

The Impact of the *Traghetti* Ruling: Reinforcing the Supremacy Principle of EU Law or Revealing New Internal Constitutional Problems?

by

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I would like to immediately open with the principles upon which my brief introductory remarks rest.

First of all, allow me to use exclusively the «orthodox» categories for an Italian constitutionalist, looking in particular at what happens in our legal system. It is important to bear in mind that the Italian State has gradually given up, legitimately and voluntarily and according to constitutional principles in force since 1948 (more specifically art. 11), sizeable portions of its sovereignty to promote and favour an equitable process of integration. Together with more and more European Countries (some of which, in order to pursue the very goal have had to adapt their own constitutions), they have pursued an integration process both ambitious and worthy, but at the same complicated, that has culminated in the creation of the European Union, which, for the time being, remains a truly supranational organization.

As a matter of fact it appears that the gap between what may be produced by International treaty law, which as far as I know does not usually allow treaties favouring steady, continued and direct intromissions into sovereign Nations, and the European Treaties that paved the way to EU institutions is rather large. It suffices to think that the latter aim their rulings to Member States' and their citizens, having established a European citizenship, that is, a membership obligation bound to overlap with and integrate national citizenship.

Nevertheless there exists a sharp difference between the institutional relations established between the Union and the Member States and the organizational status within any Country that may in its own right define itself Federal. It is common knowledge that such a public law model divides, at least theoretically and certainly formally, the sovereignty of the legal system, distinguishing quite rigidly in the Federal Constitution between the

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competencies of the Federation and those of the States that form it. As a consequence specific measures are included to solve at juridical and constitutional levels any potential competence disputes that may arise. On the contrary, according to EU Treaties and national Constitutions, the national legal systems and the European legal system are distinct and separate though they may be integrated. This means that the agreed upon (by the States) supremacy of European Union law in the matters provided in the Treaties cannot exist without a competency transfer to EU institutions. This is the case even more so since no legal institution was expressly established to solve any formal competency disputes between the Union and its Member States. Under the jurisdiction of the Court of Luxembourg, which is integrationist in its application of EU law principles, it is inevitable that States are left with nothing but brittle competencies by comparison with the relevant EU institutions, though this does not appear to me as having a firm legal grounding. Naturally, where one should not be willing to give up the separation and distinction between the two legal systems, as is the wise and shrewd case of our Constitutional Court, the problem remains of how to turn the optimal and expected cooperation between European Union and Member State levels into a reality.

As far as I believe, the asymmetry between the European Union and the Social-democratic legal systems (as is the case of, not limited to, Italy) should be still underlined. It is known that the type of State arising from the Italian Constitution leads us to conclude that, according to what is patently provided in our Constitution, social rights such as employment, healthcare, social welfare and education, are to be regarded as fundamental rights to which all individuals are entitled. The above has not yet found equal acknowledgment within the European legal system even if we consider the provisions under the Charter of Fundamental Rights from a constitutional lawyer's perspective (and not necessarily the Italian one), which cares less about the market and competition and more about social solidarity and economic balance among individuals, regions and States.

Since many, at least in the recent past, have advocated the need to rewrite the Treaty and include (at least formally) the establishment of a real European Constitution, I would deem intellectually honest and politically realistic to insist that future integration should have at its core the objective of enhancing democracy, civil and political rights and social cohesion for all European citizens.

Without prejudice to the current state of the EU legal system and the remarkable accomplishments achieved through integration, it is always good

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to bring to light the current shortcomings in the coexistence of the national and the EU legal systems, which, should they be overcome, would allow us to feel more confident about a further transformation of Democratic European States into a federal or confederate structure. After all over the centuries constitutional democracy in Europe has struggled hard to establish itself with a rather broken and winding process. For example, if we look at Eastern Europe, constitutional democracy dawned only twenty years ago after the sudden and, to a certain extent, unexpected collapse of the Soviet regime.

This is why it should not be regarded as the symptom of a short-sighted and conservative defeatism (in the light of the not-at-all-obvious recovery of the European Union after the enforcement of the Treaty of Lisbon) to remember, once again, the democratic deficit upon which the current constitution of the European legal system rests. This is even more so if we believe we are in a «permanent» process of constitutional change which, in the words of many, is far from being concluded.

The democratic deficit, by the way, does not manifest itself only with the known fact that the European Parliament (the only Institution which is directly and democratically elected by the European citizens) does not take an independent political stance in spite of its progressive involvement through to the so-called co-decision procedures. It suffices to think about how the constitutional process was carried out. Did we, as the European political community, feel somehow involved in the work done by the remarkably authoritative Constitutional Convention? It is fair to say that the majority felt excluded.

In any case it is not only the democratic deficit which is lurking in the folds of EU legal system. What is aptly dubbed the «EU legal system» has structural features which, in my view, display some remarkable shortcomings with regard to the requirement of what may be identified as a «comprehensive» legal system. These deficiencies are a consequence of the supranational treaty structure which is required to interact with the legal systems of the Member States and to which it flows back *in toto* its derived nature.

Therefore I do not know whether it would be beneficial to just acknowledge the end of the so-called dualist theory, that is, the coexistence of «distinct» legal systems, National and European, which still serves as the basis for our Constitutional Court, and finally come to terms with the fact that we have come, more or less deliberately, to a monist understanding of a single legal order which has been imposed upon us by the Court of Justice. The Court, through its jurisprudence, has «handed over» to Member States an EU legal system which is absolutely overlapping with national legal

systems and is directly in contact with their citizens and bestows upon them a special right, that is, the actual supremacy of European law, which has to be enforced not only among private parties, but also in the context of the disputes against the State-legislator. The latter has to be considered objectively responsible for the disavowal.

Such a bold and courageous construction – as it is witnessed by the notorious 1991 *Francovich* judgment – is clearly a symptom of a blatant structural difference between the European legal system and the national legal systems, which prevents the EU legal system from «proclaiming itself» as a self-standing legal system capable of imposing its own rules. As a matter of fact, unlike national legal systems, the EU legal system is not supported by a self-sufficient judicial apparatus capable of guaranteeing the compliance of the Treaties and all norms produced within the same system. The reason is that the former grants their judgments to citizens directly in the State legal systems. By contrast the European legal system lacks an operative «arm» (the national judge) to enforce the right which is «autonomously» produced by the relevant institutions. Thus, while some EU institutions are called upon by the Treaties to autonomously fulfil the other functions (regulatory and administrative), characterizing, together with the judicial function, the State legal systems, the Court of Justice alone (also after the establishment of the Court of First Instance) is not necessarily appropriately placed to guarantee the enforcement of EU law, since this is rather the duty of national Courts «borrowed» from the EU legal system.

In my understanding this is the most evident proof of the existence of one single legal system able to guarantee the efficacy of the norms (National and European), that is the national legal system. Again, Member States are pushing for an agreement for the transfer to EU institutions competence on certain issues provided that the recipients of the EU law are both the States and their citizens. This is why the application and, consequently, the preservation of «EU reasons» are in the hands of national courts, though the same may also «involve» the Court of Justice through the preliminary ruling procedure. This provides a communitarian standpoint from the *EU legal system* judge, who, once is involved in the logical-argumentative process, sets out the reasoning for the national judge to follow in the specific case. The somehow odd 'externalization' provided in the Treaties of the interpretation-enforcement of EU law reveals an upturned subsidiary structure of the relationship between European Union and national legal systems, on the ground of the lacking functional self-sufficiency of the former. While there is regulatory competence on certain matters handed to

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the EU institutions, the interpretation-enforcement of EU law, on the other hand, is left exclusively to the national legal system, which is not directly linked (neither it is partly delegated to) to the Court of Justice.

The Court of Justice (Grand Chamber), by means of the *Traghetti* ruling (June 13th, 2006), and before with the *Köbler* ruling (September 30th, 2003), acknowledged the civil liability of the State toward its citizens for damage deriving from an incorrect application of EU law by the national courts. This was so irrespective of whether national legal systems may exclude or restrict such liability of the State or the single judges. Consequently, Member States must necessarily admit that in such cases «it is true, in light of the specific judicial function and the legitimate requirements of legal certainty, the liability of the State [...] is not unlimited» (*Traghetti* ruling, para. 32). I believe that in the latter circumstance the Court in Luxembourg has not only highlighted, as customary, the primacy of EU law, but it has also made improper use of the preliminary ruling procedure (I fully agree with many of the scepticisms issued at that time by Advocate-General Dámaso Ruiz-Jarabo Colomer). I would argue that the preliminary ruling procedure was incorrectly used by the Italian judge at first instance to generally expose the alleged shortcomings of the national legislation with regard to civil liability deriving from the exercise of the judicial function (which in our Country is directed, without prejudice to specific restrictive conditions, first of all to the State, which may turn it to the faulting judge). The judge at first instance disregarded that it is the national judge, and therefore, in conclusion, the judge of last instance (the Supreme Court, in our case) who is in charge of defining the main proceedings concerning, in this case, a wrongful interpretation of the EU legislation provided in another proceeding ruled by the same judge. I am afraid that the point of view expressed by the Court in Luxembourg in this case will not be enough to solve the delicate problems related to the increasing application of EU law within national legal systems. National courts which try to offer a «genuine interpretation» of EU law should not be subjected to liability evaluation in national legal systems! We shall see how long we can endure the current communication channels open between the two legal systems, which in the above mentioned cases have proven to have some unexpected obstacles caused by «excessive zealots» in the Court of Justice and, way before that, an «Outrageous Community Narcissism» (rather than decisional modesty) of the Italian issuing judge.

Finally I think it would be fair to say that there are two options for future cooperation between national judges and the Court. Either national

judges are forced to apply, as *European judges*, EU law, and then any lack of enforcement of the EU law used to lead to liability of the State, and possibly of the single judges, must be subjected, in lack of special terms provided in the Treaty, to the general rules provided in the national legal system (hence, the Italian law of April 13th, 1988, n. 177, which enforces the so-called protection clause, excluding civil liability of judges with regard to the interpretation of legal provisions and the assessment of the facts and evidence produced in the judicial activity). Alternatively any violation of EU law by a national court, which creates non-contractual liability of States, must be decided only by the Court of Justice as a consequence of a fully-fledged breach of EU law by the State which will be liable as a result of the negligence of its judges, in compliance with the *Köbler* ruling.

It could be useful to remind that the EU law is less wide than European Law, since the latter encompasses the European Charter of Human Rights. It is common knowledge that an effective judicial protection of individual rights (even when they are jeopardised by a judicial mistake perpetrated by a national court) is in the scope of this Convention and the Court of Strasbourg is consequently involved. I'm referring to the individual actions against the State exercised by the victim of a judicial mistake, despite of the hypothetical consequences on the «res judicata», even in criminal matters, as it has been shown by the «Dorigo» Case.

Contrary to the wishes of the Court of Luxembourg (which basically points to the previous «misuse» of the legislation by the State and reports, without taking any direct responsibility, a lack of EU law in the Italian legal system with regard to civil liability of its judges), what I believe I can rule out would be to allow a «new» national judge of first instance to express a ruling on State liability as a consequence of the lack of enforcement (or correct interpretation) by the Supreme Court (which, after all, is the last instance in the new proceeding) in another separate proceeding.

The assessment whether there happened an inexcusable breach of the EU law by a national judicial authority (also in the last instance and also as a consequence of not wanting to unreasonably raise a preliminary issue), for the reasons given above, should not be given to the national judge. Rather it should be granted directly to the exclusive competence of the Court of Justice, and not decided through application of the preliminary ruling procedure.

If, on the contrary, the Italian legal system should deem not to be in the position to go against the disputable direction taken by the Court of Justice expressed with the *Traghetti* ruling, we should foster and encourage as soon as possible our Constitutional Court to separate at least the liability of the

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State from that of the single judges. In this case, in the event of liability of the State for a blatant violation of the EU law as a consequence of a «simple» interpretation by the national judge, the so-called safeguard clause should be applied in favour of the judicial authority, which would naturally remain responsible for mistakes caused by intentional fault or serious misconduct arising from the lack of enforcement of the EU law.

It would be wise for our Constitutional Judges to stretch their «EU patience», which could be truly useful to preserve the primacy of EU law, which is often too quickly «thrown» by the Court of Justice to national courts.