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## The Charter of Nice in the law in action: an investigation into the judges' statement of reasons (2000-2008)

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## **The Charter of Nice in the law in action: an investigation into the judges' statement of reasons (2000-2008)\***

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\* For the realisation of this research, reference has been made to the dossier compiled by F. AMICI-V.PAPA-E. SACCA, *The Courts and the Nice Charter. Technical arguments and interpretative activity*, visible on the site <http://www.lex.unict.it/eurolabor/en/research/dossier.htm>

\*\* This work is entirely the result of a common reflexion of the authors.

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## 1. Methodological introduction to Courts' use of the Nice Charter.

The Charter of Fundamental Rights of the European Union, proclaimed in Nice in December 2000, re-proclaimed and signed by the presidents of Parliament, of the Council and of the Commission in Strasbourg on the 12th of December 2007, was closely followed by the signing of the Treaty that modified the institutive Treaties in Lisbon, 13<sup>th</sup> of December 2007.

The history of the Charter is well-known and therefore here will be dealt with only in brief. Originally destined to be incorporated into the European Constitution, the Charter of Nice came to the same end. Following the failure of the legislative adoption process, the same term "constitution" was eliminated from successive attempts at reform with obvious disappointment on the part of those who had hoped for the constitutional consecration of fundamental rights, and in particular of social rights<sup>1</sup>.

With the Treaty that modified the institutive Treaties, hope was rekindled; art. 6 of the EU Treaty, reformed to 1 co., was, in fact provided that "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties"<sup>2</sup>.

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(<sup>1</sup>) A. SOMMA is very pessimistic about the possibility that EU fundamental rights codified in the Charter of Nice could create a framework of hard regulations to avoid a reduction in the levels of protection assured by the national legal systems, in *Soft law sed law. Diritto morbido e neocorporativismo nella costruzione dell'Europa dei mercati e nella distruzione dell'Europa dei diritti*, RCDP, 2008, 437 ss.

<sup>2</sup> During the European Council of Brussels held on the 20<sup>th</sup> June 2008 it was stressed that «The European Council recalls that the entry into force of the Treaty of Lisbon requires ratification by each of the 27 Member States in accordance with their respective constitutional requirements. It reaffirms its wish to see the Treaty enter into force by the end of 2009 ». With specific regard to the particular position of Ireland, the Council established that «Having carefully noted the concerns of the Irish people as set out by the Taoiseach, the European Council, at its meeting of 11-12 December 2008, agreed that, provided the Treaty of Lisbon enters into force, a decision would be taken, in accordance with the necessary legal procedures, to the effect that the Commission shall continue to include one national of each Member State. 3. The European Council also agreed that other concerns of the Irish people, as presented by the Taoiseach, relating to taxation policy, the right to life, education and the family, and Ireland's traditional policy of military neutrality, would be addressed to the mutual satisfaction of Ireland and the other Member States, by way of the necessary legal guarantees. It was also agreed that the high importance attached to a number of social issues, including workers' rights, would be confirmed». Furthermore, with reference to the Charter of Nice, The Council concluded that «Nothing in the Treaty of Lisbon attributing legal status to the Charter of Fundamental Rights of the European Union, or in the provisions of that Treaty in the area of Freedom, Security and

Against this backdrop of tormented normative procedure which reflects the general political difficulties regarding the process of integration, the first signs of law in action began to emerge, created by the judiciary of the Court of Justice, and even earlier by the Advocates General.

Following its solemn proclamation, the importance of the Charter of Nice became immediately apparent, not only due to its political significance, but also due to its juridical implications, both real and potential<sup>3</sup>, as the first catalogue of rights specific to the EU<sup>4</sup>. In the process of forming constitutional orders, legal scholars tend to recognise an increasingly important role to the founding norms, a/o recognising fundamental rights, compared to the rules of organisation and implementation of the system itself and to the question itself of sovereignty<sup>5</sup>.

It is precisely for this reason that we considered it useful to conduct research on a Courts' decisions which would indicate above all the effects of the Charter of Nice on supranational and national legal systems, but also reciprocal relationships between systems. In brief, in the light of careful analysis of the judgments of the Court of Luxembourg, of the General Advocate's Conclusions and of national judges' rulings, we have the first real acid test of the juridical power of the Charter<sup>6</sup>.

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Justice affects in any way the scope and applicability of the protection of the right to life in Article 40.3.1, 40.3.2 and 40.3.3, the protection of the family in Article 41 and the protection of the rights in respect of education in Articles 42 and 44.2.4 and 44.2.5 provided by the Constitution of Ireland».

<sup>3</sup> S. GIUBBONI, *Solidarietà e sicurezza sociale nella Carta dei diritti fondamentali dell'Unione Europea*, DLRI, 2001, 617 ss.

<sup>4</sup> M. CARTABIA, *Una Carta dei diritti fondamentali dell'Unione Europea*, Quad. cost., 2000, 459 ss.

<sup>5</sup> See for all, A SPADARO, *Verso la Costituzione europea: il problema delle garanzie giurisdizionali dei diritti*, DPCE, 2003, 314 ss. and *ibid.* further references to the debate of constitutional doctrine. In particular on the various constitutional structures and on the collocation of rights above all in the "long" constitutions, see R. GUASTINI, *Teoria e ideologia dell'interpretazione costituzionale*, GCost., 2006, 1, 751 ss.

<sup>6</sup> From another point of view, the majority of legislative documents published after the declaration with which the EU institutions formally bound themselves to the dispositions of the Charter, refer in a different way to the Charter or its individual dispositions. Cf. for example, the directive regarding services of the internal market 2006/123/CE of the 12<sup>th</sup> December 2006, the directive proposal of the Council xxx applications of the principle of equal treatment of persons regardless of their religion, beliefs, disability, age or sexual orientation [COM (2008) 426 def., 2<sup>nd</sup> July 2008]. And again the Conclusions of the Council of 22<sup>nd</sup> May 2008 on multilingualism (in *G.U.U.E* 6<sup>th</sup> June 2008, n.C140, p. 10) in which there is reference to art.22 on cultural, religious and linguistic diversity; consideration no. 30 of the Directive 2008/50/CE of the 21<sup>st</sup> May 2008, relative to the quality of the environmental air and for a cleaner air in Europe (in *G.U.U.E.* 11<sup>th</sup> June 2008, n. L 152,p 1 which makes reference to art.37 on the protection of the environment as consideration

To this end our intention was to start from an analysis of juridical law in action, in the light of the lessons of a great legal expert, according to whom "The figure of law in action must be introduced into the debate regarding sources of law" therefore "juridically law in action is the same law in force as it is interpreted and applied by the judiciary"<sup>7</sup>.

On the basis of this theoretical premise our aim was to verify *to what extent and in which way* The Charter of Nice and the single articles contained within it have been used by EU and domestic judges, until now. The various Courts, at various levels of jurisdiction, are faced with the non-binding nature of a document whose constitutional importance and value, however, are ever increasing in the sphere of fundamental rights on a supranational level.

The reference to law in action appears to be particularly useful in this approach for a series of reasons: a) it seems beyond doubt, as indicated by several parties, the preeminent importance of the European Courts' rulings in the construction of the constitutional basis of the new order; b) the dynamics of the order in progress, with the increasing convergence of the juridical systems determined by the process of European integration, render the differences between systems of *common law* and *civil law* less clear-cut, by considering law in action as a source of law<sup>8</sup>; c) In the European order the preceding rulings does not

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no.45 of the Directive 2008/56/CE of the 17<sup>th</sup> June 2008 which institutes a framework for Community action in the field of policies for marine environments (Directive framework on the strategy for marine environments) (in *G.U.U.E* 25<sup>th</sup> June 2008, n.L164, p.19). See also the reference to various rights (no discrimination, of property, protection of professional and family life, consumer protection (in *G.U.U.E.* 22 May 2008, L 133, p.66).

<sup>7</sup> On the concept of law in action, see the masterly elaboration of L. MENGONI, *Diritto vivente, Jus*, 1988, 15 ss. 19 in which he writes: "Law in action can express an authoritative restriction of application to future cases only on condition that it is transformable into a dogmatic rule on the basis of which an intersubjective agreement which guarantees coherence with rationality of the positive system" *ibid.* p. 21. In general, also P. GROSSI, *Mitologie giuridiche della modernità*, Giuffrè, 2005. See also M. CALVINO, *La dottrina del diritto vivente come teoria del precedente giudiziario, Diritto e formazione*, 2005, 1, 159; . *Id.*, *Il precedente tra certezza del diritto e libertà del giudice: la sintesi del diritto vivente, Dir. Soc.* 2001, 1, 159. With less dogmatic precision, the labour law doctrine tends to refer to the concept of law in action to generically extra legislative rights, even including contractual sources and of doctrinal creation; in the first sense, see S: NADELET, *Eguaglianza e nuove differenze nel diritto del lavoro. Una riflessione sui lavori flessibili. (parte seconda). Insegnamenti e incognite di un'indagine su un diritto vivente del lavoro, LD*, 2005, 1, 3 ss. In the second, A VALLEBONA, *L'autonomia privata collettiva nel diritto vivente, MGL*, 2008, 8/9, 622 ss.

<sup>8</sup> The comparative doctrine has for some time debate on the radical differences between systems of *civil law* and *common law*. See G. SACCO, *Il giurista in Europa: problematiche e prospettive, Contr. Impr. Eur.* 2002, 789 ss.; G. ALPA, *Il diritto giurisprudenziale e il diritto «vivente». Convergenza o affinità dei sistemi giuridici?, Rass. Forense*, 2007, 2, 493. See

function according to the technique of *stare decisis*, in which the value of the previous rulings is considered *a priori* as a useful element to providing criteria of judgement and to establishing precise limits to the discretion of the judge. Instead it takes on an importance *a posteriori*, constituting an element aimed at evaluating results rather than limiting the interpretive discretion of the judge<sup>9</sup>. Due to this there is a greater heuristic consonance of the “continental approach” to the law in action and to dialogue between the Courts of the European legal system.

The first part of this work is dedicated to European Courts decisions and to the Advocate General’s Conclusions; the second part is dedicated to domestic judges’ decisions.

The abovementioned division of the work aims to highlight if and to what extent the attitude demonstrated in comparisons of the same “phenomenon” by supranational judiciary and national judiciary – who are considered EU judges of the first level – is different, and to identify the various consequences that it determines.

## **2. 1<sup>st</sup> Part. EU Courts’ rulings. The salient data.**

### *a) The selection of documents*

The first phase of the research concentrated on the selection of available data<sup>10</sup>. We chose to use a wide-based set of criteria, on the basis of which Judgments (of the Court of Justice, but also the Court of the First Instance) and the Conclusions were selected where the terms “Charter of Nice” and “Fundamental rights” appeared together or alternatively. This was done in order to guarantee that a reasoned and

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also M. R. FERRARESE, *Diritto sconfinato*, Laterza, 45 ss. and *ibid.* further references in notes 21-23.

<sup>9</sup> M. CALVINO, *La dottrina del diritto vivente*, op. cit. p. 1005: “Value is not attributed to the preceding decision before the judge pronounces his decision. It will be given value only if confirmed *ex post* by other decisions of the same type: once many judges have pronounced the same decision, and only then, on the basis of a judgement *a posteriori* on their actions, will it be possible to affirm the existence of law in action”. On law in action as a “macroscopic” example of the rhetorical circular relationship on the basis of which it constitutes “a series of meanings which the community of interpreters have chosen as the most “credible” interpretation of the dispositions which the community itself retains in force, (constituting) the set of conventions stipulated by components of the community” cf. R. BIN, *La Corte costituzionale tra potere e retorica: spunti per la costruzione di un modello ermeneutica nei rapporti tra Corte e giudici di merito*, in A. ANZON, B. CARAVITA, M. LUCIANI, M. VOLPI (edited by), *La Corte costituzionale e gli altri poteri dello Stato*, Giappichelli, 1993, 8 ss.

<sup>10</sup> The database used is the official one of the Commission, Eur-lex, consultable at the website <http://eur-lex.europa.eu/it/index.htm>. Also fundamental was the invaluable collaboration of CDE – centre of European Documentation of the University of Catania – and in particular Chiara Cantarella.

correlated interpretation of the documents provided the most detailed picture possible of the legal institutions' attitude towards the Charter considered as a whole, and of its single articles.

In this first part of the research, we were able to ascertain that the number of judgments in which the Charter and its articles are cited varies according to the year in which the sentence was given: that it increases with time (in total 72)<sup>11</sup>. This confirms the intrinsic authority of the Charter (growing) and of the relative independence of this authority from its formal juridical status (contrarily, subject to wavering fortune).

On the other hand, from the documentation of the Advocates General's Conclusions, partially different data emerged: the number of Conclusions in which the Charter was cited remained more or less constant over the years (in total 139)<sup>12</sup> and furthermore, to the objective variable time, the subjective variable, the juridical sensibility of the single Advocate General, is added.

*b) The subdivision of the documents by articles*

In the second phase the cataloguing of EU documents was further refined using reference to the articles cited. It was then possible to identify a rather uniform trend in both the judgments and the conclusions, on the basis of which it was revealed that the provisions of the Charter which are most cited are those generally contained in paragraph VI-Justice and one in particular, contained instead in paragraph V-Citizenship (Right to good administration, art. 41)<sup>13</sup>.

*c) Modality and techniques of referencing the articles*

Lastly, the third phase regards the analysis of the merit of the EU rulings and Conclusions, guided by criteria identified previously and aimed at the comprehension – via the application of precise canons of interpretation (generic reference – indirect application – direct application) of the ways of referencing used by the judges and Advocates

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<sup>11</sup> Data on the increase of the number of judgments for each year are the following: 2001-1; 2002-4; 2003-7; 2004-9; 2005-10; 2006-12; 2007-15; 2008-14.

<sup>12</sup> The data on the growth of the number of Conclusions for each year are the following: 2001-16; 2002-11; 2003-17; 2004-20; 2005-18; 2006-16; 2007-17; 2008-24.

<sup>13</sup> As regards the Judgments, the data on the most cited article is as follows: Preamble-1; General reference-9; art.7-4; art. 8-4; art. 11-1; art. 12-1; art. 17-5; art. 20-1; art 21-2; art. 24-3; art. 28-2; art. 39-1; art 41-16; art. 42-4; art. 46-1; art 47-22; art. 48-8; art. 49-7; art. 50-3; art. 51-1; art. 52-2; art. 53-2.

As regards the Conclusions, the data on the most cited articles is as follows: Preamble-1, General reference:- 8; art. 1-2; art. 3-1; art. 7-13; art. 8-6; art. 9-1; art. 11-3; art. 12-4; art. 14-1; art. 15-1; art. 16-3; art. 17-9; art. 18-1; art. 20-4; art. 21-11; art. 22-1; art. 23-3; art. 24-4; art. 26-1; art. 27-3; art. 28-3; art. 30-1; art. 31-6; art. 34-1; art. 35-1; art. 36-5; art. 37-3; art. 41- 25; art. 42-5; art. 45-7; art. 47- 38; art. 48- 11; art. 49-11; art. 50- 7; art. 51-5; art. 52- 9.

General. In this way it was possible to obtain a first evaluation not of the general influence, but rather on the specific significance which the Charter has gradually obtained, eight years on from its first proclamation and in spite of its continuing lack of legal bindingness (*rectius*, a promised legal bindingness).

Subsequently it was decided to subdivide Judgments and Conclusions based on the *modality of citation* of the Charter so as to qualify and identify the hypotheses whereby it is used merely as an interpretative support, or on the other hand, as if it were already legally binding. In the first case, when only an occasional reference is made to the Charter, that which is highlighted is exclusively its political significance, placed, however, in the context of juridical argumentation and decisions through the generic reference to its authority, which remains, in any case, only *political*. On the other hand, in the second case the juridical significance is sublimated through either direct application, or, as in the majority of cases, indirect. Direct application means the decision is based precisely on the article referred to, while indirect application means that the Charter is quoted in the judge's statement of reasons, thereby conditioning it, but which technically does not provide the basis for the decision<sup>14</sup>.

### 3. EU judges and Advocates General

Quantitative data relative to references to the Charter is indicative of the different approaches adopted by EU judges and the Advocates General to this document.

Among Judgments and Conclusions, in fact, there appears to be a difference in references not only due to the time factor, that is, of the chronological vicinity to the adoption of the Charter.

The trend shows that the number of judgments in which the EU judges, those of the Court of Justice in particular, make reference to the Charter of Nice and/or to its articles, increases over the years. Until 2006, the Court had kept an "impassable" silence, "bordering on provocation"<sup>15</sup>. To explicit references in the same cases, on the part of the Advocates General, the Court responded with a deafening silence, causing an evident *fin de non-recevoir*. This phase in relations between Advocates General and judges of the Court of Justice, concerning the

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<sup>14</sup> Cf. for the modality of citation used in the text, B. CARUSO, *I diritti sociali fondamentali nell'ordinamento costituzionale europeo*, in *Il lavoro subordinato*, vol. VI of the Trattato di diritto privato dell'Unione Europea directed by G. Ajani and G. A. Benacchio, Giappichelli, 2009.

<sup>15</sup> J. WEILER, *Diritti umani, costituzionalismo ed integrazione: iconografie e feticismo*, *QCost.*, 2002, 521 ss.

references to the Charter of Nice, could be defined as *asymmetric parallelism*. To the Advocates General's suggestions to optimize the Charter, the Court, on the same cases, demonstrated a rather different attitude. The most convincing explanation of this initial prudence on behalf of the Court in terms of juridical politics and constitutional equilibrium was given by Poiares Maduro<sup>16</sup>. It was not simply a question of the Court's understandable prudence when called to rule – contrary to the Advocates General who are less bound by responsibility – on issues regarding relations between States and between States and the Union. Rather, there appeared to be an evident crisis of perception of its own institutional role which was until the emanation of the Charter "relatively free" to found a new supranational constitutional system, based also on the rights declared by the Court itself. And this, considering the political choice made by other EU institutions to formally "claim rights", which risked curbing both their judicial creativity and role of the ECJ as political barycentre in the EU's institutional order.

This asymmetry in the approaches of the Court and the Advocates General is highlighted by the data.

The number of Conclusions in which the Charter is mentioned in some way, unlike the Judgments, is constant over a period of time. The Advocates General, since the very first proclamation, showed their sensitivity towards a document which for the first time lists a catalogue of EU fundamental rights. This is also due to the relatively informal "style", of the conclusions, which allows for a more relaxed, discursive use of the charter, compared to the more traditional, legalistic and deductive approach of the Court<sup>17</sup>.

A variation in the number of Conclusions which cite the Charter can be verified when the specific Advocate General who dealt with the question in point is considered. This would most probably depend on the

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<sup>16</sup> M. POIARES MADURO, *The double Constitutional life of the Charter of Fundamental Rights of the European Union*, in T.K. HERVEY AND J. KENNER (edited by) *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective*, Hart Publishing, 2003.

<sup>17</sup> On the style of the Court of Justice, see S. DOUGLAS-SCOTT, *A Tale of Two Courts: Luxembourg, Strasbourg and the growing European Human Rights Acquis*, *Com. Mark, Law Review* 2006, 43, 629-665. See also M. ROSENFELD, *Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court*, *Int. Journ. Const. Law*, 2006, 1 ss. E M.LASSER, *Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court*, Jean Monnet Working Paper 1/03.

juridical, political and cultural background of the individual Advocate General<sup>18</sup>.

It can certainly be affirmed that almost immediately after the adoption of the Charter of Fundamental Rights the Advocates General – and some more than others – began to cite the document directly as a whole, and also to particular articles contained within it, as an element of reconstruction of EU legislation, considered useful in the solution of concrete cases in point or as a juridical instrument to define the question. However, in only 7 cases<sup>19</sup> was the stance taken by the Advocate General in accordance with that of the judges of the Court of Luxembourg, and if they referred to specific fundamental rights contained in the Charter as will be seen, they did so parsimoniously and cautiously.

#### **4. How the Charter has been used in EU Court decisions**

As already stated, the way the Charter of Nice and its articles are cited makes it possible to subdivide Judgments and Conclusions, depending on if it is used occasionally, with a merely rhetorical reference, or inserted in a more structural way in the process of juridical argumentation.

Among those described, the most common modality of reference is without a doubt the indirect application of the Charter, which rises in rank to that which has been defined *soft law* or semi *hard law*<sup>20</sup>. As it would be impossible to attribute *apertis verbis* to a juridical restriction which has not yet been consecrated in the Treaty, the Charter, and the fundamental rights recognised within it, are implicated in a circular decision-making process. In this way they enter the decisions of the judges or the opinions of the Advocates General indirectly frequently via

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<sup>18</sup> The data on the single Advocates General and the number of times in which each of them used the Charter in their Conclusions are the following: Alber-2; Bot-3; Geelhoed-15; Jacobs-6; Kokott-24; Leger-9; Mazàk-1; Mengozzi-4; Mischo-2; Poiares Maduro-15; Ruiz-Jarabo Colomer-31; Sharpston-7; Stix-Hackl-11; Tizzano-3; Trstenjak-6.

<sup>19</sup> These are the cases, C-450/06, *Varec SA c. Stato belga*; -303/05, *Advocaten voor de Wereld VZW c. Leden van de Ministerraad*; C-402/05 P. *Yassin Abdullah Kadi e Barakaat International Foundation c. Council of EU and Commission of European Community*; C-341/05, *Lavel un Partneri Ltd c. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan e Svenska Elektriker förbundet*; C-275/06, *Productores de Música de Espana (promusicae) c. Telefónica de Espana SAY e C-540/03 Parlamento europeo c. Consiglio dell'Unione europea*.

<sup>20</sup> Cf. B. CARUSO, *I diritti sociali fondamentali*, op. cit.

reference to common constitutional traditions consecrated in the European document<sup>21</sup>.

Less frequent – but in some ways more courageous and without a doubt more significant – is the use that some judges, but above all some Advocates General, have made of the Charter as if it were already a legally binding force. The judgments in which the Court took a radical decision, attributing “European” dignity to some fundamental rights sanctioned in the Charter, are already well-known but this stance did not lead to logical consequences<sup>22</sup>. However, we are dealing here with cases whose peculiarity call for serious reflection<sup>23</sup>. These examples, surely more salient, do not however exhaust the number of documents which fall into the category of “direct application”. There are, in fact other examples – mainly the Conclusions of the Advocates General – in which the fundamental rights contained in the Charter were referred to with the aim of resolving preliminary questions.

In opposition to direct application there is a way of referring to the Charter which is merely evocative. This approach can be found in those judgments and conclusions where the Charter is evoked as only one of the elements, and one of the less important ones at that, in the reconstruction of the general normative framework within which the concrete case in point is considered. It is a “rhetorical” use of the Charter of Nice which highlights, essentially, as previously mentioned, its authority as a political document.

#### **4.1. The Charter as an (occasional) element in the reconstruction of the normative framework of reference. Its rhetorical use.**

In a hypothetical scale of an ascending climax, which from the low point of indifference climbs to a high point of direct application, the first and least significant form of use of the Charter of Nice would be its citation as a mere stylistic ornament; the reference, as a clause of style, does not make use of the articles which could be pertinent to the

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<sup>21</sup> On the relationship between common constitutional traditions and the Charter of Nice, cf. A. RUGGERI, *Struttura e dinamica delle tradizioni costituzionali nella prospettiva dell'integrazione europea*, in *Ars interpretandi*, 2003, 211 ss., here p. 227ss.

<sup>22</sup> The reference is to the sentence *Laval and Viking* to which we will return shortly. Among the categories which were adopted, the above mentioned sentence technically comes under the typology defined as “indirect application” given that the fundamental right sanctioned by the Charter of Nice – the rights of bargaining and collective action (art.28) – even though recognised, were not however affirmed by the Court which instead applied the technique of balancing in favour of the specific liberty sanctioned by the Treaty with which the rights conflicted in this specific case, respectively free supply of services and the rights of the establishment.

<sup>23</sup> See par. 4.2.

resolution of the case, but to the Charter as a whole, which is considered one of the sources, and usually not the most important, of a more articulated catalogue which serves as a normative context (generic) of general reference.

This is almost an obligatory passage, above all where the citation of the Charter is made by the plaintiff of the case in which the preliminary question was raised and exposed to the Court. However, there are a number of documented cases of indifference where the reference made by the plaintiff to an article of the Charter considered relevant falls by the wayside; no trace can be found of it in either the Conclusions of the Advocates General let alone in the judgments of the Court of Justice.

In some aspects, the attitude of EU judges and Advocates General is not dissimilar to that described above, when, for example, they only make reference to the Charter of Nice in the footnotes, giving no space to it whatsoever in the sentence or the Conclusions, let alone the provisions.

Starting from this type of reference we can note some differences in the attitudes of the Court and of the Advocates General regarding the use of the Charter.

In all the period under consideration (2000-2008) the cases in which the Court cited the Charter in the notes or in the form of reference of the claim of the plaintiff are much more numerous than those in which the Advocates General do so. Yet the number of Conclusions in which the Charter is cited is much higher than that of the Judgments. This means that the Advocates General have in the vast majority of cases, preferred to give a higher profile to the Charter, rather than relegating it to the notes as the judges have frequently done.

The different attitudes manifested appear even clearer in those cases where the difference between prospected solution and decision made is registered with reference to the same preliminary question, object of the same case. In fact, it has even happened, that in the same case, the Court quoted the Charter of Nice among the references made by the plaintiff, while the Advocate General had used indirect application.

As for example in the case *The Queen against the Secretary of State for Health, ex parte British American Tobacco (investments) Ltd and Imperial Tobacco Ltd* in which Advocate General Geelhoed in his Conclusions of September 2002, had tried to argue the solution suggested to the Court using reference to the effective jurisdictional protection of which to art. 47 and to the rights of property of which to art. 17 of the Charter<sup>24</sup>, conflicting with the indifference of the Court

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<sup>24</sup> Conclusions of Geelhoed, 10th September 2002, C-491/01, *The Queen v. Secretary for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*.

which restricted itself to quoting only the reference to art. 17 as made by the plaintiff<sup>25</sup>.

The same dyscrasia can be recorded with reference to the case *Aalborg Portland A/S and a. c. Commission of the European Community*. Also in this case, the Advocate General tried to make a decisive reference to the Charter<sup>26</sup>, while the Court considered only in passing the reference made by the plaintiff<sup>27</sup>.

#### **4.2 Use of the Charter as interpretive support: its use as soft or semi hard law. The case of indirect application: the European Court**

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"The right to property is not a right recognised as such by the EC or EU Treaties. Article 17 of the Charter of Fundamental Rights does, it is true, recognise the right to property (and the protection of intellectual property). With regard to the present legal position, however, I attach more importance to Article 6 EU. That article requires the European Union to respect fundamental rights, as guaranteed by, *inter alia*, the ECHR, as general principles of Community law. One of those fundamental rights is the right to property, as referred to in Article 1, First Protocol, of the ECHR." (point 259).

<sup>25</sup> Court of Justice, 10th December 2002, - C-491/01, *The Queen c. Secretary of State for Health, ex parte British American Tobacco Investments Ltd and Imperial Tobacco Ltd*. "According to Japan Tobacco, Article 7 of the Directive prohibits it from exercising its intellectual property rights by preventing it from using its trade mark Mild Seven in the Community and by depriving it of the economic benefit of its exclusive licences for that trade mark. Such a result entails infringement of the right to property, which is recognised to be a fundamental human right in the Community legal order, protected by the first subparagraph of Article 1 of the First Protocol to the European Convention on Human Rights (ECHR) and enshrined in Article 17 of the Charter of Fundamental Rights of the European Union" (point 144).

<sup>26</sup> Conclusions of Ruiz-Jarabo Colomer 11th February 2003, Cases reunited C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S (C-204/00 P), IrishCembent Ltd (C-205/00 P), Ciments français SA (C-211/00 P), Italcementi – Fabbriche Riunite Cemento SpA (C-213/00 P), Buzzi Unicem SpA (C-217/00 P) and Cementir – Cementeerie del Tirreno SpA (C-219/00) v. Commission of the European Community*. "The Charter of Fundamental Rights of the European Union (26) takes the matter further, since, in addition to providing that an accused is entitled to defend his legal position in a fair and public judicial procedure, before an independent and impartial tribunal previously established by law, it also provides that every person has the right to be heard by the institutions of the European Union before any individual measure which could affect him or her adversely is taken and the right to have access to his or her file" (point 27).

<sup>27</sup> Court of Justice, 7th January 2004, cases reunited C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S (Portland A/S (C-204/00 P), IrishCembent Ltd (C-205/00 P), Ciments français SA (C-211/00 P), Italcementi – Fabbriche Riunite Cemento SpA (C-213/00 P), Buzzi Unicem SpA (C-217/00 P) and Cementir – Cementeerie del Tirreno SpA (C-219/00) v. Commission of the European Community*. "[...] The right of access to those documents should be regarded as a fundamental right for the purposes of Article F of the Treaty on European Union (now, after amendment, Article 6 EU) and also under Article 6 of the ECHR and Article 42 of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1)" (point 94).

We have already highlighted the ambivalent nature of this document that lacks a legal binding force, but which contains a list of fundamental rights, acting as surrogate to a formal supranational Constitution .

In spite of the obstacles and the numerous hindrances encountered along the way to acquiring binding juridical efficacy, The Charter of Nice, in fact, even before its inception, absolved the role of founding element and indispensable presupposition to the full legitimisation of the European Union by those who had supported its approbation; the Charter of Nice, furthermore, had sanctioned «visibly the crucial importance of fundamental rights and the significance that they have for European citizens»<sup>28</sup>.

Following its approbation, for the undoubted importance which it represents, the Charter in applicative phase then clearly superseded the simple declaration of principle collocating it on the crest – sometimes superseded – which separates it from full constitutional consecration.<sup>29</sup>

And it is exactly to this position, half-way between political reference and juridical use, that the EU Courts and the Advocates General have attested. They have demonstrated, albeit in different ways and intensities, a preference for indirect application of the Fundamental rights proclaimed at Nice.

The reference to the Charter – considered as a whole or with reference to specific articles – operates in the majority of cases as a merely interpretative support to a decision which has its basis elsewhere, or to an argumentation founded on other grounds, rarely constituting, therefore, the juridical basis of the solution chosen by the Court or suggested by the Advocate General.

Nevertheless, the use of the Charter of Nice as an argumentative support which is inserted in the final decision-making, justifies the observation that it now carries also juridical importance, no longer only political, which can be perceived, for example, when the reference appears just in the notes or the citation is made only in passing. In fact,

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<sup>28</sup> R. ADAM, *Da Colonia a Nizza: la Carta dei diritti fondamentali dell'Unione Europea, Il diritto dell'Unione Europea*, 2000, 4, 881

<sup>29</sup> The use of this term is consented in the awareness that it has been removed from documents and EU projects. In the Conclusions of the German Presidency of the European Council of 26th June 2007, in which it was conferred a mandate to the CIG for the elaboration of a "treaty of reform" of the existing treaties, one can read in fact that «The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called "Constitution", is abandoned» (p. 2); that «The TEU and the Treaty on the Functioning of the Union will not have a constitutional character» and, finally, that «The terminology used throughout the Treaties will reflect this change: the term "Constitution" will not be used».

in these cases, even if it is not the basis for the decisions – understandably considering its “soft” nature – the Charter occupies a prominent position in the statement of reasons of the Court and of the Advocates General, producing “soft” effects, in accordance with its nature.

Examples of this approach can be found in the judgments of both The Court of Justice and the Tribunal of the First Instance, and more numerously in the Conclusions of the Advocates General.

The most illustrious cases are represented by the judgments *Laval and Viking*<sup>30</sup> significant for more than one reason. In fact, not only do they constitute a sort of paradigm of use of the Charter as an instrument of semi *hard law*, but they also highlight the intrinsic limits in the lack of legal bindingness of the same. With the current situation of weak juridification of the Charter (proclaimed but not ratified) in order to resolve the case in point the Court had to conduct an operation of “free balancing”<sup>31</sup> – in which the results could have been different if the fundamental social rights to strike and of collective action, here implicated, had drawn their origins from a primary source legislative source.<sup>32</sup>

In the judgments *Laval* and *Viking*, the Court cites expressly the right to collective action contained in the Charter of Nice, recognising its full functionality within the supranational juridical order.

*“In that regard, it must be recalled that the right to take collective action is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No 87 of*

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<sup>30</sup> Court of Justice, 18th December 2007, C-341/05, *Laval un Partneri Ltd c. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan e Svenska Elektrikerförbundet* and Court of Justice, 11<sup>th</sup> December 2007, C-438/05, *International Transport Workers’ Federation and Finnish Seaman’s Union c. Viking Line ABP and OU Viking Line Eesti*.

<sup>31</sup> Cf. B. CARUSO, *I diritti sociali*, op. cit. 736 e, and for analogous considerations P. CARETTI, *I diritti fondamentali nell’ordinamento nazionale e nell’ordinamento comunitario*, *Dir. pubbl.*, 2001, 946.

<sup>32</sup> It is worth mentioning that recently the Court of Strasbourg included the Charter of Nice among the *European Instruments* with reference to art. 28 of the Charter of Nice, aligning European Social Charter and the Charter of Nice in the sentence of 12<sup>th</sup> November 2008, *Demir and Baykara c. Turkey*. On the theme of dialogue, for a reconstruction of the relationship between national judges and the Court of Strasbourg, from the judgments of the Italian Constitutional Court no. 348 and 349 of 2007 regarding the relationship between Italian legal order and the ECHR, cf. L. MONTANARI, *Giudici nazionali e Corte di Strasburgo: alcune riflessioni tra interpretazione conforme e margine di apprezzamento*, *Dir. pubbl. comp. eur.*, 2008, 3.

*the International Labour Organisation concerning Freedom of Association and Protection of the Right to Organise of 9 July 1948 – and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000” (point 90).*

In the next passage, however, the same right, which has just been recognised, is circumscribed and limited by specific restrictions deriving from EU law and from national legislation and praxis.

In this way the Court affirms

*“Although the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices” (point 91)<sup>33</sup>.*

Apart from these examples of indirect application of social fundamental rights – as manifest and debated as they are rare in number – it has been possible to establish, as previously indicated, that the most used articles of the Charter by judges – from the Court and the Court of First instance are those contained in paragraphs II – Freedom and VI – Justice.

Article 24, for example, concerning protection of children, was invoked by the EU Court of Justice in the case *Dynamic Medien Vertriebs GmbH c. Avides Media AG* of the 14<sup>th</sup> February 2008<sup>34</sup> in order to perform an operation of balancing. The aim was to stem the free circulation of goods of which to art. 28 Treaty of Rome, via the identification of a legitimate restriction of sales and an end to video supports via

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<sup>33</sup> The Court held exactly the same position in the Viking sentence: “Although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices. In addition, as is apparent from paragraph 5 of this judgment, under Finnish law the right to strike may not be relied on, in particular, where the strike is *contra bonos mores* or is prohibited under national law or Community law” (point 44).

<sup>34</sup> Court of Justice, 14th February 2008, C-244/06, *Dynamic Medien Vertriebs GmbH c. Avides Media AG*.

correspondence which have not undergone checks and classification in order to protect children<sup>35</sup>.

In all three cases reported in the notes, the fundamental rights evoked were considered as additions to the catalogue of fundamental rights which the EU respects, with reference to which the institutions are obliged to measure the legitimacy of their actions in the same way as the States must do when implementing EU regulations.

It is affirmed in the sentence *Advocaten voor de Wereld VZW*: "*It is common ground that those principles include the principle of the legality of criminal offences and penalties and the principle of equality and non-discrimination, which are also reaffirmed respectively in Articles 49, 20 and 21 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1)*" (point 46).

The same approach is replicated in the sentence *Unibet* in which the Court recalls point 37, reconstructing, furthermore, its own constant law in action "*the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, [...] which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1)*".

Similarly, the reference to art. 7 made on the occasion of the sentence *Varec SA c. State of Belgium* of the 14<sup>th</sup> February 2008<sup>36</sup> in which the right of respect for private life "[...] enshrined in Article 8 of the ECHR, which flows from the common constitutional traditions of the Member States and which is restated in Article 7 of the Charter of fundamental rights of the European Union, proclaimed in Nice on 7 December 2000" (point 48) was numbered as one of the fundamental rights which deserved protection.

To summarise, in the cases described, the reference to the Charter and the articles contained within it, which could appear rhetorical in that it is not fundamental to the decisions made, serves, however, to reinforce the importance of general principles of EU law derived from the constitutional traditions common to the Member States, reasserted (as

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<sup>35</sup> "The protection of the child is also enshrined in instruments drawn up within the framework of the European Union, such as the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1), Article 24 of which provides that children have the right to such protection and care as is necessary for their well-being (see, to that effect, *Parliament v Council*, paragraph 58). Furthermore, the Member States' right to take the measures necessary for reasons relating to the protection of young persons is recognised by a number of Community-law instruments, such as Directive 2000/31" (point 41).

<sup>36</sup> Court of Justice 14th February 2008, C-450/06, *Varec SA c. State of Belgium*.

the Court frequently says) in Niece. Furthermore, the Charter has the function of reinforcing, but also reflecting the rights and principles which are fundamental to the Union, in the formal circuit of statements of reasons and decisions of the judges of the Court.

#### **4.2.1.... the Court of First Instance.**

If the Court of Justice has maintained a certain self restraint, the attitude of the Court of the First Instance, and above all the Advocates General, would appear to demonstrate a greater propensity to using the Charter. The former has used the Charter on numerous occasions since its proclamation. In the sentence *max.mobil Telekommunikation Service GmbH c. Commission of the European Community* of the 30<sup>th</sup> January 2002<sup>37</sup>, for example, the Tribunal, called on to decide on the subjection of the Commission to the obligation to proceed with the examination of a statement, had clarified previously that “[...] *the diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States. Article 41(1) of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1, hereinafter the Charter of Fundamental Rights) confirms that [e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union*” (point 48)<sup>38</sup>. The same provision is recalled by the Tribunal in the sentence *Jégo-Quééré&Cie SA c. Commission of the European Community* of the 3<sup>rd</sup> May 2002<sup>39</sup>.

Indeed, in the two judgments which we have spoken about, the rights contained in articles 41 and 47 are invoked, but they are invoked in order to reconstruct a general framework of legitimisation in which a decision can be collocated using normative references in both cases contained in the Treaty. The Charter of Nice, therefore is used as semi hard law, obtaining in this case indirect application.

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<sup>37</sup> Court of First Instance EC, 30th January 2002, T – 54/99 *max.mobil Telekommunikation Service GmbH c. Commission of the European Community*.

<sup>38</sup> Furthermore, the Judge added that the fact that such an obligation falls on the Commission does not exclude the right to a jurisdictional inspection; in fact if on the one hand – sustains the Tribunal – “Such judicial review is also one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States, as is confirmed by Article 47 of the Charter of Fundamental Rights, under which any person whose rights guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal” (Point 57).

<sup>39</sup> Tribunal of First level EC, 3rd May 2002, T – 177/01, *Jégo-Quééré & Cie SA v. Commission of the European Community*; cf. point 42.

More significant, however, is the affirmation of the Tribunal contained in the sentence *Tokai Carbon Co. Ltd. And others c. Commission of the European Community* of the 29<sup>th</sup> April 2004<sup>40</sup>.

If on the one hand the reasoning seems contradictory, given that the judges evoke the principle of *ne bis idem* but deny its application in the case in point, on the other, the affirmation of its existence and efficacy turns out to be much more substantial. To point 137 of the sentence, the Tribunal, in fact, sustains that "*It is true that Article 50 of the Charter of Fundamental Rights provides that no one may be tried or punished again in criminal proceedings for an offence of which he has already been finally acquitted or convicted within the Union in accordance with the law. However, that charter is clearly intended to apply only within the territory of the Union and the scope of the right laid down in Article 50 is expressly limited to cases where the first acquittal or conviction was handed down within the Union*".

In other words, the applicability of the Charter is excluded, and of art. 50 in particular, outside EU territory, but *on the contrary*, in this way, it affirms its full efficacy within.

Technically, it involves a hypothesis of indirect application of the Charter given that the principle contained in art. 50 were not used as the basis of the decision, but the statements of the Tribunal represent an undoubted importance in terms of recognition of the specific right and of the relative applicability and are a "prelude" to its direct application.

In the same way in the sentence *Hans-Martin Tillack c. Commission of European Community* of the 4<sup>th</sup> October 2006<sup>41</sup>.

Also in this case, as in the previous one, the applicability of a right, whose source was identified in the Charter of Nice, was excluded. In other words, the article taken into consideration and the principle contained within it are not applied not only because the Charter of Nice is not legally binding, but also because it finds no application in the case in point. In these cases, if one wanted to use an ulterior expression to

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<sup>40</sup> Tribunal of first level EC, 29th April 2004 T-236/01, T - 239/01, T -244/01 to T-246/01, T -251/01 and T - 252/01, *Tokai Carbon Co. Ltd. And others v. Commission of European Community*.

<sup>41</sup> Court of First Instance EC 4th October 2006, T-193/04, *Hans-Martin Tillack v. Commission of European Community*. In this case the Tribunal sustained that "[...] the principle of sound administration, which is the only principle alleged to have been breached in this context, does not, in itself, confer rights upon individuals [...], except where it constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice [...], which is not the case here" (point 127).

describe another use of the Charter, one could speak of its *implicit application*.

Emblematic of the attitude of the Tribunal in using the Charter of Nice in order to resolve concrete questions and then the affirmation of the juridical nature of the Charter contained in the sentence *Philip Morris International, Inc e a. c. Commission of the European Community of the 15<sup>th</sup> January 2003*<sup>42</sup>, which even though uses the technique of indirect application, on the bases of which “*The right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has, moreover, been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1). Although this document does not have legally binding force, it does show the importance of the rights it sets out in the Community legal order*”(point 122).

#### **4.2.2....and the Advocates General**

Gradually more decisive in its constant use and in its juridical evaluation of the Charter is the attitude taken by the Advocates General. Immediately after the proclamation of the Charter they began to use it, always referring to it to support the interpretations suggested by the Court in the resolution of the concrete preliminary questions, sometimes calling for the indirect application, but more rarely, the direct. The list of references is now exhaustive, given that the Advocates General, as mentioned above, showed no hesitation in using the Charter, on the contrary to the judges of Luxembourg.

Already in the Conclusions of the 11<sup>th</sup> December 2003<sup>43</sup>, Advocate General Colomer clearly affirms the important role of the Charter in creating an EU citizenship.

“[...] *the creation of citizenship of the Union, with the corollary of freedom of movement for citizens throughout the territory of the Member States, represents a considerable qualitative step forward in that it separates that freedom from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union. Evidence of that qualitative development lies in the fact that freedom of movement and of residence, as an independent right, has been enshrined in Article 45(1) of the Charter of Fundamental Rights of the European Union*” (point 25).

<sup>42</sup> Court of First Instance EC 15th January 2003, T-377/00 *Philip Morris International, Inc and others c. Commission of the European Community*.

<sup>43</sup> Conclusions of Ruiz-Jarabo Colomer, 11th December 2003, C386/02, *Josef Baldinger c. Pensionsversicherungsanstalt der Arbeiter*..

Furthermore, Advocate General Kokott, in his Conclusions of the 10<sup>th</sup> of June 2004 and of the 3<sup>rd</sup> May 2005, clarifies how important the acknowledgment of a determined principle within the Charter of Nice is regarding the legal orders of the Member States and in a supranational context, highlighting on both occasions the importance of that which is sanctioned by art. 49 of the Charter of Nice<sup>44</sup>.

The object of reflection (the right under discussion) of the Advocates General may change, but not their overall attitude regarding the Charter.

Consequently, in the conclusions of Advocate General Sharpston of the 28<sup>th</sup> June 2007<sup>45</sup>, this time regarding the principle of non-discrimination, the value of the principle of non-discrimination is affirmed, not only as such, but above all as contained in the Charter of Nice.

*"[...] Non-discrimination is also, of course, one of the fundamental principles of EC law. It requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. The importance of non-discrimination is underscored by the Charter of fundamental rights of the European Union (Article 21) [...]"* (point 147)<sup>46</sup>.

Again art. 21 of the Charter of Nice and the principle of non-discrimination is used in the Conclusions of the *Maruko* case of the 6<sup>th</sup> September 2007<sup>47</sup> by Advocate General Colomer.

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<sup>44</sup> "The principle of the retroactivity of the more lenient criminal law, which is recognised in the legal systems of most of the Member States of the Community (although not, for example, in Ireland and the United Kingdom), also appears in the third sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union. It also forms part of secondary Community law relating to administrative penalties for irregularities which prejudice the Community's financial interests"(point 64, Conclusions 10th June 2004, C-457/02, *Penal proceedings against Antonio Niselli*).

And again: "However, the principle of the retroactive application of a more lenient criminal provision is not only established in the national legal systems of almost all 25 Member States but is also recognised internationally. What is more, it has for some time now been a part of secondary Community law, for example in the rules on administrative penalties for irregularities prejudicial to the Community's financial interests. That principle was also incorporated into the third sentence of Article 49 of the Charter of Fundamental Rights of the European Union" (point 156 Conclusions of 14<sup>th</sup> October 2004, joint cases C-387/02, C-391/02 and C-403/02, *Penal proceedings against Silvio Berlusconi (C-387/02), Sergio Adelchi (391/02) and Marcello Dell'Utri and a. (C-403/02)*).

<sup>45</sup> Sharpston's Conclusions, 28th June 2007, C-212/06, *Government of the Communauté française and Gouvernement wallon c. Gouvernement flamand*.

<sup>46</sup> Against/in front of the Court – demonstrating an attitude contrary to that of Sharpston – there is no reference to the principle of non-discrimination contained in the Charter.

<sup>47</sup> Conclusions of Ruiz-Jarabo Colomer, 6th September 2007, C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*.

It becomes in fact a moral support for interpretive operations of undoubted value regarding the efficacy of secondary EU law. That is to say, this efficacy is not legitimised through operations all within the procedural regulations of the treaty and/or to the general principles of EU law<sup>48</sup>, but rather linked to a fundamental right positively sanctioned by the Charter, in the style of *grundnorm* of the EU system. The improvement is obviously not in the mere declaration of the supremacy of EU law, but in the constitutional basis of its legitimisation.

The Advocate General considers, in fact, the reference to art. 21 as one of the most suitable arguments for justifying the applicability of the directive 2000/78/EC to the actual case in point<sup>49</sup>.

Also respect for the right to protection of human dignity sanctioned by art. 1 of the Charter of Nice finds ample space in the reflections of the Advocates General. In fact, this is perhaps the right which holds first place in an ideal scale of values and importance.

Advocate General Stix-Hackl, in his Conclusions of the 18<sup>th</sup> March 2004<sup>50</sup> makes very significant statements regarding its importance:

*“Therefore, inasmuch as the Community as a unity of interests considers itself to be a Community founded on respect for fundamental and human rights, it cannot accept measures by Community institutions or Member States which are incompatible with observance of the human*

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<sup>48</sup> On the principles of the supremacy, of the direct efficacy and of the interpretations conforming to EU law, cf. G. BRONZINI-V. PICCONE, *La Corte del Lussemburgo «scopre» la Carta di Nizza: verso una nuova stagione nella tutela «multilevel» dei diritti fondamentali?*, *DL*, 2006, 4, 979 ss.; *Id.*, *La giurisprudenza europea «in movimento»: luci e ombre nel processo di costruzione di un Ius comune*, in G. BRONZINI-V. PICCONE (edited by), *La Carta e le Corti*, Chimienti, 2007, p 281ss.; *Id.*, *La Carta di Nizza nella giurisprudenza delle Corti europee, I diritti dell'uomo*, 2006, 2, 5 ss.; *Id.*, *L'efficacia «anticipata» della Carta di Nizza: ius receptum?*, *I diritti dell'uomo*, 2007 2, 12ss.; Also M. CARTABIA, *L'ora dei diritti fondamentali*, in *Id.* (edited by), *I diritti in azione. Universalità e pluralismo dei diritti fondamentali nelle Corti europee*, Il Mulino, 2007, 30. See also R. CALVANO, *Verso un sistema di garanzie costituzionali dell'UE? La giustizia costituzionale comunitaria dopo il Trattato di Nizza*, *GCost.*, 2001, 1, 209 ss. and the recognition of A. CELOTTO, *Giudici nazionali e Carta di Nizza: Disapplicazione o interpretazione conforme?*, in G. BRONZINI-V. PICCONE (edited by), *La Carta e le Corti*, op. cit., 29 ss.; A. VON BOGDANDY, *I principi costituzionali dell'Unione europea*, *Dir. Pub. Comp. Eur.*, 2005, 2, 581. On the general principles, cf. E:W: BOCKENFORDE, *Diritti fondamentali come norme di principio*, in *Id.*, *Stato, Costituzione, Democrazia*, Giuffrè, 2006, 225.

<sup>49</sup> “Third, the principle of non-discrimination on grounds of sexual orientation is included in Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 and is specifically laid down in Article 21 of the Charter of Fundamental Rights of the European Union. The fact that it is fundamental in nature means that respect for the right is guaranteed in the European Union, pursuant to Article 6 EU” (point 78).

<sup>50</sup> Conclusions of Stix-Hackl, 18th March 2004, C-36/02, *Omega Spielhallen – und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*.

*rights thus recognised'. Article 51 of the Charter of Fundamental Rights of the European Union reflects that observation" (point 55).*

*"The Court of Justice therefore appears to base the concept of human dignity on a comparatively wide understanding, (65) as expressed in Article 1 of the Charter of Fundamental Rights of the European Union. (66) This article reads as follows: 'Human dignity is inviolable. It must be respected and protected'" (point 91).*

The same broad recognition is given to the right to freedom of assembly and association in the Conclusions of Advocate General Jacobs<sup>51</sup>. Again using the Charter to support his reasoning, the Advocate General identifies the sources – among which the Charter of Nice – in which the fundamental rights to freedom of expression and assembly are recognised within the supranational legal order<sup>52</sup>.

The act of balancing carried out by the Advocates General with reference to traditional civil rights such as freedom of assembly and to fundamental principles such as human dignity can, with due respect, be compared to that found in the Conclusions of the cases *Laval* and *Viking* respectively by Advocate Mengozzi<sup>53</sup> and Pólares Maduro<sup>54</sup> in relation to art. 28 of the Charter of Nice.

On *Laval*, Mengozzi reasons like this:

*"[...] Article 28 of the Charter of Fundamental Rights provides that 'workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right ... in cases of conflict of interest, to take collective action to defend their interests, including strike action'. Article 52(1) of that charter states that 'any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet*

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<sup>51</sup> Conclusions of Jacobs, 11th July, 2002, C-112/00, *Eugen Schmidberger, Internationale Transporte und Plazuge v. Republik Österreich*.

<sup>52</sup> "[...] Article 10 of the European Convention on Human Rights guarantees freedom of expression, including freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Article 11 of the Convention similarly guarantees freedom of peaceful assembly and association. More recently, the rights of freedom of expression and assembly have been reaffirmed in Articles 11 and 12 of the Charter of Fundamental Rights of the European Union." (point 101)

<sup>53</sup> Conclusions of Mengozzi 23rd May 2007, C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan e Svenska Elektrikerförbundet*.

<sup>54</sup> Conclusions of Pólares Maduro, 23rd May 2007, C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OU Viking Line Eesti*.

*objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”* (point 76).

Again, regarding the *Viking* case, Poiares Maduro sustains:

*“The right to associate and the right to collective action are essential instruments for workers to express their voice and to make governments and employers live up to their part of the social contract. [...]. Accordingly, the rights to associate and to collective action are of a fundamental character within the Community legal order, as the Charter of Fundamental Rights of the European Union reaffirms. The key question, however, that lies behind the present case, is to what ends collective action may be used and how far it may go. This touches upon a major challenge for the Community and its Member States: to look after those workers who are harmed as a consequence of the operation of the common market, while at the same time securing the overall benefits from intra-Community trade”* (point 60).

As already mentioned, the indirect application for which the Charter of Nice is used as semi hard law, represents the most common form of reference. From the Conclusions considered – among the numerous examples in the category of indirect application<sup>55</sup>, it is clear the way in which the Charter, although not the source of the decisions, is a fundamental element in the reasoning process of the Advocates General. In some significant cases – *Omega*, *Schmidberger*, *Laval* and *Viking* – it performs an important function of balancing between the specific right under consideration and the freedom with which it enters into conflict/contact in the case in point.

The cases of *Omega* and *Schmidberger*, furthermore, are particularly paradigmatic for at least two reasons. The first is that they represent a striking case of dyscrasia between the positions of the Advocate General and that of the Court. Although the Court performs the function of balancing between fundamental rights and freedom sanctioned by the Treaty as suggested by the Advocate General, it makes no reference to the Charter of Nice as the source of cognition and declaration and/or affirmation of fundamental rights recognised by the supranational order to sustain the decisions made<sup>56</sup>.

<sup>55</sup> For a complete view of the 41 Conclusions in which the Advocates General have used the indirect application technique, cf. the dossier, cit.

<sup>56</sup> In the sentence *Omega* (Court of Justice, 14th October 2004, C-36/02, *Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundessadt Bonn*), the Court takes up the discourse on fundamental rights making ample reference to the previous judgements but never to the Charter of Nice. “It should be recalled in that context that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the

The second is that the Conclusions of the Advocate General on the cases *Omega* and *Schmidberger* contain *in nuce* the line of reasoning proposed again in the Conclusions and then in the judgments of the Court on the cases *Laval* and *Viking*, with a macroscopic difference. While in the latter two the Court recognises the right to strike and the freedom of collective action contained in the Charter of Nice (art. 28) without, however, taking it seriously enough<sup>57</sup>, in the judgments *Omega* and *Schmidberger* although the judges do not use the Charter of Nice, they do call in to play the fundamental rights of protection of human dignity and the freedom of assembly, making them prevail over the freedoms sanctioned in the Treaty in the balancing process<sup>58</sup>.

However, it is necessary to note that also in the motivations of Mengozzi and Poiares Maduro, in the cited cases, the reference to traditional social rights contained in the Charter is limited and reserved, and precludes – and in some ways contributes – to a mere recognition, but not to an affirmation of these rights on the part of the Court, the outcome being a balancing effect which “makes a loss”.

The reference to the principle of proportionality and its reconstruction of those rights which are half-way between theory of external limits (they find limitation in the corresponding exercise of economic freedom) or, even more significantly, of internal limits (the aim itself of the union action is not free but “conditioned” by exercising economic freedom) indicates a different cultural metabolising not only by the judges, but also of the Advocates General, of these rights compared to the same civil and political rights in the supranational order and

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Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect (see, *inter alia*, Case C-260/89 ERT [1991] ECR I-2925, paragraph 41; Case C-274/99 *P Connolly v Commission* [2001] ECR I-1611, paragraph 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71)(point 33). And also “As the Advocate General argues in paragraphs 82 to 91 of her Opinion, the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right” (point 34).

Similar considerations are found in the *Schmidberger* sentence (Court of Justice, 12<sup>th</sup> June 2003, C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzuge v. Republik Österreich*).

<sup>57</sup> Cf. B. CARUSO, *I diritti sociali*, cit. text and notes 130.

<sup>58</sup> J. MORIJN, *Balancing Fundamental rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution*, *Eur. Law Journ.*, 2006, 1,15-40.

compared to the way in which the right to strike and collective bargaining are collocated (in terms of absoluteness and primacy) in the “juridical imagination” of national judges, as happens, for example in the Italian legal system.

From this point of view, both the conclusions and the judgments on the cases *Laval* and *Viking* are probably destined to open, rather than close, a season of fruitful dialogue between national and European judges on the subject of social rights<sup>59</sup>.

### **4.3. Use of the Charter as hard law, that is, as normative foundation of rights, with binding effectiveness. The case of direct application.**

#### **4.3.1 The position of the Advocates General**

Pioneering positions which could be considered predictive of the future role of the Charter of Nice once the Treaty of reform has been ratified by the institutive treaties, have been taken by some Advocates General. Particularly sensitive to the idea of considering the Charter of Nice as an innovation in Union law, they tend towards a direct application of fundamental rights, therein sanctioned, as if already legally binding. There is no lack of recent examples, even in judgments of the Court of Justice, although less numerous.

The Conclusions of Advocate General Tizzano are particularly pertinent, for both the times and the ways, in the sentence BECTU of February 2001. In them reference is made to art. 31 to sustain clearly and explicitly, the nature of the fundamental right to holidays. In this case, there is an illustrious and visionary use with a direct efficacy.

The Advocate General states, in fact: *“I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved - Member States, institutions, natural and legal persons - in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right”* (point 28).

It is the Charter in itself which attributes the value of fundamental social right to holidays, and not through the support of the traditional constitutions of the Member States.

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<sup>59</sup> B. CARUSO, *I diritti sociali nello spazio sociale sovranazionale e nazionale: indifferenza, conflitto o integrazione? (prime riflessioni a ridosso dei casi Laval e Viking)*, in WP C.S.D.L.E. “Massimo D’Antona” INT -61/2008.

The position of Tizzano is to be considered not only for its content, but also because it came into play ahead of its time, compared to the normal period necessary for metabolising and elaborating the question of the Charter's juridical efficacy, by legal scholars<sup>60</sup>. It is as if the Advocate General played ahead of the game, not regarding simply the nonetheless important question of the specific right to holidays, but the question – which transcends the specific right – of the general juridical significance of the Charter, only recently proclaimed at Nice, and even more, of the constitutional base of the European order.

Another example of a paradigmatic approach are the recent Conclusions of Verica Trstenjak in the *Schultz-Hoff*<sup>61</sup> and *Stringer e a.*<sup>62</sup> cases regarding right to holidays, which follow on from the opinion of Advocate General Tizzano. The line of reasoning in both cases is highly significant and it is not by chance that the position taken by the Advocate General regards a right, that of holidays, which is the protagonist of the celebrated sentence given immediately following the approbation of the Charter of Nice by the Court of Justice in the *BECTU* case; in this sentence the EU judges, on the suggestion of Advocate General Tizzano, recognised the right to holidays as a fundamental social right, but contrary to the clear suggestion formulated in the Conclusions, they did not intend to place the right to holidays on the same legal platform of fundamental rights, – at that time only just established – but rather on their own "creative" judge made law<sup>63</sup>.

Advocate General Trstenjak, repeating the position already expressed by Tizzano – which with hindsight we could define as pioneering – , without a doubt considers the right to holidays as a fundamental social right.

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<sup>60</sup> Advocate Gen. Tizzano elaborated his Conclusions just two months after the adhesion and proclamation of the Charter on the 7<sup>th</sup> December 2000.

<sup>61</sup> Conclusions of Trstenjak, 24th January 2008, C-350/06 *Schultz-Hoff*.

<sup>62</sup> Conclusions of Trstenjak, 24th January 2008, C-520/06 *Stringer e. a*

<sup>63</sup> To point 39 of the sentence of 26th June 2001, C-173/99, *The Queen v. Secretary for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* the Court affirms that "In that context, the fourth recital in the preamble to the directive refers to the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held at Strasbourg on 9 December 1989 which declared, in point 8 and the first subparagraph of point 19, that every worker in the European Community must enjoy satisfactory health and safety conditions in his working environment and that he is entitled, in particular, to paid annual leave, the duration of which must be progressively harmonised in accordance with national practices". Consequently "[...] the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Directive 93/104" (point 43).

He goes back in time, listing the international origins of the right to holidays<sup>64</sup> and recalling how its codification in art. 7 of the directive no. 2003/88 CE – object of the request for interpretation contained in the preliminary reference procedure – ends by creating a sort of cross fertilisation.

As the Advocate General writes, the right to holidays is “[...] is unequivocally included among workers’ fundamental rights”.

But adds – in complete agreement with Tizzano’s position – an element of great appreciation for the Charter of Nice as a of a system sources; he declares, in fact, its supremacy over other European Charters.

He express his ideas thus:

*“Even more significant, in my view, is the fact that the inclusion of this right in the Charter of Fundamental Rights of the European Union appears to provide the most reliable and definitive confirmation that it constitutes a fundamental right [...]”* (point 51).

His considerations on the juridical nature of the Charter are also interesting.

He affirms that, in spite of the fact it has not been attributed with an “far-reaching normative powers, nonetheless, “[...] it would be wrong to deny the Charter any relevance in interpreting Community law. Irrespective of the question of the definitive legal status of the Charter within the legal system of the European Union, which will have to be clarified in future, it already constitutes a concrete expression of shared fundamental European values” (point 52).

In support of this interpretation he brings forward an argument of cross fertilisation. It recalls, in fact, the position of those who affirm that the right to paid annual holidays, as sactioned by art. 40, no. 2 of the Spanish Constitution, is the result of a combination of international instruments aimed at protecting fundamental rights<sup>65</sup>.

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<sup>64</sup> As clarified by the Att. Gen. in fact on an international level this fundamental right is mentioned in art. 24 of the Universal Declaration of Human Rights adopted on 10<sup>th</sup> December 1948 by the General Assembly of the United Nations, which confers to everyone “the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay” It is also recognised by art.2. n. 3. of the Social Charter of the Council of Europe adopted by the Member States of the Council of Europe on the 18<sup>th</sup> October 1961 in Turin and became effective on the 26<sup>th</sup> February 1965, and also art.7, lett. d) of the International Pact regarding economic, social and cultural rights unanimously adopted on the 19<sup>th</sup> December 1966 by the General Assembly of the United Nations as an expression of the rights of everyone to fair and favourable working conditions.

<sup>65</sup> I. GARCIA PERROTE ESCARTIN, I., *Sobre el derecho de vacaciones* in AA. VV., *Scritti in memoria di Massimo D'Antona*, Giuffrè, Milano, 2004, vol. IV, p. 3586, who retains that such instruments have contributed generally to the development of a universal science or purely European of the existence of the above mentioned fundamental social right.

In the same can be said of the Conclusions rendered on 13<sup>th</sup> December 2007, the Advocate General Kokott<sup>66</sup>. This case did not deal with a typical social right such as the right to holidays, but of a right of the new generation: the right to "good administration", a principle which has some similarities to the principle of good performance in the Italian constitution, art. 97.

As is known, in the internal debate in legal-administrative<sup>67</sup> and labour law<sup>68</sup> doctrine, the principle of good performance breaks away from an abstract and ontological vision of public interest, and from a coldly efficient concept of achieving ends.

The regulations of the Charter of Nice on the right to good administration (art. 41) – immediately considered mandatory in the Advocates General's interpretation – legitimises the reinterpretation of some of the principles of the internal Constitution, according to the proposal formulated elsewhere<sup>69</sup>.

On a systematic level of sources, Advocate General Kokott considers, in fact, the obligation of communication, and therefore, the principle of transparency of public administration of which to art. 41 of the Charter of Nice co. 2, third hyphen refers, on the same level as that established by article 253 of the Treaty.

In fact it seems clear from the reasoning of the Advocate General that the regulation regarding primary rights of the Union presents itself as a specification of a rule of principle (art. 41 of the Charter), which is the basis of a fundamental right (a "principle of state of rights")<sup>70</sup>.

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<sup>66</sup> Conclusions of Kokott, 13th December 2007, C-413/06P, *Bertelsmann AG and Sony Corporation of America v. Independent Music Publishers and Labels association (Impala)*

<sup>67</sup> G. ARENA, *Cittadini attivi*, Editori Laterza, 2006; B. G. MATTARELLA, *Il diritto dell'onestà, etica pubblica e pubblici funzionari*, Il Mulino, 2007, 35 ss.; B. G. MATTARELLA, *Le regole dell'onestà*, Il Mulino, 2007; B. CARUSO, *La flessibilità (ma non solo) del lavoro pubblico nella l. 133/08 (quando le oscillazioni del pendolo si fanno frenetiche)*, LPA, 2008, 3-4, 465 ss.

<sup>68</sup> G. NICOSIA, *Il polimorfismo delle dirigenze pubbliche e la "buona amministrazione"*, WP C.S.D.L.E. "Massimo D'Antona" IT – 81/2008

<sup>69</sup> Cf. A. ALAIMO, *Il diritto al lavoro fra Costituzione nazionale e Carte europee dei diritti: un diritto "aperto" e "multilivello"*, WP C.S.D.L.E. "Massimo D'Antona". INT – 60/2008; B. CARUSO, *Occupabilità, formazione e "capability" nei modelli giuridici di regolazione dei mercati del lavoro*, DLRI, 2007, 1 ss.

<sup>70</sup> The Advocate General affirms, "Article 253 EC provides that decisions by the Commission shall state the reasons on which they are based. This duty to state reasons is a consequence of the rule of law and, in conjunction with the right to proper administration, finds expression also in Article 41 (2) of the Charter of fundamental rights of the European Union. It is intended not only to enable acts of the institutions to be subject to independent review by the Community Courts, but also to encourage the institutions to exercise self-control and to guard against ill-considered or ill-thought through measures. The statement of reasons for decisions also contributes to ensuring transparency of administrative action"

Regarding another aspect of the case, although in the form of an *obiter dictum* the Advocate General did not hesitate to use the Charter of Nice again, in particular articles 16 (freedom to conduct a business) and 17 (right to property) in an anti monopolistic function and as a direct and only source of the rights evoked<sup>71</sup>.

The inclination manifested by the Advocates General to constantly refer to and apply the Charter of Nice is fully documented and justified by the observations made on its nature and significance, not only political but also juridical.

It is not formally collocated next to positive primary law: no-one could go so far as to affirm this considering the fact it has not been ratified. However, the principles and rights of the Charter of Nice have been considered for some time as immanent to provisions of primary law, conditioning and limiting its interpretation.

Kokott expresses this in the following Conclusions:

*"Admittedly, the Charter of fundamental rights does not yet as such have binding legal effect comparable to that of primary law, but as a source of recognition of law it does shed light on the fundamental rights guaranteed by Community law [...]"* (note 59)<sup>72</sup>.

Following this reasoning, the ratification of the Charter would be nothing other than the undoubtedly useful formalisation on a systematic

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(point 97) and adds: "The obligation to state reasons is by no means restricted to decisions which negatively affect their addressees. The principles of the rule of law and of proper administration instead require reasons to be given also for decisions which benefit their addressees. This applies *a fortiori* where such decisions may negatively affect the rights and interests of third parties, not least in the field of competition law. Accordingly, neither Article 253 EC nor the third indent of Article 41(2) of the Charter of fundamental rights distinguishes between decisions which benefit their respective addressees and those which are disadvantageous for them [...]" (point 98). And also "[...] Neither Article 253 EC nor the third indent of Article 41(2) of the Charter of fundamental rights distinguishes between decisions which benefit their respective addressees and those which are disadvantageous for them as regards the requirement to state reasons" (point 134). "The rights of the defence include in particular the principle of the right to a hearing, which is a fundamental principle of Community law and which is now also recognised in Article 41(2) of the Charter of fundamental rights [...]" (point 151).

<sup>71</sup> "[...] Thus, while the commercial freedom of the participating undertakings and the property rights of their shareholders (Articles 16 and 17 of the Charter of fundamental rights) undoubtedly include the right to realise concentrations of undertakings, this applies only in so far as certain conditions or obligations on, or even the prohibition of, the concentration in question are not necessary for protecting competition from distortion" (point 214).

<sup>72</sup> Regarding this point, the same Advocate General cites some examples of the use of the Charter of Nice: the sentence of 27th June 2006, C-540/03, *Parliament v. Council*, "family reunited", and paragraph 108 of the Conclusions of the same presented the 8<sup>th</sup> September 2005, C-540/03, in the same case, as well as the sentence of 13<sup>th</sup> March 2007, C-432/05, *Unibet*.

level, but not necessary on a substantial level (regarding a particular decision) for operations of affirmation of rights, which are already, possible in the current state, in hybrid form: its preceptive efficacy could be facilitated, the Advocate General seems to be saying, by the interpretations of the judges, given that the business of approbation has not yet been concluded.

A similar affirmation is contained also in the Conclusions *European Parliament v. Council of the European Union* of the 8<sup>th</sup> September 2005<sup>73</sup>, paragraph 108:

*"[...] While the Charter still does not produce binding legal effects comparable to primary law, it does, as a material legal source, shed light on the fundamental rights which are protected by the Community legal order. For the present Directive there is a further relevant consideration: according to the second recital, the Directive is intended to be compatible with the fundamental rights recognised inter alia in the Charter [...]"*

The Conclusions of Advocate General Léger on the *Hautala* case of the 10<sup>th</sup> July 2001<sup>74</sup> are even clearer and more significant regarding the nature of the Charter; its efficacy is facilitated, perhaps with an argument which technically is debatable, via its own moral strength, its very being indicating an expression of values, even before principles, of juridical civility shared by the Member States; it is an expression of meta principles of such importance as to be collocated above the positive juridical order.

The citation, a sort of *vademecum* of the juridical efficacy of the Charter, is self-explanatory:

*"Naturally, the clearly-expressed wish of the authors of the Charter not to endow it with binding legal force should not be overlooked. However, aside from any consideration regarding its legislative scope, the nature of the rights set down in the Charter of Fundamental Rights precludes it from being regarded as a mere list of purely moral principles without any consequences. It should be noted that those values have in common the fact of being unanimously shared by the Member States, which have chosen to make them more visible by placing them in a charter in order to increase their protection. The Charter has undeniably placed the rights which form its subject-matter at the highest level of values common to the Member States (point 80).*

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<sup>73</sup> Kolkott's Conclusions, 8th September 2005, C-540/03 *European Parliament v. Council of the European Union*.

<sup>74</sup> Léger's Conclusions 10th July 2001, C-353/99 P, *Council of the European Union v. Heidi Hautala*

*It is known that the political and moral values of a society are not all to be found in positive law. However, where rights, freedoms and principles are described, as in the Charter, as needing to occupy the highest level of reference values within all the Member States, it would be inexplicable not to take from it the elements which make it possible to distinguish fundamental rights from other rights (point 81).*

*The sources of those rights, listed in the preamble to the Charter, are for the most part endowed with binding force within the Member States and the European Union. It is natural for the rules of positive Community law to benefit, for the purposes of their interpretation, from the position of the values with which they correspond in the hierarchy of common values (point 82).*

*As the solemnity of its form and the procedure which led to its adoption would give one to assume, the Charter was intended to constitute a privileged instrument for identifying fundamental rights. It is a source of guidance as to the true nature of the Community rules of positive law" (point 83).*

Such a statement does not seem casual, but its reiteration tells us of an orientation, if not agreed upon, certainly concurred with by the general advocacy of the Court. In fact we can compare<sup>75</sup> the practically identical statements of Advocate General Mischo for the case *Booker Aquaculture and Hydro Seafood* of the 20<sup>th</sup> September 2001<sup>76</sup> of Advocate General Poiares Maduro for the case *Nardone* of the 29<sup>th</sup> June 2004<sup>77</sup> and of the same Kokott of the 14<sup>th</sup> October 2004<sup>78</sup>, 27<sup>th</sup> January

<sup>75</sup> On the subject see the dossier, cit.

<sup>76</sup> Mischo's Conclusions, 20th September 2001, joint cases C-20/00 and C-64/00, *Booker Aquaculture and Hydro Seafood*. "I know that the Charter is not legally binding, but it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order [...]" (point 126).

<sup>77</sup> Maduro's Conclusions, 29th June 2004, C-181/03 P. *Nardone*: "First, the situation of those officials relates to a fundamental right of access to social security benefits providing protection in cases such as illness, industrial accidents, dependency or old age, and in the case of loss of employment. That right is entailed by Article 12 of the 1961 European Social Charter and point 10 of the 1989 Community Charter of the Fundamental Social Rights of Workers, Article 136 EC expressly referring to both charters. That right is currently laid down in Article 34 of the Charter of Fundamental Rights of the European Union. Although it does not as yet have binding legal effects, the abovementioned charter none the less serves as a guide to and point of reference for the rights guaranteed by the Community legal order. The specific purpose of Article 78 of the Staff Regulations is to provide such protection in the European public service" (point 51).

<sup>78</sup> Kokott's Conclusions, 14th October 2004, C-387/02, C-387/02, C-391/02 and C-403/02, *Penal proceedings against Silvio Berlusconi (C-387/02), Sergio Adelchi (C-391/02) and Marcello Dell'Uri e a. (C-403/02)* "Although this Charter does not yet have binding legal

2005<sup>79</sup> and 4<sup>th</sup> September 2008<sup>80</sup> respectively for the *Berlusconi et al.* case and also *Housieaux* and *UTECA*.

Justified by the considerations on the juridical nature of the Charter – which although not legally binding, constitutes a criteria of recognition or cognition of the rights guaranteed by the EU legal order<sup>81</sup>, (it should not be used, but it must) – the Advocates General have always called upon it directly or indirectly in varying degrees, determining to a greater or lesser degree the resolution of the concrete question to be interpreted ever since the Charter's inception.

Over the years more decisive affirmations have been made; to Tizzano's Conclusions on the BECTU regarding right to holidays already mentioned, followed by Trstenjak in *Schultz-Hoff* and *Stringer e a.* – equally significant examples have been added; on the right to human dignity the case *The Netherlands against European Parliament and Council of European Union* of the 14<sup>th</sup> June 2001<sup>82</sup>; regarding respect for

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effect comparable to that of primary law, it does at least, as a legal reference, provide information on the fundamental rights guaranteed by the Community legal order [...]” (note 83).

<sup>79</sup> Kokott's Conclusions, 27th January 2005, C-186/04 *Pierre Housieaux* in which the Att. Gen. refers to the conclusions on the Berlusconi case, on which see previous note.

<sup>80</sup> Kokott's Conclusions, 4th September 2008, C-222/07, *UTECA* “[...] Admittedly, it still does not produce binding legal effects comparable to primary law but it does, as a material legal reference, shed light on the fundamental rights which are protected by the Community legal order [...]” (note 72).

<sup>81</sup> In this sense, it is clear that the part of the doctrine which retains that the Charter is an “atypical source” to be put in context among the normative sources «similarly to other EU primary sources, among which “common traditions”, “the general structural principles of treaties”, common law, and therefore, as such, “destined to represent the source of cognition of the rights expressed by these traditions”». In this sense, A. BARBARA, *La Carta europea dei diritti: una fonte di ri-cognizione!*, in *Dir. Un. eur.*, 2001, 241 ss. Taken up by E. PAGANO, *Il valore giuridico della Carta dei diritti fondamentali e le competenze dell'Unione*, in DPCE, 2003, p. 1723 ss.

<sup>82</sup> Jacob's Conclusions, 14th June 2001, C-377/98, *The Netherlands v. European Parliament and The Council of European Union*. “There can be no doubt in my view that the rights invoked by the Netherlands are indeed fundamental rights, respect for which must be ensured in the Community legal order. The right to human dignity is perhaps the most fundamental right of all, and is now expressed in Article 1 of the Charter of Fundamental Rights of the European Union, which states that human dignity is inviolable and must be respected and protected. The right to free and informed consent both of donors of elements of the human body and of recipients of medical treatment can also properly be regarded as fundamental; it is also now reflected in Article 3(2) of the EU Charter which requires in the fields of medicine and biology respect for the free and informed consent of the person concerned, according to procedures laid down by law. It must be accepted that any Community instrument infringing those rights would be unlawful” (point 197). “It is of course clearly desirable that no element of human origin should be taken from a person without their consent. That principle is expressed at the forefront of the EU Charter of Fundamental Rights; it is also enshrined in Chapter II of the Council of Europe Convention

the environment in the case *The Commission of the European Community versus The Italian Republic* of the 8<sup>th</sup> January 2004<sup>83</sup>; on the principle of respect for linguistic diversity in the case *Kingdom of Spain versus Eurojust* of the 16<sup>th</sup> December 2004<sup>84</sup> and *UTECA* of 4<sup>th</sup> September 2008<sup>85</sup>; on respect for private and family life in the case *European Parliament versus Council of European Union* of the 8<sup>th</sup> September 2005<sup>86</sup>; on the right to effective jurisdictional protection in the case *Sfakianaki AEVA versus Elliniko Dimosio* of the 20<sup>th</sup> October 2005<sup>87</sup> SECAP

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on human rights and biomedicine, which provides that an intervention in the health field may only be carried out after the person concerned has given free and informed consent to it" (point 210).

<sup>83</sup> Colomer's Conclusions, 8th January 2004, C-87/02, *Commission of the European Community v. The Italian Republic* in which at point 36 it is said "Community citizens are entitled to demand fulfilment of that responsibility under Article 37 of the Charter of Fundamental Rights of the European Union, which guarantees a high level of environmental protection and the improvement of the quality of the environment".

<sup>84</sup> Poiares Maduro's Conclusions, 16th December 2004, C-160/03, *Kingdom of Spain v. Eurojust*. "In a Union intended to be an area of freedom, security and justice, in which it is sought to establish a society characterised by pluralism, respect for linguistic diversity is of fundamental importance. That is an aspect of the respect which the Union owes, in the terms of Article 6(3) EU, to the national identities of the Member States. The principle of respect for linguistic diversity has also been expressly upheld by the Charter of Fundamental Rights of the European Union and by the Treaty establishing a Constitution for Europe. That principle is a specific expression of the plurality inherent in the European Union" (point 35). "It is noteworthy in that connection that the Charter of Fundamental Rights of the European Union upholds, in Article 21, the role of non-discrimination as a fundamental right enforceable against the institutions of the Union" (note 41).

<sup>85</sup> Kokott's Conclusions, 4th September 2008, C-222/07, *UTECA* "Respect for and promotion of diversity in the cultural sector is also important to the European Union because it is this very diversity that is so characteristic of Europe and European culture. The idea of 'unity in diversity' therefore forms one of the cornerstones of the European Union, whilst Article 22 of the Charter of Fundamental Rights of the European Union states that the Union shall respect cultural, religious and linguistic diversity" (point 94).

<sup>86</sup> Kokott's Conclusions, 8th September 2005, C-540/03, *European Parliament v. Council of European Union*. "In that regard it is appropriate to recall Article 7 of the Charter of Fundamental Rights (Article II-67 of the Treaty establishing a Constitution for Europe) which provides that everyone has the right to respect for his or her private and family life, home and communications" (point 7). "By these words, the Community legislature evokes the specific prohibitions of discrimination set out in Article 21 of the Charter of Fundamental Rights (Article II-81 of the Treaty establishing a Constitution for Europe)" (point 9). "In so far as it is relevant here, Article 7 of the Charter of Fundamental Rights of the European Union, cited in the second recital in the preamble to the Directive, is identical to Article 8 of the ECHR. Moreover, the first sentence of Article 52(3) of the Charter (Article II-112 of the Treaty establishing a Constitution for Europe) provides that its meaning and scope are to be the same" (point 60).

<sup>87</sup> Léger's Conclusions *Sfakianaki AEVA versus Elliniko Dimosio* of the 20<sup>th</sup> October 2005, Joined cases C-23/04 to 25/04 "It is settled case-law that the right to an effective remedy before a court or a tribunal constitutes a general principle of Community law which underlies the constitutional traditions common to the Member States. It has been enshrined in Article

SpA (C-147/06) and *Santorso Soc. Coop. arl (C-148/06) v. Town Council of Turin* of 27<sup>th</sup> November 2007<sup>88</sup> and *Varec SA against State of Belgium* of 25<sup>th</sup> October 2006<sup>89</sup>.

Among these, the Conclusions of Advocate General Ruiz-Jarabo Colomer of the 11<sup>th</sup> January 2007 are particularly noteworthy. The case in point deals with the social right par excellence, the right to health contained in art. 35 of the Charter. The Conclusions are also worth highlighting for the reference made to the right to health care as explicit limit to the fundamental economic freedom sanctioned by the Treaty, in this case with a more decisive position compared to that assumed by Advocates General Poireres and Mengozzi on the Viking and Laval cases regarding the right to strike and collective bargaining (*supra*).

Advocate General Ruiz-Jarabo Colomer says: "[...] *although the case-law takes as the main point of reference the fundamental freedoms established in the Treaty, there is another aspect which is becoming more and more important in the Community sphere, namely the right of citizens to health care, proclaimed in Article 35 of the Charter of Fundamental Rights of the European Union, since, 'being a fundamental asset, health cannot be considered solely in terms of social expenditure and latent economic difficulties'. This right is perceived as a personal*

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47 of the Charter of Fundamental Rights of the European Union, which is based on Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms. It is the duty of the Court to ensure observance of fundamental rights in the field of Community law [...]" (point 50).

<sup>88</sup> Colomer's Conclusions, 27th November 2007, C-147/06 and 148/06 *SECAP SpA (C-147/06) and Santorso Soc. Coop. arl (C-148/06) v. Town Council of Turin*"The right not to be deprived of the opportunity to be heard is expressly provided for in the legal systems of all the Member States and forms part of the right to good administration enshrined in Article 41, under Chapter V on citizens' rights, of the Charter of Fundamental Rights of the European Union. Article 41(2) recognises the right of every person to be heard before any individual measure which would affect him or her adversely is taken" (point 50). "The Charter, whose importance the Court has recently made clear, in particular in the judgments in *Parliament v Council* and *Advocaten voor de Wereld*, requires that, before a tenderer is excluded, he must have the opportunity to state his views in order to persuade the contracting authority that his bid is genuine" (point 51).

<sup>89</sup> Sharpston's Conclusions, 25th October 2006, C-450/06, *Varec SA v. State of Belgium* "Under the European Convention on Human Rights and under the Charter of Fundamental Rights, the right to a fair hearing is an unqualified right. However, it does not follow that the entitlement to disclosure of relevant evidence is likewise an absolute right. [...]" (point 39). "Under Article 41 of the Charter of Fundamental Rights, the right to good administration includes 'the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy'. A general obligation to respect business secrecy is imposed on the Community institutions by Article 287 EC, and confirmed in a number of legislative provisions, particularly in the field of competition [...]" (point 43).

*entitlement, unconnected to a person's relationship with social security, and the Court of Justice cannot overlook that aspect"* (point 40)<sup>90</sup>.

#### **4.3.2. The position of the Court of Justice.**

Regarding the Court of Justice, as has already been clarified, the approach to the Charter of Nice is certainly more cautious than that of the Advocates General's. This is demonstrated by the fact that compared to the remarkable number of Conclusions in which there is a direct application of the fundamental rights sanctioned by the Charter, there are no actual judgments that go so far.

However, in a recent ruling it would appear that a tentative move was made towards direct application of the Charter although the move opted for a non-compromising reference: the articles called on, in fact, enter in the judgment indirectly, that is through the reference to the identified fundamental rights using the Charter of Nice as parameter.

The reference regards the sentence of 29<sup>th</sup> January 2008, C-275/06, *Productores de Musica de Espana (Promusicae) v. Telefònica de Espana SAU* in which the Court used the fundamental rights contained in the Charter of Nice as parameter of legitimacy for the correct interpretation and application of EU law.

The Court expressed itself thus:

*"The national court refers in its order for reference to Articles 17 and 47 of the Charter, the first of which concerns the protection of the right to property, including intellectual property, and the second of which concerns the right to an effective remedy. By so doing, that court must be regarded as seeking to know whether an interpretation of those directives to the effect that the Member States are not obliged to lay down, in order to ensure the effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings leads to an infringement of the fundamental right to property and the fundamental right to effective judicial protection"*(point 61).

And adds:

*"However, the situation in respect of which the national court puts that question involves, in addition to those two rights, a further fundamental right, namely the right that guarantees protection of personal data and hence of private life"* (point 63).

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<sup>90</sup> Conclusions of Ruiz-Jarabo Colomer, 11th January 2007 C-444/05, *Aikaterini Stamatelaki v. NPDD Organismos Asfaliseos Eleftheron Epangelmaton (OAE)*. The citation taken from point 40 by the Att. Gen. is contained in Opinions of the European Economic and Social Committee on the theme "Health care" approved by Plenum on the 16<sup>th</sup> and 17<sup>th</sup> of July 2003 (GU C 234, pag. 36).

And furthermore:

*"According to recital 2 in the preamble to Directive 2002/58, the directive seeks to respect the fundamental rights and observes the principles recognised in particular by the Charter. In particular, the directive seeks to ensure full respect for the rights set out in Articles 7 and 8 of that Charter. Article 7 substantially reproduces Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950, which guarantees the right to respect for private life, and Article 8 of the Charter expressly proclaims the right to protection of personal data"* (point 64).

And concludes

*"The present reference for a preliminary ruling thus raises the question of the need to reconcile the requirements of the protection of different fundamental rights, namely the right to respect for private life on the one hand and the rights to protection of property and to an effective remedy on the other"* (point 65).

In a more recent sentence, the Court of Justice seems to have taken a step forward compared to its position previously described, even though it is true to say that an isolated pronouncement cannot claim to be representative of a trend. The sentence in question is of the 16<sup>th</sup> December 2008, C-47/2007 P., *Masdar (UK) Ltd v. The Commission of the European Community* on the subject of the right to an effective remedy.

The Court affirms:

*"Actions for unjust enrichment do not fall under the rules governing non-contractual liability in the strict sense, which, to be invoked, require a number of conditions to be satisfied, relating to the unlawfulness of the conduct imputed to the Community, the fact of the damage alleged and the existence of a causal link between that conduct and the damage complained of [...]. They differ from actions brought under those rules in that they do not require proof of unlawful conduct – indeed, of any form of conduct at all – on the part of the defendant, but merely proof of enrichment on the part of the defendant for which there is no valid legal basis and of impoverishment on the part of the applicant which is linked to that enrichment"* (point 49).

And concludes, applying the Charter without ifs and buts and citing its previous uses as a European Bill of rights, in an exceedingly important passage:

*"However, despite those characteristics, the possibility of bringing an action for unjust enrichment against the Community cannot be denied to a person solely on the ground that the EC Treaty does not make*

*express provision for a means of pursuing that type of action. If Article 235 EC and the second paragraph of Article 288 EC were to be construed as excluding that possibility, the result would be contrary to the principle of effective judicial protection, laid down in the case-law of the Court and confirmed in Article 47 of the Charter of fundamental rights of the European Union, proclaimed at Nice on 7 December 2000 [...]”* (point 50).

It is evident that among the significant episodes in the history of the application of the Charter of Nice hereto described a prominent place is occupied by the previously mentioned judgments *Laval* and *Viking*, the epilogues of which are vastly different to the one just described by the sentence *Promusicae*. In the latter case, the Court put into act an operation of balancing between the two fundamental rights sanctioned by the Charter, in the end interpreting the directives which were object of the preliminary question in the light of the rights evoked, and subordinating the implementation of the measures of transposition by Member States in respect to a “constitutionally orientated” interpretation (*rectius*, guided by fundamental rights).

On the other hand, in *Laval* and *Viking*, the Court recognised the right to collective action, bringing it within the sphere of application of EU law and thus justifying an operation of balancing. At the end of this process, the fundamental right under consideration conceded before the need to protect the fundamental freedoms sanctioned by the Treaty.

## **5. 2<sup>nd</sup> Part. Domestic decisions. Use of the Charter as interpretive support in relation to soft or semi hard law. The case of indirect application.**

The Charter of Nice is now fully recognised, even in the decision-making process of Italian judges. There are various examples in which the Courts – Court of First Instance, Court of Cassation and the Constitutional Court – have demonstrated their acceptance of the Charter as a source of law<sup>91</sup>.

In the majority of cases the path followed by national and supranational judges is that of indirect application, in which the Charter of Nice is referred to as a source of semi hard law by confirming a decision already made using other normative references.

This is what happened in the sentence of the 16<sup>th</sup> October 2007, in which the Court of Cassation sustained that:

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<sup>91</sup> For complete and reasoned recognition of all the Italian judiciary in the light of the classification prospected in this survey, cf. again the dossier cit.

*"From the Charter of Fundamental Rights of the European Union we deduce how the informed and free consent of the patient to medical treatment must be considered, not only from the point of view of the lawfulness of the treatment, but above all as a real fundamental right of the European citizen, afferent to the more general right to the integrity of the person"*<sup>92</sup>.

Another example of a reference to the Charter to "persuasive" ends can be found in the Constitutional Court 24<sup>th</sup> April, 2002, n. 135<sup>93</sup>.

Worthy of note and useful to highlight the attitude of National judges is also the sentence of the 9<sup>th</sup> July 2008<sup>94</sup> in which the Court of Cassation refers to art. 11 of the Charter of Nice as an integral part of the principles of the Community and of European constitutional traditions.

*"In this sense it is useful to consider also article 11 of the Charter of Nice, recalled in the recent Treaty of Lisbon, as an integral part of EU principles and of the common constitutional traditions within Europe. The said article considers the freedom of expression and opinion, even criticism, beside the freedom of information. The Treaty is in the process of ratification, but a supplementary interpretation of Italian constitutional norms (art. 21 Cost.) must also be guaranteed by Italian National judges"*.

The Constitutional Court also ruled on the right to access all information regarding medical treatment in a recent sentence of the 23<sup>rd</sup> of December 2008<sup>95</sup>, enumerating the Charter of Nice and the right sanctioned in it among the domestic and European constitutional sources<sup>96</sup>.

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<sup>92</sup> Cass. 16th October 2007 n. 21748.

<sup>93</sup> On the subject of limiting freedom of domicile the Court affirms that a hypothetical restriction of the limitative measures of the freedom of domicile to those expressly typified as well as not having a basis in art. 14 of the Charter «*Would not find nothing comparable in the Convention for the protection of human rights and fundamental freedoms, nor in the International pact on civil rights, nor, finally, in the Charter of Fundamental rights of the European Union, proclaimed in Nice in December 2000, hereby recalled - even though it lacks juridical efficacy - for its expression of principles common to all European legal orders*».

<sup>94</sup> Cass., section III, 9th July 2008, n. 18849.

<sup>95</sup> Constitutional Court, 23 december 2008, n. 438.

<sup>96</sup> *"It is necessary to underline that informed consent, intended as an expression of the conscious adhesion to the health treatment proposed by the doctor, amounts to a real and concrete right of the person and finds basis in the principles expressed in art. 2 of the Constitution, which protects and promotes the fundamental rights and in art. 13 and 32 of the Constitution which establish, respectively, that "personal freedom is unassailable" and that "no-one can be obliged to a certain healthcare if not by disposition of the law."* "Numerous international laws provide for the necessity of informed consent of the patient regarding medical treatment. In particular, art. 24 of the Convention on rights of the child,

Recently, in a sentence of the 3<sup>rd</sup> of July 2008, the Court of Cassation used the Charter of Nice in a more compounded discourse in which the need for an interpretation of individual rights in the light of international sources was highlighted.

In this, the Court of Cassation goes beyond mere reference to the specific right contained in the Charter and so it assumes a far more general and significant task: the reference to the Charter becomes an opportunity for an unequivocal discussion on the sources of the European juridical order. The passage regarding the theory of a unitary legal order seems more than a simple "assist" to the Constitutional Court, still attested, although with some recent signs of yielding on the theory of separation<sup>97</sup>.

References to the Charter are frequent also in the judgments of the Court of the First Instance, as for example in the ruling of the Court of Salerno, 21<sup>st</sup> April 2008<sup>98</sup>.

In the majority of domestic judges' rulings, as in those of EU judges, there are significant affirmations on the juridical value of the

signed in New York on the 20<sup>th</sup> November 1989 [..]; art. 3 of Fundamental rights of the EU, proclaimed at Nice 7<sup>th</sup> December 2000 [..]."

<sup>97</sup> In fact, the Court sustains "It is quite true that the Constitutional Court with the judgments 348 and 349 of the 24<sup>th</sup> October 2007, anterior to the deliberation of this Court, but also to the negative ordinance of 2008 currently being examined, considered binding for this court, have constituted a turning point for opening our constitutional system of justice towards EU legislation, consenting the Italian Court to instigate a dialogue with the European Court of Human Rights, as the Treaty of Lisbon expects, currently in the process of ratification ( according to the governative agenda and bill deposited in parliament) with the reception of the Charter of Nice in the Treaty of the European Union. This turning point, which once and for all supersedes the limits posed by the Constitutional Court with the distant ruling of 19<sup>th</sup> January 1993 no. 10, requires an improved interpretation of the system of sources starting from the text of art. 117 Italian Constitution, comma 1, which requires an additional relationship with European sources on the fundamental rights of the person. (European Council and Charter of Nice) and a comparison via dialogue with the rulings of the EU Court of Justice [..]" Cf. Cass., section III, 3<sup>rd</sup> July 2008, n. 18203. On the circulation of juridical models of protection through dialogue between the Courts, for all. A. SPERTI, *Dialogue between constitutional courts and resorting to juridical comparison in experience*, *Riv. Dir. Cost.*, 2006, 225 ss.; also D: WILLIAMS, *Court and Globalisation in Indiana Journ. Global Legal Studies*, 2004, p. 57; R. MUNCH, *Constructing a European Society by jurisdiction*, *European Law Journal*, 2008, 5, 519.

<sup>98</sup> The Judge affirms "Rather, the competence for the specialized areas should be, since their institution, extended to the protection of all intellectual property, which, on the basis of the EC Treaty introduced by the Treaty of Amsterdam in 1997, by additional protocol from 1952 of European convention for the protection of human rights, from the Charter of Nice in 2000, as well as the institutive conventions of the various international organisations having general competence on the same intellectual property, must have as their object patents for inventions, models of utility, designs or industrial models, the manufacturing, marketing or service brands, the trading name and indications of the provenience or denomination of origin, as well as the repression of unfair competition" .....

Charter of Nice. For example, on the one hand the Constitutional Court<sup>99</sup> cites art. 49 of the Charter as a rule which functions as "confirmation", with reference to the principle of retroactivity of the most favourable penal law; on the other, it emphasises the Charter's "expression of principles common to all European orders", defining it as "an act which still lacks juridical value but recognized interpretative importance"<sup>100</sup>.

### **5.1. Use of the Charter as hard law, that is, as normative foundation of rights. The case of direct application**

However, there have been cases where, some domestic judges have been keen to jump the gun<sup>101</sup>, and have gone so far as to sustain the disapplication of a domestic statutory regulation because it contrasted with an article from the Charter of Nice.

For example, in a reasoning which was widely criticised by academic commentators<sup>102</sup>, the Court of Appeal of Rome in the ordinance of the 11<sup>th</sup> April 2002 decided to disapply a norm on legal aid contained in law no. 533/1977 because it was in contrast with article 6 of the European Convention of Human Rights and with article 47 of the Charter of Nice<sup>103</sup>.

The same approach was taken by The Court of Appeal of Florence, according to which the principle contained in art. 34.2 of the Charter of Nice which considers of the social security of non-EU citizens «*the importance of fundamental rights derived from the Courts of The Union by virtue of the universal nature of the principle of equality*», would allow for the disapplication of national regulations which distinguish who is eligible to benefit from economic assistance provided by the national order by the possession of a residence permit, thereby contrasting radically with the general principle of equality and the prohibition of discrimination on the basis of nationality<sup>104</sup>.

Similarly the Court of Ravenna retained it necessary to disapply the domestic law in order to recognise a disability allowance for a non-European citizen, although the person in question was not in possession of a residence permit<sup>105</sup>.

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<sup>99</sup> Const. Court 23<sup>rd</sup> November 2006, n. 393.

<sup>100</sup> Const. Court. 4<sup>th</sup> July 2008, n. 251 and Const. Court 24<sup>th</sup> October 2007, n. 349. For further reference cf. the dossier, cit.

<sup>101</sup> Cf. B. CARUSO, *I diritti sociali fondamentali*, op. cit. where there is reference to "constitutional impatience".

<sup>102</sup> R. CALVANO, *La Corte d'appello di Roma applica la Carta dei diritti UE. Diritto pretorio o Ius commune europeo?* in *Giur.it.*, 2002, 12, 2238 ss.

<sup>103</sup> Ordinance of the Court of Appeal, Rome, 11<sup>th</sup> April 2002, Cannella rel.

<sup>104</sup> Court of Appeal, Florence, 9<sup>th</sup> June 2007.

<sup>105</sup> Court of Ravenna, 16<sup>th</sup> January 2008.

On positions partially more cautious – that is which have not determined the disapplication of domestic laws – The Court of Cassation has ruled similarly to supranational judges and Advocates General, whereby the Charter of Nice is used as a source of recognition of fundamental rights of the European order. For example in the sentence of 11<sup>th</sup> November 2002 the Supreme Court sustained, regarding a right which has no direct corroboration in any of the national Constitutions, the right to protection against unfair dismissal through compulsory justification by the employee, which verges on the right to stability of employment as represented by compulsory re-employment.

*“Nor can we neglect, in recognition of the texts which concur in outlining the features of the International public order, the Charter of Fundamental Rights of the EU, whose art. 30 establishes that every worker has the right to protection against unfair dismissal; without going into the question here, regarding the juridical efficacy of this text, it is without doubt the expression of fundamental juridical principles, common to European orders (in this sense), [...]”;*

From which the juridical norm

*“Given that, through a process of conformation of the order to the constitutional value of work, we have reached a connotation of the public order according to which the stability of a position of work constitutes a principle of the public order and as the stability of the position is protected by the order via the almost general prohibition of “ad nutum”, additional parts of the public order are the laws which govern this protection, in its essential nucleus, expressed by the Charter of fundamental rights of the Union; if it is true, furthermore, that the real protection of which reference to art. 18, law 20th May 1970, no. 300 does not qualify as described by the public order, it is also true that this dimension is part not only of the concrete mechanism through which the unjustified withdrawal of the employer, but also the principle that the latter cannot at his will terminate the working relationship. Therefore the judge, having established that this is the case and having carried out a study on the compatibility of the foreign law with the public order of the court, can exclude the application of the former and retain that the law of the latter is applicable”<sup>106</sup>.*

Some rulings by the Court of Appeal of Rome are also representative of a tendency to use the Charter of Nice “as if” it were legally binding. Although these rulings do not go so far as to disapply domestic law, they make ample reference to art. 31 on the subject of rights to equal and fair working conditions for workers, attributing it with

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<sup>106</sup> Court of Cassation, 11th November 2002, no. 15822

binding juridical efficacy. The reference is to the judgments of the 4<sup>th</sup> October 2007, 21<sup>st</sup> November 2007 and 6<sup>th</sup> June 2008 in which the judge affirms:

*"The rights of workers to "equal and fair working conditions" established by art. 31 of the Charter of Nice with a summarily formula which wants to cover all those situations of abuse or discrimination not disciplined by other norms specific to the same European Bill of Rights [...] lead to an interpretation (having to attribute – in the wake of jurisprudence of our Constitutional Court – to the Charter of Nice an "expressive" value of the common constitutional traditions) the EU discipline and also the national one which has acknowledged the first, in the sense of requesting the "concrete" specification from the employer regarding the reason for the dismissal, so as to not compromise the ends of the agreement framework, of the directive and of the same Italian law, precedence is given to the legitimate expectations of workers to "transparency" in referring to "atypical" contractual instruments. In the sense of art. 51 of the Charter, this applies to EU and national law of application of the former and the recognition of its acknowledging nature regarding "common constitutional traditions" implies that – in the senses of art. 6 TEU – the rights sanctioned by it must be considered general principles of EU law and as such privileged instrument of interpretation of supranational and internal legislation which has acknowledges the former in internal legal order. [...] Even the formulas previously mentioned regarding the Charter of Nice ( including the principle of non discrimination applied numerous times by the Court of Justice to censure the irrational discrimination among workers possessing fundamental rights: for all see the sentence Betcu C – 173/99 of 2001) serve to achieve this hermeneutic result".*

The affirmations contained in the three rulings considered are extremely important; not only does the Court apply the Charter of Nice as if it were already a binding juridical force, but it also clarifies the reasons for its importance as a European *Bill of Rights* and source of "recognition" of the common constitutional traditions which cannot be ignored in the reconstruction of a normative framework, useful for resolving a controversy.

## **6. The Charter of Nice's steady ascent in juridical effectiveness in law in action.**

The research conducted on law in action constituted by the decisions of the EU Courts – Court of Justice and Court of First Instance – and national courts, as well as the Advocates General's Conclusions, would indicate a precise trend regarding the use of the Charter of Nice.

As has been already noted, the soft and non-binding character of the Charter, frequently highlighted by both judges and Advocates General, has not impeded its being appreciated as a source of recognition of fundamental rights acknowledged by the supranational order. On the other hand, however, the lack of binding juridical efficacy has not allowed it to be used in a way which goes beyond an indirect application, except in a few cases, courageous as they are unsustainable. This has been the case when the Conclusions of the Advocate General have been in conflict with the Court ruling or the widely criticised choice of a few judges to disapply internal norms.

Instead, in the vast majority of cases, the Charter and the articles contained therein have played a fundamental part in the path of reasoning followed by the judges or Advocates General. Rarely used simply as a "clause of style", more frequently it has been used as an essential element to the normative reconstruction useful in the resolution of specific preliminary questions or of the concrete case in point (in the case of national judges).

The Charter of Nice is not the first document that contains an enumeration of fundamental rights; nevertheless, the fact that it has a position of supremacy over the other European Charters, as well as being successful with the Advocates General (cf. above, par. 4.3.1) is demonstrated by the constant use which following its proclamation the Advocates General have made of it, followed a year or so later by the Courts.

The proof of the desire to attribute the Charter with an efficacy which goes beyond its true soft nature was then provided by some Italian judges who had in fact called on it to sustain the disapplication of an domestic law presumably in contrast with a fundamental right sanctioned in Nice.

It is certain that the prospect then destroyed, of incorporating the *Bill of Rights* contained in the Charter of Nice within a European Constitution had rekindled dampened hopes regarding a constitutional recognition of fundamental rights, signalling the start of a flourishing phase of rulings orientated to the attribution, if not of binding efficacy, at least of a central importance in the construction of supranational legislation.

The failure of the project and a moment of despondency have not, however, changed some of the key elements, which are by now founded on consolidated territory (as for example on the subject of right to holiday).

On the other hand, it is equally true that because of the non-binding juridical nature of the Charter, cases such as *Laval* and *Viking*

could have had a different end, if only the Charter had been bestowed with a binding juridical power. Instead, its persistent soft law nature is the cause of (even though this does not totally justify) an unequal balancing to the detriment of classic social rights, which nonetheless are recognised as fundamental points of reference of the strategy of European social and political integration and of its constitutional basis.

Furthermore, the judgments on fundamental rights to which we have referred would seem to trace the first outline of a hierarchy, however unstable and simplified, between fundamental rights and principles carried out by the Court of Justice, above all when these rights are confronted with the economic freedoms, considered by the European order in the same way as fundamental rights.

The right to healthcare and the right to protection of human dignity, for example, would seem to have received a higher level of protection to that reserved for the right to collective self-protection (cf. the cases *Omega*, *Schmidberger* and *Aikaterini Stamatelaki*).

The dynamic and original nature of the evolution of a European order, its multi-level and plural structure, create the conditions for the affirmation of fundamental social rights and balancing operations, integration and reciprocal osmosis with economic freedoms, performed by the Courts in reciprocal dialogue. It is this process of forming a real and unique European law in action which deserves the greatest attention on the part of the International communities of legal experts.