

THE EUROPEAN COURT OF
JUSTICE AND THE AUTONOMY
OF THE MEMBER STATES

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A PLURALISTIC EUROPE OF RIGHTS

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1. INTRODUCTION

During the negotiation of the Lisbon Treaty a new set of controversial issues among the Member States emerged: from the stance taken by some Member States, it has become clear that even fundamental rights can be an obstacle to the process of integration and a reason for incrementing Member States' Euro-scepticism or Euro-resistance. So far, the most controversial among all the fundamental rights have been mainly the social ones: traditionally Europe is marked by a variety of social policies in different countries, and although a neoliberal approach to economic matters has been softened by welfare provisions in all European countries, each of them has its own social recipe, resulting from an original mix of the two components. With the Lisbon Treaty, the area concerning controversial fundamental rights has expanded. In particular the attitude maintained by the United Kingdom and Poland during the negotiation, and by Ireland during the ratification process, shows a sort of new distrust towards the 'Europe of rights' that should not be understated.

Unlike other aspects of European integration, the 'Europe of rights' has always been presented and perceived as a result of an existent common constitutional tradition, as opposed to the outcome of a political bargain. In the first steps of the European Court of Justice's case law on fundamental rights this was an explicit statement and the legitimacy of the judicial activism of the Court was grounded on the idea that it was 'just' interpreting some common and shared principles that needed only to be spelled out. Fundamental rights in Europe claim to be part of a *jus commune europaeum*, capable of unifying the different national constitutional identities, while at the same time distinguishing the European tradition from other western countries. Even the Charter of Fundamental Rights was presented as a 'restatement of law': the claim was made that the Charter was but a codification of unwritten principles implicit in the European system on which all the Member States agreed.

Recently, the action of the European institutions on fundamental rights – including the European Court of Justice – has been debated at the national level and the dissents of some countries have been rendered explicit.

Certainly, some national institutions have always been 'alert and vigilant' with regard to the activities of the European institutions on fundamental rights. Starting with the German 'Solange' doctrine and the Italian 'controlimiti' doctrine, a growing number of constitutional or supreme courts have maintained a cautious attitude towards European developments on the matter and have affirmed over and over again the possibility of contradicting the European interpretations of fundamental rights, if necessary. Those doctrines, however, have never been applied. Many scholars have detected the signs of a potential judicial conflict between the Courts in Europe,¹ but so far all open and direct conflicts between Courts have been avoided.

During the negotiation of the Treaty of Lisbon the dissent has broken out. Protocol no. 30 to the Treaty of Lisbon expresses some serious concerns on the part of the United Kingdom and Poland on the evolution of fundamental rights in Europe, and specific reference is made to the expanding role of the European Court of Justice. Despite the rather unclear wording of the Protocol, it is not difficult to deduce from it serious concern regarding the expanding scope of the European Court's scrutiny on national measures and regarding the inclination of national judges to give direct effect to the provisions of the Charter of Fundamental Rights, an inclination that will most likely take further hold with the ratification of the Lisbon Treaty in so far as it grants legally binding force to the Charter.² As to the substance, the British concerns regard, quite unsurprisingly, the entire chapter on social rights whereas the Polish ones seem to be rather addressed³ towards rights involving ethical disputes, in particular those regarding family and the edges of life.

In the Irish case, the issue of fundamental rights was raised during the ratification stage. After the first referendum, resulting in a negative response to the Lisbon Treaty, the European Council, on 19 June 2009, attempted to remove all obstacles to Irish ratification, paving the way for a second referendum that was eventually held on 2 October 2009 resulting in a positive outcome. The European Council issued one decision and one declaration concerning all the problematic matters from the point of view of the Irish people. Among them a relevant place was occupied by some issues concerning fundamental rights such as the right to life, family and education.⁴

¹ A. TORRES PÉREZ, *Conflicts of Rights in the European Union*, Oxford University Press, Oxford, 2009, arguing that Europe has become a context of constitutional pluralism, where the protection of fundamental rights has been 'disaggregated' and for that reason there is a need for a reinforced dialogue among all the institutions involved.

² Article 6.1 of the Treaty reads: "The Union recognizes the rights, freedom and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal values as the Treaties".

³ See in particular Declaration nos. 61 and 62, where Poland restates its commitments to social rights, while claiming national autonomy in the fields of family law, and human dignity.

⁴ All the problems and possible solutions to the Irish crisis concerning the Lisbon Treaty are discussed in S. KINGSTON, 'Ireland's options after the Lisbon Referendum: Strategies, implica-

Why was there such a strong reaction on the part of these Member States on European fundamental rights? Are the concerns addressed to the innovation introduced by the Lisbon Treaty? Or are they rather due to an on-going expansion of fundamental rights activities started long before the Lisbon Treaty?

The Lisbon Treaty touches upon fundamental rights introducing two major changes: first and foremost it grants the Charter of Fundamental Rights legally binding status; the second change concerns the participation of the European Union as such to the European Convention of Human Rights.⁵ Although relevant, these new principles would not suffice to explain the defensive reaction of some of the Member States. To better understand them, we are forced to inquire into the background of the Lisbon Treaty, looking into the case law of the European Court of Justice of the last decade.

In the domain of fundamental rights, the Member States can be said to display both common background elements and different traditions: social rights, family law, state and religion – just to mention some examples – are fields in which the 27 Member States have different legal regulations. The European Union is shaped by a pluralist framework,⁶ a constitutional equilibrium made of 'contrapunctual'⁷ elements, based on the principle of constitutional tolerance⁸ and the mutual nourishment between the national and the European constitutions⁹. The tension between uniformity and diversity needs to be preserved in the European constitutional system and a fundamental antidote to the risk of judicial standardisation in the field of fundamental rights as well as the opposite risk of disaggregation is prevented by a lively judicial dialogue among the constitutional courts in Europe by means of the preliminary ruling. This is at present the most effective tool available in the European Union, permitting the national constitutional traditions to be conveyed before the European Court of Justice, especially in cases involving human rights. For this reason, this paper intends to

tions and competing visions of Europe', (2009) 34 *ELR (European Law Review)* 455. See also the British debate on the issue in House of Commons, *The Treaty of Lisbon: an uncertain future*, Research Paper 08/66 www.parliament.uk/commons/lib/research/rp2008/rp08-066.pdf, and *The Treaty of Lisbon after the Second Irish Referendum*, research Paper 09/75, www.parliament.uk/commons/lib/research/rp2009/rp09-075.pdf.

⁵ Article 6 TEU. For a general overview of the major changes introduced by the Lisbon Treaty see J. ZILLER, *Il nuovo trattato europeo*, Il Mulino, Bologna, 2007, p 176; P. CRAIG, 'The Treaty of Lisbon, Process, Architecture and Substance', (2008) 33 *ELR* 173, in particular 161 ss.

⁶ On pluralism as the contemporary model of the relationship between Member States and the EU see N. MACCORMICK, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, Oxford University Press, Oxford, 1999, p 120 and the rich debate triggered by this essay.

⁷ Recalling a famous definition by M. POIARES MADURO, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. WALKER (ed), *Sovereignty in Transition*, Hart Publishing, Oxford, 2003, p 501.

⁸ This reference recalls those authors who emphasise the pluralistic nature of the European Constitution, such as J.H.H. WEILER, who is the father of the idea of *constitutional tolerance*. See *The Constitution of Europe*, Cambridge University Press, Cambridge, 1999, at 238 ff.

⁹ I. PERNICE, 'Multilevel Constitutionalism in the European Union', (2002) 27 *ELR*, 511 ss.

insist once again on the well-known issue of judicial dialogue¹⁰ in the European Union. The paper recalls and shortly analyses 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 approval of the Charter in December 2000. The paper turns to the persistent refusal of many constitutional courts to enter into direct judicial dialogue with the European Court of Justice, a refusal which lacks justification. The European constitutional balance urges a plural constitutional dialogue: a strong and daring European Court concerned with fundamental rights needs to be surrounded by similar strong and daring interlocutors at the national level. This paper suggests that a step must be taken by both sides so as to favour an encounter of the actors in this European constitutional drama: the national Constitutional Courts should shake off their reticence to address directly the European Court; the latter, on its part, should strive to encourage judicial dialogue, which would in any case be in its own interest.

2. THE NEW MILLENNIUM AND THE FLOURISHING OF A 'EUROPE OF RIGHTS'...

Since the approval of the Charter in December 2000, fundamental rights have taken a place of honour on the European agenda. The Charter has survived the constitutional debacle of the beginning of the new century and has been endorsed by the Treaty of Lisbon despite the fact that it was meant to eliminate all constitutional language. Moreover, the Charter seems to have brought fresh constitutional fuel to the European Court of Justice's engine, which in many cases tends to act as a federal constitutional court, in particular in cases involving individual rights.¹¹ Whereas the European Union is not living the most auspicious moment as re-

¹⁰ Even though the legal literature on judicial dialogue is almost boundless, it is worth noting that some scholars criticise the idea of 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*, Hart Publishing, Oxford, 2002.

¹¹ Most scholars think that the ECJ acts as a constitutional court at least in some cases, although they do not always support the proposal of transforming the ECJ into a special judge deciding only constitutional issues: O. DUB, '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, p 2 and p 25; B. VESTERDORF, 'A Constitutional Court for the EU', (2006) 4 *IJCL (International Journal of Constitutional Law)* 607. See however L. FAVOREU, 'Les Constitutions nationales face au droit européen', (1996) 28 *RFDC (Revue française de droit constitutionnel)* 699, who affirms that at present the ECJ cannot be considered a constitutional court because it still lacks too many important elements, such as a veritable Constitution of the EU, an impartial appointment of judges and many others.

gards its political cohesion, the Europe of judges and rights is flourishing. As had been predicted,¹² a *Grundrechtsgemeinschaft* is quickly developing.

In a way this evolution is a *déjà-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 since the political way to a fully-fledged European Constitution was closed, the European Court of Justice has yet again taken the centre stage of the constitutional arena.

What is more distinctive of the new wave of judicial constitutional activism is an intense activity in fields related to fundamental rights that is incrementally imposing a "European" understanding on national constitutions and traditions. A rich list of decisions regarding human rights corroborates this hypothesis. With a view to illustrating this, this paper now turns to outline some of the most distinguished case law examples, taking those cases which do not deal with social rights¹³ as primary examples..

2.1. THE TANJA KREIL CASE

The starting point of the new dynasty of constitutional cases can be considered the *Tanja Kreil* decision in 2000,¹⁴ a judgment 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 recall that all in all it presented the Court of Justice with a constitutional conflict, between a provision of the German Constitution, Article 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, namely the principle of non-discrimination

¹² A. VON BOGDANDY, 'The European Union as a Human Right Organization?', (2000) 37 *CMLR (Common Market Law Review)* 1308. Soon after the solemn proclamation of the Charter of Rights by the European Union in Nice on 7th December 2000, Armin von Bogdandy 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 process, displaying all its seductive power.

¹³ In the present paper I will give a few examples taken from the case law of the European Court of Justice, in fields other than social rights, although cases like C-438/05, *Viking*, and C-341/05, *Laval* are among the most relevant for a complete understanding of the ECJ's attitude towards fundamental rights. See on this point the contribution by D. SCHIECK in this book. ECJ 11 December 2007, C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779; ECJ 18 December 2007, C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] I-11767.

¹⁴ ECJ 11 January 2000, Case C-285/98, *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR I-00069.

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 explicitly on the constitutional rank of the relevant German norms, the Court of Justice concludes by demanding a constitutional revision on the part of Germany, pointing out an irredeemable conflict between Community law and the national Constitution. So, while the Court of Justice up until then had prevented fanning a fire of conflict between national Constitutions and Community principles,¹⁵ in the Kreil case it did not hesitate in obliging the Germans to come into line with the European principles by revising their Constitution. For this precise reason, Tanja Kreil can be considered as the forerunner of the new line of decisions of the European Court concerning human rights issues.

2.2. THE SCHMIDBERGER AND OMEGA CASES

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

In the past, critics of the Court of Justice have repeatedly highlighted that it has exploited the rhetoric of human rights, aiming not so much at the protection of some basic values in themselves, but rather at strengthening economic integration.¹⁶ In fact, for a long time, the Community protection of fundamental rights was highly conditioned by the general objectives of European economic integration and therefore, 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 set a balance between them and other fundamental rights. Indeed, the Court of Justice has never dealt with either fundamental freedoms or fundamental rights as absolute values and consequently has always been careful to maintain 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.

¹⁵ Suffice to recall the well known decisions of the ECJ concerning the Irish Constitution: ECJ 28 November 1989, Case C-379/87, *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR 03967 on the protection of the Irish language and ECJ 4 October 1991, Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR I-04685 on the right to life and abortion.

¹⁶ J. COPPEL and A. O'NEILL, 'The European Court of Justice: Taking Rights Seriously?', (1992) 29 *CMLR* 669.

And so, that explains why the *Schmidberger* case of 2003¹⁷ was enthusiastically welcomed by many scholars and commentators. In that decision, the Court of Justice was called upon to resolve a controversy between a basic freedom of the market – in that 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 thirty hours. Surprisingly, the Court gave prevalence to the latter, in a balanced decision in which for once the civil rights in question prevailed over the economic interests.

Even more astonishing, in many respects, was the *Omega* decision in 2004.¹⁸

Also in this case, the Court of Justice had to face a conflict between an economic freedom protected by the Treaty, specifically 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.

The case could have been solved on different grounds, but the Court wanted to use the discourse of fundamental rights by affirming that human dignity is not only one of the basic values of the German Constitution, but it is also 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 unobserved. So in *Omega*, as in *Schmidberger*, fundamental rights prevailed over economic freedoms and justified the important restrictions placed on them.

2.3. K.B., RICHARDS AND TADAO MARUKO CASES

From another point of view, it can be seen that in more recent years the Court of Justice tends to widen the scope of EU fundamental rights, going beyond the limits of the European Union competences that the doctrine of *incorporation* would permit.¹⁹ This tendency is clearly visible in some cases regarding the rights of

¹⁷ ECJ 12 June 2003, Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-05659. On this issue M. AVBBLI, 'European Court of Justice and the Question of Value Choices', www.jeanmonnetprogram.org/papers/04/040601.pdf, visited 25 January 2009.

¹⁸ ECJ 14 October 2004, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-09609.

¹⁹ More cases are read in this perspective of expanding the scope of the ECJ review on national measures in A. TORRES PÉREZ, *Conflicts of Rights in the European Union*, Oxford University Press, Oxford, 2009, p 18 ss.

transsexuals: *K.B.*²⁰ and *Richards*.²¹ Both cases originate in Great Britain, where at the time of the events a peculiar legal situation was in force, one which on the one hand permitted a change of sex, it even being funded by the national health service while on the other hand, however, the record of the change of sex in the registry office was prohibited, thus in effect 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 was judged incompatible with the principles of non-discrimination on the basis of sex and the United Kingdom, which had already on several occasions been censured by the Court of Luxemburg as well as by the Court of Strasbourg on the impossibility of correcting personal data recorded at birth in the case of sex change, ended up adapting its own legislation to meet the European principles on non-discrimination.

An interesting aspect regarding this jurisprudence is that in these cases the EU fundamental rights impinge upon the regime of 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 certainly did not intend to transfer to the Community institutions, namely the legal status of transsexuals and the rules that govern the civil register.

As a matter of fact, in *K.B.* and *Richards* the European Court of Justice broadens the doctrine of *incorporation*. It is not necessary to insist here on this well known doctrine.²² Suffice to recall that at the time *K.B.* and *Richards* were decided, the area of application of fundamental rights, apart from the acts of the Community institutions, was also extended to acts of the Member States that enter the field of European law, a rule that realised itself in two main hypotheses: when States' actions constitute an application of Community law – the Wachauf

line of reasoning²³ – and when the State's action is an exception to one of the fundamental freedoms of the internal market – the ERT line.²⁴

Now the *K.B.* and *Richards* cases obviously do not fall into either hypothesis. The censured British legislation did not implement or execute Community acts; nor did 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 jeopardise 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.

It is too soon to say if a new 'spin-off' of the doctrine of *incorporation* has been heralded. However it is clear that in cases involving the non-discrimination principle, European fundamental rights tend to break into the national legal orders, well beyond the limits of incorporation. This trend is evident for example in *Tadao Maruko*,²⁵ a decision that requests the amendment of German legislation on same sex partnerships in order to grant same sex partners the same rights of spouses, at least insofar as the right to pension is concerned. In many respects, this decision oversteps the boundaries between the national protection of fundamental rights and the European one. In fact, consequently to the decision, the *Bundesverfassungsgericht* as well as other German judges have reacted to the European Court's decision by refusing to apply its interpretation.²⁶

If this trend were to continue, the impact of Union law on the fundamental rights guaranteed by the national Constitutions would be dramatically broadened, toppling the limits of jurisdiction which were so carefully established in the Charter of Fundamental Rights, in Article 51 and Article 53, according to the consolidated doctrine of incorporation. The risk involved in developing of a fully-fledged incorporation in Europe, based on the wave of the American experience, is to trigger sharp constitutional conflicts with some Member States and to transform Europe's constitutional richness and variety into a single constitutional monologue.

²⁰ ECJ 7 January 2004, Case C- 117/01, *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-00541.

²¹ ECJ 26 April 2006, Case C-423/04, *Sarah Margaret Richards v Secretary of State for Work and Pensions* [2006] ECR I-03585.

²² The first and fundamental essay about the incorporation doctrine is J.H.H. WEILER, 'The European Court at a Crossroads: Community Human Rights and Member States Action', in F. CAPOTORI and others (eds), *Du droit international au droit de l'integration. Liber amicorum Pierre Pescatore*, Nomos, Baden-Baden, 1987, p 821 and on the recent evolutions of the incorporation principle see 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, Oxford, 1999, p 873.

²³ ECJ 13 July 1989, Case 5/88, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 02609.

²⁴ ECJ 18 June 1991, Case 260/89, *Elliniki Radiophonia Tileorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdelias and others* [1991] ECR I-02925.

²⁵ ECJ 1 April 2008, C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-01757 dealing with same sex marriage and the right to survivor's pension.

²⁶ *BVerfG*, 6 May 2008, decision 2 BvR 1830/06. It has been argued that the Constitutional Courts of the new members of the EU are more reluctant to comply with the creative interpretations of the ECJ. See the interesting analysis by W. SADURSKI, 'Solange, chapter 3: Constitutional Courts in Central Europe – Democracy – European Union', *EUI Working Papers Law*, n° 2006/40 in <http://cadmus.eui.eu/dspace/bitstream/1814/6420/1/LAW-2006-40.pdf>, visited 15 January 2009.

2.4. CASES ON TERRORISM

The Union's 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 European Court of Justice seems to be much more demanding of the Member States (and even more so of third countries or States that are candidates for membership) and indulgent regarding the acts of the Union's institutions. In fact, the European Court of Justice's case law on fundamental rights is dotted with statements of principle but has rarely admitted a violation of rights on the part of the Union institutions concerning their actions, tending more frequently to ascertain violations on the part of the Member States.

If we keep this context in mind, the importance of some cases on terrorism is unmistakable. The decisions on terrorism concern some European Union Council regulations which, in implementing UN resolutions, foresee important patrimonial restrictions for people and associations that are reputed to be connected to terrorist networks. In all these cases, a number of 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 refusing to allow them to refute the proof gathered against them.

The CFI faced this problematic area in several cases, such as *Yusuf and Kadi*,²⁷ *Ayadi and Hassan*²⁸ and in the *Modjahedines*²⁹ case providing different responses.

The first group of decisions caused some criticism, because they ultimately sacrificed completely the plaintiffs' fundamental rights.

Starting with the *Modjahedines* case, the European judges appear more 'rights-oriented': in *Modjahedines* the European Court declares the decision adopted by the European Union Council void for violation of fundamental rights such as the right to defence and of the right to an effective judicial remedy. The Court relies on the fact that 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, so that the *Organisation des Modjahedines* was harmed by virtue of a discretionary choice of the European institutions.³⁰ More recently, in *Kadi*,³¹ the European Court of Justice reversed a previous decision of the Court of First Instance and annulled some European Union Council regulations imposing restrictive measures against certain persons and entities associated with Usama Bin Laden, the Al-Qaeda network and the Taliban, for violation of fundamental rights – namely the right of defence – although the European regulations had been issued in execution of UN resolutions.

The choices made by the Union's judges are certainly very courageous. Not only did the Court use the sanction of annulment of the contested acts, something that occurs very rarely; but, of no lesser importance, the Union's 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 sensitivity towards the rights of suspected terrorists and generates a greater propensity towards the need for security rather than towards that of justice and freedom.³²

2.5. 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 European Court of Justice on fundamental rights could continue ad infinitum, illustrating for example the consistent group of judgments 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 others.³³

Undoubtedly something is changing in the approach of the Court of Justice towards fundamental rights since 2000. Today many decisions issued by the EU's judges take fundamental rights extremely seriously. Since the approval of the

²⁷ CFI (now GC) 21 September 2005, Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2005] ECR II-03533; CFI 21 September 2005, Case T-315/01, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-03649. For a deep analysis and criticism of these decisions see P. EECKHOV, 'Community Terrorism Listing, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit', (2007) 3 *ECLR (European Constitutional Law Review)* 183 and C. ECKES, 'Judicial Review of European Anti-Terrorism Measures – The Yusuf and Kadi Judgements of the Court of First Instance', (2008) 14 *ELJ (European Law Journal)* 74. See also a criticism of the content of *ius cogens* as stated by the CFI in C. TOMUSCHAT, 'Note on Kadi', (2005) 43 *CMLR* 537.

²⁸ CFI 12 June 2006, Case T-253/02, *Chafiq Ayadi v Council of the European Union* [2006] ECR II-02139; CFI 12 June 2006, Case T-49/04, *Paraj Hassan v Council of the European Union and Commission of the European Communities* [2006] ECR II-00052.

²⁹ CFI 12 December 2006, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council of the European Union* [2006] ECR II-04665.

³⁰ 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.

³¹ ECJ (Grand Chamber) 3 September 2008, Case C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, [2008] ECR I-06351.

³² A thorough analysis of this case in the light of the position of the EU in the global context can be read in G. DE BURCA, 'The European Court of Justice and the International Legal Order after Kadi', *Jean Monnet Working Paper* 01/09, in www.jeanmonnetprogram.org/papers/09/090101.pdf at 21 *et seq.*

³³ For a more complete analysis see M. CARTABIA (ed.), *I diritti in azione*, (Bologna, Il Mulino, 2007). The problem is raised in L.B. and J.H.R., 'Editorial. The Relative Autonomy of the EU Human Rights Standard', (2008) 4 *ECLR* 199.

Charter, plaintiffs and their lawyers use human rights more and more often as crucial legal arguments in the proceedings before the European Court and they 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, are beginning to affect the merits of the decisions of the European courts. In this development, one cannot but notice the powerful effect of the Charter of Fundamental Rights and the new 'visibility' of fundamental rights, which was precisely one of the purposes that the Charter intended to reach. Even before being granted official legal status, the Charter had had important judicial spin-off effects. One can reasonably expect that these effects will continue to appear after the Treaty of Lisbon.

Certainly, the European Court of Justice shows to be strongly committed to a specific selection of rights – in particular to the “new rights” which are developing on the ground of non discrimination and self determination principles – whereas its jurisprudence concerning other rights – and especially social rights – is generally considered as a disappointing one.³⁴ However, everything considered, after the approval of the Charter, the feared effects of freezing and paralysing jurisdictional activism on the subject of fundamental rights did not occur, rather, on the contrary, the result is the strengthening of the Court of Justice as a *Court of Rights*. It is probably for this reason that so many commentators now tend to define the European Court as a Constitutional Court.³⁵

3. ... AND OF A 'EUROPEAN COURT OF RIGHTS'

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

There is something paradoxical in the fact that the Charter has produced a legitimising effect on the Court long before having legal effect. However, the fact that immediately after its proclamation the Charter of Fundamental Rights has been invoked and applied by many national judges, including many national constitutional courts, and that it also appeared 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.

Moreover, also the Commission, the European Parliament and the Fundamental Rights Agency regularly refer to the Charter *as if* it were a legally binding document.

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

Generally speaking every legal written text 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'*³⁶ 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.

This paradoxical effect can be explained in several ways.

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 achieved, not even in the national systems that follow the tradition of civil law. History has extensively shown that judicial 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.³⁷

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*³⁸ judges enjoy a wide discretionary power for the simple fact that in order to solve a case or controversy they can take into account 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 law* is the possibility that they are offered to refer to a multiplicity of competing sources of law in exercising the *judicial review*.

³⁴ See for example L. AZOULAI, 'Le rôle constitutionnel de la Cour de Justice des Communautés européennes tel qu'il se dégage de sa jurisprudence', (2008) 44 *RTDE (Revue Trimestrielle de Droit Européen)* 29, who emphasises the constitutional role of the ECJ although criticising its jurisprudence on social rights, in particular after the decision of *Laval* and *Viking* ECJ 11 December 2007, C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779; ECJ 18 December 2007, C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] I-11767.

³⁵ See *supra* note 3.

³⁶ For a critical historical overview of this principle, see K.M. SCHÖNFELD, 'Rex, Lex, Judex', (2008) 4 *ECLR* 274.

³⁷ For the Italian experience see E. LAMARQUE, 'L'attuazione giudiziaria dei diritti costituzionali', (2008) *Quaderni costituzionali* at 266, who demonstrates the creation of an impressive number of new fundamental rights by means of judicial decisions concerning requests of compensation for damages.

³⁸ See in particular on this point M. ROSENFELD, 'Constitutional adjudication in Europe and in the United States: paradoxes and contrasts', (2004) 2 *IJCL* 633, at 646.

The habit of judges to recall *foreign law* and *international law* in cases involving fundamental rights offers further options to their discretionary power.

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 consequently 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 written nature of the Charter of Fundamental Rights is further increasing the power of European Union judges, who have always been a vital engine for the development of European integration.

4. 'UNITED IN DIVERSITY' AT RISK

As with every relevant change, even the new trend in the European Court of Justice's case law entails both advantages and disadvantages. In particular, judicial activism in the field of fundamental rights brings about some concern for the constitutional equilibrium between the European Union and the Member States, and – more importantly – for the survival of the diverse historical traditions entrenched in the national constitutions, which are part and parcel of European identity. 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 attention to a different concern.

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 simultaneously sterilising the protection guaranteed by the national Constitutions and breaking the limits of jurisdiction in which the action of the Community institutions should be carried out.³⁹ In this centralising movement, the national constitutional traditions risk to be extinguished.

³⁹ A. VON BOGDANDY, *The European Union as a Human Rights Organization?* cit. *supra* note 2, at 1316–1318. See also on this point A.C. PERBIRA-MENAUT, 'A Plea for a compound *res publica europea*: proposal for increasing constitutionalism without increasing statism', (2003) 18 *Tulane European and Civil Law Forum* 75, at 97–98.

Cases like *K.B., Richards*, and *Tadao Maruko* are unquestionable examples of the invasion of the Union's protection of fundamental rights into areas where responsibility should lie with the national Constitutions. Article 51 of the Charter and the principles of incorporation⁴⁰ limit European judicial review of national acts only to cases where "the Member States are implementing Union law". In the aforementioned cases, the Member States were not implementing EU law. All this considered, why should the Court of Justice concern itself with violations of transsexuals' rights in the British system? The problem was under control; in particular it was under the supervision of the British courts and the Strasbourg Court.⁴¹ Cases like *K.B., Richards* and *Tadao Maruko* widen the scope of the European Court of Justice's judicial review on states' legislation well beyond the limits of the doctrine of incorporation. Besides this, as the *Kreil* case shows, this expansion can also impinge upon the national Constitutions. The Charter was conceived with a limited scope, addressing essentially the Union's institutions and the national institutions only when they execute Union law. Nonetheless, the Charter tends to be treated as if it were to overcome the national constitutions.

The expansion of the scope of fundamental Union rights is not only a matter of jurisdiction – the role of the Court of Justice in assuming the responsibilities of national Courts – but also a question about the substance of the protection of fundamental rights, because it could happen that the Union's understanding of some rights does not correspond entirely to that of one or more Member States: after all, the European Union endorses an individualistic/libertarian interpretation, whereas some national constitutions are oriented towards a personalistic/dignitarian conception of fundamental rights⁴² like, for example, the Italian Constitution which is inspired by the second line of thought, starting with its Article 2: 'The Republic recognises and guarantees the rights of each human being considered both as an individual and within the intermediate social bodies where his/her personality flourishes'. The expansion of the Union's protection of rights may end up having an impact on those fields where the national particularity is intentionally defended.

Most cases brought before the European Court of Justice concern weak subjects such as women and migrant workers and understandably the Court seeks to fulfil what it considers to be its constitutional duty towards those persons. 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

⁴⁰ See *supra* note 17.

⁴¹ After all the European Court of Human Rights of Strasbourg in *Goodwin v. United Kingdom*, 11 July 2002, 28957/1995 had already condemned the United Kingdom for its legislation on transsexuals.

⁴² On the interpretation of these two lines see M.A. GLENDON, 'Human Rights at the Dawn of the Third Millennium', in L. Antonini (ed), *Il traffico dei diritti insaziabili* Rubbettino, Cosenza, 2007, p 45.

very carefully by the national institutions 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 all weak subjects. All this is commendable. What is more debatable is that this mission is always within the institutional limits of the European Court. Expanding the jurisdiction of the European Court of Justice produces a centralising effect, suffocates pluralism, diversity and disagreement and consequently the possibility of a more considerate decision making process.

The practical effects of the Charter of Fundamental Rights as interpreted by judges are supported by a widespread legal thought that fosters the development of common European values – a '*jus commune europaeum*'.⁴³ This implies the idea that the whole continent can be unified around universally shared values and that unification flows from the judges' pens.⁴⁴ Whereas the European Union is going through a phase of political and economical stagnation, the Europe of judges and rights looks vigorous and dynamic. The success of the Europe of judges and rights is at least partly due to the opinion that the European – and more generally – the international institutions seem to be located at a more suitable level for the protection of fundamental rights. Fundamental rights are pulled out of the local boundaries, because they have a universal core: human dignity. That is why the protection of fundamental rights seems to fit better on the international scene rather than in national or local communities. Given the universal nature of human rights, European law and international law are taking the place that used to be occupied by natural law, since they imply the idea of a core of values and rights common to all human beings.

We must not, however, forget that fundamental rights have an ambivalent nature. 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 national 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 pluralism.⁴⁵

⁴³ In relation to the origin of this line of thought see I. PERNICE, 'Multilevel Constitutionalism in the European Union', quoted *supra* note 7, at 511. In Italy see at least G. SILVESTRI, 'Verso uno ius commune europeo dei diritti fondamentali', (2006) *Quaderni costituzionali* at 7; A. PIZZORUSSO, *Il patrimonio costituzionale europeo*, Il Mulino, Bologna, 2002; V. ONIDA, 'Armonia tra diversi e problemi aperti', (2002) *Quaderni costituzionali* at 549.

⁴⁴ For an insight on the American debate about the aristocratic and paternalistic character of judge-made law see A. GUTMANN (ed.), *A Matter of Interpretation*, Princeton University Press, Princeton, 1997 in particular the Comment to Justice A. Scalia by M. A. Glendon, p 95.

⁴⁵ P. G. CAROZZA, 'Uses and misuses of comparative law in international human rights', (1998) 74 *Notre Dame Law Review* at 1235.

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

Even more serious: what happens if one of the fundamental rights protected at the European and international level belongs only to one or some specific traditions or cultures and does not reflect any common shared value? Who guarantees that the European and the international institutions stick to the protection of the common fundamental rights and are not tempted to impose a particular interpretation of them as if it were universal?

The role of the Court of Justice is crucial and extremely delicate. Its pronouncements on the subject of fundamental rights tend to establish *the* standard that must be respected throughout the 27 countries of the Union.⁴⁶ Once a fundamental right enters the 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.

As has been highlighted, the very nature of the European Union is that of a pluralistic, tolerant, multiple, 'contra-punctual' legal order,⁴⁷ where a plurality of voices tends to harmonisation. Should the European Union move towards a uniform standard in the field of fundamental rights, trampling on the plurality of national constitutional traditions, or impose one out of many understandings of each fundamental right then it would betray its own ontological structure.

5. LOOKING FOR AN ANTIDOTE

This risk needs to be coupled with an effective antidote. It is difficult to elaborate the complete formula of it, but some of its components can be singled out. First, every new fundamental right should be tested with a strict scrutiny and recognised only if it is part of a common basic experience throughout the whole European continent; second, the common experience of the people of Europe cannot be defined once and forever in a dogmatic style, in abstract formulas or written principles: fundamental rights are living concepts that can only emerge from the dynamic of the *encounter* among different peoples, each one having its traditions and culture, in a bottom up movement, and for that reason are continually reshaped. In a way, this proposal recalls the idea of a common basic floor of shared values throughout the continent. However, there is here a major difference, because, the common basic ground that I am proposing is supposed to emerge from the dynamic encounter and dialogue of different peoples and traditions.

⁴⁶ This effect is clearly grasped in S. PANUNZIO, *I diritti fondamentali e le Corti in Europa*, Jovene, Napoli, 2005, p 58.

⁴⁷ See *supra* note n. 7.

If we want to prevent the extinction of the existing constitutional traditions, it is necessary that the category of fundamental rights is not excessively widened and, what is more relevant, every 'new fundamental right' should be verified within the living experience of European peoples. The further away we get from the core of fundamental rights, the greater the historical and cultural divergence between the various legal systems. The proliferation of 'fundamental rights' may impair the constitutional balance of the whole Union. The *jus commune europaeum* or, if you like, the 'common constitutional traditions' are undoubtedly a reality recognisable around a consolidated and limited nucleus of values, even though it is a category that becomes uncertain and shaky the further one distances oneself from that essential nucleus of really common values. Great care must be taken when recognising 'new fundamental rights' at the European level. After all, the primary task of the Courts is to guarantee the existing fundamental rights rather than create new ones.

However, here a crucial problem arises and needs to be answered: how can those common rights be recognised? Here I would like only to make a methodological remark: the common core of different cultures and traditions can only emerge from the encounter among living subjects able to express them. The only way to identify the rights common to different traditions is a careful observation of the common experiences emerging from the encounter among peoples belonging to the different traditions. Comparing legal and judicial texts is necessary, but not enough. The texts of the declarations of rights around the world very often repeat similar formulas. However, the judicial experiences of peoples and societies show relevant diversities. Human rights reveal their meaning when they touch upon real problems and facts. They can only be recognised in the historical experience of peoples. That is why all the subjects that can express a specific tradition should be active players in the European constitutional construction: social groups, legislators, judges, public authorities. In a certain sense, the European motto could read 'unity from living diversity'.

Democratic institutions, agencies, NGOs, all sorts of social subjects are required to become effective agents of a living culture of fundamental rights in Europe. And indeed a distinguished task rests on judges and on their dialogues. All sorts of democratic and judicial dialogues need to be strengthened and all forms of participation highly valued: a Europe of rights is to be grounded on the polyphony of the voices and traditions that make themselves heard, and if one voice is missing the cultural patrimony of the whole of Europe would be diminished. 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 in the interest of a particular national tradition that the constitutional conversation on 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.

The attitude of the Polish, British and Irish peoples when faced with the Lisbon Treaty can be considered an unconventional attempt to make themselves heard in the construction of a pluralistic Europe of rights. Should their stance be downplayed by the European institutions, then the whole construction would be at risk. A Europe of rights is not susceptible to have different speeds: either it is the expression of common and shared experiences of all peoples in Europe, or sooner or later it will fall apart. In this perspective, the Lisbon Treaty contains important steps forward towards a Europe of rights, but also relevant claims on the part of some Member States that are now in the hands of the European institutions.