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Editorial

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Dear Readers,

The development of European law shows a constant proliferation of legal sources and a rising phenomenon of reciprocal assimilation between sets of norms of various origins (Union law and law from conventional sources, e.g. the Council of Europe) – especially in recent years. Their mutual "interference" and interdependence have contributed to the extension of the catalogue of fundamental rights and their protection requirements. This implies for the judge to apply national law not only in compliance with European Union legislation but also in the light of the case law of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR).

The (legitimacy) control exercised by the highest national courts itself moves towards the search for the common features of a uniform European interpretation of the law. The role of the aforementioned courts is that of identifying the relevant rule, with regard not only to the framework of domestic constitutional principles but also to the forms and mechanisms of fundamental rights protection that emerge from supranational norms as interpreted in the case law of the two European courts.

This is a delicate and complex task, based on the awareness of cultural change that makes every national judge a European judge, called on to develop a common culture of fundamental rights protection in the light of procedural fairness and, above all, to coordinate the structural relations between the domestic legal systems and the impulses coming from the various "external" legal provisions, even those of conventional origin (ECHR). To do so, the national judge may use the instruments of conforming interpretation (where possible) or the preliminary ruling procedure under Art. 267 TFEU. For the purpose of interpretation of an ECHR provision (relevant to the decision in a specific case), the national judge can (now) also resort to a preliminary ruling procedure that, following the entry into force of Protocol 16 of the ECHR, may be submitted to the Strasbourg Court in order to obtain a non-binding advisory opinion. In this way, the legitimacy control that can be exercised by national supreme courts extends its remit beyond national legislation to European legislation, with the aim of uniformly defining the effects that can be derived– albeit in different ways and forms – from the enforcement of the judgments of the two European Courts.

In accordance with the ECJ ruling in the "*Pupino*" case, the Italian Supreme Court (*Corte di Cassazione*), in its judgment no. 4614 of 30 January 2007, referring to the domestic legislation implementing Framework Decision 2002/584/JHA on the European Arrest Warrant, reiterated the need to respect the rule of conforming interpretation, the only limit to this rule being the impossibility of a *contra legem* interpretation of domestic law if incompatibility between domestic law and secondary law provisions in the Framework Decision is arises.

Moreover, the transfer into national systems of principles established in ECJ case law appears increasingly incisive, for example with regard to the fundamental guarantees of the rule of law and the identification of conditions for the application of the *ne bis in idem* principle. Examples can also be found in the areas of mutual recognition with regard to judicial cooperation in criminal matters and immigration / asylum. The progressive assimilation of these principles resulted from the fruitful mediation efforts that emerged from the (increasingly) close interaction between national supreme courts and the ECJ. These efforts enabled the development of new perspectives aimed at maximizing fundamental rights protection, as embodied in the safeguards contained in Art. 53 CFR and in the ECHR, while at the same time strengthening (the perception of) the role that European case law can assume in the development of case law of the supreme courts.

The control over the degree of protection afforded to fundamental rights *in concreto* is therefore a task reserved to the national courts, none less than to the two European Courts, in an effort to ensure a uniform interpretation of rights throughout Europe. Within this scope, the activation of so-called constitutional

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"counter-limits" inevitably represents a last resort and, as such, must be restricted to exceptional circumstances, which see an insurmountable contrast between an EU provision and a domestic fundamental constitutional principle.

If the goals of mutual cooperation and willingness to engage in dialogue between the different European jurisdictional actors are not constantly pursued, both at the institutional level and on the parallel level of concrete enforcement practices, this would inevitably jeopardize not only the remedies necessary to ensure the effectiveness of judicial protection in the areas governed by EU law (Arts. 19 TEU, 47 of the Charter, and Art. 6 ECHR), consistency among the respective systems, and the proper exercise of the competences of the European Court of Justice (judgment of 24 June 2019, *Commission v. Poland, C-619/18*) but also the robustness of the entire European system of protection of fundamental rights and freedoms.

The broad discretion that the interpretation and application of these rights currently enjoy, however, risks giving rise to problems concerning the relationship with constitutional principles and the fundamental features of each of the national systems. As far as the Italian system and its relationship with the ECHR is concerned, it is worth recalling the problem of the admissibility of confiscation foreseen for the crime of illegal allotment, which is acknowledged by the Italian Corte di Cassazione even in the case of an expired statute of limitation (provided that all elements of crime have been ascertained). Regarding the relationship to the provisions of the EU Treaties (Arts. 325 para. 1 and 2 TFEU) and the Charter of Fundamental Rights, we can highlight the different interpretative meaning that the principle of legality (referred to in criminal law) assumes in Art. 49 of the Charter and in Art. 25 para. 2 of the Italian Constitution. There, the principle of legal certainty tends to prevail (according to the numerous rulings that have recently emerged in the course of the well-known "*Taricco*" case).

In both above-mentioned cases, the intervention of the Italian Constitutional Court proved decisive for the affirmation of two guarantees that are fundamental for the domestic system: in the first case, the protection of the public interest regarding orderly land development (judgment no. 49 of 2015); in the second case, the right resulting from necessary respect for the corollaries of the principle of legality in criminal law, that is to say predictability, certainty, and non-retroactivity (judgment no. 115 of 2018). With regard to each of these situations, in fact, the European Courts have modified the initially adopted interpretations, reaching conclusions that could hardly have been reached without robust intervention on the part of the constitutional judge. The conclusions aimed at achieving a "systemic" and not a "fragmented" integration of the different levels of protection originating from the combination of rules that are not well coordinated and that are in potential conflict.

At the same time, however, it is worth mentioning the forward-looking and cautious balancing exercise of the ECJ in the "*Taricco*" case (judgment of the Grand Chamber of 5 December 2017 in case C-42/17, *M.A. S. and M. B.*). Here, the Court recalled the importance of common constitutional traditions and the need for an interpretation capable of accommodating the founding principles of the constitutional identity of a Member State in the wider area of these traditions – traditions that contribute to shaping Union law and to decisively inspiring its development in a productive give-and-take with the national identities of individual Member States.

Ultimately, each jurisdiction, whether domestic or European, is required to respect its role within a harmonious and cognizant multilevel system, following conscious and distinct plans and avoiding the narrow confines of its operational ambit. At the same time, jurisdictions should strive to eradicate any ambitions smacking of "supremacy" and to activate good practices of dialogue and constructive confrontation through the development of forms of cooperation capable of encouraging the formation of uniform European interpretation.

This effort must also be pursued in terms of cultural development and of strengthening the current tools for professional training of all legal practitioners, e.g., by enhancing those forms of exchange of information and mutual communication of measures, concrete experiences, and decision-making techniques that are the basis of the 2015 Memoranda of Understanding (MoU) between the National High Courts, the ECtHR, and the ECJ within the framework of an increasingly closer cooperation. On the one hand, the MoU aimed at fostering a deeper knowledge of the specificities of each national legal system, also as part of the parallel initiative aimed at creating a true "network" of European Supreme Courts. On the other hand, the MoU aimed to foster the increased participation of national courts in the process of developing a supranational "living" law, as an integral and constitutive part of a common European legal heritage.

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