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EUROPEAN LEGAL INTEGRATION: THE NEW ITALIAN SCHOLARSHIP

Jean Monnet Working Paper 12/08

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Fundamental Rights, Legal Disorder and Legitimacy: The *Federfarma* Case

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ISSN 1087-2221
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New York University School of Law
New York, NY 10012
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

European Legal Integration: The New Italian Scholarship (ELINIS)

This Working Paper is part of the ELINIS project: *European Legal Integration: The New Italian Scholarship* – Second Series. The project was launched in 2006 on the following premise. 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 If Italian scholars do not publish in English or French or German, they simply will not be read.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.

The Second Series followed the same procedures with noticeable success of which this Paper is an illustration.

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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Fundamental Rights, Legal Disorder and Legitimacy: The *Federfarma* Case

By Giulio Itzcovich*

Abstract

In the *Federfarma* case (2005), the Italian *Consiglio di Stato* refused to ask the European Court of Justice to give a preliminary ruling, stating that the fulfillment of EC obligations would have implied the violation of a fundamental constitutional right. The *Federfarma* decision is noteworthy for many oddities, but its main reason of interest lies in the conception of fundamental rights which it expresses- to put it shortly, fundamental rights as “freedom of the State”. This conception is relatively new, but not unusual, and is crucial for the judicial management of a multilevel system of governance. This Article argues that the discourse on fundamental rights underpins a marked flexibility and indeterminacy in the relations between autonomous jurisdictions. However, in the long term, a case-sensitive application of fundamental rights may increase the loss of legal certainty and accountability. Depending on how they are understood and applied, fundamental rights can produce the effects of mutual delegitimation between the orders in conflict, of uncertainty of law and political overexposure of judicial power. The dynamic of legal and institutional pluralism demands the creation of procedural channels that work as tools of dialogue. Rights alone are not enough in a multilevel system.

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1. Introduction. Legal disorder and legitimacy

In decision no. 41 of 2000, the Italian Constitutional Court (CCost), pronouncing its decision on the inadmissibility of an abrogative referendum relating to fixed-term work contracts, made two curious assertions, which, although of no importance in deciding the case, together identify some fundamental theoretical and practical problems of European integration from the legal perspective.

First of all, the CCost affirmed that “despite an unchanged Constitution, the progressive integration of the national and European legal orders has resulted in deep changes in the domestic order”. This statement is obviously true; it is so widely acknowledged by Italian legal doctrine that it can be candidly included as an *obiter dictum* in a decision by the CCost. But the problems that it entails are also obvious: if the Constitution has remained unchanged, how has the domestic order been so profoundly modified? How can an order be transformed so radically if its constitution has not changed? How can this transformation be conceived, described and/or justified as legal? Law changes, because “major changes to the domestic order” occur, but such changes are not entirely regulated by domestic law; the Constitution remains unaffected by the process of integration and therefore – it may be argued – the Constitution appears to be largely irrelevant to its development. If the legal order is conceived, in a quite traditional sense, as a set of norms that regulates its own amendment in the course of time – for instance, by means of a Constitution – then the integration among legal orders can be described as a sort of process of “legal dis-ordering”¹. Moreover, if one assumes that – at least from the viewpoint of the judges – the legitimacy of authority may depend on the legality of its exercise², then the process of legal integration and dis-ordering seems to be intrinsically affected by a deficit of legitimacy: for national courts, it poses a threat to the constitutional supremacy and it produces a loss of legal certainty and accountability.

¹ See more broadly G. Itzcovich, *Integrazione giuridica. Un'analisi concettuale*, in “Diritto pubblico”, III, 2005, 749-786, discussing the topic of the legitimacy crisis in the light of different conceptions of the legal order.

² An assumption which is common to both the “ideological” legal positivism (according to the terminology of N. Bobbio, *Il positivismo giuridico*, Torino, Giappichelli, 1996, 233ff.) and to Max Weber’s sociology of power. See also N. Luhmann, *Legitimation durch Verfahren* (1969), Suhrkamp, Frankfurt, 2001. Obviously, the legitimacy deficit may depend on other factors, such as the widely debated “democratic deficit”. I will not discuss the topic. See, however, A. Føllesdal, *Survey Article: The Legitimacy Deficits of the European Union*, in “Journal of Political Philosophy”, XIV/4, 2006, 441-468.

The CCost went on to affirm: “Indeed, since the binding norm, in the fields regulated by the Treaty, is the one issued by the EC institutions under the provisions of the...Treaty, in the face of such a norm...the domestic order withdraws and is no longer operative”. The “indeed” which introduces the affirmation hides the lack of a logical connection – it is nothing short of a theoretical paradox. The Court states that the domestic order has been modified, and yet (“indeed”) the order is no longer operative in the fields regulated by the Treaties. So it would seem that the legal order has not been modified, but that it simply is “not applied”. When the CCost says that the domestic order is not operative, that it withdraws, it does not apply, etc., it means that, in the case of conflict, EC law has supremacy over domestic law, but cannot modify it. The two orders remain separate and domestic law “withdraws”, because EC law cannot affect its content or the validity of its norms.

The paradox is evident: the legal order integrates by withdrawing, but, if it withdraws, it does not integrate; it remains separate, different and autonomous. The integration process has not amended the domestic legal order, which the Court acknowledges as having been deeply modified, despite an unchanged Constitution, but has just led to its disapplication, given the “pluralistic” separation between the legal orders. This theoretical paradox is the consequence of a practical difficulty, and in this *obiter dictum* the CCost identifies, perhaps unintentionally, a problem of legal theory that is also a constitutional issue. On the one hand, there appears to be a process of legal dis-ordering – the legal order stops being the sole master of its own transformation – with a consequent deficit of legality and of certainty of law. On the other hand, this deficit cannot be remedied if, as the CCost states, the legal orders remain separate: they express autonomous claims to authority and, therefore, they are always potentially in conflict with each other.

This situation is a source of considerable tension for legal reasoning. The legal doctrine experiences this tension and, by reflecting on the legal integration process, it produces new concepts for describing the legal change. Since there appears to be no “meta-order” able to integrate and guarantee the differences within the framework of a unitary federal system, jurists begin to reason in terms of a “legal space” to describe this generic space whose dis-ordering is

generated by separate legal orders which express autonomous claims to authority³. The concept of multilevel governance is borrowed from political science to describe a decision-making structure within which separate levels of government operate without any hierarchical relation. Governance differs from government because there is no power that can conclusively decide on the conflicts between institutions endowed with differing authority and different legitimacies⁴. And all forms of rigidity, it is commonly said, must be avoided in the judicial management of the multilevel legal space. Therefore, the distinction between the validity of a norm – stable membership of the legal order – and its applicability in concrete cases, which can always be suspended in the event of a conflict between legal orders or between principles, becomes crucial⁵. If a coherent system of sources is unachievable, the conflicts must be decided on a case-by-case basis, through hermeneutic criteria and balancing tests. Criteria of formal validity and exclusive rules tend to be replaced by fundamental legal principles, and legal principles, in turn, tend to be conceived of by some jurists as self-validating norms: norms whose validity and applicability do not depend on their belonging to a particular legal order, “metapositive” norms “which demand recognition even against authorities that deny their validity”⁶.

³ C. Harding, *The Identity of European Law: Mapping Out the European Legal Space*, in “European Law Journal”, VI/2, 2000, 128-147; S. Cassese, *Lo spazio giuridico globale*, Roma, Laterza, 2003; M. P. Chiti, *Mutazioni del diritto pubblico nello spazio giuridico europeo*, Bologna, CLUEB, 2003.

⁴ The concept of multilevel governance has been applied to constitutional theory by I. Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?*, in “Common Market Law Review”, XXXVI/4, 1999, 703-750; Id, *Multilevel Constitutionalism in the European Union*, in “European Law Review”, XXVII/5, 2002, 511-529; I. Pernice, F. Mayer, *La costituzione integrata dell’Europa*, in G. Zagrebelsky (ed.), *Diritti e Costituzione nell’Unione europea*, Roma-Bari, Laterza, 2003, 43-68; F. Mayer, *The European Constitution and the Courts – Adjudicating European Constitutional Law in a Multilevel System*, Jean Monnet Working Paper No.9/03, <http://www.jeanmonnetprogram.org/papers/03/030901-03.html>; N. Bernard, *Multilevel Governance in the European Union*, The Hague, Kluwer, 2002. In the Italian doctrine see A. D’Atena, P. Grossi (eds.), *Tutela dei diritti fondamentali e costituzionalismo multilivello. Tra Europa e Stati nazionali*, Milano, Giuffrè, 2004; P. Bilancia, E. De Marco (eds.), *La tutela multilivello dei diritti. Punti di crisi, problemi aperti, momenti di stabilizzazione*, Milano, Giuffrè, 2004; P. Bilancia, F. G. Pizzetti, *Aspetti e problemi del costituzionalismo multilivello*, Milano, Giuffrè, 2004.

⁵ In German legal doctrine and subsequently in Italian legal doctrine from the 1960s and 1970s, the distinction has been traced in terms of *Geltungsvorrang* (hierarchical supremacy, which has often been denied to EC law) and *Anwendungsvorrang* (precedence in application, which has been provided to EC law). On the distinction, see recently M. Nettesheim, *EU-Recht und nationales Verfassungsrecht*, XX FIDE-Kongress, 2002, <http://www.europawissenschaften-berlin.de/texte/Nettesheim.pdf>, at 74. In Italian legal doctrine, see A. Pace, *La sentenza Granital, ventitré anni dopo* (2007), <http://www.associazionedeicostituzionalisti.it/dottrina/ordinamentieuropei/La%20sentenza%20Granital,%2023%20anni%20dopoII.pdf>.

⁶ C. Mirabelli, *Preliminary Reflections on Fundamental Rights as the Basis of a Common European Law*, in B. Markesinis (ed.), *The Clifford Chance Millennium Lectures: The Coming Together of the Common Law and the Civil Law*, Oxford, Hart, 2000, 225-237, at 233. This is just one of the many available examples of the renaissance of natural law theory within European legal integration studies: others may be found in G. Itzcovich, *Integrazione giuridica*, cit., 775ff.

The discourse on fundamental rights intervenes in this situation of legal dis-ordering, and produces two effects. First of all, due to their “fundamental” nature, due to their rhetorical and legitimising force, fundamental rights seem to intervene to resolve, or mitigate, the deficit of legitimacy, by providing the institutions of multilevel governance with additional legitimation; they provide not only a formal, but also a substantive grounding to their claims to authority⁷. In addition, the language of fundamental rights and other legal principles can transform the conflicts between legal orders from merely political ones into legal and justiciable conflicts, by means of a flexible technique of adjudication: a technique that is negotiable, adjustable from case to case, and highly “translatable” between the legal orders involved⁸. The conflicts between autonomous legal orders can thus be translated in terms of conflicts between fundamental legal rights and principles. It is often argued that some sort of coordination can be achieved spontaneously through the conventions which emerge when national and European courts repeatedly interact with one another. Apparently, the courts are engaging in a “dialogue” on the protection of fundamental rights, and judicial dialogue is becoming the tool of continuous negotiation on the distribution of powers⁹.

⁷ It is generally held that at the basis of the ECJ’s jurisprudence on human rights there has been the will to promote the effectiveness of EC law by defending it against resistances from the German and Italian courts: see T.C. Hartley, *The Foundations of European Community Law*, V ed., Oxford, Oxford UP, 2003, 132ff.; M. Cappelletti, *The Judicial Process in Comparative Perspective*, Oxford, Clarendon, 1989, at 394; J.H.H. Weiler, *Eurocracy and Distrust. Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities*, in “Washington Law Review”, 1986, 1103-1142, at 1108 on the “integrational” value of human rights; J.A. Frowein, S. Schulhofer, M. Shapiro, *The Protection of Fundamental Rights as a Vehicle of Integration*, in M. Cappelletti, M. Seccombe, J.H.H. Weiler (eds.), *Integration Through Law. Europe and the American Federal Experience*, Vol. I/3, Berlin-New York, de Gruyter, 1986, 231-344; L. Azzena, *L’integrazione attraverso i diritti. Dal cittadino italiano al cittadino europeo*, Torino, Giappichelli, 1998.

⁸ G. Itzcovich, *L’integrazione europea tra principi e interessi. Giudici nazionali e Corte di giustizia nella “guerra delle banane”*, in “Materiali per una storia della cultura giuridica”, XXXIV/2, 2004, 385-424; M. Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, in “European Law Journal”, XI/3, 2005, 262–307.

⁹ On judicial dialogue, see A.M. Slaughter, A. Stone Sweet, J.H.H. Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in Its Social Context*, Oxford, Hart 1998; J.H.H. Weiler, *The Constitution of Europe*, Cambridge, UP, 1999, spec. 287ff.; S.J. Kenney, W.M. Reisinger, J.C. Reitz (eds.), *Constitutional Dialogues in Comparative Perspective*, London, Macmillan, 1999; A. Stone Sweet, *Governing with Judges. Constitutional Politics in Europe*, Oxford, Oxford UP, 2000; C. McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, in “Oxford Journal of Legal Studies”, XX/4, 2000, 499-532; A.-M. Slaughter, *A Global Community of Courts*, in “Harvard International Law Journal”, XLIV/1, 2003, 191-219; E. Navarretta, A. Pertici (eds.), *Il dialogo tra le corti. Principi e modelli di argomentazione*, Pisa, Ed. Plus, 2004; M. Cartabia, “Taking Dialogue Seriously”. *The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union*, Jean Monnet Working Paper No.12/07, <http://www.jeanmonnetprogram.org/papers/07/071201.html>.

However, I will argue that the discourse on fundamental rights can also worsen the legitimacy deficit. Instead of acting to converge on common values, the legal orders may engage in a conflict on values and their judicial concretisation. Hence, depending on how they are understood and applied, fundamental rights can produce an effect of mutual delegitimation between the orders in conflict, of uncertainty of law and political overexposure of judicial power. The discourse on fundamental rights allows the conflict between legal orders to be conceived and resolved judicially, but it obviously cannot ensure that the conflict will be resolved in the “right” way, or in a way that is acceptable to all the authorities involved.

Moreover, one thing is pretty clear. Whether fundamental rights are applied “successfully” or “unsuccessfully”, whether they reduce or increase the perception of legitimacy of a given outcome of the judicial process, the discourse on fundamental rights underpins a marked flexibility and indeterminacy in the relations between authorities. Therefore, in the long term, case-sensitive application of fundamental rights may increase the loss of legal certainty and accountability. By this means, judicial rights talk may worsen the legitimacy deficit, if we assume that – at least from the viewpoint of the courts – the legitimacy deficit may be related to the process of legal dis-ordering: to the destabilisation of normative hierarchies, to the floating rules of competence, and to the vanishing borders between legal orders.

These hypotheses will be explored here through the discussion of the recent *Federfarma* case (2005) where, for the first time, an Italian court – the *Consiglio di Stato* (CStato) – refused to request the European Court of Justice (ECJ) to give a preliminary ruling, stating that the fulfilment of EC obligations would have implied, in this specific case, the violation of a fundamental constitutional right, i.e. the right to health. The *Federfarma* decision of the CStato is noteworthy for many oddities, but its main reason of interest lies in the conception of fundamental rights which it expresses. As we shall see, this conception is relatively new, but not unusual. It is paradigmatic¹⁰, and therefore deserves careful examination.

The *Federfarma* case may be a pretext for highlighting some changes in the concept and judicial practice of fundamental rights. The point is not to criticise the *Federfarma* judgment or its conception of fundamental rights, it is to understand how fundamental rights have become what they are in contemporary European legal culture. Obviously, the analysis of the *Federfarma*

¹⁰ In a Foucaultian sense, one may say: on the concepts of paradigm, dispositive and archaeology, see now G. Agamben, *Signatura rerum. Sul metodo*, Torino, Bollati Boringhieri, 2008.

case will not suffice to answer that question, but it will bring some insight into certain aspects of judicial rights talk.

2. *The counter-limits doctrine in the Federfarma decision*

Relations between Italian law and EC law, in the words of the *Federfarma* decision of the CStato:

...have reached a sort of “harmony among different” systems...according to the apt definition by an illustrious jurist¹¹, which has had the merit of guaranteeing the maintenance of our legal order and, with it, national sovereignty. Far from being absorbed by a superior sovereignty, national sovereignty is only limited pursuant to Art. 11 of the Constitution. As a result it has been and it is conceivable to preserve a *national legal space entirely protected from the influence of EC law, a space in which the state continues to retain full sovereignty, i.e. independence, and is therefore free to have its own sources of law. This is the area of fundamental rights*, whose protection acts as an unbreakable “counter-limit” to the limitations spontaneously accepted through the Treaty¹².

The assertion that fundamental rights constitute a space of freedom of the state is paradoxical, or at least surprising, if considered within the context of modern legal and political thought. As I have said, it offers an opportunity to reflect on how the concept and judicial practice of fundamental rights have changed in relation to European legal integration. Before doing this, however, it shall be noted that this assertion is not new, and it is perfectly clear to legal scholars studying the relationships between national law and European law, albeit not unanimously accepted by them. For this reason, it deserves particular attention.

¹¹ The CStato is here referring to V. Onida, “*Armonia tra diversi*” e problemi aperti: la giurisprudenza costituzionale sui rapporti tra ordinamento interno e ordinamento comunitario, in “Quaderni costituzionali”, 2002, 391-394.

¹² CStato, no. 4207/2005 (italics added). The judgment can be read on “Giurisprudenza costituzionale”, 2005, 3391-3403; “Diritto processuale amministrativo”, 2006, 802-816.

The CStato is quoting almost word for word an article by Fiammetta Salmoni¹³, but the origins of the jurisprudential construction behind the CStato's affirmation can be traced back to the inventors of the "counter-limits doctrine" in Italy: Paolo Barile, Manlio Mazziotti and above all Costantino Mortati¹⁴. For more than forty years Italian legal science has become accustomed to this simple and persuasive line of reasoning. Let us outline the stages. Membership of the EC/EU is constitutionally lawful under Article 11 of the Italian Constitution, which authorises "limitations on sovereignty". But these limitations on sovereignty cannot cancel that sovereignty. There must therefore be limits to the limitations of sovereignty to which Italy acquiesced. Such "counter-limits" are to be found, at least, in the inalienable individual rights and in the fundamental legal principles of the legal order. Their infringement precludes the application of European law by national public authorities. In particular, the protection of fundamental rights, as absolute constitutional duty, justifies the reaffirmation of state sovereignty, which is none other than its constitutional legality. The constitutional state does not abdicate and cannot abdicate the protection of fundamental rights, and so fundamental rights continue to be, as the CStato in the *Federfarma* case holds, a space of state freedom, the last or residual stronghold of its sovereignty.

Since the affirmation is to a large extent obvious and uncontroversial, it escaped the notice of the numerous commentators of the *Federfarma* decision¹⁵, who, nevertheless, subjected the reasoning to close and often severe examination. Much has been written on the eccentricities and shortcomings of the decision. The majority of commentators found the decision "highly worrying"¹⁶, "open to much criticism...unnecessary...disproportionate"¹⁷, "the expression of a somewhat eccentric attitude of closure, when not of 'severance'"¹⁸, and "of that nationalistic

¹³ F. Salmoni, *La Corte costituzionale e la Corte di giustizia delle Comunità europee*, in "Diritto pubblico", 2002, 491-563.

¹⁴ On the development of the counter-limits doctrine in Italian legal scholarship, see G. Itzcovich, *Teorie e ideologie del diritto comunitario*, Torino, Giappichelli, 2006, 187ff., 218ff., 376ff., 397ff.

¹⁵ In Italy the judgment has been discussed on several paper and online reviews: at least fifteen articles (of A. Adinolfi, A. Barone, V. Capuano, A. Celotto, F. Dal Canto, C. Di Seri, G. P. Dolso-S. Amadeo, F. Donati, G. M. Lignani, G. Morbidelli, A. Pizzorusso, O. Pollicino, A. Ruggeri, A. Schillaci, S. Valaguzza), but, curiously, the judgment has been neglected by international law journals, with the sole exception of L. Daniele, *La protection des droits fondamentaux peut-elle limiter la primauté du droit communautaire et l'obligation de renvoi préjudiciel?*, in "Cahiers de droit européen", 2006, 67-81.

¹⁶ L. Daniele, *op. cit.*, at 69.

¹⁷ S. Valaguzza, *La teoria dei controlimiti nella giurisprudenza del Consiglio di Stato: la primauté del diritto nazionale*, in "Il Diritto processuale amministrativo", 2006, 816-847, at 816f.

¹⁸ G. P. Dolso, S. Amadeo, *Il Consiglio di Stato tra Corte costituzionale e Corte di giustizia*, in "Giurisprudenza costituzionale", 2006, 785-816, at 816.

‘revival’ which followed the two referendums rejecting the ratification of the Treaty”¹⁹; the decision appeared to be “an anomaly of some importance”²⁰, “characterized by its marked rigidity”²¹.

However, what seemed new and debatable to the commentators is not so much the dogmatic reasoning framework of the decision – i.e., the counter-limits doctrine – as the decision actually adopted by the CStato. This was the first time since the introduction of the counter-limits doctrine (CCost, decision no. 183/1973) that an Italian court had expressly made use of the counter-limits to justify the disapplication of EC law.

It is known that the political and legal culture of almost every EU member state has developed one or often more counter-limits doctrines²², i.e., normative theories concerning the cases in which limits to the limitations of sovereignty shall operate and the state can therefore regain its sovereignty. In some member states, including Italy, the counter-limits doctrine consists in the possibility of a judicial review of the application of EC law in relation to a generic standard – the observance of the “fundamental legal principles of our constitutional order” and of “inalienable individual rights”(CCost, decision no. 183/1973).

We can distinguish two different ways in which the counter-limits doctrine can be applied and has actually been applied in the Italian experience of relations with EC law²³. The doctrine can be used with a negative function, as a “check”, as a defence of domestic constitutional principles against legal values that are considered not to be in conformity with it. Safeguarding

¹⁹ S. Gambino, *La Carta e le Corti costituzionali. “Controlimiti” e “protezione equivalente”*, in “Politica del diritto”, 3/2006, 411-460, at 437.

²⁰ V. Capuano, *Norme fondamentali del Trattato CE private dell’effetto diretto: la sentenza Admenta*, in “Rivista italiana di diritto pubblico comunitario”, 2006, at 241.

²¹ A. Schillaci, *Un (discutibile) caso di applicazione dei “controlimiti”*, in “Giurisprudenza italiana”, 2006, 2026-2033, at 2026. Among the commentators of the decision, other critical remarks by F. Donati, G. Morbidelli, A. Pizzorusso, O. Pollicino; positive remarks by A. Celotto, F. Dal Canto, C. Di Seri, A. Ruggeri.

²² On the counter-limits doctrine, the bibliography has become extensive. See, first of all, a broad comparative study: A. Celotto, T. Groppi, *Diritti UE e diritto nazionale: primauté vs controlimiti*, in “Rivista italiana di diritto pubblico comunitario”, 2004, 1309-1384; see also A.-M. Slaughter, A. Stone Sweet, J. H. H. Weiler (eds.), *The European Court and National Courts*, cit., and D. O’Keeffe, A. Bavasso, eds., *Liber Amicorum in Honour of Lord Slynn of Hadley*, I, *Judicial Review in European Union Law*, The Hague-London-Boston, Kluwer Law International, 2000. For some theoretical insights, see also E. Cannizzaro, *Il pluralismo dell’ordinamento giuridico europeo e la questione della sovranità*, in “Quaderni fiorentini per la storia del pensiero giuridico moderno”, XXXI/1, 2002, 245-271; F. Mayer, *op. cit.*; M. Kumm, *op. cit.*; N. Walker (ed.), *Sovereignty in Transition*, Oxford, Hart, 2003; A. Ruggeri, “Tradizioni costituzionali comuni” e “controlimiti”, *tra teoria delle fonti e teoria dell’interpretazione*, in “Diritto pubblico comparato ed europeo”, 2003, 102-120.

²³ A similar distinction has been made by Celotto and Groppi, *op. cit.*, 1381ff.: they distinguish between a “static” construction of the counter-limits (“as extreme safeguard of the national legal order”) and a “dynamic” construction (“as connectors which aim at guaranteeing the maximum level of rights’ protection”).

the constitutional structures of the national legal order is the most evident *ratio* of the counter-limits doctrine, and, as we shall see, this is how the counter-limits were applied in the *Federfarma* decision. But the counter-limits doctrine can also be interpreted and practised in a different, though not necessarily alternative way, namely as an instrument of inter-judicial dialogue, which has a positive function of adjustment, guidance and legitimation. In this case, counter-limits can serve as an instrument that allows national courts to justify and exercise a claim to authority over how European law should develop.

As we shall see in more detail in the commentary on the *Federfarma* decision, different conceptions of fundamental rights underlie the two forms of the counter-limits doctrine. In the first case, fundamental rights are, in a quite traditional sense, norms that provide an external justification to the legal order's claim to authority. From the legal viewpoint, they have a negative function. If they are violated, the legal order lacks legitimacy and therefore it should not be applied to the case at hand. In the second case, fundamental rights are conceived as being common legal values of several legal orders "undergoing integration"; they appear to be an internal limit towards which distinct legal orders ought to converge in order to integrate themselves. In that case, fundamental rights serve a positive function, by providing a common language and common guidelines for managing what I have proposed to call "legal dis-order" – the situation of a legal order which ceases to be the sole master of its internal dynamic, in other words, ceases to be a legal order.

In Italy, until the *Federfarma* case, it was thought – and many continue to think – that this review ought to be exercised centrally by the CCost, rather than directly by the CStato and by the other ordinary courts. Until the *Federfarma* case, counter-limits as a safeguard mechanism had lain dormant; rather than acting negatively, as a check, they had worked positively, as a means of adjustment, guidance and legitimacy. As a constitutional instrument of judge-made law, the counter-limits doctrine had been applied above all to legitimise the "limitations of sovereignty" accepted by Italy, limiting them and thereby making them "constitutionally tolerable"²⁴. The

²⁴ On the idea of "constitutional tolerance" as substantial *Grundnorm* of European constitutional law, see J.H.H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, Jean Monnet Working Paper No.10/00, <http://www.jeanmonnetprogram.org/papers/00/001001.html>; Id., *Why Should Europe Be a Democracy: The Corruption of Political Culture and the Principle of Toleration*, in F. Snyder (ed.), *The Europeanisation of Law: The Legal Effects of European Integration*, Oxford, Hart, 2000, 213-218. Among Italian legal doctrine, see, for instance, O. Pollicino *Principio di tolleranza costituzionale tra self restraint e judicial activism della Corte di giustizia*, in R. Orrù, L. G. Scannella (eds.), *Limitazioni di sovranità e processi di democratizzazione*, Torino, Giappichelli, 2004, 273ff.

doctrine had also served as an instrument of inter-judicial dialogue, used to exercise “persuasive pressure” on the ECJ and encourage it to adopt specific decisions on controversial matters – as, for instance, on the retroactive effectiveness of annulment decisions²⁵ – but above all to encourage the ECJ to adopt the language of rights and constitutional principles, starting with the *Stauder* case in 1969.²⁶

The counter-limits doctrine had, as a result, been an instrument of dialogue between national judges and the ECJ, an instrument of constitutional soft law possessing primarily rhetorical, persuasive and legitimising force. Until the *Federfarma* decision it had never been used by an Italian court to refuse to apply EC law. Indeed, in judgment no. 183/1973, the CCost had described the possibility that a European rule could violate the “fundamental legal principles of our constitutional order or inalienable individual rights” as simply “aberrant”²⁷.

Let us now look at the facts of this “aberrant” hypothesis which took place in the *Federfarma* case.

3. *The Federfarma case*

The case is related to the current government policy of privatisation of municipal pharmacies. More generally, it concerns the conflict between the traditional Italian system of retail distribution of medicines – focused on the pharmacist, a graduate professional who manages the pharmacy as a sole trader or in association with others – and the objective of eliminating all political, national and corporative barriers to the free movement of enterprises, and creating a European market for medicines that is as open as possible to joint-stock companies.

The case dates back to January 2000, when the municipal authority of Milan decided to transform the company that managed the municipal pharmacies into a public company, and to sell the controlling shareholding by means of a public procurement procedure. In April 2001, the Italian subsidiary of a German company operating in the wholesale distribution of medicines – Gehe Italia, subsequently Admenta Italia – was awarded the tender. Federfarma, the trade

²⁵ CCost, no. 232/1989.

²⁶ Through this judgment fundamental rights were to become “general principles of Community law” whose observance is protected by the ECJ (Case C-29/69, *Stauder*).

²⁷ Subsequently, CCost, no. 232/1989, acknowledged that “what is highly improbable may nonetheless be possible”.

association of pharmacists, appealed to the Regional Administrative Court (TAR) of Lombardy seeking the annulment of the procedure that led to the privatisation of the municipal pharmacies. Federfarma complained that the law reorganising the pharmaceutical sector was unconstitutional because it did not extend to companies managing the municipal pharmacies the prohibition, applicable to firms owned by pharmacists (Art. 8 of Law no. 362/1991), to operate in the wholesale production and distribution of medicines. The TAR ruled the matter material and well-founded in relation to the principle of equality and the right to health.

In decision no. 275/2003, the CCost declared the law regarding the re-organisation of the pharmaceutical sector constitutionally unlawful “in that section which did not envisage that a shareholding in companies managing municipal pharmacies is incompatible with all other operations in the sector including the production, distribution, intermediation and scientific information of medicines”. Technically this was an “additive” decision, in which the CCost, annulling a law “in that section which does not provide for” something, replaces it with a new norm. In this case, the Court introduced a new hypothesis of non-conformity, which threatened to overturn the procedures followed by many municipal authorities in Italy – including Bologna, Florence, Cremona and Rimini – in the privatisation of pharmacies.

Following the decision by the CCost, the TAR of Lombardy ruled in favour of Federfarma’s appeal and annulled the sale of the majority shareholding of the municipal pharmacies. Admenta Italia, the company which had been awarded the tender, and the municipal authority of Milan, which ran the risk of having to pay back 130 million euros, appealed to the CStato, claiming that the new regulation on the incompatibility between retail and wholesale operations was in conflict with the EC Treaty. And in fact, on 16 March 2005 the European Commission opened an infringement proceeding against Italy. According to the Commission, the ban on the acquisition of holdings in companies managing municipal pharmacies by enterprises operating in the distribution of pharmaceuticals was unreasonable and amounted to a disproportionate restriction on the freedom of establishment and freedom of movement of capital. “The CCost’s interpretation”, the Commission observed, “not only discourages but makes it impossible for enterprises operating or linked to enterprises operating in the pharmaceutical distribution to purchase majority or minority holdings in companies managing

pharmacies”²⁸. The municipal authority of Milan and Admenta petitioned the CStato to disapply the Italian law, as “rewritten” by the CCost, and to overturn the TAR’s decision, or at least to refer the matter for preliminary ruling in relation to the interpretation of Articles 12, 43 and 56 of the EC Treaty, so that the ECJ could indirectly rule on the “European legitimacy” of the “new” regulations in the Italian pharmaceutical sector.

The CStato rejected the appeal in decision no. 4207/2005 and refused to refer the matter for a preliminary ruling to the ECJ. The CStato held that the norm on the incompatibility, as amended by the CCost, must prevail in the event of a possible conflict with European law, because its disapplication would be tantamount “to a real abrogation by the court, through the disapplication of the CCost’s decision”. The law on the incompatibility, according to the CStato, had a “constitutional nature”, because it had been issued by the CCost to safeguard the right to health, which amounts to a “counter-limit” to European law insofar as it is situated in an area, that of fundamental rights, “that has not been affected by the transfer to the European Court of Justice of the interpretative competences on the Treaty”. It, therefore, made no sense to refer to the ECJ for a preliminary ruling “which cannot be taken into account”, i.e., which was immaterial to the case.

4. At the roots of the counter-limits doctrine. Old-European fundamental rights

Fundamental rights, the CStato argued, mark the boundaries of a legal space “in which the state continues to be entirely sovereign, i.e. independent, and therefore free to make use of its own normative sources”. So fundamental rights can be described as a freedom of the state. This formulation is not unfaithful to thought of the CStato, nor to the general sense of the counter-limits doctrine. When fundamental rights are violated, limits to the limitations of sovereignty operate and sovereignty resurfaces intact. Furthermore, this formulation highlights the novel features of the counter-limits doctrine which, even apart from the CStato’s decision, mark the evolution of some fundamental legal concepts in relation to European integration. The first and foremost of these is the concept of fundamental rights²⁹.

²⁸ European Commission, letter of 16 March 2005, C (2005) 762/1, infringement proceeding 2004/4928 against Italy.

²⁹ In the vast literature on individual rights and fundamental rights, see G. Oestreich, *Storia dei diritti umani e delle libertà fondamentali* (1978), Roma-Bari, Laterza, 2001; J. Waldron (ed.), *Theories of Rights*, Oxford, Oxford UP,

In the tradition of modern political and legal thought, individual rights, above all “fundamental” or “natural” rights, are not a space of freedom *of* the state: they are freedom *from* the state or, alternatively, they are freedom *through* the state. For Lockean liberal constitutionalism, in particular, individual rights exist before the state and limit its authority. They are “fundamental” because the authority of the state is grounded on their protection: by limiting state authority, they legitimise it. Even before being legal norms, before being justiciable interests protected by the law, fundamental rights are a limit which grounds, from the outside, the state’s claim to decide in a binding manner which interests are to be granted protection. They are secondary reasons, reasons to obey the state. As they lie outside the state, they can ground its authority and justify its claim to legitimacy.

Since fundamental rights lie outside the state, in this tradition of legal and political thought they can identify a “space of freedom” of the state only in a negative sense: the authority of the state is legitimate if and only if it respects fundamental rights. Fundamental rights do not positively identify, from the inside, a “space of freedom” of the state, conceived as the power to legitimately decide what a fundamental right is and how it must be protected. Further, in no way do they designate a “space of freedom” of the state in the sense of a legitimate claim of the state to its own independence, as asserted in the counter-limits doctrine. When the existence of “fundamental”, “natural”, “human” rights is admitted in the European public law tradition, they are conceived as binding on the state. They ground the state as a legitimate authority insofar as it respects fundamental rights and to the extent it respects them; they are a condition of legitimacy of political and legal power, a substantive limit, and not a space of freedom of the state, in the sense of a decision-making competence.

In addition, it can be argued that in the Old-European legal tradition, fundamental rights, although at times central to the political grounding of the legitimacy of the state, are relatively peripheral and marginal as legal concepts, that is as tools not grounding national law from the

1984; A. Baldassarre, *Diritti inviolabili*, in *Enciclopedia giuridica*, Roma, Treccani, XI, 1989; M.J. Lacey, K. Haakonssen (eds.), *A Culture of Rights. The Bill of Rights in Philosophy, Politics, and Law – 1791 and 1991*, Cambridge, Cambridge UP, 1991; G. Peces-Barba Martinez, *Teoria dei diritti fondamentali* (1991), Giuffrè, Milano 1993; M. La Torre, *Disavventure del diritto soggettivo. Una vicenda teorica*, Milano, Giuffrè, 1996; L. Baccelli, *Il particolarismo dei diritti. Poteri dell’individuo e paradossi dell’universalismo*, Roma, Carocci, 1999; L. Ferrajoli, *Diritti fondamentali. Un dibattito teorico*, Roma-Bari, Laterza, 2001; B. Celano, *I diritti nella giurisprudenza anglosassone contemporanea. Da Hart a Raz*, in P. Comanducci, R. Guastini (eds.), *Analisi e diritto 2001*, Torino, Giappichelli, 2002, 1-58; P. Costa, *Diritti individuali e governo dei soggetti: un quadro tipologico*, in “Giornale di storia contemporanea”, VII/1, 2004, 9-32.

outside, but managing it from the inside: they are marginal as legal norms, decision-making principles, and legal arguments. It would be possible to gather a whole set of citations to confirm this assertion³⁰ even just in anecdotal form. However, this is fairly obvious if we consider that in Europe, up to the second half of the twentieth century, normative documents cloaked in the language of fundamental rights and judicially enforceable were rare.

This by no means implies that, before the adoption of rigid constitutions, fundamental rights were systematically violated, nor does it imply that important theories on the concept of right, or even fundamental right, were lacking. Georg Jellinek wrote that “the internal structure of public law is intersected by a network of individual rights”³¹, and he devoted an influential historical study to *The Declaration of the Rights of Man and of Citizens*. Jellinek traced back the origin of the *Declaration* not only to natural law theories, to the American colonial charters and Bills of Rights, but also to the Reformation and to the age of the wars of religion³². This means that the crisis of the seventeenth century produced, on the one hand, the doctrines of sovereignty of the absolutist state, and, on the other hand, the doctrines of fundamental rights. Two different paths towards the rule of law: fundamental rights and sovereignty emerged together and in strict connection with the history of the modern state.

With regard to the relationship between fundamental rights and sovereignty, it is noteworthy that in 1934 Herman Heller wrote on the value of “legal principles which transcend and ground both the state and the law, and which are binding from an ethical viewpoint”³³. Already Carl Schmitt had spoken of the fundamental rights as “rights which preexist the state and are above the state”, rights which are binding upon the “bourgeois state of law”³⁴. Their abrogation, wrote Schmitt, “cannot be admitted in a bourgeois state of law, even if they were to be repealed by means of a constitutional amendment”³⁵. These ideas were resumed by Costantino Mortati, who in Italy can be regarded as being the founder, with Paolo Barile, of the counter-limits doctrine³⁶. The influence of Mortati – at the time a judge of the CCost – on the decision

³⁰ For instance, the theories of rights of Gerber, Jellinek, Romano, Kelsen, Heller, or the dismissal of the concept in authors such as Bentham and Duguit. See, generally, M. La Torre, *op. cit.*

³¹ G. Jellinek, *Sistema dei diritti pubblici subbiettivi* (1905), Roma, Sel, 1912, at 9.

³² G. Jellinek, *La Dichiarazione dei diritti dell'uomo e del cittadino* (1895), Roma-Bari, Laterza, 2002.

³³ H. Heller, *Dottrina dello Stato* (1934), Napoli, ESI, 1988, at 296; see also *ivi*, 343ff.

³⁴ C. Schmitt, *Dottrina della costituzione* (1928), Milano, Giuffrè, 1984, at 219.

³⁵ *Ivi*, at 47.

³⁶ C. Mortati, *Istituzioni di diritto pubblico*, Padova, Dott. Milani, 1952, p. 684; P. Barile, *Ancora sul diritto comunitario e sul diritto interno*, in *Studi per il ventesimo anniversario dell'Assemblea Costituente*, Firenze,

no. 98/1965 is apparent. In that decision, the CCost stated that the right to due process is among the “inviolable rights of the man”, and that it is a right which “shall be and is adequately protected within the legal order of the European Coal and Steel Community”. There were therefore infeasible constitutional principles, principles that could not be violated nor by the state legislator³⁷, nor *a fortiori* by the EC legislator. Mortati had already sustained this doctrine in the 1952 edition of his *Istituzioni di diritto pubblico (Foundations of Public Law)*³⁸. The “constitution in the material sense” of the State, which in 1940 Mortati had realistically characterised as the “prevailing trend of the political forces”³⁹, in the 1960s and 1970s changed in nature and, so to speak, it flourished, as it became a set of fundamental legal principles and inviolable rights⁴⁰.

Heller, Schmitt and Mortati, at the core of a state-centred legal culture which was not free from illiberal, authoritarian and corporatist traits, proposed that concept of fundamental rights which we now find at the basis of the counter-limits doctrine. One could say that the “spirit” of fundamental rights was born from the intestinal depths of the “body” of the state, providing it with a “supplement of soul”. Nonetheless, at least until the 1950s, the concept of fundamental right remained marginal in the discourse of legal scholarship and in the case law. Politicians and journalists, not judges and jurists, were accustomed to speak of fundamental rights. It was a highly political concept, a concept characteristic of a sphere of public opinion from which legal

Vallechi, 1969, VI, 35-54; M. Mazziotti, *Osservazioni alla sentenza del 27 dicembre 1965 n. 98*, in “Giurisprudenza costituzionale”, 1965, 1329-1342.

³⁷ Some constitutional principles cannot lawfully be violated, not even by the constitutional legislator: see C. Mortati, *Concetto, limiti, procedimento della revisione costituzionale* (1952), in Id., *Raccolta di scritti*, Vol. II, Milano, Giuffrè, 1972, 30ff.; see also CCost, no. 1146/1988: “The Italian Constitution formulates some supreme principles that cannot be overridden or modified in their essential content by any constitutional statute”.

³⁸ C. Mortati, *Istituzioni di diritto pubblico*, cit., p. 684: the limitations of sovereignty may be accepted by means of an ordinary statute when, among other things, “they do not imply changes in the constitutional organization, changes in the role and functions of the supreme state organs, nor changes in the fundamental declarations regarding the rights of the citizens”. In the 1969 edition of *Istituzioni di diritto pubblico*, published after the judgment of the CCost, no. 98/1965, Mortati specified the standard: “All fundamental principles, no matter whether they are substantive principles or principles on the organization of the state, nor whether they are written in the Constitution or implicit...the fundamental guidelines of our state as democratic and social state based on the rule of law”.

³⁹ C. Mortati, *La costituzione in senso materiale* (1940), Milano, Giuffrè, 1998, 61ff.

⁴⁰ See F. Casavola, *I principi supremi nella giurisprudenza della Corte costituzionale*, in “Il Foro italiano”, 1995, V, 153ff.; E. Rippepe, R. Romboli (eds.), *Cambiare Costituzione o modificare la Costituzione*, Torino, Giappichelli, 1995; M. Dogliani, *Il problema della rigidità e della revisione della Costituzione*, in M. Fioravanti, S. Guerrieri (eds.), *La Costituzione italiana*, Roma, Carocci, 1999, 291-322.

positivist doctrine needed to distinguish itself sharply, in order to be recognisable as “science”⁴¹. In Europe, the idea of fundamental or human rights had an influence above all on the less purely juridical of the legal sciences – international law. Here the ideas of human rights, progress and civilization inspired the first modern internationalists, the founders of the *Institut du droit international* in 1873, and their project of a cosmopolitan, but also colonialist-friendly, international law⁴². However, already at the end of the nineteenth century, the works of Jellinek, Bergbohm, Treipel and Anzilotti, representing the “positivist” and “dualist” turn in German and Italian legal doctrine, extinguished the discourse on human rights in international law. International law was, by definition, a law between the states and therefore it could not give rise to individual rights.

5. *The new fundamental rights*

Old-European public law can consider individual rights in two ways, negatively and positively. In the negative sense, they are a residual natural freedom which the legal order has not restricted in pursuit of its general ends, i.e., as freedom from the state, freedom towards the state. In the positive sense, they are a will, claim or interest protected by the legal order: as a freedom within the state, a freedom through the state. In both aspects, individual rights are a legal concept. But if we speak of “fundamental” rights, according to Old-European legal science we are moving towards a more external, political sphere, consisting of value judgments adjoining the sphere of public opinion and party politics. If fundamental rights are an external limit grounding the authority of the state, then it is clear that any decision that refuses to apply a legal norm because it is in conflict with a fundamental right is – as the CCost affirms in decision no. 183/1973 – simply “aberrant”. If the legislature violated fundamental rights, this would mean the dissolution of the social contract and also, in the case of the EC/EU, the withdrawal from the Treaties⁴³.

⁴¹ On this policy of “deresponsabilisation” of the jurists, see L. Ferrajoli, *La cultura giuridica nell’Italia del Novecento*, II ed., Roma-Bari, Laterza, 1999; G. Tarello, *Storia della cultura giuridica moderna. Assolutismo e codificazione del diritto*, Bologna, Il Mulino, 1976.

⁴² See M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge, Cambridge UP, 2002, Ch. 1.

⁴³ This is the counter-limits doctrine of CCost, no. 183/1973, which has subsequently been abandoned by the CCost, in its decision no. 232/1989 (the infringement of fundamental constitutional principles by EC law does not compel Italy to withdraw from EC). See F. Donati, *La motivazione nella sentenza n. 232 del 1989 ed il “bilanciamento” tra*

When the CStato speaks of fundamental rights as a space of freedom not from the state, nor within the state, but *of* the state, the concept of fundamental rights has already changed. The change is not the result of the CStato's decision in the *Federfarma* case, but of fifty years of constitutional case law⁴⁴. Fundamental rights are no longer a political concept grounding the legal order, but a legal concept which is administered within the legal order. Along with the concept, the judicial application of fundamental rights has also changed: far from being an "aberrant hypothesis", as the CCost maintained, the infringement of fundamental rights has become a common currency in the practice of contemporary constitutional justice.

Moreover, although the CStato speaks of fundamental rights as a space of freedom of the state and of their protection as a competence reserved to the state, it must not be forgotten that the protection of fundamental rights also falls within EC competence, and that the European institutions also speak the language of fundamental rights and principles. Everyone speaks of fundamental rights, fundamental rights are a sort of *lingua franca* in interjudicial dialogue⁴⁵, and this means that the situations that can be described as violations of fundamental rights are not at all "aberrant", but frequent. We can always find two or more fundamental rights or principles in conflict, one of which must be sacrificed, two or more spheres of sovereignty, one of which must be overridden.

Thus, the protection of fundamental rights is claimed by the national courts as a domestic competence, as a freedom of the state, and it is claimed by the ECJ as a European competence, as a freedom of the EU. Fundamental rights act as "trumps"⁴⁶ in the dialogue between the courts. Although traditionally conceived as fundamental values that ground the claim to authority of the legal orders from the outside, and for this very reason limit it, fundamental rights are also a technique to create and manage conflicts between legal orders.

interessi nazionali ed interessi comunitari nel sindacato sui "controlimiti", in A. Ruggeri (ed.) *La motivazione delle decisioni della Corte costituzionale, Atti del seminario di Messina, 7-8 maggio 1993*, Torino, Giappichelli, 1994, 494-515.

⁴⁴ Two early applications of fundamental rights as "freedom of the state", i.e., instrument of the state to attribute authority upon itself, are CCost no. 21/1957 and CCost no. 52/1962. The former concerns the state-regions relationships, and it affirms the exclusive state competence over criminal law matters, on the basis of the "fundamental rights of the human being, which the Constitution recognizes and put at the basis of the whole legal order of the state". The latter concerns the relationships with the canonical legal order, and affirms that "it would be unacceptable that, on the one side, the idea of state sovereignty were to be maintained, and, on the other side, canonical law were allowed to infringe upon fundamental constitutional rights".

⁴⁵ On human rights as a *lingua franca*, see F. Viola, *Diritti umani e scienza giuridica*, in "Diritti umani e diritto internazionale", I, 2007, 49-67.

⁴⁶ R. Dworkin, *Rights as Trumps*, in J. Waldron (ed.), *Theories of Rights*, cit., 153-167.

6. Conclusions. Competences, sovereignty and limits in European integration

When the CStato speaks of the protection of fundamental rights as a competence of the state, as a “freedom of the state”, the concept and practice of fundamental rights change significantly. The concepts of competence, sovereignty and limits are also involved in such transformation. In legal discourse the term “competence” is used essentially to mean two things: that a certain institution is “competent” because it has authority over a certain set of circumstances and legal matters (competence-authority), or that a certain set of circumstances and legal matters falls or does not fall under the competence of a certain institution (competence-matter). Competence is authority in a given matter; and it is an authority which is conferred and limited by a legal norm (norm of competence).

Now, in the counter-limits doctrine, the matter is not a generic set of circumstances subject to legal rules and reserved to the competence of certain authorities, e.g., construction and urban planning (fiscal, electoral, administrative, constitutional matters) reserved to the competence (jurisdiction, cognisance, authority, etc.) of a given institution. The “matter” is now identified directly with the substantive norms – fundamental rights – which tend to regulate all situations both in the field of EC law and national law. The “matter” is no longer a set of facts that must be regulated by the competent authority, but coincides directly with the reasons that must be applied to an unforeseeable and undefined set of circumstances, whoever the competent authority is. The matter, so to speak, has “dematerialised”⁴⁷: it is no longer a predefined field of legal relations to be regulated, but the very norm, the fundamental principles, that must be valid for an undefined field of relations.

This transformation may be a consequence of the process of integration among legal orders and of the related process of the legal “dis-ordering”. Integration among legal orders may be described as a continual shifting and redefining of the boundaries between the legal orders undergoing integration. This process involves two tendencies – the communitarisation of national constitutional law and the constitutionalisation of EC law – towards the “limit” of the enforcement of fundamental principles.

⁴⁷ F. Benelli reaches the same conclusions as regards the relationships between the regions and the State in Italy in *La “smaterializzazione” delle materie. Problemi teorici e applicativi del nuovo Titolo V della Costituzione*, Milano, Giuffrè, 2006, at 27, 81, 97, *passim*.

It must also be stressed that the provisions on European competences are often formulated in a teleological manner, on the basis of the objectives of European action, rather than on the basis of the means to achieve them. Despite the fact that a considerable amount of political negotiation among member state governments deals not only with the content of European policy, but also with a detailed definition of the competences of the EU, and despite the subsequent efforts on the part of the framers of the European Treaties to specify them, such efforts have met with insurmountable limits and the competences are often vaguely defined and always disputable. In this situation, it has been said that the “field” conferred to the competence of the European institutions is essentially “determined and circumscribed by positive, actual EC action”⁴⁸. In other words, it is not pre-determined, but determined *a posteriori*, and therefore remains undefined, “open-ended”.

The transformation of the concept of competence is also reflected in the notion of sovereignty, if it is classically understood as “competence of competences”. Sovereignty, as the competence of competences, is a competence for no predefined matter: it is a competence-authority which determines the final scope of its matter⁴⁹. The CStato claims that the protection of fundamental rights is “a space” – a dematerialised matter – “in which the state retains full sovereignty”; for its part, the ECJ extends the reach of “European sovereignty” through the protection of fundamental rights. This means that the constitutional state and the EU have “full sovereignty” only when they enforce what was previously supposed to be the insurmountable limit to sovereignty – fundamental rights. Sovereignty is formally full only when its content is empty, as the sovereign power is obliged to enforce principles which are held to be binding because of their content, and not because of their formal source of validity.

Consequently the holder of such sovereignty cannot be the state, or the EU, which are obliged to apply rights and fundamental principles, but fundamental principles themselves. It is no coincidence that “sovereignty of rights” and “sovereignty of values” have become recurrent watchwords in neo-constitutionalist legal literature⁵⁰. Indeed, the protection of fundamental

⁴⁸ F. Modugno, *È illegittimo l'art. 189 del Trattato di Roma nella interpretazione della Corte di giustizia delle Comunità europee?*, in “Giurisprudenza costituzionale”, 1979, I, 916-938, at 929.

⁴⁹ The concept of *Kompetenz-Kompetenz* was familiar to German *Staatslehre*: A. Haenel, *Studien zum Deutschen Staatsrechte*, Vol. I, Leipzig, Haessel, 1873, at 149; Id., *Deutsches Staatsrecht*, I, Leipzig, Duncker & Humblot, I, 1892; P. Laband, *Das Staatsrecht des Deutschen Reiches*, Tübingen, Mohr, I, 1911, 57ff., 73ff.; G. Jellinek, *Die Lehre von den Staatenverbindungen*, Wien, Hölder, 1882, at 34.

⁵⁰ On the topic “sovereignty of values” (or sovereignty of fundamental rights) in relation to the crisis of State’s sovereignty, see G. Silvestri, *La parabola della sovranità. Ascesa, declino e trasfigurazione di un concetto*, in

rights is a competence without a field, the competence of competences that determines the scope of its own competence and cuts across all legal matters. The capacity to decide to apply a fundamental principle, while disapplying or suspending another fundamental principle that clashes with it, appears to be a new figure of sovereignty. This is sovereignty as the capacity to make an exception to the usual division of competences between national law and EC law; sovereignty as the capacity to enforce a right that does not tolerate any violations by any authority – a right on which, therefore, no authority has jurisdiction save the one which enforces it.

Finally, this situation is reflected in a transformation of the very concept of “limit”. In the relationship between national law and European law, fundamental rights are no longer a heteronymous limit which grounds and binds the legitimate authority; they are no longer a barrier, a “border”, a line that cannot be crossed. In their traditional form, as we have seen, fundamental rights are an external limit, because they are imposed on the state by the unchallengeable autonomy of civil society, or because they are theorised and constructed by political and moral philosophy rather than by legal science. Now, in contrast, fundamental rights are built entirely as an internal concept, they therefore appear to be a “frontier” towards which to move, a limit that depends on a continuously expanding constellation of relationships and internal strengths. Fundamental rights do not demarcate, from the outside, a space within which the exercise of power is legitimate, but rather they mark a horizon towards which every authority, national or European, must tend in search of legitimation⁵¹.

We can therefore conclude that fundamental rights do not identify, as Ferrajoli claims⁵², the “sphere of the undecidable” in the European multilevel legal space. This expression is better suited to the traditional conception of fundamental rights – fundamental rights as boundary which, from the outside, delineates the space of the “decidable”, i.e., of legitimate authority. On the contrary, the protection of fundamental rights as a “freedom of the state” and “freedom of the EU”, “competence of competences”, the last stronghold of sovereignty, designates what is most decidable, and decisive, in constitutional justice and EC justice.

“Rivista di diritto costituzionale”, 1996, 3-74, spec. 55ff.; G. Zagrebelsky, *Il diritto mite. Legge, diritti, giustizia*, Torino, Einaudi, 1992; A. Baldassarre, *Costituzione e teoria dei valori*, in “Politica del diritto”, XXII/4, 1991, 639-658; A. Ruggeri, *Sovranità dello Stato e sovranità sovranazionale, attraverso i diritti umani, e prospettive di un diritto europeo “intercostituzionale”*, in “Rivista di diritto pubblico comparato europeo”, 2001, at 546.

⁵¹ For a similar distinction between two concepts of limit see G. Deleuze, *Cosa può un corpo? Lezioni su Spinoza*, Verona, ombre corte, 2007, 129ff.

⁵² L. Ferrajoli, *Principia iuris. Teoria del diritto e della democrazia*, Roma-Bari, Laterza, 2007, I, 819ff.

The protection of fundamental rights and equality identify the limit towards which a decision in search of legitimation should move insofar as it affects the relationships between legal orders in integration. The content of the decisions may coincide or differ from time to time and from legal order to legal order. However, for them to continue to be conceived as episodes in a dialogue among judges, a dialogue which is at times one of cooperation, and at times one of conflict, they must adopt a common language, common terms of reference in the protection of rights and in the enforcement of the principles of a common legal culture.

This may possibly explain or at least partially help to explain the success of the language of rights in contemporary European legal culture. However, we should also consider the risks that such a situation of “legal dis-ordering” entails for legal pluralism and its management through dialogue. The analysis of the *Federfarma* case has shown some of these risks. The first and foremost of these is the risk of the language of rights and principles becoming obsolescent; a risk that is intrinsic to this discourse, and which emerges when rights become overvalued “trumps” in the dialogue between the courts. But there is also the risk of political overexposure of judicial power. The language of rights not only blurs the division of competences between the EU and the member states, but seemingly also the distinction between the political and legal spheres.

If the authority of self-grounded legal orders and formally valid norms does not hold any longer, the main source of legitimation remains consensus, and as consensus cannot be presupposed, it must be built through dialogue. The search for shared solutions runs counter to the unilateral application of fundamental principles. This unilateral application runs the risk of producing an equally “fundamental” dissent on the principles at issue, precisely because they concern how the objectives of European policy and the ultimate goals of social cooperation are understood. On the other hand, the search for shared solutions requires an attitude of modesty on the part of the judge, though it need not necessarily amount to self-restraint. A willingness to listen is indispensable to dialogue. Moreover, the dialogue not only requires a common language – which today is, to a large extent, provided by the fundamental principles discourse – but also the creation of procedural channels that allow judges to have exchanges, within an institutionalised and therefore public interaction that is subject to debate and criticism on the part of legal scholars and of public opinion.

In this perspective, the CCost's decision no. 102/2008 and order no. 103/2008 are to be welcomed. For the first time, the Court, modifying a consolidated line of decisions, has declared itself willing to be bound by the preliminary reference procedure to the ECJ in relation to the interpretation and validity of EC law, at least in *principaliter* proceedings. This is a complete reversal or at least a half-reversal, if the turnaround remains limited to *principaliter* proceedings, with respect to its previous negative attitude that impeded direct dialogue between the CCost and the ECJ.

The management of legal and institutional pluralism and the solution of the deficit of legality appear to demand the creation of procedural channels that work as tools of dialogue. In the *Federfarma* decision, the CStato refused to have recourse to one of the most well established procedural channels between authorities placed in different legal orders – the preliminary ruling procedure. When such channels are lacking or are not used, the language of fundamental principles can produce a sort of mutual de-legitimation among the legal orders within the European legal space. Rights alone are not enough in a multilevel system.