

THE CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES IN EUROPEAN LAW, AS A TOOL FOR COMPARISON AMONG MS LEGAL ORDERS IN THE CONSTRUCTION OF EUROPEAN FUNDAMENTAL RIGHTS

*AS TRADIÇÕES CONSTITUCIONAIS COMUNS AOS
ESTADOS-MEMBROS NO DIREITO EUROPEU COMO
FERRAMENTA DE COMPARAÇÃO ENTRE OS
ORDENAMENTOS JURÍDICOS PARA A CONSTRUÇÃO
DOS DIREITOS FUNDAMENTAIS EUROPEUS*

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Abstract

The article aims to investigate the traditions that are common to the countries that form the European Union as an instrument for the construction of the fundamental rights of the European Union.

Keywords

Fundamental Rights. European Union. MS legal orders.

Resumo

O artigo objetiva investigar as tradições que são comuns aos países que formam a União Europeia como instrumento para a construção dos direitos fundamentais comuns a referida União Europeia.

Palavras-chaves

Direitos Fundamentais. União Europeia. Ordenamentos Jurídicos.

1. The legal importance of traditions

The term “tradition” and, in particular, “legal tradition”, is peculiar to the study of comparative law. In particular, this expression

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derives from the comparative analyses made in specific geographic areas where the common law system is in force.

There is no universally shared definition of this concept; nevertheless, it may be stated that by using it, reference is made to the need of the legal operator (whether it be a scholar or a constitutional judiciary body: judge, legislator, constitutional judge) to examine the law, also considering the aspects that fall outside the scope of positive-formal data, such as, in particular, the historic and cultural data that surround the legal order (or sets of legal orders) being considered.

In particular, according to the fitting definition of a well-known Author, *“A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective”*².

According to others, by considering even one of the two poles of one of the dichotomies that have become classical, namely between civil law and common law, *“tradition, the structure and the decision-making techniques of the legal system are the essence of the comparative procedure. When we speak about legal system, we intend the methods and techniques used by the legal expert in analysing legal problems and controversies, rather than the substantial rules that are applied. The latter may be classified only within the national boundaries. The method and the technique, instead, may be useful as a basis for understanding a system as a way of thinking that is not restricted to the national borders. In these terms, the civil law system is essentially an organizational structure of secular law that concerns relationships between private individuals; its formulation emphasizes a high level of abstraction and the classifications and concepts used in every Country are virtually the*

² J. M. MERRYMAN, *The civil law tradition. An introduction to the Legal systems of Western Europe and Latin America*, Stanford University Press, Stanford, 1969, p. 2.

same from a terminological standpoint. As such, the civil law system, prevails in many parts of the world, even though it does not constitute the 'law' of any 'civil law' country"³.

As regards the role and the "direction" of the comparative⁴ work done by the scholar, it is known that its development, does not unfold along a straight line in one direction, but rather appears to follow an oscillatory movement. Without looking too far in the distance, and focusing our attention on a time period that is not too long, it can be noted that, at first some Authors have used the comparative instrument to highlight the differences between legal systems, also – at times - with a view to emphasizing the superiority of one system over the other⁵. Subsequently, vice versa, the direction of comparative studies has focused on highlighting the similarities⁶ (Marini speaks about a comparison of "similarities" and comparison of differences⁷), and then, more recently, there was a return to a dialectic comparison aimed at emphasizing the contrasts and discordances⁸, of the school of thought of the so-called postmodern

³ D. De Vries, R. David, *The French Legal system. An introduction to civil law systems*, Oceana Publications, New York, 1957.

⁴ As regards, in particular, the role of comparative work, the question raised by E. DI SALVATORE, *Tradizione come problema costituzionale*, Galaad, Giulianova, 2012, p. 98, appears to be important. According to this author «what is not clear (...) is exactly what scholars mean by the term "comparative work", whether this refers to an independent scientific discipline (comparative law) or whether, on the contrary, it is only an investigation method (comparative method) and, as such, applicable to any scientific subject », quite rightly being in favour of the latter. In the same sense, see also A. SOMMA, *Giochi senza frontiere. Diritto comparato e tradizione giuridica*, in www.biblioteca.org.ar/libros/90965.pdf, p. 16, that can also be found in *Ars interpretandi*, 2003.

⁵ See for instance, H. C. GUTTERRIDGE, *Comparative law: an introduction to the comparative method of legal study and research*, Cambridge, 1946, who points out the positive aspects of the ductility of the English legal system.

⁶ See for instance, G. GORLA, *La "communis opinio totius orbis"*, in M. Cappelletti (Ed.), *New perspectives for a common law in Europe*, Sijthoff, Leyden, 1978, p. 45.

⁷ G. MARINI, *Diritto e politica. La costruzione delle tradizioni giuridiche nell'epoca della globalizzazione*, in *Pòlemos*, n. 1/2010, pp. 33-34.

⁸ See, in this sense, M. C. PONTTHOREAU, *Droit constitutionnel comparé*, Paris, 2010, pp. 121 et seq.

legal comparison⁹, according to which (at least, according to a considerable portion of this school of thought) a precise legal tradition is attributed an intrinsically higher value: the so-called *western legal tradition*.

It was pointed out above that the main attention to the “legal tradition” is usually typical of the analyses made in common law Countries. This does not mean, however, that there are no references to traditions also in the literature of civil law Countries and, in particular in the Romanist scholars and the so-called Medieval *ius commune*. Indeed, these Authors “deem that this basis is to be found in the study of Roman law either directly or through the transformations it underwent during the time of *ius commune*. And all this on the background of a perverse intertwining between empirical-positive and systematic-philosophical approaches”¹⁰.

As regards specifically Roman Law, it should constitute a historic-regulatory substrate that is common to the European legal tradition (at least the Western legal tradition that is in opposition to the Eastern European tradition that has a Socialist background). The latter that has evolved without interruptions from the former, constitutes the outcome of a constantly evolving process, without substantial fractures. However, it must be pointed out that, on the contrary, “the Romanist tradition has been reconstructed and put at the service of different projects, in different times and countries, always driven by the intention of building something new”¹¹.

In particular, the reference to Roman Law was used by French scholars «as “*ratio scripta*”, that is to say to legitimate the legal solutions of the *Code civil* as logical and rational so as to make the breaking away from the *Ancien Régime* and the overturning of its legal forms more evident »¹². The same reference was also used by the Germans and, in particular, by the history of law school founded by

⁹ See, on this issue, the analysis by E. JAYME, *Die kulturelle Dimension des Rechts – ihre Bedeutung für das Internationale Privatrecht und die Rechtsvergleichung*, in *Rabels Zeitschrift*, 2003, pp. 211-230.

¹⁰ A. SOMMA, *Giocchi senza frontiere*, *op. cit.*, pp. 11-12.

¹¹ G. MARINI, *Diritto e politica*, *op. cit.*, p. 41.

¹² *Ibidem*.

Friedrich Carl Von Savigny, especially with the aim of contributing to the definition of the popular spirit (*Volkegeist*). Indeed, according to this author, law is the result of a constant evolution of local tradition(s) - besides deriving from the *Volkegeist* - in opposition to the “fake”, artificial laws resulting from codifications: and hence, ultimately, also in opposition to the French school itself that took pride in claiming that Roman law was the root of its legal order.

In spite of the well known criticisms made against the constructions aimed at linking and fastening current law with Roman law¹³, nevertheless comparative studies have continued¹⁴ and still continue to move in the direction of unifying law, if not towards an international law, but at least towards large groupings even accompanied by an oscillatory movement that at times emphasizes the similarities and at times the differences.

One of these, probably the most important one for Western comparative science, is the already mentioned *Western legal tradition*. According to widespread ethnocentric opinions – that cannot be upheld because inherently tainted by an irremediable lack of objectivity and, hence, ultimately, lacking impartiality that should be a distinctive feature of the scholars of comparative science – that

¹³ Reference is being made here, in particular, to the opinions that compare Roman law, with general reference to tradition not in the strict sense, with the so-called “invented traditions” according to the fitting definition by E. J. HOBBSAWM, *Come si inventa una tradizione*, in E. J. Hobsbawm, T. Ranger (edited by), *The invention of tradition*, Cambridge University press, Cambridge, 1983 (Italian edition: *L'invenzione della tradizione*, Einaudi, Torino, 1984). According to Hobsbawm, this expression refers both to the traditions that are “actually invented and those that have emerged in a way that is difficult to reconstruct over a short clearly identifiable period of time – a few years perhaps – and that established themselves very rapidly”, also called “a set of practices, generally regulated by openly or tacitly accepted rules, endowed with a ritual or symbolic nature, that set out to impose given values and repetitive rules of conduct that are inherently acknowledged a continuity with a carefully selected past” (pp. 3-4).

¹⁴ See for instance, E. LAMBERT, *La fonction du droit civil comparé*, I, Paris, 1903, p. 915 et seq.

often characterize these theories¹⁵, the *Western legal tradition* seems to claim it has a sort of general value (and, often, it appears to extend also to geographic and cultural areas that are radically different from those that belong to it).

The Western legal tradition, as opposed to the Soviet-Socialist tradition, is “broken down” internally into two families that however are close given that both invoke Christian principles and the institutes of liberal democracy, but are not totally comparable, that is to say the Continental European and the North American¹⁶ systems. A characteristic of this tradition, that is hence common to the two Atlantic “branches”, is the separation between law and politics just like the distinction between State and religion, as well as there being a sharp definition of the boundaries of the legal and constitutional institutions. In greater depth it has been observed that, in relation to the Western legal tradition:

“1. There is a rather sharp distinction between legal institutions (including the legal processes like legislation and jurisdiction, just like the rules and legal concepts that they generate) and the other types of institutions. Even though law is strongly influenced by religion, politics, morality and customs, it is nevertheless possible to distinguish it conceptually from these other spheres. Customs, for instance, in the sense of habitual behavioural patterns is distinct from common law, in the meaning of customary rules of behaviour deemed to be legally compulsory. In the same way, politics and morality may produce law but are not law, as is believed in other cultures. In the West, even if obviously not only in

¹⁵ These viewpoints are according to some, “the result of an evolutionary approach to the study of law”. A. SOMMA, *Tradizione*, in ID., *Temi e problemi di diritto comparato, II. Tecniche e valori nella ricerca comparatistica*, Giappichelli, Torino, 2005.

¹⁶ See the painstaking observations by G. MARINI, *Diritto e politica, op. cit.*, pp. 43 et seq., on the differences and harmonisations between legal families and the emblematic analysis of the concept of *liberty* as opposed to *privacy*, that is said to highlight, at first sight, an alleged excessive American individualism alongside the more socially-oriented values of the European tradition, finally pointing out that a careful comparative study could clarify the complex ways in which liberty and dignity coexist - and have always existed - in both models and also the just as complex ways in which the different operating rules match the expression of such different values”.

the West, it is deemed that law has its own character and is relatively autonomous.

2. *Linked to this precise distinction is the fact that in the Western legal tradition, the administration of legal institutions is entrusted to special groups of people who devote themselves to legal activities as a profession, full time, or almost full time.*

3. *The training of legal professionals, typically called lawyers in England and in America, or jurists in most of the other Western countries, is entrusted to a separate body of higher studies, qualified as a course of legal studies with its own professional literature, its own schools and other places of training.*

4. *There is a complex and dialectic relationship between the body of legal literature for the training of legal experts and the legal institutions since, on the one hand, the literature describes these institutes, but on the other hand the latter, that would otherwise be varied and disorganized, are conceptualized and reduced to a system and hence transformed by what is stated in the treatises, articles and in the lecture rooms. In other words, law embraces not only the legal institutes, decisions and the like, but also what the legal scholars (including, at times, legislators, judges and the other officials when they speak and write about law) say with regard to those institutes, commands and decisions. Law encompasses legal science - meta-law - through which it can be analysed and evaluated”¹⁷.*

According to the same Author, one of the claims of the supporters of the *Western legal tradition* is that of enhancing the value of human rights, considered by them to be “a body of ulterior rules besides the law produced by the highest political authorities, a law that in the past was called divine, then natural”¹⁸, in this way reconnecting to theories that come close to natural law and that would therefore justify the alleged superiority of this legal tradition

¹⁷ H. J. BERMAN, *Diritto e rivoluzione. L'impatto delle riforme protestanti sulla tradizione giuridica occidentale*, Il Mulino, Bologna, 1998 (Italian translation), p. 15. See, on this, A. SOMMA, *Tradizione, op. cit.*, pp. 175 et seq.

¹⁸ *Ivi*, p. 78.

over others (like the socialist, Islamic traditions¹⁹, and, in some respects also the indigenous tradition²⁰).

In Western comparative science, the claim of the universality of the values underlying the *Western legal tradition* – together with the attribution of the role of unconditional primacy of fundamental rights, and a series of international or regional conventions for the protection of the individual, especially in more recent times – has left the impression that it is possible to compare orders that are very distant from each other if not in downright opposition to each other (think of the comparison between authoritarian and liberal regimes).

In spite of this, and for the purpose of this article, it is worth noting that recourse to the comparative method may be a very effective instrument in the hands of the scholar and of legal operators in general, once the focus has been put on legal orders that are homogeneous with the initial order and deprived of any claims of inherent superiority of one tradition over another.

On the other hand, as is well known, comparison was used in the drafting of constitutional texts and in the subsequent amendment processes: suffice it to consider the preparatory activities of the Italian Constituent Assembly and of the Parliamentary Committees that have succeeded one another in time, as well as the preparatory activities for drafting the German *Grundgesetz* or the Spanish Constitution of 1978.

Besides being used by National, constituent or even only legislative, Assemblies, comparison is often used as a practical and often decisive instrument even by judges and in particular by international tribunals and by constitutional judges: as already pointed out, indeed, «after the Second World War, an increasingly shared culture of rights was progressively diffused by the expansion of international charters and there was an increase in the number of special-

¹⁹ See, on this, R. SCARCIGLIA, *Costituzionalismo globale, tradizioni legali e diritto comparato*, in *Diritto pubblico comparato ed europeo*, n. 2/2013, pp. 441 et seq.

²⁰ C. H. DURAND ALCÁNTARA, *La tradizione giuridica indigena*, in *Seqüência: estudos jurídicos e políticos*, vol. 35, n. 68/2014, pp. 19 et seq.

ized bodies that were entrusted with constitutional jurisdiction, thus bringing about, according to some scholars, a sort of “universalization of constitutional law”²¹. While this view is deemed to be optimistic by the writer, nevertheless one cannot deny that there has been an increasing dialogue between Courts both at the horizontal level – that is to say among the Constitutional Courts of the various States, and at the vertical level, between the latter and the various Courts of Justice (think of the EHR Court or the European Court of Justice). A particularly effective comparison between judges of legal orders belonging to homogeneous families or traditions like, precisely the *Western legal tradition*, has brought about in recent times a climate of “collaboration” aimed at improving the dialogue in the search for common principles (in this case: common constitutional traditions) in order to solve concrete cases through a comparison of instruments, methods and, of course, principles.

In particular, in the practice of constitutional tribunals, «recourse to foreign law or to international law for comparative purposes may be done merely for scholarly reasons (“ornamental”) to adorn the line of reasoning of the judge, it may serve to strengthen or deny an interpretational hypothesis by having an impact on the *ratio decidendi* or by revealing in the *obiter dicta*, it may at times be even essential because the judge is deciding on a case for which there are no explicit rules (hypothesis of a true vacuum)»²².

2. Common Constitutional Traditions in the European Legal Order

The notion of tradition and, in particular, common constitutional traditions, has played an important role in the European Un-

²¹ G. DE VERGOTTINI, *Tradizioni costituzionali e vincoli alla comparazione*, in *Diritto pubblico comparato ed europeo*, n. 4/2015, pp. 966-967.

²² *Ivi*, p. 968.

ion, specifically in guaranteeing the protection of fundamental rights at the supranational level.

In actual fact, the protection of fundamental rights was virtually absent at the origin of the European order, and this could be intended as a direct consequence of the particular nature of European Community as an international organization aimed at establishing a common market and a functional type of economic integration²³.

Consistently with this idea, the founding Treaties did not contemplate the protection of fundamental rights, except for the freedom of movement (of goods, services, capital, workers) and for the freedom of establishment, that were in any case always envisaged in relation to the market²⁴.

Hence, in this initial stage – and even though the founding Treaties already contained some elements that were suggestive of a future European integration process – the community protection of rights did not extend to the subjective legal sphere in general, but was rather restricted to some legal relationships of an economic nature.

The subsequent evolution, where the development of the protection of fundamental rights played a prominent role, then determined the transformation of the European Community from a functional entity into an entity with general purposes. This process culminated with the establishment of a European citizenship (1992) that finally sanctioned a change in the status of European citizens themselves who has gradually stopped being *Marketsbürger* and became *Unionsbürger*²⁵.

It was mostly due to the role of the Court of Justice that this point was reached, a point that was rather distant from the starting

²³ S. MANGIAMELI, *Funzioni nazionali e normativa comunitaria nella garanzia dei diritti*, in Proceedings of the CNEL – LUISS Conference, *Le garanzie di effettività dei diritti nei sistemi policentrici*, Roma, 2003.

²⁴ L.S. ROSSI, *La Carta dei diritti come strumento di costituzionalizzazione dell'ordinamento dell'UE*, in *Quad. Cost.*, 2002, 567.

²⁵ S. MANGIAMELI, *La tutela dei diritti fondamentali nell'ordinamento europeo*, in *L'esperienza costituzionale europea*, Roma Aracne, 2008, pag. 325 ff.

point in which, given the economic nature of the Treaty of Rome where the individual was given little importance and, in any case he was considered only as a protagonist in the complex economic world in which the Member States cooperate.

Indeed the dissatisfactory solution offered by the Treaties was brought to the attention of the Court of Justice as early as 1959 with the *Stork*²⁶ judgment, in which, however the Court refused to take on the role that it would later on. In particular, Friedrich Stork & Co. asked that the decision of the High Authority of the ECSC be quashed claiming that it violated some fundamental rights, protected by almost all the constitutions of Member States (in particular, the German Constitution), thus seeking to put limits to the application of the Treaty.

In rejecting this claim, the Court deemed that it would “simply ensure compliance with the law in interpreting and applying the Treaty and the enforcement rules, but it is not its task to express itself on the rules of national law”²⁷. Hence the violation of the fundamental principles of national constitutions was not taken into consideration by the Court.

This first orientation of the Court determined a paradox: on the one hand, the supranational acts were unquestionable from the standpoint of the violation of fundamental rights, since there was no relevant parameter in community law; on the other hand, this gap could not be filled by the National Courts since they did not have the power to invalidate a Community Act.

In summary, it might be said that, in the area of fundamental rights, while the European Communities suffered from a “regulatory vacuum”, the legal orders of Member States had a “jurisdictional vacuum” due to the lack of powers.

²⁶ Court of Justice, judgment 4 February 1959, case 1/58, *Stork*, in *European Court reports* 1959 Page 0407.

²⁷ Sent. Cit., *In Diritto, punto 4, lett. a).*

This paradox was later solved by the Court of Justice itself with the famous *Stauder*²⁸ (1969) judgment, which marked the beginning of the assertion of the protection of fundamental rights in the European legal order.

On that occasion, albeit not going as far as identifying in practice the positive “source” of such protection, the Court, states that “the fundamental rights of the human being (...) are a part of the general principles of Community Law that are enforced by the Court”.

In a more meaningful way, the subsequent *Internationale Handelsgesellschaft*²⁹ (1970) judgment, where, in some respects, the direct efficacy of the national constitutional provisions are excluded with reference to the legitimacy of Community Acts, because “Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. 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 fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure”.

On the other hand, the Court posits that in any case “it is desirable to ascertain whether any other similar guarantee, inherent in Community law, has not been infringed. The protection of fundamental rights is, indeed, an integral part of the general legal princi-

²⁸ Court of Justice, judgment 12 November 1969, case 29/69, *Stauder*, in *European Court reports* 1969 Page 00419.

²⁹ Court of Justice, judgment 17 November 1970, case 11/70, *Internationale Handelsgesellschaft*, in *European Court reports* 1970 Page 01125.

ples enforced by the Court of Justice. *The protection of these rights, albeit being informed by the constitutional traditions common to the Member States, is to be guaranteed within the structure and purposes of the Community*".

These words of the Court recall the question – that will be dealt with below *funditus* – of the role of the common constitutional traditions and hence the individual national constitutional provisions with respect to the protection of fundamental rights guaranteed by the European Union.

First of all it must be ruled out that the National Constitutions may be “sources” in the technical meaning of fundamental rights protected at the supranational level: the sole consideration of them being referred to a different order excludes this hypothesis. And the Court itself does not reach different conclusions if we consider that it specifies that the supranational guarantee is only “informed” by the common constitutional traditions.

If we do want to speak about “sources”, this can be done only in a non-technical manner, in the meaning of a *source of inspiration*³⁰, since the final rule applicable by the Court constitutes a new rule that is the outcome of the re-elaboration of the national provisions, but not one and the same with them.

In other terms, the rules of the Charters of the Member States concerning the protection of fundamental rights do not have direct efficacy in the supranational order and hence cannot be indiscriminately used as a parameter for the legitimacy of European Acts.

The Court must indeed make a comparative evaluation of the national constitutional rules, capturing their common traits and read the result of this analysis through the filter of Community interest and social function that the disputed law is addressed to. At the outcome of this hermeneutical process, it will be possible to reach a rule that is suited to acting as parameter of legitimacy of the supranational acts from the standpoint of the violation of fundamental rights.

³⁰ Cfr. R. Bifulco, M. Cartabia, A. Celotto (Ed.s), *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione europea*, Bologna, il Mulino, 2001, 13

As it continued with its work of building a protection of fundamental rights in the European order, the Court of Justice marks another significant step with the *Nold* judgment³¹ (1974), which further enriches the “sources” on which to draw when identifying and defining the rights enforced by the Court.

With the mentioned decision, the range of Charters involving the protection of fundamental rights that the Court takes into account is widened beyond the common constitutional tradition and includes the “*international treaties on the protection of human rights that the Member States have signed or cooperated with*”, that “*may equally provide elements that are to be taken into account within the framework of Community Law*”.

Another important disputed point dealt with by the Court for the case at hand concerns the “measurement” of the concrete protection of rights: whether as absolute mandatory prerogatives or as rights liable to being balanced against others and, hence that may give in when a higher interest is present³².

In adopting this latter solution the Court observes that, “even though the constitutional orders of all Member States protect the right to property and a similar protection is granted to trade, labour and other economic activities, *the rights thus guaranteed, far from constituting absolute prerogatives, are to be considered in the light of the social function of the assets and activities that are the object of such protection*”

For this reason - the Court continues - this is done without prejudice to the limitations posed by the overriding public interest: indeed, “it is legitimate to submit these rights to some limits justified by the general interest pursued by the Community *provided that the substance of such rights is not undermined*”.

³¹ Court of Justice, judgment 14 May 1974, case 4/73, *Nold*, in *European Court reports* 1975 Page 00985.

³² On the balancing technique, especially for comparative purposes, refer to S. MANGIAMELI, *Il contributo dell'esperienza costituzionale italiana alla dommatica europea della tutela dei diritti fondamentali*, in *Corte costituzionale e processo costituzionale nell'esperienza della rivista “Giurisprudenza costituzionale” per il cinquantesimo anniversario* (a cura di A. Pace), Milano, Giuffrè, 2006.

The first particularly significant application of the hypotheses of the Court of Justice is the *Hauer*³³ judgment (1979). In the indictment ordinance the *Verwaltungsgericht* claimed that a regulation was not applicable (only) in the Federal Republic of Germany because otherwise the right to property and the right to the free exercise of professional activity as guaranteed by the fundamental German law in Articles 12 and 14 would be undermined.

The Court confirmed first of all that “*the appeal to special evaluation criteria specific to the legislation or constitutional system of a Member State would inevitably cause damage to the unity of the Common Market and would undermine the cohesion of the Community since it would cripple the unity and efficacy of Community Law*”.

Furthermore, it refers to past case law – according to which (1) fundamental rights are an integral part of the general principles of law, whose compliance is enforced by the Court; (2) the international treaties on the protection of human rights to which the Member States are parties, can provide elements that are useful for evaluating the consistency with derived Community law with regard to such rights – and, subsequently, in light of the same, it can move on to judge the legitimacy of the regulations referred to in the judgment.

In particular, the Court does not restrict itself (as it did in the *Nold* judgment) to stating the importance of international treaties in the area of the protection of human rights to which the Member States are parties, because it refers to them in the judgment.

Indeed, in evaluating the censured Act, it considers first of all Article 1 of the Protocol annexed to the European Convention on the Protection of Human Rights and, then it takes into account the constitutional rules and practice of the nine Member States of the time.

This aspect of the motivation is somewhat specious, but it serves the purpose of introducing into the decision the constitutional rules which previously it had declared to be unsuited to act-

³³ Court of Justice, judgment 13 December 1979, case 44/79, *Hauer*, in *European Court reports* 1979 Page 03727.

ing as a parameter for the legitimacy of Community rules. Hence the provisions on the protection of private property of the Italian Constitution, of the *Grundgesetz*, and of the Irish Constitution were taken into account and, on the basis of the provision that the “social function” of property must be ensured “*Eigentum verpflichtet*” and that this “ought to be regulated by the principles of social justice”, it is stated that “these rules and practices enable the legislator to regulate the use of private property in the general interest”³⁴; hence it would be right to state, according to the Community judge, that in the light of the constitutional principles common to Member States and of the constant legislative practice in various subject matters” no reason of principle prevented the Community Legislator from subjecting property to limitations since such limitations are well known, either in identical or similar forms, to the constitutional orders of all Member States and acknowledged by the latter to be legitimate”³⁵.

Therefore the Court reads these rules through the lens “of the purposes and structure of the Community”, and extrapolates the rule to be applied to the concrete case and rejects the censure on

³⁴ Court of Justice, judgment 13 December 1979, case 44/79, *Hauer*, cit., point 20; it must be pointed out that the Court does not only consider the mere text of the Constitutions of Member States, but it takes into account the way fundamental rights are used on the basis of the legal practice in each Member State; in this way, the European judge observes, on the one hand, that “in all Member States, various legal texts have given concrete expression to this social function of the right to property; in each Country there are laws in force on agricultural and forestry economics, on water management, on the protection of the natural environment, area planning and town planning, that at times considerably limit the use of land property”, and on the other hand, that “in all the Countries of the Community where vines are grown there are strict rules, even though they do not all have the same degree of severity, on the planting of the vines, on the selection of the varieties and on the growing methods. In none of these Countries are these rules considered to be incompatible, in line of principle, with the protection of the right to property” (point 21).

³⁵ Court of Justice, judgment 13 December 1979, case 44/79, *Hauer*, cit., point 22.

the violation of property right and violation of the free exercise of professional activity.

From the standpoint of the European legal order, taken as an order that is distinct from those of Member States and endowed with its own sources, this rule represents an *aliud* with respect to the constitutional provisions that inspired it, since it lost its original link with the positive law of individual Member States in order to join the supranational order.

Furthermore, it is worth pointing out that the recognition by case law of the protection of fundamental rights of the European Union has been a fundamental step in the European integration process in that this step was not at all small with respect to the principle of the prevalence of European Law.

And it is possible to state that, unlike Italian constitutional case law, that stated that there was a dualism between the European law and National law, with their respective legal sources, it was in particular the German constitutional case law that subordinated the prevalence of European law to the guarantee of the protection of fundamental rights at the European level in a way that is at least similar to that envisaged in the domestic constitutional system.

In the famous *Solange I*³⁶ judgment, after confirming the fact that Community law was not part of the national legal order, nor was it international law, the German Federal Constitutional Court stated that it was a special order that emanates from autonomous sources of law.

It added that from the mutual autonomy and independence of the Community order and of the German order there derived that neither the Community judge vis-à-vis German law, nor the Constitutional Tribunal vis-à-vis Community Law could issue a pronouncement on the validity of the rules produced by their respective systems and decide therefore in the former case, whether a rule of Community law violated the *Grundgesetz* and, in the second case whether a rule of secondary Community law could be stated to be compatible with the founding Treaties.

³⁶ BverfGE 37, p. 271 ss.

However, in case there were to be a dispute between the law of the two orders, the practical solution would be different. In a case of this type, indeed, both judges would have to achieve an “agreement of both legal systems”, without prejudice to the fact that, if this were not possible, *the conclusion could not be that Community law is superior to national law, and markedly constitutional law, since European law, like the generally acknowledged international law (Article 25 GG), can precede only ordinary law but not also the law of constitutional standing.*

It did not deny that Community bodies could establish legal rules that could be directly applicable and valid within the order of the Federal Republic, but it excluded that Article 24 (1) GG, could allow, through this route, an intrusion into the sphere of German Law such as to break the constitutional structure and impair the identity of Bonn’s fundamental law; and it would be the same for secondary Community law that, albeit consistent with the law of the founding Treaties, were to affect the essence of the structure of the Constitutions.

Furthermore, such a restrictive interpretation of the provision of Article 24 (1) GG, was determined by the state of the European integration process characterized by a «deficit of democracy», and by the absence of a *catalogue* of fundamental rights whose content would constitute minimum guarantees equal to the guarantees acknowledged to its citizens by the fundamental law of each Country.

Consequently, *until (Solange) such level were achieved, the jurisdictional reserve of the Federal Constitutional Tribunal would operate, according to which any dispute between Community law and fundamental rights would be settled by having the guarantees of the Grundgesetz, prevail, and the constitutional judge could subject the Community Acts to the “procedure of compatibility of legislation with the Basic Law” (Normenkontrollverfahren - Article 100, (1), GG³⁷), without making pronouncements on the validity or invalidity of the rules produced by the supranational level.*

³⁷ Article 100, (1), GG: «If a court considers that the law on which its decision depends is unconstitutional, the trial needs to be interrupted; [...]».

In the *Solange II* judgment, the Federal Constitutional Tribunal overturned the starting assumption (non existence of a supranational level of protection of fundamental rights comparable with the provisions of the German order), while continuing to maintain for itself the power of last resort.

It is stated that for as long as the European Communities, and in particular the case law of the Court of Justice is capable of ensuring in general an effective protection of fundamental rights vis-à-vis the sovereign power of the Communities, (to be considered substantially equal to that of the GG as mandatory protection by the fundamental law, and in particular capable of ensuring the essential content of fundamental rights), the Constitutional Federal Tribunal will not exercise its jurisdiction on the applicability of derived Community law that were taken as foundation for a decision by a German judge or authority within the order of the Federal Republic of Germany, and as a consequence European law will no longer be examined according to the parameter of the fundamental rights of the GG.

Nevertheless, in spite of its opening in favour of European law, the mentioned judgment still contains *major reservations*. In particular the German constitutional judge confirms that the authorization based on Article 24 (1) GG, is not without constitutional limits and specifically this rule does not allow that the attribution of sovereignty rights to interstate institutions should entail the waiver of the identity of the constitutional order by the Federal Republic of Germany.

According to this line of reasoning, *the constitutional judge places the fundamental rights of the Grundgesetz as foundation of the irrevocable part of the Constitution*, specifying, however, that with respect to the time of the 1974 judgment, within the European Communities the idea of protecting fundamental rights has grown and in terms of conception, content and efficacy it essentially corresponds to the standard fundamental rights of the Fundamental Law.

Ultimately, in spite of its openings, the conclusion of the *Bundesverfassungsgericht* seems to be a substantial confirmation of the basic position already expressed in the previous judgment accord-

ing to which, in case of severe violation of fundamental rights, possible national corrections are considered possible, as confirmed even recently in the judgment on the Lisbon Treaty even though, in the light of the orientation expressed within Community Law, a situation of this type should (hardly) ever come about.

Finally, mention can be made of the decision of the federal constitutional Tribunal on the Maastricht Treaty that indeed focuses more on other aspects (violation of the structural principles as per Article 20 GG and violation of the limits to constitutional review as per Article 69 (3) GG from the standpoint of the democratic principle, the division of powers and independence of the State), but in the part concerning the protection of fundamental rights, it shows how the evolution of the European system from this standpoint is perceived as being reassuring.

As a matter of fact, the Constitutional Tribunal has on the one hand maintained that fundamental rights are not guaranteed only in Germany, but would become European rights and that a reduction in the degree of protection may derive from the Europeanization process, but this would not necessarily entail a major reduction in the standard of protection of fundamental rights given the fact that the Constitutional Court would ensure an effective protection of such rights for the inhabitants of Germany also vis-à-vis the sovereign power of the Communities. Furthermore, *the protection afforded by the community system is evaluated substantially as being equal to that prescribed as being mandatory by the German fundamental law, and hence in principle there will never be a violation of the "essential content of the rights themselves" by any Community Act.*

The build up of case law of the *Bundesverfassungsgericht* shows how the internal systems have considered the creation of a system of protection of fundamental rights to be important before accepting without further reservations (with the exception of the so-called counterlimits that in fact are merely "announced" rather than being "put into practice") the prevalence of European law and more in general the significant process of European integration.

It is worth noticing that the last pronouncement that was quoted was issued precisely on the Maastricht Treaty, that has codified

the conclusions of European case law in its Article 6: “*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*”.

The evolution of case law has therefore received recognition in the *coding* of Article 6 TEU that however *is not only a simple recognition*, in that it does not merely describe an existing system, but it constitutes it, by adding an autonomous foundation to the protection of the fundamental rights in the Community system and by offering additional and different inputs for a dogmatic reconstruction of relationships and of competition between nascent guarantees from the internal constitutional catalogue of rights and their community protection³⁸.

Furthermore it cannot be overlooked that this positive recognition of case law in the area of fundamental rights can be seen as an *element of federalization* of the European order.

Indeed, as a rule, originally in the federal structure, the protection of freedom rights is (and remains) the task of Member States and not of the Federation which, by having enumerated powers, would not have the power to regulate rights in general and would be limited to having an impact only on some subjective situations, that are directly related to its attributions. Only in a subsequent phase did the Federations attract the matter of rights into the sphere of their competence thus giving rise to a single protection regime. Indeed, while the fields over which the Federation and Member States have powers tend to be exclusive, in the case of fundamental rights there is an overlap of the disciplines that ensures a greater protection of the individual.

In the European case, this overlap of disciplines is even more evident, if one considers that, at least up until the Nice Charter, the supranational order did not have its own catalogue of fundamental

³⁸ S. MANGIAMELI, *Integrazione europea e diritto costituzionale*, in *Annuario di diritto tedesco*, Milano, 2001, p. 67.

rights and therefore the Court of Justice had had to draw on the national sources.

Furthermore, the coding of rights with the Charter of Fundamental Rights of the European Union, whose legal efficacy coincided with the entry into force of the Lisbon Treaty in 2009, did not exclude the permanent importance of constitutional traditions common to the Member States.

First of all Article 6 (3) TEU continues to state that “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law”.

Moreover, after conferring legal efficacy to the Charter of Fundamental Rights of the European Union, paragraph 1 specifies that “The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions”.

Hence if we consider Title VII of the Charter and in particular Article 52, it can be seen that the scope of rights guaranteed continues to depend on external sources: “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

And if the explanations of the Charter are also taken into account and which are also recalled in Article 6 TEU, it can be found that in the formulation of its provisions, besides taking into account the constitutional traditions of the Member States, that are often referred to, account is also kept of the ECHR.

Therefore the framework that emerges is one where the protection of fundamental rights in the EU, even if endowed now with its own source, also draws on external sources, as precisely laid down in the primary law. The common constitutional traditions and the

comparative method that guides its extrapolation therefore continue to have considerable importance in the European order.

3. The role of the common constitutional traditions in guaranteeing fundamental rights in practice in the European Union

The first concrete case of special importance, as already seen, is the *Hauer* judgment where the Court concretely compared the guarantees of ownership rights in the national orders and in the ECHR, from which the rule for the case at hand was extrapolated.

The principles and rules mentioned thus far were the subject of a concrete application by the European Union Court of Justice and it can be stated that the teachings of European case law have so far been consistent with the conclusions reached thus far³⁹ and, even after that these principles have been codified and formalized in Article 6 of the TEU, with the Maastricht Treaty, the Court contin-

³⁹ see European Court of Justice, Judgment 26 June 1980, C-136/79, *National Panasonic*, in *European Court reports* 1980 Page 02033 (pt. 18 “As the Court stated [...], fundamental rights form an integral part of the general principles of law, the observance of which the Court of Justice ensures, *in accordance with constitutional traditions common to the Member States* and with international treaties on which the Member States have collaborated or of which they are signatories”); Judgment 19 June 1980, C- 41/79, 121/79 and 796/79, *Testa*, in *European Court reports* 1980 Page 01979 (pt. 18 “As the Court has repeatedly emphasized, the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself, since fundamental rights form an integral part of the general principles of the law, the observance of which it ensures. One of the fundamental rights which is accordingly protected under Community law *in accordance with the constitutional concepts common to the Member States ...*”); Judgment 18 May 1982, C-155/79, *AM & S Europe Limited*, in *European Court reports* 1982 Page 01575 (“Community law, which derives from not only the economic but also *the legal interpenetration of the Member States*, must take into account the *principles and concepts common to the laws of those States concerning the observance of confidentiality*, in particular, as regards certain communications between lawyer and client”); Judgment 15 October 1987, C-222/86, *Unectef*, in *European Court reports* 1987 Page 04097 (“that requirement reflects a general principle of Community law which underlies *the constitutional traditions common to the Member States ...*”).

ued to refer explicitly to them⁴⁰. European case law has made reference again to the constitutional traditions common to the Member States even after the Treaty of Lisbon⁴¹.

⁴⁰ see European Court of Justice, Opinion 28 March 1996, 2/94, in *Reports of Cases* I-1763 (about the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms); Judgment 5 October 1994, C-404/92 P, *X v Commission of the European Communities*, in *European Court reports* 1994 Page I-04737 (“The Court of Justice has held that the right to respect for private life, embodied in Article 8 of the EHRC and deriving from the *common constitutional traditions of the Member States*, is one of the fundamental rights protected by the legal order of the Community”); Judgment 29 May 1997, C-299/95, *Kremzow*, in *European Court reports* 1997 Page I-02629 (fundamental rights form an integral part of the general principles of Community law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States ...); Judgment 3 May 2005, Joined cases C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, in *Reports of Cases* 2005 I-03565 (pt. 67 fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States ...; pt. 68The principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the Member States); Judgment 26 June 2007, Case C-305/05, *Ordre des barreaux francophones et germanophone and Others*, in *Reports of Cases* 2007 I-05305, (It must also be stated that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States ...); Judgment of 3 September 2008, cases C-402 P and 415/05 P, *Kadi*, in *Reports of Cases* 2008 I-06351 (pt. 283 “In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance”).

⁴¹ see Court of Justice of European Union, Judgment 14 September 2010, C-550/07 P, *Akzo Nobel Chemicals*, in *Reports of Cases* 2010 I-08301 (that area of European Union law must take into account the *principles and concepts common to the laws of the Member States* concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client).

Then there are other cases of concrete application of the protection of fundamental rights guaranteed by the Court of Justice that are particularly important.

First of all mention can be made of the *Kreil*⁴² judgment, where the Court of Justice ended up exercising its control over national rules that were not directly linked with the European order. In the case at hand, albeit indirectly, the Court questioned a constitutional rule of a Member State (Article 12-a of GG: «[...] If, in the case in which the «state of defence» were to be proclaimed, the need for people doing civil service in the health and medical sectors and in the organization of stable military hospitals is not entirely covered by volunteers, then, women aged between eighteen and fifty-five years of age may be assigned to the performance of such services by a law, or on the basis of a law. But in no case shall they deliver services where the use of weapons is envisaged [...]»). This rule of legislative standing but implementing directly a constitutional provision was declared as not being consistent with Community Law for the violation of the principle of gender equality.

In this connection, it was already pointed out elsewhere⁴³ that the Court, in this case, ended up deeming irrelevant the precondition of a criterion linking the national law to community law, in that the profile considered is not the discrimination between men and women. The consequence was that the pronouncement ended up attracting into the sphere of competence of the community judge an issue of domestic (constitutional) law, thus making the exception present in the *Grundgesetz* not applicable.

Theoretically, the European judge should not have been involved with the case in that: a) the armed forces sector is not among the sectors devolved to the powers of the Community; b) the disparity

⁴² European Court of Justice, judgment of 11 January 2003, case C-285/98, *Kreil*, in *Reports of Cases* 2000 I-00069, on which See E. DI SALVATORE, *Forze armate e libertà di lavoro delle donne, tra diritto comunitario e Grundgesetz: il caso Kreil* e A. RUGGERI, *La Court of Justice ed il sindacato su norme costituzionali "irragionevoli" per incompatibilità col diritto comunitario*, entrambi in *RiSee Dir Pubb. Comp. Eur.*, 2000, risp. pp. 767 e 771.

⁴³ S. MANGIAMELI, *L'esperienza costituzionale europea*, cit., p. 313

reported was not a discrimination against one State to the detriment of a citizen of another State, but a discrimination committed towards its own citizen. Instead, the European judge could exercise its power by virtue of the fact that community law provides for equal treatment between males and females in labour matters⁴⁴.

Just as significant is the *Omega*⁴⁵ case, where the national judge asked the Court of Justice to issue its pronouncement on the compatibility with European Law of a national measure that prohibited the plaintiff (the Omega company) to run its «laserdrome» in accordance with a game model developed and marketed legally in the United Kingdom, because the “killing game” was seen to be in contrast with the principle of human dignity.

Unlike the previous example, this case undoubtedly is important for the community if one considers that it has to do with the free movement of goods and, above all, the free delivery of services.

The Court recalled the fact that, in the main case, “the competent authorities deemed that the activity subject of the prohibition measure threatens public order because of the fact that, according to the prevailing position of public opinion the commercial exploitation of games that imply the simulation of homicides affects a fundamental value enshrined in the national Constitution, namely human dignity”. In sharing this hypothesis, the Court deemed that “there are no doubts that the goal to protect human dignity is compatible with community law, it not being important in this connection that, in Germany, the principle of respect for human dignity has a special status as autonomous fundamental right”.

Hence, “Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts

⁴⁴ In the same sense: A. BARBERA, *La Carta europea dei diritti: una fonte di ricognizione?*, in *DUE*, 2001, p. 241: «[...] Ms Tanja Kreil succeeded [...] in having her aspiration to serve in the Federal armed forces satisfied [...]. The reference was to a non-Community matter – the armed forces – and concerned discrimination, laid down in the Constitution, not between workers from different Countries, but between citizens of the same Country ».

⁴⁵ Court of Justice, judgment 14 October 2004, case C/36-02, *Omega*, in *Reports of Cases* 2004 I-09609.

of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity”.

Equally important is the *Mangold*⁴⁶ judgment, which established that “community law and, in particular, Article 6, no 1, of Council Directive 2000/78/EC of 27 November 2000, that sets a general framework for equality of treatment in employment and labour conditions, should be interpreted in the sense that they prohibit a national provision, like the disputed rule in the main case, that authorizes, without restrictions, (...) that fixed-term contracts if the worker has reached the age of 52”.

More in general, it is therefore “the task of the national judge to ensure full efficacy of the general principle of non discrimination based on age by not applying any contrary provision of the national law, and this even if the term for transposition of the directive has not expired yet”.

The Court of Justice then stated, in the judgment *Kadi*, that the obligations arising from an international agreement cannot violate the principle of respect for fundamental rights that must characterize all the Acts of the Union. The outcome was the quashing of the Community regulation for violation of the principle of effective jurisdictional protection and the lack, in the United Nations system, of an adequate mechanism for controlling that fundamental rights are respected⁴⁷. In this case, the Court of Justice behaved in the same way in which some national constitutional judges have behaved, namely attributing prevalence to the protection of fundamental rights over rules deriving from international sources⁴⁸.

⁴⁶ Court of Justice, judgment 22 November 2005, case C-144/04, *Mangold*, in *Reports of Cases* 2010, I-9981.

⁴⁷ EU Court of Justice, judgment of 3 September 2008, cases C-402 P and 415/05 P, *Kadi*, in *Reports of Cases* 2008 I-06351, points 316 et seq, 320 et seq.; see J. Kokotte and Chr. Sobotta, *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?*, in *The European Journal of International Law*, Vol. 23, no. 4, 2012, p. 1015 ff.

⁴⁸ see for example It. Constitutional Court, judgment no 238 of 2014.

4. Final remarks

At the end of this short review of the analysis of legal tradition *tout court* and, specifically, the constitutional traditions common to the Member States within the framework of the European order, it is now possible to draw some brief conclusions that may help reflect on the topical importance of this legal category and on their “role” in the current situation of the European Union, also in the light of the recent important economic and financial events and of the impact they have had on European public law.

In particular, if we dwell on the analysis of a specific category of rights, namely social rights, it can be observed that, the European Court of Justice first, and then the Nice Charter have attributed to them an important role within the European order, also with regard to the fundamental rights of movement, that, as is well known, were the foundations of the first Treaties.

On the contrary, with the persistence of financial trouble in Europe, the various States have had to cope with the crisis (also) by cutting back the resources for social rights, which have been downgraded to “financially conditioned rights”⁴⁹ so much so that an Author was induced to state that “the foundation of social rights is no longer the Constitutional Charter (or other regulatory documents originated by bodies other than the EU) but the resources available: for as long as there are financial resources, there are also social rights; in lack of the former there are no titles for enforcing the latter”⁵⁰.

Inevitably, the lowering of the average standard of social rights guaranteed by the constitutional orders of Member States has determined repercussions also on the European level which, as pointed out, in order to identify the fundamental rights to be protected as general principles of community law, takes into account (besides

⁴⁹ *Ex multis*, Corte cost., sent. n. 111/2005 with reference to the right to health services.

⁵⁰ A. RUGGERI, *Corti e diritti, in tempi di crisi*, in www.gruppodipisa.it, p. 25.

the ECFR) the constitutional traditions that are common to the Member States and, hence, the level of protection that is ensured to the latter by the individual orders.

In this connection and with reference to the decisions of the European judge, it was observed that «the beginning of the European crisis coincides, time-wise, with the dramatic turnabout in the case law of the Court of Justice (the *Laval quartet*, as it has been defined) that, in the conflict with collective social rights, has *de facto* reasserted the “predominance” of the fundamental economic freedoms»⁵¹. In particular this Author refers to four important judgments issued by the European judge starting from December 2007⁵², in which “the Court defended the essential rules of the European economic system namely the community freedoms and the right to competition and free movement (also of capital), but it did so to the detriment of collective rights of primary importance, like the right to collective action and the right to go on strike”⁵³.

Hence, and by way of conclusion, today we are facing the concrete risk that the parabola of fundamental rights at the European level is dangerously set on its descending course. As is well known, the protection of fundamental rights was used at a given historic moment by the Court of Justice in order to provide legitimacy to the European order precisely as would be done for a federal system, following a path that in some respects was similar to American federal system. The “race” towards the protection of fundamental rights, in other words, caused a heightening of standards and the raising of a series of rules providing guarantees to the individual aimed also at strengthening the community system in Europe. The financial crisis in recent years has actually caused a downward level-

⁵¹ G. FONTANA, *Crisi economica ed effettività dei diritti sociali in Europa*, in www.forumcostituzionale.it, p. 2.

⁵² Namely, European Court of Justice, judgment of 11 December 2007, C-438/05 *Viking*; judgment of 18 December 2007, C-431/05, *Laval*; judgment of 3 April 2008, C-346/06, *Rüffert*; and judgment of 19 June 2008, C-319/06, *Commission/Luxemburg*.

⁵³ G. BRONZINI, *Il plusvalore giuridico della Carta di Nişantaşı*, in R. Cosio (edited by), *Il diritto europeo nel dialogo delle corti*, Giuffrè, 2013, p. 146.

ling of individual guarantees, almost a degradation of rights (especially social rights), in most of the Member States, often also by having recourse to amendments to the constitution. These rapid and incisive changes carry with them as a side effect, that of altering, at least potentially, important parts of common traditions in the area of the protection of rights that have represented the main foundation for effective guarantees of such rights also at the supranational level.

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