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Law, Liberties, and their Relationships: The Development of a Controversial Issue from the U.S. Bill of Rights to the EU Charter of Fundamental Rights

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Abstract

The relationship that exists between the law and civil liberties has characterized the development of the same idea of freedom. Whilst in the civil law countries, during the XIX century, the law was considered as the principal means in order to protect the liberties that liberal revolutions had affirmed, in United States the congress was thought as the first menace for individual freedoms. These two approaches illustrate a more general issue: the protection of civil rights needs at the same time two different and potentially contradictory conditions:

- a) The Legislator must actively contribute and adopt regulations that define the individual circle of liberty;
- b) The constitutional system has to control the legislator in order to prevent him from passing legislation that curtails individual freedoms.

These needs directly impact the drafting of constitutional provisions that protect liberties and lead its evolution through the nineteenth and the twentieth centuries.

This essay investigates this topic firstly through an analysis of the main theories that legal scholarship developed during the last two centuries on the relationship that exists between law and freedom. Secondly, it analyses constitutional drafting in order to examine the concrete relationship that exists between law and liberties in some relevant constitutional experience, from the U.S. Bill of Rights to the EU Charter of fundamental rights.

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Liberty and Property in the Nineteenth Century Liberal State

During the modern age, the idea of liberty as a legal problem emerges with the establishment of the Nineteenth Century Liberal State¹, through the translation of the philosophical concept of natural liberty in legal terms. This concept can be defined as the absence of checks and obstacles to the human conduct resulting from other people's intentional behaviour. Playing on the idea of absence (precisely absence of obstacles to the free development of the subject's faculties), this definition of natural liberty has a negative meaning: it is structured by means of the opposition to the powers that theoretically could interfere with the subject and his choices and actions.

In the context of the rising Liberal State, the translation of the concept of natural liberty in legal and political terms leads to the idea of liberty as an absence of intrusion of public powers and contributes to outline the marked separation between State and civil society, that is, between the public and private sphere, which is typical of this form of State. As a consequence, this idea of liberty consists in a *space devoid of law*,² in an area that strictly pertains to the individual and where legal orders cannot be given. In other words, it is the *magic circle* theorized by Benjamin Constant,³ which shields persons from sovereign power and from its interference, considered an undue intrusion.

1 The expression "Liberal State" refers to a specific model of State that spreads in Europe during the Nineteenth Century and that presents some specific features: the main (political and social) role played by the Bourgeoisie; the suffrage restricted on the ground of census; the principle of legality and the key role of Parliament within the frame of government; the idea that the State must tend towards the model of minimal state. On this issue see G. Amato, *Forme di stato e forme di governo*, Bologna, il Mulino, 2006, pp. 33 ff.

2 K. Bergbohm, *Jurisprudenz und Rechtsphilosophie*, Lipsia, Dunker & Humboldt, 1892, pp. 387 ff.

3 B. Constant, *De la liberté des Anciens comparée à celle des Modernes*, Discours prononcé à l'Athénée royal de Paris, 1819, now in *Ecrits politiques*, Paris, Gallimard, 1997, pp. 593 ff.

However this conception is not legal *strictu sensu* (for this reason it has been defined as legal and political rather than as simply legal). As a result it requires a translation in normative terms and needs positive law to recognize the “magic circle”.

In fact, during the Nineteenth Century, this duty was performed by the Declarations of Rights and Constitutional Charters, which enumerated and categorized the areas for activities that are reserved for individuals and saved from intervention of public powers. Executing this role, the Declarations and Charters seem to be in contrast with the ordinary laws, which have the purpose of defining and regulating public intervention and reproducing in the context of sources of law the antithesis between individual and community typical of the liberal legal order. Nevertheless it is necessary to clarify this impression because the Declarations and Charters are often on the same level of the laws in the hierarchy of legal sources; on the contrary, in many constitutional experiences they establish a relationship of direct consistency with the ordinary state laws. Therefore, the concrete guarantee of the area saved from public intervention is referred to ordinary legislation and, as a consequence, to Parliament.

In other words, the guarantee of negative freedom in the Liberal State consists in the core principles distinctive of the State based on the rule of law.

However, this concept has developed differently in various countries. It is necessary to distinguish between the continental experience and the British one. In the English legal system, the concept of the rule of law is more deferent to civil liberties than the idea of *Rechtsstaat* and of *État de droit*: it admits the existence of a *higher law*, which is the common law in the United Kingdom and the Constitution in the United States, and its enforcement by judges.

Vice versa, within the continental State of legislation (the German *Rechtsstaat* and the French *État de droit*), the negative liberty consists in the principle of legality and in the need for all intervention of public power in the sphere of individual autonomy to be grounded on explicit legal rules, which must be general and abstract and passed by Parliament (or other representative bodies).

The translation of natural freedom into legal liberty, which found its formal keystone in the dynamics of State legislation, also needs a material conjunction constituted by the declension of property as a fundamental liberty.

The idea of the individual, assumed by Nineteenth Century liberal scholars, is based on a particular concept of legal personality, which is borrowed from civil law. Under this theory, legal personality means *the will that generates legal relationships and activities*. Nevertheless, the reference to will prevents imagining social relationships as being autonomous and direct: with the exception of the hypothesis of agreement, mediation between different wills, which does not consist in the mere predominance of the first will over the second one, does not exist.⁴ Therefore, on the one hand, inter-subjective relationships require the mediation of the object over which the personal will is exercised; on the other hand, the development of individual personality – which cannot occur in a social way, through a direct relationship with another subject – needs a material area where it can spread its dominion.

As a consequence, private property is not only a fundamental liberty but is also a full-fledged principle of constitutional organization and therefore an unsurpassable boundary line between the private and public sphere. Therefore, given that liberties have a strict defensive nature, property acquires the role of firstmost guarantee of the individual against the intrusiveness of public power. In other words it is a factor of minimal guarantee of negative liberties. At the same time, as the owner is the recipient of subjective legal positions, the defensive character of negative liberties is strengthened.

On the other hand, in this context, private property assumes an additional function that explains its vital importance. It is the principle of social organization capable of defining the allocation of resources and preventing distributive conflicts. Consequently, it has an immediate relationship with the satisfaction of individual needs, which thanks to the possession of goods guaranteed by law are self-satisfied. This has an immediate

⁴ See A. Baldassarre, “Libertà, I) Problemi generali”, in *Enciclopedia giuridica*, vol. XIX, 1991, pp. 9-12.

relationship with the theme of liberties. Indeed, in securing individual independence from the needs and, consequently, from those who could ensure their satisfaction, property is a sort of *material magic circle* that provides the substantial fullness of the *legal one*.

This paper aims to analyse the evolution of the (legal) concept of liberty, from the Nineteenth Century to the end of the Twentieth, and the consequences that this evolution had on relationships that exist between law, liberty, and constitutional drafting. In order to achieve these purposes, the paper will start considering some of the most important theories on civil liberties (part 1): Jellinek's Theory of Subjective Public Rights (para 2); Berlin's "Two Concepts of Liberty" (para 3); and Schmitt's Concept of *Abwehrrechte* (para 4). After this brief review, it will deal with the modern idea of constitutional liberties (para 5) and social rights (para 6) within the Twentieth Century Democratic State. Once the theoretical framework will be completed, this paper will analyze (part 2) the constitutional drafting of Nineteenth Century Constitutions and Declaration of rights, in order to stress the differences between the American approach and the European one (para 7). Then, the last paragraphs will peruse the constitutional drafting of the modern bill of rights: the German and Italian Constitution (para 8); the European Convention on Human Rights; and the European Charter of Fundamental Rights (para 9). Eventually, para 10 will lay down some concluding remarks.

Law, Liberties and their Relationships: the evolution of the theoretical framework

The Theory of Subjective Public Rights

The first and comprehensive theory of individual liberties was developed within the German *Rechtsstaat*. For half a century it was considered the most authoritative theory in civil law countries regarding rights and liberties.

The Theory of Subjective Public Rights, systematized by G. Jellinek (1851-1911), was developed within the German theory of public law during the second half of Nineteenth Century and has

two main features. On one hand, it is characterized by an organicistic vision of collectivity and, given its Hegelian origin, by the supremacy of the whole over its parts or, what is important herein, by the pre-eminence of the State over the individual.⁵ On the other hand, the categories of the German theory of public law are developed from the general concepts of the Savigny's Historical School⁶ and adapted to the needs of public law.

Carl Gerber makes the first enunciation of the Subjective Public Rights Theory. First of all, the Author reduces legal phenomena to relations of willingness: given that from a naturalistic point of view the State is the personification – unitary and without contradictions⁷ – of the national community, from a legal perspective it is a unity of willingness. Nevertheless, while in private law relationships are on an equal footing, in public law the relationships between the State and the citizens are conceived under a basis of supremacy or subjection. As a consequence, when the public will spread out, individual legal positions consist in a mere *patri* and claims or pretensions against the public power of dominion are not allowed. From a historical perspective, it is clear that this theorization supplied the need, which was especially felt during the time when the author devised his theory, to ground an authoritarian and centralized conception of public power and to legitimize the rising positive science of public law, within Nineteenth century Prussia.

In this context, liberties (the so called civil rights, in the words of Gerber) are simply the reflected effect (*Reflexwirkungen*) of the limitations that the State imposes upon its own action. In other words, they are the areas where public power elected to take a step back. In fact, Gerber also seems to delineate the need for the State to recognize a minimum area for private law, even though he does not define what this area consists of. From this perspective, it is possible to understand what he means when he

5 See G.W.F. Hegel, *Grundlinien der Philosophie des Rechts*, Berlin, Nicolaische Buchhandlung, 1821; See also T. Hobbes, *Leviathan*, London, Andrew Crooke, 1651.

6 See F.C. von Savigny, *System des heutigen römischen Rechts*, Berlin, Veit und Comp., 1840.

7 See P. Laband, *Das Staatsrecht des deutschen Reiches*, Tübingen, Laup, 1876, pp. 64 ff.

refers to “rights to recognition of a free side of human personality”, that is to the civil rights such as “simple limitations to the monarch’s power, in the subjects perspective”.⁸

Even though it is the systematization and the improvement of Gerber’s theses, Jellinek’s Subjective Public Rights Theory maintains the fundamental arguments of the latter. Nevertheless, Jellinek’s theory is also the answer that German legal scholars give to the important developments that concern the First Reich during the last thirty years of the Nineteenth Century, such as male universal suffrage, granted in 1871, and the acknowledgement of the right to resort to the administrative courts against an illegal act of the public administration (1906).

Jellinek’s theory⁹ has some points of contact with the theory that had preceded it. The most important point of contact concerns the idea of the State as an individual legal person, which is in a position of supremacy with respect to individuals and is only capable of maintaining a relationship of dominion over them.¹⁰ Therefore, in Jellinek’s opinion, the State is the driving force behind the entirety of all legal relationships. However, unlike his precursors, Jellinek does not think that the personality of the State is grounded on the primacy of its will and, as a consequence, on its power. On the contrary, he believed that the State’s personality stands in the relationship that each individual establishes with the legal system as well as in the central position that the State assumes within the legal system.¹¹

As a consequence, the monarch’s self-limitation – which in Gerber’s opinion is possible but not necessary and had a philosophical nature – becomes an essential element for the legal

8 See C.F. Gerber, *Über Öffentliche Rechte*, Tübingen, Laup, 1852, pp. 86 ff.

9 G. Jellinek, *System der subjektiven öffentlichen Rechte*, II ed., Tübingen, J.C.B. Mohr, 1905.

10 See A. Baldassarre, “Diritti pubblici soggettivi”, in *Enciclopedia giuridica*, vol. XI, 1989, pp. 4 f.

11 See O. Mayer, *Deutsches Verwaltungsrecht*, Lipsia, Dunker & Humblot, 1895, vol. I, p. 107.

nature of the State.¹² In other words, the relational nature of law forces the State, meant as a body, to recognize the legal existence of other subjects, even though the latter are in a position of subjection. Otherwise, the State would lose its legal character. It is clear that this pattern is affected by a deep contradiction between the personality of the State, which is conceived as unity of willingness, and the concept of State as a legal order whose legal essence is grounded on the political community. This contradiction characterizes the whole of Jellinek's work because the State is at the same time within the law, given that its existence needs a legal relationship, and over the law, seeing that State action is often not subject to legal rules.¹³

Given this fundamental conception concerning the relationship between State and citizens, Jellinek categorizes the individual legal situations in four different *stati*.¹⁴ First of all, Jellinek identifies the *status subjectionis* in which the citizen is subject to public power. On the contrary, when an individual acts out of specific obligations set by public power, he is in a mere condition of negative freedom, which does not have any legal importance. However, when he comes in contact with other people's legal spheres, this condition will have legal valiance, setting up a *status libertatis*. Furthermore, if the State grants to private citizens specific benefits, this way assuming legal obligation, it will establish another status, which Jellinek called *status civitatis*. Finally, in taking action the State needs to make use of individual wills; for this reason, the State invests a particular meaning in the decision made by some categories of citizens, which contribute to the exercise of public functions. In this case Jellinek talks of a *status activae civitatis*.

These statuses are not individual legal situations. On the contrary, they are generic legal situations, which hold a mere capability to act. Instead, for pinpointing specific subjective rights a different element is necessary. That is the legal provision that confers the claim on the citizen and regulates the instruments to

12 O. Bachof, "Reflexwirkungen und subjektive Rechte im öffentlichen Recht", in *Gedächtnisschrift für Walter Jellinek*, Munich, Olzog, 1955, pp. 287 ff.

13 See again O. Bachof, *Reflexwirkungen und subjektive Rechte ...*, p. 294.

14 See G. Jellinek, *System der subjektiven ...*, pp. 99-112.

enforce it against the State. Even in the case of the *status libertatis*, the subjective public right could be pinpointed only when the law prevents any State intervention within specific areas, which are entrusted to individual choices. For this reason, relations of willingness that are made in these areas are not the exercise of a simple faculty of action (an *agere licere*, in Jellinek's words). Instead, these relations are allowed by the State that grants the capability of acting and the correlated legal guarantee.¹⁵ In other words, from a legal perspective, citizens *cannot* act, but *may* act.

In accordance with this nature, the rights that descend from the status could be asserted against the executive power¹⁶ but not against the legislative and judicial branches of government. There are two main reasons. On one hand, Jellinek's subjective public rights originate from an act of Parliament that is not *higher law*. On the other hand, legislation symbolizes the kingdom of wisdom,¹⁷ the area where the boundaries to human action are set; as a consequence, legislative will is a source of positive law. On the contrary, the public administration is the sphere of action to which individual rights could be opposed.

These circumstances point out the greatest shortcoming of Jellinek's theory because rights of freedom are mere claims to lawful action on the part of the public administration without having any autonomous and ulterior significance.

"Two Concepts of Liberty"

Typical liberties of the Liberal State are also conceived as negative liberties. In other words, they are conceived as guarantees against interference of public powers. Within this form of State, they pertain to the relation between individuals and public powers: liberties have, in other words, a strictly vertical dimension.

15 See S. Romano, "La teoria dei diritti pubblici subbiettivi", in Trattato di diritto amministrativo, Ed. V.E. Orlando, vol. I, 1900, pp. 119 ff.

16 See G. Zanobini, Corso di diritto amministrativo, Milano, 1958, pp. 112 ff.

17 C. Bornhak, Preußisches Staatsrecht, vol. I, Freiburg, 1888, pp. 267 ff.

More precisely, the defensive nature of this kind of liberty is expressed in two interrelated needs: the first one pertains to the dialectic between liberty and its limits, which are admissible only to the extent required by the protection of public interest. The limitation must be related to the public interest pursued by legislators,¹⁸ even though, in the Liberal State, this does not mean that the former (the limitation) should be proportionate to the latter (the public interest).¹⁹ The second need consists in the inadmissibility of all legislative interventions that aim at imposing specific finalities on the individual liberties or, in more general terms, at functionalizing individual freedom to the pursuing of special public interests.²⁰

However, the defensive character of liberties in the Liberal State – that is their protective meaning – is testified by the scope of the protection they are afforded as well as by the limitations they are subject to. With regard to the first aspect, the rigid separation between the private and public spheres drives the liberties into the boundaries of political irrelevance:²¹ not only political rights have property requirements, but also other politically related liberties are subjected to various kinds of restrictions.

The case of liberty of assembly in France is emblematic: it was firstly limited by *Loi Le Chapelier*, passed during the Revolution (on 14 June 1791), and then substantially denied by the *Code penal* of 1810, which required a governmental authorization for every assembly whose purpose was *de s'occuper d'objets religieux, littéraire, politiques ou autres* (Art. 291). On the other hand, the general provision of public order as a limit for all kinds of liberty emphasizes the protective aim of the legal situations guaranteed by the State.

18 G. Lombardi, “Libertà (dir. cost.)”, in *Novissimo Digesto Italiano*, vol. IX, 1963, pp. 844 ss.

19 See J. Bentham, *The Limits of Jurisprudence defined*, repinted, New York, Columbia U.P., 1945.

20 See, among others, F. Neumann, *The Democratic and the Authoritarian State*, New York, Free press, 1957, pp. 36 ff.

21 See A. Baldassarre, “Libertà, I) Problemi generali”, in *Enciclopedia giuridica*, vol. XIX, 1991, pp. 9 ff.

The idea of negative liberty, as absence of interference, is set against the idea of positive liberty, according to a dialectic contraposition between “liberty from” and “liberty of”. This antithesis can be synthesized in the logical difference between the absence of restrictions to individual actions and decisions (negative liberty) and the individual claim to be owner of oneself destiny (positive liberty).²²

However, the simplicity of this dichotomy is only apparent:²³ if liberty, as it was understood above, is included in the concept of negative liberty, the idea of positive liberty has been interpreted in many different ways. Therefore, it seems useful to consider three different notions of “liberty of”.

The first concept of positive liberty consists in the active participation of the individual to the political community. Indeed, although the natural liberty of the individual is limited by rules, it is the individual himself that lays down those rules; therefore they realize the individual autonomy, which is the very content of liberty. From this perspective, the distance between the two concepts of liberty is at the highest level. On the one hand, the idea of liberty stands as an individual claim of *space devoid of law*, free from interference of society; on the other, the idea of liberty as at the centre of the individual in shaping the constraints to which his actions are subjected to.

This concept has been criticized. First of all, it seems grounded on an idea of democracy *à la* Rousseau,²⁴ under which the *volonté generale* does not allow any kind of contradictions.

Alternatively, it requires an organicistic idea of the society, in which the individual is free when he is able to conform himself to an imprecise objective spirit, declared in the common deliberation. From another point of view, the concept is undermined as it is identified with a concise formula regarding

²² I. Berlin, *Liberty*, Oxford, Oxford U.P., 1955.

²³ See H.W. Jones, “Freedom and Opportunity as competing social values: Mill’s Liberty and Ours”, in *Nomos IV. Liberty*, Ed. C.J. Friedrich, New York, Atherton, 1964 pp. 228 ff.

²⁴ J.J. Rousseau, *Du contract social, ou principes du droit politique*, Amsterdam, Marc Michel, 1762.

the requirements that a legal system must comply with in order to be considered as free.

From this perspective the concept of liberty is understood as a *mere* political concept,²⁵ which deals with the relationship between the individual and the society.

One of the most important essays on this topic addresses all these issues: the volume, *Four Essays on Liberty* by Isaiah Berlin.²⁶ In order to carry out his research, Berlin considers the idea of liberty peculiar to stoicism and quietists: if liberty corresponds to the possibility of autonomously pursuing the goal to which every individual sets himself, the renunciation, the “retreat to the inner citadel” is the way through which the individual can find his own liberty. Berlin criticizes this idea, as it considers as a “free man” even those who live under despotic regimes, conforming themselves to the restrictions imposed by the latter. In other words, the stoicism misconstrues the very idea of liberty, confusing liberty with the means through which every man can pursue happiness, even in despotic regimes.

The same criticism is moved towards the idea of liberty developed by Immanuel Kant. The German philosopher describes liberty as rational adherence to limits of one’s own actions.

These concepts of positive liberty also lead the Author to a more convincing definition of the idea of negative liberty, specifying the notion of liberty described by J.S. Mill²⁷ as the capacity to do whatever one wants, by saying that liberty is the possibility to pursue one’s own goals.

The concept of positive liberty can also be interpreted in an authoritarian way. First, the adherence to a rational order of things, by virtue of which the subject can be said to be free,

25 See G. Amato, *Libertà* (dir. cost.), in *Enciclopedia del diritto*, vol. XXIV, Milano, Giuffrè, 1974, pp. 271 ff.

26 1969, edited again in 2002, as “Five Essays on Liberty”, with another essay. It includes: “Political Ideas in the Twentieth Century”, “Historical Inevitability”, “Two Concepts of Liberty”, “John Stuart Mill and the End of Life” and “From Hope and Fear Set Free”.

27 J.S. Mill, *On Liberty*, London, Parker and Son, 1859.

combined with certain types of theories of history,²⁸ under which things actually follow a rational historical development, leads one to consider any kind of legal system whatsoever as being free and even to consider the individual's absence of liberty as a consequence of his own specific error.

Besides, there are other consequences in terms of a possible authoritarian drift. Indeed, "my empirical self" (who can be slave of his own passions instead of free, according to different points of view), can be replaced by my "real", or "ideal", or "autonomous" self, or with "myself at its best", as free is the man who can pursue his own sake.

Having admitted the existence of an objective rationality, nothing prevents us from making another substitution: the will of "my empirical self", swept by "every gust of desire", is replaced by the will of another individual, who knows the objective well.

In other words, this concept of positive liberty makes a double substitution possible: from "my empirical self" to "my ideal self"; from "my real self" as situated individual to the will of the "true self", the one who knows "true" needs and "true" aspirations. As a matter of fact (as Berlin underlines), according to Hegel, obeying "my ideal self" means to obey our "real self". Therefore, forcing the empirical self (ignorant and swept by passions) to follow a proper scheme is not tyranny; on the contrary it is liberation.

These remarks are underlaid by an ideal, partially and critically inherited by J.S. Mill, according to which the concept of individual liberty corresponds to a pluralistic view of human reason. In other words, liberty exists only within a society that recognizes political and social pluralism. This view seems to be synthesized, in Berlin's theory, in the metaphor of the hedgehog and the fox²⁹. According to a verse from Archilochus, "The fox knows many things but the hedgehog knows one big thing". In the view of our Author, the hedgehog symbolizes the kind of people who relate the multiplicity of the world to a single

28 I. Berlin, *Historical ...*, 169. On this topic, see H.B. Acton, "Historical Inevitability by Isaiah Berlin", *The British Journal for the Philosophy of Science*, Vol. 6, No. 24 (Feb., 1956), pp. 338 ff.

29 I. Berlin, *Russian Thinkers*, New York, Penguin, 1978, pp. 45 ff.

fundamental concept, while the fox symbolizes those who pursue multiple goals, often unrelated to each other and deeply contradictory. It is the latter, the fox, that liberal society should strive for, avoiding the temptation to pursue a uniform and objective rationality.

Turning back to the definitions of positive liberty, the second definition we must deal with is hinged on the distinction between two different kinds of liberties: the first, corresponding to negative freedoms, consists in “individualistic” rights, guaranteed in order to allow the individual fulfilment of needs and wishes; the second, corresponding to positive freedom, namely “functional rights”, conferred upon the subject as a member of a community so that the membership determines the content as well as the limits of the right.³⁰ Even this distinction is not without its critics: the relationship between rights and democracy is based on values and it is certainly not comparable to that between means and ends.³¹

The third concept of liberty gives rise to an analytical distinction, which highlights two different aspects of the idea of liberty; those aspects cannot be separated, in order to classify the various freedoms guaranteed by the legal systems into two different groups.

This distinction is similar to that between the concepts of *immunity* and of *control*, to the extent that the idea of negative freedom postulates the existence of an area of independence and privacy of the individual; the positive liberty, on the other hand, guarantees the individual the possibility to choose. These are two phenomena in relationship to each other, the distinction between which coincides with the subjective and objective nature of all liberties.³²

In other words, when a freedom is understood in its negative sense, the objective-material scope that is assigned to individual

30 C. Esposito, *La libertà di manifestazione del pensiero nell'ordinamento italiano*, Milano, Giuffrè, 1958;

31 A. Baldassarre, “Diritti inviolabili”, in *Enciclopedia giuridica*, 1989, vol. XI, pp. 4 ff.

32 N. Bobbio, *L'età dei diritti*, Torino, Einaudi, 1990, pp. 33 ff.

choices becomes crucial. On the contrary, the idea of positive freedom refers to the essential role that, in its definition, is carried out by the decision that the subject is called upon to take, whilst the material boundaries that this decision encounters are hardly definable in abstract.

The analytical nature of such distinction lies in the fact that the two aspects are not mutually exclusive: any freedom has in itself both the above-mentioned aspects. However, in each legal situation only one of them can be crucial to the description thereof.

Fundamental Rights in Carl Schmitt's View and the Concept of Abwehrrechte

Another important distinction, interrelated to those addressed previously, is that between fundamental and non-fundamental rights, which in Europe was proposed for the first time by Carl Schmitt. According to the Author, fundamental rights pre-exist the State, and they do not owe their existence to the recognition by the Constitution or the laws. Besides, any restrictive intervention of the State can be made only through specific kinds of processes, which aim at safeguarding the citizens' position, and is in principle limitable.

The path that leads to their definition begins with the recognition of a fundamental and general circle of individual liberty, which is typical of the State of legislation resulting from the Liberal State. This circle is in contrast with the possibility of public power affecting individual areas of liberty; it only allows the State for restricting them in a narrow, moderate, and measurable way. However, as happens in the case of *status libertatis* imagined by Jellinek, fundamental rights are not a subjective legal situation; on the contrary, they are only their premise. Pre-existing the State, fundamental rights are spheres of freedom, from which rights determined by legal rules are derived.³³ The derivation of positive rights from areas of freedom that pre-exist the state has important consequences with regard to which legal situations are

33 C. Schmitt, *Verfassungslehre*, Munchen-Lipsia, Duncker & Humblot, 1928.

attributable to this category. First of all, these are liberties of man as an isolated individual. Furthermore, in this category Schmitt also includes *freedom of the individual in connection with other people*, but only when he is within the *purely social*. As a consequence, this kind of freedom loses the character of fundamentality when the individual enters the political sphere.

These circumstances clarify the meaning of these fundamental rights, which have a defensive nature and only serve the security of the individual and of the areas necessary so that his personality can spread. In this perspective, it is possible to fully understand the negative nature of defensive rights, which characterizes the positive legal situation (*Abwehrrecht*) that logically follow from the original spheres of liberty.

Finally, following Schmitt's thought, democratic rights of citizen's political participation also have a feeble character of fundamentality. It is feeble for two main reasons: first of all, because public power meets fewer constraints to limit this kind of rights. On the other hand, they are not a result of the separation between State and civil society. As a consequence they have a weaker safeguard, i.e. equal recognition for all members of the community.

Liberties in the Constitutional State

The various ideas of liberty, which are briefly analysed herein, are united to a single premise: they lie in areas reserved for the individual or in possibilities of choice excluded from the interference of public power. Consequently, the concept of freedoms, despite the diversity of conceptual arguments outlined, is fundamentally characterized by being positive rule, specific guarantee of a particular area free from undue State interference. It realizes the separation between State and civil society that has already been highlighted above. The exclusively vertical effect of the rights of freedom, in the liberal legal tradition, precisely lies in this idea.

However, the transition to the Constitutional State of pluralistic democracy does not fail to have an impact on individual

liberties.³⁴ In fact, at the end of World War II the process that led to the constitutionalization of the legal systems and to the identification of the *Higher Law* with the source at the highest level, aimed at hosting the core elements of the *pactum associationis* and, therefore, of the political-constitutional regime, removes the root of the assumptions on which the notion of freedom as an empty space of the law was established.

On the contrary, in the Constitutional State, freedom stands as a legal phenomenon in itself and it appears precisely in terms of “constitutional freedom”, namely as a constitutive element of the legal system of supreme values in which constitutional law is substantiated.

In other words, the foundation of freedom cannot transcend the legal order; on the contrary it is immanent to the core values which are called to oversee the legal and social dynamics of relationships and which constitute the beginning (and the foundation) for individual freedoms.

At the same time, the positive-legal basis of freedom does not allow that their protection is entrusted to a mere abstention of the State from certain areas of liberty. On the contrary, freedom must have a “normative development” consistent with the orientation given by the core values, which outlines both the range of life opportunities open to free choice of individuals and the axiological limits within which those choices can be exercised. In other words, the relationship between the values and freedoms is not without reverberation on the characters of the latter: in the Constitutional State these freedoms are understood in terms of limited freedom, consistent with the dynamics of continuous balance between different values.

The constitutional values, in fact, cannot be construed as separate and mutually exclusive. Rather, they result in a unitary system in which each value finds its own dimension through the coordination (and mutual conditioning process) with other factors

34 H. Kelsen, *Vom Wesen und Wert der Demokratie*, Tübingen, J.C.B. Mohr, 1929.

that compose the constitutional framework³⁵ and axiology, both of which determined by a super-value: human dignity.

Therefore, it is not possible to imagine that the relationship between the principles in question are, as claimed by Schmitt³⁶, hierarchical and mutually exclusive. On the contrary, in the concrete protection of a subjective position, behind the apparent “victory” of the underlying principle, there is instead the realization of the entire table of values and not only one of its parts.³⁷

From another perspective, the values cannot be interpreted as an abstract framework³⁸ of precepts that are everywhere and always valid. On the contrary, they acquire sense (and normative force) in the relation with the characteristics of the present time.³⁹ Constitutional values are not a set of precepts, the scope and the meaning of which is given once and for all, rather they represent positive values in progress, in parallel with the evolution of the specific social context in which they operate.

In this context, freedoms acquire a content of value, which has two specific consequences. First, the relationship between freedom and values means that the former is directly involved in the dynamics of constitutional balancing regarding the latter and, therefore, should be understood as a limited freedom.⁴⁰ Moreover, this kind of freedom does not imply that the content runs out its function with the defence of the individual from the public authority; on the contrary, this idea of freedom appears to be intimately connected with the chances of life inherent in the modern concept of citizenship.

35 P. Häberle, *Die Wesensgehaltsgarantie des Art. 19 Abs. 2 Grundgesetz*, Heidelberg, Muller, 1983, pp. 184 ff.

36 See C. Schmitt, *Die Tyrannei der Werte*, Berlin, Duncker & Humblot, 1960.

37 G. Peces-Barba, *Curso de Derechos fundamentales. Teoría general*, Madrid, Eudema, 1991, pp. 176 ff.

38 See again P. Häberle, *Die Wesensgehaltsgarantie des Art. 19 ...*, p. 177.

39 K. Hesse, *Die normative Kraft der Verfassung*, Tübingen, Mohr, pp. 11 ff.

40 G. Zagrebelsky, *Il diritto mite: legge, diritti, giustizia*, Torino, Einaudi, 1992, 50 ff.

The pervasiveness of constitutional values also requires calling into question the purely vertical effects of the rights of freedom. If they are the legal formalization of the values underlying social life and if they influence the entire legal order, it will be essential that their effectiveness is not limited to the relationship between the individual and the State. The effectiveness should concern the entire the inter-subjective relationship, irrespective of the characteristics of the subject themselves.

The Emerging of Social Rights

The passage from the Liberal State to the Democratic Pluralistic State determined a marked leap in the progressive widening of the situations considered worthy of legal protection. Thus additional classifications need to be addressed. Given that the Democratic State is grounded on the values of liberty and equality, it is necessary to abandon the idea of liberty as a natural freedom and enhance the concept of limited liberty that was considered previously. Furthermore, it is clear that a legal order aimed at promoting equality in the enjoyment of chances in life cannot be limited to ensuring the extension of individual personality. On the contrary, it must guarantee the existence of minimal material conditions that make it possible to reach these aims. On the other hand, human dignity requires that the community takes on the satisfaction of basic individual needs⁴¹.

The existence of these constitutional values explains why a new legal situation is established beside the traditional liberties. These rights are aimed at concretizing the principle of human dignity, as well as the value of freedom, and consist in ensuring the satisfaction of fundamental basic needs, through positive benefits provided (or indirectly paid for) by public powers.

There is a big conceptual distance between these rights and traditional liberties of the Liberal State. Social rights are not a claim for a legal empty space. On the contrary, they consist of a request for action by public authorities, which is aimed at

⁴¹ A. Baldassarre, "Diritti sociali", in *Enciclopedia giuridica*, vol. XI, 1989, pp. 4 and 19 ff.

ensuring the reality of those same chances in life guaranteed by civil liberties.

The constitutional basis of this kind of rights is very diversified among European Constitutions, above all among those written after the Second World War. On the one hand there is the Italian Constitution, where social rights have an explicit provision such as traditional liberties. On the other hand, other Constitutions (including that of V République) do not explicitly provide for social rights, but only include the main guiding principles for public intervention in social matters.⁴² In fact, the French Constitution of 1958 refers to the preamble of the Constitution of 1946 that points out certain social objectives to public powers. These could justify the partial compression of the liberties enshrined in the *Déclaration* of 1789. Under this circumstance, French scholars theorized juxtaposition between the traditional liberties, so called *droit résistance*, and the rights to benefit (so called *droit créances*), and they argued that the first are characterized by a superiority of value, within the overall constitutional design.⁴³ These scholars ground their theses on the basis of lexical arguments or because of the lack of mechanisms to punish any failure to protect the social rights by the public powers.

These views have been to some extent endorsed by decisions of the *Conseil constitutionnel*, which, from case 81-132 of January 16th of 1982 on the *loi de nationalisation*, has always demanded public power to pursue the social objectives of the *Preamble* of 1946 with respect to the liberties sanctioned by the 1789 *Déclaration*.

The German *Grundgesetz* does not make explicit reference to social rights either. On the contrary, it contains a social clause, sanctioned by Art. 20, which provides constitutional protection for the interests social rights are aimed at.⁴⁴ However, German

42 See G.F. Ferrari, *Le libertà. Profili comparatistici*, Torino, Giappichelli, 2011, 212 ff.

43 See J.M. Blanquer, “Bloc de constitutionnalité ou ordre constitutionnel”, in *Mélanges Robert*, Paris, LexisNexis, 1998, 233 ff.

44 See, among others, C. Bommarius, “Germany's Sozialstaat Principle and the Founding Period”, in *German Law Journal*, Vol. 12, Issue 11 (November 1, 2011), pp. 1879 ff.

legal scholars and judges, who are fully aware of the relationship among rights, principles, and values, have not designed a rigid hierarchy between the two kinds of right,⁴⁵ aimed at debasing social rights to the rank of mere legal rights.⁴⁶

Unique is the issue of social rights in the United States of America. It is common knowledge that the Constitution does not contain a social clause like the German Constitution nor does it provide for social rights. Moreover, welfare services were only recognized in the 1930s, and they are addressed to specific groups of people in particular need,⁴⁷ designing a model of welfare state whose character is bluntly residual.⁴⁸

In this context, it is necessary to point out that, from the mid-fifties to the seventies when Earl Warren (1953-1969) and Warren Burger (1969-1986) were Chief Justices, the Supreme Court recognized the existence of certain legal situations of social character, thus moving the U.S. closer to the model typical of European States. More precisely, on the one hand, the Supreme Court used the due process clause of Fifth and Fourteenth Amendments (traditionally addressed to protect property and the liberties sanctioned by the federal bill of rights) to limit the discretion of the legislature on social services: when these benefits were recognized by federal or state laws, they could be limited only through a fair proceeding aimed at protecting the individual position. Note that the Court did not sanction a general duty to provide certain social benefits, but it simply gave partial constitutional protection to those rights. Thus in *Goldberg*

45 This is a controversial issue. See W. Müller, C. Neusüß, "Die Sozialstaatsillusion und der Widerspruch von Lohnarbeit und Kapital", in *Sozialistische Politik*, n. 6-7 (June 1970), 267 ff.

46 See again G.F. Ferrari, *Le libertà ...*, 228 ff.

47 P. Flora, A.J. Heidenheimer, "The Historical Core and Changing Boundaries of the Welfare State", in *The Development of Welfare States in Europe and America*, Eds P. Flora, A.J. Heidenheimer, Brunswick-London, Transaction Pbl., 1981, pp. 24 ff.

48 About models of Welfare State, see R.M. Titmuss, *Social Policy. An Introduction*, London, Allen & Unwin, 1974, and G. Esping-Andersen, *The Three Worlds of Welfare Capitalism*, Cambridge, Polity Press, 1990.

*v. Kelly*⁴⁹ the Court ruled that a suspension of welfare benefits is lawful when organic forms of adversarial process are established. In *Goss v. Lopez*⁵⁰ the court sanctioned the need for adequate procedures for suspending students when the State recognizes the right to education.

On the other hand, the Supreme Court made use of the equal protection clause, in reviewing the reasonableness of legislative classifications designed to recognize the public benefits related to particular states of need. For example it equalized the families with biological children to those with legitimate offspring for enjoying state assistance programs.⁵¹

In both cases, the Court did not recognize the existence of social rights as such. Nevertheless, through the due process clause it actually made the repeal of recognized benefits more difficult. Furthermore through the equal protection clause it prevented discrimination in the allocation of social services, which was particularly unreasonable, calling into question the character of mere privileges of welfare benefits. However, from the second half of the 70s, during the Welfare State crisis, this case law progressively reduced its influence.

The rise of social rights, notwithstanding the reductionist theories, is an advancement not only for the form of State (defined as the relationship between the State and the citizens, taken individually or as a community), but also for the quality of rights that become constitutional, considering the deep difference between these rights and fundamental freedom. For this reason these rights – characterized by the guarantee of certain fundamental needs that is achieved thanks to the presence, direct or indirect, of the public sphere – are considered as second generation rights when compared to the Liberal State rights.

The differences between these rights and classical freedoms are not just in the object and in the structure but also in the purpose: there is no defensive prospective but, on the contrary, there is the idea of integration of individuals in the economic and

49 397 U.S. 254 (1970).

50 419 U.S. 565 (1975).

51 See *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973).

social sphere on the basis of equality among all citizens who should receive the same chances in life.

Despite the aforementioned fundament, the dichotomy between first and second-generation rights cannot be overemphasized.⁵² Indeed, due to their horizontal effect it is now impossible to consider freedoms as undefined spaces in which the State has no right to intervene. On the contrary, even the traditional negative freedoms, in order to be protected, call for strong State intervention.⁵³

Clear examples of this are represented by the public measures aimed at contrasting those individual behaviours that are incompatible with freedoms and protecting the public order; other examples are constituted by all the administrative and jurisdictional tools that are necessary for the purpose of the concrete preservation of individual freedom.

In brief, according to an educated ideology of freedoms, they require a public authority capable of effectively protecting them. This assumption strikes at the core of the traditional dichotomy between first and second-generation rights (according to which social rights are financially conditioned rights) endorsed by many scholars. According to this thesis, indeed, only second-generation rights call for an active involvement of the State.

On the contrary, both first and second-generation rights require a public structure for the purpose of their safeguard as well as a direct financial commitment of the State; therefore, they both imply a transfer of resources from the community to the holders of rights.

Having said this, there still remains a difference between the two categories of rights: first-generation rights require a State intervention that is difficult in a free market and that is strictly connected to sovereign power; on the contrary, it is the opposite for social rights.

⁵² See M. Luciani, "Sui diritti sociali", in *Studi in onore di Mazziotti di Celso*, Padova, Cedam, 1995, 97 ff.

⁵³ See S. Holmes, C.R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes*, New York-London, Norton, 1999, esp. 56 ff.

A further category of rights, usually distinct from social rights, encompasses the third-generation rights founded on issues regarding solidarity towards subjects different from those constituting the community to which a certain legal system is directed during a given historical period. These rights include those related to national or inter-generational solidarity (such as environmental rights or the right to development) or those that are typically characterized by a cosmopolitan-global approach (e.g. right to peace).

An additional distinctive feature of third-generation rights is that they are community-oriented rather than individual-oriented: this is due to the nature of the utility of these rights, which can be usually enjoyed only by the community as a whole.

These rights appear for the first time in various constitutions during the 70s – see for example Art. 45 of the Spanish Constitution, concerning the right to a clean and healthy environment, as well as Art. 66 of the Portuguese Constitution and Art. 24 of the Greek Constitution – and they are even more central in the following wave of constitutions.⁵⁴

These evolutions make the relationship between law and liberty closer, above all, more complex than one century ago, at the times of the Liberal State.

The Theories on Law & Liberties Relationships Tested Through Constitutional Drafting

The U.S. “Bill of Rights” and the French DDHC

Constitutional drafting is a good testing ground for the theoretical framework sketched out above. Constitutional provisions about civil liberties often reveal the ideological approach to freedom of a specific legal system. So, the First Amendment to the United States Constitution shows a marked liberal approach while the French Declaration of the Rights of Man and of the Citizen (*Déclaration des Droits de l’Homme et du Citoyen*, DDHC) is

54 C. Grewe, H. Ruiz Fabri, *Droits constitutionnels européens*, Paris, PUF, 1995, pp. 327 ff.

centred around the pivotal position of the Parliament and the statute law passed by it. On the contrary, the 1948 Italian Constitution, as well as the 1949 German one, exhibits an awareness of the problems of liberties within a Constitutional legal order that older texts cannot have.

Starting with the American “Bill of Rights” (the first 10 Amendments to the U.S. Constitution), it is easy to observe that it flows from a constitutional culture characterized by two main points: on the one hand, the idea of *higher law* and the resulting notion that the parliamentary legislative power is restricted by constitutional provisions; on the other hand, a concept of liberty strictly negative in nature. Indeed, the First Amendment sets out:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The most important words are those that open the amendment: “Congress shall make no law”. It is absolutely clear that this expression assumes that law and liberties are opposed entities: where “law” is present, there is not liberty and *vice versa*. As a consequence, in order to protect individual freedom, the Constitution must prevent Congress from exercising its powers in those specific fields (religion, speech, press, and so on).

The marked liberal approach is not the single reason that explains the First Amendment particular drafting. On the contrary, the political struggle between Federalists and Antifederalists in 1787 produced the choice for a Constitutional Charter devoid of bills of rights: given that in the American legal culture constitutional rights aim specifically to restrict public powers, asserting the need for a federal bill of rights would have dramatized the transition from the old confederation to the new Federal system. This is the reason that explains the lack of Bill of rights within the original text of the Federal Constitution as well as its insertion after the end of the approval procedure of the latter⁵⁵. The same reason explains also the choice for a

⁵⁵ The original text of the US Constitution was drafted in September 1787; the procedure of state approval ended on June 21th, 1788. Its 10 first

formulation of the Amendment that reassured the Antifederalists: it is clear that the “congress shall make no law” formula could not entail any increase of the authority of federal powers. Nevertheless, the American approach to liberties is the deepest root of a constitutional drafting that is absolutely different from the formulation of other Nineteenth century Charters of rights.⁵⁶

On the contrary, the French *DDHC* is the archetype of the other typically Nineteenth Century approach, which is characterized by a key role of the statute law. The main *tesserae* of the French mosaic are three:

1. First of all, the Charter of right is on the same level of the ordinary laws in the hierarchy of legal sources and the idea of *higher law* is explicitly refused. This is the direct consequence of the ideological centrality of the concept of *general will*⁵⁷ – the will of the people as a whole – that does not allow any authority to strike down the outcome of activities of the Parliament, considered the body that personify the Nation and its will. As a consequence the Constitution, as well as any Declaration of rights, is flexible in nature: any other parliamentary statute can modify constitutional provisions.
2. The second element is the aptitude to regulate constitutional liberties through principles. In the French perspective, the aim of the Bill of rights is not to limit the power of the Parliament (see pt. 1); on the contrary, it is to address the future Parliament choices. Furthermore, the bill of rights has a political purpose rather than a legal one. It makes clear what principles and values

Amendments – the so called US Bill of Rights – was drafted one year later (in September 1789) and approved during the next two years.

⁵⁶ See E.S. Corwin, “The ‘Higher law’ Background of American Constitutional Law”, in *Harvard Law Review*, Vol. 42, No. 3 (Jan., 1929), pp. 365 ff.

⁵⁷ It is the translation of the French expression *volonté générale*, which is used by the Genevan philosopher Jean-Jacques Rousseau in his most important work *Du Contrat Social ou Principes du droit politique*, and significantly influenced the French political and legal thought on the eve of the revolution and during the two next century.

characterize the legal system and have a pedagogical objective: it aims at creating a constitutional common culture⁵⁸ in the Nation.

3. Eventually, declarations of rights prescribe that the statute law shall discipline and restrict individual freedoms. In other word, constitutional principles are vague and merely declarative while the specific discipline of each liberty is integrally assigned to statute law. As a consequence, the exercise of legislative power is essentially independent from any legally binding constitutional directive.

The *DDHC* illustrates these points. First of all, Art. 6 explicitly links the legislative power to the concept of general will:

The Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes.⁵⁹

This article is also useful to explain what guarantee derives from the Declaration of rights *a la français*. In Europe, the Nineteenth Century liberal State is characterized by three elements: 1. the suffrage restricted on the ground of census; 2. the principle of legality and the key role of Parliament within the frame of government; 3. the main (political and social) role played by the Bourgeoisie.⁶⁰ As a consequence, on the one hand, thanks to the suffrage restricted, the Parliament represents a social class that has similar interests and feels the same values; on the other hand, the principle of legality gives the Parliament the power to direct the legal order as a whole.⁶¹ In conclusion, the very guarantee of civil liberties descends from their affinity to the

58 See P. Häberle, *Verfassungslehre als Kulturwissenschaft*, Berlin, Duncker & Humblot, 1982.

59 You can find an English translation of the *DDHC* on the web site of the French Conseil Constitutionnel: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst2.pdf.

60 See P.-M.Gaudemet, “Paul Laband et la doctrine française de droit public“, in *Revue de Droit Public*, 1989, pp. 957 ff. See also G. Amato, *Libertà ...*, p. 275.

61 See R. Carrè de Malberg, *La loi expression de la volonté générale*, Paris, Sirey, 1931.

interests and values of the social class that factually rules the legal system at large.

Many articles of the *DDHC* testify to the *French* aptitude to set out general principles instead of specific provisions. For example, art. 2, according to which:

The aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are Liberty, Property, Safety and Resistance to Oppression.

Or Art. 4:

Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law.

The normative content of both Arts. 2 and 4 is evidently vague. At the same time, they entrust their developments to the future legislator.

The same point emerges from articles that rule specific liberties instead of general questions. The habeas corpus provision (Art. 7) does not include any guarantee more than the request for the intervention of Parliament through statute law:

No man may be accused, arrested or detained except in the cases determined by the Law, and following the procedure that it has prescribed.

Similarly, Art. 11, which is on the freedom of speech, is written in the same way:

The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law.

The pivotal role of the statute law is not a character only of the nineteenth Century French legal culture. On the contrary it is a common characteristic in the coeval European legal systems, as Italian *Statuto Albertino* confirms. Indeed, its Art. 28 on the freedom of the press prescribes that “the press shall be free, but a law shall be drafted to repress abuses”.

In conclusion, those articles impact directly on the relationships that unite the principal public powers: the government and judges cannot arbitrarily restrict individual liberties and penetrate within Benjamin Constant's magic circle; rather, they must strictly follow the rules set out by the representative authority. On the contrary, the American approach sketched out above aims to directly affect the relationship between public power and private citizens. In other words, whilst both French and American approaches aim at protecting civil liberties and, as a result, Constant's magic circle, they follow two opposite ways: the French one is centred on the organization of public powers and exalts the political role of the social class that is mostly concerned with freedoms; the American one limits directly political power and exalts the autonomy of civil society.

Constitutional liberties and Twentieth Century Constitutional Democracies

Both the approaches sketched out above are overtaken by Constitutions adopted immediately after the Second World War. Indeed, in Europe between the First and the Second World War, the social and political need to go beyond the restricted suffrage produces a deep crisis of the Nineteenth Century Liberal State and, as a consequence, the rising of the authoritarian regimes of Italian fascism, German Nazism, and their Iberian followers. As a consequence, once the authoritarian experiences had ended, it became necessary to overtake the French method to protect civil liberties exclusively through statute law. Furthermore, also the American approach seemed unsuitable, given the complexity of the modern society.

These needs entail a new approach to the constitutional legislation on civil liberties. First of all, the spread of Kelsen's theories on the hierarchical structure of legal sources system⁶² facilitates the reception by continental Europe legal scholarships of the ideas of *higher law* and judicial review of legislation, which have characterized (and even now characterize) the American experience. This changed mentality allows a fundamental evolution of the role of constitutional provisions: after the Second World War, they are able to direct the future development of

⁶² See H. Kelsen, *Reine Rechtslehre*, Wien, Deuticke, 1934.

legislation on civil liberties and rights both on the political and the legal sides. Furthermore, they entrust political processes with the task to harmoniously implement constitutional provisions on civil liberties in the light of needs and requests that the political community expresses in the specific historical moment.

In this general framework, constitutional drafting of civil liberties shows two main features. On the one hand, constitutional provisions pinpoint specific directive principle as well as specific rules on awkward issues. Furthermore, they also identify what interests allow the legislator to limit constitutional liberties, with implicit disapproval for other restriction. In doing that, they limit the discretionary power of Parliament and manage to direct effectively its future activity. On the other hand, after the Second World War constitutions pay attention to problems that could arise from the implementation of constitutional provisions on civil liberties.

As for the first feature, it clearly emerges from a variety of constitutional provision. For example, Art. 5 of the *German Grundgesetz* (GG),⁶³ which protects the freedom of expression, begins setting out the general principle (“Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources”). Then it lays down the same freedom in specific areas (“Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed”) and prevents legislator from establishing a specific limitation of the freedom of expression that is particularly detrimental (“There shall be no censorship”).

The Art. 5.2 is the core of the constitutional regulation of the freedom of expression: it sets out that only general laws may establish any limit to the liberty and especially pinpoints the values that can justify any kind of general limitation. According to Art. 5.2, they are “the protection of young persons, and ... the right to personal honour”.

⁶³ The *Bundesministerium der Justiz und für Verbraucherschutz* (the German Federal Ministry of Justice and Consumer Protection) provides an English translation of the *Grundgesetz*: http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

The Italian constitutional provision on freedom of expression follows an outline that resembles the German one. First of all, the first subsection of Art. 21 sets forth the general principle (“Anyone has the right to freely express its thoughts in speech, writing, or any other form of communication”) and Subsect. 2 forbids a specific kind of limitation (“The press may not be subjected to any authorisation or censorship.”). However, whilst the German GG specify the value that can justify any general limitation to the freedom of expression, Italian Constitution sets out that “Publications, performances, and other exhibits offensive to public morality shall be prohibited”. According to the Italian Constitutional Court, public morality is not the only interest that can generally restrict the individual freedom: also the personal honour can do it⁶⁴ as well as other interests protected by other constitutional provisions⁶⁵ (protection of infancy and childhood;⁶⁶ religious beliefs;⁶⁷ and public safety⁶⁸).

The recourse to a twofold system of protection characterizes the Italian Constitution: the limitations of freedom of expression, as well as liberties that pertain to private life (habeas corpus, inviolability of home, private communications, travelling), must be set out in general terms by statute law, and that law must be applied only by judges. Furthermore, the same constitutional section regulates a specific urgency procedure. Indeed, according to Arts. 21.3 and 21.4:

Seizure may be permitted only by judicial order stating the reason and only for offences expressly determined by the law on the press (...).

In such cases, when there is absolute urgency and timely intervention of the Judiciary is not possible, a periodical may be confiscated by the criminal police, which shall immediately and in no case later than 24 hours refer the matter to the Judiciary for validation. In default of such

64 See Const. court. n. 9/1965 and n. 175/1971

65 See Const. court. n. 386/1992.

66 See Const. court. n. 121/1957.

67 See Const. court. n. 188/1975.

68 See again Const. court. n. 121/1957.

validation in the following 24 hours, the measure shall be revoked and considered null and void.⁶⁹

The same outline is followed by the constitutional provision on personal freedom: the first subsection lays down the general principle; the fourth one sets out an absolute ban of violence against detainees (“Any act of physical and moral violence against a person subjected to restriction of personal liberty shall be punished”); and the second and third clauses establish the same kind of double protection and urgency procedure sketched out above.

These provisions influenced the 1978 Spanish Constitution, whose dispositions on fundamental liberties follow the outline used by Italian and German Constitution. The freedom of expression is emblematic once again. Art. 20.1 enumerates the specific rights upheld by the general freedom and Art. 20.2 explicitly bans any prior censorship. Furthermore, the fifth clause rules the seizure of publications in the same way than Italian constitution. Eventually, Art. 20.4 deals with the issue of the limits that rights listed by the first subsection could tolerate:

These freedoms are limited by respect for the rights recognised in this Part, by the legal provisions implementing it, and especially by the right to honour, to privacy, to the own image and to the protection of youth and childhood.

Moving to other kinds of freedoms, in order to regulate freedom of assembly and of association Italian and German Constitutions use a different scheme, which is characterized by a double level of legislation: on the one hand, the general declaration of the right is directly accompanied by its limits. On the other hand, constitutional provisions directly pinpoint specific rules on important issues. Thus, Art. 17.1 of Italian Constitution sets out that “Citizens have the right to assemble peaceably and unarmed” and Art. 18.1 decrees: “Citizens have the right to form associations freely and without authorization for those ends that are not forbidden by criminal law”. Similarly Arts. 8 and 9 of the German GG enunciate that “All Germans shall have the right to

⁶⁹ An English translation of the Italian Constitution is provided on the website of the Italian Senate: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

assemble peacefully and unarmed” (8.1) and “All Germans shall have the right to form corporations and other associations. Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited” (9.1 and 9.2).

As for specific rules, the controversial issue of the freedom of assembly is the right to assemble in public place. Indeed, according to Art. 17 of the Italian Constitution, whilst “no previous notice is required for meetings, including those held in places open to the public” (Art. 17.2), “in case of meetings held in public places, previous notice shall be given to the authorities, who may prohibit them only for proven reason of security or public safety” (Art. 17.3). Similarly, Art. 18.2 sets out that “secret associations and associations that, even indirectly, pursue political aims by means of organisations having a military character shall be forbidden”.

The limits on freedom of assembly provided by the German constitution are less clear than Italian ones because, according to Art. 8.2 of the GG, “in the case of outdoor assemblies, this right may be restricted by or pursuant to a law”.

Another feature that characterizes the German *Grundgesetz* is Art. 19 that regulates the means and ways through which public powers might restrict fundamental rights. On the one hand, it sets out that each right declared by Arts. 2-18 could be restricted only pursuant to general statute law (Art. 19.1) and ordinary courts can always review any concrete restrictions made by public authority (Art. 19.4). It is interesting to highlight that these dispositions prescribe in general terms the same rules that are separately set out by each Italian constitutional provision on private liberty.

On the other hand, Art. 19.2 set forth: “in no case may the essence of a basic right be affected”. This is a principle that directly descends from the inviolability of human dignity,

protected by Art. 1 of the GG.⁷⁰ Any basic right protects a specific aspect of human personality, and its essence is the core of the capabilities through which personality appears. As regards the essential content of basic rights, the issue to deal with is what the essential content is; on this issue, German legal scholarship articulates two different theories. According to the older one, each basic right has an essential content that is objective in nature and is not linked to other basic rights. On the contrary, the more recent theory asserts that it is impossible to abstractly define the essential content. Therefore this one is relative in nature and it is not possible to define it in general terms. It is the constitutional judge that defines the essential content of a specific basic right when he analyses the constitutional aspect of a concrete legal suit. In other words, the essential content of a fundamental right is the limit that other basic rights have to respect although the latter have prevailed in the constitutional balancing.

Liberties, rights and supranational Charters of rights: The European Convention on Human Rights

The analysis of supranational Charters of liberties and their comparison with national Bills of rights encounter a methodological difficulty because of the specific twofold purpose that traditionally characterizes the former: banishing the violations of human rights that mainly offend human dignity and creating a minimum standard of decency among civilized nations in the field of civil rights.

This outline is firstly followed by the most important supranational charter of liberty: the European Convention on Human Rights (ECHR). Arts. 2 (*Right to life*), 3 (*Prohibition of torture*), and 4 (*Prohibition of slavery and forced labour*) clearly pursue the first aim outlined above. As a consequence, their formulation is concise, imperative and unconditional.⁷¹ *Vice*

⁷⁰ See, among others, E.J. Eberle, "Human Dignity, Privacy, and Personality in German and American Constitutional Law", in *Utah Law Review*, 1997, pp. 963 ff.

⁷¹ For example, Art. 3 sets out: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

versa, other ECHR provisions aim at creating a minimum standard among Nations that present various and sizable differences⁷². Thus they are generally composed by three different parts: the first one declares the liberty as a principle; the second defines the liberty and lists its different aspects; the third one details reasons and means that allow State powers to restrict the liberty itself. For example, Art. 10 ECHR declares and protects the freedom of expression:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

72 Nowadays, the European Convention on Human Rights affects 47 legal system (in brackets the year when the Country joined the Council of Europe): Belgium (1949); Denmark (1949); France (1949); Ireland (1949); Italy (1949); Luxembourg (1949); Netherlands (1949); Norway (1949); Sweden (1949); United Kingdom (1949); Greece (1949); Turkey (1949); Iceland (1950); Germany (1950); Austria (1956); Cyprus (1961); Switzerland (1963); Malta (1965); Portugal (1976); Spain (1977); Liechtenstein (1978); San Marino (1988); Finland (1989); Hungary (1990); Poland (1991); Bulgaria (1992); Estonia (1993); Lithuania (1993); Slovenia (1993); Czech Republic (1993); Slovakia (1993); Romania (1993); Andorra (1994); Latvia (1995); Albania (1995); Moldova (1995); Macedonia (1995); Ukraine (1995); Russia (1996); Croatia (1996); Georgia (1999); Armenia (2001); Azerbaijan (2001); Bosnia and Herzegovina (2002); Serbia (2003); Monaco (2004); Montenegro (2007).

The first clause sets out the principle and provide for the definition of the liberty, inclusive of its different aspects. The second one deals with reasons and means of restrictions.

Overall, the relationship that exists between liberties and the ECHR provisions is closer to the Nineteenth Century Charters than Second World War Constitutions ones. Fundamentally, the ECHR aims to prevent public powers from penetrating the Benjamin Constant's *magic circle*. Indeed, the ECtHR case law regarding Art. 1 of the Protocol 1 emphasizes the protection of property⁷³ rights and creatively enlarges its operating area to claims that only indirectly are related to it⁷⁴.

From a general perspective, it could be easily seen that the impact of the ECHR, as well as the ECtHR case law, on western European legal systems is focused around specific rights: first of all, the right to fair trial⁷⁵ and property rights⁷⁶. On the contrary,

73 Among others, see: ECtHR, *Marckx c. Belgio*, 13.6.1979; ECtHR, *Matos e Silva Lda et autres c. Portugal*, 16.9.1996; and quite recently ECtHR, G.Ch., *Scordino c. Italy*, 29.3.2006.

74 For example, see ECtHR, *Fredin c. Svezia*, 18.2.1991, and ECtHR, II sec., *Ambruosi c. Italia*, 19.10.2000. On this issue, see G. Romeo, "Civil rights v. social rights nella giurisprudenza della Corte europea dei diritti dell'uomo: c'è un giudice a Strasburgo per i diritti sociali?" in *Lo strumento costituzionale dell'ordine pubblico europeo*, Eds. L. Mezzetti, A. Morrone, Torino, Giappichelli, 2011, pp. 487 ff.

75 On the Art. 6 ECHR, see: C. Gagu, C.-A. Gavrilă, "The Right to a Fair Trial Distinct Interpretation from the Sense Outlined by the Art. 6 of the European Convention on Human Rights", in *Journal of Law and Administrative Sciences*, 2015, pp. 761 ff.; L.G. Loucaides, "Questions of Fair Trial under the European Convention on Human Rights", in *Human Rights Law Review*, 2003, Vol. 3.1, pp. 27 ff.; J.H. Moitry, "Right to a Fair Trial and the European Convention on Human Rights", in *Journal of International Arbitration*, 1989, Vol. 6.2, pp. 115 ff.; and A. Samuels, "The Right to a Fair Trial and the European Convention on Human Rights", in *International Bar Journal*, 1972, Vol. 3.1, pp. 35 ff.

76 On this topic, among italian legal scholars, see M. C. Malaguti, "The taking of property by the State: expropriation by litigation under international investment law versus protection of property under the ECHR in the *Yukos Saga*", in *Diritti umani e diritto internazionale*, 2015, pp. 337 ff.

controversial issues – as the right to marry for same sex couples, electoral systems affecting political rights, freedom of religion, and so on – are often left to the margin of appreciation of member States⁷⁷. For example, this is the case of the ECtHR ruling on the French law that prevents people to dissemble their visage in public places (*loi sur la dissimulation du visage dans l'espace public*),⁷⁸ in which necessities of society prevail over the right to respect for private and family life and the freedom of thought, conscience and religion⁷⁹.

The Charter of Fundamental Rights of the European Union

The other supranational charter of great significance in Europe is the European Charter of fundamental rights, drafted at the beginning of the Twenty-First Century and solemnly declared at the beginning of the European council of Nice, on December 7, 2000, by the European Institutions. The Charter had been devoid of full legal effects and considered as soft law⁸⁰ until the Lisbon Treaty, which recognized it thanks to the modification of Art. 6 of the Treaty on the European Union. Now, the first clause of Art. 6

⁷⁷ On the margin of appreciation doctrine and its problems, see: C. Cinelli, “Corte europea dei diritti dell'uomo, Corte costituzionale italiana e margine di apprezzamento”, in *Rivista di diritto internazionale*, 2014, pp. 787 ff.; S. Greer, “The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation”, in *UCL Human Rights Review*, 2010, Vol. 3, pp. 1 ff.; J. Kratochvil, “The Inflation of the Margin of Appreciation by the European Court of Human Rights”, in *Netherlands Quarterly of Human Rights*, 2011, Vol. 29.3, pp. 324 ff.; G. Letsas, “Two Concepts of the Margin of Appreciation”, in *Oxford Journal of Legal Studies*, 2006, Vol. 26.4, pp. 705 ff.; H.C. Yourow, “The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence”, in *Connecticut Journal of International Law*, 1987, Vol. 3.1, pp. 111 ff.

⁷⁸ See ECtHR, dec. 7/1/14, *S.A.S. v. France*.

⁷⁹ See B. Barbisan, “Vivere insieme” all'ombra del velo”, in *Diritto Pubblico*, 2014, pp. 1047 ff.

⁸⁰ See L. Burgorgue Larsen, “Les Juges face à la Charte: de la prudence à l'audace”, in *La France face à la Charte des droits fondamentaux de l'Union européenne*, Ed. L. Burgorgue Larsen, Brussels, Bruylant, 2005, pp. 12 ff.

prescribes that “the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union ... which shall have the same legal value as the Treaties” and thus gives the charter binding legal effects⁸¹.

Statesmen, politicians, and scholars who drafted the Charter, fostered its adoption, and encouraged its recognition by European treaties were motivated by a twofold, worthy and generous ambition: making an original synthesis of the national charter of liberties of EU member states⁸² and creating an European common culture in the field of fundamental rights,⁸³ a twofold purpose whose achievement seems even now strictly necessary towards the European federalization.

This ambition also impacts the subject of this study. The 1999-2000 European Convention, which factually drafted the European Charter of fundamental rights, tried to rationalize the method to draft constitutional Charters of liberties that Italian and German founding fathers, as well as later European constitutional drafters, had exploited at the end of the Second World War and during the 70s.

Firstly, the Charter organizes the different liberties and rights that it recognizes in six different chapters; each of them is characterized by a main principle (Dignity, Freedoms, Equality,

⁸¹ See P. Costanzo, “Il riconoscimento e la tutela dei diritti fondamentali”, in *Lineamenti di diritto costituzionale della Unione europea*, Eds P. Costanzo, L. Mezzetti, A. Ruggeri, Torino, Giappichelli, 2006, pp. 355-6. See also A. Spadaro, *Sulla giuridicità della carta europea dei diritti: c'è ma (per molti) non si vede*, in *I diritti fondamentali dopo la Carta di Nizza*, Ed. G.F. Ferrari, Milan, Giuffrè, 2000, pp. 259 ff.

⁸² See G.F. Ferrari, “I diritti tra costituzionalismi statali e discipline transnazionali”, in *I diritti fondamentali dopo la Carta ...*, 27 ff., and A. Pace, *A che serve la Carta dei diritti fondamentali dell'Unione europea*, in *Giurisprudenza costituzionale*, vol. 56, n. 1 (February 2001), pp. 196 ff.

⁸³ See A. Ruggeri, “Carta europea dei diritti e integrazione interordinamentale, dal punto di vista della giustizia e della giurisprudenza costituzionale”, in *Riflessi della carta europea dei diritti sulla giustizia e la giurisprudenza costituzionale*, Eds A. Pizzorusso, R. Roboli, A. Ruggeri, A. Saitta, G. Silvestri, Milan, Giuffrè, 2003, pp. 7 ff.

Solidarity, Citizens' Rights, and Justice), in order to emphasize their formal and substantial equalization. From an axiological perspective, each liberty or right has the same importance as the others. In other words, this structure is explicitly intended for refusing any hierarchy among liberties and rights.

The second element that characterizes the drafting of the Charter is the structure of each chapter: the six declared main principles are not just titles that organize congeries of individual rights otherwise disorderly written. On the contrary, they also are the directive criteria that lead the interpretation of each liberty and right and restrict the discretionary evaluation of the legal profession, starting from judges and scholars.

In spite of the generous ambitions of its drafters, as a matter of fact the final outcome of the process aimed at drafting the Charter partially failed the twofold purpose sketched out above. The presence of the main principles does not compensate for three problems that the 1999-2000 European Convention does not manage to overcome: the supranational nature of the European legal system; the genetic predominance of the so called four freedoms of the EU; and the lack of clear directives on divisive issues, as the right to marry. As a consequence, the Charter shows three main weaknesses.

First of all, many provisions only declare a principle and entrust the statute act to rule extension and limits of the right. For example, Art. 9 declares that "the right to marry and the right to found a family shall be guarantee in accordance with the national laws governing the exercise of these rights": the pivotal role of the statute law is the same that characterized the Italian *Statuto Albertino* regarding to the freedom of the press. Similarly, articles gathered under Chapter IV, pertaining to workers' rights, abstain from any controversial issue and entrust Community or State laws. For example, it is the case of Art. 30, consecrated to *Protection in the event of unjustified dismissal*, that sets out: "every worker has the right to protection against unjustified dismissal, in accordance with Community law and national law and practices".

Generally speaking, this weakness seems to be a consequence of the supranational character of the European Charter. It is the

result of the difficult process of homogenization of different legal traditions⁸⁴ that bring to collect in a single document the affinities that exist among the national legal cultures of several European member States.⁸⁵ In other words, EU Charter writers manage to create something that seems the *Greatest common divisor* instead of a *creative synthesis* of the different European legal traditions.

The second weakness flows from the cautions and the caveat that surround the legal effects of the charter. On the one hand, the same clause of Art. 6 of the Treaty on the EU, which provides the Charter with binding legal force, clearly affirms that “the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties”. On the other hand, Art. 51 of the same Charter expressly limits its effectiveness in two different ways: first of all, the second clause of the article has the same meaning of Art. 6 TEU; simultaneously, the first clause establishes:

The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

Recently, these restrictions are also strengthened by the European Court of Justice. The Court, in the leading case *Pringle*,⁸⁶ affirmed that the Charter affects neither the content of a memorandum of understanding that legitimizes the European Stability Mechanism to grant financial assistance to a member State of the European Economic and Monetary Union, nor the measures that the member State recipient of financial assistance takes in order to comply with the same memorandum.

⁸⁴ On the role played by the constitutional traditions common to the Member States, see G. Romeo, “Riposizionare i diritti sociali nelle tradizioni costituzionali comuni”, in *Cittadinanza europea*, 2016.

⁸⁵ See G.F. Ferrari, *supra* note 42, at pp. 284-287.

⁸⁶ ECJ, Dec. 11-27-2012, C-370/12, *Thomas Pringle c. Government of Ireland*.

Summarizing, in many fields, Art. 6 of the TEU, Art. 51 of the Charter, and the Court of Justice case law prevent the Charter of Fundamental Rights of the European Union from efficaciously protecting individual liberties from infringement made by public powers. On the contrary, the Charter affects only the fields that European treaties expressly assign to EU Institutions.

It is interesting to point out the consequences that descend from this kind of weakness. In the European Countries affected by the so-called debt crisis, the need to follow the economic policy guidelines issued by the European Institutions entailed structural reforms that, from the factualist perspective, weakened also the guarantees of fundamental freedoms. This is the case of labour law reforms aiming to allow the labour market to work properly, which simplified the procedure for dismissals. This change has had an important impact not only on union rights, but also on freedom of speech. For example, the number of workers fired because of social network activities has increased significantly after this kind of structural reforms. Above all, it concerns social network activities that do not have a significant relationship with worker's tasks or position; on the contrary, the bigger increase regards statements about arguments of the worker's private life.

The third weakness is linked to the different status of the provisions of the Charter and the so-called four freedoms of the EU internal market. Whilst the Charter, as we have just seen, affects only the European Institutions and do not enlarges the sphere of competence that pertain to them, the four freedoms not only weigh on member States, but also have horizontal effect. In other words, only the latter reveal the so-called *drittwirkung* and can be directly applied against private bodies by the courts⁸⁷. As a consequence, when a fundamental liberty clashes with one of the four freedoms, the European Court of Justice will give prevalence to the latter and to the internal market as a keystone of the European construction⁸⁸.

⁸⁷ See A. Clapham, *Human Rights in the Private Sphere*, Oxford, Oxford U.P, 1993.

⁸⁸ See, for example, the leading case *Viking* – CJUE, judgment of 11.12.2007, case C-438/05 – in which the Court establishes that the

The totality of these weaknesses shows the real impact that the European charter of fundamental rights could have within the European constitutional context overall understood. It mainly belongs to those hortatory statements⁸⁹ that aim at legitimizing a legal system (or a specific system of rules) and have little autonomous legal valiance.

Concluding Remarks

The development of theories on civil liberties and relationships between freedoms and law, sketched out in the first part of this work, and changes in constitutional drafting, which are analysed in the second part, show a high level of symmetry. Firstly, the theories elaborated in continental Europe during the Nineteenth Century stressed the need that liberties protected individuals from undue interference of the Crown and the Government, according to the aims pursued by liberal revolutions. On the other hand, Isaiah Berlin's idea of negative liberty rationalized the

exercise of the freedom of strike and the liberty of association and union must not affect the right of establishment of companies, which have both vertical and horizontal effects. On *Viking* see, among other legal scholars: M.V. Ballestrero, "Le sentenze *Viking* e *Laval*: la Corte di giustizia «bilancia» il diritto di sciopero", in *Lavoro e diritto*, 2008, pp. 389 ff.; B. Carr, R. O'Donoghue, "Dealing with *Viking* and *Laval*: From Theory to Practice", in *Cambridge Yearbook of European Legal Studies*, 2008-09, Vol. 11, pp. 123 ff.; A. Dashwood, "*Viking* and *Laval*: Issues of Horizontal Direct Effect", in *Cambridge Yearbook of European Legal Studies*, 2007-2008, Vol. 10.1, pp. 525 ff.; F. Hendrickx, "Beyond *Viking* and *Laval*: The Evolving European Context", in *Comparative Labor Law & Policy Journal*, 2011, Vol. 32.4, pp. 1055 ff.; T. van Peijpe, "Collective Labour Law after *Viking*, *Laval*, *Ruffert*, and *Commission v. Luxembourg*", in *International Journal of Comparative Labour Law and Industrial Relations*, 2009, Vol. 25.2, pp. 81 ff.

⁸⁹ On the concept and role of *hortatory statements* see R. Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)", in *The American Journal of Comparative Law*, 1991, Vol. 39.2, pp. 344 ff.

American approach to that freedom subtended by the First Amendment to the U.S. Constitution.

During the Twentieth Century, the authoritarian involution of the Nineteenth Century Liberal State shows the need to overcome the simply legislative protection of civil liberties. After the Second World War, European constitutional scholarship fostered a new approach to civil liberties, in which Constitutions had the power to legally direct the choices that parliaments make in order to protect individual freedoms.

Supranational charters and their increasing importance in the constitutional context affect that symmetry. All the reasons that are highlighted above explain why their drafting is close to Nineteenth Century Charters of liberties. However bicentenary development of legal scholarship directly impacts both the liberties that supranational charters protect as well as the interpretations that supranational and constitutional Courts make.

Thus, supranational charters affect the relationships that exist between law and liberties in two different ways. On the one hand, classical civil liberties, as well as property rights, receive a strengthened protection first of all against national legislators; on the other hand, second generation of rights, as well as labour rights and collective rights, are entirely devolved to national legislators. This twofold impact affects also the protection that every legal system grants to the two categories of rights: not only do legislators suffer conditioning only in the field of classical civil liberties, but also supranational Charters and Courts unbalance constitutional balancing between first and second generations of rights in clear favour of the former.