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EUROPEAN LEGAL INTEGRATION: THE NEW ITALIAN SCHOLARSHIP

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**“Taking Dialogue Seriously”
The Renewed Need for a Judicial Dialogue at the Time of
Constitutional Activism in the European Union**

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European Legal Integration: The New Italian Scholarship (ELINIS)

This Working Paper is part of the ELINIS project: *European Legal Integration: The New Italian Scholarship*. Even the most cursory examination of the major scientific literature in the field of European Integration, whether in English, French, German and even Spanish points to a dearth of references to Italian scholarship. In part the barrier is linguistic. If Italian scholars do not publish in English or French or German, they simply will not be read. In part, it is because of a certain image of Italian scholarship which ascribes to it a rigidity in the articulation of research questions, methodology employed and the presentation of research, a perception of rigidity which acts as an additional barrier even to those for whom Italian as such is not an obstacle. The ELINIS project, like its predecessor – the New German Scholarship (JMWP 3/2003) – is not simply about recent Italian research, though it is that too. It is also new in the substantive sense and helps explode some of the old stereotypes and demonstrates the freshness, creativity and indispensability of Italian legal scholarship in the field of European integration, an indispensability already familiar to those working in, say, Public International law.

The ELINIS project challenged some of the traditional conventions of academic organization. There was a “Call for Papers” and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions to ELINIS were not limited to scholars in the field of “European Law.” Such a restriction would impose a debilitating limitation. In Italy as elsewhere, the expanding reach of European legal integration has forced scholars from other legal disciplines such as labor law, or administrative law etc. to meet the normative challenge and “reprocess” both precepts of their discipline as well as European law itself. Put differently, the field of “European Law” can no longer be limited to scholars whose primary interest is in the Institutions and legal order of the European Union.

ELINIS was the result of a particularly felicitous cooperation between the Faculty of Law at the University of Trento – already distinguished for its non-parochial approach to legal scholarship and education and the Jean Monnet Center at NYU. Many contributed to the successful completion of ELINIS. The geniality and patience of Professor Roberto Toniatti and Dr Marco Dani were, however, the leaven which made this intellectual dough rise.

The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

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“Taking Dialogue Seriously”
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Constitutional Activism in the European Union

by Marta Cartabia*

Abstract

Despite the failure of the ambitious project of the European Constitutional Treaty, the new millennium has indeed heralded a new constitutional era for the European Union, focussed on the protection of fundamental rights. Since the approval of the Charter in December 2000, fundamental rights have taken place of honour in the European agenda and a new phase of judicial activism has begun in the European Court of Justice, a phase focussed on the protection of fundamental rights.

The Charter, put in the hands of the Court, is bringing about many benefits but also many risks, the most obvious one being that the European Court of Justice acting more and more often as a Court of rights is willy-nilly a potential element of centralisation and standardisation.

In this contest the judicial dialogue among the ECJ and the national constitutional courts is all the more necessary, in order to preserve all the constitutional richness and variety of the European traditions. That is why all the judicial actors on the European scene should revisit their doctrines concerning their judicial role in the European Union. On the one hand the national higher courts should find the courage to enter into a direct constitutional dialogue with the ECJ, in order to give a clear voice to their constitutional traditions. On the other hand, the ECJ should encourage the participation of the national courts to the construction of the common core of the European values, starting, for example, with a change of style in its judgements.

* Full professor of Constitutional Law, University of Milano-Bicocca. I would like to thank Prof. J.H.H. Weiler, Prof. R. Toniatti, Prof. G. Falcon, Prof. Dani, and all the participants to the Elinis meeting in Trento, December 2006, for the insightful comments and the stimulating critiques. All the usual disclaims apply.

INTRODUCTION

The new millennium: a constitutional era for the European Union.

Despite the failure of the ambitious project of the European Constitutional Treaty, the new millennium has indeed heralded a new constitutional era for the European Union. Some relevant constitutional changes are occurring in these first few years of the XXIst century, and most of them are related to the application of the European Charter of Fundamental Rights. Since the approval of the Charter, fundamental rights have taken place of honour in the European agenda – as the setting up¹ of the European Union Agency for Fundamental Rights in Vienna proves. Moreover, the Charter has brought fresh constitutional fuel to the European Court of Justice's engine. It seems that the availability of a written catalogue of fundamental rights contributes to encouraging the Court of Justice to act as a constitutional court in the European Union. In fact, a new phase of judicial activism has begun in the European Court of Justice, a phase focussed on the protection of fundamental rights.

In a certain sense this evolution is a *deja-vu*: many other stages in the history of the European integration have been marked by the weakness of the political process and by the activism of the judicial branch. After all, it is quite common that political failures leave room for judicial activism. So, it is no wonder that now that the political way to a fully-fledged European Constitution has been closed the European Court of Justice is again at the centre of the constitutional arena², as the main protagonist of constitutional developments of the European Union.

What is more distinctive of the new wave of judicial constitutional activism in the EU is an intense activity in fields related to fundamental rights, where the Members States show a

¹ The European Union Agency for Fundamental Rights was established by Council Regulation (EC) No 186/2007 of 15 February 2007.

² Most scholars think that the ECJ acts as a constitutional courts at least in some cases, although they not always support the proposal of transforming the ECJ into a special judge deciding only constitutional issues: O. DUE, *A Constitutional court for the European Communities*, and F.G. JACOBS, *Is the Court of Justice of the European Communities a Constitutional court?*, in D. CURTIN, D. O'KEEFE (EDS), *Constitutional Adjudication in European Community and National Law*, Butterworth, Ireland, 1992, 2 ss. and 25 ss.; B. VESTERDORF, *A Constitutional court for the EU*, in I-CON, vol. 4, n. 4, 2006, 607. See however L. FAVOREU, *Les Constitutions nationales face au droit européen*, in *Revue française de droit constitutionnel*, n. 28, 1996, 699 who deems that at present the ECJ cannot be considered a constitutional court, because it still lacks of too many important elements, such as a veritable Constitution of the EU, an impartial appointment of judges and many others.

common background, but also different traditions and a pluralistic attitude. In this context, the European Charter of Fundamental Rights put in the hands of the Court brings about many benefits but also many risks, the most obvious one being that the European Court of Justice acting willy-nilly as a constitutional adjudicator in issues concerning fundamental rights is a potential element of centralisation.

Soon after the solemn proclamation of the Charter of Rights by the European Union in Nice on 7th December 2000, Armin von Bogdandy wrote with his usual perspicacity: “Human rights as the core of the supranational order is a tantalizing prospect. They might provide a strong, visible, incontestable *raison d’être*, something the Union is longing for, given the technicality of the common market and its policies”³. In the Charter of Rights the Author sensed the first symptoms of an evolution destined to change the features of the European integration, from an *economic* community towards a *Grundrechtsgemeinschaft*, a community of fundamental rights.

As the Author had predicted, the Charter of Fundamental Rights actually marked a new era in the European integration, displaying all its seductive power. It has certainly enhanced the guarantees of fundamental rights in the European Union: much progress is visible in both judicial and political decisions of the European institutions.

However, in amongst all this great progress some risks are also looming. What is in danger are the pluralistic nature of the European Constitution, the contrapunctual elements of the constitutional equilibrium, the principle of constitutional tolerance and the mutual nourishment between the national and the European constitutions implied in the theory of the multilevel constitutionalism⁴.

A fundamental antidote to the risks of judicial standardisation in the field of fundamental rights is a lively judicial dialogue among the constitutional courts in Europe by means of the preliminary ruling. This is at present the most effective way available in the European Union which permits the national constitutional traditions to be conveyed before the European Court of Justice, especially in cases involving human rights.

³ A. VON BOGDANDY, *The European Union as a Human Right Organization?* in *Common Market Law Review*, n. 6, 2000, at 1308.

⁴ The reference is to those Authors who emphasise the pluralistic nature of the European Constitution, such as J.H.H. WEILER, *The Constitution of Europe*, Cambridge, 1999, in particular at 238 ss.; M. POIARES MADURO, *Contrapunctual Law: Europe’s Constitutional Pluralism in Action*, in N. WALKER (ed.), *Sovereignty in Transition*, Oxford 2003, 501 ss.; I. PERNICE, *Multilevel Constitutionalism in the European Union*, in *European Law Review*, 2002, 511 ss.

That is the reason why this paper intends to review the well-known subject of the judicial dialogue⁵ in the European Union.

The paper consists of two main parts. In the first part I will examine some leading decisions of recent case-law of the European Court of Justice on human rights in order to appreciate the dramatic evolution of the European constitutional balance in the field of fundamental rights since the Charter. It is not so relevant to record how many times the Charter of Rights is explicitly quoted by the European judiciary: as is well known the European Court of Justice, in contrast with many national judges – including some constitutional courts – and in contrast also with the Court of First Instance is very cautious in referring to the Charter of Fundamental Rights in its decisions. There are only a few cases⁶ to date where the Court of Justice mentions the Charter. The influence of the Charter on the case-law of the Court of Justice greatly exceeds the formal references and it can be appreciated by observing the fundamental *rights in action*, i.e. in the practical application of judicial cases.

In the second part of this paper I would like to discuss the refusal of many constitutional courts to enter into direct judicial dialogue with the European Court of Justice and in this part of the paper I will focus mainly on the case law of the Italian constitutional court, because it explicitly addresses the issue and explains the reasons for its doctrine, so that its position is a paradigm representing all the other constitutional courts which do not use the preliminary ruling. Later I will try to explain some of the reasons why such a doctrine is not convincing, the most important of which is that a strong and daring European Court of fundamental rights needs to be surrounded by similar strong and daring interlocutors at national level. Moreover, I will also show that the European Court of Justice has not yet done its best to encourage the judicial dialogue, which would be first of all in its own interest.

However, before discussing the difficult judicial constitutional dialogue among the Courts in the EU (Part II), I will consider some of the major decisions issued by the European Court of Justice on human rights after 2000 (Part I).

⁵ Whereas the legal literature on the judicial dialogue is almost boundless, it is worth noting that some scholars criticize the idea of a judicial dialogue in itself, contending that dialogue is a common practice within the political institutions, but is almost impossible among courts and judges. See B. DE WITTE, *The Closest Thing to a Constitutional Conversation in Europe: The Semi-permanent Treaty Revision Process*, in P. Beaumont, C. Lyons, N. WALKER (ed), *Convergence and Divergence in European Public Law*, Oxford, Hart Publishing, 2002.

⁶ The first decision where the European Court of Justice quotes the Charter is Judgement 27 June 2006, C-540/03, Parliament versus Council where the Court refers to the directives regarding the reunion of family, which in turn mentions as a premise the Charter of Rights

PART I – AFTER 2000: THE EUROPEAN COURT OF JUSTICE AS A COURT OF RIGHTS.

1. Signs of constitutional activism in the case-law of the European Court of Justice.

Although the Charter does not represent the first form of protection of fundamental rights in the European Union, but, on the contrary is integrated in a process established back in the 1960s and consolidated over time, it is undoubtedly a turning point, considering the quality and quantity of the Court of Justice's interventions on fundamental rights. Some feared that the Charter would chill the creativity of the European Court of Justice, but the result seems to be exactly the opposite. Facts show that the Charter is strengthening rather than humiliating the interpretative and creative ability of the European Court.

A rich list of decisions regarding human rights corroborates this hypothesis.

a. The Tanja Kreil case

The starting point of the new dynasty of constitutional cases can be considered the Tanja Kreil decision in 2000⁷, a sentence pronounced before the approval of the Charter, but in the midst of the mood of constitutional euphoria that pervaded the European Union in those years. It is not necessary to recapitulate in detail such a famous case which has been discussed by many, but suffice to remember that all in all it presented the Court of Justice with a constitutional conflict between a provision of the German Constitution, art. 12 of the *Grundgesetz*, which forbade women to carry out roles in the army which implied the use of arms, and a basic principle of Community law, notably the principle of non-discrimination on the basis of sex. Without beating about the bush, the Court of Justice states that the Community principle of non-discrimination “precludes the application of national provisions, such as those of German law, which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to medical and military music services”. Without insisting on the constitutional rank of the relevant German norms, the Court of Justice concludes by demanding a

⁷ ECJ Judgement 11 January 2000, C-285/98, Tanja Kreil.

constitutional revision on the part of Germany, pointing out an irredeemable conflict between the Community law and the national Constitution. So, while the Court of Justice up until then had prevented the flaring up of conflict between national Constitutions and Community principles⁸, in the Kreil case there is no hesitation in obliging the Germans to come into line with the European norms by revising their Constitution. That is precisely the reason why Tanja Kreil can be considered as the forerunner of the new line of decisions of the European Court on human rights.

b. The Schmidberger and Omega cases

From another viewpoint, important signs of novelty can be seen in some decisions regarding conflicts between the fundamental economic freedom and human rights.

Critics of the Court of Justice have often expressed suspicion about the authenticity of the Community's guarantee of fundamental rights. It has been repeatedly highlighted that the Court of Justice has exploited the rhetoric of human rights, aiming not so much at the protection of some basic values in themselves, as rather at strengthening the European integration⁹. This interpretation would account for a peculiarity that distinguishes Community law, which elevates the free movement of persons, services, goods and capital to the rank of fundamental rights. For a long time, the community protection of fundamental rights was highly conditioned by the general objectives of European economic integration and so first and foremost by the common market. Until very recently, the Court of Justice has shown great deference for the economic freedoms of the common market, each time it has been necessary to create a balance between them and other fundamental rights. Indeed, the Court of Justice has never dealt with neither fundamental freedoms nor fundamental rights as absolute values and consequently has always been careful to keep a balance between the reasons for economic freedom and those for fundamental rights. However, in this complex balance, often economic freedoms have had the upper hand.

⁸ Suffice to recall the well known decisions of the ECJ concerning the Irish Constitution: Judgement 28 November 1989, C-379/87 Groener, on the protection of the Gaelic language and Judgement 4 October 1991, C-159/90, Grogan, on the right to life and abortion.

⁹ J. COPPEL – A. O'NEILL, *The European Court of Justice: Taking Rights Seriously?*, in *Comm. Mark. Law. Rev.*, 1992, 669 ss.

And so, that explains why the Schmidberger case of 2003¹⁰ was enthusiastically welcomed by many scholars and commentators. In that decision, the Court of Justice, called upon to resolve a controversy between a basic freedom of the market – in the case the free movement of goods – and some fundamental rights – the freedom of assembly and the freedom of speech – caused by a demonstration by an environmental association that blocked the Brenner motorway for 30 hours, surprisingly gave prevalence to the latter, in a balancing decision in which the needs of the economy for once did not win over civil rights.

Even more astonishing, in many respects, was the Omega decision in 2004¹¹.

Also in this case the Court of Justice had to face a conflict between an economic freedom protected by the Treaty, at stake the free movement of services and to a lesser extent the free movement of goods, and the protection of fundamental rights, which in this specific case regarded human dignity in relation to a commercial service of entertainment offering games which simulate murders using toy laser guns.

Indeed, in this judgement two arguments emerge. The first regards the freedom to supply services and the limits justified in the name of public security. The second concerns the possible limits to economic freedom justified this time in the name of the protection of fundamental rights, among these human dignity. The case could have been solved in its entirety arguing solely on the basis of the public security. But the Court wanted to use the discourse of fundamental rights; it wanted to take the opportunity to unfurl its *rights talk*¹², by affirming that human dignity is not only one of the basic values of the German Constitution, but it is part of the values of the European system. The Court of Justice wanted to stress deliberately the commitment on the part of the European Union towards the respect for human dignity. When one reads the Omega decision, it is difficult not to perceive the subtle influence of the Charter of Fundamental Rights that opens precisely with the claim that the safeguarding of human dignity is an inviolable right. The efforts of the Court of Justice did not go unobserved¹³.

¹⁰ ECJ Judgement 12 June 2003, C-112/00, Schmidberger. On this issue M. AVBELJ, *European Court of Justice and the Question of Value Choices*, Jean Monnet Working Paper 06/04.

¹¹ ECJ judgement 14 October 2004, C-36/02, Omega.

¹² This expression is taken from M.A. GLENDON, *Rights talk: The Impoverishment of Political Discourse*, New York, The Free Press, 1991.

¹³ Among many comments to the Omega decision see A. ALEMANNI, *A la recherche d'un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur*, in *Revue du droit de l'Union européenne*, 2004, 709; A. VON WALTER, *La protection de la dignité humaine face au droit communautaire*, *L'Actualité Juridique – Droit Administratif*, 2005, 153 ss. .

So in Omega, as in Schmidberger, fundamental rights prevailed over economic freedoms and justified the important restrictions placed on them.

c. The K.B. and Richards cases.

From another point of view, it can be seen that in more recent years the Court of Justice tends to widen scope of community fundamental rights, going beyond the limits of the EU competences that the doctrine of *incorporation* would permit. This tendency is clearly visible in two recent cases regarding the rights of transsexuals. K.B.¹⁴ and Richards¹⁵. Both cases originate in Great Britain where at the time of the events a peculiar legal situation was in force, which on the one hand permitted a change of sex, it even being possible on the national health service; on the other, however, it did not allow the change of sex to be recorded in the registry office, preventing the transsexual from enjoying the status reserved to the person of the sex to which s/he belonged after the operation. In the cases brought to the attention of the Court of Justice, the impossibility to register the change of sex prevented the plaintiff from entering into marriage and thus from enjoying the survivor's pension, in one case, and from being able to retire at 60 – the age for women's retirement - in the second case. In both cases British law is considered incompatible with the principles of non-discrimination on the basis of sex and the United Kingdom, on several occasions censured by the Court of Luxemburg as well as by the Court of Strasbourg for the impossibility of the correction of personal data recorded at birth in the case of sex change, ended up adapting its own legislation to fit the demands required by European principles.

An interesting aspect regarding this jurisprudence is that in these cases the fundamental community rights impinge upon the regime of the British civil status, a subject certainly far from the Union's competence. The Court of Justice was asked to answer a question concerning the principle of non discrimination of sex in the entitlement of survivor's pension and the definition of retirement age, but its decision ends up dealing with a matter that the member states did certainly not intend to transfer to the Community institutions, namely the legal status of transsexuals and the rules that govern the civil register.

¹⁴ ECJ Judgement 7 January 2004, C- 117/01, K.B.

¹⁵ ECJ Judgement 26 April 2006, C-423/04, Richards.

As a matter of fact, in *K.B. and Richards* the ECJ broadens the doctrine of *incorporation*. It is not necessary to insist here on this well known doctrine¹⁶. Suffice to recall that up until now the area of application of fundamental rights, apart from being applied to the acts of the Community institutions, was also extended to the acts of the member states that enter the field of European law, and this happens in two main hypotheses: when the States' acts constitute an application of the community law – the *Wachauf* line¹⁷ – and when the State act is an exception to one of the fundamental freedoms of the internal market – the *ERT* line¹⁸.

Now the *K.B. and Richards* cases obviously do not fall into either hypothesis. Censured British legislation does not constitute either rules of implementation or of execution of community acts; nor does it constitute an exception to the fundamental economic freedoms. As the Court of Justice states unequivocally, British legislation on the registering of personal data does not directly jeopardize a right protected by Community law – the right to the survivor's pension, but it has a discriminatory impact on one of the conditions necessary to the entitlement thereof. The violation of the principle of non-discrimination does not directly pertain to the entitlement to the survivor's pension or retirement age, but depends on the prohibition of transcription of the sex change which is “an indispensable preliminary condition” for enjoying the above-mentioned social right.

It is too soon to say if a new “spin-off” of the doctrine of *incorporation* has been heralded, so that European fundamental rights apply to all state measures which are preliminary conditions necessary for the enjoyment of a Community fundamental right¹⁹. If this were so, the impact of Community law on the fundamental rights guaranteed by the national Constitutions would be dramatically broadened and might eventually draw the protection of fundamental rights

¹⁶ Some fundamental studies about the incorporation are: J.H.H. WEILER, *The European Court at a Crossroads: Community Human Rights and Member States Action*, in F. Capotorti and others (eds), *Du droit international au droit de l'integration. Liber amicorum Pierre Pescatore*, Baden-Baden, 1987, 821 ss.; J. TEMPLE LANG, *The sphere in which member states are obliged to comply with the general principles of law and community fundamental rights principles*, in *Legal Issues of European Integration*, 1991/2, 23ss. and K. LENAERTS, *Respect for Fundamental Rights as a Constitutional Principle of the European Union*, in *Columbia Journal of European Law*, 2000, 1 ss.; B. DE WITTE, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in P. ALSTON ed., *The EU and Human Rights*, Oxford University Press, 1999, at. 873.

¹⁷ ECJ Judgement 13 July 1989, 5/88, *Wachauf*

¹⁸ ECJ Judgement 18 June 1991, 260/89, *Elliniki Radiophonia Tielorassi ERT*.

¹⁹ In the direction of broadening the limits of the incorporation see the Conclusions of Advocate General M. Poiares Maduro 12 September 2007, C- 380/05, *Centro Europa 7*, in particular at 21 and 22, reasoning about a uniform protection of fundamental rights as a necessary condition for an effective free movement of person throughout Europe and Conclusions of Advocate General Damaso Ruiz Jarabo Colomer 6 September 2007, C-267/06, *Tadao Maruko*, dealing with the same sex marriage and the right to the survivor's pension.

at the European level, toppling the limits of jurisdiction which were so carefully established in the Charter of Fundamental Rights, art. 51 and art. 53, according to the consolidated doctrine of the incorporation. So, from the original void regarding the protection of fundamental rights in the European Union, the path towards a *Grundrechtsgemeinschaft* would be completely achieved.

d. Cases on terrorism

The Community institutions have often been accused of using different standards of protection of fundamental rights, depending on the nature of the question under review: generally speaking the ECJ seems to be very much more demanding towards member states (and even more so towards third party States or States that are candidates for membership) and indulgent regarding the acts of the Community's institutions. In fact, the ECJ case law on fundamental rights is dotted with statements of principle but has rarely admitted a violation of rights on the part of the acts of the Community institutions, while it has more often ascertained violations on the part of the member states.

If we keep this context in mind the importance of the *Modjahedines* case²⁰ is unmistakable. The decision was delivered by the Court of First Instance at the end of 2006. This judgement belongs to an important group of decisions on terrorism and regards some of the EU Council regulations which, on the execution of UN resolutions, foresee important patrimonial restrictions for people and associations that are reputed to be connected to terrorist networks. In all these cases on terrorism numerous violations of fundamental rights were claimed by the plaintiffs, among which the violation of the right to property, the right to defence and the right to effective judicial remedy. The complaints originate from the fact that the lists of terrorists (or presumed terrorists) are compiled without permitting the subjects to explain their own reasons and thus without permitting them to refute the proof gathered against them. This is first and foremost in violation of the right to defence, the right to property and the right to a judge and a judgement.

The CFI faced this problematic area in several cases, such as *Yusuf and Kadi*²¹, *Ayadi and Hassan*²² and in the *Modjahedines*²³ case providing different responses.

²⁰ CFI Judgement 12 December 2006, T-228/02, *Organisation des Modjahedines du peuple d'Iran*.

²¹ CFI Judgement 21 September 2005, T-306/01, *Yusuf*; CFI Judgement 21 September 2005, T-315/01, *Kadi*.

The first group of decisions caused some criticism, because it ended up sacrificing completely the plaintiffs' fundamental rights²⁴. In the Yusuf and Kadi decisions the European judges, after carrying out a complex reasoning on the relations between Community sources, international sources, fundamental rights and *jus cogens*, squashed all the censures, claiming that the review of the Community acts would end up in an indirect review of the UN resolutions, which, as sources of international law, prevail over Community law, including fundamental rights. The UN resolutions are only bound by the *jus cogens*, which the Court does not repute as having been violated in the case under review.

In the Ayadi and Hassan cases, the Court repeats the core of the previous decisions and considers that the contested Community regulations do not express discretionary power of the Community institutions, so that a judgement from the Court on such Community acts would inevitably become a judgement on the UN resolutions, which is not permitted. Nevertheless, in this second group of cases there is much more stress on the role of the member states, who are urged by the Court to ensure the diplomatic means to arrange for the cancelling out of the names from the UN's list of terrorists, and in case of need all the appropriate judicial remedies.

The Modjahedines case, however, differs from both these groups of precedents because the Court ascertains a violation of fundamental rights and declares the decision made by the EU Council void, which enumerates the *Organisation des Modjahedines du peuple d'Iran* in the list of terrorists, for a violation of the right to defence, of the obligation to motivation and of the right to an effective judicial remedy.

The different attitude of the Court in this latter case relies on the fact that, unlike the previous cases, the inclusion of the plaintiffs in the list of terrorists was not done directly by the UN bodies but, on the contrary, by the European institutions. *L'Organisation des Modjahedines* was harmed by economic sanctions by virtue of a discretionary choice of the European institutions, which, in order to implement a UN resolution²⁵, identified the physical and legal persons that commit or try to commit acts of terrorism, or aid and abet such persons or organisations and inflicted sanctions such as the freezing of assets and financial means. For this

²² CFI Judgement 12 June 2006, T-253/02, Ayadi; CFI Judgement 12 June 2006, T-49/04, Hassan.

²³ CFI Judgement 12 December 2006, causa T-228/02, Organisation des Modjahedines du peuple d'Iran.

²⁴ L. CAPPUCIO, *Sanzioni ad Al-Qaeda nei regolamenti comunitari: si può agire soltanto nei confronti del proprio Stato di appartenenza?*, in *Quaderni costituzionali*, 2006, 821 ss.

²⁵ UN Security Council Resolution of 28 September 2001, 1373 (2001). Council Decision 2 May 2002, 2002/334/CE and Council Decision 17 June 2002, 2002/460/CE both containing the name of the plaintiffs in the list of the suspected terrorists.

reason the Court decided for the annulment of the European Council's decision for violation of the above-mentioned fundamental rights in the part applied to the plaintiffs.

The choice made by the Community's judges was certainly very courageous. Not only did the Court use the sanction of annulment of the contested act, something that happens very rarely, not even in the decisions of the national constitutional courts, which seem to prefer solutions of interpretative nature; not only did the Community judges prove to be more severe and demanding towards their own institutions compared to what is required by the international bodies and the member states; but, of no lesser importance, the Community judges tested their capacity to be rigorous in the guarantee of rights on one of the prickliest terrains, given that the seriousness of the international situation tends to mitigate the sensibility towards the rights of suspect terrorists and generates a greater propensity towards the need for security rather than towards that of justice and freedom.

e. A panoramic overview

If we consider the comprehensive result of this line of cases on fundamental rights, we cannot help remarking that something new has taken place in the European case law since 2000. This panoramic overview of the recent case law of the ECJ on fundamental rights could continue *ad infinitum*, illustrating for example the consistent group of sentences regarding European citizenship or again illustrating the synergies which have over time been created with the protection of human rights guaranteed by the Court in Strasbourg and many others²⁶.

Undoubtedly something has changed in the approach of the Court of Justice towards fundamental rights since 2000. Whoever observes at close quarters Community jurisprudence today would answer affirmatively to the question posed provocatively many years ago: "the European Court of Justice: taking rights seriously?" Today many decisions issued by the Community judges take fundamental rights extremely seriously. Since the approval of the Charter the plaintiffs and their lawyers use human rights more and more often as crucial legal arguments in the proceedings before the European court and these do not fail to speak the language of fundamental rights. Human rights which in the past often seemed to be invoked as a mere rhetorical device begin to affect the merits of the decisions of the European courts. In this

²⁶ For a more complete analysis see M. CARTABIA (ed.), *I diritti in azione*, Bologna, Il Mulino, 2007.

development one cannot but notice the beneficial effect of the Charter of Fundamental Rights and the new “visibility” of fundamental rights, which was precisely one of the effect that the Charter was intended to achieve.

So, how can one not applaud a Court that shows it can occasionally sacrifice the needs of the economic freedoms in the face of human dignity, as happened in the Omega case? How can one not admire the courage of a Court that cancels the organisation of the Modjahedines from the list of terrorists in the name of their right to defence?

Following the approval of the Charter, the feared effects of freezing and paralysing jurisdictional activism on the subject of fundamental rights did not occur and on the contrary the result is the strengthening of the Court of Justice as a *Court of Rights*. Today, several years after the approval of the Charter of Fundamental Rights, we can say without any shadow of a doubt that human rights are even more solidly in the hands of the Court of Justice and that the authority of this Court is becoming increasingly stronger.

2. *The Charter and the Court: legitimising effects, hermeneutical effects.*

The Charter of Fundamental Rights seems to have strengthened the position of the Court of Justice from two aspects: on the one hand it has produced a *legitimising effect* and on the other a *hermeneutical effect*.

The Charter filled the void of written provisions on fundamental rights that had made the initial case-law of the ECJ so shy. The reference to fundamental rights provided in art. 6 in the TEU had not completely recovered the European Union from its initial weakness. The approval of the Charter now offers a solid base for the judicial protection of fundamental rights. Previously, the role of the Court of Justice as guarantor of rights was undermined by the lack of a text able to reflect, for better or for worse, the constitutional identity shared in the European Community²⁷.

Certainly, there is something paradoxical in the fact that the Charter is producing a legitimising effect on the Court although it has not (yet) any legal effect²⁸, but is on the contrary

²⁷ M. ROSENFELD, *Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court*, in *International Journal of Constitutional Law*, 2006, 618.

²⁸ The Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community under construction in the CIG 2007, published on 23 July 2007, CIG 01/07, provides legal effect for the Charter, by

just a political document. However, the fact that immediately after its proclamation the Charter of Fundamental Rights was invoked and applied by many national judges, including many national constitutional courts, also appearing regularly in the decisions of the Court of First Instance as well as in the Conclusions of the Advocates General, has created an aura of legality around the document, explaining the potential of legitimisation that it has produced also as regards the Court of justice.

Even more striking are the hermeneutical effects of the Charter of Fundamental Rights.

As every legal written text, even the Charter should serve to limit room for interpretation on the part of judges. This, at least, is the concept that has been spread by the multi-secular tradition of civil law countries since the French revolution. The legal systems in continental Europe, for right or for wrong, have been inspired by the idea that judges are the “bouches de la loi” and that their mission is to say what the written law provides, and to apply it to the specific cases brought before them. And yet, the Charter does not seem to have coerced the creativity of the Court of Justice but rather seems to have produced quite the opposite result.

First and foremost, it needs to be considered that the goal of reducing the role of judicial power by means of the written law has not been completely achieved, not even in the national systems that follow the tradition of civil-law. History has extensively shown that jurisdictional activity cannot be reduced to the mechanical application of the law in the form of judicial syllogism, and in recent years the role of judges is becoming all the more relevant, in particular in fields related to fundamental rights.

Moreover, it needs to be considered that the Charter of Fundamental Rights operates in a “multi-level” system, where it is placed alongside many other “bills of rights”, such as the 27 national Constitutions, the European Convention of Human Rights, a wide range of unwritten constitutional principles elaborated by all the high courts that deal with human rights and especially by the Courts in Luxembourg and Strasbourg. As is well known, in the systems of *common law*²⁹ judges enjoy a wide discretionary power for the simple fact that in order to solve a case or controversy they can rely on many different sources of law. In fact, one of the main reasons that explains the extent of the discretionary power of judges in the systems of *common*

means of an amendment of art. 6 of the Teu: “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted on [... 2007], which shall have the same legal value as the Treaties”, in www.consilium.europa.eu

²⁹ See in particular on this point M. ROSENFELD, *Constitutional adjudication in Europe and in the United States: paradoxes and contrasts*, in *International Journal of Constitutional Law*, 2004, 633, at 646.

law is the possibility that they are offered to refer to a multiplicity of competing sources of law in exercising the *judicial review*.

Lastly, it must also be considered that the text of the Charter is, so to speak, loosely formulated. The language of the Charter is very general and by consequence it does not provide strict guidelines for its interpreters. In order to find a satisfactory compromise for all the member states, the Charter uses a very broad wording, limiting itself to codifying principles and basic values which are generally shared, postponing the more controversial issues to a more detailed legal regulation or to the discretionary power of judges. Let us consider some of the provisions of the Charter: “Human dignity is inviolable. It must be respected and protected”, “Everyone has the right to life”, “Everyone has the right to his or her own physical and mental integrity”, “Everyone has the right to freedom and security”, “Everyone has the right to respect for his or her own private and family life”. Faced with such a text, all the interpretative options lie wide open and the discretionary power of the interpreter plays a most important part.

For all these reasons far from paralysing jurisdictional creativity, the writing of the Charter of Fundamental Rights is further increasing the power of the Community judges, which have always been a vital engine for the development of the European integration.

3. *The risk of “judicial colonialism”.*

Among these beneficial effects there are, however, also some potential victims. The judicial activism in the field of fundamental rights in Europe brings about new dangers for the constitutional equilibrium between the EU and the member states, and – more important – alters the relationship between the common core of values shared all over Europe and the diverse and plural historical traditions. I do not want to insist on the risk of the *gouvernement des juges*, although it is clearly implied in the present phase of European integration. I would rather draw the attention to a different danger that I dare to call the risk of “*judicial colonialism*”.

It could be easily predicted that the approval of the Charter of Fundamental Rights would produce a centralising effect, gradually drawing the protection of human rights to the European level and at the same time emptying the protection guaranteed by the national Constitutions and breaking the limits of jurisdiction in which the action of the Community institutions should be

carried out³⁰. In this centralising evolution, the national constitutional traditions run the risk of being forgotten and lost forever.

The case law of the ECJ on fundamental rights is dotted with signs showing that these predictions are coming true.

Cases like *K.B. and Richards* are unquestionable examples of the invasion of the Community's protection of fundamental rights into areas where the responsibility should lie with the national Constitutions. After all, why should it be the Court of Justice in Luxembourg to impose the recognition of transsexuals' rights on the British system? Is the care of the British courts and the Strasbourg Court not enough? Cases like *K.B. and Richards* expand the Community protection of rights on the preliminary conditions for the application of Community law and widen the ECJ judicial review on fundamental rights. If the Court of Justice consolidates this orientation, the limits to the scope of European fundamental rights clearly laid out in art. 51 of the Charter will lose value. The Charter has a limited scope, addressing essentially the Community institutions and the national institutions only when they apply to Community law. However it tends to be treated as if it were to overcome the national constitutions. As has been pointed out³¹, the greater the emphasis on the EU's Charter of Rights, the more difficult it will be to explain that the Charter was not intended to take the place of national Constitutions.

Besides this, as the *Kreil* case shows, this expansion can also lead to the sacrificing of some traditional principles established by the national Constitutions. The expansion of the scope of fundamental Community rights is not only a matter of jurisdiction – the role of the Court of Justice that takes over responsibilities of the national Courts – but also a tricky question on the merits of the protection of fundamental rights, because it could happen that the Community's "version" of some rights does not correspond entirely to that of one or more member states.

The fact that cases like *K.B.*, *Richards* and *Kreil* have generally been supported by public opinion and commentators must not cloud the transformation that is occurring in the relationships between the Community's system and the national constitutional systems. By endorsing such developments we must be aware that they leave themselves open to being used in

³⁰ A. VON BOGDANDY, *The European Union as a Human Rights Organization?* cit., 1316-1318. See also on this point A.C. PEREIRA-MENAUT, *A Plea for a compound res publica europea: proposal for increasing constitutionalism without increasing statism*, in *Tulane European and Civil Law Forum*, 2003, 97-98.

³¹ F. G. JACOBS, *European Convention of Human Rights, The EU Charter on fundamental Rights and the European Court of Justice*, in www.ecln.net

controversial cases, where the divergence between the national Constitutions and the European principles can be more striking³².

Questions which are ethically controversial in the field of fundamental rights, albeit regarding problems common to every human being, have received and still receive different answers in different countries. The questions that concern the co-habitation of different cultures – and first of all those related to the freedom of religion – concern every man and arise in every social group, and yet they have found different answers in the course of history and even today are faced according to particular traditions in each of the European systems³³.

Most cases brought before the European Court of Justice concern weak subjects such as women, homosexuals, transsexuals and migrant workers and understandably the Court wants to accomplish its own constitutional mission towards them. The European Court of Justice does not elude its duty to fight against discrimination on the basis of gender, sexual orientation and nationality. However, in most member states of the European Union problems related to sexual orientation, same sex marriage, abortion, bioethics issues, immigration and the like, mark deep cultural and political cleavages and are usually dealt with very carefully in the political arena – in particular in the parliaments – in order to find balanced solutions that reconcile the different points of view at stake. The European Court of Justice has taken over its own “judicial policy” in favour of women, immigrants, homosexuals, transsexuals and in general of all the weak subjects. The Court does not even hesitate to impose dramatic changes in the member states’ politics and legislation.

The result is that diverse cultures and traditions on these subjects are melting to form a uniform European constitutional standard fostered by the European Court of Justice. The expansion of the Community’s protection of rights may end up having an impact on those fields where the national particularity is a resource peculiar to the European Union “unit in diversity”, where unity wants to live alongside pluralism, even in the sphere of fundamental rights.

³² See on this point the critique made by M. LUCIANI, *Costituzionalismo irenico e costituzionalismo polemico*, in www.associazionedeicostituzionalisti.it to the multilevel constitutionalism because of the fact that they hide the conflict between legal systems, p. 25.

³³ See the analysis of J.H.H. WEILER, *Un’Europa cristiana*, Milano, Rizzoli, 2003, showing the different relationship in Europe between the public power and religion.

The approval of the Charter of Fundamental Rights had the effect of fuelling a current of thought that supports the development of common European values - a “*jus comune europeo*”³⁴ – intended not only to be a basis for a legal culture shared generally throughout the European Union, but also to inform the public life of the whole European society, thanks to the work of the judges and other interpreters of common values. There is the idea of a conciliatory constitutionalism³⁵, in which the whole continent is united around omni-shared values - an aristocratic vision³⁶, in which the unification flows from the judges’ pens.

These hopes about the common values for Europe are certainly rooted in the universal nature of fundamental rights which concern needs common to all men and which can be summarized in the meta-principle of human dignity. It seems that after freezing natural law and natural rights in a chapter of the history of legal thought, European law and to some extent international law are taking the place of natural law, since they imply the idea of a core of values and rights common to all human beings. The multicultural societies are in the middle of the dramatic and urgent quest for a common ground of values for all cultures and most scholars deem that the answer is to be found in European law and in international law, in particular in the field of fundamental rights. This is the ground where the need for universalism can meet the culture of legal positivism that still pervades the European legal culture.

We must not, however, forget the ambivalent nature of fundamental rights. In the struggle for fundamental rights there is a longing for *universality* that justifies the need to go beyond the boundaries of the national legal systems; but there is also a *historical dimension* in which the traditions and deepest conscience of each people is reflected, of which the Constitutional Charters are one of the salient expressions. Rooted in the value of human dignity, the idea of fundamental rights necessarily contains a *universal dimension*. Embedded in the historical, religious, moral, linguistic and political peculiarities of each people, such rights are fed by particularity and pluralism³⁷.

³⁴ The origin of this line of thought we can be considered I. PERNICE, *Multilevel Constitutionalism in the European Union*, in *European Law Review*, 2002, 511 ss. In Italy see at least G. SILVESTRI, *Verso uno ius comune europeo dei diritti fondamentali*, in *Quaderni costituzionali*, 2006, 7 ss.; A. PIZZORUSSO, *Il patrimonio costituzionale europeo*, Il Mulino, Bologna, 2002; V. ONIDA, *Armonia tra diversi e problemi aperti*, in *Quaderni costituzionali*, 2002, 549 ss.

³⁵ M. LUCIANI, *Costituzionalismo irenico e costituzionalismo polemico*, cit., who criticizes the idea of a conciliatory constitutionalisations of Europe by means of the case law of the European and national courts.

³⁶ On the aristocratic character of judge-made law see M.A. GLENDON, in *A Matter of Interpretation*, Princeton, 1997, p. 95 ss.

³⁷ P. G. CAROZZA, *Uses and misuses of comparative law in international human rights*, in *Notre Dame Law Review*, 1998, 1235.

The attraction for a European protection of human rights runs the risk of sacrificing the national historical and cultural traditions that characterise the pluralistic nature of Europe.

The position of the Court of Justice is crucial and extremely delicate. Its pronouncements on the subject of fundamental rights tend to assume an absolute value and set the standard that must be respected throughout the 27 countries of the Union³⁸. Once a fundamental right enters the realm of jurisdiction of the Court of Justice it becomes a European fundamental right. The decisions taken by the Court of Justice are binding in all the member states even if the case originated in a particular legal system: the K.B. and Richards cases, to remain with the examples dealt with here, concern the British system at the outset, but bind whichever other Member State has a norm comparable to the British one, that forbids the transcription in the registry office of a change of sex. Since K.B and Richards every national judge can apply the Community principle bypassing if necessary every incompatible domestic law.

Here lies the risk of “judicial colonialism” in the field of fundamental rights. As history has shown us colonialism intends to promote progress and civilisation, but on more than one occasion pre-existing cultural and historical patrimonies have been sacrificed in the name of a specific culture.

First and foremost, if we want to prevent the sacrificing of the plurality of existing constitutional traditions, it is necessary that the category of fundamental rights is not excessively expanded. The further away we get from the core of fundamental rights, the greater the historical and cultural divergence between the various juridical systems. The proliferation of “basic rights”, especially if it takes place through the law of the Court in Luxembourg, may impair the fundamental constitutional balance of the whole Union. The *jus commune europium* or, if you like, the “common constitutional traditions” are undoubtedly a reality recognisable around a consolidated and limited nucleus of values, while it is a category uncertain and shaky the further away one goes from that essential nucleus of really common values. Great care must be taken when recognising new fundamental rights at European level, because every new element affects the basic rights and could upset the existing equilibrium between common values and particular national rights. After all, the primary task of the Courts is to guarantee the existing fundamental rights rather than create new ones.

³⁸ This effect is clearly grasped in S. PANUNZIO, *I diritti fondamentali e le Corti in Europa*, Napoli Jovene, 2005, at 58.

Moreover, in order to contrast the risk of cultural standardisation is necessary to be aware of this risk and demand from the courts that are in the middle of the arena a jurisdictional approach that fights it.

On the one hand, as far as the national judges are concerned, we must keep in mind that the destiny of the national cultural traditions in Europe is in the first instance entrusted to the constitutional courts which should express the lively voice of their societies and the respective national constitutions. The European Court of Justice bases its work on the voices and traditions that make themselves heard, and if one is missing the cultural patrimony of the whole of Europe is diminished. Only if the constitutional courts are able to interpret and proudly express the peculiarities of their own constitutional traditions will the Court of Justice be facilitated in identifying the “common constitutional traditions” and the common core of European fundamental rights.

On the other hand, the Court of Justice is requested to show great respect for all the national constitutional traditions when interpreting the principles of the EU Charter of Fundamental Rights, but to this purpose it is indeed necessary that also the national constitutional courts change their behaviour and use all the tools at their disposal to convey their own constitutional traditions within the European Union’s system. Among these a crucial role is reserved for the preliminary ruling ex art. 234.TEC.

Both the national constitutional systems and the European constitutional systems could pay too high a price if their courts shut themselves out of the European constitutional dialogue, the former being deprived of the possibility to express themselves in the European arena, and the latter losing one or more of their precious contributions.

In this light we need to reflect on the fact that the preliminary ruling could be a valid tool in bringing traditions, experience, reasoning and different points of view before the Court of Justice on the part of the national constitutional courts. In short, it is the simplest way to keep pluralism alive within the European constitution.

PART II – THE CONSTITUTIONAL COURTS AND THE PRELIMINARY RULING

1. The refusal of the constitutional courts to use the preliminary rulings.

In this context, with the European Court of Justice quickly evolving as a judge of fundamental rights, the need for direct judicial dialogue between the constitutional courts and the European court is all the more urgent. The relationship between the supreme national courts and the ECJ requires prompt adjustment, suitable to the new trend in the European constitutional case-law.

Nowadays a heavy silence still keeps the two kinds of courts apart, in such an unnatural way that it raises some questions. Most of the national constitutional courts maintain a haughty contempt towards the European Court of Justice: they refuse to enter into direct dialogue; in particular they refuse to use the preliminary ruling provided by art. 234 Tec (and art. 35 Teu). In fact, up to now, only the British House of Lords, the Belgian *Cour d'arbitrage* and the Austrian *Verfassungsgericht* have referred to the European Court of Justice by means of preliminary rulings³⁹. The Polish Constitutional Tribunal has accepted⁴⁰ the possibility of addressing the European Court, but has not yet used it in practice. All the other constitutional courts keep strictly silent on the European stage.

Indeed, the constitutional courts share their suspicious attitude towards the preliminary ruling and the scanty use of it with the other national supreme courts. The data emerging from the praxis⁴¹ in general shows that lower courts are more active partners of the European Court of Justice than the supreme courts, although there are some important exceptions. From this point of view it may be noticed that the idea of imposing an obligation to the supreme courts to refer preliminary rulings to the European Court of Justice has not produced the expected results and the principle included in art. 234, par. 3, Tec seems to be violated in most cases.

However the attitude of the constitutional courts differs somewhat from that of the other supreme courts. In some cases, in fact, some constitutional courts contend, even from the theoretical point of view, that they are not bound by the rules and principles of art. 234 Tec.

³⁹ See the annual report of the European Court of Justice for 2005, in particular, figure n. 18 available at www.curia.eu.int.

⁴⁰ Polish Constitutional Tribunal 11 May 2005, K 18/04. par. 18.

⁴¹ See again the annual report of the European Court of Justice for 2005, figure n. 18.

Whereas the other supreme courts simply ignore the preliminary ruling, some of the constitutional courts –unreservedly the Italian *Corte costituzionale*⁴², the Spanish *Tribunal constitucional*⁴³ and the French *Conseil constitutionnel*⁴⁴ – openly assert that they cannot be bound by art. 234 and formulate theoretical arguments on the subject, so that the problematic relationship between the European Court of Justice and the constitutional courts is not only a matter of fact but also a matter of principle.

In the following pages I would like to discuss the refusal of the constitutional courts to enter into direct judicial dialogue with the European Court of Justice and in this part of the paper I will focus mainly on the case law of the Italian constitutional court, because it explicitly addresses the issue and explains at length the reasons for its doctrine⁴⁵. Later I will try to offer some reasons why such a doctrine is not convincing, the most important of which has already been made clear from the previous analysis, and relies on the fact that in the European Union a strong and daring European Court of Rights needs to be surrounded by similar strong and daring interlocutors at national level in order to preserve the original feature of Europe united in diversity.

2. The inconsistent case law of the Corte costituzionale on the preliminary ruling to the European Court of Justice.

As well as many other national constitutional courts, the Italian *Corte costituzionale* has never used the preliminary ruling provided in art. 234 Tec. What is more interesting is that the Italian Court has explicitly and thoroughly addressed the problem, and what is even more relevant, the Italian Court relies on the very nature of the constitutional courts to justify its assumptions. That is why the case law of the Italian Court deserves thorough analysis: it can be considered a paradigm for all the other constitutional courts.

⁴² Corte costituzionale ord. n. 536 of 1005

⁴³ Spanish Tribunal constitucional 28/1991.

⁴⁴ For Constitutional court the French Conseil Constitutionnel see decision 27 July 2006, Droit d'auteur, cons. 20.

⁴⁵ In a recent decision, the French Conseil constitutionnel has dealt with the problem and answered that the use of the preliminary ruling is barred because it is obliged to render its decision within one month. Decision 27 July 2006, Droit d'auteur, cons. 20. However, in this decision the Conseil constitutionnel justifies its refusal on a specific reason of the French procedure and it is not a good basis to understand the position of other constitutional courts, which are not bound by the time-limit provided by the French law.

In its first decision on the matter, no. 206 of 1976⁴⁶, the Italian constitutional court decided not to use the preliminary ruling to solve doubts of interpretation of a European regulation, without establishing a clear principle. The Italian Court asked the lower courts to solve all the problems of interpretation concerning European law, using if necessary the preliminary ruling. In this stage, the constitutional court does not use the preliminary ruling but asks the lower court to use it.

Later, the Court reversed its position. In decision n. 168 of 1991, the Court said that it was vested of the “faculty” to use the preliminary ruling in case of need. In practice, the Court has never availed of this “faculty”, but commentators appreciated the new position of the Court, now open to dialogue with the European Court. Some doubted the fact that the Court *may* refer a preliminary ruling to the European Court of Justice. Since it is a supreme court, it falls under the *obligation*⁴⁷ of par. 3 of art. 234 Tec, not under the simple possibility/opportunity offered to the lower courts from par. 2 of art. 234.

It was probably out of fear that there would be an obligation to refer to the European Court that the Italian constitutional court later withdrew its previous doctrine. In decision n. 536 of 1995 the Italian Court denied having *locus standi* in preliminary rulings before the European Court of Justice because – the Court stated – its functions are not jurisdictional in nature, since its tasks are of “constitutional control, the supreme guarantee of the Constitution”. As a consequence the Court said that it cannot be included among the judges that art. 234 refers to, because of the specific nature of its functions.

So, since 1995 the Italian constitutional court has stuck to this position and has always refused to use the preliminary ruling. However, since many cases brought before the constitutional court need the intervention of the European Court of Justice for the interpretation of European law, the Italian Court requires the lower judges to refer to the European Court before bringing a question of constitutionality before it. If the lower judge skips the European step, the Court declares the question inadmissible and refuses to solve the case on its merits⁴⁸.

⁴⁶ See decision. 28 July 1976, n. 206, confirmed by decisions 7 March 1990, n. 144 and 16 June 1994, n. 244.

⁴⁷ F. SORRENTINO, *Rivisitando l'art. 177 del Trattato di Roma*, in *Lo stato delle istituzioni italiane. Problemi e prospettive*, Milano, 1994, 646 ss.

⁴⁸ See decision 206 del 1976; decision 536 del 1995; decision 319 del 1996; decision 108 e 109 del 1998. See also decision 85 del 2002 where the Constitutional court declares inadmissible a question of constitutionality because a lower judge has referred a question to the European Court and to the Constitutional court at the same time

In short, at present the Italian constitutional court refuses to be qualified as a judge to the purpose of the preliminary ruling and by consequence closes the doors on direct dialogue with the European Court of Justice. However, its jurisprudence is very demanding for national judges, who are required to use the preliminary rulings before addressing the constitutional court. In this way, an *indirect dialogue* at present exists between the Italian constitutional court and the European Court and lower judges act as go-betweens for the two supreme courts.

3. The explicit reason: the constitutional court is not a judge.

Why are the constitutional courts, barring a few, so suspicious towards the European Court of Justice? Why do they leave the privilege to consult the European Court to the lower courts?

The Italian Court offers an explicit answer to this question, which is indeed not very convincing.

In decision n. 536 of 1995, the leading case on this problem, the Italian Court says that it does not have *locus standi* in preliminary rulings before the European Court of Justice, because of the nature of its functions. The constitutional court is not vested with judicial functions and its task is not to solve practical cases and controversies; it is rather charged with the responsibility to review the constitutionality of laws and other acts, the highest guarantee of the Constitution and by consequence it cannot be considered a common judge.

Generally speaking, commentators have found this reasoning not convincing.

For a start, it has been pointed out that the constitutional court cannot by any means profess to be alien to the jurisdictional function. Despite the fact that the nature of the constitutional court remains controversial – at the crossroads of the political arena and jurisdictional function – this is not enough to prevent the constitutional court from being included within the authorities allowed to address the European Court of Justice with a preliminary ruling. Undoubtedly constitutional courts are institutions of entirely unique nature, unprecedented inventions, not comparable to courts and common judges. However, they are also not alien to the jurisdictional function. So, highlighting their original nature is not sufficient to conclude that they are not endowed with the function to use the preliminary ruling before the Luxembourg Court.

Secondly, it must be said that the Italian constitutional court, while denying being able to use the preliminary ruling before the Court of Justice, regularly uses before itself the preliminary ruling to raise questions of constitutional review of legislation. If it were true that the constitutional court is not a jurisdictional authority, it would not then even be able to raise a question of constitutional review of legislation, since this possibility is reserved only to judges in the course of a *judicial process*⁴⁹. There is a blatant contradiction between the role of the constitutional court as a judge *a quo* in the case of the national constitutional adjudication and the negation of such a role in the European context⁵⁰.

It is true that the constitutional court and the Court of Justice offer different definitions of “judge *a quo*”⁵¹. So it may happen that the Court of Justice and the national court have different notions of “judge”. Nevertheless, it is precisely this latter remark which instead of enhancing the position of the constitutional court adds a further, decisive argument against it. Indeed, since the interpreter of community law is the Court of Justice, so the notion of judge of the preliminary ruling ex art. 234 Tec must be defined by the Court of European Justice and cannot be unilaterally established by a national court. The task to gauge whether the constitutional courts can be judges for the preliminary ruling does not rest with the national courts, but with the European Court of Justice, inasmuch as it is the organ that decides the uniform interpretation of European Community law.

On this point the case-law in the European Court of Justice is perfectly consistent. The Court of Luxembourg has formulated a series of criteria that permits the assessment as to whether a preliminary ruling has been put forward correctly by a national judicial authority. So, the Court of Justice states that “In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 234 Tec, which is a question governed by Community law alone, the Court takes into account a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is

⁴⁹ See constitutional law n. 1 of 1948 art. and law n. 87 of 1953 art. 23.

⁵⁰ See on this point T. GROPPi, *La Corte costituzionale come giudice del rinvio ai sensi dell'art. 177 del trattato CE*, in P. CIARLO, G. PITRUZZELLA, R. TARCHI (edited by), *Giudici e giurisdizioni nella giurisprudenza della Corte costituzionale*, Torino, 1997, 171 ss., spec. 187 ss.

⁵¹ The ECJ, for example, considered the Council of State capable of the preliminary ruling, ECJ judgement 16 October 1997, joined cases 69 to 79/96, while the selfsame court (Council of State) is not authorised to approach the Constitutional court with questions of constitutional review of legislation.

independent”⁵². The Court of Justice repeats ad infinitum that it falls exclusively within its competence to pronounce on the *locus standi* of national judges in preliminary rulings, since it is a question of Community and not national law.

As can be understood on examination of the criteria established by the Court of Justice, the Community judges tend to interpret broadly⁵³ the concept of judicial authority ex art. 234 Tec, so much so that the Advocates General, worried about the overloading of pending appeals before the Luxembourg Court, try (in vain up until now) to reduce the possibility of accessing the Court.

Now from the point of view of the Community position, there is no doubt that the constitutional courts come under the concept of judge according to the criteria laid down by the Court of Justice. Moreover, as has already been mentioned, some preliminary rulings have been brought before the Court of Justice by the constitutional courts of some member states and the Court of Justice has not wavered in examining them, so that there can be no doubt about the fact that the French, Spanish and Italian position, which excludes the constitutional court from the definition of national judicial authority able to apply to the Court of Justice, contrasts sharply with the position endorsed in Luxembourg.

4. The implied reason: the constitutional court “superiorem non recognoscens”.

Beyond the explicit arguments given by the Italian constitutional court, a different, implicit and conclusive reason can easily be guessed. It is a reason well rooted in the constitutional literature about the constitutional court.

It is widely accepted that the constitutional courts, inasmuch as they are the supreme guardians of the Constitution, cannot yield to the will of any other judge. The common opinion is that in contemporary States, sovereignty is no longer the attribute of a person – the king – but it

⁵² ECJ judgement 27 April 2006 C-96/04, Standesamt Stadt Niebüll, Cons. 12 and previous judgement 17 September 1997, case C-54/96, Dorsch Consult,; 21 March 2000, joined cases C-110/98 to C-147/98, Gabalfrisa and judgement 14 June 2001, C-178/99, Salzmann, point 13 and decision 15 January 2002, case C-182/00, Lutz.

⁵³ See again judgement 17 September 1997, C-43/95, Dorsch Consult and the opinion of the Advocate General Tesauero who doubted the jurisdictional nature of the administrative body; judgement 29 November 2001, C-17/00, De Coster and the limiting opinion of the Advocate General D.Ruiz-Jarabo Colomer

is instead the quality of the Constitution: that is why also the constitutional court - the *Hüter der Verfassung* - enjoys this supreme quality and must be *superiorem non recognoscens*.

Following this doctrine, the European Court of Justice is perceived as a threat to the independence and the supremacy of the constitutional courts. Since its task is to guarantee the uniform interpretation of community law, the European Court must be located at a higher level, its decisions must be binding over the national courts and the preliminary ruling should be the formal tool to ensure this “judicial hierarchy”⁵⁴. In this line of thinking, if the constitutional court made use of the preliminary ruling it could find itself “taking orders” from the Luxembourg judges or, worse still, could be contradicted and rebutted by the European judges. By refusing to have recourse to the preliminary ruling, the aim of the constitutional court is to prevent itself being subjected to the European Court, for fear of harming its own honour and credibility.

Despite these arguments being of extreme importance, we cannot but consider some serious objections that could be made against them.

Abstaining from the preliminary ruling is not enough to protect the constitutional courts from the influence of the case-law of the European Court of Justice. Quite naturally, the constitutional judges are very well aware of the case law of the Court of Luxembourg and they take it into consideration when making their decisions. Moreover, in most cases the constitutional courts seem well-disposed towards the interpretations and positions that take shape in the European Court.

Nowadays, even in Europe there is a widespread tendency on the part of the constitutional judges to keep a sharp eye on the case law of the other courts that operate in different systems, in particular in cases involving fundamental rights. This is all the more reason why attention is paid to the European Court’s decisions which have binding legal force in national systems. Indeed, the Italian constitutional court – like many other constitutional and high courts – not only knows and applies with ever more regularity the legal standpoints taken by the Court of Justice⁵⁵, but even as a matter of principle it has stated that the decisions of the

⁵⁴ Indeed, as we shall see, the tool of the preliminary ruling satisfies more the need for a collaborative *ethos* rather than hierarchical, as is well underlined by A. TIZZANO, *I diritti fondamentali e la Corti in Europa*, in *Diritto dell’Unione europea*, 2005, 839 ss, in particular 843.

⁵⁵ ... and of the Court in Strasbourg, which does not comment on this context.

European Court are binding within the national legal order and they have supremacy and direct effect⁵⁶.

So the constitutional courts are under the influence of the European Court of Justice even though they refuse to ask preliminary rulings. If, therefore, the aim is to elude the influence of the Court of Luxembourg, we can say without any shadow of a doubt that the target is missed, because the decisions pronounced by the European Court of Justice in any case bind the constitutional courts and the authority of the Court of Justice hangs over all national judges. Refusing direct dialogue does not imply evading the influence of the Luxembourg Court.

The clearest example in recent times is the complex case concerning the Italian Law about the crime of false information on a company⁵⁷. The Italian law was contested both before the Italian constitutional court and before the European Court of Justice. As usual the constitutional court refused to refer a preliminary ruling to the European Court, but asked the lower tribunals to do it. In the meantime the constitutional court issued a formal order⁵⁸ with the aim of postponing the discussion of the case until after the decision had been made by the European Court. The constitutional court did not want to take the risk of deciding the case in violation of European principles. So, taking an attitude of complete deference towards the European Court, it delayed the discussion, so that the European Court could decide first and the Italian Court later. In other words, the Italian Court wanted to comply with the statements of the European Court, but did not want to co-operate with it directly. The result was the unusual decision to suspend the constitutional process while waiting for the European Court's decision.

In the light of this example it can therefore be surmised that the constitutional court's concern is not so much that of keeping the opportunity not to comply with decisions of the European Court; it is rather so as to not *appear* to be subject to a judge in any way its superior. It seems to be a matter of image, perception and appearance. The constitutional court, as a sovereign court, does not want to open up formal cooperation with another judge, the authority of which is undoubtedly uncontested. In order to preserve the appearance of its sovereignty, the constitutional court cannot afford to ask the European Court to intervene in a question belonging to its jurisdiction and prefers to retire to its splendid isolation.

⁵⁶ See decisions 113 of 1985 and 389 of 1989.

⁵⁷ ECJ judgement 3 May 2005, C- 387/02, C-391/02, C-403/02, Berlusconi.

⁵⁸ Constitutional court ord. n. 165 of 2004.

The crux of the matter does not seem to be so much of substantial nature as to accept having to pledge itself to ritual dialogue through the channels imposed by the European Treaties.

Indeed, dialogue between the two courts is not completely absent, but it is rather indirect dialogue, involving the lower courts as intermediary.

5. *Limits of the indirect dialogue.*

As follows from the previous analysis, the Court refuses to use the preliminary ruling but it wants and even needs to comply with the decision of the European Court of Justice and to this purpose it asks the lower courts to act as mediators. To put it bluntly, the constitutional court wants to follow the European decisions without begging directly for the European Court's decision. It wants to co-operate as a result of its own sovereign decision; it does not want to be obliged to do it.

In other words, the Italian constitutional court practices an indirect judicial dialogue with the Court of justice, which of course has some advantages. The constitutional court does manage to defend its autonomy, supremacy and prestige without provoking major clashes with the decisions of the European Court of Justice⁵⁹. Moreover, the option of promoting dialogue with the Court of Justice with ordinary judges as mediators secures a great margin of interpretation and great freedom of decision for the constitutional court. Finally, the constitutional court's procedural choices prevent the two courts from being placed in direct or open conflict when the legal standpoints of the two courts may perchance not coincide⁶⁰. In the light of these remarks, it could perhaps be concluded that the procedural position of the Italian constitutional court, even if fuzzy, is on the whole reasonable.

Nonetheless, some disadvantages are to be considered as well.

⁵⁹ It is perhaps for this reason that the spirit of cordial co-operation between the National Constitutional courts and the European Court of Justice has recently been highlighted by A. TIZZANO, *I diritti fondamentali e la Corti in Europa*, quoted, at 841.

⁶⁰ There is no shortage of cases solved in different ways according to whether the decisions were made by the Italian Constitutional court or by the Community Court of Justice. One example is the case of Maria Pupino, decided by the Constitutional court with judgement n. 529 of 2002 and by the European Court of Justice with Dec. 16 June 2005, C-105/03. It is worth noting that the two decisions originated from the same Italian judge, the Tribunal of Florence, which firstly asked the Italian Constitutional court for a declaration of unconstitutionality of the law, and due to the Italian Court's negative answer he then decided to refer to the European Court of Justice with a preliminary ruling, provided under art. 35 of the Treaty on the European Union.

In the first place, the indirect dialogue between the constitutional court and the Court of Justice through the lower courts, in fact can only work in certain types of procedure, namely within the so-called incidental procedure, or *procedure en voie d'exception*⁶¹. In all the other judgements that are made before the constitutional courts, dialogue through a lower judge cannot even be imagined, so that the preliminary ruling on the part of the constitutional courts seems the only way to keep the dialogue with the European Court open.

Moreover, even where it is possible, the indirect dialogue only works partially. The choice of the Italian constitutional court to postpone its decisions as long as a question remains open before the European Court of Justice, instead of letting it have the last word on each case, results in the complete marginalization of the Italian constitutional court from cases of “European dimension”. As has been said, the Italian Court first of all requires the lower courts to challenge a law before the European Court, so that the constitutional court can have the privilege to have the final word. In most cases the lower Courts follow the suggestions of the constitutional court and bring the action before the European judges; however generally speaking they then solve the case on their own, without addressing any further questions to the constitutional court. It would be too long and difficult to suspend the main procedure a second time in order to approach the constitutional court after receiving an answer from the European Court of Justice: one should bear in mind that the average time required for a decision from the European Court of Justice is between 20 and 23 months and for a decision from the constitutional court the wait is even longer than that. The Italian Court pushes for a three-cornered dialogue - involving the lower Courts, the European Court and itself – but the course is very often interrupted before giving the constitutional court a second chance. The result is the complete exclusion of the constitutional court from the judicial dialogue on European matters.

6. New developments in the State liability doctrine and the omission of the preliminary ruling.

A further urge towards the re-examination of the constitutional courts’ attitude towards the preliminary ruling arises from some recent decisions passed by the European Court of Justice regarding State liability for infringements of community obligations. The jurisprudential trend

⁶¹ See V. ONIDA, *Armonia tra diversi e problemi aperti*, quoted, 549 ss.

initiated with the Francovich decision of 1991⁶² has developed in some cases which deserve mention in this context because they concern the claim for damages caused by the judicial authorities who fail to use preliminary ruling.

The *leading case* in this recent development of European case law is Köbler, issued in 2003⁶³, in which the European Court of Justice applied the Francovich doctrine also to judicial activities, in particular to cases where a judge of last instance has violated community law and principles. Naturally, the Court of Justice greatly curtails the hypothesis of claim for damages and establishes that it must deal with a violation of manifest infringement of European law. Nonetheless, a typical case of manifest infringement of community law is precisely *the non compliance with the obligation to make a reference for preliminary ruling under the third paragraph of art. 234 EC*⁶⁴.

Therefore, on one hand the Köbler decision implies a noticeable expansion of the principle of claim for damages for violation of community law, its effects overflowing into the sphere of judicial activity. In particular, the Köbler decision affects the national judges of last instance, who have always been reluctant to be bridled within the network of European jurisdictional relations by means of the use of the preliminary ruling ex art. 234 ECT. On the other hand, however, the Köbler decision would seem to temper the impact – potentially highly explosive – of the principles pronounced therein, where it confirms that damages are reparable only in the case of a manifest violation of community law. The community Court of Justice thus appears extremely courageous in approving the principle of civil responsibility for the violation of European law caused by the high courts, but extremely cautious in limiting damage claim solely to cases defined by manifest violation, its behaviour revealing a perfect awareness of the peculiarity of the jurisdictional function.

The fact remains, however, that the Court of Justice wants to punish the high courts that do not use, when necessary, the preliminary ruling ex art. 234 ECT.

As far as the Italian case is concerned, the Court of Justice intervened again post-haste (digging the knife deeper into the wound) in the selfsame question of the use of the preliminary

⁶² Judgement 19 November 1991, joint cases C-6/90 and C-9/90, Francovich and others. Among the following developments, see judgement 5 March 1996, joint cases C-46/93 e C-48/93, Brasserie du pêcheur et Factortame

⁶³ Judgement 30 September 2003, case C-224/01, Gerhard Köbler v. Repubblica d'Austria.

⁶⁴ Judgement Köbler, points 53-56.

ruling by Courts of last instance. In a decision of 13 June 2006, *Traghetti del mediterraneo*⁶⁵ the Court pronounces on the compatibility of Italian law on the responsibility of judges with community principles expressed in the *Köbler* decision pointing out some problematic areas. The European Court of Justice finds clear conflict between the Italian law on the civil liability of judges, in many respects too restrictive, and the community principles on the civil liability of the State for violations of community law caused by judges. What is more relevant here is that the Court states that each time a judge of last resort has not used the preliminary ruling as is compulsory according to the Treaties and the case-law of the Court of Justice, individuals have the right to claim damages from the State. This means that in cases where a preliminary ruling is mandatory and a national judge of last resort fails or refuses to appeal to the Court of Justice under art. 234 of ECT, individuals will be able to claim damages sustained by the omission of the preliminary ruling.

It is natural that when facing these developments in community law more than one doubt arises regarding the position of the constitutional courts, which refuse categorically and as a matter of principle to take into consideration the possibility of turning to the Court of Justice by preliminary ruling for problems of interpretation or doubts over the validity of community law. The principle that excludes the constitutional court from the preliminary rulings must be immediately re-examined in order to comply with the recent principles expressed by the community law. The evolution of State liability as exemplified in the decisions *Köbler* and *Traghetti del mediterraneo*, should solicit an overruling by the constitutional courts, preferably before facing the unpleasant hypothesis of requests for claims for damages on the part of individuals due to the constitutional courts' behaviour⁶⁶.

7. The obligation under art. 234 par. 3 TEC and its flexible interpretation.

One of the most likely reasons for the resistance on the part of the constitutional court to apply the preliminary ruling comes from the wording of the third paragraph of art. 234 TEC,

⁶⁵ Judgement 13 June 2006, case C-173/03, *Traghetti del Mediterraneo SpA v. Repubblica italiana*.

⁶⁶ In truth, as remarked by J. BAQUERO CRUZ, *De la cuestión prejudicial a la casación europea*, in *Revista española de derecho europeo*, 2005, 35 the civil liability for the violation of community rights has been poorly applied due to an understandable reluctance on the part of the national judges. So it can well be imagined that the same caution will guide the national judges in their application of the *Köbler* doctrine, on the civil liability for the damages due to the failure to apply the preliminary ruling to the Court of Justice.

which, for the judges of last resort, confirms that they are *obliged* to turn to the Court of Justice on doubts of interpretation or on the validity of the community law that may arise in the trials for which they are responsible. The other lower courts *can* use the tool of the preliminary ruling, but they are not obliged to. Since the constitutional courts are judges whose decisions cannot be reviewed by any other judicial body, they would without doubt be subjected to the obligation of the preliminary ruling. The principle provided in art. 234, par. 3 for the supreme courts sounds so strict as to induce the constitutional courts to find a way to “get off the hook”, by considering themselves lacking in “locus standi” before the European Court.

Although the wording of art. 234 sounds very severe, the Court of Justice has interpreted it very smoothly, so that the obligation to refer a preliminary ruling has been relaxed and one can even sense an urge towards a further slackening of it⁶⁷, in view of the need to free the Court of Justice from an overloading of cases which are often repetitive or void of general interest for the community system.

As a matter of fact, as from the Cilfit decision in 1982, the Court of Justice has listed a series of cases whereby even the judges of last instance are exempt from the obligation to use the preliminary ruling⁶⁸. Since then, there has been a certain flexibility in the interpretation of the obligation of the preliminary ruling so that on the one hand the controversial issues do not escape the Court of Justice, while on the other hand no banal, repetitive and useless questions are presented to it. All in all, the Cilfit doctrine - which might undergo further developments⁶⁹ leading to greater flexibility in favour of the high courts – endows the constitutional courts with a wide margin of interpretation, so that under the façade of a rigid obligation of the preliminary ruling lies the opportunity for a certain flexibility.

It is well known that the high courts of the member states tend to ignore or use insufficiently the preliminary ruling for the Court of Justice, but this lack of co-operation has

⁶⁷ See on this point K. LENAERTS, *The Unity of European Law and the Overload of the ECJ – The System of Preliminary Rulings Revisited*, in www.ecln.net 10 ss.

⁶⁸ This happens in particular when: a) the question is not pertinent; that is, when the solution, whatever it may be, can in no way have any influence on the judicial decision; b) the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case before the court of justice; c) when the question at issue, even though not identical, has already been decided by the Court of Justice in other proceedings, even though the questions at issue are not strictly identical, that is to say in the hypothesis of *cd. acte éclairé*; d) the correct application of community law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved, *cd. acte claire*. See ECJ judgement 6 October 1982, 283/81, Cilfit.

⁶⁹ See eg. judgement of 4 June 2002, C- 99/00, *Lyckeskog*; 15 September 2005, C- 495/03, *Intermodal Transport*; 6 December 2005, C- 461/03, *Gaston Schul*.

only rarely been sanctioned by the Court of Justice⁷⁰. Not wishing to give too much importance to the cases where the judges of last resort have openly refused to apply to the Court of Justice, as happened recently in the Federfarma case of the Italian Council of State⁷¹, it is, however, certain that the data that emerges from the annual report of the Court of Justice⁷² shows how the high courts are extremely loathe to approach the Court of Justice⁷³, thus revealing that what should constitute an obligation, on the basis of the literal formulation of the treaty, is indeed generally interpreted as an opportunity to use it when necessary.

So, if one of the reasons why the constitutional courts refuse to use the preliminary ruling of art. 234 ECT depends on the fear of being subjected to a rigid obligation, it would seem essential to contest this fear straightaway, by underlying the breadth of the margins of interpretation granted by community law. Looking beyond the rigid wording of the treaty and considering the “living law”, there can be no doubt that not even the judges of last resort are always obliged to turn to Luxembourg. A greater willingness towards direct co-operation with the Court of Justice⁷⁴ would not deprive the constitutional courts of their own “margins of assessment”, permitting them to assess the opportunity or the need, on each individual occasion, to present the acts before the Court of Justice without being obliged to always do so, yet also without ostracizing themselves definitively from a productive, worthwhile judicial dialogue.

8. Building the European Constitution.

Besides the risk of being condemned for a violation of Community law, more serious and crucial reasons urge the national constitutional courts to meet the European Court of Justice face to face, by means of the preliminary ruling. Unlike the previous arguments based on State liability, this last and definitive reason is constructive rather than defensive, in character.

The original structure of the European Constitution – dynamic and pluralistic, as has been repeatedly highlighted by Joseph Weiler – needs to be nourished by the proactive participation of the national constitutions and traditions. Although original, the European Constitution does not

⁷⁰ On the other hand this happened recently in judgement 9 December 2003, C-129/00, Commission v. Italy.

⁷¹ Council of State, sect. V, 19 April 2005, n. 4207, Federfarma

⁷² To be found in the official site of the Court of Justice www.curia.eu.int.

⁷³ See J. V. LOUIS, *The Court in the Constitution: how Federal?*, in www.ecln.net

⁷⁴ R. ALONSO GARCÍA also hopes for greater dialogue between the Constitutional court and the European Court of Justice, even through the use of the preliminary ruling in his *Justicia constitucional y Unión Europea*, Madrid, 2005, p. 49 ss.

exist as a self-sufficient entity; it is, rather, embedded in the constitutional traditions of the member states and relies on the continual contribution of the national constitutions.

However, the national constitutional traditions do not have a voice unless the national subjects and institutions speak for them on the European stage.

During the Constitutional process opened at Laeken, it was mainly the task of the political institutions to be the mouthpiece for the national traditions, and some of them spoke very clearly and loudly at that time. At present, the political path towards the European Constitution is blocked and the ball is now in the judicial courts. So the burden of wording the *viva vox constitutionis*⁷⁵ lies precisely with the national constitutional courts and the main channel to transmit the national constitutional voices in Europe is the preliminary ruling.

That is why, although following the wording of art. 234 the preliminary ruling is conceived as a duty and an obligation for the supreme courts, it is, in fact, above all a *great opportunity* for them. It is short-sighted to refuse the preliminary ruling for fear of losing freedom, sovereignty and independence. The bright side of the moon is that the preliminary ruling is a great chance for national judges to take part in the building up of the European Constitution. If the constitutional courts refuse direct dialogue with the European Court of Justice, they miss the opportunity to have any influence on the European decisions. Indeed, the European Court of Justice is open to take into account all the national constitutional traditions coming from the member states. But these traditions need to be introduced before the Court, by means of the legal documents of the process. Otherwise how could the European Court be aware of a particular constitutional principle? In a way a constitutional court using the preliminary ruling could be considered as a qualified “amicus curiae” of the Court, bringing arguments useful for the decision.

The specific mission of the constitutional courts is to look after the interests of the national constitutions. However this mission does not only imply the defence of the constitutional values when they are attacked – as in the counter-limits doctrine - but also to promote them as a necessary part of the construction of Europe.

⁷⁵ This fortunate expression is the title of a periodical publication by Valerio Onida and Barbara Randazzo, Milano, Giuffr  publisher, since 2003, containing a reasoned survey of the case law of the Italian constitutional court.

A constitutional court which cuts itself off from the constitutional dialogue with the European Court of Justice does a disservice to its own constitutional order and also to the European constitutional system, which needs to be continually fed by the national constitutions.

Moreover, the European Court of Justice would gain greater authority if it had the opportunity to benefit from the rich constitutional experience of the national constitutional courts. As has been pointed out in an interesting comparison between the US Supreme Court and the Luxemburg Court⁷⁶, whereas the Supreme Court “has the benefit of the many judicial decisions by low federal courts and/or state courts on constitutional issues it must decide upon”, in contrast, the European Court of Justice “cannot count on the experience of the other courts”, because it does not decide on appeal. This comment is very important insofar as it highlights that one of the main advantages of the common law system is that it is based on an inductive, incremental and empirical process in which the greater the number of cases that are brought before the courts, the greater is the probability of reaching a better and wiser decision. This is all the more important in constitutional adjudication, where delicate choices of value are often at stake. It is of crucial importance for the European Court of Justice to take into serious consideration the different solutions offered by other national courts before settling delicate and sometimes politically explosive constitutional issues. Although the European Court of Justice, if compared with the U.S. Supreme Court, decides without the experience of the lower courts⁷⁷, the preliminary ruling could heal at least in part the deficit of experience. The preliminary ruling could serve the purpose of presenting rich and diverse points of view before the European Court. One of its functions could be precisely to bring experience to the European court, linking its judgements to concrete cases pending before the national tribunals.

Some constitutional courts seem to have sensed that an historic task is incumbent on them on the European stage. It is indeed certain that the *Conseil constitutionnel* has understood this, as seen in its decision on the European Constitutional treaty⁷⁸, where it advanced some interpretations of the Treaty on the subject of linguistic minorities and religious freedom which deliberately wanted to stretch the meaning of the text so as to ensure that the application of the principles would conform with the French tradition. It is not by mere chance that recently the

⁷⁶ M. ROSENFELD, *Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court*, quoted at 628.

⁷⁷ M. ROSENFELD, *Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court*, quoted at 629-630.

⁷⁸ Decision 19 November 2004, n. 2004-505 DC, *Traité établissant une Constitution pour l'Europe*.

Conseil has wanted to speak explicitly of the “French constitutional identity” in its recent decision on the subject of copyright royalties⁷⁹. With the more recent decisions regarding its relationship with the European Union, the *Conseil* shows how it is able to propose the French constitutional tradition as an interpretative hypothesis for the European constitutional principles and place itself as an authoritative, strong interlocutor for the Court of Justice in Luxembourg, called upon to bring to life common constitutional values.

The *Conseil constitutionnel* seems to foresee the risk that the particular features of the national constitution dissolve into the work of harmonisation carried out by the Court of Justice. The antidote that can and must be activated to contrast the germs of a potential risk of constitutional homologation is in the hands of the national constitutional judges. The more these judges are able to convey the constitutional tradition of their own legal order to the central institutions for the common good of the whole society, the greater are the chances of respecting the cultural and constitutional pluralism in Europe. Otherwise, the constitutional courts are condemned to accept a cultural homologation established by the strongest voices, or to fight a sterile battle of defence, entrenched behind the counter-limits and national sovereignty.

It is on this backdrop that we have to assess the need to rethink the choices made by the constitutional courts on the preliminary ruling. At stake is not only the correct application of a procedural tool, but rather more significantly it is the opportunity for the national constitutions to have a voice in Europe. The use of the preliminary ruling could have constructive value in the European constitutional foundation that should not be easily sacrificed on the altar of the institutional image of the constitutional courts although worthy of being defended.

FINAL REMARKS

Taking the dialogue seriously: the role of the European Court of Justice.

The very nature of the European Constitution or - might I even dare to say - the very nature of Europe itself, requires a lively participation of all the plurality of voices, traditions and historical experiences which altogether are part and parcel of the European identity. It is not only

⁷⁹ Decision 27 July 2006, n. 2006-540 DC, Considérant 19 : « la transposition d’une directive ne saurait aller à l’encontre d’une règle ou d’un principe inhérent à l’identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti »

in the interest of a particular national tradition that the constitutional conversation on the European values and fundamental rights is to be kept alive. It is also of vital importance for the European Union to encourage and support the participation of all its components, in order to be faithful to its own origin and structure. As has been argued: “Europe’s basic Constitutional Architecture [...] was noble and original, fashioned in accordance with Schumann’s astute step by step approach in a remarkable consensual multilogue among Europe’s courts, high and low. This collaborative judicial-political exercise was not only procedural expedient, it was a reflection of Europe’s substantive *Grundnorm* and its most striking contribution to transnational statecraft: the principle of Constitutional Tolerance”⁸⁰.

Moreover, however paradoxical it may sound, all the national constitutional experiences are necessary to shape the common values shared all over Europe. It is only by means of a careful examination of all the historical experiences of the European countries that a common heritage can emerge. It is topical to think that there is an incurable contradiction between the universal and the historical, the common and the particular, as if - as far as the topic of this paper is concerned - universal human rights are inescapably corrupt when they come in contact with the specific culture of a particular country. However, as the history of the Declaration of Human Rights teaches⁸¹, the common universal core can emerge only from the particular experiences. In a certain sense, the European motto could also read “unity *from* diversity”.

Returning to the European Court of Justice as a court of fundamental rights, the more national experiences are taken into consideration, the easier it is for the Court to accomplish the task of deciding on the basis of common European values; whereas the more national experiences are missing, the more the Court runs the risk of imposing a specific cultural tradition on the whole of European society as if it were part of the common constitutional background. How could the European Court of Justice fashion common human rights without taking into account all the traditions of the member states? If one or more experiences are missing, the Court’s work is more difficult and potentially misleading. These are the reasons why the European Court of Justice cannot afford to allow the constitutional conversation to flag. It is vital for its own mission to do its best to keep the “multilogue” alive.

⁸⁰ J.H.H. WEILER, *The essential (and would-be essential) jurisprudence of the European Court of Justice: lights and shadows too*, in I. PERNICE, J. KOKOTT, C. SAUNDERS (EDS), *The Future of the European Judicial System in a Comparative Perspective*, Nomos, Baden-Baden, 2006, at 117.

⁸¹ See the wonderful book by MARY ANN GLENDON, *A world made new*, New York, 2001.

So, if we consider the decisions of the European Court on the merit, there is no doubt that in general the Court shows deference and respect towards the constitutional traditions of the member states present in the judicial process. Cases like Omega and Schmidberger show that the European Court has taken the German and the Austrian constitutional traditions very seriously. However, one question needs to be answered. What about the other constitutional traditions? Are we sure that all the voices have been expressed before the Court so that the final decision really takes into account the whole common background of the European countries? Are we sure, for example, that the meaning given by the European Court of Justice to human dignity in Omega is really shared by the European member states other than Germany? Or does it reflect the specific sensitivity of the German constitution? If the European Court wants to be the Court of the *European citizens*, it should be very careful not to issue decisions which are too nationally oriented, i.e. decisions that elevate to the rank of fundamental human rights a particular interpretation of a basic value, accorded in a specific country due to its history and tradition.

I have insisted in the second part of this paper, that there is no justification for the national constitutional courts' behaviour which keeps aloof from the European constitutional multilogue. I would like here to argue that also the European Court of Justice bears part of the responsibility for the national constitutional courts' silence for two main reasons.

First, it is not just for the national courts' fault that the European judicial multilogue has been developed mainly among the lower courts and the ECJ to the exclusion of the supreme and constitutional courts. The Simmenthal doctrine has given great importance to the lower courts, and has induced the higher courts – in particular the constitutional courts – to stay removed from the European legal evolution. It is true, as has been said, that the European constitutional architecture was not fashioned by the European Court of Justice alone, but by all the European courts, the national courts included. It is true that “the European Court has historically been quite attentive to position itself as *primus inter pares* [... and] to fashion its doctrines so as to empower national courts its principal and indispensable interlocutors”⁸². However, this is particularly true for the lower courts. It is the lower courts which have taken advantage of the European Court doctrines, even to the detriment of the supreme and constitutional courts in the member states. Doctrines like supremacy, direct effect, indirect effect and more recently the

⁸² J.H.H. WEILER, *The essential (and would-be essential) jurisprudence of the European Court of Justice: lights and shadows too*, quoted at 121.

obligation to interpret national law in order to conform to European law, and many other doctrines, are powerful tools for the judicial activity of lower courts, which have been freed by the European Court from the narrow role of *bouche de la loi* and elevated to a constitutional mission in the European context. The result is a sort of marginalisation of the constitutional courts from the European constitutional laboratory. It was probably necessary at the beginning of the European integration to give the lower courts the main responsibility of enforcing European law; however one could pose the question as to whether is it still necessary at the present stage, focussed on the fundamental rights talk, to continue to treat the lower courts as qualified actors of the judicial architecture of the EU. Doctrines like direct and indirect effect could easily be reshaped so as to involve also the supreme and constitutional courts, instead of banning them.

Second, if we consider the style and the form of the decisions of the European Court of Justice, more than one doubt arises regarding its attitude towards the national constitutional courts and towards their participation in the European adventure. As was said in a sharp critique of the European Court: “the style of judicial decisions is outmoded, does not reflect the dialogical nature of European Constitutionalism, and is not a basis for confidence building European constitutional relations between the European Court and its national constitutional counterparts”⁸³. The problem with the style of the ECJ decisions is not only aesthetic in nature. After all, one of the specific characteristic of the European system is that the more relevant constitutional steps in the European development depended upon the co-operation of the European and national institutions. Trust and mutual confidence between the European Court and the national Courts are the bases of the whole European Constitution. That is why, when the European Court takes decisions on fundamental rights which often involve the most important, delicate and controversial constitutional issues, “it is critical that such decisions emanate from a tribunal which is capable, and seen to be capable of comprehending the constitutional sensibilities of the member states at issue and communicating that comprehension to its national counterparts”⁸⁴. The problem is not only that the European Court takes into account the national constitutional peculiarities, but also that it *shows* it has considered and discussed those peculiarities. In the European Court decisions the national court which applied for the preliminary ruling looks for feedback to its arguments and deserves such feedback. Why,

⁸³ J.H.H. WEILER, *Epilogue: The Judicial Après Nice*, in G. De Burca and J.H.H. Weiler (eds), *The European Court of Justice*, Oxford, 2001, 219ss.

⁸⁴ J.H.H. WEILER, *Epilogue: The Judicial Après Nice*, quoted, at221.

otherwise, should a national court spend time and effort working out its own national constitutional tradition for the benefit of the European institutions if they do not show they attach any weight to such work? The first reason why the European Court of Justice should – as Joseph Weiler suggests – abandon its Cartesian style of judgements and move to a more discursive and conversational style, typical of the common law countries, is precisely to encourage the constitutional dialogue with the national supreme and constitutional courts.

There is a second, and perhaps more relevant reason for such a move. This reason is a direct consequence of a recent, important and widespread evolution in constitutional judicial review. Although the main purpose of the judicial review was at the origin and still is to decide on the validity of normative acts, nowadays the judicial activity is more and more focussed on interpretative rather than on decisional activity. It is quite rare that a constitutional court decides for the annulment or declares the invalidity of a piece of legislation. In most cases, the constitutional courts settle the controversies by means of interpretation. This is true both at national and European level. In all the legal systems the core of the judicial activity is shifting from the decision to the interpretation, and judges are required to be well-equipped in *ars interpretandi* even more than in *ars decidendi*. At the national level it is sufficient to consider the importance attached to the so-called “*interpretazione conforme a Costituzione*” or “*verfassungskonforme Gesetzeslegung*” in Italy and Germany as a way of solving all sorts of clashes among different legal acts⁸⁵; at the European level suffice to notice that it is probably not by mere chance that the preliminary ruling of art. 234 of the TEC is by and large more used for interpretative questions, rather than for challenging the validity of the Community acts. No doubt that hermeneutics is the fundamental tool of relationship between different levels of legislation and, by consequence, between different types of courts. Its main virtue is being a harmonising instrument rather than a competitive one.

The most recent trend in judicial activity shows that conflictual remedies leave room for harmonising remedies. This is true in general, but it is particularly true when constitutional issues are at stake, such as in cases involving fundamental rights. Constitutional principles are worded in such a loose and general way that it is difficult even to imagine a direct clash between a

⁸⁵ See R. BIN, *L'applicazione diretta della Costituzione, le sentenze interpretative, l'interpretazione conforme a Costituzione della legge* and D. SCHEFOLD, *L'interpretazione conforme a costituzione*, in www.associazionedeicostituzionalisti.it; M. LUCIANI, *Le funzioni sistemiche della Corte costituzionale oggi e l'interpretazione “conforme a”*, in www.federalismi.it

national Constitutional *provision* and a European one. It is not so difficult to imagine a conflict of *interpretation* of such provisions between different Courts. That is to say that problems do not arise from the texts, generally speaking; more often they arise from the interpretation of the texts in judicial cases.

That is why the European Court, especially when acting as a constitutional court or a court of fundamental rights, should seriously consider moving away from the old-style telegraphic judgements, although this style is endowed with important virtues: it not time-consuming for the judge who writes the decision of the Court and for the translators and, moreover, it can facilitate the compromise among different points of view, easily leading the Court towards its final decision. However important these practical reasons may be, more relevant is that the European Court needs to be engaged in a continuous conversation with its national counterparts, especially in constitutional cases involving fundamental rights.

The historical changes that are occurring in the European Union and that involve the very basis of European society require a new attitude on the part of all the actors. In the present constitutional era of the European Union, “taking dialogue seriously” is an imperative for both the European and the national constitutional courts. At present, the national constitutional courts as gatekeepers of the national constitutions show quite a distrustful attitude towards the European legal system, as the refusal of the preliminary ruling shows as well as other doctrines such as that regarding counter-limits. This defensive attitude is of scanty use at the present stage of European integration; if they want to take seriously their role of custodians of the national constitutional traditions they should take a proactive style of relationship with the European court, so that all the different voices really are part of the European polyphonic choir. The European Court on its part could and should do much more to encourage the dialogue with the supreme and constitutional courts, starting with a re-styling of its decisions and a re-shaping of the direct effect doctrines, so as to include the constitutional courts as qualified judges of the European system.

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