# THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE EU LEGAL FRAMEWORK: HISTORY OF A COMPLEX RELATIONSHIP

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SUMMARY: 1. Introduction – 2. EU and Fundamental Rights: A Contradictory Relationship – 3. Three "Seasons": "Negatory", "Pretoric" and "Of Codification" – 4. The Current Multi-level System – 5. Fundamental Rights as Principles, Values, Rules – 6. Conclusions.

**1.** Within the instability of the EU political and economic framework, the system of fundamental rights plays an increasingly important role – not only in the pursuit of a right that is both effective and certain, but above all in the defence of the principles and values shared by a community and, therefore, in the construction of an identity that could be defined as "European"[1].

* This paper, although conceived jointly, must be attributed as follows: Virgilio D'Antonio, paragraphs 1 and 2, Giorgio Giannone Codiglione paragraphs 3, 4, 5, 6.

[1] FERRARI BRAVO, *La tutela dei diritti in Europa*, in *Eur. dir. priv.*, n. 1, 2001, p. 37 ss.; ZAGREBELSKY (ed.), *Diritti e costituzione nell'Unione europea*, Roma – Bari, 2003, *passim*; MANZELLA, *L'identità costituzionale europea*, in *Studi in onore di Leopoldo Elia*, vol. II, Milano, 1999; BIFULCO *et al.* (eds.), *L'Europa dei diritti*, Bologna, 2001, *passim*; PINELLI, *Cittadini, responsabilità politica, mercati globali*, *ibidem*; CARTABIA, *Principi inviolabili e integrazione europea*, Milano, 1995, *passim*; WEILER, *To be an European Citizen*, in *Studi in onore di Giuseppe Federico Mancini*, vol. II, Milano, 1998; PECES BARBA MARTINES, *Derechos fundamentales*, Madrid, 1983, *passim*; PANEBIANCO (ed.), *Repertorio della Carta diritti fondamentali dell'Unione europea*, Milano, 2001, *passim*; MATSCHER - PETZOLD (eds.), *Protecting Human Rights: the European Dimension. Studies in Honour of Gérard J. Wiarda*, 2nd ed.., Köln – Berlin – Bonn, 1990, *passim*; MANZELLA *et al.*, *Riscrivere i diritti in Europa*, Bologna, 2001; AZZENA, *L'integrazione attraverso i diritti*, Torino, 1998, *passim*; DE CUPIS, *I diritti della personalità*, in CICU - MESSINEO (eds.), *Trattato di diritto civile e commerciale*, Milano, 1959, p. 44 ss.; FERRAJOLI, *I fondamenti dei diritti fondamentali*, in ID. (ed.), *Diritti fondamentali. Un dibattito teorico*, Roma-Bari, 2001, p. 279 ss.; RESCIGNO, «*Personalità (diritti della)*», in *Enc. giur.*, XXIII, Roma, 1990, p. 1 ss.; ZENO-ZENCOVICH, «*Personalità (diritti della)*», in *Dig. IV*, disc. priv., sez. civ., XIII, Torino, 1995, p. 453 ss.; AUTORINO STANZIONE – STANZIONE, *Diritto civile e situazioni esistenziali*, Torino, 1997, *passim* ; JORI, *Aporie e problemi nella teoria dei diritti fondamentali*, *ibidem*, p. 77 ss.; STRAMIGNONI, *Soggetto di diritto e diritti (fondamentali) del soggetto: autonomia, linguaggio e diritto comparato*, in *Riv. crit. dir. priv.*, n. 2, 2002, p. 223 ss.; HOHFELD, *Fundamental Legal Conceptions as Applied to Judicial Reasoning and Other Legal Essays*, New Haven, 1923; MORESO, *Conflitti tra principi costituzionali*, in *Ragion pratica*, n. 18, 2002, p. 207 ss.; VILLEY, *Le droit e les droits de l'homme*, Pa-

This creative – and at the same time rebalancing – function, can be ascribed primarily to the historical nature of the concept of "fundamental rights" and to its ambiguity that is explained in the various theories that have reconstructed its nature, scope and effectiveness over the centuries.

On a subjective level, fundamental rights can refer to people, understood in a universal sense; to citizens – therefore in a statist sense; or else to subjects that have the capacity to act – bringing us to the private law vision attributable to the Western Legal Tradition.

In the contrast between "fundamental rights" and "subjective rights", not only as a functional relationship between primary and secondary norms, but also in the sense of "competing" subjective situations, endowed with cogent effectiveness towards the State and third parties, the common legal-philosophical matrix of the two notions re-emerges.

Fundamental rights, in the form of the so-called human rights, borrowed the metaphysical link between nature and morality from the recognition of innate, inalienable and inviolable rights such as to freedom and equality bestowed in the first Declarations of rights at the end of the eighteenth century[2].

The subjective rights – understood as "acquired rights" – operated on the fragmentation of individual status in the context of the contractual relationship established with the State, finding their place within the German *Pandektenrecht* matrix of the private law system as an expression of individual freedom, the power or primacy of the will imparted by the legal system or, specularly, in the form of interests recognized positively, that are protected against the interference of third parties[3].

Looking at their content, fundamental rights embody this dual historical-evolutional matrix, seen from a substantial point of view in the contrast between negative freedoms (belonging to the rule of law) and positive freedoms (that reflect the ideal nature of the welfare state), implemented in the praxis of judicial interpretation both on a horizontal and a vertical level in the relation-

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ris, 1983, *passim*; CASSESE, *I diritti umani nel mondo contemporaneo*, Roma-Bari, 1994; SIMPSON, *Human Rights and the End of Empire*, Oxford, 2001, *passim*.

[2] SNYDER (ed.), *Constitutional Dimensions of European Economic Integration*, Kluwer, 1996; SUDRE *et al.*, *Droit communautaire des droits fondamentaux*, Paris, 1999, *passim;* KNÖLL, *Die Diskussion um die Grundrechtscharta der EU aus dem Blickwinkel der deutschen Länder*, in *NJW*, 2000, p. 1845 ss.; DE VERGOTTINI, *La comparazione nel diritto costituzionale. Scienza e metodo*, in *Dir. e società*, 1986, p. 165 ss.; LOMBARDI, *Premesse al corso di diritto pubblico comparato*, Milano, 1986; BOGNETTI, *Introduzione al diritto costituzionale comparato*, Torino, 1994; GAMBARO - SACCO, *Sistemi Giuridici Comparati*, in SACCO (ed.), *Trattato di Diritto Comparato*, Torino, 1996; LOSANO, *I grandi sistemi giuridici*, Torino, 1978; ANCEL, *Utilité et méthodes du droit comparé*, Neuchâtel, 1971; COSTANTINESCO, *Il metodo comparativo*, PROCIDA MIRABELLI DI LAURO (transl. by), Torino, 2000.

[3] DI MAJO, *La Carta dei diritti fondamentali dell'Unione europea: aspetti giuridici e politici*, in *Eur. dir. priv.*, no. 1, 2001, p. 41 ss.

ships between citizens and the State. The environment that defines them, in fact, does not remain in the mere declamation of them, nor in a strict definition of rights and duties, but is explained in a constant and dynamic exercise of adaptation, guaranteed by the principles of case law[4].

Moving beyond their merely individual dimension, discussing fundamental rights also means exploring their collective dimension: paradigmatic examples of this political and promotional perspective are the African Charter on Human and Peoples' Rights of 1981, the Islamic Declaration of Human Rights in Tunis in 1992 and the Declaration made in 1992 in Vienna during the UN Conference on Human Rights.

**2.** Reconstructing the "history" of European Community law from the point of view of fundamental rights, involves exploring a relationship that is rich in contradictions and in a state of continuous change.

As is well known, the EU legal system is characterised by its autonomous and supranational nature: it has independent institutions and a particular system of sources, that on one hand influence to various degrees the legal systems of the Member States according to the principles of the autonomy, pre-eminence and direct effectiveness of certain acts (such as regulations) and, on the other hand, is placed in a local/general relationship with international law[5].

Within the framework outlined briefly above – at least until the end of the 1970's –there was no room for fundamental rights.

The reason behind this radical exclusion of a codification of fundamental rights was primarily due to the predominantly economic and commercial foundations of the EU community. In this sense, neither the "gradualist and functionalist method" advocated by Jean Monnet, nor the "constituent" approach of Altiero Spinelli expressly contemplated this necessity. On the other hand, Europe already had a Charter of Fundamental Rights (the EU Convention of Human Rights, ratified in Rome in 1950) that was traditionally placed at the top of an autonomous legal system, parallel to that of the EU, formed by a political body (the Council of Europe) and another judicial body (the European Court of Human Rights)[6].

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[4] RIDOLA, *Diritti fondamentali. Un'introduzione*, Roma, 2006, *passim*; DÍAZ CREGO, *Protección de los derechos fundamentales en la Unión Europea y en los Estados miembros*, Madrid, 2009, p. 34 ss.

[5] HARTLEY, *The Foundations of the European Community Law*, Oxford, 1994, *passim*, and LASOK - BRIDGE, *An Introduction to the Law and Institutions of the European Communities*, London, 1982.

[6] SPINELLI - ROSSI, *Il manifesto di Ventotene. Per un'Europa libera ed unita. Progetto d'un manifesto*, Roma, 1944; ALBERTINI, *Nazionalismo e federalismo*, Bologna, 1999, *passim*; ID., *Il federalismo*, Bologna, 1993.

**3.** The slow process of penetration of the logic of fundamental rights within EU law took place therefore through the courts, following a path that can be divided into three distinct "seasons"[7].

The first season – that could be defined as "negatory", sees fundamental rights as a foreign body, excluding in a radical manner any possible influence they could have over EU law.

In the *Stork* case in 1959[8], the lack of jurisdiction of the Court of Justice is stated in the evaluation of an alleged violation of the fundamental principles of the Constitution of a Member State by the EU authority for coal and steel (ECSC).

The impossibility for the Court to interpret and apply the rules of domestic law is confirmed in *Comptoirs de vente du charbon de la Ruhr* in 1960[9] and the *Sgarlata* case in 1965[10].

In essence, in this initial phase the relationship between the States and the EU Community was characterised by the complete separation of competences, so the principle of the autonomy of the EU Community substantially prevented its legal bodies from protecting the fundamental rights enshrined in the Constitutions of the Member States, and consequently, the fundamental rights of the citizens.

This closed, radical position generated a real judicial rebellion on the part of some of the highest courts in the Member States. In Italy the Corte Costituzionale, in its judgment regarding the *Frontini* case (1973)[11] states that in the case that an EU Community law was found to be against the Italian Constitution, the "guarantee of a judicial review by this Court on the long term compatibility of the Treaty with the aforementioned fundamental principles" would always be ensured.

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[7] ROSAMOND, *Theories of European Integration*, Basigstoke, 2000, *passim* and ROSENAU - DURFEE, *Thinking Theory Thoroughly*, Boulder, 1995; DELMAS - MARTY (eds.), *The European Convention for the Protection of Human Rights: International Protections versus National Restrictions*, Dordrecht – Boston – London, 1992.

[8] ECJ, 4th February 1959 (case 1/58), available at: *https://eur-lex.europa.eu/legal-content/IT/ALL/?uri=CELEX%3A61958CJ0001/*.

[9] ECJ, 15th July 1960 (cases 36, 37, 38 and 40/59), available at: *https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX:61959CJ0036/*.

[10] ECJ, 1st April 1965 (case 40/64), available at: *https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A61964CJ0040/*

[11] Italian Consitutional Court, 27th December 1973, no. 183, available at: *http://www.giurcost.org/decisioni/1973/0183s-73.html/*.

With its judgment in *Solange* I (1974)[12], also the German *Bundesverfassungsgericht* states that despite complying with the so-called dual track of independence and mutual autonomy of the EU Community Law and German Law, in the case of conflict it would not be possible to decide on the "primacy of Community Law over national law, especially Constitutional law, since EU law – as the generally recognised international law (Article 25 of the German Basic Law) – could have had priority over ordinary law, but not over that at Constitutional level"[13].

Indeed, these sentences from the early 1970's are followed by the first opening up of the Court of Justice to the issue of fundamental rights, giving rise to the second season that we can define as "pretoric".

In the *Stauder* case (1969)[14], the Court recognises its jurisdiction to guarantee the observance of "fundamental human rights", understood as "general principles of the EU Community".

This change of direction was predominantly political in nature, as it is instrumental in the affirmation of the primacy of EU law over that of the single Member States: in *Internationale Handelsgesellschaft* (1970)[15], the Court of Justice reiterates that the protection of fundamental rights "whilst inspired by the constitutional traditions common to the Member States must be ensured within the framework of the structure and objectives of the Community", emphasising subsequently that "In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either

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[12] BverfG, 29th May 1974 – BvL 52/71, in *BVerfGE* 37, p. 271 (*Solange* I), available at: *http://goo.gl/eAI5dp/*. In argument see OSSENBU□HL, *Die Interpretation der Grundrechte in der Rechtsprechung des Bundesverfassungsgerichts*, in *NJW*, 1976; RUPP, *Zur Verfassungsrichtlichen Kontrolle des gemeinschaftsrecht am Maßstab der Grundrechte*, in *NJW*, 1974; MEIER, *Anmerkung zu BVerfGE 37, 271*, in *NJW*, 1974; FROMONT, *Note à l'ordonnance de la Cour constitutionnelle fédérale du 29 mai 1974*, in *RTDE*, 1975, 333; RIEGEL, *Zum Problem der Allgemeinen Rechtsgrundsätze und Grundrechte im Gemeinschaftsrecht*, in *NJW*, 1974, p. 1585 ss.; SCHEUNER, *Zum Beschluß des Bundesverfassungsgerichts vom 29.Mai 1974*, in *AöR*, 1975; HILF, *Zum Beschluß des Bundesverfassungsgerichts vom 29.Mai 1974. I. Auswirkungen auf die Gemeinschaftsrechtsordnung*, in *ZaöRV*, 1975.

[13] KNÖLL, *Die Diskussion um die Grundrechtscharta der Europäischen Union aus dem Blickwinkel der deutschen Länder*, in *NJW*, 2000, p. 1845 ss.

[14] ECJ, 29th November 1969 (case 29/69), available at: *https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A61969CJ0029/*.

[15] ECJ, 17th December 1979 (case 11/70), available at: *https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A61970CJ0011/*.

fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure".

Having confirmed the importance of "Community" fundamental rights as autonomous from the rights laid down in the Constitutional Charters of the Member States, the question remained open on the effective content of these principles.

In the *Nold* case (1974)[16], the Court follows an interpretive path of compromise, stating that "In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the Constitutions of those States", adding that "international treaties for the protection of human rights on which Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law".

In other words, after *Nold*, the Community legal system is represented as a superordinate system of norms, the interpretation of which concurs with fundamental rights, that are represented in two forms – in the principles enshrined in the Constitutional Charters of the Member States, and in the European Declaration of Human Rights.

The role of "guide" and "limit" of fundamental rights in the interpretation process of Community law is then confirmed in the Joint Declaration on Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms of the EU Parliament, the Council and the Commission (5th April 1977), in which there is official recognition of the prime importance of respecting fundamental rights "as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms' in the exercise of powers and in pursuance of the objectives of the European Communities" in the exercise of powers and in the pursuit of the objectives of the EU Community[17].

The commercial foundation of the EU Community, however, does not take long to re-emerge, strongly influencing the interpretation and balancing exercise entrusted to the Court of Justice. In *Hauer* (1979)[18], the instrumental relationship between the protection of fundamental rights and the pursuit of the Community's economic freedoms is underlined: for example, limits to

[16] ECJ, 14th May 1974 (case 4/73), available at: *https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A61973CJ0004*.

[17] The full text is available at: *https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX%3A41996X0815/*.

[18] ECJ, 13th December 1979 (case 44/79), available at: *https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A61979CJ0044*.

property rights are allowed only if they comply with Community law and are therefore coherent with the aim of the common market.

The interpretive model outlined in the "pretoric" phase is then placed in the Preamble of the Single European Act of 1986, in which it is stated that amongst the primary aims of the Community is that of the promotion of a democracy based on "the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice". The same is found in Article F.2 of the Maastricht Treaty (1992), by which "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

In addition, with the Amsterdam Treaty (1997), having established the foundational role of the principles of freedom, democracy, respect for human rights and fundamental freedoms and the State of Law (Art. 6), the Court of Justice is recognised as having the jurisdiction to verify the conformity of the actions taken by the institutions with the respect for fundamental rights (Art. 46 TEU); and also that the protection of fundamental rights becomes a precondition for the adhesion of new states to the European Union (Art. 49 TEU).

The "pretoric" season closes in a certain sense with the Treaty of Maastricht, with the construction of the subjective figure of the European citizen, to whom the political rights of freedom of movement and residence are recognized in the territory of a Member State (Art. 21 TFEU), of active and passive voting in municipal elections in the Member State in which they reside, under the same conditions as the citizens of that State (Art. 22 TFEU) and in the European elections, the right to petition the European Parliament (Art. 24(2) TFEU), the right to contact the European Ombudsman (Art. 24(3) TFEU) and to write to the institutions and to some Community bodies (and receive a reply) in one of the official languages of the EU (Art. 24(4) TFEU) and the right to protection by the diplomatic and consular authorities of any Member State in non-European countries in which their State is not represented (Art. 23 TFEU)[19].

It is precisely this figure of the European citizen that creates an ideal bridge with the new season of codification: in 2000 the Charter of Nice (or

[19] ESTEVEZ ARAUJO, *La Carta de Derechos de la UE y la dimensión social de la Ciudadanía Europea*, Madrid, 2001; ARROYO JIMÉNEZ, *Hacia la normalización constitucional del Derecho de la Unión Europea (a propósito de la STC 145/2012, de 2 de julio)*, in *Rev. Esp. de Derecho Europeo*, 45, 2013, p. 139 ss.

Charter of Fundamental Rights of the European Union) was proclaimed and, after the failure of the Treaty adopting a Constitution for Europe (2003), the Lisbon Treaty (2007-2009) makes the rights embodied in the Charter as effective as those in the Treaties, equating their legal value.

**4.** The multilevel system currently in force in the European Union is therefore characterized by the coexistence of several "systems" of fundamental rights: fundamental rights deriving from the constitutional traditions of the Member States, the rights of the ECHR (which the EU explicitly adheres to in Art. 6(2) of the Treaty of Lisbon), the rights of the Charter of Nice, the original rights dating back to the foundation of the three communities (the so-called "fundamental freedoms of the common market") as well as the political rights of citizens[20].

The Charter of Fundamental Rights is divided into seven chapters, six of which are dedicated to listing specific types of rights, while the last chapter clarifies the scope of the Charter and the principles that govern its interpretation. A significant feature of the Charter concerns its innovative grouping of rights, with which it abandons the traditional distinction between civil and political rights, on the one hand, and economic and social rights, on the other.

The first chapter ("Dignity") establishes the rights to human dignity, to life and to the integrity of the person, and reaffirms the prohibition of torture and slavery; Chapter II ("Freedoms") establishes the right to freedom and respect for private life and family life, the right to marry and to found a family, and the rights to freedom of thought, conscience and religion, of expression and assembly, and affirms the right to education, work, property and asylum; Chapter III ("Equality") reaffirms the principle of equality and non-discrimination as well as respect for cultural, religious and linguistic diversity, at the same time giving specific protection to the rights of children, the elderly and the disabled; Chapter IV ("Solidarity") ensures the protection of workers' rights, including the right to collective bargaining and action and the right to fair and just working conditions, recognizing also the right to social security, the right of access to care medical and environmental and consumer protection principles; Chapter V ("Citizens' Rights") lists the rights of citizens of the Union; Chapter VI ("Justice") reaffirms the right to an effective remedy and to an impartial judge, the right of defence, the principles of legality and proportionali-

[20] AZOULAI, *Le role constitutionnel de la Cour de Justice des Communautés Européennes tel qu'il se dégage de sa jurisprudence*, in *Rev. Trim. de Droit Européen*, 44, 2008, p. 29 ss.

ty of criminal offences and the right not to be tried or punished twice for the same crime[21].

The application of the Charter is expressly defined in Art. 51, which states that its provisions apply to the institutions and bodies of the Union as well as to the Member States, exclusively in the implementation of Union law.

In this way, a boundary line is drawn between the scope of the Charter and that of the national Constitutions: the Charter does not bind States, unless they are acting to implement Union law. Moreover, the Charter does not extend the powers or competences of the EU, thus ensuring that the adoption of the Charter in itself does not increase the powers of the EU to the detriment of those of the Member States.

The technique of "balancing" and of finding the "right equilibrium" between the fundamental rights and freedoms implemented by the Court of Luxembourg in accordance with the powers set forth in Art. 267 TFEU for resolving specific questions referred for preliminary rulings – without forgetting the implicit or explicit models for the reception of decisions of the ECtHR – nowadays penetrates into national law even without any direct or indirect regulatory effect (regulations or directives), affecting the overall set of values of a given national legal system and often transcending (or obliterating) the solutions adopted by the Member States in matters traditionally pertaining to private law, such as the protection of property, the protection of personality rights, or even involving areas that are already codified, such as competition and labour law[22].

**5.** Taking into consideration the observatory in constant evolution of electronic communications law in the most recent case law of the Court of Justice, it is possible to identify and outline – albeit in a non-exhaustive manner – three distinct phenomena, which operate by moving beyond the mere space of the horizontal relations between the State and the citizen:

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[21] D'ANTONIO, *La Carta dei diritti fondamentali*, in COLUCCI - SICA (eds.), *L'Unione Europea: Principi – Istituzioni – Politiche - Costituzione,* Bologna, p .82 ss.; ALONSO GARCÍA, *La Carta de Derechos Fundamentales de la Unión Europea*, in *GJUEC*, 2000, p. 3 ss.; BRAIBANT, *La Charle de droits fondamenJaux de l'Union Européenne*, París, 2001; CARRILLO SALCEDO, *Notas sobre el significado político y jurídico de la Carta de Derechos Fundamentales de la Unión Europea*, in *REDC*, 2001, p. 7 ss.; DEL POZO, *Diez notas a propósito de la Carta de derechos fundamentales de la Unión Europea*, in *BEUR*, 2001.

[22] BAILLEUX, *Entre droits fondamentaux et intégration européenne, la Charte des Droits Fondamentaux de Funion européenne face á son destín*, in *Rev. Trim. des Droits de l'Homme*, 97, 2014, p. 215 ss.; C. SALVI, *La proprietà privata e l'Europa. diritto di libertà o funzione sociale?*, in *Riv. crit. dir. priv.*, 2009, p. 409 ss.; ID., *Libertà economiche, funzione sociale e diritti personali e sociali tra diritto europeo e diritti nazionali*, in *Eur. dir. priv.*, 2011, 2, pp. 437-458; COMPORTI, *Diritti reali in genere*, 2nd ed., in *Tratt. Cicu-Messineo*, Milano, 2011, p. 167; NIVARRA, *La proprietà europea tra controriforma e "rivoluzione passiva"*, in *Riv. crit. dir. priv.*, 2011, pp. 575-624.

*a)* Fundamental rights as *principles*[23] overseeing Community sectoral rules and their transposition by the Member States, harmonizing or correcting, where necessary, their effects and aims (conforming function)[24].

Fundamental rights with different content can be balanced in order to find a solution to a specific case – ensuring the "right balance" between the interests involved, according to the criteria of reasonableness and proportionality[25]. This frequently happens in connection with conflicts between corporate freedom, intellectual property rights, freedom of expression and information, or with regard to the protection of personal data[26]. For example, in the case of *Digital Ireland*[27], the Court invalidated an entire directive regarding the retention of

[23] ALEXY, *Teoria dei diritti fondamentali*, Bologna, 2012, p. 101 ss.; RESCIGNO, *Relazione conclusiva*, in *I principi generali del diritto*, Atti dei convegni Lincei, 96, Roma, 1992, p. 339; ALPA, voce *Principi generali*, in *Dig. disc. priv.*, *sez. civ.*, Torino, 1996, p. 360 ss.

[24] On this point see OPPO, *L'esperienza privatistica*, in *I principi generali del diritto*, cit., p. 237; GAMBARO – PARDOLESI, *L'influenza dei valori costituzionali sul diritto civile*, in PIZZORUSSO - VARANO (eds.), *L'influenza dei valori costituzionali nei sistemi giuridici contemporanei*, I, Milano, 1985, p. 5 ss.

[25] MENGONI, *Principi generali del diritto e la scienza giuridica*, in *I principi generali del diritto*, cit., pp. 317-328, spec. p. 324 ss.; BARCELLONA, *Diritto privato e processo economico*, Napoli, 1973, spec. p. 32 ss.

[26] See e.g. CJEU, 29th January 2008 (case C-275/06), *Promusicae c. Telefonica de Espana SAU*, in *ERC*, 2008, I-271, par. 70: «In the light of all the foregoing, the answer to the national court's question must be that Directives 2000/31, 2001/29, 2004/48 and 2002/58 do not require the Member States to lay down, in a situation such as that in the main proceedings, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality»; CJEU, 24th November 2011 (case C-70/10), *Scarlet Extended SA c. SABAM*, in *ERC*, 2011, I-11959, par. 53: «Consequently, it must be held that, in adopting the injunction requiring the ISP to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other» and similarly see CJEU, 12th March 2012 (case C-360/10), *SABAM c. Netlog NV*, in *Digital ERC*, (www. curia.europa.eu), 2012, par. 40.

[27] CJEU, 8th April 2014 (cases C-293/12 and C-594/12), *Digital Rights Ireland* e *Seitlinger* et al., in *Digital ERC*, 2014, paras. 65-69: «It follows from the above that Directive 2006/24 does not lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. It must therefore be held that Directive 2006/24 entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed

personal data in electronic communications services accessible to the public for public security purposes, judging that it exceeded the limits imposed by the respect of the principle of proportionality in relation to Articles 7 and 8 of the Charter of Fundamental Rights.

*b)* Fundamental rights as *values*, that can be used in order to impose a pre-constituted hierarchical order (or maximum) between the interests involved in the communication dynamics (ordering function)[28].

This is reflected in the *Google Spain* case, in which, in the context of access to Internet search functions, the Court of Justice placed the fundamental rights of solidarity at a higher level of protection, in principle overriding the economic interests of intermediaries, as well as those of the public[29].

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by provisions to ensure that it is actually limited to what is strictly necessary. Moreover, as far as concerns the rules relating to the security and protection of data retained by providers of publicly available electronic communications services or of public communications networks, it must be held that Directive 2006/24 does not provide for sufficient safeguards, as required by Article 8 of the Charter, to ensure effective protection of the data retained against the risk of abuse and against any unlawful access and use of that data. In the first place, Article 7 of Directive 2006/24 does not lay down rules which are specific and adapted to (i) the vast quantity of data whose retention is required by that directive, (ii) the sensitive nature of that data and (iii) the risk of unlawful access to that data, rules which would serve, in particular, to govern the protection and security of the data in question in a clear and strict manner in order to ensure their full integrity and confidentiality. Furthermore, a specific obligation on Member States to establish such rules has also not been laid down. Article 7 of Directive 2006/24, read in conjunction with Article 4(1) of Directive 2002/58 and the second subparagraph of Article 17(1) of Directive 95/46, does not ensure that a particularly high level of protection and security is applied by those providers by means of technical and organisational measures, but permits those providers in particular to have regard to economic considerations when determining the level of security which they apply, as regards the costs of implementing security measures. In particular, Directive 2006/24 does not ensure the irreversible destruction of the data at the end of the data retention period. In the second place, it should be added that that directive does not require the data in question to be retained within the European Union, with the result that it cannot be held that the control, explicitly required by Article 8(3) of the Charter, by an independent authority of compliance with the requirements of protection and security, as referred to in the two previous paragraphs, is fully ensured. Such a control, carried out on the basis of EU law, is an essential component of the protection of individuals with regard to the processing of personal data. Having regard to all the foregoing considerations, it must be held that, by adopting Directive 2006/24, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter».

[28] On this matter, connected to the concept of *Objektive Wertordnung der Grundrechte* (Objective normative order of fundamental rights) firstly introduced by the German B*undesverfassungsgericht* (BVerfG, 15th January 1958 - 1 BvR 400/51, in *NJW*, 1958), see ALEXY, *Teoria dei diritti fondamentali*, cit., p. 162 ss.; FERRAJOLI, *Principia iuris*, I, Roma-Bari, 2012, p. 724 ss. and BONGIOVANNI, *Principi come valori o come norme: interpretazione, bilanciamento e giurisdizione costituzionale in Alexy e Habermas*, in *Ars interpretandi,* 2005, pp. 177-198.

[29] CJEU, 13th May 2014 (case C-131/12), in *Digital ERC*, 2014: «As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the infor-

*c)* Fundamental rights as *rules* express full rights, super-subjective claims with cogent efficacy in the horizontal relations between private individuals, but also between different state legal systems (auxiliary/concurrent function)[30].

Following the theory of fundamental rights of a constitutional nature, we are often talking about the *unmittelbare Drittwirkung* (immediate effect), in which it is the constitutional norm that directly affects relationships between private parties, since the private subjective rights of the individual are derived from this, as opposed to the *mittelbare Drittwirkung*, (mediated effect) that the primary norm exercises at an interpretative level on the underlying rules[31]. Both in the *Google Spain*[32] judgment and in the *Schrems* I[33] case, the Court of Justice uses the fundamental rights argument to grant private individuals the faculty, the powers or specific protection standards that have more content than those laid down by the sectoral regulation and even without consideration for the intervention of the competent judicial authority or the jurisdiction of sovereign states, shaping themselves as autonomous subjective rights.

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mation in question no longer be made available to the general public by its inclusion in such a list of results, it should be held, as follows in particular from paragraph 81 of the present judgment, that those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question». See also RODOTÀ, *Solidarietà*, Roma-Bari, 2014, p. 92 s.

[30] In the sens of "moral norms" see DWORKIN, *Taking Rights Seriously*, Cambridge (Mass.), 1977; ID., *Law's Empire*, Cambridge (Mass.)-London, 1986, p. 40 ss., but see also FERRAJOLI, *Costituzionalismo principialista e costituzionalismo garantista*, in *Giur. cost*., 2010, 3, p. 2771 ss.; ALEXY, *Teoria dei diritti fondamentali*, cit., p. 132 ss.

[31] ALEXY, *Teoria dei diritti fondamentali*, cit., p. 560 ss.; PINO*, Diritti fondamentali e ragionamento giuridico*, Torino, 2008, p. 26 ss.

[32] CJEU, case C-131/12, cit., par. 77: «Requests under Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 may be addressed by the data subject directly to the controller who must then duly examine their merits and, as the case may be, end processing of the data in question. Where the controller does not grant the request, the data subject may bring the matter before the supervisory authority or the judicial authority so that it carries out the necessary checks and orders the controller to take specific measures accordingly».

[33] CJEU, 6th October 2015 (case C-362/14), in *Digital ERC*, 2015, par. 95: «Likewise, legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter. The first paragraph of Article 47 of the Charter requires everyone whose rights and freedoms guaranteed by the law of the European Union are violated to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law».

**6.** The constant dialogue between the interpretation system of the Charter of Fundamental Rights of the EU found in case law and the legal systems of the Member States – which is the result of a constitutional orientation (first) and community adaptation (after) – seems to generate two contradictory tendencies: on the one hand, the impact of fundamental rights understood as "general principles" guarantees the uniform evolution of the rules relating to matters constantly subject to the destabilizing actions of technology and the market, with beneficial effects at the utilitarian level of legal certainty and – in the absence of a European Constitution – of compliance with common constitutive values such as human dignity and responsibility towards future generations[34].

On the other hand, the resolution of these questions on a case-by-case basis, delegated to the intervention of supranational Courts, remains in a monolithic juxtaposition between the general and abstract principles available both horizontally and vertically to subjects legitimated following the interests involved in specific situations[35], significantly reducing the scope traditionally attributed to private law in its task of breaking down and regulating the complexity inherent in individual relationships[36].

[34] RESCIGNO - RESTA - ZOPPINI, *Diritto privato. Una conversazione*, Bologna, 2017, p. 27 ss.; GROSSI, *Ritorno al diritto*, Roma-Bari, 2015, p. 57 and 71; SUPIOT, Homo juridicus. *Saggio sulla funzione antropologica del diritto*, Milano, 2006, spec. p. 236 ss.

[35] ZAGREBELSKY, *Diritti per forza*, Torino, 2017, p. 69 ss.

[36] SALVI, *Capitalismo e diritto civile*, Bologna, 2015, p. 206 ss.; MONATERI, *Geopolitica del diritto*, Roma-Bari, 2013, p. 151; IRTI, *Un diritto incalcolabile*, Torino, 2016, p. 63 ss., p. 75, p. 167 ss.