COMENTÁRIO

THE (JUDICIAL) CONFLICT OVER CONFLICT: FROM THE CONFLICT BETWEEN SOCIAL RIGHTS AND ECONOMIC FREEDOMS TO THE CONFLICT BETWEEN JUDGES

Gioia Bonaventura

1. The analysis carried out in "On the Cases of Conflict Between Social Rights and Economic Freedoms in the Jurisprudence of the EU Court of Justice" aims at highlighting the diachronic orientation that the Court of Justice of the European Union (henceforth: CJEU) tends to adopt in cases of conflicts between workers' collective social rights' and fundamental economic freedoms. Mr. Zezza claims that (i) the CJEU reaches decisions that "theoretically and practically subordinate social rights to economic freedoms"[17], thus determining a (ii) "functionalization" of rights for the objectives of the European Union (henceforth: EU). Moreover, (iii) he notes – albeit without further elaboration or without reaching some sort of conclusion – that according to the CJEU, Member States can apply their social protection systems and standards "only to the extent that they do not interfere with the pursuit of Community objectives, such as the creation and maintenance of a competitive internal common market"[18].

(i) I would say that the Court of Justice attributing 'greater weight' to fundamental freedoms than to workers' social rights is not really a shocking or unprecedented

17 Specifically, the analysis deals with cases of conflicts between the *fundamental* freedoms that the Treaty on European Union recognizes for citizens of the Member States (freedom of establishment and freedom to provide services: articles 26 et seq. of the Treaty on the Functioning of the European Union) and social rights, *ratione temporis* defined as "an integral part of the general principles of Community law" and, today, recognized in various provisions of the Charter of Fundamental Rights of the European Union (Articles 27 et seq. of the Charter of Fundamental Rights of European Union).

18 See the last paragraph of the analysis: "III. Linhas gerais do raciocínio jurídico do Tribunal de Justiça Europeu em matéria de direitos sociais".

finding[19], since cases of conflict between constitutional rights or principles are a particular kind of normative conflict generally resolved by constitutional or supreme judges through the "balancing" technique. In a nutshell, this judicial operation consists in 'weighing' the two conflicting principles (which are commonly equal, *i.e.* they share the same status) and formulating a judgment of comparative value: establishing which of the two has greater 'weight' (*i.e.* greater ethical-political importance). Consequently, the principle or the right that is considered more 'important' or of greater 'value' is applied to the specific case, while the other conflicting principle is virtually set aside. With a particularly elegant formula, this balancing act is defined as the establishment of a mobile axiological hierarchy between two principles, whose primary purpose is the selection of the applicable principle on a case by case basis (GUASTINI, 2011:206). Therefore, the fact that economic freedoms – not for nothing defined as 'fundamental' – trump worker's social rights in the EU's legal order is legitimate albeit (in the eyes of many) deplorable.

(ii) I would venture to say that the "functionalization" of rights for the objectives of the EU is a historical characteristic of the CJEU's approach to fundamental rights, which dates back to the establishment of the fundamental rights protection doctrine itself[20].

(iii) Aside from these issues, I believe that the most evident problem with the analysis in object has to do with the point relating to the relationship between the primacy of EU law and national constitutional supremacy of Member States. That statement is neither wrong or inaccurate: however, I feel that it deserved much more attention than it received, to shed light on one of the unresolved and most complex issues in European constitutional law.

From now on, I will refer to this problem as the *conflict over the conflict between fundamental rights and freedoms*, which is also believed to be one of the main characteristics of the so-called 'multilevel' protection of rights in the European area[21]. In

19 Among many: "so, despite recognition of the right to strike, the limitations on the exercise of that right laid down by Community law subsume much of the right. The precedence of the economic over the social is pretty clear. As John Major once put it, socialism has been dumped" (BARNARD, 2008: 264).

20 See below, para. 2 regarding the doctrine of *functionalization* of the protection of EU's fundamental rights to the structure and objectives of the Community which can be found in the well-known 1970s *Internationale Handelsgesellschaft* ruling.

21 "In the last two decades the protection of fundamental rights has seen a remarkable expansion in Europe. Fundamental rights have risen an importance *in each layer of what is now conventionally referred to as the European* multilevel *architecture.* In fact, currently fundamental rights are *simultaneously* protected by national (state), supranational (EU) and international (ECHR) norms and institutions. Each layer of the multilevel architecture is endowed with a substantive catalogue of fundamental rights. In addition, institutional remedies – most notably at every level to ensure the protection of these constitutionally

particular, I refer to those kinds of situations in which the CJEU and a national (supreme or constitutional) judge interprets and balances shared principles in a divergent way[22]. This kind of conflict[23] rests on several and heterogeneous underlying assumptions: (i) judicial discretion: the act of balancing competing rights and principles implies a high amount of judicial discretion so that it is certainly plausible that different judges may balance them in different ways, given the existence of competing views about fundamental rights law and the different policies each court might be pursuing; (ii) legal and jurisdictional overlapping: different coexisting catalogues of rights, whose scope of application mutually overlaps, each one enforced by a different judicial authority claiming the 'final word' on the matter; (iii) the lack of a clear, precise and univocal supremacy clause, making it impossible to establish a hierarchy between competing sources and legal systems.

In European Constitutional law studies, this issue is also known as the problem of *diverging protective standards of fundamental rights between the EU and the Member States*[24]. I believe that discussions on the standard of protection, in particular when they are conducted as a comparison between a minimum or a maximum standard of protection, are (at the very best) misplaced and misleading, if the notion of "balancing" is in focus. Whatever the case, I will limit myself to fill the gap in the analysis, by

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entrenched rights" (FABBRINI, 2014: 7). The idea of a multilevel protection of fundamental rights is a consequence of the idea that exist such a thing as a multilevel constitutionalism in Europe: see I. Pernice, "Multilevel Constitutionalism in the European Union", in *European Law Review*, 2002; Id., "Multilevel Constitutionalism and the Crisis of Democracy in Europe", in *European Constitutional Law Review*, v. 11/2015, p. 541 e ss.

22 The very conceivability of a conflict between the CJEU and a national judge depends on and is one of the effects of the legal 'disorder' generated by the process of European integration. The process of European integration has, in fact, highlighted *aporias* in the concepts and categories used by jurists and, according to some views, it has determined changes in the way of thinking of the jurists themselves. In general, for similar considerations with specific regard to European integration between Member States and the European Union, see: G. Itzcovich, *Teorie e ideologie del diritto comunitario*, Torino: Giappichelli, 2006.

23 "The […] conflicts […] characterizing the current phase [of the EU landscape] seem to be, on the contrary, conflicts due to the existence of an area of overlap between the national and supranational level. In other words, they are conflicts by convergence or conflicts by presence of an EU law discipline. I have elsewhere described this overlap zone between legal orders as the core of the complex (*complexus* in Latin means 'interlaced') structure of European law. This structure favors the emergence of particular antinomies (conflicts), due to the consequent and inherent difficulty in distinguishing among the different legal levels" (MARTINICO,2014: 1350).

24 "The second issue which has dominated the literature has been one of standards. […] Could the ECJ meet the highest standards of protection imposed by any of the Member States (and in particular Germany and Italy) which it had replaced? Much has been said about the particular standard actually adopted y the Court. If there were doubts raised about the Court and its human rights jurisprudence these were usually focused on the ability of the Court to match these Member State standards" (WEILER, 1986: 1106).

sketching a brief genealogy of the *conflict over conflict* problem, recalling its origins and highlighting its development. Finally, I will make some final considerations on fundamental rights in the EU and on the role of the CJEU, briefly highlighting some strategies developed by the Italian Constitutional Court (henceforth: ICC) to manage cases of conflict with the case law of the CJEU. From a normative point of view, I think that this ICC strategy could be a viable way to (judicially) emend and correct the balancing acts which are so generally perceived as inadequate for the protection of the collective rights of workers.

2. Since 1963, the CJEU established the doctrines regarding the relationship between EU law and Member State law[25]. Within this judge-made law, I believe that the origin of the problem is to be found in the *Internationale Handelsgesellschaft* ruling[26], specifically in the following points: (i) the legal irrelevance of national constitutional principles including constitutional fundamental rights (autonomy of community law); (ii) the introduction of the 'respect for fundamental rights' legal limitation to the EU's action, which are "analogous" and inspired by national constitutional tradition but "inherent to community law"[27] (*communitarisation* of fundamental rights); (iii) the doctrine of *functionalization* of the protection of EU's fundamental rights to the structure and objectives of the Community (*functionalization* of fundamental rights).

In the 70s, therefore, an autonomous set of rights was established, a set whose exclusive guardian is the CJEU, which operates in accordance with a very specific policy. Furthermore, taking into consideration the doctrine of the primacy of EU law, it is clear that, in the event of a conflict with national laws, the set of guarantees that will find preferential application is the EU one.

In the beginning, however, the establishment of an autonomous set of rights was not deemed to be so problematic for many different reasons. First of all, back then the overlapping of national fundamental rights and EU rights was not actually significant: in fact, consistently with the reason for the introduction of some kind of protection of fundamental rights in the EU's legal order[28], the review of EU's fundamental rights

25 Stein E., "Lawyers, Judges, and the Making of a Transnational Constitution," *American Journal of International Law* v. 75, 1981.

26 17 dicembre 1970, *Internationale Handelsgesellschaft*, C-11/70, EU:C:1970:114.

27 T. Tridimas, *General Principles of EU Law*, Oxford University Press, Oxford, 1996.

28 In the treaties of the three European Communities there was no mention of the individual's civil or political rights and freedoms. Whatever the reasons, a precise consequence followed from this: if the Treaties, while providing for the attribution to the Community institutions of certain powers, do not contain a declaration, a catalog, or a clause providing for the necessary respect for certain rights, then these do not constitute – at least *prima facie* – a legal limit to the exercise of these powers. This lack of provision relating to rights was transformed, with the deepening of legal integration by virtue of the judicial activism of the CJEU, into a legislative *lacuna*: the jurists of the time, divided on the implications and solutions to be adopted to

was limited to EU acts and not to Member State's legislation[29]. Secondly, the legislative competences of the EU – as well as the jurisdiction of the CJEU – were generally considered limited both quantitatively and qualitatively, and relating solely on "matters concerning economic relations [...], so that it is difficult to configure the hypothesis even *in abstracto* that a Community regulation may affect civil, ethical-social and political relations, with provisions in contrast with the Italian Constitution"[30]. Furthermore, the CJEU had begun to ensure the protection of fundamental rights, taking as a 'source of inspiration' the constitutional traditions common to Member States, which resulted in a *convergence* of values[31].

3. The rise and, in a way, the rediscovery of this *conflict over conflict* issue can be traced back to the new context established by the 2007 Lisbon Treaties, which is now characterized by the binding force of the Charter of Fundamental Rights in the EU (henceforth: CFREU), and by the extension of the competences of the Union as well as the jurisdiction of the CJEU. In particular, I believe that the problem of the *conflict over conflict issue* fully manifested itself for the first time in two rulings of the CJEU: *Melloni* and *Åkerberg Fransson*[32]. In particular, the CJEU defined the CFREU's scope of application, then it clarified the relationship between the CFREU and the national

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deal with this situation, were however unequivocally convinced that such substantial limits *should* exist, considering the Treaties to be incomplete.

29 "… the Court's effort to safeguard the fundamental rights of the Community citizens stopped at the threshold of national legislations. So far, in other words, Europe has not experienced anything resembling *Gitlow v. New York*, the judgment in which the American Supreme Court held that the limitations laid down in the United States Bill of Rights are not only applicable to the Federal Government but extend to the law and administrative practices of the individual states" (MANCINI, 1989: 611).
In fact, it seems important to me to point out that the CJEU determined an extension of its jurisdiction already at the end of the 1980s. The Member States were, in fact, required to respect the fundamental EU rights as interpreted by the Court of Justice in an increasing number of situations, such as when the national authorities were giving "execution" to a Community discipline, acting as "mandators" of the EU's institutions (*Wachauf*) or when they make use of the limitation clauses of one of the fundamental economic freedoms provided for in the Treaty (*ERT*).

30 Judgment of the ICC n. 183/1973 (so called 'Frontini'). Even the Italian *counter-limits* doctrine (according to which EU law, while prevailing over Italian constitutional law, cannot in any case be inconsistent with "fundamental principles of the constitutional order or the inalienable rights of the human person") seems to be nothing more of a rhetorical enunciation, the hypothesis of the "community dictator", clearly "very remote, indeed so fantastic as to transparently assume a covering function" (CONDORELLI, 1978: 133). Also, the hypothesis of a contrast between EU legislation and the supreme principles of the constitutional order appears in the eyes of the Constitutional Court itself to be an "aberrant" scenario as well as "difficult to configure, even in the abstract".

31 Against this conclusion, see: M. Cartabia, *Principi inviolabili e integrazione europea*, Milano: Giuffré, 1995.

32 26 febbraio 2013, *Åkerberg Fransson*, C-617/10 EU:C:2013:105; 26 febbraio 2013, *Stefano Melloni,* C-399/11, EU:C:2013:107, giving the interpretation of articles 51 e 53 CFREU.

catalogs of fundamental rights and, subsequently, it defined its powers with respect to the national (constitutional or supreme) judges.

With respect to the first question, the CJEU tautologically stated that "the Court has no power to examine the compatibility with the Charter of national legislation *lying outside the scope* of EU law. On the other hand, if such legislation *falls within the scope* of EU law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures"[33]. The notion of "implementation of EU law" is an objective notion, as it is of no relevance that the national legislation has not been adopted for the primary purpose of implementing EU law: what matters is the *function*, not the *intention*[34]. Therefore, this is a particularly expansive interpretation of the scope of application of the CFREU which comes with a noticeable extension of CJEU's jurisdiction. With respect to the second question, the Court draws a distinction between cases of "strict implementation" of EU law (that is, "when the actions of the Member States are entirely determined by EU law") and cases "of implementation in the broad sense" of EU law (that is, "when the actions of the Member States are not entirely determined by EU law")[35]. In situations of "strict implementation" of EU law, national authorities are required either to apply EU fundamental rights as interpreted by the Court of Justice or to apply the EU law which is believed to be consistent with the EU fundamental rights standard, pre-eminent and prevailing over domestic constitutional law. In situations of "implementation in the broad sense", national authorities are allowed to apply their national standards for the protection of fundamental rights, provided that they do not compromise the level of protection provided by the CFREU, as interpreted by the CJEU or the primacy, unity and effectiveness of EU law. The idea, suggested by a great deal of scholars, of applying the "more intense" or "higher" national protection standard is expressly rejected by the CJEU: this doctrine could undermine the primacy of EU law, since it would allow a Member State to escape the mandatory application of it, invoking national rules, albeit of constitutional statutes.

4. It seems to me that the CJEU cannot conceive of a 'conflict over conflict' situation with national judges in matters of fundamental rights because of the following institutional syllogism: when EU law applies the CFREU is applied and when the CFREU

33 As it has been said "the Charter is the shadow of EU law" (LENAERTS, GUTIÉRREZ-FONS, 2014: 157).

34 "Therefore it is not the *intention* of the State, but the *function* of the State act regarding the implementation of EU law which matters" (SARMIENTO, 2013:1279).

35 It is hardly necessary to point out that the distinction between situations that are "completely determined" by EU law and, *vice versa*, situations that are not, is very light and labile, ultimately essentially left to the decision solely of the CJEU.

is applied, national Constitutions do not apply; and if the CFREU is applied, the the CJEU has exclusive jurisdiction. There is no conflict because, by virtue of the primacy of EU law, the interpretation and balancing of rights carried out by the CJEU prevails: it is the CJEU that has the *last word* on the protection of rights in the EU. The jurisdiction of the CJEU in matters of rights contributes, in fact, to the uniform application in all Member States of the unitary body of EU law, removing any internal obstacles on the way to legal integration.

This brief examination provides two observations on fundamental rights in the EU and on the role of the CJEU. Firstly, fundamental rights in the EU have changed in their substance: from the traditional condition of legitimacy of the power of the EU institutions, to an instrument of (further) legal integration between the Member States. The Member States are required to respect the interpretation, the construction, the balancing of fundamental rights as decided by the CJEU, whenever the (broad) scope of application of EU law is called upon. In the EU legal system, rights are functional to the objectives of integration; they are interpreted and constructed, as specified since 1970, in such a way as to ensure the pursuit and maintenance of Community objectives. Secondly, the CJEU holds firmly to its role as the supreme court of the Union, guarantor of the autonomy, unity, and uniformity of the law of the EU: as the former President Skouris puts it "the CJEU is not a human rights court; it is the Supreme Court of the EU"[36].

However, the stabilization of the EU doctrine of fundamental rights also requires the acceptance of the authorities of the Member States, in particular judicial authorities. It is interesting to recall the position taken by the Italian Constitutional Court on this point, which can be summarized in the following points: (i) prior involvement of the ICC on fundamental rights issues in case of ECJ's overlapping jurisdiction. This rule aims at keeping the constitutional matter in the hands of the ICC[37]; (ii) when deemed necessary, the ICC makes a preliminary ruling to the ECJ, asking for a clarification or the interpretation or the Charter's provisions' scope of application; (iii) specifically, this kind of preliminary ruling might be used in order to ask for an *overruling* or to indicate that a particular interpretation might be inconsistent with the fundamental and supreme principles which form the core of the Italian Constitution[38].

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36 https://verfassungsblog.de/ecj-european-supreme-court-setting-aside-citizens-rights-eu-law-supremacy/

37 In a "constitutionalized" legal system like the Italian one, this statement is resolved in the attribution of a particularly broad competence: "quando la costituzione è sovra-interpretata non residuano spazi vuoti di – ossia 'liberi' dal – diritto costituzionale" (GUASTINI, 2011:362).

38 The *counter-limits*, therefore, abandon their function of gatekeeper of the core of the legal order are transformed into an instrument in the hands of the ICC, an argument in the context of the legal reasoning expressed in the reference for a preliminary ruling.

In the end, the ICC, is aware that it is just one of the players in the field of fundamental rights in Europe, and vindicates the right of having the first word on the matter instead of the last, so that it can try to make the ECJ aware about its view on a certain issue, thus influencing the making of EU (judge-made) law. A *dialogical* approach of this kind maybe has a chance to succeed in overruling the diachronic CJEU's orientation in the cases of conflicts between workers' collective social rights' and fundamental economic freedoms; however, this burden relies on the national judges and their competing view about fundamental rights.

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