

The Enlargement of Competences of the European Union between State Sovereignty and the so-called European “Sovereignty”: Focus on the Limits of Applicability of the Charter of Fundamental Rights of the European Union

La ampliación de competencias de la Unión Europea entre la soberanía estatal y la llamada “soberanía” europea: sobre los límites de aplicabilidad de la Carta de los Derechos Fundamentales de la Unión Europea

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Abstract

Starting from an overview on the current crisis in the European integration process, caused inter alia by the emergence of forms of “souverainisms”, the following paper focuses on the peculiarity of the European Union phenomenon and on the effects of the gradual enlargement of the European competences with respect to the classical concept of sovereignty. In this view, some observations will be made around the subtle limit which separates the EU competence from the one of its member States. For this purpose, the Charter of fundamental rights of

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the EU and the issue of the field of its application towards the member States is adopted as a privileged observation point.

Key-words: Sovereignty, Peculiarity of the EU, European demos, (Enlargement of the) Competences of the EU, European Charter of Fundamental Rights.

Resumen

A partir del panorama de la actual crisis del proceso de integración europea, provocado, entre otras cosas, por la aparición de formas de “soberanismos”, el siguiente trabajo se centra en la peculiaridad del “fenómeno” de la Unión Europea y en los efectos de la progresiva ampliación de las competencias europeas con respecto al concepto clásico de soberanía. Desde este punto de vista, se hacen algunas observaciones en torno al límite sutil que separa la competencia de la UE de la de sus Estados miembros. Para ello, se adopta como punto de observación privilegiado la Carta de Derechos Fundamentales de la UE y el ámbito de su aplicación a los Estados miembros.

Palabras-clave: soberanía, peculiaridad de la UE, demos europeo, (ampliación de las) competencias de la UE, Carta Europea de Derechos Fundamentales.

1. (Elements of) crisis in the process of European integration and return to *old* forms of “celebration” of national sovereignties

As it is well known, the combined effect of a serious economic and financial crisis that has been affecting for a long time the member States of the European Union (and some of them in particular), together with the difficult management of the migration flows² and the emergence of inequalities increased by the huge accumulations of richness produced by technological progress, have caused *faults* in an economic European system which was considered to be mostly well-established, while on the contrary it has also assumed the character of a political crisis in the Union itself. This resulted also in a crisis of political legitimacy of the Union as a consequence, in particular, of that economic crisis which, already in the Agenda 2010 had been defined by the European Commission as “an unprecedented phenomenon for our generation³”. But

² See for all, in the light of the case law of the European Courts, Pablo Antonio Fernández Sánchez, “Immigrazione irregolare e diritti umani: la prospettiva della Corte EDU e della Corte UE” [en Angela Di Stasi, Lucia Serena Rossi, (coords.), *Lo spazio di libertà, sicurezza e giustizia. A vent'anni dal Consiglio europeo di Tampere*, Napoli, Editoriale scientifica, 2020], pp. 443-474.

³ European Commission, EUROPE 2020 A strategy for smart, sustainable and inclusive growth, Brussels, 3.3.2010, COM(2010) 2020 final, p. 7.

above all, a widespread "crisis of trust" in the ability of the EU to face the most important challenges, in light of a "solidaristic" approach, has occurred. The EU tends to be often identified with the policies of austerity: policies which have been showed to be a withdrawal of individual rights, having an impact not only on economic rights, but also on social ones and inducing many negative effects, above all as regards the weakest components of society⁴. Such crisis has become even more serious, because of the health emergency linked to COVID-19, which has showed how the health crises of the globalized world can be serious as well as the economic-financial ones.

Within this complex context, we have been observing, for a long time and increasingly, the return of *old* forms of "celebration" of national sovereignties (almost conflicting with the supposed and feared so-called European sovereignty)⁵ as well as the recall to alleged "souverainisms", wrongly considered to be equivalent to a way of exercising sovereignty. The gradual transformation, in the sense of the evolution of the classical institutional, social and territorial forms of organization of the political power – physiological in a certain way – within a process like that of the European integration, essentially based on graduality, seems to find special elements of crisis, also from the theoretical reconstruction point of view, of its (present) supporting principles.

Obviously, difficulties in the development of the EU formation process, were also found in the past. It is worth remembering, in this regard, one example, the crisis of the European Economic Community (EEC) at the time of De Gaulle, as an event conflicting with the start of the political union in the '60s, but also the period when the Treaty adopting a Constitution for Europe failed to enter into force is an example of the resistances to the consolidation of that political factor of integration that the so-called European Constitution could have fostered⁶. However, today's events seem to show some elements of difference from such previous periods, above all as regards the questioning of some basic elements of the concept of European integration itself, in the light of the multifaceted principle of state sovereignty and of its different later interpretations.

Following this briefly illustrated framework, we will try to make some observations on the effects of the enlargement of the European competences,

⁴ In particular see the considerations made by Silvana Sciarra, "Eppur si muove? La strategia della Commissione per rilanciare l'Europa sociale". *Freedom Security & Justice: European Legal Studies*, 1 (2020), pp. 1-9. See also VV.AA., *La Europa social: alcances, retrocesos y desafíos para la construcción de uno espacio jurídico de solidaridad*, Madrid, Centro de Estudios Políticos y Constitucionales, 2018 and Luis Jimena Quesada, *Social Rights and Policies in the European Union: New Challenges in a Context of Economic Crisis*, Valencia, Editorial Tirant Lo Blanch, 2016.

⁵ With reference to Brexit, see, among others, Graham Gee, Alison Luk Young, "Regaiging Sovereignty? Brexit, the UK Parliament and the Common Law". *European Public Law*, 1 (2016), pp. 131-148.

⁶ Roberto Barsotti, "Organizzazioni Internazionali" [en VV.AA., coords.: *Dizionario di Diritto Pubblico*, Milano, Giuffrè, 2006], p. 4031 and the following underlines.

compared with the more general development process which has concerned the classical concept of sovereignty and its structural elements⁷. Such enlargement cannot be seen from the point of view of the peculiarity of the “phenomenon” of European integration which, as it is well known, makes it very difficult to associate the EU with the so-called “classical” international organizations, or with models of State Unions of an integrationist kind, developed in other areas of the continent.

It is obvious that the participation of a country in an international organization such as the EU, characterized by a tight membership bond, causes a necessary limitation of the sovereignty of the member States, leading to the consequent erosion of that sovereignty from a legislative, judicial and administrative point of view.

It is well known that, by the creation first of the European Economic Community and then of the EU, the member States have experienced the transition from a state sovereignty which in the classical constitutionalist doctrine of European States, “was considered one and indivisible within a European society characterized by an institutional pluralism of sovereign and independent States”, to a sovereignty limited in the technical-legal meaning of the expression “as being submitted to a double exercise of such sovereignty, one at a national level (*uti singuli*), and the other one at a community level (*uti socii o uti universi*)”⁸.

This phenomenon which has found a strong support, at a constitutional level, almost in all the Constitutional Charters of the European countries, in our Constitution, has had as a first consequence the “extended” use of art. 11 of the Constitution, in which the text concerning the “limitations of sovereignty” has been “adapted” to the needs of European integration, and then interpreted, in conjunction with the novated art. 117 first paragraph, as referring to the exercise of legislative power (also) according to the “obligations deriving from the EC legal order”⁹.

⁷ For an in-depth analysis of the evolution of the concept of sovereignty, see for all, Harry Hinley, *Sovereignty*, New York, Cambridge University Press, 1986; Joseph Camilleri, Jim Falk, *The End of Sovereignty. The Politics of a Shrinking and Fragmenting World*, Brookfield, VT, 1992 and Carlo Galli, *Sovranità*, Bologna, il Mulino, 2019; Enzo Cannizzaro, *La sovranità oltre lo Stato*, Bologna, il Mulino, 2020. In the classical doctrine, see for all, Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*, Tübingen, University of Michigan Library, 1920, Italian translation by Agostino Carrino, *Il problema della sovranità e la teoria del diritto internazionale*, Milano, Giuffrè, 1989 e Carl Schmitt, *Politische Theologie, VierKapitel zue Lehre der Souveränität*, Berlin, Duncket & Humblot, 1934, Italian translation by P. Schiera [en Gianfranco Miglio, Pierangelo Schiera, coords.: *Le categorie del “politico”*, Bologna, il Mulino, 1994].

⁸ Our translation from Massimo Panebianco [en Massimo Panebianco, Angela Di Stasi, coords., *L’Euro-G8. Contributo alla teoria dello stato euro-globale*, Torino, Giappichelli, 2006], pp. 15 and 17.

⁹ See in particular, the judgment of the Constitutional Court 129/2006. See for all, Ugo Villani, “Limitazioni di sovranità, ‘controlimiti’ e diritti fondamentali nella Costituzione italiana”. *Studi sull’integrazione europea*, 3 (2017), pp. 489-514.

The *granting, devolution, delegation or conferral* of the legislative, executive or judicial powers (according to the expressions used in the different Constitutions of the European countries) to the EU for the fulfillment of the integration purposes, however, was bound to show, over the last years, elements questioning the whole of the already mentioned factors both inside and outside the EU¹⁰. In particular, we will make some observations about the slight limit separating the EU competence from the competence of the States in reference to the gradual enlargement of those of the EU, by adopting as observation point the *issue* of the field of application of the Charter of fundamental rights of the EU by the member States.

2. Classical conceptual paradigm of sovereignty, peculiarity of the Community "phenomenon" and lasting lack of a European *demos*

It is well known that the classical conceptual paradigm of sovereignty, even before the creation of the Community legal order, had already had to adapt itself to the more general transformations occurred in the international community: from being a community of post-westfalian kind, based on the tendential anarchy of its entities, it had become a community based on the centralization of some functions and the devolution of powers and tasks to multistate bodies, up to the new conceptualization of the powers of the sovereign authority, according to a so-called *human rights oriented*¹¹ approach. It is an evolution process going from the concept of sovereignty as an instrument for the protection of private interests of sovereigns (in the 16th and 17th centuries) through a kind of sovereignty coincident with the interests of the States in the relationships between each other (in the 18th and 19th century) up to a sovereignty aimed, among others, at meeting the common needs shared by a number of entities of international Law, as international organizations are. But it is evident that such more general adaptation would have required the forced submission "of a century old concept like that of sovereignty to representations of new sovereign powers... which are to be found outside the state territory"¹² thus implying a new necessity of adaptation

¹⁰ In the Constitución española (art. 93) it is provided, as fundamental principle for the participation in the EU, that: "Mediante la ley orgánica se podrá autorizar la celebración de tratados por los que se atribuya a una organización o institución internacional el ejercicio de competencias derivadas de la Constitución. Corresponde a las Cortes Generales o al Gobierno, según los casos, la garantía del cumplimiento de estos tratados y de las resoluciones emanadas de los órganos internacionales o supranacionales titulares de la cesión" (emphasis added).

¹¹ It is obviously impossible to exhaustively report, all the literature on the matter. See, from two different points of view, Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law". American Journal of International Law, october (1990), pp. 866-876 and Antonio Ruggieri, "Sovranità dello Stato e sovranità sovranazionale, attraverso i diritti umani, e prospettive di un diritto europeo 'intercostituzionale'". Diritto pubblico comparato ed europeo, 2 (2001), p. 544 and the following.

¹² So in Tommaso Edoardo Frosini, "Presentazione" [en Antonio Pérez Miras, Edoardo Carlo

to some peculiar characteristics of the EEC, today EU, legal order.

The more general issue of the relationships between the internal legal order and that of the EU, and the different directions taken by the lively interlocution between the Italian Constitutional Court and the Court of Justice of the EU¹³ always show a general “resistance” of state sovereignty to recognize other sovereignties as being “able” to penetrate the “domain” pertaining to it and to produce within it constraints of different nature and degree¹⁴.

Then, in the wider framework of the already partly mentioned outstanding peculiarities of the European integration process, it must be recalled that the States, on signing and ratifying the treaty establishing the EEC in 1957 and the following ones have created *a legal order of a new kind, integrated in the legal order of the member States*, the subjects of which comprise not only those States but also their nationals. This, as it is well known, has been recognized by the Court of Justice, starting from the judgments *van Gend & Loos*, 26/62, and *Costa*, 6/64 but also by different Constitutional Courts¹⁵ and, more recently, it has been strongly repeated in Opinion 2/13 about the accession of the EU to the European Convention on Human Rights (ECHR)¹⁶: derives from it a different interpretation of the concept of the so-called “European sovereignty”¹⁷.

Raffiotta, Germán Manuel Teruel Lozano, Fausto Vecchio, coords.: Stato, autonomie territoriali e processi di integrazione sopranazionale, Napoli, Editoriale scientifica, 2018], p. 1.

¹³ Among many others, for a recent reflection on the theme, see Giuseppe Martinico, “Conflitti interpretativi e concorrenza tra Corti nel diritto costituzionale europeo”. *Diritto e società*, 4 (2019), pp. 691-733.

¹⁴ Antonio Ruggeri, “Sovranità dello Stato e sovranità sovranazionale, attraverso i diritti umani...”, already quoted, in part. p. 546.

¹⁵ Court of Justice, judgment of 5 February 1963, *N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos*, case 26-62, p. 12 and judgment of 15 July 1964, *Costa v. ENEL*, case 6/64, p. 593.

¹⁶ See the Opinion 2/13 of the Court of Justice (Grand Chamber), 18 December 2014. In paragraph 157 it is underlined that: “As the Court of Justice has repeatedly held, (see, in particular, judgments in *van Gend & Loos*, p. 12, and *Costa*, p. 593, and Opinion 1/09, paragraph 65), “...the EU has a new kind of legal order, the nature of which is peculiar to the EU....”.

¹⁷ See, from different points of view, Giuseppe Tesaro, *Sovranità degli Stati e integrazione comunitaria*, Napoli, Editoriale scientifica, 2006, as well as Andrea Guazzarotti, “Sovranità e integrazione europea”. *Rivista dell’Associazione Italiana dei Costituzionalisti*, 3 (2017), p. 1 and the following. See also Massimo Fragola, “Sovranità dello Stato membro e ordinamento dell’Unione europea” [en Massimo Fragola, coord.: *Temi di diritto dell’Unione europea*, Milano, Giuffrè, 2015], p. 1 and the following; Ugo Draetta, “La Costituzione europea e il nodo della sovranità nazionale”. *Il diritto dell’Unione europea*, 3 (2004), pp. 519-535; Roberto Toniatti, “Forma di Stato comunitario, sovranità e principio di sovranazionalità: una difficile sintesi”. *Diritto pubblico comparato europeo*, 3 (2003), pp. 1552-1562; Enzo Cannizzaro, “Democrazia e sovranità nei rapporti fra Stati membri e Unione europea”. *Il diritto dell’Unione europea*, 2 (2000), pp. 241-265. See the collection of writings contained in Giandonato Caggiano (coord.), *Integrazione europea e sovranazionalità*, Bari, Cacucci, 2018. In the foreign literature see Rainer Arnold (coord.), *Limitations of National Sovereignty through European Integration*, New York, Springer, 2016; Jiri Pribán, *Sovereignty in Post-Sovereign Society, A Systems Theory of European Constitutionalism*, London, Routledge, 2015, as well as Richard Bellamy, “A European Republic of Sovereign States: Sovereignty, republicanism and the European Union”. *European Journal Political Theory*, 2 (2017), pp. 188-209; Id., “Sovereignty, post-sovereignty and pre-sovereignty: Reconceptualising the state, rights and democracy in the EU” [en Neil Walker, coord.: *Sovereignty in Transition*, Oxford, 2003], pp. 167-190.

The outstanding originality of the “phenomenon” of European integration, within the landscape of the other forms of organization of the institutionalized relationships between States, finds, among others, its significant element precisely in the above mentioned mixed - interstate and interindividual - dimension of the phenomenon itself, expressed in all its outcomes. If the EU represents a new entity, different from all the other international organizations, the most significant point of those pronouncements is to be found in the necessity of guaranteeing to the individuals an essential role in the construction of the European Community while, starting from that, the central role of the protection of the individual is continuously affirmed by the Court. On the other hand, as observed by the Advocate General Yves Bot in paragraph 78 of his Conclusions in the joint cases *Bauer e Willmeroth*¹⁸ (Grand Chamber, 6 November 2018) the reference of some provisions of primary law, first of all, to the member States, cannot exclude the possibility that they can be applied to the relationships between private individuals¹⁹.

Such character of *originality* of the community “phenomenon” could not but clash on the classical conceptual paradigm of sovereignty which, as it is well known, is strongly linked to the dimension of statehood. Obviously the EU, just like – and even more so – than the other international organizations, cannot but be based on a different model of sovereignty, absolutely not comparable with the ternary model generally valid for States, considered as supremacy over a territory or a people. This concept of sovereignty must refer, in line with what affirmed above, to a different conceptual pattern, allowing the integration of many national, all sovereign and independent, legal orders. It seems, then, meaningless to refer the legal order pattern, valid for the EU, to the model of state sovereignty, recognizing in the latter the unpassable limit for the former, in a perspective of continuous, potential conflict between the two different legal orders (that of the EU law and the national ones).

There is also another element on which it is worth briefly focusing our attention. If the development of the concept of sovereignty, from a classical point of view, consists of the gradual replacement of the sovereignty of the monarch with the people’s sovereignty, as a concept of democracy – in its legal-formal aspects – can it be used with regard to the above mentioned outstanding peculiarities of the EU legal order, also in light of its ability to consider, as its subjects, both the individuals and the States²⁰?

¹⁸ Court of Justice, judgment of 6 November 2018, *Stadt Wuppertal v. Maria Elisabeth Bauer, Volker Willmeroth e K v. Martina Broßonn*, joined cases C-569/16 and C-570/16.

¹⁹ Already the Court had been clear in this sense. See the Court of Justice, judgment of 17 April 2018, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e. V.*, case C-414/16.

²⁰ Enzo Cannizzaro, *Democrazia e sovranità ...*, cited, in part. p. 248.

Since a state's sovereignty is not *per se* conflicting with a people's sovereignty²¹, it is evident that the concept of European democracy cannot but be "adapted" and shaped according to the structure of the EU legal order and to its three dimensions: the international, the supranational and the infra-national dimension.

It is well known that one of the characters of the national State is represented by its ability to combine the limitation of sovereignty and the implementation of the democratic principles, inside it, with the exercise of sovereignty, released from the subjection to democratic criteria, in the international context. With reference to its participation in the EU, it could be affirmed that within such context, the limitation of the external sovereignty of the State has inverted such relationship, in the sense that the limitation of sovereignty within the EU has not helped to increase the level of internal democracy of the member States, but rather to reduce its quality²². The member States, in other words, have been able – thanks to the process of integration and by means of the transfer of competences to an international organization – to exercise inside themselves the same portion of sovereignty which could not be exercised previously, because of its necessary subjection to the conditions of legitimacy typical of the democratic constitutional state.

To a European *demos* that has never existed and continues not to exist, and to a community construction to which a deficit of democracy has always been attributed²³ – with special reference to the ways of transferring powers to the national parliaments in favor of the Community, without suitable compensation measures at a European level – the Treaty of Lisbon has answered first of all with its art. 2 of the Treaty on the EU. This rule, in founding the EU on a list of values, mentions among others the value of democracy, which is, of course, not easy to define either from a regulatory or from a conceptual point of view. In addition to this, the Treaty itself has dedicated its Title II to the democratic principles, both in the form of representative democracy and of participatory democracy, thus involving not only the European parliament but also the national ones and, in some ways, civil society itself. It is in fact a *minimum concept* of democracy which can be referred to the people's will as legitimization of the expression and representation of regulatory power, which

²¹ In Richard Bellamy, "A European Republic of Sovereign States: Sovereignty, republicanism and the European Union". *European Journal of Political Theory*, 2 (2017), pp. 188-209, in part. on p. 188 it is affirmed "state sovereignty as necessary for a form of popular sovereignty capable of realizing the republican value of non domination...".

²² In this sense Francisco Balaguer Callejón, "Le Corti costituzionali e il processo di integrazione europea" [en VV.AA., *Le Corti Costituzionali e il processo di integrazione europea*, *Annuario 2006 - La circolazione dei modelli e delle tecniche del giudizio di costituzionalità in Europa*, Napoli, Jovene, 2010], pp. 257-308.

²³ As regards the main aspects of the debate concerning the deficit of democracy, see for all, Christophe Beaudouin, *La démocratie à l'épreuve de l'intégration européenne*, Paris, L.G.D.J., 2014.

requires an effort of deepening of the concept itself, within a new – desirable – construction stage. Being aimed at carrying out a complete project of deepening the concept of integration and overcoming the outstanding impulses to the “breaking up”, it could better define the transformation of national sovereignty beyond the dimension of statehood²⁴.

3. The new limits of the so-called “euro-national” sovereignty, within the framework of the gradual enlargement of the competences of the European Union

We have already referred, on one side, to the utmost celebration in an absolute sense in Bodin²⁵ and on the other side to the penetrating kelsenian critique, as well as to the most recent reformulations of the theory of the “limited sovereignty”, the concept of which has transformed itself over the years. Deprived of its specific territory and nation, from being the exclusive holder of competences, it has become “co-holder” – actual or potential – of its right to exist, because of the existence of other entities of International Law such as (at least some) international organizations and especially the EU. A sovereignty based on the shared performance of national sovereign functions, in line with the paradigms of a “shared sovereignty” and of a “shared Constitution”²⁶. A concept well expressed by art. 88.1 of the French Constitution which provides “La République participe à l’Union européenne constituée d’Etats qui ont choisi librement d’exercer en commun certaines de leurs compétences en vertu du traité sur l’Union européenne et du traité sur le fonctionnement de l’Union européenne...”²⁷. Then, if it is not possible to share the statement of the doctrine concerning the transformations occurred within the international community-according to which, as it has been illustrated, they tend to penetrate “the core of the sanctuary of sovereignty itself”²⁸, it has been long been pointed out how sovereignty follows a dynamic, continuously developing and delicate process, which means that it can be every day called into question.

²⁴ Let us refer to Angela Di Stasi, “Diritti fondamentali e processo di (dis)integrazione europea: una relazione complessa” [en Maria Caterina Baruffi e Matteo Ortino, coords.: *Dai Trattati di Roma a Brexit e oltre*, Napoli, Edizioni scientifiche italiane, 2018], pp. 25-50.

²⁵ Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth*, Translation by J.H. Franklin, Cambridge, 1993. See once again, Hans Kelsen, *Das Problem ...*, already quoted.

²⁶ According to Antonio Ruggeri, “Una Costituzione ed un diritto costituzionale per l’Europa unita” [en Pasquale Costanzo, Luca Mezzetti, Antonio Ruggeri, *Lineamenti di diritto costituzionale dell’Unione europea*, Torino, Giappichelli, 2019], p. 2 and the following.

²⁷ Addition as a consequence of the constitutional review of 2008.

²⁸ See Bing Cheng, “La jurimetrie: sense et mesure de la souveraineté et de la compétence national”. *Journal de droit international*, 3 (1991), pp. 579-599.

Such a *soft sovereignty*, in a certain way sense in continuous transition²⁹, at least with reference to the fluidity of its borders, more than ever at the present stage of the process of European integration, finds itself faced, in a rather tormented way, with the dialectic relationship between the single sovereign powers, traditionally exercised by the States, and their limitations, in some cases significant (let us recall the monetary sovereignty) up to the point of generating real “conflicts” of sovereignty. It is obvious that if the reference to the limitations of sovereignty “allowed” by our legal order, contained in our Republican Constitution (art. 11) does not appear suitable either to prove the failure of state sovereignty, or to prove the rise of a so-called European sovereignty (in the absolute sense of the expression), today’s concept of sovereignty still seems to be forced to register – and perhaps to tolerate – a breaking up between its political element, strongly pertaining to the States, and its legal-regulating dimension, which is much more fragmented³⁰.

What is then the maximum level of depth of the integration between States within an institutionalized union, which allows not to affect the tendential monolithic and unitary character of sovereignty as state sovereignty? In other terms, until which point can we envisage the exercise of sovereign competences by a union of States, in some way *sui generis*, as it is the EU “outside” the state body?

In the classical conceptions of sovereignty no external exercise of competences is provided, because the sovereign state represents the unique point of reference of legal relations, deriving from the performance of both the internal competences and the international ones³¹.

Now, after having observed that sovereignty (as *summa potestas*, to quote Bodin again) implies a character of totality and absoluteness of the legal order, it is difficult to assume that it can be divided, as this concept conflicts with its logic structure³². The delicate relationship sovereignty-competences has been often represented as a “zero sum game”, insofar as the growth of the powers of the Community/European Union causes a decrease in the power of the member States and a reduction of their sovereignty³³.

The 60+ years of deepening of the European integration process have caused, as it is well known, a consequential expansion of the competences

²⁹ Neil Walker, “Late Sovereignty in the European Union” [en. Neil Walker, coord.: *Sovereignty in transition*, Portland, Oregon, 2003], p. 18 and the following.

³⁰ Enzo Cannizzaro, “Il pluralismo nell’ordinamento giuridico europeo e la questione della sovranità”. *Quaderni Fiorentini*, 1 (2002), p. 245 and the following.

³¹ See Kurt Mills, “Reconstructing Sovereignty: A Human Rights Perspective”. *Netherland Quarterly of Human Rights*, 3 (1997), pp. 267-290.

³² Bruno de Witte, “Sovereignty and European Integration. The Weight of Legal Tradition”. *Maastricht Journal of European and Comparative Law*, 1 (1995), pp. 145-173.

³³ See from a critical point of view Joseph Halevi Horowitz Weiler, “L’Unione e gli Stati membri: competenze e sovranità”. *Quaderni costituzionali*, 1 (2000), p. 5 and the following, in part. p. 7.

of the European institutions, with the consequent limitation of the national ones. This, of course, without transforming the EU from body with listed competences to body with general competences since the non-original character of the powers given by the member States to the EU is proved by the voluntary character of such transfer which is reflected in its reliance on the contents and the limits of it, as set out in the institutional agreement and changed in the subsequent Treaties³⁴. Then, if the primary law does not fail to underline that any competence not given to the EU, because of provisions contained in the primary law, belongs to the member States (see in particular art. 4 par. 1 of the TEU but also art. 5 par. 2 of the TEU), the protection of the sovereignty of the member States finds a safe bulwark in the provision of par. 2 of art. 4 of the TEU referring to the respect by the EU of the "essential functions of the State".

The controversial theme of the limits of the competences assigned to the EU seemed to be overcome (starting from the Treaty of Maastricht) with the codification of the principles of conferral and subsidiarity, but also that of proportionality (today codified in art. 5 TEU), as limits to the exercise of the concurrent (or shared) competences given, according to art. 4 par. 2 TFEU, to the Union, while the exercise of the exclusive ones, provided by art. 3 TFEU, remains free from further influences, since in those contexts a unitary action is considered to be necessary. If, then, on the subjects of concurrent competence, a legislative intervention is allowed both by the Union and the member States, with a residual nature of the latter, according to art. 2 TFEU³⁵, the former keeps, instead, in the matters entrusted to the shared competence, a general legitimization to the introduction of homogeneous rules or harmonized regimes, following the principles of subsidiarity and proportionality.

That being said, even if the distinction of the fields of action, with reference to the different segments of the exclusive competences and of the concurrent ones seems, at first, to be certain, however the identification of the titularity of the former results in some way uncertain; the mere reading of the "sectors" listed by art. 3 TFEU shows the difficulty of identifying the exact limits of the exclusive conferrals, as they are defined with reference to undetermined scopes, often characterized by the setting of political and transversal objectives. But above all, if the enlargement of the scopes of competence of the EU can cause, as a consequence, a natural enlargement of the limits of the national regulations implementing the discipline of European origin, it is necessary to find equilibrium points between such phenomenon and the safety of the

³⁴ See Ugo Villani, *Istituzioni di Diritto dell'Unione europea*, Bari, Cacucci, 2020, p. 76 who underlines (our translation) the non original character of the powers of the EU, unlike the State which "is holder of the territorial sovereignty, as original title, since that it exercises an exclusive control on a certain territorial community".

³⁵ "...The member States exercise their competence inasmuch as the Union has not exercised its own competence".

intangible core of state sovereignty, insofar as the delicate sphere of the protection of fundamental rights (between state and ultra-state guarantees) is a very good observation field of a “moving watershed”.

4. The Charter of Fundamental Rights of the European Union and the question of its field of application to the member States

This watershed has brought to light a delicate question, with reference to the field of application of the Charter of Fundamental Rights of the European Union to the member States³⁶. Since its proclamation, as it is well known, the Charter has clearly set out the boundaries of such field of application³⁷. It is also known that the regulatory provisions contained in art. 51 of the Charter itself (and particularly in para. 1) have legitimized – and still legitimize – the applicability of its provisions, other than to “institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity”, also to the “Member States only when they are implementing the Union law”³⁸.

It is a *charter-catalogue* of the fundamental rights which, just because of its content of a “merely constitutional kind”³⁹, even before the acquisition of binding legal effectiveness with the entry into force of the Treaty of Lisbon, has showed to be, at least theoretically, suitable to represent a potential *vulnus* also with reference to the systems of guarantees of the rights granted by national laws⁴⁰. In addition to this, unlike most of the charters of rights which often find

³⁶ It is not possible here to give an account of the vast literature existing about the Charter. We just refer, among the general works, to Roberto Mastroianni, Oreste Pollicino, Silvia Allegrezza, Fabio Pappalardo, Orsola Razzolini (coords.), *Carta dei diritti fondamentali dell’Unione europea*, Milano, Giuffrè, 2017; Valeria Piccone, Oreste Pollicino (coords.), *La Carta dei diritti fondamentali dell’Unione europea. Efficacia ed effettività*, Napoli, Editoriale scientifica, 2018; Fabrice Picod, Sébastien Van Drooghenbroeck, *Charte des droits de l’Union européenne*, Bruxelles, Larcier, 2018.

³⁷ On a technical-legal level, among the different definitions of the value of the Charter, see Allan Rosas, Heidi KAILA, “L’application de la Charte des droits fondamentaux de l’Union européenne par la Cour de justice: un premier bilan”. *Il diritto dell’Unione europea*, 1 (2011), p. 1 and the following, in part. p. 3. See Commission Communication on the Charter of Fundamental Rights of the European Union, Brussels, 13.9.2000 COM (2000) 559 final, par. 11: “The Charter applies to the institutions and bodies of the Union, and to the Member States solely where they implement Union law “ and par. 30: “The Commission fully supports the solution chosen [...] addressing the provisions of the Charter to the institutions and bodies of the Union and to the Member States only when they are implementing Union law.” (emphasis added).

³⁸ In the different languages, the expressions used reveal some semantic “nuances”, as the English version shows: *are implementing* compared with the French version *mettent en œuvre* or the German version *bei der Durchführung*. See, among others, Julian Nussler, *Die Bindung der Mitgliedstaaten an die Unionsgrundrechte*, Tübingen, Mohr Siebeck, 2011, p. 54 and the following.

³⁹ See the definition given in the judgment n. 269/2017 of the Italian Constitutional Court, filed on 14 December 2017.

⁴⁰ On the importance of the Charter in the process of European integration, see Angela Di Stasi, *Diritti fondamentali e processo di (dis)integrazione europea...*, already quoted, in part. p. 29.

some difficulties in being applied in the case law⁴¹, the Charter has showed a kind of "anticipated application", thus confirming its potential. More in general, the normative practice of the Community institutions has registered an increasing recourse to chapters or single provisions of the Charter, as a whole of derived community law acts show.

With specific reference to the subject of this paper we will focus our attention on some problematic aspects concerning the application of the Charter by the member States of the EU which are more likely to influence the cut-off line between the competences of the EU and those of the member States. From the moment of its proclamation, doctrinal positions in favor of a restrictive interpretation of Art. 51, par. 1⁴² have not been lacking in this respect, or at least possibilistic ones, and since then, they have intersected with hypotheses of "extensive" or "broad" interpretation⁴³, while the latter was also configured as a sort of "non-reversible process" and considered, therefore, with worried reservations.⁴⁴

What is more, by the assumption by the Charter of the rank of primary law in the EU legal order, its provisions (unless they are not provided with the *self-executing* character) are also capable of direct effect. It is then particularly useful to set the limits to the obligations of "respecting the rights, observing the principles and promoting the application" (art. 51, par. 1) by the member States of the EU; this clearly enjoys the support of the case law of the Court of Justice, which has long been reconstructing the concept of "field of application of the community law" beyond the mere internal measures of execution of the law of the EU, with the consequential appearance of a series of "linking factors".

As recalled above, art. 51, par. 1 delimits, for the member States, the field of application of the Charter "exclusively in the implementation of EU law"⁴⁵.

⁴¹ See the considerations on this point in Norberto Bobbio, *L'età dei diritti*, Bologna, il Mulino, 1992.

⁴² See, among others, Gráinne de Búrca, "The Drafting of the European Union Charter of Fundamental Rights". *European Law Review*, 1 (2001), p. 136 and the following.

⁴³ In this sense Richard Clapham, "On Complementarity: Human Rights in the European Legal Orders". *Human Rights Law Journal*, 21 (2000), p. 313 and the following, in part. p. 313. See, for an extensive interpretation, Marta Cartabia, "Art. 51-Field of Application" [en William Thomas Mock, Gianmario Demuro, coords.: *Human Rights in Europe. Commentary on the Charter of fundamental rights of the European Union*, Durham NC, 2010], p. 320.

⁴⁴ On the inescapable character of such tendency, see Giuseppe Bronzini, "Le tutele dei diritti fondamentali e la loro effettività: il ruolo della Carta di Nizza". *Rivista giuridica del lavoro e della previdenza sociale*, 1 (2012), in part. p. 67. Roberto Mastroianni, "I diritti fondamentali dopo Lisbona tra conferme europee e malintesi nazionali", *Diritto pubblico comparato europeo*, 4 (2010), p. 21, deals with the application of the Charter, whenever it falls within the "umbra" of the community law.

⁴⁵ About art. 51 of the Charter, see Marta Cartabia, "Art. 51-Field of Application" [en William Thomas Mock, Gianmario Demuro, coords.: already quoted], p. 315 and the following; Thomas von Danwitz, Clemens Ladenburger, "Article 51 et suivant" [en Peter J. Tettinger, Klaus Stern, coords.: *Europäische Grundrechte-charta*, Munchen, Beck Verlag, 2006], p. 759 and the following; Marta Cartabia, "Art. 51" [en Raffaele Bifulco, Marta Cartabia, Alfonso Celotto, coords.: already quoted], p. 344 and the following; Luigi Ferrari Bravo, Francesco di Majo, Alfredo Rizzo, *Carta dei diritti*

The almost peremptory immediacy of the linguistic expression used seems, at first, to save it from more or less complex interpretation issues: the Charter is not applied, apparently, to the violations of fundamental rights which do not show any link with the law of the Union. Such link with Union law, already emphasized in the Communication from the Commission dated October 19th 2010, must be considered to exist, instead, in the case where the national legislation transposes a European directive in violation of fundamental rights or when a public authority applies a rule of the Union in violation of such rights, or when a final judicial decision of a member State applies or changes the law of the Union in violation of fundamental rights⁴⁶. In all these cases, the non-application by the States of the provisions of the Charter may lead to an infringement procedure before the Court of Justice or, in the most serious cases, to the subjection to “multilateral surveillance”, referred to by art. 7 of the TEU.

Not less interesting is then the analysis of art. 51, par. 1, if we consider it from a logic-systematic point of view, which is that adopted by the Court of Justice in its case law “interpretation” and, even before this interpretation, in the wider practice adopted by it (as regards the protection of fundamental rights) aiming at defining the “application field of community law” also to the national legislator: a practice that the Charter, in its receptive nature, was bound to absorb. A first observation concerns precisely the above mentioned phenomenon of the enlargement of the competences of the EU which, in covering the most part of “the range of the national collective life”⁴⁷, causes, as a consequence, a natural widening of the borders of the national rules implementing European legislation. In addition to this, there is a further possibility of extension of the field of application of the Charter within sectors that are of exclusive competence of the European institutions, which, nevertheless, appear to be influenced or influenceable by several “transversal” matters; these are specific sectors of intervention in which “many different interests result to be gathered and interlaced *inter se*, leading to different competences⁴⁸”. We cannot avoid recalling that, also as regards the matters of exclusive competence of the States,

fondamentali dell’Unione europea, Milano, Giuffrè, 2001, p. 197 and the following. Let us refer also to Angela Di Stasi, “L’ambito di applicazione della Carta dei diritti fondamentali per gli Stati membri dell’Unione europea: verso nuovi limiti o “confini” tra ordinamenti?” [en VV.AA., coords.: Scritti in onore di Giuseppe Tesaro, Napoli, Editoriale scientifica, 2014], pp. 165-202.

⁴⁶ See “Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union”, 19.10.2010, COM(2010) 573 def., par. 3.1 In it the recourse to an expression being extremely generic, as that of *link* between the national rules and the law of the EU, seems not to be meaningless.

⁴⁷ See the position of Antonio Tizzano, reported in *The EU Charter of Fundamental Rights. Why a Fudge Won’t Work*, in *Open Europe*, 2007, which can be looked over in <http://www.openeurope.org.uk/Content/Documents/PDFs/charteranalysis.pdf>, p. 17 where it is underlined that: “It is difficult now to find a field of national law which is not affected in any way with Union law [...]”.

⁴⁸ See the Constitutional Court, judgment of 28 December 2006, no. 450.

the "dogma" of the "merely internal situation", has been long reconsidered⁴⁹. The non-full possibility of defining the cut-off line of the "communitarized" control on the respect of fundamental rights is testified, at last, by the possibility of finding the required "connection with the community law", even when the State appeals to derogations from community constraints⁵⁰.

It is also necessary to consider that in the Charter, the limitation *ratione materiae* of its applicability for the state entities to the more or less wide "field of implementation of EU law" cannot but be interpreted in the sense of a strict connection with par. 2 of the same art. 51 (but also with par. 1 of art. 6 of the TEU) on the non-possibility of extension of the competences of the Union as an effect of the Charter's provisions. In addition to this, albeit within the limits connected with this kind of document, Declaration no.1 concerning the Charter confirms the provision of par. 2 of art. 51⁵¹, by reaffirming a sort of "neutrality" of the same Charter, in relation to the competences of the EU⁵², as logical consideration of the very nature of the rights legitimized by it.

Is it possible, then, to foresee a possible *vis expansiva* of the limit set by par. 1 of art. 51 with reference to the States, that par. 2 of the same provision would tend to soften with regard to the institutions of the EU? This would seem to result, in any case, and regardless of the complete definition of the relationship between the two paragraphs of the rule, in a situation where the institutions of the Union are "natural addressees" of the obligations deriving from the Charter⁵³, while the Member States are instead "mediated" or "reflected" addressees, subject to the operation of specific and strict material limits.

A hermeneutic element *per relationem* in the interpretation of the selected segment of art. 51, could be found in the "Explanation" concerning it⁵⁴. In this

⁴⁹ It is witnessed by the case law of the Court of Justice affirming the obligation of the compliance, by the member States, with the general principles of the legal order of the Union which shows a sort of "attraction" of the internal debate, even if it concerns matters of state competence, in the European legal order, insofar as such situation can be connected with the legal order of the European Union.

⁵⁰ See in this regard, among others, Court of Justice (Grand Chamber), judgment of 21 May 2019, *European Commission v. Hungary*, case C-235/17, par. 65-66.

⁵¹ It affirms that "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties".

⁵² Such connections are frequent in the case law of the Court of Justice. See order of 12 November 2010, *Krasimir Asparuhov Estov and others v. Ministerski savet na Republika Bulgaria*, case C-339/10, par. 12 and order of 1 March 2011, *Claude Chartry v. Belgian State*, case C-457/09, par. 24.

⁵³ Marta Cartabia, Art. 51-Field of Application, already quoted, underlines that "the Charter of Rights is applicable first and foremost to the institutions, bodies, offices and agencies of the European Union" (p. 316).

⁵⁴ The two *leading cases* represented by the Court of Justice are referred to the judgment *Hubert Wachauf*, case C-5/88; the judgment of 18 June 1991, *ERT AE v. Dimotiki Etairia Pliroforissis e Sotirios Kouvelas*, case 260/89, and also the judgment of 18 December 1997, *Daniele Annibaldi v. Sindaco del Comune di Guidonia e Presidente Regione Lazio*, case C-309/96, as well as, for confirmation, see the judgment of 13 April 2000, *Kjell Karlsson and others*, case C-292/97, par. 37.

explanation, the effort of defining in a wider sense the scope of the expression “within the field of application of the Union law⁵⁵” avails itself of the reference to the case law of the Court of Justice which, without interruption factors and according to a substantial continuity, concerns cases covering a range well beyond the mere execution of the Union law.

In light of the last observation, we cannot but point out that the (following) case law investigation on the limits of applicability of the Charter to the member States has to be aimed at checking whether the highest possible standard of protection has been reached⁵⁶. But which elements concerning the exact “limits” of applicability of the Charter by the member States can be found in the case law of the Court of Justice, which shows a significant continuity both before and after it entered into force and became legally binding⁵⁷?

The limit given to the scrutiny of the Court as regards national rules and the application of its provisions, appears strongly linked to the practical application of the often-cited incidental expression (solely) “in the implementation of the Union law⁵⁸”. The judges of the Court continuously repeat that the “fundamental rights guaranteed in the legal order of the EU are applicable in all situations governed by EU law, but not outside such situations”⁵⁹.

⁵⁵ I refer to the text of the so called updated Explanations (in GUEE C 303 del 14 December 2007) while in the “original explanations”, the expression used was that of “application framework”.

⁵⁶ See Court of Justice (Grand Chamber), judgment of 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, case C-617/10, par. 29.

⁵⁷ See, within this perspective, Sara Iglesias Sánchez, “The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ’s approach to fundamental rights”. *Common Market Law Review*, 5 (2012), pp. 1565-1612.

⁵⁸ See, at last, Court of Justice, judgment of 22 January 2020, *Almudena Baldonado Martín v. Ayuntamiento de Madrid*, case C-177/18, par. 57, but also the Grand Chamber, judgment of 19 November 2019, *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v. Hyvinvointialan liitto ry*, *cit.*, par. 42; judgment of 28 November 2019, *DK*, case C-653/19 PPU, par. 40; judgment of 7 November 2019, *Asociación Española de la Industria Eléctrica (UNESA), Endesa Generación SA v. Administración General del Estado, Iberdrola Generación Nuclear SAU, e Endesa Generación SA*, *Iberdrola Generación Nuclear SAU v. Administración General del Estado*, joined cases from C-80/18 to C-83/18, par. 37; order of 24 September 2019, *QR*, already quoted, par. 38; judgment of 18 September 2019, *José Manuel Ortiz Mesonero v. UTE Luz Madrid Centro*, already quoted, par. 49; judgment of 13 June 2019, *Gianluca Moro*, case C-646/17, par. 66; order of 15 May 2019, *AQ and others and ZQ v. Corte dei conti, Presidenza del Consiglio dei Ministri, Ministero dell’Economia e delle Finanze, Inps-Gestione*, joined cases C-789/18 and C-790/18, par. 27; Grand Chamber, judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v. Tetsuji Shimizu*, case C-684/16, par. 76; Grand Chamber, judgment of 6 November 2018, *Stadt Wuppertal v. Maria Elisabeth Bauer, Volker Willmeroth v. Martina Broßmann*, joined cases C-569/16 e C-570/16, par. 87; judgment of 25 October 2018, *Anodiki Services EPE v. GNA, O Evangelismos – Ophthalmiatreio Athinon – Polykliniki, Geniko Oγκολογικο Νοσοκομείο Kίφισιας – (GONK) «Oi Agioi Anargyroi»*, already quoted, par. 38; judgment of 19 April 2018, *Consorzio Italian Management, Catania Multiservizi SpA v. Rete Ferroviaria Italiana SpA*, already quoted, par. 33.

⁵⁹ See Court of Justice (Grand Chamber), judgments of 19 November 2019 *A.K. and others*, joined cases C-585/18, C-624/18 and C-625/18, par. 78 and *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v. Hyvinvointialan liitto ry*, already quoted, par. 43; see also the judgment of 7 November 2019, *Asociación Española de la Industria Eléctrica (UNESA), Endesa Generación SA v. Administración General del Estado, Iberdrola Generación Nuclear SAU, e Endesa Generación SA, Iberdrola*

In the judgement dated 22 January 2020, *Almudena Baldonado Martín contro Ayuntamiento de Madrid*, the Court once again reminds that the provisions of the Charter are applied to the member States exclusively while they are "implementing the EU law" which "presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other"⁶⁰. In the same judgement, the Court repeats that in order to establish whether according to art. 51, par. 1 a national provision falls within the scope of implementation of EU law, "it is necessary to determine, inter alia, whether that national legislation is intended to implement a provision of EU law; the nature of the legislation at issue and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or rules which are capable of affecting it".

In this regard, the *Grande Chambre* points out in the judgement *TSN* dated 19 November 2019⁶¹ that the mere fact that domestic measures are adopted within an area in which the EU has powers "cannot bring those measures within the scope of EU law, and, therefore, cannot render the Charter applicable" and "where the provisions of EU law in the area concerned do not govern an aspect of a given situation and do not impose any specific obligation on the Member States with regard thereto, the national rule enacted by a Member State as regards that aspect falls outside the scope of the Charter and the situation concerned cannot be assessed in the light of the provisions of the Charter"⁶².

Particularly relevant is then the statement contained in the judgement concerning the *UNESA* case, according to which the Court is not competent, when a legal situation does not fall within the scope of EU law and the "provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction"⁶³, so that, in such circumstances, it is necessary to check

Generación Nuclear SAU v Administración General del Estado, already quoted, par. 38 and the judgment of 13 June 2019, *Gianluca Moro*, already quoted, par. 67 besides the already quoted order *Åklagaren* (par. 19) of 26 February 2013, case C-617/10. See the conclusions filed on May 7th 2020 by the Advocate General Juliane Kokott, *YS v. NK*, case C-223/19, par. 100, but also the Conclusions of 5 March 2020, *European Commission c. Hungary*, case C-66/18, par. 128.

⁶⁰ Court of Justice, judgment of 22 January 2020, *Almudena Baldonado Martín v. Ayuntamiento de Madrid*, already quoted, par. 58. In the same sense, see order of the Court of Justice of 4 June 2020, *TJ v. Balga Srl*, case C-32/20, par. 27 and order of the Court of Justice of 7 September 2017, *Demarchi Gino*, joined orders C-177 and 178/17, par. 19. See previously, also the judgment of 6 October 2016, *Paoletti and others*, case C-218/15, par. 14, and the therein quoted case law.

⁶¹ Court of Justice (Grand Chamber), judgment of 19 November 2019, *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v. Hyvinvointialan liittory*, already quoted, par. 46. See, in this sense, the judgment of 10 July 2014, *Julián Hernández and others*, case C-198/13, par. 36 and the therein quoted case law.

⁶² Points 46 and 53 of the judgment.

⁶³ In the same sense, Court of Justice, order of 15 May 2019, *AQ and others* and *ZQ v. Corte dei Conti, Presidenza del Consiglio dei Ministri, Ministero dell' Economia e delle Finanze, Inps-Gestione*, already quoted, par. 28.

if the subject of the dispute referred to in the main proceedings concerns the interpretation or the application of a rule of EU law different from those contained in the Charter⁶⁴.

Then the possibility of referring to the Charter and to the fundamental rights contained therein, “for the acts of the member States issued on the execution of the obligations deriving from EU law, or, more in general, falling within the scope of EU law”, clearly shows the already mentioned potential “superimposition between levels of protection, because of the different orders (EU law, national constitutional EU and ECHR” acting within the jurisdictional and judicial European space⁶⁵, which cannot but be taken into account also in the field of fundamental rights, at least not without questioning the delicate balance between national sovereignty and derived *supranational* powers⁶⁶.

6. Conclusions

The process of European integration has undoubtedly not created a new sovereignty, in some way alternative, of the EU, which remains a functional body with well-defined listed competences, meant for reaching certain goals set out in the founding Treaty and redefined by its subsequent amendments. It is also undeniable that the increasing burden of legal obligations which, over the development of a now-mature process of European integration, have limited, on a voluntary basis, the exercise of state sovereignty in various fields (the legislative, the jurisdictional and the administrative one) does not deprive the States of their qualification of sovereign entities, insofar as it results to be a form or a way of exercising the states’ sovereignty itself. The limits to the latter for the benefit of the EU evidently do not distort the essential content of sovereignty itself seen – as has been pointed out – the voluntariness of the renunciation, on the state side, to the exercise of certain powers where the treaties themselves enshrine the balance in the dynamic tension between state sovereignty and the exercise of activities by the EU as functional to the common interest.

We can then affirm that the reference of art.4 of TEU to the respect of the national identity of the States (with reference to the loyal cooperation between the EU and the member States)⁶⁷ and the contents of the subsequent

⁶⁴ Court of Justice, judgment of 7 November 2019, *Asociación Española de la Industria Eléctrica (UNESA), Endesa Generación SA v. Administración General del Estado, Iberdrola Generación Nuclear SAU and Endesa Generación SA, Iberdrola Generación Nuclear SAU v. Administración General del Estado*, already quoted, par. 39. The Advocate General Bot had already come to the same conclusions in the judgment of 26 May 2016, *Daouidi*, case C-395/15, par. 32 and the following.

⁶⁵ See the Conclusions of the Advocate General E. Sharpston, of 30 September 2010, *Ruiz Zambrano v. Office National de l’emploi (ONEm)*, case C-34/09, par. 156.

⁶⁶ See Andrea Guazzarotti, *Sovranità...*, already quoted, pp. 10-12.

⁶⁷ See Lucia Serena Rossi, “2, 4, 6 (TUE)... l’interpretazione dell’“Identity Clause” alla luce

art. 5, safeguarding the principle of conferral of competences, consolidate and guarantee a general system of state sovereignty which continues to be susceptible to partial conferrals to a union of States such as the EU, partly absolutely not, thus delineating a so-called euro-national sovereignty⁶⁸.

Now, precisely with reference to the gradual conferral of competences to the institutions of the EU and to a certain autonomy which they enjoy, attempts have been made to frame them as elements of an intermediate stage of the transformation of the EU into a federal State. It is absolutely evident that such situation, in this historical period, cannot continue to exist for long, since that, even if vibrant appeals in such direction exist⁶⁹, the perspective of the evolution of the EU into a federal State, to date, is not concrete⁷⁰.

As it is well known, the generic character of the expression used by art. 11 of our Constitution has caused a difficult *community path* of our Constitutional Court⁷¹ and generated some moments, also quite recent, of discontinuity/reaffirmation of the primacy of the constitutional interpretation of the Charter of fundamental rights (ruling of the Constitutional Court 269/2017) by which the Constitutional Court has affirmed its competence to exercise a judicial review also as regards the *self-executing* rules of the Charter of the fundamental rights⁷². The subsequent judgements dated 21 February 2019, n. 20, 21 March 2019, n. 63, 10 May 2019 n. 112, the orders dated 10 May 2019 n. 117 and 30 July 2020 n. 182 seem to have brought the matter in the right context, opening to a better dialogue between the Constitutional Court and, at the same time, between the ordinary judges and the Court of Justice. This, however, without prejudice to the coexistence of a whole of remedies protecting the first place occupied by EU law and enhancing, at different levels, the means for protecting the fundamental rights.

In a system of multilevel guarantees, in which we find a competition between the action of the national Constitutional Courts and that of the Court of Justice, as well as of the courts of legitimacy and common courts, the application of the fundamental rights granted by EU law requires a necessary balance both

dei valori fondamentali dell'UE" [en VV.AA., coords.: *Liber Amicorum* Antonio Tizzano, Torino, Giappichelli, 2018], pp. 859-870.

⁶⁸ See, in this sense, Massimo Panebianco, Angela Di Stasi, L'Euro-G8. Contributo alla teoria dello stato euro-globale..., already cited, as corollary of the idea of a euro-global State.

⁶⁹ For a more cautious approach, see Ennio Triggiani, "Il difficile cammino dell'Unione verso uno Stato federale" [en Giandonato Caggiano, coord.: *Integrazione europea e sovranazionalità*, Bari, Cacucci, 2018], pp. 9-16.

⁷⁰ See, in this sense, Yilmaz Kaplan, "(Re)considering sovereignty in the European integration process". *Asian Journal of German and European Studies*, 3 (2018), pp. 1-11, p. 8.

⁷¹ This expression, which is popular now, was used by Paolo Barile, "Il cammino comunitario della Corte". *Giurisprudenza costituzionale*, I (1973), p. 2401 and the following.

⁷² We read, in this regard, that in the hypotheses of "double prejudicial conditions" if a law causes doubts of illegitimacy, both as regards the rights protected by the Italian Constitution, and as regards those guaranteed by the Charter of Nice/Strasbourg, first of all the question of constitutional legitimacy must be raised.

between the different levels of jurisdiction within the State and between the same principles and rights established at European level and those enshrined in the constitutional charters of the member states. The result is a contextual critical review of the relationship between the States and the Union, in order to achieve a more accurate and consistent definition of the areas of competence of the former, whose rules compete with the European ones, in respect of the principles of loyal collaboration and solidarity, and to build an integrated legal order⁷³. Such osmotic relationship between the different levels of protection is the distinguishing feature of the European legal order and as such it must be defended and protected; it consists of a circulation from top to bottom and viceversa, according to which the fundamental principles guaranteed by the single constitutional legal orders are adapted and are made their own by the Court of Justice, which transforms them into primary sources of EU law, so that those constitutional principles themselves, once they have been enhanced by the autonomous value given by the interpretation of the Court and have become shared, can newly be acknowledged in the single legal orders from which they come.

Within this complex framework, the definition of the limits of application of the Charter of the fundamental rights, as the analyzed case law shows, results to be complex and necessary for the wise exercise of a so-called euro-national sovereignty, as well as for a well-established relationship between sovereignty and statehood...beyond the ambiguity of the concept of crisis of sovereignty⁷⁴. In the context of the permanent debate about the transfer of sovereign powers to the European “building”, the idea that sovereignty is shared between the member States and the supranational institutions according to mobile patterns seems to be convincing; therefore, if it is true that integration processes are characterized by a strong dynamism, the consequence is that such character can be found also in the balances concerning the performance of functions which depend on the reference regulatory framework and the specific historical period.

In conclusion, the emergence of new factors mining the solidity of such “building”, *ab intra* and *ab extra*, poses the need to start a new “community path” to re-found the process of European integration. A *community path*, which, within the guarantee of the highest standard of protection of fundamental rights, succeeds in looking at the EU, among costs and benefits of European integration, as the most advanced form of protection of state sovereignty.

⁷³ So Ruggiero Cafari Panico, “Conclusioni” [en Angela Di Stasi, Lucia Serena Rossi, coords.: *Lo spazio di libertà...already quoted*], p. 543 and the following.

⁷⁴ See, among others, the radical hypothesis made by Luigi Ferrajoli, *La sovranità nel mondo moderno*, Bari, Laterza, 1997.

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