those that would instead be necessary to create a 'European constitution' that expresses the intent of the European peoples and countries[71].

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